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OFFER AND ACCEPTANCE IN LOUISIANA LAW:
A COMPARATIVE ANALYSIS:
PART II—ACCEPTANCE

Saül Litvinoff*

COMMUNICATION OF THE ACCEPTANCE

The problem of the duration of the offer should not be confused with the problem of whether the offer can be revoked after the acceptance, but before the latter is received.¹ This second problem is related to the communication of the acceptance. It appears involved most frequently in cases of contracts by correspondence,² making the place of the formation of the contract an interesting topic. Thus, a series of important issues arise out of the problem of communication of the acceptance.

French Law

In French law, the acceptance is dealt with as a declaration of will,³ and, therefore, when the law does not provide otherwise, it is not subject to any formalities.⁴ It can be conveyed by the human voice, directly or by telephone, or recorded by any means of mechanical reproduction; it can be written or printed, signed or unsigned. It can also be conveyed by all kinds of signs, acts, gestures, or attitudes susceptible of making the assent known in an unequivocal manner,⁵ or implying it by necessity. It is asserted that the judicial recognition given to the acceptance in any particular case will always involve a question of fact.⁶

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1. See Part I, 28 LA. L. REV. 1, 21, 61 (1967).

2. *Id.*

3. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 111, 158 (2d ed. Esméin 1952). Although a declaration of will actually constituting a juridical act, 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 172 (1923).

4. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 158 (2d ed. Esméin 1952).

5. *Id.* at 111. See Req. May 7, 1935, GAZ. PAL., 1935, 2, 58: "The contract of transportation by tramway is perfected the moment the passenger takes a place in the car." Trib. Seine, Dec. 26, 1913, GAZ. TRIB., 1914, 1, 2, 99: "The act of a magazine director whereby he sends the galley of an article to the writer from whom he received the manuscript, implies the acceptance of the article." See also LA. CIVIL CODE art. 1816 (1870).

6. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 150 (1923); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 158 (2d ed. Esméin 1952); Req. June 16, 1913, D. 1914, 1, 229; Req., Feb. 20, 1905, S. 1905, 1, 508; Cass. Civ. March 30, 1881, S. 1882, 1, 56, D. 1881, I, 359.

The acceptance should conform to the offer. If any condition is introduced by the acceptor not formulated in the offer, the acceptance is considered a counter-proposition.⁷ French law classifies this as a question of fact.⁸ It has also been decided that conventional usages and the constant need for good faith to prevail in transactions may impose the necessity of disregarding express reservations formulated at the time of concluding a contract.⁹

The principle that a declaration of will addressed to a particular person does not become effective until received by him is well recognized in French law.¹⁰ However, it is subject to the following modifications:

(a) If, according to the intention of the parties, it is not necessary to the formation of a contract that the acceptance be made known to the offeror, then the contract is perfected by the acceptor's assent, even when tacit or implied.

(b) If, according to the intention of the parties, an express acceptance is necessary, the contract will not be perfected until the communication of the acceptance reaches the offeror.¹¹

Thus, in French law, the acceptance does not *necessarily* depend on its reception by the offeror. In all cases where the acceptance can be tacit, it is effective without communication to the offeror.¹²

In this connection, a very careful distinction is made in French law between contracts in which the parties are in the presence of each other and contracts in which the parties are

7. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—PART I 158 (2d ed. Esmein 1952). See LA. CIVIL CODE art. 1805 (1870).

8. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 158 (2d ed. Esmein 1952).

9. See Req. Dec. 29, 1924, GAZ. PAL., 1925, 1, 522; 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 159 (2d ed. Esmein 1952).

10. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 171 (1923); 6 PLANIOL & RIPERT, TRAITÉ DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 159 (2d ed. Esmein 1952). In 1 AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 308 (1965), a different rule is apparently formulated, but the subject therein discussed is a contract by correspondence, and contracts of this kind should be considered an exception to the general principle.

11. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 159 (2d ed. Esmein 1952).

12. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 172 (1923).

at a distance.¹³ The formation of contracts involving two or more parties is rather simple, when they are face to face, or in a position that enables them to communicate their thoughts instantly, such as telephoning. If one of the parties is acting through an agent the situation does not vary. The contract is formed at the moment the parties, or their representatives, express their consent to the essential conditions.¹⁴ If the parties are dealing face to face, it is generally agreed that the accord of their wills must take place immediately; the offer will not remain open if not accepted in the course of the parties' face to face negotiation.¹⁵ A distinction is made when the parties agree to meet another time or when one of them has requested a time for reflection.¹⁶

But the formation of a contract is considerably less simple when it takes place between parties who must communicate through messenger, letters, telegrams, or any other means.

There has been discussion in French doctrine concerning the category under which a contract negotiated by telephone should be classified. It has been said that this question is not properly formulated, for the important thing to consider is whether the contract, or the exchange of communications, is one requiring a certain delay for its perfection.¹⁷ When the parties are face to face, no delay is required; when the parties are at a distance, a certain delay is necessary. It seems clear that contracts by telephone fall in the same category as those in which the parties are in the presence of each other, since no delay is required for the exchange of communications.¹⁸ Contracts by letter, telegram, or messenger fall in the category of contracts where a certain delay is required.¹⁹

However, this assimilation between contracts by telephone and contracts in which the parties are present should not exclude the real distance that separates the parties communicating through the telephone. This distance gives rise to the same

13. *Id.* at 149 *et seq.* This terminology is preferable to "contracts between absent parties," see, e.g., 3 PUIG PEÑA, COMPENDIO DE DERECHO CIVIL ESPAÑOL, PART I 461 (1966).

14. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 150 (1923).

15. *Id.*

16. *Id.*

17. *Id.*

18. Cass., May 14, 1912, D. 1913, I. 281. See also 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 156 (2d ed. Esmein 1952).

19. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 150 (1923).

problems as those relating to contracts by correspondence, particularly in regard to the place of formation of the contract. French courts have decided that the one who places the telephone call is considered as having gone to the other party's place to engage in negotiations, and that is where the contract is deemed to have been formed.²⁰

In sum, it can be said that in French law the general principle is that the acceptance must be communicated to the proposer for the contract to be perfected. This general principle is, however, flexible, and admits the following exceptions:

(a) When it is clear that the intention of the parties was to agree otherwise, the court will honor the intention.

(b) When the intention of the parties is not clear, the court will carefully examine the situation to ascertain whether the contract required a delay for its perfection.

(c) When the contract is such that a certain delay for its definitive formation is necessary, as when the parties are at a distance, it *may* be considered perfected the moment the acceptance is transmitted by the offeree.²¹ This becomes especially relevant:

- (1) In contracts by correspondence,
- (2) In offers made to the public, and
- (3) In the case in which the place of formation will determine the law applicable.²²

German Law

In German law a traditional distinction is made between declarations of will that must be received by the addressee in order to produce valid effects (*empfangsbedürftig*) and those which do not depend on their reception.²³ The acceptance is uniformly classified as *empfangsbedürftig*, and, therefore, does not produce any effects until its reception by the offeror.²⁴

20. Trib. Comm. Angers, Sept. 23, 1904, *GAZ. TRIB.*, 1905, 1, 2, 223.

21. 1 AUBRY & RAU, *COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS* (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 308-309 (1965); 2 COLIN ET CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 38 (10th ed. 1953).

22. 2 COLIN ET CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 37 (10th ed. 1953).

23. See Part I, 28 *LA. L. REV.* 1 n.168.

24. 1 ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS*, PART II 682 (1955); SALEILLES, *ÉTUDE SUR LA THÉORIE GÉNÉRALE*

A distinction between declarations of will made to a person who is present and those addressed to a person who is at a distance is also familiar in German law and leads to a clear-cut differentiation. The German Civil Code regulates only situations of the second kind: declarations of will addressed to an absent person.²⁵

In ancient German law this topic was already the subject of discussion, and the rule prevailed that a contract was not perfected until the acceptance reached the offeror. This was the solution adopted by the ancient German Code of Commerce, in Articles 320 and 321, but with the difference that the act of reception was granted retroactive effects.²⁶ Therefore, by the operation of this peculiar rule, the contract was not perfected until the reception of the acceptance, but upon perfection, the contract was considered as retroactively concluded at the moment the acceptance had been emitted.

The same rule was adopted by the German Civil Code, but without the artificial retroactive effects. As the modern German Commercial Code does not contain provisions regulating the moment of contract formation, the basic rules in the Civil Code are applicable to commercial matters.²⁷ According to German law, the acceptance that reaches the offeror is deprived of valid effects when a revocation was previously or simultaneously received.²⁸

A certain degree of flexibility, however, has been introduced by considering that "reception" does not mean an act whereby the offeror takes physical possession of the document containing the acceptance, but an act that places such a document at the offeror's disposal and availability.²⁹ If the offeror refuses to

DE L'OBLIGATION 142-43 (3d ed. 1925); SCHUSTER, *THE PRINCIPLES OF GERMAN CIVIL LAW* 97-98 (1907).

25. B.G.B. § 130.

26. *Accord*, 1 ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS*, PART II 666 (1955).

27. *Id.*

28. B.G.B. § 130: "A declaration of will addressed to another, when the latter is not present, shall become effective at the moment it reaches him. It shall not become effective, if previously or simultaneously, the revocation reaches the addressee. The effects of the declaration of will are not affected by the subsequent death or incapacity of the one who makes it. These provisions are also applicable when the declaration of will is addressed to a public authority." *Accord*, 91 R.G.Z. 63 (1918); 60 R.G.Z. 337 (1905).

29. *Cf.* 99 R.G.Z. 23 (1920) (declaration of will received when the letter that contains it is placed in the addressee's mail box at his disposal); 60 R.G.Z. 336 (1905); 56 R.G.Z. 263 (1904); 50 R.G.Z. 194 (1902) (the same when the letter is delivered to relatives, or members of the household in

accept delivery, reception is implied, and the contract perfected.³⁰

In contracts entered into when the parties are present, the same rules are applied by analogy. If the acceptance is in writing, the contract will be formed the moment the instrument is delivered to the offeror. If the acceptance is verbal, the formation occurs when the declaration is understood by the addressee, and not when the spoken words reach his ears.³¹

However, by virtue of the principle of freedom of contract accepted by the German Civil Code,³² the parties are free to stipulate otherwise. Thus, it is understood that the offeror may subject the future acceptance to certain conditions. He can introduce more stringent requirements, such as the condition that the acceptance is to be delivered to him, in person. He also can alleviate the legal requirements, stipulating, for instance, that the posting of a letter, or even a mere signal, will suffice as an indication of acceptance of his proposition.³³ The German Civil Code has taken into account two different situations of this kind: the first, when the offeror has waived the express declaration of acceptance; the second, when according to conventional usages a declaration of acceptance is not to be expected.³⁴ In such cases, the contract will be perfected without the offeror receiving or knowing of the acceptance.

In conclusion, it can be said that in German law:

(a) The rule that makes the acceptance effective upon its reception by the offeror is very firmly established, and does

the addressee's residence. But not if the letter is concealed in a parcel in such a manner that the addressee could not have taken cognizance of it immediately). See 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II 668 (1955).

30. *Accord*, 110 R.G.Z. 36 (1925); 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II 669 (1955).

31. 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II 671 (1955).

32. ENNECCERUS-LEHMANN, SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS 118-19 (1959).

33. 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II 683 (1955).

34. B.G.B. § 151: "A contract is concluded by the acceptance of the offer, although the acceptance is not communicated to the proposer, when such a communication is not to be expected according to ordinary usage, or when the offeror has waived it. The moment at which the offer ceases to be binding is determined according to the intention of the proposer, which shall be inferred from the offer itself, or from the circumstances." *Cf.* 124 R.G.Z. 336 (1929); 105 R.G.Z. 16 (1923); 102 R.G.Z. 371 (1921); 90 R.G.Z. 435 (1917); 84 R.G.Z. 323 (1914).

not recognize exceptions other than those expressly enumerated in the Civil Code in accordance with the parties' freedom to contract.

(b) The distinction between contracts the parties to which are present and contracts the parties to which are at a distance does not lead to the conclusion that the former do not require a delay for perfection, and the latter do require such a delay, as in French law. Such a conclusion is unnecessary in German law, as the German Civil Code, unlike the French Civil Code, contains a detailed regulation of this matter.³⁵

Common Law

At common law, the approach to this problem varies, and the existence of a definite rule has been questioned.³⁶ Only once was it asserted that notice of acceptance is necessary as a rule except when the offeror has clearly indicated otherwise, and that "notice," in this context, should mean knowledge reaching the offeror.³⁷ But the reasons underlying this rule have been strongly criticized as a "begging of the question" in order to prove a desired conclusion.³⁸ Moreover, it has been asserted by unquestionable authority that such a requirement is to be found only in certain types of cases.³⁹ The following distinctions should be made in order to arrive at the proper solution for each situation:

(a) The offeror can require notice of acceptance in any form he pleases. Thus, he may require the acceptance to be transmitted in any manner, and in any language, and that there shall be no contract "unless and until he is himself made conscious of it."⁴⁰

(b) The offeror can prescribe a certain form of making the

35. See *supra* notes 28 and 29.

36. CORBIN, CONTRACTS § 67, at 108-09 (1952); GRISMORE, CONTRACTS §§ 45-47 (Murray 1965).

37. Household Fire & Cas. Acc. Ins. Co. v. Grant, 4 Ex. D. 216, 233 (1879): "It is necessary, as a rule, to constitute the contract that there should be a communication of acceptance to the proposer. As a consequence of or involved in the first proposition, if the acceptance is written or verbal—i.e., is by letter or message, as a rule, it must reach the proposer or there is no communication so no acceptance of the offer." (Opinion by Bramwell, J., but a majority of the court disagreed.)

38. CORBIN, CONTRACTS § 67, at 109 (1952).

39. *Id.*

40. Lewis v. Browning, 130 Mass. 173 (1881). See CORBIN, CONTRACTS § 67, at 109 (1952).

acceptance of his offer without implying that the specified method is exclusive of all others. If the prescribed form is one that will not bring to the offeror the knowledge that his offer has been accepted, then such knowledge is not a requirement.

(c) If the offeror does not specify a form of acceptance, there is no requirement other than that the form adopted shall conform to usage and custom of men in similar cases.⁴¹

(d) If the offer does not indicate in an express manner that notice of acceptance is necessary where the offer calls for the making of a promise in return, notice is usually required. The basis for this is that the element of communication is involved in the essence of a promise, and, as a promise is a communicated undertaking, the offeree cannot be said to have made a promise unless and until he communicates his undertaking to the offeror. In this kind of situation, therefore, the rule would be as follows: "In bilateral contracts, notice of acceptance is usually required; in unilateral contracts, notice is usually not required."⁴²

Another attempt to generalize a solution for situations of the kind described in (c) and (d) is expressed in the following language: "The most reasonable rule . . . seems to be that if the offer is of such kind that the offeror needs to know of the acceptance in order to determine his subsequent action, and the offeree has reason to know this, a notice of acceptance must be given. If the offeree is asked to make a promise, it is not enough for him to express assent secretly, or to tell his wife or his neighbor that he accepts, or to take the train expecting to go to the offeror's place of business, or to begin work in preparation to perform that which he is asked to promise to perform. One who asks for a promise is asking for an expressed assurance for the purpose of guiding his future conduct."⁴³

It follows that, when notice of acceptance is a requirement,

41. CORBIN, CONTRACTS § 78 (1952).

42. GRISMORE, CONTRACTS § 45, at 64 (Murray 1965). In the rare case where the offeror in a unilateral contract is requesting a promise and not an act, notice of acceptance should be required as in the case of a bilateral contract; see, for instance, *White v. Corlies*, 46 N.Y. 467 (1871), although not a very convincing example. See also RESTATEMENT, CONTRACTS § 57 (1932): "If in an offer of a unilateral contract the proposed act or forbearance is that of the offeror, the contract is not complete until the offeree makes the promise requested."

43. CORBIN, CONTRACTS § 67, at 110 (1952).

it is for the offeror's benefit, and, therefore, there is no reason why he cannot be allowed to dispense with it. As a consequence, when the offeror has expressed his intention to be bound without any communication of the acceptance made to him by the offeree, the law will give support to his intention. This will always involve a problem of interpreting the offer.⁴⁴

It also follows that, when the offer calls for an act or forbearance as the return for a promise, the performance of the requested act or forbearance amounts to the offeree's manifestation of acceptance. It has been said the basis of this rule is that the offeror is usually aware that the requested act or forbearance has been performed. But a very special problem arises when the offeree knows, or should reasonably know, that the act of performance will not reach the offeror's knowledge. In this case, the most general opinion asserts the rule that notice of acceptance is still not required, when the offeror has requested an act in absence of the offeror's expressed intention that notice shall be given.⁴⁵

44. Cf. GRISMORE, CONTRACTS § 46, at 64 (Murray 1965): "Thus, where an offer for a bilateral contract stated that a contract should come into being where the offer was approved by an executive officer of the offeree at its home office, it was held that a contract was consummated the moment the specified approval was given, and without any communication of the undertaking or assent to the offeror." See *International Filter Co. v. Conroe Gin, Ice & Light Co.*, 277 S.W. 631 (Tex. 1925); *Van Arsdale-Osborne Brokerage Co. v. Robertson*, 36 Okla. 123, 123 Pac. 107 (1912), and *compare with Ever-Tite Roofing Corp. v. Green*, 83 So.2d 449 (La. App. 2d Cir. 1955), discussed Part I, 23 LA. L. REV. 1, 47-49 (1967).

45. *Midland Nat'l Bank v. Security Elevator Co.*, 161 Minn. 30, 200 N.W. 851 (1924); *City Nat'l Bank v. Phelps*, 86 N.Y. 484 (1881). But, other cases indicate that notice is required in such a situation and, moreover, that no contract is concluded unless the assent is communicated: *Kresge Dept. Stores v. Young*, 37 A.2d 448 (D.C. Cir. 1944); *Davis v. Wells Fargo & Co.*, 104 U.S. 159 (1881). Finally, an intermediate solution was formulated in *Bishop v. Eaton*, 161 Mass. 496, 499, 37 N.E. 665, 667 (1894): "Ordinarily, there is no occasion to notify the offeror of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if, within a reasonable time afterwards, he notifies the promisor." In other words, in this third approach, notice of the acceptance by performance of an act is required, but it does not need to reach the offeror's knowledge for the promise to be binding. This solution seems to avoid the harshness placed upon the offeror by the first line of cases, and prevent the harshness that could derive for the offeree according to the second line of cases. This intermediate solution seems to have been

It is relevant that the Restatement of the Law of Contracts, Section 65, recognizes important differences among the situations of the parties, as in German and French law discussed above. A distinction is implied in the treatment given to the acceptance by telephone: "Acceptance given by telephone is governed by the principles applicable to oral acceptances where the parties are in the presence of each other." By clear implication then, immediacy of the acceptance, and knowledge of it by the offeror, are required where the parties are negotiating at arm's length or by telephone.

In general terms, the principles previously discussed have found their place in the Restatement. Although there is no specific rule for the case of bilateral contracts, Section 61 provides: "If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded." It follows that, if nothing is said in the offer about the acceptance, then usage and custom will determine whether the communication of the acceptance is necessary.

Speaking of unilateral contracts, Section 56 states: "Where forbearance or an act other than a promise is the consideration for a promise, *no notification that the act or forbearance has been given is necessary to complete the contract.* But if the offeror *has no adequate means* of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, *and the offeree should know this*, the contract is discharged unless within a *reasonable time after performance* of the act or forbearance, *the offeree exercises reasonable diligence* to notify the offeror thereof."⁴⁶

Instead of formulating a rule subject to exceptions, as in civil law, the preferred approach at common law is to formulate

adopted in RESTATEMENT, CONTRACTS § 56 (1932). *Accord*, GRISMORE, CONTRACTS § 47, at 66 (Murray ed. 1965). In this type of solution, the giving of notice actually becomes part of the offeree's performance.

46. Emphasis added. It should be remembered: "In the formation of a unilateral contract where the offeror is the party making the promise, as is almost invariably the case, a compliance with the request in the offer fulfills the double function of a manifestation of acceptance and of giving consideration." RESTATEMENT, CONTRACTS § 56, *Comment a* (1932). The RESTATEMENT (SECOND) CONTRACTS has abandoned unilateral and bilateral contracts as preferred terminology. See RESTATEMENT (SECOND) CONTRACTS (Tent. Draft No. 2, 1965), especially at § 105.

different rules for different situations. At first impression, it can be said that the common law approach is more realistic. However, since communication is woven into the essence of the act of acceptance it is very difficult to disregard. Exceptions to general principles always call for a more careful determination by the courts. Assuming that the situation envisaged in Section 56 of the Restatement of Law of Contracts could be solved in the light of Articles 1816 and 1818 of the Louisiana Civil Code, the latter, in many cases, would lead to fairer decisions, as the exceptional situation is not regulated in general terms.

Louisiana Law

In Louisiana, the answer to whether the acceptance requires communication to the offeror should be sought in Articles 1809 and 1819 of the Civil Code. These articles are quoted here for clarity:

“Article 1809: The obligation of a contract not being complete, *until the acceptance, or in cases where it is implied by law, until the circumstances, which raise such implication, are known to the party proposing*; he may therefore revoke his offer or proposition before such acceptance, but not without allowing such reasonable time as from the terms of his offer he has given, or from the circumstances of the case he may be supposed to have intended to give the party, *to communicate his determination.*”⁴⁹

“Article 1819: Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, *reciprocally communicated*, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, *not only where the intent has not been mutually communicated or implied*, as is provided in the preceding paragraph, but also where it has been produced by —

“Error;

“Fraud,

“Violence;

“Threats.”⁵⁰

49. Emphasis added.

50. Emphasis added.

Exceptions

The words italicized indicate very clearly that the acceptance is supposed to be known by the offeror, as the consent is to be reciprocally communicated. However, one exception is admitted in Article 1819, since in its clear language, consent may be "*communicated or implied.*" If implied, there is no necessity of communication, which interpretation is perfectly consistent with Articles 1816, 1817 and 1818.

But this is not the only exception contemplated by the Louisiana Civil Code. Another, and very important one, is envisaged in Article 1810:

" . . . But if the contract be accepted before the death of the party offering it, *although he had no notice of it*, the obligation is complete; but if the representatives assent to an acceptance of the surviving party in the first instance, or the survivor assent to an acceptance made by the representatives in the second instance, then it becomes a new contract between the representatives and the surviving party."⁵¹

This means that if the proposer dies in the period between acceptance and reception of its communication, as an exception to the general rule, the acceptance, although not communicated, will be valid.

Mandate

Another exception flows very directly from Article 2988, dealing with the contract of mandate: "The contract of mandate is completed only by the acceptance of the mandatory."⁵² No reference is made to communication of the acceptance. In the light of Article 2989, the acceptance, in such a case, may be express or tacit. If there is room for doubt, Article 2990 adds a final degree of clarity:

"If the proxy or attorney in fact pleads that he has not accepted or acted under the power, it is incumbent on the principal to prove he has."

51. Emphasis added. See Part I, 28 LA. L. REV. 1, 64 (1967).

52. The word *only*, in this article, lends itself to some degree of ambiguity. The French text of this article reads: "*Le contrat n'est consommé que par l'acceptation du mandataire.*" La. Civil Code art. 2957 (1825). Art. 1984 of the FRENCH CIVIL CODE reads: . . . *Le contrat ne se forme que par l'acceptation du mandataire.*"

It is not very difficult to imagine that, in the kind of situation envisaged in this article, the attorney will allege, perhaps as his principal defense, the lack of communication of the acceptance as the best proof that he did not accept, and, therefore, is not bound. However, the principal may prove that the attorney accepted, even where no communication was attempted. It is necessary to conclude, therefore, that the communication of the acceptance is not a requirement in matters of mandate.

Donations Inter Vivos

Another special situation is the one contemplated in Article 1540 of the Louisiana Civil Code. It is not, certainly, an exception in the sense that Articles 1810 and 2988 form exceptions to Articles 1809 and 1819. On the contrary, Article 1540 is an exception only in the sense that it is a case where the general rule does not admit *any* exceptions. This article reads:

“A donation *inter vivos* shall be binding on the donor, and shall produce effect only from the day of its being accepted in precise terms. The acceptance may be made during the lifetime of the donor by a posterior and authentic act, but in that case the donation shall have effect, with regard to the donor, only from the day of his being notified of the act establishing that acceptance.”

According to this article, the general rule requiring that the acceptance be communicated applies in such a strict manner that no exception, as the one contemplated in Article 1810, could be admitted. Therefore, if the donor dies before the acceptance was communicated to him, the donation would be invalid.⁵³

Regular and Exceptional Situations

The preceding discussion shows that the Louisiana law, in this matter, admits a general rule subject to exceptions, in a manner consistent with the civil law approach. It should not be thought that the only exceptions are those expressly con-

53. *Accord*, 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 35-36 (10th ed. 1953); 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 79, 85 (1833). See also *Lawrence v. Police Jury*, 35 La. Ann. 601 (1883); *Fuselier v. Masse*, 4 La. 423 (1832). By the Spanish law, donations *mortis causa* did not require acceptance; and in donations *inter vivos*, it was only requisite to deprive the donor of the power of revocation, where delivery did not follow the gift. See 3 PLANIOL, CIVIL LAW TREATISE, PART II (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 2525-2533 (1959).

templated in the test of the Civil Code. On the contrary, the importance attributed by the Code to the *situation of the parties and the nature of the contract* in related matters, such as the expression of dissent and duration of the offer,⁵⁴ should command the conclusion that the same circumstances are to be taken into account in order to ascertain when and where an exception to the general rule requiring communication should be admitted. This conclusion becomes more imperative when it is realized that general precepts, as those in the Civil Code of Louisiana, its model, and its contemporaries, are mostly based on what is considered more common or current. In matters of contracts, the presence of both parties during negotiation and conclusion seem to be the commonest occurrence;⁵⁵ but it should not follow that the requirements established for regular and current situations are also to be observed in cases where the circumstances are less common, or irregular.⁵⁶ As a matter of tradition, contracts the parties to which are not in the presence of each other have been considered uncommon. This consideration should obviously be changed in view of modern ways of life and communication; but as long as traditional texts remain as they were written, their correct interpretation will require determination of the situations contemplated by the redactors as common, or unusual. Otherwise, the law would be deprived of flexibility, at the risk of making logical consistency prevail over real necessity.⁵⁷

Offers of Guaranty

The necessity of communicating the acceptance has been especially discussed in Louisiana jurisprudence in reference to the area of offers of a guaranty.⁵⁸ As in other contracts, the

54. See Part I, 28 LA. L. REV. 1, 38 (1967).

55. *Accord*, Nussbaum, *The Offer and Acceptance Doctrine*, 36 COLUM. L. REV. 923 (1936).

56. *Accord*, 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 223-24 (1954).

57. *Id.* For cases in which notice of acceptance has been discussed in Louisiana jurisprudence, see, e.g., *Hanemann v. Uhry*, 8 La. App. 534 (Orl. Cir. 1928).

58. The courts of Louisiana have been trying, without success, to determine whether guaranty and surety are the same. Though in theory they treat of different concepts, there is very little practical value in differentiating between them. Considering them to be the same have been: *Brock v. First State Bank & Trust Co.*, 187 La. 766, 175 So. 569 (1937) ("a contract of guaranty in this state is equivalent to a contract of surety"); *Reconstruction Fin. Corp. v. Mickelberry*, 189 La. 106, 179 So. 49 (1936); *Lachman v. Block*, 47 La. Ann. 505, 15 So. 649 (1894); *Graves v. Scott & Baer*, 23 La. Ann. 690 (1871). A case which adopts somewhat of a middle

general rule is that the acceptance of such an offer must be communicated to the offeror.⁵⁹ However, if the offer of guaranty is limited to a presently existing debt or to a specific future debt, there are three situations in which the acceptance need not be communicated: (1) The circumstances of the case prove that there was an express mutual assent by the parties at the time of the offer.⁶⁰ (2) The relation of the parties proves that the offeror must have known that his offer would be relied

ground on this issue is *First Nat'l Bank of Arcadia v. White*, 127 So. 433 (La. App. 2d Cir. 1930). Firmly adopting the negative point of view have been: *Citizens Bank & Trust Co. v. Barthet*, 177 La. 652, 143 So. 906 (1933); *Louisiana & N.R.R. v. Dillard*, 51 La. Ann. 1484, 26 So. 451 (1899) (in which the decision turned on the distinction); *Gale v. Thompson*, 3 Rob. 334 (La. 1842); *Gasquet v. Thorn*, 14 La. 506 (1840). The offer of guaranty may be treated as any other, and its form is relevant only as to methods of acceptance and the nature of the guaranty. See *Interstate Trust & Banking Co. v. Sabatier*, 189 La. 199, 179 So. 80 (1938). As in any other offer, its terms and the circumstances of the case may lead to the conclusion that it is irrevocable during a certain period of time.

An interesting situation occurs when there is more than one party signing as guarantor. Each party can revoke his offer until it is signed by all of the other parties, or if some of the intended parties do not sign. This is based to some extent upon a theory of mutuality. *Curtiss v. Moss*, 2 Rob. 367 (La. 1824); *Wells v. Dills*, 1 Mart.(N.S.) 592 (La. 1823). This was immediately amended to include the proviso that, even if some of the intended guarantors do not sign, the offer of guaranty cannot be revoked when it has been relied upon. *Canal & Banking Co. v. Brown*, 4 La. Ann. 545 (1849). In this case, the court spoke in terms of surety rather than guaranty. Distinctions between a limited guaranty and a continuing guaranty are made in order to determine the period during which the offeree may accept. See, e.g., *Interstate Trust & Banking Co. v. Sabatier*, 189 La. 199, 179 So. 80 (1938); *Hibernia Bank & Trust Co. v. Succession of Cancienne*, 140 La. 969, 74 So. 267 (1924); *Lachman v. Block*, 47 La. Ann. 505, 15 So. 649 (1894); *Menard & Vigneaud v. J. B. Scudder & Nolen Seewart*, 7 La. Ann. 385, 56 Am. Dec. 610 (1852). For a discussion of the requirements of the acceptance of an offer of guaranty, see *Vordenbaumen v. Gray*, 189 So. 342 (La. App. 2d Cir. 1939), in which the offeree's conditional acceptance was treated as a counteroffer which was subject to acceptance by the original offeror. In *Cottam & Co. v. Gonzales*, 5 La. App. 171 (1st Cir. 1926), the offeror had requested "prompt notice." He did not get it, and the court concluded that his offer was not accepted. At common law, this problem of notice of acceptance of the offer of guaranty has been particularly troublesome. See, e.g., *Kresge Dept. Stores v. Young*, 37 A.2d 448 (D.C. Mun. App. 1944); *Midland Nat. Bank v. Security Elevator Co.*, 161 Minn. 30, 200 N.W. 851 (1924), in which the view supported is that no notice is required; *Bishop v. Eaton*, 161 Mass. 496, 37 N.E. 665 (1894).

59. See generally *Siben v. Green*, 8 So.2d 706 (La. App. Or. Cir. 1942); *Texas Co. v. Hudson*, 155 La. 966, 99 So. 714 (1924); *Davis Sewing Machine Co. of Delaware v. Richards*, 145 U.S. 524 (1885).

60. *Commercial National Bank v. Richardson*, 163 La. 933, 940, 113 So. 152, 154 (1927): "If the Guaranty is signed by the guarantor at the request of the guarantee, or if the guarantor's agreement to accept is contemporaneous with the guaranty . . . the mutual assent is proved and the delivery to him for his use completes the contract without further acceptance." *Interstate Trust & Banking Co. v. Sabatier*, 189 La. 199, 179 So. 80 (1937); *Hibernia Bank & Trust Co. v. Succession of Cancienne*, 140 La. 969, 74 So. 267 (1917).

upon.⁶¹ (3) The terms of the offer evidence that no communication is required.⁶² If the offer is of a prospective and continuing guaranty, notification of acceptance must be given⁶³ unless from the terms of the offer⁶⁴ or the situation of the parties, waiver can be implied.⁶⁵

TIME AND PLACE OF CONTRACT FORMATION

Assuming that the offer and the acceptance take place at two different moments, when and where is the contract formed? These are questions of great interest not only because of their unavoidable relation to the problem of revocability, but also because they appear in matters of transfer of title,⁶⁶ the problem of risk,⁶⁷ the starting point of liberative prescription, and the annullability of certain acts in the case of bankruptcy.⁶⁸

The when and where of contract formation are really two questions, although generally treated as a single problem covered by the same theory. However, the reasons for the importance of each of them may differ. This may explain apparent inconsistencies in the French jurisprudence, and calls for alert awareness of the ultimate problems keyed to these questions which are present, mainly, in the case of contracts by correspondence.

The two questions will be now discussed separately.

61. *Times Picayune Pub. Co. v. Badon*, 17 La. App. 114, 135 So. 631 (Orl. Cir. 1931); *Hibernia Bank & Trust Co. v. Succession of Cancienne*, 140 La. 969, 74 So. 267 (1917).

62. *Peoples Bank of New Orleans v. Lemarie*, 106 La. 429, 31 So. 138 (1901).

63. *Menard & Vigneaud v. J. B. Scudder & Nolan Seewart*, 7 La. Ann. 385, 386, 56 Am. Dec. 610 (1852): "In the case of a prospective and continuing guaranty, the creditor must not only show that he advanced his money, or parted with his goods, on the faith of the letter of guaranty, but that he accepted the guaranty, and intended to act upon its security. But express and formal notice, emanating directly from the creditor or to the guarantor, is not indispensable. If the fact of acceptance is seasonably brought to the knowledge of the signer in any other way, and he acquiesces by silence, it is sufficient."

64. *Peoples Bank of New Orleans v. Lemarie*, 106 La. 429, 31 So. 138 (1901).

65. *Hibernia Bank & Trust Co. v. Succession of Cancienne*, 140 La. 969, 74 So. 267 (1917).

66. CODE NAPOLEON arts. 1138 and 1583, equivalent to LA. CIVIL CODE arts. 1908, 1909, and 2456 (1870). See 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 215 (1923).

67. CODE NAPOLEON art. 1138. See 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 215 (1923).

68. FRENCH COMMERCIAL CODE arts. 446 and 447 (1807). See 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 215 (1923).

TIME OF CONTRACT FORMATION

Contracts by correspondence are but one example of contracts between distant parties, or contracts *in absentia*, according to a traditional terminology.⁶⁹ Where the distant parties have selected to communicate through the mail the first problem involved is to ascertain the moment at which the contract shall be regarded as concluded.

French Law

In French law, several theories have been advanced to determine the moment of formation. Two of these theories contend that the contract is formed before the arrival of the letter of acceptance. Two other theories, on the contrary, assert that the contract is formed only when that letter arrives at its destination.

The first one, the *declaration* theory,⁷⁰ in its most orthodox version, sees the contract formed at the moment the internal will of the acceptor is generated in his mind. But all agree that this orthodox conception must be tempered and that the moment of the *expression of the will* should be substituted for the moment of the mere generation of the will, as the real instant of contract formation. Thus, it has been said that the writing of a letter suffices as expression of will. The subsequent process of addressing and mailing it, which is something that regularly takes place according to usage, or even habit, is not of the essence of the declaration of will.⁷¹

The second theory, that of *transmission*,⁷² considers the contract formed at the moment the acceptor parts with the letter containing the acceptance. It is said that, until then, his will

69. Such as contracts by messenger, or telephone. See generally 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 184 (2d ed. Esmein 1952).

70. 1 AUBRY & RAU, *COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS* (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 308 (1965); 17 BAUDRY-LACANTINERIE & SAIGNAT, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 26 (1900); 2 CARBONNIER, *DROIT CIVIL* 337 (1957); 2 COLIN ET CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 37-38 (10th ed. 1953); 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 215 (1923); 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 186-87 (2d ed. Esmein 1952).

71. CODE NAPOLEON art. 1135, equivalent to LA. CIVIL CODE art. 1903 (1870), has been invoked in this connection. See 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 215 (1923).

72. See note 156 *supra*. The French word utilized in this context is *expédition*.

is nothing but a purpose in his mind, but, from the moment of transmission, the letter *belongs* to the addressee. This argument does not seem to be convincing, because the postal regulations in France authorize withdrawal of letters not dispatched,⁷³ or, if dispatched, not yet delivered to the addressee.⁷⁴ In matters of telegrams, those not yet transmitted or delivered can be cancelled.⁷⁵

Both theories are based on the general concept of the autonomy of the will. There is a contract the moment two different wills exist, because consent takes place thereby.

From the viewpoint of the positive law, it has been argued in support of these theories, that, although the Code Napoleon does not contain a general theory of formation of contracts, Article 1985⁷⁶ implies that the acceptance of a mandate might very well be a fact unknown to the mandator, or principal. Article 1121⁷⁷ is also invoked in this connection because according to this rule, in matters of *stipulation pour autrui*,⁷⁸ the third party acquires an irrevocable right upon his acceptance, without requiring its communication to the parties to the original contract.⁷⁹

According to the third theory, that of *reception*, the acceptance takes place at the moment when its communication reaches the offeror. In this conception, if a letter of acceptance is lost, there is no contract. But it is not material whether the offeror reads the letter containing the acceptance. Thus, if such a letter arrives at its destination in proper time, but the offeror is not there to *receive* it until after the time for acceptance has expired, the contract will be concluded.⁸⁰

The fourth, or *knowledge* theory, does not consider the contract formed until the moment the offeror actually learns of

73. *Instruction Générale des Postes*, of March 20, 1868, art. 389; 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 215 (1923).

74. *Instruction* no. 319, following a decision of the *Conseil d'Etat*, of August 6, 1883; 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 215 (1923).

75. *Id.* Decree of Feb. 7, 1894, art. 28.

76. Equivalent to LA. CIVIL CODE art. 2989 (1870).

77. Equivalent to LA. CIVIL CODE art. 1890 (1870). See also LA. CIVIL CODE art. 1902 (1870).

78. Third party beneficiary.

79. For an explanation that, in cases of this sort, acceptance by the beneficiary is equivalent to ratification as in *gestion d'affaires*, see 2 PLANIOL, *CIVIL LAW TREATISE, PART I* (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 1222-1226 (1959).

80. *Cf.* 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 217 (1923), and an Italian case reported in 1 *GIURISPRUDENZA ITALIANA* 262 (1904), therein cited.

the acceptance. In support of this view, it has been said that the sole existence of two wills does not suffice, and that their real accord requires reciprocal communication.⁸¹

Against this last theory, the objection has been raised that it cannot explain the case of a tacit acceptance. Here, the offeree may perform immediately upon reception of the offer. If he were then required to make his performance known to the offeror, the contract would come to be considered formed only after having been performed. However, it is asserted, such an objection does not take into account those cases in which the acceptance is not express but is taken for granted: when an order for furnishings is placed, the order itself implies that the offeror is counting on the offeree's consent. It would be natural for the latter, therefore, not to communicate in fact that he accepts.⁸²

Another objection raised against the knowledge theory is that it makes any contract by correspondence impossible, since there is no reason not to require that the reception of the acceptance be, in its turn, communicated to the acceptor, and so *ad infinitum*. However, this objection does not take into account the fact that the concurrence of the wills exists at the moment the acceptance arrives. As it was pointed out, the offeree does not await an answer to his acceptance; he knows that the contract will be concluded, and this consideration should suffice as a practical matter.⁸³

French writers reached the conclusion that a choice between these different approaches cannot be made in a manner consistent with the legal texts, as these furnish very little, if any, guidance at all.⁸⁴ In fact, the French legal texts only provide solutions for a very limited number of particular situations. A recommendation has been formulated according to which the concept of "concurrence of the wills" should not be subject to

81. Cf. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 218 (1923). CODE NAPOLEON art. 932, equivalent to LA. CIVIL CODE art. 1540 (1870), is currently invoked in support of this view, as the rule prescribes that the acceptance of a donation will not bind the donor until he is notified. But it has been asserted that neither this article, nor articles 1984, 1985, and 1121, give support to a convincing general theory because such a theory does not seem to have been intended in the Code Napoleon. On the contrary, the Code seems to have envisaged particular situations, prescribing solutions accordingly. See 2 DEMOGUE, *id.*

82. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 219 (1923).

83. *Id.* at 219-20. See 2 COLIN & CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 38 (10th ed. 1953).

84. Cf. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 220 (1923).

much speculation and the choice be made according to practical necessities. For this, a fair solution in a particular situation should always be preferred to the one less fair that may result from the application of a general principle.⁸⁵

However, it cannot be denied that the *reception* and *knowledge* theories have found strong support in doctrine in strictly civil matters. The *transmission* theory seems to be favorite in commercial matters, according to the traditional continental distinction.⁸⁶

In the discussion of strictly civil matters, it has been said that the important problem is to ascertain the moment at which the offeror will be definitely bound, and when will the offeree be in the same situation.

When he who has proposed awaits an answer, he suffers no harm if it is decided that, until the acceptance arrives, the offeree may revoke it, or substitute his assent for a previous refusal. After reception of the acceptance, on the contrary, it should be presumed that the offeror will act in consequence thereof, and, therefore, no revocation should be allowed.⁸⁷

The offeree's position is rather more delicate. In fact, he considers himself bound from the moment he transmitted the acceptance, as he assumes that his letter will arrive in time, which is probable, although not entirely certain. This should be taken with two reservations: in the first place, the postal regulations make it impossible for the offeree to withdraw his letter while still *en route*;⁸⁸ in the second place, he can always cancel his letter by a telegram arriving beforehand, or even at the same time.⁸⁹ Consequently, if the letter of acceptance is lost, or arrives after the time for acceptance, it must be admitted that there is no contract because the offeror did not get an answer, or, at least, a timely one. The offeree should be charged with the knowledge that there is always a chance for his acceptance

85. *Id.*

86. See *id.* at 220-223; 3 LYON-CAEN & RENAULT, *TRAITÉ DE DROIT COMMERCIAL* 24-26 (1923); 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 188-93 (2d ed. Esmein 1952). *But see* 1 AUBRY & RAU, *COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS* (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 306-08 (1965).

87. *Cf.* 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 220 (1923). See also 17 BAUDRY-LACANTINIERE & SAINAT, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 27-29 (1900).

88. See note 73 *supra*.

89. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 221 (1923).

to be ineffectual. Therefore, the formula that better expresses the more desirable solution is that there is no contract until the arrival of the letter of acceptance. Before this precise moment, the offeror is in a state of uncertainty, and the acceptance is "fragile."⁹⁰

It seems that this reasoning would leave the offeree in a state of uncertainty, as he cannot know when he is definitely bound. But, as it has been pointed out, while letters do generally arrive on time, it cannot be said that offers are generally accepted. Consequently, it seems advisable to take what is most probable into account—the arrival of a letter without revocation or delay and conclude that the offeree may be reasonably assured that his letter will arrive. As it is only at this moment that the offeror will act in consequence of the contract, it is at this moment that the contract is formed.⁹¹

This view should not be taken to mean that the parties cannot otherwise agree. Moreover, the parties are always considered free to stipulate expressly or impliedly that the offeror, the offeree, or both, will be bound at the moment the letter is posted.⁹²

In this approach the contract is formed at the moment of reception or at the moment of knowledge of the acceptance, not because then and only then would the alleged "concurrence of the wills" take place, but because at this moment both parties have attained a reasonable degree of certainty. A negotiation that may result in a contract starts with successive attempts, counter-propositions, and exchanges of views as to the possibilities that the parties are discussing. Therefore, the contract should never be considered formed while the uncertainty is too

90. Actually, it might be said that everything in the contract formation is "fragile" until the letter of acceptance is *read* by the offeror. But that that is normal, according to the regular course of events, should be presumed. Consequently, the law should assume that the offeror read the acceptance immediately upon reception unless strong evidence indicates the contrary, such as where the offeror is absent, and his place closed, at the moment of the arrival of the letter, and there is no person that could have opened it. See 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 221 (1923).

91. Something like an unavoidable reason of conceptual symmetry would prevent considering the contract as formed the moment of transmission; as the acceptance is "fragile" until the letter arrives, by the same token, the offer should be "fragile"—revocable—until the same moment. Cf. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 221 (1923). It can be said that, in many situations, this symmetry of concepts will result in a fair decision.

92. Cf. CASS. CIV., May 9, 1904, GAZ. TRIB., 1904, 2, I, 148; 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 222 (1923).

great. On the contrary, it should come into existence only at the moment when the parties, knowing that they agree, are ready to act accordingly.⁹³

This consideration of the certainty or the uncertainty of the parties introduces ample flexibility in matters of approaching the moment of contract formation, and it demonstrates clearly that *reception* and *knowledge* theories in modern French doctrine, serve the purpose of establishing a general principle, a guideline, rather than an unavoidable rule.

Perhaps the more functional approach has been proposed⁹⁴ in the following discussion of which of the four different theories should prevail:

It is entirely dependent on the parties' will to consider the contract formed at the moment they please, provided, of course, it is simultaneous with or subsequent to the offeree's declaration of will. If the parties have not specifically agreed on this point, then the moment of contract formation will be determined by interpreting their will thusly:

(a) According to the intention of the parties, especially the one who makes the offer, the acceptance should, or may, be implied as the consequence of an act of the offeree, other than an express declaration of his will, performed before the knowledge of it is brought home to the offeror. In such a case, the contract is born at the moment and at the place the act constituting acceptance is performed by the offeree, and a revocation of the offer that subsequently reaches him would be ineffectual.⁹⁵

This solution should prevail where the offeror requests that certain services be rendered immediately: where an order is placed with a merchant with specific instructions to ship, store, or deliver; where an order is placed with a broker in the stock market; where offers of reward are made to whoever shall render a certain service. In all these cases the contract is concluded solely by fulfilling the order or rendering the service. In this type of situation, when the offeree is a professional, or

93. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 223 (1923).

94. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 188 (2d ed. Esmein 1952).

95. *Cf.* FRANCO-ITALIAN PROJET art. 4 (1928). This is also the solution adopted in matters of risks in course of delivery for commercial sales. See 3 LYON-CAEN & RENAULT, *TRAITÉ DE DROIT COMMERCIAL* 101, 178-80 (1923); 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 188 (2d ed. Esmein 1952); FRENCH COMM. CODE art. 100 (1807) .

a merchant, he should give immediate notice to the offeror in case of refusal or he will incur a special liability.⁹⁶ As a consequence of the contract being concluded by performance, the offeree cannot cancel it by preventing completion of such performance, as, for instance, by arresting the goods while they are on their way to the offeror.⁹⁷

It is the same thing when the offeror is the one who performs simultaneously with the making of the offer. Thus, when he ships to the offeree the things that he proposes to sell, deposit, or lend, and the offeree receives and keeps them with the intention of accepting, the contract is concluded.⁹⁸

In all cases in which the acceptance is inferred because the offeree remains silent, the contract should not be considered formed at the moment the offer is received, but at the moment when the offeror, not having received a negative answer, is reasonably led to believe that the contract is concluded. Until that moment, the existence of the concurrence of the parties' wills remains uncertain.⁹⁹

(b) In all cases other than those considered in (a), there is no contract:

(1) If a letter revoking the offer crosses in the mail with the letter of acceptance, and the former arrives at its destination prior to the latter.

(2) If a letter containing the revocation of the acceptance arrives prior to, or at the same time as, the letter of acceptance.¹⁰⁰

96. Nimes, May 13, 1932, D.H. 1932, 404; *Trib. Seine*, Aug. 22, 1882, *GAZ. PAL.*, 81-82, 2, 398; see generally 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 160 (2d ed. Esmein 1952).

97. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 189 (2d ed. Esmein 1952). Compare with the common law discussion of the effects of part performance in CORBIN, *CONTRACTS* §§ 58, 59 (1952). See also JONES, FARNSWORTH & YOUNG, *CONTRACTS* 114-15 (1965); *RESTATEMENT, CONTRACTS* § 45 (1932).

98. Cf. LA. CIVIL CODE art. 1816 (1870). According to conventional usages, the same solution may prevail even where the offeror does not perform simultaneously with the offer, for the offeree may, under certain circumstances, take immediate action in consequence of the contract upon reception of the offer and, for instance, resell the goods which are the object of the offer. This solution expedites commercial transactions, although creating certain problems in case of bankruptcy of the offeree. See 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 189 (2d ed. Esmein 1952).

99. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 190 (2d ed. Esmein 1952).

100. Cf. Paris, May 31, 1937, D.H. 1937, 431; Nimes, March 4, 1908, S. 1910, 2, 106.

(3) If the letter of acceptance does not arrive at its destination.¹⁰¹

These solutions, of course, could not be admitted by the theory of transmission, which, it is strongly recommended, should not be taken as the general principle governing this matter.¹⁰²

(c) As the will of the parties is sovereign, the court may, at any time, arrive at the conclusion that it was the offeror's understanding that he would be bound before learning from the acceptance, or, on the contrary, that his understanding was that he would not be bound until learning not only from the acceptance, but also from the accessory undertaking of a third party.¹⁰³ The offeror may also make the formation of the contract depend on the occurrence of any other event, or on the execution of a writing, or on the accomplishment of a certain performance.¹⁰⁴

As to the French jurisprudence, the Cour de Cassation has refused to adopt either theory.¹⁰⁵ There are, however, numerous decisions upholding either the *reception* or the *knowledge* theories.¹⁰⁶ In one case,¹⁰⁷ the court asserted that the moment of formation of a contract is in general a question of fact, more than one of law. Notwithstanding, the same decision has been

101. Cf. Chambéry, June 8, 1877, S. 77, 2, 252; 6 PLANIOU & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 190 (2d ed. Esmein 1952).

102. 6 PLANIOU & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 190 (2d ed. Esmein 1952).

103. Req., Aug. 6, 1867, S. 67, 1, 400, D. 68, 1, 35. Cf. 6 PLANIOU & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 190 (2d ed. Esmein 1952).

104. Cf. 6 PLANIOU & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 123-24, 190 (2d ed. Esmein 1952).

105. 2 COLIN & CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 38 (10th ed. 1953); 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 212-15 (1923); 6 PLANIOU & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 187 (2d ed. Esmein 1952).

106. Ploux v. Roullin, Nov. 21, 1949, D. 1950, J, 236; Req., June 16, 1913, D. 1914, I, 229; Aix, Nov. 23, 1908, S. 1910, 2, 6; D. 1909, 2, 61; Nimes, March 4, 1908, S. 1910, 2, 106; Toulouse, June 13, 1901, D. 1902, 2, 16; Amiens, April 26, 1887, Rec. Amiens, 1888, 52; Orleans, June 26, 1885, S. 1886, 2, 30, D. 1886, 2, 135 ("Whereas it is a principle of the law of contracts that the concurrence of the will is necessary to have a binding agreement, and this agreement cannot result from a fiction, but it must be real, effective, and not to leave any doubt as to the agreement and the mutual assent . . . it is only from the moment when the letter containing the acceptance has reached the offeror, and has been effectively received by him, that the contract has become definitive."); Chambéry, June 8, 1877, S. 1877, 2, 252, D. 1878, 2, 113; Lyon, April 29, 1875, S. 1875, 2, 263.

107. Req., March 21, 1932, S. 1932, 1, 279, D. 1933, 1, 65, followed in *Tréb. de Loches*, June 25, 1945, D. 1947, J, 113.

interpreted as adopting the theory of *declaration*.¹⁰⁸ Actually, the case deals with the determination of the court's jurisdiction under Article 420 of the French Code of Civil Procedure.¹⁰⁹ The vast majority of French decisions adhering to the theories of *declaration* or *transmission*, were actually cases where the issue was the *place*, and not the *time* of contract formation, for purposes of jurisdiction, or law applicable.¹¹⁰ This overlapping of the two questions is what causes a certain indefiniteness of French jurisprudence.¹¹¹

As to courts of appeal, the tribunals other than the Cour de Cassation, it has been said that, when dealing specifically with the problem of the *time*, and not the *place* of formation of the contract, they have allowed their decisions to be governed by equity considerations.¹¹² It is here submitted, however, that French courts entering judgment in strict civil matters have upheld the *reception* theory any time that no particular harshness resulted for the offeree.¹¹³

108. See note by Sallé de la Marnière in *Trib. de Loches*, June 25, 1945, D. 1947, J, 113. The decision reads: ". . . on the other hand, the formation of the promise is realized and the contract becomes perfect by the acceptance of the propositions, from the moment that this acceptance takes place. . . ." But the *Chambre Civile*, by decision of Feb. 2, 1932, S. 1932, 1, 68, through dismissal of a writ of review, indirectly consecrated the theory of reception. See 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 38 (10th ed. 1953).

109. "The plaintiff shall have the choice to file suit . . . before the court with jurisdiction over the district where the promise was made and the goods were delivered. . . ." For a discussion of this particular problem, see 191 *infra*.

110. Grenoble, Aug. 1, 1913, GAZ. PAL., 1914, I, 137; Poitiers, Nov. 4, 1886, GAZ. PAL., 1886, 2, 907; Rennes, Feb. 6, 1873, S. 1873, 2, 261, D. 1875, 2, 224; Caen, June 15, 1871, D. 1872, 5, 111; Colmar, Feb. 17, 1840, S. 1840, 2, 385. See 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 213 (1923); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 187 n° 5 (2d ed. Esmelin 1952).

111. However, a careful analysis of what is *ratio decidendi*, and what is *obiter dicta* in these decisions might help to clarify the French jurisprudential trend.

112. Cf. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 187 n° 5, 188 (2d ed. Esmelin 1952).

113. But see 2 ARMINJON, NOLDE & WOLFF, TRAITÉ DE DROIT COMPARÉ 19 (1950), where it is asserted that the *Cour de Cassation* adhered to the *declaration* theory in the already famous decision of 1932 cited above. The same writers express the view that the current opinion according to which the moment of contract formation is pure question of fact is untenable. 1 AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 308 (1965) expounds the theory of *transmission* as the general principle applicable in all situations; the same theory is regarded as the more sound in Mazeaud, REVUE TRIMESTRIELLE 507 (1956). Cf. AMOS & WALTON, INTRODUCTION TO FRENCH LAW 157 (2d ed. 1963). In a draft for the new French Civil Code, the transmission theory is followed. See TRAVAUX DE LA COMMISSION DE REFORME DU CODE CIVIL 681 (1950): "Unless otherwise provided by the parties, a contract between

In commercial matters, the view mentioned elsewhere prevails.¹¹⁴ In this connection, it is worthwhile to notice that an even more clearcut dual solution exists in Spanish law, where the Civil Code was inspired by the theory of *reception*, and the Commercial Code by that of *transmission*.¹¹⁵

German Law

In German law, the theory of reception seems to have inspired section 130 of the Civil Code, providing that a declaration of will addressed to a person who is not present shall become effective at the moment it arrives.¹¹⁶ This "arrival" of the declaration has been interpreted to mean the moment at which the addressee can find out for himself, in the normal course of events, what is contained in the declaration, or when he can be expected to know it.¹¹⁷ The importance of this last aspect, the common expectation of the offeror "learning" of the acceptance, has been stressed in German doctrine, thereby implying that the *knowledge* theory cannot be discarded, for it is very rich in legal consequences.¹¹⁸

In an attempt to clarify the true meaning of the word "arrival," the suggestion was made that it should be taken as the instant when the acceptance enters the sphere of the offeror's power, or, in other words, when he is in a position to get the instrument containing the acceptance, through the exercise of his own activity.¹¹⁹

It follows that, in spite of the fact that the legal text adheres to the moment of reception, German doctrine interprets

persons not in the presence of each other is formed at the time and place of the transmission of the acceptance." For a general discussion of the problem of risks in the transmission of a declaration of will, see 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 185-86 (2d ed. Esmein 1952). In case of error in the transmission, it is understood that the maker of the declaration should stand the consequences. See *Trib. Com. du Havre*, June 21, 1922, *Rec. du Havre*, 1922, 209, also July 31, 1923, *Rec. du Havre*, 1923, 24.

114. See text accompanying note 86 *supra*.

115. SPANISH CIVIL CODE art. 1262 (1889): "The acceptance made by letter does not bind the offeror until it is acknowledged." COMMERCIAL CODE OF SPAIN art. 54 (1829): "Contracts by Correspondence are perfect the moment the answer is given to the original proposition or to the conditions that modify it." See 2 PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL, PART I* 221-22 (1954); 3 PUIG PEÑA, *TRATADO DE DERECHO CIVIL ESPAÑOL, PART II* 461-64 (1966).

116. See Part I, 28 LA. L. REV. 1, 37 n.168.

117. 1 ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II* 666 (1955).

118. *Id.* at 667, n° 9.

119. *Id.* at 667, ¶ c.

it by elaborating a kind of modified theory of *knowledge*, or *information*.¹²⁰ the legal consequences attached to the fact of communicating the acceptance are, thus, made to depend not only on the offeree's activity, but also on the offeror's cooperation.¹²¹ This doctrinal effort is perfectly justified, because, by charging the addressee of a declaration of will (the offeror, in this case) with this peculiar duty of cooperation, it becomes very clear that if he refuses the expected cooperation, the acceptance will be effective even though he has no knowledge of it.¹²² As a rule, then, the contract is perfected the moment the offeree has done all in his power to make the acceptance available to the offeror, and only the latter's activity is required to take the actual possession of the instrument or learn its content.¹²³

The line between what the offeree is expected to do and what the offeror is to do, is drawn according to usage and the practices of commerce.¹²⁴

The risk in the transmission of the acceptance, according to this conception, is placed upon the one who must act in order to see that the declaration of will accomplishes its end: the risk is upon the offeree while he is trying to make the acceptance reach the offeror; upon the offeror, while he is supposed to secure for himself the knowledge of the acceptance.¹²⁵ The

120. In reality, the four debated theories constitute only two different viewpoints: (a) the moment declaration is expressed (declaration and transmission); (b) the moment the declaration reaches the addressee (reception and knowledge). German doctrine definitively favors the second viewpoint, but combines very aptly the two theories derived from the same into a veritable new conception. *But see* ARMINJON, NOLDE & WOLFF, *TRAITÉ DE DROIT COMPARÉ* 20 (1950).

121. 1 ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS*, PART II 667, ¶ c (1955).

122. For instance, when the offeror does not have his mail delivered, but takes it personally at the post office, if he does not collect the letter of acceptance, the contract will notwithstanding be perfected. The same when the offeror receives notice from the post office to collect a letter; but not when a registered letter is delivered at the offeror's address and taken back for absence of the addressee. *Cf.* 56 R.G.Z. 262 (1904); see also 125 R.G.Z. 75 (1929); 105 R.G.Z. 255 (1923); and 60 R.G.Z. 334 (1905).

123. 1 ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS*, PART II 667 (1955).

124. *Id.* at 667, ¶ d.

125. *Cf.* 58 R.G.Z. 409 (1905): "When the receiving party is the only one at fault, or is guilty of deceit, the delayed communication shall be deemed to have been timely received." For an interesting case where both parties incurred some degree of carelessness in the transmission and reception of the acceptance, see 97 R.G.Z. 336 (1920). In this case, the contract was not considered formed and the court divided the damages between the parties by application of art. 254 of the Civil Code: "If any fault of the injured

parties, however, are entirely free to covenant any requirements to be fulfilled by the arrival of the letter of acceptance, as Article 130 of the BGB does not prevent that sort of stipulation.¹²⁶ It should be remembered that the BGB contemplates expressly several instances in which reception of the acceptance is not required for the formation of the contract.¹²⁷

In sum, the theories of reception and knowledge, expertly combined, have had a definite impact on German law. The wording of the Civil Code according to the first of these conceptions has allowed a consistent trend in judicial decisions in which the decisive importance of usages has been considered in minute detail.¹²⁸

Common Law

At common law, in matters of contracts by correspondence, the leading case of *Adams v. Lindsell*¹²⁹ set up the rule that a mailed acceptance becomes effective upon dispatch.¹³⁰ However, under this particular heading, a whole set of controversies are presented.¹³¹ Courts have considered the basic question—when does the mailed acceptance take effect—and have answered it as follows:

(a) Where a letter containing a revocation of the offer crosses a letter of acceptance in the mails both the moment of effectiveness of the acceptance and the moment of effectiveness

party has contributed to cause the injury, the duty to make reparation, and the extent of it, shall depend on the circumstances of the case, especially upon the extent to which the injury was caused chiefly by one or the other party. . . ."

126. Cf. 108 R.G.Z. 96 (1924).

127. B.G.B. art. 151; see note 34 *supra*.

128. R. G. Warn n^o 157 (1919); 59 R.G.E. 300 (1905); R. G. Recht 616 (1905). However, it should be noticed that in matters of the risks of transmission, although on a less explicit conceptual basis, French jurisprudence arrives at practically the same results.

129. In the King's Bench, 1 Barn. & Ald. 681 (1818).

130. See CORBIN, CONTRACTS § 78 (1952); FULLER & BRAUCHER, BASIC CONTRACT LAW 282-86 (1964); 1 WILLISTON, CONTRACTS § 81 (3d ed. 1957). The rule of this case was usually explained by asserting that there was implied authority for the offeree to use the same means of communication the offeror employed. Thus, the fiction that made the post office the offeror's agent became a necessary conceptual ground. But this theory was limited, and has been repudiated; see *Henthorn v. Fraser*, L.R. (1892) 2 Ch. 27. In 9 TUL. L. REV. 592 (1935), it is suggested that the American approach to this problem is decidedly different, and that the objective manifestation of mutual assent substitutes, in American law, for the repudiated subjective theory of mutual assent.

131. See FULLER & BRAUCHER, BASIC CONTRACT LAW 283 (1964); 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 228 (1954).

of the revocation are taken into consideration. Different combinations of those two different moments are possible;¹³² and, in general terms, the solution that proves most successful is asserting that the acceptance takes effect on dispatch, but the revocation become effective when received.¹³³ Therefore, if a letter of revocation by the offeror reaches the offeree after he has mailed the acceptance, the contract will be already formed, and the revocation ineffective. But, if such a letter arrives before the acceptance is dispatched, there is no contract, even though the offeree has already made up his mind to accept.¹³⁴

(b) Provided that it was properly posted, the delay or loss of a letter of acceptance will not affect the validity of the contract.¹³⁵ It is assumed that it is not the offeree's fault that causes the delay or loss. The risk, in such cases, is the offeror's, unless he has made his offer in such a way as to prevent it.¹³⁶

(c) Where a certain situation calls for the ascertainment of the date from which the parties are to be regarded as liable under the contract, or, in other words, the time at which contractual liability starts, the posting of the acceptance is, again, the decisive moment.¹³⁷

132. The following combinations are presented as possible in FULLER & BRAUCHER, BASIC CONTRACT LAW 283 (1964):

- "A. Acceptance effective on dispatch.
- "Revocation effective on dispatch.
- "B. Acceptance effective on receipt.
- "Revocation effective on receipt.
- "C. Acceptance effective on receipt.
- "Revocation effective on dispatch.
- "D. Acceptance effective on dispatch.
- "Revocation effective on receipt."

133. *Id.*: "Rule D is that which has generally been applied in the common law. See Restatement of Contracts §§ 41 and 64. In civil law countries, despite a great doctrinal controversy, it is generally assumed that Rule B controls, except, where some other rule is definitely embodied in legislation. In California, Montana, North Dakota, and South Dakota, Rule A has apparently been adopted by statute. See Williston on Contracts § 56. Rule C seems to have been applied by the court which decided *Geary v. Great Atlantic & Pacific Tea Co.*, 1936, 287 Ill. App. 626, 5 N.E.2d 266, though the decision was later reversed in 366 Ill. 625, 10 N.E.2d 350."

134. *Wertheimer v. Wehle-Hartford Co.*, 126 Conn. 30, 9 A.2d 279 (1939); *Jennette Bros. Co. v. Hovey & Co.*, 184 N.C. 140, 113 S.E. 665 (1922); *Patrick v. Bowman*, 149 U.S. 411, 424, 37 L.Ed. 790, 13 S.Ct. 811, 866 (1893); RESTATEMENT, CONTRACTS § 41 (1932).

135. FULLER & BRAUCHER, BASIC CONTRACT LAW 283 (1964); *Household Fire & Carriage Acc. Ins. Co. v. Grant*, 4 Exch. Div. 216 (1879).

136. CORBIN, CONTRACTS § 78, at 127 (1952).

137. See *Tayloe v. Merchant's Fire Insurance Co.*, 9 How. 390 (U.S.S.C. 1850); FULLER & BRAUCHER, BASIC CONTRACT LAW 283 (1964): "In the Swiss law a contract results only when the acceptance is received, but § 10 of the LAW OF OBLIGATIONS provides that the contract, when formed, shall be regarded as having been in effect from the time of the dispatch of the acceptance."

(d) When an acceptance is overtaken by an attempted rejection of the offer, the problem presents certain difficulties. According to traditional views, since the acceptance is binding from the moment it is mailed, a subsequent rejection of the offer should have no effect, even if it reaches the offeror prior to the acceptance.¹³⁸ Moreover, it has been asserted that the fact that the sender of a letter may regain possession of it should have no effect on the validity of the acceptance.¹³⁹ This brings the postal regulations into discussion, and, in this connection, a contrary view has been advanced. When those regulations allow the sender the right to withdraw a letter from the post office,¹⁴⁰ the acceptance is not final until the letter reaches its destination.¹⁴¹ However, the holdings in the cases in which this line of reasoning was expressed may be more reasonably interpreted to mean that the acceptance, although still effective upon dispatch, it now legally revocable by an overtaking communication.¹⁴² This can be supported by the fact that the offeror does not change his position during the time the letter of acceptance is in the mail, and he assumes no additional risk, whether or not the acceptance is withdrawn or there is an overtaking revocation.¹⁴³ Despite the presence of postal regulations permitting withdrawal, the great majority of the courts have not considered that privilege and have continued to hold that an acceptance is communicated upon mailing.¹⁴⁴

138. 1 WILLISTON, CONTRACTS § 81, at 266 (3d ed. 1957); *Cohen v. First Nat. Bank*, 22 Ariz. 394, 198 Pac. 122 (1921). *But see* CORBIN, CONTRACTS § 94 n. 39, at 142 (1952); RESTATEMENT, CONTRACTS § 39 (1932).

139. See 1 WILLISTON, CONTRACTS § 86, at 278 (3d ed. 1957).

140. See POSTAL LAWS AND REGULATIONS §§ 42.22, 42.23, 52.44, 59.68, 108.31, and 115.1 (1948). See also 1 WILLISTON, CONTRACTS § 86, at 277 (3d ed. 1957).

141. See *Rhode Island Tool Co. v. United States*, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955): "When this new regulation became effective, the entire picture was changed. The sender now does not lose control of the letter the moment it is deposited in the post office, but retains the right of control up to the time of delivery. The acceptance, therefore, is not final until the letter reaches destination, since the sender has the absolute right of withdrawal from the post office, and even the right to have the postmaster at the delivery point return the letter at any time before actual delivery." *Cf. Dick v. United States*, 113 Ct. Cl. 94, 82 F.Supp. 326 (1949); *Trader's Nat. Bank v. First Nat. Bank*, 142 Tenn. 229, 237, 217 S.W. 977, 979 (1920). See generally, FULLER & BRAUCHER, BASIC CONTRACT LAW 285 (1964).

142. See Note, *Dispatch of Mailed Acceptance Held Not Necessarily Final as to Both Parties*, 62 HARV. L. REV. 1231 (1949). Actually, the case dealing with a clear situation where a letter of acceptance is overtaken by a telegram of rejection is *Dick v. United States*, 113 Ct. Cl. 94, 82 F.Supp. 326 (1949).

143. *Id.*

144. See Note, *Telegraphic Rejection of Offer Held Effective When Received Prior to Previously Mailed Acceptance*, 35 VA. L. REV. 508 (1949); *Geary v. Great A. & P. Tea Co.*, 366 Ill. 625, 10 N.E. 2d 350 (1937); *Corcoran v. Leon's, Inc.*, 126 Neb. 149, 252 N.W. 819 (1934).

The solution to this particular problem should not rest on the sender's power to control the letter of acceptance.¹⁴⁵ This is nothing but an attempt to bestow logical consistency on the rule of effectiveness upon dispatch: the acceptance would take effect at that particular moment, because from then on the offeree would have no power to prevent the letter from reaching its destination. But the "effectiveness upon dispatch," or "mailbox" rule is not necessary to this logical explanation. The important thing is to decide whether or not posting a letter can be reasonably regarded as a proper method of accepting an offer.¹⁴⁶ It is, certainly, proper when a contract between distant persons is involved, because the offeree is provided with some degree of protection against the offeror's practically unrestrained power to revoke the offer.¹⁴⁷ If it is conceded that the "mailbox" rule seeks to protect the offeree, then no doubts should be raised against the validity of either intercepting the letter of acceptance by withdrawing it from the post office, or overtaking it by communicating a rejection by a faster means, as no harm is caused to the offeror, who is left in a position to act according to what he learns first. To conclude that there is no contract in either situation appears consistent with the underlying purpose of protecting the offeree.¹⁴⁸

(e) The sender's lack of control after posting the letter and the fiction that the offeror makes the post his agent when the offer is made by mail have been traditionally presented as the rationale of the "mailbox" rule. This has been an attempt to harmonize the established rule with the prevailing views on mutual assent; but, if this line of reasoning is carried to its logical conclusion, the posting of a letter or the filing of a telegram will complete a contract only when the offer is received through the same medium, as only then it could be said with some degree of accuracy that the offeror has made that medium his agent for the receipt of the acceptance.¹⁴⁹ But the courts differ as to the scope of application of the rule. When an offer is made by letter there is no difficulty in applying the rule that acceptance by the same method is valid upon dispatch, because the means the offeror utilized to communicate is a sufficient

145. CORBIN, CONTRACTS § 80, at 128 (1952).

146. *Id.* § 78, at 125; § 80, at 128.

147. CORBIN, CONTRACTS § 78, at 126 (1952); FULLER & BRAUCHER, BASIC CONTRACT LAW 285 (1964).

148. *Accord*, CORBIN, CONTRACTS § 80, at 129 (1952).

149. CORBIN, CONTRACTS § 78 (1952); GRISMORE, CONTRACTS § 48, at 70 (Murray 1965).

indication that it is reasonable for the acceptance to be made in the same manner. The same results can be reached when the offer and the acceptance are made by telegram or any other mode of communication used by both parties.¹⁵⁰ Problems have arisen when courts were called upon to decide cases in which the criterion of the same mode of communication could not be used. In many instances they have been inflexible in limiting the application of the "mailbox" rule only to the situations in which both parties used the same mode of communication.¹⁵¹ A more realistic approach was adopted by an English court in *Henthorn v. Fraser*,¹⁵² in which the reasonable contemplation of the parties and the common usages were taken into account to determine the scope of the rule. The Uniform Commercial Code, section 2-206 (1) (a), seems to agree: "An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."¹⁵³ Of course, the offeror is always free to prevent the application of the rule that posting a letter, or filing a telegram of acceptance completes a contract, by stipulating otherwise in his offer.¹⁵⁴ The same result follows whenever it is clearly understood by both parties, although not expressed in words, that the reception of the acceptance is essential.¹⁵⁵ The application of the rule presupposes that the letter, or telegram, is properly addressed, and the regular charges paid, so that delivery can take place in due course.¹⁵⁶

150. *Id.*

151. *Dickey v. Hurd*, 33 F.2d 415 (1st Cir. 1929), where the offer comes by mail, filing a telegram of acceptance with the telegraph company will not consummate a contract. See also *Lucas v. Western Union Tel. Co.*, 131 Iowa 689, 109 N.W. 191 (1906). *Scottish-American Mortgage Co. v. Davis*, 96 Tex. 504, 74 S.W. 17 (1903), where the offer came to the offeree by mail, posting a letter of acceptance would not complete the contract when this letter was directed to the offeror, whereas the offer had come from the offeror's agent. *But see Jennette Bros. Co. v. Hovey & Co.*, 184 N.C. 140, 113 S.E. 665 (1922), an offer handed to the offeree personally may be accepted in a proper case by posting a letter; *Stephen M. Weld & Co. v. Victory Mfg. Co.*, 205 F. 770 (E.D.N.C. 1913), filing a telegram may complete a contract when the offer came by mail.

152. 2 Ch. 27 (1892); "I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

153. *Cf.* RESTATEMENT, CONTRACTS §§ 64, 66, and 68 (1932).

154. See generally GRISMORE, CONTRACTS § 48, at 71 (Murray ed. 1965); CORBIN, CONTRACTS § 83 (1952).

155. See generally text accompanying note 40 *supra*.

156. CORBIN, CONTRACTS § 80, at 729 (1952); GRISMORE, CONTRACTS § 48, at 71 (Murray ed. 1965); RESTATEMENT, CONTRACTS § 67 (1932): "An acceptance sent by mail or otherwise from a distance is not operative when dis-

(f) When there is an error in the transmission of the message of acceptance, the loss should be suffered by the sender.¹⁵⁷ This rule, however, presupposes that the receiver is innocent, and there is nothing to cause him to suspect an error.¹⁵⁸ If there are any circumstances indicating a probable error in the transmission, good faith requires him to investigate before taking action.¹⁵⁹ Nor is the rule applicable in the case of a forged message, for the supposed sender cannot be charged with using the means of communication through which the forgery occurs. It has been suggested that the test by which the terms of an offer or acceptance are interpreted is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the parties' position would have thought it meant.¹⁶⁰ In general, the party making use of an intermediary who makes a mistake in the words transmitted is bound by the mistake of the intermediary.¹⁶¹

patched, unless it is properly addressed and any other precaution taken which is ordinarily observed to insure safe transmission of similar messages."

157. *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 499, 10 A. 495, 497 (1887): "It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If it cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable." *Contra*, *Western Union Tel. Co. v. Cowin & Co.*, 20 F.2d 103, 54 A.L.R. 1362 (8th Cir. 1927). *Cf.* *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 48 N.E. 670 (1897).

158. *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 A. 495 (1887).

159. *Id.*

160. See 1 WILLISTON, CONTRACTS § 94, at 339 (1957).

161. *Id.* § 94, at 342. However, it is noteworthy that: "The Massachusetts Supreme Court has now adhered to the view that the relation between the sender of a telegram and the company is that of patron and public service enterprise. Therefore, the offeror is not bound by the terms of a negligently transmitted offer but is only under a duty to use due care to mitigate damages arising therefrom. *Hotz v. Western Union Tel. Co.*, 294 Mass. 543, N.E.2d 180 (1936)." *Id.* at n.12. In this connection, it should be remembered that: "In England the telegraph lines are in the control of the government, and are operated by the post office department. Attention does not seem to have been called in the American cases to the difference in this respect of the telegraph from the post office as a medium of transmission." *Id.* at 278 n.1. See *Western Union Tel. Co. v. Cowin & Co.*, 20 F.2d 103, 54 A.L.R. 1363 (8th Cir. 1927). In fact, to consider the telegraph as a public instrumentality may have a definitive impact on the fiction that makes the telegraph the party's agent.

The above discussion points out the importance of the rule established in *Adams v. Lindsell* to the solution of the problems clustered around the acceptance. Several shortcomings of this rule have been indicated and summarized thus: (1) The offeror will be bound without knowing whether or not his offer was accepted. (2) The selling offeror who sells his goods to another after waiting a reasonable time for an answer, will be liable for damages when the acceptance was delayed or lost in the mail. (3) The buying offeror will suffer likewise, if, in the same situation, he decides to buy the goods elsewhere. The acceptance once mailed cannot be revoked. (4) A revocation that arrives before the acceptance will have no effect. (5) There will be a contract even if the offeree withdraws his letter from the post office, or prevents its delivery to the offeror.¹⁶² These undesirable results would not be possible under the traditional civil law approach which, as a general rule, makes completion of the contract dependent upon reception, or knowledge, of the acceptance.¹⁶³

It has been suggested that English as well as American courts are aware of the unsatisfactory results of this doctrine, but that they keep upholding it because of the revocability doctrine, which doctrine might very well be the "root of the trouble."¹⁶⁴

The doctrine according to which, at common law, an offer can be revoked any time before it is accepted, has been linked to the *Adams v. Lindsell* rule by focusing attention on the offeree's position.¹⁶⁵ It may be that he has to take immediate measures in contemplation of the proposed contract. In case of a buying offer, the offeree may order new merchandise to replace his stock, or in the case of a selling offer, he may proceed to clear his stock; he may also reject other offers and make new offers himself.¹⁶⁶ In order to protect the offeree against these uncertainties, it would seem fair to hold the offeror to the promise expressed in his offer. This has been achieved in Germanic and Latin countries by departing from the revocability rule, either by express language of the law, as in Germany, or by

162. Nussbaum, *The Offer and Acceptance Doctrine*, 36 COLUM. L. REV. 921 (1936).

163. *Id.* at 922.

164. *Id.*

165. *Id.* at 925.

166. *Id.*

jurisprudential construction, as in France.¹⁶⁷ The same exigencies and needs that led the civil law countries to that solution have also been felt in England, but there, the consideration doctrine does not permit an offer to be held irrevocable when not made for value, nor under seal. The same doctrine prevents holding the offeror liable for damages in case of a revocation. Under the circumstances, the protection of the offeree can only be obtained through a rule such as in *Adams v. Lindsell*, as this is a solution that can be reconciled with the consideration doctrine.¹⁶⁸ The persistent survival of this rule acquires, thus, a very reasonable explanation.

Louisiana Law

In Louisiana law, a reading of Articles 1809 and 1819 of the Louisiana Civil Code leads to the conclusion that the theory of *knowledge*, or *information*, was adopted by the redactors. The language of the legal texts is sufficiently indicative, particularly if attention is focused on the expression *reciprocally communicated* found in the second of the articles mentioned.

This interpretation finds support in two different arguments. In the first place, it is consistent with the original source of the law.¹⁶⁹ Furthermore, there is sufficient grounds to support

167. See Part I, 28 LA. L. REV. 1 21-29 (1967); FULLER & BRAUCHER, BASIC CONTRACT LAW 285 (1964); 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 210-211 (1954); Nussbaum, *The Offer and Acceptance Doctrine*, 36 COLUM. L. REV. 925 (1936).

168. Nussbaum, *The Offer and Acceptance Doctrine*, 36 COLUM. L. REV. 925-926 (1936): "From a business point of view *Adams v. Lindsell* results in enabling the offeree to take, at once and in full legal security, all the steps he deems appropriate to utilize the opportunities of the offer. As to the offeror his situation is considerably like the one existing in continental law. Not only is the period of revocation curtailed, but the offeror having mailed the offer will soon find himself in a state of uncertainty as long as there is no answer. This uncertainty will restrain him from acting contrary to the offer, e.g., selling the offered goods to a third person. It may be noteworthy that *Adams v. Lindsell* is a commercial case and it certainly is not a pure accident that only six years before the irrevocability doctrine had been definitely set out in continental legislation (Austrian Code)." See also FULLER & BRAUCHER, BASIC CONTRACT LAW 285 (1964).

It is noteworthy to compare this result with those obtained through the protection of the reliance interest which "receives a much wider (though often covert) recognition in the decisions than it does in the textbooks." See Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 418-20 (1937). See also RESTATEMENT, CONTRACTS § 90 (1932); *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. App. 1959); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); *Goodman v. Dicker*, 83 U.S. App. D.C. 353, 169 F.2d 684 (1948). Cf. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933).

169. See Part I, 28 LA. L. REV. 1, 33-35 (1967); see also Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 183, 193 (1939).

the view that the time necessary for the acceptance to reach the offeror is one of the circumstances to be taken into account in order to determine the *reasonable period of time* during which the offeror is to be considered bound by the offer.¹⁷⁰ If that is the case, the contract is not perfected at the moment the offeree parts with the communication of the acceptance, but at the moment the communication arrives at its destination. In the second place, as Louisiana law adopted the rule of irrevocability of the offer during a reasonable period of time, in the civil law tradition,¹⁷¹ the offeree is furnished with sufficient protection and, therefore, the factors justifying the "mailbox" rule established in *Adams v. Lindsell* are not present. In other words, the rule of irrevocability of the offer, coupled with the rule of formation of the contract at the moment the acceptance reaches the offeror, provides adequate and fair protection to the interest of both parties, facilitates certainty in matters of business transactions, and allows a harmonic interpretation of the legal texts.

As a matter of course, the express or implied intention of the parties, when found, should govern. Thus, in all cases where the acceptance can be presumed, it should be understood that the contract was formed at the moment when the circumstances giving rise to the presumption occurred.¹⁷² The parties should always be free to agree on this subject as they deem fit, and, finally, the offeror may resign his right of becoming bound only upon arrival of the acceptance.¹⁷³

This specific topic, the "moment" of contract formation, does not seem to have been the object of express pronouncement by

170. See Part I, 28 LA. L. REV. 1, 40 (1967). *Accord*, Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 190 (1939).

171. The rule of irrevocability, in Louisiana, does not run counter to the doctrine of consideration, as in common law. See *Mouton v. Noble*, 1 La. Ann. 192 (1846); *accord*, Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 32-33 (1951). *But see* *Breard v. Kanelos*, 49 So.2d 451 (La. App. 2d Cir. 1950).

172. LA. CIVIL CODE arts. 1816, 1817, and 1818 (1870). See also *id.* art. 2989. See generally 163-68 *supra*. See also *Ryder v. Frost*, 3 La. Ann. 523 (1848).

173. In dealing with a general rule to which exceptions are formulated, the mistake should not be made of thinking that the situations governed by exceptions will be fewer than those governed by the general rule. Quite to the contrary, business practices and trade usages may cause the "exceptional" cases to be more numerous than the "regular" ones. Rules and exceptions are strictly a conceptual matter not to be confused with generality, or rarity, of occurrence. This means that, as a matter of practical approach, it might very well be that in more cases the contract is formed when the acceptance is declared, or the letter posted, than when the letter of acceptance arrives at its destination. However, because of the cogency of concepts, it is necessary to go back to the general rule every time the circumstances do not justify an exception.

Louisiana courts. But at least in one case, authority is given in support of the interpretation expressed above.¹⁷⁴

A different approach is taken by Louisiana courts in regard to insurance contracts. In this connection, the moment of posting the letter of acceptance has been taken to be the time of contract formation.¹⁷⁵ This view, however, is not as inconsistent with the *reception*, or the *information* theories as it at first blush appears to be. In fact, as indicated elsewhere,¹⁷⁶ these theories protect the best interest of the offeror, whenever the offeree is already protected by the irrevocability rule. As the insured is the offeror where a contract of insurance is about to be formed,¹⁷⁷

174. In *Hanemann v. Uhry*, 8 La. App. 534 (Orl. Cir. 1923), the defendants, by means of a letter, offered to rent certain premises from plaintiff, who, in his turn, accepted by the same means. The letter of acceptance never came to the offeror's hands, on which grounds defendants argued that their revocation of the offer was effective because it was made before the acceptance. In entering judgment for defendants, the court asserted that: "It nowhere appears that such acceptance was communicated to the defendants." *Id.* at 535. Although it could be thought that mere posting of the letter by plaintiff, and the fact that no revocation was received beforehand, was not sufficient to consider the defendants bound, the case is not perfectly in point because plaintiff addressed the acceptance to certain real estate brokers, and not to defendants. *Blanks v. Sutcliffe*, 122 La. 448, 47 So. 765 (1908), was invoked by the court as a precedent although it is a case decided on an entirely different basis. See O'Brien, *Revocation of an Offer Where the Offeror Has Given the Offeree a Stated Length of Time in Which to Accept*, 5 TUL. L. REV. 637 (1931). Some language in the *Blanks v. Sutcliffe* case indicates that certain acts by plaintiff did not constitute acceptance, but this is not the problem dealt with in the principal case. In this case, the acceptance was communicated to a third party who was not the offeror's agent, whereby the *Hanemann* case slightly sidesteps the topic here discussed. See *State ex rel. McEnery v. Nicholls*, 42 La. Ann. 214, 7 So. 738, 5 La. Dig. 588 (1890).

175. *Coci v. New York Life Ins. Co.*, 155 La. 1060, 1066, 99 So. 871, 873 (1924): "It was the completion and mailing of the contract that constituted the delivery of the policy within the intentment and meaning of the law. At that time and for nearly a month prior thereto the insured was in good health. This interpretation is sustained by the policy itself and by the action and conduct of the company." *Cf. Fruit v. Great Southern Life Ins. Co.*, 202 La. 527, 12 So.2d 261 (1942). *But see Williams v. Travelers Ins. Co.*, 19 So.2d 586, 588 (La. App. 1st Cir. 1944), where *Wilson v. Lewiston Mill Co.*, 150 N.Y. 314, 44 N.E. 959, 55 Am.St.Rep. 630 (1896), is quoted: "The *place* where the contract is accepted is important. It fixes the *time* that the minds of the parties met, and the contract was consummated." (Emphasis added.) If this statement were generalized, the conclusion could be reached that the *time* and *place* of contract formation must always coincide, as is the case according to the "mailbox" rule. But this is not necessarily so at civil law. See 191 *infra*. As *Williams v. Travelers* deals with a problem of conflict of laws, the statement in question should be considered *dictum*.

176. See text accompanying note 87 *supra*.

177. "An application for insurance, even when accompanied by a promissory note for the premium, is an offer to enter into a contract of insurance, which does not become a contract until it is accepted by the insurance company through someone having the authority to do so." *Foster v. Morrison*, 145 So. 13, 14 (La. App. Orl. Cir. 1933).

the conclusion is that the best protection of the offeror requires that the risk be covered from the moment the insurer mails the letter of acceptance.¹⁷⁸ Moreover, it can very well be said that the *nature* of this particular contract amply justifies the earliest possible establishment of the contractual bond.

Finally, the reasons given in the following quotation are noteworthy: "In the interpretation of commercial contracts, this court will be largely influenced and guided by the law merchant of the United States, and the construction of that law made by the supreme court of the United States."¹⁷⁹ Perhaps this statement of judicial policy could be taken to mean that distinctions should be made between civil matters proper and commercial matters, thus opening a door to the adoption of different rules in cases of one or the other kind. That distinction, it will be remembered, is certainly not alien to the civilian tradition.¹⁸⁰

The above discussion allows the following conclusions in solving practical problems under the Louisiana law:

(a) If the letter of acceptance is delayed, or lost in the mail and never reaches the offeror, the contract should be considered as not having come into existence.¹⁸¹

(b) A letter of acceptance can be validly overtaken by a telegram of rejection, or a letter of rejection overtaken by a faster communication of acceptance. The offeror should be bound by the communication that reaches him first.

(c) The contract should be considered formed at the moment the communication of acceptance is at the offeror's disposal, and the actual learning of its content depends solely on his own activity. Therefore, if the offeror prevents reception of the letter,

178. Cf. *Harding v. Metropolitan Life Ins. Co.*, 188 So. 177 (La. App. OrL. Cir. 1939); *National Liberty Ins. Co. v. Police Jury*, 96 F.2d 261 (5th Cir. 1938). See generally FULLER & BRAUCHER, *BASIC CONTRACT LAW* 283 (1964); 2 PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL, PART I* 229-230 (1954); Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 945, 954 (1923). For a general contention to the effect that the contract of life insurance is a contract *sui generis*, see *Sizeler v. Sizeler*, 170 La. 128, 127 So. 388 (1930).

179. *Chaffraix v. Price*, 29 La. Ann. 176 (1877).

180. See, e.g., *Kinsell & Locke, Inc. v. Kohlman*, 12 La. App. 575, 126 So. 257 (OrL. Cir. 1930); *Held v. Goldsmith*, 153 La. 598, 96 So. 272 (1923). There is, however, a contemporary trend, inaugurated by the SWISS CODE OF OBLIGATIONS, towards grouping together civil and commercial matter, with few exceptions; see Houin, *Reform of the French Civil Code and of the Code of Commerce*, 4 AM. J. COMP. LAW 485 (1955).

181. Provided, of course, it is not a case of implied acceptance, where communication thereof is irrelevant. See LA. CIVIL CODE arts. 1816, 1817 (1870).

or otherwise refuses the knowledge of it, the contract should be considered formed.¹⁸²

Where an error was committed in the transmission of a telegram containing an offer, the court of appeal of Louisiana, in *Estherwood Rice Mill, Inc. v. Western Union Telegraph Co.*,¹⁸³ held the defendant liable for the loss incurred by the offeror who was requested to perform according to the acceptance. It is noteworthy, however, that in this case the parties had agreed to be bound by the terms of the offer as received by the Commodity Credit Corporation.¹⁸⁴

Where a dispute arises as to the means of transmission, it has been decided that the mail is a proper means, unless specific instructions are given for the use of telegram.¹⁸⁵

PLACE OF CONTRACT FORMATION

The determination of the place of contract formation is of particular importance with regard to (a) problems of venue, and (b) problems pertaining to the law applicable in matters of conflicts of the laws.¹⁸⁶

French Law

In French law it has been asserted, in general terms, that the place of contract formation is that where the minds of the

182. This conclusion can be supported by generalizing the doctrine underlying LA. CIVIL CODE art. 2040 (1870); although the same, *per se*, it is not directly applicable to the situation discussed.

183. 127 So.2d 231 (La. App. 3d Cir. 1961).

184. Notwithstanding, there is language in the decision indicating that the court does not share the views expressed in federal case law where the sender is not bound by an offer erroneously expressed by the telegraph company and, therefore, cannot recover damages for an enforceable contract voluntarily performed. See *Western Union Tel. Co. v. Cowin & Co.*, 20 F.2d 103, 54 A.L.R. 1362 (8th Cir. 1927), distinguished in this decision. In reference to the federal case, the court says: "Whatever validity this holding might have under its own facts. . . ." 127 So.2d at 233. In this connection, see also Note, *Contracts—Agency of Telegraph Company as to Negligently Changed Offer*, 2 So. L.Q. 37 (1917), commenting on a North Carolina case.

185. *Vilm Milling Co. v. Guarino*, 13 Orl. App. 399 (La. 1916): "An order for the sale and delivery of flour is properly transmitted by mail, unless the purchaser instructs that it be made by wire." The order had been placed with plaintiff's agent, who transmitted it by mail instead of wiring it, as it seems would have better fit defendant's urgency. *Cf. United States Cutlery Co. v. Hawkins*, 17 La. App. 395, 136 So. 127, 128 (La. App. 2d Cir. 1931) wherein the court's actual decision was that acceptance could not be implied under the circumstances.

186. See, e.g., *Trib. Com. Seine*, July 26, 1934, D.P. 1935, 2, 12; see also 1 ENCYCLOPEDE DALLOZ 990 (1951).

parties actually meet. This general statement does not seem difficult to understand when the parties are negotiating face to face, but the scope of its meaning becomes cloudy when the contract is between distant parties. In an attempt to formulate a clearer statement, it has been said that the determination of the place of contract formation depends on the *moment* at which it is concluded; therefore, the contract should be considered concluded at the *place* where the last act necessary for this conclusion occurs. This has brought into the picture the dispute between the supporters of the different theories that have been discussed in connection with the problem of the time at which the contract is formed.¹⁸⁷

The French jurisprudence has often supported the theory of transmission, thereby asserting that the place at which the contract is formed is that from which the letter of acceptance departs, which place will, in the vast majority of cases, coincide with the domicile of the offeree.¹⁸⁸

But, as often, French decisions adhered to the knowledge theory, thereby admitting that the contract is to be considered formed at the place where the letter of acceptance is received, which, in the vast majority of cases, will coincide with the offeror's domicile.¹⁸⁹ The *Cour de Cassation* has repeatedly expressed the view that the question is one of fact, in the appreciation of which the trial court is sovereign. This had led, many times, to the holding that the contract is formed at the place where the acceptance is received.¹⁹⁰

When the contract has been concluded through a mandatary, broker, or intermediary, it is generally asserted that the place of formation is that where the mandatary deals with the party other than his principal.¹⁹¹ This rule does not vary even when

187. 2 CARBONNIER, DROIT CIVIL 337 (1957); 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 226-230 (1923); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 195-99 (2d ed. Esmein 1952).

188. *Trib. Civ. Seine*, Jan. 31, 1936, D.P. 1937, 2, 40; Paris, Dec. 21, 1916, D. 1917, 2, 33; *Trib. Seine*, Oct. 26, 1913, GAZ. TRIB., 1914, 2, 325; see 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 227 (1923).

189. *Trib. Com. d'Orange*, Feb. 26, 1932, *Rec. GAZ. DU PALAIS*, 1932, 1, 912; Aix, Dec. 23, 1908, *Rec. Marseille*, 1909, 2, 140, S. 1910, 2, 6, GAZ. PAL., 1908, 2, 577; Nîmes, March 4, 1908, GAZ. TRIB., March 19, 1908; Limoges, Jan. 27, 1894, GAZ. TRIB., 1914, 2, 183. See 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 226 (1923).

190. *Cass. Civ.*, Nov. 16, 1910, S. 1912, 1, 461; *Cass. Civ.*, Jan. 5, 1877, 1, 281.

191. Caen, July 20, 1898, *Rec. Rouen*, 1898, 2, 226; Dijon, March 22, 1897, D. 1898, 2, 102; Montpellier, May 4, 1889, GAZ. PAL., 1889, 2, 74. See 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 228 (1923).

the contract is to be ratified by the principal, for, in such cases, a certain retroactive effect is attributed to the ratification, making the contract valid from the day it took place, and not from the moment it was ratified.¹⁹²

It follows that French doctrine and jurisprudence adhere to the view that, in matters of contracts by correspondence, although two different places may be involved, and although the acts leading to the formation are performed at different times, there is one single time and one single place when and where the contract is considered formed. Moreover, it seems that time and place should coincide, the contract being formed at the *time* and *place* a certain act occurs.¹⁹³

Common Law

Similar ideas govern this question at common law. In the language found in the Restatement of the Law of Contracts, section 74: "A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done." In matters of contracts by telephone, section 65 of the Restatement makes such a situation similar to one where the parties are in the presence of each other. But, in this respect, court decisions have established that "the law is that a contract made by telephone is entered into at the place where the recipient of the call is at the time he accepts the offer."¹⁹⁴

192. Toulouse, March 27, 1884, GAZ. PAL., 1884, I, 917; Montpellier, May 4, 1889, GAZ. PAL., 1889, 2, 74; *contra*, Cass. Civ., Dec. 23, 1902, S. 1904, I, 244.

193. 2 COLIN & CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 38 (10th ed. 1953); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 183-84 (2d ed. Esmein 1952). See especially *Req.*, March 21, 1932, D. 1933, 1, 65. In a note to this decision by Sallé de la Marniée, it is suggested that the *Cour* has abandoned the previous contention that time and place of contract formation are questions of fact, and asserts instead that the problem does not depend on the circumstances of the case but on the interpretation of a suppletory rule of law of general character. In the same note, a more functional approach is outlined, based on the idea of risk. In German law, adherence to the reception, or the information, theories implies the solution to the problem of the place of contract formation. However, detailed provisions in the ZIVILPROZESSORDNUNG (German Code of Civil Procedure) arts. 29 and 603 should be taken into account in order to determine venue; also B.G.B. arts. 269 and 270, which regulate the place of performance.

194. Ward Mfg. Co. v. Miley, 281 P.2d 343 (Cal. App. 2d Cir. 1955). See 1 WILLISTON, CONTRACTS § 82A, at 272 (1957). Where a contract by teletype was involved, it was held that the place of formation was that where the acceptance was received, as if the parties were face to face. *Entore, Ltd. v. Miles Far East Corp.*, 3 W.L.R. 48 (C.A.), 2 All E.R. 493 (1955).

Louisiana Law

In Louisiana, although the law never contained a rule similar to Article 420 of the French Code of Civil Procedure, the adoption of the Anglo-American concept of venue and the discarding of French procedural concepts¹⁹⁵ eliminated the importance which in French law is attributed to the place of contract formation in order to determine *competence ratione personae*.¹⁹⁶ The importance of the place is, therefore, confined to matters of jurisdiction, and law applicable from the viewpoint of conflicts. In this connection, it has been clearly established that if goods are ordered from England, the contract is governed by the English law, and that if no privileges are given there, no privilege will be allowed here.¹⁹⁷ A contract of insurance is governed by the laws of the place in which it was concluded.¹⁹⁸ Where the law of the place where the owner resides differs from the law of the place where the contract of affreightment is formed, the latter governs.¹⁹⁹

ACCEPTANCE IN COMPLIANCE WITH TERMS OF OFFER

In order to create a valid contract, the acceptance must conform to the terms of the offer; otherwise it would amount to a counter-proposition.

In French law this clear accord is confined to the essential terms, which are determined for each kind of contract either by law or court decisions.²⁰⁰ Thus, in matters of sale, the contract is perfect upon consent of the parties on the thing and the price.²⁰¹ Therefore, no contract of sale would ever result if there is no accord as to the object and the price. But, when those two essential elements are agreed upon, a contract of sale is formed, even in the absence of any provision as to the time of payment, term of delivery, or any other stipulations con-

195. See McMahon, INTRODUCTION TO CIVIL PROCEDURE, COURSE OUTLINES AND SELECTED READINGS, PART III 4 (Unpublished).

196. See, in this connection, LA. CODE OF PRACTICE arts. 13, 86, 162, 166 (1870), and LA. CODE OF CIVIL PROCEDURE art. 42 (1961).

197. Whiston v. Stodder, 8 Mart.(O.S.) 95 (1820).

198. Shiff v. Louisiana State Ins. Co., 6 Mart.(N.S.) 629 (1828). See also Shreveport v. New York Life Ins. Co., 141 La. 360, 75 So. 80 (1917): "The contract of life insurance is completed at the place where the policy is delivered and the first premium collected."

199. Malpica v. McKown, 1 La. 248 (1830).

200. See 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 233 (1923).

201. Art. 1583 of the FRENCH CIVIL CODE, similar to LA. CIVIL CODE art. 2456 (1870).

sidered non-essential.²⁰² In matters of lease, the thing, the price, and the term of duration are essential,²⁰³ but the lack of a stipulation as to time of payment of the rent is not material.²⁰⁴ The different aspects not expressly regulated by the parties in their contract are subject to the solutions contained in the Code Napoleon for each particular contractual situation, or, in the absence of code solutions, to the general rules on interpretation of contracts.²⁰⁵

But the absence of an express stipulation of the parties on a certain point should not be confused with their disagreement on an apparently non-essential stipulation.²⁰⁶ In situations of

202. Montpellier, Feb. 11, 1909, *Mon. du Midi*, June 6, 1909; *Req.*, Dec. 31, 1900, S. 1901, I, 407, *Pand fr.*, 1901, I, 286; Lyon, May 13, 1885, *Gaz. PAL.*, 1885, 2, supp, 134. See generally 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 234 (1923).

203. CODE NAPOLEON art. 1709, similar to LA. CIVIL CODE art. 2674 (1870); Montpellier, Feb. 3, 1896, *Gaz. PAL.*, 1896, I, 756; *Trib. Seine*, July 15, 1895, *Gaz. PAL.*, 1894, 2, 682.

204. Besançon, Dec. 16, 1903, *Gaz. PAL.*, 1904, I, 232. In a contract of partnership, the term of duration is considered essential: Lyon, June 24, 1870, S. 1871, 2, 70.

205. Article 1159 of the CODE NAPOLEON, similar to LA. CIVIL CODE art. 1953 (1870); *Trib. Seine*, May 3, 1913, *Gaz. TRIB.*, 1913, 2, 171. See generally 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 235 (1923).

206. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 236, 238-39 (1923). At common law, this topic is discussed under the heading "indefiniteness." It is now recognized that the requirement of definiteness cannot be carried too far. In *Merchants' Bank of Canada v. Sims*, 122 Wash. 106, 112, 209 Pac. 1113, 1115 (1922), the court said: "Upon the question of uncertainty or indefiniteness, it will be admitted, as contended by the appellant, that a contract to be enforceable must be reasonably certain as to its terms and duration." See also *Haggerty v. Warner*, 115 Cal. App. 2d 468, 472, 252 P.2d 373, 375 (1953): "The trend of recent decisions indicates a policy of upholding contracts if a reasonable construction may be reached that the intention of the parties was mutually understood and readily may be ascertained." At civil law, the solution to this problem is clearer because of the detailed regulation of contracts in particular to be generally found in civil codes, such as in Book III, Titles VI through XX, of the Louisiana Civil Code. These regulations contain provisions suppletory of the parties' will, which means that, unless otherwise agreed on by the parties, they will be presumed to subject their contract to the suppletory code provisions. Thus, it can be said that, at civil law, there is less occasion for indefiniteness, as the requirement of definiteness is limited to the essentials of the contract. At any rate, the preceding quotations from decisions show that contemporary common law seems oriented likewise through elaboration by the courts. In this connection, the provision contained in UNIFORM COMMERCIAL CODE § 2-204(3) (1962) is noteworthy: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." Clearly, this provision is not incompatible with the traditional civilian approach reflected in LA. CIVIL CODE art. 2456 (1870). On "indefiniteness," see generally GRISMORE, *CONTRACTS* § 25 (1965).

The same comment can be made on the ways civil and common law approach the problem of additional terms implicit in a proposition. At early common law, when a statement was put in writing, the view was

the latter kind, the parties' intent will be carefully explored and, if it is found that one of them considered the point material, such a disagreement will prevent the formation of the contract.

If, however, the offer contains various terms, the acceptance, to be effective, must comply with all of them regardless of whether they are essential or not.²⁰⁷

The same detailed compliance with the terms of the offer is required of the acceptance at common law.²⁰⁸ The offeree cannot make any changes or introduce qualifications or conditions of the slightest kind.²⁰⁹ If this takes place, no contract will be consummated by the purported acceptance, but it will amount to a counter-offer. Thus, if the offer states the time, place, or manner of acceptance, there must be compliance or no valid contract will be formed.²¹⁰

that nothing could be added to the writing by implication. Modern decisions have taken a more liberal attitude. In *Wood v. Lucy, Lady Duff-Gordon*, 322 N.Y. 88, 118 N.E. 214 (1917), the court held: "It is true that he [the plaintiff] does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation' imperfectly expressed." See also *Robinson v. United States*, 80 U.S. (13 Wall.) 363, 366 (1871); *Kelsy v. Puckett*, 198 Iowa 839, 200 N.W. 421 (1924). See generally GRISMORE, CONTRACTS § 23, at 27-29 (1965). In the civilian approach, the solution is easily reached through the rule contained in LA. CIVIL CODE art. 1903 (1870). As to other implied conditions at civil law, see *Lalance Grosjean Mfg. Co. v. Wolff*, 28 La. Ann. 942 (1876): The dissolving condition is implied in all sales for non-payment of the price, is peculiar to the civil law, and does not exist in the common law. See LA. CIVIL CODE arts. 2046 and 2561 (1870).

207. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 233 (1923); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 160 (2d ed. Esmein 1952).

208. See generally GRISMORE, CONTRACTS § 49 (1965); RESTATEMENT, CONTRACTS § 59 (1932): "Except as this rule is qualified by §§ 45, 63, 72, an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested." *Id.* at § 60: "A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer." RESTATEMENT (SECOND), CONTRACTS § 59: "An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered." *Id.* at § 60: "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."

209. *Gribbs v. Oak*, 164 Neb. 296, 82 N.W.2d 410 (1957).

210. *Wheeling, O. & E. R.R. v. Wheeling Coal R.R.*, 94 W.Va. 536, 119 S.E. 551 (1923); *Horne v. Niver*, 168 Mass. 4, 46 N.E. 393 (1897); RESTATEMENT, CONTRACTS § 61 (1932): "If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not

An interesting provision is contained in section 2-206 (b) of the Uniform Commercial Code: "An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer." The shipment of such "non-conforming goods," according to the comment following the section, will complete the contract and, simultaneously constitute a breach by the seller.²¹¹

The law of Louisiana responds, in this matter, to the same

precluded." However, where a promise is requested in return for a promise, the RESTATEMENT allows the performance itself as sufficient, without insisting that the offeree make the promise. See *id.* at § 63: "If an offer requests a promise from the offeree, and the offeree without making the promise actually does or tenders what he was requested to promise or do, there is a contract, subject to the rule stated in § 56, provided such performance is completed or tendered within the time allowable for accepting by making a promise. A tender in such a case operates as a promise to render complete performance." But see RESTATEMENT (SECOND), CONTRACTS § 63: "(1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the beginning of the invited performance or a tender of part of it is an acceptance by performance. (2) Such an acceptance operates as a promise to render complete performance." The offeree may ask that some terms be changed without thereby invalidating his acceptance; see RESTATEMENT, CONTRACTS § 62 (1932): "An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms." See, e.g., *Rucker v. Sanders*, 182 N.C. 607, 109 S.E. 857 (1921); *Skinner v. Stone*, 144 Ark. 353, 222 S.W. 360 (1920); *Horgan v. Russell*, 24 N.D. 490, 140 N.W. 99, 43 L.R.A. 1150 (1913). See generally GRISMORE, CONTRACTS § 49, at 73 (1965). In the same connection, UNIFORM COMMERCIAL CODE § 2-207 (1962) is noteworthy: "(1) A definite and reasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

211. In comment 4, it is suggested that such "non-conforming" goods would be a shipment referable to the order, but with a defect. This provision can be understood only against the background of previous deals between the parties that would justify the offeror in taking the acceptance for granted, or place the offeree under duty to communicate his rejection of the offer to prevent injury to the offeror's interest. Only assuming this peculiar duty to accept on the part of the offeror is it justifiable to think that the shipment of non-conforming goods will constitute acceptance, and breach of contract at the same time, as described in the comment.

general principle. To form a contract, the acceptance must be in all things conformable to the offer; any condition or limitation contained in the acceptance gives the offeror the right to revoke.²¹² The modification or change of the proposition is considered as a new offer, and the party making it is bound by the acceptance as if the original proposition had been made by him.²¹³

Thus, it has been decided that there can be no acceptance of a written contract with variations, or subject to conditions or modifications unagreed to by the other party, since, to create a contract, the minds of the parties must meet.²¹⁴ An acceptance conditioned upon settlement of a deceased's succession has been held not binding.²¹⁵ But, in contracts where the promisor agrees to pay for goods or labor, "provided he is satisfied," the obligation is binding.²¹⁶ The rule that the acceptance must be identical with the offer to constitute a contract has received invariable application by Louisiana courts.²¹⁷ If the offer is rejected, it cannot be revived by subsequent acceptance.²¹⁸

As to the question of the terms which an offer must comprise in order for the acceptance to conclude a contract, the French views about discussed are perfectly applicable in Louisiana, especially because of the clear provisions of Louisiana Civil Code Article 1764.²¹⁹

It is noteworthy to consider whether a provision such as the above-quoted section 2-206(b) of the UCC can be deemed

212. LA. CIVIL CODE art. 1805 (1870).

213. *Id.* art. 1806.

214. *Connell v. Hill*, 30 La. Ann. 251 (1878); *Bethel v. Hawkins*, 21 La. Ann. 620 (1869); *cf. McDonough v. Winchester*, 1 La. 188 (1830).

215. *Vordenbaumen v. Gray*, 189 So. 342 (La. App. 2d Cir. 1939).

216. *Planters' Cotton Oil Co. v. Klumpp*, Orl. App. No. 7684 (La. App. 1920).

217. *Fontenont v. Huguet*, 230 La. 483, 89 So.2d 45 (1956); *International Paper Co. v. Rivers*, 35 So.2d 677 (La. App. 2d Cir. 1948); *Blythe v. Hall*, 169 La. 1120, 1121, 126 So. 679 (1930): "An offer must be accepted as made to constitute a contract"; *Mosely v. Red River Oil Mill*, 6 La. App. 725 (2d Cir. 1927); *Cottam & Co. v. Gonzales*, 5 La. App. 171 (1st Cir. 1926); *Elver v. Hart*, 121 La. 537, 46 So. 619 (1908); *Barrow v. Ker*, 10 La. Ann. 120 (1855).

218. *Wolf v. Rogers*, 6 Rob. 97 (1843): An offer to contract must be obligatory, be accepted in toto, if declined it is at an end and cannot be revived by a subsequent assent. Where a parish rejected all bids submitted and asked for new bids, the second bids being also rejected, and parish then attempted to accept plaintiff's original bid with modifications, it was held that the offer had never been accepted and the plaintiff was entitled to the return of his deposit. *Worthington Const. Co. v. Parish of Jefferson Davis*, 142 La. 659, 77 So. 492 (1918).

219. See 28 LA. L. REV. 1, 11-13 (1967).

compatible with the Louisiana law. At first impression, a shipment of non-conforming goods could not constitute acceptance in the terms of Article 1805. However, a series of transactions between the same parties may justify the offeror in taking the acceptance for granted, which gives rise to the offeree's duty to communicate his rejection to the offeror.²²⁰ This view, supported in other jurisdictions, is perfectly compatible with the civilian tradition, and also compatible with the Louisiana Civil Code due to the importance attributed to the circumstances of the case in Article 1809. Taking this into account, and reading in context Articles 1805, 1809, and 1816, whenever the circumstances allow the acceptance to be taken for granted, the offeree who ships non-conforming goods is violating the contract he is presumed to have entered for not having given notice of rejection. The manifestation that shipment is made as an accommodation to the buyer might very well be taken as such a notice, thereby releasing him from contractual liability.

CROSSING OFFERS

When two concurring propositions cross in the mail, French doctrine generally admits that a contract is formed. In support of this view it has been said that, as one of the parties is willing to contract, there is agreement at the moment the other party knows of that will and accepts. Partisans of the *reception* or *knowledge* theories suggest that the contract is formed at the moment the letter arriving last is received. The supporters of the *declaration*, or *transmission* theories, instead, assert that the contract is formed at the moment the second declaration takes place.²²¹

If there is no accord as to the sum involved in the transaction, as for instance, if the buyer offers one hundred, and the seller quotes ninety, there is a contract on the lesser amount. A logical explanation cannot be given in support of this view, but it has been advanced that, in the first place, there is a social interest in promoting the formation of contracts, and, in the second place, their formation in the less onerous conditions should be favored.²²²

A contrary view prevails at common law. It has been de-

220. See 175 *supra*.

221. See generally 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 237 (1923).

222. *Id.*

cided that where two offers identical in terms cross in the mail there is no contract.²²³ This holding is consistent with the theory that a contract is formed only when one party "has been induced to accept and rely upon the promise of another."²²⁴ It also confirms the current view that an offer is ineffective until received.²²⁵ But, at any rate, there can be no doubt that each offer creates a power of acceptance in the other party who may close the deal by accepting it, thereby making the contract each of them offered to make.²²⁶

The Louisiana Civil Code follows, in this matter, the continental tradition, and, affirming the prevalence of the parties' will, provides that there is a contract in the case of crossing offers. However, a better reason is given for this in Article 1807:

"When, however, from the circumstances of the case, the offer necessarily implies an assent to the modification of the acceptance, then the obligation is complete, although there be a difference in terms between the one and the other. If, for example, one offers to sell a certain article for one hundred dollars, and the other, not having yet received the offer, should on his part propose to give two hundred dollars, the proposal to give the greater sum necessarily implies an assent to take it for a less, and the contract is complete at the lowest sum." (Emphasis added.)

But if what is offered is of a different nature from what is requested, or if any modification to the terms of the offer is introduced, then no contract will result, even when what is offered is of greater value or the sum to be paid for a different term is larger.²²⁷

223. *Tinn v. Hoffmann & Co.*, 29 L.T. (N.S.) 271 (1873). *Contra*, *Morris Asinoff & Sons v. Freudenthal*, 195 App. Div. 79, 186 N.Y.S. 383, *aff'd* 135 N.E. 919, 233 N.Y. 564 (1921), although the facts of this case are rather peculiar, and do not conform entirely with the hypothesis in the text. RESTATEMENT, CONTRACTS § 24 (1932) is also invoked as lending support to this view. However, a different result could, perhaps, be predicated on RESTATEMENT (SECOND), CONTRACTS § 24: "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."

224. 1 CORBIN, CONTRACTS § 59, at 183 (1950).

225. 1 WILLISTON, CONTRACTS § 35, at 96 (1957).

226. 1 CORBIN, CONTRACTS § 59, at 184 (1950). Blackburn, J., in *Tinn v. Hoffmann & Co.*, 29 L.T. (N.S.) 271 (Eng. 1873): "Either of the parties may write and say, 'I accept your offer, and, as you perceive, I have already made a similar offer to you,' and then people would know what they were about; I think either side might revoke."

227. LA. CIVIL CODE art. 1808 (1870): "But a consent to give anything else, although of a greater value than that contained in the offer, or to give the

A question can be raised when the difference in the propositions crossing in the mail is not on the price, but on the quantity of the things which are the subject matter of the contract. If one party offers to sell ten units, and the other party offers to buy eight, is there a contract? Several opinions have voiced a negative answer. However, prestigious French writers are of the view that in this problem also the formation of contracts should be favored and, therefore, a contract should be deemed concluded on the lesser quantity, unless it is clear that the vendor, for instance, was only interested in the sale of the whole amount. Such an interest could be reasonably implied if wholesale sales is his habitual business.²²⁸ This is the view adopted by French jurisprudence, thus allowing the possibility for a partial acceptance to be valid.²²⁹

DAMAGES FOR REJECTION OF OFFER

An interesting question, subject to considerable debate in continental law, is whether the rejection of a proposition can give rise to damages.

As a matter of principle, the one to whom a proposition is addressed is free to reject it. But the rejection should not be made in such a way as to cause an injury to the proposer's interest.²³⁰ This would be the case, for instance, when the rejection is accompanied by unwarranted publicity, which would constitute a fault whereby damages could be recovered.²³¹

The rejection of an offer, or a refusal to contract giving rise to a claim of indemnity, was considered by the *Cour de Cassation* in connection with labor law matters. It was decided that the mere fact of refusing to hire unionized labor did not constitute fault *per se*, but it could take place under such circumstances that the refusal would become a source of indemnifiable

same or a larger sum at a different term of payment, does not imply an assent to the offer, and there is in that case no obligation."

228. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 283 (1923); 3 LYON-CAEN & RENAULT, *TRAITÉ DE DROIT COMMERCIAL* n° 23 (1923).

229. Paris, June 30, 1920, S.1921,2,4. See 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 160 (2d ed. Esmein 1952).

230. See 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 196 (1923).

231. *Trib. Seine*, Jan. 8, 1907, D.1907,5,22. The *Société d'encouragement pour l'amélioration du cheval français de demi-sang* denied a jockey a license to ride on its private race tracks; the court concluded that the *société* did not incur any liability thereby, as no damaging publicity attended the refusal.

damage.²³² This solution has been approached as an instance of the application of the *abus de droit* theory, as it is assumed that the employer is acting out of the sole intention of preventing the union from recruiting members.²³³ It would be otherwise if the employer can justify his attitude because of strikes or other conflicts provoked by members of that union. The court must, in such a case, proceed to a very careful evaluation of the facts.²³⁴

The kind of damages to be awarded in a situation of this sort has also been subject to discussion. One portion of French doctrine supports the view that only the protection of the negative contractual interest should be granted.²³⁵ The more prestigious writers, however, are of the view that the positive interest should be protected and indemnity granted for the whole frustrated expectation.²³⁶ Thus, it is said, the court should consider the worker's probability of securing another employment, and, if he does, the focus should be on the greater advantages the laborer would have derived from a job with the rejecting employer.²³⁷ French courts, however, are reluctant to grant assessments of this kind, and they usually award punitive or exemplary damages.²³⁸

Another problem that invited preoccupation of French doc-

232. *Req.*, March 13, 1905, D.1906,I,113. *Accord*, 2 DEMOGUE, TRAITÉ DE OBLIGATIONS EN GÉNÉRAL 196 (1923).

233. Aix, Dec. 21, 1910, D.1911,2,385, with a note by Planiol. See also *Trib. Com. D'Eperney*, Feb. 28, 1906, *Trib. Civ. De Lille*, Nov. 12, 1906, and Lyon, Jan. 23, 1907, all reported in D.1908,2,73, with note by Louis Jossierand where other instances of rejection giving rise to damages on grounds of *abus de droit* are considered.

When an insurance agent has a contractual right to appoint his successor to the position, the insurance company cannot systematically refuse all the agent's propositions and make the final appointment by itself. Paris, July 3, 1913, *GAZ. PAL.*, 1913,2,177. The licensee for the manufacturing of certain appliances cannot refuse to sell parts thereof to whoever shall offer to buy them. Lyon, Dec. 11, 1908, *GAZ. COMM. LYON*, Dec. 15, 1909.

234. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 197 (1923). In Morel, *Du Refus de Contracter en Raison de Considérations Personnelles*, *REVUE DE DROIT CIVIL* 299-308 (1908), it is suggested that a distinction should be made whether the person rejecting the offer had remained heretofore inactive, or had invited the offer. Only in the latter case would it be proper to speak of frustrated reliance and damages may, therefore, derive. But this suggestion has remained alien to French jurisprudence, according to which *abus de droit* may lie in silence or inactivity. *Accord*, 2 DEMOGUE, *id.* at 198.

235. Morel, *Du Refus de Contracter en Raison de Considérations Personnelles*, *REVUE DE DROIT CIVIL* 299-308 (1908).

236. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 198 (1923).

237. *Id.*

238. *Id.* At common law, to refuse to contract under the same circumstances is not a tort, but it is different under federal statutory authority; see National Labor Relations Act, 29 U.S.C.A. § 158 (8)(a)(3). See *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941).

trine is whether liability could arise because of the interruption of negotiations,²³⁹ or, in other words, whether either of the negotiating parties incurs any liability at all before a definite offer is formulated. The conclusion has been reached that such a situation may engender liability, but only when, on account of the circumstances, the abrupt abandonment of the negotiations is accompanied by fault. The existence of fault in cases of this sort should be admitted with great caution in order not to deprive the parties of their freedom to bargain and decide until the moment of the offer and the acceptance.²⁴⁰ There is fault, however, when the party who gives up the negotiations, having already accepted a concurring proposition, allowed the one with whom he was negotiating to incur research expenses in preparation of his offer.²⁴¹ There is fault also when the interruption is considered an unfair or disloyal practice, according to the usages of commerce.²⁴²

DUTY TO ACCEPT OFFER

In German doctrine and jurisprudence, it is asserted that, under certain circumstances, there is a duty to accept a proposition. This duty may derive from a preliminary contract between the same parties, as when they enter into an agreement to conclude a final contract later on, provided all the requirements are present and the subject matter of the principal contract has been clearly agreed upon in the preliminary one.²⁴³

239. See 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 154-155 (2d. Esmein 1952). Negotiations leading up to a contract are called *pourparlers* in French; for a *Théorie générale des pourparlers*, see 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 166-171 (1923). See also Saleilles, *De la Responsabilité Précontractuelle*, REVUE TRIMESTRIELLE 697 (1907); Fagella, *Fondamento della Responsabilità in Tema di Trattative Contrattuali*, 1 ARCHIVO GIURIDICO 123-150 (1909).

240. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 155 (2d ed. Esmein 1952).

241. See, e.g., *Civ.*, Jan. 4, 1937, *Rev. des soc.*, 1937, 117. *Cf. Req.*, Oct. 19, 1931, D.H.1931,540; Rennes, July 8, 1929, D.H.1929,548. *Accord*, 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 155 (2d ed. Esmein 1952).

242. See 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 155 (2d ed. Esmein 1952). See generally the following recent French decisions: *Cass. Civ. I*, Feb. 27, 1962, J.C.P. 62, IV, éd. G., 54; *Bull. Civ. I*, n° 127, p. 113; *Cass. Com.*, July 1, 1959, *Bull. Civ. III*, n° 296, p. 259. In both cases, precontractual liability is characterized as quasi-delictual.

243. Although the B.G.B. does not regulate preliminary contracts, German jurisprudence has accepted their validity: 81 R.G.Z. 135 (1913); 78 R.G.Z. 387 (1912); 66 R.G.Z. 120 (1907). See I ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II 686-687 (1955). *Cf. Mermelstein v. Schwab*, 64 So.2d 37 (La. App. Orl. Cir. 1953): Where parties make a preliminary agreement which deals with the subject matter

By special statutory provisions, certain concerns such as telegraph companies and railroads are placed under a duty to accept offers to contract from consumers.²⁴⁴ According to local ordinances and police regulations, pharmacies, meatshops, and taxi operators, for instance, cannot refuse to accept offers to buy, or to utilize their services, from the general public.²⁴⁵ Under emergency conditions created by war, landowners can be charged with a duty to let vacant premises, or employers charged with a similar duty to hire veterans.²⁴⁶

SOCIAL AGREEMENTS

As in the case of the offer, where not every proposition amounts to a real offer, not every manifestation of a certain willingness to accept a proposition constitutes a valid acceptance. Words of acceptance may be spoken in a social setting with the intent of concluding a social agreement, or a family arrangement rather than perfecting an enforceable contract. Thus, if a nonprofessional musician accepts a proposition to perform in a charity concert, or an artist assents to an invitation to send one of his paintings to a show, the courts must determine whether, according to the circumstances, the parties intended to create a legal relationship.²⁴⁷

In German doctrine, several attempts have been made to draw a line between legal relations and relations arising out of acts of mere sociability. One writer drew the line between protected and nonprotected interests.²⁴⁸ Another, along the definiteness of the engagement, such as when what is accepted

in a general way and provides that essential details shall be elaborated in and defined by a later instrument, they are not bound to give assent in the formal instrument to anything to which they have not already consented, either expressly or by implication, in the preliminary agreement.

244. Public Act of 1871 regulating the operation of the Post Office, § 3; Public Act of 1892 regulating telegraphs, § 5; GERMAN CODE OF COMMERCE 453 (1861). See generally 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II 687 (1955).

245. 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II 687 (1955).

246. *Id.*

247. See 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 203-205 (1923). The acceptance, by one of the principal editors of a magazine, of an article sent by the writer in view of its publication, does not imply an obligation on the part of the magazine, as only the editorial board could decide what materials deserve publication: *Trib. Seine*, July 9, 1910, D.1912,2,391. For obligations that may derive from an invitation to a party, see *Just. de paix de Gosselies*, Sept. 5, 1891, *Journ. Trib.*, 1891,1231.

248. 2 VON IHERING, OEUVRÉS CHOISIES 192 (1893). See also 2 WINDSCHEID, LEHRBUCH DES PANDEKTENRECHT 4 (1900).

relates to the ways in which the other party earns his living.²⁴⁹ But it cannot be said that a convincing criterion has been yet formulated.

The Civil Code of Louisiana, in Article 1815, seems to adopt a subjective approach to this problem. However, a reading of Article 1799 shows that objective considerations are brought into this picture also. This article states a legal presumption that each party confers upon the other the right to judically enforce the performance of the agreement; but the presumption gives way whenever a contrary intent has been expressed, or may be implied. When a contrary intent is express, the parties do not enter a contract, but a mere social agreement. When such a contrary intent can be said to be implied, it will thus be implied in the objective circumstances of the case. At any rate, custom and usage will play an important role in the interpretation of the circumstances.

When the relation the parties have entered into cannot be said to be an enforceable contract, but an agreement of sociability, they cannot be held liable on a contract, but they can always incur a quasi-delictual liability, whenever a manifestation of acceptance can reasonably mislead the other party to his detriment.²⁵⁰

"CONTRACTS OF ADHESION"

Not always are contracts formed through a process of negotiation and bargaining. Necessities of modern life have gradually developed a kind of contract one of the parties to which is not free to bargain. This takes place when a concern or enterprise carries out its operation through a very large number of contracts entered into with any number of co-contractants, such as public utility companies, railroads, or insurance companies. In fact, the consumer is in no bargaining position at all when applying for power for his home or buying a railroad ticket. The offer of those furnishing the services adopts the form of a take it or leave it proposition, and the acceptance, therefore,

249. Kohler, *Das Obligationsinteresse*, 12 ARCHIV FÜR BÜRGERLICHES RECHT (1897).

250. See generally 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 204 (1923) on the applicability of article 1382 of the CODE NAPOLÉON, similar to LA. CIVIL CODE art. 2315 (1870), to this kind of case.

is nothing but total submission to all the conditions stipulated by the other party.²⁵¹

In situations of this sort there is a manifest imbalance between the parties, as one of them wields unquestionably more power than the other. The less powerful party is left with no choice other than to adhere to the proposed terms—"contracts of adhesion"—a formula coined by a prominent French writer.²⁵²

Contracts of this kind are usually contained in standard forms, as the volume of business transacted by such concerns practically demands. Printed clauses in those contracts, sometimes small print clauses,²⁵³ have presented difficulties of interpretation. This is a problem of acceptance, as the real question is whether the one making use of the services actually consented to all the printed terms.²⁵⁴

Several approaches have been proposed in continental doctrine. In one, a contract of this kind is treated exactly as any other one, and the presumption should be that the consumer is free to consent to all the terms of the proposition. If he accepts it, he accepts the whole and should be held to it.²⁵⁵ As in this approach the alleged freedom is nothing but a freedom to submit leading to unfair solutions, it was succeeded by another view in which a distinction between essential and necessary stipu-

251. See CORBIN, *CONTRACTS* § 1376 (1952). Some German writers suggest that no contract, in the true sense of the word, is involved in this kind of situation, and propose a theory of "intersocietal contracts" in order to explain it. See Nirk, *Rechtsvergleichendes zur Haftung für culpa in contrahendo*, 18 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 310-355 (1953). *Accord*, 1 PUIG BRUTAU, *ESTUDIOS DE DERECHO COMPARADO*, PART II 79 (1951).

252. SALEILLES, *DE LA DÉCLARATION DE VOLONTÉ* 229 (1901). See also Dreux, *Nature Juridique du Contrat d'Adhésion*, *REVUE DE DROIT CIVIL* 503 (1910).

253. The expression "fine print" refers to clauses—generally exculpatory—so printed that it is difficult for the other party to read and understand them; in other words, the "tucking the clause away in a mass of unimportant matter." See Note, *Contract Clauses in Fine Print*, 63 *HARV. L. REV.* 494 (1950). Clauses printed in this way are to be found not only in contracts of the kind described in the text, but also in contracts of a more common nature, such as a sale. The "fine print" clause, however, more likely than not, will appear in a standard form. Provisions of this kind are effective only if they are actually called to the attention of the other party to the negotiation, or when this party may be reasonably believed to have been made aware of them. See CORBIN, *CONTRACTS* § 33 (1952).

254. *Contra*, in matters of insurance only, *Foster v. Morrison*, 145 So. 13 (La. App. Orl. Cir. 1933).

255. See 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 309-311 (1923); *Civ.*, Feb. 14, 1921, S.22,1,102. See also PERRÉAU, *Clauses Manuscrites et Clauses Imprimées*, *REVUE TRIMESTRIELLE* 303 (1927); 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 139 (2d ed. Esmein 1952).

lations was recommended. The parties should be strictly held to the essential ones, but the accessory stipulations, usually in print, ought to be interpreted always in favor of the party who adhered to the terms of the other, in other words, the weaker party.²⁵⁶

This second approach was not satisfactory either, and was soon replaced by a theory where the importance of the public service was stressed. This view found support in the French doctrinal development called *théorie de l'institution*,²⁵⁷ on the basis of which it was asserted that a certain institution is developed for the satisfaction of a public need, thus warranting that standard contracts be interpreted in a way consistent with the better performance of the services. The interpretation, thus, should favor those clauses enabling the operator to carry out the performance of the public service under the best of conditions of order, and security for its interest.²⁵⁸

Finally, as a result of a more thorough analysis, the following conclusions have been reached:

(a) These contracts are usually concluded within the field of an activity regulated by a public act.²⁵⁹

(b) When the standard contract conforms to the pattern established in the act, all its clauses are binding.²⁶⁰

(c) Wide publicity should be given to the terms of these contracts so that any person entering into it can be presumed to know the terms he is accepting, even if he is illiterate.²⁶¹

256. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 311 (1923). Cf. *Brooke v. Louisiana State Ins. Co.*, 4 Mart.(N.S.) 640 (La. 1826): "In a policy of insurance, the written controls the printed part." *But see Wallace v. Ins. Co.*, 4 La. 289 (1832): "The rule that the written governs the printed part of the policy can only be applied where the two so contradict each other as to make it necessary that one must yield." *Cotton Bros. Cypress Co. v. Home Ins. Co.*, 147 La. 308, 84 So. 792 (1920): "The written stipulation in a policy of insurance should control when irreconcilable with those which are printed, but that rule is qualified by the fundamental principle, applicable to all contracts, that they should be construed, if possible, as to give effect to all of their stipulations, and strike none with nullity." See also *Lake Arthur Dredging Co. v. Mechanics Ins. Co.*, 162 La. 1090, 111 So. 466 (1927).

257. HAURIU, *PRINCIPES DE DROIT PUBLIC* 145, 211 (1910). See also note by Hauriou in S.1908,3,17. See generally 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 311 (1923).

258. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 312-313 (1923).

259. *Id.* at 313. Cf. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 140 (2d ed. Esmein 1952).

260. 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 318-19 (1923).

261. *Id.* at 317, 318, 321.

(d) A court may always declare invalid any stipulation deemed unconscionable.²⁶²

At common law, where the expression "contracts of adhesion" is not very successful,²⁶³ the problem of standard form contracts, sometimes containing fine print clauses, has been discussed, primarily, in connection with clauses establishing a limitation of liability.²⁶⁴ In some cases, it has been decided that the offeree is bound to all the terms, provided a reasonable man in his position would have understood that a contract was being proposed.²⁶⁵ In this approach, no inquiry is made to determine whether the offeree incurred negligence for not having read and understood the terms in fine print.²⁶⁶ In other cases, the subjective theory of contract formation prevails, and, on this basis, no validity is given to the fine print clause, unless evidence is furnished that the offeree's attention was called to it by the offeror, or he otherwise had knowledge of it.²⁶⁷ In a third line of cases, the decisions consider the offeree bound by the fine print "where a reasonable man would have understood both that a contract was being proposed and that the clause in issue

262. *Civ.*, Jan. 4, 1910, S.1911,1,521, D.1911,I,104; *cf. Trib. Comm. Seine*, Dec. 3, 1919, *GAZ PAL.*, 1920,I,316. Compare with UNIFORM COMMERCIAL CODE § 2-302 (1962).

For a discussion of *contrat-type*, more recent than *contrat d'adhésion*, and almost identical with the Anglo-American notion of standard form contract, see 2 CARBONNIER, *DRIT CIVIL* 342-43 (1957). See also Léauté, *Les Contrats-Types*, *REVUE TRIMESTRIELLE* 129 (1953). These *contrats-types*, in essence, show the same structure as a contract of adhesion, but instead of being drafted for the operation of an isolated concern, the *contrat-type* is drafted by a professional association, such as the standard bill of lading, established by the Central Committee of French Maritime Carriers. Although the activity for which these *contrats-types* are designed is not regulated by public act, they should be interpreted in the same way as *contrats d'adhésion*.

263. But see Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629 (1943), and Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 *COLUM. L. REV.* 1072 (1953). See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), where both articles are cited.

264. *Cf. The Kensington*, 183 U.S. 263, 46 L.Ed. 190, 22 Sup.Ct. 102 (1902). See generally 1 WILLISTON, *CONTRACTS* § 90B (1957); Note, *Contract Clauses in Fine Print*, 63 *HARV. L. REV.* 494 (1950).

265. Yerza, *Andrews & Thurston v. Randazzo Macaroni Mfg. Co.*, 315 Mo. 927, 288 S.W. 20 (1926); *Secoulsky v. Oceanic Steam Nav. Co.*, 223 Mass. 465, 112 N.E. 151 (1916); *Taussig v. Bode & Haslett*, 134 Cal. 260, 66 Pac. 259 (1901).

266. See RESTATEMENT, *CONTRACTS* § 70 (1932): "One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation."

267. See *Reynolds v. Binding-Stevens Seed Co.*, 179 Okla. 628, 67 P.2d 440 (1937); *May Hosiery Mills v. Hall & Son*, 77 Cal.App. 291, 295, 246 Pac. 332, 333 (1916).

was part of that proposed contract, but do not otherwise inquire whether it would have been reasonable to read and understand the terms."²⁶⁸ In a particular jurisdiction, the approach may vary according to the subject matter of the contracts and the business circumstances of the case.

In certain areas, however, such as passenger baggage, the existence of federal legislation governing limitation of liability²⁶⁹ now allows the framing of this question within an institutional approach close to the continental view, as the validity of a clause limiting the carrier's liability is subject to control by a public agency, and the passenger must be given notice of the carrier's liability limitation.²⁷⁰

In other instances, the nature of a document where a certain stipulation is contained will have a very definite impact on the binding force of the stipulation. Thus, in everyday transactions imposed by the necessities of modern life, such as leaving a vehicle in a parking lot, a person will be given a cardboard tag. The question is then presented whether the tag amounts to a contract the terms of which are binding. It has been decided that if such a document can be taken by the party receiving it as a simple means of identification of an object, then it is not a contract, and the stipulations therein contained are therefore not binding.²⁷¹ This is the approach that Louisiana courts have consistently followed.²⁷² Although no code authority is invoked

268. Note, *Contract Clauses in Fine Print*, 63 HARV. L. REV. 494, 496 (1950). See *Boston Lumber Co. v. Pendleton Bros., Inc.*, 102 Conn. 626, 129 A. 782 (1925); *Roe v. R. A. Naylor, Ltd.*, 1 K.B. 712 (1917); *The Majestic*, 166 U.S. 375 (1897). See generally 1 WILLISTON, CONTRACTS § 90C (1957) for a discussion of the doctrine of constructive knowledge of offer applied to documents.

269. 49 U.S.C. § 20 (1946), Carmack amendment to the Interstate Commerce Act. See generally Comment, *Limitations of Liability: Passenger Injuries and Baggage Losses on Land, Sea and Air*, 34 TUL. L. REV. 354 (1960).

270. *Tennessee Coach Co. v. Carter*, 27 Tenn.App. 479, 182 S.W.2d 121 (1943); *Western Assur. Co. v. Wells Fargo & Co.*, 143 Minn. 60, 173 N.W. 402 (1919). See generally Comment, 34 TUL. L. REV. 354, 356 (1960).

271. See 1 WILLISTON, CONTRACTS § 90A, at 292-293 (1957): "The acceptance of a paper which purports to be a contract sufficiently indicates an assent to its terms whatever they may be, and it is immaterial that they are, in fact, unknown." (Emphasis added.) See also *id.* § 90B, at 299: "Whether the same principle is applicable to a ticket, depends essentially upon the question whether the ticket is a mere check showing the points between which the passenger is entitled to be carried, and does not purport to be a contract stating the rights of the parties. If such is the interpretation given the ticket, the passenger would not be required at his peril to read any stipulations upon it."

272. See *Lawes v. New Orleans Transfer Co.*, 123 So. 144 (La. App. Orl. Cir. 1929): which held that when a person delivers baggage to a local transfer company, and receives a paper which from the circumstances appears to be

in the decisions supporting this view, an answer to this question is clearly found in Article 1766 and 1811 of the Louisiana Civil Code. Consent may be express or implied, but in either case knowledge of what is being consented to is required from the consenting party. If such knowledge is not brought home to one of the parties, the other cannot avail himself of a stipulation, very especially if the clause is in derogation of the suppletive law.

a receipt to enable the person to identify the property, and no notice is given showing that it embodies special contract, no contract arises as matter of law from the acceptance and receipt. *Marine Ins. Co., Ltd., of London, England v. Rehm*, 177 So. 79 (La. App. Orl. Cir. 1937). See generally Note, *Effectiveness of Limitation of Liability Printed on Claim Check*, 12 TUL. L. REV. 458 (1938). See also *Levy v. Kerwin*, 6 Orl. App. 93 (1927).

Where a landlord introduced a clause in a rent receipt releasing him from liability, the court said that there is a distinction between rent receipts, commonly used in commercial transactions, and contracts between parties, in that the receipt permits of no negotiation or discussion, being simply a fulfillment of one's assumed obligations, while a contract or agreement between parties is a matter of discussion and arrangement, with full opportunity for deliberate reciprocal action. *Roppolo v. Pick*, 4 So.2d 839 (La. App. Orl. Cir. 1941).