

Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations

Saul Litvinoff

Repository Citation

Saul Litvinoff, *Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 La. L. Rev. (1987)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol47/iss4/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

CONSENT REVISITED*

Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations

Saúl Litvinoff**

CONSENT

Meanings of Consent

The consent of parties legally capable of contracting is the second requirement for a valid contract.¹ In contractual matters, however, the term "consent" bears two connotations. Under one, "consent" means a party's acquiescence to the terms and conditions of a projected contract, given with the intent of creating legal effects. Under the other, "consent" means the accord of the parties' will on the projected contract, the uniformity of their intentions or, to resort to a proverbial expression, the meeting of their minds.² In etymological perspective "to consent" means to will the same thing that another wills and wishes us to will.³

Nevertheless, the two references of the word "consent" do not differ in essence. When the term is used in the second and broader sense, meaning the accord of the parties' will, what is meant is the identity of that which the parties had in mind.⁴ Their minds are

Copyright 1987, by LOUISIANA LAW REVIEW.

* *Editor's Note:* In an earlier volume this *Review* published a two-part article by Professor Litvinoff entitled, "Offer and Acceptance in Louisiana Law: A Comparative Analysis." 28 La. L. Rev. 1 (1967) and 28 La. L. Rev. 153 (1968). In this article, he returns to the topics treated in that earlier work and reconsiders them in the light of the revision of the Louisiana law of obligations effective January 1, 1985.

** Boyd Professor of Law, Louisiana State University.

1. Chapters 2, 3, 5 and 6 of Title IV of Book III of the Louisiana Civil Code enumerate and regulate the four requirements for a valid contract. Article 1779 of the Louisiana Civil Code of 1870, which contained a listing of those requirements, was repealed for systematic reasons though without intending a change in the law. Indeed, the repealed article contained a doctrinal assertion rather than a rule.

2. See 1 S. Litvinoff, *Obligations* § 129, at 210-11, in 6 *Louisiana Civil Law Treatise* (1969).

3. See 3 C. Toullier, *Le droit civil français* 322 (1833).

4. See, for instance, *Bender v. International Paint Co.*, 237 La. 569, 111 So. 2d 775 (1959).

supposed to accord because they are aimed at the same thing. It should be noticed that in this reference "consent" is not clearly distinguishable from the agreement itself. When the term is used in the first and more restricted reference, attention is focused on what each of the parties had in mind.⁵ Since no contract will result unless some unity can be reasonably predicated on that which both parties had in mind, no particular importance can be attached to the distinction between the two meanings of the word "consent."

Subjective and Objective Elements of Consent

The making of a contract requires an act of volition of the parties. Their will to bind themselves legally is the subjective element of consent. Because of its psychological nature, however, that will can have no legal effect unless it is outwardly projected. Consent, thus, results from the concurrence of two elements, a subjective one, namely, a party's will to bind himself, and an objective one, namely, the outward manifestation or expression of that will.⁶

In French law the leading role is assigned to the subjective element, that is, each party's acquiescence to a projected contract. Thus, a careful analysis of a party's intent must be made in order to ascertain whether a contract has been formed and, if the conclusion is that a contract exists, in order to interpret it.⁷

In opposition to the classic French approach that makes of the subjective will the principal element of consent, German law assigns the leading role to the declared or manifested will. In the German approach the formation of a contract is determined by the concurrence of wills as *declared*, as the law can take into account only what each party *learned*, or *knew*, or could have *learned*, or *known*, of the will of the other, knowledge that becomes possible only when the subjective will is declared.⁸

Each of those approaches is based on social and philosophical conceptions radically different from the other. French doctrine places the greatest emphasis on the freedom of a party's will. German doctrine gives greater weight to the need of protecting credit and the security of transactions.

Those theoretical differences between the subjective and the declared will are no longer realistic. A will that is purely subjective and

5. See 1 S. Litvinoff, *Obligations* § 129, at 211, in 6 *Louisiana Civil Law Treatise* (1969).

6. See 1 S. Litvinoff, *Obligations* § 135, at 223-30, in 6 *Louisiana Civil Law Treatise* (1969).

7. See M. Le Galcher-Baron, *Droit civil—Les obligations* 37 (1982).

8. See R. Saleilles, *Étude sur la théorie générale de l'obligation d'après le premier projet de code civil pour l'empire allemand* 242-53 (1925).

never expressed is irrelevant to the law. Only the will that materializes in an objective act may start the operation of the legal mechanism. Once this occurs, an act of human conduct has taken place, and a person called to evaluate its meaning—a judge, for instance—will take the act as a single event in which a certain intention, a subjective element, is blended with a certain utterance, an objective element.⁹ Although susceptible of being analytically isolated, either of those two elements is incomplete and insufficient when not taken in the context of the whole. Each of them is a component part that should never be mistaken for the whole. The intention illuminates the declaration, in the same manner as the declaration purports to express the intention.

The Louisiana Synthesis

The realistic approach expounded above is reflected in the Louisiana Civil Code, which thereby effects a synthesis of the subjective and objective elements of consent. Thus, though the interpretation of a contract is the determination of the intent of the parties, that intent is primarily sought through the words the parties used.¹⁰ If a doubt arises because of the lack of a necessary explanation that one party should have given, or from the negligence or fault of one party, the contract must be interpreted in a manner favorable to the other party.¹¹

When the difference between the subjective will and its objective declaration is intentional, as in the case of a simulation, the subjective intent will prevail in a dispute between the parties, but the objective declaration will be given greater weight whenever the protection of the interest of a third party is at stake.¹² When the difference between the subjective will and its objective declaration is unintentional, the latter will prevail when it has induced the other party into a reasonable reliance.¹³ These are just a few of the many instances of the synthesis of the elements of consent in the Louisiana law.

Consent Conveyed Through Offer and Acceptance

The consent of the parties to a contract may be established through the process of offer and acceptance whereby a party makes a proposition to the other—the offer—and the other assents to the propo-

9. See 1 S. Litvinoff, *Obligations* § 135, at 225, in 6 *Louisiana Civil Law Treatise* (1969).

10. See La. Civ. Code arts. 2045-2047.

11. See La. Civ. Code art. 2057. See also La. Civ. Code art. 2474.

12. See La. Civ. Code arts. 2027, 2028. See also 1 S. Litvinoff, *Obligations* § 135, at 226, in 6 *Louisiana Civil Law Treatise* (1969).

13. See, for instance, La. Civ. Code arts. 1952, 1967. See also 1 S. Litvinoff, *Obligations* § 135, at 227, in 6 *Louisiana Civil Law Treatise* (1969).

sition—the acceptance.¹⁴ Such a process, however, is not a ritual, that is, it should not be regarded as indispensable for the formation of a valid contract. Indeed, a contract may be contained in a writing that does not reflect which party made the initial offer and which party concluded the contract by his acceptance. Moreover, parties may arrive at a contract through negotiations so involved as to make it extremely difficult to ascertain who made the offer and who made the acceptance.¹⁵

Rather than steps in a ceremony, offer and acceptance are useful analytical tools that, when properly used, facilitate the task of determining when a party's consent to a contract is in doubt. As analytical tools, offer and acceptance also facilitate the lawmaker's regulation of contract formation. It is in this spirit that the Louisiana Civil Code says that a contract is formed by the consent of the parties established through offer and acceptance.¹⁶

In some exceptional instances the law prescribes that a particular kind of contract must be made observing a certain form required for its validity, such as an authentic act, or a writing under private signature, or even a ceremony conducted by a particular kind of person.¹⁷ In the absence of a required form, the offer and the acceptance leading to a contract may be made verbally, or in writing, or by action or inaction that is clearly indicative of consent under the circumstances.¹⁸ Consent, that is, may be expressed by words or by conduct, and, exceptionally, even by silence.

Consent Expressed by Words

Consent conveyed by words, whether verbal or written, is usually called "express" consent.¹⁹ Such words must be clear in order to prevent misunderstanding by the other party, which may result in error for which the contract can be annulled.²⁰ Even though unequivocal, words apparently expressive of consent must not be taken out of the context in which they are spoken or written, since, when taken as a whole, that context may very well reflect the absence of a party's intention

14. See 1 S. Litvinoff, *Obligations* § 130, at 211, in 6 *Louisiana Civil Law Treatise* (1969).

15. See, for example, *North Louisiana Milk Producers Ass'n v. Southland Corp.*, 352 So. 2d 293 (La. App. 2d Cir. 1977).

16. La. Civ. Code art. 1927.

17. See, among others, La. Civ. Code arts. 90, 102, 103, 1536, 2331 and 2440.

18. La. Civ. Code art. 1927.

19. See 1 S. Litvinoff, *Obligations* § 131, at 214-15, in 6 *Louisiana Civil Law Treatise* (1969).

20. See La. Civ. Code art. 1949.

to become bound.²¹ A party using such words could be bound by them, however, if the intention those words reflect is not clearly negated by the context as a whole, so that the other party is induced to rely on those words to his detriment.²² Taken as a whole, on the other hand, the context in which certain words are used may reveal a lack of serious intent to contract. Thus, a positive promise made in a manner that shows lack of serious intent, such as an offer or an acceptance made in jest—*animus jocandi* or *jocandi causa*—will not create an obligation.²³

Consent Expressed by Conduct

Words are not indispensable as vehicles of consent. Mere action without words may evince consent provided such action occurs in circumstances that, in a natural way, suggest that implication. Consent conveyed in that manner is usually called "implied" consent.²⁴ The Louisiana Civil Code furnishes several examples of situations where consent is implied. Thus, when the owner of a thing takes it or sends it to a depositary who does not refuse it, a contract of deposit is formed through the implied consent of the parties.²⁵ Likewise, when a mandatary performs according to the terms of a power of attorney, without having made an express acceptance, a contract of mandate is formed through the implied consent of the mandatary.²⁶ Also, receiving and using goods sent by a merchant implies a promise to pay the price, as placing an order for goods with a merchant implies a promise to pay a reasonable price even though none was named in the order.²⁷

Implied consent, that is, consent evinced by a party's acts rather than words, is then a matter of presumption that may or may not be established by law.²⁸ When not established by law a presumption of consent—implied consent—is left to the discretion of the court.²⁹

21. See 1 R. Pothier, *A Treatise on the Law of Obligations or Contracts* 4 (Evans transl. 1806).

22. See La. Civ. Code art. 1967. See, for instance, *Lamb v. Lamb*, 460 So. 2d 634 (La. App. 3d Cir. 1984). Cf. *Hebert v. McGuire*, 447 So. 2d 64 (La. App. 4th Cir. 1984).

23. See 1 S. Litvinoff, *Obligations* § 131, at 215, in 6 *Louisiana Civil Law Treatise* (1969).

24. *Id.*

25. La. Civ. Code art. 2933.

26. La. Civ. Code art. 2989.

27. See *Benglis Sash & Door Co. v. Leonards*, 387 So. 2d 1171 (La. 1980).

28. See La. Civ. Code arts. 1849, 1850 and 1852.

29. La. Civ. Code art. 1852.

Consent and Inaction—The Case of Silence

In some situations consent may be conveyed by, or inferred from, a party's inaction or silence.³⁰ Here again, the Louisiana Civil Code contains a few examples. Thus, if a lessor remains inactive and silent when, after termination of the lease, the lessee remains in possession of the leased thing, the lessor's inaction and the lessee's occupancy give rise to a tacit reconduction of the contract.³¹ Likewise, if a mandatary remains silent when the act containing his appointment is transmitted to him, his consent to a contract of mandate is inferred from his silence.³² Nevertheless, where the law does not provide a clear presumption of consent based on a party's silence, the surrounding circumstances must be very clear in order to corroborate a presumption that a party's silence amounts to an "expression" of his consent. Such circumstances are present, for example, when previous transactions between the parties allow the court to interpret the silence of one as the acceptance of the other's proposition.³³

Thus, if one party is used to placing orders that are always filled by the other, or to sending goods for which the other always pays, the lack of an express dissent by the receiver to a new order or shipment may be taken by the sender as a tacit acceptance according to the parties' own practice.³⁴ It should be clear that the usages of certain trades may become very relevant in that kind of situation.³⁵ Consent by silence may be found also when an offer has been made to enter a contract for the exclusive benefit of the party who remained silent.³⁶ Of course, parties are free to agree expressly that the silence of one shall be taken as the acceptance of the other's proposition, or to stipulate that a contract made for a certain duration may be extended for a determined or undetermined time in the absence of notice of termination before a certain date. Put in other words, silence may amount to consent only exceptionally. In case of doubt consent should not be inferred from silence.³⁷

30. La. Civ. Code art. 1942. See also *Rahier v. Rester*, 11 So. 2d 87 (La. App. 1st Cir. 1942).

31. See La. Civ. Code arts. 2688, 2689.

32. La. Civ. Code art. 2989.

33. See I S. Litvinoff, *Obligations* § 133, at 216-18, in 6 *Louisiana Civil Treatise* (1969).

34. *Id.* at 218.

35. See M. Le Galcher-Baron, *Droit civil—Les obligations* 38 (1982).

36. See, for instance, *Ryder v. Frost*, 3 La. Ann. 523 (1848). See also La. Civ. Code art. 1890.

37. See I S. Litvinoff, *Obligations* § 134, at 217, in 6 *Louisiana Civil Law Treatise* (1969).

Freedom of Form

Only exceptionally does the law prescribe that consent must be expressed in a certain form. Thus, the sale of immovable property must be made in written form, either by authentic act or by a writing under private signature.³⁸ In the absence of a legal requirement of form parties are free to express their consent in any manner.³⁹ They are also free, however, to choose to make their contract in a certain form even when none is required. Thus, parties to a lease may decide that their contract will be made in writing though the law does not require a writing for a valid contract of lease.⁴⁰ In such a case, that is, when in the absence of a legal requirement the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form.⁴¹ That legal presumption is one established in the interest of private parties and is therefore rebuttable.⁴²

Indeed, in contemplating a writing the parties may intend not to be bound until the writing is executed, thereby reserving the privilege of withdrawing any time before signing, or they may intend to be bound upon their mutual consent without more although in the intentment that a writing will be subsequently executed as a memorandum of their agreement, that is, for evidentiary purposes.⁴³ If the former, the written form, through the will of the parties, is turned into a requirement for the validity of their contract.⁴⁴ If the latter, execution of a writing is just an accidental stipulation that the parties are free to introduce, a stipulation that, as all other terms of a contract, can be enforced either through specific performance or through damages assessed against the party who fails to perform.⁴⁵

Ascertaining the true intent of the parties may be quite difficult in situations of that kind. Nevertheless, guidance can be obtained from the simple or elaborate nature of the contract, the reduced or large number of terms and conditions, the usual or unusual tenor of such conditions, whether other contracts of a similar kind between the same parties were made in writing, and comparable circumstances that may

38. La. Civ. Code art. 2440.

39. See La. Civ. Code art. 1927.

40. See La. Civ. Code art. 2683.

41. La. Civ. Code art. 1947.

42. See La. Civ. Code art. 1851.

43. See I S. Litvinoff, *Obligations* § 134, at 218-23, in 6 *Louisiana Civil Law Treatise* (1969).

44. See *Breaux Bros. Constr. Co. v. Associated Contractors, Inc.*, 226 La. 720, 77 So. 2d 17 (1954).

45. See *Auto-Lec Stores, Inc. v. Ouachita Valley Camp*, 185 La. 876, 171 So. 62 (1936).

lead a court to surmise how willing the parties might have been to trust their memory at the time of binding themselves.⁴⁶ In the absence of sufficiently clear circumstances of that kind the legal presumption will, of course, prevail.

THE OFFER

General Remarks

An offer is a unilateral declaration of will that a person—the offeror—addresses to another—the offeree—whereby the former proposes to the latter the conclusion of a contract.⁴⁷ Certain consequences follow from that definition. In the first place, the offeror's will must be declared, that is, projected outward, since otherwise the offeree could not be apprised of the offeror's intent. In the second, the declaration must be addressed to the person with whom the offeror intends to contract. Thus, if in the course of a conversation a party says to another that he intends to make an offer to sell a certain thing to a third party, the latter could not make a valid acceptance upon learning of the conversation because no offer was actually made to him.⁴⁸

To constitute a true offer, a declaration of will must be sufficiently precise and complete so that the intended contract can be concluded by the offeree's expression of his own assent, thereby giving rise to that "mutual consent" of the parties which, in practical terms, is indistinguishable from the contract itself. Thus, if the intended contract is a sale, the offer must be sufficiently precise concerning the thing to be sold and the price.⁴⁹

If the intended contract is a lease, the offer must be sufficiently precise concerning the thing which is the contractual object, the desired rent and, because of a practical necessity, the contemplated time at which the lessee's enjoyment of the thing will start.⁵⁰ Other terms are provided by the suppletive rules found in the detailed regulation of particular kinds of contracts contained in civil codes, rules that become applicable in the absence of a contrary intent of the parties.⁵¹ If the offeror's declaration lacks a minimum of precision, then his declaration is not a true offer but rather an invitation to negotiate a prospective

46. See *Laroussini v. Werlein*, 52 La. Ann. 424, 27 So. 89 (1899).

47. See J. Baudouin, *Les obligations* 85 (1983).

48. See A. Weill et F. Terré, *Droit civil—Les obligations* 157 (3d ed. 1980).

49. See La. Civ. Code art. 2439.

50. See La. Civ. Code art. 2670. See also A. Weill et F. Terré, *Droit civil—Les obligations* 158 (3d ed. 1980).

51. See J. Baudouin, *Les obligations* 86 (1983).

contract.⁵² A true offer may be turned into an invitation to negotiate when the offeree makes a counterproposition that induces the parties to engage in further discussion of the intended contract.

An offer may be made to one person in particular or to several persons. In the latter situation the offeror may incur liability if he does not make each offeree aware that the offer is made to others also or fails to qualify his intent with expressions such as "subject to prior acceptance by another party" or "contract to be concluded with the first to accept." An offer may be made also to the public at large through proper means of communication.

As a vehicle of consent, an offer may be made by words spoken or written, or by action without words.⁵³ An offer, that is, may be express or implied. In the latter situation, as in the case of offers to the public, advertisements, or a combination of both, some interesting problems are present.

Offers to the Public, Advertisements and Invitations to Negotiate

A true offer is accompanied by the offeror's intent to bind himself upon the offeree's acceptance. Such a proposition—offer or pollicitation—must be distinguished from a proposal to enter negotiations or *pour parler*. The distinction may be occasionally quite difficult to make.⁵⁴ In case of doubt, the completeness or incompleteness, the preciseness or vagueness of the proposition must be looked into in order to ascertain whether certain words convey an offer or an invitation to negotiate.

In the case of offers made to an indeterminate number of persons, or to the public at large, by means of advertisements in newspapers, catalogues sent by mail, handbills or similar manners of communication, even though the terms are sufficiently precise, a question remains whether the party making the proposition truly intends to make contracts with whomever accepts, regardless of number, or merely intends to invite negotiations or entice offers, rather than acceptances, from those attracted by the proposition.

In German law it is clear that an offer made by advertisement or circular is not a true offer but an *invitatio ad offerendum*—an invitation to make offers.⁵⁵ The same conclusion obtains in American law unless the announcement clearly reflects a different intent, as that expressed in the words "first come first served."⁵⁶ In French law the matter is

52. A. Weill et F. Terré, *Droit civil—Les obligations* 158 (3d ed. 1980).

53. La. Civ. Code art. 1927.

54. See J. Baudouin, *Les obligations* 86 (1983).

55. H. Lange, B.G.B. *Allgemeinerteil* 240.

56. 1 Corbin on Contracts § 25, at 74-76 (1963); *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W. 2d 689, 251 Minn. 188 (1957).

subject to some debate. In the opinion of some writers, an offer made by advertisement is a true offer, though made "*sans engagement*," that is, without actually binding the offeror.⁵⁷ For others, such an offer should always be understood as subject to a condition such as depletion of stock.⁵⁸

In still another view, a distinction must be made between a "collective offer," or offer made publicly to an indeterminate number of persons, as when a stock of goods is offered for sale at a certain price, and an offer made to one indeterminate person by means of a public announcement, as when a certain piece of immovable property is offered for sale by means of an advertisement.⁵⁹ The former is regarded as a true offer, the latter is closer to an invitation to negotiate. Some French decisions have regarded a publicly made offer as a perfectly binding one.⁶⁰

In Louisiana, some decisions assert that an advertisement may constitute an offer susceptible of giving rise to a binding contract upon acceptance.⁶¹ Those decisions involve peculiar situations, however, such as the offer of a prize or the announcement of the terms of a contest, in which good faith and fair-dealing considerations require that a party be regarded as bound by the intent reflected in his public proposition.⁶² In the absence of special circumstances, an advertisement proposing a contract, such as the announcement that certain goods are for sale at a certain price, should be regarded in Louisiana as an invitation to negotiate rather than a true offer. Special legislation aimed at promoting fairness in business practices may occasionally call for a different conclusion.⁶³

Offer Without Words

An offer may be made by action without words and, under certain circumstances, even by inaction.⁶⁴ When the offeree is one person in particular no special problems are present, as when goods are sent by a merchant's own initiative. The offeree may either reject the offered

57. 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 145-46 (2d ed. 1952).

58. 4 J. Carbonnier, *Droit civil—Les obligations*. 77 (11th ed. 1982).

59. J. Aubert, *Notions et rôles de l'offre et de l'acceptation dans la formation du contrat* 142-43 (1970).

60. See decision of the court of Paris of December 3, 1959, J.C.P. 1961.12308, with a note by Gavalda.

61. See, among others, *Johnson v. Capital City Ford Co.*, 85 So. 2d 75 (La. App. 1st Cir. 1955); *Schreiner v. Weil Furniture Co.*, 68 So. 2d 149 (La. App. Ori. 1953).

62. See Judge Lottinger's dissent in *Johnson*, 85 So. 2d at 82.

63. See, for example, La. R.S. 51:411, :461, :461.1, :1405 and :1409 (Supp. 1987).

64. See La. Civ. Code art. 1927.

goods, or take them, in which case he is accepting the offer and binding himself for the price. There is a problem, however, when the action or inaction that may signify an offer is exposed to the public at large, as in the traditional examples of a taxicab waiting for fares at a taxi-stand, or the display of articles in a store-window with an indication of price. In situations of that kind the problem is similar to the one in the case of contractual propositions made by means of advertisements. In French law the prevailing conclusion is that there is an offer in either of the traditional examples.⁶⁵ Nevertheless, some writers assert that, under certain circumstances, the offeror is privileged to reject the acceptance, that is, a taxi-driver should not be bound to take just any passenger.⁶⁶ In another view, the display of an article in a store window lacks sufficient precision to constitute a true offer, since it is not clear whether the alleged offer involves that particular article, which may not be unique, or another though identical one that the store operator may have in stock.⁶⁷ The existence of special legislation, or the enjoyment of a monopoly by the offeror, or the fact that certain goods, such as foodstuffs, are intended for the satisfaction of primary needs of the community, are relevant aspects that French law takes especially into account.⁶⁸

In the absence of special provisions, or of the existence of a monopoly regulated by public law, that is, situations in which a clear answer can be found, there is a certain stretching of concepts in recognizing a right or privilege to *reject* an acceptance on the part of an offeror, as that would imply that acceptance by an offeree must on its turn be accepted by the offeror, which denies the basic premise that once an offer is accepted there is a contract without more. It is more reasonable to conclude that in the kind of situation exemplified by the taxicab waiting for fares at a taxi-stand there is an invitation to negotiate which elicits offers from those persons interested in availing themselves of transportation services.

Duration

A proposition to enter into a contract is certainly not intended to remain open indefinitely or for an unreasonably long period of time. A contrary belief would ignore the interest of private parties engaged

65. See J. Baudouin, *Les obligations* 85-86 (1983); M. Le Galcher-Baron, *Droit civil—Les obligations* 40 (1981); A. Weill et F. Terré, *Droit civil—Les obligations* 151, 158 (3d ed. 1980).

66. See J. Baudouin, *Les obligations* 86 (1983).

67. See 4 J. Carbonnier, *Droit civil—Les obligations* 76-77 (11th ed. 1982).

68. See, in general, 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 143-46 (2d ed. 1952).

in social and business intercourse. In Roman law an offer did not have a binding effect and could, therefore, be revoked at the offeror's pleasure.⁶⁹ The same conclusion obtained in ancient French law.⁷⁰ In modern French law, however, perhaps because of the importance gained by the mail as a regular means of communication, the idea was developed that an offer must be regarded as intended to remain open at least for a reasonable time during which the offeror may not revoke it. When the offeror has named a period of time within which the offer must be accepted, he is bound by his offer during that time. When no period of time has been named, then, if the parties are at a distance, the minimum reasonable period intended for the duration of the offer is the time necessary for the message that contains it to reach the offeree plus the time necessary for the offeree's reply to get back to the offeror.⁷¹ The problem faced by French doctrine was to find legal grounds to hold an offeror bound by his offer for any period of time. Several theories were developed to that effect.

In a first approach the offeror is regarded as bound as a consequence of his unilateral declaration of will, that is, the offeror binds himself by the force of his own will. That approach has been criticized on grounds that every duty requires a correlative right, and no right should be imposed on one party by the mere will of another.⁷²

In a second theory the offeror's freedom to revoke the offer at any time before it is accepted is recognized, but, it is said, in so doing the offeror would be abusing his right to the detriment of the offeree. Also that theory has been criticized on grounds that if the offeror's right is precisely to revoke the offer at any time before acceptance, to do exactly that does not seem to amount to any abuse.⁷³

According to a third theory, when an offer names a specified time for acceptance the offeror is actually making two offers at the same time: one is the proposition to enter into a contract, which requires the acceptance of the offeree to ripen into a contract; the other is an offer to have the offeror bound during the named period of time. That secondary or accessory offer is of such a nature as to warrant

69. See 1 S. Litvinoff, *Obligations* § 136, at 231, in 6 *Louisiana Civil Law Treatise* (1969).

70. See 1 S. Litvinoff, *Obligations* § 137, at 232-33, in 6 *Louisiana Civil Law Treatise* (1969).

71. For a full discussion, see 1 S. Litvinoff, *Obligations* § 138, at 236-37, in 6 *Louisiana Civil Law Treatise* (1969).

72. See 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 152 (2d ed. 1952).

73. See 2 A. Colin et H. Capitant, *Cours élémentaire de droit civil français* 35 (10th ed. 1953). See also 1 S. Litvinoff, *Obligations* § 138, at 234-35, in 6 *Louisiana Civil Law Treatise* (1969).

the presumption that the offeree will accept it when it comes to his knowledge, as it is made only for his advantage.⁷⁴

From that moment, thus, a *preliminary contract* is formed between the parties whereby the offeror binds himself not to revoke the offer before the expiration of the time named for acceptance. In this approach the offeror may revoke the offer before it comes to the knowledge of the offeree.⁷⁵ That *preliminary contract* theory enjoys the support of the French jurisprudence, but is criticized by the majority of contemporary French doctrine which deems that theory artificial and unrealistic.⁷⁶

The need to resort to theories of that kind is justified in France by the absence of clear provisions from the *Code Civil*.⁷⁷ There is no such need in Louisiana where the Civil Code expressly contemplates the duration of the offer.

Irrevocable Offer

In Louisiana law, an offer that specifies a period of time for acceptance is irrevocable during that time.⁷⁸ That rule is consistent with the overriding duty of good faith that governs the conduct of the parties in whatever pertains to an obligation, even at the inception of that obligation.⁷⁹ It is consistent also with detrimental reliance as a reason for a party to incur liability, since such an offer seems to invite the offeree to place warranted reliance on the offeror's intention not to revoke the offer during the time named, a reliance that may cause the offeree to change his position to his detriment.⁸⁰

Even when no time for acceptance is named in the offer the offeror may be bound not to revoke. That is the case when he has manifested an intent to give the offeree a delay within which to accept, though without specifying a time. In such a situation the offer is irrevocable for a reasonable time.⁸¹ That kind of intent may be expressly manifested, as when the offeror states that the offer will be good until he hears from the offeree, or as when the offeror states that the offeree can take his time to consider the offer.

74. See A. Weill et F. Terré, *Droit civil—Les obligations* 163-64 (3d ed. 1980).

75. See 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 155 (2d ed. 1952).

76. 2 A. Colin et H. Capitant, *Cours élémentaire de droit civil français* 36 (10th ed. 1953).

77. French Civ. Code art. 1108 lists consent among the requirements for a valid contract. No provisions regulate the expression of consent. That article is equivalent to article 1779 of the Louisiana Civil Code of 1870.

78. La. Civ. Code art. 1928.

79. La. Civ. Code art. 1759.

80. La. Civ. Code art. 1967.

81. La. Civ. Code art. 1928.

That intent may be likewise manifested when, upon learning the offer, the offeree asks for time to consider the proposition, and the offeror acquiesces in that request. Such an intent need not be expressly manifested, however, as certain circumstances may clearly imply a manifestation of that kind of intent. Thus, if a sub-contractor makes a bid to a general contractor, the former knows that the latter may incorporate the bid into its own and knows, further, that his bid cannot be accepted unless and until the general contractor is awarded the job.

In such a situation the sub-contractor should be bound not to revoke his bid or offer during the time the general contractor needs to have his own proposition accepted or rejected.⁸² The usages of particular trades, or those prevailing in certain communities, are thus relevant circumstances for the purpose of ascertaining whether an offeror, through his offer alone, has manifested an intent to allow an undetermined delay for acceptance.⁸³ Similarly, when offeror and offeree have a history of past transactions where offers have remained open for a time, a new offer made against that background must be regarded as manifesting the offeror's intent to give the offeree a delay within which to accept.⁸⁴

When no time is specified, the reasonable time for acceptance manifestly intended by an offeror depends on a number of circumstances such as the distance that separates the parties and the chosen means of communication. If the parties negotiate face to face, in the absence of any indication to the contrary, the intended reasonable time may be no longer than the time during which they remain together. If the parties communicate by correspondence, the time required for their messages to arrive in destination must be regarded as a minimum reasonable time. On the other hand, if the parties communicate by telex the reasonable time involved will be shorter than it would if they communicate by letter or telegram.⁸⁵

The nature of the proposed contract must be considered also to determine the reasonable time allowed, as it seems clear that less time is required to decide in favor of accepting a proposition to enter a gratuitous contract for the benefit of the offeree, than is required to weigh the advisability of entering an onerous or aleatory contract where the offeree's acceptance will bind him to render a performance. The

82. See *W. M. Heroman & Co. v. Saia Elec., Inc.*, 346 So. 2d 827 (La. App. 1st Cir. 1977). See also 1 S. Litvinoff, *Obligations* § 142, at 264-68, in 6 *Louisiana Civil Law Treatise* (1969).

83. See La. Civ. Code art. 2055.

84. See 3 C. Toullier, *Le droit civil français* 325-26 (1833).

85. See 1 S. Litvinoff, *Obligations* § 140, at 247-50, in 6 *Louisiana Civil Law Treatise* (1969).

nature of the contractual object comes into the picture also, since an offer involving commodities subject to a rapidly fluctuating market calls for an acceptance made within a reasonable time shorter than the reasonable time needed to accept an offer involving immovable property or other things the price of which is less volatile.⁸⁶

By the same token, the reasonable time to accept an offer that invites the offeree to render services of a delicate technical nature is longer than the reasonable time to accept an offer to buy or sell consumer goods.⁸⁷ Personal features, such as the parties' profession, must not be overlooked since, for example, the reasonable time within which a merchant is expected to accept an offer that invites him to enter a contract of the kind he makes habitually is no doubt shorter than the reasonable time within which a nonprofessional person is expected to accept an offer to enter a contract of a kind he makes only exceptionally.⁸⁸ The more circumstances are known, the fairer will be the determination of what is a reasonable time within which to accept an offer surrounded by such circumstances at the time it is made.

An offeror is bound not to revoke an irrevocable offer, but only from the time that offer comes to the knowledge of the offeree, which means that, before the offeree acquires such knowledge, the offeror may revoke his irrevocable offer if he succeeds in overtaking it by a revocation sent by a faster means.⁸⁹ On the other hand, nothing prevents an offeror from qualifying an offer that specifies a time for acceptance by stating that, in spite of that specification, the offer is subject to revocation at any time.⁹⁰ It is clear, in such a case, that the offeree is not being misled into believing that he has received an irrevocable offer on which he can rely.

There is no need in Louisiana for a theoretical justification of an offeror's obligation not to revoke an irrevocable offer. That obligation is clearly a legal one, that is, an obligation that has its source in the law itself.⁹¹

The recognition given to irrevocable offers aligns the law of Louisiana with the trend followed by modern legislation in civilian and

86. *Id.*

87. See 1 S. Litvinoff, *Obligations* § 140, at 247-50, in 6 *Louisiana Civil Law Treatise* (1969).

88. *Id.* at 249.

89. See 4 J. Carbonnier, *Droit civil—Les obligations* 77 (11th ed. 1982). See also 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 150 (2d ed. 1952).

90. See 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 145-46 (2d ed. 1952).

91. See 1 S. Litvinoff, *Obligations* § 140, at 252, in 6 *Louisiana Civil Law Treatise* (1969).

also in common law jurisdictions.⁹² Nevertheless, the law of Louisiana contemplates an alternative to offers that are irrevocable.

Revocable Offer

When the offeror does not specify a period of time for acceptance, or when he does not otherwise manifest an intent to give the offeree a delay within which to accept, the offer may be revoked before it is accepted.⁹³ That rule recognizes the freedom of an offeror who is not yet bound by a contract that can be formed only when his offer is accepted. A vast portion of French doctrine asserts that, in the absence of any contrary intent of the offeror, the general principle is that an offer is revocable before it is accepted.⁹⁴ The same approach prevails at common law.⁹⁵ Under the Louisiana jurisprudence, when the offeror has given no indication, his intent of giving the offeree a period of time for acceptance should not be lightly presumed.⁹⁶

The question has been raised in French doctrine whether a revocable offer may be revoked at just *any time* before the acceptance or whether, even in such a case, what is called a *délai moral*—a sort of moral duty to keep the offer open for a short time—should always be implied. Some writers assert that the idea of an implied *délai moral* finds support in the French jurisprudence.⁹⁷ It is clear, however, that the finding of such a *délai moral* destroys the basic principle that an offer is revocable when the offeror gives no indication to the contrary.

If any unrest arises from the thought that a revocable offer may be revoked at any time before the acceptance, a more reasonable way to quiet that unrest may be found in the Louisiana law. Indeed, even when an offer is revocable the offeror may not revoke in violation of the overriding duty of good faith, nor may he evade liability when his offer has induced the offeree to rely on it to his detriment.⁹⁸

Liability For Revocation of an Irrevocable Offer

In French law, when it is concluded that an offer was intended to remain open for either a certain or a reasonable period of time,

92. For a full discussion, see 1 S. Litvinoff, *Obligations* § 140, at 252-53, in 6 *Louisiana Civil Law Treatise* (1969).

93. La. Civ. Code art. 1930.

94. See 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 150 (2d ed. 1952); A. Weill et F. Terré, *Droit civil—Les obligations* 159-60 (3d ed. 1980).

95. Restatement (Second) of Contracts § 42 (1981). Comment (a) to that section explains the inroads made into that rule by special legislation.

96. See, for example, *Wagenvoord Broadcasting, Inc. v. Canal Automatic Transmission Serv., Inc.*, 176 So. 2d 188 (La. App. 4th Cir. 1965).

97. See J. Aubert, *Notions et rôles de l'offre et de l'acceptation dans la formation du contrat* 130-32 (1970).

98. See La. Civ. Code arts. 1759, 1967.

its revocation before that time has expired renders the offeror liable without need for the offeree to show the offeror's fault, although subject to the latter's right to prove the absence of any fault.⁹⁹ The question is whether the revocation should be considered as ineffectual and the contract regarded as concluded by a timely acceptance. A negative answer has been given by French doctrine, because, as it has been said, the accord of the parties' will is wanting and, therefore, no contract can be considered as existent for the lack of its essential element.¹⁰⁰

In this view, recovery must be granted to the disappointed offeree on quasi-delictual rather than contractual grounds. That answer is not uncontroverted, however, and it has also been asserted that French courts are sovereign in their appreciation of the remedy that better befits a situation according to its own circumstances, and they may therefore hold a party to the contract whose formation he attempted to prevent by the untimely revocation of his offer.¹⁰¹

Louisiana courts do grant recovery of the full contractual benefit when offers intended as irrevocable are untimely revoked, thereby affording protection to the positive contractual interest, or expectation interest.¹⁰² In the law of Louisiana there is no need to resort to the general principle of quasi-delictual liability in order to grant recovery in situations of that kind, since the offeror's obligation not to revoke an irrevocable offer, born as a legal one, is replaced, upon the other party's timely consent, by the contractual obligation intended in the offer.¹⁰³

Thus, a contract may be formed under the law of Louisiana in spite of the dissent of one of the parties. Express language of the Louisiana Civil Code, where the Code Napoleon is silent, allows in Louisiana a solution clearer than in France.¹⁰⁴

Death or Incapacity of Parties

An offer expires by the death or incapacity of the offeror or the offeree before it has been accepted.¹⁰⁵ Classical doctrine finds justi-

99. See 3 R. Demogue, *Traité des obligations en général* 183-90 (1923).

100. See 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 153 (2d ed. 1952).

101. See H. Mazeaud, L. Mazeaud et A. Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* 151 (5th ed. 1957). See also 1 S. Litvinoff, *Obligations* § 146, at 274-76, in 6 *Louisiana Civil Law Treatise* (1969).

102. See *Ever-Tite Roofing Corp. v. Green*, 83 So. 2d 449 (La. App. 2d Cir. 1955); *Picou v. St. Bernard Parish School Bd.*, 132 So. 130 (La. App. Or. 1924).

103. La. Civ. Code art. 1928.

104. See 1 S. Litvinoff, *Obligations* § 147, at 276-77, in 6 *Louisiana Civil Law Treatise* (1969).

105. La. Civ. Code art. 1932.

fication for that principle in the fact that an offer is only an expression of the offeror's will that terminates if either his life or his reason come to an end, so that the offeree has nothing to accept once either of those events has come to pass.¹⁰⁶

In spite of some warranted criticism the principle still prevails in modern law.¹⁰⁷ It can be said, thus, that offers are not heritable, nor, for that matter, can they be assigned.¹⁰⁸ Concerning juridical persons where offers are involved, termination of a legal entity has the same effect as the death of a natural person.¹⁰⁹

In the case of death of the offeror the principle can be readily applied since death is a fact that can be established without great difficulty. In the case of incapacity, instead, some distinctions must be made. If the incapacity is caused by insanity that results in interdiction, the principle can be readily applied, again, because of the lack of difficulty in ascertaining the fact of interdiction.

Thus, if the offeror is interdicted after making the offer but before it is accepted, the offer expires and the offeree may no longer accept. Had the offeror been interdicted prior to the moment of making it, then the offer would have been simply invalid. If the offeror, though deprived of reason, was not interdicted at the time he made the offer, then an acceptance of that offer must be regarded as valid if the offeree neither knew nor had reason to know of the offeror's incapacity.¹¹⁰

That is so because of the need of protecting those who deal with persons whose lack of capacity may be easily concealed, or is otherwise not manifest, or is difficult to recognize. The same conclusions prevail when the incapacity results from minority rather than insanity.¹¹¹

Expiration of the offer is a natural consequence of the death of the offeror or the offeree in those cases where the contract proposed in the offer would give rise to obligations that are strictly personal.¹¹² Indeed, when the contract, if concluded, would be dissolved upon death of one, or either, party, then for greater reason that contract cannot be formed when one of the prospective parties dies before conclusion of the same.

106. See A. Weill et F. Terré, *Droit civil—Les obligations* 160 (3d ed. 1980).

107. For criticism, see 1 Corbin on Contracts § 54, at 227-31 (1963); 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 160-62 (2d ed. 1952).

108. See La. Civ. Code art. 1765.

109. See 2 R. Demogue, *Traité des obligations en général* 190 (1923). See also La. Civ. Code art. 2826.

110. See La. Civ. Code art. 1925, the rule of which is here applied by analogy. See also 1 Corbin on Contracts § 54, at 231 (1963).

111. See La. Civ. Code art. 1924, the rule of which is here applied by analogy.

112. See La. Civ. Code art. 1766.

When the contract would give rise to obligations that are heritable, expiration of the offer upon death of the offeror or the offeree is more difficult to explain.¹¹³ A reason for it is traditionally found in the assumption that the offeror might not have made the same offer to, nor might the offeree have accepted the same offer from, a different person.¹¹⁴

In the case of an irrevocable offer, death or incapacity of the offeror or the offeree may occur after an acceptance has been transmitted but before it has been received. An earlier article of the Louisiana Civil Code expressly contemplated such a situation and provided that a contract is concluded in that case, as an exception to the rule asserting knowledge of the acceptance by the offeror as the moment of contract formation.¹¹⁵

The present article of the Louisiana Civil Code does not envisage such situations expressly, though without ruling out the former solution.¹¹⁶ In support of the exceptional solution classical French doctrine asserts that once the offeree declares and transmits his acceptance there is already consent of both parties.¹¹⁷ It further asserts that if no contract is formed until the offeror knows of the acceptance, that is so because the offeree may retract his acceptance or the offeror revoke his offer until that moment, but if neither retraction nor revocation occurs before reception of the acceptance, even after death or incapacity of either the offeror or the offeree, then their will was to make a contract and that will must be respected.¹¹⁸

That reasoning is somewhat artificial. A more direct approach consists in viewing the arrival of the acceptance in destination as a duty of the offeror when the offer is irrevocable, a duty the fulfillment of which, in the case of death or incapacity, is prevented by a fortuitous event.¹¹⁹ Be that as it may, prompt action in good faith by heirs or curators may favor a different solution, according to the circumstances of each particular case and the nature of the contract involved.¹²⁰

113. See La. Civ. Code art. 1765.

114. 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 161-62 (2d ed. 1952); 1 S. Litvinoff, *Obligations* § 145, at 272-73, in 6 *Louisiana Civil Law Treatise* (1969).

115. La. Civ. Code art. 1810 (1870). See also 1 S. Litvinoff, *Obligations* § 162, at 303, 6 *Louisiana Civil Law Treatise* (1969).

116. See La. Civ. Code art. 1932 and comment thereto.

117. See 3 C. Toullier, *Le droit civil français* 326 (1833). See also 4 C. Aubry et C. Rau, *Cours de Droit civil français* 308 (La. St. L. Inst. trans. 1965); 1 L. Larombière, *Théorie et pratique des obligations* 17-19 (1885).

118. 1 L. Larombière, *Théorie et pratique des obligations* 19 (1885).

119. See La. Civ. Code arts. 1873, 1875.

120. 2 R. Demogue, *Traité des obligations en général* 192 (1923).

*Offer of Reward Made to the Public**Nature*

Unlike the case of advertisements in newspapers, handbills and other means of mass communication, there is no dispute concerning the binding force of an offer of reward made to the public.¹²¹ In French doctrine opposing views have been expressed on that matter. Some writers assert that the public offer of a reward is an offer to enter a contract with a person who is not determined at the time the offer is made, or, in other words, an offer to make a contract with whomever will perform the act for which the reward is offered, a contract that comes into existence upon the rendering of that performance.¹²²

Other writers assert that a party making such an offer is bound by his unilateral declaration of will rather than by a contract resulting from the performance of the act to be rewarded.¹²³ That difference in approach leads to significant differences in result. Thus, if the person who performs the act named in the offer does not know of the existence of such offer he will not be entitled to the reward, according to the supporters of the contract approach, because he could not have accepted an offer unless he knew such offer was made.

For supporters of the unilateral declaration of will approach, instead, the person who renders the requested performance is entitled to the reward regardless of his knowledge of the offer, since his right arises not from a contract but from the offeror's declaration of will. At common law the contractual approach prevails.¹²⁴ In German law, on the contrary, the conclusion obtains that a person who causes such an offer to be published is bound by the sole declaration of his will.¹²⁵

The Louisiana Civil Code has adopted the latter approach by providing that an offer of reward made to the public is binding upon the offeror even if the one who performs the requested act does not know of the offer.¹²⁶ The obligation thus created is legal, rather than contractual, in nature.¹²⁷

121. See 1 S. Litvinoff, *Obligations* §§ 148-151, at 278-89, in 6 *Louisiana Civil Law Treatise* (1969).

122. See 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 165 (2d ed. 1952).

123. See 3 R. Demogue, *Traité des obligations en général* 204, 267 (1923).

124. See 1 Corbin on *Contracts* § 64, at 264-70 (1962).

125. BGB art. 658(2); see also 1 S. Litvinoff, *Obligations* § 149, at 280-83, in 6 *Louisiana Civil Law Treatise* (1969).

126. La. Civ. Code art. 1944.

127. See comment (a) to La. Civ. Code art. 1944.

Applicability of Contract Rules

Nevertheless, as provided in the Louisiana Civil Code, the general rules of conventional obligations are applicable also to obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations.¹²⁸ That explains that the offer of a reward made to the public may be invalidated on grounds of error, as in a contractual situation.¹²⁹ It also explains that, in case of obscurity or ambiguity, the text of such offer must be interpreted against the interest of the offeror.¹³⁰ A reward may be reduced when the offeree does perform the requested act, but the performance yields a lesser result than the one expected by the offeror.¹³¹

Policy Aspects

Rewards may be offered for the performance of many kinds of acts, capturing criminals, or finding lost objects, among others. Rewards offered for the capture of escaped criminals, for information leading to the arrest, or the arrest and conviction, of criminals have given rise to the question whether a police officer who performs the requested act is entitled to the reward. The answer is negative on grounds that performance of an act which is within the scope of his professional duties does not entitle a public official to an additional reward, a conclusion sounding with clear public policy overtones.¹³²

In another perspective, it can be said that when the offeree has done only his duty the obligation of the offeror lacks a lawful cause and therefore has no effect.¹³³ A different result is reached when the act performed by a public official is not within the scope of his duties, because the policy reasons that prompt the negative answer are absent in such a case.¹³⁴ Even when an act performed by an officer is within the scope of his duties, he is entitled to keep a reward voluntarily given to him, though he would be refused the right to claim it, a conclusion that seems to be based on the existence of a natural obligation on the part of the offeror of the reward.¹³⁵

128. La. Civ. Code art. 1917.

129. See *Wallace v. Irwin*, 4 Pelt. 652 (La. App. Orl. 1921).

130. See *Salvadore v. Crescent Mut. Ins. Co.*, 22 La. Ann. 338 (1870).

131. See *Taylor v. American Bank & Trust Co.*, 17 La. App. 458, 135 So. 7 (La. App. Orl. 1931); see also *Deslondes v. Wilson*, 5 La. 397 (1833).

132. See La. Civ. Code arts. 1966, 1968.

133. See *Pillie v. City of New Orleans*, 19 La. Ann. 274 (1867).

134. See *Taylor v. American Bank & Trust Co.*, 135 So. 7 (La. App. Orl. 1931). See also La. Civ. Code arts. 1761, 1762.

135. See *Murphy v. City of New Orleans*, 11 La. Ann. 323 (1856). The conclusion prevails also that the offeror is bound only in the terms of his offer; see *Protti v.*

Revocation

An offer of reward made to the public may be revoked provided the revocation is made by the same, or an equally effective, means utilized to convey the offer, but such revocation is valid only if made before completion of the act for which the reward has been offered.¹³⁶ That is so because once the requested act is performed the legal obligation of the offeror of a reward becomes enforceable in a manner analogous to an offer that is turned into a contract through a timely acceptance.

The revocation of this kind of offer makes an exception to the general rule that a revocation is effective only upon communication to the offeree.¹³⁷ Were it not for that exception, such an offer, that may be made to the world at large, would be actually irrevocable, as the offeror could never reach the hundreds, or thousands, of people who might have learned of his offer.¹³⁸

Additional support for the reasonableness of the exception can be derived from the thought that whoever regards himself as an offeree of such an offer should be reasonably aware that if a revocation is made it would be announced by the same means as the offer or other comparable means, so that if he neglects to keep himself informed he may not complain of his disappointment. When justified by special circumstances, however, he may be allowed to invoke detrimental reliance.¹³⁹

The revocability of offers of a reward made to the public results in another exception, this time to the rule that an offer that can be accepted only by a completed performance may not be revoked, once the offeree has commenced to perform, for the reasonable time necessary to complete the performance.¹⁴⁰ Thus, in the absence of special circumstances, such an offer of reward is essentially revocable even after any member of the public at large has commenced to perform.¹⁴¹

Were it not for that exception, the offeror would remain bound even if the need that prompted the offer has disappeared, which would discourage the making of such offers. Taking into account that offers of that kind, either through the stimulation of social solidarity or the promotion of commerce, are beneficial to the community, the exception

American Bank & Trust Co., 179 La. 39, 153 So. 13 (1934); but see *Jones v. Fowler*, 185 So. 40 (La. App. Orl. 1938).

136. La. Civ. Code art. 1945. See also *Murphy v. City of New Orleans*, 11 La. Ann. 323 (1856).

137. See La. Civ. Code art. 1938.

138. See 1 S. Litvinoff, *Obligations* § 150, at 284, in 6 *Louisiana Civil Law Treatise* (1969).

139. *Id.* at 285 and comment (c) to La. Civ. Code art. 1945.

140. See La. Civ. Code art. 1940.

141. See 1 S. Litvinoff, *Obligations* § 149, at 281, in 6 *Louisiana Civil Law Treatise* (1969).

is justified. As a consequence of the exception, the withdrawal of the offer, if timely made, does not give a right to recover damages to a person who has incurred expenses in preparation of performance.¹⁴²

Nevertheless, as in the case of any other offer, the power to revoke may be waived by the offeror either expressly or by implication.¹⁴³ Thus, when a period of time has been specified for the performance of the requested act, it should be presumed that the offeror renounced his right to revoke.¹⁴⁴ A revocation communicated to a person in particular is effective only as to that person.¹⁴⁵

Performance by Several Persons

When several persons have performed the requested act, the reward belongs to the first one who gives notice of his completion of performance to the offeror.¹⁴⁶ This is a general, and flexible, rule that must be adapted to special circumstances. Thus, if notice is given at the same time by more than one person, they should share the reward.¹⁴⁷ If several persons have contributed to the success of the requested undertaking, as when a criminal is captured by more than one person or as the result of information given by more than one person, it is fair to divide the reward among them having regard to the degree of each participant's contribution to the desired result.¹⁴⁸

Nevertheless, the terms of the offer, or the nature of the requested act, may be such that a full reward can be earned by more than one person.¹⁴⁹ That is the case when a benefit is offered publicly to whomever contracts a certain disease in spite of having submitted to a certain treatment, or free passage is offered to whomever has travelled a certain number of times with the same carrier.¹⁵⁰ In situations of that sort all

142. See L. Enneccerus-H. Lehmann und Schuldrecht, Lehrbuch des Bürgerlichen Rechts 677 (1958).

143. See 1 S. Litvinoff, Obligations § 149, at 281, in 6 Louisiana Civil Law Treatise (1969).

144. See La. Civ. Code art. 1928.

145. See L. Enneccerus-H. Lehmann und Schuldrecht, Lehrbuch des Bürgerlichen Rechts 677 (1958). Also 1 S. Litvinoff, Obligations § 149, at 281, in 6 Louisiana Civil Law Treatise (1969).

146. La. Civ. Code art. 1946.

147. See 1 S. Litvinoff, Obligations § 149, at 282, in 6 Louisiana Civil Law Treatise (1969). See also BGB art. 659.

148. See 1 S. Litvinoff, Obligations § 149, at 282, in 6 Louisiana Civil Law Treatise (1969). See also *Protti v. American Bank & Trust Co.*, 179 La. 39, 153 So. 13 (1934), where the trial court arrived at that solution. The supreme court reversed on other grounds. See also *Taylor v. American Bank & Trust Co.*, 135 So. 7 (La. App. Orl. 1931).

149. La. Civ. Code art. 1946.

150. See, e.g., *Johnson v. Capital City Ford Co.*, 85 So. 2d 75 (La. App. 1st Cir. 1955). See also *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (C.A. 1893).

those who fulfill the named condition are entitled to the offered reward.

Contests

The promotion of a contest among members of the public, though it involves a reward and is usually made through means of mass communication, must be distinguished from the mere offer of a reward made to the public, as the prize is not promised to anyone who will perform a certain act, but only to those who, in the first place, enter the contest and, in the second, qualify to be awarded the prize.¹⁵¹ Thus, the person entering a contest is in the same position as one accepting an offer, thereby creating a binding contract that entitles him to the prize or reward if he fulfills all the requirements of the offer as advertised.¹⁵²

A contest, in other words, is contractual in nature and should therefore be governed by the general rules of contract. If a term for entering the contest is named in the public notice, the offer must be deemed irrevocable.¹⁵³ In case of dispute, the rules of the contest must be interpreted against the party who prepared them, with contractual stipulations in general.¹⁵⁴ Cancellation of the contest without the consent of the contestants amounts to a breach that entitles them to recover damages.¹⁵⁵

THE ACCEPTANCE

Acceptance and Offer

Several references to the acceptance have already been made in the preceding discussion of the offer. That is unavoidable, since "offer" and "acceptance" are not only correlative terms but also correlative acts in the process of communication between contracting parties. Any attempt to discuss those two acts as entirely separate is somewhat artificial, though justifiable for analytical purposes. With that in mind the following sections are focused on some questions raised by the offeree's response to the offeror.

151. See 1 S. Litvinoff, *Obligations* §§ 149, 151, at 282, 289, in 6 *Louisiana Civil Law Treatise* (1969).

152. See *Schreiner v. Weil Furniture Co.*, 68 So. 2d 149 (La. App. Orl. 1953); *Youngblood v. Daily & Weekly Signal Tribune*, 131 So. 604 (La. App. 2d Cir. 1930).

153. La. Civ. Code art. 1928. See also 1 S. Litvinoff, *Obligations* § 149, at 282, in 6 *Louisiana Civil Law Treatise* (1969).

154. La. Civ. Code art. 2057. See also *Schreiner v. Weil Furniture Co.*, 68 So. 2d 149 (La. App. Orl. Cir. 1953).

155. See *Youngblood v. Daily & Weekly Signal Tribune*, 131 So. 604 (La. App. 2d Cir. 1930).

Manner and Medium

As the offeror has control of the offer he may name a special manner for the offer to be accepted. When that is the case, an offeree who wants to accept must do it in the manner prescribed in the offer.¹⁵⁶ Absent such a prescription, an acceptance may be conveyed in any reasonable manner and by any reasonable medium.¹⁵⁷ A medium or a manner of acceptance is reasonable if it is the one used for making the offer or one customary in similar transactions at the time when, and the place where, the offer is received.¹⁵⁸

Thus, an express acceptance is always reasonable. An implied acceptance may also be reasonable, but an acceptance made in the course of the negotiation of a different transaction, and so that the offeror may not clearly realize that the acceptance of a perhaps unrelated offer is being conveyed to him, will not be reasonable. Likewise, acceptance by letter of an offer contained in a letter is reasonable, since, in such a case, the medium is suggested by the offer itself.¹⁵⁹ Nevertheless, acceptance by written message personally delivered to the offeror rather than through the mail, or even a verbal acceptance of an offer received by mail, or a written acceptance of a verbal offer, may also be reasonable. On the other hand, if the offer is received through a fast means of communication it may not be reasonable to convey the acceptance through a slower means.

The offeree, however, may have knowledge of circumstances that call for a particular manner or medium of acceptance even in the absence of express indication or suggestion by the offeror. When that is the case, an acceptance made in another manner or by a different medium would not be effective.¹⁶⁰ Thus, even though an offer is received by mail, the offeree may know of circumstances that require a prompt acceptance by telegram. Likewise, circumstances known to the offeree may lead to the conclusion that a written message is the only reasonable manner of accepting a certain verbal offer.

In sum, as the acceptance is the expression of the offeree's consent, a declaration of his will, the general principle is that no formalities are required, a principle that recognizes only very few exceptions. Thus, an acceptance 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

156. La. Civ. Code art. 1927.

157. Id.

158. La. Civ. Code art. 1936.

159. See La. Civ. Code art. 1935.

160. See La. Civ. Code art. 1936.

the assent known in an unequivocal manner, or of implying it by necessity.¹⁶¹ In any particular case the judicial finding of an acceptance always involves a question of fact.¹⁶²

Nevertheless, when the law prescribes a certain formality for the validity of a contract, an acceptance that concludes such a contract must comply with that formality.¹⁶³ Thus, since a valid donation can be made only by authentic act, acceptance by the donee, though it need not be simultaneous with the offer, must be made by authentic act.¹⁶⁴ Likewise, since a writing is required for a valid sale of immovable property, acceptance of an offer to sell that kind of property must be made in writing in order to conclude an enforceable contract.¹⁶⁵

Communication

As the acceptance of an offer is an expression of the offeree's consent, a declaration of his will, it must be projected outside of his subjectivity in order to be effective. Indeed, a person's will has no existence at law if it is not declared and therefore not known.¹⁶⁶ Whether that will is express or implied, it must be susceptible of being known. In other words, to be effective as an acceptance a person's act must be endowed with communicability.

If express, words are always intended to convey some message to a listener or a reader. If implied in the offeree's conduct, it is known that, even in the absence of words, human action is a carrier of meaning open to the interpretation of an observer.

Two questions are relevant in connection with the acceptance. First, whether the offeree must always communicate his acceptance to the offeror. Second, whether the acceptance is effective only when communicated to the offeror. In search of answers it must be realized here again that the offeror has control of his offer, and he may therefore state that he will be bound only upon learning of the acceptance, or that he will be bound as soon as the offeree does whatever he is requested to do and even before the offeror learns of that performance, which amounts to a waiver of communication of ac-

161. See 1 S. Litvinoff, *Obligations* § 154, at 292, in 6 *Louisiana Civil Law Treatise* (1969).

162. See 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 158 (2d ed. 1952). Also 2 R. Demogue, *Traité des obligations en général* 150 (1923).

163. La. Civ. Code art. 1927.

164. La. Civ. Code arts. 1536, 1540.

165. La. Civ. Code art. 2440. See also *Barchus v. Johnson*, 151 La. 985, 92 So. 566 (1922).

166. 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 108 (2d ed. 1952).

ceptance.¹⁶⁷ When the offeror does not state any particular wish, quite exceptionally the law presumes an acceptance in certain instances. Thus, the acceptance of a remission of debt is always presumed unless the obligor rejects the remission within a reasonable time.¹⁶⁸

Also to be considered in the context of those questions is whether the parties are negotiating face to face or at a distance. If they are face to face the case may be that the offeror makes a verbal offer to the offeree, or delivers to him a written offer, and allows him a delay to accept, a situation that from the viewpoint of the acceptance does not differ from one where the parties are at a distance. If no delay is named, however, then it is generally understood that an acceptance must be given before the parties separate, lest the offer be regarded as having expired.¹⁶⁹

If an acceptance follows the offer while the parties are still together, it is clear that the offeror will receive it, as communication of the acceptance seems to be involved in the natural process of interaction between parties immersed in such a situation. The same principles obtain if the parties are negotiating by telephone.¹⁷⁰ That conclusion should be extended to other means of instantaneous communication.¹⁷¹

When the parties are at a distance and communicate through the mail or other means that does not allow instantaneous communication, there is more than one moment at which the offeree's consent expressed in an acceptance may be regarded as having the finality necessary to conclude a contract, as described below.

Parties at a Distance and Time of Contract Formation

Several theories have been advanced in French law concerning the moment of contract formation when the parties are at a distance and communicate by mail. The first one, the *declaration* theory, in its most orthodox version sees the contract formed at the moment the internal

167. La. Civ. Code art. 1927. See also *Ryder v. Frost*, 3 La. Ann. 523 (1848). See also *Travelers Indem. Co. v. Ducote*, 380 So. 2d 10 (La. 1980), where a waiver of the communication of the acceptance was found in a situation involving a contract of guaranty; 1 S. Litvinoff, *Obligations* § 166, at 305-07, in 6 *Louisiana Civil Law Treatise* (1969), for other aspects of this particular area; and *Guaranty Bank & Trust Co. v. Associate Pipe Serv., Inc.*, 476 So. 2d 1065 (La. App. 3d Cir. 1985).

168. La. Civ. Code art. 1890.

169. See 1 S. Litvinoff, *Obligations* § 154, at 294-95, in 6 *Louisiana Civil Law Treatise* (1969). Also 2 R. Demogue, *Traité des obligations en général* 150 (1923).

170. 1 S. Litvinoff, *Obligations* § 154, at 294-95, in 6 *Louisiana Civil Law Treatise* (1969).

171. Such as, for example, interconnected computers. For an example of a contract concluded by telex, see *Onaway Transp. Co. v. Offshore Tugs, Inc.*, 695 F.2d 197 (5th Cir. 1983).

will of the acceptor is generated in his mind. Such orthodox views are tempered in another and perhaps more realistic version according to which it is only upon the *expression* of the acceptor's will that a contract is formed. It has been said, thus, that the writing of a letter suffices as an expression of will and that the subsequent process of addressing and mailing it is not of the essence of the declaration of will, though it is something that regularly takes place according to usage or even habit.¹⁷²

The second theory considers the contract formed at the moment of *transmission*, that is, when the party who accepts parts with the letter containing the acceptance. It has been said that until that moment the will of the offeree is nothing but a purpose in his mind, but that the letter belongs to the addressee from the moment of transmission.¹⁷³

Both theories, *declaration* and *transmission*, are based on the general concept of the autonomy of the will. There is a contract at the moment two wills exist since at that moment there is consent.

According to the third theory it is only upon *reception*, that is, when the message of acceptance reaches the offeror, that the acceptance can be regarded as made and a contract thereby formed.¹⁷⁴ In this conception, if a letter of acceptance is lost in the mail there is no contract.¹⁷⁵ It is not material, however, that the offeror read the letter of acceptance. Thus, if that letter arrives in its destination in proper time, but the offeror is not there then so that the letter only reaches his hands after the offer has expired, a contract is nevertheless formed.¹⁷⁶

The fourth, known as the *knowledge* theory, considers the contract formed only at the moment the offeror actually learns of the acceptance, a view supported by the assertion that the mere existence of two wills does not suffice, as the real accord of two wills requires reciprocal communication.¹⁷⁷ That theory has been criticized because it does not seem to recognize the effectiveness of a tacit acceptance, nor does it account for situations where the offeror waives the communication of acceptance or simply takes the acceptance for granted. It has been criticized also because it seems to make impossible the formation of

172. See 4 C. Aubry et C. Rau, Cours de Droit civil français 308 (La. St. L. Inst. trans. 1965). See also 1 S. Litvinoff, Obligations § 169, at 308-09, in 6 Louisiana Civil Law Treatise (1969).

173. See 1 S. Litvinoff, Obligations § 169, at 309, in 6 Louisiana Civil Law Treatise (1969).

174. See 1 S. Litvinoff, Obligations § 169, at 310, in 6 Louisiana Civil Law Treatise (1969).

175. Id.

176. See 2 R. Demogue, Traité des obligations en général 217 (1923).

177. For a detailed discussion, see 1 S. Litvinoff, Obligations § 169, at 310-11, in 6 Louisiana Civil Law Treatise (1969).

a contract by correspondence, since, if knowledge of the acceptance by the offeror is required, then knowledge by the offeree that his acceptance has been received by the offeror should also be required, and so on *ad infinitum*.¹⁷⁸

Be that as it may, the *reception* and *knowledge* theories have strong support in French doctrine for matters that are strictly civil, while the *transmission* theory is favored for matters that are commercial, according to the traditional continental distinction.¹⁷⁹

Louisiana law has adopted both, *transmission* and *reception* theories. The selection of one to govern a particular situation does not depend on whether the matter involved is strictly civil or commercial, but on whether the offer correlative of a certain acceptance is revocable or irrevocable.

Acceptance of a Revocable Offer

The acceptance of a revocable offer made in a manner and by a medium suggested by the offer, or made in a reasonable manner and by a reasonable medium, is effective once it has been transmitted by the offeror.¹⁸⁰ That is so, provided of course that neither the offer nor the law contains a different prescription.¹⁸¹

The reason for this rule is that when an offer is revocable according to the pertinent provision of the Louisiana Civil Code, the offeree is left in a fragile position.¹⁸² Indeed, such an offer may effectively be revoked any time before the offeree accepts it. By making the acceptance of such an offer effective upon transmission, the law affords protection to an offeree in that position, because, by allowing him to rely on the assumption that a contract is formed at a moment earlier than the moment of reception by the offeror, the period of fragility is reduced.¹⁸³

The risk of transmission is thus placed on the offeror, that is, a contract is formed upon the mailing of a letter of acceptance by the offeree, even if the letter is lost in the mail and therefore never reaches the offeror.¹⁸⁴ Feelings that such a solution may be harsh for the offeror, who may find himself bound by a contract the conclusion of which he never learned, can be appeased by the thought that if the

178. See 2 A. Colin et H. Capitant, *Cours élémentaire de droit civil français* 38 (10th ed. 1953).

179. See 6 M. Planiol & G. Ripert, *Traité pratique de droit civil français* 188-93 (2d ed. 1952).

180. La. Civ. Code art. 1935.

181. Id. See also *supra* text pp. 723-24.

182. La. Civ. Code art. 1930. See also comment (b) to La. Civ. Code art. 1935.

183. Comment (b) to La. Civ. Code art. 1935.

184. Id.

offeror wants the advantage of making his offer revocable, then it behooves him to inquire whether his offer has been accepted in order to avoid the unpleasant surprise of being presented with a contract formed without his knowledge.

If the offeror has transmitted a message of revocation at the time the offeree transmits his acceptance, a contract is nevertheless formed, since a revocation is not effective until received by the offeree.¹⁸⁵

Whether an act of the offeree constitutes an effective transmission of acceptance is a question to be answered in the light of circumstances surrounding a particular situation.¹⁸⁶ The traditional model for an effective transmission is the mailing of a letter. Other acts that conform to that model are the sending of a telegram or the delivery of a letter to a recognized carrier other than the official post office. In the context of this question, rather than indulging in fruitless inquiry into whether a message can be retrieved once it has been delivered to a carrier, it is more reasonable to conclude that any act of the offeree is an effective transmission when it reveals a clear intention of putting across a message of acceptance to the offeror. Usages and business practices must be considered to arrive at a conclusion in a given situation.¹⁸⁷

It is now possible to conclude that when the parties are negotiating at a distance and the offer is revocable, in the absence of any provision to the contrary either in the offer or the law, the offeree must endeavor to communicate his acceptance to the offeror, but an *attempt* to communicate suffices in that case. In other words, once the offeree has done whatever is reasonable and customary for his message of acceptance to start in the direction to the offeror, the acceptance of a revocable offer is effective, and therefore a contract is formed.¹⁸⁸

Acceptance of an Irrevocable Offer

If the offer is irrevocable, the acceptance is effective when received by the offeror.¹⁸⁹ Here again, if the offeror has named a particular medium through which the acceptance is expected to be conveyed, the offeree must follow that prescription, and his acceptance will be effective only when received by the offeror through that medium. In the absence of such an indication by the offeror, the acceptance is effective when received by him through any reasonable medium, provided, of course, it is received within the time during which the offer is irrevocable.¹⁹⁰

185. La. Civ. Code art. 1937.

186. See comment (c) to La. Civ. Code art. 1935.

187. *Id.*

188. La. Civ. Code art. 1935.

189. La. Civ. Code art. 1934.

190. See La. Civ. Code art. 1929.

The reason for that rule is that, when the offer is irrevocable, it is the offeror who finds himself at a disadvantage. Indeed, he is bound by the law not to revoke the offer upon the sole declaration of his will, which leaves him, so to say, at the mercy of the offeree, who may speculate on the advantage of accepting or not while the offeror is bound for a time even though circumstances subsequent to the offer show that the contract would no longer be advantageous for him.¹⁹¹

Consistent with the policy of protecting the party in a more fragile position, here the law protects the offeror by prescribing that the acceptance must be received by him for a contract to be formed. That places the risk of transmission on the offeree, so that if his letter of acceptance is lost in the mail there is no effective acceptance and therefore no contract. The offeror, thus, is sheltered against the surprise of a contract formed without his knowledge.

Though it is quite clear that a written acceptance is received when it comes to the hands of the offeror or is otherwise in his possession, that is not the only manner in which the reception of an acceptance can occur.¹⁹² Thus, an acceptance is received when it comes into the possession of a person authorized by the offeror to receive it, or when it is deposited in a place the offeror has indicated as the place where communications of that kind are to be deposited for him.¹⁹³

The connection between the *reception* theory and irrevocable offers is consistent with the Louisiana legal tradition.¹⁹⁴ It is also favored in continental law.¹⁹⁵

Overtaking the Acceptance With a Rejection

After having sent a message of acceptance, an offeree might change his mind and try to overtake the acceptance by sending a rejection through a faster means. The question then is whether such overtaking is legally possible.

To answer that question, here again, it is necessary to inquire whether the offer, to which the overtaken acceptance was given, is irrevocable or revocable. If that offer is irrevocable the conclusion must be that it is possible to overtake the acceptance with a rejection. That is so because both acceptance and rejection are effective only

191. See comment (b) to La. Civ. Code art. 1935.

192. La. Civ. Code art. 1938.

193. *Id.*

194. See La. Civ. Code arts. 1802 (1870), 1809 (1870). See also 1 S. Litvinoff, *Obligations* §§ 161-166, at 302-07, in 6 *Louisiana Civil Law Treatise* (1969).

195. See comment (b) to La. Civ. Code art. 1935.

upon reception by the offeror, which rule compels the giving of validity to that intent of the offeree which is communicated first.¹⁹⁶

Since the offeror must wait to receive an acceptance for his irrevocable offer to ripen into a contract, he is not prejudiced by the conclusion that an overtaking rejection is effective. Indeed, he is in no worse position than when his offer expires for the lapse of the pertinent period without having received any reply from the offeree. On the other hand, there is nothing the offeror would have been warranted in doing toward performance of the contract before receiving an acceptance.

Should the offeror receive an acceptance and a rejection at the same time, it behooves him to check the date of each message in order to ascertain the latest intent of the offeree, in compliance with the overriding obligation of good faith.¹⁹⁷

If the offer is revocable the situation is quite different, since the acceptance is then effective upon transmission, which means that any later rejection could become effective only after the acceptance has become effective. Since a contract is formed as soon as the acceptance is transmitted, such later rejection, quite simply, can have no effect whatsoever.¹⁹⁸ That conclusion could be objected to on grounds of unpersuasiveness, as it would seem that the offeror would have nothing to lose if the right conclusion were exactly the opposite. That is not so, however.

If the offeree of a revocable offer were allowed to overtake his acceptance with a rejection, it would be very simple for every offeree always to accept first, thereby gaining time to speculate on the advantages of the offer, since he could always effectively reject later just by using a faster means. The offeree would be turning the revocable offer into a veritable option, or at least into an option irrevocable for some time, in total disregard of the offeror's intent, a practice that should not be condoned.¹⁹⁹

Thus, an offeror who receives first a rejection, and later an acceptance transmitted before the rejection was received, should be allowed to enforce the contract concluded upon transmission of the acceptance. Should the offeree change his mind a second time, however, he may not be allowed to claim that there is a contract in spite of his overtaking rejection, unless the offeror consents. A contrary so-

196. See 1 S. Litvinoff, *Obligations* § 179, at 330, in 6 *Louisiana Civil Law Treatise* (1969).

197. La. Civ. Code art. 1759.

198. See La. Civ. Code art. 1935.

199. See comment (b) to La. Civ. Code art. 1933.

lution would permit the offeree to benefit from his own turpitude, which runs counter to a fundamental principle of law.²⁰⁰

In sum, a rejection received after the acceptance of a revocable offer has been transmitted amounts to an offer from the offeree to dissolve the contract already concluded, an offer which the original offeror is of course free to accept or reject.

Overtaking of a Rejection by an Acceptance

Likewise, after having sent a message of rejection, an offeree might change his mind and try to overtake the rejection by sending an acceptance through a faster means. Here again, the question is whether such overtaking is legally possible.

Where such a situation is present, the solution is the same whether the offer is irrevocable or revocable, though the reasons are not identical in one and the other case.

When the offer is irrevocable, both acceptance and rejection are effective upon reception by the offeror.²⁰¹ That being the case, it is quite natural to conclude that effect must be given to the message that arrives first. For that reason, if the offeror receives an acceptance, a rejection that arrives later, though transmitted before the acceptance, does not prevent the formation of a contract.

When the offer is revocable, the acceptance is effective upon transmission, but the rejection is effective only upon reception.²⁰² Quite clearly, an acceptance that is received before a rejection is received must have also been transmitted before the rejection was received, and, here again, the law recognizes as final the first message that becomes effective. That is not all, however. To conclude that there is a contract in such a case is consistent with the parties' intent—the offeree's, because in spite of an earlier rejection he now wants to accept, and the offeror's, because the fact that he did not make an effective revocation clearly shows that he expected an acceptance of his revocable offer.

Whether the offer is revocable or irrevocable, if the offeree's attempt to overtake fails so that his acceptance is received after reception of the rejection, that untimely acceptance must be regarded as a counteroffer.²⁰³ In other words, the offeror is not free in such a

200. See 2 S. Litvinoff, *Obligations* § 94, at 168, in 7 *Louisiana Civil Law Treatise* (1975). For solutions recommended at common law, see *Restatement (Second) Contracts* § 40 (1981) and comments and illustrations thereto.

201. La. Civ. Code arts. 1934, 1938.

202. La. Civ. Code arts. 1935, 1938.

203. It can be said that such an acceptance is not in accordance with the terms of the offer, which makes La. Civ. Code art. 1943 applicable by analogy.

case to choose between the acceptance and the rejection without more. If he still wants a contract to come into existence he must now proceed to accept the counteroffer.

Acceptance by Performance

When the offer requires an express acceptance the offeree may not accept in a different manner. Even when the offer does not so require, the offeree may choose, or may deem it more orderly, to make an express acceptance. In either case, when the intended contract is bilateral and commutative, the acceptance, directly or indirectly, expresses the offeree's promise to render the performance the offeror has requested in return for his own.²⁰⁴ Even when the intended contract is unilateral and gratuitous, an express acceptance entails the offeree's promise at least to receive the benefit offered to him.²⁰⁵ For that reason such an acceptance is actually a promissory acceptance.

In some instances, however, the offeror may not be interested in a promissory acceptance and may instruct the offeree to indicate his acceptance by acts other than words. On the other hand, when the offeror does not request any particular manner of acceptance, the offeree may choose to go ahead and render the performance requested in the offer, without making a promissory acceptance. In either case performance by the offeree is an effective acceptance.²⁰⁶

When the offer is revocable and the requested performance is such that it cannot be instantaneously rendered, the question is whether the offeror may still revoke once the offeree has commenced, but has not yet completed, the performance. The answer is that when an offeror invites an offeree to accept by performance, and, according to usage, or the nature or the terms of the contract, it is contemplated that the performance will be completed if commenced, a contract is formed when the offeree begins the requested performance.²⁰⁷ Indeed, that offeror is inducing the offeree to rely on his own—the offeror's—promise and cannot ignore that the offeree may reasonably so rely. It would be unfair, therefore, to allow the offeror to revoke the offer in such a situation, once the offeree has commenced to perform relying on the offeror's promise, a conclusion consistent with a more general principle of the Louisiana law.²⁰⁸

For that purpose, however, the offeree's intent must be to complete the performance he has commenced. Since he made no promise to that effect, because his acceptance is not express, it must be shown that

204. See La. Civ. Code arts. 1908, 1911.

205. See La. Civ. Code art. 1910.

206. La. Civ. Code art. 1927.

207. La. Civ. Code art. 1939.

208. See La. Civ. Code art. 1967.

the intent to finish was implied in the act of starting. Such a showing can be made in the light of usages, as when the general and well known practice in a certain trade or a certain community is for persons to complete the work they start or the services they commence to render.²⁰⁹ It can be made also in the light of the nature of the contract, when that nature is such that the offeree cannot fail to realize that if he starts to perform the offeror will expect him to complete the performance started.²¹⁰ Likewise, that intent may be shown in the light of the terms of the intended contract, as, for example, when the offer has named a time for completion or delivery of a finished product, or clearly stated that commencement of performance by the offeree would amount to a promise to complete that performance.²¹¹

When that is the offeree's intent, a contract is formed when he begins to render the requested performance, and, quite clearly, the offeror may no longer revoke his offer. Since that contract is bilateral, a promise is implied in the offeree's action, and he is now bound to complete the performance he has started. Should he fail to complete that performance, he would then be liable for damages.

The same solution should obtain if the offer, rather than inviting the offeree to accept by performance, invites acceptance either by promise or performance or is silent concerning the manner of acceptance, and the circumstances are such that performance is a reasonable manner of acceptance.²¹²

The law of Louisiana is thus consistent with the traditional civilian approach.²¹³ At common law, attempts were made to find solutions using as a tool the notion of "unilateral contract"—common law style—which has now been abandoned because of its doubtful utility.²¹⁴ It can be said that, at the present time, the solution recommended at common law is similar to the Louisiana solution.²¹⁵

Acceptance Only by Completed Performance

The situation just discussed must be distinguished from another where, according to usage, or the nature or the terms of an intended

209. See La. Civ. Code art. 1939.

210. *Id.*

211. See La. Civ. Code art. 1939.

212. See *Ever-Tite Roofing Corp. v. Green*, 83 So. 2d 449 (La. App. 2d Cir. 1955); *Johnson v. Capital City Ford Co.*, 85 So. 2d 75 (La. App. 1st Cir. 1955). See also *Critcher v. Southland Life Ins. Co.*, 440 So. 2d 887 (La. App. 2d Cir. 1983); *Automated Personnel Int'l v. Thomas*, 293 So. 2d 669 (La. App. 4th Cir. 1974).

213. See 1 S. Litvinoff, *Obligations* § 97, at 160, in 6 *Louisiana Civil Law Treatise* (1969).

214. See Restatement (Second) of Contracts § 1 (1981), reporter's note on comment f.

215. See Restatement (Second) of Contracts § 62 (1981).

contract, only a completed performance can be regarded as acceptance of the offer.²¹⁶ That is the case, for example, when compensation is offered to a scientist in return for the rendering of an extraordinary service, such as finding a cure for a certain illness, where it is clear that only a full performance will satisfy the interest of the offeror and will therefore qualify the offeree to obtain whatever the offeror has promised in return. That is also the case when the offeror is doubtful of the offeree's seriousness, or of his willingness to render a full performance, as when a large sum is offered to a whimsical or eccentric artist for a finished work of art.

The relevant feature of situations of that kind is an element of uncertainty or doubt. In the case of the scientist, he cannot bind himself by a promise to produce the expected result, because he cannot be certain that his efforts will succeed. In the case of the eccentric artist, his promise would not be trusted by the offeror. For that reason, in situations of that sort the offer allows the offeree either to fail, or to desist, once he starts to perform, without making himself liable for damages, because the intended contract does not come into existence until the offeree renders a completed performance.²¹⁷

A mere commencement does not imply a promise to complete the performance in situations of that kind. The offeree's freedom to desist, however, is still subject to the overriding obligation of good faith in the light of which he should not desist arbitrarily for the purpose of causing injury to the offeror.²¹⁸ Nevertheless, though the offeree is not bound to complete the performance, it is clear that if he starts it he does so in reliance on the offeror's promise, for which reason it would be unfair to allow the offeror to revoke his offer once the offeree has commenced to perform.

In a clear attempt to protect the different interests involved, the rule contained in the Louisiana Civil Code provides that, when according to usage, the nature of the contract, or its own terms, an offer made to a particular offeree can be accepted only by rendering a completed performance, the offeror cannot revoke the offer, once the offeree has begun to perform, for the reasonable time necessary to complete the performance.

The offeree is not bound, however, to complete the performance he has begun.²¹⁹ The offeror is properly protected, as his own duty to perform is conditional on completion or tender of the counterperformance he has requested.²²⁰ Thus, the situation is analogous to an

216. See La. Civ. Code art. 1940.

217. *Id.*

218. See La. Civ. Code art. 1759.

219. La. Civ. Code art. 1940.

220. *Id.*

option contract where the offeror is bound not to revoke the offer for a period of time while the offeree is free to accept or not.²²¹ That sort of option contract comes into existence as soon as the offeree begins to perform.

The Louisiana rule clearly limits its application to situations where the offer that can be accepted only by completed performance is made to a person in particular.²²² Different principles are applicable if such an offer is made to the public at large.²²³

The question of the reasonable time the offeree is allowed to complete the performance he has commenced is to be answered in the light of the nature of that performance and also in the light of the circumstances surrounding the situation.²²⁴

The rule here discussed is relevant when the offer, for the lack of indication to the contrary, is revocable at least until the offeree begins to render the requested performance. The offeror, however, may make that kind of offer irrevocable, in which case it will be so by its own terms and not because of the rule.²²⁵ Even then, if the time named by the offeror is not reasonable for completion of the performance, once the offeree begins to perform the offer remains irrevocable for the time necessary for that purpose, even though longer than the one named by the offeror.

Notice of Commencement of Performance

When the parties are at a distance so that the offeror cannot immediately learn whether performance has been started by the offeree, the latter must give the offeror prompt notice that he has commenced to perform.²²⁶ That is so whether that commencement either constitutes acceptance or makes the offer irrevocable for a reasonable time.²²⁷ Nevertheless, the offeree need not give such notice in all situations. Thus, notice would not be required where the offeror should know that performance by the other party has begun, as, for example, when because of prior dealings the practice between the parties is for the offeree to accept unless he expressly rejects, or when the offeror has stated—or it is the practice between the parties—that he would call on the offeree to find out whether performance has begun.

221. See 1 S. Litvinoff, *Obligations* § 97, at 161, in 6 *Louisiana Civil Law Treatise* (1969). See also La. Civ. Code art. 1933.

222. See La. Civ. Code art. 1940.

223. See La. Civ. Code art. 1945. See also *supra* text pp. 720-21, *infra* text p. 745.

224. See *supra* text pp. 711-14.

225. See La. Civ. Code art. 1928.

226. La. Civ. Code art. 1941.

227. *Id.* See also La. Civ. Code arts. 1939, 1940.

Such notice is not a requirement for the formation of the contract in one case or the irrevocability of the offer in the other, but rather a part, or a complement of the offeree's performance. In other words, if the offeree fails to give notice of commencement of performance, the offeror is still bound and the promise contained in his offer is still enforceable by the offeree, but the latter would be liable for whatever damages the offeror might have sustained because of the lack of notice.²²⁸

Thus, if the offeror has incurred expenses in preparation of entering a contract with another party in the belief that the offeree, who failed to give notice, is not interested in the offer, the offeree would be liable for those expenses by way of damages. On the other hand, should the offeror revoke the offer once the offeree has begun to perform without advising the offeror, a notice by the offeree given at that moment would render the revocation ineffective.²²⁹

Acceptance by Silence

Since silence may be an adequate vehicle for consent, an acceptance can be made in that manner. That is exceptional, however. That kind of acceptance can occur only when, because of special circumstances, the offeree's silence leads the offeror to a reasonable belief that a contract has been formed.²³⁰ Situations of that kind have been discussed in greater detail elsewhere.²³¹

Acceptance Must Conform to the Offer

In general terms, an effective acceptance must be in accordance with the terms of the offer, since no concurrence of the parties' consent would be present otherwise. That is why an acceptance not in accordance with the terms of the offer is not valid as such but only as a counteroffer.²³²

The reasonable limitations of that general principle should be properly understood. Indeed, in the civilian tradition each contract in particular is subject to a detailed regulation in the Civil Code so that the law itself provides those terms that, in matters of detail, were not in

228. La. Civ. Code art. 1941.

229. Though no Louisiana decisions are clearly on point, *Ever-Tite Roofing Corp. v. Green*, 83 So. 2d 449 (La. App. 2d Cir. 1955), can be used to some extent as an illustration. A good example of such a situation is provided in *Bishop v. Eaton*, 161 Mass. 496, 37 N.E. 665 (1894).

230. La. Civ. Code art. 1942.

231. See *supra* text p. 704.

232. La. Civ. Code art. 1943.

the focus of the parties' attention when they gave their consent.²³³ For that reason, the necessary accord reflected in the conformity between offer and acceptance is confined to essential terms which, for each kind of contract, are either determined by law or clarified by doctrine or jurisprudence.

Thus, in matters of sale, the contract is perfect upon parties' consent on the thing and the price.²³⁴ No contract of sale may come into existence if offer and acceptance differ on the thing or the price.²³⁵ When those essential elements are agreed upon, however, a contract of sale is formed even in the absence of any provision concerning the time for payment, term of delivery, or any other stipulation regarded as nonessential.²³⁶

Where a contract of lease is involved, the thing to be let out and the rent to be paid for its use are essential, but the lack of express stipulation concerning duration or time when the rent is due does not render ineffective the parties' consent to the essential contractual elements.²³⁷ Even when the suppletive law contained in the civil code is silent as to a particular term, the parties' intent concerning that term may be uncovered through the general rules on interpretation of contracts.²³⁸

Nevertheless, the absence of an express stipulation of the parties on a certain point must be clearly distinguished from their disagreement on that point, even if apparently nonessential. That is so because if the offer, besides the essential terms, also contains matters of detail, in order to be effective the acceptance must comply with all terms in the offer, whether essential or not.²³⁹ If the acceptance limits, conditions or modifies the offer, it is itself considered a new offer and gives the one who made the original offer the right to withdraw it.²⁴⁰

233. Titles VI through XX of Book III of the Louisiana Civil Code follow that tradition. See Garro, *Codification Technique and the Problem of Imperative and Suppletive Laws*, 41 *La. L. Rev.* 1007, 1012 (1981).

234. *La. Civ. Code art.* 2439.

235. Cf. *Haymon v. Holliday*, 405 So. 2d 1304 (La. App. 3d Cir. 1981), where, upon a careful interpretation of the parties' intent, the court reached the conclusion that a difference of less than one percent in the price could not defeat the parties' consent to be bound.

236. See 1 S. Litvinoff, *Obligations* § 184, at 335, in 6 *Louisiana Civil Law Treatise* (1969).

237. *La. Civ. Code arts.* 2670, 2684-2689. See also 1 S. Litvinoff, *Obligations* § 184, at 335, in 6 *Louisiana Civil Law Treatise* (1969).

238. See *La. Civ. Code arts.* 2045, 2054. See also 2 R. Demogue, *Traité des obligations en général* 235 (1923).

239. See 1 S. Litvinoff, *Obligations* § 184, at 336, in 6 *Louisiana Civil Law Treatise* (1969); 6 M. Planiol & G. Ripert, *Traité pratique de droit civil français* 160 (2d ed. 1952).

240. *Marine Chartering (Gulf) Ltd. v. Boland Mach. & Mfg. Co.*, 273 So. 2d 316 (La. App. 4th Cir. 1973).

Consequences may differ, however, according to the moment at which the lack of conformity between offer and acceptance is noticed or alleged. If it appears when the intended contract is still executory, that is, when the parties have only exchanged messages that purport to convey their consent, a properly shown lack of conformity must lead to the conclusion that no contract has been formed, unless special circumstances indicate that the lack of conformity is only apparent. If it appears once performance by either party, or both, has started, the more reasonable conclusion may be that the intent of the parties was to be bound by a contract, and that either the offeror consented to the terms of the acceptance that differed from the offer, or that both parties understood that the suppletive law would apply in lieu of their differing propositions.²⁴¹

An acceptance may contain a term that, though not in accordance with the offer, may not indicate dissent on the part of the offeree but rather a request addressed to the offeror for modification or reconsideration of the offer. Thus, if the offer is to sell a definite thing for a certain price, and the offeree clearly expresses that he accepts but adds words suggesting that a lesser price would be more reasonable, a valid acceptance occurs. The terms added by the offeree in such a case do not amount to a counteroffer, but are merely precatory and do not prevent the formation of the contract.²⁴²

Where acceptance by action is invited, or expected, its lack of conformity to the offer, though generally amounting to a counteroffer, may also amount to a breach of the intended contract.²⁴³ Thus, if an order for goods is placed, the shipment of nonconforming goods by the addressee of the order may be regarded as a rejection and a counteroffer to sell the different goods.²⁴⁴ Nevertheless, when prior transactions between the parties warrant the offeror's reliance on acceptance by the offeree, the latter is under a good faith duty to give notice of rejection, or of forthcoming counteroffer, and in the absence of such notice the shipment of nonconforming goods constitutes a breach by the offeree of the contract he is then presumed to have

241. See La. Civ. Code art. 2053 and U.C.C. § 2-207(3) for examples of the emphasis modern law places on the conduct of the parties in order to ascertain their intent to be bound and their tacit election of the suppletive law to govern matters not expressly contemplated in their agreement, or matters where their words contradict their actions.

242. See *Laporte v. Howell*, 452 So. 2d 420 (La. App. 3d Cir. 1984), for an interesting example of judicial evaluation of a precatory term. See also *Lawes v. Erwin Heirs, Inc.*, in liquidation, 274 So. 2d 496 (La. App. 3d Cir. 1973), for a suggestion that it does not invalidate the acceptance wherein it is contained.

243. See 1 S. Litvinoff, *Obligations* § 186, at 339, in 6 *Louisiana Civil Law Treatise* (1969).

244. *Id.* See also U.C.C. § 2-206(b).

entered.²⁴⁵ In that kind of situation, a statement by the offeree that the nonconforming goods are shipped as an accommodation to the offeror may serve the purpose of a sufficient notice and release the offeree from contractual liability.²⁴⁶

A strict interpretation of the basic principle would require the same conformity between offer and acceptance as between an object and its reflection on a mirror. That strict interpretation may lead to unfair results, however, for the benefit of parties who might take advantage of a technicality in bad faith in order to extricate themselves from an otherwise binding contract. Likewise, a strict interpretation would allow a party to impose his own terms on the other by surprise, a recurring situation when, because of the large volume of transactions required by their business, parties utilize printed forms to make offers or acceptances.²⁴⁷

In modern enactments an erosion of the basic principle of conformity has already started and an acceptance is regarded as effective even if its terms are not in absolute accordance with the offer.²⁴⁸ In the absence of that kind of legislation, flexible interpretation can still adapt the basic principle to the needs of modern business reality.²⁴⁹

Counteroffer and Rejection

A counteroffer is a new offer addressed by an offeree to the offeror of an original offer involving the same matter and proposing terms that are different from those contained in the original offer. An offeree who makes a counteroffer reveals an intention to continue negotiating with the offeror.

A rejection is an expression of the offeree's intention not to accept the offer made to him and is effective when received by the offeror.²⁵⁰ An effective rejection puts an end to the offeree's ability to accept.²⁵¹ It can be readily understood that the offer also comes to an end when it is rejected. For that reason, an offeree who made an effective rejection may not attempt to revive the offer in order to accept it,

245. *Id.* See also La. Civ. Code art. 1942.

246. 1 S. Litvinoff, *Obligations* § 186, at 340, in 6 *Louisiana Civil Law Treatise* (1969).

247. See Apsey, *The Battle of the Forms*, 34 *Notre Dame L. Rev.* 556 (1959).

248. See U.C.C. § 2-207. See also *Restatement (Second) of Contracts* § 61 (1981).

249. See *Spiers v. Seal*, 426 So. 2d 631 (La. App. 1st Cir. 1982); *Lawes v. Erwin Heirs, Inc.*, in liquidation, 274 So. 2d 496 (La. App. 3d Cir. 1973); *Wondel v. Dixon Real Estate Co.*, 232 So. 2d 791 (La. App. 4th Cir. 1970); *Ward v. Parker*, 151 So. 2d 108 (La. App. 1st Cir. 1963).

250. La. Civ. Code art. 1938.

251. See *Worthington Constr. Co. v. Parish of Jefferson Davis*, 142 La. 659, 77 So. 492 (1918).

even if the offer is irrevocable and the rejection was made before expiration of the period of irrevocability.

A clear counteroffer, thus, is also a rejection of the original offer, and, to ripen into a contract, the counteroffer must be accepted by the original offeror.²⁵² A reply to an offer that is not an acceptance need not always be a rejection or a counteroffer. Such a reply may be a request for clarification or modification of the terms of the offer that does not amount to an expression of the offeree's intent not to accept, as when, upon an offer to sell a thing for a named price, the offeree inquires whether the offeror would take a lesser price.

That kind of reply does not extinguish the offeree's ability to accept for as long as the offer is not revoked, if revocable, or during the period of irrevocability, if irrevocable. In case of doubt, the wording of the offeree's message, the surrounding circumstances, and previous transactions between the parties may contribute to ascertain whether a reply to an offer is a counteroffer that implies a rejection, or an expression of the offeree's intent to preserve his ability to accept.

Duty to Accept

In some situations it is possible to admit the existence of a duty to accept an offer or offers.²⁵³ Thus, if a company engaged in the rendering of public services is regarded as a party that invites the public to make offers to use such services, then it is clear that such company's freedom to reject those offers is limited.²⁵⁴ A Louisiana court distinguished a "private carrier" from a "common carrier" on the basis of the former's right to refuse transportation to the general public, which by implication denies such right to the latter.²⁵⁵

The same conclusion should prevail in the case of services rendered by licensed professionals.²⁵⁶ Likewise, where public bids for governmental contracts are involved, it is possible to admit the existence of a duty to accept the lowest bid of a reliable bidder when all requirements are met.²⁵⁷ The same duty may arise also out of a preliminary contract between private parties.²⁵⁸

252. *Rodrigue v. Gebhardt*, 416 So. 2d 160 (La. App. 4th Cir. 1982). See also *Fontenot v. Huguet*, 230 La. 483, 89 So. 2d 45 (1956).

253. For a general discussion, see 1 S. Litvinoff, *Obligations* § 192, at 344-45, in 6 *Louisiana Civil Law Treatise* (1969).

254. See *supra* text p. 709.

255. See *Portier v. Thrifty Way Pharmacy*, 476 So. 2d 1132 (La. App. 3d Cir. 1985).

256. *J. Serna, Le refus de contracter* 4-7 (1967).

257. See, for example, *Grace Constr. Co. v. St. Charles Parish*, 467 So. 2d 1371 (La. App. 5th Cir. 1985).

258. 1 S. Litvinoff, *Obligations* § 192, at 344, in 6 *Louisiana Civil Law Treatise* (1969). See also La. Civ. Code art. 2462.

Public policy, or special legislation, or even a previous expression of the parties' will justifies the limitation of a party's freedom to reject offers in those exceptional situations. That limitation is also a reasonable compensation for the enjoyment of special privileges or exclusive rights granted to the parties whose contractual freedom is thusly curtailed.

THE REVISION

Consent

The revision of the Louisiana law of obligations effective since 1985 eliminated from the Louisiana Civil Code of 1870 a few provisions that, rather than rules of law, contained definitions and doctrinal assertions regarding consent.²⁵⁹ That elimination does not effect any change in the law, as conclusions identical to those contained in the repealed articles may be arrived at by reasoning from general principles or through exegesis of positive rules.

Thus, there is no need to provide, for example, that when one party proposes and the other assents either of them may request the aid of the law to enforce the contract, a conclusion that flows directly from the basic principle that makes a contract the private law of the parties.²⁶⁰ Likewise, there is no need to assert that, in the absence of a legal presumption, the answer to the question whether consent is implied in certain facts is left to the discretion of the court, a conclusion that emanates readily from the doctrine of judicial presumptions as a means of proof.²⁶¹ As noted by the Louisiana jurisprudence, a technical document such as a civil code is not a proper place for statements of that kind.²⁶²

A new article gives legislative formulation to the rule establishing the presumption that parties do not intend to be bound until a contract is executed in a certain form, whenever they contemplated that form for their contract in the absence of a legal requirement.²⁶³ That article introduces no change, since the rule it contains, though unexpressed in the Louisiana Civil Code of 1870, has always been a part of the Louisiana legal system.²⁶⁴

259. La. Civ. Code arts. 1797-1799 (1870), 1811-1816 (1870), 1818 (1870).

260. See La. Civ. Code art. 1803 (1870) and La. Civ. Code art. 1983.

261. See La. Civ. Code art. 1818 (1870) and La. Civ. Code art. 1852.

262. See *Ellis v. Prevost*, 13 La. 230 (1839). See also *In Re Atkins Estate*, 30 F.2d 761, 763 (5th Cir. 1929).

263. La. Civ. Code art. 1947.

264. See *supra* text p. 705.

In sum, concerning the general theory of consent, the revision made no changes. Either as a party's acquiescence or as accord of the parties' will, consent is a conceptual tool to analyze the parties' intent and, as such, cannot be changed.

Offer

Concerning the offer as a practical first step to establish consent, perhaps the main innovation introduced by the revision is a clear distinction between revocable and irrevocable offers. In the scheme of the Louisiana Civil Code of 1870 all offers were in principle irrevocable.²⁶⁵ Lack of clarity and precision in the pertinent rules, however, made possible the recognition of different periods of irrevocability and even made room for the disquieting proposition that an offer might be revoked after it had been accepted.²⁶⁶ That is no longer so.

The revision attempted to eliminate obscurity and also to account for the difficulties encountered by the Louisiana jurisprudence in recognizing an offer as irrevocable in the absence of conclusive proof of the offeror's intent to that effect.²⁶⁷ Now, an offer is irrevocable when it specifies a time during which it may be accepted, in which case the offer may not be revoked during that time, or when the offeror shows an intent to give the offeree a delay to accept though without naming a time, in which case the offer is irrevocable for a reasonable time.²⁶⁸

Otherwise an offer is revocable and may therefore be revoked any time before it is accepted.²⁶⁹ A new article gives expression to the principle that a revocation of a revocable offer is effective upon reception by the offeree prior to acceptance.²⁷⁰ Another new article explains in clear terms when a revocation is to be regarded as received.²⁷¹

The revision introduced clear rules concerning the expiration or lapse of an offer. If irrevocable, it expires if not accepted within the time specified by the offeror or within a reasonable time in the absence

265. See La. Civ. Code arts. 1802 (1870), 1809 (1870).

266. La. Civ. Code art. 1801 (1870); Palmer, *The Misinterpretation of Article 1801*, 46 Tul. L. Rev. 859 (1972). See especially Comment, *Offer and Acceptance: Comparing the New with the Old*, 45 La. L. Rev. 811 (1985).

267. See *Wagenvoord Broadcasting Co. v. Canal Automatic Transmission Serv.*, 176 So. 2d 188 (La. App. 4th Cir. 1965).

268. La. Civ. Code art. 1928.

269. La. Civ. Code art. 1930.

270. La. Civ. Code art. 1937.

271. La. Civ. Code art. 1938.

of such specification.²⁷² If revocable, an offer expires if not accepted within a reasonable time.²⁷³

A new provision permits a clear distinction between an irrevocable offer and an option and explains that the latter is already a veritable contract that, as such, is beyond the sphere of unilateral declarations to which mere offers, even when irrevocable, are confined.²⁷⁴ The same provision gives option-contracts a place in the law of obligations in general, while before the revision options were regulated only in connection with the contract of sale.²⁷⁵

In sum, where the offer is concerned, the revision has changed the law by introducing the rule of revocability of those offers not made irrevocable by the offeror's intent.

Acceptance

Concerning the acceptance, the main innovation introduced by the revision relates to the time when an acceptance is effective, which now depends on whether the offer is revocable or irrevocable. If the former, the acceptance is effective upon transmission; if the latter, the acceptance is effective upon reception.²⁷⁶ In the Louisiana Civil Code of 1870, since all offers were irrevocable in principle, exegetical interpretation compelled the conclusion that, with one exception, the acceptance was always effective only upon reception by the offeror.²⁷⁷

For the acceptance of revocable offers, since it is effective upon transmission, a new provision gives legislative formulation to the rule of reasonableness of the manner and medium by which the acceptance of such offer is made and explains when a manner or a medium are to be regarded as reasonable.²⁷⁸ For the acceptance of irrevocable offers, another new provision explains when the acceptance of such an offer is to be regarded as received.²⁷⁹

Acceptance by performance rather than by promise is now the subject of special regulation that distinguishes between possible situations calling for different solutions.²⁸⁰ The Louisiana Civil Code of 1870 contemplated that manner of acceptance in terms that were only too general.²⁸¹

272. La. Civ. Code art. 1929.

273. La. Civ. Code art. 1931.

274. La. Civ. Code art. 1933. See also *supra* text at pp. 706-07, 709-17.

275. See La. Civ. Code art. 2462.

276. La. Civ. Code art. 1934.

277. La. Civ. Code arts. 1809 (1870), 1819 (1870). See also I S. Litvinoff, *Obligations* § 176, at 327-28, in 6 *Louisiana Civil Law Treatise* (1969).

278. La. Civ. Code arts. 1935, 1936.

279. La. Civ. Code art. 1938.

280. La. Civ. Code arts. 1939-1941.

281. La. Civ. Code art. 1816 (1870).

Concerning acceptance by silence, the pertinent revised article enhances the element of reasonably induced reliance that a situation must present in order to allow the conclusion that a party's silence amounts to his acceptance.²⁸² The requirement of conformity of the acceptance with the terms of the offer is now stated in words that, for the lack of emphasis, may be susceptible to a flexible interpretation.²⁸³

Crossing Offers

An article in the Louisiana Civil Code of 1870 allowed the formation of a contract through offers that crossed each other rather than by an offer on the one hand and an acceptance on the other.²⁸⁴ The article rationalized the solution it propounded by saying that in situations of that kind one of the offers implied the offeror's assent to a modification, as when one party offers to sell a thing for one hundred and the other party, without knowing of that offer, proposes to buy for two hundred, which results in a contract for the lower sum.²⁸⁵

If the rule were confined to the example, contained in the article itself, the solution may be fair, although the question why does the benefit of the bargain go to the buyer and not to the seller remains unanswered. Indeed a seller would be as happy to sell for more as a buyer to buy for less. Be that as it may, it is doubtful whether that solution would be fair if the difference does not lie in the price, but rather in the quantity of things offered to sell and offered to buy, or in other material terms of the proposed contract.²⁸⁶ A rule that applies to just one situation lacks the generality that characterizes the law. For this reason, that article was repealed.²⁸⁷

Nevertheless, that repeal should not prevent a court from arriving at the same kind of solution contained in the eliminated article whenever the circumstances inform the court's discretion that, in a particular case, expressions of the parties' will that crossed each other on their way to their respective destinations are sufficient to establish reciprocal consent, and hence, contract.²⁸⁸ That would be the case, no doubt, when an offer to sell a thing for a certain price crosses on its way with an offer to buy the same thing for the same price.²⁸⁹

282. La. Civ. Code art. 1942. See also La. Civ. Code art. 1967.

283. La. Civ. Code art. 1943. See also *supra* text at pp. 736-40.

284. La. Civ. Code art. 1807 (1870).

285. *Id.* See also 1 S. Litvinoff, *Obligations* §§ 190-191, at 341-42, in 6 *Louisiana Civil Law Treatise* (1969).

286. See *id.* at 342.

287. See comment to La. Civ. Code art. 1943.

288. See *Ward v. Parker*, 151 So. 2d 108 (La. App. 1st Cir. 1963). See also 2 R. Demogue, *Traité des obligations en général* 237 (1923).

289. See *Spiers v. Seal*, 426 So. 2d 631 (La. App. 1st Cir. 1982).

Absent such circumstance, each offer stands on its own and must therefore be met by a proper acceptance in order to ripen into a contract.

Offer of Reward Made to the Public

The Louisiana Civil Code of 1870 contained no special provisions contemplating the offer of a reward made to the public. For that reason Louisiana courts applied general contract rules to situations of that kind.²⁹⁰ The present provisions of the Louisiana Civil Code that expressly regulate offers of that kind were introduced by the revision effective since 1985.

The model for those provisions can be found in civil codes of the Germanic family where the publication of an offer of reward binds the offeror through an obligation of a legal rather than contractual nature as a consequence of which the reward may be claimed by any person who performs the requested act even without knowledge of the offer.²⁹¹ That is consistent with the Louisiana legal tradition where, as an example, the irrevocability of offers for a reasonable period of time has been based on a legal obligation at least since the revision of 1825.²⁹²

OPTION AND RIGHT OF FIRST REFUSAL

Option Contracts

An option is a contract whereby the parties agree that one of them, the grantor of the option or offeror, is bound by his offer for a specified period of time and that the other, the grantee of the option or offeree, may accept or reject the offer within that time.²⁹³ As any other contract, an option requires the consent of both parties.²⁹⁴ Not only must the grantor or offeror clearly indicate his will to form an option, but also the grantee or offeree must give his consent to it.

290. See *Taylor v. American Bank & Trust Co.*, 17 La. App. 458, 135 So. 47 (Orl. 1931); *Protti v. American Bank & Trust Co.*, 179 La. 39, 153 So. 13 (1934).

291. See sources of Civil Code articles 1944, 1945, 1946 in La. Civ. Code Ann. arts. 1944-1946 (West 1986 Special Pamphlet).

292. 1 S. Litvinoff, *Obligations* § 140, at 252, in 6 *Louisiana Civil Law Treatise* (1969).

293. La. Civ. Code art. 1933.

294. See, in general, 1 S. Litvinoff, *Obligations* § 144, at 270-71, in 6 *Louisiana Civil Law Treatise* (1969); 2 S. Litvinoff, *Obligations* § 97, at 174-77, in 7 *Louisiana Civil Law Treatise* (1975); I. Najjar, *Le droit d'option—Contribution a l'étude du droit potestatif et de l'acte unilateral* 31-33 (1967).

If the grantee gives the grantor anything in return for the benefit of enjoying a certain time to make a decision, then it is out of the question that the grantee has given his consent also. If he does not give anything for the benefit, the grantee's consent can be taken oftentimes to be tacit, as in other situations where a party is offered something for his sole advantage and has therefore nothing to lose by accepting.²⁹⁵

The contractual object in an option is the time allowed the grantee in order to decide whether or not he wants to make another, and more final, contract with the grantor. An option is thus a contract preliminary to another one, that is, a contract entered in contemplation of another contract that may come into existence later if the grantee so elects.²⁹⁶ If the option is to buy, for example, the grantor offers to sell his property for a certain price and specifies a time during which the grantee may accept that offer. The grantee's consent indicates only his agreement to avail himself of that time for that purpose. It does not indicate his willingness to buy in the offered terms.

If he chooses not to buy, the option comes to an end without giving birth to the sale the expectation of which prompted the grantor to give the option. If the grantee chooses to buy, he must now make another acceptance, this time of the offer the option allowed him to consider for a certain time.²⁹⁷ When he so does he exercises the option, that is, the right to accept conferred by the option contract. Upon that acceptance another contract, this time the sale intended by the grantor, comes into existence.

A closer scrutiny reveals that an option is a contract that actually contains a promise to make another contract later. As that promise binds only the grantor—since the grantee remains free to accept or reject—an option is or consists of a unilateral promise to contract.²⁹⁸ When the promise is to make a contract of sale, if the grantee so wishes, then it is possible to speak of a unilateral promise of sale.²⁹⁹ Although options that contemplate a sale are a preferred example for the simple reason that they are quite common, options may be granted in contemplation of other kinds of contracts, such as the lease of a thing, or the lease of services, or even a contract of loan.³⁰⁰

295. See, for example, La. Civ. Code art. 1890; see also *supra* text at pp. 704, 725.

296. 2 S. Litvinoff, *Obligations* §§ 95-96, at 171-74, in 7 *Louisiana Civil Law Treatise* (1975).

297. *Id.* § 97, at 175.

298. 2 S. Litvinoff, *Obligations* §§ 97-98, at 174-80, in 7 *Louisiana Civil Law Treatise* (1975).

299. *Id.* §§ 100-102, at 182-86.

300. 2 S. Litvinoff, *Obligations* § 99, at 181, in 7 *Louisiana Civil Law Treatise* (1975); see also 2 R. Demogue, *Traité des obligations en général* 63-64 (1923); Sabatier, "La promesse de contrat," in *La formation du contrat, L'avant-contrat* 109-11 (1964).

The unilateral promise to contract, or option, is just a part of the wider subject of the promise to contract in general, with which modern law shows special concern.³⁰¹ Indeed, such promise need not be only unilateral but may also be bilateral, which differs from an option because it binds both parties to make a final contract later.³⁰²

Option and Irrevocable Offer

From the vantage point of effects, an option and an irrevocable offer seem to be quite similar, if not identical, since in both cases an offer is made that may not be revoked for a time. That allows the question whether the grantee of an option is in a better position than the offeree of an irrevocable offer, a question that becomes more relevant when the grantee gives something in return for the option. If that something is a sum of money, the question that immediately comes to mind is why should the grantee of an option pay for the same advantage he can derive from an irrevocable offer which he may obtain for free.³⁰³

The answer is that the grantee of an option *is* in a better position than the offeree of an irrevocable offer. An option is already a contract where the requirement of consent of both parties is properly fulfilled, whereas an offer, even when irrevocable, is just a proposition, a sollicitation by one party without any manifestation of consent by the other. An option contract gives rise to the contractual obligation of the grantor not to revoke the offer during the stipulated time, whereas an irrevocable offer gives rise to the legal obligation of the offeror not to revoke either during the time he himself has named or during a reasonable time.³⁰⁴

An offer, though irrevocable, expires by the death of either the offeror or the offeree, for the simple reason that is not yet a contract.³⁰⁵ The obligation arising out of an option, instead, also binds the heirs of the grantor upon his demise, as the grantee's right to accept also benefits his heirs upon his death.³⁰⁶ Likewise, unless otherwise intended, an irrevocable offer is understood to be made to the offeree personally,

301. See, for example, article 2932 of the Italian Civil Code of 1942. For a more general discussion, see 2 S. Litvinoff, *Obligations* § 97, at 174, in 7 *Louisiana Civil Law Treatise* (1975).

302. See La. Civ. Code art. 2462 (1). See also 2 S. Litvinoff, *Obligations* §§ 110-112, at 201-06, in 7 *Louisiana Civil Law Treatise* (1975).

303. See 1 S. Litvinoff, *Obligations* § 144, at 270, in 6 *Louisiana Civil Law Treatise* (1969).

304. *Id.* § 145, at 272-73.

305. La. Civ. Code art. 1932.

306. See comment (b) to La. Civ. Code art. 1933. See also La. Civ. Code art. 1765.

and therefore he may not assign it to another person.³⁰⁷ In the case of an option, instead, the grantee's right may be transferred or assigned.³⁰⁸

As shown, the similarity of effect between option and irrevocable offer yields to the weight of the differences between one and the other. Practical reasons explain that a party may prefer to bargain for an option rather than merely inviting a simple irrevocable offer.

A Specified Period of Time

Option and irrevocable offer differ also in that the former binds the grantor to his offer for a specified period of time, while the latter binds the offeror only for a reasonable time if he has not named a certain time. In the Louisiana law, thus, a specified time is a requirement for the validity of an option.³⁰⁹ There is no such requirement for a valid irrevocable offer.³¹⁰

In French law, when the duration of an option has not been expressly or impliedly agreed by the parties, it is subject to the regular prescriptive term for a contractual action, and, when faced with the grantee's inaction, the grantor may put him in default by giving him notice to exercise the option within a reasonable time.³¹¹ In German law, on the other hand, an option is characterized by a duration which is specified, and in excess of the minimum duration the law prescribes for an offer.³¹² Also at common law a specified time is one of the requirements for a valid option.³¹³

In the law of Louisiana, the need to specify the time of duration of an option evolved from the jurisprudential conclusion that options for an indefinite time, or perpetual options, would take property out of commerce and must therefore be prohibited.³¹⁴ Nevertheless, an

307. 1 S. Litvinoff, *Obligations* § 145, at 272, in 6 *Louisiana Civil Law Treatise* (1969).

308. *Id.* See also La. Civ. Code art. 2642. An option, of course, is neither heritable nor assignable in those cases where the intended contract would give rise to obligations that are personal to the parties, or contract *intuitu personae*; see La. Civ. Code art. 1766.

309. See La. Civ. Code art. 1933.

310. See La. Civ. Code art. 1928.

311. See 2 S. Litvinoff, *Obligations* § 97, at 176, in 7 *Louisiana Civil Law Treatise* (1975); 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 179 (2d ed. 1952).

312. See 2 L. Enneccerus - Nipperdey, *Allgemeiner Teil, Lehrbuch des Bürgerlichen Rechts*, Part II 679 (1955).

313. See Corbin, *Option Contracts*, Selected Readings on the Law of Contracts 228, 245 (1931); Restatement (Second) of Contracts § 25 (1981).

314. See *Bristo v. Christine Oil & Gas Co.*, 139 La. 312, 71 So. 521 (1916); *Delcambre v. Dubois*, 263 So. 2d 96 (La. App. 3d Cir. 1972); *Clark v. Dixon*, 254 So. 2d 482 (La. App. 3d Cir. 1971).

option may be valid, though no time has been specified for its duration, when it is given in connection with another contract that has a specified duration of its own. In that case the option is valid for as long as the other contract remains in force. Thus, an option contained in a contract of lease is valid for the duration of the lease even if no time has been specified for the option.³¹⁵

Consideration

In connection with the contract of sale one article of the Louisiana Civil Code asserts that it is possible to purchase for "any consideration" the right or option to accept or reject an offer or promise to sell.³¹⁶ That assertion allows the question whether the common law requirement of consideration has been introduced into the law of Louisiana in order to make an option valid. The answer is negative.

In the first place, the article of the Louisiana Civil Code that defines option contracts in general does not mention such a requirement.³¹⁷ In the second, that article of the Louisiana law of sale that does mention "any consideration" must be interpreted in a manner that makes it consistent with the Louisiana legal tradition and in the light of its own legislative history. The latter shows that the original text of the pertinent article referred to the purchase "*for value*" of an option or promise to sell, language that no doubt meant a tangible consideration such as a sum of money paid in hand.³¹⁸

The words "*any consideration*," deliberately chosen to substitute for "*value*" in the older text, no doubt mean not only a tangible but also an intangible something. A promise, or a legal relation, is precisely something intangible that may serve the function of consideration.³¹⁹ It can be readily understood that the party who gives an option always receives from the promisee an intangible something of that kind, even in those situations where he also receives something tangible besides.

Indeed, by definition, an option contract requires the promisee's acceptance of the other party's promise not to withdraw the offer, an acceptance that, by its very nature if not by definition, implies a promise to give thought to the offer and reach a decision.³²⁰ It is that

315. See *Becker & Assocs. v. Lou-Ark Equip. Rentals Co.*, 331 So. 2d 474 (La. 1976); *Smith Enters. Inc. v. Borne*, 245 So. 2d 9 (La. App. 1st Cir.), writ denied, 258 La. 574, 247 So. 2d 393 (1971).

316. La. Civ. Code art. 2462(2).

317. See La. Civ. Code art. 1933.

318. See 3 Louisiana Legal Archives, Part II 1356 (1942); also 2 S. Litvinoff, *Obligations* § 107, at 196, in 7 Louisiana Civil Law Treatise (1975).

319. See Restatement (Second) of Contracts § 71 (1981). See also 2 S. Litvinoff, *Obligations* § 107, at 196-97, in 7 Louisiana Civil Law Treatise (1975).

320. *Id.* at 197.

implied promise that makes the promisee's acceptance relevant, since an option contract would be otherwise devoid of any sense as a legal transaction.³²¹ Such implied promise may not be "consideration" *stricto sensu*, but it certainly befits the meaning of "*any consideration.*"

More weight can be added to that reasoning from a different vantage point. In the Louisiana Civil Code of 1870 the word "consideration" is at times synonymous with "cause," and other times with "onerous cause."³²² If "onerous cause" is substituted for "consideration" in the pertinent article of the Louisiana law of sale, it can be readily understood, in the light of that terminological equivalence, that either the promisor's interest in selling or the promisee's express or implied interest in buying, or both, suffices to make onerous the cause of the promisor's obligation, which makes of the option an onerous contract even when the promisee does not *pay* anything for the promise.³²³ An onerous contract is as enforceable at civil law as is a promise "purchased" for consideration at common law.³²⁴

That conclusion finds even greater support in the redefinition of cause contained in the revised Louisiana law of obligations.³²⁵ Indeed, if cause is the reason why a party obligates himself, the grantor's expectation of selling, which no doubt is the reason why he grants an option to his prospective purchaser, is the cause of his obligation not to revoke the offer contained in the option for the stipulated time.³²⁶

In sum, cause, rather than consideration, is one of the requirements for a valid option in the law of Louisiana.

Time When Acceptance Under an Option Becomes Effective

The acceptance of an irrevocable offer is effective upon reception by the offeror.³²⁷ By its nature, an option is a contract to make an offer irrevocable for a specified period of time.³²⁸ The question about the moment at which the acceptance under an option contract becomes

321. *Id.*

322. See 1 S. Litvinoff, *Obligations* §§ 290-292, at 522-25, in 6 *Louisiana Civil Law Treatise* (1969).

323. See *Cuoco v. Pik-A-Pak Grocery Corp.*, 379 So. 2d 856 (La. App. 4th Cir. 1980). See also *Mitchell v. Bertolla*, 397 So. 2d 56 (La. App. 2d Cir.), writ denied, 400 So. 2d 669 (La. 1981); *Kinberger v. Drouet*, 149 La. 986, 90 So. 367 (1922).

324. See 1 S. Litvinoff, *Obligations* § 104, at 184, in 6 *Louisiana Civil Law Treatise* (1969); 2 S. Litvinoff, *Obligations* § 107, at 197, in 7 *Louisiana Civil Law Treatise* (1975).

325. See La. Civ. Code art. 1967.

326. See 2 S. Litvinoff, *Obligations* § 107, at 197, in 7 *Louisiana Civil Law Treatise* (1975) and 1984 Pocket Part 12.

327. La. Civ. Code art. 1934.

328. La. Civ. Code art. 1933.

effective must be answered in the light of that nature of the offer the option contains. Indeed, the reasons that militate in favor of reception as the time of effectiveness of an irrevocable offer, that is, the need to protect the offeror in a fragile position against the risks of transmission, are even stronger in the case of an option where the offeree has consented to the offeror's obligation not to revoke during the time specified.³²⁹

In sum, the acceptance under an option contract must be regarded as effective at the moment of reception by the offeror.³³⁰ A different solution, such as making that acceptance effective at any other moment, would create inconsistencies in the law.³³¹

Right to Accept, Rejection and Counteroffer Under an Option

As explained earlier, a counteroffer implies a rejection of the original offer and puts an end to the right to accept it.³³² That is so even when the offer is irrevocable. The question now is whether the same conclusion prevails when the offer which is either rejected or countered by a differing proposition is contained in an option.

At common law it is asserted that the power of acceptance under an option contract is not terminated by rejection or counteroffer unless the requirements are met for the discharge of a contractual duty.³³³ The concession is made, however, that even in that kind of situation rights and powers can be lost by reason of facts that create an estoppel.³³⁴ It is not difficult to realize that such conclusions are reached at common law starting from the basic premise that the offeree under an option has "purchased" the right to accept or reject, for which reason the making of a counterproposal to the offeror or grantor of the option does not allow him to retain the consideration paid and declare the contract forfeited.³³⁵

At civil law, on the other hand, since *consent* rather than *consideration* suffices to conclude an option contract, it is clear that the premise is absent from which the common law conclusion is derived.

329. See *supra* text pp. 728-29.

330. But see *Bankston v. Estate of Bankston*, 401 So. 2d 436 (La. App. 1st Cir. 1981), where the option involved was declared effectively exercised at the time the letter of acceptance was transmitted.

331. The same solution is recommended at common law. See Restatement (Second) of Contracts § 63(b) (1981), where the difference of regime between revocable and irrevocable offers prevails also.

332. See *supra* text p. 740.

333. See Restatement (Second) of Contracts § 37 (1981); 1 Corbin on Contracts § 91, at 384-85 (1963).

334. See *id.* at 386.

335. *McCormick v. Stephany*, 61 N.J. Eq. 208, 48 A. 25 (1900).

At civil law, thus, an answer to the question here involved must be reasoned out starting from basic principles of that system as a premise. That is better done by discussing separately the rejection and the counteroffer under an option.

In the case of rejection before completion of the time specified in an option, the grantee or offeree is in the same position as an obligee who renounces a term stipulated for his benefit. In an option, indeed, the time specified is the term for the performance of the grantor's obligation not to revoke the offer.³³⁶ That term is resolutive, rather than suspensive, and clearly intended for the benefit of the obligee.³³⁷

The grantee of the option, as obligee, is privileged to avail himself of the full length of the term or not. In making a rejection before the deadline the grantee is expressing an intent not to avail himself of the time not yet elapsed, which clearly amounts to a renunciation of the term. It is a well known principle that the party for whose exclusive benefit a term has been established may renounce it.³³⁸

Because that term is resolutive, the obligee's renunciation puts an end to the duty of the obligor who is now free from obligation. After a rejection, thus, the grantor of the option is no longer bound not to revoke, and, therefore, the grantee may no longer accept if the grantor does not renew his consent. That conclusion finds support in views expressed by the Louisiana jurisprudence.³³⁹

In the case of a counteroffer made during the course, but before expiration, of the time specified in an option, if the grantee clearly intends to counterpropose, rather than to inquire about the grantor's consent to a possible modification of the offer, then such intent implies a rejection of the original offer, and therefore the counteroffer should be handled accordingly. Nevertheless, recognition must be given to the conclusion that an option contract places the grantee in a position stronger than the one a mere offeree is placed in by an offer even if irrevocable.³⁴⁰

Such recognition can properly be carried out by carefully probing the grantee's intent, as reflected in the terms of his counterproposal, in order to ascertain whether the implication of a rejection is a needed logical antecedent to give meaning to the counterproposal, or whether meaning can be given to the latter otherwise, namely, as an attempt to mollify the grantor into a deal more advantageous for the grantee, but without extinguishing the latter's right to accept the original offer if the grantor remains unmoved.

336. See La. Civ. Code arts. 1777, 1778.

337. See La. Civ. Code art. 1779 and comment (d) to La. Civ. Code art. 1777.

338. La. Civ. Code art. 1780 and comment (b) thereto.

339. See *Darragh v. Vicknair*, 126 La. 171, 52 So. 264 (1910).

340. A. Weill et F. Terré, *Droit civil—Les obligations* 119 (3d ed. 1980).

In other words, an option contract is a good justification for a flexible interpretation of the rule that a counteroffer implies a rejection. In the case of a simple offer, though irrevocable, stronger reasons are needed to justify that kind of interpretation.

There can be no doubt that a conclusion in favor of the survival of the grantee's right to accept after rejection or counteroffer would mark a very clear difference between an option and an irrevocable offer, further enhancing the advantages of the former over the latter. Such a conclusion, however, may easily run into a conflict with the principle of detrimental reliance.³⁴¹ Indeed, if neither rejection nor counteroffer were to impair the grantee's right to accept, parties who have given options would have to be discouraged from relying on messages from the other party, or, as an alternative, the grantor's detrimental reliance on a rejection or counteroffer from the grantee would have to be allowed to prevail over the survival of the latter's right to accept.³⁴² In either case the agility that characterizes contemporary business practices would be greatly impeded.

Right of First Refusal

A right of first refusal, or right of pre-emption, or *pacte de préférence*, is a promise whereby the promisor obligates himself to give the promisee a first choice to make a certain transaction should the promisor ever decide to make that transaction.³⁴³ For example, if given in connection with a sale, such promise binds the promisor to offer to sell his property first to the promisee, if the promisor ever decides to sell.

At first blush, the right of first refusal presents some similarity with an option. The promise is unilateral in both, option and first refusal, in the sense that it only binds the promisor. Indeed, the grantee of an option to buy is not bound to buy, nor is the holder of a right of first refusal bound to buy should the giver of the right decide to sell.

In an option, however, the grantor is unconditionally bound if the grantee chooses to accept, while the giver of a right of first refusal is not unconditionally, but rather conditionally, bound, since all he promised is to make an offer to the promisee if he—the promisor—

341. See La. Civ. Code art. 1967. See also 2 S. Litvinoff, *Obligations* § 94, at 168-69, in 7 *Louisiana Civil Law Treatise* (1975).

342. For an opinion in support of that alternative, see 1 Corbin on *Contracts* § 92, at 386 (1963).

343. See 2 S. Litvinoff, *Obligations* § 104, at 187-88, in 7 *Louisiana Civil Law Treatise* (1975). See also, in general, J. de Visscher, *Le pacte de préférence* (1938).

should decide to make a certain transaction.³⁴⁴ That condition does not make the promisor's obligation null, since it depends on his *will* and not on his *whim*.³⁴⁵

Nevertheless, it cannot be said that a right of first refusal is an option subject to a suspensive condition. That is so because the giver of the right does not promise to grant an option if he decides to make a certain transaction, but merely to make an offer of such a transaction to the promisee with preference to anybody else, an offer that may be even revocable. For example, if the right of first refusal is given in connection with a sale, the giver of the right promises that if he ever decides to sell his property he will offer it first to the promisee. He does not promise that he will grant the promisee an option to buy within a specified period of time.

Since the promised offer need not be irrevocable, it may be revoked before it is accepted by the holder of the right of first refusal, in which case the giver of the right remains bound not to sell to another without first making another offer to the promisee.³⁴⁶ Be that as it may, since parties are free to contract as they wish, at the time the right of first refusal is granted they may agree that, upon deciding to sell, the giver of the right will grant to the promisee an option to buy for a specified time.³⁴⁷ When the parties so agree it is then possible to say that the right of first refusal is, in that case, an option subject to a suspensive condition.

The terms of the transaction involved in a right of first refusal need not be as certain as the terms of a transaction contemplated in an option. Resorting again to a first refusal given to a prospective buyer, it is not necessary to state the price at which the property would be offered to the promisee. The price may be named by the promisor at the time of making the offer, or, if so agreed by the parties, may be the price offered to the promisor by a third party,

344. See 2 S. Litvinoff, *Obligations* § 104, at 188, in 7 *Louisiana Civil Law Treatise* (1975).

345. See La. Civ. Code art. 1770 and comment (d) thereto.

346. Here again, if the promisee gives something to the promisor in return for the right of first refusal, the promisee will no doubt negotiate for an option to be granted by the promisor if the latter decides to sell. That seems to be the current practice at common law because of the requirement of consideration; see 1A *Corbin on Contracts* § 261, at 470, 477 (1963).

347. See *Robichaux v. Boutte*, 492 So. 2d 521 (La. App. 3d Cir.), writ denied, 496 So. 2d 352 (La. 1986), where the parties had agreed that plaintiff would have ten days to accept or reject the offer defendant might choose to make. See also *Crawford v. Deshotels*, 359 So. 2d 118 (La. 1978). But see *Terrell v. Messenger*, 428 So. 2d 1241 (La. App. 3d Cir. 1983), writ denied, 433 So. 2d 709 (La. 1983), where there was no indication of such time.

or the price at which the promisor would sell to a third party.³⁴⁸ In either case, though ascertainable, the price lacks the kind of certainty necessary for a valid option.³⁴⁹

At common law, as any other promise, the one involved in the right of first refusal must be supported by consideration in order to be enforceable.³⁵⁰ At civil law, where no consideration is needed, the obligation to give a first refusal to the holder of the right is enforceable provided it has a lawful cause.³⁵¹ In the frequent instances where a person is reluctant to sell property, because he does not want the property to go into the hands of strangers, and a prospective purchaser, as an inducement, gives that person the right to buy the property back if the purchaser ever decides to resell it, that inducement is a valid cause that makes the right of first refusal enforceable.³⁵²

The duration of the right of first refusal gives rise to an interesting question. Here, however, it is necessary to distinguish carefully between a period allowed to the promisee for him to exercise his right of first choice, and the period during which the giver of the right is bound not to finalize a transaction with another party without offering the same transaction first to the holder of the right. The first period, as explained above, is not a requirement and therefore presents no problem. The question concerns the second period.

In French law, where no specified time is required for a valid option, there is no obstacle for the indefinite duration of a *pacte de préférence*.³⁵³ At common law, from examples taken from practice and offered by eminent authority, it would seem that a specified time is at least customary for a valid right of first refusal.³⁵⁴ In Louisiana, the jurisprudential conclusion is that the reasons to require a specified time for a valid option do not prevail in the case of a right of first refusal.³⁵⁵

348. In the three cases cited in the preceding footnote the offer to sell was to be made at the same price offered by a third party. See also 2 S. Litvinoff, *Obligations* § 104, at 188, in 7 *Louisiana Civil Law Treatise* (1975).

349. See La. Civ. Code art. 2462.

350. See 1A Corbin on Contracts § 261, at 470 (1963).

351. La. Civ. Code art. 1966.

352. See 17 G. Baudry-Lacantinerie et Saignat, *Traité théorique et pratique de droit civil—De la vente et de l'échange* 47 (2d ed. 1900).

353. See A. Weill et F. Terré, *Droit civil—Les obligations* 119 (3d ed. 1980). See also 10 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 199 (1932); 2 S. Litvinoff, *Obligations* § 104, at 188, in 7 *Louisiana Civil Law Treatise* (1975).

354. See 1A Corbin on Contracts § 261, at 470-71 (1963).

355. See *Crawford v. Deshotels*, 359 So. 2d 118 (La. 1978); *Price v. Town of Ruston*, 171 La. 985, 132 So. 653 (1931); *Robichaux v. Boutte*, 492 So. 2d 521 (La. App. 3d Cir.), writ denied, 496 So. 2d 352 (La. 1986); *Terrell v. Messenger*, 428 So. 2d 1241 (La. App. 3d Cir. 1983), writ denied, 433 So. 2d 709 (La. 1983).

In the former, it is believed, an indefinite duration would subtract the property involved from the flow of commerce, if the option is one to buy.³⁵⁶ In the latter, on the other hand, the giver of the right is not restricting his freedom to alienate but binding himself only to make an offer first to the promisee.³⁵⁷ It has been further asserted that the ten-year liberative prescription for contractual actions does not start to run from the moment the first refusal is contracted for, but from the moment the promisee's action arises, that is, the moment when the promisor makes an offer to another party or otherwise manifests his intention to sell without making an offer first to the promisee.³⁵⁸

Though no theoretical obstacle prevents the conclusion that, since it is not a perpetual restriction on the alienability of property, a right of first refusal is enforceable for an indefinite time, that conclusion may be a fertile ground for problems of a practical nature. Indeed, when heirs of the original parties become obligors and obligees of a first refusal, perhaps many years later, arduous difficulties may be encountered by heirs of the right-giver, when willing to sell, in order to locate successors of the right-holder. If the right of first refusal involves immovable property, title thereof will be clouded in such a situation.

In many situations, as shown above, the right of first refusal is germane to, though different from, the right of redemption.³⁵⁹ In the case of the latter, the lawmaker deemed it appropriate to limit the time during which it may be exercised.³⁶⁰ Comparable reasons militate in favor of limiting the duration of the right of first refusal. Since in the case of the latter the lawmaker is silent, courts are free to follow, here also, the warranted judicial belief that, where time is concerned, indefiniteness should be reduced to reasonableness.³⁶¹

It may be added, to conclude, that a right of first refusal is always regarded as given *intuitu personae* and therefore it may not be as-

356. *Becker & Assocs., Inc. v. Lou-Ark Equip. Rentals Co.*, 331 So. 2d 474 (La. 1976). See also *Crawford v. Deshotels*, 359 So. 2d 118 (La. 1978).

357. *Price v. Town of Ruston*, 171 La. 985, 132 So. 653 (1931).

358. *Robichaux v. Boutte*, 492 So. 2d 521 (La. App. 3d Cir.), writ denied, 496 So. 2d 352 (La. 1986).

359. See La. Civ. Code art. 2567. See also *Delcambre v. Dubois*, 263 So. 2d 96 (La. App. 3d Cir. 1972). See also *Travis v. Heirs of John D. Felker*, 482 So. 2d 5 (La. App. 1st Cir. 1985), where the distinction is made.

360. See La. Civ. Code art. 2568.

361. See *Caston v. Woman's Hospital Found., Inc.*, 262 So. 2d 62 (La. App. 1st Cir.), writ denied, 266 So. 2d 220 (La. 1972). Also *Jones v. Crescent City Health & Racquetball Club*, 489 So. 2d 381 (La. App. 5th Cir. 1986).

signed.³⁶² That limitation of the personal scope of that right may very well call for a parallel limitation of the temporal scope of the same.

CONTRACTS OF ADHESION

Circumstance of Formation

Contracts are not always formed through a bargaining process. Owing to the necessities of modern life a particular kind of contract has been developed where one of the parties is not free to bargain.³⁶³ That occurs when a business concern carries out its operation through a very large number of contracts entered into with innumerable co-contractants, as is the case with airlines, public utilities, railroad or insurance companies.³⁶⁴

In fact, a private person applying for electricity for his home or buying passage from a public carrier is in no bargaining position at all. The offer of the party furnishing that kind of service adopts the form of a take it or leave it proposition, the acceptance of which is expected to be total submission to all the conditions stipulated by the offeror.³⁶⁵

In that kind of situation the lack of balance between the parties' positions is evident, as one of them, quite unquestionably, is in a position stronger than the other's. The party in the weaker position is left with no other choice than to adhere to the terms proposed by the other, hence, "contract of adhesion," a successful technical expression coined by a prominent French writer.³⁶⁶

Contracts of Adhesion, Standard Forms and the Problem of Acceptance

Contracts of adhesion are usually contained in standard forms, which is justified by the volume of business transacted by those concerns of the kind referred above. Some clauses printed in those forms, occasionally in small print, may present difficulties of interpretation concerning the advantages allowed to the party in the stronger position.

362. See 2 S. Litvinoff, *Obligations* § 104, at 188, in 7 *Louisiana Civil Law Treatise* (1975).

363. See 1 S. Litvinoff, *Obligations* § 194, at 346-49, in 6 *Louisiana Civil Law Treatise* (1969).

364. See Hersbergen, *Contracts of Adhesion Under the Louisiana Civil Code*, 43 *La. L. Rev.* 1 (1982).

365. 1 S. Litvinoff, *Obligations* § 194, at 347, in 6 *Louisiana Civil Law Treatise* (1969).

366. R. Saleilles, *De la déclaration de volonté* 229 (1901).

That is actually a problem of acceptance, as the real question is whether the other party truly consented to all the printed terms.³⁶⁷

Though the theory of contracts of adhesion is mainly focused on transactions involving the rendering of public services by industries that are highly regulated because of the monopoly enjoyed by certain enterprises, the same or a very similar problem may arise in connection with transactions pertaining to activities that are less regulated or not regulated at all.³⁶⁸ Thus, for example, whether a clause that greatly limits the liability of a party is contained in an airfare ticket or a parking-lot ticket the problem is the same, although in the case of the airfare ticket the passenger perhaps had no choice because the carrier that issued it is the only one servicing that particular route, while in the case of the parking-lot ticket the owner of the car might have had a choice of several lots doing the same kind of business.

In sum, though a contract of adhesion is also a contract executed in a standard form in the vast majority of instances, not every contract in a standard form may be regarded as a contract of adhesion.³⁶⁹ Indeed, a standard form may be selected for their contract even by merchants negotiating a sale of goods on an even footing. Nevertheless, whether the contract is one of adhesion or one merely contained in a standard form, the enforceability of certain clauses, usually of the small print variety, may be questionable because the party now placed in a disadvantageous position by that clause was not aware that he was subscribing to it when he entered the contract.

The question, thus, is whether the party gave his consent to the clause in dispute or, when it is clear that it was given, whether that consent was vitiated by error.³⁷⁰ It is in the light of answers to those questions that courts attempt to restore the fairness that is lacking in situations of that kind.

The Louisiana Jurisprudence

Louisiana courts have asserted that they have not adopted the theory of contracts of adhesion, but they have further asserted that, where a party had no power to negotiate a contract, they may disregard a particular clause in the contract when that clause is unduly burdensome or extremely harsh.³⁷¹ Thus, where an employee's entitlement to

367. 1 S. Litvinoff, *Obligations* § 194, at 347, in 6 *Louisiana Civil Law Treatise* (1969).

368. *Id.* at 348-49.

369. A. Weill et F. Terré, *Droit civil—Les obligations* 108 (3d ed. 1980).

370. See Hersbergen, *Contracts of Adhesion Under the Louisiana Civil Code*, 43 *La. L. Rev.* 1, 14-16 (1982).

371. *Louisiana Power & Light Co. v. Mecom*, 357 So. 2d 596 (La. App. 1st Cir. 1978).

certain benefits would be denied or forfeited according to certain provisions printed in the company's handbook or in a pension plan, the provision in question may be regarded as contained in a contract of adhesion and deprived of effect on grounds of the employee's lack of consent to such provision.³⁷²

In other situations, Louisiana courts have inquired whether one of the parties enjoyed a virtual monopoly and have examined the level of sophistication of the negotiating parties in order to characterize a contract as one of adhesion.³⁷³ Where limitation of liability is involved, clauses in fine print, or clauses that were not expressly called to the attention of the party placed at a disadvantage are declared without effect.³⁷⁴

The Louisiana Civil Code

One of the articles of the Louisiana Civil Code dealing with interpretation of contracts provides that a contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party.³⁷⁵ That is a consequence of the more general principle of interpretation according to which, in case of doubt that cannot be resolved otherwise, a provision in a contract must be interpreted against the party who furnished the pertinent text.³⁷⁶

That principle of interpretation, together with the principle that good faith must govern the conduct of the parties in whatever pertains to the obligation, provide useful tools to reach effective solutions to the problems that arise from contracts of adhesion.³⁷⁷

372. See *Lee v. Katz & Besthoff, Inc.*, 479 So. 2d 459 (La. App. 1st Cir. 1985); *Davis v. Humble Oil & Refining Co.*, 283 So. 2d 783 (La. App. 1st Cir. 1973). See also *Golz v. Children's Bureau, Inc.*, 326 So. 2d 865 (La. 1976).

373. See *Haspel v. Rollins Protective Serv., Inc.*, 490 So. 2d 530 (La. App. 4th Cir.), writ denied, 496 So. 2d 326 (La. 1986).

374. See *Prince v. Paretti Pontiac Co.*, 281 So. 2d 112 (La. 1973); *Marine Ins. Co. v. Rehm*, 177 So. 79 (La. App. Orl. 1937).

375. La. Civ. Code art. 2056. See also comment (c) thereto.

376. See La. Civ. Code art. 2056.

377. See La. Civ. Code art. 1759. See also Hersbergen, *Contracts of Adhesion Under the Louisiana Civil Code*, 43 La. L. Rev. 1, 16 (1982).

