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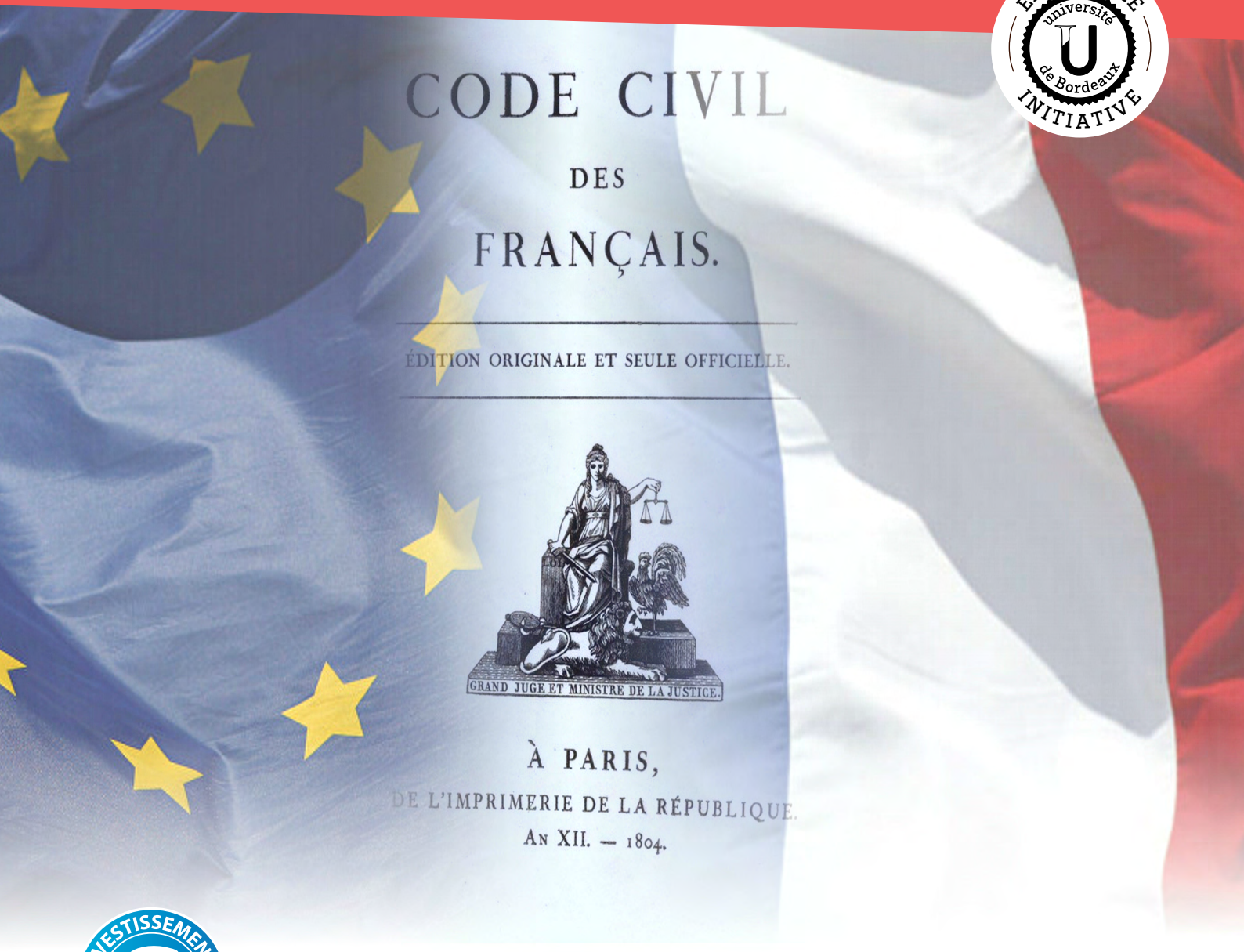

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The Characteristic Aspects of the Reform

The Creation of a Legal Theory of the Conclusion of the Contract

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The Ordinance of 10 February 2016 introduces a new chapter in the Civil Code on "*the formation of the contract*", the primary interest of which is to take into account the entire contractual process, which often means that the contract must be negotiated before being concluded. While the 1804 Civil Code did indeed create a general theory of the contract in the sense of an ordinary law independent of the nominated or unnamed character of the contract (1), it did not create a general theory which would allow us to understand the contractual phenomenon as a whole, ranging from the beginning of negotiations to the performance of the contract validly concluded. "*The rules of formation, like the rules of performance, are conceived for an instantaneous contract, the conclusion of which is effected in a single line of time, by the simultaneous encounter of an offer and an acceptance*" (2). The diversification of contractual exchanges and the multiplication of long-term contractual relations have given rise, amongst the expectations of the reform of the ordinary contract law, to the fact that the duration of the contractual relationship is taken into account, both in its formation and in its performance. This expectation is generally satisfied by the creation of two dedicated sections, one to the conclusion of the contract (3), the other to its term (4). While the rules on performance are inspired by special rights, the new rules on the conclusion of the contract are based on case law which, over time, had to fill in the gaps in the Civil Code. While there are therefore many outcomes, it should not be inferred that the reform has been wrought on the basis of existing legislation for at least two reasons.

On the one hand, the provisions devoted to the conclusion of the contract express a progressivity in the formation of the contract: the negotiations, which are in principle free albeit framed, are first and foremost succeeded by the meeting between offer and acceptance, the rules of which are based on the will of the interested parties; then the preparatory contracts, namely pre-emption agreements and unilateral promises, the contractual nature of which justifies a higher constraint. Thus, this new set constituted by Articles 1112 to 1127-6 of the Civil Code can be viewed as a legal theory of the conclusion of the contract.

On the other hand , the new articles do not include all the previous solutions. Apart from the fact that the codification of case-law solutions may sometimes give way to a new interpretation, certain articles set down new rules and even render inoperative those principles set out in case-law.

One aspect of the reform of the conclusion of the contract is, however, based on existing legislation, and concerns the contract concluded by electronic means. This choice can only be regretted insofar as it risks making the new French contract law already seem out of date. While the creation of provisions specific to the conclusion of the contract makes it possible to bring French law in step with the times, in which many contracts are formed after a fairly long, even complex, pre-contractual period, the lack of innovation in contracts concluded by electronic means is to miss an opportunity to meet the latest needs which are destined to increase very rapidly (5). The electronic method is conceived only as a particular way of concluding the contract,

when it actually gives rise to a rethinking of the contractual relationship and contractual models, and the impact of the number of contracts concluded within a limited time period. For example, the conclusion of a contract through an on-line platform that allows contractors to enter into a relationship raises questions about the platform's information obligations, its role in the contractual relationship; the distinction between party and third party may appear to fall short here (6). Similarly, the development of the internet and electronic exchanges justifies an adaptation of the ordinary rules for the conclusion of the contract, since the information delivered is more difficult to understand and the duty of good faith in negotiations may seem rather evanescent. The provisions taken from former Articles 1369-1 to 1369-9, resulting from the transposition of an old EU directive (7), fall short of modern needs, and while a response can be provided using special rights, it is also up to the Civil Code to adapt its general theory to electronic contracts, which have now become so numerous (8).

Despite this reservation, the new texts have the merit of formalizing the pre-contractual period from the preliminary talks to the very moment of the meeting of wills. There is a distinction to be made depending on whether a preparatory contract is concluded. In the absence of such a contract, contractual freedom prevails, even if obligations, sometimes newly defined, are imposed on the negotiating partners, and the breach of which will at least entail tortious liability. If a preparatory contract is concluded, the binding nature of the contractual undertaking prevails and justifies the protection of the undertaking given, up to its specific performance in kind. The task remains of situating the undertaking given by the offeror, the insertion of the offer in the Civil Code being the opportunity to decide as to its scope, which has long split opinion in French jurisprudence (9). While the definition of the offer is somewhat ambiguous, the resulting rules are closer to those governing negotiations than those on pre-contracts. Thus, as the pre-contractual process progresses, while the rules have been tightened, it is the conclusion of a contract that determines the degree of constraint on the partners: the freedom prevailing during negotiations is limited by good faith and by the weight of the manifestation of the will expressed by the offer and the acceptance; this then gives way to the binding force of the undertaking in the event of the conclusion of a preparatory contract. In order to appreciate the contribution of this legal theory of the conclusion of the contract, it is possible to follow this gradual trend which initially goes from contractual freedom to the manifestation of will (I), before reserving binding force for preparatory contracts (II).

I. From contractual freedom to the manifestation of will

Since the contract is not spontaneously and immediately concluded, it is necessary to distinguish between the period of negotiations and that of the meeting of wills. The contribution of the reform is not on the same level in both cases. With regard to negotiations, the new rules provide a framework which, while taking up the balance established by the case law between contractual freedom and good faith, goes further and particularly by creating a legal obligation to provide information. With regard to the meeting between offer and acceptance, the reform serves to clarify some of the applicable rules which had previously struggled to become established in case law, and views the offer as a simple manifestation of will.

A. The framework for negotiations

The contribution of the new texts concerns the duties of the negotiating partners and the penalties applicable in the event of non-compliance.

a. The duties of the negotiating partners

While the preliminary provisions have enshrined and defined the principles of contractual freedom and good faith, the legislature thought it necessary to recall in Article 1112 of the Civil Code that "*The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith*". While this overlaps somewhat with Articles 1102 and 1104, the reminder serves to set the framework for negotiations, which is based on the balance built over time by case law: the conduct and breakdown of talks are free from control although within the confines of loyalty. The courts have long protected contractual freedom during the negotiations, noting that the breakdown of talks is not in itself wrongful, even when the negotiations are at an advanced stage (10). Nevertheless, on the basis of the principle of good faith, which has become widespread beyond the letter of the former Article 1134 paragraph 3, the courts have at the same time set limits in the context of the breakdown of the talks. Except in cases of manifest bad faith, there are two main criteria for allocating blame: the brutality of the breakdown of the negotiations, and the fact that the partner had the legitimate belief that the contract was concluded, when this was no longer possible (11). These solutions are intended to endure under Article 1112. Misconduct in the negotiations will therefore imply a breach of good faith, as is assumed in existing case law, but also a breach of one of the two duties expressly provided in the following articles.

The duty to inform under Article 1112-1 is one of the reform's innovations. While previously case law could impose a duty of information under ordinary law (12) on one of the partners in the negotiation, its mention in legislation makes it a foreseeable duty, since the criteria are precisely stated and now presumed to be known to all; it is also an imperative duty (13), which raises doubts as to the effectiveness of the frequent clauses by which the parties acknowledge having received all the information they need. This duty gives material content to the duty of good faith imposed in the negotiations by the preceding article, and obliges the party "*who knows information which is of decisive importance for the consent of the other*" to "*inform him of it where the latter legitimately does not know the information or relies on the contracting party*". There are two criteria that can be used to change positive law. On the one hand, the criterion of the information to be delivered is based on an approach that could be interpreted subjectively: the information deciding *consent* varies from one contractor to another, and is likely to refer to his expectations or motives; this is unlike the information that determines the *conclusion* of the contract, a more objective expression that has yet to be accepted. The risk of an extensive approach to the information to be provided is, however, contained in paragraph 2, which excludes any information relating to the estimate of the value of the act of performance; and paragraph 3 in particular, which defines the decisive information as that which has "*a direct and necessary relationship with the content of the contract or the status of the parties*".

On the other hand, information must be given to the party who legitimately does not know it - which is the traditional position - but also to the party who "*relies on the contracting party*". The criterion exceeds the unbalanced professional-consumer relationship (14), and generalises the duty of information according to a criterion so vague that it will be a source of litigation. However, the party under the duty to provide information sees his situation improved by the fact that he is not required to obtain information himself in order to inform the other party, only the party "*knowing*" the information being required to deliver it.

The duty of confidentiality, which is provided at Article 1112-2, calls for fewer remarks. Case law had again provided for this scenario of disclosure or use of confidential information obtained in the course of talks, to sanction it by tort, in the absence of any contractualisation of confidentiality. Nevertheless, and again, the legal prediction of such a duty necessarily has the effect of drawing the partners' attention to what constitutes pre-contractual behaviour in good faith and the need to comply with it.

b. The penalties incurred

Each of the three articles relating to negotiations provides for the liability of the party responsible to be incurred in the event of a breach of legal expectations, while a nullity will also be possible in the event of a breach of the duty to provide information. The new texts raise at least two questions.

The first relates to reparable damage in the event of misconduct in the negotiations. Positive law, especially since the decision in *Manoukian* (15), was set to exclude any remedy for loss of the opportunity to conclude the expected contract. Only the costs incurred for the negotiations could be compensated. While the Report to the President of the Republic indicates that this case-law is enshrined in Article 1112, this is not what emerges from the text, paragraph 2 of which provides that "*the reparation of the resulting loss is not calculated so as to compensate the loss of benefits which were expected from the contract that was not concluded*". The text does not therefore exclude compensation for loss of opportunity to take advantage of the benefits expected from the contract not concluded (16), the compensation of which was rejected by case-law on the grounds of protecting contractual freedom.

The second question concerns the last subparagraph of Article 1112-1, which provides that "*In addition to imposing liability on the party who had the duty to inform, his failure to fulfil the duty may lead to annulment of the contract under the conditions provided by articles 1130 and following*", which refers to cases of defects in consent. The accumulation of liability and nullity, as provided, is not automatic, merely possible. Pursuant to Article 1130, the defects of consent - in this case error or fraudulent non-disclosure - must, in order to be admitted, "*be of such a nature that, without them, one of the parties would not have contracted or would have contracted on substantially different terms*". There may in theory be a breach of duty of information without this resulting in a defect of consent whenever the missing information could not lead the recipient to refuse the conclusion or essential terms of the contract. This rationale, however, is undermined when it is recalled that, under Article 1112-1, the information due is that "*which is of decisive importance for the consent of the other*", the determining term being found at paragraph 2 of Article 1130, or at Article 1137 defining fraudulent non-disclosure. In order to preserve the autonomy of each breach, it should be considered that the pre-contractual duty of information relates to *relevant* information and that the "*decisive*" nature of the information for consent must be assessed only in respect of defects of consent (17). This linkage, which it will be for the court to specify, will also be decisive in delimiting the scope of fraudulent non-disclosure which, due to the provision by law of a duty to provide information, may already be extended, thereby facilitating evidence of culpable silence.

B. The clarification of the meeting between offer and acceptance

The creation of texts on offer and acceptance was the opportunity to settle two debates: the scope of the offer and the date and place of the conclusion of the contract (18).

a. The scope of the offer

The legal nature of the offer, and hence its binding force, has long been discussed in French jurisprudence (19). The new texts settle the debate by making the offer a manifestation of will (20) , which differs from the invitation to enter into negotiations when "*made to a particular person or to persons generally, contains the essential elements of the envisaged contract, and expresses the will of the offeror to be bound in case of acceptance*" (21). If, logically, "*a contract is concluded as soon as the acceptance reaches the offeror*" (22), the scope of the offer has to have been determined prior any acceptance. The constraint of the offer for the party making it would appear to be acknowledged at Article 1116, which provides that it "*may not be withdrawn before the expiry of any period fixed by the offeror or, if no such period has been fixed, the end of a reasonable period*"; there is therefore an obligation to maintain the offer that is set out, even for offers without a term. Nevertheless, the withdrawal of the offer in breach of that obligation "*prevents the contract being concluded*"and the party withdrawing the offer incurs extracontractual liability only. Furthermore, the remedy is restricted, since the offeror is not obliged to "*compensate the loss of profits which were expected from the contract*", a restrictive formula modelled on that of the wrongful breach of the negotiations, which is surprising as, unlike during the talks, here the offeror is bound by an obligation to maintain the offer (23). The difference between the offer and the unilateral promise is thus enshrined, and its qualification as a unilateral act is rejected (24). According to the new Article 1100-1 of the Civil Code, *"juridical acts are manifestations of will intended to produce legal effects*", they "*may be based on agreement or unilateral*" and "*as far as is appropriate, they are subject, both as to their validity and as to their effects, to the rules governing contracts*". Excluding the formation of the contract in spite of the withdrawal of the offer, the reform rejects specific performance in kind of the offer, reserving this *only* for preparatory contracts (25) .However, the unilateral act could have been enshrined (26), at least for offers made for a limited period, except where this would deny the existence of the undertaking given by the offeror. This distinction depending on the type of offer made, which is presented in certain earlier decisions, is rejected in the reform, as is evidenced by the generalisation of the lapse of the offer in the event of the death of the offeror (27).

b. The date and place of conclusion of the contract

Where a contract is concluded between contractors who are not physically present, it is important to establish the date and place of the contract. Here the reform had to choose between the theory of emission, which gives priority to the expression of the will of each contractor, and the theory of reception, which gives priority to the meeting of wills. As previous case-law was not always clearly defined, the new texts are welcome. They opt for the theory of reception, stating that "*A contract is concluded as soon as the acceptance reaches the offeror. It is deemed to be concluded at the place where the acceptance has arrived*" (28). This choice is in line with that made by previous projects or under European law. It is simply regrettable that the reform did not provide clarification as to the date of contracts concluded electronically; there is scope of hesitation between the date of receipt of the definitive acceptance of the recipient of the offer and the receipt of the acknowledgement of receipt by the offeror (29).

By refusing to compel the offeror to comply with his undertaking by concluding the definitive contract, the reform brings the regime closer to that of negotiations, entirely subject to tort, so as not to reserve the principle of binding force - and the variety of penalties that guarantee compliance - for preparatory contracts only.

II. Binding force reserved for preparatory contracts only

All the draft bills that preceded the Ordinance provided for the introduction of specific provisions for preparatory contracts, and on this point there was no question of codification on the basis of existing legislation. The dispute arising out of the breach of the undertaking made by the promisor in a pre-emption agreement or a unilateral promise was indeed the source of a divergence between case-law and the majority of scholars (30), and the reform of the Civil Code was to be the opportunity to settle the debate, in the sense of full recognition of the binding force of preparatory contracts. If this is indeed the intention of the reform carried out in 2016, its final version ultimately falls short of expectations: while it does restore effectiveness to the unilateral promise, it does not correct the weaknesses of the pre-emption agreement arising from previous case law.

A. Restoring effectiveness to the unilateral promise of contract

In terms of promises, the Code only gives place to the unilateral promise, where it would have been useful, in view of its frequent use in practice, to devote a provision to the synallagmatic promise. With regard to the unilateral promise, the main issue was the penalty applicable to the breach of the promise by the promisor. The new Article 1124 retains specific performance in kind both on grounds of the ineffectiveness of the revocation of the promise within the prescribed period and by the nullity of the contract concluded in disregard of the beneficiary's right.

a. The ineffectiveness of revoking the promise

Article 1124 of the Civil Code lays down in its first paragraph the definition of the unilateral promise by clearly identifying it as a "*contract*". It is therefore binding force that must dictate the rules on promises and the penalties for the promisor if he claims to withdraw from his undertaking. Also, and unlike the solution chosen for the offer, "*revocation of the promise during the period allowed to the beneficiary to exercise the option does not prevent the formation of the contract which was promised*". Revocation of the promise is not only a source of liability; it cannot allow the promisor to avoid his undertaking, which is consent to the final contract: Article 1124 paragraph 1 provides that *"the promisor grants another, the beneficiary, a right to have the option to conclude a contract whose*
essential elements are determined, and for the formation of which only the consent of the beneficiary is missing". Where only the consent of the beneficiary is missing, the promisor having already promised the final contract, only the beneficiary can prevent the conclusion of the final contract by failing to exercise his option.

b. The nullity of the contract concluded in disregard of the beneficiary's right

The final paragraph of Article 1124 also settles the much debated question of the nature of the penalty in the event of the conclusion of the contract promised with a third party, in disregard of the right of the beneficiary. Invalidating previous case law (31), as the majority of scholars wished, the Ordinance of 10 February 2016 enshrines the beneficiary's right to specific performance in kind of the unilateral promise. However, knowledge of the promise on the part of the third party is required in order to constitute bad faith. In such a case, where the third party knowingly compromises the beneficiary's right to exercise the option, he incurs liability for the nullity of the contract concluded in disregard of the beneficiary's right and thus fraudulently infringing the rights of others. Despite the arguments sometimes put forward in support of previous case law, which in this case only allowed for damages, the reform restored to the unilateral promise its contractual nature, which supposed, as shown by Article 1217, that the creditor has the option of

specific performance in kind, in the sole case - and this must be emphasised - where the third party is in bad faith. This solution endows the contracts, even if they are preparatory, with a unitary regime, the old solution being unable to survive the new Article 1221 which sets down the principle of a right to specific performance in kind. The solution is not excessive since, at the same time, the same article introduces a principle of proportionality of performance in kind, which is excluded where there is "*there is a manifest disproportion between its cost to the debtor and its interest for the creditor* ". The only regret is that, unlike the project led by Professor Catala (32), nullity was preferred to the unenforceability of the contract concluded in disregard of the beneficiary of the promise, this form of rescission being sufficient to deprive the act of its effects with regard to third parties (33), and corresponding to the classic penalty of fraud (34).

B. Maintaining the weaknesses of the pre-emption agreement

Contrary to previous projects, the Ordinance of 10 February 2016 does not revert to existing case-law, whose excessively restrictive criteria it adopts, and thereby maintains the illusion - more than the real possibility - of specific performance in kind of the pre-emption agreement. The new Article 1123 of the Civil Code introduces a new "interrogatory" action (35) , whose effectiveness, however, can be doubted.

a. The sustained illusion of a specific performance in kind of the pre-emption agreement

The pre-emption agreement is now defined in Article 1123 of the Civil Code - expressly making it a "*contract*" - which supposes that *"a party undertakes that, in the event that he decides to enter into a contract, he will make the first proposal for that contract to the beneficiary of the pre-emption agreement"*. The contractual nature of such an agreement supposes - like the unilateral promise - that it is binding and consequently ensures the protection of the priority granted to the beneficiary. Unlike the solutions for the unilateral promise, case law (36) admitted the principle of specific performance in kind of the pre-emption agreement, which involves either a nullity of the final contract concluded with a third party in bad faith in order to allow the beneficiary to exercise his right of priority, or the substitution of the beneficiary for the third party. Nevertheless, the conditions required to establish a third party acting in bad faith have been criticised. Case law, now referred to in Article 1123, requires proof that the third party has knowledge not only of "*the existence of the pre-emption agreement*" but also "*of the beneficiary's intention to take advantage of it*". Not only is this severity as regards the moral element of bad faith not found in any other litigation, as it is not required by the rules of enforceability, but it leads furthermore to only admitting specific performance in kind of the pre-emption agreement in exceptional situations (37). In theory, the promisor will ensure that the beneficiary is not aware of the negotiations he is conducting with a third party in disregard of the right of priority granted. Therefore, how could the beneficiary express his intention to exercise his right of priority in concluding the final contract with regard to the third party? (38) Thus, the abandonment of this double proof of knowledge had been foreseen by all the drafts of the reform, including that issued by the *Chancellerie* in 2015. The Ordinance of 10 February 2016 surprisingly codified existing case law, which is regrettable.

b. The questionable effectiveness of the newly created "interrogatory" action

The equally surprising paragraphs 3 and 4 of Article 1123 of the Civil Code, introducing the "interrogatory" examination, which allows a third party to "*give written notice to the beneficiary requiring him to confirm, within a period which the former fixes and which must be reasonable, the existence of a pre-emption agreement and whether he intends to take advantage of it* ". The purpose of the third party approach is to secure the conclusion of the final contract, by ensuring

that the beneficiary cannot complain later. Nevertheless, the interest of this course action is undermined by the effects with which it is endowed in the following paragraph, according to which "*if he does not reply within that period, the beneficiary of the pre-emption agreement will no longer have the right to claim either to be substituted in any contract concluded with the third party, or nullity of the contract*". In other words, the third party may still incur liability, in spite of the "interrogatory" action. Since the performance in kind can only be used on condition that dual proof of the third party's knowledge is provided - which in practice is very difficult - the third party has little incentive to contact the beneficiary to discover his intentions (39). One might even say that it is not in his interest to do so (40) because the effect of the "interrogatory" action will be to inform the beneficiary of the proposed conclusion of the final contract with the third party, of which he may not be aware. In order for the action to be of interest, it would have been necessary to make it mandatory if the third party knew of the mere existence of the pre-emption agreement (41), or at least ensure that the third party incurred no liability in the event of a silence held by the beneficiary within the prescribed period. As things stand, its usefulness is dubious unless a departure is made from the letter of the text, either for there to be a duty incumbent on the third party (42) or in order to allow the courts to grant the rescission of the contract concluded in breach of the pre-emption agreement as compensation in kind. This latter approach would be particularly appropriate, since the damages are limited to the damage to which the beneficiary may prove, which (as before) will not always be such as to dissuade the promisor from breaching his undertaking and committing a fault with a view to gain. The ways open to the courts no longer depend on the legal theory of the conclusion of the contract, but on the imminent reform of civil liability which, in its most recent form (43), does not allow the application of civil fines (which are reserved for non-contractual matters) (44) but would presumably provide the reparation in kind provided that it is "*specifically capable of removing, reducing or compensating for the damage*" (45). In many cases of breach of the pre-emption agreement, damages are not of satisfactory interest (46), reparation in kind would therefore be possible. Here, as elsewhere, it is ultimately for the courts to being the new rules of the Civil Code to life.

Notes

(1) See F Terré, Ph. Simler & Y. Lequette, *Droit des obligations*, Précis Dalloz, 11è éd. n°31.

(2) M. Fabre-Magnan, *Droit des obligations, 1. Contrat et engagement unilatéral*, 3rd edition, PUF, 2012, p. 231.

(3) Articles 1112 - 1127-6.

(4) Articles 1210 - 1215.

(5) J. Huet, *Influence sur les contrats informatiques ou électroniques exercée par la réforme du droit général des obligations par l'ordonnance du 10 février 2016* : Rev. 2016 contracts, p. 663 s.

(6) G. Loiseau, *Le contrat électronique, l'indigent de la réforme du droit des contrats :* Com. com. electr. 2016, étude 15, spec. n° 4.

(7) Directive 2000/31/EC of 8 June 2000. - G. Loiseau, cited above, n° 3, "*From the Law of 21 June 2004 to the Ordinance of 10 February 2016, it is amazing that the law of electronic contracts has stalled when the use of these contracts has developed at lightning speed*".

(8) *Adde* G. Loiseau, Article 4 which stresses the fact that the special rules of the Consumer Code will not suffice when electronic contracts ensure in the professional-consumer relationship.

(9) See F Terré, Ph. Simler & Y. Lequette, *op. cit* . No. 116 et seq.

(10) See in particular Cass. Com., 9 March 1999: Bull. Civ. IV, No. 54.

(11) P. Grosser, *La négociation dans l'ordonnance du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations:* AJ contrats 2016, p. 270.

(12) On the importance of distinguishing between duty and obligation: see B. Freleteau, *Devoir et incombance en matière contractuelle*, PhD thesis, LGDJ, 2017. – Compare with M. Fabre-Magnan, *Le devoir d'information dans les contrats : essai de tableau général après la réforme, Libres propos:* JCP G 2016, 706.
(13) Article 1112-1, paragraph 5: "*The parties may neither limit nor exclude this duty*".
(14) Compare with J. Ghestin, *La formation du contrat*, 3rd ed. 1993, No. 665, which defined the obligation to inform the parties in terms very similar to those adopted by the Ordinance, but incumbent only on professionals.
(15) Cass com. 26 November 2003: Bull. Civ.IV, No. 186.
(16) M. Mekki, *Réforme du droit des obligations : pourparlers, offre et acceptation*, JCP N 2016, 1278.
(17) M. Fabre-Magnan, cited above and the author's PhD thesis.
(18) Article 1119 deals with general conditions and specifies those cases in which they are binding on contracting parties. Undoubtedly misplaced, this Article is especially important with regard to the light it sheds on the definition of standard form contracts at Article 1110.
(19) On the various trends, see F Terré, Ph. Simler & Y. Lequette, *op. cit.*, no. 119.
(20) Article 1113, Civil Code
(21) Article 1114, Civil Code
(22) Article 1121, Civil Code
(23) O. Deshayes, *La formation du contrat,* RDC 2016, hors-série p. 21.
(24) S. Pimont, *Article 1117 : la révocation de l'offre – A new french touch,* Rev. contrats 2016, p. 743.
(25) See below.
(26) Articles 1105-1 and 1105-4, Avant projet (dir) Catala, cited above – Compare with J. Antippas, *A propos de la réglementation de l'offre par le nouveau droit des contrats,* Dalloz 2016, p. 1760, which bases the binding nature of the offer on the principle of good faith.
(27) Article1117 Civil Code, *contra* Cass. Civ. 1ère, 25 June 2014, No. 13-16.529 and Cass. Civ. 3ème, 10 December 1997, No. 95-16.461.
(28) Article1121, Civil Code
(29) Article1127-2, Civil Code
(30) On the various positions adopted in jurisprudence and the solutions of the Court of Cassation, see the proceedings of the conference *Premières Rencontres jurisprudence-doctrine, Quelle efficacité pour les avant-contrats ?*, RDC 2012, p. 629 et seq.
(31) Established case law since Cass. Civ. 3ème , 15 December 1993, No. 14-91.499: Bull. Civ.III No. 174.
(32) Article 1106 of *Avant-projet de réforme du droit des obligations et du droit de la prescription*, La documentation française, 2006.
(33) V L Sautonie-Laguionie, *Proposition de modification des articles 1123 et 1124 du Code civil : supprimer l'antinomie avec l'article 1341-2 du Code civil* : RDC 2017, p. 172 s.
(34) see Article1341-2 Civil Code for Paulian actions.
(35) Compare with A. Bénabent, *Les nouveaux mécanismes, La réforme du droit des contrats : quelles innovations ?,* RDC 2016, hors-série, p. 17, who prefers to mention an interrogation question.
(36) Cass. Ch. mixte, 26 May 2006, No. 03-19.376.
(37) Of which case law gives some rare examples: see in particular Cass. Civ. 3ème, 9 April 2014, No.12-13949.

(38) See the oft repeated criticisms of P.-Y. Gauthier, *Exécution forcée du pacte de préférence : un peu victoire à la Pyrrhus, beaucoup probatio diabolica,* Dalloz 2006, p. 1861.
(39) This action, already provided for in the draft Ordinance of 2015, was justified since the conditions of bad faith had been lowered.
(40) O. Deshayes, cited above.
(41) This is not the case, since the text states that the third party "*may*" and not "*must*" contact to the beneficiary.
(42) See C Mangematin, *L'action interrogatoire en matière de pacte de préférence : une incombance ?* Droit et patrimoine 2016, No. 261, p. 38 et seq, for which the third party would be obliged to carry out the interrogation.
(43) Version dated 13 March 2017.
(44) Article 1266-1 of the draft.
(45) Article 1260 of the draft.
(46) For example, in the event of a transfer of company rights, the breach of the pre-emption agreement which makes the beneficiary lose control of a company by acquiring the securities of the promisor.