



UNIVERSITÉ PARIS 1  
**PANTHÉON SORBONNE**

ÉCOLE DE DROIT  
DE LA SORBONNE

# French Contract Law Approaches to ETSI Licensing Declaration

## Paris Conference on SEPS and FRAND

November 16, 2023

# INTERPRETATION OF THE ETSI IPR POLICY

## French Law Guidelines

### Article 1188 of the French Civil Code

*A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms.*

*Where this intention cannot be discerned, a contract is to be interpreted in **the sense which a reasonable person placed in the same situation would give to it.***

**“prepared to grant” ?**

**Approach 1:** prepared to see the FRAND licence formed at the option of implementers, further to or prior to negotiations on its terms

**Approach 2:** committing to make a FRAND offer to licence, further to or prior to negotiations on its terms

**Approach 3:** prepared to negotiate towards a FRAND licence

## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach n° 1: **A Promise of Contract** for the Benefit of a Third-Party

Article 1124 § 1 of the French Civil Code

*A unilateral promise is a contract by which one party, 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.*

Determined or... objectively determinable

## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach n° 1: A Promise of Contract **for the Benefit of a Third-Party**

Article 1205 of the French Civil Code.

*A person may make a stipulation for another person.*

*One of the parties to a contract (the 'stipulator') may require a promise from the other party (the 'promisor') to accomplish an act of performance for the benefit of a third party (the 'beneficiary'). The third party may be a future person but must be exactly identified or must be able to be determined at the time of the performance of the promise.*

Art. 1206 of the French Civil Code..

*The beneficiary is invested with a direct right to the act of performance against the promisor from the time of the stipulation.*

**Can it apply to an option right?**

*Yes: Stipulation de contrat pour autrui (SCPA)*

What are the French legal institutions apt to correspond to a FRAND Declaration?

**Approach n° 1: A Promise of Contract for the Benefit of a Third-Party (SCPA)**

### **OUTCOME**

The contract of licence with a beneficiary is formed by the exercise of the option right by that beneficiary

Most of the terms of the license are still undetermined at that time

Their determination requires negotiations (ex ante or ex post) or court determination

## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach n° 1: SCPA

#### OBJECTIONS

##### 1° Legal:

- a) not common to have an SCPA with so few terms determined
  - answer: the SEP problem is not a common one
- b) can an IPR holder give its assent to a contract with so many terms undetermined?
  - answer: assuming FRAND is an objective concept, it is permissible
  - answer: French statutory law provides for default rules to fill most gaps in the contract
  - answer: French law authorizes courts to add terms implied by equity, usage or law (but it not common for courts to do so, or to be asked to do so)

##### 2° Practical:

Which is the court having jurisdiction to fill the gaps of the French law governed promise of contract?

- answer: it depends on PIL

Can a beneficiary unilaterally ask a court to declare what the terms of the contract are?

- answer: it depends on the procedural law (uncertain French courts would entertain such a claim)

##### 3° Commercial

This analysis gives the beneficiary the right to form the contract at its will and to choose the terms-setting court

## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach n° 2: An Obligation on the Declarant to Make a FRAND Offer

#### Article 1114 of the French Civil Code

*An offer, whether 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. Failing this, there is only an invitation to enter into negotiations.*

Under French law, can one commit to make an “offer” on determinable terms?

Answer : it is not a legal feature identified in statutes or case law, but why not?

## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach n° 2: An Obligation on the Declarant to Make a FRAND Offer

# Issue 1 = Validity of such an obligation?

Art. 1163:

*An obligation has as its subject-matter a present or future act of performance. The latter **must** be possible and determined or capable of being determined.*

Are the FRAND terms capable of being determined?

Answer: same issue as for the promise of a FRAND contract (see above)



## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach n° 2: An Obligation on the Declarant to Make a FRAND Offer

#### # Issue 2 = Binding force of such an obligation?

Art. 1116

*An offer 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.*

*The withdrawal of an offer in contravention of this prohibition prevents the contract being concluded.*

*The person who thus withdraws an offer incurs extra-contractual liability under the conditions set out by the general law, and has no obligation to compensate the loss of benefits which were expected from the contract.*

Question: is there another remedy but limited damages in case of breach of an obligation to make an offer?

*To be dug into....*

## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach n° 2: An Obligation on the Declarant to Make a FRAND Offer

#### OUTCOME

- License is not formed until a “FRAND warranted” offer has been accepted by the implementer
- An implementer may sue the IPR holder where the latter did not make an offer that will be found FRAND
- If the IPR holder fails to make an offer on terms a court will determine as FRAND (or to commit to do so in the first place), an appropriate remedy must be found to meet the purposes of the ETSI IPR Policy
  - Local law remedy, such as subjecting an injunction to an undertaking to comply with the terms the court will determine as FRAND
  - French contract law remedy

## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach No. 3: An Obligation to Negotiate Towards a FRAND Licence

Approach is not exclusive of approaches 1 or 2

- Licensing Declaration may be read as setting two layers of rights:
  - Right to benefit from an obligation to negotiate governed by French Law
  - Right to benefit from an option right/a FRAND offer
  
- Two French legal tools to that effect
  - Interpretation
  - Implied terms French doctrine:

Article 1194 of the French Civil Code

*Contracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which are given to them by equity, usage or legislation*

## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach No. 3: An Obligation to Negotiate Towards a FRAND Licence

#### Legal regime of the obligation to negotiate under French law

##### Article 1112 of the French Civil Code

*The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith.*

*In case of fault committed during the negotiations, the reparation of the resulting loss is calculated so as to compensate neither the loss of benefits which were expected from the contract that was not concluded nor the loss of the chance of obtaining these benefits.*

## What are the French legal institutions apt to correspond to a FRAND Declaration?

### Approach No. 3: An Obligation to Negotiate Towards a FRAND Licence

#### OUTCOME

- An obligation to negotiate in good faith towards a FRAND License may well stem from a Licensing Declaration
- That obligation being governed by French law, its beneficiary has limited remedies against a breach
- The remedy may not be to compel the negotiator into the contract

Consistency of this approach with the overall purpose of the IPR policy is questionable

Approach 3 may come in addition to approaches 1 or 2

Sorry for having exceeded my time

FRAND declarations are a challenge for French lawyers too

Many thanks



Professor Ph. Stoffel-Munck  
psm@univ-paris1.fr