

## **What is the event giving rise to the claim of the beneficiary in a unilateral promise to purchase?**

- 1) The exercise of the Option is the event giving rise to the claim
- 2) Consequences regarding collective insolvency proceedings.

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### **1) The exercise of the option is the event giving rise to the claim.**

In the ruling of 3 May 2011, judges held that the event giving rise to the claim of the beneficiary in a unilateral promise to purchase is not contained in the promise itself but result from the exercise of the Option.

Identification of the event giving rise to a contractual claim is not always easy while it is essential. In case law, sometimes judges held an economic conception (*the claim owed by the buyer arises with the accomplishment of the seller's obligation*); whereas others adopt a more legal and intellectual position considering the simple agreement of the parties (*the price claim generates from the sale contract*).

In a unilateral promise of purchase, some doubts arise when we want to determine the event giving rise to the price claim of the beneficiary. Indeed, the promisor is, since the promise, obliged to buy and the beneficiary is holding a price claim. We could say the claim of the beneficiary is growing but on the other hand, as long as the option is not exercised the claim remains precarious (*if the beneficiary has not yet decided to sell*). The beneficiary enjoys only an option, a potestative prerogative, which gives him the right to exercise or not the option and to prohibit the promisor to recant. It is the exercise of the option by the beneficiary which makes the claim certain". The solution of the foregoing ruling confirms this description; in fact the court held "*the claim is generated with the exercise of the option*".

### **2) Consequences regarding collective insolvency proceedings**

When a judgment opens collective insolvency proceedings, it automatically entails prohibition to pay any claim born before this judgment. Moreover in order to be admitted in the collective insolvency procedure, this claim has to be declared

Thus within the framework of share acquisition in a ship exploited in joint ownership, shareholder's claims are prior to the opening judgment when the option is exercised after it (*regardless of the shareholder is or is not submitted to an observation period*)

So, this claim should be deemed as a privileged one. However it is necessary to specify that since the reform of 2005, posterior claims are only privileged if they were born for the needs and the progress of the procedure (*this condition is not compatible with the situation of a claim arising from an obligation to acquire shares*).

As far as the exercise of the option did not occur before the opening judgment, the unilateral promise of purchase could be considered as a running contract in the sense of the collective insolvency proceedings. (*This rule has already been held for the hypothesis of a unilateral promise of sale*).

Having said that, the following question arises: how could we protect the claim of the beneficiary as long as the exercise of the option did not intervene? We could admit the use of provisional measure, for instance the arrest of the ship for a maritime claim in the sense of the [Brussels Convention of 1952](#) on the arrest of the ship. However, according to this Convention, the claim has to be a maritime one and this kind of claim is unfortunately not included in the list provided by the Convention.