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**Position Paper
on
Conditions**

by

Professor Bénédicte Fauvarque-Cosson, Université Panthéon-Assas Paris II

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Introduction

The subject of “conditions” was one of the topics retained by the Governing Council of UNIDROIT for possible inclusion in an enlarged 3rd edition of the UNIDROIT Principles of International Contracts (UNIDROIT 2006 - Study L - Doc 99, para. 9, 26-29, hereinafter “Secretariat Memorandum”). At its meeting held in Rome from 29 May to 1 June 2006, the Working Group decided to deal with this topic (UNIDROIT 2006 - Study L - Misc 26, paras. 192-264, hereinafter “Summary Records”). This position paper thus covers a future Chapter of the UNIDROIT Principles

The proposals made below attempt to take into account the first discussions which took place at the Rome meeting in 2006, themselves based upon the above mentioned Secretariat Memorandum. During the discussions, the solutions provided by significant earlier codifications were considered. Special attention was given to international or European achievements such as the Principles of European Contract Law, as well as to various modern national laws on contracts.

These discussions are summarized in the Summary Records.

Terminology is always a problem in comparative law discussions. The debates that took place during the 1st session made it clear that this is especially the case concerning the word “*condition*”.

In practice, disputes often arise relating to conditions. The multiplicity of certain notions and definitions affect the clarity of fundamental notions. For these reasons, two fundamental concerns have to guide the work of the Group: simplicity and clarification of the consequences of the use of a condition. A policy decision should be taken as to how the Group should achieve a balance between drafting general principles and preparing a detailed set of provisions when a need for this is felt. This Position paper recommends the introduction of provisions presently missing from the Principles of European Contract Law. However, all of them may not be necessary; it depends on the degree of precision that is desired by the Group.

This position paper is divided into two parts.

The first part intends to provide possible future orientations of a Chapter on conditions whilst the second sketches a comparative outline of this subject.

Part I : Issues to be dealt with in a Chapter on conditions

In dealing with the topic of conditions in the context of the UNIDROIT Principles, the Working Group has considered, *inter alia*, the issues raised in the Secretariat memorandum (Doc 99).

A list of issues was set out in the Secretariat Memorandum (SM Doc 99).

These issues can be classified into three main groups :

- Issues related to terminology and scope of the texts
- Interference
- Effects

A. Terminology and scope

1. Issues raised in the Secretariat memorandum (SM Doc 99)

Should there be provisions on conditions ?

Should the Principles deal with both so-called suspensive and resolutive conditions and, if so, should the term "condition" be used in both cases?

Should an express distinction be made between conditions in a strict sense and future events which are a simple means of measuring the time of the performance (e.g., a sub-contractor is to be paid by the general contractor "when"/"not until" the general contractor is paid by the owner),

Should an express distinction be made between conditions in a strict sense and future events which are the subject of a duty (e.g., A contracts to sell and B to buy goods stipulating "selection to be made by buyer before September 1")?

Should "conditions" as a contract term implied by the court be covered?

Should conditions imposed by law (e.g., public permission requirements) be covered?

2. Further analysis

a. Provisions on conditions ?

Some members of the Group expressed doubts as to the usefulness of provisions on conditions. They observed that PECL, Art. 16:101, merely states the obvious when it provides : "*A contractual obligation may be made conditional upon the occurrence of an uncertain future event, so that the obligation takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition)*".

It was further argued that provisions on contract interpretation contained in the Principles could be sufficient.

However, the majority of the Group was of the opinion that condition is an important subject and there is a whole regime to set up for in practice, there are many problems

with conditional contracts which parties usually neglect. This cannot be done merely by looking at the provisions on contract interpretation contained in the UNIDROIT Principles.

The main purpose of the provisions is to provide suppletive or default rules for those cases in which the parties have not expressly provided otherwise.

b. Notion of condition

What is a condition ?

A great variety of meanings is attached to the term "conditions". This is the case not only within common law systems but also within civil law systems where historically breach of contract or the *clausula rebus sic stantibus* or hardship have been considered conditions.

The importance of defining the notion of "conditions" precisely was raised by members of the Group who illustrated the consequences of adopting too broad a definition, especially as regards performance and non-performance (An example was given by R. Goode, Doc. Misc. 26, para 222). Obviously, promissory conditions ("*conditions contractuelles, condizione contrattuale, Vertragsbedingungen*") have nothing to with the subject. These are the terms ("clauses") of the contract as decided by the parties when concluding the contract.

Reference should be made in the Comments to the great variety of different meanings that the word "condition" might have in the various legal systems. Besides, some members of the group felt that it would be useful to draw up a list of contracts which are truly "conditional" and those which are not, although they may be called "conditional".

c. Categories of conditional contracts

The following paragraphs attempt to draw such a distinction by way of practical categorization rather than conceptual definitions; the list is not meant to be exhaustive.

Categories of contracts or clauses (terms) which are NOT "conditional" in the sense that there is a condition

"conditional sale agreement"

A sales agreement under which title remains in the seller until the purchase price has been paid in full, although it may be called, in practice, a "conditional sale agreement" (R. GOODE, Commercial law, p. 709) does not give rise to the application of the rules on condition. If the buyer does not pay the full price, he is in breach of contract. It is also doubtful whether in a sales agreement under which title remains in the seller until the buyer has to comply with some conditions prescribed for the transfer of title to him could give rise to the application of the rules on condition. For instance, if you are required to give notice, this is not a condition.

"charge"

In this respect, a condition should be distinguished from a "charge" (*Auflage, onere*) which is an obligation imposed on the person who usually benefits from a donation or inherits.

It is not always easy to distinguish between these two concepts.

An interesting attempt is made in the *Commentaire Romand, Code des obligations I*, Thévenoz, Werro ed., Helbing and Lichtenhahn 2003, p. 827 : "la distinction pratique entre une charge et une condition n'est pas toujours facile à faire: en interprétant la volonté des parties, on peut s'appuyer sur le fait que la charge est accessoire et économiquement restrictive, alors que la condition constitue un élément subjectivement essentiel".

Categories of contracts which are "conditional" in the sense that there is a condition

- *Vente à l'essai, Kauf auf Probe, vendita a prova* : the buyer can either agree or refuse to buy the goods which have been put in his possession. In English law, this corresponds to the category of "goods supplied on approval or on sale or return" and the main question which it raises is that of loss or damages and consequently, transfer of risks (Goode, Commercial law, p. 257-258).
- *Pacte de réserve de propriété, Eigentumsvorbehalt, riserva della proprietà*: a simple reservation of title clause affects the sales contract. It can be analysed both as a suspensive condition to transfer ownership on complete payment of the price and as a condition "potestative resolutive" of the sale (see in Switzerland, CC 715 ss).
- *Contrat à option, Optionsvertrag, patto d'opzione*: it is a contract with a potestative condition which enables one party to unilaterally decide if the final contract will be concluded (it is often classified as a "promesse unilatérale de vente"). Its effect is to extend the period during which the offeror is bound by its offer. Usually, the promisee who decides not to conclude the contract has to pay an indemnity ("indemnité d'immobilisation"). However, such payment may not be due if the contract was concluded subject to the condition of obtaining a loan and the promisee, in spite of its best efforts, was not able to obtain a loan.
- *Contrat estimatoire ou de soumission, Trödelvertrag, contratto estimatori* : by virtue of this contract, A gives the goods to B who shall send them "en son nom et pour son compte". B must either pay the price or give the goods back to A if B did not sell them. Under Swiss law, such a contract used to be analysed as a sales contract with a suspensive condition but it is now considered a contract *sui generis* (*Commentaire Romand, Code des obligations I*, p. 836).
- *Tranfert de propriété fiduciaire aux fins de garantie, Suspensive bedingte Sicherungsübereignung, trasferimento fiduciario a titolo di garanzia*. This is an « act de disposition » with a resolutive condition which obliges the « fiduciaire » (sort of trustee) to retransfer the ownership to the initial owner (fiduciaire, sort of settlor of trust) on payment of the debt which was thus guaranteed *generis* (*Commentaire Romand, Code des obligations I*, p. 836) *generis* (*Commentaire Romand, Code des obligations I*, p. 836).

d. Condition and term

From the start, there was a lively discussion in the Group concerning the meanings of "condition" and "term" (Doc. Misc. 26, 29). It should be recalled that this report deals only with "condition", leaving "term" aside.

Actually, this raises another question: should there be some specific provisions on the civilian concept of "term" or are the existing texts sufficient? It has been noted by some members of the Group that Arts. 6.1.1 *et seq.* as well as Art. 1.12, already address most of the issues normally dealt with in the civil codes under the heading of "terms". In fact, "term" is really a question of date or time limit.

If the Group decides to deal with “term”, the use of the word “term” may create a risk of confusion for common law lawyers who would understand it as referring to the terms of the contract. Although some may share the view that the concept has now become international (see for instance the Chinese law on contract which refers to the “term”) and that the word could therefore be kept, others may prefer the use of a more neutral word, such as “delay”. This will only need to be discussed if the Group decides to add a specific set of rules on term.

If it is felt necessary to include specific provisions on “term” at a later stage, these provisions could then be inspired, among other models, by Arts. 1510 and 1514 of the Civil Code of Québec.

For the time being, in order to avoid confusion, it is suggested that “condition” should be defined and clearly distinguished from “term”.

This is all the more necessary as retroactivity is still considered, by some of the scholars who belong to those legal systems who remained faithful to Justinian’s Digest (Digest, 20.4.11.1), as a distinctive feature of condition which distinguishes it from “term” (see for France, Marty, Raynaud, Jestaz, *Les Obligations, Régime général*, p. 74 ; and for Canada, Lluellas and Moore, *Droit des Obligations, Thémis 2006*, par. 2486). However, this is no longer a distinctive feature since most legal systems have put aside the retroactivity rule for condition (see *infra*).

Therefore, the real distinction dwells in the uncertainty/certainty criterion: while the occurrence of a “term” is certain, that of a “condition” is uncertain.

In order to be more precise, it may be specified (in the comments) that this “certainty” test should be objective.

This has two consequences :

- The appreciation of whether or not the event is certain (“certainty test”) should never depend upon the parties’ state of mind (ie : an event which is certain only in the parties’ mind is not a term but a condition). For this very reason, it should be specified that the event must not only be uncertain but also future.
- If the parties have qualified the occurrence of the event as a “term” while in fact, it is uncertain, the judge should re-qualify the event for it is in reality a condition, and vice versa.

An express distinction could be made in the comments between conditions in a strict sense and future events which are a simple means of measuring the time of the performance.

An example can illustrate this: a sub-contractor is to be paid by the general contractor if the license to build the house is granted (condition) and when the general contractor is paid by the owner (term).

Besides, it should also be specified in the Comments that a contract can have both a condition and a term.

e. Suspensive and “resolutive” conditions

The UNIDROIT Principles should deal with both “suspensive” and “resolutive” conditions. These civilian concepts correspond to “conditions precedent” and “conditions

subsequent" in common law terminology (the term "resolutive" appears to sound better than the term "resolutive").

Although in the terminology of the Restatement on Contracts, "conditions subsequent" are referred to as "events that terminate a duty", the Rapporteur believes that the words "suspensive" and "resolutive" are more appropriate in an international context. A second best choice would be "conditions precedent" and "subsequent" (see the Chinese law on contract)

Even if, in appearance, a clear distinction can be made between these two categories of conditions, in reality, matters are often more complicated and the question is often left to the interpretation of the parties' intention, considering their reciprocal interests. It may well be that when there is a doubt, the "suspensive condition" will predominate. This is favorable to the debtor who, in good faith, believes that the condition was suspensive and awaited for the condition to be fulfilled before performing its obligation (it spares him from paying interest for being late, "intérêts moratoires" (Pichonnaz and Werro, prec., p. 831).

3. More provisions ?

It was asked whether the envisaged Chapter on conditions should also contain provisions on:

- Impossible or unlawful condition
- Discretionary condition (condition "potestative")
- Conditions implied by courts or imposed by law ?
- Time limit
- Renunciation to the benefit of the condition
- Burden of proof

Each of these questions will be dealt with separately.

a. Impossible or unlawful condition

Under Swiss law, when a condition is impossible, the parties' hypothetical intention needs to be interpreted: did they intend to be bound in any case or only if the condition could be fulfilled? In the latter case only, is the whole contract null (*Commentaire Romand, Code des obligations I*, prec. p. 834) .

The Ohada draft does not introduce such a subtle distinction. Art. 10/2 states : "A condition to which an obligation is subject must be possible and may be neither unlawful nor contrary to public order or good moral standards; otherwise it is null and renders null the obligation that depends upon it".

b. Discretionary condition (condition "potestative")

There could be a text stating that "An obligation that depends upon a condition that is at the sole discretion of the obligor is null" (Ohada draft, 10/3).

However, some members of the Group considered that it was not necessary to have black letter rules on "condition potestative". If this position were to be taken, it would be sufficient to mention in the Comments that where the occurrence of the condition is entirely dependent on the intention of the obligor, the obligation in question is null and

void. Further analysis of this question was provided by Professor Hartkamp (Summary Records, par. 236).

c. Conditions implied by courts or imposed by law

Should these text also cover the topic of conditions implied by courts or imposed by law ?

It may actually be necessary to draw a distinction between those two categories.

i - As regards **conditions implied by courts**, the relevant question is whether the courts are allowed to imply a condition and if this is so, under what conditions.

In fact, the question to be addressed is simply whether a condition can be implied by courts? If the Group considers that this should be made possible, should there then be a provision which expressly says so (comp. Second Restatement, § 226 (*How an Event May Be Made a Condition : An event may be made a condition either by the agreement of the parties or by a term supplied by the court*)? Or is it sufficient to regard it as a matter of interpretation of the contract (and merely refer in the Comments to that Chapter as well as to Article 5.1.2 (implied obligations)?

ii - As regards conditions **imposed by law** the question is whether the provisions on conditions also apply to this specific category of conditions.

A negative answer was suggested by some members of the Group.

The main argument for excluding conditions imposed by law was that most practical aspects of public permission requirements are already covered by Art. 6.1.14 and following. In this case, it should be made clear, either in the Comments or in the black letter rule, that the rules on conditions apply only to contractually stipulated conditions and not to conditions imposed by law, e.g. the granting of public permissions.

d. No time limit stated by the condition

The existence of a time limit (or "term") can either be express or tacit.

If the condition does not state a time limit, it should be implied that the condition should occur within "a reasonable time".

- This can first be done by interpreting the parties' intentions. In that case, since such a result would already follow from the general provision on interpretation contained in the Principles, it is not felt necessary to include a specific provision to that effect in the Chapter on conditions but rather to explain it in the Comments.
- It may be considered best to state that a "reasonable time" depends on the circumstances and the nature of the contract (more objective approach). This situation would then fall within the scope of the general principle of good faith (Art.1.7) and the provision on time of performance (Art. 6.1.1). Mention should then be made in the Comments to Art. 6.1.16 which refers to "a reasonable time from the conclusion of the contract".

e. Renunciation to the benefit of the condition

Is it necessary expressly to state that the party for whose exclusive benefit a condition has been stipulated is free to renounce it unilaterally ?

If it is felt necessary, two further specifications may also be useful :

- This can only be done as long as the condition has not been satisfied and provided it does not violate the other party's legitimate expectations (see Art. 1.8)
- Until that moment the parties may also, by agreement, renounce a condition stipulated for the benefit of each.

f. Burden of proof

Although this question is not often expressly dealt with in the codified systems which have some texts on conditions, it may be felt necessary to have a text on burden of proof. This may be all the more needed in the context of international commercial transactions. For indeed, due to the differences in the national legal systems, the parties may, in good faith, disagree on the nature of their obligations: is it or not conditional and consequently, does the non-performance of the obligation amount to a breach of contract? For the same reason, and even if the solution may appear quite obvious, a conflict of law rule which specifies that the law applicable to condition is the law of the contract could be desirable.

It might therefore be wise to have a rule on such a question

This rule could be twofold.

The existence of a condition should be proved by the party who argues that there is a condition. This burden of proof seems to be justified by the very fact that, usually, contracts are concluded without conditions.

The fulfillment of the condition should be proved by the party who claims its right, on the assumption that the contract produces its effect, as an ordinary contract (i.e. non conditional).

If there is doubt as to the question of whether a condition is suspensive or resolutive, there could be a presumption in favour of the suspensive condition, which is more common and easier to deal with.

B. Interference

1. Issues raised in the Secretariat memorandum (SM Doc 99).

Should there be a provision dealing in general with the rights and duties of the parties pending the fulfillment of the condition (e.g., in case of a suspensive condition, the obligor's duty to abstain from any behaviour which could jeopardise the obligee's legitimate interests and the obligee's right to take whatever steps are necessary to protect its rights)?

Should there be provisions on interference with a condition by the party interested in its non-fulfillment or fulfillment and, if so, what should their content be?

Actually, this question largely encapsulates the previous one.

2. Further analysis

a. Necessity of a provision on interference with condition

Provisions on interference are very important, especially for those legal systems not necessarily familiar with the general principles of good faith and cooperation.

Provisions dealing in general with the rights and duties of the parties pending the fulfillment of the condition could be inserted under the general heading "Interference with conditions".

The idea of having a provision along the lines of Art. 16:102 PECL dealing with good faith was supported by a large majority of the group.

It may even be considered more in line with the general principles stated by the UNIDROIT Principles (Art. 1.7, good faith; Art. 1.8 inconsistent behavior) to add the concept of **cooperation** to that of good faith. Moreover, this better shows that the duty not to interfere may sometimes take the form of doing some positive acts, such as asking for a license.

A provision similar to that of the Ohada draft could be inserted :

Article 10 (Interference by a party)

A condition is considered fulfilled where one of the parties, acting in breach of its duty of good faith or its duty to co-operate, prevents the condition from being fulfilled.

A condition is regarded as not fulfilled where one of the parties, acting in breach of its duty of good faith or its duty to co-operate, deliberately causes the condition to be fulfilled.

However, when positive action is required by the person who benefits from the condition, this obligation only amounts to an "obligation de moyens" and not to an "obligation de résultat" (see Art. 5.1.4). Proof that no appropriate steps were taken must be made by the other party.

b. Practical consequences of interference

A preliminary question is whether it is necessary to qualify the interference as "undue/unfair" in order to show that not all types of interference are reprehensible.

What consequences should then be drawn from (undue/unfair) interference ?

In the legal systems which deal with this question, the consequence of "undue/unfair interference" is that the result goes in the opposite direction to the one wanted by the person who interfered, i.e.: in the case of a suspensive condition, "the condition is deemed to be fulfilled" and in the case of a resolutive condition, "the condition is deemed not to be fulfilled" (as expressed in Art. 16:102 PECL)

However, it is not clear what is exactly meant by Art. 16:102 (1) PECL according to which in case of undue interference “the condition is deemed to be fulfilled”. Does this mean that the contract is considered to be effective (remedy of specific performance)? Or does this mean that only the right to damages was granted? More precise indications as to the consequences of undue interference ought to be given.

For common lawyers who usually prefer damages to specific performance, the consequence envisaged by PECL may not be the proper one for the “interferer”.

According to TREITEL (*The Law of Contract*) “a distinction must be drawn between two types of obligation: the principal obligation of each party (ex: to buy and sell) and a subsidiary obligation (one not to withdraw, not to prevent occurrence of the condition. One possible view is that the party who fails to perform the subsidiary obligations is to be treated as if the condition has occurred; and that he is then liable on the principal obligation”. Yet, Treitel takes a different approach : “In principle it seems wrong to hold him so liable, for such a result ignores the possibility that the machine might have failed to come up to the standard required by the contract, even if proper facilities for trial had been provided. The correct result is to award damages for breach of the subsidiary obligation: in assessing such damages, the court can take into account the possibility that the condition might not have occurred, even if there had been no such breach. To hold the party in breach liable for the full performance promised by him, on the fiction that the condition had occurred, seems to introduce into this branch of the law a punitive element that is inappropriate to a contractual action. The most recent authority rightly holds that this doctrine of ‘fictional fulfilment’ of a condition does not form part of English law”.

In spite of this interesting analysis, it may be felt by a majority of the Group that since specific performance has been adopted as a general principle in case of non-performance of a non-monetary obligation (Article 7.2.2 UP), the general principle should be that the condition is deemed to be either fulfilled or not fulfilled, depending on whether it is suspensive or resolutive. For indeed, this may be considered as a variety of specific performance. However, since Article 7.2.2 states many exceptions, some exceptions could be made here also.

c. Necessity of a distinction between conditions with a high probability of occurrence and conditions with a low probability of occurrence.

It could be appropriate to distinguish between conditions with a high probability of occurrence and conditions with a low probability of occurrence. In the latter case a less radical solution might perhaps be adopted, e.g. granting only partial compensation for the losses caused by the party acting unfairly. This opinion was already supported by some members of the group. If such a text were to be drafted, it would be useful to give examples of conditions with a high probability of occurrence and conditions with a low probability of occurrence.

C. The effects of the occurrence of a condition

1. Issues raised

Should the effects of the occurrence of a condition be retroactive or prospective – *ex tunc* or *ex nunc* effect ?

In the case of the latter, should there be an exception for resolutive conditions concerning contracts the performance of which is extended over a period of time?

There seems to be a large consensus in the Group against retroactive effect; for this reason, the second part of the question will not be dealt with.

2. Further analysis

a. Practical consequences of retroactivity/non retroactivity

It is important to understand what really is at stake and therefore to make it clear what consequences retroactivity entails.

Suspensive condition

In case of retroactivity, when the *suspensive condition* occurs, it is as if the conditional right had been perfect from the very beginning. The main consequence is that it validates the acts accomplished *pendente conditione* by the person who benefits from the condition. This is particularly important in relation to sales contracts. For instance, if the person who benefits from the condition has sold the house before the condition is fulfilled, upon fulfillment of the condition, this sale is valid

However, in those systems where retroactivity still prevails, many exceptions exist :

The risks remain on the seller.

The "fruits" are not restituted by the seller.

The acts of "administration" accomplished by the seller remain.

In case of non retroactivity, when the suspensive condition occurs, the period of "suspension" automatically comes to an end and the conditional act automatically produces its effect, as any other act (*ex nunc*). The creditor can therefore only ask for its due (for example, interest) from the moment the condition occurred; limitation of action only starts to run from that very moment.

This is the rule, for instance, in Germany (§ 159) and in Switzerland (Co 151 II); Some legal exception can be stated (see for instance CO 153 when the person who benefits from the condition already has the goods in its possession, that person can then keep the profits which were made before the fulfillment of the condition; for more examples of legal exceptions, see also CO 169 and LP 210).

Resolutive condition

In case of retroactivity, when the resolutive condition occurs, the contract comes to an end and the parties should be put in the same situation as if it had not existed (in civil law countries, this gives rise to the application of the rules on "restitutions" which apply in case of retroactivity).

In case of non retroactivity, when the resolutive condition occurs, the contract which had existed before the condition took place merely comes to an end. Since the obligations contracted have fully existed before the occurrence of the condition, the remedies which are then available do not aim at replacing the parties in the same position as if the contract had never existed. In civil law countries, remedies are granted by referring to the rules on "enrichissement injuste".

In both cases, if the condition does not occur, the contract is perfect.

Blurring the line

In fact, it should be said that even though they take opposite starting point (retroactivity/no retroactivity), the legal systems are finally not very different from each other. Take for instance the French and the German legal systems. Whilst there are many exceptions to the retroactivity rule in the French legal system (see those enunciated *supra*), under German law, the person who benefits from the condition may either ask for damages if, *pendente conditione*, its rights were diminished or ask for “inopposabilité” of “actes de disposition” (BGB § 161).

b. Generalisation of the non retroactivity rule

There is a trend in modern contract law towards abolishing the concept of retroactivity.

It was noted by some members of the Group that the UNIDROIT Principles themselves had adopted this approach, for instance with respect to termination of contract for breach and set-off, and probably the same would be the case with respect to termination of long-term contracts for good cause.

Besides, as noted in PECL’s comments, this solution is by far the simplest. Moreover, if retroactivity had been the rule, many exceptions should have been set out.

Yet, it is worth recalling the reasons why, in the “exposé des motifs” the French drafters have considered best to maintain the retroactivity rule in the Avant-Projet :

“On one particular point the Reform Proposals reject the model bequeathed by the Commission for the Reform of the Civil Code (N.B.: the work of this Commission which was set up in the middle of the twentieth century never came into force). The Commission’s giving up of the principle of retroactivity of satisfied suspensive conditions, which was settled on following a change of opinion, has not been convincing; retroactivity is justified on both theoretical and practical grounds, and removing it inevitably requires a provision that during the period of uncertainty the debtor must behave in accordance with good faith and without doing anything which harms the interest of the other party — tests which may be uncertain and difficult to apply. It should be noted that the Quebec Code retains retroactivity (Article 1506) and that all the present ‘European’ legislation or proposals for reform which remove it, still allow it to be restored if the parties expressly so provide. Our Reform Proposals take the opposite path; faithful to the present law, they retain retroactivity, but qualify its *effects*, or allow the parties to reject it altogether, if they think it preferable”.

c. Is there a need for a rule which specifies that the basic principle (non retroactivity) is not mandatory ?

It could be specified that parties may provide otherwise.

However, is such a rule really necessary since all these rules are supposed to be non-mandatory?

Such a rule would be helpful provided that it is a little more precise and adds that

- This may be result from the interpretation of the parties' intention : for instance, if the goods are handed over to the person who benefits from the condition, before it is fulfilled, this may constitute a sign of such a will (see CO 153 N 1 ss)
- The parties should then expressly state what kind of retroactive effects they envisage.

d. Is there a need for a rule which specifies that there is no retroactive effect "unless circumstances indicate otherwise" ?

Should the text also add that there is no retroactive effect "unless circumstances indicate otherwise" ? If this is felt necessary by the Group, the text or at least the Comments should then specify what sort of circumstances are envisaged.

It may be feared that such a provision would entail great uncertainty, not only as to what these circumstances are but also as to the effects of retroactivity.

e. Is there a need for a rule on Acts accomplished "*pendente conditione*" ?

The advantage of retroactivity is to better protect the rights of the parties who should benefit from the occurrence of the condition.

With the prospective effect (*ex nunc*) the following question arises: how to protect these rights against acts which violate these rights? For instance: a house with a garden is to be sold by A to B if B obtains a credit from a bank. Before B obtains this credit, A sells part of the garden to C.

This could be done by expressly stating, in a black letter rule, that before the condition is satisfied, the person who benefits from the condition may take all measures necessary to preserve his/her rights, and take action against any transactions effected by the debtor in fraud of his/her rights. For indeed, the person who benefits from the condition has a conditional right which deserves to be legally protected

This could also be done by stating that transactions effected by the debtor in fraud of his rights do not produce any effects (see BGB § 161), but this raises the whole question of third parties' right.

f. Situation after the fulfilment of the condition and restitution of profits

This is a very difficult question which does not specifically relate to the law of contract but rather to the rules on unjust enrichment (*enrichissement "injuste" or "illégitime"*).

A very detailed analysis of the diverse situations and possible solutions can be found in *Commentaire Romand, Code des obligations I, Thévenoz, Werro ed., Helbing and Lichtenhahn 2003, p. 839 et seq.*

This Commentary could serve as a reference if the Group feels that some black letter rules are necessary on this point. In civilian legal systems, the rules on unjust enrichment would apply.

Part II. Comparative overview

It is not intended to present a thorough comparative analysis of the different legal systems concerning conditions. However, it was felt necessary to provide the members of the Group with some models, be they international, European or national, in order not only to facilitate the understanding of the backgrounds of the various members of the Working Group but also to elaborate the most appropriate text

A. International or European codifications

The Working Group seems to agree with the rules expressed in PECL. The main remark which can be made is that those texts leave many questions open.

These questions should all the more be dealt with as for common lawyers, the word "condition" is multifaceted and the legal consequences are unclear since it is often viewed as a matter of interpretation. In this respect, the Ohada project, which was drafted by Professor Marcel Fontaine, may appear more appropriate.

1. Principles of European Contract Law

CHAPTER 16 - CONDITIONS

Article 16:101: Types of Condition

A contractual obligation may be made conditional upon the occurrence of an uncertain future event, so that the obligation takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

Article 16:102: Interference with Conditions

- (1) If fulfilment of a condition is prevented by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment would have operated to that party's disadvantage, the condition is deemed to be fulfilled.
- (2) If fulfilment of a condition is brought about by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment operates to that party's advantage, the condition is deemed not to be fulfilled.

Article 16:103: Effect of Conditions

- (1) Upon fulfilment of a suspensive condition, the relevant obligation takes effect unless the parties otherwise agree.
- (2) Upon fulfilment of a resolutive condition, the relevant obligation comes to an end unless the parties otherwise agree.

2. Avant-projet Ohada

The texts are much more detailed than those of PECL. They are inspired by the provisions of the Quebec Civil code (see below).

If the Group decides to have detailed texts, these provisions could constitute the best starting point¹.

CHAPITRE 10 – OBLIGATIONS CONDITIONNELLES, SOLIDAIRES
ET ALTERNATIVES

Section 1 : Obligations conditionnelles

ARTICLE 10/1

(Notion – Types de conditions)

Une obligation contractuelle est conditionnelle lorsque les parties la font dépendre d'un événement futur et incertain, soit en en différant l'exigibilité jusqu'à ce que l'événement arrive (condition suspensive), soit en la résiliant lorsque l'événement arrive (condition résolutoire).

N'est pas conditionnelle une obligation dépendant de la survenance d'un événement qui, à l'insu du débiteur, est déjà arrivé au moment de la naissance de l'obligation.

ARTICLE 10/2

(Condition impossible ou illicite)

La condition dont dépend l'obligation doit être possible et ne doit être ni prohibée par la loi ni contraire à l'ordre public ou aux bonnes mœurs; autrement, elle est nulle et rend nulle l'obligation qui en dépend.

ARTICLE 10/3

(Condition purement potestative)

L'obligation dont la naissance dépend d'une condition qui relève de la seule discrétion du débiteur est nulle.

ARTICLE 10/4

(Ingérence d'une partie)

La condition est réputée accomplie lorsqu'une partie, en violation de son devoir de bonne foi ou de coopération, a empêché sa réalisation.

La condition est réputée défaillie lorsqu'une partie, en violation de son devoir de bonne foi ou de coopération, a provoqué sa réalisation.

ARTICLE 10/5

(Condition pendante)

Le créancier peut, avant l'accomplissement de la condition, prendre toutes les mesures utiles à la conservation de ses droits.

Le simple fait que l'obligation soit conditionnelle ne l'empêche pas d'être cessible ou transmissible.

ARTICLE 10/6

(Réalisation de la condition)

L'obligation sous condition suspensive prend effet lorsque la condition se réalise.

¹ The Rapporteur wishes to thank Marcel Fontaine for sending her the provisory English translation. It was felt necessary, as these provisions could be used as a model for our Group, to insert both the French and the English version of the texts.

L'obligation sous condition résolutoire s'éteint lorsque la condition se réalise.

SECTION 1: CONDITIONAL OBLIGATIONS

ARTICLE 10/1

(Notion – Types of condition)

A contractual obligation is conditional where the parties make it depend on a future and uncertain event, either by suspending it until the event occurs (a suspensive condition), or by extinguishing it when the event occurs (a resolutive condition).

An obligation is not conditional if it depends on an event that, unbeknown to the obligor, had already occurred at the time that the obligation was entered into.

ARTICLE 10/2

(Impossible or unlawful condition)

A condition to which an obligation is subject must be possible and may be neither unlawful nor contrary to public order or good moral standards; otherwise it is null and renders null the obligation that depends upon it.

ARTICLE 10/3

(Discretionary condition)

An obligation that depends upon a condition that is at the sole discretion of the obligor is null.

ARTICLE 10/4

(Interference by a party)

A condition is considered fulfilled where one of the parties, acting in breach of its duty of good faith or its duty to co-operate, prevents the condition from being fulfilled.

A condition is regarded as not fulfilled where one of the parties, acting in breach of its duty of good faith or its duty to co-operate, deliberately causes the condition to be fulfilled.

ARTICLE 10/5

(Pending condition)

A creditor, pending fulfilment of the condition, may take any useful measures to preserve its rights.

The conditional nature of an obligation does not prevent it from being transferable or transmissible.

ARTICLE 10/6

(Condition fulfilled)

An obligation with a suspensive condition takes effect when the condition is fulfilled.

An obligation with a resolutive condition is discharged when the condition is fulfilled.

B. National legal systems

A. Common law

1. United States : the Restatement, Second, Contracts

The Restatement, Second, Contracts uses the term "condition" only for suspensive conditions (see § 224), while resolutive conditions are referred to as "events that terminate a duty" (see § 230).

With respect to the effects of the fulfillment of the two kinds of conditions, as well as with respect to the effects of the interference with the conditions by the party interested in their non-fulfillment or fulfillment the solutions envisaged are basically the same as those adopted by the European Principles (see § 225(1)(2) and § 230(1)(2)).

It should also be noted that, according to the Restatement, Second, Contracts an event may be made a condition not only by the agreement of the parties but also by a term supplied by the court (see § 226).

Restatement, Second, Contracts

CHAPTER 9 – THE SCOPE OF CONTRACTUAL OBLIGATIONS

TOPIC 5. CONDITIONS AND SIMILAR EVENTS

§ 224 (Condition Defined)

A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.

§ 225 (Effects of the Non-Occurrence of a Condition)

(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.

(2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

(3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

§ 226 (How an Event May Be Made a Condition)

An event may be made a condition either by the agreement of the parties or by a term supplied by the court.

[...]

§ 230 (Event that Terminates a Duty)

(1) Except as stated in Subsection (2), if under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance or one to pay damages for breach, that duty is discharged if the event occurs.

(2) The obligor's duty is not discharged if occurrence of the event is the result of a breach by the obligor of his duty of good faith and fair dealing, or could not have been prevented because of impracticability and continuance of the duty does not subject the obligor to a materially increased burden.

(3) The obligor's duty is not discharged if, before the event occurs, the obligor promises to perform the duty even if the event occurs and does not revoke his promise before the obligee materially changes his position in reliance on it.

2. England

As noted by some members of the Group, the expression "condition" is used in the English law of contract in a confusing variety of senses. The word "condition" can be used in the sense of "an event on which the operation of the contract depends, but which neither party is bound to bring about" (G.H. TREITEL, *The Law of Contract*, London : Sweet & Maxwell, 8th edition, 1991, p.58 et 59, An Outline of the law of contract, p. 28). In order to make matters clear, it is then sometimes called "contingent condition".

Contingent condition may be precedent or subsequent. The condition is precedent if it provides that the contract is not binding until the specified event occurs. The condition is subsequent if it provides that a previously binding contract is to come to an end on the occurrence of the event (ex: where A contracts to pay an allowance to B until B marries).

In English law, the effect of such a condition depends upon its construction. This is the reason why common law lawyers may feel that the subject is very close to that of interpretation.

These extracts of Treitel enable one better to understand this specific approach: "Although an agreement which is subject to a contingent condition precedent is not fully binding until the specified event occurs, an agreement subject to such a condition may impose some degree of obligation on the parties or on one of them. However, whether it has this effect, and if so what degree of obligation is imposed, depends on the true construction of the condition".

Along the same line, the mechanism of *implied terms* also plays its part in order to justify the parties' obligation not to prevent the fulfilment of a condition. For instance, a principal obligation to buy and sell will not take effect if no licence is obtained; but if the party who should have made reasonable efforts has failed to do so it will be liable in damages, unless it can show that any such efforts, which it could have made would (if made) have necessarily been unsuccessful.

Therefore, a distinction must be drawn between two types of obligation: the principal obligation of each party (ex: to buy and sell) and a subsidiary obligation (one not to withdraw, not to prevent occurrence of the condition).

Should the party who fails to perform the subsidiary obligations be treated as if the condition has occurred and then be liable on the principal obligation ?

According to TREITEL, "In principle it seems wrong to hold him so liable, for such a result ignores the possibility that the machine might have failed to come up to the standard required by the contract, even if proper facilities for trial had been provided. The correct result is to award damages for breach of the subsidiary obligation: in assessing such damages, the court can take into account the possibility that the condition might not have occurred, even if there had been no such breach. To hold the party in breach liable for the full performance promised by him, on the fiction that the condition had occurred, seems to introduce into this branch of the law a punitive element that is inappropriate to a contractual action. The most recent authority rightly holds that this doctrine of 'fictional fulfilment' of a condition does not form part of English law".

B. Civil law

1. French law

The French Civil Code contains detailed rules on conditions (1168 s.)

The main particularity of French law is that condition has a retroactive effect. However, as previously observed, this retroactive effect is subject to various sorts of exceptions: transfer of risks (Art. 1182 al. 2 C. civ.), parties' agreement, tax rules.

This solution has not been abandoned by the French Avant-projet (Proposals for reform of the law of Obligations and the law of Prescription).

The Avant-projet contains detailed rules on conditions. Since they have been translated into English by two eminent colleagues from Oxford, the Rapporteur felt that it could be useful to present them. The rules of the Quebec Civil Code, which drew some inspiration from the French Civil Code and in turn, inspired the draft Ohada project, are also reproduced.

French Avant-projet :

Conditional Obligations (Articles 1173 to 1184-1)

§ 1 Conditions in general

Art. 1173

An obligation is conditional where it is made to depend on a future, uncertain event.

An event until which the creation of the obligation is suspended is a *suspensive condition*; an event on which the obligation is terminated is either a *resolutive condition* or an *extinctive condition*.

Note: The contrast between suspensive conditions and resolutive (retroactive) conditions is enriched (see Carbonnier) if one adds a third kind, extinctive conditions (which are not retroactive).

Art. 1174

Any condition which rests on a thing that is impossible or unlawful is a nullity and nullifies the contract which depends upon it.

Note: 'unlawful': a general term, preferable to the present detailed list of article 1172 of the Code.

However, the contract can be maintained and the condition struck out where in reality the condition was not a decisive reason for the parties' having entered into the contract.

Note: The exception gives rise, a posteriori, to a judicial evaluation (which corresponds to existing practice).

Likewise, a condition which rests on not doing something which is impossible does not nullify the obligation undertaken subject to the condition.

Note: This puts together in the same article the principle (paragraph 1) and its two exceptions (paragraphs 2 and 3).

Art. 1175

Any obligation undertaken subject to a condition whose satisfaction depends upon the will of the debtor alone is a nullity. But nullity on this ground cannot be claimed where the obligation has been performed in full awareness of the position.

Note: A shorter form, in a single article, about what has hitherto been known as a potestative condition.

Art. 1176

The parties have an obligation of loyalty with regard to the satisfaction of the condition.

Note: In the proposed article [1176] the verb 'co-operate' is not well suited to a condition whose satisfaction depends on chance (this still exists, although no longer specifically identified by name). The obligation of loyalty seems to fit equally well the failure of a condition and its satisfaction: hence the general term 'event' applies to both.

Art. 1177

A condition is deemed to have been satisfied if the party who is interested in its failure has obstructed its satisfaction.

It is deemed to have failed if its satisfaction has been caused by the party who had an interest in this occurring.

Note: To avoid possible dispute, the words 'to the detriment of the other party' are better not included.

Art. 1178

The party for whose exclusive benefit a condition has been stipulated is free to renounce it unilaterally, as long as the condition has not been satisfied. Until that moment the parties may also, by agreement, renounce a condition stipulated for the benefit of each.

Any renunciation renders the obligation unconditional.

Note: This puts together in a single article everything concerning renunciation, which allows the final proposition to be given as a common factor (last paragraph).

In this article a reversion of order seems more logical. Unilateral renunciation, which is available only in a particular situation, deserves to be given prominence. Renunciation by agreement between the parties, which is generally available, is obvious.

Art. 1179

Before the condition is satisfied, the creditor may take all measures necessary to preserve his rights, and take action against any transactions effected by the debtor in fraud of his rights.

Note: This provision seems to go better after article 1178, and before that which governs succession to, and assignment of, obligations.

Art. 1180

Conditional obligations are transmissible on death, unless the parties have otherwise provided, or the nature of the obligation prevents it. With this same restriction, the benefit of conditional obligations is assignable inter vivos.

Note: The wording of article 1179 is not felicitous and is incomplete. Although conditional, such obligations are no less active and passive elements of a person's estate. But although transmissibility relates to both the duties and rights arising under obligations, assignment is limited to rights. The exception is common to both.

§ 2 Suspensive conditions

Art. 1181

An obligation contracted under a suspensive condition is one which depends on either a future, uncertain event, or an event which has already happened but is not yet known to the parties.

(art. 1181 para. 1 of the present Code)

The obligation cannot be performed before the event or the parties' knowledge of it.

(cf. art. 1181 paras 2 and 3, C. civ.)

Art. 1182

If the condition fails, the obligation lapses; it is deemed never to have existed.

If the condition is satisfied, the obligation is deemed to have been in existence from the date when the contract was entered into.

However, this retroactivity does not cast any doubt on the validity, either of administrative acts or of acts by which the parties exercised their rights, in the intervening period.

Note: The parallel between the failure and satisfaction of the condition in the same article seems quite illuminating, and they have in common the limiting of the effect of retroactivity (this is perhaps not very helpful, but it is not too awkward).

Art. 1182-1

Where an obligation has been contracted under a suspensive condition, the thing which is the subject-matter of the contract remains at the risk of the debtor, who has the obligation to deliver it only when the condition is satisfied.

(art. 1182 para.1 of the present Code)

If the thing perishes in its entirety, the obligation is extinguished.

If the thing deteriorates, the creditor has a choice between retroactively terminating the contract, and requiring the thing as it is, without reduction of price.

This is all without prejudice to any award of damages which may be due to the creditor under the rules of civil liability where the loss or deterioration of the thing are attributable to the fault of the debtor.

§ 3 Resolutive conditions

Art. 1183

A resolutive condition does not suspend the performance of the obligation until the anticipated event occurs; it effects its revocation when this event occurs.

Note: Would it not be better to begin with what distinguishes a resolutive condition from a suspensive condition? The remainder of Section 3 is dedicated to retroactive termination.

Art. 1184

In this latter situation termination has retroactive effect; it restores things to the same state as if the obligation had never existed, and requires the creditor to make restitution of what he has received, under the rules set out in articles 1161 to 1164-7.

Note: It does not seem to be necessary to qualify this by reference to contrary contractual provision: an extinctive condition, as explained below, is simply a resolutive condition that is not retroactive according to the parties' own provisions.

However, the creditor is not required to make restitution in respect of the fruits which he took before the event, and administrative acts which he has undertaken in the same period are maintained.

§ 4 Extinctive conditions

Note: This has a parallel in extinctive time delays.

Art. 1184-1

An extinctive condition is one which subjects the extinction of the obligation to a future, uncertain event. An extinctive condition has effect only for the future.

2. Quebec Civil Code**§ 1. — Conditional obligations**

1497. An obligation is conditional where it is made to depend upon a future and uncertain event, either by suspending it until the event occurs or is certain not to occur, or by making its extinction dependent on whether or not the event occurs.

1498. An obligation is not conditional if it or its extinction depends on an event that, unknown to the parties, had already occurred at the time that the debtor obligated himself conditionally.

1499. A condition upon which an obligation depends is one that is possible and neither unlawful nor contrary to public order; otherwise, it is null and renders null the obligation that depends upon it.

1500. An obligation that depends upon a condition that is at the sole discretion of the debtor is null; however, if the condition consists in doing or not doing something, the obligation is valid, even where the act is at the discretion of the debtor.

1501. If no time has been fixed for fulfillment of a condition, the condition may be fulfilled at any time; the condition fails, however, if it becomes certain that it will not be fulfilled.

1502. Where an obligation is dependent on the condition that an event will not occur within a given time, the condition is considered fulfilled once the time has elapsed without the event having occurred, and also when, before the time has elapsed, it becomes certain that the event will not occur.

Where no time has been fixed, the condition is not considered fulfilled until it becomes certain that the event will not occur.

1503. A conditional obligation becomes absolute when the debtor whose obligation is subject to the condition prevents it from being fulfilled.

1504. The creditor, pending fulfillment of the condition, may take any useful measures to preserve his rights.

1505. The conditional nature of an obligation does not prevent it from being transferable or transmissible.

1506. The fulfillment of a condition has a retroactive effect, between the parties and with respect to third persons, to the day on which the debtor obligated himself conditionally.

1507. The fulfillment of a suspensive condition obliges the debtor to perform the obligation, as though it had existed from the day on which he obligated himself under that condition.

The fulfillment of a resolutive condition obliges each party to return to the other the prestations he has received pursuant to the obligation, as though the obligation had never existed.

3. Germany

It is important to note that in Germany, as well as in Austria, the fulfillment of the condition has no retroactive effect.

Special attention should be paid to the aforementioned BGB § 161.

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