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**Draft Chapter  
on  
Conditional Obligations**

by

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

## **Introduction to the Draft**

This is a first draft of the future chapter of the Unidroit Principles on “Conditional obligations”.

The proposals attempt to take into account the discussions which took place at the Rome meetings in 2006 and 2007. They have considered the solutions given by some significant earlier models, giving special attention to the corresponding provision of PECL and the OHADA draft on contracts. References have been added to other models, particularly to the provision on conditional rights and obligations of the Draft Common frame of Reference (III.-I:106).

Earlier discussions are briefly summarized with references to the Summary Records of the two Rome meetings (respectively “SL Misc. 26” and “SL Misc. 27”) and sometimes also to the rapporteur’s Position paper for the 2007 meeting (Unidroit 2007 – Study L – Doc. 103, quoted as “Posit. Paper”).

Commentaries on the texts proposed are not meant to be the future comment to be included in the final version of the chapter but merely to introduce further discussions on the draft provisions within the group.

B. Fauvarque-Cosson  
April 2008

Article 1  
(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).**

*Earlier discussions*

The importance of defining the notion and types of “conditions” was stressed by several members of the Group, (SL Misc. 26, para 229; para 408).

The specific elements required are a *future* event and an *uncertain* event. In this respect, conditions are distinct from “terms” (future but certain events). More details as to what exactly is a condition can be found in the Posit. Paper, pp. 7-9.

Although the PICC only deal with contractual obligations, the group prefers to retain the reference to a “contractual obligation”, as in Art. 16:101 PECL. Therefore, the word “contractual” should not be deleted. It was also felt necessary to specify that these texts only apply to “contractually stipulated conditions” and not to conditions imposed by law” (SL Misc. 26, para 221). Most practical aspects of public permission requirements are already covered by Art. 6.1.14 et seq. (SL Misc. 27, para 432). Besides, the fact that the chapter does not deal with conditions imposed by law is sufficiently expressed by the wording “may be made conditional” which implies that the condition is of contractual origin. If further clarification of this point is needed, it can be dealt with in the comments. Conditions implied by court can be left out.

*Commentary on the proposal*

The main purpose of the provision is to define the two types of conditions. It is identical to PECL, Article 16:101

Article 2  
(No Retroactive Effect)

**Neither a suspensive condition nor a resolutive condition has retroactive effect, unless the parties otherwise agree.**

*Earlier discussions*

The new article on retroactive effect takes up important concerns expressed at the 2007 meeting. There was a strong consensus in the group in favour of non retroactivity (SL Misc. 27, para 473 et seq.).

*Commentary on the proposal*

The main purpose of the provision is to provide a general default rule for situations in which the parties have not expressly provided otherwise. The wording of Art. 1 is not sufficiently explicit to cover this question.

In view of this, as well as of the strong consensus in the group as regard such a default rule, it is felt necessary to state this right from the beginning (and not, as in PECL or OHADA draft, at the end of the chapter on condition).

This is also made necessary by the fact that retroactivity is still considered a distinctive feature of condition in some legal systems (such as France). However, there is a “trend in modern contract law towards abolishing the concept of retroactivity” (SL Misc. 26, para 238) and most legal systems have put aside the retroactivity rule for condition (see *Posit. Paper p. 17*).

The effects of non retroactivity are not specified in the blackletter rules and it should be left to the comments to give specification on this point : when the suspensive condition occurs, the conditional act automatically produces its effect, as any other act (*ex nunc*); when the resolutive condition occurs, it comes to an end.

Art. 16:103 PECL does not need to be fully taken over, because it partially repeats what is already expressed in Art. 1. The expression “unless the parties otherwise agree” should be preferred to “unless the circumstances indicate otherwise”.

Comp. DCFR, III.-I:106 (2) and (3) : these texts specify the effects of non retroactivity.

- Problems of **unwinding the contract** if the parties agree that a resolutive condition shall have retroactive effect should be borne in mind (compare Art. III-1:106 [5] DCFR).
- **No text on Condition possible and lawful**

*Earlier discussions*

There was a long discussion, in Rome, in 2007, on this subject (SL Misc. 27, para 404 et seq., para 411 and 415). The opinion that no specific text was needed was expressed by some members. It was further added that in the Unidroit Principles, the effects of unlawful conditions should be aligned with the notion and effects of illegal contracts to be dealt with in the chapter on illegality (SL Misc. 26, para 411, para 412).

PECL and the DCFR have no specific text.

On the contrary, the OHADA draft (10/4), the Avant-projet Catala (art. 1174) and other civilian legal systems contain provisions on this subject.

*Commentary on the proposal not to have any text*

*a) Impossible conditions*

Two examples of impossible suspensive conditions:

(i) The contracting parties agree that the transaction is conditional upon an export licence being granted to the seller. The parties do not know that a licence cannot be granted because the government has already imposed an embargo.

(ii) A promises B to give him £ 100,000 if racehorse X wins a particular race. A and B do not know that the horse is dead.

It could be considered that in the case of an impossible suspensive condition, there is no state of pendency and hence no obligation. No rule would be required to deal with this situation because it follows from the definition provided in Article 1 that there is no obligation, neither conditional nor unconditional. The remaining question is only whether this result is implied in the whole concept of condition and goes without saying or whether it should still be clarified either in the comments or in the black-letter rules.

In a case of supervening impossibility (such as the imposition of embargo *after* conclusion of the contract but *before* the export licence on which the contract depended could be obtained), the contract will not be invalid *ab initio*. The rules on mistake may come into play, in the case of supervening impossibility the contract will come to an end.

#### *b) Unlawful conditions*

As far as unlawful conditions are concerned, there is an overlap with the Chapter on Illegality. Therefore, discussion should take place in the context of the Draft Chapter on Illegality.

- **Condition which depends on the sole will of a party**

There is no specific text in PECL/DCFR.

On the contrary, the Ohada draft (art. 10/3), the Avant-projet Catala and other civilian legal systems contain provisions on this subject.

Some members of the group expressed “strong reservations” (SL Misc. 26, para 236 ; SL Misc. 27, para 422, , para 425, para 428) as to such a text.

The rapporteur considers it sufficient to mention in the Comments that where the occurrence of the condition is entirely dependent on the sole discretion of the obligor, the obligation is null and void. In other situations, the text on interference can provide for the right solution.

### Article 3

#### *(Interference with Conditions)*

**(1) If fulfilment of a condition is prevented by a party, contrary to the duties of good faith and fair dealing or co-operation, that party may not rely on the non-fulfilment of the condition.**

**(2) If fulfilment of a condition is brought about by a party, contrary to the duties of good faith and fair dealing or co-operation, that party may not rely on the fulfilment of the condition.**

#### *Earlier discussion :*

A provision on “interference” is important, especially for those legal systems not necessarily familiar with the general principles of good faith and cooperation (in favour of such a denomination, see SL Misc. 27, para 449 ; 450).

The idea of a provision along the same lines as those followed in PECL, Art. 16:102 (“Interference with Conditions”), was supported by a large majority of the group. (SL Misc. 27, 454).

The expression “deemed to be fulfilled” (used in PECL) was considered unclear (SL Misc. 27, 464). If it were kept, the comments should specify that “deemed to be fulfilled” can mean only damages (see the discussion in SL Misc. 27, para 463 et seq).

It was also suggested 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). The difficulty is to distinguish between these two types of situations. This distinction should be left for the comments. According to others, the comments should also distinguish between negative and positive interference (SL Misc. 27, para 450; 455 and 462).

### *Commentary on the proposal*

#### *a) Preliminary matters*

In accordance with the discussion at previous meetings, a provision on interference with a condition only applies to conditions and not to terms of the contract. Therefore, for example, the provision will not enable a seller under a contract containing an FOB clause to claim the purchase price without having to deliver the goods, in case the buyer fails to nominate the vessel.

The available remedies (specific performance/damages) are to be determined in accordance with the general rules on remedies. Therefore, if a seller – contrary to the duties of good faith and fair dealing – fails to obtain an export licence so that the goods may not be exported, “fulfilment of the condition” does not mean that the buyer must necessarily be able to claim specific performance. In this example, the buyer can only claim damages, since specific performance would be unlawful and hence excluded.

#### *b) Reference to the duties of good faith and fair dealing*

Art. 16:102 PECL is taken as the starting point.

However, the phrases “and if fulfilment would have operated to that party’s disadvantage” and “and if fulfilment operates to that party’s advantage” are deleted. Indeed, fulfilment of a condition may well operate to both parties’ advantage or disadvantage. This article should cover situations where both parties can influence the occurrence of the future event.

It is also suggested to rephrase the article and replace “deemed to be fulfilled” by “the party acting contrary to good faith etc. should not be able to rely on the non-fulfilment”.

Indeed, in case of a resolutive condition, the condition should not be deemed not to be fulfilled, but the party acting contrary to good faith etc. should not be able to rely on the fulfilment. This wording would strengthen the position of the other party because it would grant him an option: in case of a suspensive condition, for instance, it could still decide to walk away from the contract.

The consequences of the rephrased wording are tested with the help of illustrations 1 and 2 to Art. 16:102 PECL (*Lando/Clive/Prüm/Zimmermann*, Principles of European Contract Law, Part III, 2003, p. 234).

In illustration 1, the changed wording would not change the position of A; he would be bound by the contract and unable to rely on the non-approval. B on the other hand would have an option to either walk away from the contract (e.g., because he no longer wishes to co-operate with A) or treat the condition as fulfilled and exercise the remedies available to him under the PICC.

In illustration 2, again, the changed wording would not affect D's position who would not be entitled under the contract. E, again, would have an option: He would not be under any obligation to perform, but he may perform if he chooses.

This rephrased wording would also be in line with Art. 1.8 PICC on inconsistent behaviour.

Article 4  
(*Rights Preserved*)

**Pending fulfilment of the condition, a party shall act in such a way as not to prejudice the other party's rights in case of fulfilment of the condition.**

*Earlier discussions*

This rule relates to the acts accomplished "*pendente conditione*".

However, this rule does not relate to proprietary rights for this question has deliberately been omitted throughout the Principles and cannot therefore be dealt with in a chapter on condition (SL Misc. 27, para 484).

*Commentary on the proposal*

The provision is a corollary of the general lack of retroactive effect. *Pendente conditione* a party's actions may detrimentally affect the other party's position. The underlying idea of the provision is that it is generally better to prevent such actions than to cure their results.

There are some arguments for and others against keeping such a rule. Both series of arguments should be exposed here, for the sake of discussion within the group.

Arguments in favour of including a special provision in the draft :

- (i) There are similar provisions in some national codes.
- (ii) The question whether interim relief is granted can be left to the national courts. The provision is still important both in arbitration proceedings and as a reminder to the parties who enter into a contract under a condition to consider this issue.
- (iii) The situation *pendent conditione* is different from breach of contract in general and therefore deserves special treatment.
- (iv) Because of the peculiarities of a conditional obligation, one does not have to fear an unwanted *e contrario* argument.

Arguments against including a special provision in the draft :

(i) The idea expressed by the rule could be considered already covered by the general duties of good faith and fair dealing or co-operation. The problem addressed by the provision is not particular to conditional obligations.

(ii) It might look strange to have a special provision to prevent a threatened breach of contract in the context of conditions, while there is no rule on this question in general.

(iii) A special rule might even invite an unwanted *e contrario* argument to the effect that in other instances no such duty applies.

*Application to both suspensive and resolutive conditions ?*

A possible example of a resolutive condition is the following : A, who works in Paris, sells his house in Bordeaux to B under the resolutive condition that A gets a new job in Bordeaux. The question is: to what extent would the envisaged provision unduly restrict the buyer's possibilities to refurbish the house and remodel it to his needs, for example if A is a professor and B an artist and therefore B wants to turn A's study into a studio ?