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**Draft Chapter  
on  
Conditional Obligations**

by

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## **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. The texts are more detailed than these two models. The reason for this is that it is always easier to delete some proposals rather than to add new texts

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.

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January 2008

## **Draft articles on “Conditional obligations”**

### **Article 1 Definition**

A contractual obligation is conditional where it is contractually made to depend upon the occurrence of a future and uncertain event.

### **Article 2 Effect of a suspensive condition**

A suspensive condition is an event until which the creation of the obligation is suspended. Upon fulfillment of the condition, the obligation takes effect. It has no retroactive effect, unless the parties otherwise agree.

### **Article 3 Effect of a resolutive condition**

A resolutive condition is an event on which the obligation is terminated. Upon fulfillment of the condition, the obligation comes to an end. It has no retroactive effect, unless the parties otherwise agree.

### **Article 4 Condition possible and lawful**

A condition must be possible and lawful. A condition which rests on a thing that is impossible or unlawful is null and nullifies the contract which depends upon it.

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

### **Article 5 Condition which depends on the sole will of a party**

A condition whose fulfillment depends upon the sole will of the party who owes the condition (debtor) is null. However, such a nullity cannot be claimed when the obligation has been performed in full awareness of the situation.

### **Article 6 Undue interference with a condition**

The parties have an obligation of good faith, cooperation and consistent behavior in the fulfilment of the condition. A condition is deemed to have been fulfilled if the party who is interested in its failure has obstructed its fulfilment. A condition is deemed to have failed if its fulfilment has been caused by the party who had an interest in this occurring.

### **Article 7 Rights preserved**

Before the condition is satisfied, the party for whose benefit a condition has been stipulated (creditor) may take all measures necessary to preserve her rights, and take action against any transaction effected by the debtor in fraud of her rights.

### **Article 8 Transmission and assignment**

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

### **Article 9 Time of transfer of risk**

Unless the parties otherwise agree, where an obligation has been contracted under a suspensive condition, the thing (goods) which is the subject matter of the contract is delivered only when the condition is satisfied ; before delivery, the thing remains at the risk of the party who must deliver it (debtor).

### **Article 10 Deterioration and perishment**

If, before the condition is fulfilled, the thing deteriorates, the beneficiary of the condition (creditor) has a choice between terminating the contract and requiring the thing as it is, with reduction of price, without prejudice to any award of damages which may also be due under the national rules of tort law.

If the thing perishes in its entirety, the obligation is extinguished and the contract terminated, without prejudice to any award of damages which may also be due under the national rules of tort law.

## Comments

### Title : “Conditional obligations”

This longer title is clearer and makes it more evident that the word condition does not have the meaning it has in common law (condition as opposed to warranty).

Some members of the group expressed their strong preference for such a title (Komarov, Goode, Crépeau, SL Misc. 27, para 388 et seq.).

This title is adopted by some Civilian code (Quebec, French Avant-projet).

It should be noted that the Draft Common Frame of Reference, III.-1:106 is entitled “Conditional rights and obligations”.

### Article 1 Definition

**A contractual obligation is conditional where it is contractually made to depend upon the occurrence of a future and uncertain event.**

The importance of defining the notion of “conditions” was stressed by several members of the Group, especially by our Chairmann (J. Bonell, Misc. 26, para 229). In particular, conditions should be distinguished from charges and this should be explained, by giving illustrations, in the comments (R.Zimmermann, SL Misc. 26, 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.

It was also felt necessary to specify that these texts only apply to “contractually stipulated conditions and not to conditions imposed by law” (see A. Hartkamp, SL Misc. 26, para 221. Most practical aspects of public permission requirements are already covered by Art. 6.1.14 and following (Fontaine, SL Misc. 27, para 432).

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. This is recalled in the texts when felt necessary (Widmer, SL Misc. 26, para 239).

### Article 2 Effect of a suspensive condition

**A suspensive condition is an event until which the creation of the obligation is suspended. Upon fulfillment of the condition, the obligation takes effect. It has no retroactive effect, unless the parties otherwise agree.**

This text not only defines the “suspensive condition” but also immediately after refers to its effect, by expressly mentioning that it has “no retroactive effect unless the parties otherwise agree”.

Due to the importance of the question and the strong consensus in the group in favour of non retroactivity (SL Misc. 27, para 473 et seq.), it was 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. The Draft Common Frame of Reference, III.-1:106, which modifies PECL, refers to the effects before dealing with the question of interference.

Retroactivity is still considered, by some legal, as a distinctive feature of condition. However, this is no longer the case since most legal systems have put aside the retroactivity rule for condition (see *Posit. Paper p. 17*). Moreover, there is a “trend in modern contract law towards abolishing the concept of retroactivity” (A. Hartkamp, SL Misc. 26, para 238). PECL and the OHADA draft follow this approach.

There may be some rooms for exceptions, depending on “the circumstances of the case” (Bonell, Misc. 26, para 250). Yet, such an imprecise specification may not be relevant in the blackletter rule and should be left to the comments.

The comments should also specify the effects of non retroactivity : when the suspensive condition occurs, 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 in Germany (§ 159) and in Switzerland (Co 151 II), with some legal exceptions.

### Article 3 Effect of a resolutive condition

**A resolutive condition is an event on which the obligation is terminated. Upon fulfillment of the condition, the obligation comes to an end. It has no retroactive effect, unless the parties otherwise agree.**

There was a discussion in Rome on terminology and it was temporarily decided in favour of the use of the word “resolutive” (SL Misc. 27, para 402).

As for the rest of the text, the same observations as *supra* can be made. In particular, the effect of non retroactivity should be explained in the comments : 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.

It should be specified that in the case of resolutive conditions, the solutions must be in line with the general approach taken with respect to unwinding of failed contracts where the rapporteur expressed his preference for the option of prospectivity (SL Misc. 27, Zimmermann para 475).

### Article 4 Condition possible and lawful

**A condition must be possible and lawful. A condition which rests on a thing that is impossible or unlawful is nul and nullifies the contract which depends upon it.**

**However, the condition can be struck out and contract can be maintained when the condition was not a decisive reason for the parties’ having entered into the contract.**

There was a long discussion, in Rome, in 2007, on this subject (SL Misc. 27, para 404 et seq.). Various opinions were expressed and some members thought it was “not necessary” to deal with “unlawful conditions” (Lando SL Misc. 27, para 408) and also “inadvisable” to deal with impossible conditions (Zimmermann, SL Misc. 27, para 411 and 415).

PECL and the DCFR remain silent. On the contrary, the OHADA draft contains a specific text (10/4):

*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.*

In Rome, the reporter expressed the view that it may be worth attempting to have a text on such matters and, if this were so, to specify whether or not the unlawful and impossible condition nullifies the whole contract for this is a real problem (rappr. Fontaine, SL Misc. 27, para 412; Crépeau, para 419).

The text which is proposed here follows this line. It draws its inspiration from the Avant-projet Catala, art. 1174. Along the same line, it could also be recalled that 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, also quoted in the Posit. paper).

In any events, 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 (Zimmermann, SL Misc. 26, para 411, Fontaine, para 412).

### **Article 5 Condition which depends on the sole will of a party**

**A condition whose fulfillment depends upon the sole will of the party who owes the condition (debtor) is null. However, such a nullity cannot be claimed when the obligation has been performed in full awareness of the situation.**

There again, it can be observed that there is no such text in PECL/DCFR while there is one in the Ohada draft, called “discretionary obligation” (art. 10/3) : “*An obligation that depends upon a condition that is at the sole discretion of the obligor is null*”.

Some members of the Group considered that it was not necessary to have black letter rules on this subject and considered 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 in question is null and void. Some even expressed “strong reservations” (Widmer, SL Misc. 27, para 422, Zimmermann, para 425). The rapporteur was of the view that such a text was not necessary (SL Misc. 27, para 428).

On the contrary, others were in favour of such a text (Crépeau, SL Misc. 27, para 427, suggested to follow the model of the Civil Code of Québec).

A deep analysis of the concept of “Condition potestative” was provided by Professor Hartkamp (SL Misc. 26, para 236) who concluded that there was no need to deal with the issue of potestative condition.

Under French law, where the concept traditionally exists, there is a divide between conditions “simplement potestatives” which are valid and “purement potestatives”, which are

invalid; however, this is a very subtle distinction, much criticized and, eventually, it seems that the only conditions which are prohibited are those which entirely depend upon the sole capricious/discretionary/arbitrary will (“arbitraire/discrétionnaire”) of the debtor. This may not be needed in the blackletter rule but it should be specified in further comments, should such a text as the one above-proposed be kept.

### **Article 6 Undue interference with a condition**

**The parties have an obligation of good faith, cooperation and consistent behavior in the fulfillment of the condition.**

**A condition is deemed to have been fulfilled if the party who is interested in its failure has obstructed its fulfillment.**

**A condition is deemed to have failed if its fulfillment has been caused by the party who had an interest in this occurring.**

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

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 (contra, Finn SL Misc. 27, 454). In order to be more in line with the general principles stated by the UNIDROIT Principles (Art. 1.7, good faith; Art. 1.8 inconsistent behavior) it is suggested to add the concept of cooperation and consistent behavior. Another view could be that since these obligations are already stated by the UNIDROIT Principles, it is not necessary to reiterate them. In this case, the first sentence of art. 6 could be deleted.

A similar provision exists in the Ohada draft:

The expression “deemed to be fulfilled” (used in PECL) was considered unclear. What is exactly meant by it and what are the consequences ?

For common lawyers who usually prefer damages to specific performance, the doctrine of ‘fictional fulfillment’ is rather strange (see Posit. Paper, p. 14 ; Goode, SL Misc. 27, 464). Does this mean that the contract is considered to be effective and that specific performance is granted (the same question rises if one uses the words “a condition is considered”, or, “is regarded” as in the OHADA Draft) ?

In reality, the rule is simple. If the condition is deemed to be fulfilled, the contract produces its effects in the case of a suspensive condition and on the contrary, it ceases to have effect in the case of a resolutive condition. It is only at a second stage that the question of non-performance may be raised. Specific performance has been adopted as a general principle, subject to various exceptions, in case of non-performance of a non-monetary obligation (Article 7.2.2 Unidroit Principles). However, in some case, it may be considered necessary to deviate from the general rule adopted in Chapter 7. It should be specified in the comments that “deemed to be fulfilled” can mean only damages (see the discussion in SL Misc. 27, para 463 et seq and Zimmermann, 469).

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 supported by some members of the group. However, it is difficult to introduce such a distinction in the blackletter rules and this should be left for the comments. It would then be useful to give examples of conditions with a high probability of

occurrence and conditions with a low probability of occurrence.

The comments should also distinguish between negative and positive interference (Fontaine, SL Misc. 27, para 450 ; Bonell, 455 and 462).

### **Article 7 Rights preserved**

**Before the condition is satisfied, the party for whose benefit a condition has been stipulated (creditor) may take all measures necessary to preserve her rights, and take action against any transaction effected by the debtor in fraud of her rights.**

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 (Bonell, SL Misc. 27, para 484).

Traditionally, it is said that retroactivity better protects the rights of the parties who should benefit from the occurrence of the condition. Since non retroactivity has been elected, it is considered important to give the means to the creditor to protect his/her rights against acts which violate them (ex. : 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 is 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.

A similar provision exists in the OHADA Draft (art. 10/5 first sentence) and in the Quebec civil code, art. 1504 ("The creditor, pending fulfilment of the condition, may take any useful measures to preserve his rights").

Another solution would be to have a rule stating that transactions effected by the debtor in fraud of his rights do not produce any effects (see BGB § 161). However, this raises the question of third parties' right and goes beyond the scope of the Unidroit principles.

### **Article 8 Transmission and assignment**

**Conditional obligations are transmissible on death, unless the parties have provided otherwise, or the nature of the obligation prevents it. Subject to the same restriction, the benefit of condition obligation is assignable *inter vivos*.**

There was no discussion in the group on the opportunity of such a rule. It may be felt unnecessary. It is inspired from the the OHADA Draft (art. 10/5 second sentence) as well as from the Quebec civil code, art. 1505 ("The conditional nature of an obligation does not prevent it from being transferable or transmissible") and the Avant-projet Catala (1179). It does not exist in PECL.

### **Article 9 Transfer of risk**

**Unless the parties otherwise agree, where an obligation has been contracted under a suspensive condition, the thing (goods) which is**



**the subject matter of the contract is delivered only when the condition is satisfied ; before delivery, the thing remains at the risk of the party who must deliver it (debtor).**

The question is whether or not there should be a provision on “transfer of risk”?

- This question is not one usually dealt with by model codifications. There is no such provision in PECL or in the OHADA draft.
- Most of the time, the parties specify, in their contract, when risk passes.

For all these reasons, the rule which is suggested here is very basic and could be deleted.

### **Article 10 Deterioration and perishment**

**If, before the condition is fulfilled, the thing deteriorates, the beneficiary of the condition (creditor) has a choice between terminating the contract and requiring the thing as it is, with reduction of price, without prejudice to any award of damages which may also be due under the national rules of tort law.**

**If the thing perishes in its entirety, the obligation is extinguished and the contract terminated, without prejudice to any award of damages which may also be due under the national rules of tort law.**

Same observations as for Rule 9. It should be noted that the Draft Common Frame of Reference, III.-1:106 contains a provision which operates a renvoi to the rules on Restitution in the situation where a contractual obligation comes to an end on the fulfilment of a resolutive condition (para 5 of 1:106).

#### **Reminder :**

- 1) It was decided not to deal with **renunciation** to a condition ( SL 27, para.447) . However, some specifications could be made in the comments. These could be inspired from the rule on renunciation which can be found in the French Avant-projet (art. **1178**).
- 2) No text is suggested as regard a **possible time limit** within which the condition must occur. There was a discussion on this subject ; Crepeau suggested to draw inspiration from the Quebec Civil code (SL Misc. 27, para 437) ;while some members favoured such a text (Zhang, Perales Viscasillas, para 445), some members expressed doubts as to the opportunity of such a text (Brödermann, Gabriel, Garro, para 439, 441; 442). If such a text was voted for, it should, according to some, only apply to suspensive condition (Brödermann, para 439).

## Appendix

### Models

#### Draft Common frame of Reference

##### III.–1:106: Conditional rights and obligations

- (1) The terms regulating a right or obligation may provide that it is conditional upon the occurrence of an uncertain future event, so that it takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).
- (2) Upon fulfilment of a suspensive condition, the relevant right or obligation takes effect.
- (3) Upon fulfilment of a resolutive condition, the relevant right or obligation comes to an end.
- (4) When a party, contrary to the duty of good faith and fair dealing or the obligation to co-operate, interferes with a condition so as to bring about its fulfilment or non-fulfilment to that party's advantage, the other party may treat the condition as not having been fulfilled or as having been fulfilled as the case may be.
- (5) When a contractual obligation comes to an end on the fulfilment of a resolutive condition any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

#### Principles of European Contract Law

##### *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.

#### Avant-projet Ohada

##### 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.

## **French Avant-projet Catala**

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.

### 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 fulfilment 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.