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Draft Chapter
on
Conditional Obligations

by

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Introduction

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, 2007 and 2008. 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”, SL Misc. 27” and “SL Misc. 28”) and sometimes also to the rapporteur’s Position paper for the 2007 and 2008 meetings (Unidroit 2007 – Study L – Doc. 103, quoted as “Posit. Paper”).

Comments and illustrations proposed are here suggested as a mere draft of the future comments and illustrations to be included in the final version. Some guidance is sometimes given and I deliberately referred to some of my hesitations.

I have also reproduced some reactions of two practitioners who kindly made observations on a first draft I wrote.

I am also grateful to Marcel Fontaine for his comments on my first preliminary draft.

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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).

COMMENT

1. Scope of this chapter

By virtue of the autonomy principle, contracting parties can make their contract (or the contractual rights and obligations which derive from the contract), conditional on the occurrence or non-occurrence of an uncertain future event.

This chapter only deals with conditional obligations which are of a contractual origin. It does not deal with conditions imposed by law. This is expressed by the wording of article 1 : the expression “may be made conditional” implies that the condition is of contractual origin. Most practical aspects of public permission requirements are already covered by PICC, Art. 6.1.14 et seq.

When compliance with a country’s law which is not the law applicable to the contract is agreed upon by the parties, this condition is of a contractual origin.

2. Notion of “conditional obligation”

A right or obligation is conditional if it depends on the occurrence or non occurrence of future and uncertain events.

In this Chapter, the word “condition” has a specific meaning, distinct from the one given to the word “condition” in common law countries. In those countries, a condition is an essential term of the contract (a “term” is a contractual provision, a “clause”) as opposed to a warranty which is a lesser, subsidiary term of the contract. The distinction between a warranty and a condition is crucial in the event of a breach of contract.

A condition is distinct from a “term” which in civil law countries is a future but certain event. A term is nothing more than a “time clause” or time limit for performance. Time of performance is dealt with in article 6.1.1.

A term or time limit is usually included in the condition (for instance, the contract will be concluded under the suspensive condition that all necessary authorisations are given before January 30, date of the conclusion of the contract).

If the condition does not state a term, such a term may be implied, as a result of interpreting the parties’ intention according to the Principles’ general provisions on interpretation. It should also be noted that art. 6.1.16 on « Permissions neither granted nor refused » gives a party the right to terminate the contract when permission is neither granted nor refused « within a reasonable time from the conclusion of the contract».

When the obligation does not depend on a date but on precise events provisions referring to such events are most of the time considered as terms or time clauses. However,

there may be a condition (hidden) when the obligation depends on something else happening or not happening before the event.

Illustration 1

A contract of sale is concluded on January 2, with delivery of goods to be made to buyer by the seller on January 30. The obligation to deliver is future but certain. It is not conditional since January 30 will definitely arrive.

Illustration 2

If A is bound to pay C *when* (and not *if*) B dies, it is a time clause and not a condition. However, if A is a trustee bound to pay provide C with alimentary support when B dies, the obligation is conditional on A surviving B (PECL)

Illustration 3 in DCFR

The future availability or publication of information concerning a past event, such as a company's net profits in the preceding financial year, may constitute a condition.

A agrees to purchase from B a number of shares in company C if C's net profits in the preceding financial year reached a stated minimum figure. It is not known at the time of the agreement whether the profits did reach the figure. The past profits of C will become known only when its accounts have been finalised. A's obligation falls to be interpreted as conditional on an uncertain future event – whether or not the amount of net profits brought out in the final accounts reaches the stated figure.

Obs. Practitioner 2: Je ne suis pas sûr qu'en pratique le cas de l'illustration 3 serait qualifié de condition suspensive. La plupart du temps dans ce cas il y a une clause d'ajustement de prix. En effet, il est rare qu'en pratique on considère que le contrat "tombe" si la condition de "net profit" n'est pas satisfaite pour quelques centaines d'Euros, d'autant que les écarts comptables sont parfois sujets à interprétation. On peut par contre prévoir que si l'écart constaté est trop grand mais il faut fixer un seuil, l'acheteur aura le choix entre se retirer ou demander un ajustement de prix.

Illustration 4

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)

(BFC: I think this example mixes up formation and payment)

Sometimes, contracts expressly provide that the performance by one party is conditional upon the performance of the other party. Strictly speaking such provisions are not "conditions" (even if in practice they are often called "promissory condition") but merely a way of further defining the precise content of each party's obligation and determining the time of the performance is due. For indeed, the performance if the other party is not an

“uncertain future event” : not only do the parties expect it happen but various remedies will be available if that obligation is not complied with.

3. Impossible, unlawful condition

A condition must be possible and lawful. Some national codes expressly state it. However, this can be inferred from the very definition of a condition provided in Article 1 and it is not necessary to have a specific texts. This result is implied in the whole concept of condition. Indeed, in case of an impossible or illicit suspensive condition, there is no state of pendency and hence no obligation, neither conditional nor unconditional.

In the case of initial impossibility, the rules on mistake may come into play and the contract will be invalid. When appropriate due to the circumstances of the case, the rules on restitution following avoidance will then apply.

It may happen that impossibility is supervening: for instance, the imposition of embargo after conclusion of the contract but before the export licence on which the contract depended could be obtained- will make the contract invalid from the date of the embargo. In that case, a valid conditional contract was concluded but this contract comes to an end when the supervening impossibility occurs. When appropriate due to the circumstances of the case, the rules on restitution following termination will then apply.

Some legal systems distinguish whether the condition is a “cause impulsive et déterminante” of the contract - in which case the whole contract is null – or not, in which case the contract is valid and not conditional. This approach has not been followed here.

BFC

I think we should say no more and avoid stating the consequences.

If the group is of the opposite opinion, then we could add :

“In case a suspensive condition is illicit or impossible, the contract does not come into force.

In case a resolutive condition is illicit or impossible, the condition should be considered as not having been stipulated and the contract continues to exist”.

However, these remarks from practitioners would make me hesitant to do so:

Obs. Practitioner 2: Personnellement, je pense que la distinction qui est faite entre les effets d'une condition suspensive illicite / impossible et ceux d'une condition résolutoire illicite / impossible n'est pas très claire et ne correspond pas vraiment à l'intention des parties dans la pratique. En effet, dans la très grande majorité des cas la condition (qui effectivement n'a pas d'effet rétroactif dans nos contrats) est un élément essentiel de la réalisation du contrat. Si elle ne se réalise pas (s'il s'agit d'une condition " positive ") ou si elle se réalise (s'il s'agit d'une condition " négative ") le contrat conclu prend fin. Je serai donc plutôt enclin à dire qu'une vraie condition est toujours une " cause impulsive et déterminante " pouvant entraîner la fin du contrat.

Illustration 1

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. (In this case, the condition is impossible because it is illicit).

Illustration 2

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.

4. A condition cannot depend on the entire discretion of a party

Where the occurrence of the condition is entirely dependent on the sole discretion of a party, there is simply no obligation at all and therefore no condition. For example, a person says that it will do something if it so decides. The obligation is null and void. The explanation for this is that this party is in fact not bound by the contract.

In many international contracts, there is a list of "conditions precedent" ; some of them explicitly depend on the "satisfaction or discretion of a party".

If the solution was that being a « condition potestative », the whole contract is null or void, this would annihilate the whole structure of a sale and purchase agreement which has taken months to be negotiated and this would force the parties to start everything again.

Here is the solution advocated for by a practitioner :

« Il serait préférable de dire que le contrat n'est pas encore formé ou l'obligation n'est pas encore constituée tant que la condition n'est pas réalisée. Il s'agirait d'une solution similaire à celle prévue dans l'article 2.1.13 (contrat subordonné par une partie à un accord sur certaines questions relatives au fond ou à la forme): no contract is concluded before agreement is reached. Il faut savoir que, très souvent, nous sommes à l'intérieur d'un processus de négociation d'une transaction ponctué par plusieurs étapes, avec des vraies conditions suspensives en voie de réalisation, des négociations complémentaires en cours, des réserves d'engagement encore à lever, etc. Dire que le contrat est nul, c'est mettre par terre tout ce qui a été déjà construit et les procédures mises en place pour concrétiser la transaction. Il est préférable de rester dans une logique de formation du contrat, plutôt que dans une logique de nullité du contrat ».

Sometimes one of the parties is able to influence the fulfillment or non fulfillment of a condition (for example, by being more or less active in obtaining the document which is made a condition by the parties). The obligation is conditional ; however, the party's behavior, if it amounts to an interference, will be dealt with in a specific provision (art. 4).

5. "Condition precedent" clauses : not everything is a condition

Here, I deliberately give many details, it is for the group to have concrete examples and then decide how to draft the comments and illustrations. A practitioner sent me some observations, I reproduce them in French, I think they are most useful and if we adopt them, this could save us reproducing all the illustrations I have reproduced below.

Practitioner

En règle générale, les conditions listées en tant que "conditions precedent" du closing vont bien au-delà de ce l'on entend par "conditions suspensives" stricto sensu. En effet, comme on le constate dans les illustrations du commentaire 5 de l'article 1 de votre document, ces conditions sont de nature très diverse:

(a) des conditions suspensives incontestables (receipt of all necessary antitrust clearance; admittance to trading on stock exchange; legal opinion...

(b) des approbations par des organes du vendeur ou de l'acheteur. La condition de "approval of the transaction by the supervisory board of the seller holding" (illustration 1) paraît une vraie condition suspensive. Cependant, dans d'autres cas lorsque l'engagement est conditionné par l'approbation par le conseil d'administration de la partie signataire, on peut se demander s'il s'agit d'une vraie condition

suspensive, ou bien d'une réserve d'engagement, ou encore de l'affirmation que le signataire n'a pas de pouvoirs d'engagement et que son engagement doit être ratifié par le conseil d'administration. (c) des actes ou omissions de la part de l'une des parties: no material breach of the purchaser's warranties or covenants; performance of undertakings; delivery of documents.... Cela rentre dans la notion de "condition precedent" dans la logique anglo-américaine, mais pas forcément dans la notion de "condition suspensive" du droit français. (d) des constatations qui sont laissées à l'appréciation de l'acheteur: ex, "due diligence examination audit to the satisfaction of the buyer"; "reasonably satisfactory outcome of a confirmatory due diligence by the purchaser".... Ces conditions sont souvent présentes dans les sale and purchase agreements qui ne sont pas précédés par des accords préliminaires ou intermédiaires (comme des "memorandum of understanding", "heads of agreement", "term sheet"). Lorsque le processus de négociation de la transaction est ponctuée par des accords préliminaires/intermédiaires successifs, les conditions de ce type se trouvent alors dans ces accords. par ailleurs, s'agissant d'accords non définitifs, on y trouve également une "condition precedent" relative à la signature de l'accord définitif (ex, "successful finalization and signature of a sale and purchase agreement containing all terms and conditions which are mutually acceptable"), qui est une claire réserve d'engagement: voir article 2.1.13 des Principes UNIDROIT (conclusion of a contract dependent on agreement on specific matters or in a a specific form).

The following illustrations will provide for examples of categories of clauses (terms) which are NOT necessarily "conditional" in the sense that there is a condition. It frequently happens that contracts mix up various types of conditions under the heading « Condition precedent »

Illustration 1: conditions precedent in an international share purchase agreement

“Conditions precedent”

Completion of the transaction is conditional on :

- a) The approval of the transaction by the supervisory board of the seller holding
- b) receipt by the purchaser on or before the completion date of the debt financing pursuant to the debt financing commitments
- c) receipt of all necessary antitrust clearance for the transaction from the European Commission and any other competition authorities having jurisdiction over the parties or the transaction whose clearance, if not obtained, would prohibit completion and notification of the transaction having been made to the national authorities in X country
- d) no material breach of the purchaser’s warranties or any covenants of purchaser set forth in this agreement shall have occurred before completion

Illustration 2 : convention d’augmentation de capital, clause entitled « Conditions precedent » ,

In a « convention d’augmentation de capital », a clause entitled « Conditions precedent » specifies that « the obligation of the lead managers at the Closing date to subscribe for the shares is subject to the realization of the following conditions precedent (conditions suspensives) on or prior to the closing date, which may be (entirely or partially) waived by the Managers, in their sole discretion ».

The list which follows includes elements which, strictly speaking, are not a « condition » in the sense of this chapter.

a. Accuracy or representations and warranties : each of the representations and warranties of the issuer delivered in accordance Section X is correct at the Closing date, as though they will have been give or made at such time ;

b. Performance of undertakings : the issuer has performed all of its obligations herunder to be performed on or before the closing date.

c. Admittance to trading on stock exchange : the offer shares shall have been admitted to trading on the stock exchange

d. Delivery of any and all closing documents : the lead managers shall have received the following documents on or before the closing date :

(i) authorization letter from the issuer irrevocably authorizing the bank to deduct the funds in the blocked account immediately after execution of the deed recording the realization of the capital increase, an amount equal to compensation, costs, expenses and other amounts payable by the issuer to the lead managers under this agreement and instructing it to pay the same to the lead managers in the proportions as provided for therein.

(ii) Lock-up letter : a lock-up letter by or on behalf of X

(iii) Opinion : an opinion letter from legal counsel of the issuer ; dated the closing date, in form and substance satisfactory to the lead managers

(iv) officer's certificate : a certificate of the officers, dated the closing date, in the form and with the substance as set forth in Annex X

e. Absence of Material Adverse Effect : No event that has caused or that is likely to cause a Material Adverse Effect shall have occurred between 1 October 2006 and the Closing date.

f. Absence of Amendments or Supplements to prospectus

g. Absence of adverse financial market conditions (clause then defines these conditions).

If any of the above conditions shall not have been satisfied at the time they should have been satisfied pursuant to this section, the obligations of the lead managers may be terminated by the lead managers.

Practitioner's opinion on these conditions: -

Illustration 1 :

a) : OK

b) : non, mais pas sûr de bien comprendre

c) : OK

d) : possible, c'est souvent le cas (voir mon précédent article). Mais on pourrait aussi concevoir qu'un " breach of covenant " ou " warranties " donne lieu à indemnisation plutôt qu'à résiliation du contrat pour défaut de satisfaction de la condition.

Illustration 2

a) et b) : cfr. d) ci-dessus mais l'absence de " materiality " est ici gênante. A mon avis, une absence de

" breach " de " warranty " ou " covenant " ne peut être qualifiée de condition que s'il s'agit d'un " material breach ". Dans le cas contraire, le remède ne devrait être qu'une indemnisation.

c) : OK

d) iii : OK

d) iv : a priori non

e) : OK

g) : possible (voir clause de " Material Adverse Change ") mais le vendeur résistera beaucoup.

Illustration 3 : Clause entitled « Conditions precedent » in a sale and purchase of business

« The sale and purchase of the Business is conditional on :

- a. The national cartel office having cleared the acquisition of the business by the purchaser by notifying within the one-month period of the national Act against restraints of competition that the conditions for a prohibition are not met ; clearing the transaction within the four month period ; permitting the time limits to expire without having served the relevant notices or decision respectively
- b. The transfer proposal having been approved and deposited in accordance with the ... provisions and the six weeks period mentioned in the law being terminated.
- c. The satisfaction (or waiver as the case may be) of all conditions precedent to the completion of an asset transfer agreement
- d. The satisfaction (or waiver as the case may be) of all conditions precedent to the completion of a real estate transfer agreement
- e. To the extent required by its existing credit facilities, receipt by the seller of consent from its banks to the completion of the sale and purchase effected in accordance with this agreement and the satisfaction to such consent which are required to be satisfied before that sale and purchase
- f. No Material Adverse Chance has taken place pending Completion
- g. A valid tax certificate evidencing that no taxes are due by the seller and that the seller is not subject to any pending tax audit , not dating back more than 20 days before completion
- h. A confirmation from the relevant social security authorities stating that no social security obligations of the seller are outstanding, issued at the latest 40 days prior to completion
- i. A copy of VAT certificate
- j. Irrevocable withdrawal of the various encumbrances existing on the assets upon completion.

6. Renunciation to the benefit of the condition

The right to renounce to the benefit of a condition is governed by general principles and no specific provision is needed in the text. It may happen that contractual provisions specifically deal with the question. If this is not so, the general principles are the following.

Such a right can be exercised by the party for whose exclusive benefit the condition has been stipulated, as long as the condition has not been satisfied and provided it does not violate the other party's legitimate expectations (art. 1.8).

Until that moment the parties may also, by agreement, renounce a condition stipulated for the benefit of each.

Article 2
No Retroactive Effect

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

COMMENT

1. A general default rule

The main purpose of the provision is to provide a general default rule for situations in which the parties have not expressly provided otherwise. Parties should be encouraged to give specifications as to the retroactivity or no retroactivity of the condition.

This general default rule is the absence of retroactive effect of a condition. In other words, it ascribes a prospective effect (*ex nunc* and not *ex tunc*) to fulfillment of a condition.

The justification for this is twofold :

- The prospective rule is simpler when it comes to dealing with the transfer of proprietary interests, a subject not dealt with by PICC.
- Most legal systems have put aside the retroactivity rule for conditions (however, in some countries, the opposite rule still prevails).

2. Non retroactivity

The effects of non retroactivity are the following :

-when the suspensive condition occurs, the conditional contract automatically produces its effect, as any other act. The creditor can therefore only ask for its due (for example, interest) from the moment the condition occurred and limitation of action only starts to run from that moment.

- when the resolutive condition occurs, the conditional contract comes to an end (if it does not occur, the contract remains perfect). 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. This is why, in civil law countries, remedies are granted by referring to the rules on “enrichissement injuste” and not to restitutions.

Practitioner : -En pratique, dans des cessions/aquisitions, les parties distinguent la date à laquelle la transaction produit ses effets juridiques (transfert de propriété, par exemple) laquelle se produit lors du closing où dans la suite immédiate du closing, de la date à partir de laquelle la transaction produit ses effets économiques et financiers entre les parties (parfois appelée "accounting date"). Aucune de ces dates est connecté avec la date de signature du contrat.

- J'ai très peu d'expérience en matière de fonctionnement de la condition résolutoire, mais en matière de rétroactivité j'aurais tendance à traiter différemment les contrats à exécution successive (pas de rétroactivité : la résolution n'entraînerait pas l'anéantissement des prestations déjà fournies) des autres contrats (vente d'un équipement) où le principe de la rétroactivité ne me choque pas.

Difficulties linked to the process of unwinding the contract may arise, particularly when the parties have agreed that a resolutive condition shall have retroactive effect, that is to say that the parties should be put in the same situation as if the contract had never existed. In civil law countries, rules on “restitutions” apply when the resolutive condition is retroactive.

(compare Art. III-1:106 [5] DCFR which refers to the chapter on restitution upon fulfillment of a resolutive condition even when there is no retroactive effect).

Illustrations taken from DCFR

Prospective effect in the case of a suspensive condition Illustration 7

A contract for the sale of a house in Bordeaux provides that the seller’s obligation to sell is subject to the seller being appointed to a senior civil service position in Paris by a stated date. The seller is duly appointed. It is only when that appointment is made that the seller’s obligation to sell the house takes effect as an unconditional obligation. Before that there is only a conditional obligation.

Prospective effect in the case of a resolutive Illustration 8

A carrier enters into a contract with a farmer to transport water by lorry to the farm for four weeks but this obligation is to come to an end if the local drought comes to an end within that time. Under the contract, the farmer pays carriage charges 30 days after each delivery. The end of the drought within the four week period brings to an end the carrier’s obligation. The farmer, nevertheless, remains bound to pay outstanding charges for deliveries made before the end of the drought. These charges are not affected by the condition: they accrue with each delivery even if payable in the future.

3. Anticipatory non performance

In the case of a suspensive condition, specific performance may not be demanded before the condition occurs. However, anticipatory non-performance is still available and, provided all conditions are met, the party who is to receive performance may terminate the contract according to PICC 7.3.3.

Article 3

Interference with Conditions

(1) If fulfillment 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-fulfillment of the condition.

(2) If fulfillment 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 fulfillment of the condition.

COMMENT

1. Necessity of a specific provision

A provision on “interference” is a specific application of the general of good faith and fair dealing (art. 1.7) together with the provision on inconsistent behaviour (article 1.8). The same idea is to be found in PECL, Art. 16:102 and DCFR (III.–1:106 (4)).

This specific provision only applies to conditions and not to terms of the contract. Therefore, for example, it will not enable a seller under a contract containing a FOB clause to claim the purchase price without to deliver the goods, in case the buer fails to nominate the vessel (Study L-WP 16 , p. 5).

Illustration

Under a joint venture agreement, a party is bound only if it obtains a building permit from the local authorities. This party does not give all the relevant documents in order to obtain this permit in due time. Fulfilment of the condition is prevented by this party.

This black letter rule on interference with conditions does not go so far as imposing a duty to use all reasonable efforts to cause the conditions to be satisfied. In commercial practice, « conditions precedent » clauses may, after having listed all the events upon which completion of the transaction is conditional may then further provide that parties shall act in good faith.

Illustration

In a contract, the following clause may appear « the parties shall use their reasonable efforts to cause the conditions to be satisfied as soon as practicable »

Or « « the parties shall use their best efforts to cause the conditions to be satisfied as soon as practicable ».

Or « the parties shall use their respective best efforts to procure that the conditions are satisfied as soon as practicable »

It is to be noted that a duty of best efforts in one’s activity is covered by article 5.1.4 Unidroit Principles and that in practice, it is more stringent than a mere reference to « reasonable efforts ».

Such clauses may be more specific and be imposed on one party only :

« In respect to the receipt of all necessary clearance from the European Commission, purchaser shall make appropriate filings with all applicable competition authorities in an expeditious manner (subject to the seller making available all required turnover figures and other required information, if any) as may be reasonably necessary to obtain antitrust clearance as soon as (reasonably) possible ; and undertake to propose all such remedies and consider all obligations or remedies proposed by any competition authority as may be reasonably necessary to obtain antitrust clearance therefrom as soon as reasonably possible »

2. Consequences of interference

In PECL and DCFR, interference with conditions leads to the result that condition is “deemed to be fulfilled”. By contrast, this article merely states that a party who has interfered “may not rely” on the fulfillment or non-fulfillment of the condition. Indeed, the expression “deemed to be fulfilled” (used in PECL) was considered unclear and inappropriate insofar as it could be interpreted as requiring specific performance of the contract. Very often, one of the suspensive conditions is the obtention of an authorization by an authority. It would be absurd to say that if the party who was supposed to obtain this authorization did not act in good faith and consequently did not obtain it, the condition is “deemed to be fulfilled” and hence the contract should be performed. Moreover, it was felt necessary to strengthen the position of the other party by granting her an option between specific performance and walking out of the contract.

3. Remedies available

The available remedies (specific performance/damages) are to be determined in accordance with the contractual provisions and, in the absence of such clauses, with the general rules on remedies as well as with the particular circumstances of the case.

Illustration

In a share purchase agreement (management buy out) for instance, a contractual clause may provide that “if the conditions are not fulfilled before..., seller may either seek specific performance or terminate this agreement. In the latter case, no party shall have any claim against the other party as a result of such termination.

In some cases, the innocent may no longer wish to perform the contract ; in other cases, specific performance is just impossible because it would be unlawful.

Illustrations

1. The licensing of a software package by B to A is agreed by the parties to be dependent upon the professional approval of the package by an independent computer engineer, C who is nominated by A. A then regrets the bargain and bribes C to disapprove the software package. The fact that A party “may not rely on the non-fulfilment of the condition” gives B a choice between specific performance (A is bound to perform the licensing agreement) or walking out of the contract with damages. In PECL and DCFR where C’s approval was “deemed to have been fulfilled”, A and B are both bound to perform the licensing agreement.

2. Suppose now that the contract is favourable for A and, in spite of C’s reluctance, A persuades him to approve the package. C finally approves the package. In spite of C’s approval, A would not be entitled under the contract and again, B would have an option. He would not be under any obligation to perform, but he may perform if he chooses.

3. 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, the buyer can only claim damages, since specific performance would be unlawful and hence excluded.

4. Further distinctions to be made in evaluation of amount of damages

In order to evaluate the amount of damages, a distinction should be made, on a case by case basis, between conditions with a high probability of occurrence and conditions with a low probability of occurrence.

In the case of a low probability of occurrence, only partial compensation for the losses caused by the interference of the party acting unfairly may be granted. The difficulty is to distinguish between these two types of situations.

A distinction could also be made between negative and positive interference.

Article 4

Rights Preserved

Pending fulfillment of the condition, a party shall not act contrarily to the duties of good faith so as to prejudice the other party's rights in case of fulfillment of the condition.

COMMENT

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

The situation *pendente conditione* is different from breach of contract in general and therefore deserves special treatment despite the fact that there is a general rule on good faith (art. 1.7). A person who benefits from the condition has a conditional right which deserves protection.

The provision is also important as a reminder to the parties who enter into a contract under a condition to consider this issue and even expressly state which measures the person who benefits from the condition may take in order to preserve his/her rights.. It is particularly important in arbitration proceedings. If litigation goes to court, the question whether interim relief is granted can be left to the national courts.

This rule does not relate to proprietary rights. This question has deliberately been omitted throughout the Principles and cannot therefore be dealt with in a chapter on condition.

This rule applies both suspensive and resolutive conditions.

If A, sells his enterprise to B under the resolutive condition that B gets permission to exercise this activity together with another one. To what extent would the envisaged provision unduly restrict the buyer's possibilities to take important decisions for the enterprise ?

Il y a toujours dans les contrats d'acquisition d'entreprises une clause " d'ordinary course of business " (covenant) ou encore de gestion dans la période intermédiaire entre signature et closing, qui impose au vendeur de ne faire que des actes ordinaires de gestion. Et cette clause est selon mon expérience plus un " covenant " qu'une condition.

En effet, dans la pratique, dans les sale and purchase agreement de sociétés, le vendeur doit se concerter avec l'acheteur sur certaines décisions à prendre pendente conditione.

Article 5

Restitution in case of fulfillment of a resolutive condition

On fulfillment of a resolutive condition, any restitutionary effects are regulated by the rules on restitution (with appropriate adaptations?)

COMMENT

When a contract comes to an end because of the fulfilment of a resolutive condition, there has been performance of reciprocal obligations, fully or in part. The question whether either party is bound to return or pay the value of whatever has been received from the other arises.

Difficulties may arise, which are linked to the process of unwinding the contract. Such difficulties will be even greater when the parties have agreed that a resolutive condition shall have retroactive effect.

This article provides that rules on restitution apply (as in Art. III-1:106 [5] of DCFR).

This provision only applies to resolutive condition. However, in case of a suspensive condition, it may happen that a person has paid or transferred something before the suspensive condition is. If, finally, the condition is not fulfilled, this advanced payment or transfer will lead to the application of rules on unjustified enrichment.

Note on "closing"

Practitioner 1.

Le closing intervient essentiellement dans des cessions et acquisitions d'une entreprise ou fonds de commerce, de capital de société, de parts dans un consortium. D'après le Black's Law Dictionary, le closing est également utilisé (aux US) dans le "sale of real estate": "refers to the final steps of the transaction whereat the consideration is paid, mortgage is secured, deed is delivered...".

Le mot closing (ou completion) indique l'ensemble des opérations juridiques ou matérielles nécessaires pour achever la transaction: transfert physique des titres au porteur; formalités de transfert d'actions nominatives; enregistrements divers et variés; ajustement du prix; paiement du prix, etc. On parle souvent d'une closing date (ou completion date), qui est la date à laquelle, ou à compter de la quelle, lesdites opérations doivent être réalisées. Cette closing date intervient un certain nombre de jours après que toutes les "conditions precedent" aient été réalisées ou aient fait l'objet de renonciation. Pour éviter les doutes sur le sujet, à la closing date, les parties signent un document qui confirme que les parties reconnaissent qu'aucune "condition precedent" ne subsiste.

Practitioner 2.

Pour ce qui est de la notion de closing, celle-ci est effectivement désormais utilisée pour toutes sortes de contrat (couramment pour les achats d'actions ou d'activités, et éventuellement pour les contrats de financement, ...) dans lesquels on distingue la date de signature et la date de closing.

On utilise aussi parfois le terme "completion" qui pour moi a le même sens.

La notion est, comme vous le soulignez, étroitement liée à celle de condition car le plus souvent, le temps qui s'écoule entre la signature et le closing est celui nécessaire à la satisfaction des conditions suspensives.

Je pense qu'une traduction en français pourrait être "réalisation" du contrat ou "consommation" du contrat (les anglais utilise parfois le terme "consummation of the contract"), car au closing c'est bien l'objet du contrat qui est réalisé (ou "consommé") par l'échange des prestations convenues (prix contre actions, etc...).

Le terme "effective date" (ou date d'effet) est aussi parfois utilisé, mais de moins en moins car il peut laisser supposer que le contrat signé n'entre pas en vigueur tout de suite alors qu'au contraire certaines des dispositions peuvent être liantes ("binding") dès signature (confidentialité, obligation de gérer dans "l'ordinary course of business" pour les achats de sociétés, coopération pour la satisfaction des conditions suspensives), même si par la suite le contrat n'est pas poursuivi du fait de la non réalisation des conditions.

Bref, si j'avais à choisir, je pencherais plutôt pour le terme "réalisation" (closing) ou "date de réalisation" (closing date).