九州大学学術情報リポジトリ
Kyushu University Institutional Repository

Conditions: in search of the balance between the autonomy of will and imperative rules of law. A comparative study.

ポルィノフスキー, ダニル

https://hdl.handle.net/2324/7157285

出版情報：Kyushu University, 2023, 博士（法学）, 課程博士
バージョン：
権利関係：

KYUSHU UNIVERSITY

KYUSHU UNIVERSITY
GRADUATE SCHOOL OF LAW

CONDITIONS: IN SEARCH OF THE BALANCE BETWEEN THE AUTONOMY OF WILL AND IMPERATIVE RULES OF LAW. A COMPARATIVE STUDY

Doctoral Thesis by
Polynovskii Danil
LL.D. course
Student ID 3LA20005T
Polynovskydan@gmail.com

Academic Supervisors:
Igimi Mariko, professor
Fenwick Mark Dalton, professor

Fukuoka, Japan
July 2023

Table of contents

Introduction 6

Concept of condition 6

Balance, autonomy of will, and legal uncertainty 8

Research questions and sources 11

Paper structure 13

Methodology and originality 16

Acknowledgements 18

Abbreviations 19

1. Conditions and imperative rules of law 20

1.1. Clause on condition 20

1.1.1. What condition refers to (definition of condition) 21

1.1.2. What condition affects (object of condition) 26

1.2. Qualifying features and classifications of condition 33

1.3. Standards of condition (condition's criteria) 40

1.3.1. Condition vs time concept 41

1.3.2. Condition vs preliminary contract 43

1.3.3. Condition vs aleatory contracts 46

1.3.4. Suggestions on standards of condition 50

1.4. Retroactive effect of condition 52

1.4.1. Examples and functions of retroactive effect 54

1.4.2. Doctrinal debate on theoretical acceptance of retroactive effect 56

1.4.3. Comparative picture on retroactive effect 60

1.4.4. Legislative necessity of retroactive effect 62

1.5. How legislators provide the balance in the general aspect of conditions 63

1.5.1. A note on forced conceptual limitations (compliance with law) 67

2. Potestative conditions and imperative rules of law 70

2.1. Classification of conditions according to influence 70

2.1.1. Comparative look on potestative conditions 72

2.1.2. Classification flaw of mixed conditions 75

2.2. Doctrinal and case law analysis on potestative conditions 78

2.2.1. Russian doctrine and practice. Accepting potestative conditions 78

2.2.2. French doctrine. Protection from abuse of potestative power 83

2.2.3. American doctrine. Potestative condition and illusory consideration 87

2.3. Fiction of bad faith condition fulfillment 91

2.3.1. Comparative and doctrinal analysis on fiction of bad faith 91

2.3.2. Conceptual concerns on bad faith. Correlation with potestative conditions 93

2.3.3. Standards of fiction of bad faith 97

2.3.4. Purpose of fiction of bad faith. Remedies 100

2.4. Pure potestative conditions and transformative rights 103

2.4.1. Theory of transformative rights 104

2.4.2. Differences between transformative rights and pure potestative conditions 107

2.4.3. Legislative suggestions 112

2.5. How legislators provide balance in potestative conditions? 115

3. Legal pendency, or before condition occurrence 121

3.1. Doctrinal analysis of continental law on legal pendency 122

3.1.1. French answer on legal pendency. Retroactive effect 122

3.1.2. German approach on legal pendency. Protected expectation 127

3.1.3. Russian law on legal pendency. Chances and risks model 132

3.2. Doctrinal and case analysis of common law on legal pendency 137
3.2.1. English doctrine on legal pendency. Degrees of obligation 137
3.2.2. Canadian and American doctrine on legal pendency. Satisfaction model 141
3.3. Legislative analysis on pending conditions. Levels of regulation 145
3.3.1. Negligent level of regulation 146
3.3.2. Satisfactory level of regulation 147
3.3.3. A note on common law regulation of legal pendency 150
3.3.4. Proficient level of regulation. Third party acquisition in good faith 151
3.5. How uncertainty issue of legal pendency could be handled 156

4. Condition and unilateral actions 161
4.1. Doctrinal analysis of conditional unilateral actions 162
4.1.1. Classification of conditional unilateral actions. Obliged addressee 163
4.1.2. German law and doctrine on conditional unilateral actions 166
4.1.3. Russian doctrine on conditional unilateral actions 170
4.1.4. Brief conclusions on conditional unilateral actions 173
4.2. Doctrinal analysis on conditional dispositive transactions 174
4.2.1. Automaticity feature and publicity restriction 174
4.2.2. Different approaches on conditional dispositive transactions 177
4.2.3. Peculiarities of Germanic law in conditional dispositive transactions 180
4.2.4. Security function of conditional dispositive transactions 183
4.3. How uncertainty issue of conditions in unilateral actions could be handled 186

5. Rupture of synallagma in conditioned obligation performance 188
5.1. American doctrine and case law on the rupture of synallagma 192
5.1.1. Farnsworth on subject to financing cases. Reasonable time 192
5.1.2. Decisions in favor of contingency 198

5.1.3. Corbin on conditional promise. Donlan v. Turner 202
5.1.4. Williston's interpretation of promise to pay when able 207
5.2. Russian doctrine and case law on the rupture of synallagma 209
5.2.1. Russian case law on conditioned counter-performance 209
5.2.2. Karapetov on shimmering causa 213
5.2.3. Ageev's economic reasonings and solutions to the rupture of synallagma 217
5.3. Legislative analysis on counter-measures to the rupture of synallagma 221
5.3.1. French-type legislations on possible counter-measures 221
5.3.2. A note on resolutive conditions in synallagmatic contracts 225
5.3.3. Germanic-type legislations on possible counter-measures 228
5.3.4. Partnership model as a counter-measure to the rupture of synallagma 231
5.4. How uncertainty issue of rupture of synallagma could be handled 235

Conclusion 240
How could the legislators construct the balance between the autonomy of will and imperative rules of law regarding the legal concept of condition? 241
How could the legislators withstand the uncertainty issues of condition, which tend to disrupt the balance between the autonomy of will and imperative rules of law? 245

Bibliography 250

Introduction

Concept of condition

Traditional civil studies have been accompanying our existence for more than a thousand years, yet still there are many questions remained unanswered. The doctrine still debates on what the best theoretical solution for each specific cause is, while the court interprets the circumstances of each case the way the violated rights and lawful interests of the party are protected. One of the oldest legal studies known to jurists revolves around a concept of conditions. So long as there were contracts, the interested sides, or contracting parties, wanted to change it according to the current circumstances. The term condition was one of those instruments, which allowed to change the dynamics of the legal relationship the way the parties desired. "Condition" as a word was understood in multiple ways, however, most of the time it had two meanings: a condition as a term or provision of a contract (technical condition) and a condition as a modality of the legal relationship (contingent condition). The technical condition has a titular function, as it does not provide any influence on the legal relation itself. Conditions in a sales contract, where the word "condition" implies a set of provisions to be fulfilled by the counterparties is a technical condition. The contingent condition, on the contrary, as one of the oldest concepts, acts as a modifying entity towards the contract, and, thus, has been of a tremendous influence on legal and economic relationships.

Contingent condition (*hereinafter* "condition") is a modality. One of its aims is to change the course of the obligation performance, so the contracting parties will have to perform their duty only if the agreed event happens or, if agreed so, not happens. Simplest example would be an obligation to work if it rains tomorrow. The rain is a "trigger" for the obligation of the other party to start. Non-trivial example, also featuring a condition, would be a satisfaction sale, where the buyer is obliged to pay for the goods only if he was satisfied with them. An advanced example, popular in the market, would be a "strike price" agreement – a call option conditioned upon the underlying stock price. If the stock price increases above the strike price before the expiration date of the option, the buyer acquires a right to exercise his option and to purchase the shares at the lower strike price, resulting in a profit. If vice versa, the buyer just does not acquire such right and the agreement expires without any further action. For the chance to acquire the right, the buyer pays a premium to the seller. The current paper reviews a variety of such examples. The technical condition, having no substantial value, is completely disregarded in the context of the current work.

The current paper is focused on the concept of condition and transactions, where this concept is introduced. Originally, "condition" was understood as a future possible occurrence. Definitions for "condition" are of a vast amount in the literature. Yet, "condition" is a juridical fact, which might happen or not happen. Fundamental legal concepts known to the legal circuit may depend upon condition occurrence, be it contract formation, obligation performance, changing or terminating the transaction partially or entirely, remedies for the breach of contract, etc. For example, if agreed so in the contract, a party may be excused from performing its obligations under a contract if a certain unforeseen event arises and makes performance impractical or impossible. Conditions could be incorporated not only into bilateral contracts between the interested sides of the agreement, but in any legal unilateral action a person wants to commit towards the addressee, be it a conferment of authority, a debt forgiveness, or a testament. A deal which includes a conditional clause is often called a "conditional transaction" in the continental law system, and a "conditional agreement" under the common law system. The names for such transactions including conditions will be used interchangeably within the paper, as they are almost identical in their meanings and nature.

There are more similar concepts. Along with the concept of contingent conditions, the common law system acknowledges a concept of promissory conditions, which at first might seem to be alike the one the current paper is about. Imagine, A and B have signed a contract by which A is to work for B, and B is to pay A 100 stones "if it rains tomorrow." The obligations of both parties are conditional upon the happening of a certain event: if it rains tomorrow, B will pay to A. This example constitutes a contingent condition, as the contract will be binding for B only if it rains. Another example is a case in which A agrees to work for B at a weekly wage. The contract starts to be binding for both parties immediately as they sign it. B promises to pay A if he works, and A promises B to work for a wage – this is the promissory condition, well known to the common law. In summary, a contingent condition is a "condition" that must occur in order for the obligation to be enforced, while a promissory condition is a "promise" made by one party to another. This paper does not cover promissory conditions, as these conditions describe the binding agreement between the parties without any relation to an event that might occur or not.

Condition is a popular concept in the market economics. It plays a role of a "negotiator" and "stabilizer" at the same time. As a "negotiator" the condition is always set up upon the circumstances which have a valuable interest for each of the contracting parties. Unlike betting contracts, the creditor and the debtor often fix a condition upon the occurrence or non-occurrence of event in which they have an equal interest. More than that, the legal relationship in conditional agreements is affected by the "stabilizer" role of the condition: counterparties tend to use "if …" sentence constructions in the

terms of contract because they want to leave as few surprises for themselves while performing the obligations as possible. Imagine the company pays for its worker's rent in a hostel. In some cases, the hostel would like to set a pragmatic "stabilizer": if the company dismisses the worker, the worker is evicted from the hostel as well.

Setting up a condition might also affect the validity of certain contract's provisions or influence the contract's existence. It is a common practice within the legal circuit to deem void certain provisions or whole contracts if an agreed situation occurs. Since the condition is a very dynamic concept, the paper suggests a comprehensive look on its theoretical limitations, answering the question on what could be a condition and what could not be a condition. To create a set of theoretical limitations, an analysis the differences between the concept of condition and its closest legal concepts is conducted, e.g., with preliminary contracts and aleatory contracts. The answers acquired are used as the basis for inspection of the key research questions further on.

Balance, autonomy of will, and legal uncertainty

The concept of conditions in the paper is reviewed under the topic of "balance" between the autonomy of will and imperative rules of law. What is the "balance" exactly? Condition is always a change to the contract, which can be inflicted by each of the contracting parties. However, the imperative rules of law are obviously created in a way to preserve the stability of the legal circuit and, thus, the stability of conditional transactions. The imperative rules of law are presented in the paper in a various way, be it a clear prohibition in the code, the court's interpretation of "defying the nature of the legal concept", or any other form of political adjustments of the legislator. The main purposes of the imperative rules of law, which will be discussed in the paper, are to provide certainty and stability to the legal relationships, to prevent the abuse of power, and to apply concrete defensive measures to the party whose rights and legal interests are violated.

On the other side of this balance is the principle of the autonomy of will. This is a basic principle of law: the participants of the legal circuit are free in how they exercise their rights. In the current paper, the autonomy of will has two manifestations according to the type of researched transaction. In unilateral actions, the autonomy of will is shown through the ability to impose new rights and obligations onto the addressee, as well as the ability to amend or terminate the existing legal relationships. In bilateral contracts, its manifestation is seen in the freedom of contract principle, the ability to choose any type of contract, including innominate contracts, to choose the wishful contracting party, and to conclude the contract.

Condition as an instrument to change the dynamics of the legal relationship is practically attractive in today's economic and business world. It is a convenient risk-management tool to create extra benefits in case of positive scenario or to put a pillow under if a negative scenario happens. However, the autonomy to use conditions often goes far beyond the political view of the legislator, contradicts the nature of the obligation as provided in the code, or leads to an abuse of power from a stronger economic party.

Finding the right balance between the autonomy of will and the imperative rules of law can be challenging, as there is often a tension between the two. On the one hand, excessive regulation can undermine the party autonomy and hinder the ability of the contracting parties to use conditions that meet their needs and interests. On the other hand, too much freedom can lead to abuses of power and unfairness which may question the integrity of the legal circuit as well. The middle ground is different within the law systems and legislations. Therefore, the current paper strives to present different levels of the balance through a comprehensive comparative analysis on conditions and conditional transactions.

By virtue of law, the contracting parties are free in their choice of circumstances which might influence the legal consequences or affect the purpose of the whole contract. While it is undoubtable, there is a certain issue. The concept of condition is centered around something potentially occurring in the future, which is uncertain. Condition is the uncertainty itself. The term "uncertainty" is very broad, and the legal uncertainty concept often discussed in the doctrine is said to be more of a philosophical dogma. Indeed, every legal concept known to scholars can lead to legal uncertainties, and no precise meaning of legal uncertainty could be found in this sense. However, in the context of conditions, the legal uncertainty has a concrete meaning.

In the context of the current paper, legal uncertainty refers to a situation in which it is not clear whether a condition will be fulfilled or not. This occurs, for example, when the condition is based on external circumstances that are unpredictable for the parties. If a construction contract depends upon a condition that the construction site must be approved by a government agency, this is also a case of legal uncertainty. Since the government agency has not yet decided on the approval, it is unclear whether the condition will be fulfilled, and the contract will be executed. The external factor depends upon the actions of the third party which makes the case more complicated and unpredictable to the parties. Thus, the legal uncertainty can be defined as a negative effect on the contracting parties which leads to the lack of knowledge or the lack of understanding on their legal status within the contract and the possible means of defense in case of violations.

The legal uncertainty in conditional transactions imposes multiple risks, different in nature. There are substantial risks to the contract, like the risk of delay, risk of non-performance, and the risk of damages. There is also a procedural risk of litigation. There are other general business risks, caused by the legal uncertainty, such as the risk of lost opportunities and reputational damage.

The legal uncertainty can be defined more concretely in the context of conditions than in case of any other legal concept since "condition" is very conceptually close to the certain concept of "time": there is a "moment of truth" the parties stipulate in the contract for, have interest in it, and wait for. Condition is one of the most freedom-loving instruments in the legal circuit, therefore, the amount of legal uncertainty is immense.

The aim of the paper in this sense, however, is not to show all the possible "legal uncertainty" situations surrounding the concept of condition and conditional transactions. For the purposes of the paper, at least three major uncertainty issues have been chosen. These are the theoretical and practical compositions which introduce problematic situations with the parties to a conditional agreement. The uncertainty issues are actively discussed in the doctrine of different countries. Such situations ask for a clear legislative answer. The paper strives to define these uncertainty issues, to analyze, and to solve them (if it is possible), or to provide a thorough explanation. Those are very important questions regarding the concept of condition. They are visible on the surface, yet they also have peculiarities in the exact cases. In the context of the current paper, the uncertainty issues are compositions that disrupt the balance between the autonomy of will and imperative rules of law.

How does it happen? Either the law does not have an immediate answer to the uncertainty issue caused by a condition, and the courts interpret the same conditional transaction differently, or the stability of the transaction is undermined because the parties are in the situation of economic stall. In bilateral contracts, the autonomy to use conditional provisions might lead to the outcomes neither the contracting parties, nor the third parties had expected. In unilateral actions, the addressee of the action might be exposed to obligations it cannot perform.

To find the balance between the party autonomy and the imperative rules of law, it might be necessary to impose restrictions and prohibitions onto the party's autonomy of will, as well as to establish safeguarding rules that ensure the condition is fulfilled in a fair and reasonable manner. Although, the doctrine, the legislator and the court do not always give a unified answer to the uncertainty issues. Therefore, the paper strives to add to the existing doctrine and to create new solutions. The uncertainty issues discovered during the course of the research define the table of contents for the current paper.

Research questions and sources

The key research questions of the paper are:

1. How could the legislators construct the balance between the autonomy of will and imperative rules of law regarding the legal concept of condition?

2. How could the legislators withstand the uncertainty issues of condition, which tend to disrupt the balance between the autonomy of will and imperative rules of law?

First, the paper focuses on examining the current existing rules which establish the balance between the autonomy of will and imperative rules of law regarding the topic of condition. To provide a complete overview on the concept, the research delivers a comprehensive comparative analysis of different legislations within the continental law system and the common law system, including the important doctrine and case law. The paper strives to define different legal approaches on a variety of questions. The comparative analysis is committed towards multiple questions: the construction of the conditional clause, the acceptability of potestative conditions, the regulation of the status before the condition occurrence, etc. The multi-layer comparative analysis is aiming to acquire maximum information on the regulation of conditions from different parts of the world. Afterwards, the data is collected and presented in the form of "groups" – a set of countries which stand by a similar idea and rules in terms of regulating the concept. Establishing the bigger picture will eventually lead to a set of legislative suggestions and enhancements for the legal concept of condition.

The current research represents the states with a diversity of political attitudes towards the legal concept of condition. Some of them may provide the most freedom to conclude different conditional transactions and, thus, may establish a higher level of protection, while some other legislations may provide the least amount of autonomy and impose limitations to the usage. The comparative research on the continental law unifies 45 civil codifications, each of which was analyzed for the imperative rules on condition. The list of the states of the continental law system is the following: Argentina, Armenia, Austria, Azerbaijan, Belarus, Belgium, Brazil, Bulgaria, China, Czech Republic, Egypt, Estonia, France, Georgia, Germany, Hungary, Indonesia, Iran, Italy, Japan, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Luxembourg, Moldova, Nepal, Netherlands, North Korea, Poland, Quebec (Canada), Russia, South Korea, Spain, Switzerland, Tajikistan, Thailand, Turkey, Turkmenistan, Ukraine, United Arab Emirates, Uzbekistan, and Vietnam. The common law approach towards conditions and its issues is presented by the case law of the United States, the United Kingdom and Canada. The number of researched countries confirms the possibilities of acquiring big data for the subsequent analysis within the current paper.

The current paper relies not only on the vast number of codifications but the doctrine and case law as well. The knowledge base on the continental law system is supported by authors on French (Latina M., Milhac O., Valory S.), German (Zimmermann R., Hattenhauer C., Flume W.) and Spanish (Vaquer A.) doctrine, as well as the case law of the Court of Cassation (France) and the Federal Court of Justice (Germany). The Russian approach is relying on a vast amount of Russian legal doctrine (Ageev A.V., Karapetov A.G., Gromov S.A., Ostanina E.A.) and the case law of the Supreme Court and the Supreme Arbitration Court of the Russian Federation. The Russian law on conditions is presented in the paper as an example of "multiple-problems" case. The current paper attempts to touch upon the issues of Russian law and to suggest solutions applicable for every other law that lacks the necessary regulation.

The common law approach is mainly introduced in the American legal doctrine (Corbin A., Farnsworth E., Williston S.), the books of the English lawyers (Treitel G., Nicholas B.) and Canadian scholars (Fridman G.), as well as in the case law of the US Supreme Court, the UK Supreme Court and the Supreme Court of Canada. The paper strives to elaborate on how the court interpretation under the common law solves the problems caused by the usage of conditions.

The aim of the paper is to provide a thorough explanation for each of the major uncertainty issues, for example, on the concept of legal pendency. The paper attempts to give the concept of legal pendency a concise definition and presents a comparative analysis, the result of which depicts substantial differences between the legislations in their level of the legal protection. This protection is different for the creditor and the debtor during the waiting period. In this exact case the paper strives to suggest the new available mechanisms to the legislators with less available regulation. The best mechanisms are taken from the legislators who excelled at providing the legal protection during the pendency period. The paper also strives to show the process of solution, if possible. Sometimes, however, it is better to prohibit certain situations for the sake of stability of the legal circuit than to allow. It might be more efficient or more protective towards the parties. The paper strives for construction of valid theories to explain the efficient methods.

The current paper also gives a historical insight on the concept of condition. The historical-legal analysis on the uncertainty issues of conditions is important: it allows for a better understanding of the concept, as well as helps to approve or disapprove the existing theories. Harmonization and unification of law is also one of the inner aims of the current paper. Providing a set of valid instruments to maintain the balance between the autonomy of will and imperative law is an important part of the conclusion to the paper.

Paper structure

The current paper consists of five parts in total. First two parts focus on how the current legislations establish the balance between the autonomy of will and imperative rules of law and what more could be done. The paper analyses the basic aspects of conditions along with the doctrinal questions important for the further research on uncertainty issues. The next three parts focus on how the current legislations could withstand the uncertainty issues of the concept of condition. They provide an overview on each of the uncertainty issues and explore them. Each part concludes with a paragraph which presents an overview and attempts to suggest enhancements for the legislations.

Part 1 "Conditions and imperative rules of law" introduces the academic reader to the concept of conditions and presents the main imperative rules on the topic. The starting paragraph presents a comparative legislative analysis on the conditional clause. The states of the civil law are divided into several groups upon the two questions. The first question is on how the legislator defines the condition. The second question is on what the object of the condition is. Upon the comparative research on the legislations, multiple examples of imperative rules are revealed. The part continues with the question on the qualifying features of condition, as well as discovers several classifications, necessary for the further examination. A specific attention is given to the imperative criteria of conditions, which are defined through a comparison of conditions with its other closest legal concepts: time, preliminary and aleatory contracts. The last question revolves around the concept of retroactive effect, the ability to apply the legal consequences of condition occurrence to the time before the occurrence. The retroactive effect of condition is presented through examples, functions, doctrinal debate on acceptance and a comprehensive comparative picture of today's legislations. The paper presents thoughts on the legislative necessity of the concept to the legal circuit. The ending paragraph of the part provides a summary, as well as focuses on the research question by explaining how the legislator constructs the balance in the reviewed aspects of conditions.

Part 2 "Potestative conditions and imperative rules of law" introduces the academic reader to a comparative and doctrinal analysis on one of the condition types: potestative conditions. The charm of such conditions is in the ability of the party to influence its occurrence. Such an ability is itself the manifestation of the autonomy of will. However, the nature of such conditions tends to be more disruptive to the contracting parties, resulting in the legislative necessity to tame such conditions. The part starts with a closer look on the old classification of casual, potestative and mixed conditions. The paragraph exposes the theoretical issues the classification struggles with, including the flaws connected to the theory of mixed conditions. Further, the paper presents a comparative doctrinal

analysis on potestative conditions. The difference in understanding the concept led to the different issues the doctrines had with such conditions. The Russian doctrine struggled with the acceptance of potestativity, while the French doctrine tried to evaluate the abuse of potestative power. The next question of potestative conditions discusses its correlation with another important imperative rule: the fiction of bad faith fulfillment. The paper presents a comparative legislative analysis of the rule, as well as discusses the important conceptual concerns about this imperative rule. The paper attempts to find the standards of bad faith fiction which could help to create a harmonized rule in this sphere. Moreover, the rule is observed from the point of implementation: it is unclear whether this imperative rule is a sanction for the parties or just an interpretation tool for the court. Later, a question on the correlation between the pure potestative conditions and transformative rights is reviewed. The theory of transformative rights is relatively new; however, the researchers are very eager to use the concept everywhere due to its simplicity. For the same reasons the pure potestative conditions are often equated with transformative rights. The aim of the paragraph is to divide the concepts and to provide a valid legislative regulation to pure potestative conditions. At the end, a summary is provided with the focus on the balance between the autonomy of will and imperative law.

Part 3 “Legal pendency, or before the condition occurs” introduces the academic reader to one of the most important questions in the topic of conditions. It is the question on the legal status of the parties before the condition occurrence. The part provides a comprehensive historical analysis on the waiting period after the conclusion of the contract and before the occurrence of the agreed event. Legal pendency is introduced as an uncertainty issue: the parties are in the waiting process of condition occurrence. Unfortunately, the legal pendency is not explicitly regulated in most states. This leads to the question of protection of the contracting parties during the pending period. The comparative analysis revolves around the French, German, and Russian doctrine on legal pendency. The common law part is introduced with the English, Canadian and American doctrine. Each presented doctrine appears to have substantial differences. The next paragraph is a comprehensive legislative analysis on the imperative rules regarding the legal pendency. The civil law codifications are distributed upon the levels of regulation provided to the contracting parties before the condition occurrence. Along with defining the best solutions to the uncertainty issue of legal pendency, the question of the third-party acquisition in good faith is also reviewed. By providing a comparative legislative analysis, the paper strives to gather the possible instruments for the legislators to implement in their own law. Additionally, the paper aims to define the legal pendency for the purposes of doctrine harmonization and unification.

Part 4 “Condition and unilateral actions” introduces the academic reader to the comparative research on conditional unilateral actions and conditional dispositive transactions. The paper attempts to explain each of the correlation and provides own assessments on the permissibility of using conditions in such actions. Unilateral actions present a different type of manifestation of party autonomy. Accordingly, the addressee of the action is met with several risks if the unilateral action is conditioned upon a future uncertain event. The first paragraph presents a comparative doctrinal analysis on the topic of conditional unilateral actions (CUAs). The paper, for example, aims to elaborate on a “situation” when the addressor of the unilateral action is imposing a conditional obligation on the addressee. Such legal constructs should be precisely dealt with. In the second paragraph, the paper aims to explain the concept of conditional dispositive transactions (CDTs) and the way the balance between the party autonomy and imperative rules of law could be preserved. The paper strives to show the advantages and disadvantages in each case and suggests allowing or prohibiting conditional unilateral actions according to the type of the unilateral action reviewed. The part is focused on creating legislative solutions to contribute to the balance between the party autonomy and imperative law. This set of solution might be of an interest to the legislations which did not regulate conditional unilateral actions.

Part 5 “Rupture of synallagma (RoS) in a conditioned obligation performance” introduces the academic reader to the comparative analysis of the case law and doctrine on a specific issue. The issue happens within a bilateral contract with reciprocal duties. Due to the autonomy of will, the parties are free to make their reciprocal obligations subject to a condition occurrence. If the condition takes a very long time to occur, the creditor risks to never receive the counter-performance in exchange for what was provided to the debtor. Thus, the contract is left in a stalemate and the creditor’s lawful interests are violated. The issue of the Rupture of synallagmatic contract is crucial for the purposes of research. Unlike the issues reviewed in the other parts, the RoS issue takes place in a synallagmatic contract, transforming it into a gratuitous agreement against the expectations and intent of the parties. It is a disruptive issue that requires a set of instruments to be implemented. For these purposes, the paper takes a closer look onto the “subject to financing” cases in the U.S., the problematic regulation of conditioned obligation performance under the Russian law, and the legislative response of the French-type and Germanic-type legislations. Some exotic solutions to the issue are also reviewed as a matter of logic experiment. In the ending paragraph, the paper strives to give a definition to the issue, as well as attempts to apply an exhaustive set of solutions. This way a contribution to the balance between the autonomy of will and imperative of law could be achieved.

Methodology and originality

Methodology introduced in the paper is aimed towards achieving the answers for the research questions. To collect the necessary data, research on existing legal literature on the topic of condition was conducted. This included the analysis of cases and laws of different states related to the topic, as well as the review of relevant articles and books on the subject. The analysis of legal resources provided an overall understanding of the legal concept as well as allowed to dive into the specifics of certain issues. In addition to the literature review, multiple digital resources available on the Internet, the legal databases on case law or the "Round tables" with the legal experts on the uncertainty issues of conditions were reviewed to create the necessary themes and patterns for the upcoming research.

Historical method was used to collect the old and modern theories regarding the usage of conditions and conditional transactions. Discourse method was used to examine the language on definition of condition and, thus, to depict the differences between the legal understanding of the concept. Statistical method was used to organize the "levels of protection" during the examination on legal pendency. Other general scientific methods such as interpretation while working with reading materials, induction, deduction, and the formal logic method were used in process of material compilation. The accumulated data allowed for the further analysis and synthesis of the concepts of "balance" and "uncertainty issues" presented in the paper. The structural and functional analysis of the concept helped to further use the comparative method in the research and to confirm the validity of conclusions for the current paper.

The enormous amount of bibliography and legislation on the topic of conditions requires not only an immense knowledge base on the topic but also a handful number of languages to conclude a comparative comprehensive analysis. The author's main languages are Russian and English. Most of the necessary literature on the topic of conditions is presented in these two languages. However, a small part of the researched civil law codifications is presented digitally only in their own native language. These languages are Arabic, Dutch, Italian, Spanish and Portuguese.

Regarding the languages not known to the author and for the purposes of research clarity, DeepL Translator neural translation technology is used to achieve the most precise translation possible[1]. The author reviews the legislative documents both in native and translated format. Then, based on the author's experience and the available doctrinal knowledge on the topic of conditions, the paper brings the legislative interpretation done to the best abilities of the author.

[1] Jaroslaw Kutylowski, DeepL Translator, available at https://www.deepl.com/translator (visited July 1, 2023).

The overall method of the research is stated as in the title: it is a comparative comprehensive study. The collected material and data from the doctrine and legislation of different states was divided into specific debates and merged into a concise and coherent story on the topic of conditions. At times, the paper examines the effectiveness of certain legal policies and its impact towards concrete business groups. The described methodology allows to gain an overall comprehensive understanding of the topic, as well as to results which constitute a solid contribution to the current knowledge base of the academic community.

The originality of the paper is confirmed by its theoretical and practical attractiveness. The analysis presented in the paper addresses a lot of questions within the topic of conditions. Some of the questions have never been introduced or have not been answered completely. In this sense, the research provides more insights to the theories established in the past, as well as approves or criticizes the theories of the present. The paper strives to challenge certain opinions on specific aspects of condition and its occurrence, as well as attempts to suggest a new modern vision to the topic.

The usage of the legal doctrine and the case law of different countries with the focus on different states of continental and common law systems confirms the geographical diversity and, thus, geographical originality of the paper. More than the theory crafting, the paper suggests a set of solutions for the legislations with the least amount of protection for the contracting parties, making it a practical approach paper. The diversity of examples allows for a distinctive explanation of the concepts and theories presented. Even though the final goal of the paper is to achieve a certain progress by finding and accumulating concrete answers, some new questions might emerge. Those must be asked for the possibility of further research on conditions and conditional transactions.

The comparative comprehensive research presented further provides a substantial progress, significant for the legal academic community.

Acknowledgements

The contents of the current paper grew from the multiple pieces of written material on conditions and the issues surrounding them. The current and preceding papers on conditions could not be created without the necessary guidance, support, and valuable feedback from the teaching staff. Therefore, I would like to thank Kyushu University of Japan, Higher School of Economics of Russia, and Sakhalin State University of Russia for the immense amount of help provided during the completion of Bachelor diploma paper on conditions, Master thesis on conditions, and the current Doctoral thesis on conditions.

I would like to express my sincere gratitude to:

- Professor Mariko Igimi of Kyushu University, Japan.
- Professor Toshiyuki Kono of Kyushu University, Japan.
- Professor Mark Dalton Fenwick of Kyushu University, Japan.
- Associate Professor Irina Vladimirovna Sazanova of Sakhalin State University, Russia.
- Associate Professor Aleksandra Sergeevna Kasatkina of Higher School of Economics, Russia.

Also, I would like to thank Kyushu University students for providing additional sources and suggestions, valuable for the current paper:

- Oliver Posani, LL.D. candidate – for providing sources on Austrian law and case law.
- Elnur Karimov, LL.D. candidate – for providing sources on Azerbaijani law.
- Nadine Essam, LL.D. candidate – for providing sources on Egyptian law.

Abbreviations

ABGB	Allgemeines bürgerliches Gesetzbuch [Austrian Civil Code]
BGB	Bürgerliches Gesetzbuch [German Civil Code]
BGH	Bundesgerichtshof [Federal Court of Justice, Germany]
CC	Civil Code
CDT	Conditional Dispositive Transaction
CUA	Conditional Unilateral Action
DCFR	Draft Common Frame of Reference 2009
GK RF	Grazhdanskiy kodeks Rossiyskoi Federacii [Civil Code of the Russian Federation]
LLC	Limited Liability Company
OGH	Oberster Gerichtshof [Supreme Court of Justice, Austria]
PECL	The Principles of European Contract Law 2002
PICC	UNIDROIT Principles 2016
RoS	Rupture of synallagmatic contract
SAC RF	Supreme Arbitration Court of the Russian Federation
SC RF	Supreme Court of the Russian Federation
UNIDROIT	International Institute for the Unification of Private Law
USSR	Union of Soviet Socialist Republics (Soviet Union)

1. Conditions and imperative rules of law

1.1. Clause on condition

The concept of condition is one of the oldest institutes known to law. One of the most known German lawyers of the 20th century, Reinhard Zimmermann, relied on the old teachings to describe condition as a "clause by means of which the effectiveness of a transaction becomes dependent upon the occurrence of non-occurrence of a future and uncertain event."[2] Indeed, condition is a legal instrument that puts the legal relationship dependent upon a future occurrence, which might happen or not. It is a tool to forward the effectiveness of the transaction into a direction intended by the contracting parties when signing the contract. In its core, the concept of "condition" confirms the party autonomy principle: the ability to complex the contract is infinite. Making the rights dependent upon the sales targets, providing a mechanism of return if a negative scenario happens, interchanging the way obligations are performed; the usage of conditions pours more flexibility into the dynamics of contractual and non-contractual legal relationships. However, the mentioned also implies a necessity for regulating the concept with the imperative rules of law.

The way condition is regulated depends upon the jurisdiction, whether it is a continental law state with a codified law system, or a common law state with case law as the primary source of regulation. The first step in discovering how different legislations try to achieve the balance between the autonomy of will and imperative rules of law is to review available civil codifications and case law from all over the world on how the concept of condition is established. Following the description given by R. Zimmermann, it can be assessed that the general rule on condition has two parts in it: there is an "occurrence" and "something" which depends upon this "occurrence." The "occurrence" can be described as what condition is referred to (definition of condition), while "something" is what the condition affects/influences (object of condition).[3]

Therefore, it is necessary to start the comparative analysis with the two questions: "what does condition refer to" and "what is the object of condition." Answering these questions is the first step in contemplating the comparative picture on the topic of conditions. The comparative picture poses a great importance for the completion of research.

---

[2] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION, at 717 (1990).

[3] The description of condition, given by R. Zimmermann can be considered a "broad definition" of condition (which is closer to a technical condition, a clause that connects, for example, a right and an uncertain event). "Specific definition" of condition is the "occurrence" itself, this definition will be used further in the work for purposes of precise understanding.

1.1.1. What condition refers to (definition of condition)

Reference is the clause trigger. Through the course of examining the codified rules of law, it was discovered that 29 out of 45 legislators connect the concept of condition to the word "event." A variety in juridical technique can be observed: "future uncertain event", "unpredictable future event", "event not certain to happen", "expected in future uncertain event."[4] In case of these countries, the word "event" is always exposed in the starting provision of the section about conditions:

Art. 1353 (Italian Civil Code): "The parties may make the effectiveness or termination of the contract or unilateral act conditional upon ***a future, uncertain event.****"*[5]

At the same time, 9 out of 45 codifications use another word "circumstance", pairing it with the word "unknown", also to show that the parties can condition upon something not certain.[6] The countries include Russia and other 8 former USSR republics. 7 out of those have identical provisions with Russian GK RF:

Art. 157 (Russian Civil Code): "The deal shall be regarded as made under the suspensive condition, if the parties have made the arising of the rights and duties dependent ***on the circumstance****, about which it is unknown, whether it will, or will not, take place."*[7]

The different provision with "circumstance" could be seen in the Civil Code of Ukraine. The Ukrainian CC defines the legal concept of condition as a "suspensive circumstance" or "resolutive circumstance", depending on the type of condition.[8] The word "circumstance" is exposed the same way as "event", in the beginning article on conditions.

At first, the choice between the word "event" and "circumstance" seems to be a matter of stylistics. However, there is a sensible difference between the two. Since the legislations were analyzed in two languages, English and Russian, a dictionary review of both languages is possible.

---

[4] For "future uncertain event", *see, e.g.,* Belgian Civil Code. Book 5: Obligations, Art. 5.139 (in Dutch and French, 2023), available at https://bit.ly/3WINDca (visited July 1, 2023); for "unpredictable future event", *see, e.g.,* Civil Code of the Republic of Hungary, Art. 228 (1960), *available at* https://bit.ly/3Y6BnD5 (visited July 1, 2023); for "event not certain to happen", *see, e.g.,* The Federal Act on the Amendment of the Swiss Civil Code Part Five: The Code of Obligations, Art. 151 (1911, cons. ver. 2023), available at https://bit.ly/3DlCneI (visited July 1, 2023); for "expected in future", *see, e.g.,* Civil Code Of Turkmenistan, Art. 115 (in Russian, 1998), available at https://bit.ly/406KxS2 (visited July 1, 2023)

[5] Italian Civil Code, Art. 1353 (in Italian, 1942, cons. ver. 2020), *available at* https://bit.ly/3wzGBeT (visited July 1, 2023).

[6] List of states: Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, Uzbekistan.

[7] Civil Code of the Russian Federation, Art. 157 (in English, 1994), *available at* https://bit.ly/40mCWPB (visited July 1, 2023). Civil codes of Armenia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan have identical provisions describing suspensive conditions.

[8] Civil Code of the Republic of Azerbaijan, Art. 328.2 (in Russian, 1999), *available at* https://bit.ly/3kJNnw5 (visited July 1, 2023); *see also* Civil Code of Ukraine, Art. 212 (in Russian, 2003), *available at* https://bit.ly/3HEK02k (visited July 1, 2023). Important to mention, that the English translation of the Civil Code of Azerbaijan wrongfully translates the Art. 328.2 on condition, referring it to an "event, to which it is unknown whether it will happen or not."

The Oxford Advanced Learner's Dictionary describes a "circumstance" as a "situation that affects and influences your life and that are not in your control", while an "event" has multiple meanings: it is "a thing that happens, especially something important" or a "planned social and public occasion."[9] Collins English Dictionary defines a "circumstance" as "the conditions which affect what happens" and an "event" as "something that happens, especially when it is unusual or important" or "a planned and organized occasion."[10] Cambridge Dictionary speaks of "circumstance" as "a fact or event that makes a situation the way it is" or "events that change your life, over which you have no control", while the word "event" means "anything that happens, especially something important or unusual."[11] Merriam-Webster's Dictionary defines "circumstance as an "accompanying fact" or "the sum of environmental factors", whereas the word "event" is seen as a "noteworthy happening" or a "postulated outcome."[12] The most popular Ozhegov's Dictionary of Russian explains these words almost the same way: a "circumstance" is a "phenomenon accompanying some other phenomenon" and an "event" is "meaningful phenomenon of private or public life."[13] A long-history Dal's Russian Dictionary describes the word "circumstance" as "a happening of this or that way", and "event" as "an occasional existence of somebody with someone or something with something at the same time."[14] The Large Explanatory Dictionary of Russian (LEDR) explains the words in the same way: a "circumstance" is "a fact, related to something, connected to something", and an "event" is "something that happened, a significant phenomenon, a fact of public or private life."[15]

---

[9] Albert S. Hornby, *Oxford Advanced Learner's Dictionary online*, *available at* https://bit.ly/3kRZiI8 (circumstance) *and* https://bit.ly/3j58wR7 (event) (visited July 1, 2023). The word circumstance is supported by following examples: "normal circumstances", "circumstances of the case", "exceptional circumstances". The word event is supported by following examples: "recent/current/world events", "sequence of events", "overtaken by events."

[10] John McHardy Sinclair, *Collins English Dictionary online*, *available at* https://bit.ly/3IKJFJp (visited July 1, 2023). Along with the definitions the Collins Dictionary presents the examples of the word's usage: "certain circumstances", "explosive circumstances", "happier circumstances", but "the events of history", "recent events in Europe", or "major sporting events", if the second meaning is implied.

[11] Cambridge University Press, *Cambridge English Dictionary online*, *available at* https://bit.ly/3KTZHmc (visited July 1, 2023). In addition, the word "circumstance" is supported by examples: "suspicious circumstances", "circumstances beyond our control", "victims of circumstance", "by force of circumstance". The word event is supported by other examples: "sporting event", "social event", "broadcast the event."

[12] Merriam-Webster Incorporated, *Merriam-Webster's Dictionary of English*, *available at* https://bit.ly/3HCqDqH (circumstance) and https://bit.ly/3HgZB76 (event) (visited July 1, 2023). E.g., "weather circumstance" or "cardiac event."

[13] Sergey Ozhegov, *Tolkovyi Slovar Ozhegova Onlain [Ozhegov's Dictionary online]* (in Russian), *available at* https://bit.ly/3WKQAZH (circumstance) and https://bit.ly/3Y3KUuJ (event) (visited July 1, 2023). Examples are also presented: "a confluence of circumstances", "in difficult circumstances", "depending on the circumstances", whereas "historical event", "unexpected event", "international event."

[14] Vladimir Dal, *Tolkovyi Slovar Dalya Onlain [Dal's Dictionary online]* (in Russian), *available at* http://slovardalja.net/ (visited July 1, 2023). The word "circumstance" does not have examples. The word "event" is supported by following examples: "eventual incidents", "modern events", "events happening at the same time."

[15] Sergey Kuznetsov, *Bolshoi Tolkovyi Slovar Russkogo Yazyka [The Large Explanatory Dictionary of Russian]*, *available at* http://www.gramota.ru/slovari/info/bts (visited July 1, 2023). The LEDR also presents some examples with usage of those words: "to be in bad circumstances", "due to independent circumstances", "unfore*see*n circumstances", or "historical event", "international event", "an event in the life of the city."

Upon the dictionary review, two major assumptions could be given on what the difference between the words "event" and "circumstance" is.

The first assumption is the difference in scope of interpretation. "Event" appears to be a much broader term than "circumstance." The word "event" could be applied to any happening whatsoever, while "circumstance" is a set of physical and non-physical issues surrounding the situation. The usage of respectable words clearly correlates with the amount of legislation put for the concept of conditions into the civil code. 9 out of 9 codifications referring condition to a "circumstance" have a maximum of 1-2 articles for all the rules considering conditional transactions.[16] The rules are brief and identical in each of legislations.[17] The amount of regulation correlates with the "lesser" scope of the term. In case of the broad term of "event", insufficient amount of regulation can become harmful for the contracting parties. Out of the states using the word "event", an overwhelming majority (26 out of 29) of states has an extensive amount of regulation (3 and more articles) on the concept of conditions, including the effect on future/past or the protection in waiting period.[18] Being a broad term, "event" demands precise regulation, which may contribute to a higher quality of business practice at the end. The disadvantage, however, is the possibility of over-regulation, which might make the contracts more restrictive towards the participants.

The second assumption is the difference in influence. The term "event" is connected to any occurrence, including those with a human participation (international event, sport match, a celebration, etc.), while the word "circumstance" implies no human influence alongside it (suspicious circumstances, bad circumstances, etc.). The term "circumstance" is already precise in this sense: it is a happening, which is out of the human's influence. This might give a clue in the difference of legislator's attitude towards the concept of conditions. Stating that a condition is something that might occur or not, the former USSR legislators implied no human participation in its occurrence. The reason might be seen in the historical development of former USSR states, which came through long decades of administrative economics. Conditions as a popular "market economics" instrument were not a necessity there. Affected by that, the case law of the new Russian state had a negative opinion towards the conditions which might be influenced by the actions or pure will of the contracting party for a long time, such conditions are called "potestative."[19]

---

[16] Azerbaijan has 1 article with 6 sub-articles. Ukraine has 1 article. All the rest legislations – 2 articles.

[17] *E.g.,* Civil Code of the Russian Federation, Art. 157, 158 (in English, 1994), *available at* https://bit.ly/40mCWPB (visited July 1, 2023). The first article describes suspensive/resolutive conditions, the second article describes the fiction of fulfillment/non-fulfillment if the occurrence of condition is affected in bad faith (standard type imperative rules).

[18] Exclusions are Bulgaria (1 article), Hungary (2 articles), Iran (2 articles). However, Hungary has a protection mechanism in the period before condition occurrence. *E.g.,* Civil Code of the Republic of Hungary, Art. 229.

[19] *See* Part 2.1. Classification of conditions according to influence, at 70 – 75.

It could be presumed that all the other legislators from the "circumstance" group are also referring condition to something out of possible human influence.[20] On the contrary, almost all the states, which refer the occurrence of condition to an "event" allow conditions influenced by the will and actions of the parties (27 out of 29 codifications).[21] This means that the legislators are following the exact meaning of the word as in the dictionaries. Two exceptions could be found, however. Those are Georgia and Turkmenistan, also former USSR states. The legislations of those countries refer the condition to a "future uncertain event" and, at the same time, deem the conditions "depending upon the will of the party" void.[22] Such situation can be explained by a mix of historic influence of the Soviet law and the influence of the "western" legislation.

Therefore, it might be concluded that the difference in defining the concept of condition between the legislations is not about the wording and stylistics. The choice of the word for the concept is justified in both groups of states discovered. It could be suggested there is a strong historical and regulative aspect behind the reference to either event, or circumstance.

Still, there are 7 out of 45 countries, which avoided any references.[23] This implies that the section on conditions in each of the civil codes specify the dependence neither upon a "circumstance unknown to happen", nor upon a "future uncertain event." Instead, the word "condition" is used:

Art. 127 (Civil Code of Japan): "A juristic act which is subject to a condition precedent shall become effective upon fulfillment of the condition."[24]

An important nuance surrounding all the legislations from this group is that the term "condition" is used in a specific scope. Meanwhile, the analysis of the two questions is conducted under the broad term of "condition", which combines both the object of condition and the reference. In case of the 7 examined legislations, the term "condition" is understood equivalently to either "circumstance" or "event." The word "condition" itself cannot satisfy the research, thus, the correct reference should be assessed in each specific case.

---

[20] Russian legislator added an article on potestativity in 2015, while all the other identical laws of the former USSR states have not made such an addition, which implies the legislator's negative attitude towards conditions of will. Moreover, the wording of rules on conditions in Ukraine also leaves the same impression as of Russian law before 2015.

[21] *E.g.,* Civil Code of the Republic of Latvia, Art. 1549, 1552 (1992, amend. 2022), *available at* https://bit.ly/3HgSoUA (visited July 1, 2023); *see also* Luxembourg Civil Code (in French, 1803, cons. ver. 2023), Art. 1168, 1170, *available at* https://bit.ly/3jiXQOB (visited July 1, 2023); *see also* Civil Code of Quebec, Art. 1500 (1991, amend. 2022), *available at* https://bit.ly/3WJohL8 (visited July 1, 2023).

[22] Civil Code of Georgia, Art. 90, 92 (1997), *available at* https://bit.ly/3Y5hU64 (visited July 1, 2023), *see also* Civil Code of Turkmenistan, Art. 115, 117. The versions of the civil codes both in English and Russian languages fix the word "event." Moreover, the Civil Codes of Georgia and Turkmenistan prohibit explicitly pure potestative conditions not only favoring the debtor, but the creditor as well. See Part 2.1.1. Comparative look on potestative conditions, at 72 – 75.

[23] Those countries are China, Czech Republic, Germany, Japan, North Korea, South Korea, and Vietnam.

[24] Civil Code of Japan, Art. 127 (1) (1896, cons. ver. 2009), *available at* https://bit.ly/3jdExGo (visited July 1, 2023); *see also* Civil Act of the Republic of Korea, Art. 147 (2013), *available at* https://bit.ly/3kOTKOO (visited July 1, 2023).

In case of Czech Republic's legislation, it is possible to define the exact wording from the other provisions on specific contract performances: it is the word "event" in this case.[25] In case of other legislations this solution does not work. The solution could be found through the correlation of each of the legislations with the "assumptions" presented earlier. Legislations of China, North Korea and Vietnam devote 1 to 2 articles to the regulation of conditions, and do not specify anything on conditions depending upon the actions or will of the contracting parties.[26] Moreover, the wording and stylistics of provisions in these countries can be characterized as very brief and restrictive. Therefore, the term "circumstance" is more applicable to these codifications. On the other side, the legislations of Germany, Japan and South Korea have an extensive amount of regulation towards the concept of condition (more than 3 articles).[27] Each of the legislations tries to provide a mechanism of protection during the period before the occurrence of condition, as well as inexplicitly allows the concept of potestative conditions.[28] It could be assumed that the term "event" is more befitting for the abovementioned legislations. Therefore, it is 33 against 12 states which refer condition to "event" or "circumstance" respectively.

As for the common law, the answer presented in the case law and legal literature is unanimous: condition refers to an "event."[29] The American scholars refer condition either to the term "event" or "operative fact."[30] English professor Guenter Treitel also described the condition as "event."[31]

The supra-national legislation (DCFR, PECL, and PICC) also refers the condition only to a future uncertain event.[32]

---

[25] "A stipulation under which the changes in the amount of the superficies payment are conditional on an uncertain future event is disregarded…." Civil Code of the Czech Republic, Art. 1247 (2012), *available at* https://bit.ly/3DlARcw (visited July 1, 2023).

[26] Civil Code of China, Art. 158, 159 (2021), *available at* https://bit.ly/3u27kke (visited July 1, 2023); Civil Law Act of the Democratic People's Republic of Korea, Art. 30 (1990), *available at* https://bit.ly/3HDH8D2 (visited July 1, 2023); Civil Code of the Socialist Republic of Vietnam, Art. 125 (2005), *available at* https://bit.ly/3wET8Op (visited July 1, 2023). Chinese law uses the words "improper obstructs" and "improper facilitates" to explain the fiction of bad faith fulfillment. North Korean law states that in conditional acts "a party shall not do any acts which bring forward or interfere with the occurrence of those conditions." Vietnamese law uses the words "intentional hindrance" or "deliberate promotion" to explain the fiction of bad faith fulfillment.

[27] *See* German Civil Code, Book 1, Div. 3 Title 4; *see also* Civil Code of the Republic of Korea, Part I, Chapter V, Sec. 5.

[28] *E.g.,* Civil Code of Japan, Art. 129, 134. Art. 129 is on the "Disposition of Rights Pending Fulfillment of Conditions", while Art. 134 prohibits pure potestativity on the side of the debtor (which allows the concept of potestativity overall).

[29] *E.g.,* Restatement Second of Contracts, § 224 (1981), available at https://bit.ly/3kNfBpK (visited July 1, 2023).

[30] JOHN D. CALAMARI AND JOSEPH M. PERILLO, THE LAW OF CONTRACTS, at 396 (4th ed., 1998); SAMUEL WILLISTON AND GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS, VOL. 3, at 1907 (rev. ed., 1936); ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY, Sec. 627, at 12 (1950).

[31] GUENTER H. TREITEL, THE LAW OF CONTRACT, at 62 (2003).

[32] Principles, Definitions and Model Rules of European Private Law, Art. III. – 1:106 (1) (DCFR, 2009), *available at* https://bit.ly/2VKhlC1 (visited July 1, 2023); *see also* UNIDROIT Principles of International Commercial Contracts 2016, Art. 5.3.1 (PICC, 2016), *available at* https://bit.ly/3JmTD7h (visited July 1, 2023); *see also* Principles of European Contract Law, Art. 16:101 (PECL, 2002), *available at* https://bit.ly/3Y2C68r (visited July 1, 2023).

1.1.2. What condition affects (object of condition)

Object of condition is the "what" that is being conditioned upon in the clause. The comparative analysis shows 3 distinctive groups of legislations in this regard.

In the first group (19 out of 45 national codifications), the condition clause affects the transaction itself.[33] The variants on what is presented as an object consist of either a "contract" or a "transaction."[34] The legislators do not specify on whether only the whole contract can be conditioned upon something, or separate rights and obligations could also be conditioned:

*Art. 90 (Civil Code of Georgia): "**A transaction** shall be deemed conditional when it is conditional upon a future or uncertain event…."*[35]

In the second group (16 out of 45), the condition may impose changes on transactions overall, as well as on the rights and obligations of the contracting parties.[36] This is confirmed by the usage of terms "juristic act", "legal effect", "legal consequences."[37] Depicting the legal effect as the object, the rule is often supported by another provision, where a specific right is conditioned:

*Sec. 182 (Thailand Civil and Commercial Code): "A clause which subordinates the effect or the end of **the effect of a juristic act** to a future and uncertain event, is considered a condition."*[38]

The third group of states (10 out of 45) supports the idea of conditioning only obligations, by stipulating it in the starting provision on conditions.[39] Condition there is affecting only the obligations of the creditor and the debtor. This presumably affects the corresponding rights to such obligations.

*Art. 1304 (French Civil Code): "**An obligation** is conditional where it depends on a future, uncertain event."*[40]

---

[33] Full list of states: Armenia, Azerbaijan, Belarus, Bulgaria, Czech Republic, Georgia, Hungary, Iran, Kazakhstan, Kyrgyzstan, Lithuania, North Korea, Portugal, Tajikistan, Turkmenistan, UAE, Uzbekistan, Vietnam.

[34] For "contract", *see, e.g.,* Portuguese Civil Code, Art. 678 (1867, cons. ver. 2018), *available at* https://bit.ly/3wB5UgN (visited July 1, 2023); for "transaction", *see, e.g.,* Civil Code of the Republic of Kazakhstan, Art. 150 (1999), *available at* https://bit.ly/3kPXTC7 (visited July 1, 2023).

[35] Civil Code of Georgia, Art. 90 (1997), *available at* https://bit.ly/3Y5hU64 (visited July 1, 2023).

[36] Full list of states: Argentina, Austria, Brazil, China, Estonia, Germany, Laos, Italy, Japan, Latvia, Moldova, Poland, Russia, South Korea, Switzerland, Thailand, Turkey, Ukraine.

[37] For "juristic act", *see, e.g.,* Civil Code of China, Art. 158 (2021), *available at* https://bit.ly/3u27kke (visited July 1, 2023); for "legal effect", *see, e.g.,* Civil Code of the Republic of Latvia, Art. 1549 (1992, amend. 2022), *available at* https://bit.ly/3HgSoUA (visited July 1, 2023); for "legal consequences", *see, e.g.,* Civil Code of the Republic of Moldova, Art. 347 (in Russian. 2002), *available at* https://bit.ly/3j97Rhi (visited July 1, 2023).

[38] Thailand Civil and Commercial Code, Sec. 182 (1925), *available at* https://bit.ly/3DlWucF (visited July 1, 2023). Later, in Section 185, the Thai law explains the concept of "pending right" which can transfer to others.

[39] Full list of states: Belgium, Egypt, France, Indonesia, Luxembourg, Nepal, Netherlands, Quebec, and Spain. All the legislations use the word "obligation."

[40] French Civil Code, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of February 10, 2016*, *available at* https://bit.ly/2Qodnso (visited July 1, 2023).

The first group has the transaction as the object of condition. There are unifying factors for this group. First, in each of the provided legislations, the imperative rules on conditions are put into the general section on legal transactions. Secondly, even though the main rule sometimes may stipulate the words "rights and obligations" in the rule on condition, everything besides that connects the condition only with the transaction, and not with the separate rules and obligations.[41] The whole transaction as a legal act is depending upon condition occurrence.

Depicting this group at the early stages of comparative analysis created a lot of questions. Why only the legal transaction is affected by condition? For what reasons the concept of conditions was put under the general rules of transactions? Is there still a possibility for separate rights and obligations to be conditioned under these legislations? If not, why is it not possible to do so? After a thorough analysis of each of the legislation presented in the group, 3 possible explanations could be suggested.

One answer is that the laws of these states were historically created the way that condition is understood as something affecting the legal acts overall. And some legislations, for example, stipulate that there is a contract but at the same there is nothing binding before the condition occurs. Civil Code of Hungary could be presented as an example; the code stipulates that "the effectiveness of the contract" (not "effect of the contract"!) can be conditioned: the "effective date" starts if condition precedent occurs, and "the contract expires" if condition subsequent occurs.[42] This implies exactly that there no contract until the agreed condition occurs. To fulfill this gap somehow, the legislator further stipulates the protection mechanism for the period before the condition occurrence.[43] Moreover, the code applies "partial invalidity" to the contract if a contradictory condition was used, for example. This is rather unusual, since the question could be solved easily with attaching the condition occurrence to the separate rights and obligations of the contract. A similar case seems to happen with the other legislations from the group as well.[44]

---

[41] A good example of this approach would be the Civil Code of Lithuania and how it structured the rules on conditions. Art. 1.63 defines transactions as "the actions of persons intended to create, modify or extinguish civil rights and duties." Para 1 of Art. 1.66 states that "a transaction may render the appearance, modification or extinguishment of rights and duties dependent upon the fulfillment or non-fulfillment of certain conditions." However, there is no connection between condition occurrence and the change in separate rights. Para 4 of the same article suggests that "a transaction shall be null and void if the arising, modification or extinguishment of rights and duties is conditioned by the parties upon the fulfillment of an unlawful condition…" Additionally, para 2 of Art. 1.68 makes another transaction dependence clause: "If non-fulfillment of the conditions was already certain at the time when the transaction was formed, such transaction shall be unconditional in the case of a suspensive condition, and null and void in the case of a resolutory condition." Civil Code of the Republic of Lithuania (2000), *available at* https://bit.ly/3XI7Kbv (visited July 1, 2023).

[42] Civil Code of the Republic of Hungary, Art. 228 (1960), *available at* https://bit.ly/3Y6BnD5 (visited July 1, 2023).

[43] Id., Art. 229 (1) "As long as a condition is pending, neither party shall be entitled to do anything that would infringe upon or violate the other party's rights upon the realization or frustration of the condition."

[44] Presumably same reasoning applies to the Civil Codes of Azerbaijan, Georgia, North Korea, Iran, Portugal, United Arab Emirates, and Vietnam. *See*, *e.g.*, Civil Code of Azerbaijan, Art. 324, 328.1, 328.2, 328.3; Civil Code of Georgia, Art. 50, 90-93; Civil Law of the Democratic People's Republic of Korea, Art. 24, 30.

Another possibility could be there is not enough regulation to give a definitive answer. This is the case for some of the former USSR states.[45] All these legislations have two basic rules presented in the code: suspensive/resolutive conditions rule, and a fiction of bad faith fulfillment rule. Transaction is mostly defined as "actions of citizens or legal entities for the purpose of establishing, changing or terminating rights and obligations under civil law."[46] The important point is that the legislator does not specify on the influence of condition further on. This not the case for Russia, however. Even though, the legislation follows the "two basic rules" scheme, in 2015 amendments the Russian legislator fixed a new article in the law of obligations part, emphasizing that separate obligations can be conditioned.[47]

This connects to the final option: there is no such group of states. Even though some legislations in the group avoided any connection of "condition" with "right and obligations" completely, it is much more logical to assume the following rule: if the whole transaction could be conditioned, then the separate rules and obligations could be also conditioned.[48] This idea follows the teachings of Russian scholars. One of them is Doctor of Laws Artyom Karapetov, whose main assessment on this question is that there are no political reasons to prohibit the usage of conditions with the separate rights and obligations.[49] It is also possible to agree with the other legal expert Sergey Gromov, "the transaction is a juridical fact exactly because it creates legal consequences… only in the aspect of each separate right and obligation is it appropriate to discuss" the conditional transactions.[50] Indeed, the scarce amount of regulation given to the concept of condition in certain codifications leaves the question of conditioning separate rights and obligations open. Still, the legislations do not give an answer on the opposite question either: why the legal concept of condition should not apply to the rights and obligations. Therefore, it is possible to agree with a known legal maxim: everything which is not forbidden is allowed.

---

[45] This reasoning applies to Armenia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.
[46] Civil Code of the Kyrgyz Republic, Art. 172 (1996), *available at* https://bit.ly/3RaFkVf (visited July 1, 2023).
[47] "The execution of the duties, as well as the exercise, change and termination of definite rights under a contractual obligation, may be conditional…." *See* Civil Code of the Russian Federation, Art. 327.1.
[48] Such statements could contradict the political views of legislators from certain states; however, this work does not aim on characterizing the political regimes established in the world as of 2023.
[49] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, at 79 (in Russian, 2017). "There are no political-legal reasons to prohibit the conditioning of separate rights and obligations. The only critical issue arises when an obligation is conditional in a synallagmatic contract. But again, even here there is no reason to strictly prohibit such conditional obligations."
[50] Sergey A. Gromov, *Tezisy k Kruglomu Stolu Yuridicheskogo Instituta "M-Logos" "Problemnye Voprosy Uslovnyh Sdelok"* [*Thesis to the round table of the Law institute "M-Logos" "Problematic issues of conditional transactions"*] (in Russian, 2016), *available at* https://bit.ly/3WIf2L3 (visited July 1, 2023).

The next group of legislations was distinguished from the first, because the legislator could clearly or implicitly show how certain rights and obligations could depend upon condition occurrence.[51] This is often supported by an extensive amount of subsequent legislation provided by the civil codes.[52] Like with the states in the first group, the rules on conditions are put under the general rules on transactions. For example, 5 of 15 countries in the second group use the term "juristic act" as the object of condition.[53] Some of them specify what is exactly a juristic act, and some do not give a clear definition.[54] Yet, somehow, the connection between the condition and separate rights seemed to be more obvious than in case with legislations which used the words "transaction" and "contract" in the first group. However, this might be just a matter of juridical technique of individual legislations. One can suggest, although, that the states with "juristic acts" expressed the manifestation of intention better than the terms "transaction", "contract" or "civil affairs", which is still a matter of preference.[55] Linking condition occurrence to the legal effect of the contract or to the legal consequences is the logical example, which does not leave any questions on what the object of condition is.[56] This link could be further confirmed by the doctrine.[57]

Therefore, because of the close similarities between the first and second group of legislations, it can be safely stated that the first and the second group of legislations are, in fact, one group of legislations that sets both transactions and separate rights and obligations as the object of condition. Even, if the wording is overly restrictive, this is still closer to a possibility than to a prohibition.

---

[51] Take for example, the Civil Code of Brazil, where the condition "subordinates the effect of the legal business." The definition of legal business presented in Art. 104 of the Civil Code does give any clue on the correlation of condition and separate rights and obligations. Yet, the juridical technique is different from the first group of states: all the subsequent articles attach condition to some changes in separate rights. Art. 128 states, *e.g.*, "overcoming the resolute condition, extinguishes, for all purposes, the right to which it is opposed; but, if it refers to a continuing or periodic execution business, its realization, unless otherwise stipulated, is not effective…." Moreover, there is a concept of "expectation right" presented: "To the holder of the eventual right, in the cases of suspensive or resolute condition, it is permissible to practice the acts intended to retain it" (Art. 130). Civil Code of Brazil (2002), *available at* https://bit.ly/3HCfdTT (visited July 1, 2023).

[52] Id., *see also* Italian Civil Code (in Italian, 1942), *available at* https://bit.ly/3wzGBeT (visited July 1, 2023); *see also* Civil Code of the Republic of Latvia, *available at* https://bit.ly/3HgSoUA (visited July 1, 2023).

[53] These countries are China, Japan, Laos, South Korea, and Thailand.

[54] Civil codes of Japan and South Korea do not give a definition. As for the other states, *see, e.g.,* Civil Code of Lao People's Democratic Republic, Art. 15 (2020), *available at* https://bit.ly/3kRazJ3 (visited July 1, 2023) "Juristic act refer to acts that express explicitly intentions of individuals, juristic persons, and organizations to voluntarily create, vary or cease civil rights and obligations."

[55] *See, e.g.,* Civil Code of Japan, Art. 91 (1896), *available at* https://bit.ly/3jdExGo (visited July 1, 2023).

[56] Civil Codes of Moldova and Ukraine attach condition "legal consequences", while for ex. Latvia and Thailand attach condition to the "legal effect of the contract"; this leaves less questions on what the object of condition is.

[57] In case of German law, even though the BGB states that the transaction is the object of the condition, the doctrine is clarifying it is the legal effect that is being conditioned. *See*, *e.g.,* KARL-DIETER ALBRECHT, J. VON STAUDINGERS KOMMENTAR ZUM BURGERLICHEN GESETZBUCH: MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN. ECKPFEILER DES ZIVILRECHTS [J. VON STAUDINGERS COMMENTARY ON THE CIVIL CODE: WITH THE INTRODUCTION OF THE LAW AND SECONDARY LAWS. CORNERSTONES OF CIVIL LAW], at 78 (2008) "The occurrence of the suspensive condition creates the effects of the legal transaction. The occurrence of the resolutive condition makes it expire."

The same, however, cannot be told about the third group: these legislations stipulate that "obligation is conditional", which implies only separate rights and obligations can be the object of condition. Moreover, Belgian Civil Code, for example, expressly prohibits conditioning the validity of the contract.[58] Contrary to the previous group, these legislations regulate conditions under the general rules on obligations (Law of Obligation) in the section on modalities of obligations.[59] Additionally, most of the legislations presented in the group have clear historical ties and reservations to the Napoleonic Civil Code of 1804.[60] The reasoning behind such understanding of condition is quite complex and requires a brief history dive into the old French Civil Code.

Before the 2016 amendments, the rules on obligations in the French Civil Code were under the Title 3 about "contracts and obligations" which created a theoretical disarray in terms of understanding what is an obligation. Russian researcher of the French law Alexey Ageev depicted that the term "obligation" under the French law meant either a "fact" of connection by contract (a.k.a. contract validity), or an "obligation" born by the contract (its result).[61] French jurist Jean-Jaques Taisne expressed an opinion that some of the articles of the French Civil Code on conditions are applicable either only to obligations or to the contracts.[62]

Thus, two major positions on the object of condition were created. In the first position, the "contract" itself is the object of condition, which means rights and obligations are also the "objects." According to this doctrine any unlawful and contradictory conditions are damaging the contract's formation, which at the end means that the contract was unwritten.[63] Obligation was equal to contract, which meant that the condition affected both contract and obligation.

---

[58] *See* Belgian Civil Code (amendments valid from 01.01.2023) Book 5. Law of obligations (in Dutch and French), Art. 5.141, *available at* https://bit.ly/3WINDca (visited July 1, 2023). "An event on which the validity of the contract depends cannot be stipulated as a condition by the parties." Also, the code stipulates that "Nor can the performance or non-performance of another obligation arising from the same contract be stipulated as a condition."

[59] *E.g.,* Dutch Civil Code, Art. 6:21 - 6:26 (1992, cons. ver. 2019), *available at* https://bit.ly/3DlVQff (visited July 1, 2023) "Book of Obligations"; *see also* French Civil Code, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of February 10, 2016*, *available at* https://bit.ly/2Qodnso (visited July 1, 2023), "General regime of Obligations. Modalities of Obligation."

[60] In case of Indonesia, *see* Irawan Sorodjo, *The Development of Indonesian Civil Law*, Scientific Research Journal (SCIRJ), Volume IV, Issue IX, 30 (2016); in case of Egypt, *see* Egypt justice portal. Overview of Egypt's civil law and legal system, *available at* https://bit.ly/40dSq89 (visited July 1, 2023).

[61] Aleksey V. Ageev. *Osnovnye podhody k problemam v sfere usloviy vo Francii. [General approaches in the sphere of conditions in France]* (in Russian, 2016), *available at* https://bit.ly/3XLEQYg (visited July 1, 2023).

[62] *See* opinion of Jean-Jaques Taisne in: OLIVIER MILHAC, LA NOTION DE CONDITION DANS LES CONTRATS À TITRE ONÉREUX [THE NOTION OF CONDITION IN CONTRACTS FOR VALUABLE CONSIDERATION], 206 (in French, 2001). *See also supra* note 62. The opinion of Jean-Jaques Taisne revolves around the "connection" between the event and either contract or obligation. For example, if there is a connection between the uncertain event and the obligation, then the imperative rules on condition apply only to obligations, and not contracts.

[63] *See supra* note 61. Ageev relates to Art. 1108 of the old French Civil Code: "Four requisites are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract; A definite object which forms the subject-matter of the undertaking; A lawful cause in the obligation." This was not validity of agreement but validity of

The other opinion is dominant nowadays: only obligations are conditional. In the modern theory, contract is seen an agreement of will and not as an instrument of creating obligations. The contractual relationship is preceding the obligational relationship, moreover, the contract does not depend upon obligation. For those reasons, every contract has two types of effects: main and specific.[64] Main effects are the essential elements of the contract (offer, acceptance, validity, etc.). Specific effects of the contract refer to the creation, alteration or termination of rights and obligations. The modern theory suggests that only the specific effects of the contract could be conditioned which leads to the answer that only obligations could be conditioned.

This approach is what distinguishes the legislators of this group from the previous one. It allows better reception of the concept, since condition is understood as a modality of obligation. Contract's effects do not infiltrate the theoretical field of obligations, the same is for the obligations towards the contract. It is possible to condition the whole contract, but it will not be looking the same way as in other groups: a conditional contract is when all the possible rights and obligations are conditioned upon an occurrence, not when the contract itself is conditioned. As Mathias Latina wrote, "contrat conditionnel" is just a convenient way of saying that all the rights and obligations are subject to condition occurrence.[65] This concludes the comparative analysis on the continental law system: 34 codes against 11 legislations. This result might not serve as answer to the balance by itself, however, the information might be useful to explain the other rules suggested.

Common law has a view on conditions which is closer to the last group of codified legislations, however, through the history of case law the object was specified even more: it is "the performance of obligation."[66] Two reasons could be suggested. The first one is that common law is built around the theory of consideration: every contract requires an exchange of values, which is established in the legal doctrine as exchange of promises. The second reason is that in common law an obligation is a condition for counter-performance. So, the performance of obligation by one party triggers the obligation of the other party to fulfill the promise. This suggests that the meaning of "condition" is more important under the common law than continental law system, which subsequently requires a more specific term for the object of condition.

---

obligation: there was a connection between the parties only when there was obligation. French Civil Code (1804, ver. before 2016), trans. by Georges Rouhette, *available at* https://bit.ly/3XBNYyt (visited July 1, 2023).

[64] MATHIAS LATINA, ESSAI SUR LA CONDITION EN DROIT DES CONTRATS [ESSAY ON THE CONDITION IN CONTRACT LAW], at 30 (in French, 2009) The author gives an example, that in a consensual contract, condition might move the start of legal consequences to the moment the contract was concluded (retroactive effect of condition). *See* the later paragraphs for more information on the topic. *See also supra* note 62.

[65] Id., at 19.

[66] *E.g.,* Restatement Second of Contracts, § 225, *available at* https://bit.ly/3kNfBpK (visited July 1, 2023), "Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused."

International codifications are divided on this question, unlike in the previous question on the definition of condition. Model Rules of European Private Law (DCFR) and UNIDROIT Principles 2016 (PICC) have chosen the model of the first group of national codifications: contract, as well as rights and obligations could be put under a condition.[67] The exact framing of the rule on condition leaves no doubt on what choices are left to the contracting parties.[68] On the contrary the authors of the Principles of European Contract Law (PECL) have chosen the path of "conditional obligation."[69] The distinction is expressed stronger than within the national codifications.

While DCFR and PECL and supranational suggestions for the European Union states, PICC is the attempt for a global civil code. This might imply that some aspects of the rules are affected by civil law, and some are affected by common law. PICC allows conditioning both contract and obligation. Stefan Vogenauer emphasized that under the PICC "there is no need for a contract to be on foot for a condition to operate."[70] The rule appears to be a mix of both systems of law. The rules on bad faith condition fulfillment are imposing "obligations on the parties even though the contract is yet to come into force" which is close to the teachings of G. Treitel (English law).[71] Meanwhile, the mechanism of pending rights presented in PICC is based on continental system of law rules (presumably German/Switzerland approach).[72] "The contract is yet to come into force" model is also applied by S. Vogenauer.[73] The differences within supranational codifications might suggest than DCFR supports the Germanic model of conditioning both contract and obligations, while PECL supports the French-type legislative approach: with the "clear line" between the main effects of the contract and specifics of it which are conditioned.

The next paragraph discusses the definitive aspects of conditions as events, as well as the way of how legislation regulate condition through classification techniques.

---

[67] Principles, Definitions and Model Rules of European Private Law, Art. III. – 1:106 (1) (*hereinafter* DCFR, 2009), *available at* https://bit.ly/2VKhlC1 (visited July 1, 2023); see also UNIDROIT Principles of International Commercial Contracts 2016, Art. 5.3.1 (*hereinafter* PICC, 2016), *available at* https://bit.ly/3JmTD7h (visited July 1, 2023).

[68] DCFR, Art. III. – 1:106, "The terms regulating a right, obligation or contractual relationship may provide that it is conditional upon the occurrence…"; *also,* PICC, Art. 5.3.1, "A contract or a contractual obligation may be made conditional upon the occurrence of …"

[69] PECL, Art. 16:101, "A contractual obligation may be made conditional upon the occurrence…"

[70] STEFAN VOGENAUER, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC), at 691 (2015). Moreover, he states that "under the PICC, the duties can be imposed on the parties, even if the contract in only conditional and has not yet become operative."

[71] Id., at 700, Vogenauer cites one of the books of G. Treitel writing: "even though performance of the principal obligation cannot be demanded, some degree of obligation is immediately created by a conditional agreement." For more information on "degrees of obligation" model under the English law, *see* Part 3.3.1. English doctrine on legal pendency. Degrees of obligation, at 137. *See also* GUENTER H. TREITEL, THE LAW OF CONTRACT, at 65 (2003).

[72] *See* Part 3.2.2 German approach on legal pendency. Protected expectation, at 127.

[73] *See supra* note 70, at 708.

1.2. Qualifying features and classifications of condition

As previously shown, condition is referred by a vast majority of legislations to a "future uncertain event." According to the comparative analysis on national codifications, almost every state, which associates condition occurrence with an event, stipulates that it is "future" and "uncertain."[74] Some of the researchers suggest that "relation to future" and "uncertainty" are condition's criteria (standards).[75] However, it is not correct. Criteria are limiting the concept (how the legal concept works), which does not allow the condition to break the imperative rules of law, or to become another legal concept.[76] Words "future" and "uncertain" are not limiting the concept of condition, they qualify/define the concept of condition (what the legal concept is). The meanings of the words "future" and "uncertain" seem to be rather intuitive and no legislations present any definitions for these terms. Still, an explanation could be found in the doctrine.

German lawyer Jorg Neuner emphasized that regarding the concept of conditions, first, nobody knows for sure if it will happen or not, and secondly, the occurrence of the event is related to the future.[77] The first feature of every condition lies within the fact that no one really knows whether it will happen, thus, it is uncertain. If the condition occurrence is not uncertain, for example A will pay to B when "the train comes back to the station", then it is just a time specification. Secondly, although we do not know anything about condition occurrence, any condition set up in the contract should happen in future to signalize the start of the end to the rights and obligations of the contracting parties. Logically, a condition cannot happen in the time, prior to the contract conclusion. And even though some countries allow it (for a reason explained further on), most of the legislations think of a condition as an event of the future matter. Therefore, it is theoretically correct to call "future" and "uncertain" qualifying features of conditions. Still, more clarification is necessary on what is "relation to the future" and what is understood as "uncertain", and how legislator characterizes these qualifying features within the rules on conditions.

---

[74] Interesting exclusion is the Civil Act of UAE: the legislator specifically ignores the word "uncertainty." There is an article 35 which clearly stipulates, "certainty shall not be removed by a doubt." Moreover, Art. 428 of the Civil Act of UAE provides that "condition must be observed as much as possible", which is a unique wording comparing to all other researched legislations. It is not clear whether this is a rule of the waiting period before the condition occurrence, or this is a rule on compliance of condition with the nature of imperative law. *See* Federal Law On the Civil Transactions Law of the United Arab Emirates (1985), *available at* https://bit.ly/3Jrh9Ad (visited July 1, 2023).

[75] For "relation to the future", *see*, *e.g.,* Ekaterina S. Kostrikova, *K voprosu ob uslovnyh sdelkah.* [*On the issue of conditional transactions*]. Innovative technologies in modern science, at 206 (in Russian, 2017). For "uncertainty", *see*, *e.g.,* DMITRIY IV. MEIER, RUSSKOE GRAZHDANSKOE PRAVO [RUSSIAN CIVIL LAW], at 192 (in Russian, 2003).

[76] *See* later paragraph for examination on the standards of conditions, at 24.

[77] MANFRED WOLF, JORG NEUNER, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS [GENERAL PART OF CIVIL LAW], at para 52 (in German, 2016).

The word "future" defines condition as an event that happens after the conclusion of contract. It can be tomorrow, a week, a year after; yet the point is that there is a "time window" between the contract conclusion and the occurrence/termination of rights/obligations. This is one of the flexibilities this qualifying feature has. It is impossible to disagree with it. Civil law codifications, along with supra-national ones and available doctrine support this feature. The common law does not also seem to oppose to the basic concept surrounding condition: it is always related the future. Condition is no different from time on this matter.

However, an opposite idea is also presented in the legislation. Let us consider an example. A and B agreed on the clause, "If A wins the lottery, he will buy B's car for 10 000 USD." The lottery, however, had happened the day before the agreement was set. Is it a condition? When would the buyer and seller's obligations occur in this agreement? The main point is that the contracting parties simply do not have any knowledge, whether the condition was fulfilled or not. R. Zimmermann introduces that such situations took a place in the ancient times, "if the "si" clause related to a past event or to the present time, the characteristic state of pendency was lacking, for though the parties concerned might not yet be aware of it, it was immediately determinable from an objective point of view whether or not the promised sum had to be paid."[78]

The comparative analysis shows that at least six legislations refer a condition not only a future uncertain event, but also a past unknown event.[79] Legislators in some of the civil codes stipulated that if a condition is a past unknown event, then the obligation shall take effect the moment the contract was concluded.[80] Concerning modern legal practice, Hans Brox assumes that this it is not a condition, but the German law shall solve the situation in analogy with the general provisions on conditions in BGB.[81] BGB supports only the "relation to the future." It is safe to assume that the legislations decided to regulate the past events as conditions to leave as fewer legislative loopholes as possible. The solution of such cases by analogy seems to be a more correct way to deal with past unknown events. It is difficult to call them conditions. Some of the legislations clearly fix a rule that a past event cannot be a condition.[82] This approach, although excessive, might be even better.

---

[78] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION, 718 (1990).
[79] These states are Belgium, France ("unknown conditions of present"), Indonesia, Luxembourg, Moldova, and Spain. *See, e.g.,* Indonesian Civil Code (1847), Art. 1263, *available at* https://bit.ly/3JmY5mG (visited July 1, 2023).
[80] *E.g.,* Belgian Civil Code. Book 5: Obligations, Art. 5.140 (in Dutch and French, 2023), *available at* https://bit.ly/3WINDca (visited July 1, 2023) The law fixes that "consequences of past unknown event take effect from the time of commitment of obligation."
[81] HANS BROX, ALLGEMEINER TEIL DES BGB [GENERAL PART OF BGB], at Rn. 481 (in German, 2010).
[82] *E.g.,* Civil Code of Quebec, Art. 1498 (1991, amend. 2022), *available at* https://bit.ly/3WJohL8 (visited July 1, 2023), "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."

The word "uncertain" is not disputed among legislations with some variations of this word found along different translations: "unpredictable", "not certain to happen", "unknown", etc.[83] These words do not raise any disputes on the question of whether uncertainty is not a feature of condition. In fact, uncertainty is the first word that can come up to mind with the legal concept of condition. It is a sort of ambiguity in the outcome of a particular event or circumstance. The uncertainty is following the condition, and upon becoming certain to occur the conditional transaction or obligation becomes unconditional. In this sense, it is safe to assume that even the legal structure of conditional obligation is covered with uncertainty.

The first point where the uncertainty can be observed within the legal concept of condition is the period after the conclusion of contract and before condition occurrence. Depending on the researched legislation, the condition will either enable the contract or trigger an obligation performance. Up until the moment of condition occurrence nobody is certain whether the condition shall happen. Such situation asks for a legislative clarity.[84]

The second point of uncertainty could be found in unilateral acts. A unilateral act requires only the commitment of one party. In combination with the principle of party autonomy and scarce amount of regulation on this complex matter, the parties have a power to impose obligations onto other parties through such unilateral acts. Conditional unilateral actions are complexing the situation in the legal field tenfold.[85] The scarce amount of regulation could also be observed in the question of conditional dispositive transactions.

The third point where the uncertainty is following the concept of condition could be observed is in synallagmatic contracts. Such contracts usually consist of reciprocal duties and constitute an equal exchange value. However, it is not prohibited to condition the performance or counter-performance upon the actions of a third party, for instance. This causes a much more complex state of uncertainty for the counterparty with unconditional performance. While such contracts are popular, for example, in construction sphere, and present long-term relationship usually, the possibility of condition non-occurrence is still existing. Such non-occurrence would put the contracting parties into the situation of economic stall.[86]

The presented legal compositions are uncertainty issues, which the current paper shall cover.

---

[83] For "unpredictable", *see, e.g.,* Civil Code of the Republic of Hungary, Art. 228, *available at* https://bit.ly/3Y6BnD5 (visited July 1, 2023); for "not certain to happen" *see, e.g.,* The Federal Act on the Amendment of the Swiss Civil Code Part Five: The Code of Obligations, Art. 151, *available at* https://bit.ly/3DlCneI (visited July 1, 2023); for "unknown", *see, e.g.,* Turkish Civil Code, Art. 170 (2011), *available at* https://bit.ly/3Y6CSkG (visited July 1, 2023).
[84] *See* Part 3. Legal pendency, or before condition occurrence, at 121.
[85] *See* Part 4. Condition and unilateral actions, at 161.
[86] *See* Part 5. Rupture of synallagma in conditioned obligation performance, at 188.

Along with qualifying features established by doctrine and law, various classifications of conditions also have its presentation. The first and most known classification of conditions is "suspensive/resolutive."[87]

§ 102 (General Part of the Civil Code Act of Estonia): "A transaction is entered into with a ***suspensive condition*** *if* ***creation*** *of the legal consequences specified by the transaction is contingent upon an uncertain event. A transaction is entered into with a* ***resolutive condition*** *if* ***extinguishment*** *of the legal consequences specified by the transaction is contingent upon an uncertain event."*[88]

It is safe to assume, that suspensive condition (condition precedent) is a juridical fact by occurrence of which the parties' rights and obligations are activated, while a resolutive condition (condition subsequent) is a juridical fact by occurrence of which the parties' rights and obligations terminate. An overwhelming majority of national codifications support this division.[89] International harmonizing codifications present only this classification.[90]

Suspensive and resolutive conditions constitute the start of the legal consequences. Only if the suspensive condition occurs, the rights and obligations of the contracting parties will occur. The same goes for a resolutive condition, as no rights or obligations will terminate until this type of condition occurs. Besides that, there obviously should be some rights and obligations set up before in the contract, to be terminated in future by a resolutive condition.

The older law acknowledged only suspensive conditions. Resolutive conditions were seen as a suspensive condition that the parties "agreement on termination of their rights and obligations" starts.[91] Therefore, when the suspensive condition occurred, the agreement would start to act, although the agreement itself was about a termination of rights and liabilities. German scholar J. von Staudinger writes that resolutive conditions were seen as agreements on the termination of rights and obligations conditioned by a suspensive condition.[92]

---

[87] Condition "suspensive" is also called "condition precedent", and "resolutive" is also called "condition subsequent." "Suspensive/resolutive" is used more often in civil codifications, while "precedent/subsequent" descended from the common law researchers. These terms will be used interchangeably through the course of work.

[88] General Part of the Civil Code Act of Estonia (2002), *available at* https://bit.ly/3Y11Emo (visited July 1, 2023).

[89] For "suspensive/resolutive", *see, e.g.,* Egyptian Civil Law Act, Art. 266 (in Arabic, 1948), *available at* https://bit.ly/3HEHZ6g (visited July 1, 2023); *see also* Italian Civil Code, Art. 1360(1) (in Italian, 1942, cons. ver. 2020), *available at* https://bit.ly/3wzGBeT (visited July 1, 2023); for "precedent/subsequent", *see, e.g.,* German civil code, Art. 158 (1900, cons. ver. 2021), *available at* https://bit.ly/408nSVk (visited July 1, 2023); *see also* Thailand Civil and Commercial Code, Art. 183 (1925), *available at* https://bit.ly/3DlWucF (visited July 1, 2023).

[90] *See, e.g.,* DCFR, art III. – 1:106 (1); *see also* PECL, Art. 16:101, *see also* PICC 2016, Art. 5.3.1.

[91] Kirill V. Nam, *Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod* [*Comment to the #Gloss. Conditional transaction. German Approach*]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 90 (in Russian, 2018).

[92] Reinhard Bork, *Allgemeiner Teil §§ 139-163* in: KARL-DIETER ALBRECHT, J. VON STAUDINGERS KOMMENTAR ZUM BURGERLICHEN GESETZBUCH: MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN. ECKPFEILER DES ZIVILRECHTS [J. VON

The German law doctrine of the 19th century also believed that a resolutive condition is just an additional agreement to a suspensive condition about the termination of rights and liabilities.[93] It is quite understandable why suspensive conditions are necessary, as it is basically the starting point for the rights and obligations. The resolutive conditions are also a useful feature to the complex and long-lasting legal relationships, Russian researcher Kirill Nam explains[94]. The concept of resolutive conditions implies a necessary presence of a successful deal, because if there is nothing to be started, then there is nothing to be terminated. For example, if A and B agreed to have a one-time supply contract, there is a rare chance to have a resolutive clause in the contract, because when the supply is fulfilled, there is simply nothing to terminate.[95]

For the common law doctrine this classification is also primary, however mostly present in the way of "precedent/subsequent." English lawyer G. Treitel gives a definition of both types and presents an example of condition precedent, "where A contracts to pay an allowance to B until B marries."[96] American researchers also use the "precedent/subsequent" classification.[97] Because of that, according to A. Corbin, "the use of these two terms is often very puzzling": the same event might be precedent to something, or subsequent to something.[98] Samuel Stoljar assumes there are no conditions subsequent, however, instead there are two different types of conditions precedent: internal and external.[99] Internal/external classification does not possess much importance, as such conditions either apply to the whole contract (external), or to a separate clause (internal).

If to appeal to the U.S. Restatement Second of Contracts, there are no resolutive conditions, the way that the definition of condition is given leaves no doubt that the condition can only support the "performance under a contract becoming due."[100] It seems that the American encyclopedia of case law leans more towards the other known classification: positive/negative.

STAUDINGERS COMMENTARY ON THE CIVIL CODE: WITH THE INTRODUCTION OF THE LAW AND SECONDARY LAWS. CORNERSTONES OF CIVIL LAW], at § 158 (2020).

[93] WERNER FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS [GENERAL PART OF CIVIL LAW], at 681 (1992).

[94] *See supra* note 91, at 90.

[95] Id.

[96] GUENTER H. TREITEL, THE LAW OF CONTRACT, at 62 (2003). He defined them as following, "a condition is precedent if it provides that the contract is not to be binding until the specified event occurs. It is subsequent if it provides that a previously binding contract is to determine on the occurrence of the event."

[97] *See, e.g.,* ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY, Sec. 627, at 14 – 19 (1950); *see also* JOHN D. CALAMARI AND JOSEPH M. PERILLO, THE LAW OF CONTRACTS, at 398 – 402 (4th ed., 1998).

[98] ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY, Sec. 627, at 15 (1950).

[99] Samuel J. Stoljar, *The Contractual Concept of Condition. 69th Law Quarterly Review,* at 488 (1953).

[100] Restatement Second of Contracts, § 224, *available at* https://bit.ly/3kNfBpK (visited July 1, 2023). Some authors on American law have pointed out that the Restatement Second defines only suspensive conditions. However, there are still rules which precisely speak about resolutive conditions, even though they are presented not as a type of condition, but as a separate rule.

The next classification is less popular among legislations: "positive/negative" conditions.[101] The difference between the "suspensive/resolutive" and "positive/negative" lies within the cause of the legal consequences. If the legal consequences are caused by an occurrence of the event, then we talk about a positive condition. If the legal consequences are caused by non-occurrence of the event, then it is a negative condition:

*Art. 1572 (Civil Code of Latvia): "An **affirmative condition** is performed as of the moment the event has actually occurred; but a **negative condition** - as of the moment when it is apparent that the event is impossible."*[102]

At least 7 out of 45 national codifications stipulate the rules on positive/negative conditions.[103] At supra-national level this classification is not presented. The same goes for the case law under the common law system. The occurrence of positive/negative conditions is often bound to a fixed time limit. In case of positive condition – if before the time limit it becomes obvious that condition will never occur, it can be recognized as so only after the time limit passes; in case of negative condition – condition can be recognized as such even before the pass of the time limit.[104]

As shown below, the suspensive and resolutive conditions change the legal consequences by signalizing an occurrence or termination of rights. At the same time, positive and negative conditions are about the changes in a condition itself, so the legal consequences depend equally upon the fulfillment of a positive or a negative condition. In other words, for the positive/negative classification, it is not important whether the rights occur or terminate, the meaning is given to occurrence/non-occurrence of the condition.

1) Suspensive condition: contract is concluded – condition occurs – rights occur.
   Resolutive condition: contract is concluded – condition occurs – rights terminate.
2) Positive condition: contract is concluded – condition occurs – rights occur.
   Negative condition: contract is concluded – condition does not occur – rights occur.

It is not certain, why some legislations decided to regulate this classification of conditions. Perhaps, a more substantial regulation on this matter allowed less confusion in the legal business. The suspensive/resolutive classification has more valid reasons for implementation into the code.

---

[101] Sometimes "positive" conditions are called "affirmative" conditions.
[102] Civil Code of the Republic of Latvia, Art. 1572 (1992, amend. 2022), *available at* https://bit.ly/3HgSoUA (visited July 1, 2023).
[103] These states are Austria, Azerbaijan, Georgia, Latvia, Moldova, Nepal, Turkmenistan. *See, e.g.,* Austrian Civil Code, , Art. 696 (1812), *available at* https://bit.ly/3wzCSxU (visited July 1, 2023); *see also* Civil Code of Turkmenistan, Art. 118-119 (1998), *available at* https://bit.ly/406KxS2 (visited July 1, 2023).
[104] This explanation is based on Civil Code of the Republic of Moldova, Art. 349 – 350 (in Russian, 2002), *available at* https://bit.ly/3j97Rhi (visited July 1, 2023).

Besides the mentioned classifications, there is a unique classification of conditions. It became widespread among the doctrine after the Code Napoleon of 1804, which divided all conditions into three types: casual, potestative and mixed. This classification can rarely be observed in the legislations for some reason.[105] Only two national codifications out of 45 use this classification today[106]:

*Art. 1169 – 1171 (Luxembourg Civil Code): "**Casual** condition is one which depends on chance, and which is in no way within the power of the creditor or the debtor. **Potestative** condition is one which makes the performance of the agreement depend on an event which it is within the power of either of the contracting parties to bring about or to prevent. **Mixed** condition is one which depends both on the will of one of the contracting parties and on the will of a third party."*[107]

Casual condition is a pure occurrence, which is defined as something which may not be influenced by any of the contracting parties. It may be a natural phenomenon, economic or social life event, actions of the third parties. A birth of a child, elections voting results, an adoption of law, highs and lows of economic indicators, third party guarantee – anything can be a casual condition.[108] Potestative conditions are the ones that depend upon the will or actions of the contracting party: a change of living place, a sale of shares, ignoring some actions, etc. It is one of the most important instruments in the contract formation today.[109] The main difference between a potestative condition and a mixed one is seen in the presence of the will of the third party. In a mixed condition, the third party may have an influence on the condition fulfillment: acquiring a license, getting a construction permission. All the presented types have a significance in terms of "dependence" factor. There is a big difference between a condition no party can influence, and a condition the occurrence of which is in power of one of the contracting parties.

This analysis showed how different legislations approach the concept of condition regarding its qualifying features "future" and "uncertainty" which are mostly uncontested, and a variety of classifications, which are not limited by the presented ones (possible/impossible, lawful/unlawful, fulfilled/unfulfilled).[110] The next discussion shifts the comparative analysis into a more theoretical dilemma: there should be some imperative limitations every condition should comply with.

---

[105] *See* Part 2.1.1. Comparative look on potestative conditions, at 72. Even though not regulated, potestative conditions are allowed in most of the examined codifications, including international, as well as in common law.

[106] These are Latvia and Luxembourg. Important to note that Civil Code of Latvia depicts potestative conditions as "arbitrary." It also has another meaning for "mixed" condition: it is "when causality is coincidental with arbitrariness." *See* Civil Code of the Republic of Latvia, Art. 1552.

[107] Luxembourg Civil Code (in French, 1803, cons. ver. 2023), *available at* https://bit.ly/3jiXQOB (visited July 1, 2023)

[108] MANFRED WOLF, JORG NEUNER, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS [GENERAL PART OF CIVIL LAW], at para 52, Rn. 13 - 14 (in German, 2016).

[109] Significance of potestative conditions on theoretical and practical aspects of legal circuit are enormous. For more information, *see* Part 2.2. Doctrinal and case law analysis on potestative conditions, at 78.

[110] There is not very much of a scientific significance in these classifications comparing to the previously highlighted ones.

1.3. Standards of condition (condition's criteria)

Alongside with the written rules on conditions, like qualifying features and different types of conditions, there are also non-written standards of condition. Those are criteria, introduced by both legislation and doctrine, which characterize the condition to the extent it is distinguishable as a condition in the contract. This is also a part of the process to how a condition is "constructed": each condition should respond not only to the imperative rules of law but to the inner standards which are not obvious, but very important.

The first piece of information could be discovered through the legislation. Most of the researched civil codifications have an article on "prohibited conditions." They can be depicted in multiple ways: "impossible", "unlawful", "contradictory" and "incomprehensible", contrary to "good morals", "public order", "good customs", etc.[111] Such rules mostly present two outcomes: a condition is either void or unwritten (contract or obligation becomes unconditional).[112]

Art. 424 (Federal Law No. (5) of 1985 On the Civil Transactions Law of the UAE): "The act is void when the condition on which it depends is impossible, contrary to religious precepts, public policy or morality."[113]

The doctrine stipulates these are the long-history limitations. According to R. Zimmermann, in ancient times all the conditions were "subject to three rather self-evident restrictions: their realization had to be possible, and they had to be untainted by illegality or immorality."[114] For example, if the parties agree on "if you touch the sky, I will give you 10$", this clause will be invalid as it is impossible to touch the sky. There is no basis for the transaction, as the payer is literally not binding himself to pay 10$. The same goes for illegality or immorality, so committing a crime cannot become a contingency. R. Zimmermann is sure that even if the illegal and immoral conditions are supported by the will of the party, they are simply struck out.[115] For example, the testator makes a will where his son becomes the heir if he divorces his spouse or throws the remains of the testator in the sea. In this case, his son will become the heir the moment the testator dies.[116] Therefore, if the condition is contradictory to the usual understanding of law, it is disregarded as such.

---

[111] *See, e.g.,* Civil Code of Brazil, Art. 123 (2002), *available at* https://bit.ly/3HCfdTT (visited July 1, 2023).
[112] *See, e.g.,* Civil Code of Japan, Art. 132, 133 (1896, cons. ver. 2009), *available at* https://bit.ly/3jdExGo (visited July 1, 2023).
[113] Federal Law On the Civil Transactions Law of the United Arab Emirates, Art. 424 (1985), *available at* https://bit.ly/3Jrh9Ad (visited July 1, 2023).
[114] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION, at 719 (1990).
[115] Id., at 720.
[116] *See supra* note 114, at 720. He writes, "irrespective of cranky demands of the testator."

Even though the legislator and the doctrine agree on these limitations, it is necessary to admit that the legislator imposes these limitations to all possible legal concepts, as impossibility, illegality or immorality are general legal principles. These limitations are of a general meaning, as they can limit almost any legal concept. Nevertheless, they are important to the answer on what the standards of conditions are. All the rules on objective prohibition of conditions could be unified into one standard – standard of "realism." If the condition is not real then it is either void, if already presented in the transaction, or unwritten, if it is a resolutive condition, for example.

However, "realism" is not the only standard of condition. To find out the other criteria of conditions it is necessary to inspect the differences between the concept of conditions and its closest legal concepts. Three concepts have been chosen for the purposes of the current paper. The first one is a modality, which is often put together with "condition" into the legislation – time. The second concept to compare is also quite close in nature to conditions, conditional transactions, and conditional obligations – preliminary contract. The third concept is almost identical to condition to the extent of confusion, which may also reveal some of the hidden standards of conditions – aleatory contract.

1.3.1. Condition vs time concept

Starting from the time specifications, K.I. Sklovsky, a notable researcher from Russia, shows that time specifications and conditions have an obvious difference considering two examples. In the first one A is leasing a house for the whole summer. In the second example A is leasing a house on the condition that an asphalt road is built to the house.[117] While both examples constitute that the provisions are possible, legal, and not immoral, there is a drastic difference between the two as the time specification is something inevitable comparing to the condition. In the first example, the time limit is set, and the parties are no longer bound by the contract after the summer period ends. In the second example however, we cannot know for certain if the asphalt road will be built to the house or not. If it is not built, then the parties are not bound by the contract and A is free to lease another housing. Time specification is inevitable while condition is probable, as it is not known for certain whether it will occur or not. This "probability" could be assumed to be the standard of condition. This "probability" can be observed in every condition: it is a feature that distinguishes the condition as a legal concept. Condition has an option of failing, unlike the time specification.

[117] KONSTANTIN I. SKLOVSKY, SDELKA I EE DEYSTVIE. KOMMENTARIY GLAVY 9 GK RF. PRINCIP DOBROSOVESTNOSTI. [THE DEAL AND ITS ACTION. COMMENTARY ON PART 9 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION. THE PRINCIPLE OF GOOD FAITH], at 139 (in Russian, 4th ed., 2019).

A.G. Karapetov phrases the same difference in other words.[118] A human death or the start of shipping on the northern river which freezes every year – are time limitations, whereas reorganization, repayment of debts or tax offence – are conditions. At the same time, the Russian researcher notes that a time specification "can be complicated by a condition", suggesting two possible variants: a period starting after a condition occurs, or a time limitation for the condition to occur (if the condition does not occur in a certain period, then there is no condition anymore).[119] For the Russian law this feature has a certain importance, especially in preventing the "legal pendency" situations. From Karapetov's observation it is safe to assume that "probable" means something "not inevitable." This is a distinct difference of "condition" from the other legal concepts.

Similar observations can be found in the German legal doctrine. Hans Brox assumes that even though if we cannot define, when the legal consequences happen, but we know that they will happen in any case, then it is a time specification. Therefore, a death of a human is a time specification, however a certain birthday is a condition, because it is not known for certain whether the human will live up to this date or not.[120] Regarding the legal consequences, however, there are no differences between the time specifications and conditions in the German law. The German legislator fixed a rule that the same legal consequences as conditions are applied to the time specifications.[121] Manfred Wolf admits that differentiation questions on conditions and time specifications have no practical sense in German law because of the similar regulation. Same goes for the question of complicating the period with a condition and vice versa.[122] Nevertheless, some legislations have "conditions of time", which could be considered a questionable concept.[123]

From this, it could be assumed that the "probability" also implies that the happening is "not obvious" for the parties. If a condition is obvious to happen (even without binding to the time) then it is a time specification. For the purposes of theoretical precision, it could be suggested that the term "non-inevitable" and "not obvious" are the parts of the bigger term "probability."

---

[118] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, 78 (in Russian, 2017). "In condition, a legal effect is conditioned upon a circumstance, not guaranteed to happen, while time is inevitable to occur"

[119] Id., at 78.

[120] HANS BROX, ALLGEMEINER TEIL DES BGB [GENERAL PART OF BGB], at Rn. 481 (in German, 2010).

[121] German Civil Code, § 163 (1900, cons. ver. 2021), *available at* https://bit.ly/3Gc7KqY (visited July 1, 2023).

[122] MANFRED WOLF, JORG NEUNER, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS [GENERAL PART OF CIVIL LAW], at para 52, Rn 2 (in German, 2016).

[123] Today, at least two codes have a rule on "condition of time." *See, e.g.,* Belgian Civil Code. Book 5. Law of obligations, art 5.143 (in Dutch and French, 2023), *available at* https://bit.ly/3WINDca (visited July 1, 2023); *see* Luxembourg Civil Code, Art. 1176 – 1177 (in French, 1803, cons. ver. 2023), *available at* https://bit.ly/3jiXQOB (visited July 1, 2023). Old Argentine Civil Code, which acted from 1871 to 2015, also had this rule. *See* Argentine Civil Code, Art. 575 (trans. Baldwin S., 1871), *available at* https://bit.ly/3Y8x7TX (visited July 1, 2023).

Therefore, from the distinction of condition and time it can assessed that every condition should be "probable." "Probability" could be seen in two objectivities. On the one hand, being probable means "not inevitable": it is impossible to change the course of action. On the other hand, being probable means "not obvious": there is no information on whether there will be an objective occurrence. This information exclusively concerns the contracting parties. For the future definition of "probability" standard both objectivities should be used.

1.3.2. Condition vs preliminary contract

The question on condition's criteria starts to get more difficult when the differences need to be found between the preliminary contracts and conditional transactions. In the first, A and B agree to conclude a sales contract of an immovable property in a month. In the second, A and B agree on the sale of the immovable property on the condition that B pays to A if his bank loan is confirmed (no contract otherwise). At first look, the deals seem to be identical, as D.S. Rudman admits, "sometimes to the point of confusion", as in both the first and second cases, the deal is concluded, but the legal consequences do not occur immediately.[124]

Preliminary contracts are defined in a similar way by the legislations of different countries: the general rule is that a preliminary contract contains an obligation to conclude a contract in future.[125] Conditional transaction also refers to the future and both transactions seem to be "flexible and dynamical, which allows the contracting parties to confront the future changes."[126] However, after the review of the literature on the topic some differences between the concepts of preliminary contracts and conditional transactions start to show up. Some of differences seen from the examples are quite obvious (because of similarities with time), while some are not so obvious.

---

[124] Denis S. Rudman, *O sootnoshenii sdelki, sovershennoy pod otlagatelnym usloviem, i predvaritelnogo dogovora [On the relationship between a transaction made under a suspensive condition and a preliminary agreement]*, Russian Justice, № 7, at 7 (in Russian, 2018).

[125] Civil Code of the Russian Federation, Art. 429 (1994), *available at* https://bit.ly/40mCWPB (visited July 1, 2023). Art. 429 states that the preliminary contract is an agreement where "the parties become obliged to conclude a contract in the future" on the transfer of the property, on the performance of works or on rendering services. Similar definitions for preliminary contracts are given in Art. 1785 of Quebec Civil Code ("by a preliminary contract … a person promises to buy the immovable") and Art. 19 of the Obligations and Contracts Act of Bulgaria (each of the "parties to the preliminary contract is entitled to bring an action for conclusion of the final contract"). Civil Code of Quebec (1991, amend. 2022), *available at* https://bit.ly/3WJohL8 (visited July 1, 2023); The Obligations and Contracts Act of Bulgaria (1950, amend. 2005), *available at* https://bit.ly/3RasHtn (visited July 1, 2023).

[126] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, 71 (in Russian, 2017).

The first difference is shown by E.S. Izyumova, the judge of one of the Russian regional courts. In her opinion, a conditional transaction contains all the essential provisions necessary for the contract and does not require any additional steps to be made by the contracting parties.[127] On the other hand, the preliminary contract is still not the final form of contract where the parties agree on the sale of immovable property, as in this case the parties are obliged to conclude another contract within a certain amount of time. D.S. Rudman adds that a conditional transaction already contains a provision with a condition while the preliminary contract can contain only essential provisions for the future contract which is yet to be concluded.[128]

Secondly, it was previously found that the condition is not "inevitable", while concluding a new contract after the preliminary contract is inevitable. The preliminary contract obliges the contracting parties to conclude a contract in future.[129] Thus, the contracting parties in preliminary contract are obliged to conclude a contract in the future and the starting time of the obligation performance is inevitable. The same cannot be said about the condition. Additionally, while it may take a month to conclude the final contract after signing the preliminary contract, it is not obvious for the contracting parties whether the condition will occur at all. On that note, D.S. Rudman admits that the preliminary contract has a definite delay time between the contract conclusion and the occurrence of the essential rights and obligations (to buy, to sell), while in conditional transactions there is an indefinite delay till the rights finally occur.[130]

The final difference lies within the period between the conclusion of the contract and condition occurrence in case of conditional transaction or final contract conclusion in case of a preliminary contract. In conditional transactions the legal nature of the period between the contract conclusion and condition occurrence has been a subject of discussions for a long time. Most of researchers, however, consider there is a strong connection between the contracting parties in the waiting period before the condition occurs.[131] E.A. Sukhanov thinks that during this period the contracting parties cannot deviate from the conditions of the contract, as well as commit actions which obstruct the condition occurrence.[132] K.I. Sklovsky considers the same approach, as in his opinion, the contracting parties

---

[127] Evgeniya S. Izyumova, *K voprosu o dopustimosti vklyucheniya otlagatelnykh usloviy v kontrakty dlya obespecheniya gosudarstvennykh i municipalnykh nuzhd* [*On the question of the admissibility of including suspensive conditions in contracts to meet state and municipal needs*]. Laws of Russia: experience, analysis, practice, № 1, at 63 (in Russian, 2018).
[128] *See supra* note 124, at 8.
[129] *E.g.*, Civil Code of the Russian Federation, Art. 190, 429 (1994, amend. 2022), *available* at https://bit.ly/40mCWPB (visited July 1, 2023).
[130] *See supra* note 124, at 8.
[131] *See* Part 3.1. Doctrinal analysis of continental law on legal pendency, at 122.
[132] EVGENIY A. SUKHANOV, ROSSIYSKOE GRAZHDANSKOE PRAVO: UCHEBNIK V 2 TOMAKH. TOM 2: OBYAZATELSTVENNOE PARVO [RUSSIAN CIVIL LAW: TEXTBOOK IN 2 VOLUMES. VOLUME 2: LAW OF OBLIGATIONS], at 358 (in Russian, 2nd ed. 2011).

should not prevent or help the condition occurrence in bad faith during the waiting period.[133] A.G. Karapetov agrees with the previous researchers, admitting that after a conditional transaction is concluded there is a certain "connection effect" created between the conditional buyer and conditional seller. The contracting parties cannot break this "connection effect" because they condition their rights and obligations with a future uncertain event, they mutually agreed upon.[134]

Conditional transactions create some inexplicit obligations for the contracting parties. However, the preliminary contract does the same, and comparing to conditional transactions, the legislators are making even more emphasis on the legal connection between the parties then in case of conditional transactions, which are mainly discussed in the legal doctrine. At the same time, the difference is crucial. If we consider a contract of sale with conditional transaction and a preliminary contract of sale, it comes up immediately that concluding a preliminary contract does not create any obligations on buying or selling goods while a conditional transaction creates such obligations within the scope of the contract. All the parties have to do in case of conditional transaction is to wait until the condition set in the contract finally occurs, while in case of preliminary contract the parties need to conclude the final contract to create such obligations. Imagine a case where A is selling a car to B on the condition that B gets a special parking lot for the car. When B gets a new parking lot, the obligations for A and B shall occur as all the necessary precautions (concluding the contract) were made by the contracting parties. If in other case A and B decided to conclude a preliminary contract of sale, then the contracting parties will have to conclude another contract to create obligations for themselves to fulfill. The only obligations they have in the preliminary contract is to conclude the final contract sooner or later.

The abovementioned differences between conditional transactions and preliminary contracts show us some clear tendencies, available for the legal concept of condition only. First, there is no condition that is inevitable, as otherwise it is just a time limitation. Secondly, unlike in conditional transactions, the legislator sets stricter standards towards preliminary contracts, so the way to the final contract is clearer. Thirdly, condition creates obligations the moment the condition occurs, while in case of the preliminary contract another contract must be concluded. This way, the condition feels more accessible than the preliminary contract, yet more probable than the other concept.

---

[133] KONSTANTIN I. SKLOVSKY, SDELKA I EE DEYSTVIE. KOMMENTARIY GLAVY 9 GK RF. PRINCIP DOBROSOVESTNOSTI. [THE DEAL AND ITS ACTION. COMMENTARY ON PART 9 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION. THE PRINCIPLE OF GOOD FAITH], at 140 (in Russian, 4th ed., 2019).

[134] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, 77 (in Russian, 2017).

In combination with the condition-time dispute, it is possible to assume that in case of time specifications and preliminary contract it is not as important to know about the occurrence of the time stamp, then it is to know about condition occurrence in conditional transactions. The ability to know whether the condition has occurred or not is of a higher value than knowing whether an objective occurrence finally happened for the parties to a time limit or to a preliminary contract. Moreover, it is also quite important for the third parties to the conditional transaction, while in preliminary contract the third parties might assess the situation according to the rules of imperative law or another "objective to happen" matters. Natalia Ermolova, who wrote a dissertation on conditional agreements back in 2010, states that every condition should be authentically accessible.[135] Perhaps, this is what "authentically accessible" means: the ability to approach the news on condition occurrence when it finally occurs. However, to confirm whether this is true standard or not, and to find if there are any other specific criteria of conditions, it is necessary investigate the comparison between the conditional transactions and the aleatory contracts.

1.3.3. Condition vs aleatory contracts

The aleatory (risk) contracts are mostly associated with gambling. Legislations describe it as a contract where the rights and obligations of the contracting parties are defined by the occurrence of an uncertain event.[136] The situation is very similar, as the conditional transaction also provides certain rights and obligations the moment an uncertain event occurs. The difference is not easy to spot whether a specific contract is conditional, or whether it is an aleatory contract.

First difference is that aleatory contracts and conditions have different purposes. Soviet researcher V.I. Serebrovsky described this difference in a similar way, "in a conditional transaction, the existence of the transaction itself depends on the occurrence of an unknown event, whereas in a risky transaction, the existence of the transaction itself is undoubted, and the occurrence of an unknown event defines only the fact of someone's win or loss."[137] In the aleatory transaction the

[135] NATALIA A. ERMOLOVA, USLOVNYE SDELKI V ROSSIYSKOM GRAZHDANSKOM PRAVE [CONDITIONAL AGREEMENTS IN RUSSIAN CIVIL LAW], at 192 (in Russian, 2011).
[136] *See, e.g.,* Civil Code of the Czech Republic, Art. 2756 (2012), *available at* https://bit.ly/3DlARcw (visited July 1, 2023) "If the parties have stipulated that the benefit or detriment of at least one of the parties depends on an uncertain event, they have concluded an aleatory contract." *See also*, *e.g.,* French Civil Code, Art. 1964, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016), *available at* https://bit.ly/3XBNYyt "An aleatory contract is a reciprocal agreement whose effects, as to advantages and to losses, either for all the parties, or for one or several of them, depend upon an uncertain event." Interesting to note, that many legislations also use the term "uncertain event."
[137] VLADIMIR I. SEREBROVSKY, OCHERKI SOVETSKOGO STRAKHOVOGO PRAVA [ESSAYS ON SOVIET INSURANCE LAW], at 135 – 136 (in Russian, 2003).

contracting parties are well-aware of the contract they agreed upon as their main purpose is to define who is getting the rights and obligations from the occurrence of an uncertain event, and who does not acquire anything. The conditional transaction does not go with this line, as the transaction itself or occurrence of separate rights and obligations depends upon a fulfillment of an uncertain event, which is also risky, but not a gamble. The same can be said in a reverse way, because if an uncertain event will not occur, then in aleatory contract someone still wins or loses, while in a conditional transaction this will mean that the contracting parties have still some reciprocal obligations towards each other.

American lawyer A. Corbin looks at this difference from another perspective. In his opinion, the very nature of the aleatory contracts lies in unequalness of exchange between the contracting parties. In other words, by concluding an aleatory contract the parties agree to exchange something which will not be equivalents unlike if a conditional contact was concluded.[138] Imagine A agreed with B to sell shares for 10,000$ when the embargo is lifted between the countries. Embargo is lifted and A sells the shares to B for the agreed sum of money, therefore, there is an equal exchange between the contracting parties. The will of the contracting parties should be expressed blatantly, and the legal result of such transaction leads to a disparity in obligations: one of the parties even may never come under any obligations.[139] However, what if the shares, presented in the example earlier, are worth much more than 10,000$? Corbin thinks that is there is "compelling evidence" of intention to exchange something inequivalent, then the contract can be held aleatory, however, it all relies on the interpretation of the court, who might take other important factors into consideration: taking of the possession, making improvements, etc. [140] This idea of inequivalent exchanges confirms the highlighted difference about the purposes of conditional and aleatory transactions.

Second difference: while the uncertain event in an aleatory contract is a defining factor of the contract relationship, whereas the condition in a conditional transaction is not. This may sound strange but the condition in a conditional transaction is not the essential part of the contract framing. In other words, the conditional transaction would be valid even without any conditions. A clear explanation was given by the Russian researcher N.B. Scherbakov, "a conditional transaction is always a lawful will plus a conditional will."[141] When drafting a contract, the contracting parties first think of an

---

[138] ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY, Sec. 729, at 410 (1950). He wrote, "A contract is not made aleatory in the character by the fact that one of the performances is to be rendered upon the happening of an uncertain event, if reasonable interpretation shows that the parties regarded the two performances as agree equivalents."

[139] Id.

[140] Id., at 411. He emphasizes that "In aleatory contracts the parties "contemplate that one of them may have to perform even though the other does not have to."

[141] Nikolai B. Scherbakov, *Osnovnye podkhody k opredeleniyu yuridicheskoy prirody aleatornykh sdelok* [*Basic approaches to defining the legal nature of aleatory transactions*]. Bulletin of civil law, № 1, at 85 (in Russian, 2006)

unconditional contract with principal rights and obligations and only then they choose to set up a condition in their contract to foresee the future surprises. If an uncertainty arises in the object of sale, means of transportation, weather anomalies, internal problems of the seller and buyer, a condition is a usual method to minimize the risks. Being a precautions measure, the conditions are written into the contract additionally. In 2010, one of the Federal Courts of Russia emphasized "the peculiarity of conditional transaction" which is that the condition is an additional element, and as a rule of thumb, contracts are concluded without any conditions in them.[142] The aleatory contract does not work the same way. The outcome of the game, lottery or bet is the essential part of the contract. It is an uncertain future event that defines who acquires something (e.g., a possession right) and who is obliged to dispose of something. This matches the purpose of the aleatory transaction: to define a winner and a loser. Without a condition, the conditional transaction would become an unconditional transaction, but the principal rights and obligations of the parties would not change.

Third difference: in conditional transactions the contracting parties set the condition themselves, whereas in aleatory contract the uncertain event, which defines the winner and the loser, is set by the legislator imperatively, Y.V. Atnabaeva writes.[143] The most common aleatory contract nowadays is an insurance contract, which is regulated by legislations in most of the jurisdictions.[144] The legislators set an event called "insurance case" as a trigger for the insurer's obligation to pay the insurance. If the insurance case happens, the insured mitigates the damage from the case, if not, then the insurer acquires the payments.[145] The same cannot be said about conditional transactions as the legislator only sets the provisions on the good faith usage of such conditions but does not connect the conditions with any of the contracting parties' obligations. Earlier, it was stated that the legislator gives the contracting parties the right to qualify random events of social life into conditions. At the same time, Y.V. Atnabaeva calls the condition in aleatory contracts to be a "constitutive element of

[142] Resolution of the Federal Arbitration Court of the Volgo-Vyatka District on case № A43-39574/2009 (in Russian, from May 27, 2010), *available at* https://bit.ly/34f6rKc (visited July 1, 2023).
[143] Yulia V. Atnabaeva, *K voprosu o sootnoshenii riskovykh dogovorov s uslovnymi sdelkami* [*On the question of the ratio of risk contracts with conditional transactions*], Vlast Zakona, № 1, at 198 (in Russian, 2017).
[144] Some legislations clearly state that insurance contracts are aleatory by providing the regulation of insurance contracts under the rules on aleatory contracts. *See, e.g.,* Civil Code of the Czech Republic, Art. 2758 (2012), *available at* https://bit.ly/3DlARcw (visited July 1, 2023); *see also, e.g.,* Portuguese Civil Code, Art. 1537 (1867, cons. ver. 2018), *available at* https://bit.ly/3wB5UgN (visited July 1, 2023).
[145] According to the explanation, gladly provided by Prof. Caslav Pejovic of Kyushu University, who wrote a substantial amount of research on maritime law, "Historically insurance derived from a kind of fictive (conditional) sale of ship and cargo before the start of the voyage. The "buyer" who would contract to buy the ship and cargo before the voyage would pay the price only in case the ship and cargo does not arrive at the destination; if no accident happened, the contract would cease to exist and no obligation to "buy" the ship would arise. The "seller" would pay a certain amount to the "buyer", which was not to be returned, in exchange for his undertaking to "buy" the vessel in case of an accident. So, basic elements of an insurance contract were present in this transaction: the owner of the property would pay the premium to the insurer, who would pay to him the value of the property in case of loss."

the contract", as it is set by the legislator imperatively, and defines the fate of parties' rights and obligations.[146] Conditional transactions are more dispositive in this sense, as the condition to be fulfilled is decided by the participants.[147] However, the game and bet rules are also set by participants, even though they are, without doubt, aleatory contracts. In this sense, the position on "imperative regulation of condition in aleatory contract by legislator" might not be fully clear and verified. Perhaps, the whole point of the argument is that there should already be a set of rules (a usage, to be more precise) by which the contracting parties are playing, agreeing to those rules. It is not necessary that those rules are created imperatively by the legislator, but that they are already existing and are the same for every contender, making it a fair contract with a win/lose outcome. On the other hand, there are more available outcomes in case of conditional transactions, as all the participants may be the winners, as well as losers.

Another difference between conditional transactions and aleatory contracts was suggested by V.I. Serebrovsky, who considers that the condition refers only to the future, while a game or a bet can refer either to the past or to the future.[148] For example, the contracting parties may not know the results of the game, which happened yesterday, because they do not have any means of information to find out who is the winner, whereas it is not possible to make a condition about the past occasion. This is debatable in the same way as with the "conditions of the past." First, such legal constructs on condition also exist only in a handful of European legislations, and, secondly, a bet on something which has already happened is not practical-wise in the modern era of information. Still, this opinion creates an interesting impression that the contracts with "conditions of the past" are closer to aleatory contracts, than to conditional agreements. This is because the past events are not "uncertain", they are "unknown." This is conceptually closer to a bet than a condition.

The differences between the conditional transactions and aleatory contracts create a more detailed picture of what the criteria of conditions are. First, because of the similarities in "uncertainty" sector, it is important for the contracting parties and the third parties to know about whether the event occurred or not. This confirms the authentical accessibility standard exposed earlier in the paragraph. Moreover, another standard of condition was also discovered. Along with the specific purpose of the condition, which is to predict something, to anticipate the event, or to foresee the worst possible

[146] *See supra note* 143, at 199.
[147] Coming back to the explanation given by C. Pejovic, it becomes somewhat clear that the insurance contract derived from something conceptually close to conditional transactions to become completely aleatory in nature for the modern era as the rules on insurance became either a common business or an imperative law, while it was not the same 400 years ago.
[148] VLADIMIR I. SEREBROVSKY, OCHERKI SOVETSKOGO STRAKHOVOGO PRAVA [ESSAYS ON SOVIET INSURANCE LAW], at 135 – 136 (in Russian, 2003).

outcomes, the condition is, in fact, secondary towards the contract, as it is a defining feature of a conditional transaction but not the contract overall. Any condition is an addition to the contract, and the contract would not have any problems on its legal structure without the condition. Again, condition is a contractual modality after all.

1.3.4. Suggestions on standards of condition

The comparison between the conditional transaction and its closest legal concepts allows us to establish a set of criteria for the concept of "conditions." Each of the criteria should define the concept, as well as limit it. Several Russian scholars suggested their ideas on what set of imperative limitations corresponds the concept of "conditions." E.S. Kostrikova, for example, considers the following criteria of conditions: it should be probable, obscure, independent from the actions of the contracting parties, and related to the future.[149] At the same time, she adds that probability means that the condition is not obvious and not inevitable.[150] This can be relatable to the analysis on differences between the time concept and condition, as there is something objective to happen for all participants of the legal circuit (not inevitable) and there is something objective to happen only for the contracting parties (not obvious). D.I. Meier, pre-revolutionary Russian jurist defined the condition as a "future, incidental, unknown circumstance, the occurrence or non-occurrence of which predetermines the existence of a transaction."[151] This opinion also exposes "probability" standard in the word "incidental." V.N. Kruchinin and V.V. Fetisov have chosen another way to explain the condition's limitations: the condition should be inevitable, unclear in terms of occurrence "because such a condition does not take place in the moment of contract conclusion", the condition must not contradict any laws or moral principles.[152]

It is difficult to oppose the opinions presented. The topic of condition's standards was briefly touched upon by the author in 2020. There, based on the findings of other researchers, the author suggests three criteria, "every contingent condition should be probable, authentically accessible and real."[153] This position could be confirmed and further supplemented:

---

[149] Ekaterina S. Kostrikova, *K voprosu ob uslovnyh sdelkah.* [*On the issue of conditional transactions*]. Innovative technologies in modern science, at 206 (in Russian, 2017).
[150] Id.
[151] DMITRIY IV. MEIER, RUSSKOE GRAZHDANSKOE PRAVO [RUSSIAN CIVIL LAW], at 192 (in Russian, 2003).
[152] Vladislav N. Kruchinin, *Ponyatie i kharakteristika uslovnykh sdelok* [*The concept and characteristics of conditional transactions*]. Legal reform journal. Volume 1, at 56 (in Russian, 2015).
[153] *See* Danil Polynovskii, Analysis of Some Crucial Issues of Contingent (Conditional) Transactions (2020) (Unpublished LL.M. dissertation, Kyushu University) (on file with the Law Faculty of Kyushu University), at 7 – 8.

1) The condition should be probable. This implies that, first, every condition should not be obvious, and secondly, a condition should not be inevitable. If a condition is obvious to happen for the counterparties, then it is not a condition, it is just a time specification. The same goes for being inevitable. "The insurance is being paid until the death of the receiving person" is not a conditional clause. There is no probability issue in the condition "death of the receiving person", as it is an obvious and inevitable circumstance. The probability standard appears to be the most important feature of condition which distinguishes it from the other similar concepts.

2) The condition should be an additional element to the contract. The condition is not the central point of the contract, and it is presumed that the contracting parties are free to conclude a contract without any conditions. While the whole contract may be dependent upon an occurrence of condition, the framing of contract (to buy and to sell) cannot be changed by it. If the condition is the essential part of contract, which defines who will be the buyer and who will be the seller, then it is an aleatory contract (a game, a bet, an insurance).

3) The condition should be real. This is an alternative version of R. Zimmermann's "possibility" limitation, and imperative rules on "unlawful, contradictory."[154] There is a famous Russian idiom, which sounds like: "when a lobster whistles on the top of the mountain", which, basically, means the same as "when pigs fly." These idioms constitute unreal conditions, which cannot fulfill the "reality" criteria of a condition. The reality standard is more important in case on condition than in case other reviewed legal concepts: the condition is not inevitable to happen.

4) The condition should accessible. This criterion constitutes that there should be a clear opportunity for the counterparties to find out whether the condition occurred or not. The parties should have an easy access to the information on the topic. So, for instance, there is clause, "I donate you a car, if England wins South Africa in the Rugby World cup." The results of the match are easily accessible for both parties, which constitutes the presence of a condition in the clause.

Every condition should be probable, additional towards the contract, real and accessible by the contracting parties. These standards allow us to differentiate between conditions and any other close legal concepts. All of them are equally important for the further comparative analysis on topic of conditions. It is possible to suggest a set of such standards for an implementation into a civil law codification. All the standards could be introduced under an article on invalid conditions.

The next discussion covers the legislation and doctrine on the ways the condition occurrence affects the legal consequences of condition transaction.

---

[154] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION, at 719 – 721 (1990).

1.4. Retroactive effect of condition

Condition is a future event. The events of the past and present are just unknown facts for the contracting parties. Even though some legislations stipulate "conditions of the past", the nature of the transaction conditioned upon an event in the past or present is, in fact, closer to the aleatory contracts than conditional agreements. The same cannot be said, however, about the legal consequences of condition occurrence.

The legal effect of condition occurrence (how condition affects the rights/obligations when in the "happened" state) can have an impact towards two directions: to the future or to the past. The prospective effect of condition, or effect on the future, is a well-known concept: the rights and obligations are enabled once the condition occurs. The international law acts on civil law, such as DCFR, explain the prospective effect in a simple way, "upon fulfilment of a suspensive condition, the relevant right, obligation or relationship takes effect."[155] In prospectivity, the concept of condition can be somehow compared to a time stamp: a right or an obligation takes its start from the occurrence of condition. This approach is quite comprehendible since the prospective effect of condition correlates with the effect of any other modification in contract law: the change to the rights and obligations happens the moment after the modifying juristic fact happens. The prospective effect of the condition is one of the basic rules of condition as a contractual modality.

Contrary to the prospectivity, there is an opposite concept: the retroactive effect of condition, or an effect on the past. To explain how the retroactive effect works, consider two examples. In the first there is a supply contract of washing powder concluded in monthly payments under the clause, that if the seller wins the all-national consumer approval contest the buyer shall pay an additional amount of money for each supply before and after the seller's victory. Therefore, if the seller wins the contest, the buyer will pay additional amounts of money even for the period when the condition was still not fulfilled. The other example is a supply contract between a bakery and a retailer. The retailer supplies 10 bags of flour twice every month. The contract stipulates that if the baking company opens a confectionery department, the retailer would be obliged to supply 5 bags of sugar additionally to every supply of flour done before and after the department opening. The importance of the retroactive effect in both presented cases is seen in the benefits acquired by the parties even for the time before the condition occurrence. These examples constitute a legal effect on the past.

[155] Principles, Definitions and Model Rules of European Private Law, Section III–1:106 (DCFR, 2009), *available at* https://bit.ly/2VKhlC1 (visited July 1, 2023).

The origins of retroactive effect of condition are hard to trace. Reinhard Zimmermann appeals to different pandectists of the past who struggled a lot "to put a doctrinal straitjacket" on the retroactivity of the condition.

One group of researchers considered that retroactivity was invention of Roman law: the jurists had already applied a retroactive effect to conditional transactions from the start[156]. This approach is particularly supported by the French lawyer Bénédicte Fauvarque-Cosson, who wrote that "in the past, retroactivity was sometimes considered by scholars from legal systems inspired by Roman law as a distinctive feature of condition, which makes it distinct from a "term."[157] In case of a conditional transaction, "…when the condition is fulfilled, the original promise is treated as if it had been made unconditionally."[158]

However, according to Zimmerman, other group of scholars considered that in ancient times "all conditions produced effects only from the moment of their satisfaction", implying only prospective effect was supported, while the retroactive affect came as a Byzantine notion.[159] Bartolus (1314 – 1357) has developed the general retroactivity doctrine and afterwards the topic became a huge discussion between the private law researchers. Zimmermann concluded that "the truth is somewhere in the middle."[160] In ancient times there were no rules of law to confirm the theory of each of the sides of the argument. The German lawyer tries to solve the historical-theoretical problem in a pragmatic way, confirming at the end that the usage of retroactive effect depended upon a certain type of transaction. At the same time, on the reasons of no obligatory case law in old times, the decisions in individual cases regarding the retroactive effect of a condition might have been contradicting to each other, Zimmermann assumes.[161]

Fauvarque-Cosson suggests that the retroactive effect is "no longer a distinctive feature" of condition because less legislations use it nowadays.[162] From the historical analysis, it can be assumed that retroactivity was haunting the condition, whenever it was used. It cannot be called a defining characteristic of condition, but an element which distinguishes the concept from the other. It is possible to agree with Fauvarque-Cosson only partially, however[163].

---

[156] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION, at 726-727 (1990).
[157] Benedicte Fauvarque-Cosson, *The New Provisions on Conditions in the UNIDROIT Principles 2010.* Uniform Law Review. Vol. XVI. Issue 3 (2011), *available at* https://bit.ly/3G5bZV7 (visited July 1, 2023).
[158] Id.
[159] *See supra note* 156, at 727.
[160] Id.
[161] *See supra* note 156, at 728.
[162] *See supra* note 157.
[163] *See* Part 1.4.3. Comparative picture on retroactive effect, at 60.

1.4.1. Examples and functions of retroactive effect

The retroactivity concept is a very complex theoretical issue. The more examples on retroactive effect of condition are reviewed, the more confusion between the prospective effect and the retroactive effect of condition arises. Imagine a sales contract that provides for a reduction in the purchase price of a product if the product is found to have defects after its delivery. The reduction of price is in benefit to the buyer. Plus, it seems that the rights and obligations of the parties are changing retroactively since the parties basically pre-agreed to sell a defective product for a lower price. However, the reduction of price is applied to the time after the discovery of defect. It is a consequence of a juridical fact: a defect has been discovered. Two necessary points to be emphasized. First, this fact triggers a change in the payment obligation of the buyer. Secondly, the reduction of payment refers only to the future time after the defect was found. Therefore, the effect is prospective.

Another confusing example would be a distribution agreement. For instance, a manufacturer and a distributor enter into a distribution agreement with a provision that the distributor will receive a percentage of the manufacturer's profits if certain sales targets are met. If the distributor meets the sales targets, the distributor would be entitled to receive a percentage of the manufacturer's profits for the entire period of the agreement, not only from the point of the sales targets are met. Unlike in the previous example, the condition’s effect is retroactive. Indeed, the distributor is acquiring benefits even for the time before the condition occurrence. However, what is more important to understand: the legal consequences are attached to the past activities of the manufacturer. This seems to be a strong indicator of a retroactive effect. Thus, there should be an attachment to a certain counter-performing action of the other contracting party.

Consider a final example. In a construction contract the contractor is to be paid a bonus if the construction project is completed ahead of schedule. If the construction is finished earlier, the condition occurrence would trigger a change in the payment obligations of the client: for every piece of work provided by the contractor through the course of contract he will have to pay more, because of the fast completion. The fact that the bonus is applied for the whole course of work makes up for an argument that the effect of condition is retroactive. However, intuitively, the effect of condition occurrence still seems to be, in fact, prospective. The answer to why this is not a retroactive effect of condition is not easy to find. Comparing to the examples presenting the retroactivity (the bakery and distribution examples), it seems there is not enough clarity in how the consequences of condition occurrence attach to the past actions of the parties. The bonus is an additional reward, which does not trigger any effect on the past. The effect is prospective, therefore.

The examples presented earlier show an important outcome of retroactive effect of condition: the benefits the party received for the condition occurrence should be clearly referred to the time before the condition occurred. By "clearly referred" it is possible to think of a strong attachment to the past actions of each of the contracting parties. The criteria of "strong" attachment are unknown to the literature, however, there are some variants to imagine: for example, if the attachment to the past actions is blatantly stipulated into the contract, or, if the course of common business practice implies the attachment of benefits to the past actions of either creditor or debtor. At this point, the retroactive effect of condition starts to look like a juridical fiction, where the legal regime of the prospective effect (to the period after the condition fulfillment) is basically attached to the period after the conclusion of contract and before the condition occurrence. Therefore, upon the usage of the retroactive effect of condition, a similar state to an unconditional contract is created. The importance of the retroactive effect is yet to be proven, however.

What functions of retroactive effect could be suggested from the provided analysis? The first one could be connected to the condition's standard of "additional", and the function is general for both retroactive and prospective effect. It could be called a supplementary function. The point is that at the chance of condition occurrence the contracting parties might acquire additional gains from the contractual relationships. This specifically concerns the retroactive effect, which is clearly seen from the bakery and distribution examples. The bakery would be receiving an additional supply of sugar, which is a supplementary benefit.

Important to note, the retroactive effect should never be interpreted as "regaining something intended by the parties" because, first, the condition might occur or never occur, and secondly, every condition is additional to the contract. However, could there be a "regaining" in another sense? Imagine a conditional sale of property. The seller and the buyer sign a contract of car sale, where the property title transfers once the buyer acquires the funds and pays the seller. While the buyer is in the process of acquiring the funds, the car is sold to another buyer, who becomes the owner of the car. The new owner acted in good faith. Does the retroactive effect apply? At first, it could be suggested that the retroactive effect has a "restoration" power that may help the potential acquirer in returning the car. However, it is not possible. There are no legislations which present the opportunity for the retroactive effect to override the third-party acquisition is good faith. Everything the potential acquirer could hope for, in case of retroactive effect, is a monetary compensation. In this sense, the usefulness of retroactive effect is not different from the prospective effect.

Therefore, there is only one viable function of retroactive effect: supplementary.

1.4.2. Doctrinal debate on theoretical acceptance of retroactive effect

Is the retroactive effect a qualifying feature of condition on par with "uncertainty" and "relation to the future"? In an ideal world, the question could be answered with the word "yes." The concept of time limit is definite and prospective in nature, it would not make any sense if the consequences were to be applied before the time stamp. Unlike that, the retroactive effect is a unique feature of the concept of condition because it is uncertain whether the condition happens or not. With the supplementary function in sight, the retroactive effect provides more flexibility to the contractual relationships. It might feel like the retroactive effect is defining the condition on par with the other qualifying features: condition is a future uncertain event that can affect not only the future circumstances but the circumstances before the condition occurrence.

However, in the real world, the answer is "no." There is a distinctive debate on the question of existence and acceptance of the retroactive effect of condition. The debate features a vast amount of critique towards the concept itself and its capabilities. Moreover, there is a clear division in the legislative field in terms of applying the rules on retroactivity in conditional transactions. And for various reasons only a handful number of jurisdictions allow the retroactivity concept, whereas most of legislations support the general idea of prospective effect. In the doctrinal debate, there were two main camps: the supporters of the retroactivity and the scholars who disagreed with the concept. Since the French law incorporated the idea of retroactivity into its code, the idea was popular among the French scholars; however, many Russian scholars thoughtfully and logically denied the concept.[164]

French professor Marcel Planiol (1853-1931) used the concept of retroactive effect of condition to explain why the rules enforced onto the parties before the condition occurrence do not apply to them. He emphasizes that the reason lies specifically in how the condition works and not in the principle of the prohibition of the retroactive rule of law. Before the condition occurrence the legal relationship "does not yet exist", thus, in case of a change in the legal status in that period, it would be affected by the retroactivity of condition, not retroactivity of law.[165] The idea resembles the previous analysis: the legal regime of a contract with fulfilled condition is being brought to the period before the condition occurrence. Retroactive effect of condition is a convenient tool in this sense.

---

[164] Vladimir V. Vasnyov, *Priroda uslovnogo obyazatelstva do razresheniya otlagatelnogo usloviya* [*The Nature of Conditional Obligation Prior to the Settlement of a Suspensive Condition*]. Bulletin of the SAC of the Russian Federation, № 12, at 23 – 58 (in Russian, 2012). The following discussion was covered by Russian scholar Vladimir Vasnyov in his dissertation on the nature of conditional obligation. Parts of it were published in a prominent scientific journal.

[165] MARCEL PLANIOL, TREATISE OF FRENCH CIVIL LAW, PART 1: THE THEORY OF COMMITMENT, at 93 (trans. by V. Hartmann, 1911). Cited by Vasnyov, *see supra* note 164, at 33. "Does not yet exist" is debatable, *see* Part 3.2. Doctrinal analysis of continental law on legal pendency, at 122.

According to M. Planiol, the retroactive effect also explains the rule that a mortgage securing a conditional right is not considered as having been created when the condition occurs but when the contract is concluded.[166] French jurist Leon Julliot de La Morandiere (1885 – 1968) agreed with Planiol's approach. If the debtor disposes of the conditional property to the third party before the condition occurrence, the third party shall not oppose to the creditor (rightful potential acquirer) once the condition occurs.[167] Unlike the debtor's case, the creditor's dispositions made before the condition occurrence are valid. According to the scholar, the retroactivity is founded by the legislator's desire to guarantee the creditor's interests. If there was no rule on retroactivity, the debtor would be able to destroy the potential right of the creditor beforehand by disposing of it in favor of a third party. This would contradict the intended will of the parties expressed when concluding the contract, Morandiere assumes.[168] Russian scholar Vladislav Golevinskiy (1834 – 1919) was also supportive towards the retroactive effect of condition.[169] Affected by the French civil law due the work experience, Govevinskiy saw the practical importance of the retroactive effect in the possibilities for the creditor. If the condition occurs, the potential acquirer has the right to receive not only the object of the obligation, but also all of its additions, improvements and even income obtained from its usage. In addition, the retroactive effect cancels all proprietary rights and limitations established by the conditional debtor on the immovable property once the condition occurs.[170] Russian researcher Dmitriy Meier (1819 – 1856) thought the retroactive effect of condition could be deducted from the very essence of the concept of condition and was presumed, even if the law does not contain any indication to that effect. Vasnyov remarks this was the idea presented in the Russian law at that time (the Russian Empire, beginning of 1900).[171] Meier made a conclusion that the occurrence of condition is influencing not only the start of obligation but the very fact of contract's conclusion itself, "<...>when a condition occurs, the transaction is deemed to exist from the moment it is made, thus, the occurrence of the condition has a retroactive effect." But if the condition does not occur, "it was as if there was no deal at all to start with."[172] It can be assumed that the supporting authors looked at the retroactive effect through the lens of practical attractiveness, as well as theoretical loopholes. This way it was seen as a convenient and flexible instrument to be used by the contracting parties.

---

[166] *See supra* note 165. at 94, cited by Vasnyov, *see supra* note 164, at 34.
[167] JULLIO DE LA MORANDIERE, CIVIL LAW OF FRANCE.VOLUME 2, at 620 (trans. by Fleischitz E.A., 1960), cited by Vasnyov, *see supra* note 170, at 34.
[168] Id.
[169] VLADISLAV IV. GOLEVINSKIY, O PROISKHOZHDENII I DELENII OBYAZATELSTV [ON THE ORIGIN AND DIVISION OF OBLIGATIONS], at 189 (in Russian, 1872).
[170] Id., at 190.
[171] *See supra* note 164, at 35.
[172] DMITRIY IV. MEIER, RUSSKOE GRAZHDANSKOE PRAVO [RUSSIAN CIVIL LAW], at 193-194 (in Russian, 2003).

The opposing camp to the retroactive effect of condition could be considered ruthless towards the idea of retroactive effect. Vasnyov shows multiple opinions of pre-revolutionary Russian researchers (Y.S. Gambarov, G. Shershenevich, V.I. Sinaiskiy and others) who oppose the very nature of concept.[173] The first opinion stated that every conditional transaction takes its start from the contract's conclusion, and, thus, the very purpose of such transaction is to delay the legal consequences of the transaction to the period after the agreed condition occurs.[174] The "prospectivity" rule is seen as the general rule, while the retroactive effect should be seen as an exclusion from the general rule. The second negative opinion was suggested by Yuriy Gambarov (1850 – 1926), a historically acclaimed Russian researcher; he thought that the discussion about the retroactive effect is just a matter of "wording and style."[175] In fact, the retroactive effect of condition is contradicting the concept of contract's validity and has the only purpose: to explain how the condition is working before the occurrence. Gambarov compares the French and German Civil codes to depict this. The French law once allowed retroactivity as a general rule, but the legislator also provided multiple exclusions. The German law denied the retroactive effect as a general rule, however, provided exclusions that could be interpreted as a retroactive effect. Gambarov concluded that the retroactive effect of condition could not be deduced from the very nature of condition, the effect was not predetermined by the concept of condition or the mechanism of conditional transaction.[176] Still, like the previous opinion, the researcher saw some practical attractiveness in the usage of retroactive effect, admitting the tool could be managed at the discretion of contracting parties. The third opinion by V.I. Sinaiskiy (1876 – 1949) denied the concept of retroactivity on the grounds of stability of the legal circuit.[177] In his article, V. Vasnyov agrees with the opposing camp: the retroactive effect of a condition is a legal fiction, which is introduced in order to explain certain properties of conditional rights.[178] Vasnyov himself criticizes the retroactivity as it does not explain the nature of conditional rights, does not show its features, and, thus, cannot help to determine the place of condition in the system of scientific knowledge.[179] The opposing researchers are negative towards the retroactive effect of condition as it is a "fake" answer to the nature of conditions.

---

[173] Vladimir V. Vasnyov, *Priroda uslovnogo obyazatelstva do razresheniya otlagatelnogo usloviya* [*The Nature of Conditional Obligation Prior to the Settlement of a Suspensive Condition*]. Bulletin of the SAC of the Russian Federation, № 12, at 36 (in Russian, 2012).
[174] Id. The underlying idea is "there is no binding before the condition occurs."
[175] YURIY S. GAMBAROV, GRAZHDANSKOE PRAVO [CIVIL LAW], at 768 (in Russian, 1911).
[176] Id., at 768-769.
[177] VASILIY IV. SINAISKIY, RUSSKOE GRAZHDANSKOE PRAVO [RUSSIAN CIVIL LAW], at 156 (in Russian, 2002).
[178] *See supra* note 173, at 37.
[179] *See* Vladimir V. Vasnyov, *Priroda uslovnogo obyazatelstva* [*The Nature of Conditional Obligation*]. Abstract of the dissertation for the Candidate of Juridical Sciences, *available at* https://bit.ly/3WAPe3A (visited July 1, 2023). In the abstract of Vasnyov's dissertation, he attempts to criticize the very approach of that "condition is a *sui generis* institute."

The German doctrine appears to stand neutral in this discussion. Judging by the rules of BGB states that the retroactive effect could be agreed upon by the parties. Kirill Nam writes that in bilateral transactions, an agreement on a retroactive effect of the condition should be acquired blatantly in a written form, or by implicit actions of the contracting parties.[180] Reinhard Bork emphasizes that the retroactive effect onto the legal consequence is meaningful for the parties' obligations only (implying obligatory relationships).[181] In terms of obligations, by using the concept of retroactivity the contracting parties should lead each other to the same legal state, as if the legal consequences had occurred earlier.[182] At the same time the property rights (proprietary relationships) cannot be reversed or backdated, even by unanimous will of the parties, unless the German legislator fixes a specific rule in the code.[183] In most cases, the retroactive effect of condition (or the legal consequences of it) aims for the revenues, which might come from the property being sold. The retroactive doctrine helps the buyer to retrieve the revenues from the property even in the times of the "waiting period."[184] However, in case of a resolutive condition, the party should return the property back to the owner, including all the revenue earned from this property in the period of use. The receipts, resulting from the use of the property (the fruits, products) shall be awarded after the will of the contracting parties is found out. Werner Flume suggests a rather difficult scheme in this regard: if the contracting parties clearly agreed upon a cession of rights on the fruits and products and then also blatantly applied a retroactive effect to this cession then the retroactive effect shall apply to the fruits and products, gathered from the usage of property, as well. The same can be applied not only to fruits, products or incomes, but to the risk management and other negative consequences, the lawyer resumes.[185] The German law establishes a certain scheme where the imperative rules of law guide the contracting parties in their aspirations to use retroactive effect in conditional transactions.[186] The public policy sets up high standards to establish a balance in commercial business and provide maximum amount of protection to the creditor.

---

[180] Kirill V. Nam, *Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod* [*Comment to the #Gloss. Conditional transaction. German Approach*]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 92 (2018). "There is no room for assumptions, the will of the parties should be clear and unvague", he elaborates on the usage of retroactivity in bilateral contracts. Nam cites multiple sources in this question, including the following books of Bork and Flume.

[181] *See* Reinhard Bork, *Allgemeiner Teil §§ 139-163* in: KARL-DIETER ALBRECHT, J. VON STAUDINGERS KOMMENTAR ZUM BURGERLICHEN GESETZBUCH: MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN. ECKPFEILER DES ZIVILRECHTS [J. VON STAUDINGERS COMMENTARY ON THE CIVIL CODE: WITH THE INTRODUCTION OF THE LAW AND SECONDARY LAWS. CORNERSTONES OF CIVIL LAW], at § 159, Rn. 2 (2020).

[182] Id., at § 159. Rn. 11.

[183] Id., at § 159. Rn. 6.

[184] Id.

[185] WERNER FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS [GENERAL PART OF CIVIL LAW], at 724 (1992).

[186] In fact, the effect of condition under the German law is not retroactive, but "preliminary." This makes a big difference in understanding the legal status of the contracting parties in the "waiting" period. For the discussion on the "waiting period" and "preliminary action of condition", *see* Part 3.2.2. German approach on legal pendency. Protected expectation, at 127.

1.4.3. Comparative picture on retroactive effect

The comparative analysis shows that the attitude of legislators towards the retroactive effect of condition leaves much to be desired. The current legislation could be divided into three groups.

The first group of states (30 out 45 national codifications) supports only the prospective effect of condition.[187] Most states either do not specify the rules on possible retroactivity or blatantly exclude such possibility for the contracting parties:

Art. 5.147 (Civil Code of Belgium): "The fulfilment of the condition takes effect by operation of law and ***for the future****. The fulfilment of the resolutive condition gives rise to restitution of the service rendered."*[188]

The second group (7 out of 45 codes) supports the prospective effect of condition as the main rule, while also explicitly allowing the contracting parties to apply the effect of condition occurrence from the date of contract conclusion[189]:

Art. 151 (Switzerland Civil Act): "The contract takes effect ***as soon as*** *this condition precedent occurs,* ***unless the parties clearly intended otherwise****."*[190]

The third group of legislations (8 out of 45 codes) stipulates the retroactive effect as the imperative rule on the effect of condition occurrence.[191] It is always fixed blatantly and, in most cases, supported by several exclusions afterwards.

Art. 1120 (Spanish Civil Code): "The effects of the conditional obligation to give, after fulfilment of the condition, ***shall retroact to the day of constitution of the obligation****."*[192]

All the international codes are for the prospective effect of condition. Still, DCFR does not stipulate any possibility of the retroactive effect, while PECL and PICC make the option available.[193]

---

[187] Full list of states, supporting only prospective effect: Armenia, Austria, Azerbaijan, Belarus, Belgium, Brazil, China, Czech Republic, Estonia, Georgia, Hungary, Iran, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Nepal, Netherlands, North Korea, Russia, South Korea, Tajikistan, Thailand, Turkey, Turkmenistan, Ukraine, United Arab Emirates, Uzbekistan, Vietnam.

[188] Belgian Civil Code. Book 5: Obligations, Art. 5.147 (in Dutch and French, 2023), *available at* https://bit.ly/3WINDca (visited July 1, 2023).

[189] Full list of states: Argentina, France (however, resolutive conditions have retroactive effect as the main rule), Germany, Japan, Moldova (only with resolutive condition, Art. 354), Poland, Switzerland (does not allow retroactivity with resolutive conditions).

[190] The Federal Act on the Amendment of the Swiss Civil Code Part Five: The Code of Obligations, Art. 151 (2) (1911, cons. ver. 2023), *available at* https://bit.ly/3DlCneI (visited July 1, 2023).

[191] Full list of states: Bulgaria (no exclusions found), Luxembourg, Egypt, Indonesia, Italy, Quebec (no exclusions found), Spain, Portugal.

[192] Spanish Civil Code, Art. 1120 (1889, cons. ver. 2016), *available at* https://bit.ly/3HCpAag (visited July 1, 2023).

[193] Art. III. – 1:106 (2) of DCFR stipulates that "upon fulfilment of a suspensive condition, the relevant right, obligation or relationship takes effect", while, *e.g.,* Art. 5.3.2 of PICC states that "unless the parties otherwise agree, the relevant contract or contractual obligation takes effect upon fulfilment of a suspensive condition."

The comparative analysis shows that the principle of "non-retroactivity" is prevailing among the modern legislations.[194] S. Vogenauer provides the rule prevails in the U.S., even though the doctrine of common law is silent on the question of retroactive effect.[195] French lawyer B. Fauvarque-Cosson in his article elaborates on the question of what is better for the legislator.[196] In his opinion, the importance of retroactive effect of condition lies in "validation of acts" committed before the occurrence of agreed condition.[197] Such idea of retroactive effect was supported in the French Civil Code before the 2016 amendments.[198] However, such idea required a certain number of exclusions for the retroactive effect to work properly.

These limitations are presented nowadays in some of the legislations based on the Code Napoleon.[199] Those are risk management tools for a thing in possession of the debtor. If, before the condition occurs, the thing is lost/destroyed but it not the fault of debtor, then there is simply no obligation for the debtor to transfer a thing. If it is damaged during that period – the creditor can either refuse or accept without compensation. Some states added at least three more exclusions for the proper regulation of retroactive effect.[200]

Comparing to other available legislations with prospective effect of condition this regulation can be assessed as "overly excessive" and "unnecessary." The fact of necessity of exclusions confirms the idea of the opposing camp: the retroactive effect may not work as a main rule. Retroactive effect can be associated with transplantation of seeds: the natural legal regime of prospectivity is transferred to the period of time before the condition occurrence, which itself requires more regulation.

---

[194] STEFAN VOGENAUER, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC), at 696 (2015). Stefan Vogenauer calls it "the principle of non-retroactivity."

[195] Id.

[196] Benedicte Fauvarque-Cosson, *The New Provisions on Conditions in the UNIDROIT Principles 2010.* Uniform Law Review. Vol. XVI. Issue 3 (2011), *available at* https://bit.ly/3G5bZV7 (visited July 1, 2023). He writes that "it is important to make clear the consequences of non-retroactivity/retroactivity. In case of non-retroactivity, when the suspensive condition occurs, the period of suspension automatically comes to an end and the conditional act automatically produces its effect, as any other act. The creditor can therefore ask for its interest, for instance, only from the moment the condition occurred, so the limitation of action only starts to run from that precise moment. In case of retroactivity of a suspensive condition, it is as if the conditional right had been perfect from the very beginning."

[197] Id. he adds, "For instance, if the person who benefits from the condition has sold the goods before the condition is fulfilled, upon fulfillment of the condition, this sale is valid."

[198] *See*, *e.g.,* French Civil Code, Art. 1179, 1183, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016), *available at* https://bit.ly/3XBNYyt (visited July 1, 2023).

[199] *See, e.g.,* Luxembourg Civil Code, Art. 1182 (in French, 1803, cons. ver. 2023), *available at* https://bit.ly/3jiXQOB (visited July 1, 2023), *see* also Art. 1264 of Indonesian Civil Code (1847), *available at* https://bit.ly/3JmY5mG (visited July 1, 2023).

[200] The leader on the number of exclusions is Spain. Art. 1122 of Spanish civil code provides following exclusions: 1) if object lost with no fault of debtor - no obligation; 2) if object lost on fault of debtor - damage compensation obligation; 3) if object damaged with no fault of debtor - creditor can accept without compensation; 4) if object improved - creditor pays no compensation; 5) if improved at debtor's expense - debtor has the same rights as the usufructuary; *see* Spanish Civil Code (1889, cons. ver. 2016), *available at* https://bit.ly/3HCpAag (visited July 1, 2023).

1.4.4. Legislative necessity of retroactive effect

The retroactive effect appears to be a unique feature of the legal concept. Unlike other modalities, the retroactivity feature allows to refer the legal consequences of condition occurrence to the period after the start of the contract and before the condition occurrence. Theoretically, the retroactive effect distinguishes conditions with other contractual modalities, and thus even could be framed as a "qualifying feature" of condition, on par with uncertainty and relation to the future. In the ideal world, the retroactivity solves multiple issues with the uncertainty of the contracting parties before the condition occurrence. Some scholars mention that the retroactivity is useful for defining the title on fruits, products or incomes, as well as help with the diversifying risks overall. The examples on bakery and distribution show that the concept could be practically attractive and allow the change of contract dynamics by the desire of parties. Moreover, as a solution of the French school of thought, retroactivity is seen nowadays in some of the French-type legislations as an option or even regulated as a main rule for the contracting parties to use.

However, the retroactivity overall as a concept seems to be unfinished, therefore it could be fully accepted as a qualifying feature of condition. In fact, retroactive action of condition is a legal fiction the legislator uses to manage the legislation loopholes. The doctrine of retroactivity does not have much popularity within the most prominent codifications today: only a third of national codifications regulate such possibility for the parties, and only a fifth of those insist on applying retroactivity as a general rule. Even with the 2016 amendments of French Civil Code, the legislator, whose approach on general retroactivity the countries copied, finally moved away from the concept of retroactivity, limiting its usage, and proclaiming general prospectivity for suspensive conditions. The general retroactivity approach is quite good at risk-management, however, appears to require a lot of exclusions to work properly. This makes a valid argument against the concept: condition as a legal institute, does not require an extensive number of exclusions to work properly before it occurs. Still, there are no arguments to ignore the concept of retroactivity completely.

It could be suggested that the retroactive effect is valid choice for the legislator, however, only as an optional element (in the form "proclaiming prospective effect" plus *"unless the parties stipulate otherwise"*), and not a general rule. In theory, it seems there should be a better option to provide protection of the contracting party in the period of before condition occurrence, however, this is yet to be discovered. Overall, the concept of retroactivity is a pill but not a panacea – it is a valuable legal instrument, but not an all-in-one solution for the concept of condition.

1.5. How legislators provide the balance in the general aspect of conditions

All in all, the theoretical basis behind the concept of condition is enormous. This part of the paper discussed the most important of the theoretical lines, necessary for explaining the further research. While being a juridical fact, which is uncertain to happen in future, in the ideal world the condition is an instrument to provide the contracting parties a power to change the legal consequences in the most suitable way. The concept of condition very much fits into the autonomy of will principle: managing the future possibilities and taking out the most benefits of the contract. However, it is not a simple instrument to use, as the chapter shows the diversity in regulatory approach towards the concept of conditions. The comparative analysis allowed finding multiple similarities and differences in the regulation of condition.

The construction of the "balance" between the autonomy of will and imperative rules of law starts with defining the legal institute of condition. By stipulating the main rule on condition, the legislator shows two sides of the concept: the exact definition and its object, reference.

In the question of exact definition, it appears that the legislator has three ways of describing the condition: either as an "event", as a "circumstance" or ignoring the definition whatsoever. The difference between the wording is reasonable to be analyzed: the words are different in the scope of interpretation ("event" is a broader term) and in the scope of influence ("circumstance" is not compatible with human influence). The legislations which avoided the direct definition of condition also have provisions that may "hint" upon the necessary word. In the question of reference, the overall situation appeared to be even more interesting.

In the question of reference, the first analysis showed three groups of legislations in terms of what is depending upon a condition: whether only the contract could be conditioned, the contract and separate rights and obligations could be conditioned, or only conditional obligations are available under the law. After a closer look, the comparative pool was shortened to two groups: the legislations who allow conditioning the whole contract, and those who allow conditioning only the obligations. The answer on why this happened could be found both in the historical evaluation of contract (either it is an entity of itself, or "obligation equals contract") and the way the concept of condition is fixed in the legislation: be it a chapter of the code on juridical facts, or the chapter of the code on obligations. This way the concept of conditions suits the overall way the legislators want it to look like: as a matter of juridical fact that affects the contract, or a matter of obligation modality that brings changes to the parties' performance and counter-performance.

Other than the legislative comparison, the qualifying features of conditions are explained, which is also a relevant information for the future analysis. Those cannot be called standards – as they define the concept of condition. An overwhelming majority of legislators agree with these qualifying features: "relation to the future" and "uncertainty." Both features confirm the role of condition: as a modality for withstanding the future surprises, and as a flexible tool other than time specification. Some legislations suggest an opposite option as an addition: "condition" could also be a past unknown event or present unknown event. The addition of "past event" option is an attempt on filling possible legislative loopholes. However, there is not much practical necessity to such "conditions" in the modern era of information, it seems. The "uncertainty" feature is neither disputed, nor added upon. The true nature of condition is behind the uncertainty. The instances of "uncertain" are thrown within a variety of legal instruments, and the attempt of the current paper is to examine the most important of those: be it the status before the condition occurrence, or the violation of reciprocal duties with a condition dependent upon the third party, or the usage of conditions in unilateral actions. The presented uncertainty issues are the focus of the current research.

Most legislators also use another solid method of "balancing" the legal concept of condition: through its classification in the code directly. The most popular classification of condition is the "suspensive/resolutive" with the criteria of legal consequences: if the right occurs, it is suspensive; if the right terminates, it is resolutive. This classification is primary not only for the continental law system, but for the common law as well, in the form of "precedent/subsequent." Still, the analysis on the common law doctrine and case law gives the impression that resolutive conditions do not exist; those are suspensive conditions but with a "minus" sign. A less popular classification of conditions called "potestative/negative" is different from the previous one: the criteria is the occurrence of the condition, not the occurrence of the legal consequences. There is a unique classification in common law called "external/internal" with the criteria of reference (that one "reference" analyzed earlier). External conditions affect the whole contract, while the internal conditions affect a separate right or obligation within it. The continental law also has a unique classification with a lot of theoretical and practical value, called "casual/potestative/mixed" conditions. The criteria is the possible influence of the party upon the condition occurrence. The current paragraph refers to all conditions, but mostly casual. The potestative and mixed conditions have a whole different doctrine and legislation to be unveiled further on. Many more classifications could be deducted, however, there is not much practical sense in those. By extensive classification the legislators confirm their desire of less confusion in further interpretation of the concept of condition.

It is also necessary to create the imperative limitations for the concept of condition. Those could be called standards of condition, or criteria. In fact, every condition should be limited, so the condition will not turn into or overlap with any other known legal concepts. Through the course of comparative analysis, multiple legislations appear to have an explicit prohibition on unlawful, immoral, and impossible conditions. However, those are limitations, which could be addressed to any legal concept today, therefore, an analysis on unique condition limitations was conducted. The research consisted of theoretical comparison between "condition" and its closest legal concepts: time specification, preliminary contract, aleatory contract. The doctrinal analysis on the opinions from the legal doctrine allowed to establish a set of standards for the concept of "condition." These standards could be directly stipulated into legislation.

Every condition should be probable, first and foremost. The probability is seen in an objective occurrence of the event overall, and in the occurrence specifically in the eyes of the contracting parties. Therefore, the standard of "probable" should be defined as something not obvious and not inevitable. Otherwise, it is not a condition, it is a time limit. The legislations have all the prerequisites for announcing such a limitation since it is basic. The second established criterion is being "additional": every condition is an additional element to the contract, a modality. It is presumed that the contract would have still been a contract even without the conditions. However, if it is an essential part of the contract for some reasons, then there might be two reasons behind it: a) it is not a conditional transaction anymore (aleatory contract), or b) the condition is a "technical" condition – a provision of the contract. This way, it should be noted that insurance contracts are not conditional contracts, they are aleatory in nature. Being real and obtainable is also an important part in every condition, therefore, the third criterion for conditions is being "real." The condition should be possible to occur at some point, and if it turns that one of the contracting parties was deceived and the condition the parties agreed upon was never to occur, then the transaction itself should be considered unconditional. National codifications already have multiple examples of this limitation at work. The last condition's standard is accessibility. The contracting parties should have the opportunity to access the information on condition occurrence. This is important not only in the scope of bilateral contracts, but unilateral actions as well, which will be examined further on in the paper.

While most of the standards are not fixed in the civil codes at all, it is still of a great importance to deduct them. The results of the analysis are useful both to the theory and the practice. Depicting criteria makes the concept of condition more refined in the doctrine. In the practice the contracting parties are provided more potential means of defense.

One of the most important questions for the theory of conditions is the effect of the condition occurrence. Most legislations construct the concept of conditions through a "bind": the condition occurrence creates, amends, or terminates legal relationships. In this sense, a unique feature of conditions arises – an ability to refer the legal consequences of condition occurrence to the time before such condition occurs, called retroactive effect of condition. This is different from the qualifying feature of "future", as it is not about when the condition occurs, but about how it affects the rights and obligations. Retroactive effect of condition, or retroactivity, appears to be a legal fiction that allows the contracting parties to apply the legal regime of am already fulfilled condition to the time before it occurred.

The scholars doubt the true origin of the concept, yet the concept is just a unique feature, not a defining concept of condition. Through the analysis on multiple examples of prospective and retroactive conditions, the main function of retroactivity could be suggested: supplementary a. The supplementary function is seen in the additional gains for the parties comparing to non-retroactive contracts. In the ideal world, the retroactivity would be a qualifying feature of condition, because of the positives it brings to the legal relationship: any problematic encounters before the condition occurrence are solved. Yet, the reality is that the concept needs an enormous number of exclusions to work properly; thus, it is not the best solution.

Both the doctrinal and legislative opinions are mostly negative towards the idea of retroactivity, especially the idea of retroactive effect as the main rule on conditions. Still, there is a doctrine and legislation which embraces such attitude. The positive opinions towards retroactivity could be found in the old French and Russian doctrine: this is supported by the main rule retroactivity in the Code Napoleon. Other part of the old Russian doctrine and some modern scholars think this is just a matter of wording, and nothing substantial could be brought up. German doctrine stands neutral to the discussion on retroactive effect, as far as the law allows such concept optionally. Further analysis will show, however, that the German law has another, and possibly a better solution to the problem[201].

The solution which may contribute to the balance between the autonomy of will and imperative law is seen in allowing the retroactive effect of condition as an option for the contracting parties. For this solution an explicit addition could be made into the codification. Retroactive effect is a complex theoretical question which asks for further investigation and comparison with other possible solutions revolving around the period before the condition occurrence.

[201] *See* Part 3.1.2. German approach on legal pendency. Protected expectation, at 127.

1.5.1. A note on forced conceptual limitations (compliance with law)

One more question was reviewed indirectly within all the paragraphs of the current part: a question on whether there are cases of forced conceptual limitations on conditions from the law enforcement actors, meaning mostly legislator and judges. A conceptual limitation may constitute a contradiction to the autonomy of will in the context of conditions.

As of now, there is no substantial evidence to find such tendency in all 45 reviewed national codifications; moreover, there is no such tendency in the common law jurisdictions, mainly because of how the concept of condition is regulated: through a huge data base of court's interpretation. Through the course of comparative analysis, all the possible assumptions appeared to have an underlying political bias. For example, most of the analyzed codifications have a rule on "illegal, immoral, impossible" conditions, however, other than constituting a usual limitation to the concept, no signs of possible limitation of party autonomy from the law enforcement actors could be found.

Still, there are at least 7 national legislations which have a "peculiar wording" in the code.[202]

The first three legislations, China, Russia, and Poland are establishing a compliance with "the nature of juristic act."[203] While in case of China and Poland it happened through the legislation directly, in case of Russia it happened indirectly: through the court's interpretation of the civil code.[204] If the "compliance" criterion is not met, then the condition could be deemed null and void. It is not easy to understand what this "compliance" means. However, it could be assumed that the court is given a broad discretion to deem conditions void if they are not compatible with the court's understanding of what condition is and what condition is not. Still, there is not enough evidence for a determined limitation of the concept. Later, a Russian case law on potestative conditions will be reviewed, where the courts prohibited such conditions on similar grounds, however, the law changed afterwards in a positive way for the potestativity.

Thus, two suggestions could be made. First, the "compliance with the nature of juristic act" could be a form of illegality limitation. Secondly, it could be a form of distinguishing condition with the other legal concepts: for example, the court might interpret that the contracting parties stipulated

---

[202] Full list of states: China, Iran, Laos, North Korea, Poland, Russia, UAE.

[203] Civil Code of China, Art. 158 (2021), *available at* https://bit.ly/3u27kke (visited July 1, 2023), "A condition may be attached to a civil juristic act unless the nature of the act denies such an attachment"; *see* also Art. 89 of Civil Code of Poland (1964, cons. ver. 2014), *available at* https://bit.ly/3HED4Tc (visited July 1, 2023), "Subject to the exceptions provided for in the law or arising from the nature of a legal act, the arising or ceasing of effects of a legal act may be made conditional on a future and uncertain event (condition)."

[204] *See*, *e.g.*, Resolution of the Federal Arbitration Court of the North Caucasian District № F08-3832/2003 (in Russian, from October 7, 2003), *available at* https://bit.ly/34bPbWz (visited July 1, 2023). *See also* Part 2.2.1. Russian doctrine and practice. Accepting potestative conditions, at 79.

not a condition, but a time limit. Both ways are acceptable with the principle of freedom of contract. There are no signs of conceptual limitations, therefore.

The legislations of Iran, Laos and North Korea also have the wording, worth a closer analysis. In case of Iran, condition is null if it is contrary to the "requirements of contract."[205] This could either be a translation mistake, or a very broad limitation. If it is the latter, then there could be a potential for a conceptual limitation from the enforcement actors. In case of Laos, the condition is called an event criterion of juristic act.[206] The speculation is that depicting the concept condition as criterion of juristic act might create a "feeling" of control: it is as if the concept is not proclaimed as a legal institute at all but depicted in a less meaningful, controlled way. In case of North Korea, the wording is simply very strict and prohibitive.[207] Still, other than the formalistic interpretation of the civil code provisions, there is not enough evidence to support the presence of conceptual limitations.

There is not enough evidence to support a following view: "in non-democratic political regimes there is a potential for forced conceptual limitations towards the concept of conditions by the law enforcement actors." This assumption is flawed not only because of the lack of information, but conceptually wise as well. The type of political rule may explain the historical reasons of why the norm of law is understood in such way by legislators and interpreted by the court a particular way. However, the type of political rule cannot be an indicator of conceptual limitation by itself; for example, the fact that the country is authoritarian does not mean that the legislator exercises more imperative power towards the concept. There should be a more valid reason for that.

United Arab Emirates is an interesting example in this discussion, however. First, the Civil Transactions Law establishes the following main rule, "Certainty shall not be removed by a doubt."[208] Secondly, the legislator regulates "conditions of option", which are preliminary contracts in nature.[209] Thirdly, the condition is established as a future fact. And finally, there is a unique rule never seen anywhere before, "The condition must as much as possible be observed."[210]

---

[205] Civil Code of the Islamic Republic of Iran, Art. 233 (1) (1928, amend. 2006), *available at* https://bit.ly/3wzUERN (visited July 1, 2023), "The following condition are of no effect and will nullify the contract itself: (1) Conditions which are contrary to the requirements of contract." (2) Conditions which are unknown and of which lack of knowledge entails ignorance of the two things the exchange of which forms the subject of contract."

[206] Civil Code of Lao People's Democratic Republic, Art. 29 (2020), *available at* https://bit.ly/3kRazJ3 (visited July 1, 2023), "Juristic acts which have an event as a criterion refer to juristic acts of which specify any uncertain events as a criterion giving rise to the validity of or the abrogation of juristic acts."

[207] Civil Law Act of the Democratic People's Republic of Korea, Art. 30 (1990), *available at* https://bit.ly/3HDH8D2 (visited July 1, 2023), "The effect of acts of civil legal affairs can be associated with the occurrence of certain conditions. In these cases, a party shall not do any acts which bring forward or interfere with the occurrence of those conditions."

[208] Federal Law On the Civil Transactions Law of the United Arab Emirates, Art. 35 (1985), *available at* https://bit.ly/3Jrh9Ad (visited July 1, 2023).

[209] Id., Art. 219 – 222.

[210] Id., Art. 428.

This example is the closest to answering the question on conceptual limitations. The law of UAE simply denies the concept of "uncertainty" or, in the precise wording of the legislation, "doubt." While "uncertainty" is the qualifying feature of condition occurrence, under the law of UAE everything should be certain. In the analysis on preliminary contract, it was discovered that the moment of start for the obligation to conclude the contract is inevitable, thus, answers the criteria of certainty. The law of UAE calls such contracts "condition of option." The definition of condition (in the meaning of condition) omits the reference to uncertainty, which adds to the picture of conceptual limitations. Moreover, there is a specific article that asks for more control towards conditions. "The condition must as much as possible be observed" rule could also constitute a necessity of commitment towards the condition occurrence, in other words, the legislator asks the contracting parties to make the condition occurrence as less uncertain as possible.

While being the closest to the answer, the example of UAE is unique and, therefore, cannot create a full picture on the possible conceptual limitations by the law enforcement actors. Still, this analysis is important as it asks for future additions by any other national scholar who is eager to discover this topic in detail.

Nevertheless, the way the legislators construct the balance in the context of general rules on conditions appears to be group structured. It could be assumed at this stage of research that the way the balance between the party autonomy and imperative law is constructed does not differ much from the other available legal concept. Still, there are plenty of unique legislations, which review the concept of conditions in a different way. At the current stage of the paper, however, it is impossible to unify and harmonize the approaches under one set of rules on conditions. But one can try to define the legal concept of condition in a harmonized way:

Condition is a future uncertain event, which could be applied either to the whole contract or a separate obligation. It follows the standards of probability, additionality, reality and, authentical accessibility. It may affect the occurrence, amendment, and termination of legal relationships to the period after the condition occurs, unless the parties stipulate otherwise.

2. Potestative conditions and imperative rules of law

2.1. Classification of conditions according to influence

Potestative conditions refer to the old classification which divided all conditions into casual, potestative, and mixed. Unlike with casual conditions, which cannot be influenced by any contracting party whatsoever, potestative conditions are uncertain events, the occurrence of which the parties can influence. The word "potestative" comes from Latin and has the meanings of "chance" and "power" in it.[211] Both "chance" and "power" fit the concept of potestativity: there is chance of condition occurrence and there is an implied power of the party to control the occurrence. By stipulating that A will buy B's house if B relocates to another city, a potestative condition is established, so the party B acquires a choice: to contribute to the deal and to move to another city, thus triggering the condition, or to ignore it, thus the condition does not occur. Potestative conditions are practically attractive since they are widely spread both in everyday life and in complex business practice.

The example above, by the way, is a potestative condition of a simple type. Simple potestative conditions are the "actions" of a contracting party that may have their own economic or legal purposes, but as far as they are agreed upon in the contract, these conditions trigger legal consequences.[212] Imagine an example, where A and B agreed on future sale of the company with a potestative clause: "Company A will buy Company B, if B pays off all the Company's debts." It is impossible that B's debts will be paid off without B's own actions. So, for the condition to be fulfilled, B will have to influence the condition occurrence with its actions: by paying all the debts. The payoff will trigger Company A's obligation to buy the Company B.

However, it is not always the action of the party which may trigger the condition occurrence. Consider another example, where A and B agreed upon the clause, "If B stays in the city for 3 years, A will donate him an apartment in this city." This is an example of inaction by B that will still trigger the legal consequences, intended by the parties. Therefore, a simply potestative condition is one which depends upon the will of one of the parties, expressed in the accomplishment of a certain act.[213] The occurrence of condition depends upon the party's commitment, be an action or an act of ignorance.

---

[211] Kevin Mahoney, *Latin Dictionary and Grammar Resources, "potestas" definition*, *available at* https://bit.ly/3Eswuw4 (visited July 1, 2023).
[212] Artyom G. Karapetov, *Tezisy k Kruglomu Stolu Yuridicheskogo Instituta "M-Logos" "Problemnye Voprosy Uslovnyh Sdelok"* [*Thesis to the round table of the Law institute "M-Logos" "Problematic issues of conditional transactions"*] (in Russian, 2016), *available at* https://bit.ly/415mfbB (visited July 1, 2023).
[213] ANTONI VAQUER, CONTRACT LAW IN SPAIN, at Sec. 185 (2018).

Even though the potestative conditions historically come from the ancient times, the jurists viewed the concept in a slightly different way than the researchers do nowadays. They assumed that the potestative condition depended exclusively upon the creditor's actions.[214] Conditions dependent on a mere occurrence were "casual" and those dependent on a mere occurrence and on creditor's actions were "mixed"; each of the three types was accepted.[215] Nowadays, the phenomenon of potestativity is understood in a broader way. The party may influence the condition occurrence not only with actions, but by matter of pure will as well. Such conditions are presented by researchers as a purely potestative conditions, which depend merely upon on the will of one of parties.[216]

The meaning behind pure potestativity is that the legal consequences are contingent upon a desire/wish of one of the parties. Consider two examples. In the first one, the clause is "The Debtor shall pay off the debt, if the Creditor wants" (You pay if I want). In the second example, there is another clause: "The Debtor shall pay off the debt, if the Debtor wants" (I pay if I want). Both examples are purely potestative conditions, because the condition fulfillment depends upon a sole pure wish from the contracting party. The first example constitutes a loan with its duration until the creditor exercises his right of demand to pay, which is a common legal practice. The second example, however, is rather unusual, because the debtor can pay the debt whenever he would like to. It looks like the debtor does not bind himself with an obligation to pay. A consent under the condition of a consent is not a consent.[217] Antoni Vaquer explains that in contract law, such conditions are null since the effectiveness of the contract depends on the wish of one party.[218]

The classification of casual, potestative and mixed conditions might be seen as a unique approach towards understanding the concept of condition. Because of high level of applicability to the current legal relationships, such classification may pose a big contribution to the balance between the party autonomy and imperative law. A comparative look might confirm such an assumption.

---

[214] CLAUDE BUFNOIR, THEORIE DE LA CONDITION DANS LES DIVERS ACTES JURIDIQUES D'APRES LE DROIT ROMAIN [THEORY OF CONDITION IN VARIOUS LEGAL ACTS ACCORDING TO ROMAN LAW], at 61 (in French, 1866), cited by Ageev A.V. *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation. № 1, at 86 (in Russian, 2015).

[215] STEPHANE VALORY, LA POTESTATIVITE DANS LES RELATIONS CONTRACTUELLES [THE POTESTATIVITY IN CONTRACTUAL RELATIONS], No 114, at 77. (in French, 1999), cited by Ageev, *supra* note Ageev, at 86.

[216] *See*, *e.g.*, ANTONI VAQUER, CONTRACT LAW IN SPAIN, at Sec. 185 (2018); *see also* ARTYOM G. KARAPETOV, ISPOLNENIE I PREKRASHCHENIE OBYAZATELSTVA: KOMMENTARIY K STATYAM 307 - 328 I 407 - 419 GRAZHDANSKOGO KODEKSA ROSSIYSKOY FEDERACII [FULFILLMENT AND TERMINATION OF OBLIGATION: A COMMENTARY TO ARTICLES 307 - 328 AND 407 - 419 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], at 863 (in Russian, 2022); *see also* Aleksey V. Mikhashin, *Potestativnye usloviya v soprovozhdaemykh sdelkakh po gosudarstvennomu oboronnomu zakazu* [*Potestative conditions in accompanied transactions on the state defense order*]. Journal of Business and Corporate Law, № 1, at 51 (in Russian, 2020).

[217] HEINRICH DERNBURG. PANDEKTEN [PANDECTS], at 297 (in German, 1897).

[218] ANTONI VAQUER, CONTRACT LAW IN SPAIN, at Sec. 185 (2018).

2.1.1. Comparative look on potestative conditions

The comparative analysis shows that overall majority of national codifications (28 of 45) and all supra-national codes (DCFR, PECL, PICC) do not have a single word on potestative conditions, which creates doubts around a preliminary suggestion about the potestative classification.[219] At least four national codifications (Luxembourg, Quebec, Russia and Switzerland) have an article, which hints or explicitly allows potestative conditions; it is important to note that all of them refer to an obligation dependent upon a potestative condition, and not a transaction.[220]

There are also legislations which explicitly prohibit certain types of potestativity. None out of the researched legislations prohibit simple potestative conditions, which is logical since there is no obvious harm to the legal circuit. Pure potestative conditions, however, are prohibited two ways.

The first way is that all conditions depending upon the parties' will are prohibited (3 states)[221]:

Art. 328.3 (Civil Code of Azerbaijan): "Condition depending upon will of parties, i.e., one occurrence or non-occurrence of which depends upon wish of parties in agreement, shall be invalid. Agreement concluded with such condition shall be invalid."[222]

The second way is to prohibit exclusively pure potestativity favoring the debtor (12 states)[223]:

Art. 267 (Egyptian Civil Act): "An obligation is not valid if it is dependent on a suspensive condition that makes the existence of the obligation dependent on the pure will of the obligor."[224]

Prohibition of all pure potestativity in Azerbaijan, Georgia, and Turkmenistan applies not only towards to debtor, but to the creditor as well. The reason behind an explicit ban of pure potestative conditions favoring the creditor is not obvious at all. In example of Azerbaijan law, neither court practice, nor legal doctrine explains such a reason. With the help of Azerbaijani native speaker,

---

[219] Full list of states: Armenia, Austria, Belarus, Brazil, China, Czech Republic, Estonia, Germany, Hungary, Indonesia, Iran, Kazakhstan, Kyrgyzstan, Laos, Moldova, Nepal, Netherlands, North Korea, Poland, Portugal, South Korea, Tajikistan, Thailand, Turkey, Ukraine, United Arab Emirates, Uzbekistan, Vietnam.

[220] *See* Luxembourg Civil Code, Art. 1170 (in French, 1803, cons. ver. 2023); Civil Code of Quebec, Art. 1500 (1994); Civil Code of the Russian Federation, Art. 327.1 (1994), The Federal Act on the Amendment of the Swiss Civil Code Part Five: The Code of Obligations, Art. 155 (1911). Previous Argentine Civil Code of 1874 also explicitly allowed potestative conditions, "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." Current Argentine Civil and Commercial Code (2015) only has a provision on prohibition of pure potestativity. Meanwhile, the amendments of Russian civil code in 2015 fixed an article which allows any potestative conditions, "including fully dependent on the will of one of the parties." This caused a critical theoretical problem for the Russian law; *see* Part 5. Rupture of synallagma in conditioned obligation performance, at 188. Switzerland law hints at the possibility of potestative conditions when talking about transmissibility of conditions, "if the condition consists of an act by one of the parties…"

[221] Full list of states: Azerbaijan, Georgia, Turkmenistan.

[222] Civil Code of the Republic of Azerbaijan, Art. 328.3 (in English, 1999), *available at* https://bit.ly/3WHEfpb (visited July 1, 2023). The Russian translation of Azerbaijan CC also uses the wording "depends upon the desire."

[223] Full list: Argentina, Belgium, Egypt, France, Japan, Italy, Latvia, Lithuania, Luxembourg, Quebec, Spain, Thailand.

[224] Egyptian Civil Law Act, Art. 267 (in Arabic, 1948), *available at* https://bit.ly/3HEHZ6g (visited July 1, 2023).

graduate student Elnur Karimov of Kyushu University, some assumptions could be made.[225] There is a legal blog of an Azerbaijan lawyer Emin Karimov on the regulation of warranties and representations under the Azerbaijan law, where the author poses some doubts on the usage of rules on conditions.[226] There is no problem in its sense, he writes, however, the problem is in the application: there are multiple provisions both in warranty and representation which depend upon the will of the contracting parties. The article "should be applied with caution", he suggests, with considering "the characteristics of the civil business cycle (former legal relationships between the parties)."[227] The lawyer makes a big emphasis on the *"depends upon the wish of parties"* part of the article, to conclude that the condition depending only upon the wish of the party can be claimed invalid. Therefore, the author tries to distinguish potestative and mixed conditions.[228] The "narrow" application of the article puts most contracts at risk of "invalidity", the "literal" application may contradict the stability of the legal circuit – those are the reasons of the legislator to narrow down the meaning of the prohibition to the sole wish of the party, the lawyer concludes.[229]

While this may sound as a considerable explanation, an objection could be made. Consider a usual loan example. In case of the pure potestativity favoring only the debtor (I pay if I want), it is obvious that the economic values shift from the creditor to the debtor for an uncertain and indefinite amount of time, which creates a conclusion: "there is no obligation." In case it favors only the creditor (You pay if I want), the economic values are shifted till the moment the creditor demands the payment which does not disturb the legal circuit in any sense, and there is no obvious violation either for the debtor's or for the creditor's interests: if the creditor does not exercise his demand – it would be a gift. Moreover, the "payment on demand" mechanism is very well known; the bill payment is one example.

Still, it also possible to agree with Emin Karimov. There is not enough clarity for the rule on pure potestativity favoring the creditor. Perhaps, a better solution could be found to diversify the acts of common business and pure potestative conditions favoring the creditor. This way, it would be possible to prohibit the pure potestativity in full and without any questions on applicability.

---

[225] Elnur Karimov's level of education is LL.M., which allows better reliance on the understanding of Azerbaijan law.

[226] Emin Karimov, *Təsdiq və zəmanətlər Azərbaycan hüququnda* [*Application of representations & warranties in Azerbaijan law governing contracts*] (in Azerbaijani, 2017), *available at* https://bit.ly/3SjXO6o (visited July 1, 2023). Translated with the help of Elnur Karimov. Emin Karimov and Elnur Karimov are different scholars.

[227] Id. Additionally, Karimov adds the following examples: "confirming the correctness of certain information, guaranteeing the truthfulness of a number of cases."

[228] Elnur Karimov suggests that the Azerbaijan law "hints" on availability of mixed conditions within the law, however, no explicit articles on this matter could be found in the code. The "hint" is *see*n in the emphasis of "sole" wish/desire.

[229] Id. The author suggests one more example, "if, as a provision on confirmations and guarantees, the contract states that the seller will determine the accuracy of the information about the company's existing counterparties according to his desire, then the apparent condition can be considered invalid because it depends only on the expressed desire of the party in the contract." This might be an example of pure potestativity favoring the creditor.

Another fear of the Azerbaijan legislator is exactly in the "indefinity" of condition occurrence in case of pure potestativity. This "indefinity" might cause issues, for example, in the sphere of public procurement, when the government and municipalities purchase goods, works or services from private companies. Another possible suggestion could be that the legislator is trying to apply the same amount of care to the debtor, as for the creditor; therefore, the rule on prohibition of all pure potestativity is not an article against the bill payment, but an article against a possible creditor's abuse of power, in whatever form it might come. The creditor's abuse is given the same priority as the debtor's abuse. The legislator's presumption might be that this will help the stability of the legal circuit.

The other group of legislations, on the contrary, is more concrete. The pure potestativity favoring the creditor is not prohibited, which validates any contract of "You pay if I want" type. In case of the other possible variant (I pay if I want), the debtor is not bringing any obligations onto himself, thus the debtor's pure potestativity is banned. The case law has a record of exposing and explaining the mechanism of the imperative rule. For example, in 2013 the Court of Cassation (France) provided that the potestative condition depending solely on the debtor willpower itself cannot be deemed null "but the whole obligation shall be null."[230] Legislations, which do not elaborate on the rule also have court practice examples against such potestativity. In 2021 the International Commercial Arbitration Court of Russia reviewed a case between a Lithuanian seller and Russian buyer where the last payment of the debtor was conditioned upon an "act of incoming control", signed by the debtor exclusively. The court stated such condition to be a purely potestative condition on the side of the debtor and, thus, "unlawful", and therefore disregarded it when deciding the case.[231]

Still, not everything dependent upon the pure will of the debtor should be considered unlawful. The older law knew a case where the condition was dependent upon the mere observation of the debtor and such provision could not lead to the nullity of the transaction[232]. Nowadays, "satisfaction" as a condition is mostly a matter of common law, and its usage is quite different.[233] None of the national or supra-national codifications have this model, nowadays. The closest case, possible to think of, would be a probe sale: when the customer receives a small part of a product to taste (ice cream, honey, yogurt etc.), and if the customer is satisfied with the probe, the whole product is sold afterwards.

---

[230] Peter L'Ecluse and Michael Dirkx, *Purely Potestative Condition Precedent to Perform Obligation Cannot Be Declared Null* (2013), *available at* https://bit.ly/3AdF8gz (visited July 1, 2023).
[231] Decision of the Panel of Arbitrators ICAC under the Chamber of Commerce and Industry of the Russian Federation on the case № M-82/2020 ICAC (from March 9, 2021).
[232] GUENTER H. TREITEL, THE LAW OF CONTRACT, at 62 (2003); *see also* Part 3.2.2. "Canadian and American doctrine on legal pendency. Satisfaction model", at 143.
[233] Id.

2.1.2. Classification flaw of mixed conditions

Legislators are mostly safe to regulate simple potestativity in a permissible way. The pure potestative conditions pose a bigger problem, and the modern doctrine sometimes applies other legal concepts to justify the usefulness of pure potestative conditions.[234] Simple potestative conditions, though safe, however, have a slight issue. Nowadays, some researchers emphasize on a big theoretical controversy coming from the French classification itself: potestative conditions and mixed conditions are almost identical in their meanings. The doctrinally and legally established difference between a potestative condition and a mixed one is in the presence of the third party's influence. In a mixed condition, the third party plays a role in the condition fulfillment: to acquire a loan (bank approves), to sell 100 cars (buyers choose), to marry someone (consent is given). It is presumed that the role of the third party is rather significant to influence the possibility of the party in potestative power. Still, the line between a potestative condition and a mixed condition is not clear at all, because everything is relative. What is the purpose behind the mixed conditions?

Consider two examples. The first one is usually perceived as a mixed condition. In case A must take a credit in a bank so he can acquire the mortgage, A is the contracting party which influences the condition occurrence, while so does the bank (the third party), who gives or refuses the credit. This is generally understood as a mixed condition because without the bank's approval the condition cannot occur, which makes the bank's role significant. However, nothing would have happened if the customer had not gone to the bank. In fact, it is not clear whose party's influence is more important: the one who commits an action to bring the condition occurrence (customer), or the one who has the power to determine the success of such action (bank). The second example is perceived as a simple potestative condition. A will buy a car to B if B passes the driver license exam. In this example, there is no question on the main influence actor, however, the condition cannot happen without the third party which plays a role in the occurrence: it could be the driving academy, the instructor, or the traffic participants. It is very speculative to compare the influence of the bank satisfying a loan and the driving academy giving an exam pass certificate. Any simple potestativity is somehow affected by third parties. Only the pure wish of the party cannot be affected by anyone, which does not solve the issue. It could be safely assumed, therefore, that every simple potestative condition could be a mixed condition and vice versa. Everything depends upon whom the spectator (the researcher, the judge) wants to emphasize, and whom the interpreter wants to give more influencing power.

[234] However, it is a question for another time. *See* Part 2.4. Pure potestative conditions and transformative rights, at 103.

Judging from the two presented examples, the old aspirations to show the influence of the third party through the special "mixed type" of conditions are falling apart after a simple logical test.

Again, the mixed condition was a product of Code Napoleon 1804, where it was given a definition; nowadays Luxembourg Civil Code has a same provision.[235] Barry Nicholas wrote that the definitions given by the French legislators did not "serve to differentiate a mixed from a simple potestative condition."[236] Alexey Ageev, whose article was in 2015, just a year before the amendments of the French Code Civil, wrote that "both types of conditions ultimately depend on both the party to the contract and circumstances beyond its control", providing his own analysis of the similarities between potestative and mixed conditions.[237] Barry Nicholas and Stephane Valory wrote that to exclude the issue of identical condition types, it was proposed to recognize all the disputed conditions as mixed ones.[238] Moreover, B. Nicholas added that to preserve the two categories of the classification, the doctrine refined the definition to the mixed condition, "as one which is dependent on the will of one of the parties and of a determinate third party."[239]

Unfortunately, such proposal adds even more confusion to the examined issue. First, how can this "determination" be defined? What are its standards? The question of determination is no different from the speculative examples suggested before. Secondly, whatever type the condition is described as, be it a mixed or a simple potestative condition, there is no real change in the legal consequences for the contracting parties. The parties are provided similar means of defense in both cases. The theoretical classification of potestative/mixed does not bring any importance into the practice field. Finally, whenever a potestative condition involves some partial influence of the third party, the party with the potestative power can still "retreat" from influencing the condition occurrence.

It is also possible to agree with A.V. Ageev, who suggested that "the main purpose of regulating conditions is to protect the rights of a person who is unable to influence the condition."[240] Indeed, whenever the conditions are discussed, they are seen from the point of view of the party without any potestative power. For this "weaker" party there is no difference in the influencing actor, the result of condition occurrence is what is important. This confirms the idea that the way the

---

[235] *See* French Civil Code, Art. 1171, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016), *available at* https://bit.ly/3XBNYyt (visited July 1, 2023); *see also* Luxembourg Civil Code, Art. 1171 (in French, 1803, cons. ver. 2023), *available at* https://bit.ly/3jiXQOB (visited July 1, 2023). For the analysis on French law and doctrine, *see* Part 2.2. Doctrinal and case law analysis on potestative conditions, at 78.

[236] BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT, at 161 (1992).

[237] Aleksey V. Ageev, *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation, № 2, at 70 (in Russian, 2015).

[238] STEPHANE VALORY, LA POTESTATIVITE DANS LES RELATIONS CONTRACTUELLES [THE POTESTATIVITY IN CONTRACTUAL RELATIONS], No. 133, at 86, (in French, 1999); BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT, at 161 (1992).

[239] *See supra* note 236, at 161-162.

[240] *See supra* note 237, at 71.

contracting party is acting towards the condition occurrence is way more important than the possible influence of the third party, because everything starts from that party's commitment.

Therefore, it is safe to assume that the influence of the third party for the condition occurrence cannot be more valuable than the actions and commitment of the contracting party. No matter how grand the importance of getting the bank loan for the condition occurrence is, the actions of the contracting party for acquiring the loan are much more valuable for the contract overall. Since the classification relies on the "willful influence" factor, it appears the mixed conditions do not serve that exact factor. Thus, to solve the theoretical uncertainty between the simple potestative and mixed conditions, one can simply suggest removing the mixed conditions out of the classification. Mixed conditions do not fulfill any of its presumed purposes in the modern doctrine of conditions.

Even though the classification of casual/potestative/mixed conditions is old and well-established in the doctrine, the comparative analysis shows that no national or supra-national codifications, except of Luxembourg, accepts the classification explicitly.[241] It is interesting to note the experience of Latvia in this question, however. Latvian Civil Code has defined casual, arbitrary (potestative) and mixed conditions, however, the meaning behind the term "mixed" is completely different: it is "when causality is coincidental with arbitrariness."[242] The article explicitly states that there is another type of conditions "differing" from the suggested above: the conditions dependent upon the will of the third party.[243] This might be presented as an example of a thorough theoretical regulation of conditions within the legislation. The newest basic law course of Dr. Stephan Lorenz suggests there are no mixed conditions in German law, only casual and potestative.[244]

Classification discussion is the first step in discovering how the potestative conditions are viewed in different legislations. For the purposes of comparative analysis, it is wise to analyze certain individual legislations on the most important questions of potestative conditions they pursued. This way a certain contribution to the balance between the party autonomy and imperative law could be achieved. Additionally, for a complete picture on potestative conditions it is necessary to review the correlation between the potestativity and the popular rule on conditions in bad faith. Finally, for the purposes of the theoretical integrity of research, it is necessary to analyze the nature behind the pure potestative condition and compare it with the answers already available in the literature.

---

[241] Luxembourg Civil Code (in French, 1803, cons. ver. 2023), *available at* https://bit.ly/3jiXQOB (visited July 1, 2023)
[242] Civil Code of the Republic of Latvia, Art. 1552 (1992, amend. 2022), *available at* https://bit.ly/3HgSoUA (visited July 1, 2023).
[243] Id. "Differing from these three types of conditions are such conditions the coming into effect of which is dependent on the will of a third person."
[244] Dr. Stephan Lorenz, *Welcome to the basic course in civil law 2022/2023* (2022), *available at* https://bit.ly/41balwQ (visited July 1, 2023), at Slide 125.

2.2. Doctrinal and case law analysis on potestative conditions

A comparative analysis on national codifications may give an overall estimated picture of the situation, however, as it was shown, in case of potestative conditions the legislators mostly do not regulate such conditions at all. This leaves the research to the necessity of examining the doctrinal opinions on the topic. Thus, for the better picture on how the potestativity is treated under different jurisdictions, it is possible to investigate selected doctrines and to analyze the issues the scholars encountered with the concept of potestative conditions. For the purposes of research, a brief analysis into Russian, French and American doctrine and case law could be suggested. In each case, the doctrine raised specific questions on potestative conditions.

2.2.1. Russian doctrine and practice. Accepting potestative conditions

The acceptance of potestative conditions has not been a big nuisance for the countries of the continental law system, except for Russia. Starting from the times of rapid development of the legal studies in the Russian Empire (end of 19th century – till 1917) and continuing in the period of the modern state (2015 – present), the dilemma of whether the potestative conditions should be allowed was baffling the academic community as well as the low and high courts. The biggest amount of historical research on the Russian view of conditions was done by Russian researchers Sergey Gromov and Elena Ostanina.[245]

In the literature of 19th century, the Russian researchers tried to explain the concept by finding arguments from the literature of European scholars, specifically French and German doctrine. Dimitry Meier (1819 – 1856) was very cautious in accepting the potestative conditions: his wording implied that neither the creditor nor the debtor could be given a "purely potestative condition option", however simple potestative conditions were completely acceptable, same approach was supported by Yuriy Gambarov (1850 – 1926).[246] Michail Malinin (1845 – 1885) suggested that the condition could not be

[245] *See* Sergey A. Gromov, *Spornye aspekty ucheniya ob uslovnyh sdelkah* [*Controversial aspects of the doctrine of conditional transactions*]. Transactions: problems of theory and practice. Collection of articles M.A. Rozhkova (ed.) at 255 – 297 (in Russian, 2008); *see also* OSTANINA E.A. ZAVISIMOST PRAVOVYKH POSLEDSTVIY SDELKI OT OTLAGATELNOGO I OTMENITELNOGO USLOVIY: NAUCHNO-PRAKTICHESKOE POSOBIE [DEPENDENCE OF THE LEGAL CONSEQUENCES OF THE TRANSACTION ON THE SUSPENSIVE AND RESOLUTIVE CONDITIONS: A SCIENTIFIC AND PRACTICAL GUIDE] (in Russian, 2010).

[246] *See* MEIER D.I., RUSSKOE GRAZHDANSKOE PRAVO [RUSSIAN CIVIL LAW], at 216 (in Russian, 2003) He wrote, "when the occurrence of a fact depends on the will of a party to the transaction, then, of course, a fact can be a condition only when the will to perform does not constitute an essential part of the transaction"; *See also* YURIY S. GAMBAROV, GRAZHDANSKOE PRAVO [CIVIL LAW], at 624 (in Russian, 1911). He wrote about pure potestativity that "they are either not

a "sheer arbitrariness", however, it could be "an action other than a simple expression of will."[247] The main opponent of the potestativity idea at that time was Vladislav Golevinskiy (1834 – 1919), who was relying on his vision of civil law.[248] Still, the overall motif of the pre-revolutionary literature in Russia was positive towards the potestativity. The ideas of the past clearly correlate with modern legislation: simple potestativity is accepted, while pure potestativity favoring the debtor should be prohibited.

The legal doctrine of the Soviet period (1917 – 1991), however, was unanimously against the idea of potestative conditions, which was clearly motivated by the type of economics the country was pursuing. According to multiple known textbooks by O.A. Krasavchikov, O.N. Sadikov, V.F. Maslov and others, the condition under the Soviet law could never be dependent upon the will and actions of the contracting party.[249] At early stages it was even emphasized that the actions of the contracting parties could not be conditioned also. Later, as E.A. Ostanina writes, this approach was deemed to be "too overwhelming" even by the Soviet researchers.[250] However, some prominent Soviet researchers still saw the possibility of potestative conditions through another rule: the rule of condition fulfillment (the parties cannot influence the condition occurrence in bad faith)[251]. Ivan Novitskiy (1880 – 1958) assumed that, in general, each of the parties has a right to assist or hinder the occurrence of the condition, unless "it was done not in a good conscience."[252] V.A. Ryasentsev (1909 – 1992). O.S. Ioffe (1920 – 2005), Y.G. Basin (1924 – 2004) and D.M. Genkin (1884 – 1966) also wrote that the contracting parties can act accordingly with their own interests to help or obstruct the condition occurrence, irrespectively if it is beneficial or non-beneficial for them, unless no "unlawful and immoral means are used."[253] Still, overall potestativity was viewed as something "arbitrary" under the Soviet law and, thus, was hardly possible. A clear correlation with the historical-political development of the USSR could be observed in this sense.

---

conditions or just invalid" Interestingly, both Meier and Gambarov divided conditions only into casual, simple potestative and pure potestative, excluding mixed conditions.

[247] Michail Iv. Malinin, *Ob uslovnyh obyazatelstvah* [*On contingent liabilities*]. Report of the meetings of the Novorossiysk Law Society from May 20, 1880, Vol. 7., at 30 (in Russian, 1880). Cited by Aleksey V. Ageev, *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation, № 2, at 41 (in Russian, 2015).

[248] GOLEVINSKIY V.I., O PROISKHOZHDENII I DELENII OBYAZATELSTV [ON THE ORIGIN AND DIVISION OF OBLIGATIONS], at 177 (in Russian, 1872). Cited by Elena A. Ostanina, *see supra* note Ostanina, at 42. Golevinsky wrote that "the definition of an arbitrary (potestative) condition is not only useless, but even harmful."

[249] *See supra* note 245 (Ostanina), at 43.

[250] Id., at 12.

[251] *See* Part 2.3. Fiction of bad faith condition fulfillment, at 91.

[252] Ivan B. Novitsky, *Princip dobroi sovesti v proekte obyazatelstvennogo prava* [*Principle of good conscience in the draft of the law of obligations*]. Bulletin of civil law. № 1, at 168 (in Russian, 2006). Cited by Gromov, supra note Gromov, at 271.

[253] *See supra* note 245 (Gromov), at 272.

In 1994 the new Civil Code of the Russian Federation allowed to renew the discussion on acceptance of potestative conditions, as the main article on conditions was not clear on the topic. The first known attempt was made by M.I. Braginskiy (1925 – 2009), who criticized the concept of potestative condition and did not accept any sort of potestative conditions, "a condition could be only a circumstance which is not depending on the will of the contracting party"; this opinion was supported by R.O. Halfina and B.M. Gongalo.[254] Russian researcher Natalia Ermolova also doubted the validity of potestative conditions: the usage of potestative conditions may lead to a worse position of the "weaker economics" party.[255]

However, unlike in previous years, more opinions shifted towards to acknowledging potestative conditions. The first positive opinions before 2000s appeared already after the 1994 amendments following the argument by Evgeniy Sukhanov: there is simply no prohibition in the law.[256] Early commentaries by A.P. Sergeev suggested another valid argument: if the law prohibitted any influence of condition occurrence in a bad faith, then the law accepted any influence of condition occurrence in a good faith.[257] In 2010s A.G. Karapetov and A.V. Ageev introduced the most valuable works on potestative conditions. A.G. Karapetov wrote there were no "political and legal obstacles" for using such conditions, introducing a vast variant scheme of potestative conditions.[258] A.V. Ageev suggested five reasons for accepting such conditions: they confirmed the freedom of contract; they were in constant demand by society; they were not banned; they had been functioning in the world for a long time; acceptability could be proven from the interpretation of the GK RF.[259]

---

[254] MIKHAIL IS. BRAGINSKIY, SDELKI: PONYATIYA, VIDY I FORMY (KOMMENTARIJ K NOVOMU GK RF) [TRANSACTIONS: CONCEPTS, TYPES AND FORMS (COMMENTS TO THE NEW CIVIL CODE OF THE RUSSIAN FEDERATION)], at 22 (in Russian, 1995); *see also* BRONISVAL M. GONGALO, UCHENIE OB OBESPECHENII OBYAZATELSTV [DOCTRINE OF SECURING OBLIGATIONS. QUESTIONS OF THEORY AND PRACTICE], at 51 (in Russian, 2004); *see also* the opinion of Raisa O. Halfina in: ALEKSANDR YU. KABALKIN, KOMMENTARIY K GRAZHDANSKOMU KODEKSU ROSSIYSKOY FEDERATSII, CHASTI PERVOY [CIVIL CODE OF THE RUSSIAN FEDERATION. PART ONE. SCIENTIFIC AND PRACTICAL COMMENTARY], at 279 (in Russian, 2004).

[255] NATALIA A. ERMOLOVA, USLOVNYE SDELKI V ROSSIYSKOM GRAZHDANSKOM PRAVE [CONDITIONAL AGREEMENTS IN RUSSIAN CIVIL LAW], at 151 (in Russian, 2011). She writes, "the acceptance of potestative conditions, regardless of the freedom of contract, is doubtful, as it excludes a possibility to objectively think of one party's good faith, upon whose action the condition fulfillment depends."

[256] EVGENIY A. SUKHANOV, ROSSIYSKOE GRAZHDANSKOE PRAVO: UCHEBNIK V 2 TOMAKH. TOM 2: OBYAZATELSTVENNOE PRAVO [RUSSIAN CIVIL LAW: TEXTBOOK IN 2 VOLUMES. VOLUME 2: LAW OF OBLIGATIONS], at 404 (in Russian, 2nd ed. 2011).

[257] ALEKSANDR P. SERGEEV, KOMMENTARIY K GRAZHDANSKOMU KODEKSU ROSSIYSKOY FEDERATSII. CHAST PERVAYA (POSTATEYNYY) [COMMENTARY TO THE CIVIL CODE OF THE RUSSIAN FEDERATION. PART ONE (ARTICLE-BY-ARTICLE)], at 353 (in Russian, 2nd ed. rev and suppl., 2019).

[258] Artyom G. Karapetov, *Tezisy k Kruglomu Stolu Yuridicheskogo Instituta "M-Logos" "Problemnye Voprosy Uslovnyh Sdelok"* [*Thesis to the round table of the Law institute "M-Logos" "Problematic issues of conditional transactions"*] (in Russian, 2016), *available at* https://bit.ly/415mfbB (visited July 1, 2023).

[259] Aleksey V. Ageev, *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation. № 1, at 84 – 106, № 2, at 57 (in Russian, 2015)

Currently, there is no doubt in the usage of potestative conditions. Pure potestativity favoring the creditor is also accepted in the doctrine, while in case it favors the debtor – there is no obligation.[260]

However, from the early 2000s till 2015, it was not so obvious for the courts. To be clear, since the GK RF first pass in 1994 there were no rules on potestative conditions whatsoever. Therefore, in early 2000s, in the cases with conditions, where the debtor could influence the condition occurrence at will, the lower instances courts rejected such provisions and did not acknowledge potestative conditions. The courts had three reasons. First, the GK RF clearly stated that a condition is circumstance, which might occur or not occur. Secondly, the GK RF stated that the party's influence in a bad faith is presumed. Thirdly, the GK RF has no rule on potestative conditions in the Civil Code. Summing all three reasons, the courts concluded that the condition cannot be influenced by any of the contracting parties, because it will not be in the legal nature of the condition. The question of freedom of contract was solved by the lower instance courts quite interestingly. Two cases from 2003 and 2007 suggest the mechanism of "compliance with the nature of law" to be used, which restricted the usage of potestative conditions.[261] Later, in the beginning of 2010s, the upper instance courts started to think positively towards the potestative conditions, which conditioned counter-performance.[262]

---

[260] *See, e.g., supra* note Karapetov.

[261] *See* Resolution of the Federal Arbitration Court of the North Caucasian District № F08-3832/2003 (in Russian, from October 7, 2003), *available at* https://bit.ly/3U1NgYC (visited July 1, 2023). The agreement provided the following provision: "The construction work performed by the Contractor is subject to payment in case of eviction of the Worker from the hostel room by initiative of the Owner." In 4 years, the Worker was evicted from the hostel, and the Contractor sued the Owner. The upper instance arbitration court repelled this decision on the grounds that "no one can influence the condition occurrence." According to the opinion of the upper instance court, the freedom of contract principle has a restriction, provided in the Civil Code, "even though the parties can create innominate contracts out of free will, there are certain provisions about which they should comply with the imperative norms of law." Therefore, the court ruled that a provision "to pay if evicted by the Owner" cannot be acknowledged as a suspensive condition, and thus the Owner was not obliged to pay to the Contractor.

See also Decision of the Arbitration Court of the Sverdlovsk Region № A60-486/07-C3 (in Russian, from April 16, 2007), *available at* https://bit.ly/3TSvpn7 (visited July 1, 2023). The agreement provided that the payment for the rent starts after the commissioning of the basement by the administrative bodies (the object of the contract was the basement in an apartment house), and after the plaintiff submits certain documents to them. While the plaintiff appealed this is a suspensive condition, the court reviewed the Civil Code and made a different conclusion, "a suspensive condition must be associated with a circumstance that does not depend on the will of the parties and relates to the future, while the parties must not know whether the corresponding circumstance will occur or not, thus, there must always be a probability of both the occurrence and non-occurrence of the condition. In this case, there are circumstances that fully depend on the will and desire of one of the parties to the contract." The court ruled this is not a suspensive condition and, therefore, null provision of the contract. The upper instance courts supported such interpretation.

[262] *See* Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 7454/12 on case № A24-1270/2011 (in Russian, from November 13, 2012), *available at* https://bit.ly/3OpKBqE (visited July 1, 2023). There was an illustrative case of the cession agreement between two corporate participants which went up to the highest court instance in Russia to be finally decided. The agreement provided the following provisions. Paragraph 2.3: "A should pay for B's share till December 31, 2009." Paragraph 2.4: "If B does not pay in full, then the agreement is terminated from January 1, 2010, the obligations are ceased, and the parties become obliged to amend the constituent documents of the company." B did not pay in full, but then rejected to change anything, therefore A sued him. The Arbitration court, Court of Appeals and the Cassation court all rejected A's demands on the grounds discussed earlier. The courts considered the provision of paragraph 2.4. to be unlawful (the condition occurrence is influenced by the buyer), and therefore to be

The inevitable changes in the court's rulings, new legal doctrine findings, the rapid development of the market economics – everything pushed the Russian legislator to create a new article in the GK RF, which did not have the word "potestative" in its contents but did allow any potestative conditions in contract.[263] The important word is "any", however. The article was created to change the established case law, where the potestative conditions were prohibited, however, in fact, it allowed any types of potestative conditions, including those favoring the debtor in "a pure willpower" way, which became a nuisance for the courts.[264] According to Russian scholars, even after the 2015 amendments the highest courts are sometimes doubtful about the acceptability of potestative conditions in certain situations.[265] Still, it could be concluded that after the amendments the doctrine and case law both became very clear on accepting potestative conditions.

A quick analysis of Russian legal doctrine on potestative conditions provides certain insights on the reasons why the potestativity was treated negatively. Some scholars saw the "arbitrariness" as a source of disarray in the contract. Courts considered two main legal reasons: "the compliance with

---

disregarded by the courts when deciding the case. The Supreme Arbitration Court, however, stood up appealing to the freedom of contract principle and asserting that the Civil Code does not have any concrete prohibitions on such conditions as paragraph 2.4. At the same time, there was still less understanding of the situation, therefore, the court ruled such freedom only in this particular case, not making it a general rule.

[263] *See* Information memorandum on amendments to part one the Civil Code of the Russian Federation (in Russian, 2015), *available at* https://bit.ly/3EQyoYU (visited July 1, 2023). The practical sense of the article was "to allow the contracting parties to conclude complicated multi-staged contracts, with accepting a complex of interdependent, preliminary and other types of provisions, the performance of which is often long-lasting and depends on a variety of circumstances, including performance in good faith and committing certain actions during the deal and after its closure."

[264] *See* Resolution of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation № 305-ES21-10216 on case N A40-328885/2019 (in Russian, from August 20, 2021), *available at* https://base.garant.ru/402641668 (visited July 1, 2023). The court stated that "the possibility of conditioning the performance of a separate obligation on circumstances that depend on the will of the party does not mean that a situation where the will of the party to perform this obligation is not limited in any way ("I will pay if I want") is permissible."

[265] *See* Resolution of the Judicial Board for Civil Cases of the Supreme Court of the Russian Federation № 9-KG17-14 (in Russian, from December 5, 2017), *available at* https://bit.ly/3P0OqCJ (visited July 1, 2023). Bank (creditor) gave a loan to an LLC (debtor) who had an employment contract with its director-guarantor (surety debtor). The suretyship contract had a provision that the surety on the contract is ceased with the termination of the surety debtor's obligations under the employment contract. The employment contract between the director and the LLC got terminated, however, soon after the Bank asked the LLC to pay the loan, which the LLC could not do. Therefore, the Bank asked the former director to pay, which was refused as well. The first instance court ruled in favor of the Bank by stating that "the termination of labor relations is not, according to the current legislation, the basis for termination of obligations under surety agreements." On the other hand, the second instance court provided there is no prohibition in law on conditioning the suretyship contract in such a way, thus ruling against the bank. Moreover, the project of the contract was done by a stronger economics party, the bank, who cannot be in a good faith by stating the provision of their own made contract is invalid. The Supreme Court, however, overthrew the second instance ruling on the case, agreeing with the numerus clausus argument of the first instance and additionally stating that this resolutive condition is in a fact a unilateral refusal from the suretyship contract obligation, since the employee can initiate the employment contract termination by himself.
A. Karapetov disagrees with the court, as there is "no ground to establish preliminary the inadmissibility of the inclusion of such a potestative condition in a suretyship agreement." *See* ARTYOM G. KARAPETOV, ISPOLNENIE I PREKRASHCHENIE OBYAZATELSTVA: KOMMENTARIY K STATYAM 307 - 328 I 407 - 419 GRAZHDANSKOGO KODEKSA ROSSIYSKOY FEDERACII [FULFILLMENT AND TERMINATION OF OBLIGATION: A COMMENTARY TO ARTICLES 307 - 328 AND 407 - 419 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], at 870 (in Russian, 2022).

law" feature and understanding the concept of condition as a mere happening that nobody can influence. These legal reasons are mostly affected by the historical development of the Russian state, especially the period of administrative economics under the Soviet government. Still, after the political changes, the Russian doctrine started slowly but surely to catch up with the teachings of European scholars. The positive attitude of the modern Russian doctrine affected the court decisions and, subsequently, helped the amendments of the Civil Code, which as of now allows any potestative condition in the contract. Still, there is clearly some room for development, as the courts are not always sure on how to draw a border between a valid potestative condition and unlawful condition. Moreover, the legislative technique was not of the highest quality, since the synallagmatic contracts remained very vulnerable.[266]

2.2.2. French doctrine. Protection from abuse of potestative power

Extensive research of the history and current approaches to the potestative conditions under the French doctrine was done by French jurists Mathias Latina, Olivier Milhac and Stephane Valory, while Russian researcher Alexey Ageev did a comprehensive analysis on the French literature.[267]

Upon the reception of the casual/potestative/mixed classification, the French law and doctrine faced some challenges. Unlike the older law which divided the conditions according the creditor's influence, the French law, in the version before 2016 amendments, divided them according to the influence of any of the parties to the contract.[268] After 2016, the word "potestative" vanished from the Code Civil, however, the important provisions remained: an obligation is null if it is dependent upon a pure potestative condition favoring the debtor.[269] Coming back to the beginning of 1900s, however, the researchers were still confused on what was exactly null: a condition or an obligation.[270]

---

[266] *See* Part 5. Rupture of synallagma in conditioned obligation performance, at 188.

[267] *See* Aleksey V. Ageev, *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation. № 1, at 84 – 106, № 2, at 39 – 87 (in Russian, 2015). *see also* Aleksey V. Ageev, *Potestativnyye usloviya v grazhdanskom prave Frantsii* [*Potestative conditions in the civil law of France*]. Bulletin of SAC RF, № 4, at 37 – 52 (in Russian, 2013); *see also* MATHIAS LATINA, ESSAI SUR LA CONDITION EN DROIT DES CONTRATS [ESSAY ON THE CONDITION IN CONTRACT LAW] (in French, 2009); *see also* OLIVIER MILHAC, LA NOTION DE CONDITION DANS LES CONTRATS À TITRE ONÉREUX [THE NOTION OF CONDITION IN CONTRACTS FOR VALUABLE CONSIDERATION] (in French, 2001); STEPHANE VALORY, LA POTESTATIVITE DANS LES RELATIONS CONTRACTUELLES [THE POTESTATIVITY IN CONTRACTUAL RELATIONS] (in French, 1999).

[268] Aleksey V. Ageev, *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation. № 1, at 91 (in Russian, 2015).

[269] French Civil Code, Art. 1304-2, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of February 10, 2016, available at* https://bit.ly/2Qodnso (visited July 1, 2023).

[270] BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT, at 160 (1992).

As reviewed earlier, the French doctrine saw the concept of "conditional obligation" and not "conditional transaction."[271] This allowed to set simple answers for the French researchers. Since the potestative condition depends upon the will of debtor, he was not actually obliging. No main obligation means no agreement, which means no contract. This was especially useful in case of counter-performance: if such "obligation" was a basis for the counter-performance, the entire contract would be void.[272] Though simple, such approach created two theoretical issues for the scholars.

The first problem was connected to the expansion of the category of potestative conditions, as it started to include conditions that depend only on the will of the contracting party. Many "normal" conditions became "threatened" by invalidity issue: those dependent on the creditor, those dependent on the contracting party and on the will of a third party.[273] To solve the issue, it was proposed to divide all potestative conditions into simple potestative and purely potestative.[274]

The second problem was the difficulty of applying contractual sanctions towards the debtor who agreed to a contract upon a purely potestative condition.[275] This was because the debtor's consent, subject to a condition dependent upon himself, was not a true consent. Therefore, he was denied his ability to generate a contract. The French Code Civil provided "invalidity" as a measure of creditor's protection against the debtor's abuse, however, invalidity "did not allow to punish" the dishonest debtor by contractual means.[276] A.V. Ageev wrote that the main goal of courts was to prevent unjust enrichment of a debtor and to protect the creditor's rights.[277] B. Nicholas wrote that French courts protected the creditor against the arbitrary economic power of the debtor.[278] The standard itself was not a proof that the debtor is abusing his economic power or enriched in an unjust way. S. Valory states that the court practice changed the doctrinal opinion towards the "dependence upon the will" standard to negative.[279] Therefore, the French legislation did not provide any contractual sanctions, and there was no differentiation on when to nullify the contract, or when it is not necessary.

---

[271] *See* Part 1.1.2. What condition affects (object of condition), at 26.
[272] Aleksey V. Ageev, *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation. № 1, at 92 (in Russian, 2015).
[273] Id. at 93.
[274] OLIVIER MILHAC, LA NOTION DE CONDITION DANS LES CONTRATS À TITRE ONÉREUX [THE NOTION OF CONDITION IN CONTRACTS FOR VALUABLE CONSIDERATION], at 15, No. 38 (in French, 2001); *see also* STEPHANE VALORY, LA POTESTATIVITE DANS LES RELATIONS CONTRACTUELLES [THE POTESTATIVITY IN CONTRACTUAL RELATIONS], at 77, No. 115 (in French, 1999).
[275] The problem is called as such by Aleksey Ageev. *See supra* note 272, at 93.
[276] Id.
[277] Id., at 94.
[278] BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT, at 163 (1992).
[279] STEPHANE VALORY, LA POTESTATIVITE DANS LES RELATIONS CONTRACTUELLES [THE POTESTATIVITY IN CONTRACTUAL RELATIONS], at 85, No. 132 (in French, 1999). He thinks that situations where "only the will of the person, on whom the condition depends, is sufficient for the occurrence of the condition" are extremely rare, and therefore it makes no sense to consider them as a general rule.

Jean Carbonnier (1908 – 2003), prominent French jurist, was also one of the critics of the standard of "dependence upon the will." He suggested a solution: to view the potestative condition as an arbitrary power of the debtor over the creditor.[280] His approach was understandable: to evaluate whether the potestative condition violates the rights of the creditor in the specific circumstances of the litigation. Rather than determining that the creditor's rights have been violated solely based on the dependence of the condition on the debtor's will, he addressed the issue situationally and granted protection to the creditor only when the debtor actively used his power against the creditor. However, neither J. Carbonnier nor the supporters of his idea have created a *numerus clausus* of situations where the violation from the debtor could be blatantly exposed. Using J. Carbonnier's approach, however, A.V. Ageev depicted the key points to be taken into consideration when deciding on the matter: the possibility of objective judicial control over the condition; the consequences significance of the occurrence of the condition for the debtor; the balance of interests of the parties to the contract; the economic strength of the parties to the contract; the conduct of the parties to the dispute; the degree of performance of contractual obligations; the sanctions established by the contract.[281]

It is impossible to disagree with the advantages found within J. Carbonnier's research. There are ways to protect creditor's rights: a fiction of condition non-occurrence, the establishment of a term of occurrence of a condition, etc.[282] Measuring the impact upon the legal relationships between the creditor and debtor becomes much more tangible. The variety of protection instruments available with the abovementioned approach could be easily correlated with the possible consequences for the contracting parties. In addition, since the question of the formation of the will of the parties is no longer crucial, it is possible to protect the creditor's rights not only within a conditional obligation, but also in unilateral and synallagmatic contracts of any kind.[283]

As well as the concept exists, so are its critics. French researcher Mathias Latina criticizes the approach of J. Carbonnier with three main points. First, there are no clear standards that would help in understanding when the creditor's rights are violated. For example, if the debtor interferes with the fulfillment of a condition (in a good faith supposedly), the invalidity of the obligation and the recognition of the condition as having occurred will compete.[284] Thus, there are no standards to choose

---

[280] JEAN CARBONNIER. DROIT CIVIL. VOLUME II: LES BIENS. LES OBLIGATIONS [CIVIL LAW. VOLUME II: PROPERTY. OBLIGATIONS], No. 1051, at 2155 (in French, 1st ed., 2004). Cited by Aleksey V. Ageev, *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation. № 1, at 95 (in Russian, 2015).
[281] *See supra* note 272, at 95.
[282] Id.
[283] *See* Part 5. French-type legislations on possible counter-measures, at 221.
[284] MATHIAS LATINA, ESSAI SUR LA CONDITION EN DROIT DES CONTRATS [ESSAY ON THE CONDITION IN CONTRACT LAW], at 244, No. 337 (in French, 2009).

an adequate way to protect violated rights. Secondly, due to abovementioned "competition" there is still a room for the debtor to abuse the law.[285] The author is probably referring to situations where the debtor, who does not wish to fulfill his obligation, obstructs the occurrence of the condition, thus provoking the creditor to appeal to the court, hoping that the condition will be declared unlawful and, therefore, the contract would be deemed invalid. Thirdly, the qualification of a circumstance as a condition, as well as the application of a protection technique, are completely in the arbitrary power of a judge, so the fate of potestative condition is decided by the power of the judge.[286]

It is possible to disapprove these arguments, however. First, the creditor is interested in the contract validity as well as the obligation performance. The answer could be interpreted from the scope, purpose, and provisions of the contract. Plus, the cases behind such provisions of contract are always different and unique. Secondly, even though the abuse of law is a common case in any country, the argument by M. Latina is a rare occasion: in most cases the court may simply rule on a restitution for the provided performance by the creditor. Thirdly, the power of judge does not disapprove the power of law and logical thinking. Indeed, it is subjective, however any uncertainty with the potestative conditions should be reviewed by the judge since the legislator could not provide a valid piece of regulation on the matter. It is possible, however, to create a set of legislative instruments which allow regulating potestative conditions in the way the dispute would be unnecessary.

Therefore, it is possible to agree with Carbonnier's approach as it presents a solid definition of potestativity as an arbitrary power of the debtor over the creditor and gives multiple instruments to the judges for interpretation and possible defense for the creditor. The very modern theory of French doctrine made an interesting turn, however. The pure potestative conditions favoring the creditor or the debtor are sometimes called "potestative rights."[287] The difference between the potestative conditions and potestative rights, the scholars see in the ability to arbitrarily influence the creation of the contract, or the amendments of certain obligations.[288] While it is not completely clear, what is exactly what, Olivier Milhac writes that such arbitrary power should not "violate the balance of contractual interests."[289] By looking at this through the "prism" of the whole contract, a question on unjust enrichment of the debtor could be answered.[290]

---

[285] *See supra* note 284, at 246 – 247. No. 340.
[286] Id., at 244.
[287] Aleksey V. Ageev, *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation, № 1, at 96 (in Russian, 2015).
[288] *See* Part 2.4. Pure potestative conditions and transformative rights, at 103.
[289] OLIVIER MILHAC, LA NOTION DE CONDITION DANS LES CONTRATS À TITRE ONÉREUX [THE NOTION OF CONDITION IN CONTRACTS FOR VALUABLE CONSIDERATION], at 222, No. 597 (in French, 2001).
[290] Id.

The way the doctrinal view transposed in the court's decisions is quite interesting. The rule that prescribes a "nullity" for the pure potestativity became a universal solution in any case featuring arbitrary violation of someone's rights.[291] It is not limited to the concept of conditions, A.V. Ageev emphasizes, the "nullity" rule could be used to the concept of time limit and "to any other contractual relationship where one party, having gained power over the other, may unjustly enrich."[292] The article is used nowadays a reference sheet while the court decides most cases three ways: by constituting unjust enrichment; by using the fiction of bad faith fulfillment; and by the "last resort" measure: deeming the whole contract void.[293]

Therefore, the French doctrine was mostly focused on solving the issue of protecting the creditor from the abusive power of the debtor. From the troubles of reception to the theoretical answers suggested by Carbonnier, the approach towards defining the abuse changed several times. Nowadays, the interpretation of the court has the main role in defining the arbitral power, not the legislator preliminary regulation. The article on "nullity" of pure potestative conditions is universal as it could be freely used by the court to constitute an arbitral abusive power of the debtor. This allows more stability to the legal circuit at the end.

2.2.3. American doctrine. Potestative condition and illusory consideration

American doctrine does not mention the word "potestative" whatsoever. Nor this concept can be seen in the Restatement Second of Contracts, the biggest quasi-codification of the case law. Still, it does not mean the concept of potestativity is not presented in the law. Since the common law is based on the concept of promise, then if the promise is conditioned upon only the debtor's pleasure or satisfaction, such promise could be deemed illusory, and, therefore, not enforceable. There are also examples of different scholars who depicted the classification of potestative condition, however, named differently.

---

[291] *See* French Civil Code, Art. 1174 trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016), *available at* https://bit.ly/3XBNYyt (visited July 1, 2023); *see also* French Civil Code, Art. 1304-2, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016*, *available at* https://bit.ly/2Qodnso (visited July 1, 2023).

[292] *See supra* note 287, at 97.

[293] This is based on the case law, also found by A.V. Ageev. For example, in 2014 the Court of Cassation reviewed the following case. The obligation of the buyer to purchase the securities was dependent upon the fact that a bank loan had been extended to the buyer. The buyer had refused the purchase on the ground that the condition had not arisen, but it was later discovered that the buyer had not even applied to the bank for a loan. The Court of Cassation applied the rule on the fiction of condition fulfillment. *See* Judgment of the commercial chamber of the Court of Cassation, № 12-12066 (in French, from February 11, 2014), *available at* https://bit.ly/3J2hLLI (visited July 1, 2023), cited by Ageev, *see supra* note 287, at 97.

Arthur L. Corbin (1874 – 1967) suggested the classification of volitional control: this included casual conditions, pure potestative conditions dependent upon the debtor/creditor, and conditions dependent upon the third party.[294] Through the examples on case law, he showed that the potestativity favoring the promisee (creditor) is fair: such situation could be compared to a "conditional right" or a "legal power."[295] At the same time, conditions within the volitional control of the promisor (debtor) were either valid (if the promise is complied with) or "illusory" (if the debtor does not follow his promise).[296] In his older article, Corbin called such promises a matter of "personal satisfaction", which was not illegal, unless the "defendant's promise is merely to perform if he shall desire to do so", or "expression of satisfaction is conclusive."[297] Corbin suggested two approaches of the courts to interpret "the personal satisfaction": by "personal taste, feeling, sentiment" or by "market value, mechanical fitness, utility."[298]

In the first approach, if it was the case of "personal taste", then the satisfaction was always a condition: therefore, if the debtor did not like what the creditor performed, then such transfer was "insufficient", and the creditor had no chance of receiving counter-performance. Such feature is not available for the states of continental law.

In the second approach, if it was the case of "market value", then the satisfaction was condition only when explicitly stipulated in the contract. In case it was a condition, the decision is made based on the creditor's heavy loses or debtor's unjust enrichment. According to Corbin, the court would even use a standard of the "reasonable man" which is same as to refer to a good-will person.[299]

Edward Farnsworth (1928 – 2005) asked a question on whether the illusory promise is "enough of a peppercorn" to be exchanged with the promise of the other party.[300] His review suggests that the American courts divided two ways in answering this question.

---

[294] ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY, at 47 (1950). Pure potestative conditions are called "conditions within volitional control of promisor/promisee." The following examples of Corbin leave no doubt he implied a full volitional control, not simple potestativity.

[295] Id., at 48. "When the performance of a condition is within the volitional control of a promisee, he may properly be said to have a legal power as well as a conditional right. By his own act … his right becomes a right to immediate performance." This assumption of Corbin could be compared to the concept of transformative rights in German law. *See* Part 2.4. Pure potestative conditions and transformative rights, at 103.

[296] Winslow v. Mell 48 Wn.2d 581 (1956), *available at* https://bit.ly/3YelYAk (visited July 1, 2023). The Supreme Court of Washington stated that "the appellant's promise that the respondent could also log the C.Z. tract was conditioned upon appellant's acquisition of the timber rights. There was no duty on the part of the appellant to acquire the C.Z. timber so that respondent might log it. Its acquisition was at appellant's option or pleasure. One who promises to do a thing only if it pleases him to do it is not bound to perform it at all, as his promise is illusory."

[297] Arthur L. Corbin, *Conditions in the Law of Contract*, The Yale Law Journal, Vol. 28, at 762 (1919).

[298] Id.

[299] Id., at 762 – 763.

[300] EDWARD A. FARNSWORTH, FARNSWORTH ON CONTRACTS, VOLUME 1, at 106 – 107, § 2.13 (1990).

The first group of courts "was once fashionable."[301] The promise "I will pay if I want to" was interpreted as illusory and, thus, deemed not enforceable; "one party's promise was not binding as to that party."[302] Moreover, Farnsworth found the case law where even a pure potestative condition favoring the creditor was deemed an illusory consideration. This happened because of how the exchange of promises worked. In one case the creditor promised to collect the debt "until such time as I want my money" and exchanged it with a promise from the debtor's wife to pay if the debtor himself could not do so. Such promise of the creditor was no consideration, according to the rule of court.[303] Same "illusory deeming" happened if the obligation of the party was dependent on some event entirely within the control of the obligor.[304] Therefore, the first group of court attacked the pure potestative condition, if it was not binding in nature.

The second group of courts has been a tendency of the recent years.[305] Farnsworth gave an example of a corporation employee who promised to devote to the corporation the amount of time "as he in his sole judgement shall deem necessary" in return for the company's promise to employ.[306] The courts did not deem such promise illusory, however, interpreted it as a "requirement of good faith": the person who made such a broad promise should exercise it in a good faith.[307] Farnsworth also appeals to the provisions of the UCC, which indirectly supports such idea: the UCC provides that the seller may fix the price he wishes, however it should be done in good faith. Still, there was a contrary case law which denied the "mutuality" of agreement if the price was set solely according to the seller's discretion.[308]

Other than the "good faith" solution, the courts of the second group also found an "implied" return promise as consideration.[309] In *Wood v. Lucy* case, the lady gave an exclusive right to sell her works to another person, with the 50% share of the sale, however, the contract stipulated nothing of

---

[301] *See supra note* 300, at 107.
[302] *E.g.,* Gull Laboratories, Inc. v. Diagnostic Technology, Inc. 695 F. Supp 1151 (D. Utah 1988), *available at* https://bit.ly/3KL6FMA (visited July 1, 2023), "an "indefinite quantities contract", a contract where the buyer agrees to purchase and the seller agrees to supply whatever quantity of goods the buyer chooses to purchase from seller, is unenforceable because the buyer's promise from seller is considered illusory." Cited by Farnsworth, *supra* note, at 108.
[303] Strong v. Sheffield, 144 N.Y. 392 (N.Y. 1895), *available at* https://bit.ly/3y59LDr (visited July 1, 2023). Cited by EDWARD A. FARNSWORTH, FARNSWORTH ON CONTRACTS, VOLUME 1, at 108, § 2.13 (1990).
[304] *See* supra note 300, at 108.
[305] Id., at 109.
[306] Id., Farnsworth cites a case of Grean & Co v. Grean, 274 App Div. 279, 82 N.Y.S.2d 787 (1948).
[307] Id.
[308] Washington Chocolate Co. v. Canterbury Candy Makers, Inc., 18 Wn. 2d 79, 138 p2d 195, 18 Wash. 2d 79 (Wash. 1943), *available at* https://bit.ly/3kKluV0 (visited July 1, 2023), "A contract between a candy manufacturer and a chocolate company, whereby the former agreed to buy from the latter its requirements for chocolate coatings for a period of five years at "current price list", is unenforceable for lack of mutuality, where it appears that thereunder the sale price was left to the unrestricted and arbitrary determination of the seller." Cited by Farnsworth, *see supra* note, at 109.
[309] *See supra* note 300, at 110.

the person's obligation to sell; afterwards the lady appealed there was no promise from the person[310]. That appeal was rejected by the court. Even if the person did not make any promise, such promise was implied, and the person should have used "reasonable efforts" to enforce the agreement.[311] The next solution, found by Farnsworth, was a "standing offer" solution. Even if the court regarded the promise as illusory, the counter-promise to that promise was a continuing offer that the party with an illusory promise could use anytime to create a valid exchange.[312] Therefore, the legal consequences of "illusory deeming" were softened by the interpretation of court.

To sum up the findings of Farnsworth, the courts either deemed the pure potestative conditions as illusory promises or applied several "healing" techniques to expose the violation of promise: (1) promise should be committed in a good faith; (2) the promisor should use reasonable efforts; (3) even though the consideration was illusory, the other promise was still a standing offer for the party in breach.

The overall idea of American courts to counter pure potestativity is similar to the French: the aim is to find the unjust enrichment of the party in check. The provisions of Restatement Second of Contracts fix this approach of the courts by establishing a criterion of "disproportionate forfeiture":

§ 229 (Restatement Second of Contracts): "*To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."*[313]

In the context of potestativity, this provision confirms yet another "healing" technique at the American court's disposal: to deem the condition occurred, even though it objectively had not. There are many more techniques the American courts may use.[314] The potestative condition appears to be a completely valid concept under the American law, the difference with the countries of civil law is that it is understood in a different way. The "illusory deeming" appears to be the "last chance" feature: the courts try to use any other possible technique before deeming the condition as an illusory consideration.

The next paragraph presents a comparative analysis on the fiction of bad faith and the correlation of this rule with potestative conditions.

---

[310] Wood v. Lucy, Lady Duff-Gordon - 222 N.Y. 88, 118 N.E. 214 (1917), *available at* https://bit.ly/3EWfdfE (visited July 1, 2023). Cited by Farnsworth, *see supra* note 300, at 110.
[311] *See* Part 3.3.1. English doctrine on legal pendency. Degrees of obligation, at 137.
[312] Great Northern Railway Co. v. Witham, L.R. 9 C. P 16 (1873), *available at* https://bit.ly/3YAtnKN (visited July 1, 2023). Cited by EDWARD A. FARNSWORTH, FARNSWORTH ON CONTRACTS, VOLUME 1, at 111, § 2.13 (1990). Farnsworth cites the court, "it would be wrong to countenance the notion that a man who tenders for the supply of good in this way is not bound to deliver them when an order is given."
[313] Restatement Second of Contracts, § 229 (1981), available at https://bit.ly/3kNfBpK (visited July 1, 2023)
[314] *See* Part 5.1. American doctrine and case law on rupture of synallagma, at 192.

2.3. Fiction of bad faith condition fulfillment

As it was shown previously, a small number of legislators regulated the potestative conditions directly, e.g., by describing its nature and purposes via imperative rules of law. Some of the French-type legislations appeared to have a direct prohibition of pure potestative conditions favoring the debtor. Nevertheless, the overall picture is vague for the concept of potestativity: most legislations do not fix a single word on such conditions. This does not leave the contracting parties in the state of uncertainty by itself, though. Vice versa, the absence of regulation might be a clear sign of availability of potestative conditions to the legal circuit since everything which is not forbidden is allowed. However, there is another basic rule on conditions: the fiction of bad faith fulfillment. It describes a simple logic: if the contracting party influenced the condition occurrence in a bad faith, then according to how beneficial the influence was to the contracting party, the condition may be deemed fulfilled or not fulfilled. Through the course of comparative analysis, this rule appears to have a distinctive correlation with the doctrine of potestativity. It is of a theoretical value to clarify this correlation.

2.3.1. Comparative and doctrinal analysis on fiction of bad faith

Despite how popular the rule is, the differences between the ways the legislators describe the rule might seem minimal. However, two distinctive groups of legislations could be recognized.

The first group of national codifications (23 out of 45 countries) binds the rule directly to the concept of bad faith.[315] The group explicitly uses the words connected with the concept of bad faith: "contrary to good faith", "unfair", "in violation of the principles of community life" etc.[316]

Art. 355 (Civil Code of Moldova):

"If the occurrence of the condition ***has been impeded in bad faith*** *by the party who* ***does not benefit from the occurrence*** *of the condition, the condition* ***shall be deemed to have occurred****.*

If the occurrence of the condition ***has been assisted in bad faith*** *by the party who* ***benefits from the occurrence*** *of the condition, the condition* ***shall not be deemed to have occurred****."*[317]

---

[315] For "contrary to good faith", *see, e.g.,* General Part of the Civil Code Act of Estonia, Art. 104 (2002), *available at* https://bit.ly/3Y11Emo (visited July 1, 2023); for "unfair", *see, e.g.,* Civil Code of Kazakhstan, Art. 150 (1994, cons. ver. 2023), *available at* https://bit.ly/3kPXTC7 (visited July 1, 2023); for "in violation of the principles of community life", *see, e.g.,* Civil Code of Poland, Art. 93 (1964, cons. ver. 2014), *available at* https://bit.ly/3HED4Tc (visited July 1, 2023).

[316] Full list: Argentina, Armenia, Azerbaijan, Belarus, Bulgaria, Estonia, Georgia, Germany, Kazakhstan, Kyrgyzstan, Lithuania, Moldova, Netherlands, Poland, Russia, South Korea, Switzerland, Tajikistan, Thailand, Turkey, Turkmenistan, Ukraine, Uzbekistan.

[317] Civil Code of the Republic of Moldova, Art. 355 (in Russian. 2002), available at https://bit.ly/3j97Rhi (visited July 1, 2023).

The second group of national codifications (15 out of 45) avoids using any words connected to the concept of bad faith.[318] Instead, the legislators use the words "intentionally", "maliciously", "by fault" to describe how the party may influence the condition occurrence in a way which is harmful for the other party.[319]

Sec. 459 (Civil Code of the Czech Republic):

"The fulfilment of a condition ***is disregarded*** *if* ***it is deliberately fulfilled*** *by a person who is not authorized to do so and* ***who benefits from the fulfilment*** *of the condition.*

If a party ***benefiting from non-fulfilment*** *of a condition* ***deliberately frustrates*** *the fulfilment of the condition without being authorized to do so, the condition* ***is considered to have been fulfilled****."*[320]

There are also legislations which do not stipulate any rule on this matter (7 states) into their codification.[321] Yet, relying on the other provisions available in the code, it is certain that the rules of good faith also apply to the concept of conditions.[322] In case of Austria, for example, the Supreme Court emphasized the rule of good faith in conditional agreements multiple times.[323]

In both groups of legislations, the rule is triggered in opposition to an action of the party. Again, the difference is rather minimal. The first group is using the "bad faith" wording, by emphasizing on the "unfair and dishonest" aspect of contracting party which prevents condition occurrence. The second group describes the rule as a matter of "fault", emphasizing on the fact of deliberate negative action of the contracting party to prevent the condition occurrence. Both groups speak of a negative influence which triggers the rule. The second group, however, appears to have a more concrete wording on what the negative influence is. This allows the second group of legislations to possibly avoid the major concerns the concept of "good/bad faith" has in civil law.

---

[318] Full list of states: Belgium, Brazil, China, Czech Republic, France, Hungary, Indonesia, Italy, Japan, Latvia, Luxembourg, Quebec, Portugal, Spain, Vietnam.

[319] For "intentionally", *see, e.g.,* Civil Code of Japan, Art. 130 (1896, cons. ver. 2009), *available at* https://bit.ly/3jdExGo (visited July 1, 2023), for "maliciously", *see, e.g.,* Civil Code of Brazil, Art. 129 (2002), *available at* https://bit.ly/3HCfdTT (visited July 1, 2023), for "by fault", *see, e.g.,* Belgian Civil Code. Book 5. Law of obligations, Art. 5.144 (in Dutch and French, 2023), *available at* https://bit.ly/3WINDca (visited July 1, 2023).

[320] Civil Code of the Czech Republic, Sec. 549 (2012), *available at* https://bit.ly/3DlARcw (visited July 1, 2023).

[321] Full list: Austria, Egypt, Iran, Laos, Nepal, North Korea, UAE.

[322] *See, e.g.,* Egyptian Civil Law Act of 1948, Art. 148 (in Arabic, 1948), *available at* https://bit.ly/3HEHZ6g (visited July 1, 2023), "execution of contract should be in good faith"; *see also* The National Civil Act of Nepal, Art. 499 (2017), *available at* https://bit.ly/3jcjkNa (visited July 1, 2023), "obligation should be performed in good faith."

[323] The problem with Austrian Civil Code (AGBG) is that the rules on conditions are closely intertwined with the rules on inheritance which is unique within all the reviewed national codifications. Still, the case law answers multiple questions, which allow to relate the legislator to a certain group within comparative analysis. *See, e.g.,* Decision of Supreme Court of Austria, 1 Ob 622/77 (in German, from June 22, 1977), "… under no circumstances may he thwart the approval against good faith", or OGH 03/15/2001 6 Ob 39/01f (in German, 2001), "the parties to the contract must, in good faith, <…> refrain from anything that would prevent the condition from being satisfied." *See* the Austrian RIS Legal Information System, *available at* https://bit.ly/3lqyYFn (visited July 1, 2023)

2.3.2. Conceptual concerns on bad faith. Correlation with potestative conditions

The concept of bad faith, used by the first group of legislations, has two major concerns. The first is the absence of standards, it is a vague term. The legislators and courts need to concretize what are the exact actions of the contracting party could be constituted as bad faith. Words "honesty", "fairness", "wisdom" might help the interpretation and intuition of the court, however, do not solve the problem the preliminary way. To make the concept of "bad faith" sound more distinctive within the code, some legislators appear to have general articles on what the exact actions against the good faith might be.[324] In this sense, there is an advantage for the second group of legislators: the actions which trigger the fiction of bad faith fulfillment are concretized in the rule itself. Moreover, it could be noticed that they also use the good faith concept in the other parts of civil law and specifically avoid the usage of good faith with conditional obligations. Instead, the second group applies certain standards which trigger the fiction of condition fulfillment. Some of these standards could be deducted from the analysis: interest (benefit), deliberate action of obstruction, and authorization.[325]

The other concern is a logical one. The rule on bad faith fulfillment literally means that no contracting party can influence the condition fulfillment in bad faith. This works perfectly with casual conditions because no party may influence them. However, there are potestative conditions: the parties can satisfy them, or they can obstruct them at their free discretion. The rule on bad faith seems to be completely irrelevant: the party in potestative power can act in whatever faith it desires to make the condition occur. Most legislators do not specify about how the concept of potestativity correlates with the rule on bad faith. And this is yet another advantage of the second group of countries upon the first group. By stipulating certain standards that trigger the fiction rule, the legislator avoids any necessity of clarifying this logical contradiction. Moreover, it is hard to imagine a prevention of condition occurrence in a good faith, while it would be much more logical, for example, to present the case as a non-deliberate prevention of condition. If such standard is established, then in case of non-deliberate action, the fiction rule would not apply. It could be assumed that avoiding the wording "bad faith" is a much more logical and befitting approach for the civil law codifications.

---

[324] *See, e.g.,* Civil Code of the Russian Federation, Art. 10 (1994, amend. 2022), *available at* https://bit.ly/40mCWPB (visited July 1, 2023). The Russian law (first group of legislators) exposes rather concrete standards of "abuse of rights" which is also called a "bad faith article" among the Russian lawyers. "As not admissible shall be deemed the exercise of civil rights solely for the purpose of inflicting harm upon another person, actions in circumvention of the law for attaining an unlawful aim, as well as any other wittingly unfair exercise of civil rights (the abuse of rights). Seen as inadmissible shall be the use of civil rights for the purpose of restricting competition, as well as the abuse of a dominating position in the market." Vague standards of good faith are also present: the honesty of participants and wisdom of actions.

[325] *See* the example on Czech Republic, which uses all the three mentioned standards, at 77. For "obstruction" specifically, *see, e.g.,* French Civil Code, Art. 1304-3.

The international codifications seem to have the same concerns as the national codifications of the first group. DCFR, PECL and PICC use the wording "contrary to duties of good faith and fair dealing or co-operation."[326] Even though these codifications have a consistent usage of the wording "good faith and fair dealing" throughout the whole document, this approach has the same issues elaborated earlier: ambiguity and irrelevance to potestative conditions. The international codification has no word on potestative conditions; it does not have a word on the prohibition of a pure potestative condition favoring the debtor either. This might be a method to avoid the theoretical inconsistencies. It appears that international codifications, especially PICC, took after the common law approach: the fiction rule behaves like an implied obligation even though there is still no contract.[327] It could be also seen through the usage of word "interference" for the overall rule on fiction, even though there is no "fictional fulfillment" under the English law.[328] Stefan Vogenauer presents the same questions towards the concept of "good faith and fair dealing" as mentioned before: on the amounts of good faith and standards of interference; moreover, he admits there is no definition of good faith or explanation on how the principle operates neither within PICC, nor its Official Comment.[329]

The following example describes the problem in a clear way.[330] Imagine a construction contract where the general contractor agreed to make an additional payment to the subcontractor if he finished the construction earlier. Afterwards, the general contractor prevented the access to the building site. This is a clear prevention of condition fulfillment; however, it is still a tough question on whether the fiction rule should be applied. Since there are no criteria of good faith, it is necessary to find out multiple answers: whether the actions of the general contractor were deliberate, whether he was authorized to do so, whether it was done in his interests, whether the prevention was reasonable (if the site was unsafe, for example).[331] The "good faith" wording is not helping the clarity of the situation. Again, the usage of second approach with describing the standards of a possible violation is a better choice, as a better interpretation of this and other cases would be possible.

---

[326] *See, e.g.*, DCFR, Art. III. – 1:106 (4); *see also* PECL, Art. 16:102; *see, e.g.,* PICC, Art. 5.3.3, "If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition."

[327] STEFAN VOGENAUER, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC), AT 700 (2015).

[328] Id. at 701. Vogenauer relates to examples from the American and English case law. For the statement of no fiction rule under English law, *see, e.g.,* id., at 704. Moreover, he emphasized that "in English law, for instance, the duty [to not interfere] is said to rest on an implied term. Wrongful prevention of the fulfillment of a condition is a breach of this term." This is connected to the doctrine of obligations before the condition occurrence under the English law, *see* also Part 3, at

[329] Id. By "Official Comment" Vogenauer implies the official publication of PICC 2010 with commentary. See Official Commentary to PICC 2016, at 230, *available at* https://bit.ly/2Jzf3QS (visited July 1, 2023).

[330] Id., at 701. Example is given by Vogenauer.

[331] This analysis adds one more possible standard of bad faith fulfillment: unreasonableness. Reasonableness is also a bit vague word to be a standard, however, it still allows better interpretation if used with three other discovered standards.

In comparative analysis, there is no legislation which explicitly connects the fiction rule with an option to conclude contracts with potestative conditions. However, previously there were attempts to apply a more extensive regulation of the "bad faith" rule comparing to other states. By the rules of old Argentine civil law (1871 – 2015), the party in potestative power could still be punished by the fiction rule: if he was bound to the condition occurrence, and if he waived it or committed actions that prevent it from happening.[332] Old Argentine CC had an example of applying additional standards upon the concept of bad faith: there was a much cleaner reference to an obligation of non-prevention. Most of the legislations of the first group do not have an extensive amount of legislation on this matter, which leaves this question to the interpretation of courts. On the contrary, same as supra-national legislations, most legislations of the first group do not regulate potestative conditions whatsoever. It might be suggested that the legislations themselves do not have any controversy, if the potestativity is avoided as a topic. As for the old and new Argentine law, the rules on potestativity are present.

Russian law also has a new rule on potestativity. In Russian legal doctrine, A.G. Karapetov confirms that, as a rule of thumb, the fiction of bad faith fulfillment cannot be addressed to the party in potestative power, because of the clear "unfairness" element in the rule.[333] However, it is still possible to use the fiction against such party: an "obligation to ensure the condition occurrence" or an obligation to "contribute the condition occurrence in a good faith" should be clearly seen from the context of contract.[334] In 1997 the Supreme Arbitration Court reviewed a case, where a commercial bank gave a 10 mil $ credit to a sugar company. To secure the return of the credit the parties also concluded a pledge agreement of all goods and proprietary rights of the sugar company in favor of the commercial bank. The main credit agreement had a provision that the contract is enabled once the pledge agreement is registered by the sugar company in the third-party sugar-processing corporation. The sugar company did not register the contract; however, it was not enough to deem the credit agreement not enforced, the Court decided. Being obligated to register the pledge, the sugar company prevented the condition occurrence in a bad faith, which meant the condition had been fulfilled.[335]

---

[332] The old Argentine law used the word "dolus" (contrary to good conscience) to describe the fiction rule in Art. 571, however, also elaborated on unusual cases, where the fiction could be applied. The potestative condition could be met with fiction by this rule of Art. 572, "The condition to which a person has bound himself is deemed to have been fulfilled if such person willfully prevents its performance." The condition, relying on the third party's power or consent, could also be opposed by the fiction rule of Art. 571, "Conditions are considered as performed when being dependent on the voluntary act of a third person, the latter refuses to perform the act, or refuses his consent." *See* Argentine Civil Code, trans. by Comparative Law Bureau of the American Bar Association, Baldwin S. (ed.) (1871, repeal. 2015).

[333] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, at 127 (in Russian, 2017).

[334] Id.

[335] Resolution of the Presidium of the Supreme Arbitration Court of Russia, No. 129/97 (in Russian, from April 29, 1997).

German law represents the group of legislations, which have not regulated potestativity. During the creation process of BGB, there were opinions that the fiction rule is not applicable towards potestative conditions, Reinhard Bork writes.[336] Later, the creators refused to make such an addition to the BGB, thus confirming that the fiction rule could be used even with the concept of potestativity.[337] As much as the general rule, the rule could be used against a party in potestative power, if his behavior violates the principle of good conscience, and he does not perform the obligation to consider the rights and interests of the other party.[338] K.V. Nam continues that in case of pure potestative conditions the fiction rule could be used in a restrictive manner if such condition of pure will is acceptable by law[339]. The researcher refers to the article of BGB on good faith as a standard to depict the unfairness of the party, however, the same problem of ambiguity of the "good faith" concept arises, as BGB does not concretize on it in the code.[340] Bork is trying to suggest more qualification points in this sense: the intentions and purposes of the deal should be considered.[341]

The second group of legislations has an opposite tendency: most legislations regulate potestativity in some way.[342] The application of certain standards instead of bad faith allows a more formalistic approach towards all conditional transactions, including potestative. Even though the fiction rule relates to "action of obstruction" which is very similar to the concept of "action" in simple potestative conditions, the concepts do not mix with each other. Still, through the course of comparative study and legal doctrine analysis, it appeared there are more than three standards to depict the negative influence on condition occurrence. Moreover, the abovementioned standards of interest, obstruction, and authorization could be contested both logically and legally. Solving this issue and finding a preliminary way of regulation for the fiction rule in case of potestativity is not an easy task. While the existence of casual conditions brings one set of standards (which is the version suggested earlier), the concept of potestative condition needs additional limitations for the fiction rule to work properly, because the party in potestative power already responds all the "casual" standards.

---

[336] Reinhard Bork, *Allgemeiner Teil §§ 139-163* in: KARL-DIETER ALBRECHT, J. VON STAUDINGERS KOMMENTAR ZUM BURGERLICHEN GESETZBUCH: MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN. ECKPFEILER DES ZIVILRECHTS [J. VON STAUDINGERS COMMENTARY ON THE CIVIL CODE: WITH THE INTRODUCTION OF THE LAW AND SECONDARY LAWS. CORNERSTONES OF CIVIL LAW], at § 162, Rn. 4 (2020).
[337] Id.
[338] Kirill V. Nam, *Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod* [*Comment to the #Gloss. Conditional transaction. German Approach*]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 106 (in Russian, 2018).
[339] Id.
[340] German civil code BGB, § 242 (1900, cons. ver. 2021), *available at* https://bit.ly/408nSVk (visited July 1, 2023), "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration"
[341] *See* supra note 336, at § 162, Rn. 4.
[342] Mostly it is presented by the rule which prohibits any pure potestativity favoring the debtor.

2.3.3. Standards of fiction of bad faith

From the comparative analysis at least four standards of fiction rule could be suggested: the interest (benefit), the deliberate action of obstruction, the authorization, and the unreasonableness.[343] For the purposes of the current research, it is necessary to elaborate on each "candidate" to conclude whether these standards are compatible both with casual and potestative conditions.

First, the standard of interest is not contested by legislation and the doctrine, as it exposes the motivation side of the violating party: there should be a benefit for this party to prevent the condition occurrence. However, there is one more part missing: when there is a benefit to one party, there should be a mischief to the other party; therefore, it is a change in the economic value of the parties. If the violating party can prove that both parties are interested/benefitting from the prevention of condition occurrence, for example, because after the contract's conclusion the market situation changed drastically, then there should be no issues whatsoever. This allows more refinement to the standard, as for the fiction rule to be enforced, the prevention of condition occurrence shall be done to the sole benefit of the contracting party. This the "sole interest (benefit)" standard. A.G. Karapetov introduced the same idea in his analysis on Russian law, however, done from the opposite perspective.[344] He presents an unusual example, where the bad faith of the violating party is obvious, however, the enforcement of fiction rule would be "clearly not-beneficial" for the other party. As the application of the rule is not helping the interests of the other party, it is "unwise" to enforce it.[345]

Second standard is "deliberate action of obstruction." This standard shows the intention side of the violating party. It is possible to understand this standard as "fault" of the contracting party. The action of obstruction itself is not contested as a standard, since the fact of prevention is one of the bases for the enforcement of fiction rule. However, it is not clear whether the action should be always deliberate. Bork states that earlier the German courts considered "deliberateness" as a necessary element of bad faith contracting party.[346] Closer to the modern days, however, the opinions shifted,

---

[343] For "reasonable", *see, e.g.*, Dutch Civil Code, Art. 6:23 (1992, cons. ver. 2019), available at https://bit.ly/3DlVQff (visited July 1, 2023).

[344] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, at 127 (in Russian, 2017).

[345] Id. The example is rather complex: imagine supplier A and buyer B concluded a sales contract, conditioned upon the tender victory of buyer B. Then the market situation changes along with the prices, and now it is not beneficial for supplier A to continue the deal. So, by using his authority and corruption influence the tender gets cancelled. The bad faith is obvious, and the interests of buyer B are "trampled upon", Karapetov emphasizes. However, the doctor asked questions onwards. Is the enforcement of fiction in the interests of B? Is the whole supply contract between A and B in the interests of B now? Karapetov assumed the answer to these questions is "no", as it could be the same in many more situations.

[346] Reinhard Bork, *Allgemeiner Teil §§ 139-163* in: KARL-DIETER ALBRECHT, J. VON STAUDINGERS KOMMENTAR ZUM BURGERLICHEN GESETZBUCH: MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN. ECKPFEILER DES ZIVILRECHTS [J. VON

and even a mere negligence became a valid argument towards bad faith.[347] Germany is connected to the first group of examined legislations ("bad faith" group), and the idea of negligence contradicts the approach of several legislators from the second group, including some of the Germanic-type ones: Belgium, Czech Republic, Japan, Spain, Vietnam.[348] After a closer look on some legislations an assumption could be made. All the legislations from the first group of states, which depict the fiction rule through "bad faith" and similar concepts, have a potential of enforcing the fiction rule even in the case of a mere negligence, and not only deliberate action of prevention. The second group of legislations, which depicts the rule through standards, also has this potential but only if the "deliberateness" standard is not blatantly exposed in the code.[349]

Another standard is authorization. Not much could be found about the standard in the literature, however, some inconsistencies could be found among the legislations. "Authorization" is only found in the Czech law, while in some other states like Indonesia, Latvia, Luxembourg, Quebec, and Spain the fiction rule is limited to the actions of the debtor only.[350] In the meaning of Czech law, the violating party should be authorized to prevent the condition occurrence. The wording of French-type legislations ("debtor prevents") is dictated by the acceptance of pure potestativity on the side of the creditor and by the prohibition of the pure potestativity favoring the debtor. None of the presented legislations are close to the truth, it might be assumed. The authorization standard has a big flaw. The authorization standard does not address potestative conditions properly: the party in potestative power is always authorized to influence the condition occurrence, therefore, the Czech standard works only for casual conditions. On the contrary the "debtor prevents" concept also has a flaw. Both parties can prevent the condition occurrence in a bad faith, and it is not always the debtor. This applies especially to the synallagmatic contracts, whether the roles of creditor and debtor are very much intertwined. It

---

STAUDINGERS COMMENTARY ON THE CIVIL CODE: WITH THE INTRODUCTION OF THE LAW AND SECONDARY LAWS. CORNERSTONES OF CIVIL LAW], at § 162, Rn. 10 (2020).

[347] Kirill V. Nam, *Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod* [*Comment to the #Gloss. Conditional transaction. German Approach*]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 106 (in Russian, 2018).

[348] For Germanic-type legislations, *see, e.g.,* Civil Code of Japan, Art. 130 (1896, cons. ver. 2009), *available at* https://bit.ly/3jdExGo (visited July 1, 2023), "In cases any party who will suffer any detriment as a result of the fulfillment of a condition intentionally prevents the fulfillment of such condition, the counterparty may deem that such condition has been fulfilled." *See also* Belgian Civil Code, Art. 5.144; Spanish Civil Code, Art. 1119; Civil Code of Vietnam, Art. 125.

[349] Look at the Civil Code of Hungary, for example. According to para 2 of Art. 229, "persons who have actionably caused the realization or frustration of a condition shall not be entitled to establish any right thereon." The wording "actionably caused" does not equal "deliberateness", because the action to prevent the condition occurrence could be as well committed in a negligence. Therefore, there is a potential for Hungarian court to enforce the fiction rule even if there was a mere negligence of the contracting party which prevented the condition occurrence.

[350] *See, e.g.*, Civil Code of the Czech Republic, Sec. 459. *See also* Indonesian Civil Code, Art. 1260; Luxembourg Civil Code, Art. 1178. Art. 1559 of Civil Code of Latvia does not stipulate the fiction rule in the usual manner, however, states that "the conditional obligor shall not do anything that would prevent the condition from coming into effect." Important to note, that this position is taken from the French Civil Code before the 2016 amendments.

can be assumed, that the "authorization" standard is possible only with casual conditions, while the "debtor prevents" concept is possible only with potestative conditions. Therefore, none of the presented concepts could work as a standard for the fiction rule. The "authorization" and "debtor prevents" concepts should be disregarded as they are not the necessary elements of the fiction rule.[351] The 2016 amendments of the French Civil Code might indirectly confirm this point, since the fiction rule has been completely changed and there is no "debtor prevents" concept presented anymore.[352]

Final standard is reasonableness. This should be differentiated from the word "reasoning" which is a part of motivation and refers to the standard of interest. Reasonableness, on the contrary, could be associated with the word "excuse." Vogenauer's example, where the subcontractor was not given an access to the building site, might present such a case of excuse. The general contractor might have committed the action of obstruction in a deliberate and beneficial manner to himself, yet still the general contractor can prove that the building site was unsafe or there were some external dangers to the subcontractor if he had access to the site. In this case, the fiction rule is not applicable. However, the standard could be contested. First, "reasonable" is very broad in meaning, and a heavy interpretation work is required to decide whether the standard could be applied or not. Secondly, reasonableness is conceptually close to a force majeure, and the line between those concepts is blurred. Yet, in the building contract example reasonableness seems to be more specific than force majeure. The overall idea could be a standard for the fiction rule; however, a precise wording is required. "Reasonableness" suggested by the Dutch legislator, or "unreasonable conduct" considered by G. Treitel may not be precise enough.[353] The standard of "reasonable excuse" might be the best attempt.

Therefore, the three main standards of the fiction rule could be deducted: sole interest (benefit) of the contracting party preventing the condition occurrence, the level of deliberateness of the party's actions, and the presence of reasonable excuse to do so. These standards could be put into the basis of a unified rule on bad faith condition fulfillment.

---

[351] It might be suggested that those concepts are just a part of the bigger concept: implied obligation of non-interference. This approach is resembling the common law approach, which does not have the fiction rule, however, *see*s the overall situation as an implied duty not to interfere. In national codifications, this could be *see*n through the exact wording "impedes" and "facilitates", which is also a part of "action of obstruction" standard. Therefore, it is better to refuse the words like "not authorizes" and "debtor prevents" to avoid any theoretical disarray within the fiction rule.

[352] Before the 2016 amendments the fiction rule looked like the following, "A condition is deemed fulfilled where it is the debtor, bound under that condition, who has prevented it from being fulfilled. After the 2016 amendments the fiction rule looks completely different, "A suspensive condition is deemed to have been fulfilled if the party who is interested in its failing has obstructed its fulfilment." *See* French Civil Code, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016), available at https://bit.ly/3XBNYyt (visited July 1, 2023); *see also* French Civil Code, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016, available at* https://bit.ly/2Qodnso (visited July 1, 2023).

[353] G. Treitel's "unreasonable conduct" wording is cited by STEFAN VOGENAUER, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC), at 702, ft. 76 (2015).

2.3.4. Purpose of fiction of bad faith. Remedies

Bork and Nam emphasize a very important point concerning the fiction rule. Bork writes that "it is not a sanction for an unfair behavior", while Nam continues this idea by exposing the following meaning behind the rule: it "corrects the regulation of the legal consequences, which were changed" by the unfair behavior of the contracting party.[354] And this is a very interesting point for the overall analysis: for German law the fiction rule is not a sanction, but a correcting feature. The same idea could be seen in the previous example on sugar company under in Russian case law: the court corrected the legal consequences by deciding the contract was unconditional. The "deeming of condition to have been fulfilled" part is not a punishment, but an interpretation tool: the contract is interpreted as unconditional because of the fiction rule. However, there are researchers with the opposite opinion. A.G. Karapetov calls the fiction rule a "means of defense against an unfair behavior", however, also calls it a "sanction" and tries to deduct a compensational mechanism for the "unfair behavior."[355] Stefan Vogenauer also goes over several remedy mechanisms which also implies his opinion on the fiction rule as a sort of sanction for someone's bad faith.[356] What is the fiction rule exactly, a sanction or a correcting mechanism? May the contracting party whose rights and lawful interests were violated ask for damages or other reliefs in this case?

Stefan Vogenauer suggests three possible remedies in case of wrongful interference: "right to performance", "damages" and "termination of contract."[357] While the right to performance and damages are general liability provisions within PICC, termination is also a possibility, because the "innocent party has lost trust in the interfering party."[358] Termination could be used a sort of sanction with resolutive conditions, and a discharge from obligation could be used with suspensive conditions, Vogenauer assumes.[359] Moreover, he suggests it would be better to distinguish conditions with high and low probabilities of fulfillment to further apply an even more accurate compensation to the innocent party.[360] Russian authors are confident there is a possibility for damages in case of wrongful interference: be it an explicit obligation to assist the condition occurrence, be it an obligation to not

---

[354] *See supra* note 336, at § 162, Rn. 10; *see supra* note 347, at 107.
[355] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, at 127 (in Russian, 2017).
[356] STEFAN VOGENAUER, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC), at 704 – 705 (2015).
[357] Id., at 704.
[358] Id., at 705.
[359] Id.
[360] Id., at 704.

act or interfere in any way, be it a contract with a conditional obligation or a conditional contract.[361] There is a legislative basis to demand damages for the violation of obligation performance.[362]

Still, it is hard to imagine any additional compensation above the contract remedies just for the fact of influencing the condition occurrence in bad faith. Perhaps, if the innocent party could prove any additional damage suffered just from the fact of prevention of condition occurrence, it could be possible. If the contract is between natural persons, then it becomes a matter of additional moral damages. If the situation happens between commercial entities, then it may become a matter of expected income damages. It is hypothetically possible to ask for such remedies.

However, the moral damages and expected income damages are closely connected to the obligation non-performance of the violating contracting party, therefore, the fiction rule cannot be the reason itself to award such types of damages. The fiction rule allows the law enforcement actor to interpret the contract and state the non-performance of obligation, so the established fact of non-performance subsequently creates the basis for a further legal action on additional damages. This removes any possible hypothesis.

Therefore, it could be assumed that the damages and compensations coming from the fiction rule enforcement are following neither the fiction rule itself, nor the fact of prevention of condition occurrence. Those damages follow the provisions of contract, which is interpreted as unconditional in this case, thus, an obligation to perform and to pay any remedies for the non-performance arises. In the sugar company example, the court decided the case in favor of the bank and deemed the sugar company liable to pay the whole sum of credit plus the penalties resulting from the violation of the payment deadline. No additional damages, connected exclusively to the enforcement of the fiction rule, were awarded. And even if they were, like, for example, damages of expected income, they would still be connected to the obligation non-performance. Fiction rule is not a sanction in the eyes of law, but a matter of interpreting the contract as unconditional in case all the standards of the rule are met.[363] The main appeal of the fiction rule is in the restitution mechanism: the parties are brought to the state of contract as if it had been unconditional from the very start. After the correcting tool is used, the party in violation must perform its obligations.

---

[361] ARTYOM G. KARAPETOV, SDELKI, PREDSTAVITELSTVO, ISKOVAYA DAVNOST: POSTATEYNYY KOMMENTARIY K STATYAM 153 - 208 GRAZHDANSKOGO KODEKSA ROSSIYSKOY FEDERATSII [TRANSACTIONS, REPRESENTATION, LIMITATION OF ACTIONS: ARTICLE-BY-ARTICLE COMMENTARY TO ARTICLES 153 - 208 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], at 83 (ed. V.V. Baybak, R.S. Bevzenko, S.L. Budylin, in Russian, 2018).

[362] Id. Such obligation might be stated as "implied" by the court on the principle of "good faith" and "non-abuse of rights", Karapetov assumes. This analysis brings "implied" conditions from common law into the field of Russian law.

[363] Potentially, all three abovementioned standards (sole interest (benefit), deliberateness of the party's actions, and the presence of reasonable excuse to do so) must be met for the fiction rule to be enforced by the court.

The comparative analysis on bad faith condition fulfillment rule, or fiction rule, brings several important conclusions to the table. Even though the rule sounds similar within the national and supra-national codifications, there is a distinction between the usage of "bad faith" wording and the application of concrete standards. The "bad faith" wording causes the concerns for its ambiguity, as well as a logical concern in relevance to potestative conditions. Common law does not have the fiction rule, however, interprets the situation as a violation of an implied obligation of non-interference. Codification do not explain the correlation of the fiction rule and the doctrine of potestativity. The situation does not answer the balance between the autonomy of will and imperative rules of law.

A possible solution could be seen in establishing three standards of fiction rule, by meeting all of which the rule could be triggered in a formalistic way: sole interest of the violator, deliberateness of action, and absence of reasonable excuse. If the prevention of condition occurrence is not damaging or benefitting the innocent party, then the fiction rule cannot be enforced. Also, important to mention, that most legislations have a potential to apply the fiction rule to the actions of mere negligence, which caused the prevention of condition occurrence. However, it might be a very harsh instrument towards the debtor's side of the contract, therefore, as a safe approach, it is possible to suggest the clear deliberateness of actions as a standard for the legislator. A standard of "authorization" or "application only to debtor" could be disregarded by legislators for less theoretical controversy between the potential standardized rule and the concept of potestative conditions.

Additionally, it could be assumed that the fiction rule does not bring any sanctions upon the contracting parties by itself. The fiction rule is an interpretation tool, first and foremost. This tool allows to expose the non-performance of obligation by the contracting party. Such non-performance is the basis for overall damages and interests for the innocent party. Other compensations, like moral damages or damages of expected income, are also deriving from the fact of obligation non-performance and not exactly from the fact the party prevented the condition occurrence. Those are subsequent actions of the law enforcement actor as there cannot be any awarded damages from the fact of prevention. In case the prevention of condition occurrence is exposed before the obligation performance even starts, then right to damages will differ from whether there is an explicit obligation stated in the contract, the court finds an implied obligation of such in the contract, or the legislator fixes such an obligation of non-interference into the code.[364]

The next paragraph focuses the topic of pure potestative conditions and its correlation with the modern doctrine of transformative rights.

[364] For more analysis on this matter, *see* Part 3.3.1. English doctrine on legal pendency. Degrees of obligation, at 137.

2.4. Pure potestative conditions and transformative rights

The classification of potestativity presents the concepts of simple and pure potestative conditions. The difference between these types is whether the actions or the sole wish of the party are influencing the condition occurrence. Actions like buying a bicycle, moving to another city, or selling shares are examples of simple potestativity within the contract. As the previous analysis shows, there is no issue if a simple potestative condition favors either creditor or debtor. However, in case of pure wish ("I pay if I want"), many legislations prohibit pure potestativity favoring the debtor, because the debtor is not acting as giving a consent to the obligation of debt return. Yet, pure potestativity on the creditor's side ("You pay if I want") is acceptable and possible with rare exceptions. Such power of creditor and debtor, if stipulated by the contract, is resembling an option contract with the right to choose and to effect the changes of the contract.

Simple potestativity is connected to actions, and such conditions confirm not only the influence but the devotion of the contracting party to make the condition occur. It is a potestative condition in its right sense of the word. Unlike the commitment in simple potestativity, pure potestative conditions are less feasible, and they are exercised at full discretion of the party in power; those conditions are not affected by anyone other than the possessor. Such behavior is very similar to a full-fledged right. Legislations are rather silent on the inner nature of pure potestativity, limiting themselves to one rule most of the time: any potestativity on the side of the debtor is null and void. However, the modern doctrine looks at the pure potestativity at a different angle. This discussion might impose a valid contribution to the balance between the party autonomy and imperative law.

Indeed, the pure wish of the debtor is nothing less than a power to bring the change to the legal consequences of the contract. Imagine a right to terminate the contract with a notification two months prior to the termination. If both the creditor and debtor are given the same opportunity, then there are no legislative obstacles to prohibit such an autonomy. Moreover, the law hints at such opportunity. Pure potestative condition is very much alike the provision on the contract termination if the parties desire so. Is this a pure potestative condition? Is this just a right of the contracting party? How does the pure potestativity compare to a status of a full-fledged right? For answering these questions, it is necessary to dive deep into a rare legal doctrine, suggested by German historian of law and jurist Emil Seckel in 1903. This doctrine is called "transformative rights" (Gestaltungrechte).[365]

[365] Emil Seckel, *Die Gestaltungsrechte des burgerlichen Rechts* [*Transformative rights in civil law*], in: FESTGABE DER JURISTISCHEN GESELLSCHAFT ZU BERLIN ZUM 50 JÄHRIGEN DIENST-JUBILÄUM IHRES VORSITZENDEN, RICHARD KOCH [COMMEMORATION OF THE LEGAL SOCIETY OF BERLIN ON THE 50TH ANNIVERSARY OF THE SERVICE OF ITS CHAIRMAN, THE REAL PRIVY COUNCILOR, RICHARD KOCH], at 205 – 253 (1903, trans. into Russian, 2007).

2.4.1. Theory of transformative rights

Transformative rights are perceived by the German doctrine as a separate group of rights, different from the rights of possession, or rights of claim. These rights are very recent in the existence of legal mind. These are unique rights, which are not exposed in any researched codification. The doctrines call these rights differently: a "transformative right", a "potestative right", or a "secondary right."[366] Emil Seckel defines the concept in his article:

Transformative right is "a subjective (concrete) private right, which consists of an ability to fix (transform) a concrete legal relationship by a unilateral action."[367]

It is necessary to decipher every word in the definition. The right is subjective, so the party is explicitly given the free and sole discretion to use it. Seckel explains that it is a "right-advantage", "something bigger than all others can": an ability the others do not have.[368] The usage of such right is seen in the ability to start, change or terminate the contract or a particular obligation in it. By words "unilateral action" the start mechanism is defined: a willful unilateral act by the contracting party, an "expression of will", which Seckel calls "a legal-civic subjective act of Kohler."[369]

In the definition given by Tim Lassen, the transformative right mechanism is described as a willful "expression to transform" by means of a unilateral action, adding that the legal relationship could also be "cancelled", or "its contents clarified."[370] He concludes that the meaning behind this right is "to grant a person the power to unilaterally, without the participation of another person, achieve legal consequences solely of his or her own free will."[371] This way, the transformative rights are different from any other type of rights (rights of claim and rights of possession) established in the German doctrine. It is a free discretion unilateral ability to change the legal relationship[372].

---

[366] For "potestative right" *see, e.g.,* STEPHANE VALORY, LA POTESTATIVITE DANS LES RELATIONS CONTRACTUELLES [THE POTESTATIVITY IN CONTRACTUAL RELATIONS], at 105 (in French, 1999), *see also* Aleksey V. Ageev, *Problemy regulirovaniya potestativnykh usloviy* [*Problems of regulation of the potestative conditions*]. Bulletin of Economic Justice of the Russian Federation, № 2, at 47 (in Russian, 2015); for "secondary right", *see, e.g.,* Tim Lassen, *Preobrazovatelnye Prava (Gestaltungsrechte) Po Nemeckomu Pravu* [*Rights to Change a Legal Relationship by Unilateral Declaration (Gestaltungsrechte) Under German Law*], Bulletin of Civil Law, № 5, at 141 (in Russian, 2018), *see also, e.g.,* ARTYOM G. KARAPETOV, ISPOLNENIE I PREKRASHCHENIE OBYAZATELSTVA: KOMMENTARIY K STATYAM 307 - 328 I 407 - 419 GRAZHDANSKOGO KODEKSA ROSSIYSKOY FEDERACII [FULFILLMENT AND TERMINATION OF OBLIGATION: A COMMENTARY TO ARTICLES 307 - 328 AND 407 - 419 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], at 1189 (in Russian, 2022).

[367] *See supra* note 365, at 211.

[368] Id., at 211. By that reason Seckel explains that proposing an offer, creating of fund, disposing the property by the will statement are not transformative rights, because everyone has such a right by law.

[369] Id. By Kohler, Seckel implies Josef Kohler (1849-1919), German philosopher of law, prof. at University of Berlin.

[370] Tim Lassen, *Preobrazovatelnye Prava (Gestaltungsrechte) Po Nemeckomu Pravu* [*Rights to Change a Legal Relationship by Unilateral Declaration (Gestaltungsrechte) Under German Law*], Bulletin of Civil Law, № 5, at 139 (in Russian, 2018).

[371] Id.

[372] Id., at 140.

The induction method used by E. Seckel creates a myriad of examples, all of which are transformative rights: a right to accept an offer (but not the right to offer), a right to accept an inheritance (but not the right to make a will statement), a right of withdrawal from contract, a right to terminate the contract, a right to challenge the contract in court, a right of company liquidation, a right of author to change the price according the incoming deductions, the right of the counterparty or a third party to determine the subject of performance (in case of transaction with subsequent specification of the characteristics of the goods), etc.[373] One party or both parties can commit such a modifying unilateral action.

A recent monography by Vyacheslav Karnushin gives an interesting insight into the nature and history of transformative rights.[374] It is a "defined by rule of law, measure of a possible power impact on legal relations … which does not have a material expression and exists outside of the legal relationship."[375] The concept of transformative rights comes from *exceptio* – a special kind of procedural reservation by which the defendant denied the existence of a right, or at least denied his obligation to perform at the present time.[376] The aim was to transform or terminate legal relationships based on certain juridical facts.[377] Later the theory indirectly reemerged in the works of German jurist Bernhard Windscheid (1817 – 1892) who brought a materialistic feeling into the concept of legal claim[378]. He wrote that a legal claim within the contract could be opposed by another unilateral claim of the other contacting party, and the first person could counter-oppose to that claim afterwards.[379] The contemporary example is a right of set-off. At the end, such claims became a "power" which could unilaterally transform the relationship. Lassen appeals to M. Wolf and J. Neuner who wrote that the sources of transformative rights are both the imperative rules of law and contracts.[380] German scholar Konrad Hellwig (1856 – 1913) emphasized that the legal consequences of the transformative right "should be recognized by everyone", and there is no importance, whether it results from a willful statement of the party or by the decision of court.[381]

---

[373] *See supra* note 365, at 208.
[374] VYACHESLAV E. KARNUSHIN, SEKUNDARNYYE PRAVA V GRAZHDANSKOM PRAVE ROSSIYSKOY FEDERATSII: OBSHCHIYE VOPROSY TEORII, SEKUNDARNYYE PRAVA V GRAZHDANSKOM KODEKSE RF [SECONDARY RIGHTS IN THE CIVIL LAW OF THE RUSSIAN FEDERATION: GENERAL QUESTIONS OF THEORY, SECONDARY RIGHTS IN THE CIVIL CODE OF THE RUSSIAN FEDERATION] (in Russian, 2016).
[375] Id., at 24. The reason of existence for such rights, Karnushin *see*s in the peculiarity of the object: it is not about the behavior of the contracting, nor about the material world, but a right of the unilateral willful expression.
[376] Id., at 13. Karnushin relies on the dictionary of terminology by Milan Bartosek.
[377] Id., at 14. Karnushin adds that there was no division between civil law and civil procedure in Ancient Rome, therefore, every *exceptio* could be made only in opposition to *actio*.
[378] *See supra* note 374, at 14.
[379] Id.
[380] *See supra* note 370, at 141.
[381] Hellwig's statements are cited by Tim Lassen. *See supra* note 370, at 144.

On paper, transformative rights resemble the much older concept of pure potestativity. The parties are given the ability to force the condition occurrence by a pure wish. This pure wish is granted by the power of the contract, so it is unique (subjective). Pure potestative conditions also affect the start, amendment, or termination of legal relationships (the transformation mechanism).[382] Lassen's "cancellation" or "clarification" are also possible in pure potestativity: by cancelling the obligation before it might be even enabled or by changing the interpretation of the obligation itself. Finally, the unilateral action aspect is quite identical: a pure wish of the contracting party is in fact a unilateral action with a corresponding obligation for the other party to accept this action and its consequences. Pure potestativity is seen as an unlimited discretion to make the condition occur and, thus, enable certain rights and obligations of the contract. Transformative rights are also an explicit advantage of one party to change the contracts' dynamics. The concepts could be seen as identical.

Russian doctrine does not have any doubt that every pure potestative condition is a transformative right. A.G. Karapetov thinks that the "pure potestative conditions should be taken out of the equation" because those are transformative rights, in fact.[383] In pure potestativity, the legal consequences are not created by condition occurrence but by "the purposeful expression of will onto the dynamics" of the legal relationship.[384] Other Russian scholars do not oppose this point of view.[385] The French doctrine elaborated on potestative rights in a similar way: Stephane Valory described it as "an ability to influence the legal relationship with unilateral expression of will."[386]

Are pure potestative conditions identical to transformative rights? The answer is negative. The following analysis is an attempt to expose the differences of these concepts.

---

[382] Emil Seckel, *Die Gestaltungsrechte des burgerlichen Rechts* [*Transformative rights in civil law*], in: FESTGABE DER JURISTISCHEN GESELLSCHAFT ZU BERLIN ZUM 50 JÄHRIGEN DIENST-JUBILÄUM IHRES VORSITZENDEN, RICHARD KOCH [COMMEMORATION OF THE LEGAL SOCIETY OF BERLIN ON THE 50TH ANNIVERSARY OF THE SERVICE OF ITS CHAIRMAN, THE REAL PRIVY COUNCILOR, RICHARD KOCH], at 212 (1903, trans. into Russian, 2007). Seckel wrote that not only the legal relationships could be the object of transformative rights, however those cases are very rare, so they shall be disregarded, he admits. For example, the liquidation of a company (object – juridical existence) under the German law can hypothetically be done by a transformative right, but this is nearly impossible to imagine. It is difficult to imagine such case with a pure potestative condition instead of transformative right.

[383] ARTYOM G. KARAPETOV, ISPOLNENIE I PREKRASHCHENIE OBYAZATELSTVA: KOMMENTARIY K STATYAM 307 - 328 I 407 - 419 GK RF [FULFILLMENT AND TERMINATION OF OBLIGATION: A COMMENTARY TO ARTICLES 307 - 328 AND 407 - 419 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], at 865 (in Russian, 2022).

[384] Id. Meanwhile, simple potestative conditions could not be considered transformative rights, Karapetov adds. It is a "full-fledged condition" because the behavior of the contracting party (with its own purposes) is bound to the legal consequences (like relocation to another city).

[385] *See, e.g.,* Rail R. Valiev, *Imushchestvennoye polozheniye storon uslovno-otlagatelnogo obyazatelstva* [*Property Status of Parties to Conditional Suspensive Obligation*], Zakon, № 7, at 166 (in Russian. 2020); *see also* Ivan S. Chuprunov, *Voprosy sfery deystviya i obkhoda preimushchestvennogo prava pokupki doli (aktsiy)* [*Issues of the scope and circumvention of the pre-emptive right to the purchase of shares*], Bulletin of Economic Justice of the Russian Federation, № 4, at 50 (in Russian, 2021).

[386] STEPHANE VALORY, LA POTESTATIVITE DANS LES RELATIONS CONTRACTUELLES [THE POTESTATIVITY IN CONTRACTUAL RELATIONS], at 83 (in French, 1999).

2.4.2. Differences between transformative rights and pure potestative conditions

Point 1: Limits. The way the pure potestative conditions and transformative rights behave is rather different. Indeed, both are unilateral actions with a free discretion, however, the pure potestative conditions are called so because they are "pure" – unlimited in basis. Most of the examples, featuring pure potestative conditions, are based on subjectivity: the condition occurrence depends upon the unrestricted feelings and desires of the contracting party, e.g., satisfaction (I will pay for the goods if I like them). Contrary to that, transformative rights are much more limited in this aspect. These rights are acting as an "answer to the needs of situation" (a right to accept, a right to withdraw, etc.). Because of this implied urge to "answer", the transformative rights are more limited in nature. Subsequently, it might be suggested that they are more certain than pure potestative conditions.

To elaborate on the aspect of limits, consider an example from common business practice. After the work completion, the contractor wants to ask the payment from the client. The usual way of presenting this desire is by committing a unilateral action – sending a bill of payment, where the price for each type of work is shown. The right of the party to ask for payment by bill is not a pure potestative condition, but an implied transformative right of the contractor. It is a unilateral action which starts the obligation of the other party to pay. But unlike in pure potestativity, it is obvious that the level of certainty is much higher: there is a corresponding obligation of that same contractor to send a specific document, plus the full course of work had been confirmed before the realization of the right. Pure potestativity, in the example of satisfaction, is unlimited comparing to the payment by bill.

Therefore, it might be also assumed that the realization of transformative rights is associated with the actions and overall commitment of the person in charge. However, unlike in simple potestative conditions (where actions play a role), commitment of the party who wishes to use his transformative right is related to the moment after the right is established (the time of contract conclusion), whereas in case of simple potestativity – the commitment happens before the condition occurs, i.e., before the actual moment when the right of the party is enabled. In pure potestativity, there is no commitment of the party whatsoever: these are expressions of will.[387] The absence of commitment confirms the big uncertainty that comes after the pure potestative conditions.

If the Euler circles were to be drawn in terms of limits, the circle with the pure potestative condition would consume the circle with transformative rights (a small circle inside of a big circle).

[387] *See supra* note 383, at 870. Russian scholars often describe the concept of pure potestative conditions with the word "naked" to show the extent of how unlimited the expression of will is: there is no objective basis under it.

Point 2: Source. From the last example one more thing could also be deducted. The transformative right has more binding towards the imperative rules of law and implied rules of common business practice. The rights to accept, or to refuse performance, for example, are established directly by law, and act as a solid and certain answering mechanism. Pure potestative condition does not have a binding with imperative law.

Seckel exposed the sources of transformative rights in his article. Some can occur only on the grounds of the contract (a right to repurchase in the share sale agreement), some can occur only by means of imperative law, or *ex lege* (a right to challenge the contract, a right of set-off, a right to divorce), others can occur on both possible grounds (a right to preemptive purchase, a right to terminate, etc.).[388] Pure potestative conditions cannot occur *ex lege* for two reasons. The first is the fact the concept of pure potestativity is unlimited: no legislation can possibly stipulate all the wishes and desires of the contracting party. The second reason is subsequent: pure potestative conditions are mostly null and void in nature. That is because of the lack of any objective criteria to support its usage in common business practice; it was shown that many countries specifically prohibit pure potestativity favoring the debtor, whereas some legislations ban the pure potestativity overall. Therefore, unlike most of the transformative rights, pure potestative conditions originate from contracts only.

This assessment allows more refinement between the abovementioned concepts. Consider the right to terminate the contract. The common business example is the right of both parties to terminate the contract at their desire with a two-month prior notice. This is a transformative right and not a pure potestative condition. First, the source of the right is both the law and the contract. Second important point is that this is not just a pure expression of will, as there is a corresponding obligation to send a prior notice to the other party to inform about the termination. And thirdly, a right of challenge for the usage of right to terminate could be implied. Consider the contrary example: the contract is terminated if any of the party expresses a desire to end it. This provision sounds very similar to the previous one, almost identical in understanding, however, both from the wording interpretation and from the lack of additional corresponding duties, it can be assessed that this is a condition and not a right. It is a pure potestative condition as there is nothing corresponding to it. Additionally, no legislation would ever allow to terminate a contract only by the snap of fingers. The theory of transformative rights could be seen a necessary limiting mechanism towards the pure potestative conditions.

If the Euler circles were to be drawn in terms of sources, the circle with the transformative rights would consume the circle with pure potestative conditions (a small circle inside of a big circle).

[388] *See supra* note 382, at 214.

Point 3: Criterion of "additional." Another thing to be noticed in the two presented concepts is that the pure potestativity is associated with condition, and transformative right is a type of subjective right. This would not constitute a valid difference in a theoretical analysis by itself. Still, it would allow to make another assumption based on the previous points. Pure potestative condition is still a modality, even though it acts in an unlimited way. This implies that without the pure potestative condition, the contract is simply unconditional, and has no problems in operation whatsoever. The criterion of "additional" is one of the key features of the concept.

The transformative right is not a modality of obligation, as this is illogical. While having an identical outcome as the pure potestative conditions, transformative rights appear to be more integrated into the contract itself. Indeed, there is some overlap with the pure potestativity, especially in those transformative rights which are based solely on contractual relationships (a right to repurchase, for example), however, in case the legislation is explicitly stating a transformative right into the code, it is not an obligation modality, but a full-fledged contractual right. Pure potestative conditions, even though acting in an unlimited way, are still based on a legal institute of condition, which is a modality of obligation.

Point 4: Enforcement actors. Because the pure potestative condition is unlimited in the scope of desired possibilities, it is difficult to think of another legal actor who can enact such concept, other than the party of the contract. In case of the debtor, it is obvious that the pure potestativity creates no obligation whatsoever, therefore, no corresponding rights could be defended. The realization of condition through the court is a standard procedure of deeming the condition fulfilled, however, that is impossible in case the court interprets the condition as a pure potestative condition favoring the debtor. In case of the creditor, the court also has a potential to disregard such conditions, however, only in a handful of legislations which prohibit any pure potestative conditions.

Transformative right's realization process is different: it could be confirmed by the court.[389] It is impossible to violate a transformative right, however, unlike the pure potestativity, the legal consequences of such rights (amendments in obligations) could be protected by the court. Adding the previous point on contracting parties, the following could be suggested. Unlike the pure potestative conditions, transformative rights could be enabled by both contracting parties and court. The scope of legality is broader for transformative rights than for pure potestative conditions.

[389] VYACHESLAV E. KARNUSHIN, SEKUNDARNYYE PRAVA V GRAZHDANSKOM PRAVE ROSSIYSKOY FEDERATSII: OBSHCHIYE VOPROSY TEORII, SEKUNDARNYYE PRAVA V GRAZHDANSKOM KODEKSE RF [SECONDARY RIGHTS IN THE CIVIL LAW OF THE RUSSIAN FEDERATION: GENERAL QUESTIONS OF THEORY, SECONDARY RIGHTS IN THE CIVIL CODE OF THE RUSSIAN FEDERATION], at 24 (in Russian, 2016).

Point 5: Reaction mechanism nature. Possession and transformation. The previous analysis might suggest a new idea. Even though, transformative rights are well integrated into the contract and common business practice, these rights are still secondary in nature, which is not disputed among researchers, "as they presuppose the existence of other primary rights."[390] The meaning of "secondary" behind such rights can also be seen in the mechanism of the transformative right: it is an answer to something. Karnushin wrote that *exceptio* was created later than *actio*: in a theoretical sense, this meant that the progenitor of the transformative right (*exceptio*) was the legislator's reaction to a social connection enshrined by the norms of law (what is called the wording "legal relationship").[391] Therefore, the transformative right is secondary not only towards the right but as a reaction mechanism of the party to the changing circumstances.[392] This reaction mechanism is explicit in the right of acceptance or in the right of challenge, but less feasible in other cases, like the right to withdraw or to terminate. The mechanism of "answer" is still present: the usage of transformative right is dictated by the contract dynamics and changing circumstances. There is a motivation of the contracting party, a reasoning to use the transformative right. This could be interpreted by the court in a way, the realization of the transformative right is deemed valid.

Now comes the paradox. Pure potestative conditions are "additional" towards the contract and less integral with it than the transformative rights, however, they do not seem to be "secondary" as a reaction mechanism of the party. Two facts help such conclusion to be valid: condition is a juridical fact, and condition is a legal institute. In the case "I will pay if I sign the act of incoming control" or "I will pay if I am satisfied" there is no answer to anything, it is a proclamation. The acts of feeling, satisfaction and desire are "primary", they do not answer to any changing circumstance, moreover, no subjective right can affect its motivation. It is an unlimited expression of will without any corresponding obligation within its usage. This is the basic idea behind its uncertainty and overall voidness. Russian researcher I.S. Chuprunov suggests viewing every pure potestative condition as the source of transformative rights: transformative rights are born from the pure potestative conditions.[393] This is not true, however. Neither "I will pay if I want", nor "You will pay is I want" does create any transformative rights, those are closer to the rights of possession.

---

[390] Sergey V. Tretyakov, *Formirovaniye kontseptsii sekundarnykh prav v germanskoy tsivilisticheskoy doctrine* [*Formation of the Concept of Secondary Rights in German Civil Law Doctrine*]. Bulletin of Civil Law, № 2, at 253 – 270 (in Russian, 2007). Again, the Russian literature calls the "transformative rights" the word "secondary" because of this.

[391] *See supra* note 389, at 23.

[392] This gives a different feeling than the previous point on "additional": transformative right is also quite "additional" but more integrated into the contract than the pure potestative condition.

[393] Ivan S. Chuprunov, *Voprosy sfery deystviya i obkhoda preimushchestvennogo prava pokupki doli (aktsiy)* [*Issues of the scope and circumvention of the pre-emptive right to the purchase of shares*], Bulletin of Economic Justice of the Russian Federation, № 4, at 50 (in Russian, 2021).

Seckel emphasized an important point about the correlation between conditional transactions and transformative rights. He suggested two examples: in the first one, the party is given a right to acquire, in the second example, it is a disposition of property conditioned upon the buyer subsequent declaration to acquire the title. "Those are similar but in no way identical", he wrote.[394] That is because the realization of condition, even if it is an expression of will, is "so meaningless", but it plays a role of "starting mechanism."[395] The property is not disposed on the ground of pure potestative condition (the expression of will), but on the grounds of concluded contract; therefore, any expectation right in this case cannot be a transformative right. It does not vanish because of condition occurrence but becomes a full-fledged right.[396]

In other words, Seckel's assumes the expectation right is not transformative. Expectation right is derived from a casual suspensive condition: it is created for the potential acquirer after the contract conclusion and before the condition occurrence.[397] Such rights are transferable to other parties out of the contract and transmissible on death. This makes a big difference comparing to transformative rights. Transformative rights are very person- of party-related to be transferred to other parties or transmitted on death. It is impossible to think of transferring a right to terminate the contract, or a right of author to ask for price deductions. Conditions do not create transformative rights, they create a "something" which is close to the right of possession. Judging from this perspective, pure potestative conditions are closer to the rights of possession than transformative rights.

This duality is baffling. On the one hand, the pure potestative condition is a unilateral action of modification, which makes it closer to transformative rights; yet the rights derived from the legal concept of condition are closer to the rights of possession. It could be seen that Euler circles of both concepts mix and do not mix at the same time. Such analysis gives the impression that all pure potestative conditions create a unique form of subjective right, but the nature of such subjective right refers to the field out of concept of transformative rights suggested by E. Seckel. He asks a question on whether there is a *numerus clausus* of transformative rights in nature and considers that the answer to this question is "rather affirmative than negative."[398] It is possible to agree with Seckel's idea and suggest a new approach: everything not a transformative right is a pure potestative condition.

---

[394] Emil Seckel, *Die Gestaltungsrechte des burgerlichen Rechts* [*Transformative rights in civil law*], in: FESTGABE DER JURISTISCHEN GESELLSCHAFT ZU BERLIN ZUM 50 JÄHRIGEN DIENST-JUBILÄUM IHRES VORSITZENDEN, RICHARD KOCH [COMMEMORATION OF THE LEGAL SOCIETY OF BERLIN ON THE 50TH ANNIVERSARY OF THE SERVICE OF ITS CHAIRMAN, THE REAL PRIVY COUNCILOR, RICHARD KOCH], at 214 (1903, trans. into Russian, 2007).
[395] Id.
[396] Id., at 215.
[397] *See* Part 3.2.2. German approach on legal pendency. Protected expectation, at 127.
[398] *See supra* note 394, at 216

2.4.3. Legislative suggestions

How could this analysis contribute to the balance between the autonomy of will and imperative law? The theoretical analysis might suggest some valid changes to the legislations.

It is safe to assume that any right of unilateral action is a transformative right if the following is complied with. First, if the legislation is hinting or explicitly fixing the usage of such right (a right to withdraw, a right of preemptive purchase, a right to challenge), then it is a transformative right. Secondly, in the contract that stipulates a possible unilateral action of the party, if it is associated with additional corresponding duties of that same party, then it is a transformative right. Thirdly, if the possible unilateral action of free discretion is descending from the common business practice, which is well-known to a wide range of actors working in the specific sphere, then it is a transformative right. In all three cases, the legality of the transformative right within the contract could be confirmed. If there is a provision which enables the party to commit a unilateral action without any limits or remorse, without any regulation of domestic legislation (neither acceptive, nor prohibitive), and such provision is not known or contrary to the common business practice – it is a pure potestative condition. These standards might possibly be used to deem such provision in the contract null and void.

A possible legislative scheme could look the following way:

- Acknowledging and defining the transformative rights as subjective rights that modify the obligation or whole contract by the means of willful unilateral action.
- Applying the following criteria to transformative rights: "stipulated *ex lege* or by parties", presence of "associated obligation" of the party with such right, and transformative rights should be "non-contrary to the common business practice."
- Prohibiting any pure potestative conditions (including favoring the creditor and the debtor).

It is important to note that the applied criteria of transformative rights are confirming the presence of such right (this concerns *non ex lege* transformative rights). If one of the criteria is not complied with, then the court may interpret such right as a pure potestative condition, which will be always null and void with regards to the suggested scheme.

Therefore, if the Euler's circles were to be drawn with all the necessary changes into the legislation, the following would happen. The circle with the transformative rights would be smaller and placed in the center of the circle with pure potestative conditions. However, the pure potestativity circle would not consume the circle with transformative rights: in other words, everything out of the bounds of the transformative rights is a pure potestative condition, which should be deemed void.

This legislative suggestion might create three objections, which need to be addressed beforehand. First, what if the parties explicitly agree on a pure potestativity favoring the creditor in the contract ("You pay if I want")? Indeed, if the scheme above is disregarded, then, according to the freedom of contract principle, the example shall be valid. What is even more important is that the economical values of creditor and debtor are not changing in an unfair way. Still, the creditor's ability to ask for payment is quite abusive: it can happen tomorrow, or it can happen when the debtor the least wants it. The damage to the debtor would not always have an economical nature, which leads to the issue of sustainable defense for the debtor. It is impossible to award damages to the debtor in case of pure potestativity favoring the creditor. On the contrary, giving an associated obligation for the creditor (to give a prior notice, for example) would solve the issue entirely: that way it becomes a transformative right. Therefore, it is better to prohibit any pure potestative conditions as a form of unlimited discretion. Transformative rights are covering all sorts of abilities, available on the market, and they are more certain in nature.

The second complaint could be about the "contrary to common business practice" part. Indeed, there is no definition on what is considered common business practice, still it is one of the sources of law. It is impossible to leave the court without any source of interpretation. The analysis suggests the usage the wording "common business practice" for two reasons. Reason one: it is much better than using the concept of "good faith"; it is less vague, and it allows more concrete interpretation by the court within a specific case. Reason two: the criteria of transformation rights should be viewed together; if one criterion is violated, then there is no transformation right established. Coming back to the case of "act incoming control", such act is not contrary to the business practice, however, the debtor did not have any associated obligation with it. Such matter of law is, in fact, a pure potestative condition and void on these grounds.

The third complaint may concern the satisfaction model. Is such model possible under the suggested codified rules? The answer is yes, it is possible. However, with certain limitations. According to the suggested rules, the provision on satisfaction should contain an associated obligation (a written action or a form of implied-in-fact action), which could potentially be confirmed further as a matter of evidence. Also, the provision on satisfaction should not be contrary to the common business practices. Since "the common business practice" is an issue itself, perhaps, a model of reference to a good will person might help in understanding whether the criterion was violated or not. Therefore, even in case the wording of provision on satisfaction contains "if" or "when", if the "associated obligation" and "common business practice" criteria are complied with, the ability to express the satisfaction will become a valid transformative right.

The biggest advantage of the suggested approach is its direct and concrete application. It is necessary to get back to the discussion of legislations which prohibited the pure potestative conditions is full (Azerbaijan, Georgia, Turkmenistan). Their approach appears to be fitting in the current discussion. It was previously suggested by authors that the direct application of the article on pure potestativity (e.g., Art. 328.3 of the Azerbaijan CC), could be harmful and destructive to the business practice. However, with the application of the suggested approach, the issue is no longer present. Moreover, it does not threat the theoretical basics of the states which refer the concept of "condition" to a whole contract, i.e., the solution could be applied to all Germanic-type legislations.

The French-type legislations correlate the concept of condition only with obligations. This creates another picture for the theoretical problem. The Court of Cassation shows its desire to use the rule on pure potestativity favoring the debtor if there is any condition that completely violates the performance/counter-performance processes within the synallagmatic contract. This means that the legislative suggestions could be altered for convenience. The transformative rights do not need to be distinguished under the French-type legislations, and the necessary criteria of transformative rights could be reimagined as criteria of banned potestativity, therefore, anything not a pure potestative condition is a potestative right:

Possible example: "An obligation undertaken subject to a condition whose satisfaction depends on the will of the party alone is a nullity unless the realization of such obligation is associated with another action of that party and not contrary to the common business practice."[399]

Therefore, it can be safely assumed that equating the pure potestative conditions with the transformative rights is a theoretical mistake. Indeed, the legal consequences of both concepts are similar, and this matters for the practice a lot. However, the very nature of the concepts is different. There is still an inner conceptual limitation to transformative rights, while the pure potestative conditions are absolute in this sense. Meanwhile, the transformative rights have more sources, while a pure potestative condition is a product of pure unsubstantiated desire. Transformative rights are more integrated into the contractual relationship, which gives a lot more certainty and stability to its usage. And finally, the transformative right is an "answer", not a "statement", while the pure potestative condition is an "uncertain statement." "Uncertain statement" is an illogical combination of words. This supports the idea that such conditions should be prohibited in full for the purpose of theoretical and practical stability.

[399] This is a reimagined provision of French Civil Code, Art. 1304-2, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016, available at* https://bit.ly/2Qodnso (visited July 1, 2023)

2.5. How legislators provide balance in potestative conditions?

The concept of potestative conditions surrounds most of the business transactions nowadays. In each of them the parties are influencing the occurrence of rights and obligations. This all happens according to the principle of autonomy of will. However, being potestative also means being vulnerable to manipulations as far as the creditor and the debtor can use the potestative conditions not only to their own benefit and to the contrary benefit of the other party. The nature of the potestative conditions, which allows the parties to influence the condition occurrence creates certain struggles for the legal scholars and the law enforcement actors. Every potestative condition bears a possibility of negative influence on the contract execution. One of the primary concerns in this question is providing a sustainable amount of legal defense for the party, who has no authority to influence the condition occurrence, against the party with a potestative power.

The comparative analysis on this type of conditions creates a blank picture: most legislators do not regulate such conditions whatsoever. It appears, however, there is a group of French-type civil codifications which stipulate a prohibiting rule on pure potestativity favoring the debtor. Also, there is minor group of former USSR countries which prohibit any pure potestative conditions, including those favoring the creditor. At the start of comparative analysis, the prohibition of pure potestativity favoring the debtor seems to be reasonable, while towards the creditor to be not. In case the debtor acquires a pure potestative power ("I pay if I want") it can safely be assessed that there is no obligation first and foremost. In case of the creditor, the legislator's aspirations are not so simple to be understood. The analysis on the scarce amount of doctrine available in those countries shows that the legislator understands the pure potestativity in an absolute way of pure desire, therefore, it does not matter who is in the pure potestative power: creditor or debtor. In both cases the contrary party will suffer from the absence of authority. Therefore, some legislations prohibit the pure potestativity for the sake of stability of the legal circuit.

This solution seems to be valid, at first glance. However, the direct application of the prohibition can possibly damage any party actions in the common business practices. The theoretical possibility of such situation asks for the better refinement of the civil code rules. Additionally, no legislation even tries to accept to old model of satisfactory sale: if the pure potestativity favoring the debtor is prohibited, then any satisfaction sale is null and void. The first look on how legislations regulate potestativity suggest that the amount of regulation is clearly insufficient and asks for better understanding of the concept.

The first question was on the classification of potestative conditions. The classification of pure and simple potestative conditions has no visible issues, as in the first case the potestativity is associated with a pure desire, and in the second – there is always an action or a form of commitment to the condition occurrence. However, on the grand scheme of this unique classification, it appears that simple potestative conditions do not differ from long-established mixed conditions. The determination of level of influence of the third party in case of mixed condition is impossible to measure. Vice versa, every occurrence of simple potestative condition is influenced by the third parties and outer circumstances. It is wise to assess, that in case of both potestative and mixed condition, the main role is given to the contracting party, who is influencing the condition occurrence: the commitment of the party is the starting trigger to the process of condition occurrence, while everything outside of this commitment is less relevant. Therefore, it can safely be suggested that the mixed conditions failed the theoretical test and could be disregarded. This point has indirect evidence in law: some legislations once had the classification but now refused it, or some legislations understand mixed conditions as a "mix" of casual and potestative. There is indirect evidence in the doctrine: scholars from both 200 years ago and modern times do not suggest mixed condition as a type of condition. The practical validity of the mixed conditions is also questionable.

The doctrinal analysis of the doctrine on potestative conditions also creates a necessary basis for the future legislative suggestions. The approaches of Russian, French and American law were reviewed. It appeared that through the history of Russian doctrine, including the pre-revolutionary times, the attitude towards the potestative conditions was solid and relevant to the teachings of the modern days. However, the drastic changes in the governing process and the type of economics affected the attitude in a historic way. In Soviet times and after the fall of USSR, the potestative conditions encountered the issue of acceptability both within the legal doctrine and the court practice. Relevant to the question on "compliance with law", the Russian law at the time of USSR had an observable potential for a forced conceptual limitation of the usage of conditions. This limitation could be seen in exactly understanding the condition only as a happening, no party could influence. Still, the amount of literature and the absence of Soviet case law cannot give enough evidence for a clear answer on the matter of forced conceptual limitations. Moreover, the development of potestativity doctrine in Russia received a huge boost in 2010s, followed by the amendments in the civil code which explicitly allowed potestative conditional obligations in the contract. With such amendments, the question on the other possible issues with potestative conditions, for example, in the context of synallagmatic contracts, is left open.

Doctrines and courts of other jurisdictions struggled with the abuse of potestative power, mostly. The French law was a solid reference for many other legislators in the world, however, itself had theoretical issues with the reception of the classification. The classification was primarily focused on the creditor's influence, while the French legislators tried to extrapolate it onto the debtor's doing as well. As a result, two theoretical problems occurred: first, many "normal" conditions were threatened. This was a similar case comparing to the former USSR legislators who prohibit any pure potestative conditions today. Secondly, there was no understanding on how to sanction the debtor for a pure potestative condition. The solution of these issues could be seen in Carbonnier's approach, and in most court decisions up until nowadays. The understanding of the pure potestativity favoring the debtor became very broad under the court's discretion. In case the debtor abuses his right and violates the creditor's lawful interests, the court uses the article on the nullity of obligation dependent upon the debtor's pure desire. Furthermore, the French enforcement actors actively used the fiction of bad faith condition fulfillment.

The American courts were deciding the question of pure potestativity by exploring the possible unjust enrichment in the case. Some authors suggested that the pure potestativity should be interpreted under the subjective and objective criteria of personal satisfaction, therefore, the creditor either was not given any possible defense, or under the market value pretense and the conditional promise was deemed illusory consideration. Other authors suggest that the potestative condition was deemed illusory only when there no more "healing" techniques left for the court. One of the "healing techniques" of the court was deciding that the promise should be performed in a good faith. In other cases, the court asked the promisor to bring reasonable efforts to enforce the agreement. The court could even constitute an opportunity for the party in breach to offer a promise again. With similarities to French case law, the condition could be deemed as occurred or not-occurred.

The analysis on some of the individual doctrines allowed to create a picture on how the law on pure potestativity is enforced by the legal actors. From the presented cases, an assumption could be made: the courts are not eager to deem the condition void, instead there are more eager to use softening and healing techniques, like imposing certain obligations on the party in potestative power, for example. This is a tendency seen in other legal concepts, other than condition. Deeming the condition void or illusory is a very harsh instrument, the courts are trying to avoid as much as possible. Such attitude is positive for two reasons: it leaves a room for the party in potestative power to reconceal and to bring more commitment to the contractual relationships, and the parties' relationships are not torn apart, like in the American case of "standing offer."

The solutions of French and American courts bring the necessity of reviewing the rule on condition fulfillment. The fiction of bad faith condition fulfillment is a popular rule among the national and supra-national codifications. It stipulates that the condition is fulfilled if the party, to whom the occurrence of such condition is not beneficial, prevented its occurrence in a bad faith. Before examining the correlation with potestative conditions, it was necessary to make a comparative review of the fiction rule. The legislators appear to construct the imperative rule two ways: either by constituting bad faith, or by applying concrete standards for the rule to trigger. It could be suggested that the solution of applying concrete standards to the fiction rule is a better choice. The concept of "bad faith" has two major concerns: the ambiguity of the term and the lack of logical correlation with potestative conditions. Applying concrete criteria to the application of the fiction rule would solve the problem in a simple way. Still, it is necessary to admit that some of the legislations which use the concept of "bad faith" attempt to elaborate on it through the other imperative rules: for example, by describing what exactly an abuse of rights is. The comparative analysis, however, still suggests that the codified structure of the second group of legislators is better.

For the purposes of better legislation refinement, the analysis on each of the suggested standard of the fiction rule was reviewed. To satisfy the purposes of research, each of the standards should comply with the nature of both casual and potestative conditions. After the review, some of the standards were disregarded, some added, and the rest were defined. Therefore, three main standards of the fiction rule, which respond all types of conditions, could be suggested: sole interest (benefit) of the contracting party preventing the condition occurrence, the level of deliberateness of the party's actions, and the presence of reasonable excuse to prevent the condition occurrence. These standards could be put as a basis for the new rule on condition fulfillment. The standards of fiction rule may pose a contribution to the balance between the party autonomy and imperative rules of law.

Furthermore, it was also necessary to answer the question on the nature of the fiction rule: whether it is a sanction or a correcting mechanism for the party in breach. The doctrinal opinions differ, however, from the previous analysis of case law it could be safely presumed that the fiction rule is not a sanction. It is a correction mechanism, an interpretation tool in this sense. By using the fiction rule, the court makes the conditional contract unconditional. The sanctions are based on the occurred obligation of the party to perform. Hypothetically, it is possible to ask for moral damages or damages of expected income in that case. However, those damages would originate from the failure of the party to perform the obligation, and not because the party influenced the condition occurrence contrary to the rules of good conscience.

The major question was on the true nature of pure potestative conditions. Hundred years ago, the German doctrine suggested the concept of "transformative rights" which was very close to the concept of pure potestativity. Transformative right is an ability to transform the legal relationship by a means of unilateral action. At first, the way the pure potestativity works is similar, which is seen in the unilateral expression of will. Because of that, many researchers place an "equality" sign between these concepts. Transformative rights have multiple examples behind the concept, and the creator suggested that the list of such rights is *numerus clausus*. This concept is not explicitly stipulated in any legislation; however, the right to accept an offer or to terminate the contract are commonly established in law. The doctrinal analysis on transformative rights is useful for depicting the place for the concept of pure potestative condition in the law.

On paper, there are intuitive similarities between the abovementioned concepts. Yet, they are different. Exposing the differences helps in defining the pure potestative conditions. The first point of difference is the limit, the extent to which both concepts are acting. While the concept of condition is filled with uncertainty, the transformative rights are more certain: they act as abilities or opportunities for the contracting parties to be used whenever they would like to. This confirms an impression that the true nature behind the pure potestativity is a pure expression of desire, whereas a transformative right is more limited in such expression. The second point is the source the concept may come from. The pure potestative conditions appear to have only one source of presence: from the contract. Transformative rights appear to have an additional source: imperative rules of law; some of the rights are established directly into the legislation (a right to preemptive purchase, for example). There are more differences between the concepts: transformative right is more integrated into the contract, and its realization could be confirmed by court. The last difference is essential: pure potestative condition is closer to the right of possession, as it is primary and does not constitute a reaction; transformative right is secondary in this sense of word: it is a response.

The theory of transformative right is yet to be refined in future. However, after the theoretical analysis, some legislative suggestions could be made. If the transformative rights truly exist, then the pure potestative condition is any unilateral action outside of the *numerus clausus* of transformative rights. The possible legislative scheme suggests acknowledging transformative rights, establishing criteria of such rights ("stipulated *ex lege* or by parties", presence of "associated obligation" of the party with such right, and transformative rights should be "non-contrary to the common business practice"), and prohibiting any pure potestative condition, including those favoring the creditor. This set of rules might pose a novelty in legislative research. It is an attempt to contribute to the balance between the party autonomy and imperative law in the context of conditions.

To support the possible discussion on the topic of potestative conditions and transformative rights, the benefits and objections of the legislative suggestion were addressed. In case the contracting parties specially wants to include a pure potestative condition favoring the creditor, such condition could be changed into a transformative right by simply stipulating an associated obligation with it (for example, giving a prior notice). The suggestion on common business practice is more concrete than the concept of good faith. This concept has a potential to allow better court interpretation in future. Moreover, the introduction of transformative rights into the legislation and prohibition of pure potestative condition would help the concept of satisfaction to fit the continental law system. The potential provision in case of French-type legislations would require slight changes: the transformative rights might not even be established as a concept; however, the criteria of those rights could be implemented into the rule on the nullity of obligation dependent upon the pure desire of obligor. This way, the definition of pure potestative conditions is unified, and such conditions are always deemed invalid, regardless of the reference to the creditor or debtor. The acceptable form of unilateral action is a transformative right.

The next part starts a discussion on how the legislations could withstand with the uncertainty issues of the concept of condition. The first uncertainty issue to be reviewed is the legal pendency, or the period before the condition occurrence.

3. Legal pendency, or before condition occurrence

Condition is a modality which enables the rights and obligations of the contracting parties. With the occurrence of condition, the veil of modality vanishes leaving an unconditional transaction behind it. Before the occurrence, the condition is still a modality which is uncertain to occur. On the one hand, the uncertainty feature makes the concept of condition a flexible and useful tool for the contracting parties. On the other hand, the parties should wait for an undefined amount of time before its usefulness could be achieved.

This uncertainty issue could be observed immediately after concluding a conditional transaction: the condition is a trigger that is yet to occur. Unlike the time modification, it is not clear when, or if at all, the condition will occur. This qualifying feature of condition transposes into the doctrine of "legal pendency", which explores the legal status of the contracting parties in the period after the contract's conclusion and before the condition occurrence. Same as in case of condition occurrence, the legal status of the parties in the waiting period is not always clear.

While the contracting parties are waiting for the condition to occur or not to occur, many questions could be asked. Do the parties have any rights? If yes, what is the nature of such rights? If no, is the contract existing at all before the condition occurs? Are the parties obliged to do anything before the condition occurs? What are the protection measures to ensure the safety of the buyer? What happens if the goods are damaged during the waiting period? There is no unanimous understanding of what the answers to these questions are: neither within the legal doctrines, not within the legislations. For a closer look into these and other possible aspects of the legal pendency doctrine, this part attempts to present a comprehensive comparative analysis both on doctrine and legislation.

The aim of the analysis is to evaluate the methods, used by the legislators to regulate the legal pendency. Some legislators appear to apply more protective mechanisms to the parties than the others. First, it is necessary to review the waiting period from the legal-historical perspective. The evolution of the debate is reviewed through the doctrine of continental law countries (France, Germany, Russia), followed by the doctrinal analysis of common law states (the US, the UK, Canada). Afterwards, a comparative analysis on the current legislations could be presented to show the regulatory approaches to the waiting period, including the evaluation on the levels of protection.

While there are some similarities of legal systems in terms of debate, there are big differences of the same legal systems in finding the answer to the nature of legal pendency and ways to prepare the contracting parties for it.

3.1. Doctrinal analysis of continental law on legal pendency

The basic rule of "pending condition" is simple: until the suspensive condition is fulfilled, the transaction remains in the state of uncertainty as to whether it would enter into force. The discussion of pendency was particularly interesting for the Roman classicists not because of contracts, but because of the conditional legacy. The legal concept of condition, known today, derived from the conditions in the testaments, later developing as an independent clause in contracts. The reception was different for each of the major legislations: French and German law in the continental legal system and English and American law in common law. The doctrines of other states often referred to the doctrines of Germany, France, and the U.S. in order to find the most suitable answer for their own.

Therefore, it is necessary to start from one of such doctrines. In this paragraph, the discussion of the French jurists will be followed by the German scholars. Both doctrines appeared to be somewhat successful in finding the way to explain the nature of this pendency and apply the necessary legal protection based on that. The paragraph will also feature one of the "other" doctrines which attempts to accumulate the teachings of French and German: Russian doctrine. The following doctrinal analysis is important for the further comparative legislative analysis on the topic. Findings the most appropriate solution for the legal pendency is one the ways to contribute to the balance between the party autonomy and imperative rules law regarding the concept of condition.

3.1.1. French answer on legal pendency. Retroactive effect

The French lawyers considered there are two options: "there is something" and "there is no contract at all" before the condition occurs. However, there was a certain deviation in explaining the bindings/non-bindings between the contracting parties, which led to completely different answers towards the understanding of legal pendency in French law. Multiple French authors discussed the question of legal pendency and the ways to regulate it: Mathias Latina, Olivier Milhac, Barry Nicholas, and others. An extensive analysis of the French approach on the question of legal pendency was also done by Russian scholars Alexey Ageev and Dmitriy Gudkov.[400] Through the available French literature and references by other scholars, it could be possible to confirm the main ideas.

[400] *See* Aleksey V. Ageev, *Osnovnye podhody k problemam v sfere usloviy vo Francii.* [*General approaches in the sphere of conditions in France*] (in Russian, 2016), *available at* https://bit.ly/3XLEQYg (visited July 1, 2023); *see* Dmitriy V. Gudkov, *Problema kvalifikatsii otnosheniy storon do razresheniya otlagatelnogo usloviya* [*The Problem of Qualifying the Relationship of the Parties Pending the Settlement of a Qualifying Condition*], Bulletin of the Civil Law, № 3, at 7 – 56 (in Russian, 2015).

Robert-Joseph Pothier (1699-1772), the French judge, considered that the essence of a suspensive condition was to hold the moment of obligation occurrence. There was no debt after the contract was signed, in fact, there was an expectation created, that such a debt would take place in future.[401] He used this approach to explain certain aspects about the legal pendency, for example, in case of mistake the conditional creditor could claim an unjust enrichment.[402] The French doctrine already had a view that obligation was the object that was being conditioned.[403] If the suspensive condition was important for depicting the moment of obligation occurrence, then it is logical that every performance before the condition occurrence could be returned.

According to the theory of Rene Demogue (1872-1938), any juridical act, that did not have a substantial element, was still an existing one, however did not create the legal consequences as the usual juridical acts did.[404] The right created from such a juridical act was called "eventual right" (*droit eventuel*). It was in fact an "embryo of law" (*germe de droit*) which did not bind the contracting parties with obligations. R. Demogue considered that the subjective rights were developing according to a certain scheme: an expectation evolved into an eventual law, which then evolved into a right (which could be conditioned by the parties).[405] Therefore, there might have been a "something" before the condition occurred – eventual right.

The opposite opinion is presented nowadays by Mathias Latina. His original conception suggests that the condition itself is not influencing the contractual obligations, but the rules of the contract. Therefore, a suspensive condition acts as a "blockade" for a specific effect of the contract; because of that, the contract does not create any obligations immediately, but only upon the moment of the condition occurrence[406]. In sale the property is not transferred, or the debts are not redirected in the assignment contracts[407]. By this reason, M. Latina considers there are no obligation bindings or even more, there are no "embryos of law" before the condition occurs.[408] However, the contracting parties are still bound by the general contractual rules and principles, M. Latina assumes.[409]

---

[401] ROBERT J. POTHIER, A TREATISE ON OBLIGATIONS, CONSIDERED IN A MORAL AND LEGAL VIEW, VOL. 1, at 131 (1999), cited by Gudkov, *see supra* note 400 (Gudkov), at 13.
[402] *See supra* note 401, at 131.
[403] *See* Part 1.1.2. What condition affects (object of condition), at 26.
[404] OLIVIER MILHAC, LA NOTION DE CONDITION DANS LES CONTRATS À TITRE ONÉREUX [THE NOTION OF CONDITION IN CONTRACTS FOR VALUABLE CONSIDERATION], at 87 (in French, 2001).
[405] Id.
[406] MATHIAS LATINA, ESSAI SUR LA CONDITION EN DROIT DES CONTRATS [ESSAY ON THE CONDITION IN CONTRACT LAW], at 317 (in French, 2009), cited by Aleksey V. Ageev, *Osnovnye podhody k problemam v sfere usloviy vo Francii.* [*General approaches in the sphere of conditions in France*] (in Russian, 2016), *available at* https://bit.ly/3XLEQYg (visited July 1, 2023).
[407] Id.
[408] Id.
[409] Id.

A comprehensive explanation of the legal pendency in French law was given by Marcel Planiol (1853-1931). He described the legal pendency as a "hope on the occurrence of an obligation."[410] On the one hand, it seems as if the consequences of obligation occurrence were temporarily suspended. There was no enforcement, and if anything was performed before the condition occurrence by mistake, the debtor had a right to retrieve everything back. The seller risked the loss of property until the condition occurred, and the prescriptive period did not flow also. On the other hand, the creditor might undertake measures in order to secure the property, which was about to be transferred by conditional transaction (*actes conservatories*), for example, by registering a conditional right where it was possible. Even though the creditor's claim was not to occur until the condition's fulfillment, M. Planiol admitted a possibility of re-assignment and succession.[411] He also assumed that the creditor did not have any rights, but had a certain interest in condition occurrence, and because of that, "not only the rights could be assigned."[412] This implied a possibility of transferring the expectations.

Moreover, even though the contract before the condition occurs does not create any specific effects for the contracting parties, it is still existing and therefore creating general legal consequences any concluded contract in French law would have.[413] First, the law applicable to the conditional contract would be the law existing at the moment of its conclusion, not the moment of the condition occurrence. Secondly, *position contractuelle* of the conditional creditor or debtor could be transferred to another entity by means of universal or singular succession.[414] The French law does not acknowledge any rightful expectations in the pending period (*pendente conditione des droits*). In this case the previous holder is transferring an active part of the contracting parties' qualities to the next holder (*qualite de contractant*). In other words, there is no expectation, but the contractual position itself can be transferred. Thirdly, this *position contractuelle* may be secured. For example, the conditional creditor might announce his conditional right in a bankruptcy procedure of the conditional debtor, this contractual position could be secured by bank guarantees, suretyship, or mortgage. It could also be written into an inventory of inherited property after the death of the conditional debtor. A security arrest may be imposed towards the person who acquires the right conditionally. The

---

[410] MARCEL PLANIOL, TREATISE OF FRENCH CIVIL LAW, PART 1: THE THEORY OF COMMITMENT, at 93 (trans. into Russian by V. Hartmann, 1911), cited by Dmitriy V. Gudkov, *Problema kvalifikatsii otnosheniy storon do razresheniya otlagatelnogo usloviya* [*The Problem of Qualifying the Relationship of the Parties Pending the Settlement of a Qualifying Condition*], Bulletin of the Civil Law, № 3, at 17 (in Russian, 2015).

[411] See supra note 410 (Planiol), at 94, cited by Gudkov, *see supra note* 410 (Gudkov), at 17.

[412] Id., at 94-95, cited by Gudkov, *see supra note* 410 (Gudkov), at 17.

[413] Id., at 343 – 346.

[414] Ageev writes that "Position contractuelle" is a term invented by Laurent Aynes to explain an assignment not of obligation rights, but of something else, for example, potestative rights. *See supra* note 400 (Ageev); *see also* STEPHANE VALORY, LA POTESTATIVITE DANS LES RELATIONS CONTRACTUELLES [THE POTESTATIVITY IN CONTRACTUAL RELATIONS], at 344 – 348 (in French, 1999).

conditional acquirer may present his claims against the third parties, who are owning the property, based on the fact of breaking in the term of ownership.[415] The conditional creditor or acquirer could submit valid claims towards the contingent debtor or seller. For example, the conditional creditor can demand the sequestration of the right he expects to acquire. However, the conditional acquirer cannot prevent the seller to lease the object of the sale, even if it is done for a long term, because the seller was still the owner.[416]

From the analysis it becomes clear that the French doctrine provided a lot of answers to describe the contractual position of the party in the legal pendency. While the opposing opinions are still present, the overall approach of the doctrine is that there is an expectation that the obligation shall start, which is the same as the expectation that the condition will occur. However, the expectation itself is not acknowledged as such. Instead, it is a contractual position of the conditional creditor that could be transferred to others.

Other than the explanation of the contractual position in the legal pendency, the French lawyers also attempted to explain the reasoning behind the binding during the legal pendency period. The main answer is the retroactive action of the condition. If the condition occurs, it will influence not only the future after the condition fulfillment, but even the time before the condition is satisfied. In other words, the conditional obligations will be retroactively enforced from the time the contract was signed. Gottfried Schiemann, a 20th century German legal scholar, wrote that the retroactivity principle was the key point to the understanding of legal pendency in French law, since it explained the succession of conditional, pledge priority and many other practical issues.[417]

This answer correlates with the previous analysis on retroactive effect of condition[418]. However, the retroactive effect under the French law is subject to different kinds of exceptions: the parties' agreement, transfer of risks or tax rules, etc.[419] Because of these exceptions, it was earlier assumed that the retroactive effect of condition is not a completely fulfilling answer for legislators; same reasoning could be applied to the legal pendency.[420] The exclusions are done to support the stability of the legal circuit: so as, for example, the transfer of risks will not travel back in time.

---

[415] *See supra* note 400 (Ageev).
[416] MATHIAS LATINA, ESSAI SUR LA CONDITION EN DROIT DES CONTRATS [ESSAY ON THE CONDITION IN CONTRACT LAW], at 345 (in French, 2009).
[417] GOTTFRIED SCHIEMANN, PENDENZ UND RÜCKWIRKUNG DER BEDINGUNG: EINE DOGMENGESCHICHTLICHE UNTERSUCHUNG [PENDENCY AND RETROACTIVITY OF THE CONDITION: A DOGMA-HISTORICAL INVESTIGATION], at 80 – 81 (in German, 1973), cited by Dmitriy V. Gudkov, *Problema kvalifikatsii otnosheniy storon do razresheniya otlagatelnogo usloviya* [*The Problem of Qualifying the Relationship of the Parties Pending the Settlement of a Qualifying Condition*], Bulletin of the Civil Law, № 3, at 16 (in Russian, 2015).
[418] *See* Part 1.4.3. Comparative picture on retroactive effect, at 60.
[419] Id., at 90.
[420] *See* Part 1.4.4. Legislative necessity of retroactive effect, at 62.

Also, the rules on the retroactive effect of condition in French law are dispositive, meaning that the contracting parties may deem valid certain actions, committed by the parties during the period of legal pendency.[421] D.V. Gudkov appeals to the famous French academic Rene Savatier (1892-1984) to show another restriction applied to the retroactive condition. Savatier wrote that the statute of limitations cannot be retroactive against a person whose right was subject to a suspensive condition. Since a person could not exercise his right, he could be reproached retroactively and, thus, could not be deprived of this right.[422]

Moreover, in the specific question of legal pendency, the retroactive effect does not its purpose: it could be suggested that the retroactivity is subsequent to the condition occurrence. Therefore, the legal pendency is preceding the enforcement of retroactive effect. In other words, for the rights and obligation to be enabled, the parties should still wait for the condition occurrence. The retroactive effect does not award any advantages to the conditional creditor in a preliminary way. This a substantial flaw in the regulation of legal pendency. Perhaps, this could be one of the reasons why the French law refused the retroactive effect in 2016 amendments of the law of obligations.

At the end, the French approach appears to have the debate on whether there is an eventual right or not before the condition occurs. The French doctrine suggests answers for various kinds of situations. The main reply to the legal pendency is the retroactive effect of the condition, a possibility to apply the legal consequences of the conditional transaction to the period before the condition occurrence. It is a retroactive formula. This formula is convenient since it blends well with the idea of contractual position: it could be transferred, pledged, secured, etc. Along with the retroactive effect the French doctrine also speaks of ways to mitigate the following risks for the contracting parties. If the condition occurs, the French doctrine considered that the rights and obligations of the parties started from the moment the contract was concluded. However, the French law and doctrine also imposed certain restrictions to the retroactive effect. The French legislator has used the retroactivity concept to maintain legislative holes and to minimize the risks for the contracting parties. However, the retroactive effect of condition appears to be flawed: the previous analysis shows that the retroactive effect requires a substantial number of exclusions to be viable as a main rule. Moreover, on the specific question of legal pendency, the retroactive effect requires the condition occurrence for the necessary legal consequences to trigger.

---

[421] BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT, at 158 (1992).

[422] RENE SAVATIER, LA THÉORIE DES OBLIGATIONS: VISION JURIDIQUE ET ÉCONOMIQUE [THE THEORY OF OBLIGATIONS: LEGAL AND ECONOMIC VISION], at 272 – 273 (in French, 1974), cited by Dmitriy V. Gudkov, *Problema kvalifikatsii otnosheniy storon do razresheniya otlagatelnogo usloviya* [*The Problem of Qualifying the Relationship of the Parties Pending the Settlement of a Qualifying Condition*], Bulletin of the Civil Law, № 3, at 17 (in Russian, 2015).

3.1.2. German approach on legal pendency. Protected expectation

The German answer to the problem of legal pendency is somewhat different comparing to the highlighted French approach on retroactive effect. Instead of retroactive action of a condition, the German law uses another model, which is called the preliminary action of a condition. What is it and how does it differ from the French retroactivity?

According to the famous German lawyer Rudolf von Ihering, during the legal pendency, the transaction is like an heir, who has been conceived, but is yet unborn.[423] The preliminary action model considers creating legal consequences for the parties even before the condition occurs, while the retroactivity model needs to wait the moment when the condition will occur. The difference between these two models is small but important: the preliminary model creates some concrete rights for the parties the moment they sign a contract, while the retroactivity model assumes the parties need to wait first for the condition to occur to apply the retroactive effect of the condition.

At the same time, the BGB allows the parties to agree on the retroactive action of the condition, making it a dispositive clause. Benedicte Fauvarque-Cosson assumes that during the legal pendency the conditional creditor may sue the conditional debtor for the disposition he committed.[424] Hence, the parties which concluded a conditional agreement under the German law are bound more than in French law. This happens for two reasons. First, already after signing the contract both contracting parties cannot simply resign from the contract once they agreed on it. Secondly, any dispositions during the state of legal pendency are deemed ineffective. Moreover, BGB provides the rule on performance in good faith, stating that the debtor should perform up to the requirements of good faith, taking customary practice into consideration.[425] Therefore, in the state of legal pendency, the debtor should already perform in a good faith towards the creditor and the object of the contract, even though the occurrence of the condition is still uncertain. The preliminary action of condition *Vorwirkung* opens more opportunities for the conditional creditor.[426]

---

[423] Ilya I. Zikun, *Eksternalnyy effekt dogovora upravleniya imushchestvom* [*External effect of the property management contract*], Bulletin of Civil Law, № 6, at 60 (in Russian, 2017).

[424] Benedicte Fauvarque-Cosson, *The New Provisions on Conditions in the UNIDROIT Principles 2010.* Uniform Law Review. Vol. XVI. Issue 3 (2011), *available at* https://bit.ly/3G5bZV7 (visited July 1, 2023). He writes, "while there are many exceptions to the retroactivity rule in the French legal system, under German law, the person who benefits from the condition may either ask for damages if, before the condition occurs, its rights were diminished, or ask for ineffectiveness of dispositions during the period of suspension (BGB § 161)."

[425] German civil code BGB, § 242 (1900, cons. ver. 2021), *available at* https://bit.ly/408nSVk (visited July 1, 2023).

[426] Manfred Wolf, *Allgemeiner Teil* [*General Part of Civil Law*]*, Vol. 3, § 104-240* in: HANS T. SOERGEL, BÜRGERLICHES GESETZBUCH: MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN: KOHLHAMMER-KOMMENTAR [CIVIL CODE: WITH INTRODUCTORY LAW AND SUBSIDIARY LAWS: KOHLHAMMER COMMENTARY], at 521 – 522 (in German, 2002).

This is not the full answer to the German legal doctrine. In the state of legal pendency, the conditional creditor has clear expectations for the object of the contract. The legal qualification of this expectancy is not a simple question in German law and doctrine. Carl Crome (1859 – 1931) described the preliminary action of the condition as a situation, where the contracting party, in whose favor the other party was obliged to dispose something under a condition, acquires an expectation right, while the other party acquires a corresponding duty to the expectation right.[427] The existence of preliminary action and expectation rights seems to be supported by an overwhelming majority of German legal scholars.[428] Comparing to the French doctrinal scheme of conditional transaction with contractual positions, the German doctrine is way ahead: the expectation right is similar to a full-fledged right (almost a right of possession). It is still not a right because the condition has not yet occurred.

One important moment, however, is that not every conditional transaction in Germany is protected by expectation rights. The key point to understanding how the German doctrine approaches the legal pendency is that there are two types of expectations in German law.

The first one is called *Anwartschaft*, or a simple expectation of something to happen. The state of legal pendency is qualified as a simple expectation in cases, where the creditor is not guaranteed with anything. For instance, A is gifting a new car to his brother B on the condition that A wins a boxing tournament. The possible debtor A is the main influencer of the condition occurrence; hence, B is not guaranteed with anything at all. A simple expectancy is created when the condition occurrence is dependent upon the debtor's behavior or when his unilateral actions can nullify the prerequisites for the condition occurrence, K.V. Nam assumes.[429] Thus, a simple expectancy is a legal status where the law does not guarantee anything to the creditor concerning the acquisition of rights, since the occurrence of a condition is uncertain. What is the meaning behind the regime of simple expectancy? The simple expectancy regime confirms that the parties have concluded a conditional agreement, and that the parties are bound by the contract. Most of the conditional transactions in German law are covered by a simple expectancy regime.

---

[427] CARL CROME, SYSTEM DES DEUTSCHEN BÜRGERLICHEN RECHTS [THE SYSTEM OF GERMAN CIVIL LAW], Vol. 1, at 440 (in German, 1900).

[428] *See*, *e.g.*, ALBRECHT K., J. VON STAUDINGERS KOMMENTAR ZUM BURGERLICHEN GESETZBUCH: MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN. ECKPFEILER DES ZIVILRECHTS [J. VON STAUDINGERS COMMENTARY ON THE CIVIL CODE: WITH THE INTRODUCTION OF THE LAW AND SECONDARY LAWS. CORNERSTONES OF CIVIL LAW], at 274-276 (2008); *see also* WERNER FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS [GENERAL PART OF CIVIL LAW], at 709-710 (1992); *see also* DIETMAR O. REICH, EINFIIHRUNG IN DAS BÜRGERLICHE RECHT [INTRODUCTION TO CIVIL LAW], at 385 (in German, 2000); *see also* BURKHARD BOEMKE, BGB ALLGEMEINER TEIL [GENERAL PART OF THE BGB], at 320 (in German, 2009).

[429] Kirill V. Nam, *Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod* [*Comment to the #Gloss. Conditional transaction. German Approach*]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 91 (in Russian, 2018).

Still, there are specific conditional transactions, which have another type of expectancy. The second type of expectancy under the German doctrine is *Anwartschaftsrecht*, or an expectation right. After examining several German doctrine sources, Russian researcher Gudkov is concerned that the expectation right is something on a higher stage than a simple expectancy, as "there is a higher degree of expectation, that the possible owner will finally possess the right", provided by the conditional agreement.[430] The expectancy right is something guaranteed to the purchaser, as the seller cannot simply nullify the condition occurrence by his actions. It feels as if *Anwartschaftsrecht* is conceptually very close to a time gap between the start of the acquisition and the final possession of the right.[431] The final possession of the right is dependent upon the will of the purchaser. In this sense, those are simple potestative conditions favoring the creditor. Hence, there is a very high chance, that the contracting party will possess the right.

Murray Raff provides three legal situations in German law, where the contracting party acquires an expectation right. The first situation happens when a purchaser's interest in property acquired subject to express reservation of title.[432] In the second one, Raff explains the interest of an assignee of an interest in real property, and especially ownership, after settlement of the transaction and lodgment of the registrable dealing, but before registration of it.[433] The third situation describes the position of a mortgagee before the claim to be secured comes into existence.[434]

While the second and the third examples are coming from a sort of procedural waiting of an already acquired right to be confirmed or claimed, the most interesting example to review is the first one. BGB provides a known to the civil law "retention of title" model.[435] In other words, A and B agreed on the car sale on the condition that the title will be transferred once the purchaser pays the full sum of money for the car. In this example, the expectation rights are intertwined with other basic theories known exclusively to German law. The retention of title *Eigentumsvorbehalt* is a collaboration of two legal acts, where the first is the contract on sale of a movable object, that provides a set of partial payments for the purchase, or an installment plan.[436] The second act is a property

---

[430] Dmitriy V. Gudkov, *Problema kvalifikatsii otnosheniy storon do razresheniya otlagatelnogo usloviya* [*The Problem of Qualifying the Relationship of the Parties Pending the Settlement of a Qualifying Condition*], Bulletin of the Civil Law, № 3, at 17 (in Russian, 2015).
[431] Id.
[432] MURRAY RAFF, PRIVATE PROPERTY AND ENVIRONMENTAL RESPONSIBILITY: A COMPARATIVE STUDY OF GERMAN REAL PROPERTY LAW, at 189 (2003).
[433] Id.
[434] Id.
[435] *See* German civil code BGB, § 449 (1900, cons. ver. 2021), available at https://bit.ly/408nSVk (visited July 1, 2023), "If the seller of a movable thing has retained title until payment of the purchase price, then in case of doubt it is to be assumed that ownership is transferred subject to the condition precedent that the purchase price is paid in full."
[436] *See supra* note 430, at 18.

agreement that transfers the title from the seller to the purchaser.[437] The important point is that only the second act is dependent upon the payment of full price. Therefore, even though the agreement is signed by the contracting parties, and the movable object is given into the possession of the purchaser, the title is still with the seller, but until the purchaser pays the full price. Moreover, if the agreement on retention of title is void, the contract of sale does not become void or invalid. The title is transferred to the purchaser, as if it is a usual contract of sale with a common obligation on paying the full price. Thus, the retention of title is a befitting model for the implementation of expectation rights. The expectation rights provide effectiveness and convenience to the transaction.

It could be suggested that the expectation right provides more legal consequences to the conditional transaction than a simple expectation regime. K.V. Nam assumes that the conditional acquirer has a special legal status that drastically differs from the usual legal status of a creditor in a binding legal relationship, because he still does not have any absolute rights.[438] This is true since the condition has not occurred yet. However, at the same time, the creditor can use some of the features of absolute rights, such as availability to dispose them or to protect them from the third parties.[439]

For a better presentation of *Anwartschaft* and *Anwartschaftsrecht* consider a case reviewed in Germany in 1956. Rail Valiev presented this case as an example of complex *Eigentumsvorbehalt*.[440] A and B agreed upon a sales contract with a retention of title provision, therefore A secured his title until the full payment was made by B. After the contract was concluded, B transferred his rights to C to pay for the debt he owed to C. C was also warned that the property is still under the retention of title until B pays the full sum of money to A. Parties B and C agreed that until B pays all the money to A, the property is left in the hands of B. However sooner, the case got more complicated. After B and C agreed, it appeared that B also owed money to D, and after D's claim the court ruled an arrest of the property that B was going to acquire in future. B paid all the money to A, and after that C filled in a claim against D to remove the arrest of the property. The key question of this case was what B transferred to C: his title obtainable in future, or a right to expect such acquisition? The difference between the two variants is huge from a legal standpoint.

If the first answer is true, then after the whole sum of money is paid the title is transferred from A to B and then from B to C, which leads to a conclusion that C acquires a property that has already

[437] *See supra* note 430, at 18. Gudkov considers *Eigentumsvorbehalt* is a conditional transaction with a security function.
[438] *See supra* note 429, at 93.
[439] Id.
[440] Rechtsprechung BGH Urteil v. IV ZR 164/55 (in German, February 22, 1956), *available at* https://bit.ly/3KHs0UN (visited July 1, 2023), cited by Rail R. Valiev, *Imushchestvennoye polozheniye storon uslovno-otlagatelnogo obyazatelstva* [*Property Status of Parties to Conditional Suspensive Obligation*], Zakon, № 7, at 162 (in Russian, 2020).

been arrested, therefore C would have to wait for B to pay his debt to D in order to relieve the property from the restrictions imposed by the court in the past. However, if the second variant is true, and C has an expectation right, then after B pays all the money to A, the title is transferred directly to C, without staying at B's disposal. In this case the arrest of the property would have no legal basis at all. After reviewing the case thoroughly, the court decided that the second variant is true, and ruled to remove the arrest from C's property.

In 1984 the Federal Court of Justice of Germany had a similar decision on the matter of expectation rights. The decision stated, that in case of retention of title the expectation right is created whenever the person acquires the thing, even though the property rights transfer is conditional upon the payment of the full sum of money. In such cases, the expectation rights appear to be preliminary to property rights and, thus, can itself be transferrable. Therefore, the moment the condition is fulfilled, the property rights are automatically transferred not to the buyer, but to the person whom the buyer has disposed the expectation rights to.[441] In other words, the final owner of the expectation rights acquires the property when the full sum of money is paid. *Anwartschaftsrecht* can be transferred to another person at the same amounts as if there were usual rights.[442] Still, the question of third-party acquisition in good faith is open[443].

Overall, the German doctrine suggests a complete answer to the question of legal pendency. Unlike in French doctrine, the German doctrine creates a stronger connection between the seller and the buyer, denies the right to resign from the contract before the condition occurs and deems ineffective any dispositions of the object during the legal pendency phase. Moreover, the German doctrine creates different levels of expectancy: *Anwartschaft* and *Anwartschaftsrecht*. A unique system of expectation rights is preliminary to the property rights: they can be easily protected, sold, put in pledge, transferred, or disposed of. Most cases, however, the parties have a simple expectancy regime, although they are still considered to be bound enough to be protected from bad faith actions. In case of expectation rights, like in the retention of title, the law creates a feeling as if the transaction is unconditional, or, in other words, as if the condition has already occurred and the contract is already fully operational. Therefore, the stability of the contractual relationships is preserved. Perhaps, *Vorwirkung* is the apex of doctrine of pending conditions.

---

[441] *See* OLG Bamberg v. LG Coburg, Rechtsprechung BGH - IX ZR 153/83 (in German, April 17, 1984), *available at* https://bit.ly/3rTy6sy (visited July 1, 2023).

[442] Kirill V. Nam, *Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod* [*Comment to the #Gloss. Conditional transaction. German Approach*]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 94 (in Russian, 2018

[443] See 3.3.4. "Proficient level of regulation. Third party acquisition in good faith", at 152.

3.1.3. Russian law on legal pendency. Chances and risks model

The dualism of options on whether there is something binding or not before the condition occurrence was familiar to the Russian side of the research. A substantial doctrinal analysis on the legal pendency under Russian law was done by Sergey Gromov, Dmitriy Gudkov, Vladimir Vasnyov and other scholars.[444]

The first group of opinions defied any bindings between contracting parties while in the state of legal pendency. In the Russian pre-revolutionary doctrine (years 1850 – 1917) this position was supported by a famous Russian researcher D. Meier. He assumed there was no contract at all before the condition occurs, because the change in juridical status of contracting parties happens only within the occurrence of the condition. Such situation could be compared with pre-contractual discussions, as it was unknown whether the parties would come to an agreement. In his opinion, the same could be said about the condition, as nobody knew for certain if it would come to an occurrence.[445] In the modern legal doctrine same ideas are presented by Dmitriy Tuzov, who considers suspensive conditional transactions to be "invalid" because before the condition occurrence the transaction "does not result in a desired legal effect" for the contracting parties.[446]

The second group found unique legal consequences for concluding a conditional transaction. Yuriy Gambarov (1850 – 1926) noticed that unilateral exit from the contract is impossible just on the ground of contingence.[447] N.O. Nersesov (1848 – 1894) and V.I. Sinaiskiy (1876 – 1949) considered every conditional transaction to be a willful act, which was valid from the moment it was concluded, emphasizing that not the transaction was conditioned but its legal consequences were conditioned.[448]

---

[444] Sergey A. Gromov, *Spornye aspekty ucheniya ob uslovnyh sdelkah* [*Controversial aspects of the doctrine of conditional transactions*], Transactions: problems of theory and practice. Collection of articles M.A. Rozhkova (ed.) at 255 – 297 (in Russian, 2008); *see* also Dmitriy V. Gudkov, *Problema kvalifikatsii otnosheniy storon do razresheniya otlagatelnogo usloviya* [*The Problem of Qualifying the Relationship of the Parties Pending the Settlement of a Qualifying Condition*], Bulletin of the Civil Law, № 3, at 7 – 56 (in Russian, 2015); *see also* Vladimir V. Vasnyov, *Priroda uslovnogo obyazatelstva do razresheniya otlagatelnogo usloviya* [*The Nature of Conditional Obligation Prior to the Settlement of a Suspensive Condition*]. Bulletin of the SAC RF, № 12, at 23 – 58 (in Russian, 2012); *see also* Rail R. Valiev, *Imushchestvennoye polozheniye storon uslovno-otlagatelnogo obyazatelstva* [*Property Status of Parties to Conditional Suspensive Obligation*], Zakon, № 7, at 157 – 177 (in Russian, 2020).

[445] MEIER D.I., RUSSKOE GRAZHDANSKOE PRAVO [RUSSIAN CIVIL LAW], at 192 (in Russian, 2003).

[446] DANIIL O. TUZOV, NICHTOZHNOST I OSPORIMOST YURIDICHESKOY SDELKI: PANDEKTNOYE UCHENIYE I SOVREMENNOYE PRAVO [THE NULLITY AND VOIDABILITY OF A LEGAL TRANSACTION: PANDECT DOCTRINE AND MODERN LAW], at 15 – 16, 27 – 28, (in Russian, 2006). Necessary to admin, Tuzov's understanding of the word "invalid" is specific and implies that of something close to the word "void" because it is inexistent as a juridical fact.

[447] YURIY S. GAMBAROV, GRAZHDANSKOE PRAVO [CIVIL LAW], at 733 – 734 (in Russian, 1911).

[448] *See* NERSES O. NERSESOV, PONYATIYE DOBROVOLNOGO PREDSTAVITELSTVA V GRAZHDANSKOM PRAVE [THE CONCEPT OF VOLUNTARY REPRESENTATION IN CIVIL LAW], at 64 (in Russian, 1878, rev. ed. 1998); *see also* VASILIY I. SINAISKIY, RUSSKOYE GRAZHDANSKOYE PRAVO [RUSSIAN CIVIL LAW], at 155 (in Russian, 2002).

On the modern legal doctrine side, E.A. Krasheninnikov, E.A. Ostanina, and S.A. Gromov emphasize the fact that every conditional transaction is a juristic act and its existence as a juristic act does not depend upon an occurrence of uncertain event: it just exists or not exists, it cannot be conditionally existent or conditionally inexistent.[449] However, the potential acquirer has a rightful expectation after concluding a conditional agreement. Evgeniy Krasheninnikov, a Soviet and Russian researcher stated that after concluding a conditional transaction the potential acquirer has "a steady legal position."[450] The "steady" part has two valid points: first, the concluded conditional transaction cannot be canceled unilaterally by the debtor (seller), and, secondly, the transaction has a "preliminary action", so the potential acquirer is guaranteed the object of the contact when the condition finally occurs.[451] Important to note, however, the GK RF has almost none of these features.[452]

D. Tuzov, who thinks there is no contract before the condition occurrence, denies the fact that a suspensive conditional transaction is a juristic act. The same he does with all "invalid" transactions. According to Tuzov's opinion, an invalid transaction cannot be considered a juristic act since it is not producing legal consequences which is a necessary feature for the juristic act as a legal concept.[453] He denies the opinion that a conditional transaction has such a consequence as binding between the contracting parties. Gromov finds a substantial contradiction in Tuzov's assessments: while Tuzov denies any "binding" between the parties after the conclusion of a conditional transaction, he does not deny the "binding power" of the transaction as a legal concept. Gromov assumes that a conditional transaction in this case is a valid material entity.[454] It is hard to disagree with Gromov at this point. Condition is an additional element to the transaction, meaning that the transaction is a valid juristic act even without a condition: it will be just unconditional.

---

[449] *See* Evgeniy A. Krasheninnikov, *Usloviye v sdelke: ponyatiye, vidy, dopustimost* [*Condition in the transaction: concept, types, admissibility*], in: *Essays on commercial law: Collection of scientific papers of Yaroslavl University*, Krasheninnikov E.A. (ed.), Vol. 8, at 5 (in Russian, 2001); *see also* Elena A. Ostanina, *Sdelki s otlagatelnym i otmenitelnym usloviyem kak osnovaniye priobreteniya veshchnogo prava* [*Transactions with suspensive and resolutive conditions as the basis for the acquisition of property rights*], at 17 (Ph.D. thesis abstract, in Russian, 2007); *see also supra* note Gromov, at 256.

[450] Evgeniy A. Krasheninnikov, *Pravovoye polozheniye storon otlagatelno obuslovlennoy sdelki vo vremya sostoyaniya podveshennosti* [*The legal position of the parties to a suspensive conditional transaction during the state of pendency*], in: *Essays on commercial law: Collection of scientific papers of Yaroslavl University*, Krasheninnikov E.A. (ed.), Vol. 12, at 5 (in Russian, 2005).

[451] Id.

[452] However, there is a "retention of title" provision identical to BGB. *See* Art. 491 Civil Code of the Russian Federation, *available at* https://bit.ly/40mCWPB (visited July 1, 2023)

[453] DANIIL O. TUZOV, KONTSEPTSIYA "NESUSHCHESTVOVANIYA" V TEORII YURIDICHESKOY SDELKI [THE CONCEPT OF "NONEXISTENCE" IN THE THEORY OF LEGAL TRANSACTION], at 10 (in Russian, 2006). In the view of Tuzov, conditional means inoperative, or "invalid." This is a different understanding of the word.

[454] Sergey A. Gromov, *Spornye aspekty ucheniya ob uslovnyh sdelkah* [*Controversial aspects of the doctrine of conditional transactions*], Transactions: problems of theory and practice. Collection of articles M.A. Rozhkova (ed.) at 258 (in Russian, 2008), "Conditional contract is a result of a willful agreement to create a legal relationship, and therefore it corresponds to all the features of a transaction."

Another valid point of Russian researchers towards the existence of something binding is the transfer ability. Conditional rights and obligations may be transferred, disposed of, pledged, deposited, arrested or be the object of winding-up procedure.[455] There are plenty ways to act. Moreover, the contracting parties cannot interfere or help the condition to happen if it is done to their advantage. If the condition does not occur because of the debtor's fault, the creditor may sue him for damages, as an example. If the condition does occur though, there is another consequence: all dispositions non-compatible with the conditional agreement are null and void.[456] The important issue is that even under such circumstances a conditional right is still not the "right" in its juridical force sense. It is still something between the "right" and legal nothing. Before the condition occurs, the owner is still an owner, so if the condition does not occur, all the dispositions, made in the state of legal pendency, will remain valid. In addition, a conditional right is not enforceable unless the condition is fulfilled. If the performance by the debtor is demanded back, it is retrieved as an "unnecessary performed."[457] The ideas of Russian researchers follow the same ideas as German and French scholars.

D.V. Gudkov reviewed the 1910 Project of the Civil Act of the Russian Empire, where the legislators attempted to incorporate the concept of expectations, providing that the conditional rights and obligations occur upon the condition fulfillment.[458] The researcher assumes that legislators have done some preparations to create a legal instrument protecting the expectations of the contracting party. "It is not just a hope for the party", he writes, but "a protected expectancy feature", as the legislators tried to copy the German approach. The Civil Act of the Russian Empire had more provisions on the concept of condition than the modern GK RF.[459] For example, the Russian Empire's Project had "an obligation not to violate the conditional right", adding that the prospective acquirer can demand for remedies in case of the violation. Another article fixed a known rule for the obligation of non-interference.[460] This project did not see the light, however. After the 1917 revolution the research in the field of conditional transactions stopped. With the fall of the USSR in 1991, the necessity for conditional transactions increased with a new force as the market started to thrive. In this regard, the Russian legal doctrine attempts to implement the new findings found in the French and German law doctrine.

---

[455] Dmitriy V. Gudkov, *Problema kvalifikatsii otnosheniy storon do razresheniya otlagatelnogo usloviya* [*The Problem of Qualifying the Relationship of the Parties Pending the Settlement of a Qualifying Condition*], Bulletin of the Civil Law, № 3, at 13 (in Russian, 2015).
[456] Id. Important to note that the Russian Civil Code presents none of these features.
[457] YURIY S. GAMBAROV, GRAZHDANSKOE PRAVO [CIVIL LAW], at 735 (in Russian, 1911).
[458] *See supra* note 455, at 14. Historical note: the Russian Empire existed until 1917.
[459] Id.
[460] Civil Code of the Russian Empire, Art. 75-76 (Draft of the Higher Established Drafting Commission on the Compilation of Civil Code, I.M. Tyutryumov (ed.), in Russian, 1910), cited by Gudkov, supra note Gudkov, at 13.

The new ideas are approaching the Russian doctrine as well. Rail Valiev wrote an article on the property legal status of the contracting parties in case of a suspensive conditional transactions, where he introduced his ideas on the legal pendency.[461] His main idea is that the contracting parties are chased by a "duality" of property status when concluding suspensive conditional transactions. It is possible that the parties acquire a usual set of rights and obligations once the condition occurs, however, just after concluding the contract there are already bearing certain "chances/risks", which have their own property value.[462] This is similar to the assessments of Reinhard Zimmermann on the existence of chances in pending conditions.[463] These "chances" are independent from condition occurrence and torn apart from the future rights and obligations.[464] Therefore, on the one hand, the contracting parties may conclude any contracts directly towards the future rights and obligations (implying cession of future rights, pledges, etc.) On the other hand, they can conclude same type of contracts towards those "chances/risks." Valiev emphasizes the difference of legal consequences in both cases.[465] As far as the subjects of the contracts differ (in the first contract the subjects are the future rights and obligations, in the second – chances), in the first case the legal consequences will have its place only the moment the condition occurs, while in the case of "chances/risks" the legal consequences happen immediately after concluding the contract.[466]

Valiev criticizes the Russian legal doctrine for "not seeing" the duality in case of suspensive conditional transaction: in his opinion, D.V. Gudkov describes the legal pendency only from the "future rights standpoint" and not from the "chances/risks" concept; some other researchers, like S. Gromov, "do not even bother" repeating the same proposal on "the change in property status" and "possibility of selling conditional rights and obligations"; and others, like Krasheninnikov, for example, explain interesting *Anwartschaftsrecht* concepts with the help of German law but "do not elaborate on the topic further."[467] Still, he agrees with A.G. Karapetov in the way the legal pendency works. A.G. Karapetov tries to differentiate when writing on the property status of the parties after concluding a conditional transaction. He "drew a clear line between" a possible future obligation, on the one hand, and the already existing "active/passive", on the other hand.[468]

---

[461] Rail R. Valiev, *Imushchestvennoye polozheniye storon uslovno-otlagatelnogo obyazatelstva* [*Property Status of Parties to Conditional Suspensive Obligation*], Zakon, № 7, at 167 (in Russian, 2020).
[462] Id.
[463] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION, at 248 (1990).
[464] *See supra* note 461, at 168.
[465] Id.
[466] Id., at 169.
[467] *See supra* note 461, at 169 – 170.
[468] Id., at 170. Karapetov uses "active/passive" wordings, which is identical within the discussed topic.

In a cession of conditional rights, the duality of property status is also present. The first way is to set the transfer of rights the moment the condition occurs. The assignment is conditional, but the right is conditional too, and it has its own condition occurrence status. Therefore, in this case the assignor will get the right first (because the right itself meets the "condition fulfillment" requirement); the transfer of the right to the assignee will happen only after the condition occurrence. This scheme looks identical to an assignment of future rights concept, available in a variety of legislations (Russia, Germany, Switzerland, etc.)

The second way is suggested by A. Karapetov, "theoretically it is possible to imagine a cession of conditional rights <…> according to a model of immediate disposition."[469] By the immediate disposition the Russian researcher implies that the moment the condition occurs, the right will happen to be immediately at the disposal of the assignee, which is drastically different from the first example. There is a big plus and big minus to this scheme, Karapetov suggests. The big plus is that the assignee will get the right as soon as the condition occurs and, thus, he evades any risks of the assignor becoming bankrupt. However, this happens at the cost of legal pendency that the assignee acquires since the condition has not yet occurred. Comparing to Valiev's theory, the assignee acquired a "chance" to acquire a right and a "risk" to not acquire anything, and it is still not a full-power claim/right. Accordingly, Karapetov suggests that if the condition does not occur at all in this case, then the assignee will not acquire any rights and, moreover, he will not be able to redeem damages from the assignor for the cession of an invalid right.[470]

From the observation of the "new school" of Russian legal doctrine, it is clear there are multiple theoretical possibilities to be implemented in the practical sphere regarding the legal pendency. The duality of opinions was turned by the current legal doctrine into a duality of options for the contracting parties to choose from. There is almost no question about whether there is a contract or no contract before the condition occurs. And most of the Russian researchers imply that there is indeed something binding between the parties before the condition fulfillment, like a protected expectancy. However, unlike the French and German doctrine, the Russian doctrine does not answer the question on what the legal pendency really is, as there are no existing instruments created by the legislator. This is the result of the lack of development in the current legislation itself. The "chances/risks" doctrine might allow some unique suggestions by the Russian legislator in future.

---

[469] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, at 104 – 105 (in Russian, 2017).

[470] Id., at 105.

3.2. Doctrinal and case analysis of common law on legal pendency

The situation in the common law states seems to be a completely different one, because the solution to the issue is sought within the rich history of the case law. English, Canadian, and American law are important reference sources in the question of legal pendency.[471] The rules on legal pendency were constantly evolving, therefore, after collecting multiple court case examples, the researchers created their own doctrines on what exactly happened to the contracting parties after the contract conclusion and before the condition occurrence.

3.2.1. English doctrine on legal pendency. Degrees of obligation

The biggest contribution to the understanding of legal pendency concept in English law was done by Guenter Henz Treitel, a German-born professor and British academic. It is known that when the contracting parties conclude an agreement, they acquire certain rights and obligations, which have an essential meaning. However, the contracting parties do not have any principal obligations (to pay, to deliver) after they sign a conditional agreement.[472] Instead, G.H. Treitel discovered four degrees of obligation, the parties could assign themselves to, if they concluded a conditional agreement.

The first and the lowest degree of obligation – during the period of legal pendency there was no contract at all. Such degree of obligation constituted that any contracting party could easily withdraw from the conditional agreement. In the famous case of Pym vs Campbell (1856), Campbell bound himself to buy out a part of Pym's invention revenue, if all the engineers approve the invention. The parties also stated that there was no agreement unless the condition was fulfilled. One of the engineers did not approve the invention, and Campbell refused to perform, so Pym sued Campbell for damages. However, at the end Pym lost the court case because the written agreement was still "not an agreement at all."[473] G.H. Treitel assumes that if to examine the words verbatim, each of the contracting parties could have withdrawn even before the engineers started to assess the invention.[474] J. Bearson emphasizes in this regard that the will of the parties to be not bound before the condition occurrence should be expressed clearly.[475]

---

[471] Necessary to note that Canada is a bijural state with most of the provinces to accept common law and the province of Quebec to accept the continental system of law.
[472] TREITEL G.H., THE LAW OF CONTRACT, at 62 (2003).
[473] Pym v. Campbell, 6 E&B 370, 374 (1856), *available at* https://bit.ly/3KhEdkS (visited July 1, 2023).
[474] *See supra* note 472, at 63.
[475] JACK BEATSON, ANDREY BURROWS, JOHN CARTWRIGHT, ANSON'S LAW OF CONTRACT, at 140 – 141 (29th ed., 2010).

Second degree of obligation – as the condition could still occur, no one could withdraw. There were still no principal obligations for any of the contracting parties, however, one or both parties could not resign from the contract unilaterally. The reasoning behind this uneasiness was the counter-performance. Imagine the simplest example of conditional agreements: B pays A if it rains tomorrow. A is supposed to do some work according to the agreement, however, the payment by B is condition upon the weather. As far as nobody knows for sure whether it will rain or not, B cannot resign from the contract, because A expects to be paid in case it rains the next day. Once the day after tomorrow starts, B may be either bound by the contract obligations if it rained, or no longer bound by the contract at all, if it did not. G.H. Treitel notes, that in this case a suspensive condition may have an effect of a resolutive condition, as it discharges the contracting parties from the contract.[476] Pym vs Campbell could have fallen under the second degree of obligation, if not for the clear expression of the agreement non-existence before the condition occurs.

A meaningful case in this regard was Alan Estates Ltd. v. WG Stores Ltd. and Another (1981), where an acquisition of the lease agreement was conditioned by an escrow (a conditional type of payment): the landlords had to fulfill several conditions in order to conclude the procedure for an undated lease agreement. However, they failed to fulfill the conditions and the tenant wished to withdraw.[477] The landlords stopped the tenant by telling he cannot simply withdraw from the agreement and the dispute went to the court. The judgement was given by the infamous English judge Lord Denning, who deciphered the doctrine of escrow to the disputing parties.[478] The tenant theoretically could withdraw; however, he would owe a lot of money as a rent to the landlords from the start date of escrow.

Comparing to the continental legal system, the second degree of obligation resembles the mechanism of "expectations": at least one of the contracting parties is expecting the condition to be fulfilled and thus create the principal rights and obligations for the parties. This "expectation" cannot allow the other party to act freely and withdraw the contract whenever it loses the interest to cooperate. While in period of legal pendency there are no principal rights and obligation created, the contracting parties are already bound by certain rules, which will lead to damages if one of the parties decides to dissolve the agreement. Still, no confident answer on equality of concepts could be given.

---

[476] *See supra* note 472, at 63.

[477] Alan Estates Ltd v WG Stores Ltd and Another, 3 WLR 892 (1981), *available at* https://bit.ly/42U6Yeq (visited July 1, 2023). Short version *available at* https://bit.ly/3lXfgBN (visited July 1, 2023).

[478] Id. "What is the effect of an escrow before the conditions are fulfilled? One is clear. While the conditions are in suspense, the maker of the escrow cannot recall it. He cannot dispose of the land or mortgage it in derogation of the grant which he has made. He is bound to adhere to the grant for a reasonable time so as to *see* whether the conditions are to be fulfilled or not."

Third degree of obligation – no party could prevent the condition occurrence. There was still no principal obligation for any of the contracting parties, however they should act carefully, in order not to prevent the occurrence of an event, the contract was conditioned upon. In 1980, Bournemouth and Boscombe Athletic FC sold one of their best players to Manchester United FC for £200 000. Manchester United FC paid £175 000 immediately, the rest £25 000 was to be paid once the player scores 20 goals. However, the new player scored only one goal after seven matches and got dropped from the team. Bournemouth sued and won the case.[479] Manchester United FC was held in breach because the club did not give the player a reasonable opportunity to score 20 goals.

The obligation to restraint from any preventing actions towards the condition occurrence Treitel reasoned with two legal models in the common law system.[480] Model A, or "implied term" model, allows to limit the scope of the parties' obligation not to prevent the condition occurrence. As G.H. Treitel assumed, the implied term may be applied to situations, when the contracting party is acting deliberately to prevent the condition occurrence, or it may be applied in a narrower way to the situations, where the contracting party prevents the condition occurrence wrongfully, or in other words, unlawfully.[481] The difference in the usage of the "implied term" model can create convenient maneuvers for the contracting parties. For example, the company has promised the employee an opportunity of earning a bonus, if he does his job excellently. If the "implied term" model is applied only to unlawful situations, then the company may not deprive the employee of a bonus by simply dismissing him. However, nothing restricts the company to go out of business and deprive the employee of his bonus that way.[482] Model B, or "satisfaction" model, allows the contracting parties to condition the operation of the contract upon the satisfaction of one of the contracting parties. G.H. Treitel makes an interesting example on approval in the sales contract, where the buyer is bound with the contract only if he approves the goods, or in other words, is satisfied with them.[483] If the buyer does not approve, he is not bound with the contract. Even though the buyer's expression of dissatisfaction is a clear deliberate act to prevent the condition occurrence, the court is on the side of the buyer as far as the will to use the "satisfaction" model is clearly expressed by the parties in the contract. The "satisfaction" is based on the construction of the conditional agreement, and whether the contracting parties rely either on good faith or subjective decision.[484]

---

[479] Bournemouth & Boscombe Athletic F.C. v Manchester United F.C., The Times (May 22, 1980), *available at* https://bit.ly/32Ergi2 (visited July 1, 2023).
[480] TREITEL G.H., THE LAW OF CONTRACT, at 64 (2003).
[481] Id.
[482] Id.
[483] *See supra* note 480, at 64.
[484] Id., at 65.

The fourth and the highest degree of obligation – a duty to take reasonable efforts. Such degree of obligation implies that "one of the parties undertakes to use reasonable efforts to bring the condition occurrence."[485] At the same time, these efforts might succeed or fail, and nobody knows for sure, as such efforts are not solely depending on the party's actions. In other words, the party should do as much as possible to bring the condition to occurrence, however the condition occurrence is also depending on the actions of the third parties. An example could be demonstrated by Hargreaves Transport Ltd v Lynch (1969) case, where the land sale contract was conditional upon obtaining a "planning permission to use the land as a transport depot."[486] The buyer has done all the preparations, but finally got rejected by the public authority. Indeed, the buyer has failed to get the planning permission; however, he did not fail in undertaking all reasonable efforts to get the planning permission (or to bring the condition occurrence). Even though the condition did not occur, the buyer was not at fault. He was set free from any liability. The burden of proof in these cases is lying on the obliged party, as it should prove that all the reasonable measures have been taken. If the obliged party have not done anything at all, it still has a chance to avoid paying damages to another party by proving that any reasonable measures would have been unsuccessful in this case. G.H. Treitel also applies such degree of obligation to agreements "subject to the approval of court", and lease contracts assigned with the consent of the landlord.[487] Even though the party could take all the reasonable measures, if it is refused, the principal obligations of the agreement simply do not take effect.

The second, the third and the fourth degrees of obligations concern only subsidiary obligations: not to withdraw, not to prevent the condition occurrence, to take reasonable measures to bring up the condition occurrence.[488] Therefore, the question on how to treat the contracting parties which violate these subsidiary obligations is still present. G.H. Treitel thinks that it is possible to award damages for the breach of subsidiary obligation.[489] While assessing the damages, the court can take into consideration the fact that the condition occurrence chances were very low, therefore, any reasonable measures taken by the obliged party would have been in vain.[490]

Under English doctrine and case law, there are no principal obligations for the parties before the condition occurs, however, the agreement may provide subsidiary obligations on the contracting party. The breach of those obligation will lead to unfavorable consequences for the party in violation.

---

[485] *See supra* note 480, at 65.
[486] Hargreaves Transport Ltd v Lynch, 1 W.L.R. 215 (1969), *available at* https://bit.ly/3G3H4va (visited July 1, 2023).
[487] *See supra* note 480, at 65.
[488] Id.
[489] Id., at 66.
[490] Id.

3.2.2. Canadian and American doctrine on legal pendency. Satisfaction model

In Canadian legal doctrine, following the question of "true" conditions precedent, or external conditions, which apply to the whole contract, Gerald Henry Louis Fridman (1928-2017), a Canadian professor and private law scholar, asked the question on whether there is a binding contract between the parties before the condition is satisfied or not.[491] Importance of the question was shown in a case of McCauley vs McVey (1980),[492] where a contract of sale of land was conditional upon the seller obtaining the title from the third parties at the date of closing the deal. The seller failed to obtain the title by that date because of "his own failure to arrange the surveys necessary to effect the transfer of title" to the buyer from the third party.[493] The Court of Appeals ruled that obtaining a title from the third party was in fact a "true condition precedent" and thus there was no contract, however the Supreme Court of Canada reversed this judgement by the majority of votes. While the main question of the case was whether the condition was external or internal, the view demonstrated by the court was clear: the contracting parties were not bound by anything until the condition occurs.

The second view, or an alternative one, was demonstrated by the Supreme Court of Canada in the case of Dynamic Transport Ltd. v. O.K. Detailing Ltd (1978).[494] This view lies within the point that the actual validity of the contract does not depend upon the condition precedent.[495] Non-fulfillment of condition does not make the contract void, it makes it inoperative. J. Dickson, one of the judges, emphasized the fact that the obligations of the contract "were merely in suspense pending the occurrence of the event constituting the condition precedent."[496] The divided approach in case law towards the legal pendency has almost no differences to the debates of continental law jurists.

G.H.L. Fridman proposes there are suggestions in the legal doctrine about possibilities for the contracting party to enforce a specific performance, even though the condition precedent has not occurred and there is no binding contract.[497] The nature of such liability comes from the doctrine of implied terms: a duty to act in good faith, to co-operate with the other party to obtain the assent or approval of the third party whose approval is a prerequisite to the contract, or to use his best efforts to

---

[491] GENRY H.L. FRIDMAN, THE LAW OF CONTRACT IN CANADA, at 413 – 425 (2nd ed., 1986).
[492] McCauley vs McVey, 98 D.L.R. (3d) 577 (S.C.C.) (1980), *available at* https://bit.ly/3Ht1mNi (visited July 1, 2023)
[493] Id.
[494] Dynamic Transport Ltd. v. O.K. Detailing Ltd, 2 S.C.R. 1072 (S.C.C.) (1978), *available at* https://bit.ly/3AAYwmI (visited July 1, 2023)..
[495] Id., "once the parties have complied with the rules of offer and acceptance, the contract is concluded in the sense that neither party is free to withdraw from it pending fulfillment or non-fulfillment of the condition."
[496] *See supra* note 494.
[497] *See supra* note 491, at 419. He admits that "even though failure of the condition to be fulfilled might result in there being no binding contract between the parties, some liability may emerge from the lack of compliance with the condition."

achieve compliance with, of fulfillment of the condition precedent. In most of these instances, the claim for the breach of an implied duty was for damages for the breach of contract. Fridman illustrates the case of Steiner v. E.H.D. Investments Ltd[498] as an example, where a non-fulfillment of the condition precedent led to a successful claim. In this case, the court held that the seller could not frustrate the entire agreement by his failure to support the condition occurrence, so he could not resist a claim for specific performance.[499] Thus, it could be confirmed that the Canadian law used some features, which were unorthodox to the continental law, such as implied terms, for example.

In American legal doctrine, Arthur Corbin (1874 – 1967) also tried to decipher the legal status of the contracting parties in the period of legal pendency. A.L. Corbin disagreed with anyone how thought there was nothing before the condition occurs. The contracting parties before the condition fulfillment still had rights and duties, however there were called "conditional", and by that the author meant that "some of the operative facts exists, but that one or more other facts necessary to perfect the legal relation that we have in mind do not yet exist."[500] Therefore, his logics came from the difference of conditional and unconditional: since the conditional right lacked an operative fact to consider it to be of an immediate performance, then in the state after the contract is concluded but before the occurrence of the condition the parties were bound. Practically, as Corbin continued, if to imagine a conditional sale, there are A and B who concluded the contract of sale, conditional to B's acceptance and the delivery of goods, and by that A acquired a "right" to payment by B.[501] However, this is not a "right" of immediate performance as some of the operative facts were still missing: B had not accepted, the delivery was not yet done. The truth is that after the contract is concluded "the money is not yet due, and it may never become due."[502] At the same time, as previously stated, there was a "right" after the contract's conclusion, therefore it was wise to say there were a conditional right and a conditional duty for the contracting parties before the condition occurs. Corbin considered such usage of terminology to be useful and convenient.[503] While admitting the existence of conditional rights and duties, he criticized the usage of terms like "expectancy" and "vested right", as, in his opinion, they were troublesome.[504]

---

[498] Steiner v. EHD Inv. Ltd, 6 A.R. 113 (1977), *available at* https://bit.ly/3lMOHzj (visited July 1, 2023).
[499] Id.
[500] ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY, Section 626, at 6 (1950).
[501] Id.
[502] Id., Section 626, at 6 – 7.
[503] *See supra* note 500. Section 626, at 7. He wrote, "most of the facts necessary to judicial enforcement exist; and a shorthand descriptive term serves a useful purpose."
[504] Id., Section 626, at 10. "They have often been used to explain a decision without explaining it. The ideas behind them are so variable and uncertain as to make their use both deceptive and confusing."

Corbin's point was that the "expectation" term was an attempt to describe a contract that had already got a steady nature: the conclusion of contract created a contractual right, and it could not be disregarded because of its conditionality. The fact that money was to be paid in the future, and it was conditioned on uncertain event did not mean that the original concepts of the contract could be overthrown.[505] Corbin compared such situations with a fire insurance, where the insured seldom got the money promised to him.[506]

Corbin's opinion was quoted by J. Warner, the judge of Oregon Supreme Court in case Leibee v. Leibee (1960), where wife and husband concluded a contract of sale of land with a purchaser on the condition of instalment payments.[507] According to the contract, any instalments unpaid at the death of either wife or husband were to be paid to the survivor. The husband died, and his executor appeared to manage the assets of the deceased. It was not clear who was entitled to receive the unpaid balance of the purchase price remaining after the death of husband: his widow or the executor of his estate. The court held the case in favor of the wife, as the agreement did not have clearly expressed intention.[508] Therefore, the legal state of the parties before the condition occurs was not a question of expectancy or hope, but a question of a contractual right that was agreed by the parties.

Another illustrative case was Finlay v. Swirsky (1925), where A and B concluded a contract of sugar delivery, and the buyer A had a power to cancel the contract if the delivery from another continent was delayed in case of the war or other factors stated in the contract.[509] After the delay happened and the court procedures started, it became clear this was a usual condition precedent and the contracting party had always had a "right" to cancel the contract, however it was conditional, and only after the condition occurred it transformed into a "real" agreement and the party were free to cancel the contract. It may be assumed that the contractual capacity itself is conditioned.

Corbin's opinion on the condition's nature before the occurrence sounds similar to the ideas of the continental law jurists. First, there is a duty, but it is an immature one from the moment the contract is concluded and before the condition occurs, and after the condition occurs it becomes of immediate performance. Secondly, the condition is anything other than a time lapse – this idea is similar to the probability standard of condition: the condition should be not obvious and not inevitable.

---

[505] Id., Section 626, at 11. Corbin wrote, "It is immaterial whether the parties "expect" or "hope" that payment will take place."
[506] Id. "He both hopes and expects that his house will not burn down; yet no one doubts he has "rights" created by the policy contract."
[507] Leibee v. Leibee 220 Or. 256, 349 P. 2d 486 (1960), *available at* https://bit.ly/3nzP28J (visited July 1, 2023).
[508] Id., "persons desiring to impress a survivorship interest on personal property can do so by an agreement clearly expressing such intention."
[509] Finlay v. Swirsky, 103 Conn. 624, 131 A. 420 (Conn. 1925), *available at* https://bit.ly/3G2bi1w (visited July 1, 2023)

In his older papers, Corbin compared the status after the contract is concluded as a "power" and a "correlative liability."[510] Coming back to the case of Pym v. Campbell, where A was to buy B's invention on the condition of C's approval, Corbin considered that C in this example has a "power" and A has a "correlative liability." The "power" in this sense meant that the party could create instant rights and obligations for the contracting parties. However, when there was no third party and there were a lot of conditions, no party had the "power" but only the "correlating liabilities" which constituted itself as the presence of a conditional right and a conditional duty.[511]

Overall, the common doctrine understanding of legal pendency is rather different, comparing to the continental law systems. The resemblances in the debate are present, however, the legal status of contracting parties before the condition occurs in common law is based solely on the case law and, thus, can be characterized by several distinctive features:

1. The agreeing parties might acquire a certain degree of obligation in the period before the condition occurrence. This feature is most known to the English law; however, the examples of Canada and the U.S. case law show a similar approach. The degrees of obligation represent different sets of subsidiary obligations for the contracting parties. The first degree implies there is no contract at all before the condition occurs. The second degree creates a subsidiary obligation not to withdraw from the contract. The third degree of obligation restricts the contracting parties from preventing the condition occurrence. The fourth degree of obligation is to undertake certain reasonable measures to bring the condition occurrence. The judge's interpretation steps up as an imperative law mechanism to define the liberties of the agreeing parties within a conditional agreement: can withdraw, or cannot withdraw; can fail the performance, or cannot fail, etc. The contracting party which violated the subsidiary obligation is subject to paying damages.

2. There are no protected "expectations" or "hopes", as seen in continental law system. Instead, there are other concepts, with the help of which the good faith and efforts of the agreeing parties are assessed: implied terms or a satisfaction model, for example. Instead, it seems that the contractual capacity obtained by the contracting party through a conditional promise is similar to the expectation in the continental system of law. The concept of "expectation" is diluted into the contractual capacity of the contracting parties. Therefore, it can be confirmed that in most cases of legal pendency in common law there is a binding between the parties.

The next paragraph is a comparative legislative analysis of the regulation of legal pendency.

[510] Arthur L. Corbin, *Conditions in the Law of Contract*, The Yale Law Journal, Vol. 28, at 742 (1919).
[511] Id., at 742.

3.3. Legislative analysis on pending conditions. Levels of regulation

The previous historical-doctrinal analysis showed the evolution of the approach towards the uncertainty issue of legal pendency. French lawyers considered it to be the result of the retroactive effect of condition, while the German scholars deducted the concept of preliminary effect and connected the pending condition with an expectation right. Russian researchers, taking much inspiration from the German doctrine, also suggested interesting theories: those of chances and risks. Common law approach appeared to have a middle ground answer: there is not necessarily an expectation but, instead, the parties are imposed with certain obligations during the state of uncertainty (like an obligation to bring reasonable efforts, for example). This might come from the fact that the concept of promise is the basis of common law. The doctrinal analysis has shown the difference in approaches towards the understanding of legal pendency and attempts to achieve the balance on the question of creditor's expectations.

However, those were the doctrinal answers. What about the legislations in concrete? The comparative analysis on national and supra-national codifications shows three distinctive groups of legislations. These legislations could be classified by the levels of regulation:

- Negligent – little to no regulation on the question of legal pendency.
- Satisfactory – at least acknowledgement of existence for the legal pendency.
- Proficient – acknowledgement of "expectation" and application of certain rules to it.

From the groups established above, it could be deducted that the level of regulation should be evaluated by two standards. The first one is the level of elaboration the legislations provide to the concept of legal pendency. This could be seen, for example, in explicit attempts of certain legislations to define the pending conditions or the period before the condition occurrence. The second one is the level of protection the legislator applies to the contracting parties in the period of legal pendency. This could be seen in constituting the existence of expectation, in concrete or vague characterization of this concept as right or quasi-right and in applying the respective regulation towards it.

Both cases, the levels of elaboration and protection could be assessed as low, medium, and high. This time it would also be necessary to present some of the legislations in detailed way to assign the codification to a concrete group. Same will be attempted with common law and supra-national codes. This comparative analysis tries to answer the question on how each of the presented legislation regulates the legal pendency and how negligent, satisfactory, or proficient this regulation is.

3.3.1. Negligent level of regulation

The states presenting this group have not elaborated on the legal pendency whatsoever. Neither they define it, nor they explain the existence of expectations in the period before the condition is fulfilled. This group of regulation is presented by 21 out of 45 codifications.[512]

Still, according to the previous comparative analysis, most of the legislations have a rule on fictitious fulfillment (bad faith fulfillment): if the condition is helped or prevented in a bad faith, then the condition is deemed fulfilled/not fulfilled.[513] 15 states in the group have the rule on bad faith fulfillment. This rule is very basic, and the existence of only this rule cannot change the level of regulation: it is still negligent. Why? The fiction rule provides a basic restriction onto the parties: do not influence the condition occurrence in bad faith. This rule does not give any elaboration on the concept of legal pendency, nor it provides any substantial legal protection to the parties in the state of legal pendency. Moreover, the previous analysis on fiction rule shows how problematic of a term "bad faith" is.[514] Therefore, the existence of fiction rule alone cannot guarantee a valid level of protection for the contracting parties in the period before the condition occurrence.

Two legislations require a bit of additional explanation, however.

Austrian Civil Code (AGBG) appears to have very old-style rules towards conditions, which are mostly characterized along with the inheritance process. Therefore, there are no rules on legal pendency in the code whatsoever. Unlike the legislation, the Austrian courts have answered the question on pending conditions: before the condition occurrence, there is only an expectation of future acquisition.[515] Still, the absence of legislative regulation means the AGBG remains in this group.

Russian Civil Code appears to have the "retention of title" rule: the seller cannot dispose the sold thing until the full payment is done by the buyer.[516] However, an "example" rule cannot confirm any higher level of regulation: the concept of legal pendency is still not acknowledged, nor any legal protection for the condition creditor is provided other than in the sales contracts partially.

---

[512] Full list of states: Armenia, Austria (no protection mechanism found in the code, however, there is case law), Belarus, Bulgaria, China, Czech Republic, Georgia, Iran, Kazakhstan, Kyrgyzstan, Laos, Lithuania, Nepal, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, UAE, Uzbekistan, Vietnam.

[513] 6 out of 7 states which do not have the rule on bad faith fulfillment are also presented in the "negligent level of regulation" group: Austria, Iran, Laos, Nepal, North Korea, UAE.

[514] *See* Part 2.3. The fiction of bad faith condition fulfillment, at 91.

[515] *See, e.g.,* OGH 1961-12-13 5 Ob 339/61 (1961), *available at* https://bit.ly/3ZiEHeV (visited July 1, 2023). Supreme Court of Austria noted that "Rights in rem that are conditional or limited by a starting date (older) only arise when the condition or date occurs; until then there is only an expectation of the future acquisition of the right."

[516] Civil Code of the Russian Federation, Art. 491 (1994, amend. 2022), *available at* https://bit.ly/40mCWPB (visited July 1, 2023). Important to note, there are no more rules in the code which could be related to the legal pendency.

3.3.2. Satisfactory level of regulation

The group with a satisfactory level of regulation is presented with 12 national codifications.[517] Unlike the "negligent" group, the "satisfactory" group legislations attempt to acknowledge the concept of legal pendency. There are certain established rules which work specifically for the period before the condition occurs or not. The nature behind the legal pendency is indirectly addressed: in case of "satisfactory" group, it is mostly the result of the retroactive effect of condition. Therefore, most of the states presenting this group could be characterized as "French-type legislations."[518]

First important rule to observe is the rule on safeguarding measures while the condition is pending. This rule could be observed in most of the "satisfactory" codifications:

Art. 682 (Portuguese Civil Code): "The parties, whose contracts depend on some condition, may, even before the condition is fulfilled, do all the lawful acts, and necessary for the preservation of their right."[519]

It could be named "safeguarding", "preservation", or "conservation" measures; however, the meaning does not change.[520] The rule is focused on the conditional creditor (potential acquirer of right).[521] He can exercise many options, which could be both positive and negative towards the final acquisition of the right. The conditional creditor might ask for a bank guarantee or the letter of credit to be more ensured of the conditional debtor's capabilities. For the same concerns, the creditor might submit a legal action against the debtor. Also, before the condition occurrence the creditor may ask for undoing his performance while in legal pendency. In some codes, the conditional debtor also has an option to undo his performance.[522] There is no *numerus clausus* of safeguarding measures, as those could be any actions known within the common business practice. The rule on safeguarding is a direct acknowledgement of the concept of legal pendency in the code. The party in legal pendency is directly given a right to commit any valid action to protect the possible acquisition of right. However, it is necessary to admit that the hope cannot be defined only through the possibility of safeguarding.

---

[517] Full list of states: Argentina, Azerbaijan, Egypt, France, Indonesia, Hungary, Luxembourg, Moldova, Netherlands, Portugal, Quebec, Spain.

[518] This excludes Azerbaijan and Moldova, however. Perhaps, they could be influenced by French law to apply the rules.

[519] Portuguese Civil Code, Art. 682 (1867, cons. ver. 2018), *available at* https://bit.ly/3wB5UgN (visited July 1, 2023).

[520] For "safeguarding", *see, e.g.,* Civil Code of Quebec, Art. 1504 (1991, amend. 2022), *available at* https://bit.ly/3WJohL8 (visited July 1, 2023); for "preservation", *see, e.g.,* Belgian Civil Code. Book 5: Obligations, Art. 5.146 (in French, 2023), *available at* https://bit.ly/3WINDca (visited July 1, 2023); for "conservation" measures, *see, e.g.,* Spanish Civil Code, Art. 1122 (1889, cons. ver. 2016), *available at* https://bit.ly/3HCpAag (visited July 1, 2023).

[521] Most of the legislations in the "satisfactory" group apply the safeguarding rule to the conditional creditor, not the debtor. In Portuguese Civil Code the rule applied towards both the conditional creditor and conditional debtor.

[522] *See, e.g.,* Dutch Civil Code, Sec. 6:25 (1992, cons. ver. 2019), *available at* https://bit.ly/3DlVQff (visited July 1, 2023).

Second important rule in this group is the obligation of non-infringement before the condition occurrence:

Art. 229 (1) (Civil Code of Hungary): "As long as a condition is pending, neither party shall be entitled to do anything that would infringe upon or violate the other party's rights upon the realization or frustration of the condition."[523]

This rule sounds very similar to the fiction rule, "if the occurrence of the condition has been impeded in bad faith by the party who does not benefit from the occurrence of the condition, the condition shall be deemed to have occurred."[524] Even though both rules are about applying the good faith standards to the conditional transactions, those rules are, in fact, different. First, the rule on non-infringement is specifically about pending conditions, while the fiction rule is about the condition occurrence overall. This makes the object of the rule different: the "non-infringement" rule is intended to prevent one party from gaining an unfair advantage over the other during the legal pendency, rather than to evaluate the hindering of condition's occurrence. Secondly, the fiction rule is an interpretation tool which is used by the courts to deem a conditional contract unconditional post-factum, while the "non-infringement" rule is not an interpretation tool, it is a principle which brings the stability to the conditional transaction in a preliminary way.

The importance of the "non-infringement" rule is immense: it establishes an obligation of the contracting party not to violate the other party's right which shall occur upon the condition fulfillment. The fiction rule also indirectly establishes an obligation not to assist or hinder the condition occurrence. Through the comparative analysis on the "satisfactory" group, it could be safely assumed that these rules do not exclude each other. Instead, they supplement each other to bring better protection for the parties in the legal pendency. For this reason, most legislators of the "satisfactory" group fix both "non-infringement" and fiction rules.[525] As it was mentioned before, the fiction rule by itself could not be an indicator of acknowledgement to the concept of legal pendency. The "non-infringement" rule appears to be a necessary addition which confirms this "satisfactory" level of regulation. Same approach of fixing both rules is supported by one of the supra-national codifications, PICC.[526] DCFR and PECL do not fix the "non-infringement" rule.

---

[523] Civil Code of the Republic of Hungary, *available at* https://bit.ly/3Y6BnD5 (visited July 1, 2023).
[524] Civil Code of the Republic of Moldova, Art. 355 (in Russian, 2002).
[525] *See, e.g.,* French Civil Code, Art. 1304-3, Art. 1304-5, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016*, *available at* https://bit.ly/2Qodnso (visited July 1, 2023); *see also*, *e.g.,* Civil Code of the Republic of Azerbaijan, Art. 328.8, 328.9, 328.10 (1999), *available at* https://bit.ly/3WHEfpb (visited July 1, 2023).
[526] PICC, Art. 5.3.3, Art. 5.3.4 (2016), *available at* https://bit.ly/3JmTD7h (visited July 1, 2023).

Another important rule to be analyzed is the retroactive effect of condition: the ability to transfer the legal consequences of condition occurrence to the period before the condition occurrence. The previous comparative analysis on the retroactive effect is of a great help.[527]

Half legislations (6 out of 12) in the group establish the retroactive effect of condition as the imperative rule: Egypt, Indonesia, Luxembourg, Portugal, Quebec, Spain. This is dictated by the historical influence of Code Napoleon: French Civil Code before the 2016 amendments had retroactivity as the main rule over prospectivity.[528] Current French and Moldova Civil Codes, however, have fixed the prospective effect of condition as the main rule with the possibility of retroactive effect, if the parties desire to do so.[529] Azerbaijan, Hungary and Netherlands have the prospective effect of condition as the imperative rule, without any possible retroactivity.

It appears that the retroactivity rule is not 100% applicable in the case of "satisfactory" group. It could be used as an indirect answer to the nature of legal pendency; however, it is certainly not the rule to define the level of regulation. Moreover, the rule on retroactivity brings the necessity of restrictions, especially in the sphere of risk-management: Indonesia, Spain and Luxembourg have such rules.[530] For example, if the object is damaged without any fault of the debtor, then the creditor has the choice to accept the thing without any compensation or rescind the obligation.[531]

Retroactivity is a valid solution for the parties in legal pendency.[532] However, it seems that the question of retroactivity is irrelevant in this comparative analysis. The concept of retroactivity feels very vague to be used in legal pendency: even the legislations, which stated the retroactivity as the imperative rule, do not have any "connecting" regulation between the retroactive effect and legal pendency whatsoever. It is important to mention that for the retroactivity to work the condition should occur, not vice versa; therefore, the retroactive effect itself is pending while the condition is pending. On the other hand, the right of applying safeguarding measures and the obligation of non-infringement are the tools available to the parties from the start of the conditional contract.

Therefore, it can be safely assumed, that the retroactivity is not helping the solution of legal pendency. Instead, the safeguarding right and the non-infringement obligation are the defining rules which suggest the legal pendency is acknowledged and dealt with on a due level.

---

[527] For a detailed comparative picture, *see* Part 1.4.3. Comparative picture on retroactive effect, at 60.
[528] French Civil Code, Art. 1179, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016), available at https://bit.ly/3XBNYyt (visited July 1, 2023).
[529] *See* French Civil Code, Art. 1304-6; *see also* Civil Code of Moldova, Art. 354. Necessary to mention that the French Civil Code applies general retroactivity to resolutive conditions, while Civil Code of Moldova only allows retroactivity to resolutive conditions. In other words, the French are allowing a bit more, while the Moldavian restrict a bit more.
[530] Indonesian Civil Code, Art. 1264; Luxembourg Civil Code, Art. 1182; Spanish Civil Code, Art. 1122.
[531] Id.
[532] For the analysis on legislative necessity, *see* Part 1.4.4. Legislative necessity of retroactive effect, at 62.

3.3.3. A note on common law regulation of legal pendency

Common law has no codified rules on legal pendency. However, according to the doctrinal analysis, the question of rights and obligations before the condition occurrence was addressed. There was nothing before the condition occurrence, however, the contracting parties still had some available options. There were implied obligations.

The mechanism of subsidiary obligations suggested by G. Treitel could be considered equal to a "satisfactory" level of regulation. It is true that the case law established these obligations though history. Still, the level of regulation seems to be higher than in the codified states with no rules on legal pendency at all.[533] The English doctrine answered that the contracting parties are free to define the extent of their intentions in the agreement: it could be that there is no contract before the occurrence, or it could be an obligation of non-rescission. It could also be a prohibition on preventing the condition occurrence which sounds exactly like the fiction rule.[534] The highest degree, an obligation to undertake reasonable measures, is also confirming that the English law is closer to the "satisfactory" level of regulation. Same could be told about American and Canadian law.

Still, this is far from perfect. First, such regulation is post-factum, therefore, everything depends on how well the conditional agreement is drafted.[535] Secondly, it is possible to agree that the contracting parties did not acquire any property rights or quasi-rights before the condition occurrence. The nature of pending conditions is not explained under the common law, and it is not clear whether it is even necessary to define it under the common law at all.

It is possible to suggest that the concepts of promise and condition are intertwined in common law.[536] The offer and acceptance create an agreement with a promise. It seems that the promise is, in fact, a contractual capacity which could be then transferred to the other parties without any necessity of defining expectation. The addition of condition will not change the equation. The conditional promise is still a contractual capacity which could be then transferred to the other parties; however, this contractual capacity is dependent upon the occurrence of the condition. This way, the conditional promise becomes the responsibility of the last acquirer of such contractual capacity.

---

[533] That does not exclude the possibility of contracting parties under the continental law system to draft any obligations in the period of legal pendency. However, the comparative analysis aims to evaluate the level of regulation based on how its main source of regulation deals with the concept of legal pendency. While in the continental system the main source of law is the code, in case of the common law, those are court decisions. The acknowledgement of implied obligations during the legal pendency is a proof of acknowledgement of the concept of legal pendency of the source-of-law level.
[534] Assisting or hindering the condition occurrence is the object of the fiction rule, not the non-infringement rule.
[535] This is regarding to the critics of common law overall: the codification allows better preliminary regulation.
[536] This part is an expression of opinion, which might not reflect the true connection between the contractual capacity and condition occurrence. Perhaps, some experts of common law could answer this question in a better way.

3.3.4. Proficient level of regulation. Third party acquisition in good faith

There are also 12 codifications whose level of regulation could be evaluated as "proficient."[537] It is true that the states of the "satisfactory" group already provide a necessary amount of regulation to the contracting parties in legal pendency, whereas all the other aspects of pending condition could be resolved by courts. However, there are legislations which went even further in terms of explaining the concept of legal pendency, defining the nature of pending conditions, and providing valid sources of protection for the participants of the legal circuit. Most codifications presenting this group were influenced by German teachings and, thus, could be referred to as "Germanic-type legislations."[538] The "proficient" group may be presented as an upgrade to the "satisfactory" level of regulation.

One substantial upgrade to be seen is the rule on dispositions during the legal pendency. The general understanding is that upon the condition's fulfillment any disposition committed by the conditional debtor during the pending period is null and void (the "disposition" rule):

Art. 92.1. (Civil Code of Poland): "If a legal act comprising the disposition of a right is performed on a condition, any subsequent dispositions of that right lose effect once the condition is fulfilled insofar as they prevent or limit the effect of the condition being fulfilled."[539]

Identical or similar provisions could be observed in the laws of Belgium, Brazil, Estonia, Germany, Switzerland, and Turkey.[540] The disposition made by a conditional debtor should be the one that contradicts the previous intention of that debtor to sell the property to the conditional creditor. That is what understood by the words "as they prevent or limit the effect of condition fulfillment."[541] If such dispositions took place, then on the moment of condition fulfillment those dispositions would be nullified. The "disposition" rule may seem very categorical and harsh at first, however, it is an important addition to the regulation: the approach to protecting the conditional creditor becomes much more direct comparing to the previous group of legislations. Moreover, Belgian and German legislators, for example, stipulate that the "disposition" rule overrides procedural measures, like arrest or insolvency.[542] If the object is unavailable because of arrest or concurring procedures, then upon the condition fulfillment the arrest is cancelled, or the property is taken out of the bankruptcy estate.

---

[537] Full list of states: Belgium, Brazil, Estonia, Germany, Italy, Japan, Latvia, Poland, South Korea, Switzerland, Thailand, Turkey.
[538] Except for Belgium, Italy, and Latvia. Each of the states has a unique regulation of legal pendency.
[539] Civil Code of Poland (1964, cons. ver. 2014), *available at* https://bit.ly/3HED4Tc (visited July 1, 2023).
[540] Belgian Civil Code, Art. 5.146; Civil Code of Brazil, Art. 126; General Part of the Civil Code Act of Estonia, § 106; German Civil Code, § 161 (1); the Swiss Civil Code, Art. 152; Turkish Civil Code, Art. 171 (3).
[541] The law does not tell anything, however, if the disposition is not contradicting the conditional transaction.
[542] Belgian Civil Code, Art. 5.146; German civil code, § 161 (1). It "is equivalent to a disposition which is effected during the period of suspense by execution or attachment or by the administrator in insolvency proceedings."

The necessary question in regard to the "disposition" rule is the protection of a third party which acted in good faith. Imagine A and B agree on a car sale with a condition that the property is transferred once B pays the full sum of money. While B is collecting money, A sells the car to C, who does not know about the conditional contract between A and B. Finally, B pays the full sum of money which constitutes the fulfillment of condition; however, he cannot acquire the car because it has been sold to C. The acquisition of the car by the third person was done in a good faith, therefore, the situation is a stalemate. If to apply the "disposition" rule directly, then the third person C should lose the car in favor of B because of the conditional contract between A and B. This contradicts the overall doctrine of good faith acquisition: such acquisition is lawful unless the third person knew or should have known that the seller is not an entitled person. Still, it is possible to solve the acquisition issue in terms of immovable property: conditional property could be checked as such in the public registry. In case of movables though the situation might appear a bit problematic.

For this reason, legislations from the "satisfactory" group and from the "proficient" group have a specific rule on protection of the good faith acquisition.[543] Even though the legislations differ in the harshness towards the dispositions made during the legal pendency, the question of good faith third parties in conditional transactions is important for all legislations. The rule suggests that the "disposition" rule cannot override the good faith acquisition by the third party.[544] Such exclusion is often placed in the same article as the "disposition" rule. From the analysis of German legislation, the following could be safely assumed. Unless the third party knew or was so negligent not to know about the seller's conditional duties, the acquisition by the third party is deemed valid.[545] Therefore, the conditional creditor should be entitled to a restitution and a compensation.

The issue on the good faith acquisition is important, however, appears to be avoidable. According to J. von Staudingers, such cases are practically rare.[546] In Germany, the conditionally entitled party usually obtains the direct possession of the object immediately after the conditional agreement on the transfer of ownership was signed.[547] Therefore, the good faith acquisition of a third

[543] From "satisfactory" group the states are Hungary (Art. 229), Moldova (Art. 352), Quebec (Art. 1506). From the "proficient" group the states are Belgium (Art. 5.146), Germany (Art. 161), Estonia (Art. 106), Poland (Art. 92.2).
[544] *See, e.g.,* General Part of the Civil Code Act of Estonia, § 106 (3) (2002), *available at* https://bit.ly/3Y11Emo (visited July 1, 2023), "The provisions … shall not restrict nor preclude the rights acquired by third persons in good faith."
[545] German civil code BGB (1900, cons. ver. 2021) § 161 (3), § 933, § 934, *available at* https://bit.ly/408nSVk (visited July 1, 2023).
[546] KARL-DIETER ALBRECHT, J. VON STAUDINGERS KOMMENTAR ZUM BURGERLICHEN GESETZBUCH: MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN. ECKPFEILER DES ZIVILRECHTS [J. VON STAUDINGERS COMMENTARY ON THE CIVIL CODE: WITH THE INTRODUCTION OF THE LAW AND SECONDARY LAWS. CORNERSTONES OF CIVIL LAW], at 92 (2008).
[547] Id.

party is excluded from the beginning: there is no direct possession. Although the potential acquirer is not always given the possession during legal pendency, it is still possible to agree with the opinion.

The other upgrade of the "proficient" group is the acknowledgement of "expectation right." Such a recognition has two sides to it: the expectation the conditional creditor acquires after concluding a conditional contract is called a "right" and connected to an "expectation", plus it is explicitly stated that it could be transferred, transmitted on death, preserved, or secured:

Art. 149 (Civil Act of South Korea): "Disposition, etc. of Conditional Right.

The rights and duties of the parties during the pendency of a condition may be disposed of, inherited, preserved or secured in accordance with the general rules."[548]

The German law does not explicitly stipulate expectation rights; however, Brazil, Italy, Japan, Latvia, South Korea, and Thailand do that in the forms of "eventual right", "expectant right", or "pending right."[549] The acknowledgement of expectation right is the pinnacle of the possible regulation in terms of legal pendency: the nature of pending condition is defined in a clear way. The "proficient" level of regulation correlates with the German model of *Vorwirkung*, or preliminary action of condition. At the start of conditional contract, the potential acquirer already gets an expectation right. This materialistic entity is imperatively regulated and protected in case of violations.

What about the third party? Is the expectation right a strong enough concept to override a good faith acquisition? It seems the answer is "yes." First, unlike in "disposition" rule, the rule on a "good faith third party" is not addressed explicitly along with the "expectation right" rule. No legislations with "expectation" present an exclusion that the rules on third parties apply accordingly. Still, each of the legislations has a general rule on good faith acquisition.[550] Secondly, each legislation with an "expectation" rule has another well-known rule, the "non-infringement" obligation.[551] The debtor in pendency should conduct matters in good faith to preserve the reasonings of the potential acquirer.[552]

The answer to the question is not so obvious. It could be suggested that the rule of "expectation right" goes even further than the "disposition" rule. Even though the general rule still suggests the good faith acquisitions should be protected, in this particular case, the third party is losing to the

---

[548] Civil Act of the Republic of Korea (2013), *available at* https://bit.ly/3kOTKOO (visited July 1, 2023).
[549] For "eventual right", *see, e.g.,* Civil Code of Brazil, Art. 130; for "expectant right", *see, e.g.,* Civil Code of Latvia, Art. 1558; for "pending right", *see, e.g.,* The Thailand Civil and Commercial Code, Sec. 185.
[550] *E.g.,* under Art. 108 (1) of Civil act of South Korea, "A fictitious declaration of intention made in collusion with any other party shall be null and void", while according to Art. 108 (2), "The nullity of a declaration of intention as mentioned in the preceding paragraph cannot be set up against a third person acting in good faith." Art. 194 of Civil Code of Japan has a similar provision protecting the third partied who acquired the thing in good faith.
[551] *See, e.g.,* Civil Act of South Korea, Art. 148; Civil Code of Japan, Art. 128; Thailand Commercial Code, Art. 84.
[552] Italian Civil Code, Art. 1358 (in Italian, 1942, cons. ver. 2020), *available at* https://bit.ly/3wzGBeT (visited July 1, 2023).

"expectation right" of the conditional creditor. It is only an assumption, however. The third party should have a claim of restitution and monetary compensation in case such situation happens. The solution by Staudingers could be treated as a valid preliminary measure to avoid the conflict.

Therefore, the following could be suggested. In case the legislation stipulates a "disposition rule", the third party who acquired the conditional property in good faith is still protected and given an advantage towards the conditional creditor. In case the legislation stipulates an "expectation right" rule, then the conditional creditor has the advantage upon the *bona fide* third party.

In case of Germany, *Anwartschaftsrecht* is only a matter of doctrine. It could be assumed that the "expectation right" legislations took directly after the German doctrine, not after the German legislation (which has the "disposition rule"). In "expectation right" legislations, there is no explicit regulation on third parties in conditional transactions, and there is no doctrine of dispositive acts, which the German law is well known for. Thus, the "expectation right" appears to be even more strict and powerful than the "disposition" rule.

The "expectation right" rule and "disposition" rule might show the way for a "golden mean" solution in terms *bona fide* acquisition. First variant is to establish some "administrative" rules over the conditional property: the conditional property may be given into the custody of the potential acquirer from the moment the conditional transaction was concluded. Second variant could be stipulating who has the advantage in *bona fide* acquisition: conditional creditor or the third party. This could be done either explicitly, or indirectly.

Latvian law could be an example of an "indirect" solution. It is unique in terms of regulating the legal pendency: the doctrine of expectation is mixed with the risk management provisions of "retroactivity" legislations, even though the Latvian law fixed only the prospective effect of condition:

1. The "expectant right" acquired by "conditionally entitled person" cannot be "eliminated" by withdrawing or any other willful action of the "conditional obligor."[553] This rule puts the "expectant right" at highest advantage point over any reason which might override it.
2. The law presents an example of "safeguarding" measures: the creditor might demand for a security in case the conditional obligor "threatens" the expectant right.[554] The non-infringement obligation of the conditional debtor is also explicitly stipulated.

[553] Civil Code of the Republic of Latvia, Art. 1558 (1992, amend. 2022), *available at* https://bit.ly/3HgSoUA (visited July 1, 2023).
[554] Id., Art. 1559.

3. The "administration" situation is suggested.[555] The property may be transferred to the conditional creditor right after the agreement is concluded. In that case the conditional creditor becomes the administrator of the property, but not the owner. There is an obligation of return the property in case the condition fails; however, the conditional creditor does not bear any risks towards the property itself.

Italian legislation is another interesting example.[556] The effect of condition occurrence in the Italian Civil Code is retroactive (main rule) with an option to make it prospective if the parties desire so.[557] However, along with retroactivity, the Italian Civil Code also provides the rule that the conditional rights could be transferred, although in a much humbler way that Latvia.[558] This combination of "retroactivity" plus "expectation right" cannot be observed in any other researched legislation. Like in Latvia, Italian law also provides the "administration" rule, however, it is not clear who has the upper hand in case of *bona fide* acquisition.[559]

Estonia is also a unique example: the legislator explicitly defines the legal pendency:

§ 106(1) (Civil Code Act of Estonia): "Pendency period is the period of time between entry into a transaction and fulfilment of a condition or the time when it becomes evident that fulfilment is impossible."[560]

The ending of the pendency period is concretized even more comparing to the uncertain nature of condition: the moment when it is clear the condition would not occur. This "evident" moment is still quite vague, especially in case of casual conditions. However, if the condition is potestative, then the disappearance of the source of influence could mark the end of pendency period. Something similar could be seen in Latvian law.[561]

Switzerland is also an example worth mentioning. The first unusual point of legislation is the additional protection to the conditional creditor: he can apply the protective measures as if the "claim is unconditional."[562] Switzerland uses the "disposition" rule, however, there is no *bona fide* exclusion, and the conditional creditor is given more authority than "safeguarding" measures. Still there is no

[555] Id., Art. 1560.
[556] Judging by the rules on conditions, perhaps, Latvian law took after Italy in this question.
[557] Italian Civil Code, Art. 1360(1).
[558] Id., Art. 1357, "One who has a right subject to a suspensive or resolutive condition may dispose of it while the condition is pending; but the effects of any act of disposition shall be subject to the same condition."
[559] Italian Civil Code, Art. 1361
[560] General Part of the Civil Code Act of Estonia (2002), *available at* https://bit.ly/3Y11Emo (visited July 1, 2023).
[561] Civil Code of the Republic of Latvia, Art. 1562. "When it is certain that a suspensive condition will not come into effect, the contract shall be regarded as not having been entered into; therefore, everything that may already have been performed pursuant to it shall be restored or repaid."
[562] The Federal Act on the Amendment of the Swiss Civil Code Part Five: The Code of Obligations, Art. 152 (1911, cons. ver. 2023), *available at* https://bit.ly/3DlCneI (visited July 1, 2023)

sufficient proof that the "disposition" rule may override a *bona fide* acquisition by a third party. The second unusual point is that if the conditional creditor gets the conditional property into his possession, he keeps the benefits obtained in the legal pendency.[563] This is different from other legislations.

Despite own peculiarities, the states presenting the "proficient" group appear to impose the highest degree of protection for the parties in legal pendency. This is achieved by acknowledging the expectation rights and providing a thorough regulation to the legal pendency. Along with that, the countries of the "proficient" group along with some of the countries from the previous group also appear to have attached the "third party acquisition" rule to the concept of conditional transaction. This way, the regulation of legal pendency could be considered as complete.

3.5. How uncertainty issue of legal pendency could be handled

Different approaches could be observed to explain one of the uncertainty issues of the concept of condition which is the legal pendency. Before the legislative analysis on the regulation, it was necessary to dive into the doctrinal research about the concept of legal pendency. This way, the ideas presented by the legislators today would be much easier to analyze and understand. The doctrinal research showed that the concept of legal pendency revolves around a debate on whether the contracting parties were bound or not before the condition occurrence.

French doctrine attempts to present a distinctive answer, a "retroactive formula" to the pending conditions. When the condition finally occurs, the rights and duties of the contracting parties start from the moment the contract was concluded. At the same time, as the contracting parties know about the retroactivity feature, they can legally transfer their contractual positions the way they wish. The earliest scholars already suggested the ideas of "evolution" of a right from an eventual materialistic entity into something very close to a full-fledged right. The French legislator attempted to support the ideas of French scholars; however, the current legislation does not contain any concepts regarding "eventual rights." It also appears that French legislator moved away from the retrospectivity concept that it used to close out certain legislative holes and to minimize the risks for the contracting parties. Retroactive effect of condition cannot be a satisfying answer to the legal pendency. It needs many exclusions and establishment as the main rule to provide the protection, and even then, it is difficult to imagine that retroactive effect is able to maintain the balance between the autonomy of will and imperative rules of law in the context of conditions.

[563] Id., Art. 153. Important to note that this happens only if the condition is fulfilled; it is still different from other laws.

German legal doctrine, on the contrary, presents a better approach to the legal pendency. There is no debate on whether the condition is existing before the condition occurrence. Legal scholars are sure there are expectations before the condition occurrence. The answer to the nature of legal pendency is *Vorwirkung*, a preliminary action of the condition. Preliminary action is a situation, where the contracting party after agreeing to a conditional transaction acquires a simple expectation *Anwartschaft*, or an expectation right *Anwartschaftsrecht*, whereas the opposing party acquires a corresponding duty to respect the conditional creditor's possible future acquisition. Under the German teachings, the expectation appears to be a very close concept to the rights of possession. However, most of contract appear to be protected only by a simple version of expectation *Anwartschaft*, while the scope of expectation right *Anwartschaftsrecht* is very specific. One example is the retention of title *Eigentumsvorbehalt*, where the sale of property is conditioned upon the payment of full price. The expectation right in case of *Eigentumsvorbehalt* is the strongest form of expectation. In the chain of cession, the expectation right allows excluding intermediary acquirers: the case law confirms that the property can be taken out of the arrest or the bankruptcy estate. However, the condition still needs to occur in order for *Anwartschaftsrecht* to turn into a full-fledged right, therefore the role of court's interpretation is still very high.

Russian legal doctrine attempts to take the answers from the German doctrine. Gladly, the rapid development of the legal doctrine in the Empire period allowed for some interesting and valuable opinions in the discussion of existence/non-existence of the contract before the condition occurrence. Gradually, the opinion on non-existence became marginal, being only presented by few legal scholars. Those who considered there is a "hope", suggested that it was not a right in its full sense, but still feasible to be transferred to another person. The answer was similar to *Anwartschaftsrecht*. However, the research came to a stall in the period of Soviet Union, as the administrative economics did not seek for diversity in contractual agreements. Therefore, the Russian legal doctrine was left way behind the European understanding till the recent years when the new ideas on "protected expectancy" started to show up in the legal journals in 2010s. Nowadays, some of the researchers suggest looking at the debate from a different perspective: the duality of opinions could be turned into duality of possibilities for the contracting parties to choose from. Some researchers suggest that legal status of parties in pending could be defined as a set of "chances/risks", therefore, the conditional transaction lies somewhat in between the sale future rights and insurance contracts. There is chance to acquire the right, as well there is a risk to not acquire anything at all. Still, the Russian legislator does not regulate anything on legal pendency. The question on the nature of pending conditions is still far from being answered.

Another picture could be observed in the countries of the common law system. Almost none of the legal doctrines provide an explanation of pending conditions. Instead, due to peculiarities of the common law, the researchers appeal to other concepts to draw a "binding line" between the contracting parties in the period of legal pendency: degrees of obligations, true condition precedent, correlative liabilities. There appears to be a debate on whether there is a contract between the parties in the period of legal pendency or not. The case law, as the primary source of common law, presents both possible solutions. Going by the specific legal systems, the English doctrine through a substantial history of case law defined four degrees of obligations, the contracting parties may undertake after signing up a conditional agreement. Before the condition occurs, the degrees of obligations may vary from "no bindings between the parties at all" to prescribed duties to take reasonable efforts to bring the condition occurrence. The Canadian legal doctrine tried to explain the possible bindings between the contracting parties through unusual to the continental law concepts: "true" conditions precedent and implied terms of the agreement, coming to rather simple conclusions of non-interference and good faith during the legal pendency, which could be found in continental law doctrine as well. American legal doctrine also attempted to characterize the "expectancy" created from concluding a conditional agreement: there was an "immature duty" which evolves into an immediate performance. There are hopes and doubts of the contracting parties on the existence of something to protect them during the legal pendency. Fortunately, in the common law systems especially, the court has the interpretation power to solve all the possible debates in this sphere, which leaves much less room for theorization and preliminary regulation.

The common law doctrine on legal pendency gives the impression that expectation becomes a part of contractual capacity the party obtains after concluding a conditional agreement. Whenever the contractual creditors change, the whole contractual capacity is transferred along with expectations to the new conditional creditor.[564] This happens because of how close of concepts condition and promise are. Expectation is presented in a form of contractual capacity. The continental law seems to work in a bit different way: the expectation is more separated from the contractual rights and obligations; therefore, it could be defined separately as an expectation right. Such right is not the contractual right of preservation which corresponds to the obligation of non-interference. Such right is the one closer to the rights of possession, something the contracting party can possibly obtain as a property. Perhaps, the jurists of the past could not differentiate the contractual capacity and rightful expectations, which is why the continental and common doctrines have a different attitude towards the legal pendency.

[564] Contractual capacity is a set of contractual rights and obligations, which are "deeds", and not "possessions."

Legislative analysis of several national codifications confirms most theories established by the doctrine, as well as allows to make important additions to the overall regulation of legal pendency. The legislations were classified by three groups depending on the level of regulation: negligent, satisfactory, proficient. Each of the legislation was assessed on ground of how the concept of legal pendency is elaborated and how the contracting parties are protected before the condition occurrence. The analysis covers much more countries than the previously researched doctrines.

It appears that almost half of the legislation does not have any regulation connected to the legal pendency. The period before the condition might occur is not explained, nor there is any sign of hopes and expectations for the conditional creditor. Instead, the legislator relies on a standard rule of bad faith fulfillment, an interpretation fiction that allows the court to deem the contract unconditional in case the fulfillment is influenced in a bad faith. This rule does not help the regulation of legal pendency at all. Still, there are exclusions. Austria and Russia. Austria has a very old civil code, whereas the case law accepts the German model of legal pendency: there is an expectation obtained by the conditional creditor. Russian law has only a part of German regulation, a rule on retention of title. Both cases, the legislations were left in the first group because the codifications do not provide any sufficient regulation of legal pendency.

About a quarter of legislations have a satisfactory level regulation on legal pendency. Most of legislations from the group present a French model: there is an indirect attempt to explain the concept of pending conditions through the retroactive effect of condition. However, this attempt fails, as the retroactive effect requires a lot of exclusions and requires the fact of condition occurrence to work properly. Moreover, unlike the French doctrine analyzed earlier, no rules on prohibition of *ipso iure* disposals were found in these legislations, including the French law itself. It appears to be only a matter of doctrine.

Still, the amount of protection for the conditional creditor and debtor is immense. Legislators establish two important rules: a right of potential acquirer to apply safeguarding measures to the conditional property (ask for a security, submit a legal action, or undo performance) and an obligation of the conditional seller to not infringe the possible acquisition in case the condition occurs. The right on "safeguarding" is important: it is a direct acknowledgement of the concept of legal pendency and a fixed advantage of the conditional creditor over the conditional property. The "non-infringement" rule is different from fiction rule: in the object and in the type of application (preliminary vs post-factum). Still, it appears that the obligation of non-infringement is an important addition to the rule of bad faith fulfillment: the rule is focused on preventing the conditional debtor from gaining an unfair

advantage over the creditor. Therefore, most legislations stipulate both rules at the same time, which helps closing the legislative holes in regulation.

The other quarter of legislations went a step further to regulate the legal pendency. The proficient group of legislations obtains two upgrades similar to how concepts of *Anwartschaft* and *Anwartschaftsrecht* differ in German doctrine. The first upgrade is deeming dispositions void upon the fulfillment of condition. The conditional debtor still could dispose of property, however, if such disposition prevents or limits the effect of condition occurrence, the disposition is deemed void once the condition occurs. Such dispositions are explicitly given a power to override procedural measures established by court, like arrest or insolvency. This is more direct and harsher than the in case of satisfactory group; also, this correlates with the concept of simple expectation *Anwartschaft*. The second upgrade is an explicitly fixed expectation right, similar to German *Anwartschaftsrecht*. The conditional creditor acquires a right that cannot be eliminated by anything; this is a higher grade of security than in case of "disposition" rule.

Regarding the "disposition" rule, as well as "expectation right" rule, a question emerges in the protection of third parties who acquired the conditional property in good faith. Through the legislative analysis and available exclusion in the codes the following assumption could be made. In case the legislation provides a "disposition" rule (a simple expectation regime for the creditor), then the *bona fide* third party who acquired the conditional property is given the advantage over the conditional creditor. In case the legislation provides an "expectation right" rule (a protected expectation regime for the creditor), then the conditional creditor is privileged, as his right of possession cannot be eliminated. There is also a valid preliminary measure suggested by the doctrine: to convey the conditional property into the possession of the conditional creditor.

As the result of comparative research, the following definition of legal pendency could be suggested. Legal pendency is an uncertain amount of time after the conclusion of a conditional agreement and before the condition occurrence or the moment when it becomes evident that the condition does not occur. During the legal pendency the contracting parties – the potential creditor and the debtor, are bound by an expectation to acquire an object of the contract after the condition occurrence – from the potential creditor's side, and the corresponding duty to respect this expectation – from the debtor's side. This expectation is an object of civil matters itself, implying that it can be an object of a transaction (e.g., pledged upon, disposed of, transferred by succession). However, it is not a full-fledged right, as it is still not activated as such by the condition occurrence.

The next chapter covers the uncertainty issue of conditions in unilateral actions.

4. Condition and unilateral actions

Conditional transaction as a legal instrument which brings more variety to the civil relations. The usage of conditions might greatly enhance business practices and our daily life experience, mostly due to being simple and accessible. From the previous parts, the imperative rules of law played a big role in regulating the concept of conditions. The role of imperative law is not in restricting the usage of conditions but in stabilizing its continuous usage and supporting the conscientiousness between the contracting parties. While this seems to be theoretically the best way for the autonomy of will to co-exist, there is a slight issue.

There are unilateral actions, which require only one party to express their will. The unilateral actions do not follow the same principles as contracts, they directly follow the principle of private autonomy. In many cases, an unrestricted usage of private autonomy might cause a legal instability and uncertainty for the addressee of the unilateral action. Adding conditions to such types of actions creates a whole new problem. Therefore, a question emerges on whether it is necessary to give a full restrictive force to the imperative rules of law regarding the usage of conditions in unilateral actions or whether it is possible to allow such actions.

This part discusses specific types of conditional transactions, established in the doctrinal literature, and the way the imperative rules of law restrict such transactions nowadays, or should restrict, if it is not done so by the legislator. The first part will answer the question on conditioning unilateral actions, as the topic of unilateral actions is far more peculiar in terms of rights and obligations affected by condition occurrence. The second part will discuss another side of unilateral actions: the conditional dispositive transactions and the necessary restrictions to be applied to them. The answers to the questions raised in this part are not straightforward.

The focus of the research is not only on the influence of legislative element on the condition's usage, but also on the ways certain codifications should solve their problematic issues. By a comparative analysis, featuring the legal systems of Germany, Russia and other European countries, there is an attempt to achieve a legislative solution towards conditional unilateral actions and conditional dispositive actions. The comparative research analysis would also attempt establishing certain theoretical rules on the concept of condition in unilateral actions. The following analysis is based mainly on the legal doctrine, codified law, and the case law; however, the results of the research are applicable to more countries of the civil law tradition.

4.1. Doctrinal analysis of conditional unilateral actions

Unilateral action is the one that needs a consent of only one party.[565] A basic principle of private autonomy is relevant to unilateral actions. It is true that the desire of the party to commit a unilateral action should follow the rules established by society. However, the topic of unilateral actions is peculiar to the civil law since there are not many rules regarding its usage. It is a difficult task for the legislator to preserve the balance between the principle of private autonomy and imperative rules of law on the question of unilateral actions.

Unilateral actions mostly occur during the process of contract execution. The principle of private autonomy leads the execution of unilateral actions within the contract. The examples of such are well-known to the participants of the legal affairs. One example of a unilateral action is a set-off (offset). Even though, some codifications explicitly state that the set-off happens when two persons mutually owe to each other, it is committed by means of manifesting one party's intention to the other.[566] Prof. Evgeniy Sukhanov writes that the offset is very beneficial for economic relations; for this reason, the legislator provided a rule: to offset, only an expressed will of one party is necessary.[567] Another example could be the unilateral contract rescission: if the contracting parties agreed so beforehand, then the parties may have a dispositive rule of exiting the contract whenever they would like to. Thus, the contract is cancelled the moment the other contracting party receives the letter where such refusal is written.[568] The creditor may also forgive the debt, which would also be a unilateral action.[569]

On the other hand, there are unilateral actions which do not require a contract. Offer and acceptance could be such unilateral actions, as there is still a negotiation process before the contract is concluded. Also, the person may give an authority to the third party; therefore, the person would be represented somewhere (in a business meeting, in court, etc.). The declaration of authority is not required to be in the form necessary for a legal transaction.[570] Another example would be the bank changing the interest rates. There is, in fact, no contract, as the change in the interest rates is addressed to all potential customers.

---

[565] Civil Code of the Russian Federation, Art. 154 (1994), *available at* https://bit.ly/40mCWPB (visited July 1, 2023)
[566] Civil Code of Japan, Art. 505, 506 (1896, cons. ver. 2009), *available at* https://bit.ly/3jdExGo (visited July 1, 2023)
[567] EVGENIY A. SUKHANOV, ROSSIYSKOE GRAZHDANSKOE PRAVO: UCHEBNIK V 2 TOMAKH. TOM 2: OBYAZATELSTVENNOE PARVO [RUSSIAN CIVIL LAW: TEXTBOOK IN 2 VOLUMES. VOLUME 2: LAW OF OBLIGATIONS], at 354 (in Russian, 2nd ed. 2011).
[568] *See supra* note 565, Art. 450.1.
[569] Id., Art. 415.
[570] German Civil Code, § 167 (1900, cons. ver. 2021), *available at* https://bit.ly/3Gc7KqY (visited July 1, 2023).

4.1.1. Classification of conditional unilateral actions. Obliged addressee

The number of unilateral actions to choose from is immense, which confirms the principle of private autonomy. Yet, there is also the concept of condition, which brings even more flexibility to the legal circuit. At the same time, it also brings uncertainty and instability if not used properly. Can the unilateral action be conditioned upon an uncertain future event?

The question on whether it is possible to condition a unilateral action is not that simple as it may seem at first sight. The first issue that should be taken into the consideration is the classification of unilateral actions. Without the proper classification which fits the aims of the research, it is not possible to define which unilateral actions can be conditioned, and which cannot. For example, the previous classification of inside-outside the contract is not fitting the purposes of the research since the main criterion of the classification is the existence of contract. The classification of unilateral actions should aim at the rights and obligations of the sides affected by the unilateral action, thus, a way to determine unacceptable CUAs could be found.

One good classification is suggested by Nikita Rezanov, a Master of Laws from Russia. According to his recent research on unilateral actions, it wise to divide such actions into "interventive" and "non-interventive."[571] "Intervention" is a purely negative influence on the legal capacity of the side to the unilateral action.[572] For example, the unilateral amendment of contract is an "interventive" unilateral action, because it affects the legal status of either the addresser or the addressee. A guarantee, meanwhile, is "non-interventive", because the one who is affected by such action is not the addressee but only the addresser himself.

In the well-known Russian commentary to the Civil Code, called #Gloss, the unilateral actions are divided into two categories as well. The first category refers to unilateral action which "allow the will of one person to encroach on the autonomy of another person and to impose legal consequences on the latter."[573] Those could be new obligations, amending or rescinding a legal relationship. The second category is the opposite situation: the addresser limits his own legal capacity in favor of the addressee, presents legal authority to the addressee or other legal opportunities.[574]

---

[571] Nikita V. Rezanov, *Odnostoronniye sdelki: Klassifikatsii, Svoboda Sovershenia, Vozmozhnost Vklyucheniya Usloviy* [*Unilateral transactions: Classifications, Freedom to Perform, Possibility to Include Conditions*], Bulletin of Economic Justice, № 10, at 162 (in Russian, 2022).
[572] Id.
[573] ARTYOM G. KARAPETOV, SDELKI, PREDSTAVITELSTVO, ISKOVAYA DAVNOST: POSTATEYNYY KOMMENTARIY K STATYAM 153 - 208 GRAZHDANSKOGO KODEKSA ROSSIYSKOY FEDERATSII [TRANSACTIONS, REPRESENTATION, LIMITATION OF ACTIONS: ARTICLE-BY-ARTICLE COMMENTARY TO ARTICLES 153 - 208 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], at 58 – 59 (ed. V.V. Baybak, R.S. Bevzenko, S.L. Budylin, in Russian, 2018).
[574] Id.

The abovementioned classifications allow to connect the topic of conditions to the unilateral actions. However, it is necessary to understand what side of the unilateral action should be addressed for the purposes of the research. It could be stated that there are two types of unilateral actions:

1. Those imposing obligations on the addresser (the one who commits the unilateral action).
2. Those imposing obligations on the addressee (the one who receives the unilateral action).

In the first case, no uncertainties could be observed. For example, A made an offer to B to conclude a supply contract. At the same time, the offer is conditioned upon an event, on the occurrence of which the offer is withdrawn. The addresser is willing to commit a unilateral action. The opposite side, the addressee, is given options to choose from and the situation is not an uncertainty for him. If the addressee is not sure about the condition fulfillment, he can easily refuse to accept the offer. The same can be told about the cases, where the addressee is offered to give a consent to a contract or is offered authority.[575] If the addressee is not sure, there is always an option to retreat. The addressee is basically given a legal advantage by the unilateral action of someone else.

The second case, however, might create a worse situation for the addressee. Unlike in previous case, the addressee is imposed with obligations, which start the moment the condition occurs. Such cases may take place in unilateral refusals to perform a contract, unilateral contract amendments, unilateral consents to conclude a contract by an unauthorized representative. In Karapetov's opinion, if a conditional unilateral action is directly creating obligations for the addressee, then the overall situation may happen to be very dangerous and totally unfair for the latter.[576]

The unilateral action can, for example, impose an obligation for the addressee to conclude a contract. As far as the addressee is not sure about the condition occurrence, the situation can be qualified as a state of uncertainty. For instance, there is a public agreement in the sphere of water supply that obliges A to conclude a contract with any enterprise that applies.[577] The same public agreement has a condition which renders an applying company to be not a valid customer. Soon, the representative of company B offers A to conclude a contract on a water supply, A is obliged to conclude a contract. However, it is not certain that the representative of company B is legally bound with the decisions of company B, as the conferment of authority might be invalid. If A knows whether the condition has occurred or not, then he is fine. If A is not sure or cannot check about the condition

---

[575] Artyom G. Karapetov, *Tezisy k Kruglomu Stolu Yuridicheskogo Instituta "M-Logos" "Problemnye Voprosy Uslovnyh Sdelok"* [*Thesis to the round table of the Law institute "M-Logos" "Problematic issues of conditional transactions"*] (in Russian, 2016), *available at* https://bit.ly/415mfbB (visited July 1, 2023).

[576] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Conditional Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, at 96 (in Russian, 2017).

[577] *See supra* note 575.

occurrence (the condition may be a debt of the applying company more than US $10 000, etc.), then the situation is questionable. A does not know whether it is legal to conclude a contract, but he is obliged to do so by a unilateral action, since the public agreement is established either by law or by the expressed will of one entity. If the addressee is not sure, there is little room to act.

From the abovementioned examples, it becomes obvious that the question of conditions is revolving around the addressee, who can be imposed obligations through the unilateral action. At the same time there should be no issues, if the condition in a conditional unilateral action can be easily checked by participants of civil relations. Stock markets indexes, sports competitions, presidential elections – there are many examples of unilateral actions relying on easily checked conditions.[578] However, as Andrey Egorov fairly admits, the definition of "easy to check" or "difficult to check" the condition is very situational, as not everyone may have immediate access to the Internet, someone could be in a hospital or having a rest abroad.[579] The question revolves around one of the standards of condition, authentical accessibility, discussed in previous parts.[580] Indeed, if the recipient of the unilateral action is imposed with a conditional obligation and the condition cannot be accessed, then the addressee could be as well considered not obliged to perform.

The question of "right" classification is relevant in the sense of finding the weak spot in the topic of CUAs. The unilateral actions which diminish the legal opportunities of the addresser are not uncertain: it is the addressee who applied such restrictions to himself by its own will. On the contrary, the fate of the addressee is much more important. Conditioning the unilateral action which imposes obligations on the addressee is a situation which might bring more uncertainty than could possibly be allowed. Unless, the condition is easily checked, it might be suggested that the usage of conditions in unilateral actions affecting the legal capacity of the addressee in a negative way should be prohibited. This correlates with Rezanov's "intervening" unilateral actions; however, those could be specified in terms of effect only towards the addressee.

Therefore, the first solution to the problem emerges: prohibit all CUAs which impose obligations or diminish the legal position of the addressee. All other CUAs do not impose a high degree of uncertainty. However, unfortunately, this is not a complete answer. For that, a deep dive into the doctrinal literature is required.

---

[578] For example, according to Nasdaq stock marketplace requirements, "If a company trades for 30 consecutive business days below the $1.00 minimum closing bid price requirement, Nasdaq will send a deficiency notice to the company, advising that it has been afforded a "compliance period" of 180 calendar days to regain compliance with the applicable requirements." See Nasdaq Listing Center, *available at* https://bit.ly/42d4I1l (visited July 1, 2023)

[579] M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016), *available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023)

[580] *See* Part 1.3.4. Suggestions on standards of condition, at 50.

4.1.2. German law and doctrine on conditional unilateral actions

The nature of unilateral actions is very much resembling the transformative rights, a doctrine established in German law in 1900s.[581] According to Emil Seckel, the founder of the doctrine, a transformative right is the right to achieve a legal effect through a unilateral expression of will.[582] One of Seckel's ideas, presented in the work, was that the transformative rights cannot be conditioned upon a future uncertain event, "where a transaction to exercise a transformative right is a sufficient juristic fact, its execution should immediately give rise to a right."[583] Such prohibition can be deducted either from the law (a set-off, acknowledgement of paternity etc.), or from the nature of the unilateral action (the right of contract rescission).[584]

The current German legislation supports the view of prohibiting CUAs.[585] According to Jorg Neuner, the general approach to the CUAs in German law is negative: the uncertainty and legal pendency connected to such actions are negatively affecting the contracting parties.[586] Nikita Rezanov states that the prohibition of conditional set-off is the "basis for extrapolating the ban onto other unilateral interventive actions." [587] Afterwards, this approach was transferred to other right-transforming unilateral actions, such as right of challenge, right of the contract rescission, automatic amendment, unilateral return, etc.[588] Kirill Nam adds that unilateral actions are an interference in the legal sphere of another person.[589] In the mind of the German lawmaker, there must be no "unclarity" towards his legal status, rights, and interests.[590]

---

[581] *See* Part 2.4. Pure potestative conditions and transformative rights, at 103.
[582] Emil Seckel, *Die Gestaltungsrechte des burgerlichen Rechts* [*Transformative rights in civil law*], in: FESTGABE DER JURISTISCHEN GESELLSCHAFT ZU BERLIN ZUM 50 JÄHRIGEN DIENST-JUBILÄUM IHRES VORSITZENDEN, RICHARD KOCH [COMMEMORATION OF THE LEGAL SOCIETY OF BERLIN ON THE 50TH ANNIVERSARY OF THE SERVICE OF ITS CHAIRMAN, THE REAL PRIVY COUNCILOR, RICHARD KOCH], at 205 – 253 (1903, trans. into Russian, 2007).
[583] Id., at 240.
[584] Id.
[585] For the prohibition on conditional set-off, *see, e.g.*, German Civil Code, § 388 (1900, cons. ver. 2021), *available at* https://bit.ly/3Gc7KqY (visited July 1, 2023); for the prohibition on conditional acknowledgement of paternity, *see* id., § 1594 (3). Also, the BGB prohibits conditional declaration of consent, *see* id., § 1750 (2).
[586] MANFRED WOLF, JORG NEUNER, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS [GENERAL PART OF CIVIL LAW], at para 52, Rn. 1 (in German, 2016).
[587] Nikita V. Rezanov, *Odnostoronniye sdelki: Klassifikatsii, Svoboda Soversheniya, Vozmozhnost Vklyucheniya Usloviy* [*Unilateral transactions: Classifications, Freedom to Perform, Possibility to Include Conditions*], Bulletin of Economic Justice, № 10, at 171 (in Russian, 2022).
[588] Reinhard Bork, *Allgemeiner Teil §§ 139-163* in: KARL-DIETER ALBRECHT, J. VON STAUDINGERS KOMMENTAR ZUM BURGERLICHEN GESETZBUCH: MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN. ECKPFEILER DES ZIVILRECHTS [J. VON STAUDINGERS COMMENTARY ON THE CIVIL CODE: WITH THE INTRODUCTION OF THE LAW AND SECONDARY LAWS. CORNERSTONES OF CIVIL LAW], at § 158 – 163, Rn. 38 (2020).
[589] Kirill V. Nam, *Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod* [*Comment to the #Gloss. Conditional transaction. German Approach*]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 97 (in Russian, 2018).
[590] Id.

However, later the approach got "softened" a bit.[591] If in the first half of the 20th century the right of contract rescission could not be made subject to a condition, later it became acceptable if the unilateral action does not violate the rights of the other party, e.g., the party is not dragged into a situation of legal uncertainty.[592] In 1943, the Court of Labor affairs reviewed a case where the decision to dismiss the worker was conditioned upon the worker not accepting the offer to change the position. The court did not find any reason to deem such decision void, since the condition occurrence depended upon the worker's actions; therefore, no legal uncertainty for the worker (the addressee of the unilateral action) could be found.[593] According to Prof. Dr. Christian Hattenhauer, the recognition of the right of modification under labor law led to the realization that the "dogma" of the non-conditional nature of unilateral actions must often take a back seat to the practical necessities.[594] Hattenhauer called the 1943 case the "rupture of the dogma."[595]

According to K.V. Nam, today the German law allows a conditional rescission of contract if the future uncertain event (which is agreed by the parties) could be either influenced by the addressee or fully controlled by his will.[596] It is possible to agree with this approach as the legal uncertainty has the least possibility to occur. This way, the unilateral action of contract rescission committed by the addresser is only technically a unilateral action: the legal consequences and the possible outcomes are agreed upon; therefore, the unilateral action is as "bilateral" as possible. In practice, this can lead to automatic contract rescissions, a convenient tool in practice, e.g., in a business-to-consumer model. This is a logical consequence for the German law. Nowadays, the law accepts CUAs, where the parties enabled the possibility of those in a written agreement, and the contracting party, whose rights could be interfered, gave its consent.[597] According to Rezanov's findings, even the conditional set-off could be acceptable in the eyes of German law, despite of the clear prohibition in the BGB: if the provisions on the set-off include a potestative condition, fully dependent upon the addressee.[598] Therefore, the prohibition is overridden by the teleological reduction method.[599]

Still, the general rule remains the same: CUAs are prohibited. The situations, where such actions are possible, constitute exclusions from the rule.

---

[591] *See supra* note 589, at 98.
[592] *See supra* note 588, at Rn. 40.
[593] *See supra* note 587, at 173.
[594] CHRISTIAN HATTENHAUER, EINSEITIGE PRIVATE RECHTSGESTALTUNG: GESCHICHTE UND DOGMATIK [UNILATERAL PRIVATE TRANSFORMATION OF LAW: HISTORY AND DOGMATICS], at 288 (2011).
[595] Id.
[596] *See supra* note 589, at 98.
[597] *See supra* note 586, at para 52, Rn. 25.
[598] *See supra* note 587, at 174.
[599] Id. Teleological reduction method is a form of strict interpretation according to the purposes of the legal act.

Today, there is a voice in the German doctrine that the general rule should be changed: the CUAs should be allowed overall. Such position was expressed recently by Prof. Dr. Christian Hattenhauer in his 2011 book.[600] An overwhelming analysis of this position was done by Nikita Rezanov in his 2022 article.[601]

In his first argument, Hattenhauer presents that the prohibition of conditional set-off cannot be interpreted in a broad way: the BGB speaks only of a unilateral set-off outside of the court procedure. The procedural law, however, allows conditional set-offs; the same way conditional set-off is allowed if it is not a unilateral act but an agreement.[602] Based on this inconsistency, Hattenhauer assumes that the rule on "prohibition of conditional set-off" cannot be the basis for the overall attitude to CUAs.[603] In his second argument, prohibiting conditions in family (e.g., acknowledgement of paternity) and inheritance (e.g., acceptance of inheritance) affairs cannot be the basis of prohibiting CUAs as well.[604] Those prohibitions were built upon a "different logic" other than the one featuring in the law of obligations: the point is to protect the public interest.[605] In his third argument, Hattenhauer appeals to the method of teleological reduction and assumes that the main article on conditions in BGB is simply too strong to be excluded fully from the concept of unilateral actions: "there should be serious arguments" to do this, however, there are none.[606]

The main point of Hattenhauer is that the general rule of prohibition is contradicting the very principle of private autonomy surrounding the unilateral actions.[607] In his opinion, the CUAs should be allowed under the German law as a general rule with the boundaries established by the general principles of private law, one of these being the performance in good faith.[608] He agrees with Harm Westermann that the established theory often gives a stop sign to CUAs in practice.[609] Even though there is no agreement of will and the situation is quite different from contract, the principle of private autonomy is assaulted by the general theory rule.[610]

---

[600] CHRISTIAN HATTENHAUER, EINSEITIGE PRIVATE RECHTSGESTALTUNG: GESCHICHTE UND DOGMATIK [UNILATERAL PRIVATE TRANSFORMATION OF LAW: HISTORY AND DOGMATICS], at 286 – 293 (2011).
[601] Nikita V. Rezanov, *Odnostoronniye sdelki: Klassifikatsii, Svoboda Soversheniya, Vozmozhnost Vklyucheniya Usloviy* [*Unilateral transactions: Classifications, Freedom to Perform, Possibility to Include Conditions*], Bulletin of Economic Justice, № 10, at 175 – 178 (in Russian, 2022).
[602] Id., at 175.
[603] As a quick reminder, the rule of BGB § 388, which prohibits the conditional set-off, became the ground point to reject all other CUAs, as those interfering the legal status of the addressee. *See supra* note 600, at 288. *See supra* note 601, at 175.
[604] *See supra* note 600, at 286.
[605] *See supra* note 601, at 176.
[606] *See supra* note 600, at 290.
[607] Id., at 291.
[608] Id.; *see also* German Civil Code, § 242.
[609] Id., at 290.
[610] *See supra* note 601, at 177.

Hattenhauer reviewed the following example.[611] Buyer purchased a car under the influence of deception. Upon learning about the fraud, the buyer declares to the seller: "I'm challenging the contract if I can't resell this car in the foreseeable future."[612] Therefore, the buyer's right to challenge the contract depends upon a future uncertain event, a resale. To evaluate the situation, Hattenhauer suggests finding how the interests of the seller are diminished by this CUA. In his opinion, such claim would be more beneficial than if the claim on fraud was unconditional: the seller knows that the buyer has discovered the fraud and can ascertain the risks of the future litigation.[613] Even though the condition occurrence depends upon the buyer, the deceptive seller cannot be harmed, Hattenhauer assumes.[614] The example is exotic and cannot be put as the basis for overturning the theoretic dogma. It is possible to agree with Nikita Rezanov that, theoretically, the seller is still in the state of legal uncertainty regarding the question on whether the buyer resells the car.[615] However, this exotic example might discover a slight paradox. Hattenhauer seems to be arguing that allowing CUAs can benefit both parties involved in the legal affairs by providing more clarity and certainty to the situation. The certainty is achieved by an uncertain future event, however.

Still, it is possible to agree with Hattenhauer's ideas. There is a confidence that in the future the CUAs would be allowed as a general rule. Two points could be mentioned in this regard. First, the main reasoning behind the overall prohibition on CUAs is the urge to protect the addressee. However, since the start of the 20th century a set of broad exclusions was implemented into the theory: if the there is no obligation for the addressee; if the addressee is controlling the condition occurrence; if the addressee had given a consent for the future possible unilateral actions towards him – the CUA is acceptable. The scope of these exclusions is so immense, that it seems to be a better approach to allow the CUAs overall. Instead of the previous rules, there should an established prohibition of particularly those actions, which uncontrollably impose an obligation onto the addressee. Secondly, this theory is a matter of past age. The current society is striving for more freedom and thus the topic of private autonomy becomes more and more important in the scope of legal affairs. Changing the theory deletes one of the contradictions the principle of private autonomy has today. Since the ancient times, there has been less and less attachment to the formalism in unilateral actions; therefore, unless the public interests are threatened, it is possible to overturn the dogma and allow CUAs overall.

---

[611] The example is given according to Rezanov's translation. *See supra* note 601, at 177.
[612] This "challenge" claim is not a court claim, but a non-court claim known to German law.
[613] *See supra* note 600, at 292.
[614] Id., at 293. It is important to note that according to German law, the deceived buyer can challenge the contract within one year of realization that he was deceived. Therefore, the condition in the example is postponing the right of the buyer to challenge the contract, which is beneficial for the seller.
[615] *See supra* note 601, at 178.

4.1.3. Russian doctrine on conditional unilateral actions

Unlike the German doctrine, the Russian scholars have not established any doctrine regarding CUAs, nor has the law given any answer on the matter.[616] The similarities between the Russian and German law are found in regulating CUAs with the public purpose: marriage, paternity, inheritance.[617] Prohibition of CUAs because of the nature of such CUA is common for many countries; for example, the prohibition of conditional acceptance.[618] Artyom Karapetov calls this phenomenon "the rejection of conditionality by the positive law."[619]

The overall attitude in the Russian legal doctrine towards CUAs could be considered as conservative and cold. Andrey Egorov is negative towards such legal constructs. In his opinion, it is necessary "to prohibit any conditional unilateral action because we need to respect the will of the other party. Conditioning a unilateral action is already a huge risk towards the contracting parties and, moreover, creates a situation of full uncertainty for those, who acquired rights and obligations upon this transaction."[620] Elena Ostanina is also criticizing the usage of conditions in CUAs, as there is a potential risk of legal uncertainty for the addressee.[621]

"Softer" and more advanced opinion could be found in Sergey Gromov's works. He agrees with the previous researchers on prohibiting the conditional unilateral actions in general, however, also promotes a *numerus clausus* of exceptions – CUAs that should be allowed:

1. If the parties allowed the usage of conditional unilateral actions in their agreement.
2. If the condition occurrence is depending upon the actions of the addressee.
3. If the information on the condition occurrence is well-known to the society.[622]

---

[616] *E.g.*, the Russian law does not have a provision prohibiting conditional set-offs.
[617] *E.g.*, the acceptance of inheritance cannot be conditioned, *see* Civil Code of the Russian Federation, Art. 1152 (1994, cons. ver. 2023), *available at* https://bit.ly/40mCWPB (visited July 1, 2023).
[618] *See, e.g.*, Civil Code of Japan, Art. 528 (1896, cons. ver. 2009), *available* at https://bit.ly/3jdExGo (visited July 1, 2023)
[619] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Conditional Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, at 120 (in Russian, 2017).
[620] M-Logos Juridical Institute, *Scientific Round Table "On the discussion of conditional transactions"* (in Russian, 2016), *available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).
[621] ELENA A. OSTANINA. ZAVISIMOST PRAVOVYKH POSLEDSTVIY SDELKI OT OTLAGATELNOGO I OTMENITELNOGO USLOVIY: NAUCHNO-PRAKTICHESKOE POSOBIE [DEPENDENCE OF THE LEGAL CONSEQUENCES OF THE TRANSACTION ON THE SUSPENSIVE AND RESOLUTIVE CONDITIONS: A SCIENTIFIC AND PRACTICAL GUIDE], at 133 (in Russian, 2010). "Since unilateral obliging transactions are not acts of individual regulation, they cannot make the start or termination of obligations conditional upon a suspensive or resolutive condition. Consequently, we may assume that unilateral obliging transactions are, by definition, unconditional."
[622] Sergey A. Gromov, *Tezisy k Kruglomu Stolu Yuridicheskogo Instituta "M-Logos" "Problemnye Voprosy Uslovnyh Sdelok"* [*Thesis to the round table of the Law institute "M-Logos" "Problematic issues of conditional transactions"*] (in Russian, 2016), *available at* https://bit.ly/3WIf2L3 (visited July 1, 2023).

Artyom Karapetov explains his attitude towards CUAs in more loyal way. Additional to the examples discussed previously, he assumes there are no reasons to "harshly prohibit such manifestation of private autonomy" in two cases.[623] In the first case, the condition occurrence is easily checked, e.g., a set-off conditioned upon the cancelling of bankruptcy proceedings, or a right of contract rescission dependent upon the start of embargo.[624] In the second case, the condition occurrence depends upon the addressee, e.g., a right of contract rescission if the debtor does not pay for a long amount of time.[625] Still, Karapetov's opinion is a bit unclear on this question.

Even though, there are no political grounds on prohibiting CUAs, some of the transactions may seem to be just illogical or not beneficial to the legal affairs. Consider a provision, "If A does not pay to B within 2 months, there will be a set-off of the obligation of B by the counter-obligation of A from another contract."[626] At first it may seem as a practical and quite effective legal construct, however, if we investigate the nature of the offset, it can be applied by any of the contracting parties at any time. Therefore, the whole contract provision seems to be useless, since the offset is a right that naturally has an option to be used whenever the contracting party wants. As Vsevolod Baibak says, a conditional set-off does not lead to anything: neither it perfects the civil relations, nor it has any practical necessity.[627] On these assumptions, some of the CUAs may be, in fact, useless.

However, there are also examples of CUAs which are not useless at all. Consider forgiving a debt, which is a unilateral action also. A and B agree on the provision, "if B pays 30% of the debt within one month, A forgives the rest of the debt." Conditional forgiving is a useful instrument, since there is no problem with checking up the condition, because the debtor is influencing the condition occurrence himself; moreover, he is financially interested in it. Another example is very practical in modern days: conditional spot-trading. The trader delegates the stock exchange his right to buy a stock if a certain price for the share is triggered. For example, the trader sets up a conditional buy assuming the stock plunges below 30$ per share; thus, the moment it happens, the system (the stock exchange bot) automatically buys the share. In legal terms this is the manifestation of CUAs in practice.[628] The addressee (the trader) is the one who gives the consent to commit a CUA towards him in future.

---

[623] Artyom G. Karapetov, *Tezisy k Kruglomu Stolu Yuridicheskogo Instituta "M-Logos" "Problemnye Voprosy Uslovnyh Sdelok"* [*Thesis to the round table of the Law institute "M-Logos" "Problematic issues of conditional transactions"*], at 5 (in Russian, 2016), *available at* https://bit.ly/415mfbB.

[624] Id.

[625] Id.

[626] *See* opinion of Vsevolod V. Baibak, in: M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).

[627] Id.

[628] This example is about the legal relationship between the trader and the stock exchange. In fact, spot-trading is a contract since there is always a buyer and a seller at any bid price in a concrete moment of time.

Inspired by the ideas of Dr. Christian Hattenhauer, there is also an opinion on allowing CUAs as a general rule. This approach is presented by Nikita Rezanov, who extrapolated the knowledge of German doctrine onto the Russian reality.[629] Since the opinion does not differ much from the ideas expressed by Hattenhauer, it is wise to briefly summarize the points suggested by the Russian scholar:

- There is a set of unilateral actions which is expressly prohibited by imperative law: acceptance, abandon (maritime law), acknowledgement of paternity. However, these examples "do not prejudge the conclusion that conditional unilateral actions are totally prohibited."[630]
- Conditional "non-interventive" unilateral actions do not infiltrate the legal autonomy of the addressee. The Russian law establishes that an offer to alienate a share in the authorized capital of LLC could be conditioned upon.[631] Even though disputed in Russian literature, the conferment of authority could also be conditioned.[632] The inclusion of suspensive or resolutive condition does not contradict the nature of conditional non-interventive unilateral actions.[633]
- Conditional "interventive" unilateral actions could also be allowed if they do not violate the rights and lawful interests of the addressee. Acceptable CUAs are based on conditions which are in full control of the addressee, or on events that are obvious to any mindful person. However, two restrictions are necessary: first, CUAs with legal uncertainty towards the addressee, and, secondly, resolutive conditions in such CUAs since they "contradict the nature of most of such actions."[634]

The remark regarding the resolutive conditions is quite important in the context of CUAs, and it is often omitted by the scholars. Indeed, the nature of the "affirmative" answer suggests that the answer should be straight to the question asked by the other party. However, there is also one more basic truth: when the answer is given, it cannot be revoked. If the answer to the offer is affirmative, then the parties might agree on a unilateral rescission from the contract in future, but the affirmative answer cannot be deleted from existence by a resolutive condition; it is against the legal nature. If the answer to the offer is negative, no resolutive condition can restore the legal status of the parties before the answer: the seller will either find another buyer or conclude the transaction with the current buyer through a new offer-acceptance scheme.

---

[629] Nikita V. Rezanov, *Odnostoronniye sdelki: Klassifikatsii, Svoboda Sovershenia, Vozmozhnost Vklyucheniya Usloviy* [*Unilateral transactions: Classifications, Freedom to Perform, Possibility to Include Conditions*], Bulletin of Economic Justice, № 10, at 181 (in Russian, 2022).
[630] Id.
[631] *See* Federalnyy zakon № 14-FZ "Ob obshchestvakh s ogranichennoy otvetstvennostyu" [Federal Law № 14-FZ "On the LLCs"], Art. 21.11.6 (in Russian, 1998, cons. ver. 2023), available at https://bit.ly/3VTdajT (visited July 1, 2023).
[632] This opinion of Rezanov is based on the German legal doctrine and German Civil Code, § 167.
[633] Id.
[634] Id.

4.1.4. Brief conclusions on conditional unilateral actions

In 2020, the question of CUAs was briefly reviewed by the author in his master thesis.[635] There, the suggested solution did not differ a lot from the thoughts of Hattenhauer and Rezanov:

- "Conditional unilateral transactions should be allowed if the condition is easy to check and the condition occurrence is dependent upon the addressee's actions.
- If the condition is not easy to check, then any conditional unilateral transaction, which creates obligations for the addressee, should be banned.
- If the condition is not dependent upon the addressee's actions, then any conditional unilateral transaction, which creates obligations for the addressee, should be banned.
- Some conditional unilateral transactions should be restricted directly (conditional acceptance, conditional disclaim of inheritance, conditional offset)."[636]

Still, after a more extensive analysis on CUAs is provided, this position shall be further refined. It is not a simple task to find the golden mean in the question of CUAs. For example, to answer the question on acceptability, it is necessary to first answer on how prepared and the law is. In case of German law, perhaps, it is much closer to a dogmatic change, then in case of Russian law, which is still developing its core legal concepts. Political stance might play an important role: if the government does not fully believe in the good faith of the participants of the legal affairs, then the CUAs are better of being prohibited. However, it is possible to agree with the leading Russian scholars: there is no political reason to prohibit CUAs. Practically-wise, the acceptance of CUAs might constitute a huge boost to the flexibility of legal relationships. Theoretically-wise, one of the contradictions in the principle of private autonomy would also be solved.

Therefore, it is possible to affirm the position, expressed in earlier papers. CUAs should be allowed as a general rule. The CUAs which do not impose obligations on the addressee should be allowed also. The thorough regulation should be done in the scope of CUAs which oblige the addressee: the condition in these actions should be authentically accessible for the addressee, or the condition occurrence is dependent upon the addressee's action or will, or the addressee gave a consent to commit such actions towards him. The unilateral actions of public interest should be considered unconditional, the list of such CUAs is more or less similar in the countries of civil law tradition. One thing can be stated with confidence: the general acceptance of CUAs by law is a matter of time.

---

[635] *See* Danil Polynovskii, Analysis of Some Crucial Issues of Contingent (Conditional) Transactions (2020) (Unpublished LL.M. dissertation, Kyushu University) (on file with the Law Faculty of Kyushu University), at 57 – 64.
[636] Id., at 63 – 64.

4.2. Doctrinal analysis on conditional dispositive transactions

4.2.1. Automaticity feature and publicity restriction

To start the discussion on conditional dispositive transactions (*hereinafter* CDTs), it is necessary to define a dispositive transaction. Neither German, French, nor Russian civil codes mention the exact word combination of "dispositive transaction." A dispositive transaction is a deal that terminates the right for the owner and transfers the right to another person. Hans Brox describes them as "those that are directly aimed at affecting an existing right: transferring, encumbering, modifying, or terminating it."[637] Thus, under a dispositive transaction, or disposition, one entity acquires the right (property right, contractual right, intellectual property right, etc.), and the other entity loses the same exact right. A disposition transaction may be a part of every contract, however, has a distinctive feature apart from the contract itself. While the contracts are accounted by the will of two or more parties, the dispositive transaction is a unilateral action of one party to transfer its rights to another party, for example, from the former owner to the new owner, from the assignor to the assignee. Therefore, the dispositive transaction is often integrated into the structure of the contract under which the rights are disposed of.

Dispositive transactions could be conditioned upon the occurrence of a certain event; the retention of title is the most popular example of it. Consider A and B enter the contract of sale, where the transfer of the property rights for the car from A to B is conditional upon the payment of the full car price by B. Indeed, B can pay the full sum today, tomorrow, or whenever he wants to, but the property right for the car transfers only the moment he pays this full sum of money to A. The moment B pays the full price, an automatic transfer of the property right will happen from A to B. The Russian law does not restrict such situations and makes them real within the articles on the potestative conditions, on the freedom of contract, and on the preservation of the property right for the seller.[638] The same goes for German law, which defines the retention of title and provides a protected expectation regime for the buyer.[639] The French Code Civil also gives a thorough explanation to the retention of title scheme.[640]

---

[637] HANS BROX, ALLGEMEINER TEIL DES BGB [GENERAL PART OF BGB], at 51 (in German, 2010).
[638] Civil Code of the Russian Federation, Art. 327.1, 421, 491 (1994, amend. 2022).
[639] German civil code BGB, § 449 (1900, cons. ver. 2021); *see also* Part 3.2.2. "German approach on legal pendency", at 137.
[640] French Civil Code, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton, Art. 2367 – 2372 (1804, ver. before 2016).

However, none of the abovementioned countries have concrete provisions on CDTs in their codes. Therefore, the issue is solved by other means. For example, the Supreme Arbitral Court of Russia in 2010 had a case, where a cession was partially conditional upon the full payment of the acquired rights. The concrete question was whether the dispositive transaction of transferring the rights from A to B could be conditioned upon the full payment of the transferred right. The Supreme Arbitral Court decided the GK RF had no restrictions on such conditional agreements, admitting that CDTs are coherent within the principle of party autonomy.[641]

While this decision is self-explanatory, the overall situation is not that simple as it may seem at first sight. In 2011, a year later, the Supreme Arbitral Court of Russia faced a case on the lease agreement. A and B agreed on the lease of the office apartment with a condition of a buy-out, so the leased apartment property rights are transferred from A to B, when B pays the full sum of the buy-out. The Court ruled that within the payment of the full sum of the buy-out, B is freed from an obligation to pay monthly lease payments, however, the transfer of the property right for the leased office apartment may happen only upon the public registration of the right in the Unified Immovable Property Registry of Russia.[642]

These examples show two sides of one coin. On the one hand, the cases present a key feature of CDTs: they are automatic. The process of the transfer of right does not need another declaration of will from the contracting party. In retention of title the right automatically transfers the moment the buyer pays the full price. In cession, the right automatically transfers the moment the assignor pays the full price for the right. In a lease agreement with a buy-out of a movable property, the right automatically transfers the moment the tenant pays the full price of the buy-out. Since the contracting parties expressed their will to connect the disposition with the moment of condition occurrence, no other exchange of statements (willful proclamation) is necessary when the condition finally occurs.

On the other side, however, the case also shows an obvious restriction to the CDTs. This restriction is the mandatory registration of the transferred property right. Basically, any property right that needs registration to be finally acquired by the purchaser or assignee cannot be transferred through a CDT. There is no difference on whether the registry should be public or private because the effect would be still the same. Any mandatory registration postpones the moment of acquiring the transferred right, thus, not allowing the conditional dispositions to be performed. The registry restriction can be applied to a variety of situations, such as immovable property rights, founder's rights of a LLC,

[641] Ruling of SAC RF № 16283/09 on case № A34-571/2009 (in Russian, March 30, 2010), Bulletin of SAC, 2010, № 6.
[642] Ruling of the Plenum of the SAC RF № 73 "On the regulation of Civil Code of the Russian Federation on lease agreement provisions." Bulletin of SAC RF, 2012, № 1 (in Russian, November 17, 2011).

property rights on shares which are registered by the company, or intellectual property rights which need special registration, such as patent and invention rights.[643]

The German legislator also fixed a provision on ineffectiveness of using conditions when transferring immovable property.[644] Upon the analysis on German literature, Andrey Egorov assumes that for the German legislator "the legal certainty is more important than the desire of the subject of the transaction to take into account some related circumstances."[645] The same idea on "legal certainty" is shared by German lawyer J. von Staudingers.[646] Prof. Burkhard Boemke explains this prohibition in a peculiar way, as the background to this rule is to support "the general public's trust in the correct representation of the ownership situation in the land register."[647] If the dispositions of immovable property were subject to suspensive conditions and the change of the ownership subsequently entered the land register, the register itself would become incorrect as soon as the condition occurred.[648] Werner Flume emphasizes the legal significance and "fundamental meaning" of ownership transfer, therefore, since "the usage of conditions brings uncertainty", it is prohibited to make a condition for the transfer of immovable property under the German law.[649] This rule seems to be applicable to any right that must be registered in a public or a private registry.

At first glance, the approach of Russian and German law in terms of CDTs might seem to be very similar. Indeed, both countries are related to the same German branch of law, a part of the continental legal system.[650] Moreover, the Russian legislator, in fact, borrowed the "retention of title" concept from the BGB except for the rule about transferring expectation rights (Russian law does not acknowledge them). However, there are some important differences between the legislations about the understanding of the concept of dispositive transactions which affects the relationship between the imperative rules of law and concept of CDTs as a result. These differences could be found in the understanding of dispositive transaction, as well as in the feature of abstractive.

---

[643] Civil code of the Russian Federation, Art. 8.1, Art. 149.2, Art. 1366, Art. 1366, Art. 1490, (1994, amend. 2022), *available at* https://tinyurl.com/y7w28dc (visited July 1, 2023); for the "founder's rights of LLC", *see*, *e.g.*, *See* Federalnyy zakon № 14-FZ "Ob obshchestvakh s ogranichennoy otvetstvennostyu" [Federal Law № 14-FZ "On the LLCs"], Art. 21 (in Russian, 1998, cons. ver. 2023), available at https://bit.ly/3VTdajT (visited July 1, 2023).

[644] Civil Code of the Russian Federation, Art. 925.

[645] Andrey V. Egorov, *Rasporyaditelnyye sdelki: vyyti iz sumraka* [*Dispositive Transactions: to Leave the Twilight*], Bulletin of Civil Law, № 6, at 81 (in Russian, 2019).

[646] KARL-DIETER ALBRECHT, J. VON STAUDINGERS KOMMENTAR ZUM BURGERLICHEN GESETZBUCH: MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN. ECKPFEILER DES ZIVILRECHTS [J. VON STAUDINGERS COMMENTARY ON THE CIVIL CODE: WITH THE INTRODUCTION OF THE LAW AND SECONDARY LAWS. CORNERSTONES OF CIVIL LAW], at 77 (in German, 2008).

[647] BURKHARD BOEMKE, BGB ALLGEMEINER TEIL [GENERAL PART OF THE BGB], at 333 (in German, 2009).

[648] Id.

[649] WERNER FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS [GENERAL PART OF CIVIL LAW], at 697 (1992).

[650] Evgeniy A. Sukhanov, *O vidakh sdelok v germanskom i v rossiyskom grazhdanskom prave* [*Types of Transactions in German and Russian Civil Law*], Bulletin of Civil Law, № 2, at 5 (in Russian, 2006).

4.2.2. Different approaches on conditional dispositive transactions

Russian doctrine knows dispositive transactions; however, those are not implemented into the legislation. "Dispositive transaction" is just a convenient combination of words to describe the transfer of rights, and the legal meaning behind it is to symbolize the performance of the obligation. The state of Russian doctrine in regard to acknowledging dispositive transactions was very well explained by Egorov.[651] There are two major opinions on the existence of dispositive transactions in Russian law. The first opinion is the leading one: a dispositive transaction, as an essential part of every contract, constitutes the transfer of goods and rights; this was supported by such big authors like D.O. Tuzov, V.V. Rovniy, E.A. Krasheninnikov, L. Chanturia and others.[652] The opposite opinion is supported by a very notable researcher K.I. Sklovsky, who thinks "no additional willful conduct should be done when disposing of" something, and "the will to dispose of something is expressed only once within the choice of the contract, to which the imperative rules of law gave the power to transfer the right."[653] However, this position was criticized heavily by other researchers, including A. Egorov. Nevertheless, the influence of the doctrine to the codification is, in fact, minimal when it comes to dispositive transactions. The doctrine only tries to guess what the best way is to regulate the usage of conditions in such cases. Some of such guesses were discussed on scientific round tables.[654]

Russian legislation does not fix anything about dispositions or its "abstractness" feature (separability of the dispositive transaction from the main deal), with only some exclusions provided by the case law in terms of the sale of stocks.[655] The lawmakers have never touched upon this topic, so the dispositive transactions do not have any specific norms in the Code, as there is no doctrinal system behind the dispositive transactions. An obvious lack of legislation and research affects the overall discussions on using conditions in dispositive transactions. The GK RF regulated only one possible transaction which is the retention of title, restricting it drastically by prohibiting the potential buyer to transfer the goods to other parties in any way before the condition occurrence.[656]

---

[651] *See supra* note 645, at 82.
[652] Id.
[653] Konstantin I. Sklovsky, *Razdeleniye deystviya sdelki: printsipy i predrassudki* [*Dividing the action of the transaction: principles and prejudices*], Aequum ius. From friends and colleagues to the 50th anniversary of Prof. D.V. Dozhdev. A.M. Shirvindt (ed.), at 149 (in Russian, 2014).
[654] *See, e.g.*, M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).
[655] Resolution of the Arbitration Central District Court of Russia on case № A48-4764/2017 (in Russian, April 5, 2019). "Thus, given the fact that the contracts of sale of shares of JSC "PG "ALSIKO" were recognized invalid in connection with their failure to be signed by the seller, however there are transfer orders signed by the plaintiff (which are not challenged and are not recognized as invalid), the rights to the shares passed from the plaintiff to the buyers."
[656] Civil Code of the Russian Federation, Art. 491 (1994, amend. 2022).

In German law "dispositive transaction" is a legal dogma which describes a certain act of a titled party to dispose of the right in favor of the other party. Evgeniy Sukhanov explains the advantages of such approach. First, the dispositive transaction in German law is abstract: the contracting parties should not know or agree on its basis (inner abstractness), and the validity of the dispositive transaction does not depend on the validity of the obligation (outer abstractness).[657] Secondly, to transfer the right under the German law the contracting parties should conclude a separate written agreement (*Auflassung*, for example).[658] Therefore, in German law, a dispositive transaction is an agreement and an action for the transfer of right at the same time. According to Karl Larenz, German philosopher of law, this also implicates that the dispositive transaction is a bilateral agreement, that is abstract and oriented on property.[659] However, in case of retention of title, when the full price is paid to the seller, the action from the seller to transfer his title to the acquirer is unilateral in nature. Sukhanov admits that unilateral dispositive transactions are exclusions in the German law, like some others, for example, a public promise of a reward or legacy.[660] Egorov agrees with his point of view.[661] He adds that for just the purposes of practical necessity the German legislator "allowed" the CDTs for the movable property (the retention of title, for example).[662]

From the abovementioned remarks about Russian and German law on dispositive transactions, it is possible to expose two differences in terms of understanding and regulating dispositions.

The first difference lies in the practical sense behind the dispositive transactions. In Russian law the dispositive transaction is symbolizing the process and the aftermath of the transfer of right, however in German law the purpose of the dispositive transaction seems to be much more important. According to K. Larenz, the purpose of "dispositive transaction" concept in German law is to apply a special protection to the entitled party from an unauthorized access from any third parties.[663] In Russian law, according to E. Sukhanov, the dispositive transaction just shows "the peculiarities of legal consequences."[664] This can be as well applied to CDTs.

---

[657] *See supra* note 650, at 12.
[658] Id.
[659] *See* opinion of Karl Larenz, in: Manfred Wolf, *Allgemeiner Teil* [*General Part of Civil Law*]*, Vol. 3, § 104-240* in: HANS T. SOERGEL, BÜRGERLICHES GESETZBUCH: MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN: KOHLHAMMER-KOMMENTAR [CIVIL CODE: WITH INTRODUCTORY LAW AND SUBSIDIARY LAWS: KOHLHAMMER COMMENTARY], at 451 (in German, 1999).
[660] *See supra* note 650, at 13; *see also* German Civil Code, § 657, 2174.
[661] *See supra* note 645, at 54.
[662] M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).
[663] *See supra* note 659, at 421.
[664] Evgeniy A. Sukhanov, *O vidakh sdelok v germanskom i v rossiyskom grazhdanskom prave* [*Types of Transactions in German and Russian Civil Law*], Bulletin of Civil Law, № 2, at 16 (in Russian, 2006).

Secondly, dispositive transactions are exclusions for the German law while the Russian law and doctrine understands the dispositive transactions exactly as a type of unilateral actions (which is not an exclusion but the main rule). It seems that the Russian legislation gives more potential to the contracting parties to conclude CDTs than the German law. This does not mean the German imperative of law provides more restrictions to the autonomy of parties to conclude such transactions. The German law just framed the retention of title as an exclusion and a practical necessity, while the Russian law, framed the same concept as one of the alternative ways the CDTs could be done.

The French approach to the question is a completely different. The possibility of conditioning a transfer of rights itself is not questioned at all. However, the French law has a *solo consensu* principle presented in Code Civil, according to which the transfer of rights is enforced within the conclusion of the contract.[665] This means that a sales contract signed by the parties has two functions at the same time: first, it creates an obligation, and secondly, it has a power of a dispositive act. Therefore, the main question is what exactly the contracting parties are able to condition if they have a desire to condition the transfer of rights.[666]

A.V. Ageev, presented two main opinions on the matter.[667] According to the first opinion, the obligation to transfer the property could be conditioned, while the transfer of the right itself is unconditional, since it is just the consequence of the conditional obligation. Therefore, a conditional sale, gift or any other disposition can be explained as an existing "obligation to give" conditioned upon something. The second opinion is the opposite one: the translative (dispositive) effect of the contract is itself conditional. If only the "obligation to give" could be conditioned, then "it becomes impossible to condition or to terminate the transfer of the title." In their mind, the principle of *solo consensu* was of pure theoretical matter, therefore there is no "obligation to give" in practice. In fact, this obligation was performed the same time it occurred, therefore no help from the seller was necessary to transfer the property right.[668] This way the disposition could not be torn apart from the contract, however, that did not mean the conditional transfer of immovable property was possible.

---

[665] Aleksandra A. Makovskaya, *Reforma dogovornogo prava vo Frantsii. Novyye polozheniya Grazhdanskogo kodeksa Frantsii* [*Reform of contract law in France. New Provisions of the French Civil Code*], Bulletin of Economic Justice of the Russian Federation, № 8, at 86 (in Russian, 2016); *see also* French Civil Code, Art. 1196 – 1198, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016, available at* https://bit.ly/2Qodnso (visited July 1, 2023).

[666] MATHIAS LATINA, ESSAI SUR LA CONDITION EN DROIT DES CONTRATS [ESSAY ON THE CONDITION IN CONTRACT LAW] at 63, No. 81, No. 92 (in French, 2009), cited by Aleksey V. Ageev, *Osnovnye podhody k problemam v sfere usloviy vo Francii* [*General approaches in the sphere of conditions in France*] (in Russian, 2016), available at https://bit.ly/3XLEQYg (visited July 1, 2023).

[667] Aleksey V. Ageev, *Osnovnye podhody k problemam v sfere usloviy vo Francii*. [*General approaches in the sphere of conditions in France*] (in Russian, 2016), available at https://bit.ly/3XLEQYg (visited July 1, 2023).

[668] *See supra* note 666, at 64 – 65, No. 81, No. 92, cited by Ageev, *see supra* note 667.

4.2.3. Peculiarities of Germanic law in conditional dispositive transactions

Why is the concept of CDT an exclusion for the German law? There is no clear answer to this question, although a suggestion was made by A. Egorov during one of the Round Tables on the issues of conditional transactions in Moscow in 2016, "it is a question to them on why they (lawmakers) made it as a transfer of rights."[669] By his assumption, the reason was the prohibition of pledge in such cases.[670] Egorov implies that the potential buyer cannot secure the payment of the full price with a pledge of the same thing back to the seller. This idea is very interesting since BGB, in fact, prohibits a pledge without the transfer of possession to the creditor.[671]

Imagine A wants to sell B his right, but to secure the payment for A's right B should pledge this right back to A. Therefore, B becomes the right holder of A's right (a pledgor) and A becomes the pledge right holder (a pledgee). So, if B does not pay, according to the pledge, the right goes back to A. However, due to the principle of publicity mentioned before, this scheme is simply not possible under the German law. It is not possible to pledge something without transferring the possession of the thing to the pledgee, because B still did not pay the full sum of money and has nothing to transfer into A's custody. Nevertheless, this exact scheme was allowed by the case law. Nowadays, it is a popular legal instrument to be used in Germany, a security title transfer *Sicherungsubereignung*, which is an exclusion from the general rules of German law.[672] The same goes for the "retention of title" concept, which is also a CDT. The law acknowledged such transactions as specific situations to answer the practical necessities.

On the contrary, the Russian law fixes the pledge without the transfer of possession to the creditor as their main rule,[673] which is another argument for the more potential for the usage of CDTs in Russian law than in German law. Due to differences in the general understanding of pledge, the Russian law, even though failing at regulation of any expectation rights, is legislatively more attractive for the usage of conditions in dispositive transactions because this legal concept does not behave as an exclusion, as it does in the German law.[674]

---

[669] M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).
[670] Id.
[671] German civil code BGB, § 1205 (1900, cons. ver. 2021), available at https://bit.ly/408nSVk (visited July 1, 2023).
[672] Ekaterina V. Galkova, *Obespechitelnaya peredacha titula po germanskomu pravu* [*Security Transfer of Title under German Law*], Zakon, № 11, at 176 (in Russian, 2016).
[673] Civil Code of the Russian Federation, Art. 338 (1994, amend. 2022), available at https://bit.ly/40mCWPB (visited July 1, 2023).
[674] For "failing at regulation of expectation rights", *see* Part 3.4.1. Negligent level of regulation, at 146.

Coming back to the German law, the usage of conditions in dispositive transactions is based on three key points. First, the object of condition is the legal consequence of the transaction.[675] The second point is close to the first: the dispositive transaction (or disposition) is one of the two legal acts accompanying the contractual deal, such as retention of title for example. Therefore, a dispositive transaction is a separate transaction, which is regulated by the general rules on transactions, hence, all the rules on conditional rights and liabilities apply to dispositive transactions as well (except for the situations where a public registration of the right transfer is necessary).[676] Because of this, the German doctrine considers dispositive transactions to be "especially suitable for being conditioned upon" (*bedingungsfreundliche Rechtsgeschafte*).[677] Researchers think this happens because the condition negates the abstractive features of the dispositive transactions, making them much more connected with contractual obligations, than if they were not conditioned by anything.[678] Thirdly, the condition occurrence triggers the legal consequences for the dispositive transaction, so there is no need to expose any additional will for the contracting parties. The rule is acting the same way as in the previously discussed Russian law – the rights are transferred automatically upon the condition fulfillment. To deem such transfer of rights to be null or void, the interested party should prove the vice of the transaction, found in the absence of authority, absence of legal capacity, etc.[679]

The second basis poses the most importance for the current question: the condition negates the abstractness feature of condition. The abstractness feature is an imperative staple which was historically established by the doctrine and law. However, the usage of conditions negates the separability between the dispositive transaction and the main deal: the disposition in this case becomes an automatic process based on condition occurrence, and the performances of buyer and seller cannot be managed separately from the dispositive transaction anymore; they become interconnected.

Austrian and Swiss law, which are historically closely connected to German law, have a different approach towards dispositive transactions. However, the Swiss Civil Code clearly states that "an entry is unwarranted if it is without legal basis or was made on the basis of an invalid transaction."[680] The article is referred solely to immovable property, however according to a case from 1927 this "causality" principle was also applied to the transfer of furniture, therefore, to movable

---

[675] *See* Part 1.1.2. What condition affects (object of condition), at 26.
[676] Kirill V. Nam, *Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod* [*Comment to the #Gloss. Conditional transaction. German Approach*]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 75 – 108 (in Russian, 2018); see also German civil code BGB, § 925 (1900, cons. ver. 2021).
[677] Id.
[678] Id.
[679] Id.
[680] Federal Act on the Amendment of the Swiss Civil Code Part Five: The Code of Obligations, Art. 974 (2) (1911, cons. ver. 2023), available at https://bit.ly/3DlCneI (visited July 1, 2023).

property.[681] Same goes for Austria in ABGB.[682] Austria and Switzerland follow the "causality" principle, according to which the validity of dispositive transaction depends upon the validity of the deal it is based on. If A sold and transferred the thing to B, then C, to whom the thing is transferred afterwards, cannot be a title holder if the contract between A and B is void or successfully challenged on the grounds of mistake.[683] Austrian professor Helmut Koziol often criticizes the German approach with abstractive dispositive transactions, agreeing with other scholars J. Fuller and H. Westermann that "this principle (abstractness) should not belong to the German school of property law, which shaken dangerously."[684]

The usage of CDTs seems more natural for the Austrian and Swiss law than for the German law. This conclusion comes not only from the fact that German law has "abstractness" feature of dispositive transaction and Austrian and Swiss laws have "causality" feature. Consider the rules of pledge provided by the German and Austrian law as well. It was stated before that the German law prohibited pledge without the transfer of possession to the creditor according to BGB.[685] Austrian lawmakers provided a more extensive regulation upon pledge in ABGB.[686] Thus, the main rule is that to confirm the pledge the possession should be transferred to the creditor in case of movable object.[687] In this sense, the Austrian regulation does not differ from the German law. However, ABGB also allows a "hard pledge", the situation where pledging of movable property does not permit physical transfer from hand to hand. According to ABGB, the parties should establish signs that "must be used as in the case of the transfer of ownership, from which anyone can easily learn of the pledge."[688] The Swiss Civil Code took a more imperative approach, however: "except where otherwise provided by law, chattels may be pledged only by the transfer of possession of the pledged chattel to the pledgee."[689] This implies that the debtor can be in possession only if it is provided by the imperative rules of law. Comparing to the German law there is still "some room to breathe" though, because the German lawmakers did not fix any "if" regarding the possession of pledge.

---

[681] Judgement of the Federal Supreme Court of Switzerland dated by 29th November 1929, BGE 55 II 302 (in German, 1929), available at https://bit.ly/3MBlsdr (visited July 1, 2023).
[682] Austrian Civil Code, Sec. 380 (1812), available at https://bit.ly/3wzCSxU (visited July 1, 2023).
[683] Helmut Koziol, *Glanz und Elend der deutschen Privatrechtsdogmatik* [*The Splendor and Poverty of German Civilistic Dogmatics*], Archiv fur die civilistische Praxis, at 28 (in German, 2012), trans. into Russian, Bulletin of Civil Law, № 6, at 254 (in Russian, 2012).
[684] Id. at 29 (in German), at 256 (in Russian).
[685] German civil code BGB, § 1205 (1900, cons. ver. 2021), available at https://bit.ly/408nSVk (visited July 1, 2023).
[686] Austrian Civil Code, Sec. 451, "In order to acquire the pledge, the creditor provided with a title must take custody of the pledged object, if it is movable; and, if it is immovable, have his claim recorded in the manner prescribed for the acquisition of ownership of real property."
[687] It is hard to evaluate the situation with immovable objects, because of the "registration restriction."
[688] Austrian Civil Code, Sec. 452.
[689] Federal Act on the Amendment of the Swiss Civil Code Part Five: The Code of Obligations, Art. 884.

4.2.4. Security function of conditional dispositive transactions

From the discussion on abstractness feature of dispositive transactions it becomes clear that CDTs have some distinctive features. These features characterize the way condition behaves when used in dispositions made by the contracting parties. The first feature is that the conditions is dispositive transactions are "automatic", so the contracting parties do not have to express their will once more when the condition finally occurred. The second feature is that the condition negates the "abstractness" feature of dispositive transactions if it is established in legislation.

There is also another debatable feature of CDTs, which might come to mind after the discussion on pledge. Even though the dispositive conditional transactions prove to be effective in practice, Prof. A. Egorov considered that CDTs should be prohibited regardless of whether a suspensive or resolutive condition is used. In his opinion, it should be done to preserve the stability of civil relations and to make the legal relationships more predictable, since the dispositive transactions can define the ownership for literally anything.[690] Judging by his words, almost any dispositive transaction is associated with transferring a title of a certain thing, thus the dispositive transaction bears a kind of security function. Is that so? Since the rules on pledge could help to explain the potential of CDTs, why does the concept of condition not have a "security" feature?

Through the further analysis, the answer is "not always." The question on security can be as well translated into a following question: "does a dispositive transaction (be it conditional or unconditional) always require a thing?" While it is very debatable in terms of cession, since it is possible to imagine that there is still a representation of a certain right connected to "goods", there are other examples to prove that the conditions in dispositive transactions do not always bear a "security" function. The first example is introduced by a famous Russian attorney V.V. Baibak, who encountered such case in practice.[691] The client asked to help with the "transfer of the contract." The contract was a lease of governmental land. The client wanted to become the new tenant, so it would be the cession and the change of the debtor at the same time. The agreement to "transfer the contract" was conditioned upon an administrative decision to build a new highway near the land. Therefore, the client did not have any commercial interest in the contract unless an administrative decision was made. The parties agreed on the contents and every document was legally correct, however, there was no security effect in this CDT whatsoever.

---

[690] M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).
[691] Id.

A similar example would be a cession of future rights.[692] For example, A and B agreed on a construction contract, where B is building a small warehouse for A. In the process of building A happens to be low on financial resources and decides to sell the warehouse to C. However, the warehouse has still not been built by B, hence, A does not have any property rights for the warehouse. To help A and C, Russian legislators incorporated a legal model, which allows to sell future rights. Even though the right has not occurred yet, the contracting parties A and C are sure enough that the assignee A will get the property right the moment the warehouse is finally built by B. In this case, the dispositive transaction of transferring the property right from A to C is conditional upon the occurrence of the property right itself. Therefore, the moment B passes the results of his work to A, the property right automatically transfers from A to C. As there is no need to register the warehouse, the CDT happens to be conveniently applied to the situation.[693] However, depending on the sizes of the warehouse and whether its connection to the ground is firm or not, the rules of public registration can be applied, negating the possibility for an automatic transfer of property rights. Again, there is no security function in the transaction, as the thing is still not existing.

Another situation regarding the cession of future rights is the loan with creditors change. Imagine A and B signed a loan agreement where B loans 1000$ from A for 2 months. In a month A happens to need some free cash and asks C to change him as a creditor for the loan agreement. To do that they sign a cession agreement, where C pays to A 1000$, so C gets the right to demand 1000$ from B in a month. What is the profit? The interest from the loan, which is rather high for micro-loans in Russia (around 10%). The CDT is at work the moment the right of demand occurs, hence, in a month after A and C signed a cession agreement, the creditor's right of demand occurs and immediately transfers to C, who can now demand the loan payment plus 10% interest from B. Cession of the future rights seems to be a very convenient scheme for today's civil relations, since the disposition of rights is an automatic process, conditional upon the right occurrence. If there is no right to occur, then there is nothing to transfer. Moreover, the contracting parties are free to complicate the agreement up to the present circumstances.

At the same time the examples shown earlier act like some exclusions from the main approach towards CDTs: to properly dispose of a certain right or a thing, which is already existing. Combining with the previous analysis on the connection of pledge rules with the rules on retention of title, the idea of "security" feature of conditions in dispositive transactions might be more feasible.

---

[692] Civil code of the Russian Federation, Art. 388.1.

[693] M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).

Practically, the conditions had always provided a "sense of security" since the contracting parties are using the conditional transactions to minimize the possible risks and anticipate most of the future surprises. The conditions, specifically in CDTs, provide another layer of protection of the interests of the creditor and state clear perspectives for the debtor: if the buyer pays the full sum of money, the title for the car automatically transfers to the buyer. To define the "security" function in the exact way is also possible: in most cases the conditions, when used in dispositive transactions, connect the obligation performance of the debtor with the main contract (with the causa of the dispositive transaction), confirming that the goods will be transferred to the buyer upon the condition occurrence and that the goods will not be transferred to the buyer if the condition fails to occur.

As far as the resolutive conditions are concerned, however, there are two possible ways of interpretation for the conditional dispositive transactions. The first variant is logical, as in all dispositive transactions someone is to lose, the other one is to acquire. Hence, for the buyer, the conditional dispositive transaction has a suspensive condition effect, since he acquires the right, and for the seller, the conditional dispositive transaction has a resolutive condition effect, since he loses the right, he had owned before. A. Karapetov makes another example of resolutive condition which is a "reverse consensual sale."[694] According to the first contract the right will transfer from A to B if C whistles once. Nothing prohibits for A and B to conclude another contract where it is stated that the right will transfer from B to A if C whistles twice. This would act a resolutive condition for the first contract. Therefore, there seems to be no problem at first glance if the difference between the suspensive and resolutive is only in the scope of relativity (to whom the final effect applies).

However, the second variant sounds more complicated, and is much more interesting. Imagine A (from country A) is transferring a creditor right to B (from country B) on the resolutive condition of tomato embargo start between the countries of A and B. When the contract is concluded, the creditor rights are transferred to B immediately, however, if a tomato embargo starts, the creditor rights are transferred back to A. Therefore, the condition occurrence triggers a "knockback of rights." Coming back to the example with tomato embargo, let us assume that after the contract was concluded, B suggests the creditor rights to C for a little higher price without informing C about the contract with A. C agrees and another cession agreement is concluded. The contract between A and B is still valid, the contract between B and C is unconditional, hence, C becomes the owner of the creditor rights. The interesting part starts when a tomato embargo starts between countries of A and B. According to the contract between A and B, the resolutive condition has occurred, so the creditor rights are coming

[694] M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).

back to A, even though B is not the owner of the creditor rights anymore. C is not informed about the contract between A and B, but still loses the creditor rights, because of two reasons. First, the contract between A and B was before the contract between B and C, and secondly, when the condition occurs B loses his creditor rights, so if there was no legal pendency period between the contract conclusion and embargo start, B would have never been the owner of the creditor rights. In fact, such circumstance is not something any legislator in the world would like to desire. Therefore, the solutions applied to the earlier cases should be brought to this example as well to preserve stability in the civil relations, regarding conditional dispositive transactions. The simplest solution could be a prohibition of such a "knockback."

4.3. How uncertainty issue of conditions in unilateral actions could be handled

When it comes to the topic of unilateral actions the concept of condition appears to bring a different set of uncertainties than it was with the conditional contracts. Neither reciprocity, nor counter-performance are existing in unilateral actions: it is a one-way direction from the addresser to the addressee. The addition of condition should be more careful and precise than in contracts.

The manifestation of party autonomy within the doctrine of unilateral actions could bring two types of results. In the first, the unilateral action enables certain rights for the addressee, like in conferment of authority. The usage of conditions in the actions which only impose rights could be seen as a harmless way to complicate the enactment of the rights, make it more flexible, and provide even more confidence to the addresser and the addressee. The addressee is aware of the possibility to acquire the rights, and there is little to no controversy towards him. In the second way, however, the unilateral action can be also an instrument to impose obligations on a certain party. If there is, for example, a conditional unilateral amendment of contract, then the legal status of the party within the contract could be left in state of legal uncertainty until the condition occurs or not occurs.

The overall connotation around the topic of CUAs seemed to be very negative. This way it was in the German law at the beginning of the 20th century. CUAs were prohibited to preserve the stability of the legal circuit. Later, however, the approach began to soften, as the practical necessities went beyond the imperative rule of law. One important example was allowing to dismiss the worker (a unilateral action of the employer) in case the worker refuses to change the position. The "softening" process went to the stage where even a conditional set-off could be possible. Therefore, today there are voices in the German doctrine: CUAs should be allowed as the main rule.

The researchers of the modern Russian school are also looking forward to such possibility. This is because prohibiting CUAs in general is a restriction to the principle of private autonomy. In the context of developed world economics, there is no use for such a restriction to be in place. It is possible to support the view that CUAs should be allowed, however, with certain limitations: should follow the standard of authentical accessibility, or the addressee should be able to influence the condition occurrence.

The doctrine of unilateral action also refers to dispositive transactions since those are actions of transfer committed by one of the parties within the contract. The usage of conditions in disposition might prove to be useful since the process of transfer is automatic upon the condition occurrence. It is possible to conclude that the restrictive power of imperative law has a firm basis in the regulation of CDTs: the prohibition on conditioning immovable property brings stability to the legal relations and ensures that the contracting parties and the third parties are well-informed about the owner of the title through the registry. The limitation of the autonomy of will is fully justified. Moreover, there is still a variety of cases, where the CDTs can be used. Movable property rights, debts and creditor demand rights, license agreement rights on scientific papers, literature, music, and art. A lot can be disposed of through a condition occurrence.

The doctrinal and legal analysis revolved around several civil law legislations including Austria, France, Germany, Switzerland, and Russia. This analysis leads to multiple nuances which depict the underlying nature of CDTs and conditions in general. Conditions in CDTs are automatic. Conditions in CDTs negate the abstractness feature of dispositive transactions. In most cases, conditions provide a security function to the CDT.

Other than the example of Germany, however, it might be accessed that the regulation of CDTs is almost non-existent. The aim of this paragraph is to promote the possibility of CDTs. A conditional dispositive transaction is a legal model that should be accepted in the civil law countries, as it brings more diversity into the world of economic relations. There are no political reasons to prohibit such transactions completely. However, there are critical issues, which should lead the legislator to limiting the influence of such transactions in a right way. With overall acceptability, three restrictions could be imposed for the CDTs: the transfer of rights mechanism must be properly written into the agreement; the transfer of rights does not happen unless the registration is necessary; the transfer of rights cannot have a knockback effect.

The final part reviews the legal uncertainty within bilateral contracts where the contracting party's counter-performance is made subject to a condition.

5. Rupture of synallagma in conditioned obligation performance

The last but not the least important uncertainty issue in conditional agreements occurs in the situation where the counter-performance of the debtor is conditioned upon an external factor, and this external factor does not occur for a prolonged amount of time.

Consider an example. The Client specializes on concluding construction contracts with private entities. The Client finds a suitable organization for building a small kindergarten and the Contractor agrees upon a construction contract. To complete the construction the Contractor also concludes several agreements with Subcontractors. Those agreements have the following clause: "Upon the work completion the Contractor pays as soon as the payments are made by the Client." The Subcontractors executed their obligations properly, the kindergarten was constructed, and the Contractor notified the Client about the completed work. However, due to various reasons the Client cannot pay the Contractor. As the consequence, the kindergarten stays closed because the construction contract was not fully executed. All parties are in the state of legal uncertainty.

In this specific case, the obligation of the Contractor to pay to the Subcontractors is conditioned upon an external (for the Subcontractors) factor: the Client's ability to pay. His factual inability to pay "ruptures" the synallagmatic contract between the Contractor and Subcontractors, as the performance of one party is not satisfied by the counter-performance of the other. It looks as if the Subcontractors donate the result of their work, even though it is not. The synallagmatic contract is transformed into a simple donation agreement against the parties' preliminary intentions.

For the purposes of further examination, this issue shall be called "Rupture of synallagma" (RoS).[695] Theoretically and technically, the idea of a "wound" towards the synallagmatic contract is appealing enough to explain the issue. Along with other authors on the issue, the author of the current paper also tried to define the issue in one of his past articles.

"Rupture of synallagma is a situation which occurs in a bilateral synallagmatic contract where all the counter-performance [of the latter party] (or its main part) is conditioned upon [an uncertain future event], while the performance of the former party has already been executed."[696]

---

[695] Artyom G. Karapetov, *Razryv sinallagmy i mertsaniye kauzy, ili Mozhno li stavit vstrechnoye ispolneniye po vozmezdnomu dogovoru pod usloviye?* [*Rupture of synallagma and shimmering causa or Could the counter-performance be conditioned upon in a paid contract?*], Zakon legal blog (in Russian, 2017), *available at* https://tinyurl.com/398debc (visited July 1, 2023). Doctor of Laws Karapetov once used the wording "Rupture of synallagma" in his legal blog, however, in his later materials he decided to use the "shimmering causa" wording instead.

[696] Danil Polynovskii, *Razryv sinallagmy pri obuslovlennosti vstrechnogo ispolneniya: puti resheniya* [*The rupture of the synallagma within the conditioning of the counter performance: solutions*], Sovetnik jurista, № 9, at 63 (in Russian, 2017).

This example shows the important points of the RoS issue:

1. It is a long-lasting non-performance. The Creditor's rights are violated, because even though he performed his obligations appropriately, he might get nothing in return. The Creditor did not have any intention to donate to the Debtor, and his expectations of receiving payments were not met.

2. The contract is not fully executed. Therefore, the usage, exploitation, or disposition of the object of the contract cannot be possible. The property rights have not transferred, and the situation is a legal uncertainty for every party involved. The parties had no intention to enter the state of legal uncertainty before concluding the contract.

In the most critical case, the event, counter-performance is conditioned upon, never occurs, thus the creditor never gets a valid exchange for what he conveyed to the debtor.[697]

Such situation can occur not only in construction sphere. According to Ageev's examples, the RoS might as well happen in the trading process.[698] Consider an example, where the seller is a manufacturer in search of the customer. The manufacturer is focused on the mass production, which is why it concludes contracts with the retail agents who sell the product directly to the customers. It is not a rare provision in the contract between the manufacturer and retail agent that the latter pays for the goods as soon as they are re-sold to the customer. This is also a situation of conditioned counter-performance. If the products are not sold, the manufacturer is at risk of losing money.

The difference between the examples of the construction of kindergarten and the resale of goods is quite big, however. Ageev calls the common construction example a transit model, and the resale example a non-transit model.[699] In transit model (kindergarten example) the Contractor is a simple intermediary between the Client and the Subcontractor, while in a non-transit model (resale example) the debtor acquires the title for the thing sold.[700] The retail agent may sell of the goods the way he wants, without any "sufficient mechanism" from the creditor (the seller) "to interfere."[701]

The RoS issue is seen in the resale example as well, as the inability of the third-party customer to pay negatively affects the expectations of the creditor to receive the counter-performance for what he had already performed. Such situations also ask for a thorough analysis.

---

[697] *See supra note* 696, at 63.

[698] Alexey V. Ageev, *Ekonomicheskiye prichiny zaklyucheniya dogovorov s otlagatelnymi usloviyami* [*Economic reasons for entering into contracts with suspensive conditions*], Bulletin of Economic Justice of the Russian Federation, № 12, at 167 (in Russian, 2018).

[699] Id.

[700] Id.

[701] Id. Ageev confirms that the usage of conditioned counter-performance protects the interests of the debtor in the example of resail. There are often third-party agreements between the debtor and the final customer, however, the final customer is often interested to pay in installments. Therefore, the debtor needs to delay the payment to the manufacturer. Conditioning counter-performance might serve as a flexible tool in this sense.

Therefore, the RoS issue, at first glance, is very important. However, for the purposes of research, it is necessary to clarify the scope and the importance of the researched problem.

- Is there a reason for the law to deny such a situation?

If the parties agreed blatantly and unambiguously agreed that if the debtor does not get any financing, the creditor still conveys the results of his work to the debtor, then there is no problem at all. However, such situations are almost non-existent, as in most cases the parties expect a due counter-performance from each other. In case of RoS, the creditor is unjustly deprived of his expected economic value, therefore, the law should not allow such situations to happen. The term condition already implies the uncertainty about its occurrence. Conditioning an obligation performance might lead to the doubts in whether the performance is due or not. Being uncertain in nature, the legal purpose of condition is to make the legal relationship more flexible, not completely unpredictable. Condition is used to tame unexpected situations, but not to create more of them. Inability to perform stalls the progress of the contract and creates damages connected to the non-performance.

- Isn't this a case of unjust enrichment? Should the problem be resolved by restitution?

The answer to this question is clear negative. RoS is not a case of unjust enrichment. This can be proven two ways. In the first way of characterizing, the Subcontractor is deprived of his economic value however, the Contractor's economic value has not changed at all. There is no "enrichment" of the Contractor, as the Contractor is the intermediary between the Client and the Subcontractor. In the second way of thinking, this is not a situation where the disparity of economic values is finally confirmed. If there is a mistaken money transfer to somebody, then this is a situation where the economic disparity can be confirmed. The situation with the kindergarten is still a process of legal uncertainty. It literally means that the economic state of the parties is only yet to be confirmed. The change in the economic values of the parties' is expected but does not happen for a long time. Even if to compare the economic state of the parties in the period of uncertainty, they are equal. In the kindergarten situation, the creditor does not get the payment, but the debtor does not get the property rights for the building, as the contract is not performed, unfinished.

Moreover, the kindergarten and the resale examples are about something which cannot be returned by restitution rules. Coming back to the kindergarten example, the Contractor finished the building but does not get any money transfer. Even supposing there is somehow an unjust enrichment, the restitution is objectively impossible. The kindergarten is already constructed, and the demolition is economically unwise. Also, the payment is still pending and yet to be confirmed. So, the parties cannot simply come back to the point of the contract where their rights are not violated, as the restitution theory suggests.

- What if the parties just set up a time limitation in the contract? Is the RoS issue solved?

Indeed, if, for example, the parties fixed that "the payment to the Subcontractor shall be done after the Client pays to the Contractor, but not later than 5th of May" then the possibility of the RoS issue is almost non-existent. Same situation might happen if the parties decided to terminate the contract if the condition does not happen for a certain amount of time and fixed a time limit for that occasion. Therefore, upon reaching the time limit, the conditional obligation becomes an unconditional one or the contract is terminated.

It is not a secret that a thoroughly written contract may solve most of the issues the law confronts now, therefore, current part discusses the situations discussed where a time limit was not fixed by the parties. The amount of the researched case law suggests that the contracting parties are not always expecting such issues to occur. Moreover, the usage of condition instead of time might be a choice based on concrete circumstances between the contracting parties. Both setting a time limitation or a condition for the counter-performance could be treated as a manifestation of the autonomy of will. While the party autonomy might contribute to the solution of the issue, it is also the cause of the issue, which the law should solve. Time limitation is a solid solution; therefore, it will be disregarded during in the analysis process. It will appear at the end of discussion.

- What is the core of the RoS issue?

The core of the issue is a transformation of the contract from a synallagmatic one to a gratuitous agreement, which is something the parties (commercial entities) did not have any intentions to do. If they intended to do so, because of other debts or a long-term partnership, then the freedom of contract is applied. However, if the parties' intentions were to fulfill the synallagmatic contract, to perform the obligation and, subsequently, acquire certain economic benefits, then the issue needs to be resolved somehow. Again, the law cannot allow such situations to happen.

- How the RoS issue could be solved?

The further analysis on solutions will be focus on 3 sources. The first source is the American doctrine and case law, based on the books written by the prominent authors of the past century. The second source is the Russian doctrine and case law, introduced by the modern era scholars. The third source is legislative: it appears that certain codifications at least attempted to address the RoS issue (presumably without even knowing it). It is necessary to admit that the definition of the issue as "Rupture of synallagmatic contract" is not a generally accepted one. However, similar problems and issues were discovered by the abovementioned sources. The purpose of the current research is to analyze those sources and suggest the set of solutions for the RoS issue.

5.1. American doctrine and case law on the rupture of synallagma

In the books of the American lawyers (years 1933 – 1990) the issue was not viewed as a matter of synallagmatic agreement. The scholars put it as a question of interpretation of contract's provisions. The lawyers of the past century reviewed the cases, where the debtor conditions his performance upon a certain financing from outside of the contract. In the end, the creditor may never get what he is expecting, or even worse, if he had already performed something for the contract, he may never get anything in return. The nature of the "subject to financing" cases is identical to the RoS issue.

Even though the amount of American law literature which thoroughly discusses the "subject to financing" is scarce and mostly limited to construction contracts, the ideas of the American lawyers were supported by an immense amount of case law. As the basis of the further research, three American authors and their respective works were taken: Edward A. Farnsworth, Arthur L. Corbin, and Samuel Williston.[702] The further paragraphs provide the analysis for each of the author's views on the researched issue.

5.1.1. Farnsworth on subject to financing cases. Reasonable time

Edward Allan Farnsworth (1928 – 2005) reviewed the cases involving construction contracts to answer the following question,

"Is the general contractor liable to the subcontractor for work that the subcontractor has done if the owner, because of insolvency or some other reason, does not pay the general contractor?" [703]

The question reminds of the kindergarten example shown earlier. In "subject to financing" cases the general contractor and the subcontractor were also stumbled upon in a legal uncertainty since the contract could not be performed properly. Therefore, a legal solution to satisfy both contracting parties should be found. Otherwise, the synallagmatic connection between the general contractor and the subcontractor seems to be torn apart, since one party (the creditor) fulfilled its performance in a due manner, while the other party (the debtor) could not provide a valid counter-performance because of the reasons out of his reach of action. The similarities between examples suggest that Farnsworth's doctrine might be of a great help in the search of an answer to the RoS issue.

---

[702] *See* EDWARD A. FARNSWORTH, FARNSWORTH ON CONTRACTS, VOLUME 1 (1990); *see also* ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY (1950); *see also* SAMUEL WILLISTON AND GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS, VOL. 3 (rev. ed., 1936).

[703] EDWARD A. FARNSWORTH, FARNSWORTH ON CONTRACTS, VOLUME 1, at 365 (1990).

In Farnsworth's opinion, there are two possible options, which are corresponding the answers "yes" and "no" to the highlighted question. The answer depends on whether the examined provision of contract is a conditional clause or a mere time limitation. If it is an "if" solution, then it is a conditional clause, therefore, the risk of the Client's non-payment is on the subcontractor ("no" answer). If it is "at such time as" solution, then it is a time specification, and the risk of the Client's non-payment is on the general contractor ("yes" answer).[704]

According to Farnsworth's analysis of the case law, in most cases the courts consider this to be a time limitation, since "payment by the owner is merely a convenient means for measuring the time after which the general contractor must pay the subcontractor."[705] The provision about payment after acquiring a certain financing is nothing more than a "cash flow" provision, which is not intended to shift the credit risk from the general contractor to the subcontractor. Moreover, Farnsworth admits that the courts are following the idea of "aversion to the risk of forfeiture" because the subcontractor cannot influence the condition occurrence.[706] This seems to be logical as the purpose of the court is to balance out the economic state of disputing parties. The subcontractor is not expected to foresee such turn of events.[707] Court's interpretations are motivated by the economic power of the general contractor, who has more protective devices to use, Farnsworth assumes.[708]

However, what legal concepts does the court use to resolve the legal uncertainty the parties occurred to be in? And does the court always decide in favor of the subcontractor?

In Thos J. Dyer Co. v. Bishop International Engineering Co. (1962), the appellee Thos J. Dyer Co. was the subcontractor on the construction project of a Horse Racing Plant in Kentucky, while the appellant Engineering Company was the general contractor who provided materials to the owner The Kentucky Jockey Club. The paragraph 3 of the contract stated that the payments to the subcontractor were not to be "due until five (5) days after Owner shall have paid the Contractor therefore."[709] At first, there were no issues between the general contractor and the owner, as the former provided the materials for construction and the latter paid for it. However, latter it appeared that the materials provided by the subcontractor through the general contractor were not paid in full as the owner went to insolvency procedures. The general contractor refused to pay to the subcontractor because the owner had not paid to him. The subcontractor sued the general contractor.

---

[704] *See supra note* 703, at 365.
[705] Id.
[706] Id.
[707] Id., at 366.
[708] Id.
[709] Thos J. Dyer Co. v. Bishop International Engineering Co., 303 F. 2d 655 (6th Cir. 1962), *available at* https://tinyurl.com/yt35kr2s (visited July 1, 2023).

Who was in the right? Were the payments to the subcontractor conditioned upon the payments from the owner for the main contract? Or was the provision fixing a simple time limitation? Indeed, this was not a question of whether the paragraph 3 of the contract violated the law or not, it was the question of what exact legal concept was presented in that paragraph: a conditional clause or a time limit. As the U.S. Court of Appeals noticed, this case was "a question of construction or interpretation of the contract provision, not a question of its validity."[710] In deciding the "critical issue" of whether the provision constituted a condition or an unconditional promise to pay, the court stated that the owner's ability to pay for the work was, in fact, a credit risk of the general contractor. This credit risk could be minimized by various provisions on mechanics' liens and installment payments. On the other hand, the subcontractor was the one who was looking up to the general contractor for the payment, and not the owner's contract performance. Subcontractor was not interested in owner's solvency; he was interested in the general contractor's ability to pay for materials provided. Thus, the court stated that "in order to transfer this normal credit risk incurred by the general contractor from the general contractor to the subcontractor, the contract between the general contractor and the subcontractor should contain an express condition clearly showing that to be the intention of the parties."[711]

At this point it becomes clear that the subcontractor was right in this case, however what solution did the court use to resolve the issue? According to the court's statement, "paragraph 3 of the subcontract does not refer to the possible insolvency of the owner."[712] Indeed, the connection of payments and the owner's insolvency should have been expressed unambiguously in the contract. The court continues, "on the other hand, it deals with the amount, time and method of payment, which are essential provisions in every construction contract, without regard to possible insolvency."[713] This paragraph is "a reasonable provision designed to postpone payment for a reasonable period of time after the work was completed, during which the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor."[714] Otherwise, it was not something the parties had intended for when entering the subcontract, the court concluded. "To construe it as requiring the subcontractor to wait to be paid for an indefinite period of time until the general contractor has been paid by the owner, which may never occur, is to give to it an unreasonable construction which the parties did not intend at the time the subcontract was entered into."[715]

---

[710] Thos J. Dyer Co. v. Bishop International Engineering Co., 303 F. 2d 655 (6th Cir. 1962), *available at* https://tinyurl.com/yt35kr2s (visited July 1, 2023).
[711] Id.
[712] Id.
[713] Id.
[714] Id. This sentence constitutes the court's resolve to use a "reasonable time" concept to the disputed relationships.
[715] Id.

From this case, it could be concluded that the legal uncertainty, occurring in the "subject to financing" cases, was not something the parties had been intending to do upon entering the contract. And by that, the court resolves the issue by ruling a "reasonable time" for the general contractor to pay to the subcontractor, even if the owner was about to become insolvent. Therefore, a new solution could be found for RoS issue: a reasonable time to perform the obligation.

This case presents the big role of the court in finding out the exact meaning of the provision. However, does it mean that the RoS issue is a mere interpretation problem? The answer is no. The law should not allow any inconsistencies in legal relationships. Coming back to the points highlighted earlier (the creditor's rights are violated, the contract is stalled), the issue does not present only a problem of interpretation, as the U.S. Court of Appeals suggested. It also presents a much deeper issue of the synallagmatic contract transformation into a donation agreement, which is something the parties did not expect, did not intend, and thus did not prevent. Therefore, there should be universal solutions to the issue, like one of "reasonable time" the court used in the Thos J. Dyer Co. case. It is not just the question of interpretation, but a question of preliminary regulation. Moreover, the reasonable time concept is itself one of the most ambiguous concepts in law, as it does not have any definite time marks. A "reasonable time" may constitute a day, a week, a month, or years, and the expiration of the reasonable time is decided according to the business usages. It is not a sole answer to the issue.

From the Thos J. Dyer Co. case, another suggestion could be made. The court decided in favor of the subcontractor not only because the contract provision should be interpreted as a time limitation. The court decided so to prevent the situation of infinite waiting, as an "unreasonable" one. This "infinite waiting" was unintentionally caused by the parties. This is a theoretical anomaly the law should not allow by any means. The "reasonable time" solution may not be the best, but it is an effective one: it clearly works against the RoS issue.

First, the concept fixes the debtor's duty to pay, thus confirming the legal relationship to be a synallagmatic contract. Important to note, it is not a donation agreement, where one's counter-performance is conditioned upon something, and if that something does not happen, then the counter-performance becomes somewhat close to a donation. Secondly, it excludes the "infinite waiting" – a status where the parties have an infinite contractual bind, which is clearly not in their expectations or interests. Therefore, based on Thos J. Dyer Co. case, many subsequent decisions of American courts were similar: the case was decided in favor of the subcontractor, as the courts used the "reasonable time" concept for the general contractor's duty to pay.

The next case, Duncan Box & Lumber Co v. Sargent, also elaborated on the aspects of whether such situations of legal uncertainty were acceptable or not.[716] In this case, the general contractor and the owner concluded a construction contract. However, after checking the balance sheets, the parties decided to enter an agreement of future debt, where the debt payment was contingent upon the debtor being "able to effect a sale" of the real estate. The real estate was not sold for quite a long time and the subcontractor sued both the general contractor and the owner because it took too long to be paid. The court used the "purpose interpretation" to determine the nature of the event. According to the court, the contract had no purpose to create a situation of non-recovery, the intention of the parties was to return the debt, and the "sale of the real estate" was, in fact, a time limit for the obligation of the general contractor to pay.

The Supreme Court of Appeals of West Virginia stated the following, "We know, however, as a matter of common sense, that such an obligation was not contemplated by the parties. Nor is the construction adopted by the trial court more acceptable. If the debt is not to become due until the property shall have been actually sold, it may never be collectible, a result equally impossible to attribute to the parties."[717] Thus, the court clearly addresses to a possibility of legal uncertainty, where the creditor might possibly never get a counter-performance from the debtor, and considers such situation to be an impossible result, something the law should not allow. The reviewed case was an appeal, and the court of the lower instance ruled in favor of such contingency, precisely interpreting the contract and not allowing the plaintiff to show evidence of the fact that "a reasonable amount of time passed already." The higher instance overturned the decision in favor of the plaintiff, constituting the debtor "cannot become obstructive or even remain passive, but must, as promptly as is reasonably possible make the contingency come to pass", ruling that "the property should be sold within a reasonable time."[718]

The Duncan Box is another example of "reasonable time" solution. Again, the court confirms that the situation of legal uncertainty is not something that the parties intended. Instead, the parties should strive to fulfilling their obligations, even in case of contingency they should help it. This way the contract is fulfilled, and the economic state of the disputing parties is balanced out. The court appealed to a purposeful interpretation instead of concrete one to find the true intent behind the provisions of the contract.

---

[716] Duncan Box & Lumber Co v. Sargent 126 W.Va. 1, 27 S.E.2d 68, 148 A.L.R. 1072 (1943), *available at* https://casetext.com/case/lumber-co-v-sargent (visited July 1, 2023).
[717] Id.
[718] Id.

In De Wolfe v. French, the court also emphasized on the unacceptability of legal uncertainty and emphasized the fact that to make a conditional debt the parties should have intentions to do so.[719] According to Nunez v. Dautel case from the 19th century, the U.S. Supreme Court also investigated the intentions of the parties and concluded such contingency to be unlawful.[720] The case law is vast enough to consider "reasonable time" the main solution for the RoS issue.[721]

From the researched cases, another interesting point could be found. The American courts are considering the fact, that the subcontractor is a weaker economic subject of the contract than the general contractor. This is another reason to why some of the decisions to apply a "reasonable time" concept to the situation are motivated by the desire to equalize the credit risks of the parties, and thus to equalize the economic possibilities of the contracting parties in a broad manner.

In the case of Peacock Construction Co. v. Modern Air Conditioning (1977), the court emphasized on such bargaining power of the contracting parties. The Peacock Construction Co. was a general contractor of the condominium contract (a contract for multiapartment house cooperation and service), while the other side of the trial was the subcontractor. The subcontract did not provide anything about conditional rights but had a time specification – payments to the subcontractors should be done within 30 days of the completion of the work by subcontractors. The owners of the condominium have filed for insolvency and the general contractor refused to pay on the grounds he was not paid by the owner. The court ruled in favor of the subcontractors insisting that "small subcontractors, who must have payment for their work in order to stay in business, will not ordinarily assume the risk of the owner's failure to pay the general contractor."[722] The idea of economic bargain may be suggested as the underlying idea for most of the American courts' decisions. Since the court decisions in the U.S. are the primary source of law, this idea is hard to disagree with.

---

[719] De Wolfe v. French, 51 Me. 420 in: SAMUEL WILLISTON AND GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS, VOL. 3, at 2246 (rev. ed., 1936). The court suggested the following explanation. "If, in fixing upon the happening of a future contingent event as the time when money is to be paid, the parties intend to make the debt a contingent one, and the event never happens, the creditor's right to recover it will never accrue. But if the debt is understood to be absolute, and the happening of the future event is fixed upon as a convenient time for payment merely, and for some unforeseen or unthought-of cause, the event never happens, the creditor's right to recover will not be defeated. The law will require the payment to be made within a reasonable time after it is ascertained that the event will not happen. The debt will be contingent or otherwise, depending on the intention of the parties"

[720] Nunez v. Dautel 86 U.S. 560, 22 L.Ed. 161, 19 Wall. 560 (1873), *available at* https://tinyurl.com/3v9em746 (visited July 1, 2023). The court suggested the following explanation. "It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice"

[721] See, for example, the following cases, Ewell v. Landing 199 Md. 68 (Md. 1952) 85 A.2d 475; Capron v. Capron, 44 Vt. 410 (1872); Sears v. Wright, 24 Me. 278 (1844); Simon v. Etgen, 213 N.Y. 589, 107 N.E. 1066; Nelson v. Burnham 6 Div. 92. (1934); George A. Fuller Co. v. Brown, 15 F.2d 672 (4th Cir. 1926); Byler v. Great American Insurance Company, 395 F.2d 273 (10th Cir. 1968); Mignot v. Parkhill, 391 P.2d 755 (Or. 1964).

[722] Peacock Construction Co. v. Modern Air Conditioning, Inc 353 So.2d 840 (Fl. 1977), *available at* https://tinyurl.com/2s3serwx (visited July 1, 2023).

Gulf Const. Co., Inc. v. Self (1984) is a case worth noting, since the parties had agreed to a rather peculiar provision of contract, "Under no circumstances shall the general contractor be obligated or required to advance or make payments to the sub-contractor until the funds have been advanced or paid by the owner or his representative to the general contractor."[723] The owner encountered multiple financial problems and the work at the plant site stopped. The general contractor refused to pay the subcontractors for the works provided, because he was not paid by the owner. Still, the Court of Appeals of Texas ruled in favor of the subcontractors and refused to consider such clause to be a condition precedent. In deciding the case, the court suggested three reasons on why the clause is not a condition precedent. First, "the risk of non-payment by an owner on a construction contract rests on the contractor who contracts with such owner rather than on a subcontractor who has no privity of contract with the owner."[724] Secondly, "the risk of non-payment by the owner on a construction contract is not shifted from the contractor to the subcontractor unless there is a clear, unequivocable and expressed agreement between the parties to do so."[725] Thirdly, "there was no intent on the part of the parties to the subcontract of the risk of non-payment by the owner should be shifted from the contractor to the subcontractors."[726]

5.1.2. Decisions in favor of contingency

Among the vast number of cases which confirm the "time limit" solution, there were also some court decisions, where, on the contrary, the "contingency" concept was found, and the cases were decided in favor of the general contractor. What logic did the courts follow in those examples?

One of such cases was Dec Elec., Inc. v. Raphael Const. Corp (1989), where the Court of appeal's decision was supported by the Florida Supreme Court (1990). DEC Electric, Inc., a subcontractor, entered a subcontract with Raphael Construction Corporation, a contractor, to perform various jobs on a construction project. The construction project was subsequently shut down by the owner of the development. The contractor acknowledged at trial that the subcontractor was owed a debt in the amount of $25,612.00 plus interest. However, it argued that it should not have to pay the debt because the owner of the project had not paid the contractor on its general contract. The subcontract provided in paragraph 6, "No funds will be owed to the subcontractor unless the General

[723] Gulf Const. Co., Inc. v. Self, 676 S.W.2d 624 (Tex. App. 1984), *available at* https://tinyurl.com/yc2chfxr (visited July 1, 2023).
[724] Id.
[725] Id.
[726] Id.

Contractor is paid by the owner in accordance to the sworn statement[727]." On the grounds of this paragraph the general contractor refused to pay for the subcontract.

While referring to some of the previous court decisions like The Peacock Construction Co. case, the court noticed the division in court's rulings: some courts interpreted the language of the contract as a "contingency was explicitly used" and some ruled for a reasonable time for the general contractor to pay as there was no condition precedent by the language of the subcontract. In the present case, the court ruled in favor of the general contractor as the provision of the subcontract was unambiguous, and the question itself was a matter of law. Still, the court asked the Florida Supreme Court to give its own assessment on the case by asking the following question: "Must all payment provisions in contracts between contractors and subcontractors or suppliers that concern a condition or time of payment provision be construed as a matter of law?."[728] The Florida Supreme court agreed with the district court and answered this question affirmative.

Another case where the contingency was found, Foster v. Lall (1987), happened in a contract of sale of a real estate.[729] Foster (buyer) and Lall (seller) agreed on the purchase of the real estate, where the payment by the buyer was conditional upon obtaining a mortgage loan within 45 days of the agreement. Otherwise, either party could cancel the contract and refund the payments done. The buyer failed the 45-days period, so the seller returned the payments to the buyer and wrote him the deal was terminated. The purchaser returned the money to the seller again as he thought the deal was still in effect. The buyer appeared at the closing of the contract; however, the seller was not present. Afterwards, the buyer sued the seller for specific performance, but got denied by the New York Supreme Court.

As the Court stated, such provision was not for the sole benefit of purchaser.[730] "The provisions <…> must be given force and effect. By their plain meaning, the seller had the right to cancel, and he did so."[731] The purchaser could have waived this contingent provision and still be bound by the agreement, if he had sent a notice of cancellation within this 45-day period. Otherwise, "the plaintiff cannot have his cake and eat it too. He cannot not be bound past the 45-day period, and still enforce the contract, if he chose to, once the seller has exercised his right to cancel. A contrary

[727] Dec Elec., Inc. v. Raphael Const. Corp., 538 So. 2d 963 (1989), *available at* https://tinyurl.com/3vxwbdyd (visited July 1, 2023).
[728] Dec Elec., Inc. v. Raphael Const. Corp. 558 So. 2d 427 (1990) *available at* https://tinyurl.com/4pc6atv8 (visited July 1, 2023). This is a question summary by the Florida Supreme court.
[729] Foster v. Lall 135 Misc.2d 919, 516 N.Y.S. 2d 570 (1987), *available at* https://tinyurl.com/yhf97syk (visited July 1, 2023).
[730] The exact provision which allowed either party to cancel the contract if the purchaser was not able to obtain financing within 45 days.
[731] *See supra note* 729.

holding would be totally unfair to the seller, who having seen a "shaky" purchaser who was in no way firmly committed, and who might not be able to pay the purchase price, did not wish to waste time, and wanted to move on as agreed."[732] In this example, the provision was clearly a conditional clause, so the seller could have much less credit risks, and basically escape if the purchaser was incapable of fulfilling his part of promise. He failed to waive the provision and failed to get a mortgage loan within a 45-day period, therefore the purchaser failed "to obtain the benefits of contract."[733] So, the case was decided in favor of contingency because the provision was unambiguous within the contract and had a purpose of credit risk management between the parties.

Construction contracts also had cases where the court ruled in favor of contingency, and not the time limit. In an illustrative case, the contracting parties foresaw the possibility of such events and fixed the possible outcome in the contract.

In Wilson, Inc. v. Post-Tensioned Structures (1988), the subcontractor sued the general contractor for the payments.[734] The trial court ruled in favor of subcontractor and obliged the general contractor to pay, even though the contingency and its consequences were blatantly written into the contract. The District Court of Appeal of Florida reversed and remanded the decision of the trial court. The main contract expressly confirmed that the final payment to the subcontractor is conditional upon the payment to the contractor. On its behalf, the subcontract is emphasizing that in case of controversy regarding the payment (if it is delayed because of arbitration, administrative action, etc.) then no compensation shall be given to the subcontractor. Therefore, the provision "plainly and unambiguously make payment by the owner to the general contractor a condition precedent to payment by the contractor to the subcontractor herein, rather than merely fix a time for payment to the subcontractor."[735] The court also considered that the parties expressly agreed on shifting the risk of "payment failure by the owner from the general contractor to the subcontractor."[736] Therefore, this case confirms the point, discussed when the court ruled in an opposite way: the intention for the contracting parties to create a condition precedent should be plain and unambiguous.

---

[732] Foster v. Lall 135 Misc.2d 919, 516 N.Y.S. 2d 570 (1987), *available at* https://tinyurl.com/yhf97syk (visited July 1, 2023).
[733] Id.
[734] Wilson, Inc. v. Post-Tensioned Structures, 522 So. 2d 79 (Fla. Dist. Ct. App. 1988), available at https://tinyurl.com/yc4zyswm (visited July 1, 2023). The provisions of contract were the following. "Final payment is contingent upon payment to the Contractor" and "In the event a controversy occurs between the Owner and the General Contractor concerning the Contract with the Owner or these Change Order(s), then it is expressly agreed that no compensation for these items shall be due the Subcontractor from the Contractor until payment for them is received by the Contractor, regardless of the fact that payment is delayed due to the Contractor negotiating with the Owner, arbitration, administrative actions, litigation, appeals or other similar activities."
[735] Id.
[736] Id.

However, this conclusion happens to be valid even if the language of the contract is itself ambiguous. As the New York Court of Appeals showed in the case Mascioni v. I. B. Miller, Inc. (1933), if the subcontractor accepted the condition as a material part of the exchange, then the general contractor is not obliged to pay.[737] The contract suggested that the subcontractor provided material for concrete walls and the general contractor paid the money according to the following provision: "Payments to be made as received from the Owner."[738] The language of the contract was quite ambiguous, and after the general contractor refused to pay on the grounds of not receiving payments from the owner, the subcontractor sued him. The trial court ruled in favor of general contractor, while the court of higher instance ruled in favor of the subcontractor, reasoning that the condition precedent should have been obviously stated by the parties in the contract. The case went higher to the New York Court of Appeals, which decided to investigate into the intentions of the contracting parties.

Looking at the general contractor's intentions, the court realized that the general contractor would not profit from the subcontractor's performance in any way, unless the owner paid the stipulated price. "That was the defendant's (general contractor's) risk, but the defendant's promise to pay the plaintiffs for stipulated work on condition that payment was received by the defendant shifted that risk to the plaintiffs, if the condition was a material part of the exchange of plaintiffs' promise to perform for defendant's promise to pay."[739] The subcontractor expected the condition to be a material part of the exchange, and thus they accepted the risk of non-payment in case the general contractor did not receive it from the owner. An opposite conclusion "would defeat the intention of the parties", the court emphasized.[740] The trial court received the parol evidence of the actual intention of the parties. Those intention supported the presumption that the subcontractor treated the provision "I pay as received from the Owner" as a material part of exchange. Based on this, the New York Court of Appeals supported the decision of the trial court and ruled in favor of the general contractor.

Therefore, even if the language of the contract is ambiguous (which is a point against contingency), the court might still rule in favor of the general contract based on the intentions of the other party (subcontractor). This might be seen as an exclusion from the overall rule. For this exclusion to work, it should be confirmed that the subcontractor treated the provision as a conditional clause and not as an absolute promise to pay, which is theoretically very hard to prove. However, as shown above, there are valid examples.

---

[737] Mascioni v. I. B. Miller, Inc., 261 N.Y. 1 (1933), *available at* https://cite.case.law/ny/261/1 (visited July 1, 2023).
[738] Id.
[739] Id.
[740] Id.

5.1.3. Corbin on conditional promise. Donlan v. Turner

Arthur L. Corbin (1874 – 1967) examined the cases where the party "promises to pay the money out of the funds yet to be acquired." He asks a question, which is similar to the one asked by Farnsworth.

"Is it a condition of the promisor's duty to pay (a conditional promise), or is it a promise that a fund will be acquired (an absolute promise)?"[741]

According to Corbin's findings, if the party promises to pay out of the funds raised "in some specific manner", then it is "very likely" to be an absolute promise to acquire funds.[742] Therefore, the payment should be made "within the time reasonably required for the raising of the money."[743]

Conditional promise happens when the contracting party intends to fulfill its promise exactly out of the funds yet to be acquired. To elaborate, Corbin suggests the following examples:

1. Promise to pay the debt "has been barred by the statute of limitations or has been discharged in bankruptcy and is to pay as soon as financially able or out of some fund to be acquired."[744]
2. Promise to pay the agreed price only out of the proceeds acquired through the resale of goods.[745] The buyer promises to pay the seller once he resells the product.

The first example found its place in an old case of Dearing v. Moffitt (1844). In this case, a contracting party, which went recently bankrupt, decided to perform its promise of paying the debt as an honor doing, however upon a condition that he will be able to do so financially. The creditor sued him for the payment of rent (the debtor lived in the kitchen) as far as he considered that there was no contingency in his words. The circuit court agreed with the creditor, while the Alabama Supreme Court ruled in favor of the debtor, as the court considered the debtor's promise to be conditional. The reason behind such ruling is simple: the creditor (plaintiff) did not prove that the debtor has an ability to pay. The whole point of the decision was that the debtor went bankrupt before the procedure, and if he promised to pay out of funds yet to be acquired then his promise had a contingency. The court suggested similar cases, like Bessford v. Saunders, where the same situation "was held to be a conditional, and not an absolute promise, and that to recover, the plaintiff must prove the ability of the bankrupt to pay."[746]

---

[741] ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY, Sec. 636, at 43 (1950).
[742] Id.
[743] Id.
[744] Id., at 44.
[745] Id.
[746] Dearing v. Moffitt, 6 Ala. 776 (1844), *available at* https://cite.case.law/ala/6/776 (visited July 1, 2023).

The second example is introduced within the case of Donlan v. Turner (1922). The parties made a rather complicated but effective contract. Donlan's partnership (seller) agreed to sell all its existing lumber and obtained-in-future lumber to Turner's company (buyer), whereas Turner promised to sell the lumber on the market at the highest price and pay the price minus 15 percent back to Donlan. The agreement seemed profitable for both sides at first, however, soon the fire destroyed all the lumber at the seller's place. The lumber was under insurance, but it was still not enough to cover the losses of the seller that he would have gotten from the buyer's resale on the market in future. On this ground, Donlan sued Turner for the prospective profit losses. Subsequently, Turner's company filed a counter-claim towards the seller because the buyer paid also for the lumber yet to be acquired in future. After the fire the Donlan's partnership was not interested in producing lumber anymore, which prevented Turner from getting any more profits according to the agreement. Both the trial court and court of appeals ruled in favor of the Turner (buyer).[747]

The courts acknowledged the way the contracting parties foresaw the possible negative events. By its opinion, the construction of the contract was correct, and the parties did everything right from their perspective sides. However, the contract stated the buyer was to pay "the highest market price minus 15 percent" to the seller after the resale.[748] "The contract contained interdependent clauses", which in fact relieved the buyer from a risk of lumber loss by fire, so he had to pay the market price back to the seller only in case of selling the lumber on the market, the court suggested.[749] The buyer could not sell the lumber on the market if it got lost by fire. Donlan's partnership had the risk of the loss of lumber, therefore no one was obliged to pay the seller for future profit losses in case a fire destroys the lumber. At the same time, Turner's counterclaims were valid since the company paid for obtained-in-future lumber and the insurance did not cover the losses in full. While the court clearly tells "there was no condition in the sale", the way the legal construct worked was different. In this case, the resale itself was a condition precedent to the buyer's duty to pay.[750] To put it simple, the buyer promised to pay the price out of the money acquired by resale, which was yet to happen, however the loss of the lumber rendered such condition to be impossible to fulfill. And as far as the risk for the loss of timber was still on the seller (he had not produced it yet), the buyer was not obliged to pay anything to the seller. In this illustrative case, it appeared that the one party with the prospective losses was not the seller but the buyer.

---

[747] Donlan v. Turner, Dennis & Lowry Lumber Co., 282 F. 421 (1922), *available at* https://cite.case.law/f/282/421 (visited July 1, 2023).
[748] Id.
[749] Id.
[750] Id.

Corbin also suggests that in case of resale, "the buyer will usually be held to have made a promise by implication, either to use reasonable effort to make a resale of the goods, or, at least, that he will not do any act making the happening of the condition impossible."[751] For example, in case of Schlottman v. Du Pont Powder co., the Powder company purchased from Schlottman's predecessor a whole capital stock of a third company for 150000$ and promised to pay additional 25000$ in one year if the property is worth 175000$. However, less than in a year the Powder company sells all the stocks to another party, which dismantles the plant. The courts of both instances assumed this was a conditional promise made by Du Pont, and the company simply made the condition occurrence impossible. "In other words, the performance of a condition for valuation having been prevented by the act of the vendee, the price of the thing sold was to be fixed by the jury on a quantum valebat", the court decided.[752] Therefore, Du Pont owed 25000$.

Do the Corbin's cases, on "conditional promise", represent the RoS issue?

Indeed, they are the examples of RoS, but the reason for that is not so obvious at first glance. In construction contract cases the premise was clear: if the general contractor was not paid, then it happened that the subcontractor unintentionally donated the results of his works to the contractor for free. If to project this case onto Donlan v. Turner, for example, then it occurs they had interdependent provisions, where they were both creditors and debtors, which constituted a synallagmatic agreement. However, Donlan sold all his lumber to Turner to make profits of the higher market prices and Turner could not sell the lumber because of the fire at Donlan's place. The synallagma was torn apart in this occasion and Donlan happened to donate a part of the lumber's price to Turner ("prospective profit loss" in the case), which was the inner reason Donlan filed a claim against Turner and lost. This situation was not an unjust enrichment for the reasons discussed earlier. One party was still at clear economic disadvantage towards the other, however, the other has not gained anything. This case clearly reminded of the RoS issue described in the kindergarten example. The U.S. Court of Appeals had to solve it by deciding whether it was a conditional promise or not. Still there were other factors to consider for the court: intentions, economic bargain power, malicious activity to deem a condition impossible, etc. The interpretation of the provision itself appeared to be the key to deciding the RoS cases under the common law. Donlan was the creditor and Turner is the debtor, thus the question of whether Turner made a conditional promise or an absolute one was quite important.

---

[751] ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY, Sec. 636, at 44 – 45 (1950).

[752] E.I. Du Pont de Nemours Powder Co. v. Schlottman 218 F. 353 (1914), *available at* https://tinyurl.com/2bswamrc (visited July 1, 2023).

If it was for the absolute promise, then Turner would have been obliged to pay all the prospective profit losses to Donlan, whereas the court decided differently and favored the debtor, finding that the risk of the timber loss by fire was not shifted to the buyer (creditor). Therefore, the cases, where the conditional promise is found, follow the same idea as the cases presented by Edward A. Farnsworth, where the contingency was found, and the court avoids the RoS issue by ruling in favor of the debtor. The question of risks is playing a substantial part in the court's decision, which is also important in generalizing the approach to the issue. However, Corbin also acknowledged that most cases are decided the other way.

In case the "absolute promise" option is right, then "an action will lie for non-performance of the promise after the expiration of such reasonable time, even though the fund has not actually come into existence."[753] According to A. Corbin's review of the case law, there are a lot of cases, where the courts decided the problem using a "reasonable time" concept, as a distinctive solution. Be it a promise of paying a wage for services received by the promisor or be it a compromised settlement where the debtor promised to pay on condition "payable at the time that I would sell" the property – in these cases the courts do not consider the promise to be conditional upon the acquisition of the fund. Moreover, when there is a legal construction which looks similar enough to a condition, then the court can apply the interpretation tests, discussed earlier, like "a reasonable effort to make a condition occur" or "not preventing the condition occurrence."[754]

A clear example of an "absolute promise" can be found in case of Hood v. Hampton Plains (1901), where the mining company (defendant) stopped all the work at its mines and employed the plaintiff to manage the property at the wage of 4 dollars per day, half of which was to be paid at the end of each month, and the other half was to be paid when the work at the mining plant was resumed. Four years passed, however, the work at the plant was still not resumed, which is why the plaintiff sued the defendant for the half of the money, which was not paid to him all that time. The Circuit Court of Nevada reviewed the case and decided that "it certainly was not the intention that the defendant might, if it saw fit, so postpone the time, of its own volition, as to deprive plaintiff of his right to recover."[755] Therefore, "under the agreement between the parties in this case, the debt was absolute, but the time of its payment indefinite."[756]

---

[753] ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, VOL. 3A. CONDITIONS OF LEGAL DUTY, Sec. 636, at 43 – 44 (1950).
[754] Id.
[755] Hood v. Hampton Plains Exploration Co., 106 F. 408 (1901), *available at* https://cite.case.law/f/106/408 (visited July 1, 2023).
[756] Id.

This situation also reminds of the concepts surrounding the RoS issue: the creditor (the plaintiff) is risking to never recover those 2 dollars per month agreed by the contract, as far as the defendant does not resume the mining plant. To avoid such legal uncertainty, the court uses the concept, discussed before, "the law presumes that it was the intention of the parties that the contingencies mentioned should occur within a reasonable time."[757] In the opinion of the court, 4 years is a period that clearly exceeds the limit of reasonable time; thus, the promise was held to be absolute, and the case was resolved in favor of the plaintiff (creditor).

Another point worth being mentioned is that there was a contingency on the part of the debtor, which is what the courts also considered when ruling similar cases. In C.J. Hogan v. Atlantic Corp. (1955), the plaintiff and the defendant almost had a compromised settlement on promissory notes, and the defendant counterclaimed the plaintiff on some of them, considering the plaintiff owed him 3000$. The important point was that those notes were to be "payable at the time (the plaintiff) would sell" his property, however the sale had still not happened, and the plaintiff is suing the defendant for the promissory notes. In this case, the court repeated the same ideas from the previous Hood v. Hampton Plains case, "it seems unlikely that the parties intended that this liability for money previously absolutely due should become wholly conditional at the option of the plaintiff upon the disposition of some of its property."[758] Then the court emphasized the fact that "if the words are taken literally, the event might never occur."[759] Moreover, the court suggests the existing obligation to be absolute and that such obligation cannot become wholly conditional just because one of the agreements between the parties is partly contingent in favor of the debtor. "In such circumstances the cases are to the effect that payment is to be made within a reasonable time", the court concludes, therefore ruling in the creditor' favor (the defendant).[760]

Both Corbin's and Farnsworth's teachings along with the case law confirm the consistent ideas on the regulation of RoS. The contract is interpreted as a time limitation or a condition, plus several other aspects are reviewed, one of them being the transfer of risks within the contract. Again, the reasonable time concept is shown as a clear solution to the RoS issue. If the promise is not performed within the reasonable time, the conditional promise becomes an absolute promise to pay.

---

[757] Hood v. Hampton Plains Exploration Co., 106 F. 408 (1901), *available at* https://cite.case.law/f/106/408 (visited July 1, 2023).
[758] C.J. Hogan, Inc. v. Atlantic Corp. 124 N.E.2d 905 332 Mass. 322 (1955), *available a*t https://tinyurl.com/hd27vr85 (visited July 1, 2023).
[759] Id.
[760] Id.

5.1.4. Williston's interpretation of promise to pay when able

Samuel Williston (1861 – 1963), also discusses the situations where the promise to pay is dependent upon the ability of the contracting party to pay.[761] He asks the same question of the legal nature of such agreements as Corbin and Farnsworth. He suggests three variants:

1. "The promise to pay when able" should be interpreted as "when the promisor reasonably ought to be able to pay."[762] This is because, in Williston's opinion, the courts interpreted the condition of satisfaction to mean a reasonable satisfaction, and this is an analogous situation.

2. "The promise to pay when able" is an implied obligation to use reasonable efforts to become able. In the same way it may be interpreted as a "promise to pay in a reasonable time."[763]

3. "The promise to pay when able" should be understood as it is. It means that what the promisor "might, could, should have done" is not essential in deciding the case.[764]

According to Williston, the courts are willing to use the last option and to interpret the meaning of the promise as it is. To confirm that Williston presents the case of Work v. Beach, where the debtor had promised to pay $15 000 "when able." Three years passed and the creditor brought the action. However, in the court it was proved that during those 3 years, the debtor had received a salary of $15 000 a year, out of which he saved nothing. Therefore, the court understood the "promise to pay when able" as it is and held the debtor not liable.[765]

In a similar case Boynton v. Moulton, the debtor promised to pay on a certain barred claim "such amount as I can." The court held this was a mere promise to pay on the particular day when the promise was made. However, it was found as a fact that on that day the debtor could pay nothing, so the creditor (plaintiff) was entitled to recover nothing.[766] Therefore, S. Williston supports an idea that the promises like "to pay when able", when supported by consideration, are "generally, though not universally, upheld and enforced according to their natural meaning." Therefore, the new promise should bind the promisor to pay on the condition and only on the occurrence of such a condition the promisor becomes able to do so.[767]

---

[761] SAMUEL WILLISTON AND GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS, VOL. 3, at 2254 (rev. ed., 1936).
[762] Id.
[763] Id.
[764] Id., at 2255.
[765] Work v. Beach, 13 N.Y.S. 678, in: SAMUEL WILLISTON AND GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS, VOL. 3, at 2255 (rev. ed., 1936).
[766] Boynton v. Moulton, 159 Mass. 248, 34 N.E. 361 in: SAMUEL WILLISTON AND GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS, VOL. 1, at 583 (rev. ed., 1936).
[767] SAMUEL WILLISTON AND GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS, VOL. 1, at 582 (rev. ed., 1936).

At the same time, Williston acknowledges the cases, where the courts decide by using a "reasonable time" concept. In Smithers v. Junker, a note "payable at my convenience and upon this express condition that I am able to be the sole judge of my convenience and time of payment" was held payable after a reasonable time.[768] In another example, Link v. Hill, the borrower had promised to repay upon the sale of certain property. The court held, that there could be no implication of a promise to repay in any event within a reasonable time where "the facts and circumstances at the time of the execution of the contract are such as to preclude any implication that the full terms of the contract were not expressed."[769] In these cases, the debtors created purely potestative conditions for themselves, which resulted in unintentional donation from the creditor as well. Therefore, after finding out the real intentions of the contracting parties, the courts used the "reasonable time" concept to solve the cases. Williston's examples also confirm the importance of additional information: on the economic bargain power and the bearer of risks.

In the end, the American case law presented lots of cases with the elements of the RoS issue. They were fully met in a variety of examples where the obligation is partly conditional on the side of the debtor, the creditor risks getting nothing in return and happens to unintentionally donate the results of his work to the debtor. While in some cases the American courts decided that the creditor agreed to such outcome, most of the cases are solved with a more pragmatic approach. The court assessed the contract provisions, the parties' intentions and the risks followed such provisions. In the end most of the courts decided to choose a "reasonable time" concept and admitted the obligation to be absolute, therefore preventing the RoS issue. However, this is the specifics of common law. The case law is the primary source of law; therefore, the "reasonable time" concept may be seen as a very logical solution to the "subject to financing" cases. In each case the court may already decide whether the reasonable time threshold was reached or not.

But what is the situation in civil law codifications? Is the issue existing? Is it relevant? Does the legislation, doctrine, or case law address it? The next paragraph discusses the problematic issues and approaches in Russian law regarding the RoS issue.

[768] Smithers v. Junker, 41 F. 101, in: SAMUEL WILLISTON AND GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS, VOL. 1, at 583 (rev. ed., 1936).
[769] Link v. Hill, 117 Oh. St. 421, 159 N. E. 573 (1928), in: SAMUEL WILLISTON AND GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS, VOL. 1, at 583 (rev. ed., 1936).

5.2. Russian doctrine and case law on the rupture of synallagma

The Russian literature calls the issue more actively than the American since the market economics and the civil law are still at the stage of rapid development in Russia. It has been roughly 30 years since the fall of the USSR, and the current legislation is still trying to keep up with the new findings the market presents to the people. As it was highlighted earlier, the doctrine of conditions was almost inexistent in the Soviet Union since the administrative economics did not allow much diversity in the legal relationships between contracting parties.[770] Nowadays, the Russian courts are facing similar examples the American case law faced a hundred years ago with own specifics. However, the differences in the systems of law between Russia and the U.S. (codification vs. case law) and the undeveloped state of the Russian Civil Code (GK RF) makes the RoS issue to be a much more "screaming" issue in the Russian law. It is important to say that this issue is very closely connected to the doctrine of potestative conditions, which had a long history of recognition in the GK RF.[771] Some of courts started to encounter this problem in early 2010s but technically after 2015's amendments to the GK RF it is possible to tell that the RoS became a clear legal issue. After the 2015 amendments, which legalized potestative conditions, several Russian scholars started to discuss the presented problem more thoroughly.

5.2.1. Russian case law on conditioned counter-performance

Unfortunately, in case of Russia, the legislation did little to nothing to answer the possibility of the RoS issue, which means that the courts had to solve the problem according to concrete circumstances of the case. In this regard, the case law can be divided into 2 stages: before and after the 2015 amendments of the GK RF.

In 2011, when the Russian Civil Code still had not acknowledged potestative conditions, the Supreme Arbitration Court of Russia (SAC RF) encountered a peculiar construction case. The contract had a provision that the works are paid only after a positive approval by expertise. The expertise did not happen for a long time; therefore, the Contractor (creditor) was not paid in full. The lower instance courts were split in opinions: some considered this provision to be void, some – to be acceptable by law. Two points were clear: first, it was a conditioned counter-performance against an executed obligation, and, secondly, the condition did not happen for a long time. The contracting parties were

[770] *See* Part 1.1.1. What condition refers to (definition of condition), at 21.
[771] *See* Part 2.2.1. Russian doctrine and practice. Accepting potestative conditions, at 78 – 83.

left in the state of legal uncertainty. Since there was no regulation on such type of conditions in the Civil Code, the SAC RF had to decide within the current legal terms available. The court ruled this was a void provision, as it was not a proper time fixation done by the parties. The court admitted that this "condition of time" did not constitute a circumstance which is "inevitable to occur."[772] Therefore, the Contractor should be paid in full for the works provided, the court concluded.[773] In this case, the court clearly understood what was happening and what it was dealing with. To solve the problem of conditioned counter-performance, the court ruled it was literally impossible to condition such.[774] The court addressed the RoS issue by simply prohibiting any conditional counter-performance as if those opposed the nature of contractual relationships.

In 2013, the SAC RF reviewed a service contract case, where A and B agreed on the following provision: "The final date of the services is the date the customer approves the act of services without any claims."[775] The court considered such condition to be void, because "the payment for the contract can be delayed for an indefinite amount of time depending on the customer's discretion. Moreover, the contract turns from paid into a gratuitous one."[776] The court continued that such provision contradicts the nature of the contract of service. It also disrupts the freedom of contract principle, since this principle does not allow contract provisions that violate the law, the court concludes.[777] Same year, a similar solution was provided by the SAC RF in another case with participatory housing construction, "this condition (which conditions counter-performance) is not only contradicting the GK RF, but actually allows the Constructor to be not bound by the terms of the construction contract, and the forfeit provided by the contract as a whole does not stimulate him to fulfill his obligations."[778]

Therefore, it can be safely assumed that before 2015 the higher courts mostly excluded conditioned counter-performances on the grounds of disrupting the economical balance between the contracting parties. The inner reason in the judge's mind was simple: one party acquired an economic benefit and, because of that, did not have any incentive to perform its own obligations. The idea of conditioned counter-performance may have contradicted the conservative understanding of law.

---

[772] Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 11659/10 on case № A40-76599/09-159-650 (in Russian, from January 18, 2011), *available at* https://tinyurl.com/3kwx7k63 (visited July 1, 2023).
[773] Id.
[774] Danil Polynovskii, *Razryv sinallagmy pri obuslovlennosti vstrechnogo ispolneniya: puti resheniya* [*The rupture of the synallagma within the conditioning of the counter performance: solutions*], Sovetnik jurista, № 9, at 63 (in Russian, 2017).
[775] Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 12945/13 (in Russian, from December 17, 2013), *available at* https://tinyurl.com/47vnycun (visited July 1, 2023).
[776] Id.
[777] Id.
[778] Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 16179/12 on case № A40-134623/11-37-27 (in Russian, from April 2, 2013), *available at* https://tinyurl.com/y2pvjrce (visited July 1, 2023).

However, in the same year of 2013, there was an exceptional case, where the court accepted such conditioned counter-performance favoring the debtor.[779] The subcontract stated that the subcontractor is helping the general contractor with one of the stages of the building process. 5% of the payment to the subcontractor was set contingent upon the finish of the whole building process. The building was not finished, and the subcontractor filed the claims all the court instances up to the SAC RF to get the 5% of the payments. Contrary to the previous case law, the subcontractor company was rejected, as the court admitted such legal construction to be possible, as it is not contrary to the law established by the GK RF.[780] Such decision may have happened only because of the "5% of the payment" as it hardly shakes the economic balance of the contracting parties. Except for this case, the courts called such provisions to be contradictory to law.

In 2015, the GK RF was supplemented by a new article which allowed potestative conditions:

"The execution of the duties, as well as the exercise, change and termination of definite rights under a contractual obligation, may be conditional on one of the parties to the obligation taking or not taking definite actions or on the occurrence of other circumstances provided for by the contract, including fully dependent on the will of one of the parties".[781]

The level of juridical technique for this rule of law was very low.[782] Because of the negligence during the adoption of the article, the Russian law allowed the RoS issue to exist in full.[783] Andrey Egorov assumes that the rule above was formulated as broad as possible.[784] Vsevolod Baibak agrees with this opinion, stating that the 2015 rule is essentially a "black box": "it is possible to pull anything out of it."[785] Indeed, the 2015 amendments allowed potestative condition, which was a huge step for the regulation of conditions and the case law on potestativity in Russia.[786] However, an additional review of law still had to be done to address the RoS issue specifically. The Russian legislation on conditions has not changed ever since, which meant that it was the court's work to solve the RoS issue. And this is exactly what happened a year later.

---

[779] *See supra note* 774, at 64.
[780] Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 4030/13 on case № A40-131858/11-56-1157 (in Russian, from July 23, 2013), *available at* https://tinyurl.com/48tv5b3u (visited July 1, 2023).
[781] Civil Code of the Russian Federation, Art. 327.1 (1994, amend. 2022), available at https://bit.ly/40mCWPB (visited July 1, 2023).
[782] *See supra note* 774, at 63.
[783] Id.
[784] *See* opinion of Andrey V. Egorov, in: M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).
[785] *See* opinion of Vsevolod V. Baibak, in: M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023).
[786] *See supra note* 774, at 63.

In 2016, the Supreme Court of the Russian Federation (SC RF) released an Opinion, which had a regulatory meaning for all courts when resolving cases of similar matters, where it answered the RoS issue. According to the Opinion, if it happens that the contracting parties had not set a proper time limitation for their performance, and the creditor's performance is contingent upon debtor's performance, then upon the expiration of reasonable time the debtor is deemed to be overdue.[787] Therefore, the SC RF has finally chosen a path of "reasonable time" concept. However, it also suggested one more option. Other than setting a reasonable time for this kind of cases, the courts may also constitute bad faith of the debtor, in whose benefit it is for the condition to not occur.[788] So, if the debtor has prevented the condition occurrence in a bad faith, then the condition is considered to have occurred and vice versa. For example, if the debtor (general contractor) does not take any actions to receive the money from the client, then the court may constitute the bad faith of the debtor and deem the condition to have occurred, therefore the contractor must pay to the subcontractor.

In 2017 the SC RF made a review on the case law and included among everything a passage that answered the question on whether provisions, conditioning counter-performance, are lawful or not. "A subcontract provision that the works performed are paid after the general contractor finished the building process or acquires a financing from the customer is not itself violating the civil law."[789]

At the same time, the other courts were finding their own ways to nullify the RoS issue. In 2015 the court encountered an example situation with the general contractor and the subcontractor. The contract provided that the payments should be made 10 days after the general contractor receives the money transfer from the municipal budget. The courts of all instances rejected the appellations of the general contractor, since the "failure to receive funds from the budget does not relieve the defendant from the obligation to pay for the work."[790] In 2017 the Arbitration Court of Ural District solved a similar situation in favor of the creditor admitting that "the condition of payment for the work performed only upon the receipt of funds to the special account of the Client creates a threat for the Contractor to never receive the payment for the work performed within the time frame provided for by the contract, because the receipt of the funds depends solely upon the actions of the Client."[791] The courts interpreted the conditional clause as an unconditional.

---

[787] Resolution of the Plenum of the Supreme Court of the Russian Federation № 54, Clause 23 (in Russian, from November 22, 2016), *available at* https://rg.ru/2016/12/05/plenum-dok.html (visited July 1, 2023).
[788] Id.
[789] Review of judicial practice of the Supreme Court of the Russian Federation № 2, 2017 (in Russian, from April 26, 2017), *available at* https://tinyurl.com/mu3vey4h (visited July 1, 2023).
[790] Resolution of the Seventeenth Arbitration Court of Appeal № 17AP-12678/2015-GK on case № A71-2288/2015 (in Russian, from October 28, 2015), *available at* https://tinyurl.com/59jpcjku (visited July 1, 2023).
[791] Resolution of the Arbitration Court of the Ural District № F09-11893/16 on case № A50-11302/2016 (in Russian, from January 31, 2017), *available at* https://tinyurl.com/3784mffd (visited July 1, 2023).

5.2.2. Karapetov on shimmering causa

Artyom Karapetov, Doctor of Laws from Russia, calls this problem a "shimmering causa" (or indefinite causa) – a case where the debtor's counter-performance is conditioned upon something while the creditor has already performed its obligations for the synallagmatic contract.[792] In his opinion, the concept of conditioned counter-performance is not a problem by itself, instead, it is a very popular instrument used nowadays. Take for example a sales contract, where the starting price can be corrected dependently upon different conditions occurring after the deal is closed.[793] Or, for example, in a delivery contract, if the parties agreed on an automatic price reduction or increase depending on the customs fee change.[794] The view of Karapetov towards the conditional transactions in whole and specifically the "shimmering causa" could be characterized with one phrase: "there are no political or legal reasons to prevent such instances of the freedom of contract."[795]

However, the issue of "shimmering causa" occurs when a counter-performance (in full or its part) is still undecided because the condition is yet expected to occur, while the performance of the other party has already been executed.[796] According to Karapetov's findings it may depend either on:

a) Creditor: e.g., the contractor will be paid only when the guaranty of quality from the third parties is acquired.[797]

b) Debtor solely: e.g., reorganization, "enhancing the financial situation", when able.[798]

c) Debtor and third parties: e.g., the payment is subject to finance of the third parties.[799]

d) Circumstances completely outside of contract: e.g., the parties agreed on the following, "the government continues financing the project overall so the works shall be paid."[800]

"If the suspensive condition depends on the creditor, there are no sufficient problems", Karapetov is confident that the condition occurrence is "in the hands of the creditor" and therefore the creditor is to blame only himself if the condition does not occur.[801]

---

[792] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, at 92 (in Russian, 2017).
[793] Id.
[794] Id.
[795] Id., at 86.
[796] Artyom G. Karapetov, *Tezisy k Kruglomu Stolu Yuridicheskogo Instituta "M-Logos" "Problemnye Voprosy Uslovnyh Sdelok"* [*Thesis to the round table of the Law institute "M-Logos" "Problematic issues of conditional transactions"*] (in Russian, 2016), *available at* https://bit.ly/415mfbB (visited July 1, 2023).
[797] Id., at 13.
[798] Id.
[799] Id.
[800] Id.
[801] *See supra note* 792, at 93

And there was an example. In 2016, the courts encountered a multimillion-dollars case, where the Contractor and the Client agreed to build a thermoelectric power station.[802] The agreement provided that "the payment for the work performed is carried out on the condition that the Contractor provides the Client a bank guarantee to ensure the quality of the work performed."[803] The work was performed; however, the Contractor had not provided a bank guarantee to the Client. The Client did not pay, so the Contractor sued him and won the case in the first instance, however the Client did not agree and went up all the way to the Supreme court. The lower instance courts decided this is a void provision since the economical state of the contracting parties would be imbalanced. The Contractor performed everything he was asked by the agreement, and therefore he should be paid. Moreover, the courts considered this provision to be a time limitation and thus violating the criteria of inevitability, provided by the Civil Code. However, the Supreme Court considered such a provision to be lawful and supported the party autonomy.[804]

According to the court's thought, the contractor had two options: to provide a bank guarantee or to wait until the end of the warranty period (2 years by the civil code) so the debtor's obligation to pay will be enabled anyway. Therefore, the Contractor, who is demanding the payment, but not providing a bank guarantee, is himself causing damage to the economical balance of the contract, and the Client is right in this case.[805] Confirming this position and proving the lower instance courts wrong, the Supreme Court should have ruled in favor of the Client (debtor) but ruled in favor of the Contractor still. According to the history of the case, this happened because after the third instance court (there are 4 instances in Russia) confirmed that the Contractor is right, the contracting parties made an amendment to the contract, excluding the chapter on bank guarantees. The money has already been paid to the Contractor (it is obligatory after the second instance confirms the decision), therefore the case was resolved in a peaceful way. Still, the SC RF confirmed that potestative conditions favoring the creditor are acceptable and should be executed accordingly.

The same way the SC RF confirmed Karapetov's idea: there are no critical issues if the contract's performance is conditioned upon the creditor. The only issue is the negligence of the creditor. The legal construct of synallagmatic contract is very unlikely to be disrupted if the creditor does not use his right to demand the payment properly. If to look at the situation from the theory of transformative rights, then the creditor simply failed to use his right established by the contract.

---

[802] Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation № 301-ES16-4469 (in Russian, from August 25, 2016), *available at* https://tinyurl.com/32r79m36 (visited July 1, 2023).
[803] Id.
[804] Id.
[805] Id.

If the suspensive condition depends solely on the debtor (b) or on the debtor and third parties (c), or on circumstances outside of the contract (d), then the situation becomes much more complicated, Karapetov assumes.[806] When the condition does not depend on the creditor, there is always a possibility that the condition will never occur, and the creditor will get nothing for his own performance. However, there is a small point to pay attention, Karapetov reminds: if the contracting parties created any time limitations on the debtor's obligation to perform, then there are no grounds on preventing such freedom of contract.[807] This is in line with the previous assumptions that the time limitation is one of the obvious solutions to the RoS issue. For example, if an agreement provides that the payment for the acquired shares should happen in case the company is sold to a certain strategic investor, however, if it does not happen withing 5 months, the deal is "turning around", and the shares are returning to the previous holder.[808]

Like American scholars, Karapetov asks his question:

"What to do if the parties conditioned a synallagmatic counter-performance and there is no time limitation set neither for a due performance nor for a restitution?"[809]

The solution Karapetov advocates after is to use the "reasonable amount of time" concept, discussed earlier.[810] If the contracting parties willingly desired to conclude a synallagmatic contract (that creates an economic exchange: sales, works, services) it means they considered that such an exchange should happen sooner or later, therefore, the condition for the counter-performance should sooner or later occur. There is a "conflict" between the choice of bilateral contract and conditioned counter-performance.[811] The law cannot presume that the contracting parties were willing to create an eternal contractual connection and an "infinite indefinity" in terms of condition's realization, where the payment could not ever possibly happen.[812] The conflict creates an incentive for a better interpretation.[813] So, the only affordable and responsive solution, that preserves reasonableness, good faith and fairness is to set a "reasonable time" after which the shimmering causa will be excluded.[814]

---

[806] Artyom G. Karapetov, *Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF* [*Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation*]. Bulletin of Economic Justice of the Russian Federation, № 6, at 93 (in Russian, 2017).
[807] Id.
[808] Id.
[809] Id.
[810] ARTYOM G. KARAPETOV, SDELKI, PREDSTAVITELSTVO, ISKOVAYA DAVNOST: POSTATEYNYY KOMMENTARIY K STATYAM 153 - 208 GRAZHDANSKOGO KODEKSA ROSSIYSKOY FEDERATSII [TRANSACTIONS, REPRESENTATION, LIMITATION OF ACTIONS: ARTICLE-BY-ARTICLE COMMENTARY TO ARTICLES 153 - 208 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], at 106 – 107 (ed. V.V. Baybak, R.S. Bevzenko, S.L. Budylin, in Russian, 2018).
[811] Id.
[812] Id.
[813] Id.
[814] Id.

In the opinion of Karapetov, the decisions of the Supreme Arbitration Court were made from the perspective of possibility or non-possibility of conditioning the debtor's counter-performance, which is itself "rude and disrespectful to the freedom of contract."[815] He believes prohibiting such conditions should be a "last chance measure", where "the fairness and economical expediency is impossible to restore in more gentle ways."[816] With the amendments of the GK RF in 2015, Karapetov saw a positive sign in the rulings of the SC RF in terms of sustaining the private autonomy and solving the RoS issue.[817] However, in his opinion, "the law cannot stop on this note."[818]

Karapetov admits one more important point in his research. The issue of shimmering causa is important not only because the creditor's rights and interests are violated and there are risks to "infinitely wait" to get the intended counter-performance from the debtor. The public interests are also damaged. The RoS situation presents a violation of rule provided GK RF, which prohibits any gifts between commercial entities.[819] Therefore, while an ordinary transaction between neighbors (with a conditioned counter-performance) can create a dispute but will not violate the law, the same type of transaction between two companies will constitute a "severe violation of interest balance between the parties" and a "disruption of the causa of the synallagmatic agreement."[820] Thus, the law should exclude such situations, Karapetov concludes.[821]

Regarding the "bad faith" solution, Karapetov also sounds supportive. In his opinion, the court used the "bad faith" concept to show that if the creditor finds out the debtor is preventing the condition occurrence, then he may demand the performance from the debtor even before the end of the fixed term or reasonable time.[822] Karapetov's logic is quite similar to the non-infringement rule seen in the Civil Code of Hungary or supra-national legislations, such as PICC.[823] Russia does not have such a rule. Moreover, his ideas are identical to the English doctrine established by Guenter Treitel: a duty to take reasonable efforts is the highest degree of obligation in pendency.[824] Perhaps, establishing a non-infringement rule or a duty to take reasonable efforts is a good preliminary solution for Russia.

---

[815] *See supra note* 810, at 106.
[816] Id.
[817] Important note: SAC RF was dismissed in 2014, with all its competence going to SC RF, i.e., economic disputes.
[818] *See supra note* 810, at 106.
[819] Civil code of the Russian Federation, Art. 575, (1994, amend. 2022), *available at* https://tinyurl.com/y7w28dc (visited July 1, 2023). "It shall be impermissible to donate gifts, except for common gifts, whose value does not exceed three thousand roubles [40 dollars]: <…> 4) in relations between profit-making organizations."
[820] Artyom G. Karapetov, *Tezisy k Kruglomu Stolu Yuridicheskogo Instituta "M-Logos" "Problemnye Voprosy Uslovnyh Sdelok"* [*Thesis to the round table of the Law institute "M-Logos" "Problematic issues of conditional transactions"*] (in Russian, 2016), *available at* https://bit.ly/415mfbB (visited July 1, 2023).
[821] Id.
[822] *See supra note* 810, at 106.
[823] *See* Part 3.4.2. Satisfactory level of regulation, at 147.
[824] *See* Part 3.3.1. English doctrine on legal pendency. Degrees of obligation, at 137.

5.2.3. Ageev's economic reasonings and solutions to the rupture of synallagma

The importance of Ageev's doctrine in the question of RoS issue is in explaining the economic reasonings for concluding such contracts as far as introducing the ways out of the situation of "eternal pendency."[825] His analysis allows to explain even more about the legal construct of conditioned counter-performance and the RoS occurring from it.

Each transaction bears costs. Those costs may be of many types: "information costs" to find the suitable contracting party, "information costs" to find the goods to trade, "costs of negotiations and contract amendments", administrative costs such as "costs of control for the contract execution."[826] The aim of conditions, in Ageev's mind, is to lower the transaction costs.[827] This is in line with the desire of commercial entities to take the maximum profit out of the deal.[828]

"The Client – Contractor – Subcontractor" example is a transit model, where the subcontractor is paid once the contractor acquires the money from the client. The Client has the money but no experience, the Contractor has the experience of controlling the construction process, while the Subcontractor is the expert is his field of work. According to Ageev's thoughts, the Contractor can lower the costs of information about the quality of work but for that he would have to strengthen the control over the Subcontractors.[829] The payment by the Client is a "guarantee of quality", which lowers the information and administrative costs of the Contractor.[830]

Contractor is an intermediary between the Client and the Subcontractor; his interests are obvious: the Client's money would be used for the payments to the Subcontractors as well for the compensation of transaction costs. The interests of the Subcontractor, however, should be "serious" to allow such a scheme, Ageev assumes.[831] The first interest is to perform the work in order to acquire economic benefits as well as to avoid the salary or emergency cases costs. The second interest is the reputation: a quality work might allow a long-lasting cooperation in future. The third interest is to allow a weaker position in payments for strengthening the negotiation position in the other contractual questions. The aim of the model is to diversify the risks between the creditor and the debtor.[832]

---

[825] Alexey V. Ageev, *Ekonomicheskiye prichiny zaklyucheniya dogovorov s otlagatelnymi usloviyami* [*Economic reasons for entering into contracts with suspensive conditions*], Bulletin of Economic Justice of the Russian Federation, № 12, at 165 (in Russian, 2018). Ageev calls the issue with the word "pendency" and not RoS.
[826] Id., at 162 – 163.
[827] Id.
[828] Id.
[829] Id., at 165.
[830] Id.
[831] Id., at 166.
[832] Id., the first, second, and third interests are also retold by Ageev's article. He also suggests that the provision "I pay if I am paid" is beneficial for the Subcontractor, because the risk of non-payment is countered by a higher subcontract price.

"Manufacturer – Retailer – Customer" example is a non-transit model, where the manufacturer is paid once the retailer sells the goods to the customer. As explained earlier, the manufacturer has the product but does not want to bear the costs of finding the customer, the retailer is an expert in selling the product directly to the customer, and the customer is willing to overpay to the retailer instead of searching for the manufacturer directly.[833] According to Ageev, the debtor acquires the title for the goods sold by the manufacturer, therefore the debtor is free to transfer the goods to whomever and however he desires; he is not an intermediary between the manufacturer and the customer.[834]

The conditioned counter-performance is also logical for such type of contractual relationships. The debtor (the retailer) is a professional actor who already might have an agreement with the third-party customer, which excludes the RoS issue, however, he does not always have the money to pay for the manufacturer's goods immediately.[835] The condition to pay upon the resale is a good defensive mechanism for the retailer.[836] The creditor (the manufacturer) is also interested in this conditional transaction. Neither he bears the costs of finding the customer, nor the additional storage costs; moreover, as Ageev assumes, the manufacturer is sometimes interested in remaining anonymous to the final customer.[837] Unlike the transit model, the non-transit model does not diversify the risks.[838] This is logical since the debtor acquires the title over the product. Still the model is popular because the transaction costs are diversified benefitting both parties.[839]

Through a myriad of examples, Ageev suggests "principally possible" solutions to the RoS issue.[840] The first solution is "reasonable time", which is a "simple", "universal", and "bears low transaction costs."[841] At the same time, it is also possible to agree with Ageev that the "reasonable time" concept allows for a procedural uncertainty – the judge's subjectivity; to avoid it the court should find out the reasons for non-payment and what the parties have already done to solve the legal uncertainty.[842] An alternative solution is to apply a "unified" time limit for such occasions (e.g., one year from the contract conclusion), however, in the variety of contracts it is impossible to find one.[843]

---

[833] *See* Part 5. The Rupture of synallagma in conditioned obligation performance, at 190.
[834] Alexey V. Ageev, *Ekonomicheskiye prichiny zaklyucheniya dogovorov s otlagatelnymi usloviyami* [*Economic reasons for entering into contracts with suspensive conditions*], Bulletin of Economic Justice of the Russian Federation, № 12, at 167 – 168 (in Russian, 2018).
[835] Id., at 168.
[836] Id.
[837] Id.
[838] Id.
[839] Id. Ageev concludes that the creditor is benefitting from removing the organizational and storage costs in exchange for a titular right conveyed to the debtor. The debtor can buy without paying and acquire economic benefits after resale.
[840] Id., at 169.
[841] Id.
[842] Id.
[843] Id.

The next solutions Ageev calls with the term "conditional means": those solutions create more transaction costs for the creditor, and they are dependent upon different external factors.[844] It is possible to agree with Ageev that the next solutions cannot be universal, as those are not applicable to every case. On the other hand, however, those solutions allow to look into the real intentions of the parties and to balance their interests.[845]

The second solution is using the fiction of bad faith.[846] Ageev advocates for an "exceptional" usage of such rule, as "it cannot be used in a broad way."[847] This is true, as it was discussed earlier, the concept of bad faith has its problems: it is a vague term, and it overlaps with the concept of "potestativity."[848] Ageev sees a lot of "subjectivity" in the concept of bad faith.[849] Still, it is a rather powerful solution to be used in accordance with the circumstances of a concrete case. Moreover, the SC RF supported the possibility of "bad faith" solution.[850]

Another option is to deem the condition "impossible to occur", e.g., if the debtor files for insolvency.[851] Important to note, that Russian law does not have such rule in law, whereas many other civil codifications have a rule on the impossibility of condition occurrence.[852] Again, this is a solution for a concrete case approach, where it is obvious to the court that the condition will never occur.

The final solution, as suggested by Ageev, is to constitute an "implied right of the creditor to amend the contract's provision on payment from a conditional to an unconditional."[853] According to Ageev, this solution could be used "when the reasons of condition non-occurrence are obviously out of the boundaries of the risk assumed by the creditor in the relevant model."[854] The "implied right" to amend the contract is a rather unique solution for a civil law codification. The concept of "implied right" might look familiar for the common law legislations, however, in the civil law system such a solution is very unlikely to be used. The closest doctrinal concept to the "implied right" might be a transformative right to amend the contract.

---

[844] Alexey V. Ageev, *Ekonomicheskiye prichiny zaklyucheniya dogovorov s otlagatelnymi usloviyami* [*Economic reasons for entering into contracts with suspensive conditions*], Bulletin of Economic Justice of the Russian Federation, № 12, at 170 (in Russian, 2018).
[845] Id.
[846] Id.
[847] Id.
[848] *See* Part 2.3.2. Conceptual concerns on bad faith. Correlation with potestative conditions, at 93.
[849] *See supra note* 844, at 170.
[850] *See* Part 5.2.1. Russian case law on conditioned counter-performance, at 209.
[851] Id, at 170, 172.
[852] *E.g.*, Belgian Civil Code. Book 5: Obligations, Art. 5.142 (in Dutch and French, 2023), *available at* https://bit.ly/3WINDca (visited July 1, 2023); *see also* Civil Code of Japan, Art. 131 (2) (1896, cons. ver. 2009), *available at* https://bit.ly/3jdExGo (visited July 1, 2023); *see also* Civil Code of the Republic of Latvia, Art. 1562, 1563 (1992, amend. 2022), *available at* https://bit.ly/3HgSoUA (visited July 1, 2023).
[853] Id.
[854] Id.

The solution of "implied right" may be seen as an experimental suggestion by the author, as there are a lot of concerns arising from such a solution. First, awarding the right to change the contract creates a very imbalanced solution, as the suddenly occurred creditor's ability to change the contract might be very disruptive towards the debtor. Ageev suggests two articles of the GK RF to support the possibility of such solution: one article is about the interpretation of contract and the second is on the ability to unilaterally change it.[855] However, currently there are no legal institutes on "implied terms" in Russian law. The suggested articles are very vague to allow such a distinctive move to award a transformative right to the creditor. Other solutions, while also being subjective, appear to be more concrete and legislatively based.

Moreover, even though the court might hypothetically constitute such an "implied right", the creditor would still have to use it. Therefore, if the court awards the "implied right" to the creditor, the case is still not solved. It is a first step in a double-layer solution where the creditor is not awarded the necessary payment but only a transformative right to change the contract. It is not possible to criticize Ageev for this solution, as it is experimental, whereas other solutions seem to be befitting into the structure of Russian law. Perhaps, the "implied right" solution might be a unique case of a bad faith on the debtor's side. The fiction of bad faith could be a more stable solution.

From the analysis of Russian law on the RoS issue it could be concluded that the doctrine and the case law are well-aware of the issue with the conditioned counter-performance. In a span of few years, the court practice changed its mind completely from totally prohibiting such conditional clauses in contract to completely allowing conditioned counter-performances. With the rather low level of amendments done to the GK RF in 2015, the issue of shimmering causa became possible. This situation asked to be solved, which was precisely done by the SC RF with two solutions: reasonable time concept and the fiction of bad faith fulfillment.

The prominent Russian authors on the topic of conditional transactions, Artyom Karapetov and Alexey Ageev, managed to provide a substantial analysis of the situation and a set of solutions. Those solutions include the introduction of a time limit to the contract (a general solution), the reasonable time concept (a universal solution), and two more: the fiction of bad faith and the unknown rule on the impossibility of condition occurrence. The "implied right to change the contract" solution, suggested by Ageev, is unfortunately too unique for the Russian law.

The next paragraph briefly discusses the legislative ways used to solve the RoS issue in other civil law codifications.

[855] *See supra note* 844, at 170. *See also* Civil code of the Russian Federation, Art. 431, 450.

5.3. Legislative analysis on counter-measures to the rupture of synallagma

So far, the solutions to the RoS suggested by the doctrine are mostly post-factum (except for the time limit) since they appear to be implemented by the court in cases where the conditioned counter-performance caused sufficient trouble to the contract's execution. This correlates with the jurisdictions used for the previous analysis: the American doctrine suggested the case law solutions, while the Russian law appeared to have no specific regulations towards the RoS issue, which also led to the courts solving the problem. However, there are still a plenty of legislations which regulated the conditional transactions in their own unique way. Therefore, are there any additional solutions to the problem of conditioned counter-performance? How the other civil law legislations evaluate the RoS issue? Are there any other preliminary solutions to such occasions?

5.3.1. French-type legislations on possible counter-measures

Since the question of RoS revolves around the obligations in a synallagmatic contract, some peculiarities could be noticed in the jurisdictions which connect the term "condition" with the term "obligation."[856] In most states where the object of "condition" is a contractual obligation, there are rules which address the potential of an RoS situation in an indirect or direct way.

According to Mathias Latina's research, the legal construct of condition is not applicable to the obligations in a synallagmatic contract.[857] In other words, the reciprocal duties cannot be conditioned towards each other. Alexey Ageev made an important overview of at least three reasons for such a rejection. First, condition is an additional element to the contract, therefore the important elements of the contract (which are the performance and counter-performance of the main obligations) cannot be conditioned upon.[858] Secondly, the reciprocal obligation is a "compulsory element of the contract as of such", therefore it cannot be conditioned.[859] Thirdly, the reciprocal obligation is the causa of the main obligation, which is different from the nature of condition.[860]

---

[856] *See* Part 1.1.2. What condition affects (object of condition), at 26, 30.

[857] MATHIAS LATINA, ESSAI SUR LA CONDITION EN DROIT DES CONTRATS [ESSAY ON THE CONDITION IN CONTRACT LAW], at 201 (in French, 2009), cited by Aleksey V. Ageev, *Osnovnye podhody k problemam v sfere usloviy vo Francii.* [*General approaches in the sphere of conditions in France*], at 3 (in Russian, 2016), *available at* https://bit.ly/3XLEQYg (visited July 1, 2023).

[858] Id.

[859] Id.

[860] Id. Ageev notes that the difference between "causa" and "condition" is in the "dependence upon the willpower." The existence of causa may depend upon the "pure willpower" of the contracting party, while the existence of condition cannot depend upon the "pure willpower." This might be an argument towards the theory of potestative rights, though disputable.

It is possible to agree with Latina's statement based on the previous analysis on the standards of condition: condition is indeed additional to the contract.[861] Moreover, since the obligation of payment is the main reciprocal obligation, it also confirms the validity of the contract and, therefore, Latina's position.[862] Causa in this sense could be seen as the main cause of the contract which confirms the intentions of the parties to perform it. According to the French legislation before the 2016 amendments, the "lawful cause in the obligation" was one of the four pre-requisites for the validity of the contract.[863] Therefore, from the first look it might be suggested that this rule indirectly prohibited all conditioned performances and counter-performances of the main obligations.[864]

However, that was not the case. In simple words, conditioning a non-important obligation was completely acceptable, while conditioning the main reciprocal duty (such as to buy, to pay, to accept, etc.) was only partially acceptable. Ageev writes that a conditioned reciprocal duty was a "method to diversify the risks" among the parties.[865] For example, a debt payment could be conditioned upon the sale of property by the debtor: once he acquires the money the obligation to pay is due.[866] "Partially acceptable" means that in case the debtor did not sell the property, the obligation was still due. The court had some options to solve the case. In the first option, the court could deem the provision to be purely potestative favoring the debtor and the condition to be void.[867] In the second option, the court could also use the fiction of "bad faith fulfillment" to deem the obligation unconditional.[868] It could be suggested that in such cases, conditioning the main obligation was seen equal to conditioning the contract itself, which then was deemed contradictory to the French law. Therefore, the pre-2016 French law repelled the RoS issue with a prohibition of conditioned counter-performance where an abuse of potestative power by the debtor was proven.

Undeniably, this was a very complicated way to solve the RoS issue. The methods did not differ from the American case law: interpretation, examination of the desired intent of the parties, and establishment of unjust situation. Moreover, it was still not a preliminary solution, which would allow an easier way to solve the issue and create a base of consistent court decisions. A concrete prohibition of indefinite-in-time counter-performance in the code could be a valid preliminary solution.

---

[861] *See* Part 1.3.4. Suggestion on standards of condition, at 50.
[862] *See* Part 1.1.2, What condition affects (object of condition), at 31.
[863] French Civil Code, Art. 1108, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016), available at https://bit.ly/3XBNYyt (visited July 1, 2023).
[864] Aleksey V. Ageev, *Osnovnye podhody k problemam v sfere usloviy vo Francii.* [*General approaches in the sphere of conditions in France*], at 8 (in Russian, 2016), *available at* https://bit.ly/3XLEQYg (visited July 1, 2023).
[865] Id.
[866] Id.
[867] *See* French Civil Code, Art. 1174 (1804, ver. before 2016).
[868] *See supra note* 864, at 8.

And this is what was introduced in the new French Civil Code, as the legislator fixed an article prohibiting any perpetual (indefinite-in-time) obligations:

Art. 1210 (French Civil Code): "Perpetual undertakings are prohibited. Either contracting party may put an end to such an undertaking under the conditions provided for contracts of indefinite duration."[869]

This is a very broad prohibition as it does apply to all rules on contracts. Still, it could be seen as a valid preliminary solution for the RoS issue since the perpetuality of the obligation performance is the main part of the problem. A more concrete approach, however, was done by the Belgian legislators in the new 2023 amendments of the Law of Obligations:

Art. 5.141 (Belgian Civil Code): "An event on which the validity of the contract depends cannot be stipulated as a condition by the parties. Thus, the obligation does not depend on a purely potestative condition precedent on the part of the debtor."[870]

The Belgian legislator accomplished two objectives with the amendment.

First, Belgium is also the state where the obligation is the object of "condition"; therefore, the rule is a concrete preliminary prohibition established, presumably, in search of stability for the legal circuit. Another article of Belgium Civil Code describes the requirements for the contract's validity, which includes, among others, a "permissible cause."[871] This "permissible cause" consists of determining motives that made the reason for the parties to enter the contract.[872] It could be confidently assumed that those "determining motives" are the main reciprocal obligations between the parties in a synallagmatic agreement (e.g., to buy, to sell, to deliver). Therefore, from a brief overview, it could be suggested that the Belgian law "prohibition" refers concretely to the conditioned counter-performances of the main reciprocal obligations. This way the RoS issue is negated in full.

Secondly, the Belgian legislator gives a valid justification for the courts to solve the possible RoS issue: by stating that such conditioned performances are, in fact, purely potestative conditions favoring the debtor. This possibly might give multiple alternative ways for the court to qualify the condition as a purely potestative. Moreover, it could be speculated that, by such regulation, the court is given more legal instruments to use towards such obligations: from deeming the condition null and void to changing the status of the obligation from conditional to unconditional.

---

[869] French Civil Code, Art. 1210, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of February 10, 2016*, *available at* https://bit.ly/2Qodnso (visited July 1, 2023).
[870] Belgian Civil Code, Book 5. Law of obligations, Art. 5.141 (in Dutch and French, amend. from 01.01.2023), *available at* https://bit.ly/3WINDca (visited July 1, 2023). The rule is in the Chapter on conditional obligations.
[871] Id., Art. 5.27 (4).
[872] Id., Art. 5.53.

Targeting conditioned performance with a prohibition is not the only tool the lawmakers use. The other preliminary option is to constitute additional rights for the creditor in a synallagmatic contract. Several legislations established at least two opportunities:

1. Creditor has the right to force the debtor to perform his obligation.
2. Creditor has the right to terminate the agreement with the compensation of costs, damages and interests.[873]

This is a preliminary solution since the legislator established the two options as a preliminary way for the creditor to solve the issues surrounding the synallagmatic agreements. Moreover, the articles are fixed in the chapter on conditions. This implies the usage of the above-mentioned options in a very specific manner: in situations where the reciprocal duties are conditioned upon an uncertain future event. By such regulation, any possibility of the RoS issue is almost completely negated, since the law establishes concrete options for the creditor awaiting the condition to occur.

In both cases, the creditor may ask the court to force the debtor to perform or terminate the contract. In case of forcing the debtor to perform, it could be also done within the negotiations outside of any court proceedings. In case of the contract termination, both Spanish and old French legislations specify that the contract termination procedure is done exclusively by the court, and the debtor is given a specific amount of time to fulfill his obligations.[874] The possible amount of time to be given is not specified by the law. Therefore, it could be speculated that the French-type legislations already had the "reasonable time" answer to the RoS issue within the provisions of the code.[875]

Indonesian law is a unique example: it provides an identical regulation to France and Spain, however, also establishes an upper time limit for the court: not more than one month for the debtor to fulfill his obligations.[876] This way, the solution becomes closer to a "unified time" to fulfill the obligation. Such legislative solution, unfortunately, might not fit every case.[877]

---

[873] *E.g.*, Indonesian Civil Code, Art. 1267 (1847), *available at* https://bit.ly/3JmY5mG (visited July 1, 2023); *see also* Luxembourg Civil Code, Art. 1184 (in French, 1803, cons. ver. 2023), *available at* https://bit.ly/3jiXQOB (visited July 1, 2023); *see also* Spanish Civil Code, Art. 1124 (1889, cons. ver. 2016), *available at* https://bit.ly/3HCpAag (visited July 1, 2023); *see also* French Civil Code, Art. 1184, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016), *available at* https://bit.ly/3XBNYyt (visited July 1, 2023).

[874] *See, e.g.*, Spanish Civil Code, Art. 1124 (1889, cons. ver. 2016), "The Court of Law shall order the requested termination, unless there are justified grounds which authorise it to set a term."

[875] This speculation is hard to prove, however within the old (pre-2015) Argentine law there was a hint to the usage of "reasonable time" concept. Art. 575 of the Civil Code regulated the conditional obligations in reciprocal duties, "If no time has been fixed, the condition must be performed within the time that it is likely the parties understood that it was to have been performed." *See* The Argentine Civil Code (1871), official translation by the Comparative Law Bureau of the American Bar Association, director Baldwin S., available at URL: https://bit.ly/3Y8x7TX (access date: 20.01.2022)

[876] *See* Indonesian Civil Code, Art. 1266 (4) (1847), "If the [provisions of termination are] not included in the agreement, then the judge, considering the situation, upon the defendant's request, has the discretion to fix a timeframe to fulfill such obligations, but such timeframe may not exceed one month."

[877] *See* Part 5.2.3. Ageev's economic reasonings and solutions to rupture of synallagma, at 217.

There is one more option for the legislator to address the RoS issue. Some legislators, like in case of Nepal and Quebec, for example, appear to establish the rule on impossibility of condition occurrence.[878] If, after the conclusion of the contract, it became certain that the condition would never happen, then the condition is disregarded. This is different from impossible conditions which are "impossible" from the start. In the mind of the legislator, if the condition was valid at the time of contract's conclusion, however, became impossible to happen along the contract's execution, then the conditional obligation is turned into an unconditional one.

In the kindergarten example, the performance of the obligation to pay depended upon the acquisition of funds by the Contractor from the Client. Therefore, if it is established by the court that condition is impossible to occur, the Contractor is obliged to pay to the Subcontractor. This could also be seen as a preliminary solution, as the court is given another option to oblige the debtor to pay.

5.3.2. A note on resolutive conditions in synallagmatic contracts

An interesting theoretical detail emerges from the analysis on the French-type legislations. The pre-2016 French regulation, as well as other similar regulations, connected the term "obligations in synallagmatic agreements" with the term "condition subsequent."[879] The legislator fixed that such conditions were "always implied" in synallagmatic contracts.[880] This happened for the "cases where one of the parties did not carry out his undertaking."[881] According to Zimmermann, the theory comes from the "natural lawyers" who argued that the reciprocal duties in a mutual agreement were dependent to each other.[882] Therefore, if one of the parties did not perform what it should, the other could rescind his main obligation as well.[883]

The law has been amended in 2016, and this specific provision is no more present in the French regulation, yet still the theory remains. What was the problem with this theory of "conditional to each other" reciprocal duties? Why did the legislator change the approach?

---

[878] *See, e.g.*, Civil Code of Quebec, Art. 1501 (1991, amend. 2022), *available at* https://bit.ly/3WJohL8 (visited July 1, 2023), "If no time has been fixed for fulfillment of a condition, the condition may be fulfilled at any time; the condition fails, however, if it becomes certain that it will not be fulfilled." See also, The National Civil Act of Nepal, Art. 513 (3) (2017), *available at* https://bit.ly/3jcjkNa (visited July 1, 2023), "… the obligation under such a contract shall arise only after such an event becomes impossible to happen." *See also* French Civil Code, Art. 1176, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016).
[879] *See* French Civil Code, Art. 1184, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016).
[880] Id.
[881] Id.
[882] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION, at 803 (1990).
[883] Id.

According to Kseniya Usacheva, it was a "variant to elaborate on the termination" of contract in French law.[884] According to her research, the concept of resolutive condition was used by the French doctrine to explain the nature behind the termination.[885] This explanation took its roots from the *lex commissoria* and dominated the legal opinion throughout the whole 19th century.[886] The resolutive condition was implied in every synallagmatic agreement. Moreover, such condition had a retroactive effect upon its occurrence.[887] The usage of resolutive conditions theory "predetermined the complete destruction of the legal effect of the concluded contract."[888] In other words, the main reciprocal obligations of the parties (e.g., to pay, to deliver) were resolutive conditions to each other. The fulfillment of the obligations "destroyed" the legal effect of the contract.

This situation, unfortunately, creates a theoretical inconsistency. The topic of conditioned performance and the RoS issue revolve around conditioning the main reciprocal obligation. However, according to the French theory, the main reciprocal obligation is a resolutive condition by itself, therefore, upon the fulfillment of the reciprocal duties by each of the parties, the contract ends to exist. This theory is very questionable because it is hard to imagine conditioning a condition. It is not possible to create a multi-layer condition, it will be just two or more conditions with the particle "and."

Moreover, the theory creates a rather strange and contradictory situation. If an obligation to pay is a resolutive condition towards the obligation to convey, then the buyer is the first to commit his obligation, and only afterwards the seller gives the product. If an obligation to convey is a resolutive condition towards the obligation to pay, then the seller must first convey the product and only then the buyer should pay. Disregarding the practice (where both variants are possible according to the preferences of the parties), the fact that main obligation is resolutive condition immediately creates two contradictory scenarios. This theory creates a chain of command rather than explains that the obligations are committed simultaneously. The only thing such theory excels at is the termination of the contract: the parties simply dispose of their duties. At the same time this theory is very debatable, especially in relation to the theory of condition. Perhaps, for these reasons, the current French regulation changed the provision on resolutive conditions, giving them a more refined approach.[889]

---

[884] Kseniya A. Usacheva, *O Kvalifikacii Vozvrata Poluchennogo v Sluchae Rastorzheniya Narushennogo Dogovora: Istoricheskiy Ocherk* [*On Qualification of the Parties' Relationships on the Return of What Was Received after the Termination of the Violated Contract: Historical Review*], in: A.M. Shirvindt, N.B. Shcherbakov, *Opyty tsivilisticheskogo issledovaniya: sbornik statey* [*Experiments of civilistic research: collection of articles*], at 358 - 359 (in Russian, 2019).
[885] Id., at 358.
[886] Id. This opinion is supported by multiple French sources, unavailable to the author of the thesis.
[887] Id.
[888] Id., at 359. This opinion is supported by multiple French sources, unavailable to the author of the thesis.
[889] French Civil Code, Art. 1304-7, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of February 10, 2016*, *available at* https://bit.ly/2Qodnso (visited July 1, 2023).

The refined French approach suggests two important changes to the relationship between the terms "resolutive condition" and "obligation in a synallagmatic agreement."

1. The resolutive condition is separated from the obligation, therefore, the main reciprocal obligation (to pay, to deliver) is not a resolutive condition by itself.[890] The previous French legislation was very vague on the terms "undertaking" and its connection to the resolutive condition. The new approach divides those terms in a more concrete way.

2. In reciprocal obligations, the resolutive condition does not have a retroactive effect: the consequences of the resolutive condition apply to the obligation only from the moment the condition occurs (prospective effect).[891] This rule also constitutes an important point in dividing the "obligation" and "condition": the resolutive condition terminates the existence of the obligation.

These changes resolved the theoretical inconsistences around the usage of conditions in synallagmatic agreements. Still, one question remains unclear: in the kindergarten example, is the condition to receive the payment from the Client a suspensive condition or a resolutive?

The new French law appears to answer this question as well:

Art. 1304 (French Civil Code): "A condition is suspensive where its fulfilment renders the obligation unconditional."[892] *Art. 1306: "An obligation becomes unconditional from the moment when the suspensive condition is fulfilled."*[893]

The regulation implies that the obligation to pay upon the acquisition of funds is an obligation depending upon a suspensive condition, as it activates the performance of such.

Therefore, from the overview of French-type legislations, three more solutions to the RoS issue could be suggested. The first is to prohibit any indefinite-in-time obligations. The second is to award the creditor in synallagmatic agreements an additional set of rights, such as forcing the debtor to perform the obligation or requesting a termination of agreement. It could be suggested that those rights are implicit in every contract and transformative in nature. The third solution is to state the impossibility of condition occurrence. All the solutions could be seen as valid prophylaxis towards any issues arising from the usage of conditions in synallagmatic agreements, including the RoS issue. Moreover, the modern French law changed the dogma of reciprocal obligations, separating them from the "resolutive conditions." Now it is certain, that the main reciprocal obligations are not resolutive conditions to each other and, therefore, do not depend upon each other.

---

[890] French Civil Code, Art. 1304-7 (2016), "The fulfilment of a resolutory condition extinguishes the obligation…"
[891] Id., "The [resolutive] effect is not retroactive if <...> the acts of performance that have been exchanged have fulfilled their aims in the course of the reciprocal performance of the contract."
[892] French Civil Code, Art. 1304 (2016).
[893] French Civil Code, Art. 1306 (2016).

5.3.3. Germanic-type legislations on possible counter-measures

At first, the situation in the Germanic-type legislations might look similar. Russian researcher Kirill Nam, who wrote an article on conditional transactions in German law, suggests there is no such problem as infinite waiting.[894] He assumes that the situation is theoretically possible but easily solvable within the identified intent of the contracting parties, which is given the priority in court cases.[895] The interpretation would allow to determine for what period the parties wished to be bound by the infinite waiting, i.e., when they expected the occurrence of the agreed circumstances.[896] Nam also suggests a similar solution discovered earlier: if the condition becomes obvious to not occur, then the condition is disregarded.[897] However, in his opinion, there are no other legal mechanisms created by the legislator "which could infiltrate the autonomy of the will of the parties, their freedom of contract and remove the infinite waiting."[898] It is possible to agree with his opinion, as far as the RoS issue has not been outstanding in the German doctrinal literature. However, upon the closer look on BGB and other Germanic-type legislations, some additional findings could be provided.

Finding 1. There is a specific article in BGB, which regulates the unjust enrichment:

§ 812 (BGB): "This duty [to surrender unjustly obtained] also exists if the legal grounds later cease to exist or if the result intended to be achieved by an act of performance in accordance with the substance of the legal transaction does not materialize."[899]

The RoS issue is not a case of unjust enrichment.[900] However, it could be speculated that in the mind of German legislator the rule also applies to a potential case of infinite waiting. The next sentence in the same article suggests that such an "act of performance" could be a concrete act of acknowledgement of the obligation existence.[901] In other words, in the kindergarten example, if the Contractor fails to pay the money to the Subcontractor because of the Client's inability to pay the Contractor, the German law indirectly prescribes the Contractor to commit an "act of performance" – to acknowledge the existing obligation to pay towards the Subcontractor.

---

[894] Kirill V. Nam, *Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod* [*Comment to the #Gloss. Conditional transaction. German Approach*]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 92 (in Russian, 2018).
[895] Id. *See also* German civil code BGB, § 131 (1900, cons. ver. 2021), available at https://bit.ly/408nSVk (visited July 1, 2023).
[896] Id.
[897] Id. *See also* Part 5.3.1. "French-type legislations on the possible counter-measures", at last page.
[898] Id.
[899] German civil code BGB, § 812 (1900, cons. ver. 2021)
[900] *See* Part 5. "The Rupture of synallagma in conditioned obligation performance", at 191.
[901] German civil code BGB, § 812 (1900, cons. ver. 2021), "Performance also includes the acknowledgement of the existence or non-existence of an obligation."

Again, there is no unjust enrichment in the kindergarten example because the disparity of economical values is yet to be confirmed. Moreover, § 812 of BGB itself is not directly stating such an act of acknowledgment. The main point of § 812 is simple: no legal ground to obtain – should surrender. Nevertheless, this rule of German law still could be seen as a potential piece of regulation towards the case in a synallagmatic contract where the condition does not occur. How possible is that the BGB rule is applicable to the RoS issue?

If to analyze the suggested paragraph of BGB closely, the duty to surrender something unjustly obtained has two alternatives. These alternatives appear to easily blend with the topic of conditions. In the first alternative, the condition might be the "legal ground" that ceased to exist after the contract was concluded, e.g., a resolutive condition. The example suggested by Dr. Dietmar O. Reich confirms this assumption.[902] In the second alternative, the condition is a part of a transaction, the result of which has not materialized yet.[903]

Do these scenarios correspond the RoS issue? After some thought, it could be suggested that the first alternative might address the topic of conditions in a non-synallagmatic contract: in case, for example, the condition ceased to exist or no longer possible to occur. The second alternative, however, might address specifically the synallagmatic contract with reciprocal obligations. Perhaps, the "result does not materialize" approach is the very same approach used by the French and Belgian legislators to prohibit indefinite-in-time obligations, though done rather discretely.

Therefore, upon the close analysis of § 812 of BGB a speculation is possible that the German lawmaker fixed an indirect prohibition of indefinite-in-time obligations into the unjust enrichment rule. The legislator encouraged the debtor (the Contractor) to acknowledge his existing obligation towards the creditor (the Subcontractor) in case of infinite waiting. This is possibly equal to turning a conditional obligation into an unconditional one. Still, the analysis provided is only a guess, so far as neither there is case law, nor the doctrine reached the level of necessity to explain the issue.

---

[902] *See* DIETMAR O. REICH, EINFIIHRUNG IN DAS BÜRGERLICHE RECHT [INTRODUCTION TO CIVIL LAW], at 296 (326) (in German, 2000). Dr. Dietmar O. Reich suggests that the practical importance of the case regulated by § 812 of BGB is "rather small." In case the resolutive condition comes to existence and the contract is challenged, the theory of § 812 of BGB contradicts the theory of § 142 of BGB: § 812 supports the view that the resolutive condition brings the end to the contract only from the moment of its occurrence (prospective effect), § 142 claims that a challenged contract is void from them moment of contract conclusion (if applied to a resolutive condition, then it has a retroactive effect). Therefore, if to understand Dr. Dietmar O. Reich correctly, § 812 of BGB is prevailing over § 142 because it is a specific regulation over the general rule. In his opinion, "this dispute over theories is only relevant in exceptional cases, as it usually leads to the same results in the end." However, it seems Reich's dispute was not considering the topic of synallagmatic agreements and the RoS issue. Because of that, his opinion on "rather small" practical importance of § 812 of BGB could be contested. Perhaps, the truth is that he considered that the practical importance of § 812 of BGB is very specific.

[903] Important to note, the legal ground is still existing in this case, however, the result expected by the parties is not achieved, thus the rule is triggered.

Finding 2. The theory of expectation rights, discovered in Germanic-type legislations earlier, might be applicable in this case as well.[904] It is rather complicated to imagine an expectation right in a synallagmatic contract, however, it is still possible. In such agreements, both parties take the places of the creditor and the debtor. Yet, in the kindergarten example it appears that the Subcontractor finished his duties as the debtor: he completed the construction process. The only remaining question revolves around the Contractor's role as the debtor in the obligation to pay. If to highlight the legal relationship between the Contractor and the Subcontractor on this specific obligation to pay, then the following picture could be imagined.

The Contractor is the debtor who is willing to perform the obligation to pay upon the condition occurrence (which is the payment from the Client); therefore, the Subcontractor has, in fact, an expectation towards the Contractor in regard to the obligation to pay. Upon the occurrence of condition, the Subcontractor acquires a corresponding right to the payments. The example of the manufacturer and retailer is also applicable. While the retailer is busy with the realization of the goods (which is a condition precedent to the obligation to pay), the manufacturer has an expectation that he will receive the payments from the resale.

The question of whether this is an expectation right or not is irrelevant: though it is quite possible that the "matter" occurring from the expectation during the condition fulfillment in a synallagmatic contract is, in fact, a future right.[905] Nevertheless, because of the conceptual similarities with expectation rights, another legislative suggestion could be made to the RoS issue.

The rules on safeguarding/conservation measures and the rules on non-infringement are applicable to the relationships where the reciprocal obligation is conditioned. For example, Latvian legislation fixed a rule that the conditional creditor (subcontractor/manufacturer) may demand a "security for the coming into effect condition" if the right to the payments is threatened.[906] The rules might not be the direct solutions to the RoS issue but act as valid supplementary instruments for the court to identify the real intent of the contracting parties.

---

[904] *See* Part 3.4.4. Proficient level of regulation. Third party acquisition in good faith, at 151.

[905] Although there is insufficient literature to confirm the assumptions, it seems that this is where the difference between the term "expectation right" and "future right" could be seen. It could be suggested that there a higher level of guarantee in a synallagmatic contract with reciprocal obligations, which subsequently means that the implied "right" to the payments is a future right, and not an expectation right. Moreover, the condition of acquiring funds revolves around the existence or non-existence of the main obligation, which is another point towards the future right. The topic of expectation right is reviewed within the property law mostly.

[906] Civil Code of the Republic of Latvia, Art. 1559 (1992, amend. 2022), *available at* https://bit.ly/3HgSoUA (visited July 1, 2023). "The conditionally entitled person may not bring an action for the performance of the contract before the condition comes into effect, but if the conditional obligor threatens his or her right or gives other cause, security for the coming into effect of the condition may be demanded."

Unlike in French-type legislations which appeared to have direct preliminary solutions, through the course of research on German law and Germanic-type legislations (plus Latvia and Italy) no direct solutions to the RoS issue could be found. However, from a closer look onto the German Civil Code and the previous research on legal pendency, at least two speculations could be made for such legislations. First, the court has an option to apply § 812 of BGB on unjust enrichment to the possible situation of infinite waiting and possibly turn the conditional obligation to pay into an unconditional one. The legislator also indirectly gives the creditor the right to compel the debtor in acknowledging an existing obligation to pay. Secondly, because of the similarities with the theory of expectation rights, the Germanic-type legislations (plus Latvia and Italy) have a potential to apply the rules on non-infringement as well as allow safeguarding/conservation measures for the conditional creditor. Other solutions, suggested by other researchers, imply a statement of impossibility: if the condition is certain not to occur, the obligation to pay becomes unconditional.

Other than the French-type and Germanic-type legislations, it should be also noted that there is a big group of Russian-type legislations.[907] Unlike the Russian law, which attempted to solve the RoS issue, the other USSR states, unfortunately, do not have any regulation of potestative conditions, nor they have any counter-measure policy towards the conditioned performance in synallagmatic contracts. Such situation asks for a legislative suggestion for these states as well. A legislative suggestion will be presented later, upon the collection of all ideas discovered.

5.3.4. Partnership model as a counter-measure to the rupture of synallagma

There is one more interesting solution, never encountered in the doctrinal literature. In 2016, during the scientific round table on the issues of conditional transactions in Russia, prof. Aleksandr Kuznetsov suggested an untrivial solution to the possible situation of infinite waiting in synallagmatic contracts.[908] This solution was the model of simple partnership.[909] Unlike the solutions introduced earlier, the intention of this theory is to find out the party at fault. The fault is the main criterion to this solution. Upon the exposed fault, the risks of the disputing parties could be assessed.

---

[907] This applies to all post-USSR states, except for Azerbaijan, Moldova, and Russia itself.

[908] *See* opinion of Aleksandr Kuznetsov, in: M-Logos Juridical Institute, *Scientific Round Table "Problematic issues of conditional transactions"* (in Russian, 2016)*, available at* https://www.youtube.com/watch?v=ieqhMmzsyQQ (visited July 1, 2023). Aleksandr Kuznetsov is Doctor of Laws, Professor of Higher School of Economics, Russia.

[909] Id. The model has already been covered before in the previous research papers of the author. *See* Danil Polynovskii, *Razryv sinallagmy pri obuslovlennosti vstrechnogo ispolneniya: puti resheniya* [*The rupture of the synallagma within the conditioning of the counter performance: solutions*], Sovetnik jurista, № 9, at 65 (in Russian, 2017), *see also* Danil Polynovskii, Analysis of Some Crucial Issues of Contingent (Conditional) Transactions (2020) (Unpublished LL.M. dissertation, Kyushu University) (on file with the Law Faculty of Kyushu University), at 30 – 31.

What is the basis of the solution? In 2015, the Russian legislation on banks and banking activity received a major amendment. This amendment introduced a new institute: subordinate loan.[910] Subordinate loan is a debt that is paid only after all the other debts of the organization are paid in case of insolvency. The rules of law on subordinate loans do not have a connection to conditional transactions, however, according to A. Kuznetsov, one of the law projects from the Ministry of Justice of Russia considered a conditional scheme.[911] According to the scheme, the bank-creditor cannot demand the debt from the bank-debtor, unless the bank-debtor's debtor pays. The scheme is a chain of three subjects, where the payment to the bank-debtor from its own debtor is a condition precedent to the obligation of the bank-debtor to pay to the bank-creditor.

How the solution works? From the idea on partnership suggested by Kuznetsov, two outcomes could be found.[912] Take the example of Client – Contractor – Subcontractor.

The first outcome is the estimated Client's fault. If it is the Client's fault that the Contractor cannot fulfill his obligation to pay, then the Contractor and the Subcontractor should share the risks of non-payment. Sharing the risks would constitute the following consequences:

- the Contractor
  - does not receive the money from the Client
  - acquires a share in the right of retention to the property
  - can sell his share to cover the losses
- the Subcontractor
  - does not receive the money from the Contractor
  - acquires a share in the right of retention to the property
  - can sell his share to cover the losses

The second possible outcome is the estimated Contractor's fault. If it is the Contractor's fault that the Subcontractor is not paid, then the Contractor should pay the entire sum of money for the contract out of his own funds. Such an outcome would constitute the following consequences:

- the Contractor
  - does not receive the money from the Client
  - pays the whole sum to the Subcontractor for the work completed
  - acquires the right of retention to the property (in whole)
  - can sell the property to cover the losses
- the Subcontractor
  - receives the money
  - does not acquire any right of retention

[910] Federalnyy zakon № 395-1 "O bankakh i bankovskoy deyatelnosti" [Federal Law № 395-1 "On banks and banking activity"], Art. 25.1 (in Russian, 1990, cons. ver. 2023).
[911] Interview with Aleksandr Kuznetsov, Doctor of Laws, Professor of Higher School of Economics, Russia (June 27-28, 2023). According to Kuznetsov, such a project existed, however, it is not available as an open source.
[912] The outcomes are original, i.e., suggested by the author of the thesis.

The above-mentioned scheme, though interesting, appears to have some issues.

Issue 1. The suggested scheme follows the concepts, available in Russian law: such as the right of retention (not "retention of title") and the coverage of the losses with the help of the right of retention.[913] The right of retention is the creditor's right to retain the property until the reciprocal obligation of the debtor is performed. This is a popular rule in other states of the continental system of law as well.[914] The right of retention is a valid instrument, however, there is an issue: the Subcontractor is not tied with the Client, there is no contract between them. Still, it appears that the Subcontractor has a share in what supposed to be a result of work the Contractor must convey to the Client. By applying a simple partnership theory, the roles of the Subcontractor and the Contractor mix creating two Contractors.

Issue 2. In case the Client is at fault, the Contractor and the Subcontractor become the parties to a simple partnership agreement. Hypothetically, they may acquire the shares to the right of retention. If to disregard the previous issue, the situation will eventually lead to a split of money gain after the property is sold. A new problem arises, however. It is not clear how many percentages of the shares could be split between the Contractor and the Subcontractor. One might suggest it is a 50/50 split in case there is one Contractor and one Subcontractor, however there is no concrete proof to this. Moreover, in case there are multiple Subcontractors, it is not clear whether the Contractor has always the 50% share and the rest is split among the Subcontractors, or the whole right of retention is shared equally among the sides to a simple partnership (in case of 4, each has 25%, in case of 5, each has 20%, etc.) Again, this is excluding the question on the Subcontractor-Client's relationship.

Issue 3. In general, the synallagmatic agreement transfers into a completely new legal state: a partnership agreement. The difference is immense. In synallagmatic contracts with reciprocal duties the direction of the parties' willpower is opposite (→ ←), meaning that each of the party pursuits their own purposes which are mutually exclusive (to buy – to sell). In case of the partnership agreement the direction of the willpower is identical (→ →) meaning that each of party pursuits one purpose in the agreement (to acquire something, to administrate something). Therefore, in addition to the previous issues, the synallagmatic agreement turns into a type of legal relationship which is alien to it.

---

[913] *See* Civil Code of the Russian Federation, Art. 359, 712 (1994, amend. 2022), *available at* https://tinyurl.com/y7w28dc (visited July 1, 2023), "The creditor, in whose custody is the thing, subject to the transfer to the debtor or to the person, named by the debtor, shall have the right, in case the debtor fails to discharge in time the obligation on the payment for this thing or on the compensation to the creditor of the expenses and other losses he has borne in connection with it, to retain it until the corresponding obligation is discharged."

[914] *See, e.g.*, German civil code BGB, § 273, 320 (1900, cons. ver. 2021), *available at* https://bit.ly/408nSVk (visited July 1, 2023), *see also* Civil Code of Japan, Art. 295, 296 (1896, cons. ver. 2009), *available at* https://bit.ly/3jdExGo (visited July 1, 2023).

Issue 4. The possession of the property is unclear. For this specific reason, the usage of partnership model in case of "Manufacturer – Retailer – Customer" example is impossible to imagine. The Retailer acquires the possession over the products, and he may dispose them the way he desires. Subsequently, there is not diversification of risks available to the parties. There can be no "faulty" customer, since the Retailer is not the same type of an intermediary, as it is in case of the Contractor in the kindergarten example. Moreover, in the kindergarten example, it is also unclear who should hold the results of the work or whether it becomes a joint property of the Contractor and the Subcontractor.

Issue 5. The condition occurrence becomes irrelevant in the partnership model. The RoS issue is a long-lasting issue where it is still not clear whether the condition occurs or not. Therefore, for the "fault" criterion to be used, an impossibility of condition occurrence should be stated. The statement of impossibility is done by the court. The court also decided who is at fault. Therefore, comparing to the other possible solution in the RoS issue, the partnership solution makes no sense as it cannot be a preliminary solution. It can only be a post-factum solution, and in that case, there are many other solutions which are simpler.

Is the solution of simple partnership valid? No. Can the research on this exotic model tell something? Yes. The partnership model, though inapplicable, might show the important obligation that the Contractor/Retailer has in such synallagmatic contracts. This is an implied obligation to care about the condition occurrence. As discussed previously in the context of English law, this is the obligation to undertake reasonable efforts to bring the condition occurrence.[915] A. Karapetov, for example, also suggests this is possible within the Russian law: if the debtor violates this implied obligation, the fiction of bad faith is used.[916] It is difficult to expose such a violation from the debtor. However, there might be cases, like for example, the Contractor forgives the debt of the Client in the kindergarten example.[917]

Furthermore, it might be suggested that the exotic partnership model is, in fact, another case of a solution through the fiction of bad faith: if the debtor impeded the condition occurrence in bad faith, then the condition is considered to have occurred, and vice versa.[918] The model itself may constitute a useful logic experiment. However, it fails due to the issues exposed.

---

[915] *See* Part 3.3.1. English doctrine on legal pendency. Degrees of obligation, at 137.

[916] ARTYOM G. KARAPETOV, ISPOLNENIE I PREKRASHCHENIE OBYAZATELSTVA: KOMMENTARIY K STATYAM 307 - 328 I 407 - 419 GRAZHDANSKOGO KODEKSA ROSSIYSKOY FEDERACII [FULFILLMENT AND TERMINATION OF OBLIGATION: A COMMENTARY TO ARTICLES 307 - 328 AND 407 - 419 OF THE CIVIL CODE OF THE RUSSIAN FEDERATION], Art. 327.1, at 8.2.3. (in Russian, 2022).

[917] Id. The thought is based on Karapetov's suggestion of forgiving the debt.

[918] *See* Part 2.3. The fiction of bad faith condition fulfillment, at 91.

5.4. How uncertainty issue of rupture of synallagma could be handled

The usage of conditions in synallagmatic contracts might bring another danger to the balance between the party autonomy and imperative law. One of these dangerous situations happens after conditioning a reciprocal obligation. As the parties are not always aware about the possible negative consequences, it may happen that the condition does not occur for the time longer than the parties could expect. In addition to this situation, one of the parties could have already performed its obligation while the other party is still waiting for the condition occurrence to trigger its own. Such case of infinite waiting might inflict a "wound" to the synallagmatic contract; therefore, the issue of Rupture of synallagma (RoS) emerges. The RoS issue is a situation where the performance of the main reciprocal obligation is stalled because the condition does not occur for a long amount time. Therefore, it is possible to refine the definition comparing to the one presented earlier:

"Rupture of synallagmatic contract is a long-lasting disparity in obligation performance which leads to a stall in economic activity: the creditor's obligation has already been executed while the debtor's obligation is still conditioned upon an external event."

The RoS issue is theoretically different from the case of unjust enrichment: neither there is enrichment of the conditional debtor, nor the change in the economic state of the parties is yet confirmed. Still, the issue is rather menacing because the parties are subject to the case of infinite waiting. If they blatantly agreed on such possibility, then there is no issue; however, it is a rare case. The law should definitively deny the RoS issue: a set of possible preliminary solutions would contribute to the stability of the legal circuit.

Unlike the previous uncertainty issues, the way to establish the balance between the party autonomy and imperative law, in case of synallagmatic contracts, could be found through detailed research on case law. Thus, the American case law and the Russian case law were the objects of extensive analysis in this part of the paper. The research shows the important role of the court in solving the RoS issue, as none of the legislators managed to provide a direct vision of the situation in the past. The situation started to change recently, with the amendments in the GK RF, in the French Code Civil, and in some other codifications on the questions of perpetual (indefinite-in-time) obligations. The new legislator's attitude towards the issue and the corresponding doctrinal literature on the topic allowed for the contemplation of a solution set to the possible RoS issue.

The following set of instruments is an attempt to provide preliminary and non-preliminary actions to negate any issues with conditioned obligation performance, including the RoS issue.

Instrument 1 – a time limit. This is the best advice solution to the parties which are at stage of negotiating provisions of the contract. Limiting the conditioned obligation performance with a time limitation denies any possibility of infinite waiting. Additionally, it requires only a certain amount of vigilance from the contracting parties. For example, in the kindergarten example, the Contractor and the Subcontractor may stipulate the following provision:

"Upon the work completion by the Subcontractor, the Contractor is obliged to pay as soon as the work is accepted and paid by the Client, but not later than 30 days after the work completion."

The rule on the time limitation does not require any legislative regulation. If the 30 days period is over, the Contractor's obligation to pay becomes unconditional, which is a risk the Contractor was willing to take upon when accepting the project. The next solutions concern situation where such a term was not agreed by the parties.

Instrument 2 – reasonable time. This concept was actively used by American courts to decide the "subject to financing" cases. From the research on the American case law specifically, the following forms of reasonable time could be defined. Reasonable time is a legal concept which constitutes an expected or necessary amount of time for the occurrence of condition, or the obligation performance of the conditional debtor.

The older interpretations reveal that the court used both iterations. The first way was to find out whether a reasonable amount of time has passed for the condition to occur, subsequently deeming it impossible to happen. The second way was establishing a reasonable time for the conditional debtor to perform his obligation. Later, these pieces of interpretation mixed into one: a reasonable amount of time to perform the obligation was asked from the debtor.

The advantages of the reasonable time concept are obvious. The concept is applicable to a variety of business activities. In each possible dispute the reasonable time may constitute a different amount of time: a month, several months, a year. It is convenient for the parties, as well as bears low costs for them. Two issues could be seen, however. The overall concept of reasonable time is very vague. Moreover, the subjectivity aspect has a potential to harm the disputing parties.

From the positive side, the concept of reasonable time may become a preliminary solution through a preliminary regulation in law. A possible provision could look the following way:

"In synallagmatic contracts, in case the main reciprocal obligation depends upon a suspensive condition, the party to receive its performance has an implied right to demand for its performance since the condition has not been fulfilled within a reasonable period of time."

This is a potential suggestion for all civil codifications, as none regulate this aspect.

Instrument 3 – an implied right to influence the contract. The previous suggestion on the reasonable time concept also introduces the instrument of implied right. This is meant to be an interpretation tool for the court to identify the real intent of the parties, yet still there is a potential to introduce each of the implied rights into the legislation. Conditional creditor to the main reciprocal obligation is the main subject of such right.

Implied rights have two functions. First, they are unilateral: they require only the willful action of one party to the contract. Secondly, they are transformative in nature: they are directed to the amendment of contractual provisions or the termination of the contract. The idea comes from the common law; however, the researchers of continental law system suggest the usage of such rights in the states of civil law also.

During the research, a set of possible implied rights was discovered:

- Implied right to force the obligation performance.
- Implied right to turn the conditional obligation into an unconditional.
- Implied right to terminate the contract with all possible compensations.

As it was discovered through the course of research both French-type and Germanic-type legislations have a potential to introduce each of the implied rights. Those are preliminary solutions.

Instrument 4 – an implied obligation to care about the performance. Opposite to the implied rights, the comparative research on the doctrine and case law also discovered several implied obligations towards the maintenance of the conditioned obligation performance. These tools also have a potential to be introduced into the civil law codification of any type. Conditional debtor to the main reciprocal obligation is the main subject of such obligation.

Implied obligations have one important function: they are enforceable. The concept of implied obligations is a helping tool for the court to assess the necessary circumstances of the court case. Upon the discovery of misconduct on the side of the condition debtor, the court might use the tool of an implied obligation to deem the conditional obligation unconditional. Though speculative, if the legislator fixed such implied obligation into the code, the creditor would have more means of defense in the case of infinite waiting.

During the research, the following possible implied rights were discovered:

- Implied obligation to take reasonable efforts to bring the condition occurrence.
- Implied obligation to acknowledge the existing obligation.

Again, both French-type and Germanic-type legislations have a potential to introduce each of the implied obligations. Those are potentially preliminary solutions as well.

Instrument 5 – restrictive regulation of conditioned performance. Such restrictive regulation was discovered in the current French and Belgian legislations. The legislator targeted the situations where the reciprocal obligation is conditioned upon a future uncertain event by applying the following rules to the legal relations:

- Prohibition of perpetual (indefinite-in-time) obligations (French solution).
- Prohibition of conditioned contract validity (Belgian solution).

Both variants aspire to prevent any possibility of infinite waiting situation during the execution of contract. The French variant is a broad legislative instrument to prevent any indefinite-in-time obligations, including the ones presented in the RoS issue. Upon the discovery of a perpetual obligation, both parties are given a right to put an end to such an obligation, though not explicitly.

The Belgian 2023 variant is much more precise in this sense, as within the legislation a specific reference to conditioned obligation performances could be tracked. The Belgian legislator clearly makes a restrictive chain: contract validity → permissible clause → determining motives. Suggested legal dogmas could not be conditioned. It is unclear, however, whether the other legislations have a potential to apply such regulation to the RoS issue.

Other instruments – those instruments rely upon the good faith and actions of the parties. Comparing to the instruments presented before, there are well-known rules, which might be applicable to the situation of infinite waiting in conditioned obligation performance. Some of the solutions were introduced with the analysis on the concept of legal pendency.

These include the following rules. The first rule is ***the fiction of bad faith fulfillment*** – if the party influenced the condition occurrence in a bad faith, then the condition may be deemed fulfilled or not fulfilled. The second rule is the ***non-infringement rule*** – no party should acquire an unfair advantage over the party while the condition is pending. The third rule is on ***the safeguarding or conservation measures*** – the conditional creditor has the right to do all the lawful act to preserve their right. The specifics change because the topic changes from the uncertainty issue of legal pendency to the uncertainty issue of conditioned performance. For example, the safeguarding rule might refer to the corresponding right of the creditor to the payments from the conditional debtor.

Due to the specifics of mentioned rules, these rules may be applied only in a very specific manner in the context of conditioned obligation performance. For example, the fiction of bad faith fulfillment is useful only to the situations where the bad faith of the conditional debtor is exposed and proved. Same goes with the rule on unfair advantage. The usage of safeguarding measures is also very speculative and requires a vague set of action from the conditional creditor.

Exotic solution – a partnership model. Such kind of solution was discussed as a thought experiment in transformation of contract. On paper, the instrument of partnership might seem like an interesting risk management tool. This is beneficial for the parties whose expectations were violated from the non-occurrence of an external event. Unlike in previous cases, the synallagmatic contract is transformed into a partnership agreement according to the stated fault: if the debtor is not at fault, the debtor and the creditor share the risks of the failed external event; if the debtor is at fault, he must pay the creditor for the works provided.

The first impression of model might create an impression of an interesting model to use by the parties. However, there are at least five issues which sufficiently undermine the possibility of such a solution. First issue: the party is not tied with the third party on whom the condition depends. Second issue: the shares for the right of retention are not clear. Third issue: the contract transformation affects the direction of wills of the contracting parties. Fourth issue: the possession of the property is questionable. Last issue: the condition occurrence itself seems irrelevant in the model.

It is possible to assume such a model during the negotiation process to the contract, however, such an instrument cannot be applied to the parties unprepared for the infinity waiting issue. Therefore, as of now, the partnership model could be nothing more than a logic experiment.

Conclusion

The paper provided a comprehensive comparative analysis on conditions and its uncertainty issues. The research aimed to show the different approaches the legislations have towards the legal institute of condition and aspired to find the balancing solutions between the party autonomy and imperative law. Each part of the paper provided a substantial amount of analysis on how the legislators see the various aspects of conditions, how the doctrine suggests the new theories or revives the old ones, and how the courts enforce the rules on conditions in concrete practical situations. The new knowledge acquired upon the comparative analysis allows to introduce a set of legislative instruments to the authorities which might be interested in enhancing their own rules on conditions.

The paper addressed the legislators on national and supra-national level, regardless of how much regulation has already been done towards the concept of condition. The following conclusions may be useful to the legislations which fix only a single article on suspensive/resolutive conditions, as well as to the legislations which, for example, define the legal pendency and propose the regime of expectation rights to the conditional creditor. The conclusion might be also useful to the legal doctrine of different states which seeks to answer certain questions, issues, or other needs regarding the concept of condition. Even though the paper mostly addresses civil law codifications, the conclusions might also present an interest to the common law doctrine. The conclusion of this paper is addressed not only to the enforcement actors and the academic community, but to the legal practice community as well. The lawyers and legal attorneys might take a few useful suggestions from the paper to further implement them into their contracts. This may prove exceptionally useful, as some of the solutions aim to negate the uncertainty issues of the concept of condition.

The ending paragraph of each part already suggests a thorough overview of the topic. Each part presents a piece to be further collected into a puzzle. The conclusion of the current paper is an attempt to suggest a set of rules which shall fulfill both the interests of the legislator and the contracting parties. The following assumptions are based on the comparative comprehensive analysis and, therefore, are subjective. Those suggestions are completed to the best abilities of the author, as they present an original view on what should be implemented into the legislation to provide the best piece of regulation. In this sense, the discussion on a variety of questions regarding the concept of condition was very meaningful. Something new could be introduced, as well as some unnecessary and not-fitting regulation could be removed. This way, the balance between the autonomy of will and the imperative law could be achieved. Though it is impossible to create a perfect balance, it is possible to suggest the closest solution to it.

The first key research question established in the introduction was the following:

How could the legislators construct the balance between the autonomy of will and imperative rules of law regarding the legal concept of condition?

1. The analysis shows that they are two variants to define the concept of condition: through the term "event" or "circumstance". The term "event" is much more accepted in civil law (29 out of 45 codes), as well as in the doctrine. The term "circumstance" is also accepted, however, mostly in the former USSR states (9 out of 45 codes). The last 7 out of 45 codes did not define the condition in their legislation. Upon the closer research the following clarifications could be suggested:

- If the legislator is willing to allow potestative conditions – then the condition could be defined as event. If the legislator is willing to restrict the usage of potestative conditions – then the condition could be defined as a circumstance. This way, the definition would not contradict the rules on the ability to influence the condition occurrence.
- Most of the legislators, who established condition as an "event" also introduced its qualifying features: relation to the future and uncertainty. These qualifying features are undisputed, therefore, could be implemented into every civil law codification.

This conclusion is addressed to the legislators who wish to amend the legislation on conditions, as well as to the legislators who did not define the condition but would like to.

2. None of the researched legislations establish a set of standards for the concept of condition. Instead, the legislators fix the common rules on invalid conditions, e.g., impossible, unlawful, immoral conditions. However, in search of the balance, it is possible to optimize the rule on valid/invalid conditions by establishing a set of standards to the concept:

- Probability – means "not obvious" and "not inevitable".
- Additionality towards the contract – simple to discard without invalidating the obligation.
- Realism – unifies the understanding of "not immoral", "not impossible", "not illegal".
- Authentical accessibility for the contracting parties and the third parties.

This solution could be implemented to every current codification, including the supra-national ones. The standards could be implemented through a set of different articles, or as a unified solution (within one article). The comparative analysis faced examples where different standards of conditions were introduced in different articles: such regulation cannot cause much trouble. Still, the unified solution might be seen as a better choice. The article on standards could be named "Invalid conditions" and the standards could be presented in a negative connotation, e.g., obvious, or inevitable conditions are disregarded.

3. The concept of condition appears to have a unique feature – retroactivity. Retroactive effect allows to bring the legal consequences of condition occurrence to the period before its occurrence. Such effect has a supplementary function (additional gains, benefits). Though an interesting concept, the comparative picture shows that most of the civil law codifications ignore this feature (30 out of 45 codes), giving the privilege to the standard prospective effect where the legal consequences occur after the condition occurrence. There are two smaller groups of legislations, however: those which explicitly make the retroactive effect an option for the parties (7 out of 45 codes), and those which state the retroactivity as the main rule (8 out of 45 codes). Making the retroactivity an option is close to legislations which have ties to Germany, while the retroactivity as the main rule is favored by the legislations with the ties to the French law.

The doctrinal opinions of retroactivity are opposing; it is either a convenient tool for the parties, or a legal fiction bearing no practical sense. Upon the doctrinal and legislative analysis of the retroactive effect, it could be concluded that the feature is indeed useful for the contracting parties. Therefore, to achieve the balance between the party autonomy and imperative law, it would only be beneficial for the legislators to look up to this concept. However, it is not preferable to establish the retroactivity as the main rule towards the concept of condition. The implementation of the concept as the main rule might require a lot of exclusions and adjustments to the civil law, e.g., risk transfer rules, as well as to closely connected regulations, e.g., tax law. These exclusions are a negative drawback of the retroactive effect. Therefore, the following could be suggested:

- If the legislator is willing to introduce the retroactive effect of condition into their codification, such implementation could be done as an option. Therefore, the rule on the legal consequence of condition occurrence might look like this: prospective effect as the main rule + the retroactive effect if the parties desire so.
- If the legislator is willing to introduce the option of retroactivity to the parties without the explicit regulation of retroactive effect (without naming it), the safer solution, is also possible: "unless the parties clearly intended/agreed otherwise."

Generally, the German/Swiss approach in this question might be seen as the solution that achieves the most balance between the party autonomy and imperative law. Following the ideas from supra-national codifications (PECL and PICC 2016), one more optional rule could be suggested:

- Retroactive effect of condition could be applied to both suspensive and resolutive conditions. The meaning of such rule is to simplify the interpretation of the law enforcement actors.

4. The analysis shows multiple classifications of conditions which have their own value. For the purposes of achieving balance between the party autonomy and imperative law, the most important ones should have its implementation. Upon the research two main classifications could be introduced to each civil law codification:

- The standard suspensive/resolutive classification.
- The casual/potestative classification. The casual condition could be defined as an event out of the influence of the contracting parties. The potestative condition could be defined as an event the party may influence with his own actions. Only actions and not the pure will of the party. Mixed conditions, as known historically, should not be introduced.

These classifications bear the most importance to the concept of condition. These types provide the most significant practical variations to the contracting parties. Moreover, these classifications cover the entirety of conditions. It could be suggested to make such classifications as blatant as possible in the code for the purpose of clarity.

5. The clarification of the rules which exist in most legislations may serve as an important contribution to the balance. In the context of condition, this applies to the fiction of bad faith condition fulfillment: if the party is influencing the condition in bad faith, then the condition is deemed fulfilled or not fulfilled according to the benefits that party soke. Through the course of research, it appears that out of all legislations with the rule (38 out of 45 codes), the first group relies directly on the concept bad faith (23 out of 38 codes), while the other group evades the wording (15 out of 38 codes). Instead, the legislations suggest different criteria which should be fulfilled for the rule to trigger. As an important interpretation tool for the courts, it might be better to rely upon a set of concrete criteria other than upon the vague concept of bad faith. Therefore, the following enhancements to the fiction of bad faith rule could be suggested:

- If the legislation does not have a rule on bad faith fulfillment, then such a rule could be implemented without any relation to the concept of bad faith. Instead, the legislator could introduce the three standards: sole interest (benefit) of the contracting party preventing the condition occurrence, the level of deliberateness of the party's actions, and the presence of reasonable excuse to prevent the condition occurrence.
- If the legislator has the rule which directly applied the concept of bad faith to conditions, the legislator may disregard the concept and apply the same adjustments as previously mentioned.

Establishing criteria to the fiction rule corresponds all types of conditions. At moment of research, no contradictions of the established criteria with the existing rules were noticed.

6. The other suggestion might present more curiosity to the legislator and doctrine. The balance between the party autonomy and imperative law could be achieved by addressing the pure potestative conditions in a concrete way and prohibiting them in full. This could be achieved by introducing the doctrine of transformative rights into the legislation.

Transformative rights are subjective rights that allow the holder to amend the contract or to terminate it. The paper attempts to provide a theoretical analysis of this concept in the context of pure potestative conditions. The paper suggests that the transformative rights are very similar to such conditions, yet very different if examined closely. From the analysis it could be concluded that everything which is not a transformative right is a pure potestative condition. Transformative rights, though established only in doctrine, seem to be much more certain and lawful. Establishing the theory of transformative rights would create two opportunities. First, it would allow the better coverage of party autonomy: the unilateral actions to modify the contract will be regulated in a harmonized way. Secondly, it would provide more refinement to the imperative law: the rule on pure potestativity favoring the debtor would not be necessary anymore because all the pure potestativity could be prohibited. Therefore, if the legislators desire so, the following could be implemented:

- Introducing the concept of transformative rights into the law. Transformative rights could be defined as subjective rights that modify the obligation or whole contract by the means of willful unilateral action. The following criteria could be applied to transformative rights: "stipulated *ex lege* or by parties", presence of "associated obligation" of the party with such right, and transformative rights should be "non-contrary to the common business practice."
- Prohibiting any condition which depends upon the pure wish of any contracting party. Again, this rule could apply both to the those favoring the creditor and the debtor.

The only issue is that the theory of transformative rights is very much applicable outside of the scope of current discussion. Therefore, there will be a question on where to introduce the theory of transformative rights in the civil law codification. In terms of prohibition of pure potestativity, it could belong in the rules on conditions. For the reasons of novelty, the author would like to ask the academic community for a further examination of transformative rights in the context of conditions. Upon the current analysis it could be safely stated that the theory of transformative rights is of great importance to the concept of condition.

7. The balance between the party autonomy and imperative law could be also achieved by the application of specific rules on concrete uncertainty issues of the concept of condition. This correlates with the next key research question of the current paper.

The second key research question established in the introduction was the following:

How could the legislators withstand the uncertainty issues of condition, which tend to disrupt the balance between the autonomy of will and imperative rules of law?

The paper covered the essential issues regarding the concept of condition. These issues presented the questions of theoretical and practical significance. Each of the uncertainty issues posed a challenge both to the parties and the legislators. The analysis discovered the potential of each of the issues to disrupt the balance between the autonomy of will and imperative law. Through the committed research, such disruption could be seen in two ways. In first, if the legislator does not address the issues in a concrete way there is more potential for the parties' rights and lawful interests to be violated. The autonomy of will could be used to damage the other party: such situation might happen within the unilateral actions or within the synallagmatic contracts with reciprocal duties. In second way, the imperative law itself appears to have legislative holes, like in case of the legal status of parties before the condition occurrence. Such situation is harmful for the parties: the legal uncertainty is a long-lasting process and the inability to stop it might potentially bring substantial economic costs to the parties. Subsequently, such situation is harmful for the government policy as well. Therefore, providing a concrete regulation of uncertainty issues may serve as an important enhancement tool to both sides of the balance: to the legislator and to the participants of legal affairs.

To support the findings regarding the research question, multiple research methods were used: doctrinal analysis, case law analysis, and comparative comprehensive analysis. The results of the research bring more possible solutions to the legislators who are interested in addressing such issues. To achieve the results, the paper discussed three major uncertainty issues:

A. Uncertainty issue of legal pendency. Legal pendency is an uncertain amount of time after the conclusion of the conditional agreement and before the condition occurrence or the moment when it becomes evident that the condition shall never occur.

B. Uncertainty issue of conditional unilateral actions. Conditional unilateral actions are unilateral actions the legal consequences of which depend upon the occurrence of condition. The paper reviews two examples of such acts: conditional unilateral actions and conditional dispositive actions.

C. Uncertainty issue of rupture of synallagmatic contract. Rupture of synallagmatic contract is a long-lasting disparity in obligation performance which leads to a stall in economic activity: the creditor's obligation has already been executed while the debtor's obligation is still conditioned upon an event out of the influence of the parties.

Each issue has its own coverage within the ending paragraphs of Parts 3, 4 and 5 of the paper.

A. Legal pendency is the most discussed uncertainty issue in the doctrinal literature. Historically, there were two opposing opinions on the matter: there is either no binding before the condition occurrence, or there is an expectation that the condition occurs. The paper supported the point of view that in all cases after the conclusion of a conditional agreement the potential acquirer receives an "expectation." This "expectation" is an object of civil matters itself: it could be an object of a transaction (e.g., pledged upon, disposed of, transferred by succession). However, it is not a right, as the expectation is still not activated by the condition occurrence. It could be a form of quasi-right. Through the course of doctrinal and comparative research it could be also suggested that the expectation of the conditional creditor is very close conceptually to the German right of possession.

The comparative legislative analysis suggests the following groups of regulation:

- Negligent (21 out of 45 codes) – non-existent or very vague regulation of the legal pendency.
- Satisfactory (12 out of 45 codes) – safeguarding and non-infringement measures for the contracting parties, sometimes with the addition of the rule on *bona fide* third parties.
- Proficient (12 out of 45 codes) – prohibiting dispositions by the conditional debtor during the legal pendency and providing the regime of expectation rights to the conditional creditor.

The paper provides an assumption that the regime of expectation rights in some countries might create contradiction within the law. According to the legislative analysis, some countries regulate the expectation right the way that such rights may override the good faith acquisition of the third party. Such unlawful situation was allowed due to the direct reception of the German doctrine of expectation rights in the law for all conditional transactions, as well as due to the negligence in fixing the exclusion on third-party *bona fide* acquisition.

Nevertheless, the solutions presented in both Satisfactory and Proficient groups provide a decent level of regulation for the legal pendency and contribute to the balance:

- The legislators which have not regulated anything on the topic of legal pendency could withstand the issue by implementing the approach of legislations from either Satisfactory of Proficient group. The safest approach could be the Satisfactory group approach: by fixing safeguarding measures for the creditor and by implementing the rule on non-infringement.
- The legislations should clarify the rules on third-party acquisition in good faith in correlation with expectation rights acquired during conditional transactions.

The author would like to ask the academic community for a further examination of the correlation between the regime of expectation rights and the rules of third-party *bona fide* acquisition in states of Brazil, Italy, Japan, Latvia, South Korea, and Thailand.

B. Conditional unilateral actions (CUAs) also impose potential threats to the participants of legal affairs. No current legislations provide the regulation to conditions in unilateral actions, other than prohibiting the usage of such in willful imperative acts, e.g., acceptance. The main concern on CUAs is the possibility to diminish the legal position of the addressee by imposing conditional obligations. Upon the comparative research, a set of solutions could be suggested for the regulation of conditional unilateral actions (CUAs).

Participants of the legal affairs are free to conclude CUAs, however, the following is applied:

a) CUA which imposes an obligation onto the addressee should be within the addressee scope of control: the addressee should be able to influence the condition occurrence (potestative condition). Otherwise, the rule on authentical accessibility is applied.

b) CUA which imposes an obligation onto the addressee should be at least authentically accessible to the addressee. Otherwise, such CUA is invalid.

c) Acts, established as such by law, could not be conditioned (e.g., disclaim of inheritance).

d) If the condition is resolutive, CUAs which impose rights onto the addressee should follow the rule on authentical accessibility. Therefore, the addressee is not left in any uncertainty regarding the reversal of rights conferred by a unilateral action.

Conditional dispositive actions (CDT) could also be regulated for the purposes of the balance between the party autonomy and imperative law. Through the course of research crucial details were discovered about CDTs. CDTs have the feature of automaticity. The main obstacle for the CDTs is the mandatory registration of the title acquired. Conditions in CDTs are automatic. Moreover, conditions in CDTs negate the abstractness feature of dispositive transactions. Furthermore, in most cases conditions in CDTs provide a security function to the transaction. The following set of solutions could be applied to conditional dispositive transactions (CDTs).

Participants of the legal affairs are free to conclude CDTs, however, the following is applied:

a) In the states with “non-abstractness” of dispositive transactions, the provisions on CDT should not contradict with the main contract, or an additional written agreement on CDT should be signed. The provision is advised to include the condition and a reasonable amount of time necessary for the occurrence of the condition.

b) Property rights, intellectual rights or any other rights which require a registration in a private or a public register cannot be transferred via a CDT.

c) CDT subject to a resolutive condition is, in fact, unconditional.

d) CDT cannot override the rule of third-party acquisition in good faith.

C. Rupture of synallagmatic contract is an uncertainty issue which happens in bilateral contracts with reciprocal obligations. The potential harm to the contracting parties is seen in the potential of economic stall and significant costs accompanying it. Through the analysis of case law and doctrine, the paper attempted to find every solution to this uncertainty issue. The following instruments could be suggested depending on the actor who wishes to implement such an instrument:

- Time limit – a standard solution addressing the contracting parties which requires vigilance.
- Reasonable time – this solution may address both parties and courts. Such instrument is not preferable for implementation into the legal code because of the concept's vagueness.
- Implied rights to influence to contract – this solution could be implemented into the legislation. The instrument addresses the conditional creditor. The way of implementation depends upon the preferences of legislators and available mechanisms in law. A set of such rights might include an implied right to force the obligation performance, an implied right to turn the conditional obligation into an unconditional, and an implied right to terminate the contract with all compensations. Such rules contribute to the balance between the party autonomy and imperative law as preliminary solutions to the possible problematic situations.
- Implied obligations to care about the performance – this solution could also be implemented into the civil law codification. The instrument addresses the conditional debtor. Again, the implementation mechanism may vary upon the peculiarities of a concrete legislation. A set of such obligations include an implied obligation to take reasonable efforts to bring the condition occurrence, and implied obligation to acknowledge the existing obligation. The rules also present a contribution to the balance as preliminary solutions.
- Restrictive regulation of conditioned performance – the legislator could impose a certain restriction on the conditioned performance: either by prohibiting perpetual obligations or by prohibiting the case of conditioning the contract validity. This instrument could be addressed only to the legislations which established the obligation as the object of condition. Otherwise, the solution is difficult to implement. It requires very precise assessment. The legislative cases of Belgium and France show that the implementation of such rule is accompanied with a complete overhaul of the law of obligations. Therefore, such solution cannot be introduced to every legislation.

The paper also reviewed other practical solutions which did not prove to be acceptable for the enforcement actors. These instruments include the fiction of bad faith, the safeguarding and non-infringement rules, and the model of simple partnership. Such solutions are quite specific; therefore, it is difficult for them to provide a valuable contribution to the legal regulation.

All-in-all, the current legislations have all the opportunities to maintain the balance between the autonomy of will and imperative rules of law in the context of conditions by providing a fair and equal treatment to the contracting parties. The way the law may construct the balance and withstand its disruption by uncertainty issues depends upon multiple factors, including the historical-political development of law and state. The paper systemized the available knowledge, created new definitions, affirmed, and criticized old and new theories, provided a comparative comprehensive oversight on the topic of conditions and its uncertainty issues. The paper attempted to provide a set of legislative solutions in a unified and harmonized way. The paper also asked questions for the potential future research on the topic of conditions.

Hopefully, solutions given to the raised research questions will make a significant contribution to the knowledge base of the legal academic community, as well as help to improve civil law.

Bibliography

Legislation, quasi-legislation

Argentine Civil and Commercial Code (in Spanish, 2015), available at https://bit.ly/42fa8bL.

Argentine Civil Code (1871, repeal. 2015), trans. by Comparative Law Bureau of the American Bar Association, Baldwin S. (ed.), available at https://bit.ly/3Y8x7TX.

Austrian Civil Code (1812), available at https://bit.ly/3wzCSxU.

Belgian Civil Code. Book 5. Law of obligations (in Dutch and French, 2023), available at https://bit.ly/3WINDca.

Civil Act of the Republic of Korea (2013), available at https://bit.ly/3kOTKOO.

Civil Code of Brazil (2002), available at URL: https://bit.ly/3HCfdTT.

Civil Code of China (2021), available at https://bit.ly/3u27kke.

Civil Code of Georgia (1997), available at https://bit.ly/3Y5hU64.

Civil Code of Japan (1896, cons. ver. 2009), available at https://bit.ly/3jdExGo.

Civil Code of Lao People's Democratic Republic (2020), available at https://bit.ly/3kRazJ3.

Civil Code of Poland (1964, cons. ver. 2014), available at https://bit.ly/3HED4Tc.

Civil Code of Quebec (1991, amend. 2022), available at https://bit.ly/3WJohL8.

Civil Code of the Czech Republic (2012), available at https://bit.ly/3DlARcw.

Civil Code of the Islamic Republic of Iran (1928, amend. 2006), available at https://bit.ly/3wzUERN.

Civil Code of the Kyrgyz Republic (1996), available at https://bit.ly/3RaFkVf.

Civil Code Of The Republic Of Armenia, available at https://bit.ly/3WKNAwf.

Civil Code of the Republic of Azerbaijan (in English, 1999), available at https://bit.ly/3Hidd21.

Civil Code of the Republic of Azerbaijan (in Russian, 1999), available at https://bit.ly/3kJNnw5.

Civil Code of the Republic of Belarus, Vedomosti Nacionalnogo Sobraniya [Bulletin of the National Assembly], No. 7 – 9, at 2 – 538 (1999).

Civil Code of the Republic of Hungary (1960), available at https://bit.ly/3Y6BnD5.

Civil Code of the Republic of Kazakhstan (1994, cons. ver. 2023), available at https://bit.ly/3kPXTC7.

Civil Code of the Republic of Latvia (1992, amend. 2022), available at https://bit.ly/3HgSoUA.

Civil Code of the Republic of Lithuania (2000), available at https://bit.ly/3XI7Kbv.

Civil Code of the Republic of Moldova (in Russian, 2002), available at https://bit.ly/3j97Rhi.

Civil Code of the Republic of Tajikistan (in Russian, 1999, amend. 2020), available at https://bit.ly/3HCrfwt.

Civil Code of the Republic of Uzbekistan (in Russian, 1997, cons. ver. 2022), available at https://bit.ly/408IiO9.

Civil Code of the Russian Empire (Draft of the Higher Established Drafting Commission on the Compilation of Civil Code, I.M. Tyutryumov (ed.), in Russian, 1910).

Civil Code of the Russian Federation (1994, amend. 2022), available at https://bit.ly/40mCWPB.

Civil Code of the Socialist Republic of Vietnam (2005), available at https://bit.ly/3wET8Op.

Civil Code of Turkmenistan (1998), available at https://bit.ly/406KxS2.

Civil Code of Ukraine (in Russian, 2003), available at https://bit.ly/3HEK02k.

Civil Law Act of the Democratic People's Republic of Korea (1990), available at https://bit.ly/3HDH8D2.

Dutch Civil Code (1992, cons. ver. 2019), available at https://bit.ly/3DlVQff.

Egyptian Civil Law Act (in Arabic, 1948), available at https://bit.ly/3HEHZ6g.

Federal Act on the Amendment of the Swiss Civil Code Part Five: The Code of Obligations (1911, cons. ver. 2023), available at https://bit.ly/3DlCneI.

Federal Law On the Civil Transactions Law of the United Arab Emirates (1985), available at https://bit.ly/3Jrh9Ad.

Federalnyy zakon № 14-FZ “Ob obshchestvakh s ogranichennoy otvetstvennostyu” [Federal Law № 14-FZ “On the LLCs”] (in Russian, 1998, cons. ver. 2023).

Federalnyy zakon № 395-1 “O bankakh i bankovskoy deyatelnosti” [Federal Law № 395-1 “On banks and banking activity”] (in Russian, 1990, cons. ver. 2023).

French Civil Code, in: John Cartwright, Benedicte Fauvarque-Cosson, and Simon Whittaker, The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016, available at https://bit.ly/2Qodnso.

French Civil Code, trans. by Georges Rouhette, Dr. Anne Rouhette-Berton (1804, ver. before 2016), available at https://bit.ly/3XBNYyt.

General Part of the Civil Code Act of Estonia (2002), available at https://bit.ly/3Y11Emo.

German civil code BGB (1900, cons. ver. 2021), available at https://bit.ly/408nSVk.

Grazhdanskiy kodeks Rossiyskoi Federacii (chast chetvertaya) [Civil Code of the Russian Federation (part four)], Sobranie zakonodatelstva RF, № 52, st. 5496 (in Russian, 2006).

Grazhdanskiy kodeks Rossiyskoi Federacii (chast pervaya) [Civil Code of the Russian Federation (part one)], Sobranie zakonodatelstva RF, № 32, st. 3301 (in Russian, 1994).

Grazhdanskiy kodeks Rossiyskoi Federacii (chast tretya) [Civil Code of the Russian Federation (part three)], Sobranie zakonodatelstva RF, № 49, st. 4552 (in Russian, 2001).

Grazhdanskiy kodeks Rossiyskoi Federacii (chast vtoraya) [Civil Code of the Russian Federation (part two)], Sobranie zakonodatelstva RF, № 5, st. 410 (in Russian, 1996).

Indonesian Civil Code (1847), available at https://bit.ly/3JmY5mG.

Italian Civil Code (in Italian, 1942, cons. ver. 2020), available at https://bit.ly/3wzGBeT.

Luxembourg Civil Code (in French, 1803, cons. ver. 2023), available at https://bit.ly/3jiXQOB.

National Civil Act of Nepal (2017), available at https://bit.ly/3jcjkNa.

Obligations and Contracts Act of Bulgaria (1950, amend. 2005), available at https://bit.ly/3RasHtn.

Portuguese Civil Code (1867, cons. ver. 2018), available at https://bit.ly/3wB5UgN.

Principles of European Contract Law (PECL, 2002), available at https://bit.ly/3Y2C68r Principles, Definitions and Model Rules of European Private Law (DCFR, 2009), available at https://bit.ly/2VKhlC1.

Restatement Second of Contracts (1981), available at https://bit.ly/3kNfBpK.

Spanish Civil Code (1889, cons. ver. 2016), available at https://bit.ly/3HCpAag.

Thailand Civil and Commercial Code (1925), available at https://bit.ly/3DlWucF.

Turkish Civil Code (2011), available at https://bit.ly/3Y6CSkG.

UNIDROIT Principles of International Commercial Contracts (PICC, 2016), available at https://bit.ly/3JmTD7h.

Books and articles

Ageev A.V. Osnovnye podhody k problemam v sfere usloviy vo Francii. [General approaches in the sphere of conditions in France] (in Russian, 2016), available at https://bit.ly/3XLEQYg.

Ageev A.V., Ekonomicheskiye prichiny zaklyucheniya dogovorov s otlagatelnymi usloviyami [Economic reasons for entering into contracts with suspensive conditions], Bulletin of Economic Justice of the Russian Federation, № 12, at 167 (in Russian, 2018).

Ageev A.V., Potestativnyye usloviya v grazhdanskom prave Frantsii [Potestative conditions in the civil law of France]. Bulletin of SAC RF, № 4, at 37 – 52 (in Russian, 2013).

Ageev A.V., Problemy regulirovaniya potestativnykh usloviy [Problems of regulation of the potestative conditions]. Bulletin of Economic Justice of the Russian Federation, № 1, at 84 – 106, № 2, at 39 – 87 (in Russian, 2015).

Albrecht K., J. von Staudingers Kommentar zum Burgerlichen Gesetzbuch: mit Einfuhrungsgesetz und Nebengesetzen. Eckpfeiler des Zivilrechts [J. von Staudingers Commentary on the Civil Code: with the Introduction of the Law and secondary laws. Cornerstones of civil law] (2008).

Atnabaeva Yu.V., K voprosu o sootnoshenii riskovykh dogovorov s uslovnymi sdelkami [On the question of the ratio of risk contracts with conditional transactions], Vlast Zakona, № 1, at 196 – 205 (in Russian, 2017).

Beatson J., Burrows A., Cartwright J., Anson's Law of Contract (29th ed., 2010).

Boemke B., BGB Allgemeiner Teil [General part of the BGB] (in German, 2009).

Bork R., Allgemeiner Teil §§ 139-163 in: Karl-Dieter Albrecht, J. von Staudingers Kommentar zum Burgerlichen Gesetzbuch: mit Einfuhrungsgesetz und Nebengesetzen. Eckpfeiler des Zivilrechts [J. von Staudingers Commentary on the Civil Code: with the Introduction of the Law and secondary laws. Cornerstones of civil law] (2020).

Braginskiy M.I., Sdelki: ponyatiya, vidy i formy (kommentarij k novomu GK RF) [Transactions: Concepts, Types and Forms (Comments to the New Civil Code of the Russian Federation)] (in Russian, 1995).

Brox H., Allgemeiner Teil des BGB [General part of BGB] (in German, 2010).

Bufnoir C., Theorie de la condition dans les divers actes juridiques d'apres le droit romain [Theory of condition in various legal acts according to Roman law] (in French, 1866).

Calamari J.D. and Perillo J.M., The Law of Contracts (4th ed., 1998).

Carbonier J. Droit civil. Volume II: Les biens. Les obligations [Civil law. Volume II: Property. Obligations] (in French, 1st ed., 2004).

Chuprunov I.S., Voprosy sfery deystviya i obkhoda preimushchestvennogo prava pokupki doli (aktsiy) [Issues of the scope and circumvention of the pre-emptive right to the purchase of shares], Bulletin of Economic Justice of the Russian Federation, № 4, at 24 – 97 (in Russian, 2021).

Corbin A.L., Conditions in the Law of Contract, The Yale Law Journal, Vol. 28, at 739 – 768 (1919).

Corbin A.L., Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law, vol. 3A. Conditions of Legal Duty (1950).

Crome C., System des Deutschen Bürgerlichen Rechts [The System of German civil law], Vol. 1 (in German, 1900).

Dernburg H., Pandekten [Pandects] (in German, 1897).

Duvernois N.L., Chteniya po grazhdanskomu pravu. Tom 1. Vvedeniye i obshchaya chast [Readings on civil law. Volume 1. Introduction and general part] (in Russian, 1905, rev. ed. 2004).

Egorov A.V., Rasporyaditelnyye sdelki: vyyti iz sumraka [Dispositive Transactions: to Leave the Twilight], Bulletin of Civil Law, № 6, at 51 – 107 (in Russian, 2019).

Ermolova N.A., Uslovnye sdelki v rossiyskom grazhdanskom prave [Conditional agreements in Russian Civil Law] (in Russian, 2011).

Farnsworth E.A., Farnsworth on Contracts, Volume 1 (1990).

Fauvarque-Cosson B., The New Provisions on Conditions in the UNIDROIT Principles 2010. Uniform Law Review. Vol. XVI. Issue 3 (2011), available at https://bit.ly/3G5bZV7.

Flume W., Allgemeiner Teil des Bürgerlichen Rechts [General Part of Civil Law] (1992).

Fridman G.H.L., The Law of Contract in Canada (2nd ed., 1986).

Galkova E.V., Obespechitelnaya peredacha titula po germanskomu pravu [Security Transfer of Title under German Law], Zakon, № 11, at 173 – 186 (in Russian, 2016).

Gambarov Yu. S., Grazhdanskoe pravo [Civil Law] (in Russian, 1911).

Golevinskiy V.I., O proiskhozhdenii i delenii obyazatelstv [On the Origin and Division of Obligations], (in Russian, 1872).

Gongalo B.M., Uchenie ob obespechenii obyazatelstv [Doctrine of securing obligations. Questions of theory and practice] (in Russian, 2004).

Gromov S.A., Spornye aspekty ucheniya ob uslovnyh sdelkah [Controversial aspects of the doctrine of conditional transactions]. Transactions: problems of theory and practice. Collection of articles M.A. Rozhkova (ed.), at 255 – 297 (in Russian, 2008).

Gromov S.A., Tezisy k Kruglomu Stolu Yuridicheskogo Instituta “M-Logos” “Problemnye Voprosy Uslovnyh Sdelok” [Thesis to the round table of the Law institute “M-Logos” “Problematic issues of conditional transactions”] (in Russian, 2016), available at https://bit.ly/3WIf2L3.

Gudkov D.V., Problema kvalifikatsii otnosheniy storon do razresheniya otlagatelnogo usloviya [The Problem of Qualifying the Relationship of the Parties Pending the Settlement of a Qualifying Condition], Bulletin of the Civil Law, № 3, at 7 – 56 (in Russian, 2015).

Hattenhauer C., Einseitige private Rechtsgestaltung: Geschichte und Dogmatik [Unilateral Private Transformation of Law: History and Dogmatics] (2011).

Izyumova E.S., K voprosu o dopustimosti vklyucheniya otlagatelnykh usloviy v kontrakty dlya obespecheniya gosudarstvennykh i municipalnykh nuzhd [On the question of the admissibility of including suspensive conditions in contracts to meet state and municipal needs]. Laws of Russia: experience, analysis, practice, № 1, at 62 – 65 (in Russian, 2018).

Kabalkin A. Yu., Kommentariy k Grazhdanskomu kodeksu Rossiyskoy Federatsii, chasti pervoy [Civil Code of the Russian Federation. Part One. Scientific and practical commentary] (in Russian, 2004).

Karapetov A.G., Ispolnenie i prekrashchenie obyazatelstva: kommentariy k statyam 307 - 328 i 407 - 419 Grazhdanskogo kodeksa Rossiyskoy Federacii [Fulfillment and termination of obligation: a commentary to articles 307 - 328 and 407 - 419 of the Civil Code of the Russian Federation] (in Russian, 2022).

Karapetov A.G., Razryv sinallagmy i mertsaniye kauzy, ili Mozhno li stavit vstrechnoye ispolneniye po vozmezdnomu dogovoru pod usloviye? [Rupture of synallagma and shimmering causa or Could the counter-performance be conditioned upon in a paid contract], Zakon legal blog (in Russian, 2017), available at https://tinyurl.com/398debc.

Karapetov A.G., Sdelki, predstavitelstvo, iskovaya davnost: postateynyy kommentariy k statyam 153 - 208 Grazhdanskogo kodeksa Rossiyskoy Federatsii [Transactions, representation, limitation of actions: article-by-article commentary to Articles 153 - 208 of the Civil Code of the Russian Federation] (ed. V.V. Baybak, R.S. Bevzenko, S.L. Budylin, in Russian, 2018).

Karapetov A.G., Tezisy k Kruglomu Stolu Yuridicheskogo Instituta “M-Logos” “Problemnye Voprosy Uslovnyh Sdelok” [Thesis to the round table of the Law institute “M-Logos” “Problematic issues of conditional transactions”] (in Russian, 2016), available at https://bit.ly/415mfbB.

Karapetov A.G., Uslovnye Prava i Obyazannosti: Obzor Problemnyh Voprosov Primeneniya st. st. 157 i 327.1 GK RF [Contingent Rights and Liabilities: Review of Problems with Application of Articles 157 and 327.1 of the Civil Code of the Russian Federation]. Bulletin of Economic Justice of the Russian Federation, № 6, at 71 – 128 (in Russian, 2017).

Karimov E., Təsdiq və zəmanətlər Azərbaycan hüququnda [Application of representations & warranties in Azerbaijan law governing contracts] (in Azerbaijani, 2017), available at https://bit.ly/3SjXO6o.

Karnushin V.E., Sekundarnyye prava v grazhdanskom prave Rossiyskoy Federatsii: obshchiye voprosy teorii, sekundarnyye prava v Grazhdanskom kodekse RF [Secondary rights in the civil law of the Russian Federation: general questions of theory, secondary rights in the Civil Code of the Russian Federation] (in Russian, 2016).

Klang H., Kommentar zum Allgemeinen bürgerlichen Gesetzbuch [Commentary to ABGB], Bd. 1, Halbbd. 2, §§353-530 (in German, 1931).

Kostrikova K.S. K voprosu ob uslovnyh sdelkah. [On the issue of conditional transactions]. Innovative technologies in modern science, at 206 – 208 (in Russian, 2017).

Koziol H., Glanz und Elend der deutschen Privatrechtsdogmatik [The Splendor and Poverty of German Civilistic Dogmatics], Archiv fur die civilistische Praxis, at 1 – 62 (in German, 2012), trans. into Russian, Bulletin of Civil Law, № 6, at 227 – 288 (in Russian, 2012).

Krasheninnikov E.A., Pravovoye polozheniye storon otlagatelno obuslovlennoy sdelki vo vremya sostoyaniya podveshennosti [The legal position of the parties to a suspensive conditional transaction during the state of pendency], in: Essays on commercial law: Collection of scientific papers of Yaroslavl University, Krasheninnikov E.A. (ed.), Vol. 12, at 5 – 18 (in Russian, 2005).

Krasheninnikov E.A., Usloviye v sdelke: ponyatiye, vidy, dopustimost [Condition in the transaction: concept, types, admissibility], in: Essays on commercial law: Collection of scientific papers of Yaroslavl University, Krasheninnikov E.A. (ed.), Vol. 8, at 3 – 18 (in Russian, 2001).

Kruchinin V.N., Ponyatie i kharakteristika uslovnykh sdelok [The concept and characteristics of conditional transactions]. Legal reform journal. Volume 1, at 55 – 61 (in Russian, 2015).

L'Ecluse P., Dirkx M., Purely Potestative Condition Precedent to Perform Obligation Cannot Be Declared Null (2013), available at https://bit.ly/3AdF8gz.

Lassen T., Preobrazovatelnye Prava (Gestaltungsrechte) Po Nemeckomu Pravu [Rights to Change a Legal Relationship by Unilateral Declaration (Gestaltungsrechte) Under German Law], Bulletin of Civil Law, № 5, at 139 – 168 (in Russian, 2018).

Latina M., Essai sur la condition en droit des contrats [Essay on the condition in contract law] (in French, 2009).

Makovskaya A.A., Reforma dogovornogo prava vo Frantsii. Novyye polozheniya Grazhdanskogo kodeksa Frantsii [Reform of contract law in France. New Provisions of the French Civil Code], Bulletin of Economic Justice of the Russian Federation, № 8, at 76 – 101 (in Russian, 2016).

Malinin M.I., Ob uslovnyh obyazatelstvah [On contingent liabilities]. Report of the meetings of the Novorossiysk Law Society from May 20, 1880, Vol. 7 (in Russian, 1880).

Meier D.I., Russkoe grazhdanskoe pravo [Russian civil law] (in Russian, 2003).

Melnichenko O.A., Nekotoryye voprosy obuslovlennogo i vstrechnogo ispolneniya obyazatelstv [Some issues of conditional rights and counter performance of obligations], Zakon, № 1, at 122 – 135 (in Russian, 2017).

Mikhashin A.V., Potestativnye usloviya v soprovozhdaemykh sdelkakh po gosudarstvennomu oboronnomu zakazu [Potestative conditions in accompanied transactions on the state defense order]. Journal of Business and Corporate Law, № 1, at 49 – 54 (in Russian, 2020).

Milhac O., La notion de condition dans les contrats à titre onéreux [The notion of condition in contracts for valuable consideration] (in French, 2001).

Morandiere J., Civil Law of France. Vol. 2 (trans. into Russian by Fleischitz E.A., 1960).

Nam K.V., Kommentariy k #Glosse. Uslovnye sdelki. Nemeckiy podkhod [Comment to the #Gloss. Conditional transaction. German Approach]. Bulletin of the Economic Justice of the Russian Federation, № 11, at 75 – 108 (in Russian, 2018).

Nersesov N.O., Ponyatiye dobrovolnogo predstavitelstva v grazhdanskom prave [The concept of voluntary representation in civil law] (in Russian, 1878, rev. ed. 1998).

Nicholas B., The French Law of Contract (1992).

Novitsky I.B., Princip dobroi sovesti v proekte obyazatelstvennogo prava [Principle of good conscience in the draft of the law of obligations], Bulletin of civil law, № 1 (in Russian, 2006).

Ostanina E.A. Zavisimost pravovykh posledstviy sdelki ot otlagatelnogo i otmenitelnogo usloviy: nauchno-prakticheskoe posobie [Dependence of the legal consequences of the transaction on the suspensive and resolutive conditions: a scientific and practical guide] (in Russian, 2010).

Ostanina E.A., Sdelki s otlagatelnym i otmenitelnym usloviyem kak osnovaniye priobreteniya veshchnogo prava [Transactions with suspensive and resolutive conditions as the basis for the acquisition of property rights] (Ph.D. thesis abstract, in Russian, 2007).

Planiol M., Treatise of French civil law, Part 1: The Theory of Commitment (trans. into Russian by V. Hartmann, 1911).

Polynovskii D., Analysis of Some Crucial Issues of Contingent (Conditional) Transactions (2020) (Unpublished LL.M. dissertation, Kyushu University) (on file with the Law Faculty of Kyushu University).

Polynovskii D., Razryv sinallagmy pri obuslovlennosti vstrechnogo ispolneniya: puti resheniya [The rupture of the synallagma within the conditioning of the counter performance: solutions], Sovetnik jurista, № 9, at 62 – 66 (in Russian, 2017).

Pothier R.J., A treatise on obligations, considered in a moral and legal view, Vol. 1 (1999).

Raff M., Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law (2003).

Reich D.O., Einfiihrung in das Bürgerliche Recht [Introduction to Civil law] (in German, 2000).

Rezanov N.V., Odnostoronniye sdelki: Klassifikatsii, Svoboda Sovershenіya, Vozmozhnost Vklyucheniya Usloviy [Unilateral transactions: Classifications, Freedom to Perform, Possibility to Include Conditions], Bulletin of Economic Justice, № 10, at 155 – 190 (in Russian, 2022).

Rudman D.S., O sootnoshenii sdelki, sovershennoy pod otlagatelnym usloviem, i predvaritelnogo dogovora [On the relationship between a transaction made under a suspensive condition and a preliminary agreement], Russian Justice, № 7, at 7 – 10 (in Russian, 2018).

Savatier R., La théorie des obligations: vision juridique et économique [The theory of obligations: legal and economic vision] (in French, 1974).

Scherbakov N.B., Emptio rei speratae i Emptio spei: v poiskakh ponyatiya aleatornoy sdelki [Emptio rei speratae and Emptio spei: In Search of the Concept of an Aleatory Transaction], Civil Law: Modern Problems of Science, Law and Practice: Collection of Articles on the Jubilee of Doctor of Juridical Sciences, Professor E.A. Sukhanov, at 589 – 613 (in Russian, 2018).

Scherbakov N.B., Osnovnye podkhody k opredeleniyu yuridicheskoy prirody aleatornykh sdelok [Basic approaches to defining the legal nature of aleatory transactions]. Bulletin of civil law, № 1, at 70 – 87 (in Russian, 2006).

Schiemann G., Pendenz und Rückwirkung der Bedingung: Eine dogmengeschichtliche Untersuchung [Pendency and retroactivity of the condition: a dogma-historical investigation] (in German, 1973).

Scott S.P., The Civil Law (1932).

Seckel E., Die Gestaltungsrechte des burgerlichen Rechts [Transformative rights in civil law], in: Festgabe der Juristischen Gesellschaft zu Berlin zum 50 jährigen dienst-jubiläum ihres vorsitzenden, Richard Koch [Commemoration of the Legal Society of Berlin on the 50th anniversary of the service of its chairman, the real privy councilor, Richard Koch], at 205 – 253 (1903, trans. into Russian, 2007)

Serebrovsky V.I., Ocherki sovetskogo strakhovogo prava [Essays on Soviet insurance law] (in Russian, 2003).

Sergeev A.P., Kommentariy k Grazhdanskomu kodeksu Rossiyskoy Federatsii. CHast pervaya (postateynyy) [Commentary to the Civil Code of the Russian Federation. Part One (article-by-article)] (in Russian, 2nd ed. rev and suppl., 2019).

Sinaiskiy V.I., Russkoe grazhdanskoe pravo [Russian civil law] (in Russian, 2002).

Sklovsky K.I., Razdeleniye deystviya sdelki: printsipy i predrassudki [Dividing the action of the transaction: principles and prejudices], Aequum ius. From friends and colleagues to the 50th anniversary of Prof. D.V. Dozhdev. A.M. Shirvindt (ed.) (in Russian, 2014).

Sklovsky K.I., Sdelka i ee deystvie. Kommentariy glavy 9 GK RF. Princip dobrosovestnosti. [The deal and its action. Commentary on Part 9 of the Civil Code of the Russian Federation. The principle of good faith] (in Russian, 4th ed., 2019).

Sorodjo I., The Development of Indonesian Civil Law, Scientific Research Journal (SCIRJ), Volume IV, Issue IX, 30 (2016).

Stadler A., Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion [Design freedom and traffic protection through abstraction] (in German, 1996).

Stoljar S.J., The Contractual Concept of Condition. 69th Law Quarterly Review, at 485 – 511 (1953).

Sukhanov E.A., O vidakh sdelok v germanskom i v rossiyskom grazhdanskom prave [Types of Transactions in German and Russian Civil Law], Bulletin of Civil Law, № 2 (in Russian, 2006).

Sukhanov E.A., Rossiyskoe grazhdanskoe pravo: Uchebnik v 2 tomakh. Tom 2: Obyazatelstvennoe parvo [Russian civil law: Textbook in 2 volumes. Volume 2: Law of Obligations] (in Russian, 2nd ed. 2011).

Treitel G.H., The Law of Contract (2003).

Tretyakov S.V., Formirovaniye kontseptsii sekundarnykh prav v germanskoy tsivilisticheskoy doctrine [Formation of the Concept of Secondary Rights in German Civil Law Doctrine]. Bulletin of Civil Law, № 2, at 253 – 270 (in Russian, 2007).

Tuzov D.O., Kontseptsiya "nesushchestvovaniya" v teorii yuridicheskoy sdelki [The concept of "nonexistence" in the theory of legal transaction] (in Russian, 2006).

Tuzov D.O., Nichtozhnost i osporimost yuridicheskoy sdelki: pandektnoye ucheniye i sovremennoye pravo [The nullity and voidability of a legal transaction: pandect doctrine and modern law] (in Russian, 2006).

Usacheva K.A., O Kvalifikacii Vozvrata Poluchennogo v Sluchae Rastorzheniya Narushennogo Dogovora: Istoricheskiy Ocherk [On Qualification of the Parties' Relationships on the Return of What Was Received after the Termination of the Violated Contract: Historical Review], in: A.M. Shirvindt, N.B. Shcherbakov, Opyty tsivilisticheskogo issledovaniya: sbornik statey [Experiments of civilistic research: collection of articles], at 352 – 375 (in Russian, 2019).

Valiev R.R., Imushchestvennoye polozheniye storon uslovno-otlagatelnogo obyazatelstva [Property Status of Parties to Conditional Suspensive Obligation], Zakon, № 7, at 157 – 177 (in Russian. 2020)

Valory S., La potestativite dans les relations contractuelles [The potestativity in contractual relations] (in French, 1999).

Vaquer A., Contract law in Spain (2018).

Vasnyov V.V., Priroda uslovnogo obyazatelstva [The Nature of Conditional Obligation]. Abstract of the dissertation for the Candidate of Juridical Sciences, available at https://bit.ly/3WAPe3A.

Vasnyov V.V., Priroda uslovnogo obyazatelstva do razresheniya otlagatelnogo usloviya [The Nature of Conditional Obligation Prior to the Settlement of a Suspensive Condition]. Bulletin of the SAC of the Russian Federation, № 12, at 23 – 58 (in Russian, 2012).

Vogenauer S., Commentary on the UNIDROIT principles of international commercial contracts (PICC) (2015).

Williston S. and Thompson G.J., A treatise on the law of contracts, vol. 3 (rev. ed., 1936).

Windshade B., Uchebnik pandektnogo prava. T. 1. Obshchaya chast [Textbook of Pandect Law. Vol. 1. General part] (in Russian, 1874).

Wolf M., Allgemeiner Teil [General Part of Civil Law], Vol. 3, § 104-240 in: Hans T. Soergel, Bürgerliches Gesetzbuch: mit Einführungsgesetz und Nebengesetzen: Kohlhammer-Kommentar [Civil code: with introductory law and subsidiary laws: Kohlhammer Commentary] (in German, 1999).

Wolf M., Neuner J., Allgemeiner Teil des bürgerlichen Rechts [General part of civil law] (in German, 2016).

Zikun I.I., Eksternalnyy effekt dogovora upravleniya imushchestvom [External effect of the property management contract], Bulletin of Civil Law, № 6, at 34 – 73 (in Russian, 2017).

Zimmermann R., The Law of Obligations: Roman Foundations of the Civilian Tradition (1990).

Case law

Alan Estates Ltd v WG Stores Ltd and Another, 3 WLR 892 (1981), available at https://bit.ly/42U6Yeq.

Bournemouth & Boscombe Athletic F.C. v Manchester United F.C., The Times (May 22, 1980), available at https://bit.ly/32Ergi2.

Boynton v. Moulton, 159 Mass. 248, 34 N.E. 361 in: Samuel Williston and George J. Thompson, A treatise on the law of contracts, vol. 1, at 583 (rev. ed., 1936).

Byler v. Great American Insurance Company, 395 F.2d 273 (10th Cir. 1968), available at https://casetext.com/case/byler-v-great-american-insurance-company.

C.J. Hogan, Inc. v. Atlantic Corp. 124 N.E.2d 905 332 Mass. 322 (1955), available at https://tinyurl.com/hd27vr85.

Capron v. Capron, 44 Vt. 410 (1872), available at https://cite.case.law/vt/44/410.

De Wolfe v. French, 51 Me. 420 in: Samuel Williston and George J. Thompson, A treatise on the law of contracts, vol. 3, at 2246 (rev. ed., 1936).

Dearing v. Moffitt, 6 Ala. 776 (1844), available at https://cite.case.law/ala/6/776.

Dec Elec., Inc. v. Raphael Const. Corp., 538 So. 2d 963 (Fla. Dist. Ct. App. 1989), available at https://tinyurl.com/3vxwbdyd.

Dec Elec., Inc. v. Raphael Const. Corp., 558 So. 2d 427 (1990) available at https://tinyurl.com/4pc6atv8.

Decision of the Arbitration Court of the Sverdlovsk Region № A60-486/07-C3 (in Russian, from April 16, 2007), available at https://bit.ly/3TSvpn7.

Decision of the Imperial Supreme Court of Germany RGZ 140, 223, (in German, April 4, 1939).

Decision of the Panel of Arbitrators ICAC under the Chamber of Commerce and Industry of the Russian Federation on the case № M-82/2020 ICAC (in Russian, from March 9, 2021).

Donlan v. Turner, Dennis & Lowry Lumber Co., 282 F. 421 (1922), available at https://cite.case.law/f/282/421.

Duncan Box & Lumber Co v. Sargent 126 W.Va. 1, 27 S.E.2d 68, 148 A.L.R. 1072 (1943), available at https://casetext.com/case/lumber-co-v-sargent.

Dynamic Transport Ltd. v. O.K. Detailing Ltd., 2 S.C.R. 1072 (S.C.C.) (1978), available at https://bit.ly/3AAYwmI.

E.I. Du Pont de Nemours Powder Co. v. Schlottman 218 F. 353 (1914), available at https://tinyurl.com/2bswamrc.

Ewell v. Landing, 199 Md. 68 (Md. 1952) 85 A.2d 475, available at https://casetext.com/case/ewell-v-landing.

Finlay v. Swirsky, 103 Conn. 624, 131 A. 420 (Conn. 1925), available at https://casetext.com/case/finlay-v-swirsky-1.

Foster v. Lall 135 Misc.2d 919, 516 N.Y.S. 2d 570 (1987), available at https://tinyurl.com/yhf97syk.

George A. Fuller Co. v. Brown, 15 F.2d 672 (4th Cir. 1926), available at https://tinyurl.com/4k4a7hvx.

Great Northern Railway Co. v. Witham, L.R. 9 C. P 16 (1873), available at https://bit.ly/3YAtnKN.

Gulf Const. Co., Inc. v. Self, 676 S.W.2d 624 (Tex. App. 1984), available at https://tinyurl.com/yc2chfxr.

Gull Laboratories, Inc. v. Diagnostic Technology, Inc. 695 F. Supp 1151 (D. Utah 1988), available at https://bit.ly/3KL6FMA.

Hargreaves Transport Ltd v Lynch, 1 W.L.R. 215 (1969), available at https://bit.ly/3G3H4va

Hood v. Hampton Plains Exploration Co., 106 F. 408 (1901), available at https://cite.case.law/f/106/408.

Judgement of the Federal Supreme Court of Switzerland dated by 29th November 1929, BGE 55 II 302 (in German, 1929), available at https://bit.ly/3MBlsdr.

Judgment of the commercial chamber of the Court of Cassation, № 12-12066 (in French, from February 11, 2014), available at https://bit.ly/3J2hLLI.

Leibee v. Leibee 349 P. 2d 486, 489 – Or. – (1960), available at https://case-law.vlex.com/vid/349-p-2d-486-621751866.

Link v. Hill, 117 Oh. St. 421, 159 N. E. 573 (1928), in: Samuel Williston and George J. Thompson, A treatise on the law of contracts, vol. 1, at 583 (rev. ed., 1936).

Mascioni v. I. B. Miller, Inc., 261 N.Y. 1 (1933), available at https://cite.case.law/ny/261/1.

McCauley vs McVey, 98 D.L.R. (3d) 577 (S.C.C.) (1980), available at https://bit.ly/3Ht1mNi.

Mignot v. Parkhill, 391 P.2d 755 (Or. 1964), available at https://tinyurl.com/y8bzj5tm.

Nelson v. Burnham 6 Div. 92. (1934), available at https://casetext.com/case/nelson-v-burnham.

Nunez v. Dautel, 86 U.S. 560, 22 L.Ed. 161, 19 Wall. 560 (1873), available at https://tinyurl.com/3v9em746.

OGH 1 Ob 622/77 (in German, from June 22, 1977).

OGH 5 Ob 339/61 (in German, 1961), available at https://bit.ly/3ZiEHeV.

OGH 6 Ob 39/01f (in German, from March 15, 2001).

OLG Bamberg v. LG Coburg, Rechtsprechung BGH - IX ZR 153/83 (in German, April 17, 1984), available at https://bit.ly/3rTy6sy.

Peacock Construction Co. v. Modern Air Conditioning, Inc 353 So.2d 840 (Fl. 1977), available at https://tinyurl.com/2s3serwx.

Rechtsprechung BGH Urteil v. IV ZR 164/55 (in German, from February 22, 1956), available at https://bit.ly/3KHs0UN.

Resolution of the Arbitration Central District Court of Russia on case № A48-4764/2017 (in Russian, April 5, 2019).

Resolution of the Arbitration Court of the Ural District № F09-11893/16 on case № A50-11302/2016 (in Russian, from January 31, 2017), available at https://tinyurl.com/3784mffd.

Resolution of the Federal Arbitration Court of the North Caucasian District № F08-3832/2003 (in Russian, from October 7, 2003), available at https://bit.ly/34bPbWz.

Resolution of the Federal Arbitration Court of the Volgo-Vyatka District on case № A43-39574/2009 (in Russian, from May 27, 2010), available at https://bit.ly/34f6rKc.

Resolution of the Judicial Board for Civil Cases of the Supreme Court of the Russian Federation № 9-KG17-14 (in Russian, from December 5, 2017), available at https://bit.ly/3P0OqCJ.

Resolution of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation № 305-ES21-10216 on case N A40-328885/2019 (in Russian, from August 20, 2021), available at https://base.garant.ru/402641668.

Resolution of the Plenum of the Supreme Court of the Russian Federation № 54 (in Russian, from November 22, 2016), available at https://rg.ru/2016/12/05/plenum-dok.html.

Resolution of the Presidium of the Supreme Arbitration Court of Russia, No. 129/97 (in Russian, from April 29, 1997).

Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 7454/12 on case № A24-1270/2011 (in Russian, from November 13, 2012), available at https://bit.ly/3OpKBqE.

Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 11659/10 on case № A40-76599/09-159-650 (in Russian, from January 18, 2011), available at https://tinyurl.com/3kwx7k63.

Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 12945/13 (in Russian, from December 17, 2013), available at https://tinyurl.com/47vnycun.

Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 16179/12 on case № A40-134623/11-37-27 (in Russian, from April 2, 2013), available at https://tinyurl.com/y2pvjrce.

Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 4030/13 on case № A40-131858/11-56-1157 (in Russian, from July 23, 2013), available at https://tinyurl.com/48tv5b3u.

Resolution of the Seventeenth Arbitration Court of Appeal № 17AP-12678/2015-GK on case № A71-2288/2015 (in Russian, from October 28, 2015), available at https://tinyurl.com/59jpcjku.

Review of judicial practice of the Supreme Court of the Russian Federation № 2, 2017 (in Russian, from April 26, 2017), available at https://tinyurl.com/mu3vey4h.

Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation № 301-ES16-4469 (in Russian, from August 25, 2016), available at https://tinyurl.com/32r79m36.

Ruling of the Plenum of the SAC RF № 73 "On the regulation of Civil Code of Russia's lease agreement provisions." Bulletin of SAC RF, 2012, № 1 (in Russian, November 17, 2011).

Sears v. Wright, 24 Me. 278 (1844), available at https://cite.case.law/me/24/278.

Simon v. Etgen, 213 N.Y. 589, 107 N.E. 1066 (1915), available at https://casetext.com/case/simon-v-etgen-1.

Smithers v. Junker, 41 F. 101 (1889), in: Samuel Williston and George J. Thompson, A treatise on the law of contracts, vol. 1, at 583 (rev. ed., 1936).

Spence v. Allen 260 P. 2d 949 (Or. 1953), available at https://bit.ly/3g1b9OI.

Steiner v. EHD Inv. Ltd., 6 A.R. 113 (CA) (1977), available at https://ca.vlex.com/vid/steiner-v-ehd-inv-680989681.

Strong v. Sheffield, 144 N.Y. 392 (N.Y. 1895), available at https://bit.ly/3y59LDr.

Thos J. Dyer Co. v. Bishop International Engineering Co., 303 F. 2d 655 (6th Cir. 1962), available at https://tinyurl.com/yt35kr2s.

Washington Chocolate Co. v. Canterbury Candy Makers, Inc., 18 Wn. 2d 79, 138 p2d 195, 18 Wash. 2d 79 (Wash. 1943), available at https://bit.ly/3kKluV0.

Wilson, Inc. v. Post-Tensioned Structures, 522 So. 2d 79 (Fla. Dist. Ct. App. 1988), available at https://tinyurl.com/yc4zyswm.

Winslow v. Mell 48 Wn.2d 581 (1956).

Wood v. Lucy, Lady Duff-Gordon - 222 N.Y. 88, 118 N.E. 214 (1917), available at https://bit.ly/3EWfdfE.

Work v. Beach, 13 N.Y.S. 678, in: Samuel Williston and George J. Thompson, A treatise on the law of contracts, vol. 3, at 2255 (rev. ed., 1936).

Other sources

Austrian RIS Legal Information System, available at https://bit.ly/3lqyYFn.

Cambridge University Press, Cambridge English Dictionary online, available at https://bit.ly/3KTZHmc.

Dal V., Tolkovyi Slovar Dalya Onlain [Dal's Dictionary online] (in Russian), available at http://slovardalja.net/.

Egypt justice portal. Overview of Egypt's civil law and legal system, available at https://bit.ly/40dSq89.

Hornby A.S., Oxford Advanced Learner's Dictionary online, available at https://bit.ly/3kRZiI8 and https://bit.ly/3j58wR7.

Information memorandum on amendments to part one the Civil Code of the Russian Federation (in Russian, 2015), available at https://bit.ly/3EQyoYU.

Interview with Kuznetsov A.A., Doctor of Laws, Professor of Higher School of Economics, Russia (June 27-28, 2023).

Kutylowski J. DeepL Translator, available at https://www.deepl.com/translator

Kuznetsov S., Bolshoi Tolkovyi Slovar Russkogo Yazyka [The Large Explanatory Dictionary of Russian], available at http://www.gramota.ru/slovari/info/bts.

Lorenz S. (Dr.), Welcome to the basic course in civil law 2022/2023 (2022), available at https://bit.ly/41balwQ.

Mahoney K., Latin Dictionary and Grammar Resources, "potestas" definition, available at https://bit.ly/3Eswuw4.

Merriam-Webster Incorporated, Merriam-Webster's Dictionary of English, available at https://bit.ly/3HCqDqH and https://bit.ly/3HgZB76.

M-Logos Juridical Institute, Scientific Round Table "Problematic issues of conditional transactions" (in Russian, 2016), available at https://www.youtube.com/watch?v=ieqhMmzsyQQ.

Nasdaq Listing Center, *available at* https://bit.ly/42d4I1l.

Official Commentary to PICC 2016, available at https://bit.ly/2Jzf3QS.

Ozhegov S., Tolkovyi Slovar Ozhegova Onlain [Ozhegov's Dictionary online] (in Russian), available at https://bit.ly/3WKQAZH and https://bit.ly/3Y3KUuJ.

Sinclair J.M., Collins English Dictionary online, available at https://bit.ly/3IKJFJp.