THE LAW ON CONTRATOS INNOMINADOS[1]

CESAR VILLANUEVA,[2] B.S.C., LL.B, LL.M

I. INTRODUCTION

The sanctity of contracts is a primary constitutional doctrine prohibiting the passage of any law impairing the obligation of contract,[3] and also finds substantive law provisions in the Civil Code principle that "[o]bligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith."[4] Although the Philippine Civil Code and other special laws define and regulate specific nominate contracts, the general rule in Philippine Contract Law is that "[t]he contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy,"[5] and from the moment of the perfection of contracts, "the parties are bound not only to the fulfillment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage and law."[6]

When it comes to innominate contracts (*contratos innominados*), the Civil Code provides simply that they "shall be regulated by the stipulations of the parties, by the provisions of Titles I [Obligations] and II [Contracts] of this Book, by the rules governing the most analogous nominate contracts, and by the customs of the place."[7]

The tremendous advances achieved in science and technology, and the complexities of business and commercial relationships, have brought about in our modern society innovative contractual relationships that have not before been

[1] The article, originally entitled *Philippine Law on Commercial Contracts of "Contratos Innominados,"* was written and submitted as the required output for the Justice Carmelino Alvendia Chair award for Schoolyear 1996-1997.

[2] The author is a professorial lecturer at the Ateneo College of Law, teaching Sales and Corporate Law. He has authored two books: *Commercial Law Review* (Rex Book Store, 1993), and *Philippine Law on Sales* (Rex Book Store, 1995). He is a senior partner of the Villanueva, Bernardo & Gabionza, 12/F Antel Corporate Centre, Valero Street, Salcedo Village, Makati City, Philippines.

[3] PHIL. CONST. art III, § 10.

[4] Civil Code of the Philippines, art. 1159.

[5] Civil Code of the Philippines, art. 1306.

[6] Civil Code of the Philippines, art. 1315.

[7] Civil Code of the Philippines, art. 1307.

designated as among the nominate contracts governed by the specific provisions of the Civil Code and special statutes. Derivatives, commercial franchising, underwriting agreements, to name a few, are terms used to define contracts that were fashioned in fairly recent times, all of which would constitute innominate contracts since they have not been defined particularly by any statutory provision. Yet no single set of doctrinal rules have been systematically achieved as the governing law to decide issues arising from such innominate contracts.

As will be shown in the discussions hereunder, the lack of central doctrinal rules pertaining to innominate contracts has led the Philippine Supreme Court to "infect" nominate contracts with rulings that should rightfully apply to innominate contracts. In attempts to define the rights and obligations of contracting parties in contracts which should be considered as innominate contract, the courts tend to lean back and fit the relationship into a nominate contract relationship, and thereby make doctrinal pronouncements that do not "fit" into the essence of the nominate contract chosen. Consequently, such practice may introduce a viral doctrine that infects and tends to weaken the logical fabric of the set of laws governing the infected nominate contract.

II. OBJECTIVES

The paper endeavors to demonstrate the dangerous tendency of the courts to force into particular nominate contract scenarios issues that arise from innominate contractual relationship and the invective consequences of such practice, and to show the need to clarify a set of doctrinal rules that should be adopted in dealing with innominate contractual relationships which should control in the situations covered. Particularly, this paper will concentrate on the particular innominate contracts *facio ut facias*.

III. THE NEXUS OF CONTRACTUAL RELATIONSHIPS

Whether it be nominate or innominate, what distinguishes a contract from other agreements or covenants is that it gives rise to an "obligation" which is defined as the "a juridical necessity to give, to do or not to do,"[8] or otherwise stated, "whereby one binds himself, with respect to the other, to give something or to render some service."[9]

The key, it would seem to the author, to the understanding of innominate contracts in general, the types thereof, and how not to mistake them for nominate contracts, lie in the realization of the two basic types of obligations created by a contractual relationship: (a) the real obligation "to give" or "to deliver;" and (b) the personal obligations "to do" or "not to do," or "to render some service."

[8] Civil Code of the Philippines, art. 1156.

[9] Civil Code of the Philippines, art. 1305.

The essential difference between real obligations and personal obligations, lie in the nature of their enforcement. Real obligations can legally be enforced by the remedy of specific performance; while personal obligations cannot constitute the basis for an action for specific performance because of the public policy against involuntary servitude; and the remedy for breach would be only an action for recovery of damages.

In addition, in an obligation to give when the subject matter is determinate, the obligee has a right to compel the debtor to make the delivery;[10] whereas, when the subject matter is indeterminate or generic, the obligee may ask that the obligation be complied with at the expense of the obligor.[11]

IV. TYPES OF INNOMINATE CONTRACTS

Civil Law authors[12] have classified innominate contracts into the following:

(a) *Do ut des* – "I give that you may give;"

(b) *Do ut facias* – "I give that you may do;"

(c) *Facio ut des* – "I do that you may give;" and

(d) *Facio ut facias* – "I do that you may do."

The Supreme Court has had occasions to apply innominate contract provisions. In *Perez v. Pomar*,[13] where a person demanded payment for doing interpreting work even in the absence of an express contract, the contract *facio ut des* was applied to compel the person who benefitted to pay compensation. In *Aldaba v. Court of Appeals*,[14] the Court refused to impose a contractual obligation to compel the estate of a deceased elderly woman to pay for the years of care given by a doctor and her daughter because of the admission by the latter that they never expected any compensation for their service.

In *Pacific Merchandising Corp. v. Consolacion Insurance and Surety Co., Inc.*,[15] the Court discussed the rationale of the *Pomar* doctrine:

[10] Civil Code of the Philippines, art. 1165.

[11] Civil Code of the Philippines, art. 1165.

[12] TOLENTINO, 4 CIVIL CODE OF THE PHILIPPINES 399 (1973); PARAS, 4 CIVIL CODE OF THE PHILIPPINES ANNOTATED 85 (1994).

[13] 2 Phil. 682 (1901).

[14] 27 SCRA 263 (1969).

[15] 73 SCRA 564 (1976).

> As early as 1903, in *Perez v. Pomar*, this Court ruled that where one has rendered services to another, and these services are accepted by the latter, in the absence of proof that the service was rendered gratuitously, it is but just that he should pay a reasonable remuneration therefore because "it is a well-known principle of law, that no one should be permitted to enrich himself to the damage of another."[16]

The Court referred to such ruling as "equitable principle which springs from the fountain of good conscience."[17]

In *Corpus v. Court of Appeals*,[18] payment of attorney's fees demanded by the lawyer for legal services was also justified by the Court "by virtue of the innominate contract of *facio ut des* ("I do and you give") which is based on the principle that 'no one shall unjustly enrich himself as the expense of another.'"[19]

What one notices from the classification of the four (4) types of innominate contracts, is that they seem to cover only reciprocal obligations in bilateral contracts. However, rightfully, the innominate contracts should also cover unilateral contracts which are not governed by specific rules pertaining to nominate contracts.

The four types of recognized innominate contracts provide for various combinations of real obligations and personal obligations.

The *Do Ut Des* contract ("I give that you may give") is essentially a barter or exchange agreement defined under Art. 1638 of the Civil Code: "By the contract of barter or exchange one of the parties binds himself to give one thing in consideration of the other's promise to give another thing." Under Art. 1641 of the Civil Code, contracts of barters are essentially governed by the provisions pertaining to the nominate contract of sale. Like a contract of sale which consists of bilateral real obligations (to deliver and transfer ownership of the subject matter on the part of the seller, to pay the price on the part of the buyer), a *do ut des* contract, which is a barter contract, also consists of reciprocal obligations to give.

Therefore, for practical purposes, there is really no separate innominate contract of *do ut des* because it would be defined by law as a barter and governed by the Law on Sales.

The *Do Ut Facias* contract ("I give that you may do") and the *Facio Ut Des* ("I do that you may give") are the opposite sides of the same legal relationship, depending on whose point of view (from the obligor's side) one were looking at the relationship. Therefore, they essentially are not different types of contracts.

[16] 73 SCRA 572, 573.

[17] 73 SCRA 572, 573.

[18] 98 SCRA 424 (1980).

[19] 98 SCRA 424.

More importantly, both types of so-called innominate contracts define the contractual relationship in the nominate contract for a piece-of-work, or a contract of service. Under Art. 1713 of the Civil Code "[b]y the contract for a piece of work the contractor binds himself to execute a piece of work for the employer, in consideration of a certain price or compensation." Consequently, these two types of innominate contracts do have a set of governing laws applicable to them, namely, the Law on Contracts for a Piece-of-Work, or Contracts for Service.

It all boils down therefore to the innominate contracts of *Facio Ut Facias* ("I do that you may do") which in essence would constitute the bulk or substance of the *contratos innominados* under Philippine legal system upon which no particular set of governing law applies, and which do not fall within the strict definition of any other nominate contract.

V. *Facio Ut Facias* as the Controlling Innominate Contract in the Philippine Legal System

If the foregoing observations are true, then the characterization of the bulk of true innominate contracts under Philippine jurisdiction, namely that of *facio ut facias* contracts, would be as follows:

(a) Since the delivery of object or the thing is not the subject matter of the contract, it is a consensual contract and therefore perfected by mere consent;

(b) It consists of reciprocal personal obligations to do or not to do;

(c) In the event that it is a bilateral contract, in case of breach, rescission is a remedy to the party who stands ready to perform his obligation; and

(d) Its breach cannot be the subject of specific performance, but for rescission with recovery of damages.

By narrowing down the so-called innominate contracts to the *facio ut facias* contracts, we are therefore able to more accurately gauge the treatment of the subject in various decisions of the Supreme Court, to determine the evolving doctrinal rules, and to come to clearer recommendations of the doctrinal rules that should govern Philippine innominate contracts.

VI. Principles on the Law on Sales

The "missed opportunities" by which the Supreme Court could have defined more clearly the parameters of innominate contracts (*i.e., facio ut facias* contracts) can be found in treating certain contractual situations akin to or arising from contracts of sale. Therefore, certain principles in the Law on Sales should be discussed which would be the basis for the analyses that will follow.

By definition, a contract of sale is certainly a nominate contract, and is a bilateral contract consisting of two sets of real obligations (*i.e.*, obligations "to do"), namely:

(a) On the part of the Seller, to deliver possession and transfer ownership, of the subject matter; and

(b) On the part of the Buyer, to deliver or pay the price, which is a sum certain in money.[20]

A contract of sale being a bilateral contract and consisting of reciprocal obligations, its breach entitles the non-defaulting party to rescission,[21] or to an action for specific performance because both sets of obligations created by the contract of sale are real obligations.

Finally, a contract of sale is a consensual contract because it is perfected by mere consent.[22]

From the foregoing it is clear that the innominate contract of *facio ut facias* cannot be confused with a contract of sale because the former consists of reciprocal personal obligations, while the latter consists of reciprocal real obligations. Consequently, the remedy available to the non-defaulting party in case of breach of contract of sale, *i.e.*, specific performance, is not available in case of breach in a *facio ut facias* contract.

VII. Contract of Sale v. Contract to Sell

The only species of a sale contract to which the *facio ut facias* contract is akin to would be the *contract to sell*. Both a contract of sale and a contract to sell are governed by the genus "sale" defined by Art. 1458 of the Civil Code as a contract where "one of the contracting parties obligates himself to transfer the ownership of and to deliver a determinate thing, and the other to pay therefor a price certain in money or its equivalent." In addition, the same article provides that "[a] contract of sale may be absolute or conditional."

Unlike in a contract of sale which by its perfection gives rise to reciprocal obligations to give, a contract to sell is essentially a reciprocal promise *to buy* and *to sell*,[23] which means that even with the perfection of the contract to sell, the

---

[20] Civil Code of the Philippines, art. 1458.

[21] Civil Code of the Philippines, art. 1191.

[22] Civil Code of the Philippines, art. 1475.

[23] Civil Code of the Philippines, art. 1479.

seller has not yet sold, but only bound himself to sell at some future time, upon the happening of the condition, and the buyer has not yet bought, but has only bound himself to buy at some future time upon the happening of the condition.

The distinction given above between a contract of sale and a contract to sell may seem to be delving on semantics, but really it goes into the nature of the obligations created. When a seller has "sold," that means that he has already obliged himself to deliver possession and transfer ownership of the subject matter, which are obligations to give. On the other hand, when a seller has bound himself "to sell," he has not yet sold, meaning he has not yet obliged himself to delivery possession and transfer ownership of the subject matter, but what he has obliged himself is that upon the happening of the condition, he "will sell." This may be interpreted to mean that the seller has only obliged himself "to enter into a contract of sale," which essentially is an obligation to do and not to give.

In the same manner, when in a contract of sale, the buyer has "bought," that means that he already assumed the obligation to pay the price, which is a real obligation to give. On the other hand, when the buyer enters into a contract to sell, although he has assumed the obligation to pay the price in the terms stipulated, he is not yet entitled to demand the title to and possession of the subject matter, until he fulfills his obligation to fully pay the price.

Under such reasoning, the perfection of the contract to sell creates only a conditional obligation "to sell" coupled with a counterpart obligation "to pay," and the non-fulfillment of the obligation to pay would extinguish the contract because of non-fulfillment of the condition, or would grant the seller an action for specific performance to compel the buyer to fulfill his obligation. This will show that a contract to sell, even at perfection, does not really take the form of a *facio ut facias* contract, since the obligation of the buyer to pay (which is a real obligation "to give") already exists at the point of perfection, and is subject to specific performance.

At most, a contract to sell would be more akin to the innominate contract *do ut facias* ("I give that you may do") from the point of view of the buyer; or a *facio ut des* ("I do that you may give") from the point of view of the seller. Even such a position is doubtful, since it seems to be contrary to the principle that the species should have the essential characterization of the genus. As the author has written before,[24] since the genus sale as defined under Art. 1458 covers contracts creating reciprocal obligations to give, then both the species contract of sale and contract to sell must necessarily have the same characterization. In other words, both a contract of sale and a contract to sell, by their perfections, give rise to real obligations to give, and the only difference is that in the former, the obligations are demandable, while in the latter, the obligations are conditional.

[24] *See* VILLANUEVA, PHILIPPINE LAW ON SALES 187-190 (1995).

In a contract of sale, the non-payment of the price on the part of the buyer or the non-delivery of the subject matter on the part of the seller, may constitute *resolutory conditions*, and may therefore be the legal basis to rescind the contract. In a contract to sell, the payment in full of the price is a *positive suspensive condition*, the non-happening of which prevents the obligation to sell on the part of the seller from materializing at all.

In a contract of sale, ownership over the subject matter generally passes to the buyer as a result of the tradition thereof; whereas, in a contract to sell, delivery of the subject matter does not pass ownership to the buyer even though he possesses the same, under the stipulation that ownership shall pass only upon full payment of the purchase price.

In a contract of sale, delivery will effectively transfer ownership of the subject matter to the buyer, and the seller cannot recover ownership by the fact of non-payment of the price, without rescinding the contract through judicial action. On the other hand, in a contract to sell, since delivery does not transfer ownership to the buyer, the non-payment of the purchase price prevents the obligation to sell from arising and thus ownership is retained by the seller.[25]

However, even in a contract to sell, since the seller still cannot take the law into his own hands, he would still have to seek court action to recover possession from the buyer if the latter refuses to voluntarily return the immovable. However, such action is not for rescission but actually merely for recovery of possession.[26]

In a contract of sale, rescission can be availed of only in case of substantial breach; whereas, in a contract to sell, the principle of substantial breach has no application, since the non-happening of the condition by whatever means or reason, whether or not substantial, *ipso jure* prevents the obligation to sell from arising.

In essence, therefore, the differences between a contract of sale and a contract to sell can be broken down as follows:

(a) In a contract of sale, the perfection thereof gives rise to reciprocal *demandable* obligations: on the part of the seller, obligations to transfer ownership and deliver possession of the subject matter; on the part of the buyer, to pay a price certain in money or its equivalent; and

[25] Manuel v. Rodriguez, 109 Phil. 1 (1960).

[26] Thus, art. 539 of the Civil Code provides that "[e]very possessor has a right to be respected in his possession; and should he be disturbed therein he shall be protected in or restored to said possession by means established by the laws and the Rules of Court." In turn, art. 433 provides that "[a]ctual possession under a claim of ownership raises a disputable presumption of ownership [and] [t]he true owners must resort to judicial process for the recovery of the property."

(b) In a contract to sell, the perfection of the contract only gives rise to reciprocal *conditional* obligations, *i.e.*, non-demandable obligations until the condition happens.[27]

In a rather simplistic manner of looking at the matter, a contract of sale and a contract to sell are the opposite ways of approaching the very same sale transaction.

The contract of sale is basically one where the reciprocal obligations created are deemed to be subject to one another as each being the resolutory condition for the other. That is the reason why Art. 1191 provides that the "power to rescind" is implied in reciprocal obligations. As Tolentino aptly observes:

> This article recognizes an implied or tacit resolutory condition in reciprocal obligations. It is a condition imposed exclusively by law, even if there is no corresponding agreement between the parties.[28]

On the other hand, a contract to sell is one where the reciprocal obligations created are deemed to be subject to the full payment of the purchase price as constituting the suspensive condition for the obligation of the seller to deliver possession and/or transfer ownership.

Therefore, the manner and effect of extinguishment of obligations subject to condition should make both the contract of sale and the contract to sell basically the same: in an obligation subject to a suspensive condition, the non-happening of the condition prevents the obligation from arising; whereas in an obligation subject to a resolutory condition, the happening of the condition extinguishes in almost like manner the obligation as if it never arose. However, such seeming similarity between the two types of sale contracts is clear only when both are compared in their perfection stages, when no obligation has been performed.

When, however, performance stage is reached, a contract of sale assumes different consequences from a contract to sell. In a contract of sale, delivery would transfer ownership to the buyer, and therefore rescission must necessarily be done judicially since only the courts can grant the remedy of recalling ownership that has passed to the buyer and returning it to the seller. On the other hand, in a contract to sell, delivery of the subject matter does not transfer ownership to the buyer, and therefore when the condition is not fulfilled (*i.e.*, non-payment of the purchase price) no court intervention is needed to "rescind"

[27] The obligation of the seller to transfer ownership and deliver possession of the subject matter is conditioned upon the full payment of the price. Consequently, in a conditional obligation, "the acquisition of rights, as well as the extinguishment or loss of those already acquired, shall depend upon the happening of the event which constitutes the condition" (Article 1182). And the non-happening of the condition, *i.e.* the non-payment of the price, "shall extinguish the obligation" (Art. 1184).

[28] TOLENTINO, *supra* note 12, at 170.

the contract since ownership has remained with the seller. If court intervention is necessary, it is not for the rescission of the contract, but for the recovery of the possession from the buyer who is not entitled thereto.

In short, in their executory stages, there is no practical difference in remedies available to the innocent party in both a contract of sale and a contract to sell for purposes of rescission, since both can be done extrajudicially. When performance stage has been reached, generally, court action is necessary to rescind a contract of sale; whereas, no such court action is necessary to rescind a contract to sell.

In any event, the failure to clearly define the differences between the obligations created by a contract of sale, on one hand, and the obligations created by a contract to sell, on the other, has actually created a distortion of doctrinal pronouncements in certain decisions of the Supreme Court when covering *facio ut facias* contracts because of their similarity to contracts to sell.

VIII. REVIEW OF LEADING SUPREME COURT DECISIONS[29]

The requisite for the subject matter of a valid and binding sale contract to exist are that it must be: (a) existing or subject to coming into existence;[30] (b) licit;[31] and (c) determinate,[32] or at least determinable.[33] When the subject matter of a sale contract does not possess all three requisites, then there can be no valid and binding sale contract to enforce.

On the other hand, the requisites for the price of a valid and binding sale contract are: (a) it must be real;[34] (b) it must be in money or its equivalent;[35] (c) it must be certain or ascertainable;[36] and (d) the manner of payment of price must be agreed upon.[37] When the certainty of the price is not met at perfection, then there is no valid and enforceable contract.[38]

[29] The author will use the generic term "sale contract" to embody both a contract of sale and a contract to sell in the discussions that will follow.

[30] Civil Code of the Philippines, art. 1462.

[31] Civil Code of the Philippines, art. 1459.

[32] Civil Code of the Philippines, art. 1460.

[33] Civil Code of the Philippines, art. 1460.

[34] Civil Code of the Philippines, art. 1471.

[35] Civil Code of the Philippines, arts. 1458, 1468.

[36] Civil Code of the Philippines, art. 1469.

[37] Velasco v. Court of Appeals, 51 SCRA 439 (1973); Navarro v. Sugar Producer's Corp., 1 SCRA 1180 (1961).

[38] Tan Tiah v. Yu Jose, 67 Phil. 739 (1939).

It has been the established doctrine that "[a]n offer to sell and an acceptance do not create a valid and binding contract to sell when the terms and conditions of the price and its payments have not been agreed upon, and any action for specific performance will not prosper."[39]

In spite of the requisites of subject matter and price to support a valid and binding sale contract, the Supreme Court started to legitimize certain contracts as being and embodied in the genus "sale" when more properly they should be considered as part of the scope of *facio ut facia* contracts.

A. Quantity of Subject Matter Not Essential for Perfection

In 1989, the Supreme Court in *National Grains Authority v. Intermediate Appellate Court*,[40] held that the failure to express the exact quantity of the subject matter did not prevent a valid and binding sale contract from coming into existence, by showing that the subject matter fulfilled the requisite of at least being determinable.

The facts in that case show that seller Soriano entered into an agreement with NGA for the former to sell and deliver and for the latter to purchase a maximum of 2,640 cavans of palay which *was to be harvested from the seller's farmland*, pursuant to the requirements of Pres. Decree No. 4, which authorized the NGA to purchase palay grains from qualified farmers. The following day, seller Soriano delivered 630 cavans of palay to NGA. Subsequently, NGA refused to make payments pending the investigation being conducted showing that the seller was not a *bona fide* farmer and the palay delivered by him was merely taken from the warehouse of a rice trader, and he was later on advised to take back the 630 cavans of palay delivered by him. Seller Soriano filed the action to demand specific performance against NGA to pay him the price of the palay delivered.

In deciding that the action for specific performance of the seller against NGA for the payment of the price of the palay grains delivered was valid, the Supreme Court, noting from the findings of the lower court that the palay came from seller Soriano's farmland, characterized the transaction as a sale contract and quoted the definition of sale under Art. 1458 of the Civil Code. The Court held:

> In the case at bar, Soriano initially offered to sell palay grains produced in his farmland to NGA. When the latter accepted the offer by noting in Soriano's Farmer's Information Sheet a quota of 2,640 cavans, *there was already a meeting of the minds between the parties. The object of the contract were the palay grains produced in Soriano's farmland and the [NGA] was to pay the same depending upon its quality. The fact that the exact number of cavans of palay to be delivered has not been determined does not affect the perfection of the contract.*[41] Article 1349 of the New Civil Code provides: "The fact that the quantity is not determinate shall not be an obstacle to the existence of the contract, provided it is possible to determine the same, without the need of a new contract between the parties." In this case, there was no need for [NGA] and Soriano to enter into a new contract to determine the exact number of cavans of palay to be sold. Soriano can deliver so much of his produce as long as it does not exceed 2,640 cavans.[42]

[39] Navarro v. Sugar Producer's Corp., 1 SCRA 1180 (1961); Tan Tiah v. Yu Jose, 67 Phil. 739 (1939).

[40] 171 SCRA 131 (1989).

The basic authority quoted by *National Grains Authority* is Art. 1349 of the Civil Code which provides for the test of the subject matter being "determinable" in the sense that the subject matter can be made determinate without the parties needing to enter into a new contract. In that case, although the action for specific performance was for 630 cavans of palay, the terms of the contract agreed upon showed the subject matter to be determinable because it specified a maximum amount of 2,640 cavans of palay and designated the source: from the farmland of seller Soriano. Therefore, the agreement on the subject matter is valid and produced a valid and binding sale contract upon perfection.

Unfortunately, the Supreme Court in 1993 in the case of *Johannes Schuback & Sons Phil. Trading Corp. v. Court of Appeals*,[43] unduly extended the *National Grains Authority* ruling even to contracts which constitute supply agreement rather than sales contracts. In that case, during the negotiations for the supply of engine parts, the supplier gave a formal written offer containing the item numbers, quantity, part number, description, unit price, and the total to the buyer. A few days later, the buyer issued a purchase order containing only the item numbers and description, but without the quantity per unit and confirmed that he will submit the quantity per unit he wanted to order within a week's time. At that point the supplier already placed an order to the German manufacturer in order to avail of the old price, which order was subject to a 30% cancellation penalty provision.

A week later, the buyer confirmed the quantities of the items ordered. The buyer eventually refused to open the letter of credit to effect payment saying that he did not make any valid purchase order and that there was no definite contract created. The supplier then brought an action to recover from the buyer the 30% cancellation fee paid to the German manufacturer, the storage fee and interest charges, including unearned profits.

The Supreme Court held that although the purchase order issued by the buyer did not contain the quantity he wanted to order and merely bound himself to the terms of the price of the spare parts described, a binding contract of sale

[41] 171 SCRA 131, 136. (emphasis supplied)

[42] 171 SCRA 131, 136.

[43] 227 SCRA 719 (1993).

existed between them *upon issuance of the purchase order even though the quantities were confirmed only later on*, at the time the supplier ordered the items from the German manufacturer as to have made it liable for the 30% cancellation charge.

The Court of Appeals held that there could not be a valid sale contract between the supplier and the buyer at the time of the issuance of the purchase order and the ordering of the items by the supplier from the German manufacturer, and therefore dismissed the case. On appeal, citing *National Grains Authority*, the Supreme Court held: "[Q]uantity is immaterial in the perfection of a sales contract. What is of importance is the meeting of the minds as to the *object* and *cause*, which from the facts disclosed . . . these essential elements had already concurred [at the time the supplier placed the order with the German manufacturer]."[44]

The problem with the basic ruling in *Johannes Schuback* is that at the "point of perfection" decreed by the Supreme Court, the fact that the quantity of the subject matter was unspecified, and that there were no terms or stipulations upon which the parties could determine the same without need of entering into a new agreement, would not fulfill the requirements of "determinable" subject matter, and therefore, no valid and binding sale contract had yet arisen. If there was already a perfect contract of sale upon the giving of the purchase order without quantity, and if in fact later the buyer did not confirm any quantity, there could be no basis of an action for specific performance on the part of the seller, since there is also no basis to compute the price which would depend upon the actual quantity of the items ordered.

The proper characterization of the contract that arose between the supplier and the buyer at the time the purchase order was given without specification of the quantity of the items ordered would have been a supplier's contract under the genus *facio ut facias* which would have preserved the integrity of the doctrines pertaining to the characteristics of the proper subject matter of sales contracts, and which would have accorded the supplier basis for recovering damages for breach of contract.

B. Option Contracts

An option to buy is not a contract of purchase and sale.[45] As used in the law on sales, an option is a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time, or under, or in compliance with, certain terms and conditions, or which gives to the owner of the property the right to sell or demand a sale. It is also sometimes called an "unaccepted offer."

[44] 171 SCRA 722. (emphasis supplied)

[45] Kilosbayan, Inc. v. Morato, 246 SCRA 540 (1995).

In *Adelfa Properties, Inc. v. Court of Appeals*,[46] the Supreme Court has clearly held that an option is not of itself a purchase, but merely secures the privilege to buy. It is not a sale of property but a sale of the right to purchase. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time. He does not sell his land; he does not then agree to sell it; but he does sell something, that is, the right or privilege to buy at the election or option of the other party. Its distinguishing characteristic is that it imposes no binding obligation on the person holding the option, aside from the consideration for the offer. Until acceptance, it is not, properly speaking, a contract and does not vest, transfer, or agree to transfer, any title to, or any interest or right in the subject matter, but is merely a contract by which the owner of property gives the optionee the right or privilege of accepting the offer and buying the property.[47]

In *Equatorial Realty Development, Inc. v. Mayfair Theater, Inc.*,[48] the Supreme Court in determining that an option clause in a contract of lease did not cover a real option held:

> As early as 1916, in the case of *Beaumont vs. Prieto*,[49] unequivocal was our characterization of an option contract as one necessarily involving the choice granted to another for a distinct and separate consideration as to whether or not to purchase a determinate thing at pre-determined fixed price. . . There was, therefore, a meeting of minds on the part of the one and the other, with regard to the stipulations made in the said document. But it is not shown that there was any cause or consideration for that agreement, and this omission is a bar which precluded our holding that the stipulations contained . . . is a contract of option, for, . . . there can be no contract without the requisite, among others, of the cause for the obligation to be established. . . The rule so early established in this jurisdiction is that the deed of option or the option clause in a contract, in order to be valid and enforceable, must, among other things, indicate the definite price at which the person granting the option, is willing to sell. As such, the requirement of a separate consideration for the option, has no applicability.

An option contract is a unilateral contract, unlike the sale contract which is a bilateral contract. A right or privilege is created in favor of the offeree-optionee to exercise the option which really means to accept an offer given under the option, and a corresponding obligation is created on the part of the offeror-optioner not to withdraw the offer during the option period. An obligation to offer is essentially a personal obligation "to do;" whereas an obligation not to withdraw the offer is essential an obligation "not to do." Consequently, when the

[46] 240 SCRA 565 (1995).

[47] 240 SCRA 565, 579.

[48] G.R. No. 106063 (21 November 1996).

[49] 41 Phil. 670 (1916).

offeror-optioner withdraws the offer in a option contract, that would be a breach of contract, but since it only constitutes an obligation not to do, an action for specific performance is not available, and the only remedy of the offeree-optionee is an action to recover damages based on breach of contract.

This was the principle adopted by the Supreme Court in *Ang Yu Asuncion v. Court of Appeals*,[50] where it held that "[i]f in fact, the optioner-offeror *withdraws the offer before its acceptance* (exercise of the option) by the optionee-offeree, the latter may not sue for *specific performance* on the proposed contract ("object" of the option) since it has failed to reach its own stage of perfection. The optioner-offeror, however, renders himself liable for damages for breach of the option."[51]

The ruling in *Ang Yu Asuncion* is a clear acknowledgment that although option contracts are nominate contracts with their governing provisions being found in the Title on the Law on Sales under the Civil Code, and although option contracts are preparatory contracts to sales contracts, nevertheless they are not species of the genus sales for which an action for specific performance would be available.

C. *Rights of First Refusal*

In *Guzman, Bocaling & Co. v. Bonnevie*,[52] without characterizing the contractual status of a right of first refusal or right of first priority, the Supreme Court nevertheless recognized that a lessee in a contract of lease that granted him a right of first refusal on the subject property, has legal standing to sue for the rescission of the contract of sale executed by the lessor in favor of a buyer who knew or ought to have known of the existence of the right of first refusal under the contract of lease.

In that case the Court held: ". . . Under Article 1380 to 1381(3) of the Civil Code, a contract otherwise valid may nonetheless be subsequently rescinded by reason of injury to third persons, like creditors. The status of creditors could be validly accorded to the holder of a right of first refusal for he has substantial interest that was prejudiced by the sale of the subject property to the third party buyer without recognizing his right of first priority. The Court further held:

> According to Tolentino, rescission is a remedy granted by law to the contracting parties and even to *third persons*, to secure reparation for damages caused to them by a contract, even if this should be valid, by means of the restoration of things to their condition at the moment prior to the celebration of said contract. It is a relief allowed for the protection of one of the contracting parties *and even third persons* from all injury and damage the

[50] 238 SCRA 602 (1994).

[51] 238 SCRA 602, 614.

[52] 206 SCRA 668 (1992).

> contract may cause, or to protect some incompatible and preferential right created by the contract. Rescission implies a contract which, even if initially valid, produces a lesion or pecuniary damage to someone that justifies its invalidation for reasons of equity."[53]

Later, in *Ang Yu Asuncion v. Court of Appeals*,[54] the Supreme Court, through Justice Vitug, gave an extensive discussion on the nature of a right of first refusal, as it distinguished it from a sale contract and an option contract. It held that:

> [i]n the law on sales, the so-called 'right of first refusal' is an innovative juridical relation, but cannot be considered a perfected contract of sale under Article 1458 of the Civil Code. Neither can the right of first refusal, understood in its normal concept, *per se* be brought within the purview of an option . . . or possibly of an offer. . . [since both] would require, among other things, a clear certainty on both the object and the cause or consideration of the envisioned contract.

The Court held that "[i]n a right of first refusal, while the object might be made determinate, the exercise of the right, however, would be dependent not only on the grantor's eventual intention to enter into a binding juridical relation with another but also on the terms, including the price, that obviously are yet to be later firmed up. Prior thereto, it can at best be so described as merely belonging to a class of preparatory juridical relations governed not by contracts (since the essential elements to establish the *vinculum juris* would still be indefinite and inconclusive) but by, among other laws of general application, the pertinent scattered provisions of the Civil Code on human conduct."[55]

The Court also characterized that a breach of a right of first refusal as not being subject to an issuance of a writ of execution even under a judgment that recognizes its existence, nor would it be enforceable by specific performance without thereby negating the indispensable element of consensuality in the perfection of contracts. It held that the only remedy available for breach of the right of first refusal would be an action for recovery of damages under Article 19 of the Civil Code.[56]

The basis for such conclusion of the Court was its earlier discussion in the decision that held that even in the case of a valid option contract, that is supported by a separate consideration, the withdrawal of the offer in breach of the contract, would grant the offeree-optionee only the right to recover damages, but not the enforcement of a contract of sale that never was perfected because of the withdrawal of the offer before the acceptance was given.

[53] 206 SCRA 668, 675-676. (emphasis supplied)

[54] 238 SCRA 602 (1994).

[55] 238 SCRA 602, 614-615.

[56] 238 SCRA 602, 615.

The difficulty with the *Ang Yu Asuncion* doctrine on the right of first refusal, was its characterization of the right of first refusal as a "preparatory juridical relation" governed not by Law on Contracts but by "laws of general application, the pertinent scattered provisions of the Civil Code on human conduct." Under such characterization, its value in the realm of contracts was therefore illusory and not dependable as an "innovative juridical relation."

This rather illusory characterization in *Ang Yu Asuncion* led to the modification of the doctrine in the subsequent case of *Equatorial Realty Development, Inc. v. Mayfair Theater, Inc.*[57]

In that case, there was a contract of lease where the lessee was given a 30-day exclusive option to purchase the leased property in the event the lessor should desire to sell the same. The contractual stipulation did not provide for a price certain nor the terms of payment. Although the lessor did inform the lessee of the intention to sell the property and granted him the first option, nevertheless, the lessor subsequently sold the property to another person without going back to the lessee. The lessee filed an action for rescission against the lessor and the buyer of the property with remedy for specific performance for the lessor to sell the property to him.

The Supreme Court, in the main decision penned by Justice Hermosisima, found that the *Ang Yu Asuncion* ruling "would render ineffectual or inutile the provisions on right of first refusal so commonly inserted in contracts such as lease contracts." It held that there need not be a separate consideration in the right of first refusal since such stipulation was part and parcel of the entire contract of lease to which it was attached to. The consideration for the lease includes the consideration for the right of first refusal.

The Court held that in a situation where the right for first refusal is violated and the property is sold to a buyer who was aware of the existence of such right, the resulting contract is rescissible by the person in whose favor the right of first refusal was given, and although no particular price was stated in the covenant granting the right of first refusal, the same price by which the third-party buyer bought the property shall be deemed to be the price by which the right of first refusal shall therefore be exercisable.

The Court then proceeded to modify the *Ang Yu Asuncion* doctrine as follows:

> Under the *Ang Yu Asuncion v. Court of Appeals* decision, the Court stated that there was nothing to execute because a contract over the right of first refusal belongs to a class of preparatory/juridical relations governed not by law on contracts but by the codal provisions on human relations. This may apply here if the contract is limited to the buying and selling of the real property.

[57] G.R. No. 106063 (21 November 1996).

> However, the obligation of [the lessor] to first offer the property to [the lessee] is embodied in a contract. . . It should be enforced according to the law on contracts instead of the panoramic and indefinite rule on human relations. The latter remedy encourages multiplicity of suits. There is something to execute and that is of [the lessor] to comply with its obligation to the property under the right of the first refusal according to the terms at which they should have been offered then to [the lessee], at the price when that offer should have been made. Also, [the lessee] has to accept the offer. This juridical relation is not amorphous nor is it merely preparatory. . . [and] can be executed according to their terms.

Equatorial Realty decreed that a right of first refusal, which is part of a bilateral contract, such as a contract of lease, is subject to specific performance, but only when certain conditions have been met (which are the same conditions that would probably trigger the right of first refusal), namely, the decision taken by the seller to sell the subject property and the price upon which he has decided to sell, or that in fact he has offered to sell or has sold the subject property to a third party, either of which would supply the necessary ingredients (*i.e.*, the price and the terms of payment) necessary to enforce the resulting contract of sale once the right of first refusal is triggered.

The *Equatorial Realty* doctrine would therefore place the right of first refusal at a higher hierarchical position than an option contract since the *Ang Yu Asuncion* doctrine which holds that even when the option contract is supported by a consideration separate from the purchase price, "if in fact the optioner-offeror withdraws the offer before its acceptance (exercise of the option) by the optionee-offeree, the latter may not sue for specific performance on the proposed contract ("object" of the option) since it has failed to reach its own stage of perfection." In other words, while in a valid option contract the withdrawal of the offer in breach thereof would not give rise to a valid and binding contract of sale by the exercise of the option, in a right of first refusal, the withdrawal of the offer or refusal to make the offer for the sale of the subject property would still entitle the person in whose favor the right of first refusal is granted, to exercise the right that would give rise to a valid, binding and enforceable contract of sale!

The failure of the Supreme Court to properly identify the nature and characteristic of the underlying contractual relationship in such preparatory contracts that lead to or intended to mature into sales contracts or other contractual relationship, and the insistence to fit them into the governing laws and jurisprudence on particular nominate contract is what has created conflicting doctrines within such areas. To the author, the solution to keeping the integrity of the statutory and jurisprudential doctrines pertaining to nominate contracts, in this case the Law on Sales, is to create clear jurisprudential doctrines pertaining to innominate contract known as *Facio Ut Facias* contracts.

IX. INSTITUIONALIZING THE LAW ON *FACIO UT FACIAS* CONTRACTS

There are contractual arrangements entered into in the commercial world which, by themselves, are intended merely to set the *broad but underlying relationship* between parties as the basis for continual dealings and pursuant to which specific and serial contracts would be entered into during the course of their relationship. Being general contractual relationships, they are necessary because of the uncertainty of prevailing economic conditions upon which the details can only be fixed later on.

A very good example of such contractual arrangements would be a Supply Agreement entered into between, say a manufacture of goods and a distributor of products such as an entity engaged in the export of products or in operating department stores. Often, such supply arrangements would cover quota or targets to be met on both sides, but would be flexible in recognition of several factors in the commercial world that cannot be anticipated such as the flow of the market at any given period, the changing costs and prices of materials and labor, the uncertainty of demand, etc. And yet a general supply contract is entered into to establish a formal juridical relationship between the parties upon which they can plan their business affairs.

Often, therefore, in a long-term relationship or where the term is indefinite and not fixed, the parties try to work on a target of transactions without being strictly bound thereto, and cannot even pin down the pricing of the items sold or supplied, except each time the order is placed or when delivery is made by the supplier. The underlying supply agreement is meant to create a legal relationship between the supplier and the buyer, but by itself is not yet a sale contract because it does not contain definite items respecting the subject matter and the price. The supply agreement is meant to be the underlying basis by which a series of subsequent binding contracts would be entered into. In the above illustration, it would be a series of sales contracts as each order is placed and serviced.

The underlying supply agreement in the illustration between the supplier and the buyer is not a species of the sales contract because by itself it has not created obligations on the part of the seller to deliver ownership and possession of determinate or determinable subject matter, and no obligation on the part of the buyer to pay a price certain. The supply agreement does not, therefore, by itself, create real obligations on the part of either of the contracting parties; what it constitutes is an "agreement to agree," which in the illustration above would cover an agreement to enter into series of sales contracts.

An "agreement to agree" is a species of the innominate contract *facio ut facias* because it essentially covers bilateral obligations "to do" (*i.e.*, obligations to "enter into a contract"), and does not create real obligations. Consequently, a supply agreement, in case of breach thereof, is not capable of enforcement by specific performance, but would give legal basis for recovery of damages for breach of

contract, which recognizes the underlying contractual relationship between the contracting parties.

A supply agreement may also be in preparation for a specific future sale contract and may not mean to establish a long-term relationship between supplier and buyer. This was the case in *Johannes Schuback* whereby the purchase order was issued by the buyer without yet committing itself to the exact quantity of the subject matter. In effect, when the buyer issued the purchase order, it entered into a limited supply agreement with the supplier, *i.e.*, with the specific quotation given by the supplier binding itself to supply the parts at specified unit prices during the covering period. The buyer, in issuing the purchase order, committed itself at that point "to purchase," or rather, "to enter into a purchase agreement," within the period indicated. What was constituted at that point was merely an "agreement to agree," which meant that both parties agreed that they will enter into a final sale contract within the covered period.

Prime White Cement Corp. v. Intermediate Appellate Court,[58] although the *ratio decidendi* dealt with corporate issues on powers of corporate officers to bind the corporation and the principle of self-dealings by corporate directors, nevertheless recognized that a Dealership Agreement entered into by a supplier with the manufacturing corporation for the supply of white cement products over a period would be valid and binding if the price formula covered in the contract was reasonable to afford protection to the corporation. In that case, the Court held that when the Supply Agreement provided that the corporation would be obligated to supply "20,000 bags of white cement per month, for five years . . . at a fixed price of P9.70 per bag,"[59] the price was in fact unreasonable as to be void at the instance of the corporation, having been entered into with a director of the corporation. The Court held that the dealing director:

> is a businessman himself and must have known, or at least must be presumed to know, that at that time, prices of commodities in general, and white cement in particular, were not stable and were expected to rise. At the time of the contract, petitioner corporation had not even commenced the manufacture of white cement, the reason why delivery was not to begin until 14 months later . . . no provision was made in the 'dealership agreement' to allow for an increase in price mutually acceptable to the parties.[60]

In other words, *Prime White Cement* recognized that in a Supply Agreement, involving the delivery of merchandise over a long period of time, it would even be unreasonable to fix the price already for goods yet to be delivered in the future; and that properly, the contract should provide only for future agreement of the price at the time of compliance with the delivery commitments. The Court

---

[58] 220 SCRA 103 (1993).

[59] 220 SCRA 103, 112.

[60] 220 SCRA 103, 112.

even cited that in the sub-contracts entered into by the dealing director, such flexible price-fixing formula which were provided based on the prevailing market rate at the time of delivery, were deemed to be more reasonable. There was therefore implied recognition in *Prime White Cement* that supply contracts or dealership agreements which constitute merely agreements to agree or agreements to enter into series of sale contracts during its life, are valid and reasonable arrangements which can be binding on the parties.

Contrary to the decision in *Johannes Schuback* that upon issuance of the purchase order there was already a valid and binding sale contract, there could not have been one at that point since the quantity of the subject matter of the supposed sale contract was not given and could not be obtained without the parties needing to enter into a new contract (*i.e.*, to subsequently agree) of what that quantity would be. If the buyer in *Johannes Schuback* had not confirmed the quantity later on, nothing would have happened with the supposed existing sale contract which could not have been subject to specific performance because there was no determinate subject matter, much less a price certain, upon which enforcement could be pursued.

But the equity sought by the Court in *Johannes Schuback* would have been achieved without distorting principles in the Law on Sales, by recognizing that, at the time of the issuance of the purchase order, a perfected *facio ut facias* contract arose, which took the form of a singular supply agreement, and there being a contractual relationship, the unjustified refusal of the buyer to proceed with the conclusion of the sale would be in breach of that contract, and although not subject to specific performance, would entitle the non-defaulting party to recovery of damages, including the 30% cancellation fee incurred by the supplier in ordering the items from the manufacturer.

Another clear example of the species *facio ut facias* is a contract granting a right of first refusal, whether it is constituted as its own contract, as in the case of *Ang Yu Asuncion*; or it is part of principal contract, as in the case of *Equatorial Realty*.

The essence of a right of first refusal is to constitute two bilateral obligations "to do:" on the part of the offeror that if in the future he would decide to sell the subject property, he will have extend to the offeree an offer to sell; and on the part of the offeree, that if it be his desire at that point to accept the offer, to enter into a sale contract. The only existing obligation created by the perfection of a right of first refusal arrangement therefore is an obligation "to do" on the part of the offeror, and a privilege on the part of the offeree, which if exercised would give rise to a valid and binding sale contract. The arrangement would be a species of *facio ut facias* contracts that encompass an "I do that you may do" situation if you look at the entire exercise of the relationship.

Under such contractual classification, then the Supreme Court could move into the doctrinal position it took in *Equatorial Realty* that refused to treat a right of first refusal arrangement as belonging to a class of preparatory/juridical

relations not governed by law on contracts but by the codal provisions on *human relations*. As a species of *facio ut facias* contracts, a right of first refusal arrangement can therefore *"be enforced according to the law on contracts instead of the panoramic and indefinite rule on human relations."* But contrary to the sweeping acknowledgment given in *Equatorial Realty*, being a species of the *facio ut facias* contracts, a right of first refusal arrangement merely covers an obligation "to do" and is not subject to specific performance unless and until it reaches the next stage of ripening into a sale contract (by the exercise of the right) and therefore would constitute a real obligation which can then be the subject of specific performance. Under such position, the *Ang Yu Asuncion* doctrine of stating that a right of first refusal arrangement is not by itself subject to specific performance is correct because of the very nature of the personal obligation constituted, but unlike the *Ang Yu Asuncion* doctrine, the remedy for its breach is not damages under Art. 19 of the Civil Code on human relations which does not recognize a contractual relationship, but an action for damages for breach of contract under the *Equatorial Realty* doctrine which recognizes the relationship as given rise to a contract. Under such a setting, rights of first refusal so commonly inserted in leases and other contracts over real estate would not be rendered "inutile".

Equatorial Realty also makes a distinction between a right of first refusal which is limited to buying and selling the real property, to which it concedes that the *Ang Yu Asuncion* doctrine of non-availability of specific performance applies, and that which is contained in another principal contract (*e.g.*, contract of lease), which according to the Court *"should be enforced according to the law on contracts instead of the panoramic and indefinite rule on human relations."* Although the observation is correct that a right of first refusal arrangement can create a contractual relationship, realizing the nature of the obligation created by such contractual relationship does not make a personal obligation subject to specific performance. Even in his concurring opinion in *Equatorial Realty*, Justice Panamanian used the terms "make and send the offer" and "deliver an offer to sell" to describe the obligations of the lessee-offeree in the right of first refusal, which still constitute obligations "to do" and which are not real obligations.

Another example of a *facio ut facias* contractual relation would be a commercial franchise arrangement, which, although it has the payment of an up-front aspect, would generally constitute an arrangement of future obligations to do on the parts of both the franchisor and the franchisee. For example, under the franchise arrangement, the franchisor is obliged to allow the franchisee to use it trademarks and servicemarks; the franchisor would be obliged to undertake the design and supervision of the construction of the store outlets and the training of the managerial and staff of the franchisee. On the other hand, the franchisee is obliged to operate the franchise business in accordance with the systems of the franchisor, and to remit royalty payments from the sales it makes to the public. The franchise agreement usually also carries an obligation to enter into future sales contracts between the parties either when it comes to the materials and equipment for the store outlets and the ingredients of the items to be sold in the store outlets.

In a franchise arrangement, when one of the parties refuses to proceed with any of their obligations to do, such as failure to grant the necessary training, or to provide for advertising exposure, on the part of the franchisor, the franchisee has no legal action to seek specific performance but rather rescission and/or an action for damages. On the other hand, if the franchisee should refuse to proceed with the running the business in accordance with the franchisor's systems, or to even continue with the business, there is no doubt that the franchisor would not be in a position to file an action to compel the franchisee to comply, but the proper remedy would be to rescind and/or recover damages.

X. CONCLUSIONS

The author agrees with the observation of Justice Vitug in his dissenting opinion in *Equatorial Realty* that "[i]t would be perilous a journey . . . to try to seek out a common path for such juridical relations as [sales] contracts, options, and rights for first refusal since they differ, substantially enough in their concepts, consequences and legal implications."

Several contractual and juridical relationships are being evolved in the modern business world not even dreamt of at the time when the provisions of the Civil Code were drafted covering both nominate and innominate contracts. Although Art. 1307 of the Civil Code enjoins that innominate contracts be regulated and construed by the rules governing the most analogous nominate contracts, the intention has never been for innominate contract situations to dilute the logical and well-established doctrinal basis of analogous nominate contracts.

There is a need to recognize that many new contracts being fashioned today are truly innovative, and the should be adjudged by analyzing their inherent structure to be able to evolve a jurisprudential pool of integrated and logical doctrines that would be the basis upon which parties can determine their rights and obligations.

REINFORCING THE ENFORCEMENT PROCEDURE: THE INTERPLAY OF THE LITIGATION ASPECT OF COMMUNITY ENFORCEMENT WITH DIRECT EFFECT AND STATE LIABILITY FOR DAMAGES FOR BREACHES OF COMMUNITY OBLIGATIONS

LORENZO U. PADILLA*

ABSTRACT

From a spectator's perspective and in the context of procedures for ensuring the effectiveness of Community law, this paper seeks to review the interplay, as an ensemble, under the remedial system of Community law, between private enforcement (mainly through the medium of direct effect pleas[1] and damage claims against Member States in breach of Community obligations[2]) and public enforcement procedures made available under the EC Treaty[3] for failure of Member States to fulfill obligations under Community law.

It endeavours to present such private enforcement procedures as primarily reinforcing, whilst separately pursuing distinct "objects, aims and effects," the public enforcement procedures made available under the EC Treaty against defaulting Member States.

* *LL.B.* 1983, Ateneo de Manila University. The author is a Faculty Member of the Ateneo de Manila School of Law.

[1] By rulings under the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 177. [hereinafter referred to either as "EC Treaty" or simply "Treaty;" also, unless otherwise indicated, all Article references are hereafter understood to refer to those of the Treaty].

[2] Under Cases C-6/90 and C-9/90 Francovich and Bonifaci v. Italy, 1991 E.C.R. I-5357; Joined Cases C-46 & 48/93 Brasserie du Pûcheur v. Germany, 1996 E.C.R. I-1029; Joined Cases C-178 179, 188, 189 & 190/94 Dillenkofer v. Germany, 1996 E.C.R. I-4845; and Case C-5/94 The Queen v. Ministry of Agriculture, Fisheries and Food, *ex parte:* Hedley Lomas (Ireland) Ltd., 1996 I-2553. *See also*, Case C-91/94 Faccini .Dori v. Recreb SRL., E.C.R. 1994 I-3325; C-106/89 Marleasing SA v. Comercial Internacional de Alimentacion SA., 1990 E.C.R. I-4135; and Case C-334/92 Wagner Miret v. Fondo de Garantia Salarial, 1993 E.C.R. I-6911.

[3] Mainly under Article 169, EC Treaty.