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THE SUCCESSORSHIP DOCTRINE IN PHILIPPINE LABOR RELATIONS

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Well-settled is the rule in Philippine labor relations that the employer is bound to honor the contractual rights of his or her employees by virtue of a collective bargaining agreement. Our laws, however, are silent on the labor obligations of a successor employer in a business which experiences a change of ownership. The Supreme Court has had few occasions to rule on the matter. But for Filipino workers, the prevailing jurisprudence can best be described as disturbing.

The High Court has been mindful of schemes perpetrated by employers to abscond on their labor obligations through a change of ownership and has held that a successor employer in bad faith must honor the labor obligations of a predecessor employer. Otherwise, if the change of ownership occurs through a bona fide sale of assets, a successor employer cannot be required to honor the labor obligations of the previous employer. The principle of privity of contract compels this result.

But this reliance on the principle of privity of contract places Filipino workers in a precarious condition. The implication is that the successor employer has no obligation whatsoever to the predecessor's employees even if the business is continued. The workers stand to lose their employment, because the successor employer is not under the duty to rehire their services. Moreover, their other labor claims cannot be enforced against the new employer.

A need arises therefore to update our labor laws to insure the security of tenure and other interests of our laborers in such situations.

The present article attempts to determine the extent of legislative reforms required for Philippine labor relations for the protection of the interests of laborers. It proposes the application of the successorship doctrine which has judicially evolved in the United States. For the doctrine to apply there must be a sustantial continuity of a business across a change of ownership. Then, two core values in the American legal system come into play: labor policy and capital mobility. Simply put, the successorship doctrine provides that if the imposition of a particular labor obligation would further labor policy and would not unduly hamper free transferrability of productive assets, the labor obligation should survive a change of ownership.

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Applying these two criteria in the Philippine context, it is found that a bona fide successor may be required to observe the following duties to predecessor employees: (1) duty to hire; (2) duty to arbitrate the extent of a successor's obligations under an existing collective bargaining agreement; (3) duty to bargain with the union recognized or certified as the employees' bargaining representatives during the predecessor's incumbency; and (4) duty to remedy the predecessor's unfair labor practices.

INTRODUCTION

A. Background of the Study

Our labor laws have been silent on the rights of workers in cases where ownership of a business changes. The few Supreme Court decisions on the matter indicate a lack of necessity in the past to fill this void, either because business buy-outs had been infrequent or because parties had most often made arrangements which satisfactorily addressed the workers' concerns.

The 8 December 1986 enactment of Proclamation No. 50 launching the Aquino Government's privatization program ended labor's complacency on the issue. Section 27 of said law expressly provides that the sale or disposition of the Government's controlling interest in or of all or substantially all of the assets of a government-owned-and-controlled corporation will automatically result in the termination of the employees working in said corporation. The buyers are given absolute discretion to hire or replace the existing work force. Faced with the prospect of losing their jobs and the gains they derived from bargaining, workers in government firms turned to the legislative arena to seek redress where they received positive responses. Bills have been filed in both houses of Congress proposing the enactment of laws that would require purchasers not only of government but also of privately-owned businesses to retain their predecessors' employees and to observe the terms of existing collective agreements.[1]

The novelty and far-reaching effects of these proposed measures necessitate an inquiry into their wisdom. Fortunately, there are decisions in the United States directly addressing this problem. In that jurisdiction, the rights of workers in a change-in-ownership situation

[1] See House Bill No. 8910 authored by Congressman Vicente de la Serna; House Bill No. 10943 authored by Congressman Ramon J. Jabar; and Senate Bill No. 303 authored by Senator Ernesto Herrera.

are primarily determined through the application of the judicially-evolved successorship doctrine. The doctrine, in essence, states that a *bona fide* successor[2] to a business, under certain circumstances, may be held bound to the labor duties of his predecessor. First applied in 1964, the doctrine has gone through refinements because of legal and practical considerations. The doctrine could thus provide a framework for the current investigation.

B. Objective of the Study

This study seeks to determine, both from the viewpoint of legal policy and practicality, the propriety of allowing an employer's labor law obligations to survive a change of ownership. Factors that argue for and against such survival will therefore be identified. On the basis of these factors, a proposal will be made regarding the circumstances under which survival of labor obligations may be allowed and the labor obligations to which a successor may be held bound.

C. Methodology

The jurisprudence that is presently applied in determining the rights of workers in a change-in-ownership situation will be discussed briefly. This is to determine the extent of the changes required to protect workers who unfortunately get caught in such a situation. As the U.S. successorship doctrine will be used as framework for proposing changes in our labor laws, the rationale and the manner of application of the doctrine in said jurisdiction will be extensively examined. An analysis of our present labor laws and policies will follow to determine whether a different application of the doctrine is required. Thereafter, proposals will be made on the manner and the extent of application of the doctrine in Philippine labor relations.

D. Delimitation of the Study

This study takes for granted the constitutionality of a law requiring a successor to assume the labor obligations of his predecessor. Likewise, it does not take into account the conflict that may arise

[2] The term "successor" in U.S. Supreme Court decisions refers to a new owner of an enterprise who employs a substantial number of his predecessor's employees and continues the business of his predecessor in substantially the same manner. The term, however, will be used through out this paper to refer to a person or corporation that acquired an on-going concern.

between the workers in predecessor firms and the workers in a successor's existing business to which the former may be integrated.

I. PRESENT LAW AND JURISPRUDENCE

The rights of workers under the Labor Code[3] may be asserted only against their respective employers.[4] To establish an employment relation, a hiring must be shown through some contract, express or implied.[5] At times, however, a previously established employment relation is disrupted by a change in the legal identity of the owner of the employing industry. The change may be brought about in various ways. The rules determining the liabilities of the successor to the predecessor's employees differ, depending on the method used in effecting the change.

A. Changing the Form of the Business Organization

The theory of corporate entity has often been used by employers as a device in reorganizing their work force in order get rid of employees engaged in unionization. Cases decided by the Supreme Court have established a definite pattern of employer-conduct in the utilization of this scheme.[6] A corporate employer is besieged with demands for union recognition and collective bargaining. It responds with termination of employment of union members. Charged with unfair labor practices, the stockholders vote to dissolve the corporation. Shortly thereafter, a new corporation is formed to take over the same business and with the same stockholders at the helm. When ordered to reinstate the illegally dismissed employees, the stockholders put forth the defense

[3] LABOR CODE OF THE PHILIPPINES, PRES. DECREE NO. 442 (1974) as amended by REP. ACT. 6715 (1989).

[4] The Labor Code directs an "employer" as defined therein to observe certain conditions of work, to pay the minimum wage, to respect the employees right to security of tenure, to bargain and to refrain from interfering with the workers' exercise of the right to self-organization.

[5] P.V. FERNANDEZ & C.D. QUIASON, THE LAW ON LABOR RELATIONS 135 (1963)(citing Maligaya Ship Watchmen Agency v. Associated Watchmen & Security Union, 103 Phil. 920 (1958).

[6] See *H. Aronson & Co., Inc. v. Associated Labor Union*, 40 SCRA 7 (1971); *National Federation of Labor Union (NAFLU)* v. Ople, 143 SCRA 124 (1986; *A.C. Ransom Labor Union-CCLU v. NLRC*, 150 SCRA 498 (1987).

of lack of employment relation between the new corporation and the complaining employees. In such cases, however, the Court disregards the interposition of the new fictional entity. It reasons:

> It is very obvious that the second corporation seeks the protective shield whose veil in the present case could, and should be pierced as it was deliberately and maliciously designed to evade its financial obligations to its employees.
>
> ... when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporations as an association [of] persons, or, in case of two corporations merge them into one.[7]

The issue that has not come up for decision in the High Court is whether such a change, when made not in the context of unfair labor practices but for genuine business reasons, would justify the separation of employees from the enterprise absent a showing of just cause. The doctrine of piercing the corporate veil, however, has been applied by the Supreme Court not only in cases where the separate entity privilege is used for clearly illegal ends.[8] In a case, the Court disregarded the separate juridical personality of a dissolved partnership and a newly formed corporation, despite apparent good faith, in computing the latter's term of existence for purposes of compulsory coverage under the Social Security Act. The Court said that while the corporation may not have been formed for the purpose of evading a statutory obligation, "yet in substance, its theory that it has a separate and distinct personality from the defunct partnership would precisely result in such an evasion that cannot but defeat the purpose of the law."[9]

B. Mergers and Consolidations

Merger, on the other hand, is the union of two or more corporations where one absorbs all the others whose juridical personalities are extinguished.[10] Consolidation, on the other hand, is a union of two

[7] *A.C. Ransom*, 150 SCRA at 508 *(citing Claparols, v. Court of Industrial Relations*, 65 SCRA 613 (1975); *Koppel Phil. Inc. v. Yapco*, 77 Phil. 496 (1946); *Cease v. CA* 93 SCRA 483 (1979).

[8] *San Teodoro Development v. Social Security System*, 8 SCRA 96 (1963).

[9] *Id.* at 102.

[10] CAMPOS & CAMPOS, THE CORPORATION CODE COMMENTS, NOTES AND SELECTED CASES 340 (1981).

or more corporations in a new single corporation.[11] The personalities of all constituent corporations are extinguished in the process.[12] The extent of the liability of the surviving or consolidated corporation for the debts and obligations of the constituent corporations is set forth in Sec. 80 of the Corporation Code,[13] to wit:

> The surviving or consolidated corporation shall be responsible and liable for all the liabilities and obligations of each of the constituent corporations in the same manner as if such surviving or consolidated corporation had itself incurred such liabilities or obligations, and any claim, action or proceeding pending by or against any of such constituent corporations may be prosecuted by or against the surviving or consolidated corporation, as the case may be. Neither the rights of creditors nor any lien upon the property of any of each constituent corporations shall be impaired by such merger or consolidation.

The *nature* of the obligations (i.e. whether it would be limited to purely financial obligations or would include continuing contracts such as employment contracts) that would be deemed absorbed by the surviving or consolidated corporation is yet to be determined in an appropriate case by the Supreme Court.[14]

C. Sale of the Business

In cases of sale of the business, the rule is settled that the purchaser could not be held liable for the predecessor's labor contracts which he has not expressly assumed.[15]

> The rule is that unless expressly assumed, labor contracts such as employment contracts and collective bargaining agreements are not enforceable against a transferee of an enterprise, labor contracts being *in personam*, thus binding only between the parties. A labor contract merely creates an action *in personam* and does not create any real right which should be respected by third parties. This conclusion draws its force from the right of an employer to select his employees and to decide when to engage them as protected under our Constitution, and the same can only be restricted by law through the exercise of police power.[16]

Without a law requiring the purchaser of a business to absorb the employees of the seller, the Court feels that the most it can do, for reasons of public policy and social justice, is to direct such purchaser to give preference in employment to qualified separated employees of the predecessor.[17]

In some cases, however, employers sell their businesses in order to thwart their employees' efforts to unionize or to bargain collectively. The labor obligations of the seller would devolve upon the buyer where the latter willingly lends himself as an instrument to the commission of such unfair labor practices.

In *Cruz v. Philippine Association of Free Labor Unions*,[18] the Tan spouses sold their factory to Carlos Cruz after receiving demands for negotiation of a collective bargaining agreement from the Philippine Association of Free Labor Unions (PAFLU), the union certified as the bargaining agent of their employees. PAFLU filed a case for unfair labor practices against both the sellers and the buyer. During trial, the sellers disclosed that the buyer was made aware of the current labor problems in the factory. Imputing bad faith upon the buyer, the Court of Industrial Relations (CIR) ruled that he should be made solidarily liable with the sellers for the reinstatement and payment of backwages of the employees. The Supreme Court sustained the CIR saying that "[i]t would be a frustration of the statutory scheme in the Industrial Peace Act instituting a regime of free collective bargaining to hold otherwise."[19] Reliance upon *Visayan Transportation Co. v. Java*[21] where the Court first enunciated the rule that labor contracts are not enforceable against a transferee of an enterprise was found inappropriate. The Supreme Court reasoned:

> There is no need to inquire as to the applicability of such a decision in the disposition of the present case. If facts were otherwise and

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[11] *Id.*

[12] *Id.*

[13] BATAS PAMBANSA Blg. 68 (1980).

[14] In *Filipinas Port Services, Inc. Damasticor v. NLRC*, 177 SCRA 203 (1989), the Supreme Court ruled that an employee of a corporation merged with another corporation cannot claim from the latter retirement benefits corresponding to the period of his employment with the former. The facts, however, do not clearly show a statutory merger.

[15] *Visayan Transportation Co. v. Java*, 93 Phil. 962 (1953); *Fernando v. Angat Labor Union*, 5 SCRA 248 (1962); *MDII Supervisors & Confidential Employees Association (FFW) v. Presidential Assistant on Legal Affairs*, 79 SCRA 40 (1977); *Sundowner Development Corp. v. Drilon*, 18 SCRA 14 (1989)

[16] *Sundowner*, 180 SCRA at 18.

[17] *MDII Supervisors*, 79 SCRA at 47.

[18] 42 SCRA 68 (1971).

[19] *Id.* at 73.

[20] 93 Phil. 962

> no bad faith could be imputed to petitioner Cruz, then perhaps it would be in order to ascertain whether it governs the situation... petitioner Cruz is in the position of a tort-feasor, having been a party likewise responsible for the damage inflicted on the members of the respondent Union and therefore cannot justly escape liability.[21]

In *Philippine Land-Air-Sea Labor Union v. Sy Indong Company Rice and Corn Mill*,[22] the union filed unfair labor practices against Sy Indong Company Rice and Corn Mill (Sy Indong), a partnership. During the pendency of the case, Sy Indong sold its assets to Sen Chiong Rice & Corn Mill Co. (Sen Chiong). The union amended its complaint to include Sen Chiong as party defendant. It alleged that Sen Chiong and Sy Indong were one and the same entity. The CIR *en banc* absolved Sen Chiong on the theory that Sy Indong and Sen Chiong have separate and distinct juridical personalities which could not be disregarded by the mere fact that they have common partners. The Supreme Court reversed. Noting that Sen Chiong was organized on the very same day on which the assignment of the assets of Sy Indong took place and that the two companies have a common managing partner, the Court ruled:

> These circumstances, when considered in relation to the fact that the present unfair labor practice case had been pending in the CIR for about 18 months prior to [the sale], lead to no other conclusion than that the organizers of Sen Chiong were aware of said case when they established the company and acquired the assets of Sy Indong in Tubod, and that they either organized Sen Chiong in an attempt to relieve Sy Indong of the consequences or effects of the present litigation, or acquired said assets assuming the risk of having to bear the liabilities or part of the liabilities that said litigation may eventually entail.[23]

In *National Labor Union v. Court of Industrial Relations*,[24] Benito Estanislao sold his business to Ang Wo Long while negotiation of a collective bargaining agreement, commenced only after a strike, was under way. Four days after the execution of the deed of sale, a collective bargaining agreement was concluded between the firm and the union with Benito Estanislao signing as general manager. Meanwhile, Ang

[21] 42 SCRA at 77-78.

[22] 11 SCRA 277 (1964).

[23] *Id.* at 283.

[24] 116 SCRA 417 (1982).

Wo Long secured the necessary permits for the operation of the business. After this was accomplished, he sent letters to the employees notifying them of the sale and of his decision to close the business temporarily. The union filed a case for unfair labor practices against both Estanislao and Ang Wo Long. In the meantime, Ang Wo Long commenced operations employing twenty-four new workers in the firm. At first, the CIR found Ang Wo Long guilty of the charges after concluding that at the time of the signing of the collective bargaining agreement, he was already taking an active hand in the operation of the business. Upon reconsideration, however, the CIR reversed itself. It found that Ang took over the business only after securing the necessary permits and could not therefore, have had any knowledge of the existence of the union or of the collective bargaining agreement. On appeal, the Supreme Court reinstated the first decision of the CIR. It ruled that "it is irrational if not specious to assume that Mr. Ang bought a business lock, stock, and barrel without inquiring into its labor-management situation."[25] The court said that Ang, for having secured business permits, had shown himself to be a normally cautious buyer and could not but have extended "the same care and caution... to a more sensitive aspect of the business, one attracting the greatest degree of concern and attention of any new owner, which was the relationship of the workers to management, their willingness to cooperate with the owner, and their productivity arising from harmonious relations."[26] Ang's replacement of the union members with a new set of employees, considered together with his use of the same premises, the same business name, machineries and tools, and the same officials and supervisors, could not be read as anything than an attempt to rid the firm of unwanted union activity.[27]

It is evident from the abovecited cases that the determination of the good or bad faith of a transferee of a business depends on whether he has knowledge of facts which will show the underlying motive of his predecessor for the sale. This underlying motive can be deduced from the predecessor's previous acts of resisting unionization or collective bargaining. The doctrine evolved in these cases amount to a directive to third parties to keep a hands-off policy regarding businesses beset by labor problems. This doctrine is nevertheless justified by the need to promote free collective bargaining as the scheme to afford labor

[25] *Id.* at 428.

[26] *Id.* at 429.

[27] *Id.*

the opportunity to secure better working conditions and thus, to achieve industrial peace.[28] The same policy consideration may have led Justice Fernando to raise doubts on the applicability of the privity of contract rule even in cases where no unfair labor practices are involved. Thus, in *Cruz*, he invoked the rule on joint tortfeasors in ordering the successor to remedy his predecessor's unfair labor practices "without discounting... the criticism to which the *Visayan Transportation Company* case had been subjected insofar as it would ignore the binding force of a collective bargaining contract just because of the sale of the enterprise, when the vendee would be looked upon as the successor-in-interest of the vendor to whatever rights or obligations [that] could be transferred."[29]

II. THE DOCTRINE OF EMPLOYER SUCCESSORSHIP IN THE UNITED STATES

In the United States, the determination of the labor liabilities of a *bona fide* successor to a business had traditionally been based on three legal principles. These principles are the following: (1) the alter ego rule under which an organization succeeding to a business is considered a mere continuation of the personality of the predecessor;[30] (2) the corporate rules on mergers and consolidations which generally hold a surviving corporation bound to perform the obligations of the corporation it absorbs;[31] and (3) the principle of privity of contract which absolves a purchaser of business assets from the labor obligations of the seller absent the former's affirmative assumption of said obligations.[32] These traditional bases of determining successor liability,

[28] *Cruz*, 42 SCRA at 73.

[29] *Id.* at 78.

[30] Note, *The Contractual Obligations of a Successor Employer Under the Collective Bargaining Agreement of a Predecessor*, 113 U. PA. L. REV. 914, 917 (1965) (citing *United Shoe Workers v. Brooks shoe Mfg. Co.*, 183 F. supp. 568 (E.D. Pa. 1960) (one member of a partnership became the new employer); *Kraft v. Garfield Park Community Hosp.*, 296 III. App. 613, 16 N.E. 2d 936 (1938) (new incorporation of an old corporation); *In re Reif*, 9 N.Y. 2d 387, 174 N.E 2d 492 N.Y.S. 2d 395 (1961) (partnership formed a corporation).

[31] *Id.* at 918. Where there is a merger or consolidation, the labor obligations of the surviving corporation would really depend on the state law under which the combination was effected. 15 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, Sec. 7102 (Perm Ed. 1973).

however, have given way to a new analysis — the successorship doctrine — in order to more fully implement federal labor law policy.

The United States Supreme Court first applied the doctrine of successorship in *John Wiley & Sons, Inc. v. Livingston*.[33] In that case, Interscience Encyclopedia, Inc. and Interscience Publishers, Inc. (Interscience) merged with a larger publishing firm, John Wiley & Sons, Inc. (Wiley). All the employees of Interscience were absorbed by Wiley. For some time after the merger, these employees continued to perform the same duties in the Interscience plant. Later, the Interscience plant was closed and the Interscience employees were integrated with that of Wiley's.

District 65, Retail, Wholesale and Department Store Union, which represented forty of Interscience's eighty employee complement, requested Wiley to arbitrate on the effect of the merger on the collective bargaining agreement previously concluded between the union and Interscience. Wiley refused claiming that being a stranger to the agreement, it was not bound by its arbitration clause. The union brought suit to compel Wiley to arbitrate. The federal district court ruled for Wiley, but both the Court of Appeals for the Second Circuit and the United States Supreme Court reversed.

The United States Supreme Court could have overcome the lack of privity argument of Wiley by relying on the New York Stock Corporation Law.[34] This law imposes upon the corporation surviving a merger the duty to honor the contracts of the corporation it absorbs.[35] The United States Supreme Court, however, chose not to base its decision on this narrow ground. Instead, it applied federal law which it felt dutybound to "fashion from the policy of [their] national labor laws."[36]

Seizing upon the opportunity presented in *Wiley*, the United States Supreme Court announced that it could not allow changes in the corporate structure or ownership of a business enterprise to undermine the federal policy of settling labor disputes by arbitration.[37] It also recognized that "[t]he objectives of national labor policy... require that the rightful

[32] *Id.* at 917.

[33] 376 U.S. 543, 11 Ed. 2d 898, 84 S. Ct. 909 (1964).

[34] The Union had actually relied on Sec. 90 of the New York Stock Corporation Law which provides that no "claim or demand for any cause" against a constituent corporation shall be extinguished by a consolidation

[35] NEW YORK STOCK CORPORATION LAW, Sec. 90.

[36] 376 U.S. at 548.

[37] *Id.* at 549.

prerogative of owners independently to rearrange their businesses... be balanced by some protection to the employees from a sudden change in the employment relationship."[38]

To meet Wiley's lack of privity argument, the United States Supreme Court ascribed to a collective bargaining agreement a peculiar nature that require its observance even by an unconsenting successor. Thus,

> While principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. "... [I]t is a generalized code to govern a myriad of cases which draftsmen cannot wholly anticipate... The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular plant." Central to the peculiar status and function of a collective agreement is the fact... that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate... must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.[39]

The United States Supreme Court, however, was careful to limit its holding to circumstances presented in *Wiley*.

> We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with the union does not automatically terminate all rights of the employees covered by the agreement, and that, in *appropriate circumstances*, present here, the successor employer may be required to arbitrate with the union under the agreement.[40]

The circumstance that United States Supreme Court required for the survival of the duty to arbitrate was "substantial continuity of identity in the business enterprise" which, in *Wiley*, was found to be "adequately evidenced by the wholesale transfer of Interscience employees to the Wiley Plant, apparently without difficulty."[41]

> [T]here may be cases in which the lack of substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved.[42]

[38] *Id.*

[39] *Id.* at 550.

[40] *Id.* at 548. (emphasis added)

[41] *Id.* at 551.

Subsequent cases saw the delimitation of the successorship doctrine both in terms of the labor obligations to which a successor may be held bound and the conditions under which such labor duties may be imposed. The United States Supreme Court set the limits of *Wiley* by clarifying American labor policy. Factored in also in the analysis of successorship cases is the doctrine's impact on another core value in the American economic system — capital mobility.[43]

In *NLRB v. Burns International Security Services, Inc.*,[44] the United States Supreme Court decided two issues: (1) whether a successor[45] could be obliged to bargain with the union certified during the predecessor's incumbency; and (2) whether such successor is bound to perform the substantive provisions of the predecessor's collective bargaining agreement.

The facts of that case are as follows: Burns International Security Services, Inc. (Burns) replaced Wackenhut Corporation (Wackenhut) in providing plant protection services to Lockheed Aircraft Service Co. (Lockheed). For the purpose of servicing the Lockheed plant, Burns employed 42 guards. Twenty seven of these guards previously worked in the same plant under the Wackenhut contract.

Prior to the termination of Wackenhut's contract with Lockheed, Wackenhut concluded a collective bargaining agreement with the United Plant Guard Workers of America (UPG), the union which the National Labor Relations Board (Board) certified as the bargaining agent of the Wackenhut employees at the Lockheed plant. Thus, when Burns took over, UPG demanded that it be recognized as the bargaining representative of Burn's employees at Lockheed and that the collective bargaining agreement between it and Wackenhut be honored. Burns refused, questioning the appropriateness of the unit and denying its obligation under the Wackenhut labor agreement. UPG filed unfair labor practice charges against Burns. The Board found for UPG. Both

[42] *Id.*

[43] *Successorship Doctrine, the Courts and Arbitrators: Common Sense of Dollars and Cents?* 44 U. MIAMI L. REV. 403 at 415 (1989).

[44] 406 U.S. 272, 32 L. Ed. 2d. 61, 92 S Ct 1571 (1972).

[45] The finding of successorship here was described as rather unusual because the "successor" did not purchase the business or the assets of or merged with the predeccessor. *Id.* at 299 (J. Rehnquist, separate opinion).

the Court of Appeals and the United States Supreme Court held that Burns had a duty to bargain with UPG, but was not bound to observe the terms of the UPG-Wackenhut contract.

Burns' obligation to bargain with the union, the United States Supreme Court said, arose from its hiring of a majority of Wackenhut's employees who had already expressed their choice of a bargaining representative. The change in the ownership of the employing industry was found not to be "such an unusual circumstance" that could affect this choice of a bargaining representative as certified by the board.[46]

However, the same consideration (i.e. Burns' hiring of a majority of Wackenhut's employees) could not be made the basis of Burns' duty to honor the substantive terms of the UPG-Wackenhut contract. The United States Supreme Court implied that a different holding would amount to compelling a successor to agree to terms and conditions of employment, a policy wholly inconsistent with "the fundamental premise on which the [National Labor Relations] Act is based — private bargaining under governmental supervision of procedure alone, without any official compulsion over the actual terms of the contract."[47]

The Board's invocation of *Wiley* was found inappropriate. The United States Supreme Court emphasized that *Wiley* sanctioned the survival only of the contractual duty to arbitrate, not of the whole collective bargaining agreement.

> That decision emphasized "[t]he preference of national labor policy for arbitration as a substitute for the tests of strength before contending forces" and held only that the agreement to arbitrate, "construed in the context of a national labor policy," survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract.[48]

The United States Supreme Court also noted that requiring a successor to observe the terms of the predecessor's collective bargaining agreement "may result in serious inequities."[49] This holding may prohibit "a potential employe... tak[ing] over a moribund business to make changes in corporate structure, composition of the labor force..." thereby discouraging or inhibiting the free flow of capital.[50] On the

[46] *Id.* at 279 (footnotes omitted).

[47] *Id.* at 282-84, 287.

[48] *Id.* at 285-86.

[49] *Id.* at 287.

[50] *Id.* at 287-88.

other hand, the union may be tied to a contract providing economic benefits way below that which a successor is capable to give.[51]

The U.S. Supreme Court's concern over the effect of the successorship doctrine on free transferrability of capital became even more pronounced in *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*[52] where the United States Supreme Court further qualified *Wiley* via the substantial continuity test.

P.L. Grissom & Son, Inc. (Grissom) sold to Howard Johnson Co. (Howard Johnson) all personal properties used in connection with its restaurant and motor lodge businesses. Grissom retained ownership of the premises over which these businesses were conducted, but leased the same to Howard Johnson. Howard Johnson made it clear to Grissom that it was not assuming any of the latter's labor obligations. Thus, before the date set for the transfer of the operation of the restaurant and motor lodge, Grissom advised its employees of the termination of their employment. On the other hand, Howard Johnson placed advertisements in local newspapers for the hiring of its own work force. Nine of the 53 Grissom employees were hired by Howard Johnson through this process.

Hotel & Restaurant Employees & Bartenders International Union (Hotel Employees), as representative of the Grissom employees, filed an action to compel Howard Johnson to arbitrate the extent of its obligation under the Grissom-Hotel Employees bargaining agreements. It also applied for preliminary injunction to require Howard Johnson to hire all of the Grissom employees whose tenure was protected by the bargaining agreements. The federal court, relying on *Wiley* issued an order compelling arbitration but refused to grant injunctive relief.

The United States Supreme Court found the lower court's decision as an "unwarranted extension" of *Wiley*. The successor in *Wiley* hired *all* of its predecessor's employees. In contrast, Howard Johnson adamantly refused to do so. This distinction was found material in that the court, in *Wiley*, conditioned survival of the duty to arbitrate upon susbtantial continuity of the business enterprise. This substantial continuity test may be passed only upon a finding of "substantial continuity in identity of the work force across the change in ownership."[53]

The United States Supreme Court also noted that Hotel Employees resorted to a suit to compel arbitration to hold Howard Johnson to a duty to hire all of the Grissom employees. The court dodged this attempt by adverting to the policy considerations announced in *Burns*.

[51] *Id.*

[52] 417 U.S. 249, 41 L. Ed. 2d. 46, 94 S. Ct. 2236 (1974).

[53] *Id.* at 263.

> What the Union seeks here is completely at odds with the basic principles this Court elaborated in Burns. We found there that nothing in the federal labor laws "requires that an employer... who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer." Burns emphasized that "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force... and the nature of supervision." We rejected the Board's position in part because "[i]t would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted." Clearly, Burns establishes that Howard Johnson had a right not to hire any of the former Grissom employees, if it so desired. the Union's effort to circumvent this holding by asserting its claims in a Sec. 301 suit to compel arbitration rather than in unfair labor context cannot be permitted.[54]

Where the substantial continuity of the business test is satisfied, the U.S. Supreme Court shows no misgivings in requiring a *bona fide* successor to remedy the predecessor's unfair labor practices of which he has notice. In *Golden State Bottling Co. v. NLRB*[55], the U.S. Supreme Court ruled that a finding of successor liability under the above circumstances strikes a balance between the conflicting legitimate interests of a *bona fide* successor, the public and the affected employee.[56] Requiring remedial action by a successor would effectuate the policies implicit in the NLRA, to wit: avoidance of labor strife; prevention of a deterrent effect on the employees' exercise of their right to self-organization; and protection for the victimized employee.[57] And yet, the rule would tax a successor minimally. The U.S. Supreme Court explained thus:

> Since the successor must have notice before the liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him from liability arising from the seller's unfair labor practices." If the reinstated employee does not effectively perform, he may, of course, be discharged for cause.[58]

[54] *Id.* at 261-62.

[55] 414 U.S. 168, 38 L. Ed. 2d 388, 94 S. Ct. 414 (1973).

[56] *Id.* at 184.

[57] *Id.* at 185.

III. SUCCESSORSHIP DOCTRINE IN THE PHILIPPINE CONTEXT

A. Rationale for the Doctrine

The U.S. Supreme Court evolved the doctrine of employer successorship in recognition of the need for a rule to govern change-in-ownership situations that takes into account the American labor policy.[59] Thus, the scope of successor liability under the doctrine expanded and contracted as the U.S. Supreme Court grappled to define this policy.

B. The American Labor Policy

The U.S. Supreme Court has defined American labor policy through exposition on two aspects of federal labor relations law. These two aspects are: (1) the objectives of the law; and (2) the means sanctioned by the U.S. Congress for the realization of these goals. An analysis of the cases discussed above would show that the latter aspect has controlled the U.S. Supreme Court's determination of the obligations which may be imposed upon a successor.

Thus, in *Golden State*, a *bona fide* purchaser of a business was required to remedy the unfair labor practices of the predecessor. That case noted that the unremedied unfair labor practices of the predeccesor may

[58] *Id.*

[59] This is apparent from the U.S. Supreme Court's choice of federal labor law over pertinent State law in resolving the issue of whether a corporation surviving a merger is bound by the labor contracts of the corporation it absorbs.

The Wiley decision was described by commentators as a "substantial departure from prior law." Benetar, *Successorship Liability Under Labor Agreements*, 1973 WIS L. REV. 1026, 1029; Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 NW. U. L. REV. 735 (1969). One author suggested that

> Wiley presented a choice between applying existing contract-corporation law principles or fashioning federal labor law [and] by requiring the successor to arbitrate the dispute, the Court chose the latter.

Note, *The Contractual Obligations of a Successor Employer Under the Collective Bargaining Agreement of a Predecessor*, 113 U.PA.L.REV. 914, 916 (1965). The same author justified this choice by saying that "corporate-contract rules reflect different values than those present in collective bargaining relations" and hence said rules would have "little continued value in the latter context." *Id.* at 919.

This last observation is not borne out by successorship cases subsequent to Wiley. The U.S. Supreme Court, in later cases, had tended to focus on American labor policy and had been least concerned in negativing the effects of application of ordinary contract principles.

affect the employees absorbed by the successor in either of two ways. It might lead said employees to engage in collective activity to force remedial action, resulting directly in labor unrest.[60] It might also deter said employees from asserting their right to self-organization,[61] an institution so central in free collective bargaining. The imposition of successor liability in the first case is justified by the need to promote the labor policy objective of preserving industrial peace and in the second case, by the need to protect the institutions of collective bargaining — the congressionally-approved mode of settling labor disputes.

Burns was less explicit in its reasons for imposing upon the successor the duty to bargain with the union certified as the representative of the employees during the predecessor's incumbency. The *Burns* rule, however, simply confirmed previous NLRB holdings, the rationale for which follows:

> The certification herein was an announcement of the designation of employees of their bargaining representative. It cannot be said that a change in management resulted in a change in their preference. *If every change in management would nullify a designation of representatives, this would constitute an encouragement of litigation and industrial strife which the Act seeks to prevent.*[62]

On the other hand, *Burns* refused to impose upon a successor the duty to honor the predecessor's collective-bargaining contract despite strong endorsement from the National Labor Relations Board in the interest of preserving industrial stability. It reasoned:

> Preventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. When a bargaining impasse is reached, strikes and lockouts may occur.[63]

Wiley likewise built on the need to promote industrial stability in sanctioning the survival of the duty to arbitrate. It hammered on the "impressive policy considerations favoring arbitration" in order to override the lack of consent of the successor to the contract containing the arbitration clause. The tension in *Wiley*, however, consisted in the determination of the principal means by which Congress seeks

[60] *Golden State*, 414 U.S. 184.

[61] *Id.*

[62] Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 NW. U. L. REV. 735, 793 (1969) (citing Simmons Engineering Co., 65 N.L.R.B. 1373), 1377 (1946). (emphasis added)

[63] Burns, 406 U.S. at 287.

to achieve industrial peace. Would it be through arbitration or through free collective bargaining?[64] The later case of *Burns* affirmed the primacy of free collective bargaining. It seemed to suggest, however, that holding a successor to the duty to arbitrate under the predecessor's labor contract would not violate the policy of free bargaining. Some commentators entertained a contrary view.[65] To illustrate the incongruity in the two policies which the U.S. Supreme Court sought to simultaneously implement, one author asked:

> [H]ow meaningful in real terms is the *Burns* rule that a nonconsenting successor is not bound by its predecessor's labor contract if an arbitrator acting under *Wiley* may find the precise opposite as to part or all of that very contract or a modification of the contract?[66]

Wiley also implied that a non-consenting successor must be held bound to his predecessor's contractual duty to arbitrate in order to afford employees some protection in change-in-ownership situations. This expression of concern over employee-protection is a surprise, coming as it does from a court known for its staunch adherence to the *laissez faire* tradition. Imposing successor liability on this ground, it was opined, is not justified, employee-protection being a value only remotely, if at all, reflected in established principles of federal law.[67]

> The Court's suggestion that it is among the objectives of national labor policy to protect employees from the harmful consequences of their employer's conduct, other than through protection of the rights of self-organization and collective bargaining, is hardly reflected in established principles of federal law, but is somewhat novel. As stated previously, it is the very essence of national labor policy that protection of employees economic interests is normally to be achieved through collective bargaining and through federal protection of the institutions of collective bargaining, as well as its fruits, the collective agreement, not through providing those employees with economic gains not won at bargaining tables.[68]

[64] The policy of free bargaining prohibits the imposition even of the duty to arbitrate on unwilling employers and unions as a means of avoiding or terminating labor disputes. Goldberg, *supra* note 63 at 742.

[65] Benetar, *Successorship Liability Under Labor Agreements*, 1973 EID. L. REV. 1026, 1034; Barksdale, *Successorship Liability Under the National Labor Relations* Act and Title VII, 54 TEXAS L. REV. 707, 710 (1976).

[66] Benatar, *Id.* at 1034

[67] Goldberg, *supra* note 62 at 744.

Wiley's suggestion that employee-protection is among the objectives of American labor law policy has been nullified by the more recent case of *Howard Johnson*. In that case, the court ruled that a purchaser of business assets is not bound to absorb the employees of the predecessor. The refusal of the court to require a successor to address the most basic concern of employees, that is, job security, is compelled by *Burns*. Tenurial security is not a right granted to U.S. labor by statute.[69] It is a right that workers should secure through collective bargaining. *Burns*, however, has definitively laid down the rule that a successor cannot be compelled to observe the substantive terms of a predecessor's collective contract.

The complaining union in *Howard Johnson* relied on *Wiley* to compel the purchaser of the assets to at least arbitrate on the continuing vitality of the security of tenure provisions of the collective bargaining agreement. The U.S. Supreme Court, however, found that the lack of work force continuity across the change in ownership rendered *Wiley* inapplicable. This interpretation of *Wiley*, the U.S. Supreme Court said, is compelled by the need to reconcile "protection of employee interests in a change of ownership... with the new employer's right to operate the enterprise with his own independent labor force."[70]

One author[71] suggests that *Howard Johnson* is still consistent with the policy of the National Labor Relations Act. That law, according to said author, does not intend to alter the effects of market regulation of labor relations.[73] It merely legalized collective action in order to enhance workers' ability to prevail in disputes over interests already recognized as legitimate under the regime of liberty of contract.[73] In the development of the successorship doctrine, therefore, the U.S. Supreme Court has found the need to accord due respect to liberty of contract an ever-present restraint. Thus,

> The opinion in *Howard Johnson* concedes what should have been

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[68] *Id.*

[69] An employer covered by the NLRD may discharge an employer for any reason, reasonable or unreasonable, so long as it is not for a reason prohibited by the ACT. 48 am Jur. 2d Sec. 10 (1979) (citing *NLRB v. Standard Coil Products Co.*, 224 F2nd 465, 51 ALR 2d 1268, cert. denied 350 U.S. 902, 100 L. Ed. 792, 76 S. Ct. 180).

[70] *Howard Johnson*, 417 U.S. at 264.

[71] Silverstein, *The Fate of Workers in Successor Firms; Does the Law Tame the Market?*, 8 INDUS. REL. L.J. 153 (1986).

[72] *Id.* at 155.

[73] *Id.*

> apparent at the time *Wiley* was decided. Under the NLRA all employers, including successors, are free to establish the structure of their economic relationships without interference of labor organizations or legislation. The schedule of worker concerns that is the subject of bargaining between individual workers and employers may be dealt with through the process of collective bargaining, but that process, and the attendant legal protection for organized labor, must respect the boundaries of a market-based economy.[74]

C. Philippine Policy on Labor

A variance in the labor policies of the United States and the Philippines may require a different application of the doctrine in the latter context. It is therefore prudent to first assess the Philippine policy on labor before any application of the doctrine is made in this jurisdiction.

One cannot discuss the Philippine policy on labor without noting its historical context which as far as material started in the American Regime. Free enterprise was the governing principle in labor relations during that period. Management and labor were left on their own to bargain for terms and conditions under which they would operate, without taking into account the inherent imbalance in the bargaining positions of the parties. This imbalance was even reinforced earlier by an outright curtailment of the right of workers to self-organization,[75] and tolerated later by the government's continued indifference to the need to provide special protection to unionism.[76]

This state of things continued until the adoption of the 1935 Constitution. Said Constitution embodied the principle of social justice which commands a legal bias in favor of the underprivileged.[77] What

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[74] *Id.* at 174.

[75] *Proceedings of the Conference on the Highlights of the Herrera-Veloso Law*, PHIL. LG. April, 1989 at 2, 4.

[76] P. V. FERNANDEZ, LABOR RELATIONS LAW 15 (1977).

[77] The idea of social justice in the constitution was developed in the course of the debates to mean justice to the common *tao*, the "little man" so called. It means justice to him, his wife and children in relation to their employers in the factories, in the farms, in the mines, and in other employments. It means justice to him in his dealings with different officers of the government, including the courts of justice. In other words, it means justice to him in his relations with the more fortunate class of people. I. ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 147 (1949).

> [W]hat the declaration of principles advocated was nothing less than the idea echoed in slogans used by many candidate[s]... Those who have less in life should have more in law. 2 J. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES 41, 468 (1987).

is interesting to note is that the concept was introduced in the 1935 Constitution in the face of surging agrarian and labor unrest.[78] Yet, the policy of promoting social justice was not cast in terms that would make it a mere palliative to this societal problem. It was made a goal in itself, furthering only the end of "insur[ing] the well-being and economic security of all the people."[79] Thus, constitutional endorsement of governmental intervention in labor-capital relations and of compulsory arbitration as a mode of dispute settlement[80] was made a mere corollary of the provision on social justice, "in order that it [the principle of social justice] may not just be a medley of words."[81]

Within a year from the approval of the 1935 Constitution, Commonwealth Act No. 103 was enacted. This law marked the shift of legislative policy on labor relations from free enterprise to compulsory arbitration. Collective bargaining was allowed under the law. But where a deadlock occured leading to a strike or lock-out, the Court of Industrial Relations was authorized to assume jurisdiction to arbitrate, either upon petition of any of the parties or upon its own volition.[82] The Court of Industrial Relations then was authorized to impose upon the parties any obligation to resolve the dispute or to prevent further dispute between them.[83] The law had made both labor and management dissatisfied.[84] Labor then felt that the CIR, in resolving disputes, had been giving them less than their due, while management thought that it could have parted with less under the regime of free contract.[85]

In 1953, following a move from militant labor leaders towards autonomy in labor-management relations[86], Republic Act No. 875, otherwise known as the Industrial Peace Act, was enacted. This law, which was patterned after the U.S. Labor-Management Relations Act

[78] Proceedings, *supra note* 75 at 4; *Antamok Goldfields Mining Co. v. Court of Industrial Relations*, 70 Phil. 340, 356-57 (1940).

[79] PHIL. CONST. OF 1935, Art. II, Sec. 5

[80] PHIL. CONST. OF 1935, Art. XIII, Sec. 6.

[81] 1 J. BERNAS, THE (REVISED) 1973 PHILIPPINE CONSTITUTION NOTES AND CASES 105 (1983).

[82] P. V. FERNANDEZ *supra* note 76 at 16.

[83] *Id.*

[84] FERNANDEZ & QUIASON, *supra* note 3 at 18.

[85] *Id.*

[86] Fernando, *State Policy on Labor Relations Law: the Constitutional Aspect*, ASPECTS OF PHILIPPINE LABOR RELATIONS LAW 1971 at 212, 226.

of 1947, emphasized reliance on the process of collective bargaining to establish and govern the relations between capital and labor. The law declared as its primary objective the promotion of industrial peace.[87] The promotion of employee-interests is made a mere incident of this objective.[88]

It should be stressed however that while the Act was basically a transport of American labor law, it was enacted to remedy a situation different from that obtaining in the United States. In the United States, the Labor-Management Relations Act, the precursor of the NLRA, was passed against a background of judicial decisions endorsing absolute freedom of contract and outlawing labor combinations that interfere with this freedom.[89] On the other hand, the Industrial Peace Act was passed after the Supreme Court had shown a commitment to depart from the *laissez faire* concept. In fact, the Act sanctioned a departure from compulsory arbitration which had proved to be an ineffective means of preserving industrial stability.[90] It should bear emphasis that this marked shift in legislative policy carried the strong endorsement of the labor sector. Owing to the growth of the Philippine labor movement, labor then argued that the time had come for it "to fight for its rights, with management at the other side of the negotiating table."[91] This

[87] REP. ACT. 875 (1953), Sec. 1 states:

It is the policy of this Act:

(a) To eliminate the causes of industrial unrest encouraging and protecting the exercise by employees of their right to self-organization for the purpose of collective bargaining and for the promotion of their moral, social and economic well-being.

(b) To promote sound and stable industrial peace and the advancement of the general welfare, health and safety and the best interests of employers and employees by the settlement of issues respecting terms and conditions of employment through the process of collective bargaining between employers and representatives of their employees.

(c) To advance the settlement of issues between employers and employees through collective bargaining by making available full and adequate governmental facilities for conciliation and mediation to aid and encourage employers and representatives of their employees in reaching and maintaining agreements concerning terms and conditions of employment and in making all reasonable efforts to settle their differences by mutual agreement; and

(d) To avoid or minimize differences which arise between the parties to collective bargaining by prescribing certain rules to be followed in the negotiation and administration of collective bargaining agreements and by requiring the inclusion in any such agreement of provisions for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application of interpretation of such agreements and other provisions designed to prevent the subsequent arising of such controversies.

[88] *Id.*

[89] See generally L. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940).

[90] FERNANDEZ & QUIASON, *supra* note 3.

historical note could play an important role in determining the extent to which the Act intended to favor workers through the scheme of free bargaining.[92]

The 1973 Constitution built on the social justice provisions of the 1935 Constitution. Its most valuable additions consisted of a mandate to regulate the acquisition, ownership and disposition of private property in order to promote social justice[93] and of a guarantee of the workers right to security of tenure.[94] The constitutional provision on security of tenure was implemented through Article 280 of the Labor Code.[95] Said provision prohibited employers from terminating the services of employees absent a showing of just cause. It nullified the provision in the Termination Pay Law[96] which allowed management to dismiss employees for any cause upon service of a written notice therefor and payment of separation pay.

In the field of labor relations, however, the legislations enacted during the effectivity of 1973 Constitution were seen as derogating from, rather than promoting, the labor policies contained in said Constitution. The Labor Code combined the features of collective bargaining and compulsory arbitration in the regulation of labor-management relations.[97] It also sought to restructure the labor movement through the creation of industry-wide labor organizations.[98] In addition, Presidential Decree No. 823[99] banned strikes in industries affected with national interest. All these legislative developments were seen as repressive methods of labor control adopted by the deposed President Marcos in order to lay the groundwork for the implementation

[91] Fernando, *supra* note 86 at 226.

[92] Conventional scholars in the United States, with whom the U.S. Supreme Court agrees, hold that the purpose of statutory regulation of labor relations is merely to promote collective bargaining. Revisionist scholars, on the other hand, see the NLRA as "underwriting organized labor in its efforts to make the concerns of employees central to all business decisions." According to them, federal labor policy establishes the legal right of workers to participate in all aspects of enterprise management. Silverstein, *supra* note 71 at 154-55. The view of the revisionist scholars is more compatible with the historical background of the industrial Peace Act as discussed above.

[93] PHIL. CONST. OF 1973 at. II, Sec. 6.

[94] PHIL. CONST. OF 1973, Art. II, Sec. 9.

[95] PRES. DECREE 442 (1974).

[96] REP. ACT 1052 (1954) as amended by REP. ACT 1787 (1957).

[97] FERNANDEZ, *supra* note 76 at 21-22.

[98] *Id.*

[99] November 3, 1975.

of the World Bank sponsored export-oriented industrialization program.[100]

The 1987 Constitution retains the social justice provisions of the 1973 Constitution. However, it contains a longer list of things that the State must do to achieve social justice in the labor front. Also, it changes the preferred mode of dispute settlement. Thus,

> The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.
>
> It shall guarantee the rights of all workers to self-organization, collective bargaining, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision making processes affecting their rights and benefits as may be provided by law.
>
> The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes of settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.
>
> The State shall regulate the relations between workers and employers, recognizing the right of labor to a just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth.[101]

The implementation of the labor provisions of the 1987 Constitution came in form of amendments[102] to the Labor Code. Book Three of said Code, which deals with the rights of workers to humane conditions of work and a living wage, was largely left untouched. Said book provides for minimum standards, irreducible by contrary stipulations either in individual or collective contracts. No significant innovation was likewise made on Book Six of the Labor Code which deals with the workers' right to security of tenure. What should be empasized here for purposes of this study is that this right devolves upon employees independently of contract.

The portion of the Labor Code that suffered major revisions was Book Five which deals with labor relations. The amendments were

[100] BELLO, KINSLEY & ELINSON, DEVELOPMENT DEBACLE: THE WORLD BANK IN THE PHILIPPINES 142-43 (1982).

[101] PHIL. CONST., Art XIII, Sec. 3.

[102] REP. ACT 6715 (1989).

made in order to remove the vestiges of the deposed strongman's unpopular labor decrees and to re-establish the legal framework for the adjustment of the interests of labor and capital contained in the Industrial Peace Act.[103] Once again, collective bargaining is made the centerpiece of the scheme to achieve industrial peace. In fact, Book Five merely institutes mechanisms which will insure the operational efficiency of collective bargaining.[104] Thus, the formation of independent unions which will play the role of bargaining representatives is specially protected through the mechanism against unfair labor practices.[105] A duty to bargain is imposed upon an employer upon whom demand is made by a union that has acquired majority status either through voluntary recognition by the employer or through certification by the Bureau of Labor Relations.[106] Violation of this duty is likewise punished as an unfair labor practice.[107] However, to assure the parties of the freedom to structure their relations, the Code provides that the duty to bargain does not compel any party to agree to a proposal or to make a concession.[108] To provide stability in the bargaining relationship, representational challenges are regulated through the 25 percent signature requirement to a petition for certification election in an organized establishment.[109] Where a collective bargaining agreement is concluded and duly registered, representational challenges may be entertained only within the 60-day period immediately preceeding the expiry date of the five year term of said agreement.[110]

What distinguishes the Labor Code from the Industrial Peace Act is the former's provision on voluntary arbitration. By requiring the parties to name a panel of arbitrators in their collective bargaining agreement,[111] the Code in effect compels the parties to agree to arbitration as the mode of settling disputes relating to the interpretation and implementation of their contract.

[103] Proceedings, *supra* note 75.

[104] The following analysis is patterned after that of Professor Perfecto Fernandez who wrote on the bargaining structure under the Industrial Peace Act in Fernandez, *Retrenchment of Closure as an Unfair Labor Practice*, ASPECTS OF PHILIPPINE LABOR RELATIONS LAW 112-14 (1972).

[105] LABOR CODE, Art. 248.

[106] LABOR CODE, Art. 251 in relation to Art. 258 and 250.

[107] LABOR CODE, Art. 248 (g).

[108] LABOR CODE, Art. 252.

[109] LABOR CODE, Art. 256.

[110] LABOR CODE, Art. 232.

D. The Need to Strike a Balance

Our constitutional and legislative history suggests a worker-protective labor policy. The extent to which this policy is to be carried in change-in-ownership situations should be determined, however, upon due consideration of the legitimate interests of the successor. The U.S. Supreme Court's successorship doctrine undeniably places restraints on a successor's control of the business he has acquired. These restraints, the U.S. Supreme Court has recognized, have a tendency to hamper free transferrability of capital. On this account, the U.S. Supreme Court has severely limited successor obligations under the doctrine. One author has even suggested that the negative impact of the doctrine on capital mobility could, in the long run, work to the detriment of all concerned, including labor. Thus,

> There is force to the argument that binding a new employer to a host of obligations under an old collective bargaining agreement will force business to cease operations, to the detriment of all concerned.[112]

A cardinal principle of social control of any aspect of business is that such control should not destroy the thing it seeks to regulate.[113] In determining the extent of application of the doctrine, therefore, care should be taken to see to it that transfer of assets be not unduly inhibited; there would, otherwise, be no occassion where the doctrine could apply.

[111] LABOR CODE, Art. 260.

[112] See Silverstein, *supra* note 71 at n. 81.

[113] J.M. CLARK, SOCIAL CONTROL OF BUSINESS 16-17 (1939). The following are the other tests of a good system of control suggested by the author: (1) It must be democratic. This means that it must be exercised in the interests of the governed as they see their interests; (2) It should know what it wants; (3) It must be powerful enough to make an unwilling minority obey the will of the majority and searching enough to detect evasions; (4) It must utilize all the strongest and most persistent motives of human nature, both generous and selfish; (5) The duties imposed must be simple enough to be understood and this means, among other things, that social control must follow precedent a great deal of time; (6) Control must be guided by experience or wisely experimental; (7) It must economize coercion; (8) It must look to be adaptable; (9) It must be farseeing. It must look beyond the immediate effect of doing a given thing to the further results of leading people to expect it in the future; (10) social control must be capable of progressively raising the level of mankind.

IV. APPLICATION

A. Conditions for Survival of Obligations

Before holding a *bona fide* successor bound by the labor law obligations of his predecessor, the U.S. Supreme Court has invariably required a showing of substantial continuity in the business after a change in ownership. In *Wiley*, said court rationalized that to compel arbitration without such continuity "would make the duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement or the acts of the parties involved."[114] This rhetorical ratiocination[115] may be reduced to more practical terms. A substantial change in the nature of the business may render irrelevant the skills of the predecessor's employees and the bargained for terms and conditions of employment under said predecessor. The imposition of successor obligations under these circumstances may adversely affect the execution of the new management's plan to institute operational changes in the business it has acquired. It may also severely limit the new owner's discretion in determining the use of his productive assets. These considerations, undoubtedly, would discourage acquisitions of on-going concerns. Thus,

> The primary justification for imposing limitations on the survival of the duty to arbitrate is found in the protection of legitimate employer interests in the free transferrability of productive assets, in the freedom to apply terms and conditions of employment relevant to the nature of the enterprise and, to the extent the assets of another employer are to be integrated with those of the purchaser, in not having a multiplicity of collective bargaining contracts covering the employees engaged in the same or similar tasks. While each of these interests, taken to its logical extreme, provides an argument for no survival whatsoever of the predecessor's contract obligations, each receives a substantial measure of protection from the "substantial continuity of identity" test that bars survival when few assets are purchased or when purchased assets are used in a significantly different industry.[116]

The determination of essential identity of the business is based on several factors. These are as follows: (1) acquisition of substantial

[114] *Wiley*, 376 US at 551.

[115] Goldberg, *supra* note 62 at 747.

[116] *Id.* at 748.

assets of the predecessor; (2) similarity of the methods of production or service; (3) similarity of the product or service; (4) location of the business; and (5) continuity of the workforce.[117] Not all of these factors need be present.[118] Emphasis may be placed on one, several, or all of these factors depending on the labor duty to be imposed.

The case of *Howard Johnson*, however, has made workforce continuity an essential element of the substantial continuity test. That decision has been severely criticized by some American legal writers for providing an escape mechanism that could render the successorship doctrine useless.[119]

In the Philippine context, it may be circuitous to make workforce continuity an essential element of the substantial continuity test. Owing to our constitutional and legislative guarantee of the workers' right to security of tenure, a successor may be required to hire the predecessor's employees. Therefore, workforce continuity should be made a requisite for application of the doctrine only when justified by the nature of the obligation to be imposed upon a successor. For instance, in determining whether a successor is obligated to bargain with the union recognized or certified as the bargaining representative of the employees during the predecessor's incumbency, there must be a showing of substantial similarity in personnel across the change of ownership. This is because a union's right to act as bargaining representative depends upon the trust reposed upon it by the employees in an appropriate bargaining unit.

B. Labor Duties of A Successor

Where there is a finding of substantial continuity of the business, a successor may be required to assume a variety of the predecessor's

[117] *Id.* at 750-51.

[118] Mace, *The Supreme Court's Labor Law Successorship Doctrine After Fall River Dyeing*, 39 LAB. L.J. 102, 107 (Fall 1988).

[119] *Successorship Doctrine, the Courts and Arbitrators: Common Sense or Dollars and Cents?*, 44 U. MIAMI L. REV. 403 n. 62 (1989). Silvertein observes that in view of the ruling in Howard Johnson,

> [i] It is quite unlikely that many successors will hire incumbent employees. Selection of too many predecessor employees triggers legal obligations that invite constraints, albeit minimal ones, on employer discretion. Ironically, the NLRA, as read in Howard Johnson, all but guarantees loss of employment by workers who have secured the benefits of a collective bargaining agreement... but unfortunate enough to be caught in a change of ownership... Indeed, predecessor workers like those in Howard Johnson – facing an employer with no plans to change the enterprise – might have been better off had the statute been interpreted as not applying to successor employers at all. *Supra* note 71 at 173.

labor obligations. The U.S. Supreme Court's successorship cases show that the labor duties of a successor are to be determined upon consideration of two factors: one, whether the imposition of a particular obligation would further national labor policy;[120] and two, whether a finding of successor liability would unduly hamper free transferrability of assets. The foregoing will be used in determining successor obligations in the Philippine context.

1. DUTY TO HIRE

The 1987 Constitution expressly guarantees the right of workers to security of tenure. In implementation of this right, Article 279 of the Labor Code prohibits employers from terminating the services of an employee except for a just cause. It is thus apparent that until a person is taken in as an employee, the right to security of tenure would find no application. Until then, a person has a mere liberty to work.[121] However, to hold a previously established employment relation terminated by a change in the ownership of the business would derogate from the policy of the law to provide the workers with job security. This rule would frequently convert the right to work to a mere liberty.

The threshold question, however, is whether the new employer may justly be compelled to contract the services of persons not of his own choice. In acquiring an on-going concern, a successor knows that he is entering a business that affects the interests of a number of workers. It is therefore but fair to balance his right to choose his own independent labor force with the existing employees' interest in continued employment. At any rate, the hiring of the predecessor's employees would not unduly prejudice a successor where he operates the business in substantially the same manner. He could even benefit from the training the employees received under the predecessor. On the other hand, where he finds the predecessor's workforce as too large, he may retrench under Article 283 of the Labor Code. Employees who perform unsatisfactorily may likewise be terminated under Article 282 of the same Code.

[120] National labor policy is determined upon consideration of the objectives of labor legislations and the means sanctioned by Congress for the realization of these objectives. See discussion in *supra* pp. 17-21.

[121] J.M. Clark, *supra* note 113 at 81.

2. DUTY TO HONOR THE TERMS OF INDIVIDUAL AND COLLECTIVE LABOR CONTRACTS

The policy of the Labor Code, insofar as terms and conditions of employment are concerned, is to fix minimum standards and then to leave the workers to bargain for improvements thereon. The result of this bargaining process would, to a great extent, depend on the financial capacity and desired profits of an employer. Differing in these two aspects, a successor may be unwilling to observe the terms of the predecessor's labor contracts. Since this matter impinges on the financial returns the enterprise, the most basic concern of businessmen, legal compulsion in this regard may unduly hamper free transferrability of capital. The workers' concern for protection of gains derived from bargaining should, therefore, give way.

3. DUTY TO ARBITRATE

Under the Labor Code, the duty to arbitrate is not purely contractual. Parties to a collective bargaining agreement are compelled to resort to arbitration to settle disputes relating to the interpretation and implementation of their contract.[122] The manifest intent of the Code is to forestall the occurence of industrial strife. A previously concluded collective bargaining agreement, however, is required for the operation of the concept.[123] This is to enable the parties to set the parameters for arbitration. After all, the employer and the union are the ones most familiar with the employment relationship.[124] The intrusion of an outsider is thus allowed only to the extent that the parties had, by contract, allocated any burden or benefit arising from that relationship.

A mere change in the identity of the owner of the business does not totally nullify the bases of the collective contract.[125] The interests of the employees remain the same. It is only the new employer's financial vision that may require the registration of a new agreement. The financial interests of the employer, however, may be given due consideration in the process of arbitration. The arbitrators, following a change in the ownership of the enterprise, may weed out contract provisions

[122] See discussion in *supra* p. 26.

[123] LABOR CODE, Art. 260; see also discussion in *supra* p. 22.

[124] Goldberg, *supra* note 62 at 745.

[125] *Id.* at 745-46.

rendered inapplicable by such change. Meanwhile, the successor and the employees are given more time to develop familiarity with each other and to lay the groundwork for the peaceful adjustment of their interests.[126] It therefore appears sound to utilize arbitration as a means to resolve transitional problems.

4. DUTY TO BARGAIN

While the U.S. Supreme Court has severely limited a successor's contractual obligations, it has shown no misgivings in requiring a successor to bargain with the union designated as the representative of the employees during the predecessor's incumbency. The latter obligation is seen as constituting "a less serious interference with management prerogatives and the free movement of capital than is the imposition of contractual obligations."[127]

The imposition of this duty constitutes an extension of the policy of the law to limit representational challenges. Representational challenges are so limited to accord stability to the bargaining relationship and to enable employees to focus their energies on reaching satisfactory collective agreements rather than on vying for employee support.[128] Indeed, stability in union representation is crucial in a successorship situation.[129] A new employer may introduce changes in personnel policies and in terms and conditions of employment. Employees should thus immediately work together to effectively influence management decision on this aspect. Survival of a union's authority to bargain affords employees a collective voice without delay occasioned by the need to get a recognition from the employer or a certification from the Bureau of Labor Relations.

The only legally recognized employer-concern in representation issues is the assurance that the union demanding to bargain enjoys the majority support of the employees in an appropriate bargaining unit. This concern, however, is adequately addressed in a successorship situation. A successor's duty to bargain with the union designated as bargaining representative during the predecessor's incumbency is conditioned upon substantial continuity of the business. For purposes of this duty, substantial continuity is to be evidenced by substantial

[126] *Id.* at 747.

[127] *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759, 760 (1975).

[128] *Id.* at 760-61

[129] *Id.* at 762.

similarity in personnel and in the nature of the jobs performed by the employees. Under these circumstances, it is unlikely that employee support to a union would substantially diminish.[130]

5. DUTY TO REMEDY UNFAIR LABOR PRACTICES

The mechanism of unfair labor practices primarily seeks to deter management from committing acts that would frustrate their workers' initiative to organize and to bargain collectively. Its far-sighted objective is to encourage unionism. Thus, in the United States, remedial measures are required of a successor in order to dissipate from the minds of the employees absorbed by the successor any impression that the exercise of the right would work to their disadvantage rather than to their benefit.[131] Fixing liability on the erring predecessor alone, it may be argued, could very well serve this purpose. Where, however, a successor continues the predecessor's business without substantial change, the employees retained by him "may well perceive [his] failure to remedy the predecessor's unfair labor practices arising from unlawful discharge as a continuation of the predecessor's labor policies."[132] This perception could discourage the retained employees from exercising their right to self-organization.

On the other hand, the successor can shield himself from liability by hiring, together with all the other employees, the unlawfully discharged workers. This act would show that he does not concur with the unlawful intent of his predecessor. On the other hand, if despite notice of a pending unfair labor practice case against his predecessor, he refuses to hire the employee alleged to be unlawfully discharged, then he should be deemed to have voluntarily taken the risk of being made to answer for whatever judgment that may be rendered in said case. In this latter instance, he may still protect himself from contingent liability. Having notice of the pendency of an unfair labor practice case, a successor, during negotiations, can demand for a fair adjustment of the price of the business.[133]

[130] *Id.* at 766.

[131] See discussion in *supra* pp. 15-16

[132] *Golden State*, 414 US at 185.

[133] *Id.*

CONCLUSION

On the one hand our present laws sanction the survival of an employer's labor obligations in three instances: (1) where only the form of the business enterprise, and not the real identity of the owner, changes; (2) where the transaction between the predecessor and the successor is clothed with bad faith; and (3) where there is a merger or consolidation. The last instance, however, is yet to be confirmed by the Supreme Court through a construction of Sec. 80 of the Corporation Code.

On the other hand, a *bona fide* purchaser of a business is held not to be bound by the seller's labor law obligations which he has not expressly assumed. The basis of this rule is the principle of privity of contract.

In the United States, there has been a departure from the privity of contract rule in determining successor obligations. A new doctrine has evolved - the successorship doctrine - which not only takes into account American labor policy, but also allows for more flexibility in adjusting the conflicting interests of the new owner of a business and the employees of a predecessor. The Philippine legislature may be justified in following this lead considering the constitutional mandate for the promotion of the workers' interests.

The U.S. Supreme Court developed the successorship doctrine on two levels. In the first level, said court laid down the conditions under which a successor may be required to honor the labor commitments of his predecessor. In their totality, these conditions would show substantial continuity in the business across a change of ownership. In the second, the U.S. Supreme Court determined the labor obligations which may be imposed upon a successor. In making this determination, said court was guided by two consideration: (1) whether the imposition of a particular labor obligation would further national labor policy; and (2) whether a finding of successor liability would unduly hamper free transferability of assets. Applying these two criteria in the Philippine context, it has been found that a *bona fide* successor may equitably be required to observe the following duties to predecessor employees: (1) duty to hire; (2) duty to arbitrate the extent of a successor's obligations under an existing collective bargaining agreement; (3) duty to bargain with the union recognized or certified as the employees' bargaining representative during the predecessor's incumbency; and (4) duty to remedy a predecessor's unfair labor practices.

A REVIEW: TAXATION OF FOREIGN CORPORATIONS IN THE LIGHT OF SUPREME COURT DECISIONS

EUNEY MARIE J. MATA*

Foreign investments, as generated and channeled through foreign corporations, must necessarily be subject to the sovereign supervision and regulation by the host state. Among other means, the most cognizant and ubiquitous manifestation of this regulation is taxation. The power of taxation to effectively sustain or smother business viability cannot be belabored, thus, its effectivity as an instrument of regulation. Taxation of foreign corporations traces its rationale to the state's grant of the privilege and protection of corporate existence and right of doing business within the jurisdiction of the host state. It is axiomatic, therefore, that in order to effectively regulate foreign corporations, sound and strategic taxation policies be formulated and consistently applied to induce, not retard, the influx of foreign investments.

A spate of controversial rulings in the last decade has casted the Bureau of Internal Revenue (BIR) to be more inclined to tax first and find any legal basis later, particularly vis-a-vis foreign corporations. This taxation-happy posture by the revenue agency is no doubt buoyed by the judicial affirmation subsequently stamped on these controversial rulings, albeit, in the absence of any legal basis in our tax laws or jurisprudence.

The role of the Supreme Court in interpreting the tax provisions that constitute our taxation policies is critical and cannot be overly emphasized. Supreme Court decisions on the validity of BIR rulings could very well determine or decide for the foreign investor whether to invest or not. In a series of decisions, the Supreme Court stamped its imprimatur on the strict stand adopted by the BIR in taxing as many transactions and as high a rate possible on foreign corporations, in deviation with the well-settled taxation tenet of liberal construction in favor of the taxpayer. The High Tribunal made several pronouncements which at the very least digressed from established taxation principles.

For the vacillating stance of the Supreme Court with regard taxation of foreign corporations, current tax laws are partly to blame. While the U.S. tax laws, after which our Tax Code was patterned, have since undergone several major revisions, abandoning principles deemed not beneficial, our Tax Code has indiscriminately continued to embody these

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