



Case Western Reserve Journal of International Law

Volume 16 | Issue 3

1984

Specific Performance under Venezuelan Law

Sergio J. Galvis

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](#)

Recommended Citation

Sergio J. Galvis, *Specific Performance under Venezuelan Law*, 16 Case W. Res. J. Int'l L. 437 (1984)

Available at: <https://scholarlycommons.law.case.edu/jil/vol16/iss3/4>

This Comment is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

COMMENT

Specific Performance Under Venezuelan Law

by Sergio J. Galvis*

I. INTRODUCTION

This article examines the role of specific performance as a contractual remedy under Venezuelan law. It does not undertake a comprehensive comparison of the theory and practice of common law and civil law in this area. Nevertheless, the study makes frequent reference to common law concepts in order to define the terminology and to assist lawyers whose research and practice exposes them to both systems.

The first part of the article examines the theoretical role of specific performance under each system. It suggests that specific performance, though treated as an extraordinary remedy by the common law, is viewed as the usual and natural remedy under the civil law. The article then discusses the general treatment of obligations under Venezuelan law. It explores Venezuelan doctrinal and jurisprudential concepts about the formation and reasons for enforcement of contractual obligations. The discussion focuses on those general principles of contractual obligations which operate to limit the application of specific performance in Venezuela.

The article next explains that contractual obligations can be performed either in specie (specific performance) or in equivalent (money damages), voluntarily or involuntarily (pursuant to a court order), and directly (by the promisor) or indirectly (by the promisee or by a third party). These methods of performance give rise to three types of contractual remedies: (1) specific performance; (2) indirect specific performance;

* Judicial Clerk to Hon. Lawrence W. Pierce, U.S. Court of Appeals for the Second Circuit; J.D., Harvard Law School (1983); B.A., College of William & Mary, Williamsburg, Virginia (1980).

The author wishes to thank Eugenio Hernández-Bretón for his assistance in completing this article.

and, (3) money damages. The discussion focuses on the practical circumstances under which Venezuelan courts generally grant these remedies.

The article then examines various mechanisms that might be available under Venezuelan law to enforce these remedies. The inadequacy of these mechanisms seriously undermines the application of specific performance, limiting its role to the enforcement of simple obligations to give and to deliver. Finally, the article proposes various alternatives that a party might pursue to assure that he will secure in Venezuela the preferred remedy of specific performance.

II. DISCUSSION

A. *Specific Performance Under Common and Civil Law*

The common law and the civil law differ fundamentally in their treatment of specific performance as a contractual remedy.¹ In common law jurisdictions, a promisor's primary obligation to perform is transformed upon breach of contract into a secondary duty to compensate through money damages.² Courts of equity in common law systems only grant specific performance where money damages are inadequate and other prerequisites are met.³ Thus, specific performance becomes an extraordinary, equitable remedy which courts in common law systems rarely will impose.⁴ Once it issues its order of specific performance, however, the common law court will enforce it against the defendant's person as well as property. To enforce his judgment, the judge is empowered to order coercive measures including, if necessary, the defendant's arrest.⁵

Under Venezuelan and other civil law systems, a promisor's primary obligation to perform is not affected by his breach of contract.⁶ His non-performance does not transform his duty to perform into a secondary obligation to pay money damages. Rather, the promisor remains obligated to comply with the precise terms of the contract. Moreover, in some civil

¹ See generally Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 231 (1955).

² A. CORBIN, LAW OF CONTRACT 506 (1930).

³ Specific performance is also precluded in the common law where (1) continuous supervision would be required to obtain the necessary performance; (2) the contract involves the continuance of a personal relationship; (3) the defendant after obeying the order would be entitled to nullify his performance; (4) the defendant's performance is conditioned upon performance by the plaintiff; (5) the performance was impossible at the time the contract came into existence; (6) the performance required has not been specified with certainty; and, (7) the granting of specific performance would place undue hardship on the defendant. See Szladits, *supra* note 1, at 210-11.

⁴ *McCallister v. Patton*, 214 Ark. 293, 215 S.W.2d 701 (1948).

⁵ Szladits, *supra* note 1, at 211.

⁶ E. MADURO LUYANDO, CURSO DE OBLIGACIONES: DERECHO CIVIL III, at 82 (1967).

law jurisdictions, though certainly not in all,⁷ the promisee is precluded from demanding money damages unless he demonstrates that specific performance is no longer possible.⁸ Thus, civil law jurisdictions, unlike common law jurisdictions, consider specific performance the usual and natural remedy for breach of contract.⁹

B. Contractual Obligations Under Venezuelan Law

The Venezuelan Civil Code defines a contract as an agreement between two or more parties to institute, regulate, transfer, modify or extinguish a legal obligation.¹⁰ These agreements embody the free will of the parties and, hence, carry the force of law between the them.¹¹ For this reason, Venezuelan jurisprudence and doctrine,¹² as well as the Civil Code,¹³ deem it essential that the parties perform, and if necessary the courts enforce, contractual obligations exactly as contracted.¹⁴ In theory, therefore, all contractual obligations are to be enforced in specie.¹⁵

This general view is limited by two principles of Venezuelan law that underlie the performance of all civil obligations. First, Venezuelan law provides that all contractual obligations are patrimonial in nature.¹⁶

⁷ Venezuela is one of these jurisdictions. *Id.* (citing CODIGO CIVIL DE LA REPUBLICA DE VENEZUELA [CIV. CODE] arts. 1264, 1290 and 1291 (1982)). So is France. See Szladits, *supra* note 1, at 233.

⁸ Argentina, Germany and Switzerland fall within this category. See E. MADURO LUYANDO, *supra* note 6, at 83; Szladits, *supra* note 1, at 233.

⁹ See Szladits, *supra* note 1, at 233 (citing *Stewart v. Kennedy*, 15 App. Cas. 75, 102 (1890)).

¹⁰ CIV. CODE art. 1133.

¹¹ *Id.* at art. 1159.

¹² Judgment of July 27, 1955, Corte de Casación, Caracas, Gaceta Forense (2S) IX 545. The term jurisprudence is used in Venezuela to refer to case law. Doctrine refers to the commentaries of domestic and foreign authors.

¹³ CIV. CODE art. 1264.

¹⁴ Under the Venezuelan Civil Code, *el buen padre de familia* is equivalent to the reasonable man standard used under the common law to evaluate the promisor's behavior. CIV. CODE art. 1270.

¹⁵ The theoretical preference for specific performance thus seems to be based on the triumph of moral considerations (i.e., parties *must* fulfill their promises) over economic ones. In theory, at least, specific performance is the proper remedy under Venezuelan law, regardless of economic considerations. This approach removes the option generally available to a promisor in common law systems of breaching a contract and then paying the resulting money damages, if it is economically feasible to do so. The moral tone of contract law in civil law systems results, in part, from the greater role played by Roman and canon law in its development. In contrast, the common law approach to contracts developed, in large part, through the practical application of general principles to particular cases. See generally A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 15-18 (2d ed. 1977) (comparing the early history of contract law in Continental Europe and England).

¹⁶ E. MADURO LUYANDO, *supra* note 6, at 31 (citing CIV. CODE arts. 1863, 1864 and

Thus, by virtue of the contract which creates an obligation between the promisor and the promisee, the promisee acquires certain rights over the promisor's property. In the case of nonperformance, the promisee can seek satisfaction of the outstanding obligation by acting against the promisor's property. Second, Venezuelan doctrine accepts the legal maxim, *nemo potest praecise cogi ad factum*,¹⁷ which provides that the law cannot compel a promisor, *manu militari*, to undertake a physical act in performance of a contractual obligation.¹⁸ The upshot is that a Venezuelan court seeking to enforce a civil judgment will be able to act against the promisor's property, but not his person.¹⁹

1. Classification of Obligations

Venezuela, like other civil law systems, classifies contractual obligations into the following categories: (1) obligations to give (*obligaciones de dar*); (2) obligations to do (*obligaciones de hacer*); and, (3) obligations to abstain (*obligaciones de no hacer*). Most contracts contain a mixture of these obligations. For example, a contract for the sale of personal property ordinarily involves an obligation to give as well as a consequential obligation to conserve, which itself combines obligations to do and to abstain, and an obligation to deliver.²⁰

a. Obligations to Give

Where the parties agree to transfer ownership or another right in rem²¹ from the promisor to the promisee, the contractual obligation is called an obligation to give.²² The pure obligation to give is satisfied when the promisor gives his express consent to transfer the title of the property stipulated in the contract.²³ The promisor performs his duty at an abstract level without having to undertake any physical acts.²⁴ In practice,

1929); see also A. COLIN & H. CAPITANT, CURSO ELEMENTAL DE DERECHO CIVIL 71 (1960).

¹⁷ "No one can be compelled to give specific performance of an undertaking to perform some act." See generally Szladits, *supra* note 1, at 215 (citing R. POTHIER, TREATISE ON THE CONTRACT OF LETTING AND HIRING (*contrat de louage*) 27, 88 (1953)).

¹⁸ See *supra* note 12.

¹⁹ E. MADURO LUYANDO, *supra* note 6, at 31.

²⁰ CIV. CODE art. 1265; see also A. COLIN & H. CAPITANT, *supra* note 16, at 23.

²¹ For example, an easement, usufruct or mortgage. See A. COLIN & H. CAPITANT, *supra* note 16, at 20.

²² E. MADURO LUYANDO, *supra* note 6, at 60.

²³ See CIV. CODE art. 1161; see also 3 M. ARCAYA, CODIGO CIVIL 31-32 (1968) (citing Judgment of Mar. 17, 1961, Juzgado Segundo de Primera Instancia en lo Civil Mencartil de la Circunscripción Judicial del Estado Zulia).

²⁴ See A. COLIN & H. CAPITANT, *supra* note 16, at 20; CIV. CODE art. 1285 (the promisor can validly consent if he is the owner of the good and has the power of alienation).

obligations to give usually are accompanied by the consequential obligations to conserve and to deliver the object specified in the contract. These consequential duties are classified as obligations to do because their performance usually requires the promisor to undertake some physical activity.²⁵

Obligations to give may involve either real property (*inmuebles*) or personal property (*muebles*).²⁶ They may also involve either unique, nonfungible goods (Picasso's *Guernika*) or fungible goods (a truck). The goods might be determined (a particular truck) or in genere, non-determined (10 trucks). Moreover, the property may be in the promisor's possession or in the possession of a third party.²⁷ Whether the contract involves real or personal property, unique, fungible or nonfungible property, and determined or nondetermined goods in the possession of the promisor or in the possession of a third party will determine whether the obligation to give is subject to specific performance.

b. Obligations to Do

Obligations to do are the most common of the three types of contractual obligations. This category includes all obligations that require the promisor to undertake an activity other than the transfer of property. One set of obligations to do involves duties that are directly connected with obligations to give, for example, where the promisor is committed to conserving and delivering the object of the contract.²⁸ Another set of obligations to do includes duties that bind the promisor to undertake an activity, perform and act or develop a particular object or behavior.²⁹ These activities can be of three types. The first type involves acts that are personal in nature, i.e., *intuitu personae* obligations. The contractual value of these obligations to the promisee lies in their being performed personally by the promisor, for example where a famous artist contracts to paint the promisee's portrait. The value of the obligation to the promisee arises from the particular artist painting the portrait.³⁰ The second type in-

²⁵ CIV. CODE art. 1265; see *supra* note 23. The obligation to conserve also carries elements of an obligation to abstain.

²⁶ CIV. CODE arts. 525-37. Unlike the common law, Venezuelan civil law does not place real property in a special category with respect to specific performance. Nevertheless, Venezuelan courts usually grant specific performance with respect to obligations to give real property.

²⁷ For an excellent discussion of these variations, see G. KUMMEROW, *COMPENDIO DE BIENES Y DERECHOS REALES* 44-48 (1980).

²⁸ CIV. CODE art. 1265.

²⁹ A. COLIN & H. CAPITANT, *supra* note 16, at 21.

³⁰ E. MADURO LUYANDO, *supra* note 6, at 99. Professor Ruggiero draws a distinction between those activities having a strictly personal character and those activities not having that character. The former can be undertaken by the promisor pursuant to his personal

cludes activities that are not personal in nature, and can thus be performed equally by the promisor, the promisee or a third party. This occurs, for example, where the promisee contracts to have a ditch dug. In that case, the activity can be performed equally by the promisor or by any other ditch digger. The third type of activity involves obligations that are to be performed abstractly and, hence, do not require the promisor to undertake any physical activity.³¹ This situation arises, for example, where the obligation is to enter into a contract. As is the case with obligations to give, the type of obligation to do determines whether a Venezuelan court will grant specific performance.

c. Obligations to Abstain

Obligations that bind the promisor to refrain from undertaking a particular activity are known as obligations to abstain.³² These obligations are breached the moment the promisor does the act which he had promised not to do. For example, an obligation to abstain is breached when the promisor goes into business in violation of a noncompetition agreement.

Venezuelan civil law distinguishes between obligations to abstain where the breach leads to consequences that can be reversed, erased or destroyed, and where the breach creates irreversible consequences.³³ Destruction is possible, for example, where the obligation is to abstain from building a wall, but it is not possible where the obligation is to refrain from burning a painting. Obviously, the contractual remedy granted upon breach of an obligation to abstain depends upon whether the consequence of the breach can be reversed, erased or destroyed.³⁴

C. Performance of Obligations

1. Specific Performance or Money Damages

As stated above, since contracts embody the free will of the parties, they carry the force of law in Venezuela and are enforceable between the parties.³⁵ Obligations, therefore, are to be performed, and if necessary, enforced, exactly as contracted.³⁶ Consistent with this principle, Venezue-

qualities; the latter can be performed by the promisee or by a third party. See 3 M. ARAYA, *supra* note 23, at 192 (citing R. RUGGIERO, INSTITUCIONES DE DERECHO CIVIL 34-35 (1964)).

³¹ E. MADURO LUYANDO, *supra* note 6, at 99. To an extent, therefore, these obligations are similar to obligations to give.

³² A. COLIN & H. CAPITANT, *supra* note 16, at 21.

³³ CIV. CODE art. 1268; E. MADURO LUYANDO, *supra* note 6, at 100.

³⁴ See *supra* note 33.

³⁵ See *supra* notes 11-14 and accompanying text.

³⁶ See *supra* note 12 and accompanying text.

lan law permits the promisee to retain the right, after a breach of contract, to demand the specific performance of the obligation.

Obligations in Venezuela can be performed either in specie or in equivalent, voluntarily or involuntarily, and directly or indirectly.³⁷ These various methods of performance give rise to the following types of contractual remedies: (1) specific performance (*cumplimiento forzoso en especie*); (2) indirect specific performance (*cumplimiento forzoso en especie indirecto*); and, (3) money damages (*cumplimiento forzoso en equivalente*).

The Venezuelan Civil Code states that all obligations must be performed exactly as they were contracted.³⁸ The aggrieved promisee, therefore, has a right to demand specific performance³⁹ as long as that remedy is not legally or physically impossible.⁴⁰ If specific performance is not possible, however, the promisee only can seek compensation for damages arising from the breach of contract. This compensation, usually in the form of money, is viewed as a substitute for specific performance⁴¹ and thus is considered equivalent to money damages.

Venezuelan law does not provide a clear standard for measuring money damages.⁴² Both the case law⁴³ and the commentators⁴⁴ make general reference to damages (*daños y perjuicios*) but fail to specify how these are to be determined. Venezuelan law recognizes that money damages should be sufficient to place the promisee in the position he would have been in had there been full performance of the contract.⁴⁵ This is similar to the expectancy measure followed in common law jurisdictions.⁴⁶ Yet, this general notion is not clarified further and therefore is not very helpful. Unlike the common law,⁴⁷ Venezuelan law does not specify the different measures that might be appropriate to determine what the

³⁷ E. MADURO LUYANDO, *supra* note 6, at 88-89.

³⁸ CIV. CODE art. 1264.

³⁹ E. MADURO LUYANDO, *supra* note 6, at 77-78 (citing Civ. CODE arts. 1264, 1290 and 1291).

⁴⁰ For a discussion of the circumstances under which specific performance would be impossible, see *infra* notes 71-74 and accompanying text.

⁴¹ See A. COLIN & H. CAPITANT, *supra* note 16, at 39-40.

⁴² See generally E. MADURO LUYANDO, *supra* note 6, at 80. See also A. COLIN & H. CAPITANT, *supra* note 16, at 135-36.

⁴³ See 3 M. ARCAYA, *supra* note 23, at 190 (citing Judgment of Nov. 10, 1953, Corte de Casación, Gaceta Forense, No. 2 (2S) 434).

⁴⁴ E. MADURO LUYANDO, *supra* note 6, at 80.

⁴⁵ *Id.*

⁴⁶ See, e.g., *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929).

⁴⁷ In the common law courts, expectancy damages are determined either by the cost of completion or by the diminished value. See, e.g., *Peevyhouse v. Garland Coal & Mining Company*, 382 P.2d 109 (Okla. Sup. Ct. 1962). See generally A. VON MEHREN & J. GORDLEY, *supra* note 15, at 1110-11.

promisee's positions would have been had the promisor performed fully.

A principle issue raised by the distinction drawn between performance in specie and performance in equivalent is whether the aggrieved party has a choice to request either specific performance or money damages. Some civil law jurisdictions give an absolute priority to specific performance.⁴⁸ Under this approach, the promisee is permitted to sue for specific performance as long as that remedy remains possible. The promisee can only request money damages if he proves that specific performance is impossible.⁴⁹ The courts will dismiss the claim for money damages if specific performance is still available.⁵⁰

Venezuelan civil law follows a system of relative, rather than absolute, priority.⁵¹ Performance in specie is given full force during the period between the birth or rise of the obligation and the time of performance; during this time, which from a common law perspective is prior to the breach of contract, the promisee cannot demand, and the promisor cannot offer, performance of a different obligation.⁵² Once the time for performance has expired, the promisee is given the option of claiming money damages in lieu of specific performance.⁵³ The same option, however, is not extended to the promisor. He must perform in specie unless he proves that to do so would be impossible.

a. Voluntary or Involuntary Performance

This distinction is an obvious one. The promisor is to perform all contractual obligations spontaneously and voluntarily.⁵⁴ Nonperformance gives the promisee the right to have the obligation enforced through coercive means (*cumplimiento forzoso*).⁵⁵ The issue then becomes whether the court will grant specific performance or money damages.

b. Direct or Indirect Performance

Direct performance occurs where the promisor executes the contractual obligation. This is the usual and expected method of executing obligations under Venezuelan law.⁵⁶ Indirect performance exists where a party other than the promisor performs the obligation. Some, if not most,

⁴⁸ These jurisdictions include Argentina, Germany and Switzerland. E. MADURO LUYANDO, *supra* note 6, at 82; Szladits, *supra* note 1, at 221-34.

⁴⁹ Szladits, *supra* note 1, at 228.

⁵⁰ *Id.*

⁵¹ E. MADURO LUYANDO, *supra* note 6, at 83-86.

⁵² Civ. CODE art. 1290 and 1291.

⁵³ E. MADURO LUYANDO, *supra* note 6, at 83.

⁵⁴ *Id.* at 86; *see* Civ. CODE art. 1160.

⁵⁵ E. MADURO LUYANDO, *supra* note 6, at 86-87; Civ. CODE art. 1167.

⁵⁶ *See supra* note 14 and accompanying text.

obligations are subject to both direct and indirect performance,⁵⁷ such as where there is an obligation to give a fungible good possessed by the promisor. Other obligations are subject to direct, but not to indirect, performance. This would be the case where the promisor has a unique good or where the obligation involves a personal activity by the promisor.⁵⁸

Under Venezuelan law, the concept of direct performance is distinct from that of specific performance.⁵⁹ For doctrinal purposes, contractual obligations can be subject to specific performance whether they are performed directly or indirectly. Thus, Venezuelan courts and commentators draw a distinction between direct specific performance (*cumplimiento forzoso en forma específica*) and indirect specific performance (*cumplimiento forzoso en especie indirecto*). Direct specific performance occurs where the court directs the promisor to perform the obligation himself;⁶⁰ indirect specific performance occurs where the court gives the promisee authority to have the duty performed at the promisor's expense.⁶¹ Where neither of these two remedies is available, the promisee must settle for compensation in the form of money damages.⁶²

2. Forced Performance of Contractual Obligations

a. Forced Performance of Obligations to Give

The rules pertaining to the specific performance of obligations to give are relatively simple. An obligation to give is performed where the promisor gives his express consent to transfer ownership or some other type of right over the object of the obligation.⁶³ A court decision recognizing such an obligation also can serve as a substitute for the promisor's consent. Thus, the obligation to give can be accomplished without having to coerce the promisor into undertaking a physical act; under these circumstances,

⁵⁷ *But see* Civ. CODE art. 1801 (obligations arising from games of chance or other forms of gambling will not be enforced).

⁵⁸ Civ. CODE art. 1284.

⁵⁹ E. MADURO LUYANDO, *supra* note 6, at 88.

⁶⁰ *Id.*

⁶¹ *Id.* at 89.

⁶² *Id.* at 89-90. Indirect specific performance and money damages are not the same remedy even though their money value may sometimes be the same. The two remedies differ in at least the following three ways: (1) the money value of each remedy at times will differ (i.e., the cost of knocking the wall down will differ from the damages suffered as a result of the wall); (2) the promisee must show actual loss to collect money damages but not to receive indirect specific performance; and, (3) the execution of indirect performance may involve a greater invasion of the promisor's property interest than might be the case with the payment of money damages (i.e., entering his property to destroy the wall). Melich-Orsini, *La Ejecución Forzosa en Especie de las Obligaciones de Hacer y de no Hacer*, in ESTUDIOS DE DERECHO CIVIL 65, 128-49 (1st ed. 1975).

⁶³ *See supra* note 23 and accompanying text.

the maximum *nemo potest praecise cogi ad factum*⁶⁴ does not preclude the issuance of specific performance.

This general statement is applicable regardless of whether that good is movable or immovable,⁶⁵ to situations where the obligation to give involves a unique, nonfungible good that is in the promisor's possession.⁶⁶ This analysis also applies to those situations where the promisor holds a determined, fungible good that is the object of the obligation. Finally, the general rule also applies to nondetermined fungible goods where the promisor holds a sufficient quantity and quality of the good.⁶⁷

Various obligations to give are not subject to direct specific performance, but can be indirectly performed in specie, such as where the promisor does not own the property that he is to transfer. The promisor cannot be compelled to enter the market and purchase the good or right for the promisee's benefit.⁶⁸ The promisee, however, can seek judicial authority to obtain the good from a third party at the promisor's expense.⁶⁹ In practice this will usually occur where the object of the obligation is a fungible good, but in theory, indirect specific performance is also applicable to unique, non-fungible property as long as the promisee can obtain the property from the third party.⁷⁰

Some obligations to give cannot be performed in specie, either directly or indirectly. If the object of the obligation cannot be acquired from a third party,⁷¹ then the promisee must settle for money damages.⁷² This occurs if the property involved is a unique, nonfungible good that has perished or has been destroyed.⁷³ Money damages also are the only available remedy where the good, available at the time of the breach, no longer is obtainable due to shortages or legal prohibition.

Other obligations to give which are not subject to either direct or indirect specific performance are those that involve in genere goods the selection and measure of which require the promisor's cooperation. Enforcement of these obligations in specie becomes impossible since the

⁶⁴ E. MADURO LUYANDO, *supra* note 6, at 98; Judgment of July 27, 1955, Corte de Casación, Caracas, Gaceta Forense (2S) IX 545.

⁶⁵ Melich-Orsini, *supra* note 62, at 179-84; *see also* 3 L. BOFFI BOGGERO, TRATADO DE LAS OBLIGACIONES 305 (1973) (citing article 574 of the Argentinian Civil Code which expressly regulates this situation).

⁶⁶ E. MADURO LUYANDO, *supra* note 6, at 98. For example, a famous painting.

⁶⁷ For example, 10 trucks. 2 J. GIORGI, TEORIA DE LAS OBLIGACIONES 155 (1928).

⁶⁸ 3 H. MAZEAUD, L. MAZEAUD & J. MAZEAUD, LECCIONES DE DERECHO CIVIL 214-15 (1960) [hereinafter cited as 3 MAZEAUD].

⁶⁹ Civ. CODE art. 1266; *see* E. MADURO LUYANDO, *supra* note 6, at 89.

⁷⁰ Melich-Orsini, *supra* note 62, at 184 n.113 (citing Commercial Code arts. 142, 181, 295, 339, 397 and 534).

⁷¹ E. MADURO LUYANDO, *supra* note 6, at 93.

⁷² Civ. CODE art. 1264.

⁷³ 2 J. GIORGI, *supra* note 67, at 158.

promisor cannot be forced to do these activities. Under those circumstances, the promisee must settle for money damages.⁷⁴

The promisor may request money damages even if specific performance would be available to him.⁷⁵ If he does request specific performance, he also will be able to demand compensation for the direct losses suffered between the time the contract is breached and the judgment is enforced.⁷⁶

b. Forced Performance of Obligations to Do

The discrepancy found between the rule that all contractual obligations should be performed exactly as contracted⁷⁷ and the infrequent application of specific performance is most evident with respect to obligations to do. This type of obligation requires that the promisor undertake a physical activity. Venezuelan law, however, does not permit the use of force to compel a party to do a physical act⁷⁸ and, thus, few of these obligations are subject to specific performance.

There are two sets of obligations to do that courts will enforce through specific performance. The first group involves obligations to conserve and to deliver, duties that are consequential to the obligation to give.⁷⁹ The second group includes those obligations that the promisor is to perform abstractly and that therefore do not require the promisor to undertake any physical activity.⁸⁰ This is the case, for example, where the promisor agrees to leave an offer open, but then tries to revoke the offer before the promisee accepts it.⁸¹ A similar situation exists where the obligation is to decree a right or sign a document. A judicial order will serve as a substitute for the act, thus granting the promisee specific performance.⁸²

With the exception of the limited cases described above, all obligations to do must be enforced either by indirect specific performance⁸³ or the payment of money damages.⁸⁴ In case of nonperformance, courts can authorize the promisee to perform or to have a third party perform, at the promisor's expense, the particular contractual obligation.⁸⁵ This rule applies, for example, where the promisor breaches his duty to dig a ditch

⁷⁴ Melich-Orsini, *supra* note 62, at 179.

⁷⁵ See *supra* note 7.

⁷⁶ Melich-Orsini, *supra* note 62, at 132.

⁷⁷ Civ. CODE art. 1264.

⁷⁸ See *supra* notes 17 and 18.

⁷⁹ Civ. CODE art. 1265.

⁸⁰ See *supra* note 31 and accompanying text.

⁸¹ Civ. CODE art. 1137.

⁸² Judgment of July 27, 1955, Corte de Casación, Caracas, Gaceta Forense (2S) IX 545.

⁸³ Civ. CODE art. 1266.

⁸⁴ 3 MAZEAUD, *supra* note 68, at 215-16.

⁸⁵ Civ. CODE art. 1266.

and the promisee seeks authority to have another ditch-digger do the job at the promisor's expense. Indirect specific performance therefore makes the promisee whole without violating the prohibition of use of force against the promisor.⁸⁶

Venezuelan courts may also grant indirect specific performance where the obligation involves a fungible activity that the promisor or another party can perform equally well. Obligations to do which are not subject to indirect specific performance, however, require the promisee to settle for money damages. This will occur, for example, if the obligations involve acts that are personal in nature. The contractual value of these *intuitu personae* obligations is in the performance by the promisor. Since the courts cannot force the promisor to undertake these activities, and since performance by a third party would not satisfy the promisee, the promisee's only remedy is money damages.⁸⁷ Other obligations to do that only can be remedied by the payment of money damages arise where the promisor is to perform an activity within a certain time period that already has expired.⁸⁸

The promisee may request money damages even if specific performance is available to him in a particular case.⁸⁹ If he prefers money damages and the remedy is available, he also can demand compensation for the direct losses suffered between the time of breach and the enforcement of the judgment.⁹⁰

c. Forced Performance of Obligations to Abstain

The rules regarding the specific performance of obligations to abstain are similar to those pertaining to obligations to do. The prohibition against the use of physical force to coerce an individual to undertake or cease from doing an activity pursuant to a contractual obligation once again serves to severely limit the general preference for specific performance.⁹¹

The common law concept of the injunction does not exist in Venezuelan civil law.⁹² Thus, Venezuelan courts cannot compel parties to act in connection with the enforcement of civil obligations. Moreover, obligees cannot seek judicial enforcement of obligations prior to a promisor's breach.⁹³ That is, Venezuelan law does not recognize the common law

⁸⁶ Melich-Orsini, *supra* note 62, at 135.

⁸⁷ See *supra* note 30 and accompanying text.

⁸⁸ 2 J. GIORGI, *supra* note 67, at 158.

⁸⁹ See *supra* note 7 and accompanying text.

⁹⁰ Melich-Orsini, *supra* note 62, at 132.

⁹¹ *Id.* at 153.

⁹² 3 M. ARAYA, *supra* note 23, at 195.

⁹³ *Id.*

concept of anticipatory breach. In Venezuela, therefore, the promisee of an obligation to abstain cannot begin an action against the promisor until the promisor has undertaken the prohibited activity. Yet, by the time the breach occurs, the specific performance of the obligation has become impossible,⁹⁴ and the promisee is forced to settle for money damages. This would be the case, for example, if a theater owner and an opera singer entered into a contract pursuant to which the promisor would be prohibited from singing at the theater across the street. The impresario could not sue the promisee for breach of contract until the latter actually had sung for the competitor's theater. At that point, the promisee could seek the indirect specific performance of the obligation (not available since the breaching act was not reversible) or the payment of damages arising from the promisor's breach. He could not, however, sue to prevent the promisor from singing for the competitor in the future.⁹⁵

For purposes of contract remedies, Venezuelan law distinguishes between obligations to abstain which, if breached, lead to consequences that the parties or a court can reverse, erase or destroy from those where breach creates irreversible consequences.⁹⁶ According to the commentators and the jurisprudence, the former type, but not the latter type obligation, is subject to indirect specific performance.⁹⁷ The Civil Code implements this approach by providing that a court may grant the promisee authorization to destroy or have a third party destroy, at the promisor's expense, that which has been done in breach of an obligation to abstain.⁹⁸

This distinction raises an ambiguity about when a particular consequence arising from a breach is subject to destruction. Commentators do not agree as to the scope and definition of the destruction doctrine.⁹⁹ Similarly, Venezuelan law does not purport to specify the circumstances under which such consequences are subject to destruction.¹⁰⁰ Obviously, there are physical limits to the ability to reverse, destroy or erase consequences.¹⁰¹ Beyond these practical limitations, destruction could be legally impossible in the following situations: (1) where destruction of the consequence would trammel on the rights of third parties; and, (2) where the cost of destruction would be disproportionate to the loss suffered by the promisee. Unfortunately, Venezuelan commentators discuss the issue

⁹⁴ 2 J. GIORGI, *supra* note 67, at 158.

⁹⁵ See generally 3 M. ARAYA, *supra* note 23, at 195.

⁹⁶ See *supra* note 33 and accompanying text.

⁹⁷ Melich-Orsini, *supra* note 62, at 134; E. MADURO LUYANDO, *supra* note 6, at 99.

⁹⁸ Civ. CODE art. 1268.

⁹⁹ Compare E. MADURO LUYANDO, *supra* note 6, at 97, with Melich-Orsini, *supra* note 62, at 134; 3 L. BOFFI BOGGERO, *supra* note 65, at 434-36.

¹⁰⁰ Melich-Orsini, *supra* note 62, at 134.

¹⁰¹ For example, a document cannot be recovered once it is burned.

in general terms without clarifying the analysis in this manner.¹⁰²

It appears that the application of the destruction doctrine in situations involving third parties depends on the degree of interference with the third parties interests and rights. It is clear that upon a promisor's breach of a noncompetition agreement, a promisee can receive judicial authority to have the promisor's business closed down.¹⁰³ The degree of interference with third parties is relatively low in this situation. It is unclear, however, how far Venezuelan courts would be willing to go. For example, would the court order indirect specific performance if the promisor, instead of establishing his own business, began to work for the promisee's competitor? Could the court order the competitor to refrain from hiring the promisor?¹⁰⁴ Could the court order the competitor's business to turn over to the promisee the profits earned as a result of the promisor's work? Could the competitor's business be closed down? A foreign commentator suggests that this last option would be within the scope of the doctrine.¹⁰⁵ Nevertheless, it is unlikely that the courts would grant such a remedy under Venezuelan law.¹⁰⁶

With respect to the second possible limitation on the doctrine of indirect specific performance, it is not clear whether a Venezuelan court would order the destruction of an object where the cost of performance or the loss to the promisor would be disproportionately high in comparison with the damage¹⁰⁷ suffered by the promisee. Neither the Civil Code¹⁰⁸ nor the commentators address this issue.¹⁰⁹ The scarcity of case law on this point suggests that the courts have not considered the matter.

The promisee will have to settle for money damages if the consequence of the abstention breach is physically or legally irreversible and, hence, indirect specific performance is rendered impossible.¹¹⁰ As is the case with obligations to give and obligations to do, there is no clear guidance in this situation as to how courts would measure these money damages.¹¹¹

In Venezuela, the promisor may alternatively seek money damages

¹⁰² See, e.g., E. MADURO LUYANDO, *supra* note 6, at 100.

¹⁰³ 3 L. BOFFI BOGGERO, *supra* note 65, at 434.

¹⁰⁴ Clearly not.

¹⁰⁵ 3 L. BOFFI BOGGERO, *supra* note 65, at 435-36.

¹⁰⁶ E. MADURO LUYANDO, *supra* note 6, at 101. These issues are of particular concern to foreign entities that enter into sales representation and licensing agreements in Venezuela.

¹⁰⁷ See generally A. COLIN & H. CAPITANT, *supra* note 16, at 40.

¹⁰⁸ Cf. CIV. CODE arts. 1274 and 1275. Article 1274 states that the promisor only will be liable for damages that are foreseen or should have been foreseen at the time of the contract. Article 1275 limits damages to those that arise immediately and directly from the breach.

¹⁰⁹ See E. MADURO LUYANDO, *supra* note 6, at 101.

¹¹⁰ Melich-Orsini, *supra* note 62, at 134.

¹¹¹ See *supra* note 47 and accompanying text.

even if specific performance is available to him. Pursuant to the Civil Code, he may demand the payment of money damages for the loss suffered solely from the promisor's breach.¹¹²

D. Enforcement of Judgments

The aggrieved promisee seeks not only the affirmation, but, also the enforcement of his contractual right by a court of law.¹¹³ Like most legal systems, the Venezuelan system does not grant the promisee the unilateral power to enforce a court judgment. Similarly, the Venezuelan system does not simply leave it up to the promisor to obey judgments at will. Rather, the Venezuelan Code of Civil Procedure places the responsibility for enforcing court judgments on courts of first instance.¹¹⁴

Under general principles of Venezuelan law, judicial procedure must grant to whomever has a substantive right all that he has a right to obtain.¹¹⁵ Thus, in theory, Venezuelan procedure should not interfere with a promisee's ability to vindicate his substantive right to specific performance. In practice, however, this maxim is seldom satisfied with respect to the enforcement of judgments for specific performance.¹¹⁶ This inadequacy results from the application of three principles found in the Venezuelan civil law system. The first two principles are that: (1) all contractual duties are patrimonial in nature,¹¹⁷ and, (2) a court cannot compel an obligor, through the use of physical force, to undertake a physical act in performance of a contractual duty.¹¹⁸ These rules leave room for courts to enforce civil judgments against an obligor's property but not against his person. The third principle—that a civil judgment merely reaffirms the promisor's obligation toward the promisee, but does not necessarily establish a new relationship between the promisor and the court¹¹⁹—accentuates this limitation. This third rule in effect makes it impossible for a Venezuelan court to compel direct, personal compliance with its civil decrees. In short, the Venezuelan system undermines com-

¹¹² Civ. Code art. 1266; see also E. MADURO LUYANDO, *supra* note 6, at 97.

¹¹³ J. DUQUE SANCHEZ, PROCEDIMIENTOS ESPECIALES CONTENCIOSOS 71 (1981).

¹¹⁴ CODIGO DE PROCEDIMIENTO CIVIL DE LA REPUBLICA DE VENEZUELA [CODE CIV. PROC.] arts. 446-57, reprinted in A. HERNÁNDEZ-BRETÓN, CODIGO DE PROCEDIMIENTO CIVIL VENEZOLANO 300-05 (1967).

¹¹⁵ Melich-Orsini, *supra* note 62, at 75.

¹¹⁶ 2 J. GIORGI, *supra* note 67, at 216.

¹¹⁷ See *supra* note 16 and accompanying text.

¹¹⁸ See *supra* note 17 and accompanying text.

¹¹⁹ This attitude is perhaps derived from the view that the promisor's breach does not affect his primary obligation to perform and does not transform his duty into a secondary obligation to pay money damages. See *supra* note 6 and accompanying text. Under this scheme, the judgment is viewed as a reaffirmation of the primary obligation, rather than as the basis for a new relationship between the promisor and the court.

pliance with certain kinds of civil judgments, particularly judgments for specific performance. Venezuelan procedure fails to provide for personal sanctions such as the common law concept of contempt of court,¹²⁰ or for patrimonial sanctions, such as the French *astreinte*¹²¹ or the German system of fines.¹²² The absence of these mechanisms, which are directed at coercing obligors into complying with civil judgments,¹²³ allows promisors in Venezuela to ignore certain civil judgments without incurring an obligation greater than the existing contractual duty affirmed by the judgment.

The inability to enforce civil obligations against the promisor's person as well as the absence of patrimonial or personal sanctions aimed at coercing obedience thus results in an inadequate procedural mechanism for the enforcement of most specific performance judgments.

1. Enforcement of Judgments in Venezuela

a. Enforcement of Judgments for Specific Performance

A major portion of the Venezuelan Code of Civil Procedure is devoted to the enforcement of judgments.¹²⁴ Pursuant to the Code of Civil Procedure, the defendant is given three days to comply with a civil judgment.¹²⁵ If he has not done so by the fourth day, the court will intervene and order that the judgment be enforced.¹²⁶

If the judgment involves an obligation regarding title to real property, the court's decision and order (*fallo*) will serve as evidence of the title. In those cases, the plaintiff will acquire title over the property immediately upon proper registration of the judgment.¹²⁷ Additionally, the court will order that the plaintiff be put in possession of the property through the use of public force if necessary.¹²⁸ The courts also will enforce obligations to give and to deliver personal property in this manner.¹²⁹

A recalcitrant defendant can avoid even this simple form of specific performance. For example, without sanction, he can hide or destroy the good which he is to deliver. If he succeeds in making the good unavaila-

¹²⁰ Goldschmidt, *Las Astreintes, las Sanciones por Contempt of Court y Otros Medios Para Conseguir el Cumplimiento de las Obligaciones de Hacer y de no Hacer*, in ESTUDIOS DE DERECHO COMPARADO 253, 267 (1958).

¹²¹ *Id.* at 254; 3 MAZEAUD, *supra* note 68, at 220-24.

¹²² Szladits, *supra* note 1, at 228.

¹²³ 2 J. GIORGI, *supra* note 67, at 214.

¹²⁴ CODE CIV. PROC. arts. 446-501.

¹²⁵ *Id.* at art. 449.

¹²⁶ *Id.*

¹²⁷ Judgment of July 27, 1955, Corte de Casación, Caracas, Gaceta Forense (2S) IX 545.

¹²⁸ CODE CIV. PROC. art. 449, § 2.

¹²⁹ *Id.*; Melich-Orsini, *supra* note 62, at 135.

ble, he will have to pay the promisee the money value of the good, but he will not be subjected to any additional sanctions for disobeying the court.¹³⁰ In the end, he will have succeeded in denying the promisee his right to specific performance.¹³¹

b. Enforcement of Judgments for Indirect Specific Performance

One of the chief distinctions which Venezuelan law draws between indirect specific performance and the payment of money damages is that the former, unlike the latter, requires "the forceful penetration of the defendant's property in order to realize the substitute activity against the defendant's will."¹³² The enforcement of a judgment for indirect specific performance can involve domestic intervention with the obligor's property. This occurs, for example, where the court authorizes the promisee to have someone destroy, at the promisor's expense, a wall constructed by the promisor in violation of an obligation to abstain. The Civil Code provides that courts can grant the promisee authority to secure such indirect performance of the obligation.¹³³ The Code of Civil Procedure provides the mechanism by which the defendant's property can be attached and liquidated to pay for the costs of destroying the wall.¹³⁴ To this extent, therefore, Venezuelan procedure provides a method for enforcing judgments for indirect specific performance.

The difficulty arises, however, where the promisor attempts to interfere with the execution of the judgment. For example, in the situation described above, the promisor could resist the enforcement of the judgment by resorting to force to prevent the third party from entering his property to destroy the wall. The promisor's interference could frustrate the court's decision, yet the court would find itself unable to subject the culprit to any civil sanctions beyond requiring him to pay the money equivalent of the obligation. In short, even with respect to indirect specific performance, the obligor retains the ability under certain circumstances to frustrate enforcement of the judgment.

c. Enforcement of Judgments for Money Damages

The Code of Civil Procedure establishes the mechanism for the enforcement of money damages.¹³⁵ The Code authorizes judges of first in-

¹³⁰ CODE CIV. PROC. art. 449, § 3. Of course, this route is probably not available where real property is involved.

¹³¹ See CIV. CODE art. 1264.

¹³² Melich-Orsini, *supra* note 62, at 130 (English translation).

¹³³ CIV. CODE art. 1268.

¹³⁴ CODE CIV. PROC. art. 450.

¹³⁵ *Id.*

stance to order the attachment of the defendant's property.¹³⁶ The value of the property attached cannot exceed twice the amount of the verdict.¹³⁷ The Code does not provide a general preference for personal or real property, although it does grant immunity from attachment of certain items of personal property.¹³⁸ Once attached,¹³⁹ the obligor's property is deposited with a trustee.¹⁴⁰ The value of the property then is assessed and a public auction is held.¹⁴¹ The proceeds from the auction are used to satisfy the judgment for money damages.

2. Reliance on Article 6 of the Law of Judicial Power and Article 485 of the Penal Code for the Enforcement of Judgments

With the exception of the provisions on attachment of goods, the Code of Civil Procedure fails to provide a mechanism for enforcing civil judgments. As a result, the defendant often is permitted to disregard an order for the direct or indirect performance of a contractual obligation without being subjected to any sanctions.¹⁴² As stated earlier, the absence of sanctions may result from the view that a civil judgment reaffirms the promisor's obligation toward the promisee, but does not necessarily establish a new relationship between the defendant and the court.¹⁴³

A strong argument can be made, however, that the Penal Code,¹⁴⁴ in conjunction with the Partial Reform Law of the Organic Law of Judicial Power (Law of Judicial Power),¹⁴⁵ establishes the requisite relationship between the defendant and the court arising from the judgment. The Law of Judicial Power authorizes courts to employ "all legal means of coercion" at their disposal in order to enforce their judgments.¹⁴⁶ Moreover, the Penal Code provides a clear sanction where the defendant violates his obligation to the court.¹⁴⁷ Article 485 of the Code states that:

Whoever disobeys an order issued legally by the competent authority or fails to observe a rule decreed legally by said authority in the interest of justice or security or public health will be punished with five to twenty

¹³⁶ This represents the practical application of Civ. CODE arts. 1283 and 1284.

¹³⁷ CODE CIV. PROC. art. 450.

¹³⁸ CIV. CODE art. 1929.

¹³⁹ CODE CIV. PROC. arts. 458-61 establish the procedure for attaching the defendant's property.

¹⁴⁰ *Id.* at arts. 462-68.

¹⁴¹ *Id.* at arts. 477-95.

¹⁴² Of course, the promisor still will have to pay money damages arising from the breach of the principal obligation.

¹⁴³ *See supra* note 119.

¹⁴⁴ CODIGO PENAL DE LA REPUBLICA DE VENEZUELA [PENAL CODE] art. 485 (1982).

¹⁴⁵ Partial Reform Law of the Organic Law of Judicial Power, art. 6 (Oct. 12, 1971).

¹⁴⁶ *Id.*

¹⁴⁷ PENAL CODE art. 485.

(20) days of arrest, or a fine of twenty to one-hundred and fifty bolivares.¹⁴⁸

Courts certainly are competent authorities and their judgments clearly are orders issued legally in the interest of justice. Thus, although on its face article 485 would appear applicable, there is no indication that Venezuelan lawyers have resorted to this article to obtain the enforcement of civil judgments granted in favor of their clients. It would appear that they consider the article applicable only to penal obligations. This may change, however, as the level of litigation increases in Venezuela and the case law develops further.

E. Use of Penalty Clauses to Obtain Specific Performance

Finally, a promisee may try to employ contract penalty clauses as an alternative method under Venezuelan law of securing the specific performance of contractual obligations.¹⁴⁹

The Civil Code permits the inclusion of penalty clauses for the purpose of assuring the performance of contractual obligations.¹⁵⁰ Although such clauses would be of little, if any, value to the promisee if they directly stated that obligations would be executed in specie in the case of breach,¹⁵¹ the provisions could still achieve that goal indirectly, by providing for a substantial pecuniary penalty for nonperformance.¹⁵²

Such an approach raises the question of whether Venezuelan courts would exercise discretion in voiding penalty clauses which stipulate disproportionately high amounts and which thus could lead to economically irrational outcomes.¹⁵³ The Venezuelan Civil Code does not expressly grant judges this power of avoidance. The Code does not even provide for contracts to be voided on grounds of unconscionability. It does permit the judge to diminish the amount of the penalty where there has been partial performance of the principal obligation.¹⁵⁴ A court could apply this clause broadly to lower a particularly disproportionate penalty. A carefully drafted contract clause, however, probably could prevent the court from using article 1260 in this manner. For example, the contract could stipu-

¹⁴⁸ *Id.* (English translation).

¹⁴⁹ See generally A. COLMO, DE LAS OBLIGACIONES EN GENERAL 131 (1961).

¹⁵⁰ CIV. CODE art. 1257.

¹⁵¹ In principle, and regardless of penalty clauses, in case of breach, all obligations should be specifically performed as long as it is not legally or physically impossible to do so. See *supra* notes 71-74 and accompanying text.

¹⁵² A. COLMO, *supra* note 149, at 130-31.

¹⁵³ For a discussion of possible conflicts between the remedy of specific performance and economically rational behavior, see A. VON MEHREN & J. GORDLEY, *supra* note 15, at 1119-21.

¹⁵⁴ CIV. CODE art. 1260.

late that any delay in performance would amount to a complete breach and further that the penalty clause would apply upon any delay in performance.

III. CONCLUSION

In Venezuela, a sharp contrast exists between the general principle that all obligations should be performed exactly as they are contracted,¹⁵⁵ and the infrequent application of specific performance as a contractual remedy. This paradox arises in part from the application of three other general principles of civil law: (1) all contractual duties are patrimonial in nature; (2) the promisor cannot be compelled, by the use of force, to undertake a physical act in performance of a contractual obligation; and, (3) civil judgments reaffirm the promisor's obligation toward the promisee, but do not necessarily establish a new relationship between the promisor and the court.

These principles of Venezuelan law prevent courts from enforcing civil obligations against an obligor's person. They also lead to an absence of sanction that a court might apply against the promisor's person or property to coerce him into obeying the court's judgment. These two consequences severely limit the circumstances under which courts will grant specific performance.

More specifically, Venezuelan courts will grant direct specific performance of obligations to give if the obligor controls the real or personal property which is in dispute. If necessary, the court will order the attachment of the promisor's property pursuant to the Venezuelan Code of Civil Procedure.¹⁵⁶ The courts also will make direct specific performance available in connection with obligations to do that are consequential to obligations to give.¹⁵⁷ In addition, obligations to do will be subject to specific performance if the duty can be met abstractly and therefore does not require that the promisor undertake any physical acts. The absence of a concept similar to the common law injunction precludes the imposition of specific performance of obligations to abstain.

Courts will order the indirect specific performance of obligations to give if the promisor does not own the property which he is to transfer and the promisee can obtain such property from a third party.¹⁵⁸ In practice, this usually occurs where the object of the obligation is a fungible good; in theory, indirect specific performance also applies to unique, non-fungible

¹⁵⁵ *Id.* at art. 1264.

¹⁵⁶ CODE CIV. PROC. art. 449.

¹⁵⁷ CIV. CODE art. 1265 (an obligation to conserve and to deliver).

¹⁵⁸ The court cannot compel the promisor to purchase the good for the benefit of the promisee.

property that the obligee can acquire from third parties. Courts will enforce through indirect specific performance obligations to do if the obligation involves a fungible activity that can be performed equally well by the promisor or by another party. This remedy also is granted in connection with obligations to abstain if the breach leads to consequences that can be reversed, erased or destroyed. However, the promisor may frustrate indirect specific performance of these obligations by interfering with their performance. Venezuelan civil procedure does not provide a mechanism for sanctioning a defendant who disobeys a court order in this manner.

Venezuelan courts will enforce all other contractual obligations by ordering the payment of money damages. Obligations to give which involve a unique, nonfungible good that has perished or has been destroyed are treated in this manner. Duties that involve a fungible good which was available at the time of the breach but no longer is available due to shortages or legal prohibition also lead to money damages. Obligations to give that require the promisor to cooperate in the selection and measure of the goods are also enforceable only by the payment of money damages. Similarly, obligations to do that involve acts which are personal in nature are only subject to money damages. The same is true of those activities that were to be performed within a certain time period that has already expired. Finally, only money damages are available in connection with obligations to abstain where the breach creates irreversible consequences. The promisee always may request money damages even where specific performance would be available to him.

The above scheme leaves a Venezuelan court impotent in the face of a recalcitrant promisor, principally because the court's judgment fails to create a direct relationship between the promisor and the court. This article has argued that this crucial relationship can arise from the application of article 485 of the Penal Code in conjunction with article 6 of the Law of Judicial Power. Taken together, these provisions establish a mechanism whereby courts can sanction obligors who ignore the court's civil judgments. The article also has argued that contractual penalty clauses, which are permitted under Venezuelan law, provide a second alternative for a party seeking to assure the availability of specific performance in case of breach of contract. The question remains open whether Venezuelan courts would refuse to enforce disproportionately high penalty clauses, which could lead to economically irrational outcomes, even in the absence of express code provisions permitting courts to do so.

