BUYING TIME IN SPAIN: THE SPANISH LAW OF INSTALLMENT SALES

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Because Spain for many years was lacking in consumer goods, it was obligatory to prove that the United States had lost its soul in pursuit of such goods. Special contumely was heaped upon our system of time payments . . . . But with the arrival of television the initial cost of a set was so great that the average Spanish family could not advance the cash at one time. A system of time payments was obligatory and one was initiated, but if you ask a Spaniard about this he says, 'Yes, but the system we worked out doesn't corrupt the soul.'

J. Michener, Iberia 491 (1968).

While Spain is renowned as a country attractive to tourists, the

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1 In 1981, the year of the last Spanish census, approximately 41.3 million travelers entered the country. The domestic population at that time was 37.7 million. Ministerio de Economia y Hacienda, Espana: Anuario Estadistico de Espana 1984, at 35, 319 [hereinafter cited as 1984 Anuario Estadistico].


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extraordinary economic growth that Spain has experienced over the past twenty years is less widely known.\(^2\) The Spanish gross national product (GNP) ranks fifth in Western Europe,\(^3\) and eleventh in the world.\(^4\) The Spanish per capita GNP\(^5\) is exceeded by only seventeen nations with industrial market economies and a handful of high income oil-exporting nations.\(^6\)

Spain also is perceived often as a country with a primarily agricultural economy. In the past twenty years, however, the proportion of the working force engaged in agriculture has steadily declined.\(^7\) The importance of agriculture in the national economy, moreover, has declined with the steady growth in the industrial and service sectors.\(^8\) The current Spanish economy is broad-based,
with industry accounting for 34%, service accounting for 60%, and agriculture accounting for only 6% of the gross domestic product. Since the 1960's, marked development has taken place in such industrial fields as automobiles, shipbuilding, basic metals, steel production, cement, and petroleum refining.

In 1982, Spain's manufacturing production amounted to close to $40 billion, ahead of corresponding figures for the Western European countries of Ireland, Belgium, Austria, Sweden, and the Netherlands, but behind France, West Germany, Italy, and the United Kingdom. Mining also plays an important part in the Spanish economy. In addition, Spain produced 110 billion kilowatt hours (kwh) of electricity in 1982, constituting the thirteenth highest national production figure in the world, and ranked thirteenth in the world in general energy consumption.

Spain has undertaken an increasingly important role in world trade. A reflection of the change in Spain's economy from 1960 to 1981 can be seen in the structure of its merchandise exports. Primary products, fuel, and minerals accounted for 78% of Spain's exports in 1960, whereas in 1981, 71% of Spain's exports consisted of manufactured products, machinery and transport equipment, and textiles and clothing. In 1982, Spain's total exports amounted to over $20 billion, ranking Spain as twentieth in the world.

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9 The World Bank, supra note 2, at 223. Comparable United States figures are 33% for industry, 64% for service, and 3% for agriculture. Id.
10 The automobile industry is the nation's largest employer and has helped make Spain one of the world's major car producers. It is estimated that in 1985 Spain will be manufacturing 1.75 million cars per year. Spain Introductory Survey, supra note 8, at 775.
11 By 1972, the Spanish shipbuilding industry ranked seventh in the world. A. Wright, supra note 1, at 31.
12 Spain's steel production, in 1981, was 12.9 million metric tons, thirteenth in the world. U.S. Bureau of the Census, supra note 3, at 874.
13 In 1981, Spain produced 30.5 million metric tons of cement, third in Western Europe, behind only Germany and Italy. Eurostat, Basic Statistics of the Community 160 (21st ed. 1983).
14 For a thorough statistical account, see the works cited at supra note 1.
15 The World Bank, supra note 2, at 223. Spain's major manufacturing industries are footwear, clothing, textiles, and toys, in addition to those mentioned in the text at supra notes 10-13. See also Spain Introductory Survey, supra note 8, at 775; The Statesman's Yearbook 1984-85, at 1104 (J. Paxton, 121st ed. 1984); Organization For Economic Co-Operation and Development, OECD Economic Surveys, Spain 12 (1981).
16 The Statesman's Yearbook 1984-85, supra note 15, at 1103. Lignite, iron ore, coal, anthracite, and zinc ore are among the minerals found in Spain. Id.
17 U.S. Bureau of the Census, supra note 3, at 875-76.
18 Id.
19 The World Bank, supra note 2, at 237.
world,\textsuperscript{20} imports, in 1982, amounted to $32 billion, twelfth in the world.\textsuperscript{21} During this same period, Spain imported close to $3.5 billion worth of goods from and exported $1.5 billion worth of goods to the United States.\textsuperscript{22}

The rapid economic growth has led to a significant increase in personal income in Spain.\textsuperscript{23} Until 1963, Spain could be categorized as a "developing country" under the United Nation's per capita income level classifications. Spain's per capita income level surpassed $500 in 1963, however, reclassifying the country as a "developed" nation. The per capita income figure doubled twice by 1975. By 1982, Spanish per capita income approached $5,500.\textsuperscript{24}

The growth in the Spanish economy and the corresponding increase in per capita income has produced a wealthier class of Spaniards,\textsuperscript{25} which in turn has led to an increased demand for consumer durable goods since the 1960's. Disposable income, while still below the European average, has increased substantially. As a result, purchases of consumer durables have increased with the higher standard of living. For example, in 1960, only 4\% of Spanish households owned refrigerators and 19\% owned washing machines. These figures increased to 66\% and 52\%, respectively, by 1971.\textsuperscript{26} In 1980, Spain ranked eighth of seventy-five nations with 8,937,000 motor vehicles in registered use,\textsuperscript{27} placing Spain ahead of

\textsuperscript{20} Spain's main manufacturing exports consist of iron and steel castings, vehicles, machinery and appliances, refined petroleum, chemicals, plastic, and rubber. The Statesman's Yearbook, supra note 15, at 1104; OECD Economic Surveys, Spain, supra note 15, at 57. Agricultural products amount to less than 20\% of total exports. 1984 Anuario Estadistico, supra note 1, at 150.

\textsuperscript{21} U.S. Bureau of the Census, supra note 3, at 880. Spain's main imports are crude petroleum, metal and metal products, electronic and electric machinery, and agricultural and food products. The Statesman's Yearbook, supra note 15, at 1104.

\textsuperscript{22} U.S. Bureau of the Census, supra note 3, at 835. Spain, in 1982, thus became the fifteenth largest United States export trading partner and the twenty-seventh largest United States import trading partner. Id. In 1982, the United States was Spain's number one import trading partner. The Statesman's Yearbook, supra note 15, at 1105.

\textsuperscript{23} Economic growth also led to a significant shift in types of employment. In 1975, 23\% of Spain's active labor force was employed in agriculture, 37\% in industry, and 40\% in services. In 1950, the corresponding figures were 47\%, 26\%, and 26\%. J. Harrison, supra note 1, at 150. In 1983, the figures were 16\%, 33\%, and 44\%, with the remaining 7\% unclassifiable. 1984 Anuario Estadistico, supra note 1, at 239.

\textsuperscript{24} A. Wright, supra note 1, at 83.

\textsuperscript{25} See supra note 6 and accompanying text. On the establishment of a substantial middle class during this period, see R. Graham, Spain: A Nation Comes of Age 65-89 (1984).

\textsuperscript{26} A. Wright, supra note 1, at 84.

\textsuperscript{27} In 1960, Spain had 10 cars per thousand inhabitants; by 1975, there were 111 cars per thousand. In the same period, telephone ownership rose from 60 to 195 per thousand, and television ownership rose from 9 to 260. A. Wright, supra note 1, at 84.
nations such as Australia, New Zealand, and Ireland. In the same year, Spain reported 11,945,000 telephones in use, ranking Spain as ninth of eighty-nine nations, 9,424,000 televisions, ranking Spain as tenth, and 9,600,000 radios, placing Spain sixteenth.\textsuperscript{28} As early as 1970, Spanish purchases of consumer durables approximately matched expenditures in other European countries.\textsuperscript{29}

Despite recent economic difficulties,\textsuperscript{30} in the last quarter century Spain has evolved into a major industrialized nation with a modern economy and an active consumer market. As in similar economies, consumer credit and, more particularly, the sale of goods on time plays a significant role.\textsuperscript{31} This Article explores, tentatively, the Spanish legal structure governing consumer installment sales. Specific attention will be given to the major statutory framework,\textsuperscript{32} the Law of Installment Sales of Personal Property adopted in July of 1965,\textsuperscript{33} which appears in translation in the Appendix,\textsuperscript{34} and com-

\textsuperscript{28} Statistical Yearbook, \textit{supra} note 1, at 436-44, 995-97. From 1975 through 1980, ownership of passenger cars increased at an annual rate of 9.5%; telephones increased by 8.6%, and televisions, 7.6%. \textit{Eighteen West European Markets and How They Compare}, \textit{Business Europe}, Jan. 21, 1983, at 19, 20.

\textsuperscript{29} \textit{A. Wright, supra} note 1, at 85.

\textsuperscript{30} Trouble began again with the oil shortage of 1974. The Spanish economy has been plagued with serious unemployment and inflation resulting in decreasing investments and ever-increasing trade deficits since the oil shortage. \textit{S. Lieberman, supra} note 1, at 245-359; \textit{R. Graham, supra} note 25, at 86-88.

\textsuperscript{31} \textit{See, e.g., Warren, Mexican Retail Installment Sales Law: A Comparative Study}, 10 \textit{UCLA L. Rev.} 15-16 (1962) ("[t]he regulation of retail installment selling entails such a delicate balance between the needs and power positions of the participants—consumers, sellers, financiers and government—that a good bit can be learned about a nation's attitudes by its legal structure in this area.").

\textsuperscript{32} It may be argued that “major” overstates the situation. In Spain, as in other civil law countries, the Civil Code of 1889 provides the legal foundation. The 1965 Act was enacted as a supplement to the Civil Code and focused on a specific, problematic legal situation. The Civil Code is “general law;” the 1965 Act is “special law.” It is unclear whether the 1965 Act is mandatory or whether it merely provides an optional legal framework so that contracting parties may elect between conforming to the 1965 Act or the Civil Code. For further discussion, see \textit{infra} note 66.

\textsuperscript{33} \textit{Ley 50/1965, de 17 de julio (Jefatura del Estado), Sobre Venta de Bienes Muebles a Plazos (Boletin Oficial del Estado [BOE], num. 173, de 21 de julio de 1965)} [hereinafter cited as 1965 Act]. The 1965 Act may also be found in \textit{BOE, Ventas a Plazos y Entidades de Financion, Textos Legales} (5th ed. 1984). This official publication also contains the implementing decrees, orders, and resolutions, as amended. An English translation of the 1965 Act appears in the Appendix to this Article.

\textsuperscript{34} Translations from Spanish into English were performed by the author, although he received a great deal of assistance from Spanish-speaking research assistants. The single exception is the translation of sections of the Civil Code. Several English translations of the Civil Code exist, primarily due to the acquisition of Puerto Rico and the Philippine Islands in 1898. The translation used in this article is \textit{F. Fisher, The Civil Code of Spain} (2d ed. 1921); \textit{see also F. Walton, The Civil Law in Spain and Spanish-America} (1900).
parisons will be made to United States laws. Although they arise from different legal backgrounds, the problems inherent in installment selling and the remedies advanced in Spanish and United States law have been strikingly similar.

I. THE PRE-1965 HISTORY

Spain is a civil law country, with legal roots reaching back to the

Certain legal words, when translated into English, risk misinterpretation. In these cases, the Spanish word also is given. Generally, the translation has followed L. ROBB, DICTIONARY OF LEGAL TERMS: SPANISH-ENGLISH AND ENGLISH-SPANISH (1980). For information on the difficulties and pitfalls in translating from a foreign language, see R. SCHLESINGER, COMPARATIVE LAW 815-19 (4th ed. 1980).

This Article is designed for non-Spanish speaking American readers. Spanish works, therefore, are not cited extensively except the two basic works on the subject of installment sales. See R. BERCOWITZ, COMENTARIOS A LA LEY DE VENTAS A PLAZOS DE BIENES MUEBLES [COMMENTARIES ON THE PERSONAL PROPERTY INSTALLMENT SALES LAW] (1977) [hereinafter cited as R. BERCOWITZ]; V. BALDO DEL CASTANO, REGIMEN JURIDICO DE LAS VENTAS A PLAZOS [JURIDICAL REGIME OF INSTALLMENT SALES] (1974) [Hereinafter cited as V. BALDO]. The reader interested in pursuing Spanish-language sources will find many citations to other writings in these two basic works.

The Spanish Codes and other statutes, as well as related decrees, orders, and other legal materials, are contained in a series of booklets (textos legales) published by the Official State Bulletin (Boletín Oficial de Estado [BOE]). Spain does not have an equivalent to the United States Code Annotated. Decisions of the Spanish Supreme Court (tribunal supremo) are contained in Coleccion Aranzadi. It is difficult therefore to find cases relating to a specific statute, but the two basic works mentioned above are invaluable in this regard with respect to the 1965 Act. Of course, case citations are less important in Spain, as in most civil law countries, than in the common law world. See infra note 36.

There are, multivolume treatises on the basic Codes. See, e.g., M. ALBALADEJO, CODIGO CIVIL (6th ed. 1978); J. GARRIGUES, TRATADO DE DERECHO MERCANTIL (1964). There is also a Spanish work written for nonlawyers which provides a very useful overview of the Spanish legal system. See M. MARTIN FORNOZA, CURSO DE INICIACION JURIDICA (1979). Other accounts, written for prospective Spanish law students, are J. LOPEZ MENDEL, DERECHO: GUÍA DE LOS ESTUDIOS UNIVERSITARIOS (1979), and A. LATORRE, INTRODUCCIÓN AL DERECHO (1976). Probably the best single source of Spanish law materials in the United States is the vast collection found in the Library of Congress in Washington, D.C.

* The Uniform Commercial Code (UCC) and the Uniform Consumer Credit Code (UCCC) are employed in this Article for comparative purposes. The UCC has been enacted in every state except Louisiana; the UCCC, to date, has been adopted in one form or another in ten states and, although subject to criticism, is considered to strike a "workable balance" between the interests of creditors and consumers. R. SPIEDEL, R. SUMMERS, & J. WHITE, COMMERCIAL AND CONSUMER LAW 499 (3d ed. 1981). Reference is also made to the Consumer Credit Protection Act, 15 U.S.C. § 1601 (1982). It should be noted that the Spanish Law of Installment Sales is not limited to consumer transactions, although such transactions receive the greatest amount of attention under the Act. See infra note 106.

* The common law reader may be struck by the small number of Spanish case citations in this Article. Spain, however, operates under a civil law system. A Spanish Supreme Court magistrate explained the difference between civil law cases and common law as follows: The Anglo-Saxon system of precedent, stare decisis, is not in force in our country. When presented with a conflict, the judge—in accordance with the parties'
allegation of facts and citations of applicable rules—searches, in a sense, the normative horizon of positive and written rules (whether or not they are contained in a formal code) for the rule that is properly applicable to the facts of the case. If the proposed and proved facts of the case fit comfortably into the rule selected as being applicable, or adequate, the double task of subsumption and application is easy. Obviously there is no need to resort to additional sources or to make further inquiries. It is possible, and this is normally done in the Spanish courts, to add to the mere examination of the rule other arguments *ex abundancia*, whether they are doctrinal or scientific in nature (absent, of course, any identification of the writers) or citing a Supreme Court decision or statement on a similar subject, which always gives more authority to the holding and provides it with a more solid base, but which does not constitute, as in the common law, a *ratio decidendi* for the holding unless the decision is sustained only in the jurisprudence. (It is interesting to recall that, during the 18th century under the reign of Charles III, judges were prohibited from giving reasons for their decisions, in order to avoid confusing the parties and citing varied and contradictory theories.)

de la Vega Benayas, Judicial Method of Interpretation of Codes, 42 La. L. Rev. 1643, 1651 (1982).

It is interesting to note that the Spanish Civil Code exhorts judges to act as more than mere literal-minded automatons. The chapter focusing on application of juridical norms provides: “[t]he norms will be applied according to the proper meaning of their words, in relation to the context, the historical and legislative antecedents, and the social reality of the time in which they are being applied, paying attention fundamentally to their spirit and purpose.” CÓDIGO CIVIL ESPAÑOL [C. Civ.] art. 3 (7th ed. 1955).

It also should be noted that while Spanish court decisions, as those of other civil law countries, generally are not binding precedent nevertheless, if the Supreme Court makes two or more consistent and uniform decisions on a legal point, these decisions are binding and must be followed. de la Vega Benayos, supra, at 1658.

37 A study of the historical sources of Spanish law from Rome onwards to the end of the eighteenth century may be found in J. VANCE, THE BACKGROUND OF HISPANIC-AMERICAN LAW: LEGAL SOURCES AND JURIDICAL LITERATURE OF SPAIN (1943); see also T. PALMER, GUIDE TO THE LAW AND LEGAL LITERATURE OF SPAIN (1915), for Spanish legal history of the 1800's.

There was not, however, an unbroken political chain of control on the Iberian peninsula (Spain) from Roman times forward. Rome conquered the entire Iberian peninsula during the two centuries before the birth of Christ. Over the next five centuries, Iberia became thoroughly romanized, in language, law, and culture. The emperors Hadrian and Trajan were from Iberia, as was the famous writer, Seneca. When the Roman empire collapsed, Germanic tribes swept across the Iberian peninsula until the Visigoths consolidated the tribes and established a capital in Toledo in 507 A.D. In 711 A.D., Islamic invaders from North Africa crossed the Mediterranean Sea and, within a decade, conquered all but a small and remote portion of northwest Spain known as Asturias. (The heir apparent to the Spanish throne is known as the Prince of Asturias). The next seven centuries brought more or less constant warfare between the Christians and Moslems. The last Moslem ruler was expelled in the year of 1492. Since 1492, the borders of continental Spain have remained fairly constant, except during the years 1581 to 1668, when Portugal and Spain united under the Spanish crown. See generally J. VICENS VIVES, APPROACHES TO THE HISTORY OF SPAIN (1970); J. CROW, SPAIN: THE ROOT AND THE FLOWER (3d ed. 1985).

38 For an introduction to general legal philosophy and judicial structure in civil law nations, see J. MERRYMAN & D. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN-AMERICAN LEGAL SYSTEMS (1978); R. SCHLESINGER, supra note 34. The former contains a far
includes civil, commercial,\textsuperscript{38} criminal, and procedural codes, supplemented or superseded by statutes and decrees.\textsuperscript{40} A distinguishing feature of Spanish law, however, is the applicability of regional law.\textsuperscript{41}

The Spanish Civil Code was promulgated in 1889, three-quarters of a century after enactment of the 1804 Napoleonic Code.\textsuperscript{42} Nev-

\textsuperscript{38} Spain, like most civil law countries, has both a Civil Code and a Commercial Code and, consequently, difficulties arise in discerning which set of laws applies in any given situation. See Kozolchyk, \textit{The Commercialization of Civil Law and the Civilization of Commercial Law}, 40 La. L. Rev. 1 (1979); Steadman, Book Review, 120 U. Pa. L. Rev. 1013 (1972). Consumer installment sales, the major focus of this Article, are specifically excluded from the Spanish Civil Code sections dealing with commercial contracts of purchase and sale (compraventa). \textit{Código de Comercio Español (Comentado)} § 326(1) (1984) [hereinafter cited as C. Com.]. Instead, installment sales contracts are governed by C. Civ. arts. 1.445-1.537.

Certain aspects of installment sales transactions additionally may be affected by the Commercial Code. Generally, application of the Spanish Commercial Code turns not on the merchant status of a particular person, but rather on the particular act. The question depends on whether the act qualifies as an "act of commerce." C. Com. § 2. See the discussion infra notes 239-43 and accompanying text, about the application of the Commercial Code's provisions to bills of exchange, which are often used in installment sales. For a current discussion of the interplay between the Spanish Civil and Commercial Codes, see Lalaguna Dominguez, \textit{The Interaction of Civil Law and Commercial Law}, 42 La. L. Rev. 1629 (1982).

\textsuperscript{39} In addition to statutory enactments (leyes) by Parliament (Cortes Generales), the Spanish Constitution provides for two types of decrees (decretos) which carry with them the full force of law. First, legislative decrees, similar to administrative rules in the United States, promulgated by the executive branch pursuant to legislative authorization as provided by articles 82 and 85 of the Constitution. \textit{Constitución Española} art. 82, 85 (Spain 1978). Second, decree-laws are promulgated in cases where the executive branch finds a compelling need for action and ordinary legislative procedures cannot meet this need in a timely manner. \textit{Constitución Española} art. 86, § 1.


\textsuperscript{42} The idea of a Code, however, had been long nascent in Spain. The 1812 Constitution of Cadiz contained a provision that "a single Civil Code shall be in force in all the dominions
Nevertheless, the Spanish Civil Code preceded by many years widespread Spanish consumer credit sales. The 1889 Code, in fact, contains very few secured credit provisions. Real estate mortgages are recognized in the 1889 Code, but the only personal property security interest recognized is the traditional pledge. The pledge requires that the pledged object be transferred from the possession of the debtor to the creditor or some third party. While the 1889 Code contains many provisions relevant to contracts of sale, installment sales contracts do not receive special statutory attention. In particular, the Code remains silent on the subject of secured protection for the sellers who deliver goods where the purchase price is prepaid.

The Spanish legal regime under the 1889 Code was not suited for large-scale credit use. Thus, just as the traditional pledge of the Spanish monarchy, a goal generally repeated in the Constitutions of 1869 and 1876. A brief discussion of the century-long Spanish struggle to achieve a Civil Code appears in Herman, Louisiana’s Contribution to the 1852 Project of the Spanish Civil Code, 42 LA. L. Rev. 1509 (1982).

Professor Herman refers to the long-standing, and still existing, struggle between what he calls “a tension between German customary impulses and a ‘foreign’ Roman impulse.” In an interesting reverse twist, Professor Herman recounts the influence of the 1825 Louisiana Civil Code on the influential 1852 draft of the proposed Spanish Civil Code. See Royo Martínez, Influencia del Codigo Civil Louisiana Sobre el Vigente Codigo Civil Espanol, 5 ANUARIO DE ESTUDIOS AMERICANOS 483 (1948). C. Civ. art. 1.868. In the event of default, the Code provides for the sale of pledged property. C. Civ. art. 1.872. See infra note 255. If the amount realized at the sale fails to cover the loan, the debtor presumably remains liable for a deficiency judgment. 3 M. ALBALADEJO, CURSO DE DERECHO CIVIL ESPANOL 428 (1982).

Title IV of Book IV of the Code is devoted specifically to sale and purchase (compraventa) contracts. C. Civ. art. 1.445. As mentioned above, see supra note 39, the Code deals with contractual obligations generally followed by specific provisions for various types of contracts.

For further discussion, see infra note 230. The seller has the right to “resolve” the agreement of sale where the price is not paid, and, by doing so, regain title to the goods. Enforceability of this right against third parties is, at best, very doubtful. See V. BALDO, supra note 34, at 103-26, 223-75. Priorities under Spanish law, where specific goods are sold on time, are exceedingly complex and this Article will not attempt to address the subject in detail.

A modern credit scheme often is thought to require security interests in personal property. Personal property security interests, however, are the subject of considerable controversy. See, e.g., Schwartz, The Continuing Puzzle of Secured Debt, 37 VAND. L. Rev. 1051 (1984).

Civil Code articles 1.863 to 1.873, governing the traditional pledge, were supplemented in 1941 by articles 1.863(2) to 1.873(2), providing for the pledge without change of possession (prenda sin desplazamiento). The preamble of the 1954 law, however, recites that the 1941 law “for diverse reasons, has not succeeded in bringing about in practice the development and the application desired by the lawmaker.” Ley de 16 de diciembre de 1954, Sobre Hipoteca Mobiliaria y Prendas in Desplazamiento de Posesion 11 (BOE, num. 352, de 18 de
eventually was supplemented in common law countries by chattel mortgages, conditional sales, and trust receipts, Spanish lawmakers gradually enacted laws designed to meet the realistic financial needs of the maturing Spanish economy.

After the enactment of measures aimed at specific types of lending, a comprehensive personal property security device, intended as a supplement to the traditional pledge, was created in 1954. The 1954 law permanently established two new general security devices: the chattel mortgage and the pledge without change of possession. The preamble to the 1954 law recognized that while the two forms originated from laws of Spain and other countries, these two new legal forms did not follow the classic pattern and instead deviated significantly from the norm.

The 1954 law follows an overall scheme whereby certain categories of property, including commercial property and privately-owned motor vehicles, are subject to the two legal forms. The law distinguishes items which may be subject to a chattel mortgage from items which may be pledged without change of possession. In fact, the 1954 law attempts to make the two categories mutually exclusive. Items capable of accurate identification which may be pursued in kind, similar to the real estate mortgage, are subject to chattel mortgage; personal property from certain listed categories which avoids precise identification is subject to pledge without change of possession. The 1954 law recognizes the ready transferability of property subject to a pledge and establishes a simple and expeditious court proceeding so that goods may be seized and the pledge may be converted without change of possession into the

diciembre de 1954) [hereinafter cited as 1954 law]. Interestingly, the 1941 law provided only for the pledge without change of possession, but the record in which such pledges were to be registered was denominated the "chattel mortgage" book (hipoteca mobiliaria).

The classic history of the adjustment of the United States legal system to expanding secured credit needs is G. Gilmore, Security Interests in Personal Property (1965). A useful overview of the installment sales laws of most major industrialized nations may be found in Farnsworth Installment Sales, 8 International Encyclopedia of Comparative Law 4-1 to 4-55 (1982).

See 1954 law, supra note 46.

Examples of property subject to chattel mortgage are motor vehicles, airships, industrial machinery, and intellectual and industrial property, such as copyrights, patents, and trademarks, as well as entire "commercial establishments." Id. at art. 12.

Livestock, crops, and related equipment used in farm and ranch operations, personal property incapable of specific identification sufficient to meet the requirements for a chattel mortgage, merchandise and stored raw materials, and artistic or historical collections such as pictures, statues, and books are examples of property subject to pledge without change of possession. Id. at art. 54.
traditional pledge in which the creditor has possession.\textsuperscript{50}

Once created, notice of the lien is published in a special registry established by the 1954 law.\textsuperscript{51} The drafters of the Code intended that registration substitute for the public notice previously accomplished by the change of possession required by the traditional pledge. Once registered, the security interest is equal to and has the same priority as the traditional pledge.\textsuperscript{52}

The Spanish statutory scheme for lenders, under the 1954 law, resembles Article 9 of the Uniform Commercial Code (UCC) in the United States. The 1954 Law, however, severely limits the use of Spanish personal property security interests\textsuperscript{53} and, a major difference, fails to unify the different forms into a single security interest.\textsuperscript{44} Yet, despite potential application of these new forms to all aspects of installment sales,\textsuperscript{55} the development of the forms took a different direction in the area of installment sales over the next decade.

History strongly influenced drafting of the 1965 Act.\textsuperscript{56} Spain,

\textsuperscript{50} See id. at preamble. Title V of the law separates the procedures to be followed in realizing upon a chattel mortgage and a pledge without change of possession.

\textsuperscript{51} This special registry is appropriately entitled the Registry of Chattel Mortgages and Pledges without Change of Possession and is under the direction of the Ministry of Justice, the General Office of Registries and Notaries. Id.

\textsuperscript{52} Certain differences exist; for example, labor claims have priority over chattel mortgages and pledges without change of possession, but not over the traditional pledge. Id. at art. 10.

\textsuperscript{53} The UCC contains sweeping inclusionary provisions in U.C.C. § 9-102(1)(a) (1978), which states that "... this Article applies to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures ..." and U.C.C. § 1-201(37) (1978), which defines a security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation."

\textsuperscript{54} The drafters of the 1954 law considered creating a new juridical form rather than employing the pledge without change of possession but ultimately rejected the proposal as neither prudent nor desirable as measured against "the reality of abandoning the institution [of the pledge] to the difficulties of a doctrinal, jurisprudential and practical nature that all legislative novelty carries with itself." 1954 law, supra note 46, at preamble.

\textsuperscript{55} The 1954 law specifically recognized the interrelation of its new security devices within the installment sales setting. Article 2 forbids a chattel mortgage or a pledge without change of possession upon any item where the purchase price is not paid in full, except where a security interest secures the deferred price. Article 2 was included in the 1954 law in order to avoid priority conflicts between the seller, who normally reserves title, and the holder of a security interest. See id. at preamble.

\textsuperscript{56} In general, three fundamentally different legal forms developed in various countries as installment selling became more common: the sale form, which predominates in the United States; the lease form, which predominates in England; and the loan form, which predominates in France.

Generally this preference for a particular form was not due to any inherent functional superiority of that form in practice. It resulted instead from the search by dealers during the formative era of installment sales for the form that would
similar to other civil law countries, followed the ancient concept that a seller of goods without full payment of the purchase price could reserve title by express contractual provision. This practice was the mechanism by which installment sellers protected themselves. The juridical concept, however, had no express statutory foundation in Spain, unlike other countries, and considerable legal uncertainty existed with respect to its true nature and efficacy. As installment selling increased due to the burgeoning Spanish economy, creditor exposure increased accordingly and a firmer legal foundation for installment sales became imperative. As a result, the Law of Installment Sales of Personal Property was enacted on July 17, 1965. The provisions and operation of this comprehensive Act are the major focus of this Article.

give them the greatest protection under prevailing legal doctrines. And the protection that was most eagerly sought in this early stage of development was protection against the competing claims of third parties.

7 E. Farnsworth, supra note 46, at 4-18.
9 See V. Baldo, supra note 34, at 20-22.
10 For example, Germany's Civil Code for many years has contained provisions dealing with installment sales. Pennington, supra note 57, at 279. See R. Bercovitz, supra note 34, at 273; V. Baldo, supra note 34, at 135-40.
11 The fundamental thought holds that since a contract of sale is freely entered into by the parties, they may make any agreement they wish as to the time when title passes. Many aspects of reservation of title are highly controversial. For example, several leading authorities debate whether the clause is "resolutory," in the sense that it is a condition subsequent, or a condition "suspensive," in the sense that it acts as a condition precedent; the latter follows classic doctrine. "Doctrine" consists of concepts developed by scholars, thought to flow from written law. See generally V. Baldo, supra note 34, at 201-23.
12 See supra note 33. The 1965 Act is the law to which Michener referred in the passage quoted at the beginning of this Article. Spanish legislation appears to have been modeled after similar Belgian legislation enacted in 1957. See Law of 9 July 1957, Loi Reglementant les Ventes a Temperament et leur Financement [LVT] (Belg. July 26, 1957). After passage of the Belgian law, consumers began seeking personal loans in the amount of the purchase price from finance companies in order to avoid the economic control features of the law. Another law was enacted in 1965 to cover these personal installment loans. See Law of 5 March 1965, Loi Modifiant la Loi du 9 juillet 1957 Reglementant les Ventes a Temperament et Leur Financement pour L'etendre aux Prets Personnels a Temperament [MLVT] (Belg. Mar. 27, 1965). See generally E. Farnsworth, supra note 56, at 4-24. The 1965 Act expressly covered such loans, perhaps as a result of the Belgium experience. See infra note 96 and accompanying text.
13 Historically, in most industrialized market countries, legislation, apart from the basic Civil and Commercial Codes, relating to installment sales generally developed in the following order. First, legislation designed to provide protection to the installment seller, particularly against subsequent buyers and unsecured creditors of the buyer, including bankruptcy situations, developed in response to unfavorable judicial decisions. For example, in the United States, the Uniform Conditional Sales Act (UCSA) developed to overturn the rule
II. Scope of the 1965 Act

Several overlapping and often conflicting motives inspired the Law of Installment Sales of Personal Property. One motive was to provide a measure of consumer protection. The Act's provisions regarding this motive are discussed in Part III of this Article. A second motive sought to provide a legal basis for government intervention and oversight in the area of installment selling, a subject covered in Part IV of this Article. A third major motive, as previously noted, was to provide a firm legal foundation to protect the interests of sellers and lenders in installment sales transactions. Their rights and remedies under the 1965 Act are covered in Parts V and VI of this Article.

The Act generally attempts to provide a broad nationwide legal framework that conditional vendors had to elect between rescission of the contract or an action for the price. Warren, Statutory Damages and the Conditional Sales, 20 Ohio St. L.J. 289 (1959). Under the UCSA, the seller could obtain a deficiency judgment even after repossession. Uniform Conditional Sales Act, U.C.S.A. § 24. This scheme was carried forward into the UCC. See U.C.C. § 9-501 (1978). Several forms of modern consumer protection statutes, interestingly, in effect restore the old election of remedies rule by prohibiting deficiency judgments in the event of repossession. See infra note 247 and accompanying text.

Second, legislation protecting consumers develop which focused on abuses by sellers in cases of default. For example, as early as 1894, Germany adopted legislation which limited acceleration rights to cases where at least two installments were in default and the total amount in default equaled at least 10% of the purchase price. Several countries, within the next few decades, adopted legislation carefully regulating procedures for resale after default. In the United States, for instance, the UCSA contained a large number of provisions dealing with repossession, redemption, and resale. See U.C.S.A. §§ 16-22.

Third, by the middle of the twentieth century, legislative attention turned from seller's rights and procedures upon default to the time of contracting. The first statute in Europe was the Belgian Act, adopted in 1957, the model for the Spanish Act of 1965. See, LVT, supra note 61. The Belgian Act contained two types of consumer protection provisions, one aimed at direct control of the terms of the contract and the other aimed at full disclosure of relevant terms to the customer. See id.

In addition to the three legislative stages for installment sales laws, provisions were enacted to assure publicity of the seller's reserved rights in order to protect third parties dealing with the buyer and to permit considerable governmental economic control over the installment loan process.

As discussed in this Article, there are five aims of the 1965 Act: (1) protection of the seller's position; (2) prevention of seller's abuse on default; (3) protection of buyer at time of contracting, through mandated contract terms and disclosure requirements; (4) protection of third parties against "hidden" seller's rights by publicity; and (5) government economic regulation.

For an extensive discussion of this abbreviated history, see E. Farnsworth, supra note 46. See infra note 105 for R. Bercovitz's acerbic comment.

Part III covers elements of the Act that protect the buyer prior to default. Certain protections of the buyer after default, such as the right of redemption, are discussed with creditor's remedies in Part VI.
framework within which installment selling takes place. It is in this regard that the scope of the Act becomes relevant. Notwithstanding the unqualified title of the Act, the actual scope is more limited. An analysis of the reach of the Act is accomplished best by examining application of the Act to goods covered, types of sales contracts, and extent of lender participation. Each of these aspects is defined in the Act and subsequent decrees and orders.

A. Types of Goods Covered

Article 1 of the Act seeks generally to regulate installment sales and related loans of "tangible personal property other than consumables." The government, however, must determine what goods come within the scope of the Act. Accordingly, a Decree, enacted in 1966 and subsequently modified, outlines the types of goods which come within the scope of the Act. The three basic categories established under article 1 of the Decree are domestic goods, vehicles of all kinds, and capital equipment.

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66 The 1978 Spanish Constitution established autonomous communities with limited lawmaking powers. CONSTITUCION ESPANOLA art. 148. See also supra note 41. The Constitution reserved, however, to the central government "exclusive competence" over a number of matters, including mercantile as well as civil legislation involving regulation of registers and public instruments. CONSTITUCION ESPANOLA art. 149.

67 An important theoretical question involves whether the Act is mandatory with respect to transactions falling within its scope or whether parties may opt for governance by the otherwise applicable Civil Code provisions; in other words, whether the Act is optional. Baldo's view that the "imperative character of [the Act] is beyond any doubt," V. BALDO, supra note 34, at 29, has substantial support, but Bercovitz argues that coverage is a matter of choice. See R. BERCovitz, supra note 34, at 29. As a practical matter, however, Bercovitz acknowledges the benefits bestowed by the Act with respect to security cause the great majority of transactions to take place on official government forms and thus fall within the Act's coverage. See generally id. at 95-122.

68 Decreto 1193/1966, de 12 de mayo, Por el que se Dictan Disposiciones Complementarias a la Ley 50/1965 (BOE, de 14 de Mayo) [hereinafter cited as 1966 Decree].


70 General domestic goods consist of electrical household appliances, radios, television sets, stereos and record players, motion picture cameras, projectors, cameras and their accessories, and tape recorders. The second category includes vehicles of all kinds, except those used for commerce, industry, and agriculture. Vehicles used for commercial, industrial, and agricultural purposes belong to the third category, which encompasses capital equipment, such as heavy agricultural machinery, engines designed for industrial or agricultural purposes, trucks for the transport of merchandise, buses, and machinery. A clause added to the Decree permanently places sewing machines in the third category, regardless of the nature of actual use. See 1966 Decree, supra note 68. See also R. BERCovitz, supra note 34, at 29-30.
The goods included in these three categories are limited further through a valuation system. General domestic goods and vehicles have minimum and maximum price levels; the cash price paid for such goods and vehicles must fall within this range in order to come within the scope of the Act.\(^7^1\) Capital goods have only a minimum price level.\(^7^2\) The maximum limits placed on consumer durable goods reveals the Act's principal socio-economic aim of regulating everyday consumer purchases. For instance, expensive and exotic consumer durable goods are not included within the scope of the Act.\(^7^3\) Nevertheless, while the Decree purports to restrict the number of goods included within the Act, the broad terminology of the Decree gives it wide practical application.\(^7^4\)

B. Types of Sales Contracts

The Act defines an "installment sale" as a contract in which the seller transfers tangible personal property to the buyer, receiving in return part of the purchase price. The buyer, in an installment sale, is obligated to pay the deferred balance within a period greater than three months and in a series of installments as prescribed by the government. The tangible personal property, of course, must be one of the types included within the scope of the Act. From the Spanish jurist's point of view, the installment sales contract is a curiosity because it has legal validity for purposes of the Act only upon delivery and partial payment; installment sales contracts thus depart from the usual promissory nature of contracts.\(^7^5\) This curiosity is due both to consumer protection motives and to the desire to accommodate economic regulation of installment sales transactions.\(^7^6\)

In a manner reminiscent of Article 9 of the UCC,\(^7^7\) the Spanish

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\(^7^1\) General domestic goods must fall within the cash price range of 15,000 to 150,000 pesetas, or roughly $100 to $1,000 at an exchange rate of approximately 150 pesetas to one United States dollar. Vehicles must fall within the range of 15,000 to 4,000,000 pesetas. These price ranges may be statutorily modified to reflect inflation.

\(^7^2\) Capital goods must have a cash price of at least 50,000 pesetas.

\(^7^3\) R. Bercovitz, supra note 34, at 90-91. For instance, gems and jewelry are not within the Act's scope although they display the necessary characteristics. Bercovitz feels this results because luxury items like gems and jewelry fall outside the socio-economic setting contemplated by the Act and they are neither mass-produced nor do they actually fall within the strict category of consumer durables since they are non-consumable. Id. at 90.

\(^7^4\) Id. at 84.

\(^7^5\) Id. at 123-26.

\(^7^6\) See infra note 166.

\(^7^7\) See U.C.C. § 9-102(1)(a) (1978).
Installment Sales Act refuses to exalt form over substance. Acts and contracts, in whatever juridical form, in which the parties propose to attain the same economic ends as in an installment sale also fall within the ambit of the Act. Legal forms such as the lease-sale and the lease with an option to buy could fall within the Act.\textsuperscript{78} Notwithstanding the original broad definition of actions subject to the 1965 Act, five types of situations are expressly excluded from the Act’s application.\textsuperscript{79} Viewing the five exclusions as a whole, the Act obviously was designed principally to cover ordinary course of business installment financing of “ultimate” sales.\textsuperscript{80}

The first exclusion exempts sales of goods destined for resale to the public\textsuperscript{81} and any related loans. The preamble to the Act explains that these sales necessarily take place between merchants presumably knowledgeable in business transactions and therefore not in need of special protection.\textsuperscript{82} A second exclusion covers occasional non-profit sales, reemphasizing the Act’s intended coverage only of ongoing business transactions.\textsuperscript{83}

\textsuperscript{78} The use of the lease as a financing device has experienced considerable growth in Spain. As early as 1975, there were over thirty leasing entities with operations exceeding ten billion pesetas. C. Sánchez, \textit{La Naturaleza del ‘Leasing’ o Arrendamiento Financiero y el Control de las Condiciones Generales}, \textit{Anuario de Derecho Civil} 42 (1982). In a section of an article devoted to “cases in which a sale is hidden under the form of a financing lease,” Sanchez concedes the 1965 Act applies. His discussion pertaining to installment sales, particularly with reference to the adequacy of the option price, resembles the debate over the applicable scope of U.C.C. § 1-201(37), distinguishing a true lease from a security interest. See id. at 69-73.

\textsuperscript{79} The five exclusions are listed in article 4 of the 1965 Act.

\textsuperscript{80} Normally only the financing of consumer purchases are regulated in installment sales statutory schemes, but the Act also reaches sales of capital goods. See supra note 70.

\textsuperscript{81} “Resale to the public,” defined broadly, includes all buyer categories. The definition obviously encompasses retailers, who ordinarily sell to the public, but it also covers sales between manufacturers and wholesalers, a result not expressly contemplated by the drafters. See R. Bercovitz, supra note 34, at 146; V. Baldo, supra note 34, at 39.

\textsuperscript{82} The exclusion was intended to encompass mercantile purchase and sale contracts as defined in § 325 of the Commercial Code: “[a] purchase and sale of personal property for the purpose of resale, either in the form purchased or in a different form, for the purchase of deriving profit in the resale, shall be considered commercial.” C. Com. § 325. See \textit{The Code of Commerce of Spain} (J. Espiritu 2d ed. 1923) for a translation of the Spanish Commercial Code. Bercovitz argues that contracts of sale subject to the Act are essentially civil and governed first by the Civil Code, notwithstanding frequent payment with bills of exchange which is clearly a commercial act. R. Bercovitz, supra note 34, at 146-47. Baldo, on the other hand, views such contracts as essentially mercantile. V. Baldo, supra note 32, at 47-50.

\textsuperscript{83} A major unsettled issue concerns whether this exclusion is alternative or cumulative. In other words, is a transaction excluded if either occasional or non-profit, or must the transaction meet both criteria? The literal language of the exclusion suggests the latter, although the preamble to the Act simply states that “occasional sales and loans are not covered by
The most interesting exclusion, from the juridical point of view, is found in the fourth exception. This provision attempts to distinguish between the system of security contemplated by the 1965 Act, with an optional reservation of title and a mandatory prohibition against alienation, and the security structure provided by a chattel mortgage or a pledge without change of possession, the legal forms created and regulated by the 1954 law. These two statutory schemes occasionally overlap because both involve security in personal property, and thus conceivably either law could apply. The fourth exclusion actually acts as a prohibition against mixing the guarantees of the two statutory schemes within a single transaction. The fourth exclusion, thus, clarifies sales of personal goods without a formal unification of the two statutory schemes.

The preamble to the 1965 Act explains the fourth exception further by providing that loans guaranteed by chattel mortgages and pledges without change of possession are excluded from the Act's

the law,” without any reference to profit. For an extensive discussion, see R. Bercovitz, supra note 34, at 147-50 and V. Baldo, supra note 34, at 39-43. The Belgian law, a model for the Spanish Act, was interpreted to require both criteria. An amendment, in 1964, clarified the Belgian law and provided that either criterion sufficed to exclude the contract from the law’s application. V. Baldo, supra note 34, at 41-2.

The two other exceptions are sales and loans where the face amount falls outside the minimum and maximum as decreed by the government and foreign commercial transactions. See supra notes 71, 72. This latter exclusion covers exports as well as imports. R. Bercovitz, supra note 34, at 153. In a resolution, the Direccicn General stated, “a time sale, made by a person domiciled in Spain, involving goods that have been delivered to him by a contract made in this country, will be presumed to be an operation of domestic commerce and the contract will have no difficulty in being inscribed into the Registry.” Resolucion de 14 de agosto de 1971 (Direccion General). A second resolution held:

the exclusion of the operations of foreign commerce is not such an absolute principle that it will impede the good, once the good sold is imported, from being the object of a contract executed by a person who is the seller’s delegate, since the nationality of the parties is not relevant so long as the contracts fulfill the requirements imposed by the law.


Article 4(4) of the 1965 Act excludes “those loans secured by a mortgage or pledge without change of possession.”

A lender, according to the strict theory, may “reserve title” by an assignment from the seller to the lender. See infra note 88.

See supra notes 46-48 and accompanying text.

Examples of goods subject to either law can be found in article 12 numbers 2, 3 and 4; article 52 number 4; and article 53 number 1 of the 1954 law.

In other words, a party could not receive the guarantees from one law and conform the contract to the specifications of the other law. See R. Bercovitz, supra note 34, at 151.

Id.
scope not only because they apply to a very limited number of goods, but also because these loans are secured by guarantees that make other protective measures unnecessary. Bercovitz suggests that the exclusion created by this section applies not only to loans, as indicated by the literal language, but also to sales financed, at least initially, by the seller. Although the drafters of the Act probably failed to envision a time sale by the seller guaranteed directly by a chattel mortgage or a pledge without change of possession on the goods sold, such a possibility exists. The fourth exclusion, therefore, applies to sales as well as to loans.

In those instances where both statutory schemes may apply, the parties theoretically have the option of utilizing either scheme and its own distinctive system of guarantees. In practice, however, the 1965 Act apparently controls Spanish installment sales transactions.

C. Extent of Lender Participation

The 1965 Act necessarily encompasses financing of installment sales by financing entities, in addition to sellers, in order to achieve the stated purposes of the Act. Article 3, which governs installment sales financing by persons other than the seller, is divided into two paragraphs; the first paragraph applies to the seller and the second applies to the buyer. The first paragraph covers loans

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91 See supra notes 48-50 and accompanying text.
92 R. Bercovitz, supra note 34, at 152.
93 The 1954 law arguably contemplates seller use of mortgages on pledges without change of possession. The law bans such liens on goods whose purchase price has not been fully paid, “except in the case where the mortgage or pledge is given to secure the payment of the deferred price.” 1954 law, supra note 46, at art. 2. See supra note 55.
94 Article 3(b) of the Order of Nov. 15, 1982 disallowed registration of finance loans and time sales contracts which do not contain express declarations that the goods have not been mortgaged, pledged, or levied upon. Registration is vital in order to take advantage of the Act’s guarantees. Orden de 15 de noviembre de 1982 [BOE], [hereinafter cited as Order of Nov. 15, 1982], reprinted in BOE, Venta a Plazos, supra note 33.
95 Bercovitz, after more than ten years experience with the 1965 Act, asserts that, despite the theoretical choice, “in practice, and for economic and juridical reasons, [it is] the Installment Sales Law which is utilized almost exclusively in this type of juridical traffic.” R. Bercovitz, supra note 34, at 153. Another Spanish scholar, Lalguna, earlier predicted this result. E. Lalguna, Revista Critica de Derecho Inmobiliario 677-718 (1961). In discussions with Spaniards, the 1965 Act was invariably referred to as the controlling law.
96 Early installment sales legislation in other countries failed to cover loans, thus the provisions were easily avoided. See supra note 61 with respect to the Belgian experience.
97 The original text consisted of only one paragraph. It provided that agreements, in whatever form, that related to the sale of movable, tangible goods were finance loans for the purposes of the Act when: (1) a third party advanced part of the price to the seller or buyer;
between the seller and a financier which are designed to facilitate the acquisition of personal goods through installments and deems such loans financing loans to the seller when: (1) the seller transfers or subrogates to the financier his claims against the buyer, with or without reserving title; or (2) the seller and financier arrange to participate in the acquisition of the goods by the buyer against the subsequent payment of the price in installments.

The first type of financing loan, as described above, arises in the ordinary installment sales situation where the seller makes a time sale falling within the Act's scope, the seller delivers the goods, and the buyer makes the initial down payment. The seller then receives financing from a financier who gives the seller a discounted price in return for an assignment of the seller's rights against the buyer under the installment sales contract.98

The second type of seller financing contemplated by the first paragraph of article 3 arises where the seller and financier together finance the transactions. The precise wording of the Act presents several difficult interpretive problems.99 As a practical matter, however, this form of co-participation is rarely, if ever, employed.100 The interpretive difficulties, therefore, seldom arise.

The Act also extends to situations in which a lending institution makes a loan directly to a buyer under repayment terms101 which would qualify under the Act if the transaction had been seller-financed.102 As noted above, economic reality was not a considera-

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98 In Spain, as in the United States, this type of financing is customary in business. The seller and financier usually have an arrangement under which the financier agrees to finance the various time sales made by the seller. Id. at 132.
99 See id. at 132-36.
100 The official form designed for co-participation situations, model C, apparently rarely receives use. As explained later in this Article, transactions under the 1965 Act invariably employ one of the standard model forms made available by the government. See infra notes 184-93 and accompanying text. Model A is designed for financing of the first described type, Model C, for the second type, and Model B, for the third type.
101 Drafts drawn by the financier and accepted by the buyer usually represent individual installments. See text accompanying infra note 257.
102 See 1965 Act, supra note 33, at art. 3, para. 2. Although this type of loan transforms the sale into a cash transaction from the seller's standpoint, the scope of the Act encompasses these types of loans because, in practice, they receive frequent use. It was felt that these loans deserved the recognition and protection of the Act due to their popularity. R. Bercovitz, supra note 34, at 137. To facilitate time sales financing, specific entities have
tion in earlier installment sales laws of other European countries. Where the buyer takes out a loan to finance an installment sale, the buyer and lender face the same conditions that confront the vendor and buyer in the classic installment sale.

The equated positions of seller and lender developed in response to a perceived inequality of rights under two similar lending situations. Where the seller makes an installment sale and discounts the obligation to a financing entity, the seller reserves title to the goods sold and later transfers his rights to the financing agency. This comports with the doctrine of reservation of title. Where, however, the financing entity makes the loan directly to the buyer, who uses the loan proceeds to pay the seller the full cash price, the seller does not have the opportunity to retain title. In the second situation, the lender only receives protection from the prohibition against alienation imposed on the buyer. The drafters of the 1965 Act, apparently in response to this situation, attempted to equate the rights of a lender against third parties under a prohibition against alienation to the rights of a seller who reserves title. The Act thus transformed a bare contractual promise by the buyer into a newer and stronger juridical form. This transformation is explored further in Parts V and VI.

III. BUYER PROTECTION BETWEEN TIME OF SALE AND DEFAULT

The 1965 Act, closely resembling legislation enacted by other countries governing installment sales, contains a number of provisions which purportedly protect the buyer both prior to and at the time of contracting. Several provisions deal with disclosure. The

been created. See infra note 174 and accompanying text.

103 See supra note 96.

104 R. Bercovitz, supra note 34, at 139, 141-42. The prohibition against disposition provides protections similar to those of the reservation of title. Once inscribed into the Registry, the prohibition against disposition: (1) is effective against a third party (1965 Act, supra note 33, at art. 23); (2) receives the preferences established in art. 19 of the 1965 Act; and (3) is protected by criminal penalties for wrongful appropriation (1965 Act, supra note 33, at art. 12). See infra note 177 and accompanying text.

105 Bercovitz scorns the alleged consumer protection features of the 1965 Act. For example, in reference to the article 8 “cooling off” provision, he says:

In [this provision] we find the most significant example—an authentic caricature—of this demagogic aspect of the Act, that leads to falsifying its true content, making it appear like regulation in defense of buyers, that is, of consumers, when in reality it does nothing more than legitimize indispensable juridical protections for sellers and financing entities, linked with an indirect introduction of state economic control.

R. Bercovitz, supra note 34, at 196.
disclosure requirements generally seek to ensure buyer awareness of the consequences of entering the contract. One disclosure provision directly mandates the inclusion of certain substantive clauses, recognizing the disparity in the bargaining positions of the parties.106

The protective provisions of the 1965 Act fall into four categories: (1) advertising restrictions to protect the consumer prior to consummation of the contract; (2) disclosure provisions to apprise the buyer of the costs of credit; (3) provisions to ensure that the buyer realizes his rights at the signing of the contract and during performance; and (4) provisions to establish a “cooling off” period and rights of the parties subsequent to contract signing.

A. Restrictions on Advertising

The provision in the 1965 Act restricting pre-sale advertising reflects a basic concern often expressed in consumer credit situations that the buyer should be apprised fully of any additional costs he will incur through a credit purchase. For instance, the Act specifically requires that any advertising which refers to price must set forth both the cash price and the time price,107 recognizing the critical importance of full financial disclosure at an early stage.108

The requisite advertisement information also must appear in the installment sales contract. Disclosure of the time-price differential at the pre-sale advertising stage was thought necessary for consumer protection reasons. The Spanish law presumably inhibits the seller from “baiting” the potential consumer. Large-type advertising, contrasted with small-type contract language, seems more likely to “bait,” confuse, or mislead the consumer.

106 The 1965 Act is not limited to consumer transactions, but the majority of buyers subject to the law are in fact consumers. See R. Ber covitz, supra note 34, at 256. There is a debated theoretical question, however, about the mandatory nature of the legislation. See supra note 66.

107 1965 Act, supra note 33, at art. 15. The Act makes the omission of pricing information a violation of the Statute of Publicity. The Statute of Publicity prohibits illegal, false, or misleading information. Estatuto de la Publicidad [Statute of Publicity] §§ 6, 8(1). The Statute of Publicity authorizes the Government to suspend violators and impose fines. It directly affects advertising agencies and the media. The 1965 Act imposes no other restrictions on installment sales advertising.

108 While the Act stipulates that the “total time price” must be set forth, a common practice is to set forth the cash price, the amount of each monthly installment, and the number of months installments are required. Thus, a mathematical multiplication operation (amount of each monthly installment times the number of months) is necessary to compare the two prices.
A similar recognition of the importance of the timing aspect of installment sales advertising appears in the provisions of the Consumer Credit Protection Act (CCPA) in the United States.\(^{109}\) The CCPA, however, focuses on disclosure of the finance charges in terms of an annual percentage rate. The Uniform Consumer Credit Code (UCCC),\(^{110}\) in comparison, contains a more generalized ban prohibiting "false, misleading, or deceptive" advertising.\(^{111}\)

B. Mandated Contract Disclosure Terms

The 1965 Act contains a number of provisions dealing with contract formation. Some of the provisions concern general disclosure requirements; others stipulate precise substantive contract terms. First, article 5 requires that the agreement, be it a loan or sale, be in writing. Further, it requires as many writings as there are parties in the transaction. Unlike the French, German, Austrian, and Swiss laws,\(^{112}\) the Act does not include an express requirement that the buyer or borrower receive a copy, although the Act clearly intends such a result.\(^{113}\)

Article 6 of the Act sets forth in considerable detail the information which the agreement must contain. A number of the requirements are essentially evidentiary, enabling clear identification of the parties and the transaction. For instance, article 6 requires disclosure of the place\(^ {114}\) and date\(^ {115}\) of the agreement, the names and addresses of the parties, and a description of the goods sold "with the characteristics necessary to facilitate their identification."\(^ {116}\)

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112 E. Farnsworth, supra note 46, at 4-35. R. Bercovitz, supra note 34, at 158 nn.5-6.

113 Bercovitz reports that an amendment specifically requiring copies provided to the buyer was rejected during discussion of the proposed Act, without explanation. Id. at 158.

114 The place of contract formation normally determines appropriate jurisdiction, but article 14 of the Act modifies the normal rule. See infra notes 149-51 and accompanying text.

115 The date requirement relates to payment. Both the Act, article 20, and the 1966 Decree, article 5, place limits on the period for installment payments.

116 1965 Act, supra note 33, at art. 6(3). Plainly, the Act demands greater specificity than the UCC, both in the description required in the security agreement under U.C.C. §§ 9-203 and 9-110, and in the financing statement under U.C.C. § 9-402(1). The 1966 Decree defines identifiable goods, eligible for registration, as those that contain "the trademark and serial or fabrication number in an indelible or inseparable form, on one or more of its fundamental parts." 1966 Decree, supra note 68, at art. 2. The drafters apparently thought this a generous definition. The preamble to the 1966 Decree states: "[f]or the determination of the goods that are considered identifiable for purposes of the Registry, there is established a very general norm that will permit access by all classes of goods that in the future may be
The majority of the mandatory disclosure provisions concern the time payment features of the transaction. As in the case of pre-sale advertising, the agreement must set forth both the total cash and time prices, or the total loan, if applicable. The agreement also must set forth the amount of the down payment and details about the amounts and due dates of subsequent installment payments. The agreement must separately state any additional charges imposed above and beyond the cash price, or on top of the principal amount loaned. Finally, the agreement must separately state the proportion of the price financed by a third party.

The disclosure requirements not only aid consumer understanding of the true cost of credit, but also act as evidence of and ensure compliance with the economic regulatory features of the Act. In other words, with respect to the disclosed items, the government sets the minimum amount of the down payment, the maximum surcharges, and the maximum period over which installment payments may be made. The implementing decrees and ordinances spell out in considerable detail the procedure for determination of the statutory figures. Disclosure requirements aim, at least in part, toward consumer protection. The sanction for omission of mandated disclosure information, moreover, generally relieves the buyer of liability for the time-price differential.

The Act does not require disclosure of the true “annual percentage rate,” the subject of the long struggle of the 1960’s preceding passage of the CCPA in the United States. Considering the various computational factors and other complexities involved in the concept, and the limited availability of credit in Spain in the years preceding 1965, perhaps the legislature wisely eschewed disclosure of the annual percentage rate, if it considered the possibility at all.

C. Mandated Contract Terms Relating to Performance of the Contract

The four remaining mandatory contract provisions relate not to

included in the norms of the Law.” Id. at preamble. See infra notes 194-97 and accompanying text.

117 1965 Act, supra note 33, at arts. 6(4), (5).
118 Id. at art. 6(6); see infra notes 160-67 and accompanying text.
119 Id. at art. 6(7).
120 Id. at art. 6(8).
121 Id. at art. 6(9).
122 See infra note 129 and accompanying text.
123 See D. RICE, CONSUMER TRANSACTIONS 332 (1975).
disclosure, but rather to ongoing aspects of the transaction, primarily the seller's rights during the course of the installment payments and the buyer's right of prepayment. The first provision requires specification of the rate of interest upon default, as well as any agreement for the assignment of rights, present or future, by the seller. Typically, the seller assigns his rights to a financing entity.

The most important seller's rights provisions are the optional clause in which the seller reserves title and the mandatory clause in which the buyer is prohibited from alienating any interest in the item sold until full payment is made, unless he procures the preliminary written consent of the seller or lender. Both provisions directly relate to a seller's rights and remedies in case of default.

The final mandatory provision deals with the buyer's right of prepayment, but only provides information concerning this right; the substantive right to prepay appears in article 10 of the Act.

D. Consequences of Failure to Comply with Mandated Terms

While the mandated formalities do not seem particularly onerous or complicated, the question arises as to the consequences when, through chicanery or more likely inadvertence, the mandated formalities are not observed. The 1965 Act provides guidance for situations where the requisite formalities are ignored.

Article 7 stipulates that the omission or incorrect statement of the various provisions relating to items sold or amount of payments reduces the buyer's price obligation to the cash price;
which itself may be paid in installments. This result assumes that the omission or error is not imputable to the buyer. The standard is a tough one. Efforts by sellers to revise the law and apply it only to material or malicious errors, or to require a showing of prejudice to the buyer as a result of the omission, or to require proof that the seller or financing entity caused the error or omission have all proven unsuccessful. Other possibly less rigid sanctions, such as a system of governmental fines and suspensions for violators, or the exclusion of tainted contracts from the privilege of recordation, or the total nullification of the contract, have been, in effect, rejected. The omission of or error in other mandated items leads to the same result, namely, reduction of the buyer's obligation to the cash price payable in installments, but only if the buyer proves to the court's satisfaction that he has been prejudiced.

The sanctions of article 7, dealing with omission of or error in mandated terms, provide an interesting comparison with the sanction for violating the article 5 requirement that the contract be in writing and in as many copies as there are parties involved in the transaction. Article 5, read literally, might be construed to mean that a contract without sufficient copies is totally void and without effect. There has been considerable theoretical discussion among Spanish jurists on this subject and it is believed that its resolution relates to the controverted issue of whether application of the 1965 Act is mandatory or optional. The latter view, strongly promoted by Bercovitz, holds that a failure to follow the mandates of articles 5 and 6 simply remits the contract to the norms of the Civil Code, at least where the model forms are not used. Others strongly disagree with this view, and, from the perspective of effective application of the law, the Bercovitz view seems debatable.

The drafters of the CCPA and the UCCC in the United States struggled with the same problems, attempting to make the punishment fit the crime. Under the CCPA, various governmental regulatory agencies enforce the Act. Willful and knowing violations constitute criminal offenses punishable by fines of up to $5,000 or a year's imprisonment. The CCPA also creates an elaborate system of civil liability for noncomplying creditors. Likewise, the

must initiate suit.

130 R. Bercovitz, supra note 34, at 189 nn.2, 3.

131 See id. at 156. Bercovitz also cites considerable authority in opposition to his view. See supra note 66.

UCCC contains extensive provisions for civil enforcement, including authorization for a court to assess a sliding scale penalty of an amount up to $1,000, so that penalties may be apportioned "according to the seriousness of the offense and the overall circumstances of each violation." Other UCCC sanctions determine liability for violation of disclosure provisions, similar to provisions of the CCPA, and impose criminal penalties. The 1965 Act's provisions for fines and suspensions relate mainly to violations of the economic regulatory features of the Act.

Realistically, violations of the formalistic requirements of articles 6 and 7 rarely occur. In almost all cases, installment sales contracts are on official or quasi-official forms. Such uniformity is interesting, and understandable. An essential part of the 1965 Act centers on the availability of a system for recordation of contracts subject to the Act. Such a system affords a means by which sellers and financing entities receive protection against third parties. Only contracts that meet the standards of the forms prescribed by the Registry are eligible for recordation, thus the use of such forms is almost universal.

E. Buyer Protection During Performance and Prior to Default

In addition to the formal requirements imposed at the time of contract formation, the 1965 Act covers several aspects of buyer protection during performance of the contract, prior to default. Initially, the buyer's absolute right to prepay the contract seems the most significant requirement. The Act deems this right a mandatory contract term in article 10 and provides that the buyer's right to prepayment arises at the time any installment payment is due. It further provides for a proportionate rebate on the time charges.

This benefit, however, rarely is realized for two reasons. First, the prepayment right requires prepayment in full; partial prepay-
ment is not acceptable. Absent a sudden and unusual change in financial circumstances, the prepayment right thus carries little significance. The second reason stems from the express stipulation in article 10 that the prepaying buyer bears all expenses of recovering the bills of exchange from the holders. The Spanish generally use bills of exchange as evidence of unpaid installments. Under Spanish law, as under United States law, the holder of a bill of exchange cannot be forced to accept payment before the due date.\textsuperscript{138} Under such circumstances, the buyer attempting to prepay because of interest rate changes or other reasons will be subject to the holder’s demand for payment in full without any rebate. The UCCC, in its prepayment provisions, also demands full prepayment, but provides for a rebate.\textsuperscript{139} Those who have worked their way through the “rule of 78” and other rebate formulas\textsuperscript{140} will be intrigued by the apparent simplicity of the rebate formula in article 10 of the Act.\textsuperscript{141} Commentators have produced little criticism on the practical application of the article 10 rebate formula, perhaps due to the rare invocation of the right to prepayment. The UCCC avoids difficulties presented by a ban on prepayment of negotiable instruments other than checks by prohibiting their use in consumer transactions and by subjecting assignees to all claims and defenses.\textsuperscript{142}

Another provision in the 1965 Act which initially appears familiar permits withdrawal from the contract within a three-day “cooling off” period,\textsuperscript{143} thereby providing the buyer an opportunity to test and inspect the goods. Bercovitz points out, however, in a biting denunciation of the 1965 Act, the effectiveness of this provision depends entirely upon both an express agreement between seller and buyer and upon the buyer’s conformity with the extraordinarily strict prerequisites for exercising this right. For instance, within three days after receiving the goods the buyer must give notice by certified mail of his intent to withdraw from the contract.

\textsuperscript{139} U.C.C.C. §§ 2.509, 2.510.
\textsuperscript{141} Paragraph 3 of article 10 provides: “[i]n any case, the surcharges which were applied to the cash price, because of the deferment of payment, will be reduced in proportion to the amount of time by which the duration of the contract is shortened.” 1965 Act, supra note 33, at art. 10, para. 3.
\textsuperscript{142} U.C.C.C. §§ 3.307, 3.404.
\textsuperscript{143} 1965 Act, supra note 33, at art. 8.
Further, the buyer must return the goods to the same place, in the same form, and in the same state in which he received them; the buyer must not have used the goods except as needed for a simple examination or test. In addition, the buyer bears all expenses for return of the goods. Bercovitz asserts that this provision of the Act reflects the seller's desire to fix the terms of any "buyer may return" provision in an installment sales contract, rather than trust in freedom of contract under the applicable Civil Code provision. In any event, the failure to include the "cooling off" period clause in any of the standard contract forms for installment sales practically assures the demise of the contract.

Recognition of a brief "cooling off" period by the buyer raises the possibility of future modification of the Act in order to conform the provision to the laws of other countries. West Germany, in particular, extensively amended its law in this regard. In the United States, efforts to this end have been focused mainly on regulation of home solicitations, reflecting the fear that people often must go to extreme lengths to convince an overzealous salesperson to leave their home. The UCCC contains a similar three day "cooling off" period for cancellation which resembles article 8 of the 1965 Act.

Two provisions of the 1965 Act apply to ongoing features of the contract. The first, although a somewhat technical provision, specifies the place of litigation in case a contract dispute develops. Article 14 of the Act grants jurisdiction over disputes concerning contracts regulated by the Act to the courts of the buyer's domicile. Contractual agreements allegedly specifying jurisdiction inevitably cause problems and legal systems differ in their recognition and treatment of such provisions. In Spain, an intricate interplay be-

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144 Civil Codes traditionally recognize freedom of contract. For example, C. Civ. art. 1.255 provides: "[t]he contracting parties may establish any agreements, terms and conditions they may deem advisable provided always they are not contrary to law, morals, or public order." The 1965 Act expressly recognizes, in article 6, that the parties may add "agreements and clauses which the parties freely stipulate," and article 18, in a negative sense, recognizes the same principle.

145 See infra note 184 and accompanying text.


148 U.C.C.C. § 3.502.

149 See, e.g., R. Schlesinger, supra note 34, at 365-69.
tween article 14 and the Law of Civil Procedure occurs when con-
fronted with agreements containing this type of provision.\textsuperscript{150} Article 14 apparently voids contractual agreements containing a conflicting jurisdictional provision and thus acts as an unusual ex-
press nullifying clause.\textsuperscript{151}

The drafters of the UCCC recognized that "one of the common
abuses in consumer credit is the bringing of an action against the
consumer in a country or district other than that of his resi-
dence."\textsuperscript{152} The UCCC, therefore, provides that an action arising
from a consumer credit transaction must be brought in the county
of the consumer's residence,\textsuperscript{153} unless the action involves land.\textsuperscript{154} The UCCC provision also covers situations of changed residence.\textsuperscript{155}

Perhaps the most striking provision of the 1965 Act appears in
article 13, which declares that the courts may revise contractual
payment terms "for just cause determined with discretion" and in
"exceptional circumstances" such as family tragedies, unemploy-
ment, job injuries, or long illnesses. A similar suggestion appears in
the Civil Code,\textsuperscript{156} but the Civil Code provision does not have the
sweep and clarity of article 13. Article 13 also conditions payment
postponements and determination of new contract terms on a re-
quirement that the court also simultaneously redetermine the
credit surcharge.

Bercovitz reports that no cases have arisen involving article 13,
suggesting the section's ineffectiveness. As discussed in connection
with article 8, the reformation provision may have diminished ap-
lication in situations involving bills of exchange. The provision,
nevertheless, goes beyond common law court powers, with the pos-
sible exception of the protections afforded by the bankruptcy laws,
by exemplifying a willingness to allow courts to override contrac-

\textsuperscript{150} R. Bercovitz, supra note 34, at 242-93.
\textsuperscript{151} See Schlesinger, Jurisdiction Clauses in Consumer Transactions: A Multifaceted
\textsuperscript{152} U.C.C.C. § 5.113 comment.
\textsuperscript{153} "Residence" is defined as the address given by the consumer as his residence in con-
nection with the transaction and as changed from time to time by notice by the consumer to
the creditor. U.C.C.C. § 1.201(6). This provision invites abuse where a consumer wishes to
harass a creditor.
\textsuperscript{154} U.C.C.C. § 5.113.
\textsuperscript{155} Id.
\textsuperscript{156} C. Civ. art. 1.124, dealing with cancellation of a contract, provides that a court will
enter a decree cancelling a contract when the appropriate prerequisites have been met, "un-
less there should be grounds which justify the allowance of a term for the performance of
the obligation."
tual terms solely on the basis of changed consumer circumstances.  

IV. ECONOMIC REGULATORY FEATURES

The 1965 Act resulted from a need for legislative controls in three areas. The first area focused on consumer protection in installment sales, discussed in the preceding section of this Article. The second area focused on governmental economic regulations, discussed in this section. The third area legitimized the security position of sellers and financing entities. That aspect of the Act is discussed both in the next section, describing the Registry, and in the final section of this Article discussing the seller's remedies on default.

Direct governmental controls over consumer credit are common, even in the United States. Generally, governmental controls seek to inhibit inflation, although other economic purposes such as correcting trade imbalances may be involved. Consumer protection also prompts governmental controls, such as regulations placing limits on down payments and finance charges. Consumer protection controls, however, usually are administered by agencies concerned with the national economy and designed to respond to broad economic changes.

187 Baldo commented on this provision: "[i]n this article there is revealed the social preoccupation of the lawmaker, resolving the ancient debate about whether the court may, in exceptional cases that prevent the fulfillment of the contractual obligations, render the contract without effect or modify it . . . ." V. BALDO, supra note 34, at 119.

A full understanding of the judicial power created by article 13 would entail a far greater inquiry into and understanding of both civil law and common law attitudes toward judicial contract modification that can be undertaken in this Article.

188 A 1941 executive order authorized the Federal Reserve Board to impose direct controls over consumer credit under statutory authority dating back to World War I. Exec. Order No. 8843, August 9, 1941, Trading with the Enemy Act, 50 U.S.C. § 5(b) (1982). The controls were instituted in September of 1941, under Regulation W, lifted briefly after the end of World War II, reimposed during the Korean conflict, and finally lapsed in June of 1952. Legislation passed in 1969 gave the President the power to authorize the Federal Reserve Board to regulate all extensions of credit. 12 U.S.C. § 1904 (1969). In the spring of 1980, the President exercised this authority for a few months. The 1969 legislation terminated in 1982. Proposals have been made more recently for renewal of credit rationing. See W. LOVETT, BANKING AND FINANCIAL INSTITUTIONS LAW 90-93 (1984); D. JACOBS, L. FARWELL & T. NEEVE, FINANCIAL INSTITUTIONS 192-93, 605-06 (4th ed. 1966). These controls are distinctly separate from the lending restrictions placed upon the various classes of financial institutions by federal and state supervisory authorities.

189 See generally, E. FARNSWORTH, supra note 46, at 4-20 to 4-25.
A. Governmental Control of Credit Terms

The 1965 Act adopts the most common form of governmental intervention in installment sales by imposing direct limits on credit terms. Article 20 specifically requires that the government establish the minimum down payment, the maximum surcharge that can be imposed for a time purchase, and the maximum time period over which payments may be made. The Act indicates that the fundamental purpose behind these limits is economic control rather than consumer protection. In this regard, article 20 directs the government to consider economic advantages and consult, in advance, with economic and labor representatives before establishing credit limitations.

The minimum down payment takes on special importance by virtue of article 9 of the Act, which requires that the seller receive

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160 The generally applicable surcharge limit, effective in 1982, was 0.7% of the deferred price, multiplied by the number of months for installment payments. 1966 Decree, supra note 68, at art. 4(1). In 1984, however, all surcharge limits were removed. Id.

161 Article 2 of the 1965 Act imposes a minimum term of three months. Contracts which will be repaid in a shorter period fall outside the Act. See R. Bercovitz, supra note 34, at 128.

162 In 1984, for example, a 25% minimum down payment was in effect for time purchases of motorcycles, mopeds, ranges with no more than three burners, stoves, non-automatic or semi-automatic washing machines, and heaters; likewise, a 30% minimum down payment for refrigerators and television sets with screens up to 19 inches, and a 35% minimum down payment for all other goods were required. The maximum installment period was 18 months for all goods except automobiles. Orden de 22 de enero de 1971, reprinted in BOE, supra note 33, at 35 [hereinafter cited as Order of Jan. 22, 1971]. With respect to automobiles, on June 6, 1980, an Order reduced the required minimum down payment to 15% and extended the installment time period to 36 months, where financed by a finance company, or entidad de financiacion. The Order specifically stated that the change was due to “the present situation through which the automobile industry is passing, aggravated by the energy crisis.” Order of June 6, 1980, reprinted in BOE, supra note 33, at 35 n.58.

163 Article 21 of the Act authorizes the Ministry of Justice to dictate regulations. The implementing decree, however, places at least part of the process under the authority of the Finance Ministry, particularly with respect to equipment loans. Furthermore, initiatives suggesting changes may flow from several government sources. 1966 Decree, supra note 68, at art. 7(1). Perhaps the most significant role played by the Ministry of Justice in implementing the Act is its participation in the approval of the standard contract forms. The original proposal for the Act split jurisdiction among several ministries. R. Bercovitz, supra note 34, at 262-63.

164 The 1966 Decree states that revisions of the limits imposed by the Decree may be proposed by the Ministries of Finance, Industry, or Commerce, and by the Commission of the Plan for Economic and Social Development. 1966 Decree, supra note 68, at art. 7(1).

165 The labor organization specifically mentioned in the 1965 Act reflected the structure of the Franco regime, which was replaced by the government of Adolfo Suarez in 1976. See S. Lieberman, supra note 1, at 327-28. The Council on the National Economy, also mentioned in the Act, was abolished in 1980.
the initial payment simultaneously\textsuperscript{166} with his making the goods available to the buyer. Failure to follow this requirement results in the seller's waiver and forfeiture of his right to receive the down payment and renders the buyer liable only for the installment payments. This provision thus imposes a severe penalty on the seller and results in unjust enrichment of the buyer where the proper procedure is not followed. Whether the provision serves as an appropriate remedy is debatable, but it clearly underscores the importance of the down payment. Article 16 of the 1965 Act demonstrates the economic importance of the down payment requirements. This article limits the amount that may be borrowed in an installment sale to the deferred portion of the price and explicitly prohibits use of loan funds to cover the initial payment. Loans covering the initial payment are declared void\textsuperscript{167} and the responsible parties become subject to fines and other sanctions au-

\textsuperscript{166} Technically, the definition of a time sale, contained in article 2 and the first sentence of article 9, requires that delivery and initial payment occur at the "same moment." The literal reading apparently does not control and interpretation instead focuses on receipt of the down payment before delivery of the goods, an intended economic control. Bercovitz points out that simultaneous performance protects the consumer because the buyer does not risk the initial payment in the case of nondelivery by the seller. R. BERCovITz, supra note 34, at 202-06. The official contract forms include a specific acknowledgement by the parties that the initial payment has been made and the goods delivered.

A more serious theoretical difficulty lies in wording of the Act which renders the contract ineffective until both delivery and initial payment have occurred, a result contrary to the normal presupposition that a purely executory contract binds the parties. See, e.g., C. Civ. art. 1.445. Both Bercovitz and Baldo discuss this point at length. See R. BERCovITz, supra note 34, at 202-04; V. BALDO, supra note 34, at 64. There is, of course, a certain logical incoherence in stating in the same article that an effective contract requires both handing over the goods and initial payment simultaneously, and then provides that if the initial payment is not made, it need not be made at all and the buyer is responsible only for the unpaid installments. Bercovitz notes the remarks of a legislator made at the time the Act was passed to the effect that the courts will work it out doctrinally. Bercovitz responds, '[t]hese words can be annotated with the following observation: mister 'legislator,' doctrine would appreciate being able to work on texts in which there has been taken into account the doctrinal constructions commonly accepted in order to achieve the exact ends intended by the legislature instead of having to 'amend' texts absolutely incoherent. A prior knowledge of doctrine would facilitate the later work of developing doctrine and would raise the task to a level superior to that of the simple 'patching' of the technical outrages of the legislature. R. BERCovITz, supra note 34, at 207-08.

\textsuperscript{167} Use of the word "void" (nulo) presents a conceptual difficulty within the scheme of Spanish law; ordinary usage of the word results in an unwinding of the relationship, in other words, return of the money loaned. The sanction imposed in article 16 differs from the sanction imposed in article 9. In article 9, a failure to receive the down payment continues enforceability of the contract but with buyers not liable for the amount of the down payment. The legislative history reveals this result was intended. See R. BERCovITz, supra note 34, at 248-49.
authorized by article 20.

The extensive economic controls in Spain present a contrast to the current regulatory scheme in the United States. The principal regulations in the United States focus on "overcharging" the credit buyer and contain overtones of the policies behind the ancient usury laws. Classic learning maintained that the normal usury statute, imposing limits on interest chargeable by lenders, did not apply to the "time-price differential" between cash and credit sales. Article 2 of the UCCC heroically seeks to balance the interests of all parties by imposing finance charge limits for consumer credit transactions. Limits on the total amount of finance charges vary significantly, however, from state to state. The lack of uniformity has prompted calls for a uniform federal statute. The CCPA, in contrast, relies only on disclosure on the assumption that the free market will result in economically determined limits. Disclosure concerns are limited to the amount of finance charges and are not extended into other areas such as the amount of down payment and time period of installment loans, which involve economic rather than consumer concerns.

B. Government Control of Sellers and Lending Agencies

The second major aspect of governmental regulation of the installment sales process concerns controls over financing entities. Article 20(2) of the 1965 Act broadly grants to the government the power to determine conditions and obligations which must be fulfilled by merchants or lenders in installment sales transactions.

This governmental power, however, has not been utilized in any meaningful way. The drafters of the Act included this provision

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169 The prefatory note to the UCCC explains the underlying premises:

[many consumers do not have equal bargaining power with creditors and traditionally have been protected by governmental controls, including maximum rates, and the UCCC should provide recommended maximum rates in a standard form more simple and understandable than a hodge-podge of exceptions to general usury statutes . . . [A]ny rate structure provided should be of the maximum ceiling variety and not a specification of actual rates to be charged as in the regulation of public utilities.

171 See generally R Speidel, R. Summers & J. White, supra note 140, at 472-508.
172 The 1966 Decree requires that sellers and financiers "comply with the general conditions established for the exercise of commerce and for financing operations, as well as the
because of a belief, supported by a study of other legal systems, that Spain needed a "moderate system of control and vigilance" over installment sellers and lenders. In fact, however, control over one critical member, the lender, already existed prior to 1965 through close state supervision of installment sales financing companies, or "entidades de financiacion de ventas a plazos." Close supervision of financing entities intensified notwithstanding the 1965 Act. As a practical matter, financing companies play a major role in installment financing; regular Spanish commercial banks, in comparison, normally play little part in the installment sales process, although these institutions recently have expressed interest. This situation presents a marked contrast to the situation in the United States where finance companies, banks, and other financial entities vigorously compete for consumer business.

A party violating the 1965 Act, in addition, risks serious penalties because article 20 imposes fines up to 100,000 pesetas, temporary suspensions up to one year, or a total prohibition against installment selling and financing. The provisions specifically applicable to finance companies, though, also operate as an effective control mechanism. Although article 20 is essentially a punitive provision, it may significantly inhibit sellers wishing to experiment with different contract forms or other activities that may contravene the literal terms of the 1965 Act.

V. THE REGISTRY AND RIGHTS AGAINST THIRD PARTIES

A. The Registry Process

A major result of the 1965 Act was statutory "legitimization" of special obligations set forth in the Act ...." 1966 Decree, supra note 68, at art. 6.

The preamble to the 1965 Act states: "[i]n harmony with the precedents of comparative jurisprudence and with the object of achieving proper compliance with the provisions of this law, there is established a moderate system of control and supervision of the merchants and companies that are engaged in these types of transactions ...." See 1965 Act, supra note 33, at preamble.

The original statute was promulgated on December 27, 1962, although the existence of financing entities precedes the statute. In 1982, the National Association of Finance Companies celebrated its twenty-fifth anniversary. The series of decrees and orders regulating financing entities may be found in BOE, Ventas a Plazos, supra note 33.

Finance companies are prohibited from accepting deposits. Decreto-Ley 57/1962, de 27 de diciembre, art. 4(a), reprinted in BOE, supra note 33, at 121.

In 1984, commercial banks accounted for approximately 45% of consumer installment credit, finance companies accounted for roughly 25%, and other entities, such as credit unions and retailers, accounted for another 30%. Fed. Res. Bull., Aug. 1984, at A38. For the corresponding figures for France, Sweden, and England, see the dated, but interesting, account in E. FARNSWORTH, supra note 46, at 4-21.
the retention of title doctrine.\textsuperscript{177} As the trade-off, however, the Act requires registration of agreements in a newly-established Registry of Installment Sales if the agreements are to be enforceable against third parties.\textsuperscript{178}

The details of this process are vitally important in the practical operation of the Spanish installment sales system, but an in-depth description would be both tedious and unnecessary for the analytical purposes of this Article. In brief, the registration system\textsuperscript{179} requires a filing for all sales and loan agreements subject to the Act which contain a reservation of title or a prohibition against alienation clause.\textsuperscript{180} The Act establishes a Registry for each province of Spain. Two copies of the document must be filed with the Registry of the buyer’s domicile at the time the contract is signed.\textsuperscript{181} Within ten days, each provincial Registry must forward one copy of the registration document to the Central Filing Office in Madrid.\textsuperscript{182} The registry system is financed by registration fees.\textsuperscript{183}

A critical element in the installment sales registration scheme is

\textsuperscript{177} See R. Bercovitz, \textit{supra} note 34, at 171-72. As previously noted, in addition to legitimizing the doctrine of reservation of title, the Act also bestows upon an agreement against alienation the same protections as against third parties. See \textit{supra} note 104 and accompanying text. \textit{See also infra} notes 202-07 and accompanying text.

\textsuperscript{178} The registration requirement mirrored the requirement contained in the 1954 law dealing with personal property mortgages and pledges without displacement, in which a separate Registry for such documents was established under the General Office of Registries and Notaries and administered by the Registrars of Property. The General Office is part of the Ministry of Justice. 1954 law, \textit{supra} note 46, at art. 67. \textit{Orden de 8 de julio de 1966}, [hereinafter cited as Order of July 8, 1966] art. 1, \textit{reprinted in BOE, Venta a Plazos} (4th ed. 1980), \textit{supra} note 33, at 39. The details of the two systems, however, vary significantly. Indeed, the preamble to the Order instituting the Registry of Installment Sales provided for the establishment of “a registration system totally new and without precedent” in Spain. \textit{Id.} at preamble.

\textsuperscript{179} The original Order establishing the new Registry and setting forth its functioning system was issued on July 8, 1966. After fifteen years, a new Order, modifying the registration system, was issued on Nov. 15, 1982. Order of Nov. 15, 1982, \textit{supra} note 94.

\textsuperscript{180} 1965 Act, \textit{supra} note 33, at art. 23. A filing technically is required only for valid priority rights against third parties. \textit{Id.} at art. 19.

\textsuperscript{181} Order of Nov. 15, 1982, \textit{supra} note 94, arts. 9(1), 13. There is an exception for licensed automobiles and small craft by which registration usually falls within the province of licensing laws. \textit{Id.} at art. 9(2).

\textsuperscript{182} \textit{Id.} at art. 15. This central office apparently carries out functions such as compiling statistical data and generally overseeing the registration system, as well as providing a single central source where third parties may acquire information with respect to an item of personal property. \textit{See Order of July 8, 1966, supra note 178, at preamble.}

\textsuperscript{183} The registration fee system utilizes a sliding scale. For example, on documents where the time payments total between 600,000 and 1,000,000 pesetas, the fee is 900 pesetas. Order of Nov. 15, 1982, \textit{supra} note 94, at art. 40. In addition, each official form requires a documentary stamp, another source of income to the State. \textit{Id.}
the requirement specifying that the document must be drawn on forms approved by the General Office of Registries and Notaries in order to be eligible for registration. These forms, sequentially numbered, are purchased from the General Office. All installment selling in Spain under the Act thus involves the use of "official contracts." As a result, "official contract" terms are extremely important.

The model forms fall into three categories. The first, Model A, is a general form, signed by both buyer and seller. Model A expressly prohibits alienation and provides the seller the option to reserve title. Model A, however, contemplates possible assignment of the contract to a financing entity on a recourse basis, with bills of exchange evidencing the several installments.

Model B is used when a financing entity makes a loan directly to the buyer and contains only the prohibition against alienation. As with Model A, the installment debt owed the financing entity is evidenced by bills of exchange, drawn by the lender and accepted by the borrower. As previously noted, the chattel mortgage or pledge without change of possession may not be available to the

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184 Id. at art. 10.
185 "Official contract" terms, as used in this context, means both the specifically included contractual provisions and the precise wording of those provisions.
186 Bercovitz suggests that the greatest influence of the Ministry of Justice in installment sales regulation comes from its role in the approval of the official forms. See R. Bercovitz, supra note 34, at 262-63. The preamble to the Order of July 13, 1966 explains that the use of model contracts gives "greater rapidity and facility" to the registration process. Order of July 8, 1966, supra note 178, at preamble.
187 The three categories shall be designated Models A, B, and C. See also supra note 100 for a brief discussion of these models.
188 Title is routinely reserved.
189 The section on the form specifying the amount and due date of installments provides that the installments are "represented, respectively, by bills with the same amount and due dates, drawn by the seller and accepted by the buyer."
190 The financing entity may also claim reservation of title. The optional language, which may be inserted in Model B, states: "[i]t is understood that title is conferred on the financing entity, with the sole effect of a guaranty, until the full payment of the loan, with the same rights as if ceded to the financing entity by the seller." Circular de 19 de noviembre de 1968, reprinted in BOE, Venta a Plazos (4th ed. 1980), supra note 33, at 57 [hereinafter cited as Circular of Nov. 19, 1968]. In fact, the printed version of Model R, a variant of Model B used by ASNEF [Agrupacion Sindical Nacional de Empresas de Financiacion de ventilas a plazos] affiliates, includes identical language. Doctrinally, reservation of title in the financier under such circumstances is an anomaly and presents profound theoretical difficulties. See R. Bercovitz, supra note 34, at 140-41, 171, 177. Since "reservation of title" in the lender is invariably coupled with a prohibition against alienation, however, and the effects of the two doctrines are equivalent for most purposes under the 1965 Act, the courts have not taken exception to this added provision for the lender. See id. at 141.
lender in this situation because of the limited applicability of that particular legal form under the 1954 law.\(^{191}\)

Model C, in a sense, combines Models A and B. Executed by the seller and financing agency, Model C allows the seller to receive the face amount of the loan and, thus, resembles a cash sale. The bills of exchange are drawn by the seller, accepted by the buyer, and transferred to the finance company, along with all of the seller's rights.\(^{192}\) Model C, however, is rarely used.\(^{193}\)

All three of the model forms require a detailed description of the item or items involved in the installment sale. Spaces are provided for the trademark, model, and motor number, manufacturer or chassis number, and license number. One of the responsibilities placed upon the government by the 1965 Act is to determine those goods sufficiently identifiable so as to trigger registration.\(^{194}\) The concern for precise identification relates to the expectation that registration will be a sufficient source of information.\(^{195}\) The 1966 Decree defines identifiable goods as those “in which there is contained the trademark and serial number or fabrication number in an indelible or inseparable form, on one or more of its fundamental parts.”\(^{196}\) This definition was thought “a very general norm that will allow access [to the Registry] of all classes of goods that in the

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\(^{191}\) See *supra* note 91 and accompanying text.

\(^{192}\) R. Bercovitz, *supra* note 34, at 136. Interestingly, in Model C, the buyer acknowledges his debt to the financing entity; the debt is evidenced by the bills of exchange drawn by the vendor and accepted by the buyer. *Id.*

\(^{193}\) See *supra* note 100. The Order of Nov. 15, 1982 contemplates the possibility of adaptation of the basic forms for particular businesses to accommodate the needs of the particular field in which they operate. See Order of Nov. 15, 1982, *supra* note 94, at art. 10. Most adaptations are for the ASNEF.

Model P is designed for equipment loans and takes the form of a loan by the financing entity to the seller but, in effect, acts as a loan to the buyer. It is evidenced by bills of exchange drawn by the seller, accepted by the buyer, then transferred to the finance company. See R. Bercovitz, *supra* note 34, at 133.

Model R is an adaptation of Model B for use in automobile installment sales. Model R has stricter requirements, however, than Model B. Model R provides that, in the event of default on two or more installments, the entire loan falls due with no rebate on the finance charge “which may be retained by the financing entity in the sense of penal clause for default.” The contract contains an anomalous clause giving title to the financing entity. See *supra* note 190.

\(^{194}\) 1965 Act, *supra* note 33, at art. 20, para. 1.

\(^{195}\) Although, in theory, an item might be subject to the 1965 Act (e.g., as to payment terms) but not be subject to registration because of insufficient identification, it is widely assumed that eligibility for registration implies total exclusion from the Act. R. Bercovitz, *supra* note 34, at 259-60.

\(^{196}\) 1966 Decree, *supra* note 68.
future may be included in the norms of the Act.  

This brief description of the Spanish registration system illustrates the remarkable difference from the UCC scheme. The UCC requires only the filing of a financing statement containing the signature of the debtor, addresses of debtor and creditor, and a broad description of the collateral. This system presents a striking contrast to the Spanish requirement that the agreement itself be recorded. The Spanish registration system is complete in itself; all the necessary information is readily available to third parties. The UCC system, by contrast, only provides inquiry notice. Inquiry notice, first utilized in the Uniform Trust Receipts Act, significantly changed prior law and despite the exhortation found in U.C.C. § 9-402(8), is not always respected by the courts.

B. Effect of Registration

The critical importance of proper registration stems from the fact that under the 1965 Act, registration is required for a valid reservation of title or prohibition against alienation as against third parties. The principal parties involved are subsequent buyers and creditors of the buyer. The 1965 Act diverged from prior doctrine, supported by case law in the Supreme Court, that a reservation of title might be valid against third parties. Prior to

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197 Id. See supra note 116.
198 U.C.C. § 9-402.
200 "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." U.C.C. § 9-402(8).
201 See J. WHITE & R. SUMMERS, supra note 128, at § 23-16.
202 1965 Act, supra note 33, at art. 23. Baldo suggested that a third party with actual knowledge of the reservation of title or prohibition against alienation should not prevail, even if the contract was not registered. V. BALDO, supra note 34, at 230-31. Bercovitz contests this position. See R. BERCovrrz, supra note 34, at 276. Both creditors and subsequent buyers are included within the term "third parties" in the great majority of cases arising under the 1965 Act, although an occasional case holds the provision inapplicable to creditors. See id. at 273-76.
203 The problem arises when parties dealing with the buyer receive possession of the goods sold. In such cases, the lender with a superior claim asserted "a third-party intervention with a paramount right." Where the seller reserved title and wished to assert his rights, he traditionally proceeded under a "third-party claim to ownership." Both Baldo and Bercovitz point out, however, that since article 19 equates a reservation of title to a pledge, the former action presumably would be used in both cases. See V. BALDO, supra note 34, at 244-45; R. BERCovrrz, supra note 34, at 253-54. There is, however, disagreement on the point. See REVISTA DE DEREcAS PRIVADo 601, 634-35 (1975).
205 There was a requirement of clear evidence that the date of the reservation of title
the 1965 Act, nothing more could be done in the way of recorda-
tion. On the other hand, the doctrine lacked statutory support, a
matter for serious concern in civil law. The 1965 Act ended the
uncertainty.

The 1965 Act further explains the consequences of registration
in article 19. The first two paragraphs effectively equate, in insol-
vency proceedings, the rights of a creditor under a recorded
agreement of sale with those of a classic pledgee under the Civil
Code. Article 19 followed the 1954 law, which also defined the
rights of the chattel mortgagee and the pledgee without change of
possession by reference to the traditional rights of the pledgee.

In short, while representing distinct juridical models, the tradi-

preceeded the allegedly impermissible transfer. Doubt existed, however, as to the actual ex-
tent of third-party protection, especially as to buyers in good faith from the conditional
vendee. See V. Baldo, supra note 34, at 126-88; R. Bercovitz, supra note 34, at 272-83. In
general, under Spanish law, possession of an item acquired in good faith is equivalent to
title. C. Civ. art. 464.

See supra note 57 and accompanying text.

One issue remains unresolved, however. Does the prior doctrine survive the 1965 Act?
Or, does the 1965 Act mean that only where the legislature established registries for reserva-
tion of title and prohibition against alienation should such clauses be effective against third
parties? Bercovitz argues the latter point. See R. Bercovitz, supra note 34, at 172-73. It
should be noted that chattel mortgages and pledges without change of possession are recog-
nized as valid only when they fall within the ambit of the 1954 law; prior to 1954, they were
not recognized.

Under Spanish law, insolvency proceedings fall into three categories: (1) meeting of
creditors (concurso de acreedores), see C. Civ. arts. 1.922-1.926; (2) suspension of payments
(suspension de pagos), see Law of Suspension of Payments; and (3) bankruptcy (quiebra),
see C. Com. § 874. The suspension of payments process has been termed “a peculiarly Span-
ish device.” R. Graham, supra note 25, at 293 n.25. The Law of Civil Procedure also con-
tains a number of relevant sections. Normally, only the first type of proceeding will be rele-
vant since the majority of buyers subject to the 1965 Act are consumers. The latter two
proceedings are limited to businesses. The second paragraph of article 19 refers to the credi-
tors’ preferred rights, similar to those of a pledgee, in such proceedings. See R. Bercovitz,
 supra note 34, at 257-59. There is also available to individuals a “debt moratorium” (quita y
espera) under C. Civ. arts. 1.917-1.919. See generally Lopez Anton, Creditors’ Rights Under

Specifically, article 19 gives the creditor, under the recorded agreement, the preference
and priority enjoyed by the traditional pledgee. C. Civ. art. 1.922(2) provides: “[w]ith respect
to determinate personal property of the debtor, the following are preferred . . . 2. Credits
secured by a pledge in the possession of the creditor, with respect to the thing pledged and
to the extent of its value.” C. Civ. art. 1.926(1) provides: “[c]redits secured by a pledge shall
exclude all other [creditors] to the extent of the value of the thing pledged.”

Where the contract of sale fails to include a reservation of title or prohibition against
alienation, an unpaid seller enjoys certain priority rights. Under article 1.922(1) of the Civil
Code, priority is given to creditors for the purchase price of personal property in the posses-
sion of the debtor, to the extent of its value. The weakness of this preference lies in the
italicized phrase. See R. Bercovitz, supra note 34, at 255.

1954 law, supra note 46, at art. 10.
tional pledge, chattel mortgage, pledge without change of possession, reservation of title, and prohibition against alienation maintain similar juridical positions against third parties: 211 the secured creditor retains priority. 212 The effectiveness of these forms against third parties causes such creditor protections to be referred to as "real" guarantees, not merely contractual rights stemming from reservation of title and prohibition against alienation. These rights arise between the contracting parties themselves. As a juridical form, however, reservation of title remains distinctly different from a chattel mortgage or pledge in conventional Spanish legal philosophy. 213

Reservation of title and prohibition against alienation are treated throughout the Act as separate juridical forms although they are equated for rights against third parties. 214 This treatment is most obvious in the list of elements that must be included in a contractual agreement. 215 Reservation of title, moreover, is viewed as an optional clause, 216 while a clause prohibiting alienation is mandatory. 217

The stated explanation for the differing treatment of these two clauses is more historical than functional. The clause reserving title had a long doctrinal history as a well-recognized and much dis-

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211 The operations of each of these juridical forms is not absolutely identical in all cases. For example, the 1954 law gives certain labor and farming debts priority over chattel mortgagees and pledgees without change of possession. Id. at arts. 10, 66. No similar qualification appears in the priorities under the 1965 Act.

212 Bercovitz mentions a conceptual difficulty in analogizing reservation of title to other forms because the property, under the standard theory of reservation of title, already "belongs" to the secured party. Bercovitz and Baldo resolve this difficulty by asserting that reservation of title is essentially a lien, although they concede this position does not accord with standard doctrine. See R. Bercovitz, supra note 34, at 172, 254-55; V. Baldo, supra note 34, at 253. Bercovitz explained the thesis at length in a prior work R. Bercovitz, La Clausula de Reserva de Dominio (1971) and repeats it in the 1977 work, see R. Bercovitz, supra note 34, at 172-73. This unusual position is, of course, profoundly agreeable to an American lawyer accustomed to article 9 of the UCC. See infra note 227 and accompanying text.

213 Even Bercovitz, although fervidly arguing the contrary, concedes this point. See R. Bercovitz, supra note 34, at 173.

214 As between the parties, different legal consequences flow from the choice of form. For example, different forms may impose different duties of care for the goods. Cf. 1965 Act, supra note 33, at art. 12.

215 See supra note 126 and accompanying text.

216 Article 6(12) of the Act requires inclusion of a clause reserving title only "if it is so agreed."

217 1965 Act, supra note 33, at art. 6(13). If the contract is silent on the point, the clause is deemed included and the agreement is eligible for registration. Order of Nov. 15, 1982, supra note 94, at art. 2(a). See also R. Bercovitz, supra note 34, at 186.
cussed legal form. Clauses prohibiting alienation also frequently appeared but carried fundamentally obligational effects not necessarily affecting the ability of the promisor to pass good title. During the development of the 1965 Act, financing entities realized that elevation of the prohibition against alienation to the status of a property right would afford them the same protection in installment sales as the traditional doctrine of reservation of title afforded sellers.

In any event, equating the two different juridical concepts for functional purposes under the 1965 Act caused difficulties in collateral areas, particularly in harmonizing the Act with other Spanish laws. One difficulty within the 1965 Act arises in the interpretation of article 12, which provides that a buyer who fraudulently disposes of goods sold is subject to punishment under the Penal Code provisions dealing with unlawful appropriation. The mere threat of criminal punishment is a significant weapon for the creditor in an attempt to ensure faithful compliance by the buyer. The creditor obviously is the real party in interest. Article 12 expressly provides that penal action shall go forward only upon the demand of the seller or financing entity. The novelty arises in applying the Penal Code to resale situations where only a prohibition against alienation appears because, traditionally, the provision prohibiting unlawful appropriation only operated where the

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218 See V. Baldo, supra note 34, at 200-01.
219 Real estate lending transactions in the United States occasionally utilize clauses prohibiting alienation in lieu of the usual real estate mortgage and litigation may ensue as to whether a property right is created thereby, for example, such as an equitable mortgage. Usually, courts reject this argument. See, e.g., Equitable Trust Co. v. Imbesi, 287 Md. 249, 412 A.2d 96 (1980). For a discussion of the negative covenant as a mortgage substitute, see G. Osbourne, G. Nelson & D. Whitman, Real Estate Finance Law 110 (1979).
220 R. Bercovitz, supra note 34, at 183-84. See supra note 104 and accompanying text.
221 Both Bercovitz and Baldo discuss this problem in a number of contexts. See, e.g., R. Bercovitz, supra note 34, at 170-87. One area of uncertainty is the precise procedure to be followed when the creditor asserts his rights in the goods sold. The seller reserving title intervenes in a third-party "action of title," as opposed to the mortgagee's third-party "action of greater right." See supra note 203.
222 Penal Code art. 535. Article 12 of the Act also applies to buyers who harm the goods and refers to the appropriate Penal Code sections with respect to inflicting harms. Penal Code arts. 557-63. See R. Bercovitz, supra note 34, at 229.
223 Baldo suggests that this clause applies to the extent that even after the criminal action begins, the creditor at any time may dismiss the action. V. Baldo, supra note 34, at 218-19. Bercovitz disputes this interpretation as fundamentally and impermissibly blending concepts of penal and civil law. R. Bercovitz, supra note 34, at 234. He cites, in support of his contention, a Supreme Court judgment of November 14, 1975. Id.
property appropriated belonged to another;\textsuperscript{224} in installment sales, the reselling buyer actually has title to the property. Nevertheless, article 12 applies.\textsuperscript{225}

In pre-UCC days, United States law likewise provided a varying range of legal consequences depending on whether the security interest at issue was a pledge, chattel mortgage, conditional sale, factor's lien, trust receipt, or lease.\textsuperscript{226} The drafters of the 1965 Act attempted to deal with economic reality by modifying traditional forms and creating equivalent forms without disrupting pre-existing legal structure. The 1965 Act emphasizes the extraordinary innovation and daring with which the drafters of the UCC created the novel unitary concept of the "security interest" in article 9, which is defined in sweeping, all-encompassing terms.\textsuperscript{227}

VI. SELLER AND FINANCIER RIGHTS UPON DEFAULT

Default presents a true picture of the extent of seller and financier rights in the legal framework of installment sales. The preceding section dealt with third-party rights in the collateral. This section explores the options open to a seller or financier under the 1965 Act upon buyer default. The most significant feature, in contrast to the United States system, is that self-help repossession is not an option because self-help repossession clearly is disfavored in Spain.\textsuperscript{228}

\textsuperscript{224} Penal Code art. 535. For many years, article 535 of the Penal Code was applied to cases where the seller reserved title. R. Bercovitz, supra note 34, at 235-36. Bercovitz cites a Supreme Court case of May 19, 1970 which dealt with a contract that preceded the 1965 Act. Id. at 136. Bercovitz argues that, after the passage of the 1965 Act, article 535 of the Penal Code should not be applied in cases respecting reservation of title in which the contracts are not registered under the Act, in order to promote and expand use of the Act. Id. This theory accords with his general thesis that reservation of title, to be valid against third parties, should not be recognized if outside the Act. See generally M. Castineira Palou, Ventas a Plazos y Apropiacion Indebida (1983).

\textsuperscript{225} See R. Bercovitz, supra note 34, at 229-30 and cases cited therein.

\textsuperscript{226} See 1 G. Gilmore, supra note 46, at 5-250.

\textsuperscript{227} U.C.C. 1-201(37) defines "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation." Article 9 of the UCC, governing "secured transactions," applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures . . . ." U.C.C. § 9-102(1)(a). Only the "true lease" exception remains. DeKoven, Leases of Equipment: Puritan Leasing Co. v. August, a Dangerous Decision, 12 U.S.F.L. Rev. 259 (1978).

\textsuperscript{228} This result is true even under the traditional concept of the reservation of title doctrine. Actual buyer consent is a prerequisite for a nonjudicial retaking by the seller. Even so, it is doubtful that contractual clauses purporting to give such consent in advance will be accorded legal effect. R. Bercovitz, supra note 34, at 182. Bercovitz mentions a striking Supreme Court case where a seller ripped out an electric calculator after a default in pay-
The seller has two fundamental options upon buyer default: (1) "resolution"\(^{229}\) of the contract, in which the buyer returns the goods voluntarily or is forced to do so by judicial action, and the seller refunds part or all of the purchase price; or (2) honoring the contract, in which the seller attempts to collect the balance due on the purchase price or loan.\(^{230}\) These options do not become available, however, until the buyer defaults on two installment payments.\(^{231}\) A modest consumer protection element, therefore, is provided. Statutes of other European countries contain similar provisions, some interposing an additional or alternative requirement that the amount in default be a specified percentage of the unpaid balance.\(^{232}\) These provisions make an interesting comparison with the UCC, which fails to contain a provision for a grace

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\(^{229}\) The clumsy English word "resolution" is used to translate the Spanish concept of resolucion. The civil law concept applies to cancellation of a contract and subsequent restitution because of a cause that arises after the making of the contract. It is to be contrasted with "rescission" of a contract, used when there is some defect in the execution of the contract, such as fraud, justifying termination of the contract by a party, but which is not so fundamental, such as insanity, as to cause the contract to be a nullity from the outset. See BLACK'S LAW DICTIONARY 1474 (rev. 5th ed. 1979). "Resolving" a contract thus refers to "unwinding" a contract. On the common law remedy of restitution, see J. CALAMARI & J. PERILLO, CONTRACTS 570-78 (1977).

\(^{230}\) 1965 Act, supra note 33, at art. 11. The Civil Code provides similar options with respect to obligations:

The right to resolve reciprocal obligations, in case one of the obligors should fail to comply with that which is incumbent upon him, is deemed to be implied.

The person prejudiced may choose between exacting the fulfillment of the obligation or its resolution with indemnity for damages and payment of interest in either case. He may also demand the resolution of the obligation even after having requested its fulfillment, should the latter be found impossible.

The court shall decree the resolution demanded, unless there should be grounds which justify the allowance of a term for the performance of the obligations.

C. Civ. art. 1.124.

\(^{231}\) These options also become available if the final installment is in default. The provision is not clear as to whether the two defaults must be consecutive and whether, if one default is cured, a later default triggers the rescission and acceleration rights. Bercovitz decides that the former interpretation is the most sensible and accords with the other provisions of the 1965 Act. R. BERCOWITZ, supra note 34, at 216-17.

\(^{232}\) For example, Belgian law forbids resolution unless two defaults have occurred or the amount of a single default exceeds 20% of the credit price. N. REICH & H. MICKLITZ, supra note 145, at 142.
period and permits self-help repossession on default.\textsuperscript{233} The UCCC, in comparison, requires that the seller give written notice of default to the debtor and wait twenty days before taking repossession action.\textsuperscript{234} The practical relevance of these provisions is questionable, however, since repossession or other legal action is viewed as a last resort.

Article 11 also seems to require that acceleration of the debt must await default on two installments.\textsuperscript{235} The UCCC, in contrast, explicitly states that acceleration may not take place until after expiration of the twenty-day notice period.\textsuperscript{236}

A. Seller's Election to Resolve

If the seller exercises his option to rescind the contract,\textsuperscript{237} each party must return the benefits realized; the buyer returns the goods\textsuperscript{238} and the seller refunds the purchase price. The Act, however, clearly recognizes that the seller is entitled to compensation for the time during which the buyer possessed the goods as well as for any economic deterioration in the value of the goods. The Act, therefore, provides that the seller may retain ten percent of installments paid as compensation for use of the goods, or "rent," and also may retain the entire initial payment to cover "commercial depreciation." Rigid application of this formula rarely yields a result that corresponds with actual damages, but it provides a quick means of determination and avoids individualized, judgmental decisions. By implication, this formula precludes the possibility for consumer abuse resulting from the routine inclusion of contractual clauses permitting the seller to retain all payments as a penalty in the event of rescission.\textsuperscript{239}

\textsuperscript{233} U.C.C. § 9-503.
\textsuperscript{234} U.C.C.C. §§ 5.110, 5.111.
\textsuperscript{235} Article 11 of the Act expressly provides for acceleration of debt after default on two installments in the case of a lender.
\textsuperscript{236} U.C.C.C. § 5.111.
\textsuperscript{237} The more advantageous option for the seller will depend upon several circumstances, such as the present value of the goods sold as compared with the contract price. See A. FARNSWORTH, CONTRACTS 905-06 (1982). There is some uncertainty as to the effect of a decision to seek full payment of the purchase price on the continued validity of the reservation of title. See infra note 256. Other subtleties of Spanish law and procedure may also influence the seller's choice.
\textsuperscript{238} Litigation may be necessary. For a thorough discussion of the action of resolution, see V. BALDO, supra note 34, at 103-125.
\textsuperscript{239} On this subject Bercovitz and Baldo agree. See R. BERCOVITZ, supra note 34, at 222-23; cf. V. BALDO, supra note 34, at 122, 211-12. This view accords with the general view that positive commands in the law are not normally perceived as "waivable" by agreement. An
A third type of possible seller compensation allows recovery for "deterioration" of the goods. In the event of deterioration, the seller is entitled to an amount provided by law. This concept appears to encompass more than loss of value due to natural deterioration; presumably natural deterioration is covered by the concept of "rent" and, arguably, commercial depreciation. "Deterioration" in this sense refers to the concept of unusual damages. This third concept may result in the payments being insufficient to cover the amount owed to the seller by the buyer. The Act specifically grants to the seller the right to bring a damage action against the buyer for the deficiency.

The seller's right to recover the goods, however, differs markedly from the United States system because, it seems, the Spanish seller cannot elect to retake goods by cancelling the contract and recover the full purchase price; that is, he cannot retake the goods and seek fulfillment of the contract. The seller is thus put to an "option" that approaches the judicial doctrine that developed with respect to conditional sales contracts in the United States. The disadvantage of conditional sales contracts, as compared to chattel mortgages where a deficiency judgment followed a foreclosure sale, was a major cause for the promulgation of the Uniform Conditional Sales Act (UCSA) early in the twentieth century. The UCSA established the right to a deficiency judgment if the seller retook and resold the goods. The same pattern has been carried forward into the UCC. In a sense, however, the wheel has come nearly

example of a case involving such a clause is the Supreme Court (Civil) decision of February 24, 1966. Apparently such clauses were routinely inserted in installment contracts prior to enactment of the 1965 Act. V. Baldo, supra note 34, at 211. Language contained in Model R tries to retain the concept of a penalty by retention of all payments. See supra notes 190, 193.

In particular, see C. Civ. art. 1.124, supra note 230 and its concept of "damages" recoverable by the resolving party.

See C. Civ. art. 1.124. It is argued that the real meaning of the provision is to allow the seller to recover compensation for use and/or for commercial depreciation where they actually exceed the minimum set forth; this generally amounts to the initial payment for value of use and ten percent of installments paid for commercial depreciation. See V. Baldo, supra note 34, at 124; R. Bercovitz, supra note 34, at 224. Baldo quotes, however, a contrary position as apparent from the legislative history: "[t]his system of a fixed valuation of the consequences of default can be the object of criticism . . . but it provides an easy system to liquidate damages with all the advantages that this carries." V. Baldo, supra note 34, at 124.

See G. Gilmore, supra note 46, at 1202-03. The conditional sale is the subject of chapter 3 in Gilmore's book.


U.C.C. § 9-504(2). A vestige of the old rule may be found in the UCC provision that
full circle because the UCCC prohibits deficiency judgments where the cash sale price of a "commercial unit" of goods is equal to or less than $1,750. The propriety and limits of legislation opposing or constraining recovery of deficiency judgments is a frequently disputed element in consumer protection law relating to secured transactions.247

The right to resolve the contract and retrieve the goods does not necessarily relate to whether the seller reserves title or prohibits alienation. This remedy is generally available to all sellers. In this respect, the UCC diverges from the Spanish Act because the UCC generally precludes any seller from "cancelling" once the goods have been delivered. The result is, at first blush, surprising. Normally, the party not in default under a contract has a restitution action as an alternative and it is difficult to see why, as between seller and buyer, the seller ought not to have this option. The policy argument supporting the UCC position is that, in reality, it is not readily discernible that the dispute is confined to seller and buyer. Furthermore, recovery of the price is always a sufficient remedy. Pre-Code law, as well, did not permit the credit seller to obtain restitution in the form of specific relief. Only the seller receives the option to resolve in article 11. For the lender, the only meaningful option is to proceed by collecting the outstanding balance of the loan. In article 11, a lender may

the repossessing secured creditor, in most cases, may propose to the debtor that the creditor retain the goods "in satisfaction of the obligation." U.C.C. § 9-505(2). While the debtor always may force a sale, if he does so he runs the risk of liability for a deficiency judgment, a risk he may avoid totally by consenting to the creditor's retention of the goods.

246 The concept of the "commercial unit" precludes the argument that the provision does not apply in certain situations, such as the sale of a stove, refrigerator, washer, dryer, and television set for a total cash price of more than $1,750 where none of the items, considered separately, costs that amount. The $1,750 figure originated from the Report of the National Commission on Consumer Finance. U.C.C.C. § 5.103 comment 3.

147 See, e.g., D. Rice, supra note 123, at 568-602.

248 See supra note 230.

249 The seller may have the right to recover goods in the special situation where a buyer, upon receipt of the goods, was insolvent. U.C.C. § 2-702. Successful reclamation of the goods under such circumstances excludes all other remedies—an "anti-deficiency" provision, if you will, intended to protect other creditors. See id. at comment 3.

150 See V. Calamari & V. Perillo, supra note 229, at 570-78.


152 See id. at 498 and cases cited at n.86.

153 The lender who is a transferee of the seller's interest theoretically may have the option
accelerate the loan in the event of default on two installments, or the last installment, and proceed with collection efforts.

B. The Action for the Balance of the Purchase Price

The other option open to the seller and the usual remedy of the lender is to proceed forward with the agreement and attempt to collect the balance of the price or loan due. The 1965 Act contains few, if any, provisions setting out a procedure to carry out this option. The only procedural provision set forth in detail is extrajudicial and depends completely upon the cooperation of the buyer; it entails taking action through a notary public. Under this provision, the debtor is notified of the debt claimed and the intended auction and, within three days, must either pay or turn over the goods. In the latter case, a public auction is held in the presence of the notary public. If, after two such auctions are held with respect to the same goods, there is still no bidder, the creditor may retain the goods in full satisfaction of the debt.

If the debtor refuses to turn over the goods or pay the debt, the creditor must proceed through judicial channels, most probably to resolve; this result is indicated by the last phrase of article 11 of the Act.

The status of the notary public in Spain, as in other civil law countries, is far more elevated than in the United States. Legally trained, a notary public plays a major part, for example, in the transmission of family wealth and in real property transactions. They are appointed by the government after a fiercely competitive selection procedure. See generally R. Schlesinger, supra note 34, at 18-24. For a brief but interesting historical sketch of the notary public, including Spain and extending back to Rome, see Margadant, The Mexican Notariate, 6 Cal. West. L. Rev. 218 (1970).

The described procedures, set forth in article 19, are identical to those contained in article 94 of the 1954 law of chattel mortgages and pledges without change of possession. The procedures lead to a notarial sale equivalent to that provided in cases of true pledges, where preliminary steps to regain possession of the goods are unnecessary. The Civil Code provides:

If the debt is not paid when due the creditor may proceed, before a notary, to sell the pledge. The sale must be made at public auction . . . . If the pledge should not be sold at the first auction, a second one, with the same formalities, may be held; and should no result be attained the creditor may become the owner of the pledge. In such case he shall be obliged to give an acquittance for the full amount of the credit.

C. Civ. art. 1.872.

If the item does not sell at a price sufficient to cover the credit at the auction, an action is available against the debtor for any deficiency. See supra note 43.

A dispute exists as to the effect of bringing a suit to collect the balance of the purchase price upon the creditor's right to recover the goods sold by resolving the contract. Bercovitz cites several cases in which a creditor suing for the purchase price was deemed to have lost his right to resolve. He criticizes this result because he believes that the creditor should have the right to change his mind and later elect the option of resolving the agreement. R.
a summary action based on bills of exchange followed by an attachment or embargo of the debtor's property. The 1965 Act, as previously noted, is virtually silent on this subject. Nevertheless, almost invariably in installment sales the deferred purchase price is evidenced by bills of exchange drawn by the seller or finance company on the buyer and accepted by him, with a separate bill of exchange being drawn from each installment. One plausible reason for this practice may be the elimination of defenses through the holder in due course doctrine. The principal justification for this procedure, however, is directly related to the availability of a swift and effective judicial mechanism, at least in theory, to obtain payment of the purchase price.

In Spain, as in most civil law countries, there are two major pro-

BERCOVITZ, supra note 34, at 220. Under Civil Code article 1.124, a party suing for fulfillment of an obligation, if impossible, may ask for resolution instead. Baldo suggests that even invoking the procedure for notarial auction will prevent a later action for resolution and vice versa. V. BALDO, supra note 34, at 221. It is not suggested, however, that a judicial action exists which would allow the judicial repossession of the specific goods sold under reservation of title, along with a deficiency judgment against the buyer for any unpaid balance of the purchase price or loan, as is the case under article 9 of the UCC.

Conversations with installment sellers in Madrid indicates to an increasing degree that use of bills of exchange is declining, especially in small transactions. The paperwork is burdensome and bills of exchange are valuable only to provide access to executory proceedings, whose practical usefulness is questioned.

The model forms all recite that bills of exchange have been used, an indication of custom in these transactions.

There is an interesting reason why a separate bill of exchange is used for each installment. Under Spanish law, a bill of exchange payable in installments is deemed a demand instrument. This result follows from the fact that section 451 of the Code of Commerce specifies that bills may be drawn for one of several listed periods. The same practice occurs, or at least occurred, in Mexico in the early 1960's. See Warren, Mexican Retail Installment Sales Law: A Comparative Study, 10 U.C.L.A. L. Rev. 15, 28-29 (1962). Warren explains that the reason separate bills of exchange are used, rather than a single document, is that a single document providing for successive installments is payable at sight. Id. at 28-29. The reason why a bill of exchange is used instead of a promissory note can only be ascribed to custom and usage. Id. at 29. In Spain, the explanation is that only a bill of exchange, not a promissory note, entitles the holder to use the executory procedure, as described in infra notes 263-65.

The use of separate bills of exchange presents a procedural problem where the creditor wishes to accelerate the loan upon default. Bercovitz describes an interesting procedure whereby, in addition to the individual installments, the creditor also obtains a single bill of exchange due on sight for the total amount of the outstanding installments, for use in the case of default. R. BERCovITZ, supra note 34, at 221-22. He does not discuss possible buyer resistance to the situation where negotiable paper potentially double the actual debt is placed in circulation. Baldo seems to suggest that the summary proceeding is not available if the debt is accelerated. V. BALDO, supra note 34, at 208-09.

This Article does not attempt a study of the holder in due course doctrine or its equivalent under Spanish law.
cedures for civil litigation — an ordinary procedure and an executory procedure. The latter is a variation of a summary proceeding, given special priority and involving streamlined procedures, with limited opportunities for a defendant to raise defenses. The procedure essentially is in execution of judgment, and involves documents where the right to recover theoretically is manifest. Included among the very limited number of transactions which justify use of summary procedure is an action against the acceptor of a bill of exchange. By this mechanism, the seller or the financial institution may bring an executory proceeding against the defaulting defendant and rapidly execute upon the item in which title is reserved, in addition to other property belonging to the defendant.

In brief, the procedure for bringing such an executory proceeding is as follows:

1. Upon nonpayment of an installment, the creditor must protest through a notary within twenty hours after the time payment is due. The debtor is granted a fourteen hour grace period.

2. The Spanish term for the executory proceeding is juicio ejecutivo. The ordinary court proceeding is called a juicio declarativo, which should not be confused with the declaratory judgment action in the United States. The Spanish law of civil procedure, again in accordance with normal civil law custom, divides judicial actions into two major types: "voluntary," which are basically ex parte actions, and "contested," which are generally similar to regular legal actions in the United States.

3. Other examples are certain public writings, private documents acknowledged under oath before a court, and confessions of judgment. Ley de Enjuiciamiento Civil [LEC] art. 1.429.

4. The single instance where an action against an acceptor cannot be brought under the summary proceeding occurs when, at the time of protest, he denies the authenticity of his signature. Id.

5. While a creditor holding a bill of exchange has the option of proceeding against the defaulting debtor in an ordinary action, in practice, he usually does not want to renounce the summary action because it is faster, less costly, and more certain in its economic result. J. Garrigues, supra note 34, at 807.

6. The author was informed that the requirement of protest by means of a notary public is a highly disfavored, formalistic step, at least in the context of installment sales, and that movement is under way to abolish this procedure. In 1982, some 5.7 million bills of exchange were protested, with the average value of each protest at 211,682 pesetas, or approximately $1100. 1984 Anuario Estadistico, supra note 1, at 198. In the United States, protest is required only in the case of drafts drawn or payable outside the United States. U.C.C. § 3-501(3). The protest formalities are set forth in U.C.C. § 3-509.

7. For an exhaustive treatment of the subject, see F. Gomez de Liano, El Juicio Ejecutivo Cambiario 101-202 (1980) [hereinafter cited as F. Liano].

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within which to make payment before the summary action proceeds;\textsuperscript{270} 

(2) The proceeding begins when the plaintiff completes a claim form and presents it to the judge. The minimum that may be claimed is 10,000 pesetas, but this amount may be reached by suing on several bills in a single action.\textsuperscript{271} The plaintiff presents the form along with the notarized protest and bill of exchange; 

(3) The judge's evaluation of the case is limited basically to studying (a) whether the plaintiff has met all the procedural requirements and (b) whether the plaintiff has valid title to the instrument. If valid title exists and the procedural requirements have been met, the judge is required by law to hand down a decision in favor of the plaintiff;\textsuperscript{272} 

(4) The judge's agent executes the decision by contacting the debtor and ordering him to pay the amount due immediately.\textsuperscript{273} If the debtor pays the judicial agent the principal plus the cost incurred by the creditor, the summary proceeding is over. In cases where the debtor cannot immediately pay the debt but does not deny it, his personal property may be "embargoed."\textsuperscript{274} Embargo is similar to attachment and garnishment procedures in the United States. Any of the debtor's goods that have been given to the creditor as collateral against an installment sale are embargoed first.\textsuperscript{275} 

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\textsuperscript{270} Id. at § 506. 
\textsuperscript{271} LEC, \textit{supra} note 264, at art. 1.435. So long as the circumstances comport with articles 153, 155, and 156 of the LEC, summary proceedings may be invoked by accumulation of bills of exchange, according to most Spanish legalists. F. Liano, \textit{supra} note 267, at 99. In addition to Liano, Guasp and Ferrer Martin are among the Spanish authorities who support the accumulation of actions. \textit{Id.} Proponents support accumulation because it promotes economical usage of judicial time and allows the debtor to defend only one suit rather than multiple suits. 
\textsuperscript{272} F. Liano, \textit{supra} note 267, at 107-09. 
\textsuperscript{273} Id. at 109-11. 
\textsuperscript{274} LEC, \textit{supra} note 264, at art. 1.442. 
\textsuperscript{275} Id. at art. 1.447. The section speaks only of pledges and mortgages but presumably also applies to installment sales under the 1965 Act. An intriguing intellectual puzzle develops where title has been reserved by the seller in the contract of sale, as expressed by Baldo: 

If the agreement is interpreted literally, it is obvious that the thing sold cannot be attached, since an embargo can only be made on the property of another, nevertheless it has been recognized that in such a case, the embargo is valid because it is considered that at the moment of the embargoing the seller has carried out the acquisition of the item by the buyer with the renouncing of his (the seller's) rights, and this same criterion has been followed in recent Italian jurisprudence. 

Mossa, in his work "The execution by the seller on the thing sold with reservation of title" [written in 1915], concerns himself with this subject and states that there can be embargoed not only things that are the property of the buyer but
A priority system of other property follows, beginning with cash, government securities and bonds, gold and silver jewelry, and gems. Items which the debtor uses in his business, however, may not be embargoed. Garnishment of the debtor's salary or pension is an available remedy; the amount which may be taken, however, is determined according to the debtor's total salary.

If the defendant-debtor opposes the summary judgment, he must send a formal note in opposition to the judge. In the note, the debtor must explain his basis for opposition. According to the literal language of the Ley de Enjuiciamiento Civil [LEC], there are only five valid defenses which the defendant may raise. These defenses are fraud, payment in cash, payment by substituting another document, statute of limitations, or release from or extension of the debt. The opposing debtor is seriously handicapped, however, because he must pay the alleged debt to the judicial agent or permit his goods to remain embargoed in order to preserve his right to oppose. As a result, a type of escrow situation is maintained pending final disposition of the opposition.

The defendant's opposition may be contested by the plaintiff...
within four days.\textsuperscript{283} Regardless of the plaintiff's reply, the defendant may not introduce any new defenses.\textsuperscript{284} The parties must submit any evidence in support of their respective positions within ten days.\textsuperscript{285}

In summary, the executory proceeding bestows on the installment sale creditor a powerful tool and places a great deal of pressure upon a defaulting debtor. The limitation of available defenses, the purportedly strict and short time limits within which actions must be taken, and the embargo of the debtor's goods collectively serve a function analogous to that served by the immediate right of self-help repossession in the United States.\textsuperscript{286} Perhaps what matters in consumer installment sales are not the details of the mechanism used, but rather the presence of some device which swiftly and effectively deprives the non-paying debtor of the right to continued use and enjoyment of the goods for which he has not paid.\textsuperscript{287}

\section*{VII. Conclusion}

Spain now has had two decades of experience with the Personal Property Installment Sales Law. The text of the 1965 Act has never been amended and modifications to the implementing decree and order have been infrequent.\textsuperscript{288} As a juridical framework within which retail installment sales are transacted in Spain's modern market economy, the Act seems to have met with considerable popular satisfaction.\textsuperscript{289} While it could be perceived as presumptu-

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\textsuperscript{283} LEC, supra note 264, at art. 1.468.
\textsuperscript{284} F. Liano, supra note 267, at 172.
\textsuperscript{285} LEC, supra note 264, at art. 1.464.
\textsuperscript{286} A major complaint with respect to installment sales voiced to the author was the amount of time the executory proceeding actually required for effective relief.
\textsuperscript{287} An interesting analogy may be seen in the landlord-tenant situation in the United States. The non-paying tenant who remains on the property rent-free is a source of deep concern to the landlord. Self-help was one option, but existed only in some states. See, e.g., Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20 (1961). Another option was institution of a supposedly rapid procedure, the summary detainer action, which permits landlords to regain possession from defaulting tenants and recognizes only a limited number of defenses. See, e.g., Lindsey v. Normet, 405 U.S. 56 (1972).
\textsuperscript{288} The only major revision of these three basic documents occurred in a publication of a revised Order on November 15, 1982, dealing primarily with details of the registration process. See supra note 94. The BOE edition of the Act, with accompanying relevant material, contains over twenty different orders, communications, resolutions, and decrees, but most of these items relate to the workings of the financing entities and are comparable to bank regulations.
\textsuperscript{289} The author interviewed a number of automobile dealers, appliance sellers, financiers, and consumer representatives; on the basis of the interviews, the author was struck by the
\end{flushleft}
ous to propound specifics with respect to the Act, this Article concludes with four major observations.

First, the Act ingeniously and successfully accommodates the driving needs of a new commerce within a previously established jurisdictional framework. Faced with the necessity of developing some significant security for the installment seller-lender, yet confronted with the inadequacy of the older forms, the drafters, in effect, took the old forms and gave them new meaning within the framework of the Act. Continuity was preserved, yet progress occurred. Faced with the solidity of the Civil Code and the traditions of the civil law, the Spanish drafters could not, as Llewellyn did with the UCC, sweep aside the old forms and begin anew. Yet, in their own way, they used the old forms to meet the new needs.

Second, and equally impressive, is the sheer ambition of the Act. It attempts to deal with the pressing requirements of conditional sellers and lenders for adaptation and expansion of traditional legal doctrine, with problems of government regulation of this sphere of economic activity, and with consumer protection needs. In short, it is an all-encompassing statutory framework contained in only twenty-three articles. The drafters of the UCC, in comparison, contented themselves with only the problem of the new form of security interest, eschewing any significant consumer protections.290

Third, a major requirement for a workable retail installment sales system is a swift mechanism that the seller-lender may employ to put pressure upon the defaulting buyer; in other words, a swift and sure device is needed to prevent the buyer from retaining possession and using the goods while refusing to pay for them. The United States solution is seller self-help repossession. As this remedy is outlawed in Spain, the juridical equivalent of self-help repossession appears in the ingenious use of accepted bills of exchange to provide access to readily available summary judicial proceedings. The outcome, theoretically, is the same: the defaulting buyer must promptly pay for or lose the goods.

Finally, consumer protection concerns now appear inherent in general satisfaction with the existing Act. The two major complaints voiced by sellers and financing entities concerned the relative slowness of collection procedures in cases of default and priority technicalities in certain insolvency situations. The consumer spokesman, representing the fledgling Council of Consumers, remarked that problems involving the quality of foodstuffs and increases in basic utility costs constituted far more urgent matters than installment purchase law irregularities. See generally A. Garcia-Pablos, 35 Millones de Consumidos (1975).

290 2 G. Gilmore, supra note 46, at 1093.
any consideration of consumer credit. Even in this relatively early 1965 Spanish Act, common threads of concern are apparent: disclosure of true costs of buying on credit, prepayment rights, "cooling off" periods, and advertising restrictions. The seeds began with these concerns. It will be interesting to watch how the Spanish deal with these concerns and thus perhaps continue the attempt to ensure, in the words of Michener's anonymous informant, that the system does not "corrupt the soul."

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**Note:** The Spanish enacted a forty-one article Law for the Protection of Consumers and Users in mid-1984, dealing with a number of these concerns. See BOE, *hum. 176, de 24 de julio de 1984.*
APPENDIX

(Translation of the Law of Installment Sales of 1965)

The importance that the role of credit has attained in this day and age is beyond question. It constitutes one of the bases for the development of society, not only in its commercial and industrial aspects, but also in domestic and family life. One of the forms of the use of credit is in the time sales of personal property, an important factor in plans for economic development and the expansion of which is a characteristic of modern life. Until now, such transactions have been carried out under the general rules of our legal code, but present reality urgently requires the establishment of a special regime which delineates just parameters of efficiency and security for buyers and sellers.

The Treasury Department order of January 12, 1962 has regulated the financing of time sales of equipment and the Law on the Control of Credit and Banking of April 14, 1962 dedicated its tenth provision to this subject, providing for the creation of specific agencies to facilitate the financing of time sales transactions. Subsequently, there has been issued, in the development of the aforementioned provision, the Decree-Law of December 27, 1962 and the Orders of January 25, and February 8, 1965, which in regulating time sales from the financial point of view demonstrate the necessity of a provision of law which will regulate these sales in their substantive aspects.

Such is the object of this Law, which covers exclusively that buying and selling which displays the characteristics which this Law specifies, without denyng the possibility of that contract the goal of which is to obligate the contracting parties to execute a future time sale of personal property and without intending to limit the role of the general principals of private law.

The purchase of personal property for resale is not covered because it concerns transactions between merchants which, as experts in economic practicalities, do not need special protection. Also excluded are loans secured by chattel mortgages and pledges without change of possession, not only because they are applicable to very limited types of property, but also because they are secured with a guarantee which makes other protective measures unnecessary. Similarly excluded from this Law are occasional sales and loans, such as transactions which do not reach or surpass the level designated by the government, and sales and loans in external commerce.
The buying and selling of personal property subject to this Law must be evidenced in writing, without intending to alter the ordinary rules of evidence, and with the end that, by such a simple formality, the essential content of the contract may be supported. The requirement of an initial payment tends to avoid the abuse of credit and is a common requirement of foreign legislation in this area, as with the financial provisions previously discussed.

The prohibition of contracts of submission which alter the judicial jurisdiction set forth in this Law, the ability of judges and tribunals in exceptional cases to designate new installments or modify those agreed upon, the enforcement of penal sanctions in cases of specific offenses, and the limitation on the amount that may be loaned are precautionary measures that circumvent any abusive or fraudulent provision of the contracting parties.

In harmony with the precedents of comparative jurisprudence and with the object of achieving proper compliance with the provisions of this Law, there is established a moderate system of control and supervision of merchants and companies which are engaged in these types of transactions, as well as a registry of contracts organized to achieve their greatest efficacy.

The regulations which are issued in executing this Law shall round out the legal mechanism that is adapted to present-day societal realities, through a system which has proved successful in comparative legislation.

In its name and in conformity with the proposal developed by the Spanish Parliament, it is promulgated as follows:

1. It is the object of this Law to regulate installment sales of tangible personal property (other than consumables), loans made to facilitate the acquisition of such property, and the guarantees that are given to assure the fulfillment of the obligations arising under such contracts.

2. "Installment sale" shall mean, under this Law, the contract by which the seller delivers to the buyer some item of personal property and receives from him, at the same time, a part of the price, with the obligation to pay the rest extended over a period of time greater than three months and in a series of installments which will be determined in the manner provided in article 20.

Also covered by this Law will be the acts or contracts, whatever may be their legal form, by which the parties seek to achieve the same economic ends as with an installment sale.

3. For purposes of this Law, arrangements to facilitate the acquisition of personal property on time will be considered financing
loans to the seller when the seller transfers or subrogates to the financier his claim against the buyer, with or without reservation of title, or when the seller and financier together arrange in any manner to participate in the acquisition of the goods by the buyer against the subsequent payment of the price in installments.

Financing loans to the buyer shall be those by which a third-party makes available to the buyer, at most, the deferred portion of the total price in transactions to which this Law applies, reserving to himself any guarantees agreed upon, with the buyer being obligated to repay the loan over a period greater than three months and in the number of installments, never less than three, which is determined in the manner provided in article 20.

4. Excluded from coverage under this Law are:

(1) The installment sale of personal property which, with or without further modifications or handling, is destined for resale to the public, and loans whose purpose is to finance such transactions.

(2) Those occasional loans and sales made without purpose of profit.

(3) Those sales and loans whose amount is lesser or greater than the limits that the Government may determine.

(4) Those loans secured by a mortgage or pledge without change of possession.

(5) Transactions in foreign commerce.

5. For the validity of contracts subject to this Law, and to be affected by the same, it is necessary that they be in writing and in as many copies as there are parties involved.

6. The contracts, in addition to the agreements and clauses which the parties freely stipulate, shall contain, of an obligatory nature, the following terms:

(1) Place and date of the contract.

(2) The full names, firm name, and domiciles of the parties.

(3) A description of the goods sold, with the characteristics necessary to facilitate their identification.

(4) The total amount of the time sale and the total amount of the loan, as the case may be.

(5) The cash sales price.

(6) The amount of the first installment or initial payment, whose minimum will be fixed by regulations promulgated in accordance with this Law.

(7) The successive installments of payment on the purchase price or of repayment of the loan, with an indication of their
number, amount, and date of maturity. If, as a method of payment, bills of exchange are drawn, the amount of each and their date of maturity shall be set forth.

(8) The surcharges which, within the limits determined by the Government in accordance with article 20, are imposed upon the retail price or upon the principal of the loan, because of the installment payment.

(9) That part of the price which is financed by a third-party, if such be the case. In no event shall this refer to the initial payment, which shall always be the responsibility of the buyer.

(10) The interest which will be imposed on the buyer or the borrower in case of default in payment.

(11) When agreed, the assignment of rights against the buyer by the seller, subrogating to a third-party, and the name or the firm name and address of the third-party; or the reservation of the right to assign in favor of a person not yet determined, when it is so agreed.

(12) The clause reserving title, if it is so agreed, as well as the right to assign the same or any other guarantee of a type provided for and regulated by the juridical system.

(13) Prohibition against alienation or taking any other disposi-tive act as long as the total purchase price or the loan remains unpaid, without the written authorization of the seller or lender, as the case may be.

(14) The right of the buyer, in the event of accelerated payment, to obtain a reduction of the surcharge provided for in article 10.

7. The omission or incorrect statement of any of the provisions enumerated in paragraphs numbered (3) to (10) of the preceding article which are not imputable to the buyer will reduce the buyer's obligation to paying only the cash price, with the right to pay it in the agreed installments, exempt from all surcharges of any nature.

Omission of the other provisions of the preceding article, or an error in any of them, may result in the same reduction, as determined by the court, if the buyer shows he has been prejudiced.

8. If it has been so agreed, the buyer may rescind the contract within three days following the delivery of the goods, communicating the same to the seller by certified mail or by any other reliable means, provided that the buyer has not used the goods other than merely for examination or testing and that he return them within the same period of time to the place, and in the form and condi-
tion in which he received them, free of all costs to the seller.

9. In accordance with the provisions of article 2, the time sale of personal property regulated by this Law shall have legal validity only when the buyer makes the initial payment at the time the goods sold are delivered or otherwise made available.

If the seller delivers the goods without having simultaneously received the initial payment, he will lose the right to receive the initial payment, and the buyer's obligation shall be understood to be reduced to the remaining unpaid balance of the purchase price, with the buyer retaining the right to make payment thereof in the agreed installments.

10. The buyer may, on the due date of any of the installments, pay off the balance of the debt.

If bills of exchange or order instruments were accepted as the means of payment of the deferred part of the price, the costs that may be incurred in redeeming these from their holder shall be borne exclusively by the buyer.

In any case, the surcharges which were applied to the cash price, because of the deferment of payment, will be reduced in proportion to the amount of time by which the duration of the contract is shortened.

11. If the buyer defaults in the payment of two installments or the last installment, the seller, without prejudice to the provisions of article 13, can choose between the requirement of payment of all remaining installments or the cancellation of the contract.

When the seller elects to cancel the contract, the parties must return to one another the benefits realized. In all cases the seller shall have the right to deduct:

(1) Ten percent of the total of the installments paid, as compensation for the possession of the goods by the buyer.

(2) An amount equal to the initial payment, for the commercial depreciation of the goods.

If there is any deterioration in the goods the seller may require indemnification as provided by law.

If the total amount of the installments paid is not enough to reimburse the seller for the matters mentioned in this article, there remain available the appropriate legal actions for compensation.

The failure to pay two installments or to pay the final one shall give a third-party who financed the acquisition under the provisions of article 3 the right to require payment of the balance of the remaining installments, without prejudice to those rights he has as an assignee of the seller.
12. The buyer who fraudulently, to the detriment of the seller or a third-party who has financed the transaction, disposes of or damages the goods, will be punished under the provisions of the Penal Code for the crime of unlawful appropriation or damage, as the case may be, the matter to be carried forward only on the demand of the injured party.

13. Judges and courts can set new installments or alter those agreed upon, in exceptional circumstances and for just cause determined with discretion, such as family tragedies, unemployment, job injuries, lengthy illnesses, and other misfortunes.

In such cases the same court or tribunal shall determine the surcharge which, as a consequence of the new installments, must be added to the price.

14. Jurisdiction over disputes relative to contracts regulated by this Law shall lie with the courts and tribunals in the domicile of the buyer, with any agreement to the contrary being void.

15. Publicity relating to the price of items offered for sale in installments must set forth the cash price and the total time price, with the violation of this provision to be considered an act contrary to the practices regulated by the Statute of Publicity.

16. The loans to which this Law applies cannot exceed the amount of the deferred purchase price of the goods for whose acquisition they were made, and in no case may the loans cover the initial payment.

Loans which sellers or financing entities make to the buyer to cover all or part of the initial payment shall be void, with the sanctions contained in the third paragraph of article 20 being applicable to the responsible sellers or financiers.

17. Loan contracts governed by this Law should contain, when applicable, the provisions set forth in article 6, substituting for the concepts of retail price and time price those of the principal of the loan and of the total amount of the loan resulting from the repaid installments. The provisions of article 7 are also applicable.

18. Agreements, clauses and conditions in contracts covered by this Law, which are contrary to its precepts or seek to evade compliance, shall have no effect.

19. The creditor, in order to recover the amount due under the agreements inscribed in the Register referred to in article 23, shall enjoy the preference and priority established in article 1.922, no. 2, and article 1.926, no. 1 of the Civil Code.

In bankruptcy cases, the goods bought on time shall not be included in the estate of the bankrupt while the secured credit re-
mains unsatisfied, without prejudice to adding to the estate the surplus of the price obtained in the auction. In cases of suspension of payments, the creditor shall have the status of singularly privileged with the right of abstention, according to articles 15 and 22 of the Law of Suspension of Payments.

For the sale by notarial auction of the items bought on time, the creditor, through a notary qualified to act where the items may be found, shall demand payment from the debtor, stating the total amount claimed and the cause of the maturity of the obligation, making clear that if payment is not forthcoming the goods will be auctioned, without need of further notices or demands.

The debtor, within the next three days, must either pay or surrender the goods to the creditor or to the person designated in the notice of demand of payment.

When the debtor does not fulfill his obligation to surrender possession of the goods, the notary shall not continue further in the process, and the creditor may have recourse to any judicial proceeding, without prejudice to his taking any civil or criminal action to which he may have a right.

If the debtor does not pay, but surrenders possession of the goods, the notary shall dispose of the goods through the procedures provided in article 1.872 of the Civil Code.

20. The Government, taking into account the economic situation and previous reports of the National Economic Council and the Organization of Labor, shall define the goods that may be the object of contracts governed by this Law and shall determine the requisites for entry into the Registry, such as the maximum rates or amounts of surcharges in times sales, the amount of the initial payment, and the maximum time for payment of the deferred price.

In the same manner, the Government shall determine the conditions that must be met and the obligations that must be assumed by merchants and businesses that habitually, in the form of a principal or accessory, or any other manner, engage in the transactions governed by this Law.

The failure to fulfill such conditions or obligations and, in particular the breach of the provisions of the first paragraph of article 16, may be punished by a fine of up to 100,000 pesetas, temporary suspension of business in such transactions for up to a year, or a final termination of the right to engage therein.

21. The regulation of time sales and loans to which this Law applies shall be under the exclusive jurisdiction of the Ministry of Justice, with the authority to propose or dictate enabling rules.
22. Under the provisions of article 10 of the General Tax Law, contracts for the time sales of personal property and loans to which this Law applies, when they constitute acts in the ordinary course of business, as well as the guarantees that they provide for, shall be exempt from or, in the appropriate case, shall not be subject to the tax imposed on Patrimonial Transmissions and Documented Juridical Acts. They may also enjoy other fiscal benefits that the Treasury Department may determine on this matter.

23. Reservations of title or prohibitions against alienation contained in the contracts subject to this Law shall be effective against third-parties only if they are inscribed in the Registry referred to in the following paragraph.

The Registry for reservations of title and prohibitions against alienation shall be undertaken by the mercantile registers and shall be governed by rules established by the Ministry of Justice.

24. This Law shall take effect six months from the day following its publication in the Official State Bulletin.