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Secured Credit Devices in Latin America: A Comparison of Argentina, Brazil, and Mexico

John Gerber

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SECURED CREDIT DEVICES IN LATIN AMERICA:
A COMPARISON OF ARGENTINA, BRAZIL,
AND MEXICO

JOHN GERBER*

I. INTRODUCTION .......................................................... 679
A. Purpose and Scope ................................................ 679
B. Statutory Interpretation ............................................ 680

II. THE COMMON PLEDGE (Prenda, Penhor) .................... 680
A. Historical Antecedents ........................................... 680
B. Applicable Law ..................................................... 681
C. Characterization .................................................... 681
D. Objects Which May Serve As Security ...................... 682
E. Delivery of the Object .......................................... 684
F. Form of the Agreement .......................................... 684
G. Registration of the Agreement ................................ 684
H. Obligations of the Pledge Creditor .......................... 685
I. Obligations of the Pledge Debtor ............................. 685
J. Termination of the Pledge Agreement ....................... 686
K. Enforcement of Pledge Rights .................................. 686

III. THE MERCANTILE PLEDGE (Prenda Mercantil, Penhor Mercantil) ...................................................... 686
A. Characterization .................................................... 686
B. Applicable Law ..................................................... 687
C. Differentiation of the Mercantile Pledge ................. 687
D. Requirements of Form ............................................ 688
E. Rights and Obligations of the Parties ..................... 689

IV. PLEDGE WITHOUT DISPOSSESSION .................................. 690

V. ARGENTINA'S AGRARIAN PLEDGE .................................. 690
A. Antecedents and Applicable Legislation .................. 690
B. Characterization .................................................... 690
C. Objects Which May Serve As Security .................... 691
D. Registration Requirements ..................................... 691
E. Fixed and Floating Pledges ..................................... 692
F. The Principal Obligation ........................................ 692
G. Eligible Creditors ................................................ 692
H. Enforcement ....................................................... 693

VI. ARGENTINA'S WARRANT (Warrant) .......................... 693
A. Characterization and Operation .............................. 693
B. Objects Which May Serve As Security .................... 694
C. Registration ......................................................... 694
D. Enforcement ........................................................ 694

VII. BRAZIL'S RURAL PLEDGE (Penhor Rural) ................ 694

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VIII. BRAZIL'S AGRARIAN PLEDGE (Penhor Agricola) .................................................. 695
   A. Antecedents and Applicable Legislation .............................................. 695
   B. Characterization ............................................................................. 695
   C. Form of the Agreement and Its Registration ...................................... 695
   D. Objects Which May Serve As Security ................................................... 695
   E. Duration .......................................................................................... 696
   F. Who May Enter Into An Agrarian Pledge Agreement ............................... 696
   G. Duties and Obligations ...................................................................... 696
   IX. BRAZIL’S LIVESTOCK PLEDGE (Penhor Pecuario) ............................................. 696
   X. BRAZIL’S INDUSTRIAL PLEDGE (Penhor Industrial) ........................................ 697
      A. Characterization ............................................................................. 697
      B. Objects Which May Serve As Security ................................................... 697
      C. Rights and Obligations of the Parties ................................................ 698
      D. Variations of the Industrial Pledge ...................................................... 698
   XI. BRAZIL’S CONSTRUCTIVE PLEDGE (Penhor Legal) ............................................. 698
   XII. THE MEXICAN CHATTEL MORTGAGE (Hipoteca sobre Bienes Muebles) .......................... 699
      A. Antecedents and Applicable Legislation .............................................. 699
      B. Characterization ............................................................................. 699
      C. Objects Which May Serve As Security ................................................... 699
      D. Form of the Agreement .................................................................... 700
      E. Requirements of Form; Registration ..................................................... 700
      F. Enforcement ................................................................................... 700
   XIII. MEXICO’S CREDITO DE HABILITACION O AVIO AND CREDITO REPACCIONARIO ............... 701
      A. Antecedents and Applicable Legislation .............................................. 701
      B. Modern Distinctions ...................................................................... 701
      C. Who May Utilize These Devices ......................................................... 701
      D. Form of the Agreement .................................................................... 702
      E. Property Which May Serve as Security .................................................. 702
      F. Obligations of the Debtor ................................................................. 702
      G. Enforcement of Rights .................................................................. 703
   XIV. CONDITIONAL SALE (Venta con Reserva de Dominio, Venda com Reserva de Dominio) ............ 704
      A. Terminology .................................................................................... 704
      B. Antecedents ................................................................................... 704
      C. Characterization ............................................................................ 704
   XV. CONDITIONAL SALES IN BRAZIL ........................................................................ 705
      A. Brazilian Antecedents ................................................................... 705
      B. Property Which May Be Subject to Conditional Sale ............................. 705
      C. Rights and Obligations of the Parties ................................................ 706
      D. Registration Requirements ............................................................... 706
   XVI. CONDITIONAL SALES IN MEXICO (Venta con Reserva de Dominio) .................................. 707
      A. Applicable Law ............................................................................... 707
      B. Creation of the Conditional Sale ......................................................... 707
      C. Property Susceptible of Conditional Sale ............................................. 707
      D. Registration ................................................................................... 707
   XVII. CONDITIONAL SALES IN ARGENTINA ................................................................ 708
      A. Prohibition of the Pacto Comisorio ..................................................... 708
      B. Criticism of the Prohibition ............................................................... 708
      C. Future Prospects for the Conditional Sale ............................................ 708
   XVIII. THE TRUST RECEIPT IN MEXICO .................................................................. 708
   XIX. THE TRUST RECEIPT IN ARGENTINA ................................................................ 710
      A. Antecedents ................................................................................... 710
      B. The Argentine Variation of the Trust Receipt ......................................... 710
      C. Operation ........................................................................................ 711
      D. Enforcement ................................................................................... 711
      E. Criticism ........................................................................................ 711
      F. Doubtful Validity of the Present Practice ............................................ 711
   XX. THE DUPLOCATA OF BRAZIL ....................................................................... 711
      A. Introduction .................................................................................... 711
      B. Characteristics ............................................................................... 712
The immediate target of the present study, as the title suggests, is to survey credit devices secured by personalty in the legal systems of Latin America's three largest countries. This exposition should be of value to lawyers and businessmen wishing to learn of financing techniques and creditor rights and obligations within the focal countries. A second and broader purpose, however, is to lay a foundation from which useful comparisons and conclusions may be drawn with respect to the growth and direction of the credit structure in these developing nations.

Although the three countries selected may be said to represent most Latin American approaches to our subject, all who have had experience with the laws of the various systems realize the dangers which inhere in transnational generalization. The basic fabric of civil law principles throughout Central and South America is frequently rent by totally distinct treatments of specific legal problems—especially with respect to legal institutions which were developed after independence from Spanish colonial rule.

Inconsistencies are compounded where federal systems permit their constituent entities to legislate on the areas in focus. While the commercial codes of Argentina, Brazil and Mexico are national in application, they may be supplemented by local legislation. The civil codes and their procedural counterparts in Mexico are left entirely to the responsibility of constituent entities.

The following analysis will not attempt to explore the occasional variations or nuances of provincial law. Where local law is the primary source, however, the legislation of the federal district shall be studied since it is often wholly adopted in sister jurisdictions or provides the pattern from which their enactments are cut.

1. Secured credit devices over real property will not be dealt with here.
2. Const., art. LXVIII, para. 11 (Argen., 1853); Const., art. 41, 73, frac. X (Mex., 1917).
3. Const., art. 41 (Mex., 1917), allows states to legislate in any matter affecting them so long as it does not clash with Constitutional provisions. The Constitution authorizes the federal government to promulgate a commercial code but fails to authorize a federal code in civil matters.
B. Statutory Interpretation

Throughout the following analysis, one should remember that in keeping with general civil law doctrine, secured credit rights are exceptions to the rules of ordinary credit which give all creditors equal and general rights to satisfaction out of the debtor's assets. And, since they are exceptions, legislative provisions defining and regulating security devices are given strict interpretations.\(^4\)

II. THE COMMON PLEDGE (Prenda, Penhor)

A. Historical Antecedents

The oldest of the secured credit devices, and the most uniform throughout the systems of Latin America, is the common or traditional pledge. It derives from the early Roman "fiducia," a highly formalized device which later became the "pignus."\(^5\)

In pre-Justinian Rome the pledge (pignus) and the mortgage (hipoteca) were essentially the same device.\(^6\) Either could be contracted over movable or immovable property, and either could provide that the creditor take possession of the security object (pignus contractum) or that the debtor retain possession (pignus conventum).\(^7\) Gradual developments beginning during the Byzantine period differentiated the terms, leaving the pledge confined solely to movable property and the mortgage to immovable property.\(^8\)

Failure of the debtor to perform in accordance with the contract could at times produce a windfall for the creditor since the lex commissoria allowed arrangements whereby the pledge or mortgage creditor became owner of the property securing the obligation.\(^9\) The Emperor Constantine later prohibited such clauses because they were profoundly prejudicial to the debtor's interests.\(^10\) Thereafter, in the event of default, the creditor was obliged to sell the property held in security, paying himself out of the proceeds and returning the excess to the debtor.\(^11\)

Early Spanish law, like its Roman antecedents, subsumed both the pledge and the mortgage, as we now know them, within a single, vague device called the peño.\(^12\) Without some system of notification of third

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\(^5\) L. Leon Arqueles, Del Contrato de Prenda en Materia Mercantil (1947).
\(^6\) "inter pignus et hypoteca tantum nominis sonus differt," D. 20.1. 11.2.
\(^7\) G. Margadant, El Derecho Privado Romano 225 (1960).
\(^8\) Id.
\(^9\) R. Fernandez, Tratado de la Hipoteca, La Prenda 4 Demas Privilegios 49 (1941).
\(^10\) Code 8.35.3. See Digest 18.3.
\(^12\) Las Siets Partidas, Law I, Title XIII, Part 5, (Spain, © 1200)

Peño es propiamente aquella cosa que un home empeña a otro, apoderándole della en mayormente cuando es mueble. Mas segund el large entendimiento de la ley, toda cosa, quier sea mueble, o raíz, que sea empeñada a otro, puede ser dicho peño; mauger non fuese entregado della, aquel a quien la empeñassen.
people, however, a creditor would presumably have been reluctant to leave a movable security object in the hands of the debtor since there would be no adequate protection against a bona fide purchaser. It is also unlikely that a debtor would often wish to relinquish possession of his real estate to the creditor to be held as security. Thus, the eventual distinction of the pledge from the mortgage was a natural—albeit overdue—development.

Throughout Latin America's period of colonial rule, and during the early years of independence, the legal institution of the pledge remained essentially unchanged. Indeed, it was not until the latter half of the nineteenth century that positive legislative steps were taken to clarify and regulate pledges.

B. Applicable Law

The outlines of the common pledge in Argentina, Brazil, and Mexico are found in their respective civil codes. The Argentine Civil Code deals with the pledge (prenda) in Title XV of the Third Book. Brazil defines and regulates its penhor by Civil Code articles 768 through 775. The basic Mexican provisions are contained in articles 2.856 through 2.892 of the Civil Code for the Federal District and Territories. The dispositions of the civil codes also apply generally to commercial and hybrid pledge devices, except where they conflict with the provisions of other codes or later legislation.

C. Characterization

Some years ago Dr. Rogina Villegas of Mexico proffered a definition of the traditional pledge which has since gained wide acceptance by foreign as well as local jurists. He concludes that the pledge is "an accessory contract by virtue of which the debtor or a third person delivers to the creditor a specific and alienable thing to guarantee the performance of a separate and principal obligation, giving the creditor a contingent right of sale and priority of payment in the event of breach of the principal obligation by the debtor. If the principal obligation is performed, the creditor must return the object to the guarantor."

Of the three survey jurisdictions, the only formal attempt at definition is found in the Mexican Civil Code for the Federal District and Territories. The Code states that the pledge is a "...property right [thus, enforceable vis-à-vis the world] over movable, alienable goods for the

13. FERNANDEZ, supra note 9, at 49.
15. CODIGO CIVIL (1869) (Argen.) as revised by Law of Sept. 9, 1882, Ley 1196 (Argen.).
16. CODIGO CIVIL Lei 3.071 (1916) (Braz.), as amended CODIGO CIVIL Lei 3.725 (1919) (Braz.).
17. 2 R. VILLEGAS, CONTRATOS 116 (1945).
purpose of guaranteeing the performance of an obligation and its priorities in payment."\textsuperscript{18}

Each of the civil codes requires the presence of three elements in order to constitute a contract of pledge:

1. \textit{The existence of a prior obligation}. This element is presupposed by each code rather than spelled out as an element, since the accessory nature of the pledge obviously precludes its existence independent from a principal obligation.\textsuperscript{19}

2. \textit{Delivery of a movable, alienable object to the creditor}.\textsuperscript{20}

3. \textit{Intent that the object shall serve as security against the debtor's performance of the principal obligation}. This element is simply the \textit{causa} or positive mental state essential to the existence of any agreement.\textsuperscript{21} Such intent, however, is usually presumed until the fact of mistake or absence of intent is established.\textsuperscript{22}

When all three elements are present and free of blemishes, such as unlawful purpose, lack of legal capacity, or improper form, the agreement is binding upon the parties. In Brazil, however, to be valid and enforceable against third persons, all traditional pledges must also be recorded in the appropriate public register.\textsuperscript{23}$

D. Objects Which May Serve As Security

The civil codes of Argentina, Brazil, and Mexico merely require that the pledge object be a "movable" and susceptible to alienation.\textsuperscript{24} Thus, under the permissive words of the statutes, nearly any kind of movable, alienable property may constitute the pledge res, including intangible property\textsuperscript{25} and obligations to give something or to perform certain acts.\textsuperscript{26} Clearly, it was not the aim of the respective legislatures to restrict the range of pledgable objects short of those limits where other devices—especially the mortgage—adequately assumed the credit function and provided for effective notification of third persons.

In early Latin American pledge legislation, the classic Roman criterion of physical mobility presented a natural limitation since only

\textsuperscript{18} N.C. Crv. Dist. y Terr. Fed. art. 2856 (1932) (Mex.).

\textsuperscript{19} Argentina: \textit{Código Civil} art. 3204 (1869, rev. 1882); Brazil: \textit{Código Civil} art. 768 (1916, rev. 1919); Mexico: \textit{C. Civ. Dist. y Terr. Fed.} art. 2856 (1932).

\textsuperscript{20} Argentina: \textit{Código Civil} arts. 1141, 1142, 3204, 3205, 3207 (1869, rev. 1882); Brazil: \textit{Código Civil} art. 768 (1916, rev. 1919); Mexico: \textit{C. Civ. Dist. y Terr. Fed.} art. 2858 (1932) (Mex.).

\textsuperscript{21} Argentina: \textit{Código Civil} art. 499 (1869, rev. 1882); Brazil: \textit{Código Civil} art. 768 (1916, rev. 1919); Mexico: \textit{C. Civ. Dist. y Terr. Fed.} art. 1794, 1813 (1932).

\textsuperscript{22} See e.g., \textit{Código Civil} art. 500 (1869, rev. 1882) (Argen.).

\textsuperscript{23} Argentina: \textit{Código Civil} art. 3217 (1869, rev. 1882); Brazil: \textit{Código Civil} decreto 4857 (1939); Mexico: \textit{C. Civ. Dist. y Terr. Fed.} art. 2857 (1932).

\textsuperscript{24} Argentina: \textit{Código Civil} art. 3204 (1869, rev. 1882); Brazil: \textit{Código Civil} arts. 768, 769 (1916, rev. 1919); Mexico: \textit{C. Civ. Dist. y Terr. Fed.} art. 2856 (1932).

\textsuperscript{25} 2 O. Gómez, \textit{Direitos Reais} 620 (1962).

\textsuperscript{26} 2 C. Goncalves, \textit{Tratado de Direito Civil} 223 (1944).
movable objects could be readily delivered into the hands of the creditor, a requirement under most civil and commercial codes. The rapid development of commercial needs and practices, however, has left the old criterion tattered and torn. Argentina and Brazil have clung to the traditional definition of "movables" as things which may be transported from one place to another under their own power or by exterior force, but new interpretations as well as special exceptions have broadened the range of possible pledge objects.

With regard to rights, claims, or other intangibles, the movable nature is determined by looking to the underlying subject matter. If, for example, the intangible right or claim is over movable property, it will also be treated in law as movable. Such property is sometimes called "movable by representation."

Other code provisions and special legislation often expressly set forth specific items which are to be considered movable, e.g., securities, evidences of indebtedness, copyrights, and electric power.

On the other hand, some property which is physically transportable may nevertheless be deemed immovable by accession and therefore improper as objects of the traditional pledge. Under Argentine law such property includes those things whose existence and nature are determined by another thing, on which it depends or to which it is attached.

Mexico arrives at a similar result by defining movable properties as those which are not considered by law to be immovable, and then provides an enumeration of immovables, including those machines, equipment, instruments, etc., used in the exploitation of some enterprise. Thus, for example, restaurant furniture or the rolling stock of a railroad would be considered immovables by law notwithstanding their physical mobility.

The requirement of the codes that the pledge res be alienable usually excludes such movables as professional licenses, support rights, and certain pensions which are highly personal in nature and non-transferrable as a matter of public policy.

29. 2 O. Gomes, Direitos Reais 526 (1962).
30. Argentina: CODIGO CIVIL art. 2317 (1869, rev. 1882); Brazil: CODIGO CIVIL art. 48 (1916, rev. 1919); Mexico: C. CIV. DIST. Y TERR. FED. art. 754 (1932).
31. CODIGO CIVIL art. 2313 (1869, rev. 1882) (Argen.).
32. Decree-Law of July 14, 1934, Decreto-Lei 24.778, art. 1 (Braz.).
33. CODIGO CIVIL art. 48 (1916, rev. 1919) (Braz.).
34. CODIGO PENAL art. 155 (1942) (Braz.).
35. CODIGO CIVIL art. 2328 (1869, rev. 1882) (Argen.).
36. C. CIV. DIST. Y TERR. FED. art. 759 (1932) (Mex.).
37. See A. Carvajal, Segundo Curso de Derecho Civil 76 (1960).
E. Delivery of the Object

All of the codes require delivery of the traditional pledge res, but if the parties agree, such delivery may be effected by turning the object over to a third party for care and protection.

F. Form of the Agreement

As has been noted, the mere delivery of a proper object with the proper intent is sufficient to create a binding agreement between the contracting parties. In order for it to be valid against the subsequent claims of third persons, however, the agreement must be in the form of a written instrument—public or private—stating the names of the parties, the date of execution, the amount of the credit, and a detailed description of the pledge res.

G. Registration of the Agreement

One of the great problems retarding the development of credit devices secured by movables has been the need for an adequate system of notifying third persons of the credit arrangement. In order to satisfy that need, a vast and often complicated system of registration has been established in each Latin American system.

Although the need for registration is more apparent in credit forms which allow the security res to remain in the hands of the debtor, the registration of the traditional pledge offers additional notification to subsequent general and preferred creditors of the pledgor as well as persons to whom the creditor might unlawfully transfer the res.

Under Brazil's present system of registration, if the pledge agreement is not registered, the pledgee is essentially no more than a general creditor, since the pledge agreement is no defense against the claims of bona fide third persons. In Argentina and Mexico, however, the traditional pledge agreement ordinarily need not be registered to be effective against third persons provided the creditor takes actual possession of the pledge res and the agreement has been executed by a public writing in order to authenticate the date of effectiveness. A notable Mexican exception occurs when the pledge object consists of future rents or produce (e.g., crops), in

43. See discussion, page 705, infra.
44. Law of August 30, 1937, Lei 492, art. 10, (Braz.), Decree of November 9, 1939, Decreto 4.857 (Braz.).
which case the traditional pledge must be registered in order to achieve validity beyond the contracting parties.46

H. Obligations of the Pledge Creditor

The pledge creditor is generally treated, under the law, as custodian of the res with the responsibilities of a bailee (depositario).47 Neither the Argentine nor Mexican Codes, however, uses the term bailee (depositario) and thus juridical treatment is not strictly limited by that concept. Many commentators have maintained that, in fact, the responsibilities of the creditor are broader than a bailee or depository, since the bailee performs a service only for another while the pledge creditor must serve himself as well.

The pledge creditor is liable for damages resulting from his failure to protect the object or to render such protection and care as the nature of the res requires.48 (Expenses incurred in protecting and caring for the res are reimbursible.)49 The pledge creditor must deliver the res back to the pledgor along with its respective fruits and accessions upon the satisfaction of the principal obligation.50 In the event of the debtor’s non-performance and subsequent judicial sale, the creditor must turn over to the pledgor all proceeds in excess of the principal obligation, interest, and conservation expenses.51

Under Mexican law, if the creditor is disturbed in his possession of the pledge, he must advise the pledgor so that he may defend; otherwise, the creditor is liable for the ensuing damages.52

I. Obligations of the Pledge Debtor

The pledge debtor must, of course, respect the right of the creditor to possession of the res and to satisfaction of its value in event of default. He must also reimburse the pledgee for expenses incurred in the protection, conservation, or defense of the res except where the pledgee has incurred them negligently or unreasonably.53 The pledgor must also in-
demnify the creditor for any damages proximately caused by a flaw or imperfection in the pledge res.\(^\text{54}\)

**J. Termination of the Pledge Agreement**

The pledge agreement is automatically terminated when the principal obligation is satisfied or forgiven.\(^\text{55}\) Fortuitous loss or destruction of the pledge object may terminate the pledge agreement in Brazil,\(^\text{56}\) but in Argentina the pledgee is treated as if he continued to possess the res until the time for accounting.\(^\text{57}\) In Mexico the creditor may ask the debtor for a substitute pledge object or simply rescind the obligation.\(^\text{58}\)

**K. Enforcement of Pledge Rights**

If upon maturity of the principal obligation the debtor fails to perform, the creditor may then apply to the court for judicial sale of the pledge res and satisfaction of the principal debt out of the proceeds.\(^\text{59}\)

A summary executory proceeding (*juicio ejecutivo*) is available to obtain judicial recognition of the credit right, its enforceability, and its compulsory satisfaction.\(^\text{60}\) An ordinary proceeding must be pursued, however, when there are issues involving the manner in which the contract was entered into or the absence of certain formalities in the agreement itself.\(^\text{61}\)

Once the judgment has been obtained, the res may be sold at public auction. The creditor may bid in the auction on the same basis as the public.\(^\text{62}\) Public auction is usually avoided, however, by the express consent of the debtor,\(^\text{63}\) provided that such arrangements are not injurious to general creditors.\(^\text{64}\)

**III. The Mercantile Pledge (Prenda Mercantil, Penhor Mercantil)**

**A. Characterization**

The mercantile pledge is similar to the traditional pledge in most respects except that it is tailored to serve the legal and practical needs

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\(^{54}\) CÓDIGO CIVIL art. 773 (1916, rev. 1919) (Braz.). The same result follows in Argentina and Mexico although it is not legislatively stated outside of the general law of responsibility.

\(^{55}\) CÓDIGO CIVIL art. 3236 (1869, rev. 1882) (Argen.). CÓDIGO CIVIL art. 802, frac. I (1916, rev. 1919) (Braz.).

\(^{56}\) See O. Gomes, DIREITOS REAIS 537 (1962).

\(^{57}\) CÓDIGO CIVIL art. 3208 (1869, rev. 1882) (Argen.).

\(^{58}\) C. Civ. Dist. y Terr. Fed. art. 2875 (1932) (Mex.).

\(^{59}\) CÓDIGO CIVIL art. 3224 (1869, rev. 1882) (Argen.).


\(^{62}\) 1 R. FERNANDEZ, DE LA HIPOTECA, LA PRENDA Y DEMÁS PRIVILEGIOS 171 (1941).


\(^{64}\) E.g., C. Civ. Dist. y Terr. Fed. art. 2883 (1932) (Mex.).
SECURED CREDIT DEVICES

of the commercial sector. Thus some special rules have been adopted in order to facilitate smoother credit operations, while other provisions applicable to traditional pledges, such as requirements of form in many cases, have been dropped. The credit preference which obtains by virtue of the mercantile pledge is identical to the preference of the civil pledge.

B. Applicable Law

In Argentina and Brazil mercantile pledges are regulated primarily by their respective commercial codes. Mexico's source of regulation may be found in the Law of Titles and Credit Operations (1932) (*Ley de Títulos y Operaciones de Crédito*). Industrial pledges and other hybrid devices, while commercial in nature, are usually regulated by special legislation and will be discussed separately.

It is important to note that in each of the countries under discussion, the civil code continues to apply to mercantile pledges where its provisions have not been restricted or modified by the commercial code or, in the case of Mexico, the Law of Titles and Credit Operations (1932). This priority of laws is in keeping with the recognized civilian principle (and indeed our own) that a general law must yield to a later or more specific one where there is any conflict between them.

C. Differentiation of the Mercantile Pledge

The relaxation of form and enforcement provisions for mercantile pledges points up the necessity of distinguishing them from pledges of a traditional or civil character. Both the Argentine and Brazilian commercial codes provide that a pledge is to be considered commercial when it serves as "security and guaranty of a commercial obligation." Mexico presents a special case. The General Law of Titles and Credit Operations (1932) derogates, *inter alia*, Title Eleven of the Commercial Code (1889), which declared that a pledge is a mercantile act when it is guaranteeing an act of commerce. The new law, however, does not specify when a pledge is considered to be commercial, so it must be assumed that the old provision still applies. Therefore, as in Argentina and Brazil, in order to come under commercial regulation, the pledge must

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66. 2 O. Gomes, Direitos Reais 533 (1962); Código de Comercio art. 581 (1869, rev. 1882) (Argen.).
67. 1 R. Fernandez, De la Hipoteca, La Prensa y Demás Privilegios 175 (1941).
68. Ley General de Títulos y Operaciones de Crédito (General Law of Titles and Credit Operations) art. 334, et. seq. (1932) (Mex.).
71. Código de Comercio art. 580 (1869, rev. 1882) (Argen.). Código Comercial art. 271 (1850, rev. 1899) (Braz.).
72. Código de Comercio art. 605 (1869, rev. 1882) (Argen.).
be shown to be accessory to a principal obligation which may be sub-
sumed within the commercial category.\textsuperscript{73}

The burden of establishing the commercial nature of the principal
obligation falls upon the party wishing to invoke the commercial law.

D. Requirements of Form

The requirements of form vary substantially from country to
country. The Commercial Code of Argentina sets forth the general rule
that the lack of a written instrument is not a defense for the debtor if he
has delivered the res to the creditor. On the other hand, the lack of a
written instrument is a valid defense for the creditor against the claims of
the debtor.\textsuperscript{74}

The Mexican General Law of Titles and Credit Operations sets forth
no such general rule, but enumerates the various ways in which a mercan-
tile pledge may be constituted:\textsuperscript{75}

1. By delivery to the creditor of the goods or bearer instru-
ments;

2. By the indorsement of the negotiable instruments in favor
of the creditor, if such instruments are in the name of the
holder-debtor and by indorsement plus the corresponding
annotation in the records of the issuer of the instrument in
those cases where stipulated in the instrument itself, or the
law requires the issuer to keep such records.

3. By delivery to the creditor of the instrument or the document
on which the credit is constituted, if the object of the pledge
is not negotiable, with inscription of the encumbrance in
the issuer's records or with notification of the debtor,
whether or not such records are required.

4. By deposit of the goods or bearer instruments with a third
party designated by the parties and to the availment of the
creditor.

5. By deposit of the goods in any place where the creditor
may have direct access to them. The place may even be in
the debtor's establishment, so long as the keys are delivered
into the possession of the creditor.

6. By delivery or indorsement of representative title of the
goods, or issuance or indorsement of a bond.

Unlike Argentina and Mexico, Brazil requires all mercantile pledge
agreements to be in writing.\textsuperscript{76}

All three legal systems permit symbolic (constructive) delivery or

\textsuperscript{73} M. MAntilla, Derecho Mercantil 72 (1964).
\textsuperscript{74} Código Civil art. 581 (1869, rev. 1882) (ArGen.).
\textsuperscript{75} Ley de Títulos y Operaciones de Credito (Law of Titles and Credit Operations)
art. 334 (1932) (Mex.).
\textsuperscript{76} Código Comercial art. 273 (1850, rev. 1899) (Braz.).
special stipulations that the pledge res remain in the hands of the debtor or a third party, provided that the agreement is registered to that effect.77

E. Rights and Obligations of the Parties

Like the traditional pledge, the holder of the mercantile pledge is treated as a bailee and must perform those acts necessary to conserve the effectiveness of the credit and the rights of the debtor, to whom he is liable for negligence.78

Under Mexican law, if the object is lost or has deteriorated prior to maturity of the principal debt without fault of the creditor, he may demand another pledge or security. If additional security is not supplied and the value of the original pledge object depreciates to less than the amount of the debt plus 20%, the creditor may apply to the court for permission to sell it. The debtor, however, has the power to suspend the sale by paying the debt within twenty-four hours subsequent to the court order.79

Where the pledge res consists of debt securities, the pledgee stands in the shoes of the pledgor with regard to their administration, charging of interest, and principal amounts.80

There is a conflict of opinion in Mexico regarding who enjoys the shareholder's rights of corporate shares held in pledge. Oscar Vasquez de Mercado maintains that the creditor assumes those rights by virtue of Article 338 of the Ley de Títulos y Operaciones de Crédito, which allows full property rights to the creditor over the thing pledged.81 On the other hand, Luis Manuel Rojas, Jr. argues that shareholder rights are of a personal nature and thus are not transferred to the pledge creditor when he takes physical possession of the shares.82

It should be noted that Mexican legislative proposals of 1947, 1952 and 1960, provided that in the cases of pledge, embargo, etc., shareholders' rights should remain with the owner (pledgor) of the shares and not pass to the creditor. Practically speaking, however, if the stocks are negotiable and in possession of the creditor, he can in fact attend shareholders' meetings and exercise shareholder rights. Also, there is no

79. Ley de Títulos y Operaciones de Credito (Law of Titles and Credit Operations) art. 335 (1932) (Mex.).
80. E.g., Código Comercial art. 277 (1850, rev. 1899) (Braz.).
81. V. del Mercado, Asamblea de Sociedades Anónimas 114 (1955).
82. L. Rojas, Jr., El Derecho de Voto en las Sociedades Anónimas 111 (1943). Rojas supports his argument by analogy with Ley de Títulos y Operaciones de Credito (Law of Titles and Credit Operations) arts. 261-63 (1932) (Mex.).
reason why the parties could not stipulate a solution to this legal problem.83

IV. PLEDGE WITHOUT DISPOSSESSION

The increasing growth of commerce and industry throughout the nineteenth century along with the desire to stimulate certain economic sectors—especially agriculture—prompted recognition of the need for new credit devices whereby goods serving as security might be retained and utilized by the pledgor during the period of indebtedness. The principal problem was to find an adequate system of protection both for creditors and bona fide purchasers in the event of the debtor’s wrongful alienation of the security.

Thus, with the development of more sophisticated institutions providing for notification through registration, legislatures enacted new forms of pledge which did not require delivery of the security object to the creditor.

Because these devices were created independently by the various nations of Latin America, each bears unique markings. It will be necessary, therefore, to study those of our survey countries on an individual basis.

V. ARGENTINA’S AGRARIAN PLEDGE (Prenda Agraria)

A. Antecedents and Applicable Legislation

The agrarian pledge was first instituted in Argentina in 1914.84 Substantial revisions, however, were instituted in 1947 in order to modernize the device.85 Over the past two decades it has remained basically unchanged.

B. Characterization

Like ordinary pledges, the agrarian pledge is a secured credit device whereby the debtor confers upon his creditor the privilege of recovering the amount of a principal obligation from the proceeds of the sale of certain movable goods. The debtor, however, is not deprived of the property as he would be in the case of the traditional pledge. In effect then, this device operates like the American chattel mortgage since the res does not pass into the power of the creditor. Delivery is instead substituted by an inscription of guaranty in a special register maintained by the state for that purpose. Thus, the debtor is not deprived of the use of machines, tools or materials necessary for the accomplishment of his economic activities.

83. See M. MANZILL, DERECHO MERCANTIL 379 (1964).
84. Law of September 30, 1914, Ley 9644 (Argen.).
C. Objects Which May Serve As Security

The Argentine device, unlike the general chattel mortgage of the Anglo-American system, is limited to certain types of chattels. The legislation in force provides that an “agrarian pledge” may have as its object “machines in general, farm equipment and tools, animals of any kind and their products, movable things necessary for agricultural exploitation; crops of any kind corresponding to the agricultural year in which the contract is entered into, whether pending or already harvested, as well as timber, mining products, and those of the national industry.”

The denomination “machines in general,” however, has led many courts to uphold the validity of contracts of agrarian pledge where the object serving as security was not in any way related to agriculture. Other courts have upheld validity with regard to machines not related to agricultural exploitation, but only when such property was for commercial or industrial exploitation. Still other decisions, such as the National Supreme Court decision which declared that the machinery of a dentist could not be considered a proper object of an agrarian pledge, have restricted the interpretation even more. Thus, although judicial interpretation has been generally liberal, it is sometimes difficult to predict whether a given object is a permissible object of the agrarian pledge. (The doctrine of stare decisis is not formally recognized in the Argentine system, although prior decisions are usually said to wield considerable weight in the interest of institutional stability.)

D. Registration Requirements

Although the pledge without dispossession was originally instituted to aid the agrarian sector of the economy, there appeared to be no dogmatic reason for such restriction. One difficulty, however, was organizing an efficient system of publicity which would readily permit third parties to learn of the encumbrance on the chattels.

In order for the pledge to be effective against third parties, it must be registered with the Registry of Pledge Credits, which operates as a department of the Ministry of Commerce. (Additional registration requirements are necessary for pledges of motor vehicles.) If registered within 24 hours of the making of the agreement, effectiveness will run from the moment of agreement; otherwise, effectiveness obtains from the
time of registration. Thus, in 1947, the agrarian pledge became available to commerce and industry with the benefit of these improved registration procedures.

E. Fixed and Floating Pledges

The 1947 law divided the registered pledges into two types: fixed and floating pledges. Fixed pledges are those which have as their object "movable or semi-movable goods and their fruits and/or products." The floating pledge consists of "merchandise and raw materials in general, belonging to a commercial or industrial establishment."

F. The Principal Obligation

The pledge without dispossession may be used to insure any type of principal obligation. One limitation, however, is that a floating pledge may not secure an obligation which does not mature within 180 days. The reason for the limitation is that the floating pledge is designed to help merchants and manufacturers in obtaining short-term credit, and not to create a substitute for long-term commercial credit devices. As a result of the limitation, the Supreme Court of Argentina has held invalid a floating pledge in security for obligations which were matured at the time that the pledge contract was entered into.

G. Eligible Creditors

Only certain types of creditors may enter into a contract of pledge without dispossession. Argentine Law enumerates eligible creditors as follows:

a. The State, its political subdivisions, and duly authorized public, private, or mixed banks.

b. Cooperative companies and companies of farmers, raisers of livestock, or manufacturers.

c. Buyers of agrarian crops or products [where the purpose of the pledge is] to secure money credits to be used for agricultural exploitation.

d. Merchants and manufacturers inscribed in the Public Register of Commerce, when the purpose is to secure total or partial payment of the price of merchandise sold by them, [and] over which the pledge attaches.

94. Id. at arts 4, 19.
95. Law of March 26, 1947, Ley 12.962 (Argen.).
96. Id. at art. 10.
97. Id. at art. 14.
100. 2 C. MALAGARRIGA, DERECHO COMERCIAL 372 (1963).
The practical reason for the limitation of the pledge without dispossession to certain creditors appears to be to avoid usury and simulated or sham pledges.

H. Enforcement

As in other forms of pledges, if the debtor fails to perform the principal obligation the creditor may repossess the chattel and claim the amount due out of the proceeds of sale.

Good faith alleged by the third party purchaser of a pledged object is not sufficient to oppose execution by the pledgee where the pledge has been duly registered. Thus, the creditor of an automobile dealer prevailed against a good faith purchaser of one of the pledged automobiles. To hold otherwise would be to destroy the effectiveness of the pledge without dispossession as a security device. Consequently, this exception to the defense of good faith acquisition has been established.

VI. ARGENTINA'S WARRANT (Warrant)

A. Characterization and Operation

The warrant has been distinguished from civil and commercial pledges in order to permit a more flexible type of pledge over certain properties of commerce and industry. The system of warrants permits manufacturers and merchants to obtain credit on their products in a rapid and effective manner through the use of the certificate of deposit, an instrument which is freely negotiable.

When the goods are deposited in the warehouse the depositor receives a certificate of deposit, made and registered in his name, which accredits his property rights over those goods but without prejudice to the rights of subsequent pledge (warrant) creditors. By endorsement of this deposit certificate, the depositor may transfer his rights over the property subject to any encumbrances (i.e., warrant obligations) he has previously negotiated.

In addition to the certificate of deposit, the depositor receives a warrant which certifies credit (pledge) rights over the deposited prop-

104. The defense of good faith acquisition is derived from CODIGO CIVIL art. 2767 (1869, rev. 1882) (Argen.).
105. Law of September 5, 1878, Ley 928, art. 2 (Argen.).
If the depositor-owner of the goods chooses, he may, by endorsement, transfer these preferred credit rights to a third party, thus creating the warrant obligation.  

B. Objects Which May Serve as Security

There have been two major laws in Argentina on warrants. The Law of 1878, in its first four chapters, provides for warrant on merchandise deposited with the customs authorities and on excess production or crops deposited in government warehouses. The Law of 1914, modifying the prior law, provides for warrants on agricultural production, livestock, timber, mineral resources, or goods manufactured in Argentina and deposited in public or private general warehouses.

C. Registration

The first transfer of the warrant must be registered on the books of the warehouse. Subsequent transfers, however, need not be registered, allowing the warrant to be freely transferred by simple delivery.

D. Enforcement

If the debtor-depositor fails to satisfy the principal obligation, the creditor must, within 10 days, present the warrant to the administrator of the warehouse where the goods are stored. The goods must then be sold at public auction with prior notification to the debtor. In the event that the proceeds from the sale are insufficient to satisfy the entire debt, the creditor retains the right to the unsatisfied portion as a general creditor against the depositor and subsequent title holders. Jurisdiction over claims arising out of the execution of warrant obligations resides in the civil courts of the domicile of the debtor and the place of the deposit, at the election of the creditor.

VII. BRAZIL'S RURAL PLEDGE (Penhor Rural)

The term "rural pledge" is used by many of Brazil's commentators to include both the agrarian pledge and the livestock pledge. The Brazilian Civil Code does not employ the words "rural pledge", but instead places...
the provisions applicable to both sub-forms under the section heading "agrarian pledge."

For purposes of our investigation, we will avoid the composite terms and take up each of the components, since their distinction is manifest in the substantive legislative treatment.

VIII. Brazil's Agrarian Pledge (Penhor Agricola)

A. Antecedents and Applicable Legislation

The agrarian pledge was first instituted in Brazil in 1885 to serve the credit needs of the agricultural industry and thus stimulate its development. The device has since been readapted and regulated several times, resulting in a broadening of its scope and improvement of its operation while preserving the basic institution.

B. Characterization

The agrarian pledge, like its Argentine counterpart, is really a specialized type of chattel mortgage. The res itself remains in the hands of the debtor, who is treated as bailee of the property.

C. Form of the Agreement and Its Registration

The agrarian pledge agreement need not be entered into with the formalities of a public contract, but its existence must be recorded in the appropriate public registry in order to be effective against third persons.

With respect to bank loans in the agrarian sector, the Law of 1957 created the rural credit certificate (cédula de crédito rural) to cover both agrarian and livestock pledges. This certificate is really a standardized kind of secured note which is issued by the borrower in favor of the financial institution.

D. Objects Which May Serve as Security

Generally, the res of the agrarian pledge may consist of machines, equipment, timber, pending crops, and produce which is already harvested or processed for market. Many of these objects, while physically movable, may be deemed by law to be immovables by accession, i.e., considered to be a part of the real property to which their function or existence is related. The Civil Code, therefore, provides that if the real estate is encumbered by a prior mortgage (which will ordinarily include immovables by accession), then a subsequent agrarian pledge over those same objects

116. Decree of Oct. 5, 1885, Decreto 3272 (Braz.).
117. Regulation of 1886, No. 9594 (Braz.); Regulation of 1890, No. 370 (Braz.); Decree of 1911, Decreto 2415 (Braz.); Códico Civil arts. 781-88 (Braz.); Law of 1937, Lei 492 (Braz.); Law of 1938, Lei 1.0003 (Braz.); Law of 1957, Lei 3.253 (Braz.).
118. Law of August 27, 1957, Lei 3.253 (Braz.).
119. Códico Civil art. 781 (1916, rev. 1919) (Braz.).
will be invalid absent notice of such mortgage in the pledge agreement itself.\textsuperscript{120}

E. Duration

The agrarian pledge agreement may stipulate a duration of up to one year, with a provision for an extension thereafter of up to six months.\textsuperscript{121}

F. Who May Enter Into An Agrarian Pledge Agreement

The same rules and exceptions which apply to the common or traditional pledge with regard to capacity of the parties to enter into the contract apply also to the agrarian pledge.\textsuperscript{122}

G. Duties and Obligations

Like the traditional pledge, the creditor enjoys a privileged security position in the event that the debtor fails to perform. The same provisions which establish the rights of the common pledge creditor apply also to the agrarian pledge, except that the agrarian pledge creditor has the additional rights and duties of a bailor with respect to the res. Conversely, the pledge debtor has the same rights and obligations as a common pledge debtor, with the exception of his rights and duties as bailee of the pledge res.

IX. Brazil’s Livestock Pledge (Penhor Pecuário)

As mentioned in Part VII, supra, the livestock pledge has been distinguished from the agrarian pledge because of the unique profile attributed to it by commentators, certain civil code provisions, and supplementary legislation. Its deviations from the agrarian pledge are primarily the result of the highly mobile, marketable, and perishable nature of livestock, all of which present special problems with respect to the protection of creditors and bona fide third party purchasers.

The Brazilian Civil Code declares that livestock may be pledged provided such chattels are designated in the agreement with precision.\textsuperscript{123} The place where such chattels may be found must also be specified\textsuperscript{124} and the pledgor may not remove them without the creditor’s consent in the form of written authorization.\textsuperscript{125}

If the pledgor should attempt to alienate or remove the livestock without the creditor’s authorization by wilfully or negligently threaten-
ing the interest of the creditor, penal sanctions may result. The creditor in such cases may require that the animals be placed in the care of a third person or, in some cases, that the debtor satisfy the whole amount of principal obligation immediately.

A pledge of livestock may not exceed two years plus an extension of equal length if so agreed by the parties. The agreement must be entered in the public registry to be effective against third persons. Where animals serving as pledge security have died, replacements of the same kind become automatically subject to the pledge obligation. In other respects the livestock pledge is subject to most of the same provisions as the agrarian pledge.

X. BRAZIL'S INDUSTRIAL PLEDGE (Penhor Industrial)

A. Characterization

The industrial pledge is a special form of pledge created and regulated primarily by statutes outside of the civil and commercial codes. It differs from the ordinary mercantile pledge in that neither actual nor symbolic delivery of the res is necessary. Also, it is essential that the industrial pledge transaction be recorded in the Registry of Immovables.

B. Objects Which May Serve as Security

The industrial pledge, as created in 1939, was intended to allow the pledging of machinery and equipment utilized in industry. It was later extended to cover goods of the salt industry, products of the pork industry, meat and its derivatives, and fish. Each of the above categories of objects is subject to its own special legislation.

While these various industrial pledges are substantially similar, there may be differences between them with respect to form, registration, duration, and even with respect to the rights of the debtor to alienate pledge property. (For example, pork industry products may be sold by the debtor while in pledge, and the creditor automatically gains a security interest in the subsequent replacement of such inventories.) Thus, in each

126. CÓDIGO PENAL art. 171 (1940) (Braz.) (up to one year in civil prison).
127. CÓDIGO CIVIL art. 786 (1916, rev. 1919) (Braz.).
128. Id. art. 788.
129. See Decree of November 9, 1939, Decreto 4.857 (Braz.).
130. CÓDIGO CIVIL art. 787 (1916, rev. 1919) (Braz.).
131. 2 O. GOMES, DIREITOS REAIS 532 (1962).
132. Decree-Law of May 6, 1939, Decreto-Lei 1.721 (Braz.).
133. Id.
134. See Decree-Law of April 2, 1941, Decreto-Lei 3.169 (Braz.).
135. See Decree-Law of October 23, 1939, Decreto-Lei 1.697 (Braz.); Decree-Law of March 7, 1940, Decreto-Lei 2.064 (Braz.).
136. Decree-Law of May 20, 1942, Decreto-Lei 4.312 (Braz.).
137. Decree-Law of September 6, 1940, Decreto-Lei 2.566 (Braz.).
138. See appendix for applicable legislation in addition to the foregoing footnotes.
139. Decree-Law of October 23, 1939, Decreto-Lei 1.697 (Braz.); Decree-Law of March 7, 1940, Decreto-Lei 2.064 (Braz.).
case, the respective legislation must be consulted to determine the precise characteristics of the particular industrial pledge under study.

C. Rights and Obligations of the Parties

The pledge debtor, who retains possession of the res, assumes the responsibilities of a bailee in addition to his obligations under the principal agreement. Generally, he may not alienate or encumber the pledged property.

The pledge creditor, as in other forms of pledge, gains the right of security in the pledge res. Thus, if the debtor should fail to perform, the creditor may force the sale of the res, taking his expenses as well as the amount due on the principal obligation out of the proceeds.

D. Variations of the Industrial Pledge

A type of industrial pledge may also be effected by virtue of recent legislation which permits capital goods to be purchased using the duplicata device (negotiable trade acceptance).140 (The duplicata is discussed infra at Section XIX).

The same legislation created a new industrial pledge certificate (cédula industrial pignoraticia) for pledge credits extended by financial institutions to industrial enterprises for the acquisition of raw materials. This document is a standardized promissory note which is issued by the industrial borrower in favor of the financing institution and secured by the inventory of raw materials.

XI. BRAZIL'S CONSTRUCTIVE PLEDGE (Penhor Legal)

The Brazilian constructive pledge is so called because it operates independently of any explicit agreement. In other respects it possesses the same characteristics as the traditional pledge. It is not ordinarily a financing credit device, however, and will not be dealt with here at length.

According to the Brazilian Civil Code, innkeepers, restaurants, and establishments providing rest or recreation become pledge creditors with respect to baggage, jewels, money, or other movables placed in their care.141 A landlord is also deemed by law to be a pledge creditor with respect to furniture and other movables of a tenant or lessee of his property.142 Thus, these creditors may satisfy the debts of their non-paying customers or tenants out of the constructive pledge res.143 The creditor, however, must obtain court authorization prior to executing his rights over such objects.144

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141. Código Civil art. 776, frac. I (1916, rev. 1919) (Braz.).
142. Id. frac. II.
143. Id. art. 778.
144. Id. art. 779.
There is also a constructive pledge in favor of actors and their theatrical complement with respect to the scenery and trappings of a theater for the amount of their salaries and transportation expenses.\textsuperscript{145}

XII. THE MEXICAN CHATTEL MORTGAGE (\textit{Hipoteca sobre Bienes Muebles})

A. Antecedents and Applicable Legislation

The ancient security device of mortgage is regulated by Mexico's civil codes, apparently without regard to circumstances of a commercial nature which usually surround the transaction.\textsuperscript{146} The Civil Code for the Federal District and Territories of 1884 and prior legislation had limited mortgages to immovable assets.\textsuperscript{147} The present code, however, has stricken the word "immovables" (\textit{inmuebles}) from the definition, thus implying that chattels are also susceptible to being mortgaged so long as they are specifically identifiable.\textsuperscript{148}

B. Characterization

Now that movables are able to be mortgaged, the only elementary difference between the mortgage and the traditional pledge is the possession of the object serving as security.\textsuperscript{149} Thus a mortgage over movables is essentially the same as a pledge without dispossession. There are, however, greater formalities and controls upon the mortgage device, such as special registration and foreclosure procedures, which in most circumstances would make it less desirable than the pledge.

The mortgage is legislatively defined as a security arrangement involving property which is not delivered to the creditor and which, in the event of non-performance of a principal obligation, gives such creditor the right to be paid out of the value of that property with priority as established by law.\textsuperscript{150}

C. Objects Which May Serve as Security

Any movable property which is susceptible to alienation may now serve as the security object of a mortgage save for express legislative exclusion. Assets that have been set forth as unsuitable for mortgage include pending produce (\textit{e.g.}, crops or goods in process) and future profits when separated from the property which produces them. In addition, movables which are permanently affixed to an immovable may not be mortgaged independently. And finally, assets which are involved in pend-
ing litigation are not proper for mortgage unless the litigation is registered and the mortgagee has knowledge of such proceedings. The foregoing prohibitions are enumerative rather than illustrative.

D. Form of the Agreement

If the mortgage credit exceeds 500 pesos the contract must be celebrated before a notary in a public writing. When the mortgage credit is less than 500 pesos a private writing before two witnesses is sufficient. There should be a copy executed for each party to the contract.

E. Requirements of Form; Registration

Where the credit extended exceeds five hundred pesos (approximately $40.00 U.S. currency) the mortgage agreement must be contained in a public document executed before a notary. For lesser amounts, a private writing with two witnesses is sufficient.

In order to be enforceable against third persons, the mortgage must always be registered. All subsequent modifications or related agreements must also be registered.

The mortgage may subsist as long as the principal obligation. Where no expiration date is stipulated, however, the mortgage may not last more than ten years.

F. Enforcement

In the event of a debtor's default, the creditor may apply to the court for judicial sale. Foreclosure is effected by a summary proceeding, provided that the validity of the agreement is not attacked. The sale is conducted in accordance with the applicable provisions of the Civil Code, although the debtor and creditor may agree to settle the debt by other means so long as their arrangement does not prejudice third parties. The action to foreclose must be exercised within ten years from the date on which the cause accrued.

151. Id. art. 2898.
152. Id. art. 2917; Ley Notariado Dist. y Terr. Fed. art. 54 (1945) (Mex.).
154. Article 2917 of the Civil Code was derogated by Ley Notariado Dist. y Terr. Fed. art. 54 (1945) (Mex.), changing the original 5,000 peso amount to 500 pesos. Although the modifying provision refers to immovables, it would probably be interpreted to apply to chattels by analogy.
156. Id. art. 2927.
157. Id. art. 2916.
160. Id. art. 2916.
161. Id. art. 2918.
XIII. MEXICO'S CREDITO DE HABILITACION O AVIO AND CREDITO REFACCIONARIO

A. Antecedents and Applicable Legislation

The crédito de habilitación o avio and the crédito refaccionario are two related forms of secured credit which are extended for the special purpose of fomenting the production of the borrower’s enterprise.

The historical ascension of these credits is uniquely Mexican. During the colonial period, they were put to frequent use by the silver banks (bancos de plata) to promote the mining of silver. At that time, the crédito de avio and the crédito refaccionario were synonymous.

In 1897 the General Law of Credit Institutions created special financing banks (bancos refaccionarios) with the aim of stimulating production by means of short term credit, extended specifically to sustain the expenses incurred in private undertakings of an agrarian, mining, or industrial character. The credit was then repaid with proceeds from the sale of the crop, minerals, or manufactured products. The primary source of current law governing these credit devices is found in the Law of Titles and Credit Operations (Ley de Títulos y Operaciones de Crédito).

B. Modern Distinctions

Although a distinction is now made between the crédito de habilitación o avio and the crédito refaccionario, the basic concept remains the same. The main difference between the crédito de habilitación o avio and the crédito de refacción is that the former applies directly to the immediate process of production whereas the latter applies to the more basic operation, that is, the preparation of the enterprise for eventual production. Thus, the crédito refaccionario might be used where the owner of rural property solicits credit for the clearing, draining, and preparation of the land for productive farming. The crédito de habilitación o avio could be used when, once ready for farming, the owner solicits credit to purchase seed.

With respect to industrial use, the owner of a shoe factory who needs to acquire machinery and install it might obtain capital by means of the crédito refaccionario. He may then elect the device of crédito de habilitación o avio in order to buy raw materials and to pay wages.

C. Who May Utilize These Devices

The borrower need not be the owner of the productive assets, provided that he is directly exploiting the enterprise or undertaking for which

162. J. Escriche, Diccionario Razonado de Legislacion y Jurisprudencia (1880).
163. Ley de Títulos Operaciones de Credito (Law of Titles and Credit Operations) arts. 321-33 (1932) (Mex.).
the credit is extended. For example, a lessee or assignee as well as an owner may avail himself of these devices.\textsuperscript{164}

\textbf{D. Form of the Agreement}

Usually, \textit{créditos de habilitación o avío} are entered into by the opening of a credit account. A private contract, signed by three known witnesses and ratified before the official of the Public Registry of Commerce where such witnesses should be registered, is sufficient.\textsuperscript{165}

\textbf{E. Property Which May Serve As Security}

The \textit{créditos de habilitación o avío} are secured by those raw materials and supplies acquired and the fruits, products or artifacts obtained with the credit, even though they may be in the process of being produced or are to be produced sometime in the future.\textsuperscript{166} In addition to present, pending, or future produce, the \textit{crédito refaccionario} may be secured jointly or separately by the farms, constructions, buildings, machinery, equipment, implements, or chattels owned by the debtor and utilized in the undertaking.\textsuperscript{167} The \textit{Ley de Títulos y Operaciones de Crédito} requires, however, that the goods which are to serve as security for either the \textit{crédito de habilitación o avío} or the \textit{crédito refaccionario} must be specifically identified in the contract.\textsuperscript{168}

\textbf{F. Obligations of the Debtor}

By virtue of the contract of \textit{crédito de habilitación o avío} the debtor is bound to use the borrowed amount for the acquisition of raw materials and supplies, or for the payment of wages, salaries, and direct expenses necessary to achieve the purpose of the business.\textsuperscript{169} The credit may be extended to a going enterprise or one which is newly formed and ready to commence operations.

By virtue of the contract of \textit{crédito refaccionario} the borrower is obliged to invest the amount of the credit in the acquisition of tools, equipment, farming implements, fertilizers, or livestock employed in the realization of cyclical or permanent plantings or cultivations; in the clearing of lands for cultivation; in the purchase or installation of machinery; or in constructions for the realization of material works necessary to accomplish the borrower's undertaking.\textsuperscript{170}

It may also be stipulated in the contract of \textit{crédito refaccionario} that

\begin{table}[h]
\begin{tabular}{|c|c|}
\hline
165. & \textit{Ley de Títulos y Operaciones de Crédito} \textit{(Law of Titles and Credit Operations)} art. 326 (1932) (Mex.). \\
166. & \textit{Id.} art. 322. \\
167. & \textit{Id.} art. 324. \\
168. & \textit{Id.} art. 326. \\
169. & \textit{Id.} art. 321. \\
170. & \textit{Id.} art. 322. \\
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\end{tabular}
\end{table}
part of the credit extended may be used to meet the fiscal responsibilities burdening the borrower’s enterprise or assets at the time of entering into the agreement, or similarly, part of the credit may be applied to pay prior debts which the borrower has incurred as capital or operating expense. The acts or operations from which such debts proceed, however, must have taken place within a year prior to the making of the contract.

The contract must express the manner in which the borrower is permitted to dispose of the credit, but the creditor has the burden of assuring that the credit is used for those purposes. Non-compliance in this respect gives the creditor the right of rescission and of immediate repayment of the debt plus interest as though the obligation had come due.

If the borrower uses the credit for purposes not expressed in the agreement with knowledge of the creditor, the creditor, “for his negligence,” loses his privileged security rights. The burden is on the borrower, however, to show that the creditor had knowledge of the deviation from the expressed purposes.

The objects serving as security for the credits remain in the possession of the borrower, who is treated as a judicial bailee (depositario judicial) and is correspondingly responsible both civilly and penally.

G. Enforcement of Rights

The creditor has a right of action for recovery of the fruits or products serving as security against any third party who has acquired the goods directly from the borrower or from other persons who, when the goods were acquired, knew or ought to have known of the encumbrance upon those goods.

In the event of default, both forms of credit enjoy priority over mortgages contracted subsequently, but the crédito de habilitación o avío will normally receive priority over the crédito refaccionario, and perhaps even over mortgages contracted prior to it. The priority over mortgages was determined by the Mexican Supreme Court in 1930, when it was declared that créditos refaccionarios, duly registered, took legal precedence over older mortgages. The decision, however, was based on the provisions of the General Law of Credit Institutions and Banking Establishments of August 31, 1926, which explicitly established the priority. The currently applicable law (Law of Titles and Credit Operations [1932]) contains no such provisions.
XIV. CONDITIONAL SALE (Venta con Reserva de Dominio, Venda com Reserva de Dominio)

A. Terminology

If translated literally into Spanish or Portuguese, the term "conditional sale" would not mean the secured credit device which is under discussion. Civil Law systems have a well-developed body of conditional contract law, and thus "conditional sale" is thought of merely as a sales contract with a condition of some sort. Moreover, many civilians maintain that a sale with title remaining with the seller—what we would call a conditional sale—is in fact and law something more than a mere condition.178

B. Antecedents

There is considerable academic controversy over whether the pactum reservati dominii was part of Roman law179 or a modern creation (including the Latin denomination).180 For purposes of this article it is sufficient merely to point out these uncertainties without entering the arena of debate. It is more important for us to note that once conceived, such transfers with reservation of title in the seller were widely felt to be unfair and often prohibited by statute. Indeed, Argentina has retained such a law to the present date.181 Most other countries, however, have instituted modern legislation which allows the conditional sale but safeguards fairness through the imposition of various limitations and controls.

C. Characterization

The conditional sale is generally defined as a contract whereby the buyer acquires title to the property only upon full payment of the price, notwithstanding the fact that he enters into possession of such property at the time of the celebration of the contract.182

Characterizations of this device are the subject of much controversy. Some commentators consider the conditional sale as a sort of lease arrangement with an option to purchase, while others insist it is a contract of sale with the condition subsequent that the debtor pay the stipulated amount. Still others maintain that the sale is completed upon a lapse of time subject to the buyer's performance in the interim.183

Because the law of conditional sales varies significantly from country to country, each of our survey countries will be dealt with separately.

178. A. Brasil, Reserva de Dominio 50 (1943).
179. Id. at 15 et. seq.
180. Pontes de Miranda, Comentario ao Código de Processo Civil, Comments on art. 343.
181. Código Civil art. 1,376 (1869, rev. 1882) (Argen.).
183. See A. Brasil, Reserva de Dominio 49 (1943).
XV. CONDITIONAL SALES IN BRAZIL

A. Brazilian Antecedents

The earliest Brazilian legislation dealing directly with the conditional sale was passed in 1890, and permitted a seller to recover the property in the event of buyer's nonpayment provided that before the delivery of the property, the parties had agreed that the seller reserved title until the buyer had performed.\textsuperscript{184} The conditional sale, however, was rarely practiced in Brazil,\textsuperscript{185} and the Brazilian Civil Code was—and remains—silent on the subject.\textsuperscript{186}

On the other hand, according to traditional Civil Law\textsuperscript{187} and the Brazilian Civil Code,\textsuperscript{188} title to an object passes to the buyer at the time of the formation of the contract of sale, \textit{i.e.} at the time buyer and seller exchange promises. It was not until 1938 that the Brazilian legislature once again referred to the \textit{reserva de dominio}, making it a penal offense for a seller who retains title to withhold, upon repossession of the property, any amount other than depreciation out of the installments paid prior to the buyer's default.\textsuperscript{189}

Then in 1939 a decree was enacted, requiring the inscription in the Public Registry of Certificates and Documents of all installment sales containing a provision for retention of title in order to be effective against third persons. Since registration is especially important in the Civil Law system where possession is a large element of "title" to personalty, only after this enactment was the conditional sale free to develop as a true and effective secured credit device.\textsuperscript{190}

B. Property Which May Be Subject to Conditional Sale

Any movable property susceptible to alienation appears to be permissible as an object of conditional sale. Orlando Gomes asserts that with regard to immovables the requirement for registration of the property in the buyer's name upon entering into a sales contract effectively precludes conditional sales.\textsuperscript{191} Agostinho Alvim, however, insists that there is neither real nor effective preclusion of conditional sales over immovables.\textsuperscript{192} The question remains unsettled.

\textsuperscript{184} Decree of October 24, 1890, Decreto 917 (Braz.).
\textsuperscript{185} A. Alvim, \textit{Da Compra e Vende e da Troca} 240 (1961).
\textsuperscript{186} Some Intervening drafts included a provision referring to conditional sales, but all failed.
\textsuperscript{187} See A. Brasil, \textit{supra} note 181, at 26.
\textsuperscript{188} \textit{Código Civil} art. 1.126 (1916, rev. 1919) (Braz.).
\textsuperscript{189} Decree of November 18, 1938, Decreto 869 (Braz.).
\textsuperscript{190} Decree-Law of January 2, 1939, Decreto-Lei 1027 (Braz.).
\textsuperscript{191} O. Gomes, \textit{Contratos} 255 (1966).
\textsuperscript{192} A. Alvim, \textit{supra} note 183, at 252.
C. Rights and Obligations of the Parties

Since the conditional sale is not covered explicitly in the civil code, the rights and obligations of the parties must be derived from the code sections on property law and general contract law.

Title to the property passes only upon the buyer’s full payment of the price, but up to that time the buyer enjoys the right of possession and use so long as he complies with the payment terms of the contract and does not alienate the property.

Agostinho Alvim states that a duty of care on the part of the purchaser is implicit in the nature of the contractual obligation, which is to afford security for the seller. The legal obligation of care would also exist if the contract were characterized as a lease arrangement, a mandato, or a type of deposit.193

Since the seller is deemed to be an “indirect possessor,” he, as well as the buyer (the “direct possessor”), has the right to judicial interdiction to defend such possession against the claims of third persons. The buyer also may invoke the same defense against the seller provided that the buyer has not violated the agreement.195

In the event of the buyer’s default, the seller ordinarily may pursue an action in rem to recover the possession of the property on the strength of his legal title. He also has the alternative of suing on the contract for the unpaid amount. If the seller recovers the property, he may deduct from the buyer’s prior payments the difference between the current value of the property and the contract price.196 Whatever remains after the deduction must be returned to the purchaser so as to avoid unjust enrichment and the penal sanction.197 For the same reason, if the seller recovers on a contract basis he must relinquish title to the buyer.

The decision as to which action the seller ought to pursue will depend upon the amount already paid by the buyer at the time of default, the resalability of the property, and the economic situation of the buyer. With the present high rate of inflation in Brazil, however, recovery on the contract would rarely be desirable.

D. Registration Requirements

In order to be effective against third persons, the conditional sale must be recorded in the Public Registry of Certificates and Documents. Such registration is not, however, as in the chattel mortgage or pledge, a means of enforcing a lien over an object that has been lawfully transferred by the buyer to a third person. Rather, its purpose is to allow

193. Id. at 253.
194. Código Civil art. 486 (1916, rev. 1919) (Braz.).
195. A. Alvim, supra note 183, at 254.
196. Código de Processo Civil art. 344 (Braz.).
197. Decree of November 18, 1938, Decreto 869 (Braz.).
easier recovery of the object by serving notice of implementation of registration.\textsuperscript{198}

There are additional provisions for the conditional sale of automobiles, requiring inscription of the transaction in the registry of the transit service within three days.\textsuperscript{199}

XVI. \textbf{CONDITIONAL SALES IN MEXICO (Venta con Reserva de Dominio)}

\textbf{A. Applicable Law}

Conditional sales are basically regulated by the civil codes of the twenty-nine Mexican states plus the Federal District and Territories.\textsuperscript{200} Commercial sales, however, are additionally regulated by the Commercial Code (1887), which applies throughout the nation and takes precedence over the local civil codes where there is any conflict of provisions. A commercial sale is ordinarily one which is entered into for the primary purpose of speculation or profit.\textsuperscript{201}

\textbf{B. Creation of the Conditional Sale}

Conditional sales are permitted in Mexico. They may be created by expressly stipulating in the sale agreement that the seller shall retain title until the full price is paid. If partial payments are to be made periodically, it is also necessary to stipulate that the contract may be rescinded in the event that any installment is not rendered in accordance with provisions indicating amount and manner of payment.\textsuperscript{202}

Sales reserving the right to repurchase are prohibited, but the seller may provide for preferential status to buy at the same price or higher than the price offered by a third person, \textit{i.e.} right of first refusal.\textsuperscript{203}

Delivery of the object is not essential to the formation of the sales contract. The agreement is binding upon mere acceptance of the offer.\textsuperscript{204}

\textbf{C. Property Susceptible to Conditional Sale}

Virtually any property right is susceptible to conditional sale provided it is lawfully alienable and specifically identifiable.\textsuperscript{205}

\textbf{D. Registration}

In order to be valid with respect to third persons, the property and the condition must be entered in the public registry.\textsuperscript{206}

\begin{itemize}
\item \textsuperscript{198} Kozolchyk, \textit{Law and the Credit Structure in Latin America}, 7 Va. J. Int'l L. 15 (1967).
\item \textsuperscript{199} Decree of January, 1946, Decreto 20483 art. 47 (Braz.).
\item \textsuperscript{200} The basic provision of the \textbf{CIVIL CODE FOR THE FEDERAL DISTRICT AND TERRITORIES} (1932) (Mex.) is article 2312.
\item \textsuperscript{201} Id. art. 2312.
\item \textsuperscript{202} C. Civ. Dist. y Terr. Fed. art. 2310 (1932) (Mex.).
\item \textsuperscript{203} Id. arts. 2303, 2304.
\item \textsuperscript{204} Id. art. 2248. \textit{See also} R. Bandala, \textit{La Compraventa} 22 (1949).
\item \textsuperscript{205} C. Civ. Dist. y Terr. Fed. art. 2310, frac. II (1932) (Mex.).
\item \textsuperscript{206} Id. arts. 1951, 2310.
\end{itemize}
XVII. CONDITIONAL SALES IN ARGENTINA

A. Prohibition of the Pacto Comisorio

The conditional sale of movable property as it is known in the United States has not developed in Argentina. Unlike many of the Latin American countries, Argentina has clung to the traditional view that the seller may not retain title in himself. Thus, in dealing with the sale of movable property, the Civil Code of Argentina explicitly prohibits the inclusion of the pacto comisorio, i.e., the agreement that ownership shall not pass until the buyer has rendered full performance.

In the case of immovables the pacto comisorio is permissible, but once 25 percent of the price has been paid it becomes unenforceable.

B. Criticism of the Prohibition

There has been considerable criticism of the provisions prohibiting the pacto comisorio. It is argued that such a provision is not justified if one takes into account the fact that in the Commercial Code the pacto comisorio is understood as being implicit in all bilateral contracts and that a sales contract may ordinarily be rescinded on grounds of non-performance.

C. Future Prospects for the Conditional Sale

Until the prohibition of the pacto comisorio is lifted, the device of the conditional sale cannot be developed. Many legal writers are confident that the prohibition will soon be lifted, they reason that it would be desirable for the efficient operation and flexibility of the commercial community to permit movable property to be sold with title remaining in the vendor until the total price has been paid. This thinking appears to be corroborated by consensus, since modern civil codes generally do not contain the prohibitory provisions. On the other hand, the remaining resistance to the pacto comisorio is predicated on the belief that such agreements often place the uneducated or unwitting buyer at the mercy of the seller.

XVIII. THE TRUST RECEIPT IN MEXICO

The trust receipt as an independent security device does not exist in Mexico. The concept of the trust (fideicomiso) was first introduced

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208. CODIGO CIVIL art. 1374 (1932) (Argen.).
209. Id. art. 7.
210. Ley 14.005, art. 7 (Mex.). For detailed discussion see L. REZZONICO, ESTUDIO DE LOS CONTRATOS EN NUESTRO DERECHO CIVIL 305 (1958).
211. CODIGO CIVIL art. 216 (1869, rev. 1882) (Argen.).
212. C. CIV. DIST. Y TERR. FED. arts. 1413, 1420, 1421, 1430 (1932) (Mex.).
213. Among the eminent legal writers sharing this feeling are Felix R. Alonso, Baudry Lacantinery and Luis Maria Rezzonico.
into the area of commercial transactions in Mexico in 1932 by way of the *Ley de Títulos y Obligaciones de Crédito*, which provides that by virtue of the *fideicomiso* the settler (*fideicomitente*) designates certain assets to be used for a lawful purpose, delegating (*encomendando*) the realization of such purpose to a fiduciary institution. The operation of the *fideicomiso*, however, is quite limited in comparison to its Anglo-American counterpart, because only banking institutions may serve in the fiduciary capacity.

When the need for a security device to serve the function of the trust receipt became apparent in Mexico, the problem of coming up with a satisfactory substitute proved difficult. The traditional pledge was inadequate since it required that the security object be delivered to the creditor. Other standard devices often required cumbersome formalities. Although the chattel mortgage and pledge without dispossession allowed the debtor to retain the object, they effectively precluded multiple transactions by their registration requirements and impeded circulation of the security by their rigid resale procedures. The *fideicomiso* could hardly be adapted to a trust receipt transaction, since only the banker could be a trustee.

Rather than creating an ad hoc body of law based on party stipulations, Mexico has resorted to a type of contract within the area of ordinary bailments (*depositos*). It is, however, more limited in scope and function than the trust receipt in the United States.

The Mexican trust receipt is little more than a receipt of deposit whereby the customer acknowledges delivery of the documents held by the bank as pledgee. It is used solely to facilitate the importation, elaboration, or warehousing of the goods. The bill of lading is endorsed by the bank with the label "in commission for" ("como simple comisionista") and the delivery of merchandise is said to be pursuant to a bailment ("carácter de depositario"). Thus, the principal or bailor retains the warehouse receipt, and any subsequent issue of a warehouse receipt in the customer's name over those goods would be considered a breach of the agreement, except when expressly authorized by the bailor.

Trust receipt charges are generally one fourth of one per cent per thirty day period, or a fraction thereof, which is approximately the same as in the United States.

The Mexican instrument fails to satisfy mercantile needs in many cases. The biggest problem is that customers' ability to market the goods is greatly impaired. A liberal treatment of the pledge without possession (*prenda sin posesión*) and the fiduciary transaction, (*negocio fiduciario*)

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215. Id. art. 350.
216. B. KOZOLCHUK, supra note 205, at 173.
217. Id. at 174.
may therefore come to replace the present Mexican method of effecting a trust receipt device.

XIX. THE TRUST RECEIPT IN ARGENTINA

A. Antecedents

Argentine law has never expressly provided for the credit device of the trust receipt as it is known to Anglo-American jurisdictions.\(^\text{218}\) Even the general freedom to contract has failed to produce an Argentine equivalent. The foremost legal obstacle to the development of such a device has been the Civil Code of Argentina\(^\text{219}\) which, as we have already seen, explicitly prohibits sales contracts whereby legal ownership of a chattel does not pass immediately\(^\text{220}\) to the purchaser (\textit{pacto comisorio}).\(^\text{221}\)

In 1937, however, the Commercial Chamber of the Court of Appeals for the district of Buenos Aires upheld a trust receipt in \textit{Nuevo Banco Italiano v. Isaac Coschinsky}.\(^\text{222}\) The court declared that "the banking institution which acts as a delegate or agent of the seller in order to transmit the assets and receive their purchase price, may judicially demand such price or the return of the goods . . . ." Thus, the reservation of ownership was recognized by the court.

Dr. Roth and other commentators, however, have refused to recognize \textit{Nuevo Banco Italiano v. Isaac Coschinsky}, characterizing it as a clear transgression of the Civil Code provisions.\(^\text{223}\) They also point to the fact that the courts have never reiterated the conclusions of that case.

The Bar Association for the City of Buenos Aires has at various times sponsored legislative proposals with explicit provisions to permit the unequivocal acceptance of the Anglo-American style trust receipt. In its draft in 1943 of a law to regulate letters of credit,\(^\text{224}\) provisions were included for a type of transferable bank security based on the concept of pledge and proposed the trust receipt as a means for the buyer to obtain possession of the goods.\(^\text{225}\) To date, however, such recommendations have not been incorporated into Argentine law.

B. The Argentine Variation of the Trust Receipt

Notwithstanding Argentina's failure to provide explicitly for the trust receipt, the influence of British and American practices along with

\(^{218}\) Id. at 178.
\(^{219}\) CODIGO CIVIL arts. 1374, 1376 (1944) (Argen.).
\(^{220}\) For immovable property a stipulation of reservation of ownership in the seller appears to be valid until twenty-five percent of the purchase price has been paid.
\(^{221}\) The prohibition of the \textit{pacto comisorio} is discussed in text at notes 207-13 supra.
\(^{222}\) 123 Gaceta del Foro 131 (1936), 131 Gaceta del Foro 230 (1937).
\(^{223}\) Roth, \textit{El Trust Receipt en la Practica y en la Ley Argentina}, 2 REVISTA DE DERECHO COMERCIO, no. 4355 (1939).
\(^{224}\) Primera Conferencia de Abogados de la Ciudad de Buenos Aires, Buenos Aires, 1943, at 72.
\(^{225}\) PROYECTO DE LEGISLACION: CREDITO DOCUMENTADO arts. 62-65 (1943) (Argen.).
the demands of modern commerce have produced a similar device, which may be loosely termed a trust receipt although it is actually rooted in the concept of bailment (deposito).\textsuperscript{226}

C. Operation

By the Argentine method, the customer is stipulated as custodian of the goods rather than the owner of them. This stipulation technically avoids the undesirable legal effect incident to ownership which results from the prohibition of the pacto comisorio\textsuperscript{227} in the Civil Code.\textsuperscript{228}

D. Enforcement

In the event of default, quick execution of the banker’s rights is achieved by a number of procedural devices agreed to by the customer. As a rule, it is provided that three days after the date upon which the customer’s note comes due the banker may have the goods warehoused at the bank’s disposition.\textsuperscript{229}

E. Criticism

The major criticism of present practice is that it does not provide adequate protection for bona fide third parties. Torres insists there must be some system of public notice which will protect third parties while maintaining the convenience and flexibility required by commerce and industry.\textsuperscript{230}

F. Doubtful Validity of Present Practice

Dr. Kozolchyk notes that “in Argentine banking circles, trust receipt instruments are regarded as worthless from a legal standpoint.”\textsuperscript{231} The reasoning for such a conclusion appears to be that the trust receipt is merely a disguised conditional sale and should be treated as such. Therefore, since the conditional sale is invalid under Argentine law, the trust receipt is likewise invalid.\textsuperscript{232}

XX. THE DUPLICATA OF BRAZIL\textsuperscript{233}

A. Introduction

The duplicata, a form of negotiable trade acceptance, is of uniquely Brazilian origin.\textsuperscript{234} In recent years it has risen in popularity and is today

\textsuperscript{226} Roth, \textit{supra} note 220, at n. 4.
\textsuperscript{227} P. Torres, \textit{El Crédito Documentado} (1942).
\textsuperscript{228} Código Civil arts. 1374, 1375 (1944) (Argen.).
\textsuperscript{229} B. Kozolchyk, \textit{Commercial Letters of Credit in the Americas} 178 (1966).
\textsuperscript{230} Lobos, \textit{Ventas a Crédito con Reserva de Propiedad}, 19 \textit{La Ley} 45 (1940).
\textsuperscript{231} B. Kozolchyk, \textit{Commercial Letters of Credit in the Americas} 178 (1966).
\textsuperscript{232} Id. at 179.
\textsuperscript{233} For a thorough treatment of the Brazilian duplicata see generally I. Penna, \textit{Da Duplicata} (1966); A. Avellar, \textit{Promissorias & Duplicatas} (1943).
\textsuperscript{234} Penna, \textit{supra} note 230, at 9.
the most common method of financing in that country.\textsuperscript{235} It is initially a mere duplicate of the sales invoice issued in all credit sales. Once, however, the duplicate has been indorsed by the buyer and returned to the seller, it becomes a negotiable credit instrument secured by the goods sold and can be discounted along with other \textit{duplicatas} in representation of accounts receivable.\textsuperscript{236}

B. Characteristics

The \textit{duplicata} is a freely negotiable instrument transferable by endorsement and extrinsically valid even with respect to bona fide parties.\textsuperscript{237} It is tied to the institution of commercial sales, notwithstanding its subjection to the provisions which regulate negotiable instruments,\textsuperscript{238} since without an effective sale of goods or services\textsuperscript{239} a duplicate may not be issued; to do so is punishable as fraud under the Brazilian Penal Code of 1942.\textsuperscript{240}

C. Antecedents

The \textit{duplicata} grew out of articles 219 and 426 of the Brazilian Commercial Code of 1878.\textsuperscript{241} The first of those articles required the issuance of invoices or accountings with respect to credit sales between commercial enterprises. The other article gave such invoices the attributes of credit instruments. The seller could have these instruments discounted by financing institutions to obtain capital for future operations. Article 426, however, was abrogated in 1908, and as a result the \textit{duplicata} vanished completely as a viable credit device.\textsuperscript{242}

In 1922, however, a national law was enacted authorizing a federal tax on sales and consignments.\textsuperscript{243} In order to effect the tax, it was provided that a merchant when making a credit sale was to issue an invoice in duplicate to the buyer and attach special sales tax stamps to the duplicate copy. It was also provided that the duplicate should then be signed by the purchaser and returned to the seller with a statement that the buyer received the merchandise as invoiced and that the buyer agreed to pay the invoice within the time stipulated on the duplicate.\textsuperscript{244} Thus, the \textit{duplicata} re-emerged. The Brazilian Legislature later remolded

\textsuperscript{235} P. Garland, \textit{A Businessman's Introduction to Brazilian Law and Practice} 10-13 (1966).

\textsuperscript{236} With the exception of Mexico, Argentina, and Brazil, there is no accounts receivable financing by independent non-banking, mercantile "factors" in Latin America. Kozolchyk, supra note 196, at 16.

\textsuperscript{237} Penna, supra note 230, at 17.

\textsuperscript{238} Id. at 15.

\textsuperscript{239} Decree-Law of February 28, 1967, Decreto-Ley 265 (Argen.).

\textsuperscript{240} \textit{Cóódigo Penal} art. 172 (1942) (Braz.).

\textsuperscript{241} Avellar, supra note 230, at 43.

\textsuperscript{242} Decree of December 31, 1908, Decreto 2044 (Braz.).

\textsuperscript{243} Law of December 31, 1922, Lei 2919, art. 2 (Braz.).

\textsuperscript{244} Decree of May 22, 1923, Decreto 16.041 (Braz.); \textit{amended by} Decree of October 29, 1923, Decreto 16.189 (Braz.) and Decree of December 22, 1923, Decreto 16.275-A (Braz.).
the device of the *duplicata* by its Decree of 1936, which remains in force today as amended.\(^{245}\)

D. **Execution of the Duplicata**

Under present law, in all transactions of credit sales of goods between Brazilian domiciliaries the seller is required to deliver to the buyer an invoice or bill of sale and a duplicate (*duplicata*) thereof.\(^{246}\) The buyer is then required to return the duplicate signed and accepted.\(^{247}\)

E. **Form and Contents of the Instrument**

The *duplicata* agreement is normally a private transaction, *i.e.*, without need for special formalities or notarization. With respect to content, however, the instrument must bear the word "*duplicata*,"\(^{248}\) the date of issuance, serial number, invoice number, ledger page number, the value of the sale, names and domiciles of the purchaser and seller and their signatures, the date when payment is due and the place where payment is to be made.\(^{249}\) The amount of the down payment and installments must also be included.\(^{250}\)

F. **Time for Return and Supervision**

The law fixes time limits for the return of the *duplicata* to the seller according to the circumstances, and subjects its issuance and acceptance to the supervision of the agents of the Public Treasury.\(^{251}\) (In the event of dispute over the contract, see "*Rejection of the Duplicata*," infra.)

G. **Rejection of the Duplicata**

A purchaser may refuse to accept the *duplicata* only in those cases where the goods are damaged or defective, where the goods were never received, or when there is a dispute over the terms or prices agreed upon.\(^{252}\) In such cases, the time limit for the return of the *duplicata* may be extended for the period necessary to effect a settlement of the controversy. If no settlement is reached, the *duplicata* must be returned without acceptance, along with the goods, to the seller or his legal depository.\(^{253}\)


\(^{247}\) Id.

\(^{248}\) The new law provides that the document shall be entitled either *Duplicata of Installment Sale of Consumer Goods* or *Duplicata of Installment Sale of Capital Goods*. Decree-Law of February 28, 1967, Decreto-Lei 265, art. 1, frac. II (Braz.).

\(^{249}\) Law of January 15, 1936, Lei 187, art. 3 (Braz.).

\(^{250}\) Decree-Law of February 28, 1967, Decreto-Lei 265, art. 1, frac. III (Braz.).

\(^{251}\) Law of January 15, 1936, Lei 187, art. 6 (Braz.).

\(^{252}\) Id. art. 13.

\(^{253}\) Id. art. 13.
H. Rights of a Holder in Good Faith

Once perfected, the duplicata has validity independent of the underlying obligation. Thus, it has been held that absence of causa in the formation of a sales contract is no defense against a holder in good faith.

It might be said generally, without attempting to search out minor exceptions, that the duplicata in this respect is comparable to a draft or bill of exchange (letra de câmbio). The holder in good faith takes free of all defenses save for fraud in the creation of the instrument or deficiencies and flaws in the instrument itself.

I. Rights of the Obligor

Effective payment to the holder of the instrument releases the obligor of all duties under the instrument. It has been held that the obligor is released even where the holder has unlawfully acquired the instrument if such payment is in good faith and otherwise proper.

J. Enforcement

The financing of accounts receivable in Brazil may be on a recourse or non-recourse basis, but in practice it is almost invariably on a recourse basis owing to "the financier's unwillingness to assume the commercial credit risks inherent in negotiable instrument collection." However, in spite of the custom of using a recourse basis of financing, the high rate of inflation, accompanied by great numbers of business failures and debtors' defaults, has hampered the growth of accounts receivable financing, produced high rates, and made satisfactory enforcement of claims largely impractical.

XXI. Conclusion

The foregoing survey clearly demonstrates the lack of symmetry between the legal systems in focus with respect to their credit institutions. Excepting the common pledge, the devices we have described are often

254. PENNA, supra note 230, at 19.
256. PENNA, supra note 230, at 19.
257. Código Civil art. 937 (1916, rev. 1919) (Braz.).
260. The Brazilian Department of Commerce, Office of Stabilization of Prices, estimated inflation of 20% in 1956, 38.9% in 1959, and 65% in 1960.
261. Kozolchyk, supra note 196, at 17.
SECURED CREDIT DEVICES

1969]

significantly different from country to country and sometimes are totally unique.

Some general conclusions, however, may be drawn. Most apparent is the interest and effort which is being directed by scholars and legislators in each of the survey countries to improve their credit structures. Internal capital formation has come to be recognized as an important factor in the urgent struggle toward economic growth and well-being. Thus, development and reform in that area of the law is gathering momentum.

The general need is to stimulate the stable expansion of credit operations in order to broaden domestic markets for manufactured goods and to generate the private formation of capital. The general solution is to create new forms of credit as well as to make old ones more available and more susceptible to efficient, effective operation. In following such a course, however, the respective governments are faced with special problems.

The root of substantial problems in Brazil and to a lesser degree in Argentina is inflation. Although the scope of this paper does not permit an extended discussion of economics, it is important to note the poor relationship existing between facilitated credit and gross inflation. Expanded credit, unaccompanied by capital formation and increased production, may result in inflationary pressures. On the other hand, an inflationary climate hinders the achievement of productive capital formation because of high interest rates, tough security requirements, and unstable risk factors which are unattractive for both creditor and debtor.282

Other important problems must be confronted in order to provide adequate protection for the credit consumer. This concern now becomes especially acute, since in order to broaden domestic markets creditors must be allowed favorable terms and efficient remedies to enforce credit obligations. Moreover, these new market areas consist largely of consumers who are inexperienced and uneducated in credit matters. Thus, ways must be found to protect such consumers from abuse at the hands of the law while at the same time encouraging merchants and financial institutions to extend credit.

Doubtless, the commercial practices of common law jurisdictions will have some effect on the direction of future development of Latin American credit structures. The extent of such influence is not readily apparent, but judging from past performance and contemporary attitudes it will most likely be limited to supplying impetus and certain desirable goals rather than supplying means of implementation. Latin American jurists are well aware of the difficulties in attempting to fit Anglo-American legal institutions into a civil law framework. They also realize that their unique socio-economic situations demand unique solutions. Thus, it is

likely that every effort will be made to develop and streamline existing institutions before resorting to foreign ones. Our survey has shown considerable activity toward that end and we may expect it to continue.

APPENDIX

BASIC LEGISLATION APPLICABLE TO CONDITIONAL SALES

Argentina: (Negative provision) Código Civil, Article 1374.
Brazil: Decreto Lei No. 1027 of January 2, 1939.
Chile: Ley 4702 of December 3, 1929.
Mexico: Código Civil (1932), Article 2312.
Perú: Ley No. 6565 of May 12, 1929.