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WAIVER OF PROTEST: A COMPARATIVE STUDY*

Raúl Olivera y Borges †

I

ADMISSIBILITY

1. General Observations

(a) Origin and Use. Parallel to the study of protest, it is pertinent to consider the nature and legal effects¹ of exempting clauses² which, while not essential, may be found in bills of exchange. Waiver of protest appears to have been introduced by the practice in France during the first third of the nineteenth century.³ It is generally used to moderate the consequences of non-payment, by a drawer who lacks confidence in the solvency of the drawee, or who fears that he may not be able to provide the necessary funds before maturity. The drawer can thus spare the susceptibilities of a drawee who does not wish non-payment to be authenticated by a protest. This situation occurs especially in the relationships between dealers and their customers, when the former draw bills of exchange on the latter for sums due; also when the amount of the bill is very small and it is desired to avoid costs that would increase the debt disproportionately.⁴ On the other hand, the clause may be inserted at the instance and for the benefit of a payee or holder, when he wishes to avoid the inconvenience of having

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¹ “La clausola senza spese ha valore cambiario, non di diritto commune.” 1 Mosca, LA CAMBIALE SECONDO LA NUOVA LEGGE 366, § 332 (Milano, 1937).

² Valeri distinguishes essential and accessory clauses and subdivides the latter into supplementary and derogatory. 2 Valeri, DIRITTO CAMBIARIO ITALIANO 58, § 134 (Milano, 1938).

³ Lévy-Bruhl, HISTOIRE DE LA LETTRE DE CHANGE EN FRANCE AU XVII⁰ ET XVIII⁰ SIÈCLES 289 (Paris, 1933).

to make protest (and in some legislations he may thus also avoid having to present the bill and to give notice of dishonor), or in order to facilitate the discounting of the bill at a bank, in case the drawee resides in a locality without banking facilities.\(^5\)

(b) **Expressions Used.** Although there exists no pre-established formula, the expressions used in the different countries exhibit a certain uniformity, the most common being *retour sans frais*, *retour sans protest*, *retorno sin gastos*, or simply *sans frais*, *sin protesto*, or "protest waived."\(^6\) Even mere initials seem to be admissible,\(^7\) although they are not very desirable, especially in Spanish, where the initials of *sin gastos*, "S.G." (without costs), might be confused with the clause *sin garantía* (without recourse), permitted with an entirely different connotation by some laws with respect to endorsers. There are other expressions, similar to those mentioned above, to which a somewhat different meaning has been attached (e.g., *au besoin sans frais*,\(^8\) *con spese*\(^9\)) but these are little used today, and the tendency is to treat all alike.

\(^5\) Piñol Agulló, *Comentarios al código mercantil español, sección letra de cambio* 369 (Madrid, 1933).

\(^6\) *Sin gastos, sin protesto, sin protesto si el librado es vecino de una plaza no bancable, senza spese, senza protesto, senza pregiudizio, ohne Kosten, ohne Protest.*

Although the French terms *sans frais* and *sans protest* were said in earlier works to have been in use in England, it is very doubtful that they are now. At least, they seem to be unknown in America (United States). Byles, *A Treatise on the Law of Bills of Exchange, Promissory Notes, and Cheques*, 19th ed., 252, note x (London, 1931).

Although the use of the term "waiver" seems to be inveterate and it would now be very difficult to substitute an alternative, the term is so ambiguous that its use in legal proceedings and discussions should be avoided so far as possible. Falconbridge, *The Law of Banks and Banking, Bills, Notes, and Cheques*, 5th ed., 566 (Toronto, 1935). See Ewart, *Waiver Distributed Among the Departments: Election, Estoppel, Contract, Release 15* (Cambridge, 1917); 3 Williston, *Treatise on the Law of Contracts*, 2d ed., 1958, § 678 (New York, 1936). Id. 1960, § 679, gives nine distinct meanings of the term "waiver."

The term "waiver" has been translated as "renuncia" in the Panama Ley de Documentos Negociables (see, for instance, art. 109) and as "excusa" in the Colombia Ley de Instrumentos Negociables (art. 111), although the Colombian author, Cock, prefers the term "renuncia," which is also that adopted by the Inter-American High Commission on Uniform Legislation in its Spanish version. Cock, *Derecho Cambial colombiano* 165-166, and 131 (1933).

\(^7\) 2 Mosá, *La cambiale secondo la nuova legge* 579 (Milano, 1937).

\(^8\) The Court of Commerce of Paris deemed this clause to mean that the holder should address himself to the referee in case of need before protesting the instrument. 20 Dalloz, *Repertoire de legislation, de doctrine, et de jurisprudence* 300, § 647 (Paris, 1850).

\(^9\) The clause *con spese* inserted in a bill means only "with protest," and not also with repayment of the costs of protest. It is within the authority of the judicial officer and not incumbent on the creditor to determine whether costs of protest should also
(c) Criticisms. Waiver of protest has been criticized on the ground that it encourages negligence and fraud on the part of the holder, who may neglect or deliberately fail to present the bill for payment if to his advantage. Such may be the case, for example, if the acceptor is about to fail, or if a difference in the rates of exchange makes the action of recourse more profitable. Moreover, it is alleged, the bill of exchange is discredited by such a clause, since it indicates, on the part of the person who affixes it, fear that the bill may be dishonored, and the issue of bills of exchange without provision of funds, etc., is encouraged.

Others point out that by inclusion of the clause in question:

- The position of the parties secondarily liable is impaired, since when payment is demanded of them by the holder, they are not certain whether the party primarily liable has actually failed to honor the bill and whether, as a consequence, the obligation to pay devolves upon them. Even the position of the holder is weakened thereby, in view of the possibility that the defendant can allege this defense, not possible with the protest.

In considering the formal requirements and the scope, substantive and personal effects of this clause, and the solutions offered by modern legislation, we shall see that many of these criticisms are without foundation.

(d) Legislative Systems: New Classification. The text writers generally differentiate and classify the various legal provisions on this subject in three groups or systems: the Belgian, German, and


10 Bonelli, Della cambiale, dell'assegno bancario, e del contratto de conto corrente 502 (Milano, 1930).

11 2 Tená, Derecho mercantil mexicano, 2d ed., 344, § 223 (Mexico, 1938).

12 Rébora, Letras de cambio, 3d ed., 376, § 305 (Paris, 1928); 2 Blanco, Estudios elementales de derecho mercantil, 3d ed., 271 (Madrid, 1911); 2 Williams, La letra de cambio en la doctrina, legislación, y jurisprudencia 35-37 (Buenos Aires, 1930).

18 "... La clause du retour sans frais, insérée dans l'effet par le tireur, dispense le porteur de l'obligation de faire protester la lettre et d'intenter dans la quinzaine l'action récursoire avec notification du proté. Toutefois, le porteur est tenu d'informer du non-payment de la lettre, dans la quinzaine qui suit l'échéance, ceux contre qui il veut conserver son recours, et ceux-ci ont la même obligation à remplir vis-à-vis de leurs garants, dans la quinzaine de la réception de l'avis.

"La clause du retour sans frais émanée d'un endosseur produit ses effets vis-à-vis de cet endosseur et de ceux qui le suivent," Belgium, Law of 20.V.1872, art. 59.

See 1 Frédéricq, Principes de droit commercial belge 465, § 483 (Gantes, 1928).

15 "Die Aufforderung, keinen Protest erhaben zu lassen ("ohne Protest," "ohne
Italian systems. Without failing to recognize the advantages of this classification, the present writer prefers not to follow it in the present exposition, in view of the impossibility of adapting to such a broad generalization the diverse problems and solutions presented. However, with regard to each particular problem, the laws have been grouped according to "systems" with reference to the individual topic, without dogmatic pretension and purely for the purpose of illustration.

Thus, considering the legal attitudes concerning the admissibility of waiver clauses under the bills of exchange law, the writer prefers to distinguish four systems, arbitrarily designated the French, Spanish, Italian, and "statutory."

2. French System (Haiti, Dominican Republic, Argentina, Bolivia, Paraguay, and Uruguay)

The system exemplified by the French legislation and jurisprudence is characterized by the absence of any reference to the waiver clause in the positive law, which, on the contrary, expressly prescribes the indispensability of protest as a proceeding for which no other act can be substituted. At the beginning of the nineteenth century, the legitimacy of such clauses was discussed, but since 1834 they have been completely accepted by the courts and in common commercial usage, in which they are very frequent, and they present no difficulties other than of their interpretation.

As Lyon-Caen and Renault explain, the intention of the parties is evidently powerless to bestow the character of a bill of exchange on an instrument that does not comply with all requirements prescribed.


16 "La clausola 'senza protesto' o 'senza spese' od altra che dispensi dall'obbligo di protestare apposta dal traente, dall' emittente o da un girante, si ha per no scritta." Italy, C.Com. 1882, art. 309; cf. 3 Vivante, TRATADO DE DERECHO MERCATIL 427, No. 1318 (Madrid, 1936).


by law, but in a bill satisfying all conditions that the law demands, the intention may modify its legal effects. Thus, under the decisions of the courts, a bill of exchange admits all accessory stipulations which are not contrary to law or public policy (ordre public).

Protest and the formalities which should, on principle, accompany it, do not pertain to ordre public. The parties in whose interest these requirements have been established may freely renounce the benefits thereof, “without in the least infringing upon the rights or disturbing the interests of society.” Their agreement falls within the sphere of freedom of contract without threatening the public order.

In America, it is natural that what has been said of the French system should apply to Haiti and the Dominican Republic, since they have adopted the French Code of Commerce word for word. Also to be included within this system are the following other American laws on bills of exchange which have taken the French Code as model: Argentina, Bolivia, Paraguay, and Uruguay. The Argentine writers in particular unanimously agree on its acceptance. In his commentary on article 723 of the Argentine Code of Commerce, it is pointed out by

20 Id. 350, § 376; 7 Dalloz, Répertoire pratique de législation, de doctrine, et de jurisprudence 637, § 332 (Paris, 1915).

21 2 Obarrio, Curso de derecho comercial, 2d ed., 392, § 262 (Buenos Aires, 1924).

22 2 Williams, La letra de cambio en la doctrina, legislación, y jurisprudencia 35 (Buenos Aires, 1930); Rébora, Letras de cambio, 3d ed., 373, § 305 (Paris, 1928).

23 See French cases cited by Borno, Code de Commerce haitien mis au courant de la législation en vigueur 90, note a (Port-au-Prince, 1910), in regard to Haiti—C. Com., art. 159.

24 Piñero, La letra de cambio ante el derecho internacional privado, 2d ed., 272 (Buenos Aires, 1932); 4 Malagarriga, Código de Comercio commentado, 3d ed., 383, § 361 (Buenos Aires, 1928); 2 Obarrio, Curso de derecho comercial, 2d ed., 392, § 262 (Buenos Aires, 1924); 3 Argaña, Tratado de derecho comercial 96-97 (Asunción, 1936); Malagarriga, La unificación internacional de la letra de cambio 222 (Buenos Aires, 1916). Rivarola mentions it among “the non-essential statements, not provided for by the law.” 4 Rivarola, Tratado de derecho comercial argentino 675, § 1293 (b) (Buenos Aires, 1940).

The lapse of rights (caducidad) alleged by the avaliste does not occur if he expressly waived protest and other formalities required by law, asserting that he would maintain his liability. Cámara Comercial, 88 Gaceta del Foro 98 (Sept.-Oct., 1930); cited in 3 Victorica, Segundo diccionario de jurisprudencia 996 (Buenos Aires, 1931). Contra: Ortiz y Arce, 26 Enciclopedia jurídica española 284 (Barcelona, 1910).

25 Cf. Fr.—C. Com., art. 175; Dom.—C. Com., art. 175; Haiti—C. Com., art. 172; Bol.—C. Merc., art. 417; Parag.—C. Com., art. 723; Urug.—C. Com., art. 916.
Segovia\textsuperscript{26} that no act performed at the request of the holder can take the place of protest, except in the presence of the clause \textit{retour sans frais}. He states that the legal text does not preclude the stipulation \textit{retour sans frais} or the like whereby necessity of protest is renounced.

Rébora\textsuperscript{27} bases his acceptance of this position on the fact that the French Code of Commerce contains "no provision relating to optional clauses, and yet the opinion favoring their admission is unanimous." He adds:

If it be said that the provision in our article 663 [presumably he means article 662] the provisions of which article 714 repeats, is absolute and rejects the admissibility of the clause, we should have to note that it does not differ from that enacted by articles 168 and 170 of the French Code, which served as model for 663 [662?] of Argentina..., which did not prevent the development of the jurisprudence just mentioned.\textsuperscript{28}

Williams\textsuperscript{29} sketches a less convincing argument, contending that the law itself, in its context,\textsuperscript{30} has anticipated lack of protest, thereby indicating that it is not absolutely indispensable. He considers\textsuperscript{31} that, in spite of the fact that article 1 of Ley 9689 provides that "the execution of bills of exchange shall issue with \textit{visa} of the bill and protests," a suit initiated on an instrument not accompanied by protest implies renunciation of a part of the procedural requirement.\textsuperscript{32}

\textsuperscript{26} 2 SEGOVIA, EXPLICACION Y CRITICA DEL NUEVO CÓDIGO DE COMERCIO DE LA REPÚBLICA ARGENTINA 181, note 2404 (Buenos Aires, 1933).
\textsuperscript{27} RÉBORA, LETRAS DE CAMBIO, 3d ed., 378, § 306 (Paris, 1928).
\textsuperscript{28} Fr.—C. Com., art. 168. Cf. Dom.—C. Com., art. 168; Haiti—C. Com., art. 165; Arg.—C. Com., art. 714; Bol.—C. Merc., art. 453; Parag.—C. Com., art. 714; Urug.—C. Com., art. 907 (bill prejudiced for want of protest).
\textsuperscript{29} 2 WILLIAMS, LA LETRA DE CAMBIO EN LA DOCTRINA, LEGISLACION, Y JURISPRUDENCIA 38 (Buenos Aires, 1930). Cf. 4 RIVAROLA, TRATADO DE DERECHO COMERCIAL ARGENTINO 675, § 1293(b) (Buenos Aires, 1940).
\textsuperscript{30} Williams cites Arg.—C. Com., arts. 621, 666, and 714.
\textsuperscript{31} Id. 39, note 1.
\textsuperscript{32} There are some rules of procedure that pertain to public order and others that do not. In general, rules of procedure are not rules of public order. In order that a procedural rule be deemed a rule of public order, it must result from its terms, express or implied, that the parties are without power to modify it. This must be determined in each case, and in case of doubt, the decision should incline to the negative. TOMAS JOFRE, I JUR. ARG. 66-67, note 40 (1918).

In Uruguay, Garrone states in his criticism of the Code of Commerce, that, although the formalities of protest have not been simplified, it is also true that it has not been sought to make them more complicated, and therefore the clauses tending to excuse the obligation to make protest, which he considers to be in common use, have been left standing.

3. Spanish System (Cuba)

Although from the point of view of positive law the legislative norms of this system exhibit almost complete likeness to those of the French, the doctrine, for the most part, has elaborated a somewhat surprising, although not new, interpretation, since the same is to be found, with respect to a waiver clause inserted by the drawer, in the Albertine Code and in the Italian Code of 1865.

(a) Prevailing Doctrine: Conversion of Bill into Note. The first difficulty with regard to the admissibility of waiver of protest is encountered by the writers in articles 502 and 509 of the Spanish Code of Commerce, which categorically and without exception prescribe the necessity of protest for the exercise of the action of recourse. Nevertheless, it has already been seen that the French system, more attentive to the necessities of commercial practice and although encountering the same legal obstacles, admits such stipulations.

Garrone, Letras de cambio 143 and 154 (commentaries on art. 916) (Montevideo, 1936).

Albertine Code, art. 189; Code of 1865, art. 261; if inserted by the drawer, it would lose the nature of a bill of exchange and be transformed into a promissory note or order to pay, with the same effects as a simple obligation. Supino e de Semo, Della cambiale e dell'assegno bancario 353 (Torino, 1935); Malagarriga, La unificación internacional de la letra de cambio 222 (Buenos Aires, 1916).

Martinez Escobar, Letras de cambio, libranzas, cheques, vales, y pagarés 169 (La Habana, 1929); Garrigues, Curso de derecho mercantil 694 and 719 (Madrid, 1936).

Ortiz y Arce, 26 Enciclopedia jurídica española 283-284 (Barcelona, 1910), qualifies the case of France as “anomalous.” He personally believes that protest embodies a natural requisite which can be excused, as its renunciation is not contrary to morals or public order and its omission could prejudice only the payee of the bill; the same rule holds for the contract of exchange as for that of mutuum, of which the former is a manifestation or instrument, if the waiver agreed upon be not motivated by critical circumstances that limit freedom, as might happen to the drawee or even to the drawer.

Cuba—C. Com., art. 509; cf. Fr.—C. Com., art. 175 et al. (see note 24, supra).

The second objection, the one that really gives typical character to this interpretation, is fully expounded by Martinez Escobar. He states that in the Cuban legislation so-called "limited" bills are not permitted. Non-protestable bills are not such bills; at least, they are not perfect bills. They are no other than defective bills, or what is the same, promissory notes in favor of the payee, on account of the drawer, in conformity with the principle contained in article 450 of the Code of Commerce. He considers that the prohibition of protest, a formality required by article 502 of the Code to prove nonacceptance or nonpayment, is a primary defect in the bill, which places it within the prescriptions of the said article 450.

What, then, is the position of the holder of such a "bill-note"? According to Martinez Escobar, if the drawer does not accept or pay the bill, the holder cannot protest it; a stipulation of the contract, freely contracted, precludes this. If, despite the prohibition, he does protest, this has no effect, having been done in contravention of what is agreed. It is not lawful to exercise rights that have been expressly waived. The bill cannot be considered to be prejudiced for want of protest. A bill is prejudiced when the possessor, able and obliged to take it, omits this step, that is, by an omission imputable to him; not when, by reason of the contract, he is prohibited from taking it, when the very contract itself has imposed on him the obligation not to do so. Damages ensue from infraction of what is agreed, never from performance. What rights and actions, then, will the holder have? Consistently with what has been stated, he comes to the conclusion that, if the bill is not accepted or paid, the payee and those who succeed him have no other right than to demand of the drawer refund of the amount delivered or that compensation be made therefor in their accounts, without prejudice to the solidary liability of the endorsers if the "promissory note" (by transformation) be of mercantile character.


"El efecto que a lo sumo podría dársese era dispensar al portador del protesto, como se acordó en el Congreso de Amberes."

38 "Si la letra de cambio adoleciera de algún defecto o falta de formalidad legal, se reputará pagaré a favor del tomador y a cargo del librador." Cuba—C. Com. art. 450.

39 "Los pagarés que proceden de operaciones de comercio son mercantiles; los demás son civiles.

Par que aquellos lo sean, no basta que su importe se destine a operaciones de comercio. Lo que les caracteriza es su origen; no la aplicación que se dé a su valor."
This was the view expressed by the Spanish Minister of Justice in his reply to the questionnaire of the Hague Conference of 1910.\textsuperscript{40}

At the Hague Conference of 1912, in the "Observations" of the Spanish delegation,\textsuperscript{41} it was remarked that the clause under consideration is very useful, since as a general rule very few bills of exchange can be protested in towns of slight importance, even if they are sent there on that condition and there is a notary in the locality, because no one wishes to place himself at odds with his neighbor, and in practice the result is that many bills are returned without satisfying this requirement. It was pointed out that in their Code of Commerce \textit{this type of bill is not admitted}, but that custom tolerates it, and the banks and individual bankers always reserve their liability in case such bills are not protested for nonacceptance or nonpayment. The decisions of the courts, although somewhat uncertain, seem also to incline in this direction.\textsuperscript{42}

\textbf{Martínez Escobar, Letras de cambio, libranzas, cheques, vales, y pagarés 359 (La Habana, 1929).}

\textsuperscript{40} Cf. Cuba—C. Com., art. 532. For actions against the endorsers of the note and omission of protest, see Martínez Escobar, id. 272.

\textsuperscript{41} Deuxième Conférence de La Haye pour l'unification du droit relatif à la lettre de change, de billet à ordre et de cheque, 1912, Documents 234.

\textsuperscript{42} Martínez Escobar, Letras de cambio, libranzas, cheques, vales, y pagarés 359 (La Habana, 1929).

The Supreme Court of Spain held that protest was not necessary to the validity of the instrument in question, because this extrinsic requisite, although it grants certain privileges, does not release the drawer from the obligation to satisfy the amount of the bill, according to art. 483, and expenses according to art. 458, of the Code of Commerce, it being sufficient, as stated in art. 460, in order for the obligation to exist, that it had been presented for payment.

The court did not determine, deeming it a new and unnecessary question, whether or not such instruments were "executory," since what was declared was sufficient to satisfy the first of the requisites of article 876, par. 2, of the Code of Commerce, which requires only that the instrument prove a debt and not that it be "executory." Spain—T.S., Sen. No. 70, 8.V.1913, 127 Jur. Civil 433.

2. The notice stated: "... for further instructions consult Mr. —" (agent of the drawer). The plaintiff alleges that Mr. — gave order not to protest.

Even supposing the notice to be an integral part of the bill (to which it was annexed), it cannot be given such scope as to excuse protest, being in conflict with conclusive and obligatory precepts of the Mercantile Code, such as articles 502 and the like, and even supposing the contrary, the plaintiff bank would not have proved that the person to whom it ascribed the order not to protest, gave it in due time. Spain—T.S., Sen. No. 106, 18.IX.1927, 178 Jur. Civil 497 at 492.

3. A bill drawn to the order of a bank was discounted by the bank, which credited the amount with the usual formula "S.B.F." (\textit{salvo buen fin}).

It was held:

"Resultando que esta fórmula de abono subordina su eficacia y efectividad a que
Pedro Huguet distinguishes the *transforming* effects of the stipulation, according to whether or not it appears on the bill. If it be written or stamped on the face of the bill itself, the bill is transformed into a mere promissory note to order. If it appears in a separate document, as a special agreement between the drawer and the payee, Huguet holds that the bill retains its character as a perfectly negotiable bill, and the only effect of the stipulation is that the payee by signing the agreement is definitely precluded from demanding the costs of protest from the drawer.

(b) *Favorable Opinions in the Doctrine.* On the other hand, Gay de Montellá and Piñol Agulló fully admit bills containing the clause *sans protèt, sans frais,* or some other equivalent, and even bills assigned

la operación se finalizara entre acreedor y deudor, sin quebranto ni detrimento para el Banco que admitía la letra para su cobro, de tal modo que si no lo lograba después al hacer las gestiones adecuadas, quedaba exento de responsabilidad y sin efecto el abono en cuenta, con lo que no se infringe el artículo 2° del Código de Comercio, que en nada se opone a los acuerdos y convenciones que puedan adoptarse entre el tomador y librador sobre los efectos y responsabilidad, en su caso, si el librado no pagase, los cuales, aún cuando no pudieran regularse por los preceptos mercantiles son lícitos al amparo del Código Civil, y aunque no trasciendan a terceros que los desconocieran y que en ellos no intervienen, han de surtir sus efectos entre aquellos para los de las cuentas que entre ellos mediasen y hacerse los abonos correspondientes, según las condiciones del pacto complementario del fundamental del cambio que representa la letra, doctrina amparada en el artículo 1255 del Código Civil y en la sentencia de este Tribunal de 20 de enero de 1905 . . .” Esp.—T.S., Sen. No. 62, 14.I.1928, 180 Jur. Civ. 387 v. 397.

43 “Si se consigna escribiéndola o estampillándola en la cara de la misma cambial, rige dicha cláusula no sólo para el *tomador,* sino para cuantas personas vayan adquiriendo la letra, de suerte que nadie, en caso de protesto, puede reclamar al librador, ni al endosante alguno, los gastos ocasionados; pero como quiera esto pugna abiertamente con la naturaleza del contrato mercantil de cambio, de ahí que una letra limitada con tal frase no goza con respecto al *librador* y *endosantes* genuino carácter de cambial, sino que ha de reputarse mero *pagare a la orden,* y por las leyes de esta clase de documentos debe regularse.” HUGUET, *LA LETRA DE CAMBIO* 91.

44 “Mas si la frase *sin protesto* ó *sin gastos* se consigna en documento aparte como convenio particular entre *librador* y *tomador,* la letra conserva su carácter de perfecta cambial, y de todos cuantas personas intervienen en su circulación, sólo el *tomador,* firmando del expresado convenio, queda en definitiva privado de reclamar al *librador* los gastos de protesto, ora los realice dicho *tomador,* ora se los haya exigido algún *endosatario*; y decimos en definitiva, porque si llegase el caso de dirigirse dicho *tomador* contra el *librador* pidiéndole en juicio ejecutivo el reembolso de la letra y sus gastos, el Juez despacharía ejecución incluyendo el importe de tales gastos sin que le fuese dable al *librador* oponerse alegando la excepción de *no pedir,* y únicamente terminado el juicio ejecutivo le cabría demandar al *tomador* la indemnización procedente en juicio ordinario á tenor del particular convenio referido.” Id. 91 ff.

to a banking entity, in whose invoice of discount the expression is inserted: "The transferee entity [bank] accepts drafts without the corresponding protests being made, if the drawee resides in a locality without banking facilities." The only difference between the two forms, according to Piñol Agulló's observation, is that the first springs from the intention of the drawer or assignor and appears on the bill itself, while the second derives from the intention of the payee or assignee, agreed to by the assignor, and appears in a separate document.

In commenting on article 460 of the Spanish Code of Commerce, Piñol Agulló reads into this article, which appears to treat presentment as a condition distinct from protest, a tacit reference to bills of exchange which, containing the designation sans frais, do not have to be protested and need only to be presented.

(c) Opinion and Criticism of the Author. With the greatest respect for the authoritative opinions maintaining that inclusion of the clause *sans frais* or some similar expression transforms a bill of exchange into a mere promissory note, the present writer believes it possible to support the contrary opinion, not only as being modern and the more consistent with the imperious needs of commercial practice, which should have sovereign control over the destiny of such legal rules, but also since it is considered admissible pursuant to a mere correct interpretation of the pertinent legal principles.

Before attempting to interpret article 450, it is pertinent to distinguish the essential formal elements of bills of exchange, set forth in the first section of Title X of the Spanish Code of Commerce, from what may be termed the *essential consequences* of bills of exchange, among which the action of recourse may be cited. Article 450, in question, undoubtedly refers to the former, the lack or default of one of which will transform the bill into a promissory note.

Protest, in the second category, is no more than a condition precedent to the right of recourse or, at most, a formal, although today not absolutely essential, element of that right. Thus, we see that an en-
dorser may cause this right of recourse to disappear by inserting the clause "without recourse," which the Code expressly authorizes, and yet it is sought to deny him the right to waive what constitutes a mere requisite or a mere condition of the same right of recourse.

(d) Procedural Difficulties. It should be observed that in Cuba, in order to support an executory action against an acceptor, without the necessity of prior acknowledgment of the signature, a difficulty is encountered which does not pertain to substantive law, to private law (which, as has been stated, can be waived by the interested party), but to the law of procedure. Contrary to the principle maintained by the Argentine courts, the Supreme Court of Cuba has repeatedly held that the law of procedure pertains to the domain of public law, and that therefore its principles concern public order, which means that the parties cannot, by covenant among themselves, alter the operation of the procedural law, that is, the fulfillment of the steps established for each proceeding.

In other words, the writer sees no obstacle in the law of procedure that would prevent a judge from issuing execution against an endorser or drawer who has previously acknowledged his signature, in case the action is based on a bill of exchange, not protested but which contains the clause sans frais inserted by the debtor. On the other hand, it

48 Cuba—C. Com., art. 467.
49 "La acción ejecutiva deberá fundarse en un título que tenga aparejada ejecución.

"Sólo tendrán aparejada ejecución los títulos siguientes: . . .

"2°. Cualquier documento privado que haya sido reconocido bajo juramento ante el Juez competente para despachar ejecución . . .

"4°. Las letras de cambio, sin necesidad de reconocimiento judicial respecto al aceptante que no hubiere puesto tacha de falsedad a su aceptación, al tiempo de protestar la letra por falta de pago. . . ." Cuba—L. Enj. Civil, art. 1427, incs. 2 and 4.
50 See note 32.
53 L. Enj. Civil, art. 1427, supra note 48.

It might be alleged that article 521 of the Code of Commerce requires protest as a requisite of execution, in the exercise of the right of recourse. This requisite is not part of procedural law stricto sensu, since a non-protested bill [but not "prejudiced," see MARTINEZ ESCOBAR, LETRAS DE CAMBIO, LIBRANZAS, VALES Y PAGARES 249 ff. (La Habana, 1929)] like any other private document, can be subject to immediate execution, if the signature previously has been judicially acknowledged.

The Audiencia de La Habana has invariably held that bills that have lost executory force, upon becoming prejudiced for failure to take the necessary steps, cannot recover it by acknowledgement of signature or debt, nor in any other way. Id. 210. Contra:
1945 ] Waiver of Protest 125

does not appear possible for execution to issue against an acceptor who has not previously acknowledged his signature, if the complaint is not accompanied by a protest, the only mode of proving in this stage of the proceeding that the acceptor does not reject the acceptance as false. The advantage granted to the plaintiff by the procedural law, of being able to demand issue of execution against the acceptor without necessity of prior acknowledgment of the signature, is a purely procedural privilege, and is based on the guarantee, on the presumption of validity, that the protest, and only the protest, offers to the court. It has been observed that the intention of the parties is powerless to modify the rules of procedure.

4. Italian System (Brazil, El Salvador, and Peru)

The classic characteristic of this system is exemplified by the Italian Code of Commerce of 1882, which declares that the clause sans protêt or sans frais, or any other clause that gives exemption from the obligation to protest, whoever may insert it, shall be treated as not written. The advocates of this system find the rationale of this position with respect to such clauses, in the economic and legal nature of the bill of exchange, which requires that the possibility to destroy, by agreements contrary to the essence of the obligation, its guarantees and its legal efficacy, which constitute the chief basis of negotiable credit, should not be left to the discretion of the contracting parties. In America, the laws of Brazil, El Salvador, and Peru follow this criterion.

In spite of the express declaration in the law, Bonelli holds that


55 Bra.-Dec. 2044, art. 44, II.

56 El Sal.—C. Com., art. 448.

57 Peru—C. Com., art. 497, which follows the Code of Commerce of Italy. See Exposición de motivos, DE LA LAMA, Código de Comercio 91 (Lima, 1902).

58 Bonelli, DELLA CAMBIALE, DELL'ASSEGNO BANCARIO E DEL CONTO CORRENTE 502, § 259 and note 1 (Milano, 1930). But Vivante admits that the Italian decisions have distinguished between a waiver stipulated outside of the bill and one stipulated on the bill itself, admitting the former and declaring the latter void. And even more recently (1907), the Court of Cassation of Turin qualified this distinction as "illogical
the principle characterizing the clause as nonexistent can and should be interpreted to mean that, when inserted in the bill, it has no greater effect than the identical statement would have, if made in a separate document. That is, its effect is limited to the personal relations between its author and the holder; he cites as an example, by analogy, the interest clause, which also is regarded as not written in the same sense. He explains that apart from the bill such declaration has effect, not against any possessor (holder), but against the party with whom the waiver has been agreed; wherefrom it results that, in his opinion, a clause inserted in the bill has greater effect than one stipulated in a separate document. On this account, he is criticized by Navarrini, who reflects that, if the declaration should really be valid as against any holder, how could it be said that it must be deemed not written?

Vivante admits that, if the stipulation was in a separate document, it might be effective, not for the purposes of an action or execution on the bill, which is not available, but for an action on the agreement to pay the bill even though protest be omitted.

Bonelli goes still further, holding that the clause has a derogatory effect and that the obligation and the right under negotiable instruments law exist without the protest, which only assures exercise of the action. Accordingly, the action is not an ordinary action, but an action on the bill (acción cambiaria).

Navarrini likewise criticizes Vivante since he denies the action on the bill to one who did not protest on account of the clause, and limits the action which he may bring to an ordinary action. He considers that there is involved, in effect, no more than a waiver excluding a defense under negotiable instruments law, and that there is no reason why the action should not continue to be based on this law, without such defense. He explains that the law does not intend, by the action on the bill (acción cambiaria), to hold (colpere) parties secondarily liable if protest has not been made, but anyone may renounce the and absurd,” declaring the waiver to be equally invalid in both cases. 3 Vivante, Tratado de Derecho Mercantil 427, note 1 (Madrid, 1936).

59 3 Navarrini, Trattato Teorico Pratico di diritto commerciale 532, note 2 (Roma, 1917).

60 3 Vivante, Tratado de Derecho Mercantil 427, No. 1318 (Madrid, 1936).

61 Bonelli, Della cambiale, dell’assegno bancario e del conto corrente 504, note 3 (Milano, 1930); contra: Supino, Della cambiale e dell’assegno bancario 353 (Torino, 1931).

62 3 Navarrini, Trattato Teorico Pratico di diritto commerciale 532, note 2 (Roma, 1917).
benefits of the law. The validity of the clause being thus reduced to
the relations between the contracting parties as a bar to a defense of the
debtor, Navarrini opposes the position of Supino, who enunciates the
maxim that what is outside the bill can have no effect under negotiable
instruments law.

In his Trattato and in his more modern work, La cambiale e
l’assegno bancario, secondo la nuova legislazione, Navarrini concludes
that the principle in question means that the clause is not valid for the
purposes of the law of negotiable instruments, that it cannot pass the
right to invoke it to a third-party holder, proceeding against whoever
inserted such clause, without making the protest that would otherwise
be necessary; nor to the one who inserted the clause the right to charge
the former with the corresponding costs and damages which might
have been occasioned by making protest. But, on the other hand, Na­
varrini holds that this does not mean that an agreement on the point
should not be deemed valid, whether or not it appears on the instru­
ment; anyone can renounce the protection that the law assures him,
wherefore the holder, with whom the one who inserted the clause has
contracted, can prove its existence and resist the corresponding defense.
Vice versa, he may be liable to bear the costs and damages of a protest
which, without special reason, notwithstanding the agreement, he may
have caused to be drawn.

Against these interpretations, especially that of Vivante, Stradelli
claims that a bill of exchange cannot, at the option of the holder, be
collected by an action other than that peculiar to it, so as to validate a
clause that must be deemed not written and always void.

Pontes de Miranda holds that the provision which deems such
clause to be not written does not have an absolute effect; it should, on
the contrary, be interpreted in a manner in harmony with the customs
and needs of commerce, in the sense that the declaration should be
considered as not written for purposes under negotiable instruments

63 Ibid.
64 Id. 531, § 1312.
65 NAVARRINI, LA CAMBIALE E L’ASSEGNO BANCARIO, SECONDO LA NUOVA LEGIS-­

The clause sans protéè stipulated in writing, apart from its effects under negotiable
instruments law, is effective for the relations between the endorser and the endorsee
who have so stipulated. Cassazione Torino, 30.XII.1891, 17 Foro It. (1a. pt., 1892)
416.
66 Stradelli, "Das clausulas que se consideram não escritas," 49 Rev.D. (Bra.)
529 (1918).
67 PONTES DE MIRANDA, DIREITO CAMBIARIO, LA LETRA DE CAMBIO 350, § 37
(Rio de Janeiro, 1937).
law, but that, as between the parties who so stipulated, it should have full validity with the ordinary effects of a common contract.

Paulo de Lacerda is also of the same opinion. He explains that, if such a clause were the object of a separate agreement, the bill would not be affected by it, being a formal and complete instrument. A clause that the law deems not written when included in the bill, a fortiori, is regarded as void for the purposes of the law of negotiable instruments, for it would thus tend to prejudice the rigorous principles of negotiability as respects the form and the integrity of the instrument.

But he adds that the owner of the bill may, nevertheless, prohibit his agent from protesting it, or may give restrictive instructions to that effect. He is master of whether or not it is protested and suffers the consequences. However, wherever the clause may be written, even if in a restrictive endorsement, it would have no effect on the relations arising on the bill: neither can the official refuse to make the protest, nor can any party liable avail himself of it; its existence is only in the relations not derived from the bill between principal and agent. The Brazilian decisions seem to follow the reasoning of Pontes de Miranda and Paulo de Lacerda.

At the Hague Conference of 1910, in answering the pertinent inquiry in the Questionnaire, only two countries opposed the admissibility of this clause, Italy, and Portugal. Brazil, in answering, limited itself to pointing out that in its legislation such stipulations

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68 LACERDA, A CAMBIAL NO DIREITO BRASILEIRO 285, § 290 (Rio de Janeiro, 1921).
70 Conférence de La Haye pour l’unification du droit relatif à la lettre de change, 1910, Documents 343.
71 Id. 2, question 5(f).
72 Id. 267.
73 Id. 200.

It is to be noted that neither the United States (id. 80) nor Chile (id. 207) referred to this question in their answers; the other American countries that replied to this questionnaire answered this question in the affirmative, Argentina, id. 94; Bolivia, id. 196; Haiti, id. 261; Paraguay, id. 338.
were considered as not included. In the discussion of the various sections, Brazil, Italy, and Portugal voted against admission.\textsuperscript{74}

In anticipation of the Geneva Convention of 1930, the Rome International Institute for the Unification of Private Law, remarked in its report to its governing board, that, although acceptance of such clause was approved, it was doubted whether it would be admitted by states in which the invalidity of the phrase \textit{sans protet} was determined also by considerations of a fiscal nature.\textsuperscript{76} At the Geneva Convention, Portugal supported the text approved at The Hague, considering it superior to its own system,\textsuperscript{78} and it was the Italian delegation itself that drafted and presented the motion approved as the official text.\textsuperscript{77}

5. \textit{"Statutory" System}

This system, which we have arbitrarily called "statutory" in default of a better term, is characterized by the fact that in its positive law it expressly accepts and regulates the scope and effects of the waiver clause.

(a) Canada, Colombia, Costa Rica, Panama, and the United States. Because of their common Anglo-American source, Canada, the United States, Colombia, Panama, and Costa Rica\textsuperscript{78} form a group or "family" within this system. The North American writer, Daniel,\textsuperscript{79} justifies the admissibility of waiver clauses, stating that when the protest has been waived by agreement of the parties, it would be a fraud upon the holder if he were made to suffer for having acted upon the assurance given by the party to whom he looks as guarantor of the instrument. And since the protest is a requirement solely for the benefit of the drawer and endorsers, they alone are the judges to determine whether they should require it or not.

Attention should be drawn to the fact that, in referring to waiver of protest, Anglo-American writers generally do so with reference to waiver of presentment and notice, and sometimes only to waiver of

\textsuperscript{74} Second section (Brazil and Italy) id. 212; fourth section (Portugal) id. 253.
\textsuperscript{77} Id. 296 ff.
\textsuperscript{78} Can.—B.E.A., ss. 34, 110, 106(b); U.S.—N.I.L., ss. 159, 109, 110, 111; Col.—Ley 46 de 1923, art. 160, 111, 112, 113; Pan.—Ley 52 de 1917, arts. 159, 109, 110, 111; C.R.—L. Cam., arts. 18, 51, 130; cf. Eng.—B.E.A., ss. 16(2), 51(9), 50(2).
\textsuperscript{79} 2 DANIEL, A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS, 7th ed., 1304 (New York, 1933).
presentment, although it is understood that what is said equally applies
to waiver of protest. Frequently, especially in the decisions of the courts, references are found to promissory notes, which in this respect are equivalent to bills of exchange. For this reason and in the interest of uniformity, the term “drawee” has been substituted herein for “maker,” when referring to the person to whom the bill must be presented and against whom the protest must be made.

(b) Ecuador, Guatemala, Honduras, Nicaragua, and Venezuela. Ecuador, Guatemala, Honduras, Nicaragua, and Venezuela belong to the “family” of the Hague Uniform Regulation of 1912, which has also been followed by the Geneva Uniform Law and by the Yadarola Project (Argentina).

(c) Chile. Chile limits itself to express admission, without reference to the scope or effects of the clause. Although article 460 refers only to a clause agreed upon by the drawer and the payee, it is the writer’s opinion that insertion by an endorser is equally possible.

(d) Mexico. Mexico follows the principle advocated by the Committee of Legal Experts of the League of Nations, which was

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80 So Daniel states, ibid.
81 Cf. Can.—B.E.A., s. 110; Col.—Ley 46 de 1923, art. 160; Pan.—Ley 52 de 1917, art. 159; Eng.—B.E.A., s. 51(9); C.R.—L.Cam., art. 130.
82 Ec.—L. de 5.XII.1925, art. 45; Guat.—C. Com., arts. 621 and 710; Hon.—C. Com., arts. 589 and 596; Nic.—C. Com., art. 644; Ven.—C. Com., art. 459. Cf. La Haye—R.U., art. 45.
83 Gen.—L.U., art. 46; INSTITUTO ARGENTINO DE ESTUDIOS LEGISLATIVOS, Publicación No. 6, Proyecto art. 50, at pp. 30 and 123.
84 “El librador y tomador pueden acordar las cláusulas devuelta sin gastos, sin más aviso y otras expresivas de pactos accessorios que no alteren la esencia del contrato” Chile—C. Com., art. 640.
85 I Davis, LA LETRA DE CAMBIO 191 (Santiago de Chile, 1928); 2 Palma, DERECHO COMERCIAL 326 (Santiago de Chile, 1940).
86 I Davis, LA LETRA DE CAMBIO 191 (Santiago de Chile, 1928). Although he mentions only article 640, the present writer believes that support could well be found in the express provision of article 665: “El endosante y endosatario pueden celebrar convenios que modifiquen los efectos jurídicos del endoso.” Chile—C.Com. art. 665.
88 Dom.—C. Com., art. 45; L. of N. No. C.175.M.54.1928.II, Committee of
endorsed by the International Chamber of Commerce, admitting and regulating the clause when inserted by the drawer and declaring it not written when included by an endorser.

II

Personal Scope

One of the most debated problems in the practical application of the clause in negotiable instruments dispensing with protest has undoubtedly been that of determining its effects as respects the persons who have so agreed, or who, in one way or another, have intervened in the circulation of the bill. Even in the cases in which the positive laws have sought to solve the problem, both the parties and the courts themselves have been confused by diverse and conflicting interpretations. With a view to facilitating analysis and comparison of the numerous solutions and principles, the writer has grouped them into “systems,” without attempting to establish an absolute classification, but merely in order to simplify the discussion.

I. English System (Canada, Costa Rica)

The English writers concur in noting the absolutely personal or autonomous character of the waiver clause. Its effect is strictly limited to parties participating therein and does not extend to other parties to the bill. Therefore, it does not affect endorsers of the instrument, despite the fact that the clause appears in the text itself of the bill.

It is to be noted that the English Act contains no provision similar to sections 110 and 111 of the Negotiable Instruments Law, while, on the other hand, section 16 of the English legislation clearly indicates that

Legal Experts on Bills of Exchange and Cheques, Report to the Economic Committee


89 BYLES, ibid.
such waiver does not affect the rights of any party who does not ex-
pressly assent thereto. Even at an earlier date, Chalmers had pointed out that it was very doubtful whether the English law would admit the interpretation given to such clauses in the United States and in France.

In Canada, the same principle has been maintained by Falcon-
bridge, based on the expression "as regards himself," which, as in the English Act, appears in section 34(b) of the Canadian law; writers and courts agree on this. The Costa Rican Ley de Cambio, which appears to be derived from the English Act and the French Code of Commerce, follows the English law on this point.

In Germany, the clause exonerates only the party who inserted it (according to the commentators on article 42 of the German law and the invariable practice). And this was the point of view adopted in the project submitted by Norsa for the consideration of the Institut de Droit International at its meeting in Brussels in 1885.

2. United States System (United States, Colombia, and Panama)

Under this system, a distinction must be made between a clause inserted by the drawer in the text of the instrument or in any other place on its face, and one placed on the back by any other party. In the

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90 "The drawer of a bill and any endorser, may insert therein an express stipulation: . . . (2) Waiving as regards himself, some or all of the holder's duties." Eng.—B.E.A., s. 16.


93 Cf. 3 PERRAULT, TRAITÉ DE DROIT COMMERCIAL 758 (Montreal, 1940); MACLAREN, BILLS, NOTES, AND CHEQUES, 6th ed., 108 (Toronto, 1940); Banque de St. Jean v. Desmarais, 17 R.DEJ.(Que.) 304 (1910).

94 "El librador puede insertar en la letra la expressa estipulación de qui niega o limita su responsabilidad con respecto al tenedor, o de que renuncia con respecto al mismo librador todos o algunos de los deberes del tenedor." C.R.—L.Cam., art. 18.

95 Piñero, LA LETRA CAMBIO ANTE EL DERECHO INTERNACIONAL PRIVADO, 2d ed., 272 (Buenos Aires, 1932); 2 WILLIAMS, LA LETRA DE CAMBIO EN LA DOCTRINA, LEGISLACIÓN Y JURISPRUDENCIA 36 (Buenos Aires, 1930); GIDE, FLACH, LYON-CaEN, AND DIETZ, CODE DE COMMERCE ALLEMAND ET LOI ALLEMANDE SUR LE CHANGE 409, note 2 (Paris, 1881).

96 Report of M. Norsa, "Conflit des lois et unification internationale en matière de lettres de change et autres papiers transmissibles par endossement," 7 AN.INST.D.INT. 53 at 73 (Belgium, 1885).

Annex I, "Principes et règles en vue de la rédaction d'une loi uniforme en matière de lettre de change et autres papiers négoçiables," art. 38. Id. at 85; see question 53 of the questionnaire, Annex II, id. at 95.
first case, as Bonelli\footnote{Bonelli, Della cambiale, dell'assegno bancario e del contratto di conto corrente 501, note 3, at 502 (Milano, 1930).} points out, the United States system is closer to the French than to the English, since not only the drawer but all subsequent endorsers are covered. Incorporated in the instrument itself, the clause forms part of the contract of each party who signs, whether the drawer, acceptor, or endorser, who are in effect new drawers. Such is the case even if the endorsee knew that the drawee had sufficient funds on deposit to pay the bill at maturity.\footnote{2 Daniel, A Treatise on the Law of Negotiable Instruments, 7th ed., 1306, § 1257; cf. Appleton v. McCarthy, 104 N. J. L. 431, 140 A. 918 (1928).} The law clearly provides that when the waiver is embodied in the instrument itself, it is binding upon all parties.\footnote{Where the waiver is embodied in the instrument itself, it is binding upon all parties . . . " U.S.—N.I.L., s. 110.} Nevertheless, Mackenzie,\footnote{"Cuando la mencionada excusa está en el instrumento mismo, obliga a todas las partes . . . " Col.—L. 46 de 1923, art. 112.} commenting upon article 112 of the Negotiable Instruments Law of Colombia, holds that, if the drawer uses a form book, like those now common, and one of the endorsers at the time of transfer expressly demands that notice be given him, article 112 will not strictly apply, since a subsequent holder in case of dishonor of the bill will have to give notice thereof to such endorser, under penalty of discharging him. He adds that the clause inserted by such endorser and accepted by the subsequent taker, is a condition that the latter must respect, among other reasons because it comes within the sphere of autonomy of contract.

In this system, there arises the problem of determining the scope of the clause when inserted by an endorser. Prior to the Negotiable Instruments Law the principle of the common law was that a clause endorsed on the instrument covered all endorsers unless they were expressly excluded,\footnote{Bigelow, The Law of Bills, Notes, and Checks, 3d ed., 338 (Boston, 1928); Chalmers, A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques, and Negotiable Securities, 10th ed., 46 (London, 1932); 26 Mich. L. Rev. 570 (1928).} although a small minority considered it limited to the endorser immediately below.\footnote{2 Randolph, A Treatise on the Law of Commercial Paper, 2d ed., 1989, § 1364 (St. Paul, 1899); Bigelow, ibid.}
As Bigelow¹⁰³ points out, the meaning of the provision in section IIO¹⁰⁴ is not clear, and has suffered conflicting interpretations. The problem is to determine whether the clause represents an effort to eliminate difficulties of the unwritten law (common law) supra, or whether the section in unhappy phraseology refers to the accepted rule that a waiver in the body of the instrument binds all parties but, when not incorporated in the instrument, does not bind endorsers whose signatures precede the waiver; or, on the other hand, whether the clause is to be limited solely to the endorser whose signature appears immediately below.

In studying the interpretation of the so-called uniform laws,¹⁰⁵ a constant tendency is to be found, on the part of judges and writers, to interpret the positive text in terms of common law principles, despite the fact that these texts were enacted as specific statutes in each state.¹⁰⁶

Thus, Williston¹⁰⁷ appears to hold that, although the word “embodied” is not free from ambiguity, it would seem that a printed or written waiver clause anywhere on the instrument should be considered within the meaning of the term, especially since this was the customary interpretation at common law. And he adds that the fact that one endorsement appears after another scarcely can be said to take the lower endorsement out of this section, since a negotiable instrument is rarely so complex a document that an endorser cannot readily take account of its terms when he signs. Moreover, a holder in due course should have the protection the words import of themselves, and should

¹⁰⁴ “... but where it is written above the signature of an endorser, it binds him only.” U.S.—N.I.L., s. 110.
“... pero quando se hallare escrita sobre la firma de un endosante, la renuncia obligará a éste solamente.” Pan.—L. 52 de 1917, art. 110.
“... cuando está escrita encima de la firma de un endosante, sólo obliga a éste.” Col.—L. 46 de 1923, art. 112.
¹⁰⁶ For the works of the National Conference of Commissioners on Uniform State Laws, which met for the first time in 1892 and in its first forty years of existence prepared some seventy draft laws, of which fifty-three were included in the list approved in 1933, see National Conference of Commissioners on Uniform State Laws, Handbook 465-467, 503-518 (1933).
¹⁰⁷ See also American Institute of Banking, Negotiable Instruments 302-378 (New York, 1941), for the text of the Negotiable Instruments Law with the modifications introduced in each state in its legislation. No state has modified the wording of section 110, id. 349.
¹⁰⁸ 21 Mich. L. Rev. 697 (1923); 7 Minn. L. Rev. 343 (1923); and citations in 8 C. J. 47.
not, at his peril, have to decide whether he must give notice to one of the endorsers.

Daniel remarks that there are various cases in which the courts of the state of Maine have held that, where the first endorser wrote a waiver of protest above his signature, subsequent endorsers who merely appended their signatures were bound by the clause, and that, if a subsequent endorser desired to exempt himself from its operation, he should add a statement to that effect, e.g., “requiring demand and notice.”

Bigelow attempts to find justification for this interpretation in the text itself, by extending the meaning of the term “endorser,” in the singular, to the plural as well. And he questions whether in reality the clause is not written or printed above the signatures of the second and successive endorsers as well as over the signature of the endorser immediately below.

Among the commentators on the Colombian law, Cock interprets this section as indicating that the clause cannot be given effect in prejudice of third parties; i.e., if the waiver is above the signature of an endorser, it binds him only and not the antecedent parties, by which he seems to admit, _ex contrario_, that it should bind subsequent parties.

Others have endeavored to introduce a distinction between written and printed clauses, in spite of the fact that it openly conflicts with the principle of interpretation stated in section 191 of the Negotiable In-

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108 2 Daniel, _A Treatise on the Law of Negotiable Instruments_, 7th ed., 1308 (New York, 1933); cf. Confidential Finance Co. v. Monastersky 106 N. J. L. 14, 148 A. 183 (1930); 15 Bus. L. J. 434 (June, 1930). It is clearly stated that in section 110, “written above,” does not mean immediately above or next to the signature; that at no time has the law sought to require a waiver clause for each endorser. The case involved three endorsers who signed simultaneously in order to induce the plaintiff to receive the instrument. It was maintained that the clause bound all three.

Brannan, _Negotiable Instruments Law Annotated_, 6th ed., 942 (Cincinnati, 1938) approves this decision, since it involves the very parties to the original agreement. Even 2 Daniel, _A Treatise on the Law of Negotiable Instruments_, 7th ed., 1308 (New York, 1933), who skilfully defends the contrary opinion, admits that this rule does not endeavor to require a separate clause for each endorser but recognizes the fact that several may sign under a waiver clause with intent to be bound by it.

109 Bigelow, _The Law of Bills, Notes, and Checks_, 3d ed., 338 (Boston, 1928); contra Norton, 10 Bost. Univ. L. Rev. 527 at 528 (1930), who characterizes this interpretation as “tortuous”: “such construction is tortuous to an excessive degree.”

110 He believes that where “written” is stated, “printed” is equally included, since “It is improbable that section 110 uses the term ‘written’ in contradistinction to ‘printed,’ in view of the provision of section 191 that ‘written’ includes printed, and ‘writing’ includes print.” Bigelow, id. 339, note.

111 Cock, _Derecho cambiario colombiano_ 158 (Bogotá, 1933).
Instruments Law.\textsuperscript{112} Daniel\textsuperscript{112} cites Mr. Justice Morris of the District of Columbia Court of Appeals as making this distinction, in order to arrive at the conclusion that, when the formula or clause is found printed on the back of the bill and their signatures are located in connection therewith, the endorsers are presumed to have seen and read the words and to have adopted them in their contracts.

The Supreme Court of New Hampshire\textsuperscript{114} has decided that where both endorsers sign below the clause as a part of the same transaction, the second endorser is equally bound. And Williston\textsuperscript{115} goes even further, holding that it should make no difference whether or not the endorsers sign at the same time, provided the clause appears on the instrument at the time when the endorser’s signature is placed thereon.

The subtleties have reached the extreme of distinguishing between a clause in the handwriting of the first subsequent endorser and one in another’s handwriting, and also between clauses expressed in the singular and in the plural\textsuperscript{116} The American Institute of Banking\textsuperscript{117} deems it

\textsuperscript{112}See note 110, supra; cf.:

"En esta ley, a menos que el texto de otra manera lo requiera, el significado de los términos a continuación es el siguiente: . . . ‘Escrito’ incluye lo impreso, y ‘lo escrito’ incluye lo que haya sido objeto de impresión." Pan.—Ley 52 de 1917, article 191.

Curiously, the Colombian Ley de Instrumentos Negociables failed to enact these general provisions contained in title IV of the Negotiable Instruments Law and the Ley de Documentos Negociables of Panama.

\textsuperscript{114} 2 DANIEL, A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS, 7th ed., 1308, note 8 (New York, 1933); cf. Bigelow, THE LAW OF BILLS, NOTES, AND CHECKS, 3d ed., 338 (Boston, 1928), who admits this solution in spite of not accepting the distinction between writing and print. See note 110, supra.

Cf. National Bank of Portsmouth v. Sciotoville Milling Co., 79 W. Va. 782, 91 S. E. 808 (1917). This refers to several persons who, before delivery to the payee, at the same time and in regular order sign under the printed form, but in its decision the court generalizes the interpretation to include all who sign below.


Attleboro Trust Co. v. Johnson, 282 Mass. 463, 185 N.E. 19 (1933), ratifies the principle but admits evidence to show the intention of the second endorser to make the clause his own.

\textsuperscript{115} Record v. Rochester Trust Co., 89 N.H. 1, 192 A. 177 (1937), 110 A.L.R. 1218 and note (1937); criticized in 4 Univ. Pitt. L. Rev. 50 (1937). The stipulation was written before delivery to the first endorser.


\textsuperscript{117} Bigelow, THE LAW OF BILLS, NOTES, AND CHECKS, 3d ed., 338 (Boston, 1928).

\textsuperscript{117} AMERICAN INSTITUTE OF BANKING, NEGOTIABLE INSTRUMENTS 147 (New York, 1941); nevertheless, in the case of Public Investment Co. v. Stafford, (La. App.
possible for a clause to affect all endorsers despite its being written on the back of the instrument, e.g., "All endorsers of this instrument waive notice."

Sometimes the mere placement of the clause has served to determine whether the courts deem it effective or not with regard to a particular endorser. Bigelow\(^{118}\) points out that the law probably does not intend to exclude a clause written by an endorser immediately below his signature, as where, for example, the payee in discounting the instrument writes below his signature, "protest waived," a not uncommon practice.

In the case of an endorser who has signed at right angles to the clause, commencing his signature in juxtaposition thereto, the Supreme Court of Rhode Island\(^{119}\) held that he had made the clause his own. On the contrary, the Supreme Court of Michigan\(^{120}\) held that an endorser was not bound by a clause printed, not above the signature of the defendant, but on some other part of the bill.

The most important case, not only since it is the one generally cited as declaratory of the scope of the law and accepted by the majority of the writers, but also because it contains the most complete discussion of the interpretation of section 110 of the Negotiable Instruments Law, is undoubtedly that of Mooers v. Stalker.\(^{121}\) A clause excusing presentment, protest, and notice had been printed on the back of the instrument. Below it appeared three endorsements, made by the payee and two transferees. The majority of the Supreme Court of Iowa held

1940) 195 S. 817, the clause read: "We, the endorsers of this note do . . . waive protest thereof," and had been signed by the original taker; it was held that the waiver was not applicable to persons who subsequently endorsed the instrument, although the clause was in the plural.

\(^{118}\) BIGELOW, THE LAW OF BILLS, NOTES, AND CHECKS, 3d ed., 340 (Boston, 1928).


\(^{120}\) People's National Bank of Ypsilanti v. Dicks, 258 Mich. 441, 242 N.W. 825 (1932).

Cf. Stuhldreher v. Dannemiller, 26 Ohio App. 388, 158 N.E. 556 (1927); 2 Univ. Cin. L. Rev. 100 (1928); 12 Minn. L. Rev. 287 (1928); 26 Mich. L. Rev. 570 (1928). The endorsements were written at the end of the instrument opposite the clause printed on the back, suchwise that the clause was upside down and under the endorsements. It was held that it did not bind the endorsers.

\(^{121}\) Mooers v. Stalker, 194 Iowa 1354, 191 N.W. 175 (1922); 2 DANIEL, A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS, 7th ed., 1307, note 6 (New York, 1933).

For a detailed study of the cases and decisions on this matter subsequent to the Negotiable Instruments Law, see a comment in 18 Bost. Univ. L. Rev. 154-169 (1938).
that the third endorser was not a party to the clause in question and that therefore it did not bind him; that the old and differing rule of the common law existing in Iowa had been modified by section 110 of the Negotiable Instruments Law, which they interpreted in the sense that, to be able to give any meaning to the second clause, the first had to be limited to waivers appearing on the face of the instrument. Two judges did not agree to the opinion of the majority, holding that the waiver under consideration was "embodied in the terms of the instrument itself" and therefore bound all parties. They deemed the distinction contemplated by the two clauses of section 110 to be one of time and not of place, and that the first referred to waivers introduced before the instrument left the hands of the drawer and the second regarded those added thereafter. The majority opinion has been considered to be more in harmony with the spirit of the Negotiable Instruments Law, which on this point sought to amend the rule of the common law, and better from the practical point of view.

As Daniel most correctly points out, when the clause is not embodied in the instrument itself, but is made by one of the endorsers who writes some appropriate expression above his signature, the better opinion is that the excuse relates solely to the individual above whose signature it appears and does not bind others who do not make themselves parties thereto. And he bases this on the consideration that an endorsement is a separate and independent contract, embodying, it is true, the terms of the bill, but not by implication embodying the terms of other endorsements; each endorsement speaks independently of

122 The minority opinion is defended in 21 Mich. L. Rev. 697 (1923) and 7 Minn. L. Rev. 343 (1923).
123 In 8 Iowa L. Bull. 265 (1923), it is pointed out that it would permit the admissibility of extrinsic evidence to show at what moment the written waiver was placed in the instrument, which would produce uncertainty on the part of the holder at the instant of maturity, since he would not have assured knowledge whether or not he should present for collection, protest, and give notice; whereas the view of the majority would provide definite objective proof.

Cf. Sawyer, 4 Univ. Pitt. L. Rev. 50 (1937), who defends the very desirable principle that a negotiable instrument should tell its own story, and considers that the genesis of the present conflict is to be found in the decisions prior to the Negotiable Instruments Law, supporting both views.

the others and includes such terms as may be consistent with the nature of the act.

3. French System (Chile, Argentina, Bolivia, Haiti, Paraguay, Dominican Republic, and Uruguay)

This system is characterized by, among other things, the absence of rules of positive law regulating the admissibility and effects of the clause under consideration. Nevertheless, if the same be inserted by the drawer in the body of the instrument, the courts admit that such original stipulation, although not reproduced in the endorsements, affects the successive endorsers. To the same effect, Lyon-Caen declares that the clauses that appear in a bill are implied in the endorsements, that they are inherent in the instrument, but that, nevertheless, commercial usage is not completely in accord, for which reason it is prudent to repeat the clause in each endorsement.

The Union Syndicale des Banquiers des Départements is of the opinion that, in accordance with constant commercial usage, the clause retour sans frais, written on the face (recto) of a bill has no effect except when the bill has been drawn by the drawer to the order of a third party, and that it is ineffective if the bill, drawn to the order of the drawer himself, is endorsed by him to a third party without repeating the stipulation.

The Chilean writer, Davis, considers that, if one of the endorsers should refuse to accept the clause inserted by the drawer, and so speci-
fied on the bill, a holder who sought to preserve his rights against such endorser and those following, would find himself obliged to protest the bill.

If the clause is inserted by an endorser, there are some writers who consider it equivalent to a special engagement that applies to such endorser vis-a-vis the future holder, and cannot be effective except in relation to himself, the situation of each endorser being independent and not subject to modification by the terms of a prior endorsement to which he is not a party. As early as 1913, the Union Syndicale des Banquiers des Départements stated that one who endorses a bill without reproducing the clause retour sans frais assumes the entire responsibility for this lack of repetition.

Despite these opinions, what generally characterizes this system is the fact that a clause inserted by an endorser binds subsequent endorsers. Naturally, it does not affect the drawer or prior endorsers. This conception, which is maintained by the majority of the writers and the courts, is defended by Lyon-Caen and Renault, who hold that there is no reason why the transferor should not be able to modify the position of his transferees. It has been followed by some American writers and by the Chilean legislation. Within its orbit are included the American legislations which in this subject matter follow the French system, such as Argentina, Bolivia, Haiti, Paraguay, the


133 3 ARGAÑA, TRATADO DE DERECHO MERCANTIL 98 (Asunción, 1936); RÉBOURA, LETRAS DE CAMBIO, 3d ed., 378, § 307 (Paris, 1928); 1 DAVIS, LA LETRA DE CAMBIO 190 (Santiago de Chile, 1928).

134 "El endosante y endosatario pueden celebrar convenios que modifiquen los efectos jurídicos del endoso.

"Aunque tales convenios se hallen consignados en el endoso, sólo serán obligatorios para las partes y los que adquieran posteriormente la propiedad de la letra." Chile—C. Com., art. 665.
Dominican Republic, and Uruguay. This was the system approved by the International Congress of Antwerp in 1885, contrary to the anteprojet of Norsa.

4. Former Italian System (Mexico)

One method of resolving the debated problem of the scope of a waiver clause inserted by an endorser is to be found in the abrogated Italian Code of Commerce of 1865, which in turn followed the Albertine Code. It is simply to prohibit the insertion by an endorser of this clause, which is deemed in such case as not written. This solution has been adopted by Mexico, which admits only the clause inserted by the drawer and considers as not written that introduced by an endorser or by the holder. The same solution was adopted by the Brussels International Congress of 1888 but was rejected at The Hague in 1912.

In the Draft Regulation presented by the Committee of Legal Experts at the Geneva Conference, the experts adopted the view that an endorser should not be allowed to insert the clause, since, if permitted, there might exist the uncertainty whether such stipulation were applicable to the subsequent endorsers. Therefore, they proposed that when such clause was inserted by an endorser, it should be held

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135 See pp. 116-119, supra.
136 Congrès International de Droit Commercial, Anvers, 1885, Projet, art. 37, Actes 435; see introduction, id. 348 and note 3.
137 It.—C. Com., 1865, art. 261; Albertine Code, 1842, art. 189, cited by SUPINO E DE SEMO, DELLA CAMBIALE E DELL'ASSEGNO BANCARIO 353 (Torino, 1935).
138 "El girador puede dispensar al tenedor de protestar la letra, inscribiendo en ella la cláusula 'sin protesto,' 'sin gastos' u otra equivalente . . .
"La cláusula inscrita por el tenedor o por un endosante se tiene por no puesta." Mex.—L. Gen. Tit. Op. Cr., art. 141.
139 Congrès International de Droit Commercial, Bruxelles, 1888, Actes 554, Projet art. 40; this proposal of M. Vauthier (Belgium) was approved by a vote of 18 to 15, Actes 516.
140 Beichmann (Norway) proposed that insertion by an endorser should not be permitted and the complications thus avoided. The proposal was rejected. Deuxième Conférence de La Haye pour l’unification du droit en matière de lettre de change, de billet à ordre, et de cheque, 1912, 2 Actes 55.
not written, a solution which was accepted by the International Chamber of Commerce. The Convention, however, did not adopt this rule.

5. Italian System of 1882 (Brazil, El Salvador, and Peru)

Apart from certain conceptions by which it is sought to give some validity to this clause under the Italian law, it may be stated that the problem does not exist within the Italian system of 1882, since the clause is considered as not written.

6. System of the Hague Conferences (Ecuador, Guatemala, Honduras, Nicaragua, and Venezuela)

It becomes most interesting to ascertain the true scope of the rule agreed to at the two Conferences held at The Hague in 1910 and 1912, since the provisions of the Uniform Regulation approved in 1912 have been the source of the enactments of Ecuador, Guatemala, Honduras, Nicaragua, and Venezuela. The text of the Uniform Regulation is not clear on this question, and its mere reading seems to suggest an omission. This has caused the Venezuelan writer, Morales, to hold that the Hague Regulation did not solve the problem of the scope of the clause in the case of its insertion by an endorser, adding that this point is no clearer locally (referring to the Venezuelans), although he believes that what he calls the Belgian conception

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142 Report of M. Albert Troullier, id. 122.
144 Supra, pp. 125-129, Italian System.
145 It.—C. Com., art. 309; cf. 3 Vivante, TRATADO DE DERECHO MERCANTIL 427, No. 1318 (Madrid, 1936); Bra.—Dec. 2044, art. 44, II; Peru—C. Com., art. 497; El Sal.—C. Com., art. 448.
146 Ec.—L. de 5.XII.1925, art. 45; Guat.—C. Com., art. 710; Hon.—C. Com., art. 596; Nic.—C. Com., art. 644; Ven.—C. Com., art. 434.
147 “Le tireur ou un endosseur peut, par la clause de ‘retour sans frais,’ ‘sans protége,’ ou toute autre clause équivalent, dispenser le porteur de faire dresser, pour exercer ses recours, un protége faute d’acceptation ou faute de paiement.
Cette clause ne dispense le porteur ni de la présentation de la lettre de change dans les délais prescrits ni des avis à donner à un endosseur précédent et au tireur. La preuve de l’inobservation des délais incombe à celui qui s’en prétend contre le porteur.
La clause émanant du tireur produit ses effets à l’égard de tous les signataires. Si malgré cette clause, le porteur fait dresser le protége, les frais en restent à sa charge. Quand la clause émane d’un endosseur, les frais du protége, s’il en est dressé un, peuvent être recouvrés contre tous les signataires.” Hague—R.U., art. 45.
148 Morales, ESTUDIO SOBRE LA LETRA DE CAMBIO EN EL CÓDIGO DE COMERCIO VENEZOLANO 103 (Caracas, 1935).
(which has been termed above the French system) is the prevailing one, in view of the fact that the assignor or endorser can modify the condition of its assignees or endorsees.

In the report presented to the Conference (The Hague, 1910) on behalf of the Central Committee, by Lyon-Caen and Simons, it was remarked that the Committee agreed that, if the clause was inserted by the drawer, it bound all who signed, but, if it was inserted by an endorser, it would have effect only as to him. The resolution of the Committee met with no objection in the plenary session, being approved in its original wording; nevertheless, for reasons which do not appear in the Actes, in drafting the anteprojet, the last paragraph of the motion in question was modified, the specific reference to the personal limitation of a clause inserted by an endorser being omitted.

At the Hague Conference in 1912, which took as its basis the anteprojet of 1910, no objection whatsoever was made in the discussion of the text in question. At the meeting of the Committee of Revision, the only innovation, proposed by the Japanese delegate, Seitaro Tomitani, was to abandon the Hague system of 1910 and to introduce the restrictive German system, but this was not approved. In the report presented to the Conference on behalf of the Committee of Revision, concerning the modifications of the anteprojet of a Uniform Law of 1910, presented by Lyon-Caen and Simons, the position of the Central Committee of the Hague Conference of 1910 was specifically and emphatically ratified. Nevertheless, in the text of the draft Uniform Regulation presented by the Committee of Revision, the same omission

149 Conférence de La Haye pour l’unification du droit relatif à la lettre de change, de billet à ordre et de cheque, 1910, Actes 75 at 94.
150 “La clause de retour sans frais insérée par le tireur dans la lettre de change, produit ses effets à l’égard de tous les signataires, nonobstant toute stipulation contraire dans les endossements.
“Cette clause, quand elle est insérée dans un endossement, ne produit d’effets qu’à l’égard de l’endosseur qui l’y a inscrite. Dans ce cas, les frais du protêt, s’il a été dressé, peuvent être recouvrés contre tous les signataires.” Resolutions du Comité, annex to the Report, art. 73. Id. 98 at 112.
151 Sixth plenary session, id. 67-74.
152 “... Quand cette clause est insérée dans un endossement, les frais du protêt, s’il a été dressé, peuvent être recouvrés contre tous les signataires.” Avant-projet, art. 53. Id. 156.
153 Deuxième Conférence de La Haye pour l’unification du droit en matière de lettre de change, de billet à ordre, et de cheque, 1912, I Actes 33, Third plenary session.
154 2 id. 55; cf. project presented by Japan at 320.
155 “Il est important de constater (1) que la clause de retour sans frais émanant du tireur produit ses effets à l’égard de tous les signataires; (2) qu’au contraire, la
was repeated, which was reproduced in the text of the Uniform Regulation approved in the seventh plenary session, and naturally is to be found in the American legislations that have followed this regulation.

Another interesting omission, which refers to a question that has already been mentioned, relates to the possibility that an endorser of a bill that contains the clause "without costs" inserted by the drawer, may, by means of an express provision in the bill, require performance of the formality of protest (naturally only with regard to himself). The Resolutions of the Central Committee and the Hague anteprojet concretely provided that a clause inserted in a bill of exchange by the drawer, should be effective against all signatory parties, notwithstanding any contrary stipulation in the endorsements.

This point was not mentioned in the plenary session at The Hague in 1912, at which the anteprojet was discussed, nor by the Committee of Revision nor in its report. Nevertheless, for reasons that also are not to be found in the Actes, the phrase "notwithstanding any other stipulation to the contrary in the endorsements" was omitted in the draft of the Central Committee and in the Regulation as approved. As in the previous case, the omission recurs in the American texts above cited.

(a) The Geneva Convention. In spite of the report and the draft submitted by the Committee of Experts, which declared a clause inserted by an endorser to be not written, the Geneva Convention accepted the Hague system, which was defended against the experts by Quassowski (Germany), holding that in this system the effect of the clause was clear.

mème clause émanant d'un endosseur n'a d'effets qu'à l'égard de celui-ci." 1 id. 75 at 94.

156 Id. 114, art. 45.
157 "... La clause émanant du tireur produit ses effets à l'égard de tous les signataires. Si malgré cette clause le porteur fait dresser le protêt, les frais en restent à sa charge. Quand la clause émane d'un endosseur, les frais du protêt, s'il en est dressé un, peuvent être recouvrés contre tous les signataires." La Haye—R.U., art. 45, par. 3; id. 251.
158 See Davis, supra note 125, and Mackenzie, supra note 100.
159 Resolutions, art. 73, supra note 150; Avant-projet, art. 53.
160 Deuxième Conférence de La Haye pour l'unification du droit en matière de lettre de change, de billet à ordre, et de cheque, 1912, 1 Actes. 33.
161 2 id. 54-56.
162 1 id. 75 at 94.
163 Projet, art. 45; La Haye—R.U., art. 45; see note 156, supra.
164 See notes 140 and 141, supra.
This time it was expressly declared that, if the stipulation was written in by the drawer, it would be effective for all persons who had signed the bill; if inscribed by an endorser or an avaliste, it could be effective only with regard to such endorser or avaliste, in accord with the previously established principle of autonomy of endorsements, as pointed out in the report of the Drafting Committee.

If the clause is inserted by the drawer, it remains to determine whom it affects, pursuant to the expression, “all parties who have signed the bill.” This becomes important, not only in the exercise of the action of recourse, but also in actions to recover damages on accounts of protests unduly made. According to Supino and de Semo, it includes not only the avalistes, but also referees in case of need and even the acceptor. The language of the law is wider than if it were stated, “all those liable to recourse.” At the Conference, precisely in connection with the question of damages, Bouteron (France) indicated that the expression seemed to include the acceptor, and that acceptance on the part of the drawee of a bill which contained the clause “without costs” inserted by the drawer, would thus be equivalent to a conditional acceptance, as a consequence of which it would be better not to include the acceptor among “all parties who have signed the bill.” Nevertheless, the text as it had been proposed by the Italian delegation was approved.

With regard to a clause inserted by an endorser or avaliste, the principle is to limit it solely and exclusively to the party who inserted it. It has been held that, contrary to the principle of formal dependence (accessoriedad formal), the insertion of the clause by an endorser does not obviate the necessity of protest in order to sue one who has given aval for him or who has accepted the bill supra protest in his

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166 “If the stipulation is written by the drawer, it is operative in respect of all persons who have signed the bill; if it is written by an endorser or an avaliseur, it is operative only in respect of such endorser or avaliseur...” Gen.—L.U., art. 46, par. 3.


168 Id. 355, § 386.


170 Id. 298.

honor. On the contrary, Valeri holds that the principle established by article 37 of the Italian law (article 32 of the Uniform Law) with regard to aval, and by article 77 of the Italian law (article 58 of the Uniform Law) with regard to intervention, should be interpreted in harmony with the general rule of article 53 of the Italian law (article 46 of the Uniform Law), and that, on the other hand, the formulation of this general rule established in the law, does not seem irreconcilable with the assimilation, even in this field, of the legal position of the avaliste or of the intervener with that of the person for whom the aval is given or for whose honor the bill is accepted.

7. The Special Case of Cuba

As has been indicated, in Cuba the very admissibility of the waiver clause is a highly debatable problem. If the view that insertion of the clause transforms the bill into a mere promissory note is accepted, it would follow that, if the bill should originate in commercial transactions, it would be a mercantile promissory note; this would raise the problem, beyond the limits of this work, of determining the scope of the requirement of protest and even of waiver of protest in commercial promissory notes!

Among the authors who accept the admissibility of the clause without incurring such transformation of the bill, Gay de Montellá appears to ascribe to it the same effects as the Geneva Convention. Piñol Agulló seems inclined toward the French system, although he

172 Id. 380, § 273.
173 See pp. 119-125, supra, Spanish System.
174 Cuba—C. Com., art. 532.
175 "El tenedor [¿librador] de la cambial puede entregarla con la indicación inserta en la misma de que se presente a la aceptación o la cobro sin gastos, en cuyo caso el cedente protesta de los que se hagan por causa de protesto, corriendo por tanto a cargo del cesionario si se efectúan. Pero si no fuera el librador quien insertara la indicación sino que la consignara un endosatario posterior, caso de no protestarse la letra, incurirá ésta en la tacha de perjudicada, siendo responsable de la falta de protesto, el endosatario que la hubiere insertado en la letra, perdiendo su acción contra los anteriores cedentes. Deber de los endosatarios posteriores a esta indicación no puesta por el librador, es de protestarla a pesar de la indicación, si no quieren correr las consecuencias de tal cláusula..." GAY DE MONTELLÁ, CÓDIGO DE COMERCIO ESPAÑOL, tomo 3, vol. 2, 595-596 (Barcelona, 1936).
176 "Si fué el librador quien puso la indicación de sin gastos... tanto el librador como los sucesivos cedentes protestan de los gastos que puedan ocasionar el protesto y si éste se hiciese reintegrarían en su caso únicamente el importe de la cambial, es decir, es potestativo del tenedor el protestarla o no, pero los gastos corren de su cuenta.

"Mas si fuera un posterior cedente el que indicara esta cláusula y la letra no se protestase, se entenderá perjudicada para el que hubiera puesto la condición o indicación, ya que fué el culpable de la falta de protesto y así como los sucesivos cedentes
falls into an inconsistency that rather places him close to the English system, but of these, neither is clear. Blanco,\textsuperscript{177} though in a very succinct manner, accepts the solution voted by the Congress of Antwerp, namely, the French system.

The Spanish writer, Pedro Huguet,\textsuperscript{178} conceives that, if the clause has been inserted by the drawer, the bill has the character of a promissory note to order for all those who have participated in its creation and circulation, from the drawer to the last holder and the drawee, inclusively; but, if it has been inserted by one of the endorsers, the bill retains its character as a perfect bill of exchange (\textit{cambial}) for all persons who have taken part in its creation and circulation, except for such endorser in relation to the endorsees who have acquired the document after the inclusion of the clause in question. In the first case, if the drawee refuses to accept or to pay the bill, the holder does not have to protest it but should proceed as if he had a promissory note to order. In the case of insertion by an endorser, he holds that, on the contrary, it must be protested, since in such case it is necessary for the holder to prove that he made presentment in due time, in order that those who may be in position to do so may assert the liabilities accruing for failure of acceptance or payment against the person by whom they may have been incurred through fault or negligence. In such event, the holder may prosecute the action available on a perfect bill of exchange (\textit{cambial}), against any of the persons liable who did not sign after said clause, but with respect to parties thereto it is possible only for him to turn the bill over to them in order that they may refund its amount and repay the costs of the protest.

Huguet holds that such costs are to be repaid because, even if an endorsement be made with the condition “without costs” or “without protest,” nevertheless the holder, by making protest, acted as implied agent (\textit{gestor de negocios}) for the endorser, preventing the bill from

\textsuperscript{177}“El efecto que a lo sumo podía dársele era dispensar al portador del protesto, como se acordó en el Congreso de Amberes.” \textit{2 Blan\c{c}o, Estudios elementales de derecho mercantil,} 3d ed., 272 (Madrid, 1911).

\textsuperscript{178}Huguet, \textit{La letra de cambio}, 2d ed., 264 (Barcelona, 1910).
becoming prejudiced (perjudicada) and returning it in such condition that such endorser can exercise the right of re-exchange or the executory action with all its legal consequences, against the other parties liable.

8. Summary

Analyzing and summarizing the rules enacted by the American countries, it may be noted that Canada and Costa Rica follow the restrictive English principle. The United States, Panama, and Colombia follow a more liberal principle, although the majority opinion tends to impose limitations corresponding to the Hague and Geneva Conventions. Argentina, Bolivia, Haiti, Paraguay, the Dominican Republic, and Uruguay, as has been seen, follow the French system, characterized by liberality. By express enactment, Chile in this matter follows the French system. Mexico almost eliminates the problem by following the negative system of the Italian law of 1882. Ecuador, Guatemala, Honduras, Nicaragua, and Panama follow the Hague Uniform Regulation. Cuba presents a problem sui generis, with the possibility of following the system of the Geneva Convention.

Among the American draft proposals, it is noted that the Proyecto Cueto in no way modifies the position of Cuba; the Proyecto Yadarola (Argentina) accepts the principle of the Geneva Convention. We must make clear that we have referred only to the scope of the negotiatory waiver clause (cláusula cambial), i.e., of the clause appearing inserted in a bill.

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179 Can.—B.E.A., s. 34(b); C.R.—Ley de Cambio, art. 18.
180 U.S.—N.I.L., s. 110; Pan.—Ley 52 de 1917, art. 110; Col.—Ley 46 de 1923, art. 112.
181 U.S.—N.I.L., s. 110; Pan.—Ley 52 de 1917, art. 110; Col.—Ley 46 de 1923, art. 112.
182 Chile—C. Com., art. 665.
184 Bra.—Dec. 2044, art. 44, II; Peru—C. Com., art. 497; El Sal.—C. Com., art. 448.
185 Ec.—L. 5.XII.1925, art. 45; Guat.—C. Com. art. 710; Hon.—C. Com., art. 596; Nic.—C. Com., art. 644; Ven.—C. Com., art. 434.
186 See pp. 146-148, supra, The Special Case of Cuba.
187 Cuba—Comisión Nacional Codificadora, I BoLETIN DE LEGISLACIÓN 130 ff. (La Habana, 1929).
188 Arg.—Yadarola project, art. 50. INSTITUTO ARGENTINO DE ESTUDIOS LEGISLATIVOS, EL DERECHO CAMBIARIO ARGENTINO Y LA LEGISLACIÓN UNIFORME, Publicación No. 6, 30 and 123 (Buenos Aires, 1940).