

Has the ‘UN Convention on International Bills of Exchange and Promissory Notes’ Achieved Its Objective?

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ABSTRACT

There exist currently no international rules for bills of exchange, thus the United Nations Convention on International Bills of Exchange and Promissory Notes purported to meet such need. Long before that, harmonization among civil law countries was achieved by the signing of three Geneva Conventions on the Unification of the Law relating to Bills of Exchange. The model for the common law world is the UK’s Bills of Exchange Act of 1882. However, since there are several great divergences between these two systems, an international bill of exchange circulating within a common law country and a civil law country may be precluded from being commercially accepted. To overcome such a problem, the drafters of the UN Convention have opted to make a compromise between the two systems, especially by providing for aval, and introducing a totally new concept of “protected holder.”

ÖZET

Poliçelere ilişkin olarak hâlihazırda hiçbir uluslararası kural bulunmamaktadır, bu nedenle Uluslararası Poliçeler ve Bonolar hakkında Birleşmiş Milletler Sözleşmesi bu tür bir ihtiyacı karşılamayı amaçlamıştır. Bundan çok önce, Kıta Avrupası hukuku ülkeleri arasındaki uyumlaştırma Poliçelere ilişkin Hukukun Birleştirilmesi hakkındaki üç Cenevre Sözleşmesi’nin imzalanması ile başarılmıştır. Anglosakson hukuku dünyası

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için yeknesak modeli, İngiltere'nin 1882 tarihli Poliçeler Kanunu'dur. Ancak, bu iki sistem arasında bazı büyük farklılıklar olduğu için, bir Anglosakson hukuku ülkesi ve Kıta Avrupası hukuku ülkesi içerisinde dolaşan bir uluslararası poliçe, ticari kabule sahip olma özelliğinden yoksun kılınabilir. Bu tür bir sorunu gidermek için, BM Sözleşmesi'ni kaleme alanlar özellikle avalı öngörerek ve "korunan hamil" şeklindeki tamamen yeni bir kavramı getirerek iki sistem arasında bir uzlaşma yapma yolunu seçmişlerdir.

KEYWORDS: *UN Convention on International Bills of Exchange and Promissory Notes, bill of exchange, holder, aval, forged endorsement.*

ANAHTAR KELİMELEER: *Uluslararası Poliçeler ve Bonolar hakkında Birleşmiş Milletler Sözleşmesi, poliçe, hamil, aval, sahte ciro.*

I. INTRODUCTION

At the moment, there exist no international rules for bills of exchange that are widely used as a method for the financing and payment of international sales. However, there existed universal harmony in the usage thereof during medieval times that was lost after formation of independent countries. The starting point of the United Nations Convention (UNC) on International Bills of Exchange and International Promissory Notes of 1988 was to return to those times in international arena. In fact, long before the UNC, most civil law countries realized the need for harmonization in the nineteenth century and achieved such an objective by signing three Geneva Conventions on the Unification of the Law Relating to Bills of Exchange, on 7 June 1930. The substantial provisions were regulated in the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (ULB). The common law world has taken the English law and Bills of Exchange Act of 1882 (BOE) as their model. Therefore, such unification efforts were only successful to reduce the systems to two, but neither was universal like the UNC. However, what happens if two systems conflict with each other while an international bill of exchange circulates between a country using a common law system and other using a civil law system? The main rationale behind the UNC was to overcome such a problem, since the differences between common law and civil law systems are more important than other systems existing throughout the world. The objectives of the UNC can be summarized as harmonizing procedures, facilitating international trade and banking practice, bridging the gap between common law systems and civil law systems, providing uniform law, and forming a special international instrument which would circulate freely in international trade and be accepted in commercial life.¹

¹ Michael Rowe, *Bills of Exchange and Promissory Notes-Uses and Procedures in International Trade*, in THE LAW OF INTERNATIONAL TRADE FINANCE, 245, 254 (N. Horn, ed., Kluwer Law and

To achieve the objective of universal commercial acceptance, the instrument should be negotiable. With regards to the objective of free circulation, the provisions should be clearly drafted so as to create an instrument that would preclude claims and defenses while being able of adaptation to banking practices in most regimes.² However, this task of drafters was not easy, since there are several great differences in need of harmonization that were called "major controversial issues" by the drafters.³ The method was not to adopt the rules of either system, but provide solutions through the UNC to such issues that would be practical, adaptable to both systems, and consistent with the goal of the UNC to create a special instrument. Therefore, the suggestion of revising the ULB was not accepted by the UNC drafters. However, whether the result was successful in achieving the intended result will be answered in this paper. The UNC tries to bring concepts and regulations from both common law and civil law systems; accordingly, one can see that there is a compromise between two systems.

Turkey has signed, but not ratified the ULB. However, the Commercial Code of 1957 was mainly translated from the Swiss Code of Obligations. Since Switzerland has ratified the ULB, Turkey has essentially adopted the text of the ULB in its Commercial Code. Therefore, Turkey can be a good example of a civil law system in the field of bills of exchange. The Turkish Commercial Code (TCC) of 1957 regulates all negotiable instruments, including bills of exchange and promissory notes. The TCC starts with general provisions for all negotiable instruments (Articles 557-581), and then continues with specific rules for bills of exchange that correspond to provisions of ULB.

Taxation Publishers, 1989); Norbert Horn, *Payment and Financing Arrangements in International Trade*, in THE LAW OF INTERNATIONAL TRADE FINANCE, 15 (N. Horn, ed., Kluwer Law and Taxation Publishers, 1989); Carol Murray, SCHMITTHOFF'S EXPORT TRADE 386 (11th ed., Sweet & Maxwell, 2007); Gerold Herrmann, *Background and Salient Features of the United Nations Convention on International Bills of Exchange and Promissory Notes*, 4 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL BUSINESS LAW 517, 517 (1988); Roy Goode, COMMERCIAL LAW 526 (3rd Ed., Penguin Books, 2004); Anthony G. Guest, CHALMERS & GUEST ON BILLS OF EXCHANGE 6-7 (16th ed., Sweet & Maxwell, 2005); Uwe Jahn, BILLS OF EXCHANGE: A GUIDE TO LEGISLATION IN EUROPEAN COUNTRIES 6 (3rd ed., ICC Publishing, 1999); Ademuni-Odeke, The United Nations Convention on International Bills of Exchange and Promissory Notes, JOURNAL OF BUSINESS LAW 281, 281 (1992); William & Richard Hedley, Bills of Exchange and Bankers' Documentary Credits 137-38 (4th Ed., Informa UK Ltd, 2001).

² John A. Spanogle, *United Nations Convention on International Bills of Exchange and International Promissory Notes-Introductory Note*, 28 INTERNATIONAL LEGAL MATERIALS 170, 170 (1989).

³ Herrmann, *supra* note 1, at 517.

The objective of this paper is to demonstrate how the UNC finds solutions to make a compromise between two divergent systems in the field of bills of exchange and whether such a compromise can be considered to be successful. In the each section, the paper will establish first the legal statute in the two systems, then the provisions provided for in the UNC. In this way, the reader will also see the comparison between civil and common law systems. To this end, English law was chosen as an example for common law systems and Turkish law was chosen as an example of civil law systems that have adopted the ULB. The content of the paper is limited to the three “major controversial issues” existing in common law and civil law systems: nature of holders, forgery of necessary endorsement and unauthorised endorsement, and guarantee or *aval*; these are addressed in Sections II, III, and IV, respectively The paper will conclude in Section V with an overall evaluation of success of the bridge built by the UNC.

II. THE NATURE OF HOLDERS

There are four types of holders in English law: mere holder, holder for value, holder in due course, holder claiming through holder in due course. Pursuant to BOE Section 2, a holder is “payee or endorsee of a bill who is in possession of it, or the bearer thereof.” Unless it is established that he/she is a holder for value, he/she acquires the bill with all equities that can be set up against prior parties. A holder for value is defined under Section 27 (2) as a holder who himself/herself has given consideration for the bill or a holder of a bill for which any previous holder gave consideration. Although a holder for value cannot confront the defense of absence of value, he/she has the same protection as that of an assignee. According to Section 29 (1), a holder in due course is a holder who takes the bill before it was overdue, in good faith and for value, without notice of any defect and dishonor. A payee cannot be a holder in due course, since the bill must be negotiated to a holder in due course. Clearly, it is difficult to become holder in due course. Under Section 29 (3), a holder claiming through holder in due course is different from a holder in due course because he/she does not need to take the bill for value and might have notice of defect. Nevertheless, he/she acquires the same rights as those of a holder in due course against an acceptor and the parties prior to him/her. The only one that can claim better title than the respective transferor is a holder in due course, who benefits from the negotiable nature of bills. No personal defenses can be set up against holder in due course. In the case of a defect in title, a holder in due course can ask for payment from prior parties under Section 38 (2); therefore, a holder in due course gets better title than his/her endorsee defective in title. A holder in due course and a holder claiming through a holder in due

course can avail themselves of the principle of estoppel⁴ under Sections 54 (2), 55 (1) (b), 55 (2) (b) binding acceptor, drawer and endorsers. The exception to the special protection of a holder in due course is that, in the case of a forged signature, he/she can not claim against parties prior to forgery.⁵ In *May v Chapman*,⁶ G drew a bill payable to J.G. & Co. in fraud of his partner and endorsed it to B who did not know of the fraud. B later endorsed the bill to the plaintiff who knew of the fraud. The defense was held to be not successful because innocent person may transfer title to a person who is not party to the fraud despite his/her knowledge of the fraud.

According to TCC Article 558 (2), unless he/she has committed fraud or gross negligence, the debtor is discharged by paying, on the date of maturity, to the person who appears to be the creditor according to the nature of bill. The creditor who appears to be the creditor is the lawful holder and he/she can be determined in three ways depending upon the transfer method of the bill: bill payable to order, registered bill and bill payable to bearer.⁷ For a bill payable to order, a "lawful holder" is governed by TCC Article 598 (1). This Article deems a holder of a bill to be the lawful holder if he/she can prove his/her title to the bill through an uninterrupted series of endorsements, even if the last endorsement is in blank. This provision in TCC Article 598 is a result of public confidence adopted in Turkish law for bills payable to order. According to this doctrine, rights and liabilities of parties derive merely from the bill.⁸ It is to a certain extent equivalent to the concept of "negotiability" in English law.⁹ In compliance with this doctrine, a *bona fide* holder is widely protected under Turkish law. Due to the public confidence¹⁰ and abstract nature of bills, defenses that can be raised against the holder are, in principle,¹¹ only those that

⁴ Estoppel is a legal bar that prevents one from asserting a claim or a right that contradicts what one has said or done before or what has been legally established. BLACK'S LAW DICTIONARY 247 (2nd Pocket ed., West group, 2001).

⁵ Goode, *supra* note 1 at, 536-44.

⁶ *May v. Chapman*, 16M.&W 355, 360, 361 (1847).

⁷ Hüseyin Ülgen, *et al*, KIYMETLİ EVRAK HUKUKU (LAW OF COMMERCIAL PAPER) 22-23 (3rd ed., Vedat Kitapçılık, 2006).

⁸ Another result of the doctrine is the lack of means to claim defenses.

⁹ For negotiability, *see* Goode, *supra* note 1, at 519.

¹⁰ Fırat Öztan, KIYMETLİ EVRAK HUKUKU (LAW OF COMMERCIAL PAPER) 36-37 (8th ed., Turhan Kitabevi, 2004).

¹¹ Cases of unauthorized agency, incapacity, physical coercion and forged signature may be set up even if they cannot be understood by examining the bill and even against a *bona fide* holder.

originate from the bill and that can be understood by examining the bill. This gives rise to a limited number of defenses. There is one general exception to this rule – that is, the bad faith of the holder. However, the burden of proof is on the liable party, since it is not easy to prove something that does not exist.¹² Such an exception is established in TCC Article 598 (2), equivalent to ULB Article 16 (2), according to which a dispossessed person can claim the new lawful holder to retain the bill if, and only if, the holder has acquired it in bad faith, or he/she has committed gross negligence in acquiring it. Another case where bad faith should be proved is regulated under TCC Article 599, equivalent to ULB Article 17, according to which personal defenses cannot be raised.¹³ Under TCC Article 599, defenses founded on the relationships of liable persons with the drawer or with previous holders are not allowed. According to this provision, personal defenses can only be effective in limited circumstances if, and only if the holder, in acquiring the bill, has deliberately acted to the detriment of debtor. Another case where bad faith should be proved is when a blank bill of exchange is completed differently from an agreement between the parties. The principle according to TCC Article 592 is that non-compliance with the agreement to complete a blank bill cannot be raised against a *bona fide* holder. However, if the holder has acquired it in bad faith or gross negligence is imputed to him during acquisition, completion in breach of the agreement can be raised (TCC Article 592, equivalent to ULB Article 10).

One can see from above-mentioned principles that there are considerable differences between Turkish law and English law. First of all, in Turkish law, the concepts of “holder in due course” and “holder for value” do not exist and there exists only one kind of holder, the “holder.” Moreover, it is not required to have given value to be a holder. Second, bad faith is not sufficient for raising personal defences in Turkish law; in addition, the holder must act deliberately to the detriment of debtor (TCC Article 599).¹⁴ However, in English law, bad faith is sufficient to raise any personal defenses. In other words, personal defenses cannot be raised in Turkish law against a holder who only has bad faith, but does not act deliberately to the detriment of debtor, whereas they can be raised in English law against such a holder. Third, with respect to the protection of holders, Turkish law accords more protection to the “holder” than English law does to the “holder in due course,” even in the case of a holder with bad faith, unless he/she is deliberately acting to the detriment of debtor. The “lawful

¹² Hasan Pulaşlı, KIYMETLİ EVRAK HUKUKU (LAW OF COMMERCIAL PAPER) 36 (5th ed., Nobel Kitabevi, 2001); Jahn, *supra* note 1, at 13-14.

¹³ Öztan, *supra* note 10, at 37, 72.

¹⁴ Pulaşlı, *supra* note 12, at 36.

holder” has been accorded more protection than the “mere holder” as well.¹⁵ This is due to restricted variety of defences in Turkish law. Such protection may be illustrated by a case where a bill was transferred to the plaintiff through pledge endorsement and the plaintiff sued the debtor to recover the amount of the bill. The debtor in this case claimed that the bill was cancelled by the judgement of Burhaniye Commercial Court. However, the Court of Cassation (High Appeals Court – *Yargıtay*) remarked that in the mentioned judgement, the plaintiff was not a party to the action and concluded that the parties to a bill cannot set up defences, founded on their personal relations with the endorser, against a bank acquiring the bill through pledge endorsement under TCC Article 601 (2) (equivalent to ULB Article 19). Moreover, it was neither claimed nor established that the holder, in acquiring the bill, had deliberately acted to the detriment of debtor. Consequently, it was held that the defense of defendant was not acceptable.¹⁶

Given the divergence between English law and Turkish law, the task of the drafters of the UNC was to bridge the gap concerning the definition of holder, rights of holders and defences that can be raised. The UNC, in Articles 28-30, is structured as a “two-tiered system”¹⁷ that mentions two different types of holders, a “protected holder” and “holder who is not a protected holder.” The possessor of a bill is either a protected holder or an unprotected holder. One can note that “holder” is mentioned, but “holder in due course” is not mentioned. To reach a compromise, instead of using the term “holder in due course,” a new similar concept of protected holder is provided. The protected holder is defined in Article 5 (g) as a holder who meets the requirement of Article 29. Pursuant to Article 29, protected holder is the holder of a bill which was complete in acquisition or blank but completed in accordance with authority, provided that at the time of acquisition, he/she was without knowledge of defense, valid claim to the bill and dishonor of the bill, and the time limit for presentment of the bill for payment had not expired and he/she was not involved in a fraud or theft concerning the bill. In comparison with the requirements to become a holder in due course, these requirements are not many; however, in comparison to the ones to become a holder under Turkish law, these are quite a few. Moreover, under Article 30, the defenses that can be raised against a protected holder are less than the defenses that can be raised against a holder in due course, but are greater than the defenses that can be raised against a holder under Turkish law. For instance, “defenses arising from any fraudulent act on the part of holder in

¹⁵ Jahn, *supra* note 1 at 10; Spanogle, *supra* note 2 at 173; Ademuni-Odeke, *supra* note 1 at 281; Herrmann, *supra* note 1 at 526; Rowe, *supra* note 1 at 257.

¹⁶ Yargıtay, 12th Law Chamber, Case No. 1993/2315, Decision No. 1993/6229, Decision Date 7 April 1993.

¹⁷ Herrman, *supra* note 1 at 527.

obtaining the signature on the bill of that party”¹⁸ cannot be set up in Turkish law. Accordingly, both the protection and the requirements of a protected holder indicate a compromise between a holder in due course under English law, and a holder under Turkish law. The UNC does not define the “holder who is not a protected holder.” Such person could be called an unprotected holder or a mere holder. Yet, he/she is not without protection, since the defenses stated in Articles 28 (1) (b), 28 (1) (c), 28 (2) may be raised “only if he/she took the bill with knowledge of such defense or if he/she obtained the bill by fraud or theft or participated in a fraud or theft concerning it.” Therefore, the unprotected holder receives more protection than a holder in English law. These compromises may be deemed to be practical since such provisions can be applied in both systems, thereby giving rise to the free circulation of a bill, regulated by UNC, within two different systems.¹⁹ They also show that the mentality of English law may not be in conformity with the evolution of law, therefore, had to approach towards the mentality of Turkish law.

III. FORGED AND UNAUTHORISED ENDORSEMENTS

Under BOE Section 24, a forged or unauthorised endorsement invalidates the bill. Since it is a real defence, the person whose signature is forged or unauthorised will not be liable for the bill unless he/she is estopped from raising the forgery or want of authority or he/she, by his/her actions or silence, misleads others that the signature is genuine. Moreover, the person taking the bill from forger is not even a holder, even if he/she acquires it in good faith, for value and without notice of forgery.²⁰ Pursuant to Section 24, such person cannot retain the bill against claims of the person whose signature is forged or without authority, cannot enforce it against any party and cannot have title. In case of payment even in good faith, the bill is not discharged. Thus, the bank cannot debit the account of a customer who is a drawee or an acceptor, and the person whose signature is forged or unauthorised can still claim payment against the acceptor. However, the acceptor can recover from the person paying since it was money paid by mistake. The situations of subsequent endorsees are not the same because they are estopped, on the one hand, against the holder in due course from denying the genuineness of previous endorsements by virtue of Section 55 (2) (b); on the other hand, they are estopped against their immediate or subsequent endorsees from denying the validity of bill by virtue of Section 55 (2) (c). Therefore, parties subsequent to the person taking the bill from forger can claim payment from parties up to the forged endorsement and the forger, or in the case of recovery by acceptor, can claim the loss down the line. However,

¹⁸ UNC Article 30 (b).

¹⁹ Spanogle, *supra* note 2 at 173; Ademuni-Odeke, *supra* note 1 at 281.

²⁰ BOE Sec. 2 (iii).

since forgery breaks the line between a drawer and a holder, similar to the endorsee of forger, they cannot sue the parties prior to forgery and bill is not discharged by the acceptor's payment. The only exception to the non-liability of the acceptor is in the case of a fictitious payee where Section 24 is not applicable. Consequently, the person taking the bill from a forger suffers the risk of loss, because although all parties subsequent to forgery can sue him/her, he/she can only claim against forger.²¹ In *Robarts v. Tucker*,²² where the acceptor domiciled a bill for payment at a bank and the bank, without knowledge of forged endorsement on the bill, paid it in good faith, the bank was nevertheless held to be liable and was not entitled to debit the account of acceptor. It can be seen that even a holder in due course cannot sue an acceptor in the case of a forged endorsement.

The effect of a forged endorsement under Turkish law is regulated in TCC Article 589, equivalent to ULB Article 7. Pursuant to this provision, if a bill bears forged signatures, the genuineness of other signatures is not invalidated for this reason. This is the principle of the "independence of signatures," according to which every stipulation binds its signatory independent from other signatures; this also covers the validity of a stipulation.²³ Therefore, in the case of a forgery of a necessary endorsement, in contrast to English law, a bill will continue to be valid under Turkish law. The person whose endorsement is forged, however, will not be liable and can set up a defense to everyone including *bona fide* holders. I agree with Goode that this rule is more realistic for the negotiable character of bills.²⁴ Moreover, a *bona fide* person who holds the bill through such an endorsement will be able to have good title by the aforementioned Article 589(1). It is immaterial whether his/her title to the bill is through a forged endorsement. Thus, the endorsee may well use all rights deriving from the bill, such as claiming payment from anybody in the chain of liability, except for the forger and the person whose signature is forged. Pursuant to a payment by bank, a drawer's account may be debited.²⁵ The holder can also retain the bill albeit a forgery, unless if he/she acquired it in bad faith or in acquiring it was displayed gross negligence.²⁶ Accordingly, the

²¹ Guest, *supra* note 1, at 183-93.

²² *Robarts v. Tucker*, 16 QB 560 (1851).

²³ Öztan, *supra* note 10, at 70-71.

²⁴ Pulaşlı, *supra* note 12, at 34, 67; Jahn, *supra* note 1, at 9; Spanogle, *supra* note 2, at 172; Ademuni-Odeke, *supra* note 1, at 281; Goode, *supra* note 1, at 562; Guest, *supra* note 1, at 191.

²⁵ Spanogle, *supra* note 2 at 172; Ademuni-Odeke, *supra* note 1, at 281; Guest, *supra* note 1, at 191; Öztan, *supra* note 10, at 71; Mackenzie D. Chalmers, *THE BILLS OF EXCHANGE ACT 1882*, 15 (18th ed., Waterlow and Sons Limited, 1967); Herrmann, *supra* note 1, at 528.

²⁶ TCC Article 598 (2).

person whose signature is forged will only be able to get it under limited circumstances. The basis of such protection is that in accordance with TCC Article 558 (in the general provisions), equivalent to ULB Article 40, a person who pays the bill at maturity to an endorsee whose title is obtained through forgery, will be discharged unless he/she has been guilty of fraud or displayed gross negligence. Consequently, if we presume the absence of fraud on the part of the payer, under Turkish law, the person taking the bill with a forged endorsement does not suffer the loss. In such a case, the person whose signature is forged suffers the loss²⁷ since, although he/she can raise this case against everyone as a real defense and be saved from paying the holder applying to him/her, he cannot succeed in receiving his/her bill credit due to theft and the forged signature, whereas he would be a creditor and receive the bill credit at maturity if the bill had not been stolen. The person who suffers the theft may claim only damages from the forger under tort liability. In a criminal action, where the accused drew a promissory note with the handwriting of someone else, removed the stamp from another instrument bearing signature of that person, stuck it to the promissory note and gave it to the creditor stipulated on the note, the General Assembly of Criminal Chambers held that the case in which the order instrument drawn by forgery is signed by a person other than the purported drawer or the stamps bearing the signature of the debtor were removed from another place and stuck to the instrument, as in this action, did not change the character of the instrument in being an order instrument (promissory note), provided that other elements are complete.²⁸ This case may be an illustration for bills of exchange, because under Article 690, Articles 589 and 598 are applicable also to promissory notes. The effect of an unauthorised endorsement is similar to that of forgery, except for the provision under TCC Article 590, equivalent to ULB Article 8. The difference of between an unauthorised endorsee from a forger is that the unauthorized endorser will be bound personally as a party to the bill.²⁹ Therefore, a *bona fide* holder is protected more than in the case of forgery, by providing for not a liability for damages but a liability from the bill.

The UNC finds a solution in Articles 25-26 that combines the provisions in TCC articles 589 and 590, and BOE Section 24. Therefore, the UNC, at first seems to be in the middle of two systems in this respect. The justification of the drafters was that the regulations of the two systems were advantageous according to their respective considerations; therefore, the regulation of neither system should be the solution. Pursuant to Article 25, forgery of necessary

²⁷ Guest, *supra* note 1, at 191; Herrmann, *supra* note 1, at 528.

²⁸ Yargıtay, General Assembly of Criminal Chambers, Case No. 1997/6-23, Decision No. 1997/41, Decision Date 11 March 1997.

²⁹ Pulaşlı, *supra* note 12, at 35, 72.

endorsement is valid and the person claiming under forgery may present the bill for payment. This rule is the same as the one in TCC Article 589. Thus, the risk of loss falls on the person whose signature is forged.³⁰ However, the provision continues and grants a remedy to the person whose signature is forged or parties prior to forgery – a right to sue not only the forger, but also the endorsee to whom the forger transferred the bill and the party or drawee who paid the bill to the forger. At the end of the day, the loss falls not on the person whose signature is forged but on the person taking the bill under forgery. This is the same approach adopted by English law.³¹ In conclusion, the UNC was not successful in this compromise, as weird consequences may arise in the final analysis. Since the holder will be paid and later sued, the number of actions brought will increase. Article 25 also provides for an exception. If the endorsee, or the party or drawee that pays the bill is without knowledge of forgery, he/she is not liable unless this lack is due to his/her failure to act in good faith or to exercise reasonable care.³² Under Article 26, the effect of unauthorized endorsements is the same as that of forged endorsements.

IV. GUARANTEE OR AVAL

There is no concept of *aval* or guarantee specifically referred to under the BOE. Pursuant to Section 56, if a person signs a bill otherwise than as drawer or acceptor, he/she incurs the liabilities of an endorser to the holder in due course. Such person is called a quasi-endorser, but not *avaliser*, and is always a third party. He/she has a limited liability in the sense that when he/she signs the bill, he/she is not necessarily liable to every party but only against the holder in due course. This is a problem for the payee, since he/she is not deemed to be a holder in due course. The solution is to make the quasi-endorser a normal endorser by virtue of Section 20(1). In *Gerald McDonald & Co. v Nash & Co.*,³³ the quasi-endorser, by signing the bill, was held to impliedly authorize the payees to complete it by endorsing their names above that of the quasi-endorser. In the views of Ryder, as well as Bueno and Goode, Section 56 should not be interpreted to mean that a quasi-endorser is only liable to the holder in due course but should be construed to impose the same liability as that of an endorser to the holder in due course.³⁴ Even according to such interpretation, a

³⁰ See discussion in *supra* Section III.

³¹ Spanogle, *supra* note 2, at 172; Ademuni-Odeke, *supra* note 1, at 281; Herrmann, *supra* note 1, at 528.

³² UNC Article 25 (2)-(3).

³³ *Gerald McDonald & Co. v Nash & Co.*, AC 625 (1924).

³⁴ F. Ryder & Antonio Bueno, *BYLES ON BILLS OF EXCHANGE* 199 (26th Ed., Sweet & Maxwell, 1988); Goode, *supra* note 1, at 553.

quasi-endorser is liable only to parties subsequent to the quasi-endorsement, but not to prior parties. Although the quasi-endorser acts as a surety, he/she is not a guarantor in the sense of Section 4 of the Statute of Frauds of 1677. Because of its secondary obligation nature, a quasi-endorsement falls under this Statute. For a formal guarantee, in addition to signature, there are other formalities to fulfill, such as a note or memorandum in writing. Such non-compliance gives rise to many defences that can be claimed by the quasi-endorser.³⁵ In *Steele v M'Kinlay*,³⁶ where J procured his sons' acceptance, signed on the back of the bill and delivered to W; he was held to be not liable to W since he had no liability to the parties prior to the quasi-endorsement. Moreover, there existed no note or memorandum in writing of alleged collateral contract of guarantee to comply with the Statute of Frauds.

Under the specific provisions of the TCC, payment of a bill may be guaranteed, by a signature on the bill, of a third or other party to a bill.³⁷ This is called *aval*. *Aval* is an essential element in forfaiting transactions. *Aval* is not the same as the quasi-endorsement in English law. First of all, if *aval* is given for a drawee, in contrast to English law, the endorsement of payee is not required for the liability of *avaliser* to exist. The second difference is with respect to form; according to TCC Article 613, equivalent to ULB Article 31, *aval* is given either on the bill or in an *allonge*. It is expressed by the words "good as *aval*" or by any other equivalent formula and signed by the *avaliser*. However, it may be constituted by mere signature of *avaliser*. In this case, every signature on the face of bill, other than that of drawer and drawee, is deemed to be an *aval*. The third difference concerns the level of liability. *Aval* has the character of a formal guarantee. In contrast to English law, there exists only one kind of guarantor, the *avaliser*. Under TCC Article 614 (1), equivalent to ULB Article 32, an *avaliser* is liable in the same manner as the person guaranteed. This is the only concern in which the liability of *avaliser* is dependent on the liability of the person guaranteed. Moreover, pursuant to TCC Article 613 (4), *aval* must specify on whose account it is given; otherwise the TCC presumes that it is given for drawer. Accordingly, the holder will never be in doubt with regards to who is the person guaranteed. The main controversy with English law is that Turkish law has regulated *aval* as an independent guarantee under the negotiable instruments provisions of TCC, but not under the concept of suretyship in the Code of Obligations. The obvious result is that *avaliser* will not be able to set up the defenses that a surety is entitled to. Another consequence is that, as the rights of guarantor derive not from the person

³⁵ Ryder & Bueno, *supra* note 34, at 199-201; Goode, *supra* note 1, at 551-55; Guest, *supra* note 1, at 454-460.

³⁶ *Steele v M'Kinlay*, 5 AppCas 754 (1880).

³⁷ TCC Article 612.

guaranteed but from the bill, he/she acquires, when he/she pays a bill, the rights arising out of the bill against parties, liable to the person guaranteed on the bill.³⁸ With regards to the defenses of the *avaliser*, the liability of *avaliser* is independent from liability of the person guaranteed, that is, unconditional, and valid even when the liability of the person guaranteed is invalid for any reason other than defect of form.³⁹ Therefore, even when the person guaranteed is not liable, for instance in the case of a fictitious person, the *avaliser* will continue to be bound. The fourth difference is that the *avaliser* becomes liable to all parties to a bill and not only to parties subsequent to the signature of *avaliser*,⁴⁰ because under TCC Article 636 (1), equivalent to ULB Article 47 (1), all drawers, acceptors, endorsers or guarantors by an *aval* of a bill are jointly and severally liable to holder. In a case where a co-operative was the defendant, the Court of Cassation held that the position of the co-operative is as an *avaliser* pursuant to TCC Article 613 (3), because every signature on the face of bill, other than that of the drawer or drawee is deemed to be an *aval*. The Court of Cassation also confirmed that under Article 614 (1), an *avaliser* is liable in the same manner as the person for whom he/she has become guarantor.⁴¹

The UNC again provides for a two-tiered system of guarantee under Articles 46-48. The level of liabilities depends on the wording and level of the institution. If a bill contains the words "guaranteed", "payment guaranteed" or "collection guaranteed," or words to similar effect, then the guarantor may set up against protected holder only those defenses that the person for whom he/she has become guarantor may set up against protected holder. However, if the guarantee is expressed by the words "*aval*" or "good as *aval*," the guarantor may set up against a protected holder only the real defenses of fraud, presentment for acceptance or payment, due protest, and lapse of time.⁴²

In this way, the UNC allows for stronger liability and accordingly facilitates forfaiting. There is another provision indicating compromise, with respect to *avals* or guarantees, constituted by mere signatures. Such *avals* or

³⁸ Ertan Demirkapı, KAMBIYO SENETLERİNİN AVAL YOLUYLA TEMİNİ (EXCHANGE INSTRUMENT'S SECURITY BY WAY OF AVAL) 54-66 (Güncel Yayınevi, 2005).

³⁹ TCC Article 614 (2).

⁴⁰ Demirkapı, *supra* note 38, at 175; Rowe, *supra* note 1, at 245-256; Murray, *supra* note 1 at 389-391; Herrmann, *supra* note 1, at 532-533; Guest, *supra* note 1, at 459-460; Ryder & Bueno, *supra* note 34, at 206; E.P. Ellinger & Eva Lomnik, MODERN BANKING LAW 606-07 (4th ed., Oxford University Press, 2005).

⁴¹ Yargıtay, 12th Law Chamber, Case No. 1995/143, Decision No. 1995/331, Decision Date 19 January 1995.

⁴² UNC Article 47(4)(b)-(c).

guarantees are given by banks in particular. Article 47 (4) (d)-(e) creates two categories of guarantors and provide for different level of liabilities for each in the case of such *avals* or guarantees. A bank or other financial institution will be able to set up against a protected holder only real defenses mentioned in subparagraph (c); that is, the guarantee will be deemed to be an *aval*. However, other guarantors will be able to set up against a protected holder the defenses mentioned in subparagraph (b); that is, the guarantee will be deemed to be a common law suretyship with narrow liability. Consequently, the UNC distinguishes between two kinds of guarantee with regards to the defences the guarantor may set up against a protected holder. The abovementioned compromises may be regarded to be practical and successful, because the parties are given an option; therefore, provisions are adaptable to both systems and the parties can decide according to their intentions. In fact, when the common law world uses and sees the advantages of *aval* in forfaiting transactions, *aval* will become a more frequently-used aspect of the UNC.⁴³

V. CONCLUSION

The task of the UNC was to find a middle-way between the different ways of common law and civil law worlds. Clearly, while other codifications in international trade, such as INCOTERMS, were created by general consensus, because of the abovementioned disparities, there was no consensus at the beginning of the drafting of the UNC. Therefore, the drafters chose the pragmatic method by taking the benefits of international trade into account. The UNC is especially beneficial with respect to facilitating forfaiting transactions by providing for *aval*. In this respect, the UNC is more flexible than both systems. Moreover, it has brought a totally new concept of “protected holder,” however it is the only radical change. The UNC failed in one respect – by combining elements from both systems with respect to forged endorsements – since this may cause problems of interpretation in each system. Apart from the provisions for forged endorsements, the UNC is a clear compromise between the common law and civil law systems. Therefore, the objection of the ULB countries that common law systems are favored more is acceptable only in respect of forged endorsements. The common elements between the UNC and the ULB, and the UNC and the BOE give strength to the UNC and help it achieve its objective of bridging the gap.⁴⁴ As Schmitthoff has expressed, UNC proves that realisation of codifying international trade law is “not utopian.”⁴⁵

⁴³ Herrmann, *supra* note 1, at 533-534.

⁴⁴ Jahn, *supra* note 1 at 7; Spanogle, *supra* note 2 at 173; Ademuni-Odeke, *supra* note 1 at 281.

⁴⁵ Clive M. Schmitthoff, *The Codification of the Law of International Trade*, JOURNAL OF BUSINESS LAW 34, 34 (1985).