AVALS AND QUASI-INDORSEMENTS OF NEGOTIABLE INSTRUMENTS: A Comparison of Civil Law and Common Law Approaches

ROBERT LOMBARDI*

PART A: INTRODUCTION

To facilitate the negotiation of a bill of exchange, a creditworthy party may lend his credit to the bill by guaranteeing payment by the party on whose behalf he intervenes. Such party signs not in a formal capacity as drawer, acceptor or indorser, but simply on the back of the bill and is therefore said to "back" the bill. A similar principle applies to promissory notes. In civil law countries this form of surety is termed an "aval" and is common in commercial practice. By contrast, most common law countries have not adopted the aval but have achieved the same practical result through the principle of "quasi-indorsements" in conjunction with a series of fictions and expedients.

This article compares the civil law and common law approaches to the principle of the aval by analysing three different implementations of the aval principle and discussing the implications of such differing implementations on international finance generally and to the developing area of forfaiting trade finance in particular.

This article is divided in the following way:

Part B: The Commercial Application of Avals.
Part C: The De Jure Aval: The Civil Law Approach.
Part D: The De Facto Aval: The Common Law Approach.
Part E: The Transposed Aval: Canada and South Africa.
Part F: Recent UNCITRAL Proposals.
Part G: Avals in the Context of Forfaiting Financing.
Part H: Conclusion.

PART B: THE COMMERCIAL APPLICATION OF AVALS

Avalising a bill or note is well recognised in civil law countries in both domestic and international finance.[1] In common law countries, avals have only been directly adopted in connection with forfaiting arrangements in respect of trade finance and even in this respect their status remains unsettled (See Part G below).

*B.Ec., LL.B., solicitor with Freehill, Hollingdale & Page (Melbourne).

[1] See generally, C.M. Schmitthoff, *Schmitthoff's Export Trade* (8th edition, Stevens & Sons, 1986) at pp. 327-328; and Alasdair Watson, *Finance of International Trade* (3rd edition, Institute of Bankers, 1985), Chapter 7.

First, only a time bill, and not a sight bill, can be avalised. An aval cannot be given by a drawer or acceptor as they are already liable on the bill and an aval is, by its nature, the added liability of a stranger to the bill. An aval is a stronger form of surety than a guarantee. An aval giver will be liable even if the liability which he has guaranteed is void for any reason, other than faulty drafting: Article 32(2) of the Geneva Uniform Law, discussed below in Part C. This is in contrast to a guarantee, which is valid only if the principal liability for which the surety has been given is valid[2].

An aval granted by a bank can be distinguished from an acceptance credit by a bank. In the former case the bank, as avaliser, adds its signature to that of the acceptor (or other party). But in the latter case, the bill is drawn on the bank who signs as one of the original parties to the bill.

Commercially, the aval of a bank of a creditworthy party adds considerable security to a bill or note and hence greatly facilitates its negotiability. Consequently, the charges of an avaliser of sound creditworthiness for adding its liability are likely to be high.

Avals play an important role in the emerging area of forfaiting finance for international trade, a market based in London with a volume of US$20-30 billion of outstanding debts in 1988 (See Part G of this article).

Avals can also be used in connection with transport documents.[3] In this case, if under a collection arrangement the documents are to be presented to the acceptor of the bill (who in the sales transaction will be the buyer) it may be a condition precedent of the release of the documents to him that he obtains a creditworthy aval. Or, conversely, the acceptor can make the procurement of the aval by him conditional on the documents being released to him first. This combination of the financial and the documentary aspect bears some similarity to a letter of credit transaction, but cannot replace the latter and does not give the export seller the same financial assurance as, for example, an irrevocable and confirmed letter of credit.

In the United States, the Uniform Commercial Code provides that the equivalent of the aval is the inscription "payment guaranteed" on the bill of exchange.[4]

PART C: THE DE JURE AVAL: THE CIVIL LAW APPROACH

The basis for the law of negotiable instruments in most civil law countries is the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes signed in Geneva on 7th June 1930 by delegates of 26 nations ("the Geneva Uniform Law") which now applies to about 70 countries in the world including most of Europe and South America, as well as China, Japan and (inter alia) to the Soviet Union.[5]

[2] Dick Easton, "Practical Problems of Forfaiting" a paper delivered to the *Euromoney Seminar on Trade Finance*, London on 20th March, 1984.

[3] See Schmitthoff, supra at note 1, at pp. 327-328.

[4] *American Uniform Commercial* Code, S.3-416(1).

[5] On the scope of the Geneva Uniform Law generally, see Feller and Hudson, "International Unification of Laws Concerning Bills of Exchange" (1931) 44 *Harv. L. Rev.* 333.

However, the effectiveness of the Geneva Uniform Law was limited by the fact that it was not acceded to by any of the common law countries. The United Kingdom did not accede to the Convention mainly because it would disrupt the uniformity on bills of exchange law that had been achieved throughout its colonies and dominions, and, because the Geneva Uniform Law was on the eve of the Statute of Westminster, the United Kingdom claimed it would not have the constitutional power to create a new uniformity. The United States did not accede mainly for it had only recently achieved national uniformity on the law of bills of exchange and considered it undesirable to have new upheaval in the law so soon thereafter.

The effect of this was to have the law on bills of exchange and promissory notes in most nations based on one of two main systems: the Geneva Uniform Law or the common law system. Many of the provisions between the two major systems are of course consistent or equivalent. However, one of the significant differences was that most of the common law systems had no equivalent of the aval. The reason for this is explained in Part D of this article; this part examines the Geneva Uniform Law provisions concerning the aval.

The relevant Articles of the Geneva Uniform Law are:

Article 30: Guarantee by "Aval"

(1) Payment of a bill of exchange may be guaranteed by an "aval" (*Wechselburgschaft*) to the whole or part of its amount.
(2) This guarantee may be given by a third person or even by a person who has signed as a party to the bill.

Article 31: Form of "Aval"

(1) The "aval" is given either on the bill itself or on an "allonge".
(2) It is expressed by the words "good as aval" (*"bon pour aval"*) or by any other equivalent formula. It is signed by the giver of the "aval".
(3) It is deemed to be constituted by the mere signature of the giver of the "aval" placed on the face of the bill, except in the case of the signature of the drawee or of the drawer.
(4) An "aval" must specify for whose account it is given. In default of this it is deemed to be given for the drawer.

Article 32: Liability of Giver of an "Aval"

(1) The giver of an "aval" (*Der Wechselburge*) is bound in the same manner as the person for whom he has become guarantor.
(2) His undertaking is valid even when the liability which he has guaranteed is inoperative for any reason other than defect of form.
(3) He has, when he pays a bill of exchange, the rights arising out of the bill of exchange against the person guaranteed and against those who are liable to the latter on the bill of exchange.

The foregoing Articles providing for the aval is one of the few significant divergences between the bills of exchange law of the Geneva Uniform Law and that of the common law countries. Articles 30-2 of the Geneva Uniform Law have given rise to little litigation or practical problems, except for two contentious issues concerning Articles 31(2) and (4).

In relation to Article 31(4), the issue is: can the presumption in favour of the drawer's obligations be rebutted by evidence other than an express

statement that the aval giver intended to guarantee the drawee's obligations?[6] In the Federal Republic of Germany, the Supreme Court has adopted the approach that Article 31(4) is only a rule of interpretation which is capable of being rebutted by evidence that the aval is given for the account of the drawee.[7] In one case the Supreme Court held that the presumption had been rebutted by the fact that the aval giver's signature was placed crosswise below that of the acceptor.

The French courts have adopted the opposite interpretation of Article 31(4). Two Court of Cassation decisions[8] held that because of the formalistic character of the Geneva Uniform Law, the presumption of Article 31(4) could not be rebutted. The Court of Cassation suggested that Article 2011 of the French Civil Code could be used to achieve the same effect, but subsequent practice has shown that this has not always been the case.[9]

Switzerland has adopted yet a third construction of Article 31(4). The Swiss Courts[10] had construed the word "specify" in the sub-article to include implied specification and have held that the signature by the aval-giver in close proximity to the signature of the acceptor or drawer was such as implied specification. Thus, the Swiss Courts have been able to achieve the same equitable result as the German Courts without entering into the controversy of whether the presumption is rebuttable or not. However, as has been pointed out[11], although the Swiss interpretation gives effect to the avaliser's true intention, it deprives Article 31(4) of any real meaning for it is difficult to see where an aval-giver can place his signature except below that of the drawer or acceptor.

The only other aspect of the aval provisions of the Geneva Uniform Law which have attracted contention has been Article 31(2). At issue is what is the position if words "good as aval" (or of similar import) do not appear, for if an aval-giver signs on the reverse of a bill without such words, there is no presumption of an aval having been given. However, this issue has not been significant because in practice evidence can normally be adduced to establish that the purpose was to grant an aval.[12]

PART D: THE DE FACTO AVAL: THE COMMON LAW APPROACH

The earliest principal English case to consider the aval was *Jackson* v. *Hudson*[13] in 1810. In that case, A drew a bill on B who accepted it. Under B's acceptance X wrote: "Accepted, X", and gave an oral guarantee to pay if B dishonoured. In an action by A against X, it was held by the Court of

[6] On this issue, see generally: O.C. Giles, *Uniform Commercial Law.* (A.W. Sijthoff, 1970) at pp. 155-166.
[7] BGHZ 34, 179, 181 (1961). Cited in Giles at 157.
[8] 23.1.56, 1956 Dalloz 304 and 18.11.57, 1958 Dalloz 29.
[9] For a discussion on this point, see Giles, supra at note 6, at pp. 160-161.
[10] See Giles, supra at note 6, at p. 161-164 for a line of Cantonal and Supreme Court decisions.
[11] Id. at p. 164.
[12] Id. at p. 164.
[13] (1810) 2 Campbell 447; 170 E.R. 1213.

King's Bench that X was not liable as an acceptor because he signed as stranger. Lord Ellenborough held:

> "If you had declared that, in consideration of the plaintiff selling the goods to Irving, the defendant undertook that the bill should be paid, you might have fixed him by this evidence. But I know of no custom or usage of merchants, according to which, if a bill be drawn upon one man, it may be accepted by two."[14]

Therefore, it appears the first reason the aval was not accepted was because the aval-giver did not meet the requirement of privity between the aval-giver and the person secured. The other major reason was that because the aval was a contract of suretyship it was required by Section 4 of the *Statute of Frauds* 1677 (U.K.) to be evidenced by a note or memorandum in writing signed by the surety; this reason was clearly established by the case of *Steele* v. *M'Kinlay*.[15].

In *Steele* v. *M'Kinlay,* A drew a bill on B payable to A's order. B accepted and X wrote his name on the back to guarantee B's acceptance, and thereafter A indorsed below X. In an action by A against X, judgment was given in favour of X because X, not being a drawee, could not be liable as an acceptor. Lord Blackburn held:

> "By the old foreign law, not in this respect entirely adopted by English law, this [ie. making X liable] might be done by what was called an *aval* (said to be an antiquated word signifying "underwriting") . . . An *aval* for the honour of the acceptor, even if on the bill, is not effectual in English law . . . But the indorsement by a stranger to the bill on it to one who is about to take it is efficacious in English law, and has the same effect as an *aval* . . . such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subsequently."[16]

Therefore, had it not been for Section 4 of the *Statute of Frauds*, A could have adduced evidence to show that the reason X signed the bill was to guarantee the obligation of B, and X would have been bound by that guarantee. It has been stated by one commentator that this, "the real point of the decision was lost, and the rule has constantly been stated in the form "no *aval* – no guarantee for the honour of the acceptor" ".[17]

This rule of law was subsequently enacted in Section 56 of the English *Bills of Exchange Act* 1882 (U.K.) and adopted verbatim in Australia by Section 61 of the *Bills of Exchange Act* 1909-1971 (Cth) which reads:

> "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to the holder in due course."

This rule is further sanctioned by the provisions of the *Bills of Exchange*

[14] 170 E.R. 1213 at 1214.
[15] (1880) 5 App. Cas. 754.
[16] (1880) 5 App. Cas. 754 at 772.
[17] *The Emerging Money Market* (Monash Law School and the Accepting Houses Association of Australia, 1976) at p. 48, per Professor David E. Allen.

Act providing for accommodation parties[18] and accommodation bills.[19] A stranger who signs as the type of "indorser" foreseen by *Steele* v. *M'Kinlay* and Section 61, is not a true indorser for he has no right to the bill and cannot transmit it. Therefore, such a party is variously termed a "quasi-indorser", "anomalous indorser" or "irregular indorser". (The term quasi-indorser is used in this article).

It is clear from both Section 61 of the *Bills of Exchange Act* (Cth), as well as *Steele* v. *M'Kinlay,* that the quasi-indorser is liable to a subsequent holder, just as an aval-giver would be. The important difference is that a quasi-indorser is not liable to a prior holder, whereas an aval-giver would be. This is a significant difference because if the principle of the aval had been applied in the cases of *Jackson* v. *Hudson* and *Steele* v. *M'Kinlay,* then the prior holders in those two cases would not have suffered the injustice they did in not being able to recover from the quasi-indorser. It has been pointed out that in both those cases the quasi-indorser would have undoubtedly been liable as aval-givers had those actions come before any court which adopted the civil law doctrine of the aval.[20]

In order to overcome this injustice to the prior holder, the courts of common law countries have constructed a series of fictions and expedients to make the quasi-indorser liable to prior holders. In doing so, they achieve what is in effect a de facto aval: that is, the surety giver being liable to both prior and subsequent holders. However, the grounds upon which the common law courts have constructed these judicial expedients are quite tenuous, as the following cases demonstrate.

In *Re Gooch*[21], A drew a bill and B indorsed it back to A. B argued that he was not liable under the principle of *Steele* v. *M'Kinlay* because A was a prior party. Scrutton L.J. rejected this contention because "where the relations between the prior parties are such that the second could not sue the first, the fact the third party is also the first is no answer for the second party when sued by the third."[22]

In *Wilkinson* v. *Unwin*[23], A first indorsed the bill to the quasi-indorser, X, who then re-indorsed it back to A. X could not sue B by reason of B's antecedent indorsement. The court held that this circularity of action could be avoided because there was clear evidence of X's intention to be liable. This ratio is out of line with the House of Lords decision in *Steele* v. *M'Kinlay* and in *Duthie* v. *Essery*[24], Burton J.A. described this reasoning as a "clumsy contrivance".

In *Jenkins* v. *Coomber*[25], B accepted a bill drawn by A payable to A's own order. X quasi-indorsed the bill and A later indorsed it. In an action

[18] S.33 *Bills of Exchange Act* 1909-1971 (Cth.); S.28 *Bills of Exchange Act* 1882 (U.K.).
[19] S.64(3) *Bills of Exchange Act* 1909-1971 (Cth.); S.59(3) *Bills of Exchange Act* 1882 (U.K.).
[20] Per Professor Denis Cowen, Infra at note 39, at pp. 221-222.
[21] (1921) 2 K.B. 593.
[22] (1921) 2 K.B. 593 at 605.
[23] (1881) 7 Q.B.D. 636.
[24] (1895) 22 O.A.R. 192.
[25] (1898) 2 Q.B. 168.

by A against X it was held that X was not a quasi-indorser pursuant to Section 56 of the *Bills of Exchange Act* (U.K.) because X had indorsed it prior to the indorsement of A (to whom it was payable). This precluded A being a "holder in due course" per Section 56 because he had not taken a bill "complete and regular" on the face of it. It is clear A would have been liable under an aval, had it been applicable.[26]

However, *Jenkins* was confined to its facts by *McDonald (Gerald) & Co.* v. *Nash & Co.*[27] In that case, B drew a bill on A payable to B's order. X indorsed it by signing the back of the bill, and later B signed above X's signature; however, to be proper, B ought to have signed before X. X argued that B was not a holder in due course because the bill was not "complete and regular", so held in *Jenkins*. The House of Lords distinguished *Jenkins* because in the case before it, it was orally agreed that X would guarantee the bill, and this agreement had the effect of making the bill complete and regular. The House of Lords further held that B had X's implied authority to sign after X's signature, thus the bill became retrospectively enforceable by B. Both these grounds appear to be essentially fictions to achieve what is in effect an aval, thus providing an equitable result in that case.

In *National Sales Corporation* v. *Bernardi*[28] the drawer indorsed the bill both in wrong chronological order as well as on the wrong part of the bill. The court rejected the quasi-indorser's argument that the bill was not complete and regular by saying that the intention of the parties rectified the irregularity. This case is difficult to reconcile with *Jenkins* v. *Coomber*, which was not considered in the judgement.

In *McCall Brothers* v. *Hargreaves*,[29] the quasi-indorser and drawer signed in wrong chronological order, as well as in the wrong place. The court simply applied *Bernardi* and held that the parties' intention rectified the irregularity. The court further held that although the parties' intention was only evidenced in oral form, the quasi-indorser was not entitled to set up Section 4 of the *Statute of Frauds* as a defence. This ratio is also difficult to reconcile with *Steele* v. *M'Kinlay* or *Jenkins* v. *Coomber*.

The Australian courts have also followed the British practice of adopting a series of fictions to construct a de facto aval in order to prevent an injustice being suffered by the prior indorser. One of the earliest cases was *Ferrier* v. *Stewart*[30] where the indorser signed his name both before and after the quasi-indorser's signature. The reason for this was that the promissory note was being renewed. The quasi-indorser invoked *Jenkins* v. *Coomber* and *Steele* v. *M'Kinlay* and argued that the payee was a prior indorser. The High Court of Australia was able to easily distinguish those two cases because in the present case the payee signed both before and after the quasi-indorser, and hence did not need to invoke a principle akin to the aval.

[26] Cowen, Infra at note 39, at p. 223.
[27] (1924) A.C. 625.
[28] (1931) 2 K.B. 188.
[29] (1932) 2 K.B. 423.
[30] (1912) 15 C.L.R. 32.

In *Freedman & Co.* v. *Dan Che Lin*[31] the quasi-indorser signed the promissory note before it was indorsed by the drawer-payee. The Supreme Court of Western Australia did not apply the fiction used in *Bernardi* or *McDonald* but applied a novel fiction: that the quasi-indorser and the drawer-payee were in fact joint promisors and the quasi-indorser was liable to that capacity. This ratio is unsupportable by any precedent.

The most recent Australian decision on this issue is the decision in the Supreme Court of New South Wales of Sheppard J in *H. Rowe & Co. Pty. Ltd.* v. *Pitts*[32], described by one commentator as a "bold and innovative decision".[33] In that case, B accepted a bill of which A was a drawer-payee. The bill was quasi-indorsed by X. B dishonoured and the drawer-payee sued the quasi-indorser for recovery. Sheppard J. held that Section 61 of the *Bills of Exchange Act* (Cth.) had no application because "it does not, as was submitted on behalf of the plaintiffs, confer rights of the nature therein referred to upon person other than holders in due course. I think this was the clear view of the judges in *Durack* v. *West Australian Trustee Executor & Agency Co. Ltd.*[34]."[35] However, Sheppard J. found that the quasi-indorser was liable on an alternate basis:

> "What it comes down to is that a person who signs a bill in order to back it will be liable to the drawer, in the event of dishonour, if it was his intention to make himself so liable when he signed the bill."[36]

This reasoning, however, circumvents the clear words of Section 61 of the *Bills of Exchange Act* (Cth.) which provides that the quasi-indorser is only liable to a "holder in due course" and not any holder for value, and is unsupported by any common law precedent except for cases like *Bernardi* which are themselves out of line with precedent. However, as has been writted by one commentator, it "is to hoped that his Honour's approach will remain undisturbed as it plainly does justice by recognising the realities of modern commercial transactions".[37]

In summary, the implication in the above cases is that the courts in Britain and Australia will, in the effort to give effect to commercial reality, normally attempt to construct an expedient or fiction to make the quasi-indorser liable to the prior holder as well as the subsequent holder, thus achieving a de facto aval.

But this approach is not entirely satisfactory for two reasons. First, there is no guarantee that the courts will always oblige by constructing an expedient: for example, *Jackson* v. *Hudson*, *Steele* v. *M'Kinlay* and *Jenkins* v. *Cooper*. Secondly, even if the court does oblige, the use of fictions, expedients or

[31] (1905) 7 W.A.L.R. 179.
[32] (1973) 2 N.S.W.L.R. 159.
[33] M.J.L. Rajanayagam, *The Law Relating to Negotiable Instruments in Australia* (Butterworths, 1980) at p. 91.
[34] (1944) 72 C.L.R. 189.
[35] (1973) 2 N.S.W.L.R. 159 at 168.
[36] (1973) 2 N.S.W.L.R. 159 at 167.
[37] Rajanayagam, supra at note 33 at p. 92.

"clumsy contrivances" to evade the clear meaning of legislation and House of Lords authority does not engender public confidence in the law. A more satisfactory solution would simply be to amend the Bills of Exchange Acts to adopt in direct *de jure* fashion the civil law aval. This is discussed further in the conclusion (Part H) of this article.

PART E: THE TRANSPOSED AVAL: CANADA AND SOUTH AFRICA

Although most common law countries have adopted the English approach of not recognising the aval, a number of common law jurisdictions have done so, due to particular vicissitudes of their history. This Part looks in particular at the law of South Africa (where the aval was introduced via its Roman-Dutch law legacy) and the law of Canada (where the aval was adopted via the civil law tradition in Quebec).

Turning to South Africa first. When the general body of Roman-Dutch law was introduced into South Africa from Holland in 1652 (thus becoming South African common law), it included the early customary rules on bills of exchange known as the *wisselrecht*.[38] The law concerning the aval is one of the few areas where the *wisselrecht* still have any practical application today.

The aval of Roman-Dutch law was a surety given by a stranger to a bill or note, whereby he assumed the same liability as the party for whom he intervened. The only formality required was that the aval-giver clearly state on the face of the bill his intention to guarantee payment thereof. This statement of intention did not need to be express: an unqualified signature other than that of an ordinary party to the bill was prima facie deemed to be an aval. The quality that distinguished the aval from other varieties of suretyship was that it flowed with the bill as it was negotiated without the need for continual cession by the aval-giver. This quality, of course, was critical to the efficacy of bills of exchange.[39]

This was the position at South African common law when the *Bills of Exchange Act,* No. 34 of 1964, replaced the four pre-Union enactments by one uniform law for the whole Republic. Section 54 of that Act provides that: "if a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course". Although this section replicates Section 56 of the British *Bills of Exchange Act* it has had the opposite consequences. Section 56 of the British Act had the result of making the law clear for holders in due course and uncertain for prior holders. The equivalent section of the South African Act made the law uncertain for holders in due course, but clear for prior holders. The reason for this inversion is the interaction of the common law aval on the South African legislation.

[38] For a general history of negotiable instruments in South Africa, see Cowen, D.V. *The Law of Negotiable Instruments in South Africa* (5th Edition, Juta & Co. 1985) Vol. One, at pp. 112-117 and pp. 132-134.

[39] For a general discussion, see Cowen, D.V. and Gering L. *Cowen on The Law of Negotiable Instruments in South Africa* (4th Edition, Juta & Co. 1966) at pp. 215-20.

The law respecting prior holders is settled because it is governed entirely by the Roman-Dutch common law rules of aval described above. It was held in the leading case of *Moti & Co.* v. *Cassim's Trustee*[40] that Section 54 had no operation in respect of prior holders. In that case the Apellate Division of the South African Supreme Court held that a prior holder could not use Section 54, for they were expressly excluded by the section, but in any event could always obtain redress by suing the aval-giver at common law on the aval itself. The reason the British section has caused difficulty was that there was no principle of aval to give redress to prior holders. Undoubtedly in cases like *Jackson* v. *Hudson* and *Steele* v. *M'Kinlay* a South African court would have dealt with each case as an instance of an aval and would have avoided the injustice to the prior holder done in those cases: per Innes C.J. in *Moti's* case.[41]

By contrast, the position regarding subsequent holders still remains unsettled at South African law.[42] At issue is whether an aval-giver, whether he does or does not expressly state that he is signing as surety, incurs the liabilities as an indorser by imposition of Section 54. The reason for the uncertainty is that there is one case answering the question in the affirmative,[43] another answering in the negative[44] (the Canadian Courts adopt the affirmative view, see infra) and a third concluding that the question did not require an answer because in either case the signer was still liable at common law as an aval-giver.[45] This state of uncertainty is heightened by the fact that legal commentators in South Africa are also at variance in their views on this issue.[46] Professor Cowen has written that "in the present state of authority it would be presumptuous to venture a dogmatic answer to this difficult question".[47] The most recent case on this question is the case of *Lion Mill Manufacturing Co. & Ano.* v. *New York Shipping Co.*[48] In that case the third defendant signed the reverse of a promissory note that expressly indicated that he was signing in capacity as surety. The Transvaal Province of the Supreme Court held:

> "Where a person signs on the reverse side of a note and indicates expressly or otherwise that he is merely signing as a surety the provisions of Sec. 54 are in my view excluded. Where *ex facie* a note it is obvious that the signatory is an *aval* only, his liability is that of surety and no more."[49]

It is clear that this holding would apply to bills as well as promissory notes. However, pending a determinative decision by the Apellate Division the issue

[40] 1924 A.D. 720 at 723-727.
[41] 1924 A.D. 270 at 728-29.
[42] See generally on this issue, L.R Carney *The Law of Surety ship in South Africa* (2nd Edition, Juta & Co. 1970) at pp. 60-61.
[43] *National Bank of South Africa* v. *Seligson* [1921] W.L.D. 108 at 116. Cited in Cowen supra at note 39, p. 234.
[44] *National Acceptance Co. (Pty.) Ltd.* v. *Robertson* [1938] C.P.D. 175.
[45] *Piemer* v. *Finbro Furnishers (Pty.) Ltd.* [1936] A.D. 177.
[46] This whole issue is covered at length in Cowen, 4th ed., supra at note 39, at 229-237.
[47] Id., at 232.
[48] (1974) 4 S.A.L.R. 984.
[49] (1974) 4 S.A.L.R. 984 at 990.

of what effect Section 54 has on the common law aval remains unsettled.

Canada is another predominately common law country that has adopted the civil law principle of aval in a direct *de jure* manner. A brief legislative history is given by MacClaren J.A. of the Ontario Court of Appeal in *McDonough* v. *Cook*:[50]

> "Before the [Bills of Exchange] Act of 1890 such an indorsement was well known in the Province of Quebec as as "aval" and the party so signing was liable under Article 2311 of the Civil Code, without notice of dishonour . . . When Sec. 56 of the bill of 1890 [currently, S.131] was under discussion in the Senate, it was decided to recognise such indorsement and to adopt the Quebec doctrine, but to treat the 'aval' as an ordinary indorser and give him notice of dishonour."

Section 131 of the Canadian *Bills of Exchange Act* provides:

> "When a person signs a bill otherwise than a drawer or acceptor her hereby incurs the liabilities of a holder in due course and is subject to all the provisions of this Act respecting indorsers."

The last twelve words of this section do not appear in the equivalent sections of the Australian (Section 61) or British (Section 56) *Bills of Exchange Act*. MacClaren J.A. (supra) has pointed out that the intent of the last twelve words was to incorporate into Canadian law the civil law doctrine of the aval. However the words did not say so expressly and there was at the time academic debate on the issue with Byles[51] arguing they did and Falconbridge[52] arguing that they did not.

The issue was settled by the leading Supreme Court of Canada decision of *Robinson* v. *Mann*[53] in which it was held that the last twelve words did import the doctrine of aval. In that case, the quasi-indorser signed the back of a note as surety for the maker, before it was indorsed by the maker. The maker subsequently executed a chattel mortgage to the defendant to indemnify him against the payment of the note. Upon the maker's failure to pay the note on maturity, the quasi-indorser paid it. The maker afterwards made an assignment for the benefit of his creditors, and an action was brought by the assignee to set aside the mortgage as fraudulent and void as against the creditors. The Supreme Court held that the payee was a holder in due course and the quasi-indorser was liable under section 131. Strong C.J. held:

> "When the bank took the bill was it not entitled to the benefit of the respondent's liability as indorser? Certainly it was, for by force of the statute [section 131 of the *Bills of Exchange Act*] the indorsement operated as what has long been known in the French Commercial Law as an 'aval', a form of liability which is now by the statute adopted in English law."[54]

Byles[55] points out that by "English law", Strong C.J. almost certainly means "Canadian law" because there is nothing in the English cases above set out

[50] (1909) 19 O.L.R. 267 at 272-273.
[51] *Byles on Bills of Exchange* (25th Ed., Sweet & Maxwell, 1983) at p. 190.
[52] Falconbridge *Banking and Bills of Exchange* (4th Ed., 1929) at 753-754.
[53] (1901) 31 S.C.R. 484.
[54] (1901) 31 S.C.R. 484 at 486.
[55] Byles, supra at note 51, at p. 190.

to justify the contention that the principle of the aval has been recognised by the English, as distinguished from Canadian law, since the passing of the Code. In this respect, therefore, the English and Canadian cases are in sharp contrast.

To summarise, both Canada and South Africa have in a direct *de jure* manner adopted the civil law doctrine of aval, by reason of civil law traditions in their respective histories. However, the two nations have taken opposite positions as to the relationship between the civil law aval and the common law provisions concerning quasi-indorsers in their respective bills of exchange legislation. The most recent case in South Africa has held that the civil law principles of aval are not to have super-imposed upon them the common law provisions concerning quasi-indorsers as found in the South African *Bills of Exchange Act*. By contrast, Section 131 of the Canadian *Bills of Exchange Act* expressly states that the aval giver is subject to all the provisions of that Act respecting indorsers.

PART F: RECENT UNCITRAL PROPOSALS

Editor's note: The Sixth Committee of the General Assembly established on 23rd September, 1988 a Working Group to consider the draft convention. The Working Group recommended the draft adopted by Unictral at its 20th session with some minor amendments (none relevant to the aval provisions). That draft was then adopted by the General Assembly at its 43rd session in October, 1988.

As mentioned above, the substantive law on negotiable instruments in most countries is based either on the Geneva Uniform Law of 1931 or on the British *Bills of Exchange Act* of 1882. This dichotomy has important ramifications for international trade where much of the payments between traders is effected by bills of exchange or promissory notes. The problems created by bills and notes passing between the two legal regimes has received the attention of the United Nations Commission on International Trade Law (UNCITRAL) which was formed in 1966 to assist the removal and reduction of legal obstacles in international trade.[56] The culmination of UNCITRAL's work on this point was the Draft Convention on International Bills of Exchange and International Promissory Notes adopted by UNCITRAL at its Twentieth Session (20th July – 14th August 1987)[57] ("the Draft Convention").

The Draft Convention applies only to international bills of exchange and international promissory notes of the Draft Convention and the Draft Convention is a self-contained system of negotiable instruments law within that ambit. The application of the Convention would be optional, not mandato-

[56] For a brief survey of UNCITRAL's work in international payments see generally, I Mezneries, *The Law of Banking in East West Trade* (Sitjhoff/Oceana, 1973), Chapter 17.

[57] *Report of the United Nations Commission on International Trade Law on the work of its twentieth session* (20 July – 14 August 1987) Supplement No. 17 (A/42/17). For a summary of the history and objectives of the draft, see the Report of the Secretary General in the *UNCITRAL Yearbook*, (1982, Volume XIII) at pp. 122-125.

ry: Article 1 of the Draft Convention. The Draft Convention is largely based on a detailed questionnaire drawn up by the Secretariat on the issue and circulated to governments, banks and trade institutions for their response and suggestions. The Draft Convention reflects a deliberate policy to minimise departures from the two legal regimes, as far as this was possible. Where the systems concur on a rule, the Draft Convention has normally adopted that rule. Where the systems differ, the Draft Convention either compromises, or chooses the rule most consonant with current commercial practice and needs.[58]

The notion of the aval is one of the areas where the two systems differed.[59] This difference is more in the means than in the end for, as argued above, the common law achieves a de facto aval through a series of judicial expedients.

The relevant provisions of the Draft Convention are as follows:

Article 47

(1) Payment of an instrument, whether or not it has been accepted, may be guaranteed, as to the whole or part of its amount, for the account of a party or the drawee. A guarantee may be given by any person who may or may not already be a party.
(2) A guarantee must be written on the instrument or a slip affixed thereto ("*allonge*").
(3) A guarantee is expressed by the words "guaranteed", "*aval*", "good as *aval*" or words of similar import, accompaned by the signature of the guarantor. For the purposes of this convention, the words "prior endorsements guaranteed" or words of similar import do not constitute a guarantee.
(4) A guarantee may be effected by a signature alone on the front of the instrument. A signature alone on the front of the instrument other than that of a maker, a drawer or a drawee, is a guarantee.
(5) A guarantor may specify the person for whom he has become guarantor. In the absence of such specification, the person for whom he has become guarantor. In the absence of such specification, the person for whom he has become guarantor is the acceptor or the drawee in the case of the bill, and the maker in the case of a note.
(6) A guarantor may not raise as a defence to his liability the fact that he signed the instrument before it was signed by the person for whose account he is a guarantor, or while the instrument was incomplete.

Article 48

(1) The liability of a guarantor on the instrument is of the same nature as that of the party for whom he has become guarantor.

[58] On the legislative process of the draft, see generally, W.C. Vis, "Unification of the Law of Negotiable Instruments: The Legislative Process" (1979) 27 *Am.J.Comp.Law* 507.

[59] See generally, D.E. Allan, "International Negotiable Instruments – The UNCITRAL Draft Convention revisited", *Sixth International Trade Law Seminar of the Australian Academy of Science* p.27 (Australian Government Publishing Service, 1979).

(2) If the person for whom he has become guarantor is the drawee, the guarantor engages:
  (a) To pay the bill at maturity to the holder, or to any party who takes up and pays the bill;
  (b) If the bill is payable at a definite time, upon dishonour by non-acceptance and upon any necessary protest, to pay it to the holder, or to any party who takes up and pays the bill.

(3) In respect of defences that are personal to himself, a guarantor may set up:
  (a) Against a holder who is not a protected holder only those defences which he may set up under paragraphs (1), (3) and (4) of article 29;
  (b) Against a protected holder only those defences which he may set up under paragraph (1) of article 31.

(4) In respect of defences that may be raised by the person for whom he has become a guarantor:
  (a) A guarantor may set up against a holder who is not a protected holder only those defences which the person for whom he has become a guarantor may set up against a holder under paragraphs (1), (3) and (4) of article 29;
  (b) A guarantor who expresses his guarantee by the words "guaranteed", "payment guaranteed" or "collection guaranteed", or words of similar import, may set up against a protected holder only those defences which the person for whom he has become a guarantor may set up against a protected holder under paragraph (1) of article 31;
  (c) A guarantor who expresses his guarantee by the words "*aval*" or "good as *aval*" may set up against a protected holder only:
    (i) The defence, under sub-paragraph (b) of paragraph (1) of article 31, that the protected holder obtained the signature on the instrument of the person for whom he has become a guarantor by a fraudulent act;
    (ii) The defence, under article 54 or 58, that the instrument was not presented for acceptance or for payment;
    (iii) The defence, under article 64, that the instrument was not duly protested for non-acceptance or for non-payment;
    (iv) The defence, under article 85, that a right of action may no longer be exercised against the person for whom he has become guarantor.
  (d) A guarantor who is not a bank or other financial institution and who expresses his guarantee by a signature alone may set up against a protected holder only the defences referred to in subparagraph (b) of this paragraph;
  (e) A guarantor which is a bank or other financial institution and which expresses its guarantee by a signature alone may set up against a protected holder only the defences referred to in subparagraph (c) of this paragraph.

Article 49

(1) Payment of an instrument by the guarantor in accordance with article 73 discharges the party for whom he became guarantor of his liability on the instrument to the extent of the amount paid.

(2) The guarantor who pays the instrument may recover from the party for whom he has become guarantor and from the parties who are liable on it to that party the amount paid and any interest.

The salient features of the above Draft are as follows.[60] In some legal systems, a guarantor was liable only to the same extent as the person for whom he had become a guarantor and could raise as a defence against his liability on the instrument not only defences that were personal to him, but also any of the defences that the party for whom he had become guarantor could invoke. In other legal systems, including those that followed the Geneva Uniform Law, the liability of the aval giver was independent of that of the person for whom he had become guarantor; the guarantor could invoke only defences personal to him, and only very few of the defences available to the person for whom he had become a guarantor.

Since the Article 48 was derived from Article 32 of the Geneva Uniform Law, it was likely to be understood by States whose domestic law was based on the Geneva Uniform Law to provide for an aval. However, many participants at UNCITRAL from States that did not incorporate the Geneva Uniform Law understood the article to provide for the first type of guarantee described above.

UNCITRAL found that it had not proved possible to merge the two approaches described above into a unitary system. Therefore, the approach taken as reflected in the proposed Article 48(3) and (4), to make both approaches available under the Draft Convention. If the guarantor expressed his guarantee by the words "guarantee", "payment guaranteed", "collection guaranteed" or words of similar import, he would be liable only to the same extent as the person for whom he became a guarantor and could invoke against a protected holder of the personal defences mentioned in Article 31(1) as well as the defences mentioned in paragraph (4)(b) available to the person for whom he became a guarantor. He could not raise defences other than those specifically mentioned, such as suretyship defences under national law. If the guarantor expressed his guarantee using the words "aval" or "good as aval", he would be able to invoke against a protected holder only the personal defences mentioned in Article 31(1)(b) and the limited defences mentioned in paragraph (4)(c) available to the person for whom he became a guarantor. Both types of guarantor could invoke against a holder who was not a protected holder the defences mentioned in paragraphs (3)(a) and (4)(a).

Article 48(4)(d) and (e) dealt with the type of guarantee given by the signature alone of the guarantor. It provided that a guarantee given by signature alone by a bank or other financial institution would have the same legal consequences as if the word aval had been used. A guarantee given by signature alone by someone other than a bank or other financial institution

[60] For a detailed discussion, see UNCITRAL's 20th session report, supra at note 57.

would have the same legal consequences as if the word "guarantee" had been used.

In support of that distinction it was pointed out that in many States that followed the Geneva Uniform Law, banks frequently gave their guarantee by signature alone and they would not be surprised to find they had given the stronger aval form of guarantee. It was felt by UNCITRAL that banks and other financial institutions in other States could easily be educated to the distinction between the two types of guarantee and how to undertake either one of them. However, guarantors who were not banks or other financial institutions could be expected to give guarantees less often and should not be led to undertake the strong aval unless they clearly intended to do so by use of appropriate words.

The purpose of Article 48(1) was to provide that the liability of the guarantor was primary if the liability of the party for whom he became guarantor was primary, and secondary if the liability of that party was secondary. Article 47(3) clarifies previous debate to provide that words such as "prior endorsements guaranteed" would not constitute a guarantee under the Convention. UNCITRAL noted that in the commercial practice of some countries those words were used to create a guarantee only of the validity of the signatures but not of the creditworthiness of the prior endorsers.

Some supporters[61] of Articles 47 to 49 stated that, while it was complex and therefore not an ideal solution, it was the only satisfactory way in which the liability of the guarantor could be dealt with in the convention, given the differences in the two major approaches to the matter in different legal systems. It was not possible to merge those approaches into a unitary system, and to adopt only one or the other of those approaches would be confusing and unacceptable to those banks and traders to whom the adopted approach was unfamiliar. The proposal would enable guarantors to continue to express their guarantees in customary ways and thereby subject themselves to liability regimes that were familiar to them. Articles 47 to 49 would therefore by workable and acceptable in all areas of the world.

An additional point of view[62] was expressed that the system proposed by Article 48 had advantages in that it would allow the parties to choose between two different kinds of guarantee: one a guarantee of creditworthiness only, the other a guarantee of payment. It was felt such a choice would assist the parties to allocate risks more precisely in their commercial transactions.

The prevailing view of UNCITRAL was that the proposal was generally acceptable. However, various suggestions were made for amending the proposal. With respect to Article 48(2)(b), UNCITRAL decided to insert, after the words "by non-acceptance", the words "other than a bill payable on demand", in the light of the decision of UNCITRAL that the non-acceptance of a bill payable on demand did not give rise to the right of recourse by the holder. In connection with a suggestion to delete the reference to protest in Article 48(2)(b), UNCITRAL decided to retain the reference

[61] Ibid.
[62] Ibid.

since, in connection with the accelerated liability of the guarantor of the drawee resulting from dishonour by non-acceptance, it was useful to require a protest in order to prove that the bill had been dishonoured by non-acceptance.

A suggestion at UNCITRAL that proposed Article 48(4) should be amended to clarify that it did not apply to the guarantor of a drawee was found to be unnecessary, since it was already clear from the text of the proposed article, in particular by virtue of the references to Articles 25 and 26, which dealt only with defences available to a party. A suggestion to delete subparagraphs (d) and (e) from Article 48(4) as being too confusing, was not adopted. A further suggestion with respect to those sub-paragraphs was to specify with greater precision what was intended by the term "financial institution". It was stated, however, that any ambiguity concerning the meaning of that term could be resolved by interpretation, and that in any case the problem was not of practical importance since the question of whether or not a particular guarantor that had given its guarantee by signature alone was a financial institution would arise in only a few cases. Accordingly, the suggestion was not adopted by the Draft Convention.

UNCITRAL decided to clarify in Article 49(2) that the guarantor could recover interest, since without an express reference to interest courts in some legal systems might interpret the provision as entitling the guarantor to recover only the amount paid by him.

The aval provisions of the Draft Convention are a sensible and practical set of self contained rules governing international bills of exchange and promissory notes and would provide no problems to traders in common law countries who decide to be governed by them.

PART G: AVALS IN THE CONTEXT OF FORFAITING TRADE FINANCE

Trade is increasingly being financed by the technique known as "forfaiting".[63] The essence of forfaiting is the provision of fixed rate supplier credits to an exporter through the non-recourse negotiations of promissory notes made by, or bills of exchange drawn on, the importer.[64]

Forfaiting as a method of financing international trade originated in the 1960's. At that time, Zurich was the European forfaiting centre, although by 1984 London accounted for some 70% of the estimated forfaiting volume, a volume which has grown to US $20-30 billion of outstanding debts in 1988.[65]

[63] The author wishes to express his gratitude to ANZ Banking Group Ltd. (Melbourne) and ANZ Aval Ltd. (London) for their assistance providing information on forfaiting finance.

[64] On forfaiting finance generally, see: the 29 page forfaiting supplement appearing in the February 1988 *Euromoney;* Jason Nisse, "Let's Play Forfaits", *The Banker* November 1987, at page 45; *Trade Financing* Co-ordinated by C.J. Gmur (Euromoney Publications, 1981) Chapter VIII "Forfaiting by C.J. Gmur and Chapter XI "Legal Issues" by R. Davies and A. Grabiner; and R.M. Goode *Commercial Law* (Penguin, 1982) pp. 691-692.

[65] "What Fate For Forfaiting? *The Economist,* February 27, 1988 at p. 71; Hans Berndt "Zurich Looks to the German Exporter", *Euromoney* January 1984, at p. 124.

A typical forfaiting transaction is as follows. The exporter draws a bill on the importer who excludes liability on the bill by writing "without recourse" or "sans recours" on it. The bills or notes are accepted by the importer and are avalised by (usually) the importer's bank, The aval appears on the face or reverse of the bill or note.

If the aval is not recognised in a particular jurisdiction (such as Britain or Australia) the surety takes the form of a seperate letter of guarantee given by the importer's bank. As mentioned above, a guarantee is a weaker form of surety than an aval, so to be practicable in the forfaiting market the guarantee must ideally be unconditional, transferable, irrevocable, divisable and engage the guarantor as primary obligor.[66]

It should be noted that *with* recourse forfaiting is fairly common when a sale between the exporter and its bank has minor documentary details which remain to be resolved. In that instance, the bank purchases with recourse and assumes the responsibility itself for clearing these points of detail before subsequently confirming that recourse has been waived.[67]

The avalised bills are then delivered to the exporter who will, in turn, sell them to a forfaiting company (normally the exporter's bank), so called because the company forfeits all recourse the exporter, and looks for payment only to the avalising or guaranteeing bank. In return, the exporter receives his proceeds. The forfaiting company may either present the bills for payment at maturity, or, alternatively, may on-sell the bills onto the secondary à forfait market. Each subsequent buyer, like the exporter's bank itself, looks principally to the importer's bank for payment and forfaits any recourse to previous holders of the bill up the chain. For the bill to have ready negotiability in the à forfait market, it is important that the aval be given by an internationally recognised bank, and the fees charged are likely to be high.

The exporter's "without recourse" signature relieves the exporter of liability on the instrument itself. However, the exporter will, of course, remain liable to the importer under the terms of the commercial contract, if, for instance, he supplied defective goods.

In countries which use the Geneva Uniform Law basis for bills of exchange it is not possible for the drawer to exclude his liability on a bill of exchange (although the indorser may). To overcome this impasse, the practice has developed in Europe that the importer draws a promissory note in favour of the exporter, payable, say, in 90 days; then the exporter forfaits ("sells") this to a discount house, the transfer being effected by a without recourse endorsement. A without recourse endorsement on a promissory note is permissible. The promissory note is "backed" by an aval or guarantee.[68]

An important issue is whether a court of a common law country would give recognition to an aval in the context of a forfaiting transaction. This

[66] Ian Guild, "An Explanation of the Forfait Market", a paper delivered to the *Euromoney Seminar on Trade Finance,* London, 20th March, 1984.

[67] J. Skelton and M. Johns, "Avoiding the Legal Hazards of Forfaiting", *I.F.L. Rev.* May 1985 at p. 33.

[68] Robin Edwards and Rae Weston, *International Trade Finance* (The Law Book Company, 1986) at pp. 19-22.

is particularly pertinent in Britain which accounts for 70 percent of the forfaiting volume.

If an Australian or English court was asked to decide a case in which the parties decided in their documentation that their forfaiting transaction was to be governed by a foreign legal system which recognised the aval, such a court would no doubt give effect to the aval.

However, if an English or Australian court was faced with an aval in a case undoubtedly governed by Australian or English law, then difficulties would arise. If the forfaiter is a holder in due course (and this will normally be the case) then the situation can be resolved by reference to Section 56 of the English *Bills of Exchange Act* (U.K.) or Section 60(2) of the *Bills of Exchange Act* (Cth.) which both provide:

> "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course".

A holder in due course is someone who takes a bill complete and regular on the face of it, taking it in good faith and for value and without any notice of any defect in title. Most forfaiters would thus comply with the definition of a holder in due course and thus be able to sue the accommodating bank on its endorsement in the event of the overseas acceptor failing to pay. The same principle would apply to the bank's endorsement on a promissory note: it would be liable to a forfaiter who was a holder in due course.

Some commentators have argued that such a court would ignore the aval as there would be no statute or common law precedent recognising such a principle[69]. This is probably correct if the courts were to strictly follow the legislation or *Steele* v. *M'Kinlay*. However, some other commentators have argued it is likely that the courts would attempt to give effect to the aval in the name of commercial efficacy[70].

Another possibility would be for the court to consider the aval as a sort of guarantee placed on the back of a negotiable instrument. This is unlikely since, first Section 4 of the *Statute of Frauds* 1677 (U.K.) requires that contracts of guarantee be in writing and it is highly doubtful whether an endorsement would be sufficient to be regarded as a guarantee in writing. Secondly, because the concept of negotiable guarantee is novel at English law, although there is not reason why it should not be introduced, especially in the context of forfaiting transactions.

In summary, a prudent forfaiter in common law country should either specify in his documentation that the transaction is to be governed by a law that recognises an aval. Alternatively, the transaction should be devoid of an aval, and the surety be given by a separate guarantee. However, a better solution would be for the common law country to directly adopt the aval principle.

[69] Edwards and Weston, Ibid at p. 21.

[70] Michael Johns, "Forfaiting, Managing the Legal Risks", *International Banking Law*, August 1984, at p. 26.

PART H: CONCLUSION

In summary, most civil law countries, some common law countries and the UNCITRAL Draft Convention all adopt the civil law approach concerning the aval. It is true that by a series of evasions, fictions and devices, the common law achieves much the same position as the civil law. But as mentioned in Part C of this article, this common law approach has a number of disadvantages: first, the result is unpredictable. Secondly, the use of evasions, fictions and devices does not engender public confidence in the law. Thirdly, the UNCITRAL Draft Convention largely adopts the aval and it is incongruous for Britain and Australia to have an aval recognized by a convention to which they are a party, but not by the domestic legislation and common law. Finally, failure to have avals incorporated in their respective laws needlessly complicate forfaiting transactions governed by British or Australian law.

It would be desirable to bring the common law position regarding avals in line with the majority of the world, in view of the prevalent use of bills of exchange and promissory notes in the conduct of international trade. This could easily be achieved with a simple amendment to the *Bills of Exchange Act* in both Britain and Australia to make quasi-indorsers liable to both prior and subsequent holders. Not only would an amendment eliminate the two disadvantages mentioned above, but an amendment becomes more compelling when it is recalled that the common law position was precariously based on the, nothing other than hapless, situation of one of the parties in *Steele* v. *M'Kinlay* and this, the real point of the decision, was lost and the result was turned into a rule of law.

Furthermore, it has been argued[71] that the civil law aval is not necessarily inconsistent with the *Bills of Exchange Act* (Cth.) and the antiquated provisions of the *Statute of Frauds,* largely reformed in 1954, are highly unlikely to constitute a substantial argument against the introduction of the aval in England and in other Commonwealth countries.

[71] Per Professor E.P. Ellinger, in D.E. Allan, supra at note 59, at p. 108.