

Tutorial Letter 102/3/2018

Commercial Law 2B

CLA2602

Semesters 1 & 2

Department of Mercantile Law

IMPORTANT INFORMATION

This tutorial letter contains important information about your module.

BARCODE

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1 LECTURERS

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2 PRESCRIBED TEXTBOOK

The prescribed textbook for this module as from 2015, is the **8th edition** of Schulze *et al* ***General Principles of Commercial Law*** which was published by Juta in 2014. However, if you are already in possession of the 7th edition, you may make use of it taking into account the differences between the 7th and 8th edition that follow:

3 THE DIFFERENCES BETWEEN THE 7TH AND 8TH EDITIONS OF THE TEXTBOOK

SECTION A: INSTRUMENTS OF PAYMENT

For the purposes of Section A, you need to consult chapter 25 of the 8th edition and chapter 24 of the 7th edition.

UNIT 1: NEGOTIABLE INSTRUMENTS AND AN INTRODUCTION TO OTHER METHODS OF PAYMENT

Page number in study guide	Paragraph/ chapter reference in 7 th edition	Paragraph/ chapter reference in 8 th edition	Addition or deletion in edition
5,7	24.2.2	25.1.2	<p>Note that para 25.2 of the 8th edition includes the following after the third sentence dealing with statistics:</p> <p>'In 2008 there were 670 million electronic magnetic tape transactions in South Africa with a total value slightly less than R5 billion. In the same year more than 69 million cheques (with a face value of more than R1,39 billion) were processed by the Automated Clearing Bureau ('ACB'). Since 2008 these figures have changed dramatically. During 2013 there were more than 839 million electronic magnetic tape transactions in South Africa with a total value of R7,5 billion. In the same year 18,7 million cheques (with a face value of R310 million) were processed by the ACB.</p> <p>Although there was a sharp decline in the use of cheques as instruments of payment, the bill of exchange (which, like cheques, is a type of negotiable instrument) is still an important and often-used instrument in the</p>

			<p>commercial world to guarantee payment. The future payment of a debt is in the commercial world often supported by the use of a bill of exchange.</p> <p>But because cheques are still the most common <i>negotiable instrument</i>, and the average person on street is acquainted with cheques as a method of payment, we will explain the legal rules governing the use of negotiable instruments such as bills of exchange and cheques, on the basis of a discussion of cheques. Except where indicated otherwise, all the legal rules governing cheques also apply to bills of exchange.'</p>
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UNIT 2: OF THE STUDY GUIDE: CHEQUES: DEFINITION, PARTIES, RELATIONSHIPS AND ESSENTIAL ELEMENTS (PAGES 11– 23 OF THE STUDY GUIDE.)

Page number in study guide	Paragraph/ chapter reference in 7 th edition	Paragraph/ chapter reference in 8 th edition	Addition or deletion in edition
11	Chapter 25	Chapter 26	
12	24.3.1- 24.3.2	25.2.1- 25.2.2	
13	24.3.3	25.2.3	
14	24.3.4	25.2.4	
15	24.3.5.1	25.2.5.1	<p>Note that in para 25.2.5.1.4 of the 8th edition includes the following at the end of the paragraph:</p> <p>'It is important to note that in the case of a bill of exchange the order to pay is addressed by one person (or institution) to another. If the person or institution to whom the order is addressed is a bank, the document is by definition a cheque.'</p>
17	24.3.5.1.8	25.2.5.1.8	
18	24.3.5.2	25.2.5.2	

UNIT 3: WHO CAN CLAIM PAYMENT ON A CHEQUE?

Page number in study guide	Paragraph/ chapter reference in 7 th edition	Paragraph/ chapter reference in 8 th edition	Addition or deletion in edition
24	24.3.6	25.2.6	
25	24.3.6.1.1	25.2.6.1	
26	24.3.6.1.2	25.2.6.1.2	
26	24.3.6.1.3	25.2.6.1.3	
27	24.3.6.2	25.2.6.2	
28	24.3.6.2.3	25.2.6.2.3	
29	24.3.6.1.3	25.2.6.1.3	

UNIT 4: SIGNATURES

Page number in study guide	Paragraph/ chapter reference in 7 th edition	Paragraph/ chapter reference in 8 th edition	Addition or deletion in edition
32	24.3.7.1.1	25.2.7.1.1	
34,35	24.3.7.1.2	25.2.7.1.2	<p>Note that in paragraph 25.2.7.1.2 of the 8th edition the following paragraph was added at the end:</p> <p>‘The Close Corporations Act, unlike the Companies Act of 1973, has not been replaced by a new Act. The Close Corporations Act’s strict rules of compliance in the case of signatures on negotiable instruments on behalf of close corporations, will thus still apply to negotiable instruments that are signed on behalf of a close corporation.’</p>
37,40	24.3.7.1.3	25.2.7.1.3	
38	24.3.7.2.5	25.2.7.2.5	
42,43,45	24.3.7.1.4	25.2.7.1.4	
46	24.3.7.1.5	25.2.7.1.5	

UNIT 5: DELIVERY

Page number in study guide	Paragraph/ chapter reference in 7th edition	Paragraph/ chapter reference in 8th edition	Addition or deletion in edition
51	24.3.7.2	25.2.7.2	
52,53,54	24.3.7.2.1- 24.3.7.2.5	25.2.7.2.1- 25.2.7.2.2	

UNIT 6: THE LIABILITY OF THE DRAWER AND INDORSER ON A CHEQUE AND DISCHARGE OF THE OBLIGATION TO PAY A CHEQUE

Page number in study guide	Paragraph/ chapter reference in 7th edition	Paragraph/ chapter reference in 8th edition	Addition or deletion in edition
56,59	24.3.7.3.1- 24.3.7.3.2	25.2.7.3.1- 25.2.7.3.2	
61	24.3.8	25.2.8	

UNIT 7: THE NATURE OF THE RELATIONSHIP BETWEEN THE DRAWEE BANK AND THE DRAWER AND THE DIFFERENT MARKINGS ON A CHEQUE

Page number in study guide	Paragraph/ chapter reference in 7th edition	Paragraph/ chapter reference in 8th edition	Addition or deletion in edition
64-66	24.3.9.1	25.2.9.1	
67-73	24.3.9.2	25.2.9.2	

UNIT 8: THE PROTECTION OF THE DRAWEE BANK

Page number in study guide	Paragraph/ chapter reference in 7 th edition	Paragraph/ chapter reference in 8 th edition	Addition or deletion in edition
74-79	24.3.9.3	25.2.9.3	

UNIT 9: THE LIABILITY OF THE COLLECTING BANK

Page number in study guide	Paragraph/ chapter reference in 7 th edition	Paragraph/ chapter reference in 8 th edition	Addition or deletion in edition
83	24.3.10	25.2.10	

SECTION B: OTHER METHODS OF PAYMENT

For the purposes of Section B, you need to consult chapter 26 of the 8th edition and chapter 25 of the 7th edition.

UNIT 1: CREDIT CARDS

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
91	25.1	26.1	<p>Note that paragraph 25.1 of the 7th edition has been deleted and replaced with the following paragraph 26.1 in the 8th edition:</p> <p>'Every day billions of rands are transferred in South African between payers (debtors) and payees (creditors) who are involved in millions of transactions. Payers can use any of a number of instruments or methods of payment to pay payees. These payments as well as the clearing and settlement of these payments between the various banks involved when various paying instruments and methods of</p>

			<p>payment are used, must be managed and regulated in an organized manner.</p> <p>Payment does not only involve the payer and the payee. It also involves banks with which the payer and payee hold bank accounts. The payer and payee can, of course, be clients of the same bank. However, they are often clients of different banks, hence involving two different banks in the payment process.</p> <p>The payment process between banks, in terms of which payment is made and/or received on behalf of their clients, can be described as the interbank clearing and settlement process. 'Clearing' in this context refers to the exchange of documents (eg, cheques) or electronic information (eg, an instruction by a client to effect an electronic funds transfer) between banks which act behalf on their clients. 'Settlement' refers to the process in terms of which banks calculate what they owe each other based on the total of all payments made and/or received on behalf of their clients.</p> <p>The National Payment System Act 78 of 1998 provides for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems in South Africa. It also provides for a South African National Payment System ('NPS').</p> <p>The NPS consists a various facets, fulfils various roles in the payment system and its operation is based on complex sets of regulations. A detailed discussion of these falls outside the scope of the present text.</p> <p>Suffice it to mention that only registered banks which have a settlement account with the South African Reserve Bank, or are sponsored by another bank in settlement, may participate in the NPS.</p>
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			<p>Apart from the provisions of the National Payment System Act, the operation of the NPS is further propped by the provisions of the Banks Act 94 of 1990; the Mutual Banks Act 124 of 1993; the Co-operative Banks Act 40 of 2007; and the South African Reserve Bank Act 90 of 1989.</p> <p>This, in brief, is the framework in which payments in South Africa take place.</p> <p>In the remainder of this chapter we will look at a selection of conventional and modern methods of payment. We have already referred in chapter 25 above to bills of exchange and cheques. In this chapter other methods of payment are briefly discussed which are not specifically governed by the Bills of Exchange Act, namely credit cards, travellers' cheques, stop orders, debit orders, documentary letters of credit, electronic fund transfers, e-money, mobile banking and PayPal.'</p>
92-95	25.2	26.2	

UNIT 2: TRAVELLER'S CHEQUES, STOP ORDERS AND DEBIT ORDERS

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
98	25.3	26.3	<p>Paragraphs 26.3.4 and 26.3.5 has been added in the in the 8th edition:</p> <p>'26.3.4 Advantages of travellers' cheques</p> <p>A travellers' cheque is a secure and safe method of payment. When it is lost or stolen, it can be replaced with 24 hours worldwide or refunded, provided that the owner has complied with certain terms and conditions.</p>

			<p>Lost or stolen travellers' cheques are placed on a worldwide alert computer system which means that it is easy to know when someone tries to cash or use a lost or stolen travellers' cheque.</p> <p>It is an internationally accepted method of payment: travellers' cheques are accepted worldwide.</p> <p>26.3.5 Alternatives to travellers' cheques</p> <p>The past decade has witnessed a sharp decline in the use of travellers' cheques. Although most major South African banks still offer a variety of internationally branded foreign currency travellers' cheques, an ever-increasing number of international travellers make use of other methods of payment when paying for goods and service while they are abroad.</p> <p>Credit and debit cards which are branded and supported by an international card scheme (eg, Visa and MasterCard) are accepted by millions of international merchants. These cards can also be used to withdraw cash at overseas' ATMs.</p> <p>The travel wallet (also referred to as the electronic wallet or international travel card) is a popular modern alternative to travellers' cheques. The travel wallet is a pre-paid electronic card. Although it is a very convenient method of payment while travelling abroad, the holder bears the risk of loss of the card as it is possible to use the card without a PIN or password required by the merchant.'</p>
99	25.4	26.4	
102	25.5	26.5	

UNIT 3: LETTERS OF CREDIT

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
105	25.6	26.6	

UNIT 4: ELECTRONIC FUNDS TRANSFERS

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
110	25.7	26.7	<p>Note that paragraph 25.7.7.5 of the 7th edition has been replaced with the following paragraph 26.7.7.5 in the 8th edition:</p> <p><i>‘26.7.7.5 New payment systems involving payment intermediaries outside the existing bank system</i></p> <p><i>26.7.7.5.1 Mobile Payments</i></p> <p>Because of the highly competitive and innovation nature of both the cellular telephone and banking sectors, these two industries have in the recent past co-developed a number of payment-related products which allow customers to make payments with their cellular telephone: so-called mobile payments.</p> <p>A mobile payment is any payment that is conducted through the medium of a cellular telephone device.</p> <p>The term ‘mobile payment’ is quite broad. It encompasses a number of different products or payment facilities which involve a mobile phone. Mobile phones can be used to effect electronic fund transfers, or to make credit or debit card-related mobile payments.</p>

			<p>Because of the fast-moving nature of mobile banking in general, and mobile payments in particular, new products are constantly developed and introduced to the market, while others which are outdated, disappear from the scene. We will therefore restrict ourselves to a broad overview of some of the products currently available in South Africa.</p> <p>The major cellular service providers in South Africa have all introduced cellular money-transfer and payment service schemes or products. Some of these products are offered in association with either one of the retail banks or in association with a large food store.</p> <p>Some of these mobile banking services include balance enquiries; account statements; bill payments; EFTs; mobile payments; pre-paid airtime top-ups; other pre-paid consumables such as electricity; money transfers and card payments.</p> <p>Instead of a card, ATM or computer a mobile device is used to activate and perform these banking and payment activities.</p> <p>A second type of 'mobile banking' product is the so-called 'mobile electronic wallet. It operates in a closed-loop system, which means that both the sender and the receiver of money have to be registered with the same scheme and have accounts at the same bank.</p> <p>It has been argued that 'the mobile wallet concept' has a great future – primarily because the mobile phone is more pervasive, more flexible and more intelligence than a card or payment instrument.</p> <p>The mobile phone is therefore far more versatile than a standard one-dimensional EFT or credit or debit card.</p>
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26.7.7.5.2 *PayPal*

Internet or online money transfers serve as electronic alternatives to paying with traditional paper-based methods of payment, such as cheques.

PayPal is currently the leading Internet payment intermediary system.

PayPal is the name of an international e-commerce business which administrates payments and money transfers made through the Internet.

PayPal performs payment processing for online merchants, auction sites such as 'eBay' and 'Bid or Buy', and other commercial users, for which it charges a fee. The fee depends on what currency or payments the seller is using. In addition, certain auction site-purchases made by credit card through PayPal may incur extra fees if the buyer and seller use different currencies.

On October 3, 2002, PayPal became a wholly owned subsidiary of eBay, the world's biggest online auction site.

PayPal is used to send and/or receive payment through the Internet. It operates as follows. The PayPal user must first create a PayPal account on the PayPal website. During the registration process the user provides his or her name and address and credit or debit card details. Importantly, an email address and password are also registered when the PayPal account is created.

In order to pay someone through PayPal, both the sender and the recipient of the money must be registered PayPal users.

Once a user is registered as a PayPal participant and he or she wants to make payment to another registered user, he or she must visit the PayPal website and key in his or her email address and password.

		<p>Next the user will key in the amount that needs to be paid, as well as the email address of the intended recipient. Once these details have been confirmed, the user will send an instruction to PayPal to effect payment to the recipient. PayPal will then request payment from the sender's bank and the amount will be debited against the sender's credit or debit card account. PayPal will also request the sender's bank to forward the money to the recipient's bank account.</p> <p>Paypal is thus first and foremost a payment intermediary or facilitator.</p> <p>Using PayPal has a number of advantages:</p> <p>(a) Creating a PayPal account is free. Buying with PayPal is also free when you buy domestically. The seller (ie, the recipient of the money) pays a small fee for the secure processing of the payment to him or her. There are also charges involved when you use PayPal to make international payments. It may also charge a fee for receiving money, proportional to the amount so received.</p> <p>(b) Because the user's credit or debit card details are registered with PayPal, users don't need to enter the number of the card every time they want to pay for something online. The user simply enters his or her email address and password.</p> <p>(c) The user also doesn't need to obtain and enter the recipient's name and bank account details when making payment. Provided that the intended recipient of the money is also a registered PayPal user, the sender of the money simply types in the recipient's chosen PayPal email address, and the PayPal system will ensure that the money is transferred to the bank account of the recipient which is linked to the recipient's PayPal profile.</p> <p>(d) It is easy and simple to use and it is completely web and email-based.</p>
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		<p>(e) Unlike credit card payments where the receiver of the money has to be registered as a merchant to receive money by way of a credit card payment, payment through PayPal can be made to anyone and received from anyone.</p> <p>(f) It is a global network, with payments possible in a number of currencies.</p> <p>(g) Although funding of the payment instruction usually takes place via credit and debit cards, it can also take place via an electronic fund transfer into the recipient's account.</p> <p>(h) PayPal has a relatively strong security system and instances of fraud through PayPal are rare.</p> <p>PayPal has a number of disadvantages:</p> <p>(a) Receiving money through PayPal attracts high fees, round 4 to 5 per cent of the transaction value.</p> <p>(b) For many years South Africans only had restrictive use of PayPal, as they could only buy and send payments through PayPal, but could not also sell and receive payment. First National Bank (FNB) is currently the only South African bank which offers the facility to receive payment through PayPal.</p> <p>(c) Receiving international payments through PayPal attracts high currency conversion fees.</p> <p>(c) South African users of PayPal are not allowed to leave money which they received in their PayPal account, but must transfer it to their FNB account. This is inconvenient and costly.</p>
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SECTION C: THE LAW OF TRUSTS

For the purposes of Section C, you need to consult chapter 27 of the 8th edition and chapter 26 of the 7th edition.

UNIT 1: THE CREATION OF A TRUST (PAGES 115–119 OF THE STUDY GUIDE.)

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
115	26.1-26.4	27.1-27.4	<p>Paragraph 27.4.4.3 has been added in the 8th edition:</p> <p><i>'Special trusts' for purposes of the Income Tax Act</i></p> <p>For purposes of the payment of income tax only the Income Tax Act created a separate category of trusts called 'special trusts'. The definition of a 'special trust' provides for two types: (a) a trust that is created solely for the benefit of persons with a disability; (b) a trust created in terms of a will of a deceased person solely for the benefit of beneficiaries, the youngest of which must be under the age of 18 years old, and who are the deceased person's relatives. The benefit of being classified as a 'special trust' for purposes of the Income Tax Act is that the tax rate will not be the fixed rate applicable to other trusts but will special trusts be taxed on a variable sliding scale that may benefit the 'special trust' for income tax purposes.'</p> <p>Note that in the 7th edition the rest of paragraph 26.4.5 was deleted from the sentence beginning with 'Similarly'.</p>

UNIT 2: THE OFFICE OF THE TRUSTEE

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
120,122	26.6	27.6	Note that last paragraph of 26.6.5 in the 7 th edition, was amended to read as follows in paragraph 27.6.5 in the 8 th edition: 'From this it follows that, during the period of such lack of legal capacity, the trustees necessarily lack authority and are unable to enter into contracts or institute an action on behalf of the trust.'

UNIT 3: THE ADMINISTRATION OF A TRUST

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
125	26.7	27.7	

UNIT 4: THE TRUST BENEFICIARY AND THE REVOCATION, VARIATION AND TERMINATION OF A TRUST

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
128	26.8-26.9	27.8-27.9	

SECTION D: THE LAW OF INSOLVENCY

For the purposes of this Section D, you need to consult chapter 28 of the 8th edition and chapter 27 of the 7th edition.

UNIT 1: VOLUNTARY SURRENDER AND COMPULSORY SEQUESTRATION

Page number in study guide	Paragraph /chapter reference in 7th edition	Paragraph/c hapter reference in 8th edition	Addition or deletion in edition
134,135	27.1	28.1	<p>Note that in the 8th edition in paragraph 28.1 the Act number and year of the Companies Act have been deleted. Further, the following has been added at the end of that sentence just prior to the sentence 'Winding-up is discussed below'.</p> <p>'The Companies Act 71 of 2008 replaced the Companies Act 61 of 1973 on 1 May 2011. The new Companies Act does not make provision for the liquidation of insolvent companies, but retains some of the provisions of the previous Act as transitional arrangements. According to these transitional arrangements, chapter 14 of the previous Act continues to apply to the winding up and liquidation of insolvent companies. The winding up and liquidation of solvent companies, however, are specifically regulated by the new Companies Act.'</p>
135	27.2	28.2	
137	27.3	28.3	<p>Note that in the 8th edition in paragraph 28.3.1 at the end of the paragraph the following has been added:</p> <p>"It is important to note that the National Credit Amendment Act of 2014 amended the Insolvency Act to specifically state that a debtor who has applied for debt review must not be regarded as having committed an act of Insolvency."</p>

UNIT 2: EFFECT OF SEQUESTRATION ON THE PERSON AND PROPERTY OF THE INSOLVENT AND UNCOMPLETED CONTRACTS

Page number in study guide	Paragraph /chapter reference in 7th edition	Paragraph/c hapter reference in 8th edition	Addition or deletion in edition
142-149	27.4	28.4	

UNIT 3: EFFECT OF SEQUESTRATION ON THE PROPERTY OF THE SOLVENT SPOUSE

Page number in study guide	Paragraph /chapter reference in 7th edition	Paragraph/c hapter reference in 8th edition	Addition or deletion in edition
152	27.5	28.5	

UNIT 4: IMPEACHABLE DISPOSITIONS

Page number in study guide	Paragraph /chapter reference in 7th edition	Paragraph/c hapter reference in 8th edition	Addition or deletion in edition
155	27.6	28.6	

UNIT 5: ADMINISTRATION OF THE INSOLVENT ESTATE

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
161,162	27.7-27.10	28.7-28.10	

UNIT 6: COMPOSITION AND REHABILITATION

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
166	27.11-27.12	28.11-28.12	

UNIT 7: THE WINDING-UP OF COMPANIES AND CLOSE CORPORATIONS

Page number in study guide	Paragraph /chapter reference in 7 th edition	Paragraph/c hapter reference in 8 th edition	Addition or deletion in edition
169	27.13.1.1	28.13.1.1	Note that in the 8th edition in paragraph 28.13 at the end of the paragraph the following has been added: (See paragraph 28.1 above).
170	27.13.1.2	28.13.1.2	
171	27.13.2	28.13.2	
171	27.13.3	28.13.3	
171	27.13.4	28.13.4	
171	27.13.5	28.13.5	
171	27.13.6	28.13.6	

SECTION E: THE LAW OF ADMINISTRATION OF ESTATES

For the purposes of this Section E, you need to consult chapter 29 of the 8th edition and chapter 28 of the 7th edition.

UNIT 1: THE MASTER AND THE EXECUTOR

Page number in study guide	Paragraph /chapter reference in 7th edition	Paragraph/c hapter reference in 8th edition	Addition or deletion in edition
176	28.2	29.2	
176	28.3	29.3	
177	28.4	29.4	

UNIT 2: THE RIGHTS, POWERS AND DUTIES OF THE EXECUTOR

Page number in study guide	Paragraph /chapter reference in 7th edition	Paragraph/c hapter reference in 8th edition	Addition or deletion in edition
180	28.5.1	29.5.1	
181	28.5.2-28.5.12	29.5.2-29.5.12	

UNIT 3: THE REMOVAL/DISCHARGE OF THE EXECUTOR AND THE ADMINISTRATION OF SPECIAL TYPES OF ESTATES

Page number in study guide	Paragraph /chapter reference in 7th edition	Paragraph/c hapter reference in 8th edition	Addition or deletion in edition
183	28.3.3	29.3.3	
184	28.6-28.7	29.6-29.7	
184	28.6.5	29.6.5	