



Tutorial Letter 201/2/2018

Commercial Law 2B

CLA2602

Second Semester

Department of Mercantile Law

IMPORTANT INFORMATION:

This tutorial letter contains important information
about your module.

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1. GENERAL

Dear Student

This tutorial letter contains a feedback on Assignment 01 and 02.

2. FEEDBACK TO ASSIGNMENT 01

QUESTION 1

Answer: (3) (See paragraph 25.2.9.2.1 - 25.2.9.2.3 on page 405 - 408 of the textbook).

- **Option (3)** is the **CORRECT** answer. The two parallel transverse lines across the face of the cheque only or words “not negotiable” written between the two lines constitute a general crossing. A cheque which bears boldly across its face the words “not transferable” is deemed to be crossed generally, in terms of s75A(1)(b) of the Bills of Exchange Act 34 of 1964.
- **Options (1), (2) and (4)** are **INCORRECT**. Where the name of a bank is inserted between two parallel transverse lines on the face of the cheque, this is a special crossing.

QUESTION 2

Answer: (1) (See paragraph 25.2.5.2 on page 387 of the textbook).

- **Option (1)** is the **CORRECT** answer. A cheque is not invalid because of a lack of date or place of payment. Date and place of payment are therefore not essential elements of a cheque.
- **Options (2), (3) and (4)** are **INCORRECT**. A cheque is defined as an unconditional order, in writing addressed by one person to a bank, signed by the person giving it, requiring the bank to whom it is addressed to pay on demand a sum certain in money to a specified person or his order or to bearer. From this, it is clear, that a cheque must have an order to pay, the sum must be certain in money and it must be signed by the drawer.

QUESTION 3

Answer: (3) (See paragraph 25.2.6 on pages 387-391 of the textbook).

- **Option (3)** is **CORRECT**. Section 1 of the Bills of Exchange Act 34 of 1964 defines a holder as “the payee or endorsee of a bill or note, who is in possession of it or the bearer thereof”. Bokang is the payee in possession of the cheque, and therefore the holder of this cheque.
- **Options (1); (2) and (4)** are **INCORRECT**. Although Bokang qualifies as the holder of this cheque in terms of section 1 of the Bills of Exchange Act 34 of 1964, she does not qualify as the holder in due course. The payee of a cheque payable to order cannot become a holder in due course of such cheque. One of the requirements of a holder in due course is that the bill must have been negotiated to the holder (section 27). Although Bokang qualifies as the holder and possessor, she does not qualify as the holder in due course. Bokang is more than a mere possessor – he is the holder of this cheque.

QUESTION 4

Answer: (2) (See paragraph 25.2.6 on pages 387-391 of the textbook).

- **Option (2)** is **CORRECT**. In terms of section 53(2)(b) of the Bills of Exchange Act, the indorser, Y, by indorsing the cheque to Z, guarantees to a holder in due course, Z, that the signature of the drawer, A, and the signature of the earlier indorser, X are genuine.
- **Option (1), (3) and (4)** are **INCORRECT**. The indorser, Y, by indorsing the cheque does not guarantee to the holder in due course that the drawer exists or that the previous indorser, Y, has the capacity to indorse the cheque.

QUESTION 5

Answer: (4) (See paragraph 25.2.7.1.3 on page 396 of the textbook).

- **Option (4)** is **CORRECT**. In terms of the BEA, A signature on a cheque can fulfil the three different functions mentioned in option (4).
- **Options (1), (2) and (3)** are **INCORRECT**, as the act does not provide function of a signature for referral purposes.

QUESTION 6

Answer: (3) (See paragraph 25.2.2 on page 382 of the textbook)

- **Option (3)** is the **CORRECT** option. The essential parties to a bill are the drawer who gives the order, the drawee mostly a bank to which the order is addressed, and the payee to whom payment must be made.
- **Options (1); (2) and (4)** are **INCORRECT**.

QUESTION 7

Answer: (2) (See paragraph 25.2.9.2.2 on pages 406-408 of the textbook).

- **Option (2)** is **CORRECT**, as it is the incorrect statement. The requirement to pay “in good faith and in without negligence”, is the requirement under section 79 and not section 58 of the BEA. Section 58 requires that the drawee bank must pay in good faith and in the ordinary course of business as in option (4).
- **Options (1), (3) and (4)** are **INCORRECT**, as all the statements are the correct requirements to be in place for section 58 to apply.

QUESTION 8

Answer: (4) (See paragraph 25.2.9.2.1 on pages 405-406 of the textbook).

- **Option (4)** is **CORRECT**. The Bills of Exchange Act (BEA) provides only for these two types of crossing that can made on a cheque.
- **Options (1); (2) and (3)** are **INCORRECT**. There is no provision for simple crossing in the BEA.

QUESTION 9

Answer: (2) (See paragraph 25.2.7.1.4 on page 396 of the textbook).

- **Option (2)** is the **MOST CORRECT** answer. In terms of section 22 of the BEA, a forged signature on a cheque is wholly inoperative. Also, section 53(2)(b) preclude the indorser (in this case Ben) from denying the genuineness and regularity of the drawer's signature and all previous endorsements.
- **Options (1), (3) and (4)** are **INCORRECT**. The exception in section 53(2)(2) only applies to the indorser of the cheque and not the drawer (Maphuti), the drawee (Cash bank) or the payee (Phillip).

QUESTION 10

Answer: (1) (See paragraph 25.2.7.2.4 and 25.2.7.2.5 on page 400-402 of the textbook).

- **Option (1)** is **CORRECT**. Negotiation of an order cheque takes place by endorsement and delivery. When the payee/endorser delivered the cheque to the endorsee, he/she negotiated it to him/her. The endorsee may also become a holder in due course if the necessary requirements for a holder in due course are met.
- **Options (2), (3) and (4)** are **INCORRECT**. Issue is the first delivery of the cheque from the drawer to the payee. An endorsement is an instruction made on a cheque to effect its transfer.

3. FEEDBACK TO ASSIGNMENT 02**QUESTION 1**

Answer: (2) (See paragraphs 25.2.5.1.8 and 25.2.9.2.2 on page 386 and 406 of the textbook).

- **Option (2)** is the **CORRECT** answer. Crossing of the cheque does not affect its negotiability or transferability. A bearer cheque that is crossed generally, remains a bearer cheque.
- **Options (1), is INCORRECT**, the crossing of a cheque does not change a bearer cheque into an order cheque.
- **Options (3), is INCORRECT**. Crossing of a cheque does not render it non-transferable.
- **Options (4) is INCORRECT**. Crossing of a cheque alone does not render the cheque not negotiable.

QUESTION 2

Answer: (4) (See paragraphs 27.4.1.1, 27.4.1.2, and 27.4.4.2 on page 450-451- and 453 of the textbook).

- **Option (4)** is the **MOST CORRECT** answer. MMEO trust is a trust *inter vivos* (between the livings) as it was entered in term of an agreement by the founders. It is also has a charitable object of funding university fees.

- **Options (2), is INCORRECT**, a trust *mortis causa* is a testamentary trust (in terms of a will) where the testator bequeaths property in his or her will and becomes effective only on the his or her death.

QUESTION 3

Answer: (3) (See paragraphs 27.4 and 27.5.2 on pages 450 and 454 of the textbook).

- **Option (3)** is the **CORRECT** answer. Although a transfer of the property to the trustee is necessary, it is not essential for the proper administration of a trust.
- **Options (1), (2) and (4) are INCORRECT**. All of them are the essential requirements for a valid trust.

QUESTION 4

Answer: (3) (See paragraphs 28.9 and 28.10 on pages 481-483 of the textbook).

- **Option (3)** is the **CORRECT** answer. Mortgage bond is an example of an encumbered asset that serves a real security the proceeds of which are used to extinguish the claims of secured creditors.
- **Options (1), (2) and (4) are INCORRECT**.

QUESTION 5

Answer: (2) (See paragraphs 28.3.1 on pages 471 and 472 of the textbook).

- **Option (2)** is the **CORRECT** answer. To constitute an act of insolvency in terms of the Insolvency Act 24 of 1936(the Act), the debtor must give a written notice that he or she is unable to pay.
- **Option (1), is INCORRECT**. One of the act of insolvency in terms of the Act is where the debtor leaves or remain absent from the Republic or depart from his or her house with the intention to evade or delay payment of his or her debts.
- **Option (3), is INCORRECT**. One of the act of insolvency in terms of the Act the debtor removes or attempts to remove property with the intent to prejudice the creditors or to prefer one creditor above another.
- **Option (4) is INCORRECT**. One of the act of insolvency in terms of the Act is where the debtor makes or offers to make an arrangement with any of the creditors from releasing him or her wholly or partially from the debts.

QUESTION 6

Answer: (4) (See paragraph 26.6.1 on page 425-426 of the textbook).

- **Option (4)** is the **CORRECT**. A letter of credit is suitable for protecting the interest of both the exporter and the importer when making payments in case of an international purchase and sale.
- **Options (1); (2) and (3) are INCORRECT**. These payments methods are not suitable for protecting the interests of both the exporter and the importers in case of an international purchase and sale.

QUESTION 7

Answer: (1) (See paragraphs 29.7 on page 502 of the textbook).

- **Option (1)** is the **CORRECT** answer. Pensioners are not one of the categories whose estates is administered in terms of the Administration of Estate Act, who are unable to exercise control over their own estates, and need the appointment of either a guardian or a curator.
- **Options (2), (3) and (4)** are **INCORRECT**.

QUESTION 8

Answer: (2) (See paragraphs 29.5.8 on page 498 of the textbook).

- **Option (2)** is the **CORRECT** answer. An heir is a person who receives the remainder, or a part of the remainder of an estate, i.e that which remains after payment of creditors and legatees.
- **Options (1), (3) and (4)** are **INCORRECT**. Legacy is not a person but a specific testamentary bequest for goods or money, and a legatee is the beneficiary of the legacy. A person is not entitled to any goods in the deceased estate in terms of the the law relating to the administration of deceased estate, in his or her capacity as the Master.

QUESTION 9

Answer: (3) (See paragraphs 29.4 on page 495 of the textbook).

- **Option (3)** is the **CORRECT** answer. A bank statement of potential executor is not a prerequisite for the appointment of executor or issuing of letter of executorship be the Master.
- **Options (1), (2) and (4)** are **INCORRECT**. All are the documents that must be submitted to the Master before he or she can issue a letter of executorship

QUESTION 10

Answer: (2) (See paragraphs 29.5 .10.5 on page 502 of the textbook).

- **Option (2)** is the **CORRECT** answer as it contains two statements that are not correct. It is not a requirement for a valid redistribution agreement that each heir receive exactly the same in value as that which he or she forfeits. The redistribution agreement must be approved by the Master and not the Registrar of Deeds.
- **Options (1), (3) and (4)** are **INCORRECT**. (i) and (iii) are the requirement for a valid redistribution agreement.

4. DISCUSSION OF QUESTIONS CONTAINED IN THE MAY/JUNE 2012 EXAMINATION

The following are examples of some of the questions contained in the May/June 2012 examination paper. The questions appear in bold immediately followed by the suggested answer.

QUESTION 1 - NEGOTIABLE INSTRUMENTS AND OTHER METHODS OF PAYMENT.

- (a) **A draws a crossed cheque on B Bank payable to “C or order”. A thief (D) steals the cheque from C and forges C’s signature on the back of the cheque and delivers it to E. E then places his signature on the cheque and delivers it to F who takes it in good faith and for value. F deposits the cheque into his bank account at I Bank. F does not receive payment.**

Discuss whether or not F can institute legal action against the following parties:

- | | |
|-------------|-----|
| (i) A | (1) |
| (ii) B Bank | (1) |
| (iii) C | (2) |
| (iv) D | (2) |
| (v) E | (4) |

[10]

- (i) A In terms of section 22, A will not be liable because the forged signature is wholly inoperative.
- (ii) B In terms of section 22, B Bank will not be liable because the forged signature is wholly inoperative. No right to enforce payment against any party can be acquired through the forged signature
- (iii) C In terms of section 21, no one can be held liable as drawer, indorser or acceptor unless he/she has signed the bill. C did not place any signature on the cheque and is accordingly not liable.
- (iv) D To be liable on the cheque, D, the thief, must have placed his own signature on the cheque. The thief was never a party to the cheque. The thief forged a signature; he did not place his own signature on the cheque. Therefore, the thief is not liable **in terms of the cheque**. If the thief can be found, he can be held liable based on delict or unjustified enrichment.
- (v) E E endorsed the cheque after the forged indorsement. Section 53(2)(b) applies and requirements are met. Requirements of Section 53(2)(b) have to be met: being that there must be order cheque; a forged indorsement plus true indorsement. E is known as indorser by estoppel. Section 53 (2)(b) provides that the indorser of the cheque is precluded from denying the genuineness and regularity in all respects of the drawer’s signature and all previous indorsements. E will therefore be held liable to F. E will not be able to rely on the principle that the forged signature of the thief renders the cheque wholly inoperative as Section 53 (2)(b) applies. F will be able to claim payment for the amount of the cheque from E, **BUT**, not from any earlier parties before the forgery.
- (b) **Distinguish between the “issue” and “negotiation” of a cheque and thereafter explain why the distinction between “issue” and “negotiation” is important. (5)**

Issue is the first delivery of a cheque complete in form to a person who takes it as a holder. It takes place only where the drawer delivers a cheque to the first payee thereof. Negotiation refers to any further transfer of a cheque after issuing the cheque. The recipient of a cheque that was negotiated may also become a holder in due course if all the other requirements for holder in due course are met. Negotiation is one of the requirements that must be met before a person may become a holder in due course of a cheque. Only the payee of a bearer cheque may become a holder in due course through mere issuing. The payee of an order cheque will never become a holder in due course since there is no indorsement on the cheque.

- (c) **A draws an uncrossed cheque on B Bank in favour of "C or order". X steals the cheque from C, forges C's signature on the back of the cheque and presents the cheque for payment at B Bank. X obtains payment from B Bank over the counter.**

What protection will B Bank enjoy, in the abovementioned example, in respect of the forged indorsement? (5)

B Bank is deemed to have paid the bill in due course if all the requirements listed in section 58 are met.

The requirements of section 58 that must be complied with are:

- The cheque must be payable to order.
- The cheque may be crossed or uncrossed as this section applies to both.
- There must be a forged or unauthorised indorsement on the cheque.
- The drawee bank must pay in good faith and in the ordinary course of business.
- The forged indorsement must not be that of a customer of the bank at the branch on which the said cheque is drawn.

From the facts it appears that all the requirements of s 58 are complied with, accordingly B Bank will be protected.

QUESTION 2 – THE LAW OF TRUST/ADMINISTRATION OF ESTATES

- (a) **John, the executor of the estate of the late Michael Jackson approaches you for advice on the types of documents that are considered "[a] trust document" in terms of the Trust Property Control Act 57 of 1988.**

List THREE examples. (3)

- (i) a written agreement ;
- (ii) a testamentary writing (or a will) ; and
- (iii) a court order.

- (b) **John would like to know his rights, powers and duties as the executor of the deceased estate.**

Name any FIVE of these rights, powers and duties. (5)

- (i) taking custody of the estate;
- (ii) the opening of a banking account;
- (iii) to submit executor's inventory to the Master;

- (iv) advertisement of notice to creditors to lodge their claims against the estate;
- (v) examination of claims against the estate;
- (vi) determination of solvency of the estate;
- (vii) determining who the legatees and heirs are;
- (viii) lodging and advertising of the liquidation and distribution account; and
- (ix) liquidation of the estate.

QUESTION 3 – THE LAW OF INSOLVENCY

(a) Meven approaches a court to apply for the sequestration of his estate.

What are the requirements that Meven must prove in order to obtain a sequestration order? (4)

- (i) He has complied with formalities for notification of creditors and other interested parties.
- (ii) That he is indeed insolvent, i.e., that his liabilities exceed his assets.
- (iii) That sequestration (or surrender) *will be (not there is a reasonable believe)* to the advantage of the creditors.
- (iv) There are sufficient assets to cover the costs of sequestration.

(b) Meven is successful in obtaining a sequestration order and a trustee is appointed to administer his insolvent estate. While realising the assets in the estate, the trustee discovers that Meven has alienated some of his assets before the application for sequestration of his assets.

Name THREE forms of dispositions that the trustee can apply to have set aside. (3)

Any **three** of the followings:

- (i) Dispositions not made for value;
- (ii) Voidable preferences;
- (iii) Undue preferences;
- (iv) Collusive dispositions; and
- (v) Voidable transfer of a business.

(c) Briefly explain what the trustee should do with respect of uncompleted contract under the following circumstances:

- (i) Where neither the insolvent nor the other party has performed. (2)**
 - (ii) Where only the other party has performed, but the insolvent has not. (1)**
- [3]**

- (i) The trustee can claim performance from the other party, but the trustee has to tender performance of the obligation of the insolvent. He/she may also repudiate. The other party will then have only a concurrent claim for damages against the estate.
- (ii) Depending on the wishes of the creditors, the trustee may either uphold the contract and perform, or repudiate the contract. If he repudiate, the other party will then have a concurrent claim for the return of his or her performance as well as for damages.

5. GENERAL GUIDELINES FOR THE OCTOBER/NOVEMBER 2018 EXAMINATION

PREPARING FOR THE EXAMINATION

- Plan in good time how you are going to master the work. Therefore, ensure that you allocate sufficient study time in preparation for the examination: you will **not be able to master this course successfully over a weekend**.
- Study regularly and make sure that you are able to do the activities in the study guide and understand the feedback provided.
- Set questions for yourself and try answering them without the aid of a study guide or textbook.
- Contact your lecturers in time if you are in doubt about the content of the work or the feedback given in relation to the activities.
- Read the content of the work as many times as possible in preparation for the examination.
- Attend the video conference the dates, venues and times of which will be provided to you in tutorial 103.

THE STRUCTURE OF THE MAY/JUNE 2018 EXAMINATION

- The May/June 2018 examination is divided into **FOUR SECTIONS (A to D)** which consist of questions from all the prescribed chapters in the textbook.
- The types of questions contained in each section are as follows:
 - **SECTION A** consists of **10 multiple-choice questions** (2 marks each). The answers to the multiple choice questions have to be filled in on the mark-reading sheet provided to you.
 - **SECTION B** consists of **10 true/false questions** (1 mark each). Your answers have to be completed in the space provided on the examination paper itself.
 - **SECTION C** consists of **10 mix and match questions** (2 marks each). Your answers have to be completed in the space provided on the examination paper itself.
 - **SECTION D** consists of **3 questions** worth 50 marks in total, and has to be completed in the space provided on the examination paper itself.
- The examination paper contains questions from all topics contained in your prescribed material.

DURING THE EXAMINATION

- Read the questions carefully and answer only that which is asked.
- Plan your answer before writing it down.
- In general, you will need to write down ten facts if a question counts ten marks.
- Try answering the questions point by point and make use of shorter sentences.
- Write legibly and neatly.
- Note the division of marks and use available time and the space provided in the examination paper accordingly.

We wish you all the best.

CLA2602 LECTURERS