INSTRUMENTS OF PAYMENT

BIR324
INSTRUMENTS OF PAYMENT

HOW TO USE THIS GUIDE

This study guide is an exposition of this semester’s lectures. The lectures are set out as follows in this guide:

- **Subject** (as a heading) - The heading indicates what the lecture is all about.

- **Prerequisites** – Indicates (where applicable) which prior knowledge or prior learning you need in order to successfully approach that subject.

- **Study objectives** - Expound the basic knowledge and skills you need to accomplish after you have completed the lecture. When you study/prepare for the exam/test, this will serve as your demarcation.

- **Study** – Prescribed material which you HAVE to study. It includes the applicable passages in your prescribed textbook. Refer to the checklist hereunder, indicating all the prescribed cases, for your own usage – tick off the case after you have read and summarised it. When a case is used in more than one lecture, you can even copy your summaries to use in the different lectures. Just remember that the emphasis may differ slightly in different lectures.

- **Read** – Material which you may read by own choice. It is however recommended that these sources be consulted as it will improve your basic knowledge and understanding of the course.

- **Purpose of prescribed material** – A brief exposition of the importance of the prescribed material in order for you to study it within that context and to get a grip on the gist of the matter.

- **Activities** – Different activities are included to assist you in mastering and applying the work.

- **Vocabulary** – A list of important terminology is included. You need to look up the meaning of these words. There is a space provided at each lecture in this guide where you can complete the meaning of the terms.
• **Questions for revision** – These questions are basically included for your own usage to test your knowledge. These questions are not necessarily asked in tests and examinations, but will guide you through the work and, if you are able to answer all these questions, you will also be able to answer any question in a test or examination.

• **Control** – At the end of each lecture you will find a ‘control panel’ which will refer you to the applicable passage in the textbook which you had to study. You may check whether you have read, summarised and/or studied the material.

**MEANING OF ACTION WORDS FOR ASSESSMENT**

This list of words is provided in order for you to understand what is expected of you during evaluation. You already studied this list in Criminal Law (Adv Kruger).

**Name/List**
Give the information requested in short sentences – no discussion.

**Describe**
Give a detailed account of a topic by mentioning the parts, characteristics or qualities of the matter.

**Discuss**
Explain the meaning of something by using logic arguments.

**Identify**
Give the main points relating to the subject.

**Give an overview**
Give a summary (shortened version) of the main points relating to the issue and comment on them.

**Outline**
Give a general summary. It should contain a series of main ideas supported by secondary ideas. Omit minor details. Show the organisation of the ideas.

**Summarise**
Give the main points of something. Do not include details, illustrations, critique or discussion.

**Illustrate**
Use a sketch, diagram or graphic presentation or explain a concept or solve a problem.

**Bring in relation to**
Clearly indicate the relation between different aspects of a topic and show what the connection or similarities are.
Interpret Comment on the available facts, with reference to appropriate examples. Give a clear indication of your own understanding of the matter.

Contrast Emphasise the differences, distinctiveness and inequalities of facts or events.

Compare Put the facts, events or problems in opposition and indicate similarities and differences; or analyse the similarities and differences between statements, ideas, etc. (Take note of the difference between contrast and compare.)

Comment on Give your own opinion on a given matter. Say whether you agree or disagree with a certain statement.

Criticise Give your reasoned opinion of something, showing its good and bad points. Your opinion must be supported by the facts and reasoning. To criticise does not mean that you must attack.

Examine/analyse Split the given information into its parts and critically discuss the relevant issues.

Explain Give a clear and precise account of something. Elucidate with examples and/or illustrations and motivate your conclusions or results.

Evaluate Judge the quality of something on the bases of specific points of departure of criteria. Also give your own opinion. Do not discuss.

LECTURE SCHEDULE:

Lectures 1-6: General principles
Lectures 7-9: Cheques
Lecture 9: Promissory note
Lecture 10: Traveller’s cheques & Credit cards
Lecture 11: Online Banking & Credit Transfers
Study objectives:
Upon completion of this lecture, you must be able to:
1. Distinguish between commercial papers and negotiable instruments.
2. Discuss the cambial and underlying obligation.
3. Demonstrate a thorough knowledge and understanding of the components, role of the parties and functions related to bills of exchange, cheques and promissory notes.
4. Define bills of exchange, cheques and promissory notes.
5. Identify the parties involved in negotiable instruments.

Study:
1. Malan F.R., Pretorius, J.T. and du Toit S.F., Malan on Bills of Exchange, Cheques and Promissory Notes, 5\textsuperscript{th} ed, LexisNexis: Durban, 2009 (par 1, 3-7 & 10-14)
2. Nagel C.J. \textit{et al}, Commercial Law, 3\textsuperscript{rd} ed, LexisNexis Butterworths: Durban, 2006 (par 30.01-30.03, 30.05 & 30.07-30.20)

Read:
1. Malan F.R., Pretorius, J.T. and du Toit S.F., Malan on Bills of Exchange, Cheques and Promissory Notes, 5\textsuperscript{th} ed, LexisNexis: Durban, 2009 (par 2 & 8-9)

Activity 1
Explain the ‘cambial’ and ‘underlying obligation’.

Vocabulary:
Negotiable instrument: _____________________________________________
______________________________________________________________
Theory

1. Introduction

- The law of negotiable instruments deals with negotiable instruments with the necessary emphasis on:
  - The distinction between commercial papers and negotiable instruments.
  - Basic concepts and definitions of negotiable instruments.
  - Requirements for validity of negotiable instruments.
  - Negotiation.
  - Acceptance.
  - Holdership.

2. General principles and the distinction between commercial papers and negotiable instruments

- It is important to understand whether and when negotiable instruments are negotiable and transferable. The traditional test of negotiability is whether the instrument is transferable like cash by delivery, and capable of being sued upon by the person holding it pro tempore. Another usual requirement is that the instrument should embody an undertaking to pay money or to deliver securities representing money.
- Negotiable instruments are otherwise known as commercial paper. Both negotiable instruments and commercial papers have a value that is much higher than the intrinsic value of the piece of paper itself because these documents embody personal rights that mobilize and simplify their enforcement and transfer. These rights can only be enforced through possession of the
documents.

- Commercial papers are a broader/wider concept than the concept “negotiable instrument”, because not all such documents are negotiable instruments because they cannot all be negotiated (share certificates, postal orders and bills of lading are commercial papers but cannot be negotiated, while bank notes, share warrants, bills of exchange, cheques and promissory notes are negotiable instruments which can be negotiated). Negotiable instruments are a specific kind of commercial paper. (See figure 1)

- Negotiable instrument has a dual meaning:
  • Firstly, a negotiable instrument is distinguishable from commercial paper as a particular kind of commercial paper, because all negotiable instruments can be negotiated, while not all commercial papers can be negotiated. Therefore, the document and the rights it embodies must be easily transferable from one person to another. (This is not the position with all commercial papers)
  • Secondly, the subsequent holder of the document who takes the document in good faith and for value, usually acquires all the rights in the document (bill, cheque or note), even if his predecessor had a defective title thereto. The essential powers of the holder of a negotiable instrument are those set out in sect 36 which, in a certain sense, defines a negotiable instrument. The maxim nemo plus iuris ad alium transferre potest quam ipse habet does not apply in this instance. This particular characteristic of negotiable instruments developed because bills and notes were likened to money and given some of its attributes. (If the transferee had not acted in good faith or had not given value, he will acquire no better title than his predecessor had.)

- With reference to the abovementioned nemo plus iuris rule: This rule does not apply to negotiable instruments, although it applies on commercial paper (mainly because of the law of property and because negotiable instruments were likened to money). See Figure 2.

- Let me explain this principle by means of an example. If a thief sells a stolen vehicle to a bona fide purchaser who pays for the vehicle, the thief cannot transfer rights of ownership of the vehicle to the purchaser because he/she does not have a rightful title to the vehicle. The thief is not the owner of the vehicle and therefore, the latter will only acquire a defective title and will not qualify as rightful owner of the vehicle. Although the purchaser acted in good faith (bona fide) and had given value, he/she will not acquire a better title than his/her predecessor (the thief) had. The real owner from whom the vehicle had been stolen can claim it back from the thief or the purchaser.

- In the law of negotiable instruments, a transferee can, under certain circumstances, acquire all the rights embodied in a document (bill, cheque, or note), even though his/her predecessor had a defective title. If the transferee qualifies as a holder in due course who takes the document in good faith and for value from a predecessor with a defective title, the transferee will acquire all the rights embodied in the document. The transferee will acquire more rights in the document than the predecessor had. In such an instance, the nemo plus iuris rule does not apply.

- Let me explain this by means of another example. If a holder with a defective title in a bearer cheque (sometimes referred to as a cash cheque) negotiates the cheque to a bona fide transferee who gives value for the cheque, the transferee will acquire the document with all the rights evidenced in it. The transferee will become a holder in due course and may present the cheque for payment. Mere personal and defects-in-title defences (relative defences) will not be available against the transferee.

- The commercial paper seeks to express the close nexus between possession of the instrument and exercise of the rights embodied in it. By illustration:
  • First, the contract on a bill is concluded by delivery of the instrument in order to conclude the contract.
• Secondly, only the holder of a bill has the power to sue on the instrument and to enforce the rights embodied in it, although no every holder or possessor of an instrument is also creditor in respect of the rights incorporated in it. A creditor i.r.o. a bill is the person who has concluded a contract on the bill with the drawer, acceptor or indorser.
• Thirdly, the parties to the bill undertake to effect payment of it to the holder.
• Fourthly, the acceptor of a bill can be discharged from liability on the bill only by payment in due course.
• Fifthly, transfer of the personal rights embodied in a bill is generally effected only by the negotiation of the instrument.
• Sixthly, acquisition of the real and personal rights i.r.o. a bill by a holder in due course is made dependant on his acquisition of the instrument itself.

3. The cambial obligation

- Originally, the cambial obligation was seen as being founded on a contract of exchange. In terms of this contract (cambium traiecticum vel mercantile) one party undertook to pay a sum of money to the other party who, in turn, undertook to repay this amount at another time and place and in a foreign currency. The bill drawn pursuant to this contract merely evidenced its conclusion but had no obligatory force. According to this traditional view it was possible for the cambial obligation to come into existence without a bill ever having been drawn.
- The new approach entailed a radical departure from the traditional view and founded the cambial obligation on the bill itself, and resulted in two dominant theories: the creation theory and the contract theory.
- The creation theory founds the cambial obligation on a unilateral and abstract act of the debtor, namely his signing the instrument: consensus is not necessary to create liability. This theory is not being followed in SA. It is incorrect to elevate the mere signature on a bill to a declaration of an intention to be bound. The drawer does not intend to pay every holder, regardless of his title.
- Therefore, the cambial obligation rests on two pillars, the contract theory and the protection of good faith.

• Contract theory The cambial obligation is principally a contractual obligation. Contract alone does not provide a satisfactory solution for all cases in which liability is imposed and they invoke the doctrine of the protection of good faith as a subsidiary source to complement contract as a source of cambial obligation. The Act supports this approach in sects 19 (liability is based on contract and no contract on a bill is complete and irrevocable until delivery of the instrument in order to conclude the contract), 19(3) (if a bill is in the hands of a holder in due course a valid delivery by all parties prior to him making them liable to him is conclusively presumed) and 21 (no person is liable as drawer, acceptor or indorser of a bill if he has not signed it as such, but his signature by itself is not sufficient).

• Protection of good faith Protection of good faith justifies the imposition of liability in those cases where the signatory is held liable to a purchaser in good faith both where he has not bound himself contractually and where he can raise defences against his immediate party. Commercial paper protects the interests of 3rd persons who were not parties to the issue and negotiation of the instrument and the transactions underlying it. But the law cannot protect every belief. The good faith of the purchaser is only protected where the appearance that another is capable of disposing of the property can be attributed to the erstwhile owner. Liability to a holder in due course is not founded on contract or fault, but rests on objective foundations. The idea of risk lies at the root of the cambial obligation. However, not every signature on a bill appearing to be that of a party thereto will found liability. The signatory to
a bill will incur liability only if he has signed the instrument knowing it to be a bill. The protection of the good faith of the *bona fide* holder for value not only vests the real and personal rights i.r.o. the instrument in him but also eliminates defences available to prior parties amongst themselves.

3.1 Cambial and underlying obligation

- Bills, cheques and notes are used primarily to pay debts, give credit or make donations. The contract on the instrument in concluded with the intention of executing one or another underlying obligation between drawer and payee, drawer and acceptor or indorser and indorsee. The contract on the instrument delivered for this purpose is an auxiliary agreement, because it executes or reinforces the original or underlying obligation. The *underlying obligation* is the *causa of the contract* on the instrument.
- The *causa* is not a mechanical part of the contract on a bill; an underlying obligation constitutes the *causa* only if and to the extent that the parties intend to make the contract on the bill dependant on it.
- An acknowledgement of debt coupled with an express or implied promise to pay that debt gives rise to a similar dependant obligation.
- The question of whether a new obligation is created is determined by the intention of the parties. A new obligation seldom replaces the existing debt and involves no novation of the old obligation.
- The order in a bill may not be conditional and a bill may not be drawn in such a way that it is conditional on the underlying debt for which it was given.
- The cambial obligation does not replace the underlying obligation but the two obligations co-exist and are cumulative, both being directed at payment of the same debt.

4. Basic concepts en definitions

- Definitions on the three negotiable instruments:
  - **Bill** An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to a specific person or his order, or to bearer.
  - **Cheque** A bill drawn on a bank and payable on demand.
  - **Promissory note** An unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specific person, or to his order, or to bearer.

- Definitions on parties involved with bills, cheques and notes:
  - **Drawer** The drawer is the person who gives written order that an amount of money has to be paid. The person who creates a bill or cheque.
  - **Promissory/maker** The person who creates a note. The person who promises to pay. The promissor/maker does not correspond with the drawer of a bill, but with the acceptor of a bill.
  - **Drawee** The person to whom the order to pay is addressed. He must be named or otherwise indicated with reasonable certainty in a bill. In the event of a cheque, the drawee must always be a bank. In the case of a note, there is no drawee.
• **Payee** The payee is the person in whose favour the document was initially drawn. If the bill is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty. A bill may be drawn payable to:
  - two or more payees jointly
  - one of two payees
  - one of several payees in the alternative
  - the holder of an office

• **Acceptor** No person shall be liable as a drawer, acceptor or indorser, unless he has signed the bill in that capacity. The drawee of a bill is not liable on the instrument because he did not sign it. He is merely involved in the bill but he is not a contracting party to it. When, however, he accepts the bill, in other words he assents to the order of the drawer by signing the bill, he becomes a party to the bill and is liable on it. The acceptor, therefore, is the drawee who has become a party to the bill by acceptance thereof. Acceptance only takes place in case of bills of exchange.

• **Indorser** The payee of a bill is not a party to the bill and is therefore not liable on it. He has certain rights though, such as to negotiate the bill. If the payee negotiates the instrument by way of indorsement, he will thereafter be known as the indorser of the document. Due to his having signed the instrument, he becomes a party to it and is liable thereon. The indorser, therefore, is the person who has negotiated the document by way of indorsement and delivery.

• **Indorsee** An indorser may indorse a bill to someone else by name, e.g. “Pay D or Order”. The person thus indicated by name, D, is known as the indorsee. D may in turn negotiate the document by indorsement and delivery, in which instance he (D), too, becomes an indorser.

• **Holder** The holder is the payee, indorsee or bearer of a bill who is in possession of the instrument. The holder is the person entitled to payment i.t.o. the instrument.

• **Bearer** The person in possession of a bill payable to bearer.

• **Aval or surety** If a person binds himself as surety for payment by the drawer, acceptor or indorser by signing the instrument, he is known as the surety, or signer of an aval.

- In the case of a bill or a cheque, there are at least three parties involved, namely, the drawer, the drawee and the payee. In the case of a promissory note, there are only two parties involved, the promissor/maker and the payee.
**Figure 1 (Characteristics and kinds of commercial papers)**

<table>
<thead>
<tr>
<th>Commercial papers</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>(Value document – representing value)</em></td>
</tr>
<tr>
<td>➢ Possession</td>
</tr>
<tr>
<td>➢ Personal right</td>
</tr>
<tr>
<td>• Easily transferable</td>
</tr>
<tr>
<td>• Not so easily transferable</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>KINDS OF COMMERCIAL PAPERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ Negotiable instruments</td>
</tr>
<tr>
<td>➢ Deeds of sale</td>
</tr>
<tr>
<td>• Movable property</td>
</tr>
<tr>
<td>• Immovable property</td>
</tr>
<tr>
<td>➢ Deeds of transfer</td>
</tr>
<tr>
<td>➢ Notarial bonds</td>
</tr>
<tr>
<td>➢ Bills of lading</td>
</tr>
<tr>
<td>➢ Share certificates</td>
</tr>
<tr>
<td>➢ Non-transferable cheques and deposit certificates</td>
</tr>
<tr>
<td>➢ Not negotiable postal order</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Negotiable instruments</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>(Representing value)</em></td>
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</tbody>
</table>

**Common law**
- Share warrants

**Statutory law** *(Bills of Exchange Act)*
- Bills of exchange
- Cheques
- Promissory notes
- Treasury bill
- Traveller’s cheques

Distinguishing characteristics
➢ Transferability
➢ Exclusion of *nemo plus iuris* rule
➢ Holder in due course

Attributes
➢ Ownership is acquired by *bona fide* purchaser even if transferor had no title to it.
➢ Instrument is taken free from defences.
➢ *Bona fide* payment to holder discharges the instrument and parties to it.
Figure 2 (Application of the nemo plus iuris maxim on negotiable instruments and commercial papers)

<table>
<thead>
<tr>
<th>Negotiable instruments</th>
<th>Commercial Papers</th>
</tr>
</thead>
<tbody>
<tr>
<td>If a holder with a defective title in a bearer cheque (cash cheque) negotiates the cheque to a bona fide transferee who gives value for the cheque, the transferee will acquire the document with all the rights evidenced in it. The transferee will become a holder in due course and may present the cheque for payment. Mere personal defects-in-title defences will not be available against the transferee.</td>
<td>If a thief sells a stolen vehicle to a bona fide purchaser who pays for the vehicle, the thief cannot transfer rights of ownership of the vehicle to the purchaser, because he doesn't have a rightful title to the vehicle. The thief is not the owner and, therefore, the latter will only acquire a defective title and will not qualify as rightful owner of the vehicle. Although the purchaser acted bona fide and had given value, he/she will not acquire a better title than his/her predecessor had. The real owner from whom the vehicle had been stolen, can claim it back from the thief or the purchaser.</td>
</tr>
</tbody>
</table>

LECTURES 2-3: REQUIREMENTS FOR VALIDITY

Study objectives:
Upon completion of this lecture, you must be able to:

1. Name and discuss in full the requirements for validity of a negotiable instrument. (Up to 20 marks per requirement!)
2. What is the position regarding signatures on negotiable instruments, on behalf of companies and CC’s?

Study:
Read:

Activity 2
One of the requirements, for constitution of a valid negotiable instrument, that must be complied with is that it must be signed. Explain signatures by juristic persons.

Theory
1. Introduction
- The definition of a bill of exchange and, for that matter, of a cheque as well as a promissory note, contains 8 requirements for validity. Although some essential differences will be pointed out, the same requirements are, as a general rule, also applicable to promissory notes.
- The requirements are as follows:
  - Order/promise to pay.
  - Unconditionality.
  - In writing.
  - Addressed by one person to another.
  - Signed by person giving it.
  - On demand or at a fixed or determinable future time.
  - A sum certain in money.
  - To a specified person or his order or to bearer.

2. Order/promise to pay
- A bill and a cheque must contain an order to pay, which is directed by the drawer to the drawee. In the case of a cheque it is customary for banks to print both the English word “Pay” and below it the Afrikaans word “Betaal” immediately to the left of the space provided for the name of the payee.
- In the case of a promissory note, it is the maker himself who promises payment to the payee (thus there is no drawee in this instance).
- Note that in the case of a bill and a cheque it is an order by the drawer of the bill/cheque, while in the case of a promissory note it is a promise by the maker.
- When the words are imperative, it is usually required that the instrument of payment contains an order. Even words of permission, authority or request, qualified by other words and expressions,
which will normally not qualify as an order i.t.o. the Act, may sometimes be qualified by other words constituting an order (i.t.o. Grotius's definition of a bill in the common law). A mere acknowledgement of debt, for example, does not qualify as a promissory note, since it contains no clear promise to repay the debt.

- To determine whether it contains an order, the whole of the instrument must be examined. The use of polite expressions is not irreconcilable with the making of an order.

3. Unconditionality

- The order in a bill and a cheque, as well as the promise in a note, must be unconditional. The obligations on a bill or note, as a matter of form, may not be made dependant on the underlying obligation for which it was given. Where the order contains the condition that payment be made only if the payee signs a receipt on the instrument, it is not unconditional. However, where the condition does not qualify the order but is directed to the payee, the order is unconditional. The unconditionality of an order is not affected by a qualified acceptance. By accepting the a bill with qualification, the drawee accepts the unconditional order but subject to the qualifications stated in his acceptance.

- This requirement facilitates the negotiability of bills and notes and their acceptances as substitutes for money.

- It brings about certainty and is set for the benefit of 3rd parties who acquire or pay them. (Carlos v Vancourt)

- A qualified acceptance of a bill in express terms, varies the effect of the bill but does not affect the unconditionality of the order.

- A document qualifies as a bill only if the event on which it is payable, is certain to happen – e.g. one cannot say payable in the event of breach of contract, because that is not a certain event. An order/promise linked to a dies certus an incertus quando is not conditional. I.t.o. the Act a bill will be regarded payable at a determinable future time if it is expressed to be payable on/at the expiration of a fixed period after the occurrence of a specified event that is certain to happen, though the time of happening may be uncertain, e.g. a certain period after the death of a person. But an instrument expressed to be payable on/after the occurrence of a specified event that is not certain to happen is not a bill and the happening of the event doesn’t cure the defect.

- Note the following example:
  
  a) An order to pay out of a particular fund is not unconditional e.g. “Pay cash or bearer R100 from my Account No 13579”.

  b) An unqualified order to pay coupled with an indication of a particular found out of which the drawee is to reimburse himself, or of a particular account to be debited with the amount, is unconditional e.g. “Pay cash or bearer R100. Debit my Account No. 13579”.

The difference between (a) and (b)? In (a) the order to pay is subject to the sufficiency of funds in that account to cover the amount of the bill, which might or might not be the case (a condition), while in (b) there is an order to pay (regardless of where the money comes from), coupled with an indication of the account to be debited after payment by the drawee.

- Also refer to the terms of sect 2(3) on Malan. p.48.
4. In writing

- Writing is not defined in the Act, but is provided for in sect 3 of the Interpretation Act 33 of 1957 (“unless a contrary intention appears, writing shall be construed as including also typewriting, lithography, photography and all other modes of representing or reproducing words in visible form”).

In addition to those already mentioned, there is writing, both in pencil and ink. Words may also be reproduced electronically on a television/computer monitor.

- A bill can be reproduced on a variety of substances such as soap, sand, metal, paper etc. However, not all these ways or reproducing or representing words in visible form will satisfy the requirements of the Act. Without prescribing specific categories, it is submitted that the material on/manner in which words are reproduced should conform to the function of a bill/note as a negotiable instrument. Bills and notes are intended to circulate: they must be delivered, presented, accepted, and paid, and the material used/the manner applied should be reconcilable with these functions.

- The material on/manner in which words are reproduced should also conform to the function of a bill/note as a negotiable instrument.

- The words “in visible form” does not necessarily require the words to be legible. Nor does it require that any one document be written in a specific manner, such as in typewriting only. It need not be in any specific language and can be made up of more than one document and may also be drawn in a set.

5. Addressed by one person to another

- The order in a bill must be directed to another person, who must be named or otherwise indicated with reasonable certainty.

- Does not apply to notes (there is no drawee to whom an order to pay is directed).

- In case of a cheque the drawee to whom the order is addressed, can only be a bank, and in case of a bill, the drawee may be either a private person or a bank.

- Where a bill is drawn by A on himself, the holder may treat the instrument either as a bill or a note. In view of this provision, a so-called bank cheque, where the same bank is both the drawer and the drawee, is perfectly valid. (S v De Castro)

- There may be more than 1 drawer or the order may be addressed to more than 1 drawee. However, a bill may not be addressed to 2/more drawees in the alternative or in succession. Certainty of payment of bills in the same manner as if they were cash, and the protection of the payee, in that he can be sure of who the drawee is and does not have to go on a chase from one drawee to another in order to obtain payment is achieved by this provision.

6. Signed by the person giving it

- No definition of signature is given in the Act. Reference is to be made to the Interpretation Act. According to Malan, it means any mark placed on the instrument with the intention of identifying the signatory.

- The signature of one/more of the parties plays an important role. A person who places his signature on a negotiable instrument will prima facie become liable as a drawer, acceptor, maker, endorser or aval, but no person is liable as a party unless he has signed the instrument. (But refer to Lecture 1. Signature alone is not enough to impose liability – must sign as drawer / in the capacity as a drawer) A signature can be any mark/sign (full name and surname or initials and surname or only
initials or a mere mark) made on the document by a person with the intention that it shall be his signature. A mark on a bill need not be attested by witnesses and may be placed on it by a person unable to write.

- Three functions are met by the requirement that negotiable instruments must be signed:
  - **A constitutive function** Necessary for the valid creation of the instrument. Only the drawer's signature is necessary to constitute a bill. Drawer does not need to sign in his own hand – may be written by another person under his authority*.
  - **A transfer function** Necessary for the valid negotiation of an order instrument. An order instrument is negotiated by endorsement and delivery. Negotiation is the transfer of a bill in such a manner that the transferee is constituted holder, and a bill payable to order is negotiated by the endorsement of the holder, completed by delivery.
  - **A guarantee function** Necessary in order to found the liability of the various parties to the instrument. Signature is a precondition for liability, but not the only condition.

- Signature need not be in ink and need not be written in a specific manner or in a specific place.
- Sealing/stamping with the seal/stamp of a corporation is deemed to be the equivalent of a signature.
- No person is liable if he has not signed as such, provided that if he signs in a trade or assumed name, he is liable thereon as if he had signed it in his own name. The signature of the name of a firm is equivalent to the signature, by person so signing, of the names of all persons liable as partners of the firm.
- A signature does not always correctly reflect the identity of the person signing it. The consequences of such an “irregular signature” can vary. The mere fact that the payee’s name has been misspelt or that he is wrongly designated, does not necessarily disqualify him as a payee, provided he is indicated with reasonable certainty.

6.1 **Agency signature**
- Party may authorize another to sign on his behalf. (Refer to*)
- According to common law, a principal will be bound by the signature of the agent if the agent had actual authority to sign on behalf of the principal, or if the initially unauthorized signature is ratified subsequently by the principal.
- At common law, on the basis of ostensible authority, a 3rd party may proceed against a person who has not signed himself.
- It is provided that a person who signs will escape personal liability if he adds words to his signature indicating that he is signing for/on behalf of the principal, or in a representative capacity. If the had no authority to sign for/on behalf of the person indicated as principal or in a representative capacity, he shall be personally liable.
- In determining whether the signature on a bill is that of a principal/agent by whom it was written, the construction most favourable to the validity of the instrument must be adopted.

6.2 **Forged or unauthorized signatures**
- With regard to forged signatures, it is provided that:
  - A forged signature is wholly inoperative.
  - A person may in certain circumstances be precluded from raising the forgery as a defence.
- Refer to Commercial Law par 30.33 for an example of liability on forged cheques.
- An unauthorized signature may be ratified, while ratification is not possible in the case of a forged signature. In the event of forgery, the forger imitates the signature of somebody else with the intention to defraud, while in the event of an unauthorized signature, the signatory signs on behalf of another, but without that person’s consent and without the intention to defraud.
- A principal may be bound by representative's unauthorized act, e.g. if the principle did not inform relevant people of restrictions on representative’s authority.

6.3 Signatures by juristic persons

- To understand signatures by juristic persons, it is important to understand the concept of representation of companies and close corporations (CC’s).
- A juristic person is a separate legal entity and has a legal existence independent of its members. But it is still a non-human entity and therefore cannot perform juristic acts on its own. It has to take part in legal transactions by means of its representatives. The position are therefore as follows:

  - **Company** Sect 70 of the Companies Act provides that a bill/note is deemed to be drawn on behalf of a company, or so accepted, or indorsed, if it is drawn, accepted or indorsed in the name, or on behalf, or on account of the company, by a person who acts i.t.o. an authorization by the company. Authority must be determined with reference to the articles of association of the company. Directors are usually expressly/impliedly authorized to represent the company, but the mere fact that a person is a director of a company does not mean that he is automatically authorized to represent the company. If anyone exceeds his authority to represent/bind the company, the company would be liable only if the 3rd party *bona fide* and reasonably believed that the representative was acting on behalf of the company. When it is found that a company’s signature on a bill is not authorized, the company will not be liable on it. Two principles of company law qualify the authority of an agent to bind a company; Doctrine of constructive notice and the *Turquand rule* (refer to Malan par 77). Sect 50(3)(b) also plays a role. Any agent who signs/authorizes the signature of a bill, cheque or promissory note on behalf of a company, is guilty of an offence if the name of the company is not correct in all respects. Such a person is also personally liable on the instrument if the company fails to pay. This means that these mentioned persons will be personally liable if the name of the company does not appear on the instrument, or is in any way incorrect, even if they had the authority to bind the company.

  - **CC** The general rule is that any member of the CC is an agent of the CC in relation to a non-member dealing with the CC. Members generally have equal rights to manage the business and to represent it. This general rule can be amended by an association agreement. Any act of a member shall bind the CC, whether or not such act is performed for the carrying on of the business, unless the member has in fact no power to act for the CC, and the 3rd party has, or ought reasonably to have, knowledge of the fact that the member has no such power.

- Sect 24(1) of the Bills of Exchange Act has the following implications i.r.o. signatures by juristic persons:
  - It is, strictly speaking, not necessary for a natural person (agent) to sign his name along with the name of the company/CC. The mere name of the company/CC ought to be sufficient to serve as signature of the company/CC and to lead to liability on the part of the company (sects 70 & 50(3)(b)) and the CC. In practice, it is usually required that natural persons should sign the company’s cheques. Previously, sect 24(1) provided that natural persons, who signed in the name of a company/CC and who did not add the words which indicated that they were signing in a representative capacity, incurred personal liability. Such a person could not adduce extrinsic evidence to show that he had only signed in a representative capacity.
  - Sect 8 of the Bills of Exchange Amendment Act 56 of 2000 clarified the uncertainty regarding the liability of the person who signs a bill/ cheque as an agent, where the pre-
printed name of the principal appears on the bill/cheque. If the pre-printed name of the principal appears on the cheque, the person who signs as drawer will not be personally liable on the cheque, even if he did not indicate his capacity (in the past, such a person would be held personally liable). However, such a person should have had the necessary authority to sign on behalf of the principal to avoid personal liability.

- To summarize: A company/CC, as a juristic person, will be liable on a negotiable instrument if:
  - It has the capacity i.t.o. sect 36 of the Companies Act to incur liability.
  - The person signing on behalf of the company/CC has the authority to do so.
  - The company’s/CC’s name is correctly written on the instrument. (Decisions in a number of court cases reflect the situation where company officers with authority to sign on behalf of the company, and who clearly indicated that they were signing as representatives, incurred personal liability because they failed to state the company’s name correctly.)

- A forged or unauthorized signature is wholly inoperative and no right to retain the bill can be acquired through that signature, unless the party against whom it is sought to retain/enforce payment, is precluded from setting up the forgery or want of authority, e.g. if he is estopped from denying its genuineness (estoppel). Also, a party is entitled to have a written contract (negotiable instrument) rectified if, as a result of a common or mutual error or fraud, it does not correctly reflect the common intention of the parties to it.

- Distinguish between the liability of an unauthorized – and an authorized agent:

  - **Unauthorized** Will be personally liable on the instrument to the other party.
  - **Authorized** Usually, no personal liability. If authorized agent, however, signs a bill without qualifying his signature, or if he signs as drawer and the name of the principal does not appear with his signature, he will be personally liable. The correct approach, therefore, to determine whether the agent is personally liable, is to ask how a reasonable man would construe the instrument in order to determine whether qualifying words have been added, or whether the name of the principal appears with the agent’s signature as drawer.

- The principles regarding the signature of the legal person (company/CC) are as follows:

  - **Company** Words such as “for”, “on behalf of”, “pp”, “per” or “in the capacity of” are sufficient to qualify signature. But according to sect 24(1), qualifying words are not necessary if the name of the company also appear on instrument. For this purpose, the bare name of a company, sealing or stamping will suffice. Sealing or stamping is, however, not necessary anymore. The writing/typing of the company’s name, will suffice. Composite signatures (where an officer of the company signs in conjunction with the company’s seal, rubber stamp or typed/written name, as amanuensis of the company”) will also suffice. The results of sects 50(1)(c) and 50(3)(b) are that a company’s name must always appear on an instrument, together with the abbreviations (“Ltd”, “Pty”, “Inc” or “Co”). If the registration number is omitted or is incorrect, no personal liability will be incurred. (The important thing is therefore the name and identifying abbreviation)

  - **CC** The results of sects 22(1) and 23(2) are that a CC’s name must always appear on the instrument, together with the abbreviation (CC), as well as the registration number. If the registration number is omitted or is incorrect, personal liability will be incurred. (The name, identifying abbreviation and registration number are therefore crucial).

- The effect of the *ultra vires* – doctrine:
• **Company** Except where it’s memorandum/articles of association provide otherwise, a company will have the capacity to draw and accept/make bills/note and to negotiate them.

• **CC** The *ultra vires* – doctrine has no application to CC’s.

7. **On demand or at a fixed determinable future time**

- A bill is payable on demand if it is expressed to be payable on demand, or at sight, or on presentation, or if no time for presentation is expressed therein.

- A bill is payable on a fixed future time if the day upon which it will fall due in the future, is mentioned in it. Where only the month of payment is expressed, it is not payable at a fixed/determinable future time.

- A bill is payable at a determinable future time if it is expressed to be payable:
  - at the expiration of a fixed period after date/sight; or
  - on, or at the expiration of a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

- A cheque is always payable on demand. A post-dated cheque is not invalid by reason only it is post-dated. Such a post-dated cheque becomes valid as a cheque on/after the period of the post-date (*Standard Bank of SA Ltd v Sham Magazine Centre*).

- The drawee bank may refuse payment of cheques which had been in circulation for an unreasonably long period.

8. **Sum certain in money**

- Several instances are provided for where the amount of a bill will be regarded as a sum certain in money, namely where the bill is required to be paid:
  - With interest.
  - By stated instalments.
  - By stated instalments, and upon default in payment of an instalment, the whole becomes due by virtue of a provision to that effect in the bill.
  - According to a rate of exchange indicated, or to be ascertained as directed by the bill.

- An instrument in which payment in ostrich feathers, usable timber, or mules is ordered or promised, cannot be a bill or a note.

- An instrument that orders an act to be done in addition to the payment of money, is not a bill.

- If there is a discrepancy between words and figures expressing an amount, the sum denoted by the words is the amount payable. (See *Dependable Aluminium Windows & Doors CC v Antoniades* for an exception in this regard)

9. **To a specified person or his order or to bearer**

- The person/institution that will receive payment is known as the payee. An instrument is payable to a payee who may be either a bearer/order. The payee must be named or otherwise indicated with reasonable certainty.

- If instrument is payable either to bearer/order, it is negotiable. If it is not payable to bearer/order, it is not negotiable (although it may nevertheless be a valid bill, cheque or note).

- Instrument payable to bearer is known as bearer-instrument (name of the person/institution doesn’t appear on instrument); instrument payable to order is known as an order-instrument (name of the
- An instrument is a bearer-instrument if:
  - It is expressed to be so payable (the words “or bearer” appear on it and does not contain words prohibiting transfer).
  - The only/latest endorsement on it is in blank.
  - The payee is a fictitious, non-existing person or a person without capacity to contract.
- An instrument is an order-instrument if it:
  - Is expressed to be so payable.
  - Is payable to a specified person (does not contain words prohibiting transfer).
  - Is payable to order of a specified person.
- A special endorsement may convert an order-instrument into a bearer-instrument.
- An instrument made payable to “cash or order” is a valid bill and will also be a bearer-document.

**Study objectives:**
Upon completion of this lecture, you must be able to:
1. Discuss negotiation in general.
2. Discuss the methods of negotiation.
3. Distinguish between negotiation and cession.
4. Define endorsement.
5. Name the requirements of endorsements.
6. Name and discuss the different kinds of endorsements.
7. Explain endorsement of a bearer bill.
8. When is presentment for acceptance necessary?
9. Name the requirements for acceptance.
10. Discuss the different kinds of acceptance.

**Study:**
Read:

Activity 3
Discuss the different types of endorsements.

Vocabulary:

_negotiation:_ ________________________________________________________________

______________________________ ____________________________________________

_cession:_ ________________________________________________________________

______________________________ ____________________________________________

_Animo transferendi:_ _______________________________________________________

______________________________ ____________________________________________

_endorsement:_ _____________________________________________________________

______________________________ ____________________________________________

_endorsement in blank:_ _____________________________________________________

______________________________ ____________________________________________

_special endorsement:_ ______________________________________________________

______________________________ ____________________________________________

_restrictive endorsement:_ __________________________________________________

______________________________ ____________________________________________

_conditional endorsement:_ __________________________________________________

______________________________ ____________________________________________
Theory

NEGOTIATION

1. General

- Negotiable instruments are transferable by delivery/delivery and endorsement, and on which the holder is entitled to sue in his own name. A *bona fide* holder for value can therefore acquire ownership in them even if they were purchased from one not entitled to dispose of them.
- Negotiation takes place if a bill is transferred from one holder to another in such a manner that the transferee becomes the holder (even if the transferor did not have full right of ownership).
- To be negotiable, a bill must be payable either to order or to bearer:
  - **Order** If it is expressed to be so payable, or if it is expressed to be payable to a particular person and does not contain words prohibiting further transfer or indicating an intention that it should not be transferable.
  - **Bearer** If it is expressed to be so payable, or if the only or last endorsement on it is an endorsement in blank, or if it is expressed to be payable to the order of “cash” or to “cash or order”.

- Any instrument (bill, cheque or note) may be negotiated if it does not contain words which prohibit transfer of the instrument or words which evidence such an intention (e.g. “payable to C only” or “not transferable”). – *Hibernian Bank v Gysin and Hansons*
- Negotiation entails the transfer of rights in and to the instrument.
- Negotiation can either be subject to the *nemo plus iuris* rule or not (E.g. a crossed cheque with the words “not negotiable” will be subject to the rule. No one who takes such a kind of cheque has or is capable of giving a better title to it, than the person from whom he took it, had. But such a cheque is still negotiable in the sense that the transferee is constituted holder of it. Also, an overdue bill can be negotiated by delivery/delivery and endorsement, although, that party cannot take it as holder in due course.).
- Not every transfer is a negotiation. Where a bill payable to order is delivered to the payee, it is issued and not negotiated to him, because it can only be negotiated by endorsement of the holder completed by delivery.
- A bill negotiable in its origin continues to be negotiable until it is restrictively endorsed, or discharged by payment or otherwise.
2. Method of negotiation

- Negotiation is a purely formal concept providing for the transfer of a bill to someone who takes it as a holder.
- Every holder in due course acquires a bill by negotiation (possession), but not every holder acquires title by negotiation. Title can only be acquired if it is negotiated *animo transferendi*.
- Note once again the distinction in the method of negotiation of bearer and order documents:
  - A bearer document is negotiated by the *mere delivery* of the document to another holder.
  - An order document is negotiated by the *endorsement* by the holder supplemented by the *delivery* of the document to another holder. The first delivery of a bill complete in his form is its issue, and not negotiation. Consequently, the payee of a bill payable to order cannot be a holder in due course, because a holder in due course must have acquired it by negotiation and not by issue.
- Cession and negotiation are of a similar nature. Cession is the delivery/transfer of personal rights (by agreement). Negotiation is the transfer of a bill in such a manner that the transferee is constituted holder; when it is transferred *animo transferendi*, ownership and personal rights embodied in the instrument will be transferred. Therefore, the differences between cession and negotiation are:
  - By indorsing a bill, an endorser undertakes that it will be paid. The cedent does not guarantee payment of the debt by the debtor.
  - A holder is presumed to be the creditor i.r.o. a bill. A cessionary must prove both the debt and the cession.
  - Where a bill is negotiated to a holder in due course, he acquires full title and takes it free from personal defences available to prior parties among themselves. A cessionary acquires the rights of his/her predecessor; the defences which could be raised against the latter can be available against him/her.
  - The drawee/acceptor will be discharged if payment is made to a holder: a bill is discharged only if payment in due course is made to the holder. Where the debtor in good faith and without knowledge of the cession pays the cedent, he/she will be discharged.
  - Rights on a bill will be transferred to a holder only if the bill is negotiated *animo transferendi*. The transfer of rights by cession is done by agreement.

2.1 Endorsement

- Endorsement has several meanings:
  - Any signature on a bill, whether it is placed on it as a receipt, or by way of identification, or in order to effect a negotiation or incur liability.
  - A signature placed on a bill with the intention of undertaking the well-understood liabilities of an endorser.
  - An endorsement completed by delivery of the instrument. Liability of the endorser is founded and negotiation is brought about.

- The requirements with which an endorsement has to comply in order to effect a negotiation, are:
  - The endorsement must be made on the bill itself, be signed by the endorser and be an endorsement of the entire bill.
  - The mere signature of the endorser, without any additional words, is sufficient to effect an endorsement.
If the bill is payable to the order of more than one person, who are not partners, each of them must endorse the bill unless the one endorsing has authority to endorse on behalf of the others.

Should the payee/endorsee be incorrectly designated, or his name spelt wrongly, he must endorse the bill as designated and append his proper signature to it.

### 2.2 Different kinds of endorsement

- An endorsement can be an endorsement in blank, a special endorsement or a restrictive endorsement. The Act also contains provisions i.r.o. partial- and conditional endorsements. It is important to understand the distinction between different kinds of endorsements and the legal effects thereof.

- The different kinds are as follows:

  - **Endorsement in blank** An endorsement which does not specify a new payee to whom payment must be made. It consists of the mere signature of the endorser. Document becomes a bearer document (it becomes payable to bearer), and it may be negotiated from one holder to another by the mere transfer of the document. The holder in possession of the document may present it for payment. Any holder may convert the blank endorsement into a special endorsement, by writing above the endorser’s signature a direction to pay the bill to himself/his order/some other person.

  - **Special endorsement** An endorsement in which the name of the person to whom or to whose order payment of the bill has to be made (“Pay D” (signed) “C”), is indicated. If a bill is endorsed in blank, any holder may alter the endorsement into a special endorsement by entering the name of a specific payee or his order above the signature of the endorser. Document is an order document.

  - **Restrictive endorsement** Two types of restrictive endorsement, namely: (a) An endorsement which prohibits further negotiation (“Pay D only”). The endorsee becomes the owner of the bill, but further negotiation is prohibited. No other person can, subsequent to the endorsee, become the holder thereof. The endorsee can acquire ownership in the bill and become creditor i.r.o. the concomitant rights. (b) An endorsement which merely entitles the endorsee to deal with the bill as directed therein, but which does not allow the ownership of the bill to pass to him (“Pay D for the account of X” or “Pay D or order for collection”). The endorsee does not become the owner of the bill and as the mandatory of the endorser, he is obliged to deal with the bill as prescribed in the endorsement. The endorsee acquires the right to receive payment of the bill and the relationship between him and his endorser will be determined by the terms of the mandate given to him. Where a bill is negotiated to the mandatory by endorsement, the endorsement need not be expressly “for collection”. It can also take the form of an endorsement in blank or a special endorsement coupled with a mandate to collect. An endorsee under a restrictive endorsement is entitled to receive payment of the bill and to sue any party that his endorser could have sued, but not to transfer his rights as endorsee, unless the endorsement expressly authorizes him to do so.

  - **Conditional endorsement** If a bill is endorsed conditionally, the condition may be disregarded by the payer and the payment to the endorsee is valid, whether the condition has been fulfilled or not.

  - **Partial endorsement** It purports to transfer to the endorsee only part of the amount payable or to transfer the bill to two or more endorsees severally. I.t.o. sect 30(3) such endorsement does not effect a negotiation of the bill.
2.3 Endorsement of a bearer bill

- Bill payable to bearer is negotiated by delivery and no endorsement is necessary for it negotiation.
- The signature of a stranger on a bearer bill does not affect its negotiability, but a special endorsement raises the question whether the instrument is thereby converted into an order instrument.
- The Act makes provision for the conversion of an order document into a bearer document and of an endorsement in blank into a special endorsement. However, no provision for the conversion of a bill originally payable to bearer into one payable to order. A bearer document, therefore, can’t be converted into an order document. *Interlease Ltd v Massyn*
- A holder of a bearer document does not have the power to convert it into an order document.

**ACCEPTANCE**

1. General

- It is the signification by the drawee of his assent to the order of the drawer.
- Upon acceptance, the drawee becomes a party to the bill and he incurs liability thereon. His legal status changes and he becomes the principal and final debtor upon it.
- The acceptor’s contract only becomes complete and irrevocable upon delivery of the document or notification of acceptance.

2. When presentment for acceptance is necessary

- The acceptance of a bill is not a requirement for the validity of the document. The holder of a bill is obliged to present it for acceptance in 3 instances only:
  - If a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the bill.
  - If the bill expressly states that it shall be presented for acceptance.
  - If the bill is payable elsewhere than at the place of residence/business of the drawee.

3. Time and requirements for acceptance

- No prescription for any specific time for acceptance. May be accepted before it has been signed by the drawer, or while still incomplete, or when it is overdue, or after it has already been dishonoured by non-acceptance or non-payment.
- The following requirements for the validity of an acceptance are provided:
  - It must be written on the bill itself and be signed by the drawee. The mere signature without additional words is sufficient.
  - It must not stipulate that the drawee will perform his promise by any other means than payment of money.

4. Kinds of acceptance

- By accepting the bill, the acceptor engages that he will pay it according to the tenor of his acceptance. Distinguish between a general and a qualified acceptance:
• **General**  Assents without qualification to the order of the drawer. (An acceptance to pay at a particular place is deemed to be a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

• **Qualified**  It varies the effect of the bill as drawn, in express terms. Therefore only a partial assent to the order of the drawer. The Act provides the following examples of qualified acceptances:
  - A conditional acceptance (where payment is made subject to the fulfilment of a condition).
  - A partial acceptance (an acceptance to pay part only of the amount for which the bill is drawn).
  - An acceptance to pay only at a particular specified place and not elsewhere.
  - An acceptance that qualifies the time of payment.
  - An acceptance of one/more of the drawees but not of all.

Holder of a bill may refuse to take a qualified acceptance and may treat the bill as dishonoured by non-acceptance. If a qualified acceptance is taken and the drawer or endorsers have not authorized the holder to do so, the drawer and endorsers are discharged from liability on the bill.

**FIGURE 3**

**Summary regarding the words “not negotiable” and “not transferable”**

<table>
<thead>
<tr>
<th>Bill</th>
<th>“Not transferable”</th>
<th>“Not negotiable”</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Causes non-transferability</td>
<td>Causes non-negotiability of bill</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cheque (Crossed)</th>
<th>“Not transferable”</th>
<th>“Not negotiable”</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Causes non-transferability</td>
<td>Still negotiable. Only makes it subject to the <em>nemo plus iuris</em> rule</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cheque (Uncrossed)</th>
<th>“Not transferable”</th>
<th>“Not negotiable”</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Causes non-transferability</td>
<td>Causes non-negotiability</td>
</tr>
</tbody>
</table>
LECTURES 5-6: HOLDERSHIP & LIABILITIES

Study objectives:
Upon completion of this lecture, you must be able to:
1. Discuss the general principles regarding holdership.
2. What are the rights of the ordinary holder, the holder for value and the holder in due course?
3. What are the duties of the ordinary holder?
4. Discuss the requirements that have to be complied with in order to be a holder in due course.
5. Define absolute defences.
6. Name and discuss the different absolute defences.
7. Discuss the liabilities of the different parties.

Study:

Read:

Activity 4
Provide a comprehensive report explaining the differences between ordinary holders, holders for value and holders in due course. Refer to requirements, rights etc.
**Vocabulary:**

Holder: ___________________________________________ ____________________

________________________________________________________________________

Holder for value: __________________________________________________________

________________________________________________________________________

Holder in due course: ______________________________________________________

________________________________________________________________________

Transferor by delivery: _____________________________________________________

________________________________________________________________________

Absolute defences: _________________________________________________________

________________________________________________________________________

Vis absoluta: ______________________________________________________________

________________________________________________________________________

Non est factum: _____________________________________________________________

________________________________________________________________________

Conditional endorsement: ___________________________________________________

________________________________________________________________________

Partial endorsement: _________________________________________________________

________________________________________________________________________
Theory

HOLDERSHIP

1. General

- A bill of exchange is an instrument which embodies a right of action in such a way that the right may, in principle, be exercised only through possession of the instrument. This close connection between right and paper finds expression in the obligations resting on the parties to a bill. The drawer and endorser give certain warranties to the holder, and the acceptor undertakes to pay the holder.
- The holder of an instrument can only be the payee, endorsee or bearer who is in possession of the bill. Possession is therefore the essence of being the holder of the instrument.
- However, possession by itself does not suffice. A person must possess the instrument in a capacity of payee, endorsee or bearer. The possession need not be lawful.
- The payee is the holder of the bill only if he is in possession thereof, and still appears ex facie the instrument to be such. An endorsee is the person to whom or to whose order a bill is payable by virtue of a special endorsement. The bearer is the person in possession of a bill payable to bearer.
- The holder has the power to sue on the bill and the bill itself forms the cause of action. The holder need only rely on the unconditional promise therein contained to hold the debtor liable. The defendant then has to show why he should not be ordered to pay.
- The holder may be an agent acting on behalf of the owner of the bill. The holder is the only person who may “sue on the bill in his own name”. He, however, is not the only person who may enforce the rights embodied in the bill. His principal is the creditor i.r.o. the rights flowing from the bill. The nominal holder (agent) enforces qua holder the rights of his principal.

- A bank collecting a cheque for a client may do so either as agent/mandatory (acquires no rights for itself i.r.o. the cheque and the customer retains all the rights i.r.o. the instrument) or as a holder for value. But a bank may, in certain circumstances, accept a cheque ex causa onerosa as a holder for value (when a cheque deposited for collection has expressly/impliedly been undertaken by bank, before receipt of the proceeds, to honour cheques of the customer drawn against it).
- The obligation on a bill is characterized as a formally abstract obligation. The holder is presumed to be the creditor. The defendant bears the burden showing that the holder is not the creditor, or that certain defences may be raised against his claim.
- Holder is therefore a neutral concept. The holder may, but need not, be the owner of the bill. Being holder is thus not synonymous with being owner, true owner or creditor: it merely gives one the power to sue on the bill without implying that one is entitled to the rights embodied in it. (E.g. thief/mandatory)
- A bill of exchange is movable corporeal property and like any other res corporalis it may be pledged.

2. Ordinary holder

- The rights of an ordinary holder include:
  - May sue in its own name on the instrument and may enforce payment thereof against any party liable on it.
  - The holder of a bill which has been dishonoured may claim, from any party liable on it, the following:
    - The amount of the bill.
The interest on the amount of the bill from the date of presentation for payment, or from the date of its maturity.

The costs of noting and protest (if protest is necessary).

Not only the holder may claim on it. A person who had been a holder, but who has lost possession of the document, will be able to claim as the owner of the document, by instituting his *rei vindicatio* against a wrongful possessor. By recovering possession in this manner, the owner may again qualify as holder and, as holder, be entitled to sue on it. However, if a holder in due course has acquired the instrument in the meantime, the person who lost it has ceased to be owner, and the erstwhile owner will not be entitled to vindicate.

- To negotiate the instrument.
- To add to the bill any particulars which might be missing, e.g. the date of issue or of acceptance of the bill.
- To make certain additions to the instrument, e.g. to alter an endorsement in blank into a special endorsement, or crossing of a cheque as “not negotiable”.
- To request from the drawer a copy of an instrument which has been lost.
- May discharge the bill by intentionally cancelling it, cancelling the signature of any party to the bill, by absolutely and unconditionally renouncing his rights against the acceptor or by accepting a payment in due course.

- The duties of a holder include:
  - Presentment of the instrument for acceptance (if required by the Act).
  - Presentment of the instrument for payment. Failure to do this will release the drawer and endorsers from liability.
  - If the bill is dishonoured by non-payment or non-acceptance, notice of the dishonour must be given to the drawer and to every endorser. Failure will release the drawer and endorsers of liability.
  - A foreign bill which has been dishonoured by non-payment/ non-acceptance, must be protested by the holder. (This duty does not apply with regard to cheques)

### 3. Holder for value

- An ordinary holder who complies with an additional requirement: he has given value for the instrument. A person gives value for an instrument if he gives/does something in return for it (if he renders some form of counter-performance and does not obtain the document gratuitously).
- The holder of value has rights, additional to those of the ordinary holder. Certain persons, such as an accommodation party and the so-called transferor by delivery, are liable to him, while they are not liable to the ordinary holder:

  - **Transferor by delivery** A bearer document is negotiated by mere delivery. The holder who negotiates such an instrument is called a transferor by delivery. Because the transferor by delivery does not sign the document, he will not be liable on the document itself. However, sect 56(3) provides that a transferor by delivery upon negotiation warrants to his immediate transferee (who is a holder for value) that:
    - The bill is what it purports to be.
    - He has a right to transfer it.
    - At the time of transfer he is not aware of any fact which renders the instrument valueless.
The transferor by delivery is therefore not liable on the instrument. Should the instrument be dishonoured, he will be liable to his immediate transferee (provided he is a holder for value) for breach of warranty (breach of contract), though not on the instrument itself, because he didn’t sign it.

4. **Holder in due course**

- A holder in due course acquires ownership in the instrument even where he acquires it from a *non dominus* and takes it free from defects of title and mere personal defences available to prior parties among themselves.
- SA decisions refer to the holder in due course in various ways: holder “for valuable consideration”, or “for due consideration”, or as one who has given value to the bill, or a *bona fide* onerous endorsee, or a holder for a *quid pro quo/ex causa onerosa*.

- In order to be a holder in due course, a person must meet the following requirements:
  - **A holder in due course must be a holder** Payee, endorsee or bearer in possession.
  - **He took a bill which was complete and regular on the face of it** It has often been said that “face” refers to both the front and the back of the bill. The meaning of the word “face” in this section is that of “external appearance; look…visible state or condition; aspect; configuration; outward show, etc. In determining whether an instrument is complete and regular on the face of it, the judgment of the reasonable man taking the instrument with due care, has to be borne in mind. A bill is irregular on the face of it if its appearance leads one to reasonably conclude that prior parties have defences against the claims on the bill or that they are entitled to real rights to it.
  - **He must have become the holder of the instrument before it was overdue** If not, he takes it subject to those defences and claims which could have been raised against his predecessor in title. An overdue bill may be negotiated in the sense that the transferee may become the holder. However, it cannot be negotiated in the sense that the transferee takes it free from equities. The negotiation of an overdue bill effects a transfer of the real and personal rights of the transferor.
  - **If the bill had previously been dishonoured, he must not have had notice thereof** The holder should have no knowledge that the bill has previously been dishonoured.
  - **He must have taken the instrument in good faith** A thing is deemed to be done in good faith if it is in fact done honestly, irrespective of whether or not it is done negligently. Therefore, he must have taken without knowledge of any defect in title of the person who negotiated the instrument to him, the bill had to be complete and regular and he should have acquired it before it was overdue. The Act insists on the holder’s honesty. The measure is whether he had a certain subjective state of mind when he acquired the instrument. The question is not whether he should have had knowledge of a certain fact, but whether he did in fact have such knowledge. The doctrine of constructive knowledge does not apply to negotiable instruments. A holder who has acquired a bill through carelessness, negligence or ignorance cannot by reason only of his state of mind be disqualified as a holder in due course. His acquisition might be in bad faith if he merely suspects that something is wrong or suspect something untoward about the bill. To determine the holder’s state of mind one has to consider the facts known to him and evaluate those apparently suspicious circumstances that call for enquiry.
  - **He must have taken it for value** A holder takes a bill for value if he takes it under onerous title. I.t.o. English common law, the *bona fide* holder for value gave value for the bill in the sense that he gave value for it himself: acquisition of a bill by discounting it, is an acquisition
for value. English law required an acquisition by contract. The English contract is a “bargain”, a transaction through which the parties agree to exchange performances; thus, requiring consideration. I.t.o. the BEA it is “any consideration sufficient to support a simple contract”. The holder must acquire by agreement and under onerous title. Acquisition takes place when the bill is acquired by discounting; other negotiable instruments are given for it; it is accepted as payment for a pre-existing debt; or is obtained as consideration for an undertaking to care for an illegitimate child; or is accepted in payment of maintenance or if it is acquired in consideration for the granting of credit facilities.

- **The bill must have been negotiated to him** Even if a cessionary or a person who has found a lost bill has met all the other requirements in the definition, they cannot be holders in due course. Because the payee of a bill payable to order becomes a holder by the issue of the bill and not by negotiation, the payee cannot be a holder in due course.

- **At the time of negotiation, he must have had no notice of a defect in the title of the person who negotiated to him** The title who negotiates a bill is defective if he obtained the bill, or the acceptance thereof, by fraud or other unlawful means, or for an illegal consideration, and is deemed to have been so defective if the negotiates the bill in breach of faith, or under such circumstances as amount to fraud. The word “title” can be interpreted only with reference to the rights of the holder. The holder is not necessarily the owner of or creditor i.r.o. the bill in his possession. He may also be subject to real/personal claims for the recovery of the instrument. The word “title” can have meaning only if it relates to his real rights on the bill, and to the question of whether he is entitled to enforce the personal rights flowing from it. “Defects in title” refer to claims for the recovery of the bill and to defences available against the rights arising from the bill that are based on the contracts on the bill or on the underlying agreement.

- Because the holder in due course has to satisfy more requirements than the ordinary holder and the holder for value, he has more rights than these holders. The holder in due course has the same rights as the ordinary holder and the holder for value, but in addition has the following rights:
  - **Presumption of holding in due course** The holder’s opponent must prove, on a balance of probabilities, that the holder is not a holder in due course. However, should the holder’s opponent prove that acceptance, issue or subsequent negotiation of the bill is affected by fraud or illegality, the holder must prove that, subsequent to such fraud or illegality, value has in good faith been given for the bill.
  - **Not affected by wrong date on the bill**
  - **Valid delivery of document conclusively presumed in his favour**
  - **Obtaining a good and complete title to the bill even if transferor’s title was defective** Also free from mere personal defences available to prior parties among themselves. These title defects and personal defences (relative defences) cannot be set up against the holder in due course, in contrast to the so-called absolute defences. See example of this in Commercial Law par 30.100.
  - **Statutory estoppels operating in his favour.**
  - **Aval/endorser.**
  - **Not prejudiced by omission to give notice of dishonour by non-acceptance**

### 5. Absolute defences

- A holder in due course acquires a real right to the instrument in his possession and he takes it free from claims that prior parties may have to the instrument. He is also entitled to the personal rights expressed in the bill and may enforce them without being subject to defences that prior parties may
have among themselves. Sect 36 puts it beyond doubt that where the title to an instrument is
defective, the holder in due course “obtains a good and complete title” to it.
- Sect 36 does not enumerate all the defences against which the holder in due course is protected,
nor does it name those to which he is subject. It merely states that he takes free from defects in title
(Defences in rem. They are not the same as “mere personal defences” and absolute defences.) of
prior parties as well as from mere personal defences, and provides further that he may enforce
payment against all parties liable on the bill.
- Before defects in title (pacti conventi, rei iudicatae, praescriptionis, simulationis, solutionis,
malperformance, fraud of the cedent and defences based on the contracts on the bill or the
underlying agreements for which it was given) or mere personal defences (can be ascertained by
examining the rights of a remote party who is not a holder in due course) are investigated, it has to
be established whether the defendant is in any way liable on the bill. A party who has signed a bill
but who is not “liable” on it, has an absolute defence. By raising an absolute defence the defendant
says in effect that although he appears to liable on the bill, liability cannot be attributed to him.
- In addition to absolute defences, those defences that are founded on the contract on the instrument
between him and his immediate prior party, as well as those based on the underlying transaction for
which the bill was negotiated to him, may be raised against a holder in due course.
- Absolute defences are based on the instrument itself. These defences are important, as they play a
major role as defences that can be set up against holders in due course and other holders.

- The following absolute defences can be distinguished:

  - **Lack of contractual capacity** One can raise the defence that he did not have contractual
capacity at the time of signature and delivery, and that he can therefore not in law be held,
liable on the instrument.

  - **Absolute force (vis absoluta)** The defendant may also raise the defence that his signing
of the instrument was not a juristic act because it was performed by force and against his
will. It does not constitute a defect of title. The defence that the defendant was forced to act
can be either absolute or relative. It is absolute if the defendant himself did no act and
cannot in law be considered to have acted. If is relative if, despite the force involved, the
defendant nevertheless formed his own will and intended to act. In the latter case a legal act
is constituted.

  - **Forged/unauthorized signature** A person will not be liable as a drawer, acceptor or
endorser of a bill, unless he has signed it as such. A forged/unauthorized signature is wholly
inoperative. If a person’s signature on a bill is forged/unauthorized, he is not liable on the
instrument, not even to a holder in due course. A person who has no authority to sign for or
on behalf of the person indicated as principal, or who signs in a representative capacity, will
in terms of sect 24(1) be personally liable on the bill.

  - **Material alteration** If a material alteration of the bill or its acceptance has occurred, the
defendant may raise the defence that he cannot be held liable in accordance with the altered
document, because he was not a party to the alteration and did not consent to it. An
example of a material alteration is any alteration of the date, the amount payable, or the time
and place of payment – an alteration which would alter the liability of any of the parties to the
bill.

  - **Non-delivery of an inchoate (incomplete) instrument** The defendant may also raise the
defence that the document he has signed was an inchoate document and that he did not
deliver it for the purpose of converting it into a bill/note. A person who signs either an
incomplete instrument or a blank paper subsequently converted into a bill is, in principle, not
liable on it. In certain circumstances, however, he may be liable on the bill, liability being
founded either on the provisions of sect 18 or the common law. (Sect 18 deals with 2 distinct
situations, namely the signing of a blank paper and the omission of a material particular on the bill. If a person places his signature upon a blank paper and delivers it to any other person in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill. If a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. The completion of a bill and the filling in of a material particular, must take place within the time agreed on or, if not time is agreed on, within a reasonable time, and strictly in accordance with the authority given.

- **Non est factum** If a person signs a document not knowing that it is a negotiable instrument or that it will be used as such, he may avail himself of the defence of *non est factum*. The essence of this defence is that the defendant did not sign and deliver the document with the intention of undertaking cambial liability. If, however, the person upon signing the document negligently created the impression that he was to be bound on the bill, he cannot avail himself of this defence.

**LIABILITIES OF THE PARTIES**

1. **Introduction**
   - Capacity to incur liability as a party to a bill depends on legal capacity. A person of limited legal capacity can therefore incur liability on a bill only if the contracted with necessary assistance, or if his act is subsequently ratified.
   - The mutual independence of the cambial obligations entails that the liabilities of the parties are not affected by the fact that other parties on the bill signed without authority, or that their signatures are forged, or that they are those of persons lacking capacity, or are otherwise without legal effect.

2. **Liabilities of the different parties**

2.1 **Co-debtors**
   - A note may be made by two or more persons and they may be liable on it jointly, or jointly and severally, according to its tenor.
   - Any note signed by two or more persons is deemed to be their joint and several note in the absence of a contrary intention on the face of it.

2.2 **Drawee**
   - The drawee is not liable on the bill.
   - The drawee is liable on the bill only if he has accepted it.

2.3 **Acceptor and maker**

- **Acceptance** The drawer does not undertake to pay the bill in the first instance, but only to do so when it is not paid/accepted by the drawee. Initially the drawee takes no part in the transaction and the bill is valid before acceptance. Nor does he incur liability before his acceptance. Acceptance consists of his acceptance of the order of the drawer and undertaking to the holder to pay the bill when due. By accepting a bill, the drawee becomes both the principal and final debtor upon it. Acceptance is in the acceptor’s own name and is not dependent upon the order given to him. Nor is an acceptance dependent upon the
relationship between the drawer and the holder. Generally, the defences based on the relationship between the other parties to the instrument cannot be relied on by the acceptor (countermand of payment by the drawer/an agreement between drawer and drawee to cancel the bill/upon defences based on the underlying contract of sale. The source of the obligation of the acceptor is not a unilateral declaration of intention to be bound, but rather a contract between the acceptor and the holder.

- **Requirements for acceptance** To be valid an acceptance must be written on the bill and signed by the drawee. An acceptance is invalid if it contains a stipulation that the drawee will perform his promise by any means other that the payment of money.

- **Date and time of acceptance** A bill may be accepted before it is signed by the drawer, or while it is still incomplete, and also when it is overdue, or after it has been dishonoured by non-acceptance or non-payment. If the acceptance of a bill, payable at the expiration of a fixed period after sight, is undated, any holder may insert the true date of acceptance, and the bill shall be payable accordingly. If the acceptance of a bill is dated, the date is deemed to be the true date of acceptance. If a bill is payable at the expiration of a fixed period after sight, the period begins to run from date of acceptance, if the bill is accepted, and from the date of noting/protest, if the bill is noted/protested for non-acceptance.

- **General and qualified acceptance** An acceptance is either general or qualified. A general acceptance is the assent, without qualification, of the acceptor to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. An acceptance is qualified if it:
  - Is a conditional acceptance (if it makes payment by the acceptor dependent on the fulfilment of a condition).
  - Is a partial acceptance (an acceptance to pay part only of the amount for which the bill is drawn).
  - Is an acceptance to pay only at a particular specified place and not elsewhere.
  - Qualifies the time of payment.
  - Is the acceptance of one or more of the drawees but not of all.

- **Liability of acceptor and maker** The liability of an acceptor must be determined by the terms of his contract and the provisions of the Act. The acceptor is precluded from denying to a holder in due course:
  - The existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill.
  - In the case of a bill payable to the drawer’s order, the then capacity of the drawer to endorse, but not the genuineness or the validity of his endorsement.
  - In the case of a bill payable to the order of a 3rd person, the existence of the payee and his then capacity to endorse, but not the genuineness or the validity of his endorsement.

2.4 Drawer

- The drawer orders the payee to pay a bill. His order contains a tacit undertaking guaranteeing/warranting payment of the bill.
- The liability of the drawer is not solely based on his drawing of the bill but also on delivery to conclude the contract. Since delivery usually takes place *credendi donandi solvendi causa*, the liability of the drawer on the bill is not absolute in the sense that it is determined solely by the contents of the bill.
- His liability must rather be determined by the agreement between the parties when the bill is delivered.
2.5 Endorser

- Endorsement refers to the signature of the endorser on the bill, but also signifies the transfer of the rights and the corresponding contract of the endorser.
- Endorsement has two meanings: It is a method of negotiation and it forms the basis of the contract on the endorser on the bill. The contract in terms of which an endorser guarantees payment of the bill is real, and is concluded by delivery of the bill by the endorser to the endorsee. Generally, as in the case of the drawer, delivery takes place *credendi donandi solvendi causa*.
- As between endorser and endorsee, the bill embodies merely a formally abstract right of action.
- Since the liability of an endorser to his endorsee is contractual, he can raise against his endorsee defences which he would have been entitled to raise against an ordinary contractual partner.
- By endorsing a bill the endorser engages that, on due presentment, it shall be accepted and paid according to its tenor and that if it be dishonoured, he will compensate the holder, or a subsequent endorser who is compelled to pay it, provided the requisite proceedings on dishonour are duly taken.

2.6 Signer of an aval

- The obligations of the parties to an instrument can be secured by suretyship.
- A surety for the drawer, acceptor or endorser who evidences his suretyship by his signature on the bill is known as the giver or signer of an aval.
- His liability is founded not only on his signature but on his intention to be bound and, it is submitted, delivery of the bill to the payee or person towards whom the suretyship is undertaken.

2.7 Transferor by delivery

- If the holder of a bill payable to bearer negotiates it by delivery without endorsing it, he is called a transferor by delivery.
- A transferor by delivery is not liable on the instrument because he has not signed it.
- The Act, however, imposes certain warranties upon him.
Study objectives:
Upon completion of this lecture, you must be able to:

1. Discuss the origin and the position of cheques in the SA Law.
2. Discuss ‘n cheque as an instrument of payment.
3. Define a cheque, a bank cheque and a bank.
4. To what is reference made by the ACB and MICR?
5. Discuss the process of presentment of cheques for payment.
6. What is a stale cheque?
7. Discuss acceptance, certifying and bank-guaranteed cheques.
8. When are cheques paid?
9. Discuss the position regarding cheques send by mail.
10. Discuss the nature of the bank customer relationship.
11. In what circumstances is a bank allowed to refuse payment of a cheque?
12. In what circumstances is a bank obliged to refuse payment of a cheque?
13. Discuss the duties and liabilities of both parties in the abovementioned relationship.
14. Distinguish the different types of crossings.
15. Who are allowed to cross a cheque?
16. Discuss the nature and effect of crossings.
17. Discuss the consequences and characteristics of the different additions to crossings.
18. Explain the legal position in case of the forgery of a drawer’s signature on a cheque.
19. Discuss the applicability of sect 58 with regards to the protection of the drawee bank in the event of forged/unauthorized endorsements.
20. Discuss the applicability of sect 79 with regards to the liability on crossed cheques which was not paid in accordance with the crossing by the drawee bank.
21. Discuss the applicability of sect 83 with regards to the protection of the drawee bank in the event of absence/irregularity of endorsements.
22. Discuss the requirements that must be met in order for a true owner to hold the collecting bank delictually liable?
23. What are the characteristics of a note?
24. Discuss the liability of the maker of a note.
25. Discuss the time of presentment of a note.
26. Discuss the place of presentment of a note and also refer to the “body of the note” and the “particular place”. Also refer to case law when giving examples.
27. Define a promissory note.
28. What are the uses/functions of a note?

**Study:**

**Read:**

**Activity 5**
Discuss the payment of cheques in full.

**Vocabulary:**

ACB: _______________________________________________
Theory

CHEQUES
1. Introduction
- The cheque (most widely used negotiable instrument) originated in payment instructions given by a customer to his bank.
- The law of cheques forms part of banking law and is not an autonomous branch of law. Its sources are found in legislation, custom and the general rules of private and public law.
- Because a cheque is a bill drawn by a bank, payable on demand, the provisions of the BEA applicable to bills, generally also apply to cheques.
- The parties to a cheque are as follows:
  - **Drawee** - Bank
  - **Drawer** - Person who issues a cheque
  - **Payee** - Person in favour of whom the cheque has been issued

2. Cheque as an instrument of payment
2.1 General
- A cheque is neither money nor legal tender, and a creditor is not obliged to accept it in payment of a debt. It is rather an instrument by which a person can easily dispose of amounts to his credit with a bank.
- Because a cheque is principally used as an instrument of payment, it is seldom negotiated, but is usually deposited into the account of the payee to be collected on his behalf.
- Sect 1 of the BEA defines a cheque as a bill drawn on a bank payable on demand. Thus, a cheque must comply with the formal requirements of a bill, and, in addition, be drawn on a bank and payable on demand. The question on whether certain documents such as “house cheques”, “travellers’ cheques” or “postcard cheques” are to be classified as bills or cheques must therefore be determined with reference to the definitions of “bill” and “cheque”.
- The “Automated Clearing Bureau” (ACB) was established in 1973 to provide for the computerized collection and payment of cheques. This system uses sophisticated electronic data equipment and processes cheques by means of magnetic ink character recognition (MICR). It also provides a magnetic tape service for clearing direct debit and credit transactions. (All MICR cheques are standardized and have a code line in which are preencoded in magnetic ink, certain characters representing the serial number of the cheque, the drawee bank, the branch, and the drawer’s account. The bank at which a cheque is deposited, encodes in the code line the amount of each cheque. Cheques deposited in areas in which the ACB operates are listed and sent in batches of 50 by the collecting banks to the ACB centres where they are electronically read, and the encoded information transferred to magnetic tape. Cheques are then sorted according to bank, branch, account and serial number.)
- Truncation or cheque retention refers to a truncation/shortening of the collection process. The customary route a cheque takes it from drawer to payee, from payee to collecting bank, from collecting bank via a clearing house to the drawee bank, and from the drawee bank back to the drawer. Truncation shortens this route and immobilizes the cheque somewhere in the process. Refer to the forms of truncation and the legality thereof in par 190 (Malan).
- A cheque which is not dated is valid *qua* cheque.
- A cheque must be presented for payment according to the provisions of sect 43 and 43A in order to hold the drawer and endorsers liable. It must be presented within a reasonable time after its issue
to render the drawer liable, and within a reasonable time after its endorsement to render the endorser liable. If a cheque is not presented for payment within a reasonable time of its issue, and the drawer had the right, at the time when the cheque should have been presented for payment, as between himself and the drawee bank, to have the cheque paid, and suffered actual damage through the delay, he will be discharged to the extent of such damage. The extent of damage is the amount for which the drawer is a creditor of the drawee bank for an amount larger than would otherwise have been had the cheque been paid. The holder of such a cheque is substituted as a creditor in lieu of the drawer of the drawee bank to the extent of the discharge.

- A cheque becomes “stale” after 6 or, in the case of bank cheques, 3 months after its date. Banks refuse to pay stale cheques although such a cheque remains valid qua cheque. (In Jade Engineering v Tool Storing Systems the judge concluded that the 6 month period mentioned is at most a guideline laid down by banks for the protection of their clients).

- According to sect 1, “bank” means a body of persons, whether incorporated or not, that carries on the business of banking, and includes the SA Reserve Bank (the inclusion of the Reserve Bank in this definition in 2001 does not affect the legal position but was inserted to remove any doubt created by the decision in The Godfather v CIR, where it was said that since there was no evidence before the court that the Reserve Bank also collected cheques and conducted current accounts, it may be that, unless it does, its business is not banking business within the ordinary meaning of the expression), a bank as defined in the Banks Act, a mutual bank and the Post Office Savings Bank. Banking is the business of dealing in money. It comprises a whole range of financial transactions and is not limited to the different payment transactions. The business of banking in this wide sense is not a legal concept but a more general one comprising those matters usually understood by the term.

2.2 Acceptance, certification and bank-guaranteed cheques

- Cheques are used to pay debts and for this reason they are seldom accepted by the drawee bank. The bank merely pays his customer’s cheques (provided that funds are available) in terms of the contractual relationship between the bank and the drawer. However, there is no reason why they cannot legally be accepted: the acceptance need comply only with the requirements for the acceptance of bills.

- Although a cheque is seldom accepted, it is often certified. Before 2000, the viewpoint was held that certification merely adds to the negotiation of the cheque by showing that it was drawn on sufficient funds. Now the following suggestion is made: although some of the expressions used to certify a cheque could be interpreted as the signification by the drawee of his assent to the order of the drawer so that it could amount to an acceptance, certification is generally not intended or understood to be an acceptance. Certification may nevertheless impose contractual liability on the drawee bank to the holder where the drawee bank intends to be liable, or where the words used can reasonably be construed as amounting to an undertaking to pay, and the holder accepts this undertaking or relies on the words used. When a bank guarantees a cheque, the bank contractually binds itself to the payee to pay the cheque. This undertaking is independent from the relationship between itself and the drawer. The guarantee is often subject to various conditions.

- A bank cheque is a cheque drawn by a bank upon itself whether at the same or another branch. Previously, bank cheques were not valid as either a bill or a cheque. After the amendment of the BEA, it is now provided that the provisions of the BEA applicable to a cheque apply to a bill drawn by a bank on itself and payable on demand (bank cheque).
2.3 Time of payment by cheques

- The consequences of paying by cheque are the same as those of paying by bill/note. Payment by cheque is based on an agreement between debtor and creditor that the debtor will be entitled and the creditor obliged to accept a cheque in conditional payment of a debt.
- Where a cheque is issued to a creditor in “full and final settlement” of a debt, and the debt has been compromised (an agreement i.t.o. which the parties settle a dispute between them), the debtor will be discharged from all liability. But if a debtor who has not reached a compromise partially, pays a debt, he will be discharged pro tanto only, and will remain indebted for the balance.
- Where a cheque is paid over the counter, payment takes place when the money is handed to the drawer. But the time of payment becomes complicated when payment is effected through the instrumentality of a collecting bank and the ACB. Where payment is not made directly to the holder of a cheque, but is made through the instrumentality of a collection bank and a clearing bureau, the clearing arrangement should apply. Payment is then only final when the period, laid down by the clearing agreement and in which the drawee may decide to honour the cheque, expires without notice of dishonour by the drawee.
- In *Rosen v Barclays National Bank* it was decided that a cheque is paid the moment it is passed for payment by the official concerned and not at the expiry of the time allowed for by the clearing house rules to dishonour the cheque. In *Volkskas Bank v Bankorp* it was decided that the time of payment should be determined with reference to that agreement. There must be a decision to pay, but also, it is submitted, a crediting of an account to give effect to that decision.

2.4 Sending cheques by mail

- The position regarding payment by cheque sent by medium of the post is as follows: if a debtor posts a cheque to his creditor without the latter’s consent or request, he has to pay the amount of the debt again if the instrument is discharged without the creditor receiving it: since the cheque has not been delivered, ownership in it does not pass, and the debtor bears the risk of its theft or loss.
- Where the creditor has requested or authorized the debtor to post the cheque, the underlying debt will be deemed to have been discharged provided only that the cheque be paid

3. Banker-Customer Relationship

- A cheque is always drawn by a drawer (customer) on a bank and is then paid out to the payee. The relationship between the bank and the customer is therefore a *sui generis* and an important relationship.

- This relationship is of a contractual nature and may be described as that of debtor and creditor (*London Joint Stock Bank v Macmillan & Arthur; Estate Ismail v Barclays Bank and Standard Bank of SA Ltd v Minister of Bantu Education*). If a customer’s account shows a credit balance, the customer is the creditor. If the customer has availed himself of overdraft facilities provided to him by the bank, the bank is the creditor and the customer the debtor.
- This relationship stems from a contract of mandate (which arises by virtue of a customer’s signature on the cheque) i.t.o. which the customer lends money to the bank on current account, the bank undertakes to execute all orders to repay the amount (by honouring the customer’s cheques), given to him by the customer (provided that there are sufficient funds at the customer’s disposal), to collect on behalf of the customer, cheques paid into the latter’s account (*Stapelberg v Barclays Bank; S v Kearny and S v Graham*) and to keep account of his current account. The bank must pay the person designated as payee, or if the cheque is payable to the payee’s order, the bank must
pay the last-named endorsee or the bearer of the cheque if the cheque is payable to bearer. I.t.o. this mandate, the bank may not without good reason, refuse to pay the customer’s cheque. Should the bank refuse to pay in circumstances where it is obliged to do so, the client may in certain circumstances, be entitled to claim damages from the bank either for breach of contract or possibly for defamation (Trust Bank of Africa Ltd v Marques).

- A bank may refuse payment of a cheque in the following circumstances:
  - If the cheque was not made out on one of the printed forms supplied by the bank.
  - If the cheque bears no date.
  - If the amount in words differs from the amount in figures (even though the words have priority over the figures).
  - If the amount is expressed only in figures.
  - If the date of a post-dated cheque has not arrived yet.
  - If the cheque is “stale”. (After the expiry of a period of between 3-6 months, depending on banking practice)

- In some instances the bank must refuse payment, because i.t.o. sect 73, the duty and authority of the bank to pay a cheque is terminated by:
  - Countermand of payment.
  - Receipt of notice of the customer’s death.
  - Receipt of notice of the customer having become insolvent.

- A distinction must be made between the termination of the bank customer contract and the termination of the duty of the drawee bank to pay a particular cheque. Abovementioned is the termination of the duty. The bank and customer contract is a consensual agreement that can be terminated in the same way as other consensual contracts.

- Where the bank grants an overdraft to the customer it becomes obliged to pay cheques of the customer within the limits of the overdraft. Each time a cheque is drawn against an overdraft is paid, a separate debt arises. An overdraft is thus a series of loans, repayable on demand, so that the prescription begins to run from the moment the advance is made.

- If a bank pays a cheque and the customer alleges that the amount thereof has been raised without authority after it was drawn, the onus is on the bank to prove that there was no such alteration and that the cheque was paid in accordance with the customer’s mandate. If not proven, the bank will be entitled to debit the customer’s account only for the original amount of the cheque. The reason for the bank bearing this risk, is payment in contradiction of the customer’s mandate.

- The bank may also debit the account of the customer with the amount of a forged or unauthorized signature if the customer knows of the forgery/lack of authority and adopts the signature or fails to notify the bank timeously.

- I.t.o. this relationship, it is not only the bank owing duties to the customer. The customer will be bound by the practice of the bank in relation to an agreement to provide overdraft facilities (Senekal v Trust Bank of Africa Ltd). Also the customer owes the bank a duty of care when drawing the cheque. He should fill in the amount in such a manner that it cannot readily be altered. Should the customer fail to take due care in this respect and the alteration cannot be detected by an ordinary inspection of the cheque, the bank will be entitled to debit the customer’s with the altered amount.

- The question of whether the drawee bank, which has paid a cheque on which the signature of the drawer/endorser has been forged or a cheque the payment of which has been countermanded, is entitled to recover the amount paid from the recipient is a complex one and must be resolved by
applying the general principles of liability for unjustified enrichment.

- A collecting bank that was involved in the payment of a cheque that had been altered without authority, may possibly be liable in delict if acted negligently in the collection of the cheque. But the potential negligence of the collecting bank will only arise where the alteration was so obvious/apparent that any reasonable bank would have noticed it.

- A current account, in which money that was obtained by fraud or theft, is deposited, in certain circumstances, can be attached or the beneficiary and bank interdicted from making withdrawals from it.

4. Crossing of Cheques

4.1 Types of crossings

- You must distinguish between general and special crossings:
  
  - **General crossing** Two parallel transverse lines with/without the words “not negotiable”.
  
  - **Special crossing** An addition comprising the name of the bank with or without the words “not negotiable” or “and Company” or any abbreviation thereof. Two parallel transverse lines are not necessary for this crossing.

- The following may cross a cheque of make certain additions to a crossing:
  
  - The drawer or collecting bank may cross a cheque generally or specially.
  
  - The holder may cross either generally/specially a cheque that has not been crossed.
  
  - The holder may cross specially a cheque that has been crossed generally.
  
  - The holder may add the words “not negotiable” to a cheque that has been crossed generally or specially.
  
  - The bank to which a cheque has been crossed specially may again cross it specially to another bank for collection.

4.2 Nature and effect of crossings

- A crossing is an addition on the face of a cheque. A crossing does not have any influence upon the negotiability of a cheque. It also does not change the type of cheque and it remains an order or a bearer cheque, or a cheque which is valid *inter partes*. The method and the possibility of negotiation therefore remains the same, whether or not is an open (uncrossed) or a crossed cheque.

- The crossing of a cheque qualifies the order of the drawer and requires the drawee bank to pay it in a specific manner, *viz* in accordance with the provisions of sect 78. The order of the drawer is qualified in this manner not only where the drawer, but also a holder, crosses the cheque. The crossing of a cheque by a holder is thus a qualification *ex post* of the drawer’s order to the drawee bank.

- The effect of a crossing is that the drawee bank may only pay to another bank. In case of a general crossing the drawee bank may pay to any other bank, while in the case of a special crossing, the bank may only pay to a specific bank to whom the cheque is crossed, or to the agent for collection of the latter, if it is a bank.

- Therefore, the drawee bank may not pay a crossed cheque over the counter. The holder can only obtain payment of the cheque by depositing it in his own banking account. His bank (the collecting bank) then collects the cheque from the drawee bank and credits his account with the amount of the cheque.
The duties of the drawee bank i.r.o. crossed cheques are as follows:

- If a cheque is crossed generally, the drawee bank must not pay it to any person other than a bank.
- If a cheque is crossed specially, the drawee bank must not pay it to any person other than the bank to which it is crossed.
- If a cheque is crossed specially to more than one bank, except when crossed to two banks of which one is an agent for collection of the other, the drawee bank must refuse payment.

Specific consequences follow the failure of the drawee bank to comply with these duties. Usually, the drawee of a cheque does not incur liability to the holder/owner: a cheque is seldom, if ever, accepted, nor is there a contractual/other obligation between the holder and the drawee obliging the latter to pay the instrument. The bank will be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

This gives the drawee bank a defence to the liability created and applies to the case where the cheque presented for payment does not, at the time of presentment, appear to be crossed or to have had a crossing that has been obliterated, or to have a crossing that has been added to or altered, otherwise than as authorized by the BEA. The drawee bank paying such cheque in good faith and without negligence shall not be responsible or incur liability, nor may the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or added to or altered otherwise than as authorized by the BEA, and of payment having been made to a person other than a bank or the bank to which the cheque is/was crossed, as the case may be. Where the obliteration or alteration is apparent, the drawee bank will not be protected.

A holder of a cheque may make a crossing/addition to the cheque, on condition that, effectively, a crossing increases, and not decreases. A holder may not erode from that which already exists on the cheque by, e.g. cancelling the crossing or addition.

### 5. Additions to Crossings
#### 5.1 “Not negotiable”

- The crossing of a cheque does not affect its negotiability or transferability. A crossed cheque can be negotiated, and its transferee be a holder in due course. Where a cheque is lost/stolen and subsequently acquired by a holder in due course, the person dispossessed forfeits his ownership and other rights on the instrument to the holder in due course.
- One of the dangers facing the drawer of a cheque is: although a cheque is used primarily to pay debts, it remains a negotiable instrument which, if lost/stolen and subsequently acquired by a holder in due course, leads to the loss of the rights arising from it.

Sect 80 and 81 of the BEA provide the following: A person who takes a crossed cheque bearing the words “not negotiable”, shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. In colourful language the words “not negotiable” have been described as “a danger signal held out before every person invited to deal with it and are equivalent to saying: ‘Take care – this cheque may be stolen’”.

The words “not negotiable” do not prohibit the transfer of the cheque. The cheque can still be transferred but the transfer is subject to the nemo plus iuris rule. No person can therefore become the holder in due course if these words have been added by the drawer before issue of the cheque.

The true owner of such a cheque may recover from any person who was a possessor of the
cheque after it was stolen/lost and who either gave consideration therefor or took it as a donee, the amount of the true owner’s loss or the amount of the cheque, whichever is the lesser. This action lies if the cheque was paid by the drawee bank under circumstances which do not render such bank liable to the true owner for any loss he may sustain due to the cheque having been paid.
- “True owner” is not defined in the Act. The person who was entitled to possession and from whose possession the cheque was stolen/lost, is the true owner for these purposes.

5.2 “Account payee only”

- These words do not have a precise literal or grammatical meaning, and our courts have interpreted them in the same manner as the English courts had done in the past. They do not form part of the crossing even if they appear to be directed at the drawee bank calling on it to pay only into the account of the payee and are written between the parallel lines of the crossing. Furthermore, whether or not the word “only” is used in conjunction with them, they do not restrict the negotiability of the cheque.
- In Standard Bank of SA Ltd v Sham Magazine Centre it was held that these words do not prohibit transfer or affect the transferability of the cheque and that the words moreover do not contain an order by the drawer to the drawee bank.
- According to the Appellate Division this addition serves as “some safeguard if the cheque should fall in the wrong hands” and it is “a direction to the collecting bank that the specified payee should receive the money”.
- It is submitted that disregard of these words by the collecting bank may be relevant when the delictual liability of the bank is considered.

5.3 “Not transferable”

- These words prohibit any further transfer of the cheque. It is therefore an order to the drawee bank to pay the specified payee only.
- It was pointed out in 4.2 that a general crossing is an order to the drawee bank to pay any other bank. It therefore appears as if the words “not transferable” added to a crossing, contain two conflicting orders. This conflict can, however, be reconciled by the explanation that in such an instance the bank is instructed to pay to another bank only, namely the bank collecting on behalf of the specified payee.
- These words have the effect of amending the nature of the cheque by rendering an order/bearer cheque to become a cheque that is only valid inter partes, namely between immediate parties.
- The non-transferable cheque is deemed to be crossed generally, unless it is crossed specially.
- The words “non-transferable” and “not transferable” may not be cancelled, and any purported cancellation shall be of no effect.
- The Banking Council of SA announced that banks would no longer accept altered, previously deposited or unpaid cheques as of 1 August 2001. The consequence of this announcement is that if the drawer makes a mistake on the cheque and corrects it by scratching it out and initialling it, the cheque will not be honoured by the bank and will be returned to the depositor.

5.4 “Not negotiable” and “not transferable”

- The words “not negotiable” do not prohibit transfer of the cheque. Such transfer will however always be subject to the nemo plus iuris rule.
- The words “not transferable” prohibit further negotiation. These words will have priority if appearing on a crossed cheque together with the words “not negotiable”.
- Such a cheque will consequently not be transferable.
6. Payment of cheques

6.1 General

- A cheque is an instrument of payment drawn by a debtor (drawer) in favour of his creditor (payee) and delivered to him to pay a debt.
- A cheque is seldom negotiated, but is either presented to the drawee bank for payment or deposited with the payee’s (creditor) bank for collection. In the latter case, the collecting bank presents the cheque for payment and payment by the drawee bank takes place in due course.
- The bank undertakes to pay on behalf of its customer (drawer), cheques drawn by its customer, and also to collect cheques paid into the customer’s (payee) account.
- With regard to the bank’s obligation to pay the drawer’s cheques, the bank has to make payment in due course (bona fide payment on/after the date of maturity, to the holder). If the bank does not make payment in due course, it may not debit the customer’s (drawer) account with the amount “paid”.

6.2 Forgery of drawer’s signature

- When a customer draws a cheque on his bank, he instructs his bank, by means of his signature, to pay the cheque. Should the bank therefore pay a cheque on which the drawer’s signature is forged, the bank will not be entitled to debit his account with the amount paid, because it does not have the necessary instruction (mandate) to pay, the forgery being a nullity.

6.3 Protection of drawee bank in event of forged/unauthorized endorsements

- Sect 58 of the BEA protects the bank in event of payment on the basis of a forged/unauthorized endorsement. If such payment was made bona fide (something must be done honestly, but it is not necessary that it should be done without negligence) and in the ordinary course of business, payment will be deemed to be payment in due course.
- The bank will, however, not be entitled to this protection if the forged/unauthorized endorsement purports to be that of a client of the particular branch on which the cheque was drawn.
- Sect 58 only applies if the cheque contains an endorsement in the technical sense (National Bank v Paterson; Stapelberg v Barclays Bank). If a thief of an order cheque should for instance pretend to be the payee of the cheque and should demand payment of the cheque over the counter, he will usually be required to sign on the back of the cheque. Such signature is not an endorsement i.t.o. sect 58, because it was not made with the intention to negotiate the cheque, but only for purposes of identification and to serve as a receipt. In such an instance, the drawee bank will not enjoy the protection afforded by sect 58, should it pay the thief.
- If the thief forges the endorsement of the payee on the back of the cheque, and afterwards pretends to be the holder of the cheque, the bank will enjoy the protection afforded by sect 58. A payment in these circumstances will be deemed to have been made in due course, even though the thief is not the holder of the cheque.
**6.4 Payment of crossed cheques**

- If a drawee bank pays a cheque strictly in accordance with the crossing and the payment is made *bona fide* and without negligence, the bank will be in the same position as if it had paid the cheque to the true owner thereof, according to sect 79 (*Gishen v Nedbank*).

- For example: A draws a cheque on B bank in favour of C/order. The cheque is crossed generally. X steals the cheque from C, forges C’s endorsement on the back of the cheque and deposits the cheque for collection into his own bank account with Z bank. Z bank presents the cheque for payment to B bank and receives payment. If the payment to Z bank is made *bona fide* and without negligence, B bank will be protected i.t.o. sect 79, because it paid a bank strictly in accordance with the crossing. B bank will be entitled to debit A’s account with the amount of the cheque.

- If the drawee bank does not pay in accordance with the crossing, it will be liable to the true owner for any damages suffered by him due to the payment of the cheque.

- For example: A draws a generally crossed cheque on B bank in favour of C/order. X steals the cheque from C, forges C’s endorsement on the back of the cheque and presents the cheque to B bank for payment. B bank pays X over the counter. The drawee bank has not paid in accordance with the crossing, because payment was not made to a bank. B bank will therefore be liable to the true owner (C) for damages suffered as a result of the payment.

**6.5 Protection of drawee bank in event of absent/irregular endorsements**

- Sect 83 protects the drawee bank in case of an absent/irregular endorsement, where it pays a cheque drawn on itself to another bank or where it has credited the account of its client (drawer) with the amount. In order for the drawee bank to enjoy this protection i.t.o. sect 83, the following requirements must be met:
  - The cheque must be drawn on another bank. (If a cheque has been paid over the counter, sect 83 does not apply)
  - Payment or crediting of the account must be made *bona fide* and in the ordinary course of business.

- For example: A draws a cheque on B bank in favour of C. X steals the cheque and deposits it into an account which he has opened in C’s name with Z bank. Z bank presents the cheque to B bank for payment and receives payment. If payment is made *bona fide* and in the ordinary course of business, B bank will be protected i.t.o. sect 83, even if X had not endorsed the cheque when he deposited it and even if X had forged C’s endorsement. Where X, however, opens an account in the name of C with B bank, B bank will not make payment to another bank, but will credit C’s account with the amount of the cheque. B bank will also be protected if the crediting was done *bona fide* and in the ordinary course of business.

**7. Collection of cheques**

**7.1 Protection of collecting bank in event of absence/irregularity of endorsements**

- The protection afforded to a drawee bank i.t.o. sect 83 (refer to 6.5), is also offered by sect 84 to a collecting bank.

- For example: A buys a washing machine from C. A draws a cheque on B bank in favour of C/order and delivers it to C. Without endorsing the cheque, C hands the cheque to his bank, Z (collecting bank) to collect payment from B bank. Z bank allows C to withdraw the amount of the cheque prior to its collection. In the interim, A has stopped payment of the cheque by B bank because the
washing machine did not function properly. When Z bank presents the cheque for payment, it is notified by B bank that payment of the cheque has been stopped. Z bank is not the holder of the cheque did not endorse the order cheque in its favour. Z bank is nevertheless protected by sect 84 which provides that where the holder has not endorsed, or has not regularly endorsed an order cheque, the bank acquires all the rights it would have had, had the holder (C) upon delivery to it, endorsed the cheque in blank. Z bank will therefore enjoy the rights of a holder and because it has given value for the cheque (by allowing C to withdraw the amount of the cheque prior to its collection), it will furthermore qualify as a holder for value. If it, in addition, meets all the other requirements for a holder in due course, it will be entitled to hold A liable. The defect in the washing machine is a relative (personal) defence only, which cannot be raised against Z as holder in due course.

7.2 Delictual liability of collecting bank

- Look at the following example: A draws a cheque on B bank in favour of Pretoria Marriage Bureau in the amount of R1000 and hands it to the Bureau’s secretary, X. X steals the cheque, opens a current account with D bank in the name of Pretoria Marriage Services and deposits the stolen cheque for collection into this account. B bank, bona fide and in the ordinary course of business, pays the cheque to D bank. X then withdraws the amount of the cheque from D bank, spends it all and disappears. Can Pretoria Marriage Bureau, who became the true owner of the cheque upon delivery thereof to secretary X, claim the R1000 from D bank?

- In Idac Electronics v Volkskas Bank the Appellate Division recognized the delictual liability of the collecting bank towards the true owner of the cheque in these circumstances. Such liability is based on a duty of care on the part of the collecting bank towards the true owner of a lost/stolen cheque, not to collect such cheque in a negligent manner. The true owner (Pretoria Marriage Bureau) will succeed with a claim for damages against the collecting bank if it can establish that:
  - All the normal requirements for delictual liability are met.
  - The collecting bank received payment of the cheque on behalf of someone who was not entitled thereto.
  - The true owner sustained a loss because of the bank’s conduct.
  - The damages claimed, represent proper compensation for such loss.
**PROMISSORY NOTES**

1. **Introduction**

- The general principles of the law of negotiable instruments are, *mutatis mutandis*, also applicable to promissory notes.
- A note is an unconditional promise, in writing, made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed/determinable future time, a sum certain in money, to a specified person of his order, or to bearer.
- A promise is an undertaking to pay and involve more than a mere acknowledgement of debt with an implied undertaking to pay. Positive statements such as “I will pay” are sufficient to constitute a promise. Where the promise is dependant on the performance by another person of an obligation, it is conditional. But the promise is unconditional of the note only refers to the reason for the promise without making it dependant on it.
- An IOU is not a note but simply an acknowledgement of debt. Fixed deposit certificates that merely acknowledge the receipt of money, are not promissory notes.
- The definition of a note implies that there are two necessary parties:
  - The party who engages/promises to pay is the **maker**. He is the principal debtor.
  - The party to whom payment is promised, is the **payee**.
- A note is not invalid by reason only that it also contains a pledge of a collateral security with authority to sell/dispose of it.
LECTURE 10: TRAVELLER’S CHEQUES & CREDIT CARDS

Study objectives:
Upon completion of this lecture, you must be able to:

1. What are the advantages of travellers’ cheques?
2. What safety mechanism is built into travellers’ cheques?
3. Who are the parties to a travellers’ cheque
4. What was the AD’s decision regarding the legal nature of travellers’ cheques in S v Katsikaris?
5. What are the advantages and disadvantages of credit cards?
6. Describe the relationship between the issuer, the card holder and the supplier?
7. Define a money lending transaction.
8. Discuss the relationship between a supplier and a card holder.
9. Discuss the relationship between a supplier and an issuer.
10. Discuss the relationship between a card holder and an issuer.
11. What is the legal position regarding the unauthorized use of a stolen/lost credit card?

Study:

Read:

Activity 6
Discuss the different relationships with the three parties in credit card transactions.
Vocabulary:

Traveller’s cheque: _______________________________ _____________________
................................................................................................................................

Countersignature: _________________________________ ___________________
................................................................................................................................

Credit card: _____________________________________ _______________________
................................................................................................................................

Tri-partite relationship: ________________________ ___________________________
................................................................................................................................

Direct payment obligation scheme: _________________________________
................................................................................................................................

Theory

TRAVELLER’S CHEQUES

1. Introduction

- Travellers’ cheques offer the advantage of paying in a foreign currency when abroad, without having to carry large sums of the currency itself *in specie*.
- They are accepted throughout the world by suppliers such as hotels, travel agencies, shops and restaurants.
- The issuer normally contractually undertakes to refund the traveller if they are lost or stolen before the latter has countersigned them.
- Travellers’ cheques have a built-in safety mechanism in the form of a countersignature. When a traveller purchases travellers’ cheques from the issuer, he is normally required to sign them in the presence of the issuer or his agent. These documents also provide a space for a countersignature, where the traveller must sign again, this time in the presence of the supplier/encashing party.

2. Classification and form

- There is no legislation in SA governing the wording and form of travellers’ cheques. There is also a dearth of judicial authority on the subject, since disputes between travellers and issuers seldom reach the courts, probably because of the small amounts involved or because the issuers (in an
attempt to protect the goodwill of their product) prefer rather to pay these documents than to get involved in legal proceedings. It is, therefore, very dangerous to generalize on the topic, as each individual document must be construed according to its tenor and form.

- They may be classified broadly as being either mandatory (an order to the issuer to pay, e.g. “Pay this Cheque to the Order of”, “Pay Self/Order and “Issuer Pay this Cheque to”) or promissory (it evidences a promise/unequivocal undertaking to pay, e.g. “We will Pay” or “The Issuer will Pay”) in form.

3. Legal nature

- A travellers’ cheque may not be regarded as a valid cheque for purposes of the BEA. Therefore, the general rules of the law of negotiable instruments as provided for by the BEA, should not be applied to these documents. The legal position should in each case be determined from the tenor and form of the document itself, as well as from the underlying contract between the parties.

- Thus far, the Appellate Division has had only one opportunity to consider the legal nature of a travellers’ cheque. In *S v Katsikaris* the document under consideration was issued by American Express Company (Amexco) and appeared thus:

<table>
<thead>
<tr>
<th>U.S. DOLLAR TRAVELLERS CHEQUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>When countersigned below with this signature</td>
</tr>
<tr>
<td>___________________________________________ 20</td>
</tr>
<tr>
<td>American Express Company</td>
</tr>
<tr>
<td>Pay this Cheque (Signature)</td>
</tr>
<tr>
<td>To the Order of ____________________________ CHAIRMAN</td>
</tr>
<tr>
<td>Countersign here in presence of person cashing</td>
</tr>
</tbody>
</table>

- The AD first identified the parties as follows:
  - The traveller is the drawer and he signs in that capacity in the above left-hand corner.
  - Amexco is the drawee to whom the order to pay is directed.
  - The signature in the lower right-hand corner constitutes an acceptance of the document by the chairman of Amexco (drawee) on behalf of the company.
  - The payee’s name is to be filled in at a later stage.

- Ruling against the validity of the document for purposes of the BEA, the AD held that:
  - It is not a promissory note, since it contains an order and not a promise to pay.
  - It is not a cheque, since the drawee (Amexco) is not a bank.
• It is not a bill, since the order to pay is conditional. The condition is to be found in the very safety mechanism embodied in the document, since the drawee is instructed to pay only if the two signatures of the drawer actually do correspond. Even if the two signatures were to correspond, that does not cure the original defect.

CREDIT CARDS
1. Introduction

- "Tri-partite" credit cards means that 3 different parties to the credit card scheme may be distinguished, namely the issuer, the card holder and the supplier.
- The best-known of these types of credit cards are those issued by the various banks, who in turn, belong to the international issuer organizations like Visa or Master Card. There are also so-called travel and entertainment or universal credit cards where the issuer is not a bank, such as those issued by Diners Club and the American Express Company.

2. Direct payment-obligation scheme

- The issuer enters into a standard-form contract with various suppliers, i.t.o. which the latter undertake to accept payment for goods/services by means of the credit cards issued by the former, while the issuer undertakes to refund the suppliers, subject to certain conditions and usually minus a certain percentage, for purchases made by the card holder.
- The issuer therefore takes upon himself the obligation to pay directly to the supplier.
- The issuer also enters into a standard-form contract with every card holder which contains the conditions of use of the card i.t.o. which the card holder may make purchases up to a certain credit limit. The issuer debits the card holder with the amounts spent and the latter undertakes to repay these amounts, or a portion thereof, within a specific time directly to the issuer.

3. Advantages and disadvantages

- The disadvantages concerned are the following:
  • There is always the possibility that an irresponsible card holder may use his card in an injudicious manner.
  • The card holder may incur large amounts of debt for goods he sometimes does not really need or for which he cannot ultimately afford.
  • The card holder may under certain circumstances be held liable for unauthorized amounts spent with his card after it has been stolen/lost.
- For the card holder, the system has several advantages:
  • He does not have to carry large amounts of cash.
  • Credit cards are more readily accepted than cheques, after making purchases from a number of different suppliers.
  • He only has to pay one consolidated account to the issuer.
  • He may make cash-withdrawals with his card and even use it overseas.
- For the issuing bank, the advantage is that a smaller number of cheques have to be processed, which helps to minimize banking costs.
5. Legal relationship between the parties

- The legal relationship can be determined from the provisions of the Usury Act, the standard-form contracts and the general principles of the law of contract.

5.1 Supplier and card-holder

- Primarily determined by the underlying contract between them. The credit card is simply used as an instrument of payment.
- Because of the direct payment obligation by the issuer towards the supplier, the supplier obtains a personal right to payment directly against the issuer, immediately upon the completion and signing of a transaction slip by the card holder.
- The card holder’s obligation to pay the supplier does not lapse because of novation.
- Payment by credit card is only a conditional payment, which means that the card holder’s obligation to pay the issuer is suspended until such time as the issuer pays the supplier. If the issuer does pay, the card holder’s liability towards the supplier is extinguished, while if he does not pay, the card holder himself will be liable for payment.

5.2 Supplier and issuer

- I.t.o. their standard-form contract the issuer undertakes to reimburse the supplier for the amounts represented by transaction slips presented by the latter. The supplier, by presenting such slips for payment, makes certain warranties to the issuer, e.g. that he has indeed delivered such goods.
- Usually no express/tacit provision i.t.o. which the issuer’s liability is dependant on the existence or non-voidability of the contract between the card holder and supplier. The issuer may, however, under certain circumstances refuse payment or recover amounts already paid, e.g. where the supplier is in breach of warranty.
- The legal nature of the issuer’s liability towards the supplier can best be explained i.t.o. the concept of delegation: Based upon this agreement with the issuer, the card holder gives a payment order in the form of a transaction slip to the issuer to pay the supplier, and in effect transfers his obligations towards the supplier, to the issuer. The card holder (debtor) and the supplier (creditor) on their part agree that the supplier will in the first instance turn to the issuer for payment. The issuer undertakes the card holder’s obligations upon himself and is liable for payment as soon as a valid transaction slip has been completed and signed by the card holder.

5.3 Card holder and issuer

- The issuer is entitled to recover from the card holder the amounts paid to the supplier i.t.o. transaction slips. This liability is based on both mandate and loan for consumption.
- There is a general relationship of mandate between the issuer and the card holder. The issuer will carry out order to pay directed to him by the card holder in the form of transaction slips. The individual transaction slips are a method of concretizing the general duty of mandate in this context. The card holder as mandator is under a duty to reimburse the issuer as mandatary for expenses incurred by the latter in the performance of his mandate. If the card holder has a credit balance on his account with the issuer, the issuer will simply debit the amount of the transaction slip against it, while if he does not have a credit balance, the issuer will debit the card holder’s account and the card holder will have to reimburse him within the period agreed upon.
- Because the transaction between issuer and card holder is a money lending transaction, the issuer is in the same position as a bank who has granted overdraft facilities to the holder of a cheque account, in that the transaction is equivalent to a loan for consumption.
6. Unauthorized card-use

- The following appears to be the general rule in the event of the unauthorized use of the card after its theft/loss:
  
  - The card holder bears the risk and is responsible for transactions completed with the lost/stolen card up to and until such time as he informs the issuer of the theft/loss. Oral notice is usually required to be confirmed in writing.
  
  - From the moment he receives notice of the loss/theft, the issuer bears the loss occasioned by the unauthorized use of the card until such time as he informs the suppliers of this fact by providing them with a list of the account numbers of lost/stolen cards.
  
  - Once the supplier has received such a list, he is obliged to check each card presented by a customer against it. If he fails to do so, the loss is his should he accept a stolen/lost card.
Study objectives:
Upon completion of this lecture, you must be able to:

1. Demonstrate knowledge and understanding of the characteristics, use and legal consequences of online banking.
2. Define online banking as a method of electronic payment.
3. Define and explain an electronic funds transfer (EFT). Also refer to the process and the parties involved.
4. Discuss the legal requirements of data messages.
5. Discuss the types of payment cards and the parties involved.
6. Discuss advantages of online banking.
7. Discuss disadvantages of online banking.
8. Comprehensively explain the liabilities of the different parties involved in online banking.
10. Explain a ‘credit transfer’.
11. Explain a ‘debit transfer’.
12. Explain electronic payments.
13. Define the terminology as set out in the Uniform Commercial Code (par 205 of Malan).
14. Discuss the suspension of the creditor’s remedies in case of electronic payments.
15. Discuss the general mandate.
16. Discuss the role of intermediary banks.
17. Discuss the role of beneficiary banks.
18. Explain the time of payment.

Study:
Activity 7

Discuss the liabilities of the different parties involved in online banking.

Vocabulary:

Online banking: ________________________________________________________

Electronic Funds Transfer (EFT): _____________________________________________

Data message: ____________________________________________________________

Theory

1. Introduction

- Online banking (also known as Virtual banking, Cyber banking, Internet banking, and E-banking) is a worldwide phenomenon, and virtually all South African banks offer Internet services. Basically, all banking transactions can be executed by means of the Internet. Some foreign banks provide banking services only via the Internet and are known as Cyber banks or Internet banks.

- Online systems allow customers to plug into a host of banking services from a personal computer by connecting to the bank’s computers over telephone wires. Technology continues to make online banking, once attempted only by computer enthusiasts, easier for the average consumer.

- The Electronic Communications and Transactions Act 25 of 2002 (ECT Act) took effect on 30 August 2002 and is a facilitatory element of legislation intended to ensure legal recognition of equivalents of communications and transactions conducted in the online world.

2. Electronic Funds Transfer (EFT)

- It can be defined as a fund transfer effected through the banking system by electronic techniques, which input and output methods being largely/completely in electronic form. It includes all payment instructions which are transmitted through magnetic material (tapes/disks) or purely electronic media (telephone/telex) or by the use of electronic transmissions between computers and terminals.

- EFT means any transfer of funds, other than a transaction originated by cheque, draft, or similar paper instrument, that is initiated through an electronic terminal, telephone or computer/magnetic tape for the purpose of ordering, instructing or authorizing a financial institution to debit or credit an account. The term includes, but is not limited to, point-of-sale transfers, automated teller machine transfers, direct deposits or withdrawals of funds, and transfers initiated by telephone. It also includes all transfers from debit card transactions.

- The parties to an EFT are:
  - The Bank/Financing House of the client/originator’s bank.
  - The client/payer/sender.
  - The beneficiary.
  - The beneficiary’s bank. It may be the same bank or another bank/branch.
  - Intermediary bank or clearing agent.

- During this process, the client instructs his bank to make payment to a 3rd party. This instruction is given through an ATM, an EFTPOS or the internet from a home based PC. The bank verifies the instructions through a security procedure. It then debits the client’s account and forwards the instructions to the beneficiary’s account. This occurs off-line, either by delivering disks/tapes/telecommunication lines. If intermediary banks are used, the client’s bank will issue the instruction to the intermediary, which in turn will issue the instruction to the beneficiary’s bank or to another intermediary, which will do the same until a final payment order is issued to the beneficiary’s bank.

3. Legal requirements for data messages

- The legal requirements for data messages are contained in Part I of Chapter 3 of the ECT Act. The provisions contained in this part are mandatory and must be adhered to.
- Sect 11 gives recognition to data messages. A data message is any electronic representation of information generated, sent, received or stored by electronic means. Sect 11 does not intend to override any mandatory provisions in SA law relating to data messages, but merely provides that information in the form of a data message may not be denied on the grounds that it is contained in the form of a data message.
- A data message must comply with the following requirements to have legal recognition:
  - **Writing** If information is presented in the form of a data message and is available for future access, it complies with this requirement.
  - **Signature** A signature is usually required for purposes of integrity and authenticity. An electronic signature (string of alphanumeric characters) plays the same role.
  - **Original** Originality is usually required to ensure the import/delete of information on a later stage.
- A data message can be equated with other documents, especially in terms of the different requirements to which documents must usually comply with. See Buys in this regard.
4. Communication of data messages
- Provisions regarding the communication of data messages are contained in Part II of the ECT Act. The provisions contained in this section allows a default position which may be varied by agreement between parties.

5. Online card payments
- Three types of ‘payment cards’ can be distinguished:
  - **Pay later** Credit cards are a good example. The total amount incurred by the cardholder must be paid at an agreed date.
  - **Pay now** Debit cards are a good example. The total amount is deducted from the cardholder’s account immediately.
  - **Pay before** Prepaid cards are a good example. Value is stored on the card and diminishes as the card is used.

- The parties involved in the card payment system are:
  - **Issuer** Bank
  - **Cardholder** Consumer
  - **Acquirer** Merchant’s bank
  - **Merchant** Supplier
- See Buys with regards to typical problems and possible solutions.

6. Advantages of Online Banking
- Regardless of the name, these systems offer certain advantages over traditional banking methods:
  - Consumers can use their computers and a telephone modem to dial in from home or any site where they have access to a computer – therefore it is very convenient.
  - Banking hours are extended because the services are available seven days a week, 24 hours a day.
  - Transactions are executed and confirmed quickly, although not instantaneously. Processing time is comparable to that of an ATM transaction.
  - And the range of transactions available is fairly broad. Customers can do everything from simply checking on an account balance to applying for a mortgage.
  - It minimizes the need for cash.
  - It minimizes the issuing of cheques which reduces the potential for fraud and theft risks.
  - Cost effective.
  - High level of confidentiality can be maintained.

7. Disadvantages of Online Banking
- There are also disadvantages:
  - You must be comfortable using a computer.
  - Investment of time upfront can be formidable. The data entry is necessary before the numbers can be messaged and money managed successfully. Online bill payment is an example of an effort that requires setting up that leads to ultimate convenience.
• Switching software or banks can mean re-entry of data, although Internet-based systems are less impacted by this. But competition seems to be minimising this problem. The personal finance management software, Microsoft Money, enables users of competing software to import data easily.
• Electronic payments are irrevocable once they are released, and because of “Straight Through Processing”, no validation on account names is possible and the payer carries the risk of using the wrong account number.
• It is susceptible to attack from outsiders such as hackers who obtain access to consumer’s bank account details fraudulently and then transfer funds illegally to their own/nominated accounts.

8. Services offered by Online Banking

- What services are available, varies from bank to bank. Virtually all of the banks that offer electronic services allow consumers to check the balances in their accounts, transfer funds between accounts, and order electronic bill payments.
- More sophisticated systems allow customers to apply for loans, download information about accounts to their own computers, trade stocks or mutual funds, and look at images of their cheques and deposit slips.
- “Online banking will become Internet banking. Banks will just have this Internet branch,” said James Verbrugge, a banking expert and chairman of the Department of Finance at the University of Georgia, USA.
- The "client-based" systems, in which customers use their own software, generally use personal financial managers – specialised computer programs that help customers carry out a variety of personal finance activities. These programs typically allow consumers to do much of their work offline and to then dial in to complete their bank transactions. These client-based systems have the advantage of allowing consumers to integrate all their banking information with other personal finance data using a single program.

9. The situation in SA

- There is currently no legislation that regulates the legal relationship of the various parties to EFT in SA. The general principles of the law on contracts is applied and the legal relationship between the bank and its client, is one of contract and mandate.
- Because of the instantaneous nature of EFT, the instructions given by the client to his bank to pay, and after the banks has implemented its own security measures re the verification of the instruction, the instruction is irrevocable as it constitutes final payment without recourse. It is also similar to a bank guarantee.
- The direct liabilities of the parties are:
  • **The Bank** The originator’s bank has the authority to verify the client’s instruction and if found to comply, has to execute the instruction, unless the client can prove that the instruction was issued fraudulently and without his knowledge. The bank then will have to reimburse the client for the amount that was “removed” from the account. The bank can then institute legal and criminal proceedings against the 3rd party that issued the instructions fraudulently.
  • **The Client** The client must ensure that he has followed and implemented all the recommended security measures that the bank requires. He must ensure that his instructions are correct and that the beneficiary’s details are correct. If he provides the bank
with incorrect instructions, the bank cannot be held liable. The client will have to contact the 3rd party to whom the funds were incorrectly transferred to.

- **The Beneficiary's Bank** It acts upon instructions received from the originator’s bank. It can only be held liable if the bank credits the wrong account.
- **The Beneficiary** If the instructions were given correctly, but the amount is not credited to the beneficiary’s account, a claim can be made against the beneficiary’s bank.
- **The Intermediary and/or Clearing House** Liabilities is based on the general principles of contract, the relevant mandates given and the rules of the specific clearing house.

### 10. Electronic payment instruments

- Cheque is oldest and best known payment of instrument.
- Electronic payment instruments may include credit and debit transfers, stop orders, debit orders, electronic funds transfers, electronic funds transfers at the POS, ATM, smart cards, credit cards, debit cards and cheque cards.
- Note however that not all of the above are payment instruments (e.g. the ATM which is an instrument effecting payment).

### 11. Credit transfer

- Transaction is executed by virtue of a series of mandates resulting in the crediting of beneficiary’s account. Beneficiary then obtains a personal right against his bank to credit and pay amount transferred to him.
- It is a transfer of value in an economic sense but is not similar to a transfer as in the law of property. (It involves neither funds in the sense of notes and coins nor a physical transfer of funds)
- Debtor pushes funds to creditor’s account.
- Also not a cession of originator’s rights (against his bank) to beneficiary.

### 12. Debit transfer

- Initiated by creditor who instructs his bank to collect payment of debt from debtor. Creditor pulls funds from debtor’s account.
- Debtor must give express or tacit consent to his bank before debit transfer may take place.
- Debtor may authorise bank in advance.
- Any credit to the creditor’s account has provisional effect only, subject to the debit transfer order being paid.

### 13. Electronic payments

- Electronic funds transfer at the POS is an example of a debit transfer coupled with the use of an electronic card.
- Payment by direct debit and credit at the POS is payment by virtue of an agreement between the parties and not a *datio in solutionem*.
- If payment is not effected, remedies of creditor i.t.o. underlying obligation revive.
- If payment is effected, it occurs the moment the creditor obtains an unconditional right against his own bank.
14. Terminology

- Terminology in the area of debit and credit transfers has been standardised by Article 4A of the Uniform Commercial Code:
  - **Originator** When debtor pays creditor by means of a credit transfer.
  - **Originator’s bank** Debtor’s bank.
  - **Beneficiary** When creditor is paid by means of a credit transfer.
  - **Beneficiary’s bank** Creditor’s bank.
  - **Payment order** Instruction given by originator.
  - **Intermediary banks** Other banks involved.

15. Suspension of remedies

- Although techniques involved in making payment between ordinary instruments of payment and electronic instruments of payment may differ, the different instruments’ legal constructions are not necessarily different.
- In none of the instances does the bank effecting the payment, act as representative of the debtor. The bank functions as a mere mandatary but does not represent its customer. The agreement to accept any specific means of payment rests on an agreement between the drawer/originator/credit card holder and the payee – not between the paying bank and the payee. It is therefore the drawer/originator/credit card holder who is entitled to the **condictio indebiti** since it is the drawer/originator/credit card holder who indeed performs i.t.o. his accord with the payee. The paying bank is not the representative of the debtor and the beneficiary’s bank is not the payee’s representative.
- Where payment is made with a cheque, the rights of the creditor (remedies) are suspended until such time the cheque is paid or dishonoured. Where payment is made by means of an electronic instrument of payment, e.g. a stop order, the remedies of the creditor are also suspended pending execution of the stop order by the bank.

16. General mandate

- Credit transfers in SA law are effected by means of payment orders by a customer to his bank pursuant to the general bank and customer agreement or general mandate.
- Payment orders are usually pursuant to the general bank and customer agreement. In the case of an originator who is not a customer, the payment order indeed qualifies as a mandate. However, in *Gilbey Distillers and Vintners v ABSA Bank* it was said that the relationship between a bank and a customer instructing a transfer of funds was one of mandate.
- By characterising the bank and customer agreement as a general mandate providing for *i.a.* payment orders, the **naturalia** of the agreement can be determined. The common-law duties of the bank will usually amount to the following:
  - To perform mandate timeously.
  - To perform mandate in good faith.
  - To perform mandate without negligence. Bank must act as a reasonable bank would’ve acted in the circumstances. Payment orders must be drawn with reasonable care in order to prevent forgery/alteration.
  - Bank must give effect to the order of customer and order must be clear and unambiguous.
  - Bank is generally bound to follow customer’s order *i.r.o.* method of transfer.
  - Bank must install and maintain a reasonably efficient security system and ensure efficient operation of system.
  - Bank must adhere to the terms of the payment order.
17. Intermediary banks
- Usually a submandatary of originator’s bank, an intermediary bank, stands in no contractual relation with originator.
- Contractual duties of originator’s bank towards originator do not extend to beneficiary – it is submitted* that the beneficiary’s bank does not owe the originator a duty of care – intermediary bank does not owe the originator a duty of care. Therefore: no contractual relationship between originator and beneficiary bank even if beneficiary bank is regarded as a submandatary (intermediary bank) of originator’s bank.

18. Beneficiary bank
- It is trite that there is not contractual relationship between originator and beneficiary bank.
- Is abovementioned submission*, that the beneficiary’s bank does not owe the originator a duty of care, correct? Question can be asked whether beneficiary bank owes a duty of care to originator to handle transfer with due care and in accordance with standards and practices of banking industry. Have regard for the following:
  - **Arthur E Abrahams & Gross v Cohen and others** Defendant (beneficiary bank) may be held liable *ex delicto* for causing pure economic loss unassociated with physical injury. However, before he is held liable, it must be established that possibility of loss of that kind was reasonably foreseeable and that in all circumstances he was under legal duty to prevent such loss occurring.
  - **BOE Bank Ltd v Ries** Although claimant (creditor) for pure economic loss without injury to person/property is no longer faced with insuperable obstacles, claimant nevertheless faces difficulties. Physical injury is *prima facie* unlawful – causing pure economic loss is not.
  - **Gilbey Distillers and Vintners v ABSA Bank** Did not concern duties of beneficiary bank. Stated that there is no privity of contract between beneficiary bank and originator. Reasoned that beneficiary bank undertakes to receive money for beneficiary’s account. Beneficiary bank has contractual duty to credit beneficiary’s account when bank receives funds by transfer. Beneficiary bank does not enter into a contract with originator as well. Originator’s bank executes instructions as mandatory and not as originator’s representative.
- Malan, however, argues as follows: Liability of a collecting bank towards owner of lost/stolen cheque is based not only on the fact that the collecting bank introduces itself into the process at the instance of it’s own customer for whose identity if vouches but on an evaluation of all the circumstances. In the case of a collecting bank, a duty is therefore owed to the true owner of the lost/stolen cheque and not necessarily to the customer. Therefore i.r.o. beneficiary bank in case of instruction to accept transfer: If there is no duty to match the named beneficiary with the account number, then one could hardly argue that the payment and crediting was made with any skill/care. Is the duty of care therefore not actually owed to originator in stead of customer?

19. Time of payment
- Also refer to Lectures 7-9 (par 2.3).
- Payment of electronic payment instruments is effected at the time the decision is made to debit and credit respective accounts whether or not payee’s account had actually been credited or whether he had been notified of the payment.