

Article 7 of the EU's Directive on Electronic Commerce 2000/31/EC, for instance, contains an anti-spam provision requiring member States of the European Union which allow unsolicited commercial communication by electronic mail to ensure that such communications by a service provider established in their territory are identified clearly and unambiguously as unsolicited commercial communications. The intention is to give consumers an opportunity to identify such mail and to take action to eliminate or avoid it.<sup>247</sup> Article 7 further provides that member States must ensure that these service providers regularly check opt-out registers in which individuals have registered themselves. Most EU countries have such registers in which individuals can indicate that they do not wish to receive unsolicited commercial e-mails, but these registers have proved to be ineffective.<sup>248</sup>

## 6.5 Electronic payment

### 6.5.1 Introduction

Whereas there have been great strides in the development of law relating to electronic contracting, electronic payment systems for payments on the Internet have been slow to evolve.<sup>249</sup> Fear of fraud and abuse of payment information is probably the biggest single factor slowing down Internet trade today. According to Hedley,<sup>250</sup>

Payment systems have yet to change as radically as have other market mechanisms involved with the Internet. The conservatism and apparent solidity of banking institutions militates against the rapid adoption of new technologies. In fact, ICT is increasingly used in banking institutions, but much of it is in proprietary systems rather than part of the Internet, and we are a very long way from a point where payment over the net is a simple and secure process. The risk of fraud is omnipresent.

This analysis may be a bit more pessimistic than reality justifies. Internet and cell-phone banking and online credit-card payments are commonplace today, facilitating the transfer of funds from banking customer to banking customer through electronic funds transfers, although often this is limited to payment within a particular country and not across borders. Certainly that is the case within South Africa.

Although Internet banking has become an important part of domestic banking practice and continues growing in significance,<sup>251</sup> most payments on the Internet are credit-card transactions, even though such transactions are at risk of fraudulent interference by unscrupulous fraudulent websites or even employees of trusted above-board and honest websites.

247 Kuner "Directive 2000/31/EC – Directive on electronic commerce" 237–238.

248 Ibid. 238.

249 For a discussion of various new and innovative electronic payment methods and instruments see Schulze "Smart cards and e-money: New developments bring new problems" 2004 *SA Merc LJ* 703–715; Lawack-Davids "Internet cheques" 2001 *Obiter* 406–415; Pretorius "Elektroniese tjeks" 1999 *THRHR* 592–596.

250 Hedley *The Law of Electronic Commerce and the Internet* 248.

251 For an overview of the development of Internet and electronic banking see Kulundu-Bitonye "Electronic banking: An overview of systems and operations" 1998 *Lesotho LJ* 67–86 and Schulze "E-money and electronic funds transfers: A shortlist of some of the unresolved issues" 2004 *SA Merc LJ* 51–66.

The analysis below focuses on payment and payment systems in electronic trade and the consequences of payment, mistaken payment and fraud. A description of the development of electronic clearing and inter-bank relationships and transactions falls outside the scope of this work and readers are referred to more specialised works in this regard.<sup>252</sup>

### 6.5.2 Internet banking

The relationship between the bank and its customer is determined by the contract concluded between them. It can take the shape of a various traditional relationships such as loan and mandate, as well as specialised relationships founded on the agreement.<sup>253</sup> The most common relationships are the following:

- Bank as debtor and client as creditor, where the client has a savings or similar account or a current account which is in credit.
- Bank as creditor and client as debtor, where the client has a loan account or a current account which is in overdraft.
- Bank as mandatory and client as mandator, where the client has a cheque account or any other type of account from which the bank pays a third party according to the client's instructions. In terms of the contract of mandate, the mandatory undertakes to carry out instructions of the mandator.

Most banks have a specific agreement which covers the relationship between the client and the bank when the client uses Internet banking services.<sup>254</sup> These contracts vary from ones that are very user-friendly and easy to understand<sup>255</sup> to contracts which require of the client a level of education and sophistication most South Africans do not have.<sup>256</sup>

All of these contracts contain fairly wide-ranging limitation of the bank's liabilities and indemnities. Typical liability-limitation clauses in these standard agreements

252 For instance, Ellinger, Lomnicka and Hooley *Ellinger's Modern Banking Law*, Gkoutzinis *Internet Banking and the Law in Europe: Regulation, Financial Integration and Electronic Commerce*, Brindle *Law of Bank Payments*, Schudelar *Electronic Payment Systems and Money Laundering: Risks and Measures in the Post-Internet Hype Era*, Lawack-Davids "The effect of electronic techniques on the payment process in cheques" 1997 *Obiter* 42–62, "Electronic payments and digital cash" 2001 *Obiter* 312–324 and "Internet cheques" 406–415; Vercuil "Electronic banking" 2002 (April) *De Rebus* 36–37; Schulze "Smart cards and e-money" 2004 *SA Merc LJ* 703–715; Pretorius "The truncation of cheques: Novel developments in America" (2005) 13(1) *Juta's Business Law* 38–43.

253 See Malan and Pretorius *Malan Bills of Exchange, Cheques and Promissory Notes* 333–334; Stassen "Drie-party betalingsmeganismes in die moderne bankreg – Die regsraad van die verhouding tussen bank en kliënt" 1980 *MBL* 77; Petzer "Who should carry the Internet banking can?" 2003 (Nov) *De Rebus* 59–60; Lawack-Davids "Internet cheques" 2001 *Obiter* 406–415; Schulze "Smart cards and e-money" 2004 *SA Merc LJ* 703–715.

254 Schulze "Countermanding and electronic funds transfer: The Supreme Court of Appeal takes a second bite at the cherry" 2004 (16) *SA Merc LJ* 670.

255 See, for instance, the First National Bank site at [www.fnb.co.za/legallinks/legal/ibTandC.html](http://www.fnb.co.za/legallinks/legal/ibTandC.html) (accessed 26 August 2007). The agreement is couched in user-friendly language and easy-to-understand terms and layout. At the time of writing, it was one of the few agreements that was date-stamped, indicating when last it was changed.

256 See, for instance, the Nedbank contract at [www.nedbank.co.za/terms/Nedbank\\_terms1.htm](http://www.nedbank.co.za/terms/Nedbank_terms1.htm) (accessed 26 August 2007) and the ABSA Bank contract at [www.nedbank.co.za/terms/Nedbank\\_terms1.htm](http://www.nedbank.co.za/terms/Nedbank_terms1.htm).

include clauses indicating that, although reasonable care has been taken to prevent harm or loss to its customers, the bank will not be liable for

- any harm or loss whatsoever arising as a result of the client's use of the online banking system, unless such loss or damage arises from the bank's gross negligence or intentional misconduct;
- any damages the client might suffer as a result of a compromise of his or her access codes;
- any interruption, malfunction, downtime or other failure of the bank's online banking system, third-party system, databases or any component part thereof for whatever reason;
- any loss or damage arising from the client's orders, investment decisions, purchases or disposal of goods and services, including financial instruments or currencies, from third parties based on the information provided on the bank's online banking system;
- any loss or damage with regard to the client's data directly or indirectly caused by malfunction of the bank's system, third-party systems, power failures, unlawful access to or theft of data, computer viruses or destructive code on the bank system or third-party systems, programming defects, or negligence on the bank's part;
- any interruption, malfunction, downtime or other failure of goods or services provided by third parties, including, without limitation, third-party systems such as the public switched telecommunication service providers, internet service providers, electricity suppliers, local authorities and certification authorities; or
- any event over which the bank has no direct control.

In terms of these agreements online customers of banks are issued with certain security data and procedures that they must follow when accessing and using Internet banking services. The usual security measures of user identity, coupled with a password for access and encryption, is bolstered by additional safety measures such as SMS or e-mail messages notifying customers of access to and transactions on their accounts. Most online banking sites also require an additional security code which is sent to the customer's cellphone when he or she wants to add new payment recipients to his or her account. In the few publicised instances where the security measures have been breached, the banks have been quick to allay consumers' fears about security and customer liability, taking full responsibility for protecting customers and not relying on the strict exclusion and indemnification clauses.

The relationship between the customer and bank, where a customer makes use of Internet banking services, is that of a debtor-creditor or mandator-mandatory, depending on the terms of their specific agreement.<sup>257</sup> Although the ECT Act<sup>258</sup> contains some provisions that may be relevant to Internet banking and electronic funds transfers (EFT), there is no specific legislation dealing with such transfers.<sup>259</sup> Apart

257 Kulundu-Bitonye "Electronic banking" 1998 *Lesotho LJ* 70; Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 56.

258 Act 25 of 2002.

259 See Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 57-58 and "Countermanding and electronic funds transfer" 2004 *SA Merc LJ* 670, who refers to the position in the USA where

from providing customers with online and up-to-date information about their accounts, the bank undertakes to give effect to the following instructions received via the Internet:<sup>260</sup>

- Transfer of funds between various accounts that the client may have.
- Payment to third parties nominated by the client, in other words EFT payments.
- Other specialised services such as buying shares online and accessing credit reports.<sup>261</sup>

Schulze describes an EFT payment "as a method of payment, a medium through which a third party (the payer's bank) is given an instruction by the payer to effect payment through an electronic medium (a computer system) to the beneficiary's bank account".<sup>262</sup> An EFT payment instruction does not qualify as a negotiable instrument.<sup>263</sup> Its effect is to oblige the payer's bank to debit the payer's account and credit the payee's account, if the payee is a client of the same bank, or to request another bank to credit the payee's account with that other bank in terms of the inter-bank agreement.<sup>264</sup> In terms of this agreement, the payer is not entitled to countermand the electronic payment or require a reversal of the payment without the consent of the payee. However, if payment was made without an underlying cause – in other words, it was made by mistake – the payer can prevent the payee from using the funds, by notifying the payee of the mistaken payment and applying for an appropriate court order for the retransfer of the money.<sup>265</sup> The banks deal with mistaken payments much as they do with cheque payments:<sup>266</sup> when there is a seemingly valid payment instruction, they will carry it out and not reverse the payment. Should a dispute about the payment arise, the banks simply act as stakeholders while the parties resolve the dispute.<sup>267</sup>

The transfer of funds and payment of third parties take place by way of automated transactions, in that the consumer instructs the bank's computer which then carries out the instruction without human intervention. Consequently, all such transactions are subject to section 20 of the ECT Act, which section deals with automated transactions; in addition, all consumer transactions are subject to section 43(2), but such banking transactions are not subject to the cooling-off period in section 44.<sup>268</sup>

---

there has been legislation in place since 1978, and Meiring "Electronic funds transfers" 1998 *JBL* 36–41.

260 Meiring "Electronic funds transfers" 1998 *JBL* 37; Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 53–54.

261 See Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 667–668.

262 *Ibid.* 670–671. See also Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 53–54, 57–58; Kulundu-Bitonye "Electronic banking" 1998 *Lesotho LJ* 70 and Meiring "Electronic funds transfers" 1998 *JBL* 36.

263 See Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 670–673.

264 See *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA). See Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 675–678 for a critical analysis of this case.

265 *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* [2006] 4 All SA 120 (SCA), 2005 (1) SA 441 (SCA).

266 See, for instance, *First National Bank of Southern Africa v Perry* 2001 (3) SA 960 (SCA) which dealt with the proceeds of a stolen cheque held by the bank.

267 Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 680.

268 See s 42(2)(a).

In terms of section 20(d) and (e), dealing with automated transactions, the customer is not bound to transactions if he or she is not able to review the transaction details before it is finalised. Customers are also protected against mistakes when they are not given an opportunity to review the transaction. Section 20, however, only governs this situation if the contract itself does not, and the parties are free to deviate from the section's provisions in their agreement. Practically speaking banks are able to dictate the terms in their standard agreements.

However, if the transaction is a consumer transaction, the application of section 43(2) is mandatory – it may not be excluded.<sup>269</sup> According to this provision, if the bank fails to give the customer an opportunity to review the transaction before it is finalised, the customer may cancel the transaction within 14 days of receiving the goods or service. All South African banks employ techniques requiring the consumer to review any payment instructions and correct mistakes or cancel the transaction, thus effectively complying with the protection requirements in sections 20 and 43. These measures effectively prevent the customer from relying on the additional rights afforded by those provisions.

The danger of EFT transactions is graphically illustrated by *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)*.<sup>270</sup> Nissan owed one of its creditors, TSW Manufacturing, an amount of approximately R12,7 million. Owing to an administrative mix-up at Nissan, its bank received instructions to pay TSW but was erroneously given the account number of Maple Freight, another of Nissan's creditors. However, no money was owed to Maple at that time. It was not generally known at the time that the automatic agents of the banks, their computers, did not perform a cross-check between the name of the account holder and the account number but simply effected transfer of funds to the account number provided in the EFT instruction.<sup>271</sup>

Stanley, the sole member of Maple, became aware of the unexpected windfall and, after obtaining legal advice, transferred the money from his Standard Bank account to Maple's current business account at First National Bank, where the funds were used in the day-to-day operations of Maple. The legal opinion obtained advised Stanley to put the money into an interest-bearing call account and further advised that the capital was repayable on demand to the person who made the payment in error, but that any interest earned would not be repayable.

Nissan brought an urgent interdict after Stanley failed to pay the amount of R12,7 million on demand. Stanley had also insisted on the payment of a rather large "administrative fee". Nissan thereupon obtained a court order freezing Maple's bank accounts, which were in credit in the amount of about R10,5 million. Stanley meanwhile caused Maple, which apparently was an ongoing concern, to go into liquidation.

After failing initially with its application in the Witwatersrand Local Division, Nissan was successful in obtaining an order for the payment of most of the money that was

269 See s 48.

270 [2006] 4 All SA 120 (SCA), 2005 (1) SA 441 (SCA). See Schulze "Countermanding and electronic funds transfer" 2004 (16) SA Merc LJ678–683 for a critical analysis of this case.

271 Some banks now clearly warn their clients that they (the banks) rely solely on the correctness of the account number for the transfer.

still in Maple's current account. The Supreme Court of Appeal made the following pertinent findings:

[24] It is now necessary to consider to what extent, if any, the position of Maple as against FNB differed from Dambha's position as against Nedbank. Payment is a bilateral juristic act requiring the G meeting of two minds (*Burg Trailers SA (Pty) Ltd and Another v Absa Bank Ltd and Others* 2004 (1) SA 284 (SCA) at 289B). Where A hands over money to B, mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. Ownership of the money does not pass from A to B. Should B, in these circumstances, appropriate the money, such appropriation would constitute theft (*R v Oelsen* 1950 (2) PH H198; and *S v Graham* 1975 (3) SA 569 (A) at 573E-H). In *S v Graham*, it was held that, if A, mistakenly thinking that an amount is due to B, gives B a cheque in payment of that amount and B, knowing that the amount is not due, deposits the cheque, B commits theft of money although he has not appropriated money in the corporeal sense. It is B's claim to be entitled to be credited with the amount of the cheque that constitutes the theft. This Court was aware that its decision may not be strictly according to Roman-Dutch A law but stated that the Roman-Dutch law was a living system adaptable to modern conditions. As a result of the fact that ownership in specific coins no longer exists where resort is made to the modern system of banking and paying by cheque or kindred process, this Court came to regard money as being stolen even where it is not corporeal cash but is represented by a credit entry in books of B account. 18

[25] The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank account. Should he appropriate the amount so transferred, ie should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft.

[26] In this case, FNB, as agent of the appellant, intended to effect payment to TSW, and Standard Bank, as agent of Maple, intended to receive payment on behalf of Maple. There was no meeting of the minds. In these circumstances, Maple did not become entitled to the funds credited to its account. Any appropriation of the funds by Maple, with knowledge that it was not entitled to deal with the funds, would E have constituted theft. The transfer of the funds to the receipts account and thereafter to the payments account of Maple did not change Maple's position concerning those funds. Just like Standard Bank, FNB received funds to which Maple was not entitled. An appropriation of these funds by Maple, with knowledge that it was not entitled to the funds, would likewise have constituted theft thereof.

Following this decision two types of situation must be distinguished where mistaken EFT payments are concerned:

- When the party whose account is credited with the funds becomes aware of the mistaken payment and decides to use the funds for its own purposes. In such a case that party will be guilty of theft and liable for payment of the full amount received.
- When the party whose account is credited is unaware of the mistake and inadvertently uses the funds mistakenly paid. In these circumstances such a party has simply been enriched unjustifiably and is liable to repay the funds to the extent that it

is deemed to have been enriched. The basis for the claim in these circumstances will be either the *condictio indebiti* or more likely the *condictio sine causa specialis*.<sup>272</sup>

Schulze quite correctly indicates that this area of South African law is still in its formative stage and that many vexing questions remain unanswered.<sup>273</sup>

### 6.5.3 Credit-card payments

Internationally credit-card payments are still the most important payment method on the Internet, despite the risk of fraud and misappropriation of payment information.<sup>274</sup>

At the domestic level, EFT payments in business-to-business transactions are probably the most common form of payment, and credit-card payments in consumer transactions.<sup>275</sup> A 2006 report by the Organisation for Economic Co-operation and Development states:<sup>276</sup>

By far the major international online payment means are credit cards, which are also dominant in many national transaction markets. Some estimates put their use at over 90% of all e-commerce transactions. In some countries debit cards and payments via online banking are widely used alternatives to credit cards. There is also a large diversity of other payment means such as mediating services, mobile payment systems and electronic currency which may be appropriate for different transactions. However, with the exception of the mediating service PayPal, the majority of alternative online payment means have not yet gained the necessary wide user base of both merchants and consumers. For micropayments, which are of increasing importance for digital content industries, one-off payments are not yet widely developed as alternatives and complements to subscription payment models or cumulative systems.

The introduction of new payment systems faces significant barriers given infrastructure market characteristics, with high initial investment costs and positive network externalities favouring established incumbents with a wide user base. These characteristics strengthen the market position of traditional payment system providers – credit card institutions and banks – and associated lock-in to established and/or well-known systems and standards.

There have been a number of attempts to explain the legal nature of a credit-card transaction with reference to traditional legal concepts such as cession, subrogation, factoring, mandate, agency and delegation,<sup>277</sup> but it would seem that this transaction

272 The court did not specify which enrichment action was applied. See Lotz and Brand "Enrichment" paras 78–81 and 87–89 for the scope and requirements of the *condictio indebiti* and the *condictio sine causa specialis*. See also Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 106–127 and 171–179, and *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).

273 Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 683–684. See also OECD Working Party on the Information Economy Report DSTI/ICCP/IE(2004)18/FINAL of 18 April 2006, 5 [www.oecd.org/dataoecd/37/19/36736056.pdf](http://www.oecd.org/dataoecd/37/19/36736056.pdf) (accessed 26 August 2007).

274 See the OECD Working Party on the Information Economy Report DSTI/ICCP/IE(2004)18/FINAL of 18 April 2006, 5 at [www.oecd.org/dataoecd/37/19/36736056.pdf](http://www.oecd.org/dataoecd/37/19/36736056.pdf) (accessed 26 August 2007). For a general description of the use and working of credit cards in ATMs see *Diners Club SA (Pty) Ltd v Singh* 2004 (3) SA 630 (D) and Schulze "Of credit cards, unauthorised withdrawals and fraudulent credit card users" 2005 *SA Merc LJ* 202–213. See also Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 51–52 generally on the growth of credit-card payments.

275 Schulze "Smart cards and e-money" 2004 (16) *SA Merc LJ* 703.

276 [www.oecd.org/dataoecd/37/19/36736056.pdf](http://www.oecd.org/dataoecd/37/19/36736056.pdf), 5 (accessed 26 August 2007).

277 See Cornelius "The legal nature of payment by credit card" 2003 *SA Merc LJ* 153–171; Schulze "Of credit cards, unauthorised withdrawals and fraudulent credit card users" 2005 *SA Merc LJ* 202–203;

*continued*

will not fit any of these straitjackets and should rather be regarded as an innominate transaction *sui generis* the underlying agreement of which determines the rights, duties and consequences of the parties. The only result of this conclusion is that the common law will not fill with implied terms any gaps that may arise in any of the relationships created. Because there are relatively few players in the banking field and the comprehensive standard terms of the card issuers dominate the relationships, there is no need to force credit-card contracts into a specific category.

At its basic level, a credit-card agreement involves the following rights and obligations:<sup>278</sup>

- The card issuer concludes an agreement with the card holder (consumer) in terms of which the card holder is entitled to present her or his card for payment of goods or services at accredited merchants or to draw money from banks, including automatic teller machines (ATMs), provided that the card holder meets certain minimum conditions such as presenting the card and signing a credit-card slip.
- The card issuer concludes an agreement with the merchant in terms of which the card issuer undertakes to pay the merchant for goods or services rendered to the card holder provided the merchant fulfils certain minimum requirements.
- The merchant supplies goods or services to the card holder against payment made with the credit card – the card holder presents the card and signs the slip or includes on it additional information, such as the number on the back of the card, as proof of authentication.
- The card issuer is obliged to pay the merchant upon presentation of the proof required by the issuer.
- The card holder must pay the periodic account issued by the card issuer within the stipulated time.

In traditional credit-card transactions the card holder presents the card and signs a slip in a face-to-face transaction. That traditional model no longer holds true, as card issuers allow certain merchants to receive credit-card payments in respect of which the credit card is not presented, such as when payment is made by telephone, fax or over the Internet. Whether a merchant is allowed to make such transactions depends on the underlying agreement with the credit-card issuer.

In some countries legislative protection exists for the users of credit cards,<sup>279</sup> but in South Africa credit-card payments are governed by the law of contract and the customs of credit-card issuers. Card issuers' standard terms of agreement are often very wide-ranging and do not include the procedures for dealing with payment disputes.<sup>280</sup> In the United Kingdom, for instance, when the authority of the card holder

---

Smith "Credit cards and the law" 1976 *THRHR* 1217–1219; *Diners Club SA (Pty) Ltd v Singh* 2004 (3) SA 630 (D).

278 Schulze "Of credit cards, unauthorised withdrawals and fraudulent credit card users" 2005 *SA Mer LJ* 204.

279 Hedley *The Law of Electronic Commerce and the Internet* 225–256; Todd *E-Commerce Law* 221.

280 See, for instance, the provisions of clauses 5 and 11 of Nedbank's credit-card agreement at [www.nedbank.co.za/website/content/forms/formshome.asp?SubSubCatid=1333andsubsubcatname=Cards](http://www.nedbank.co.za/website/content/forms/formshome.asp?SubSubCatid=1333andsubsubcatname=Cards) (accessed 26 August 2007). Clause 5.10, for instance, reads thus: "You will be liable for and must repay us all amounts we pay or have to pay if the Card, your Card number or PIN is used unless you have reported it as lost, stolen or being used wrongfully as set out in 5.9 above".



for a transaction is disputed, the onus of proving such authority is on the card issuer.<sup>281</sup> Consumers in the United Kingdom are also protected when goods are defective or substandard.<sup>282</sup>

Credit-card agreements of South African issuers do not as a rule seem to make provision for Internet transactions. For example, Nedbank's standard terms simply state:

5.11 Except where a transaction is made by means of your PIN or is requested by mail or telephone order, or is effected with the Personal Travel Card, you must sign a sales voucher, a cash advance voucher or a refund voucher, as the case may be, every time you use the Card or give the Card number to a merchant or supplier. By signing the voucher you confirm that the information on it is correct. You will be liable for and must repay us all amounts we pay or have to pay in respect of your Card transactions. If you do not sign the relevant voucher(s), you will still be liable to us.

The term "mail" is not defined in the definitions clause and could conceivably include e-mail transactions, but is definitely not wide enough to cover Internet transactions.

#### 6.5.4 *Development of new payment systems*

It would seem that the development of Internet banking and the ability of banking clients to make electronic funds transfers have been the most important new developments as far as electronic payments are concerned. Other more innovative attempts to create e-money, e-credits or e-cheques have not yet become generally available or acceptable.

To a large extent the boom in electronic commerce has been made possible by the willingness of credit-card companies to make payment by credit card over the Internet generally available despite the ever-present danger of fraud. Although South African law does not offer credit card holders any special legislative protection similar to that provided by English law, the practice of credit-card companies in dealing with fraudulent transactions seems to have allayed the fears of many consumers who make regular credit-card payments over the Internet, especially in respect of certain types of products and services or in transactions with webtraders who have built up a sound reputation.

### 6.6 Conclusion

Electronic commerce has become an important part of the way in which businesses and consumers do business today and all indications are that this type of business communication is set to grow exponentially in future. Despite fears that the law is unable to deal with the legal problems created by the use of electronic communications in the process of negotiating and concluding contracts and making payments, business has flourished even in the absence of special legal provisions. Legal uncertainty was nevertheless seen as a major stumbling block in the development of this type of trade.

<sup>281</sup> See Hedley *The Law of Electronic Commerce and the Internet* 225–256; Todd *E-Commerce Law* 221.

<sup>282</sup> See Hedley *The Law of Electronic Commerce and the Internet* 256.