View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by ScholarBank@NUS

THE LAW RELATING TO CREDIT CARDS IN SINGAPORE

NGUYEN HOANG VIET

(LL.B.) Hanoi Law University

(LL.M.) Queen Mary College, London

A THESIS SUBMITED FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

FACULTY OF LAW

NATIONAL UNIVERSITY OF SINGAPORE

2006

ACKNOWLEDGEMENTS

This research project has been a big challenge for me. I need to say thank you to some very important people, without the support of whom I could not have completed my thesis.

First of all, I would like to thank Professor Peter Ellinger, my research supervisor who has given me invaluable guidance throughout the course of my study. The wisdom and depth of understanding in his feedback and support kept me on track and encouraged me to find my own voice.

Coming from a civil law jurisdiction with little knowledge about the common law, I could not have completed my paper without the foundation knowledge passionately imparted by my supervisor and all the professors at the Faculty of Law. I especially thank Professor Tan Cheng Han, Associate Professor Teo Keang Sood, Professor Adrian Briggs, Professor Gerard McCormack, Associate Professor Yeo Tiong Min, Associate Professor Dora Neo, and Associate Professor Victor Ramraj, the teaching of whom I enjoyed very much. I would also like to acknowledge the wonderful support provided by the administrative staff of the Law Faculty, especially Normah Mahamood and Shamsiah Dasuki.

Special thanks to my friend, Mr. David Kriner, who took on doing a final proof reading of this thesis despite his own business and family commitments.

Finally, there are some very special people, who ended up on my research journey simply by virtue of their relationship to me and I need to thank them in particular. To my wife Van for always being my best companion. I would not have made it without your love, encouragement, and support. To my son Brian, for being a much loved source of distraction.

Nguyen Hoang Viet
December 2006

TABLE OF CONTENTS

Title i
Acknowledgements ii
Table of Contents iii
Summary v

CHAPTER I....1

INTRODUCTION 1

1. PAYMENT CARDS AND PAYMENT SYSTEMS 1
1.1 Concept of payment cards....1
1.2 Types of payment cards.... 2
1.3 Features of payment cards 7
1.4 The payment systems of payment cards 10

2. TRANSACTIONAL ASPECTS OF CREDIT CARD PAYMENT SYSTEM 12
2.1 Organization of credit card payment system....12
2.2 Typical payment transaction in a credit card system 15
2.3 Effecting a payment transaction in credit card system remotely....17
2.4 Reversing a credit card transaction 20
2.5 Comparison with ATM/EFTPOS system 21

3. ECONOMICS ASPECTS OF CREDIT CARD PAYMENT SYSTEM 24
3.1 Costs and revenue sharing in the credit card system 24
3.2 The importance of the credit card system in Singapore.... 26
3.3 Potential of the credit card system....31
3.4 Primary function of credit card system 34

CHAPTER II 41

RELATIONSHIP BETWEEN THE PARTIES 41

1. CHARACTERIZATION THEORIES 41
1.1 Contractual structure 41
1.2 Assignment vs. direct obligation theories.... 45
1.3 Cardholder-Issuer relationship: Agency vs. Undertaking approach....51

2. RELATIONSHIP BETWEEN THE CARDHOLDER AND THE MERCHANT 57
2.1 Nature of the consideration 57
2.2 Position of the carduser 61

3. RELATIONSHIP BETWEEN THE CARDHOLDER AND THE ISSUER 64
3.1 The cardholder agreement.... 64
3.2 Cardholder agreements are standing offers 70
3.3 Validity of the cardholder agreement and position of the cardholder.... 72

4. RELATIONSHIP BETWEEN THE ISSUER AND THE MERCHANT 80
4.1 Making of issuer-merchant contract....80
4.2 Content of the contract between the issuer and the merchant 84

5. FINALITY OF CREDIT CARD PAYMENT 89
5.1 Meaning of finality 89
5.2 The final point in card-absent transaction 90
5.3 Reversing of payment by the cardholder 91
5.4 Discharge of cardholder's obligation 92

6. CONCLUSION AND OVERVIEW OF THE NEXT TWO CHAPTERS 99
6.1 Conclusions on the relationship between the parties 99
6.2 Situations of disputes and causes of action 102

CHAPTER III 106

DISPUTES RELATING TO THE PAYMENT TRANSACTION 106

1. GENERAL ANALYSIS 106
1.1 Nature of the cardholder's liability to the issuer 107
1.2 Account-holder's liability for the act of the carduser 111

2. APPLICATION OF PRINCIPLES OF AGENCY 113
2.1 Actual authority 113
2.2 Apparent authority 118
2.3 Usual authority and agency by estoppel 125
2.4 Conclusion on the application of agency doctrines to credit card 127
2.5 Unauthorized card transaction in Britain and America 128

3. APPLICATION OF THE RULES OF LAW PROTECTING PERSONAL CHATTEL 134
3.1 Unsolicited card 135
3.2 Solicited card 143

4. ESTOPPEL 148
4.1 The doctrines of estoppel 148
4.2 Estoppel by convention 150
4.3 Estoppel by representation 152
4.4 Estoppel by negligence 155

5. NEGLIGENCE 158
5.1 Duty of care of the cardholder 158
5.2 Proximate loss and recovery of economic loss 170

6. RISK-SHIFTING TERMS IN THE CARDHOLDER AGREEMENT 180
6.1 Terms that directly exclude or restrict the issuer's liability 181
6.2 Terms with indirect effect of excluding or restricting the issuer's liability 193

7. SUGGESTIONS FOR A REFORM 200
7.1 Risk-shifting practice in Singapore 200
7.2 Allocation of fraud loss according to card possession and methods of effecting transaction 203
7.3 Allocation of fraud loss according to type of cards and purposes of usage 217

CHAPTER IV 221

DISPUTES RELATING TO THE SALE CONTRACT 221

1. DISPUTES BETWEEN THE CARDHOLDER AND THE MERCHANT 221
1.1 Situations of disputes 221
1.2 The cardholder's claim against the merchant 223
1.3 Resolution of disputes via the issuer and card association 228

2. ISSUER'S LIABILITY FOR CARDHOLDER'S CLAIM IN THE SALE CONTRACT. 235
2.1 Issuer's involvement in the sale contract.......... 235
2.2 Issuer's liability in contract.......... 237
2.3 Issuer's liability in tort.......... 240
2.4 Issuer's liability in Britain and America.......... 242

3. SUGGESTIONS FOR REFORM 248
3.1 Basis for issuer's liability.......... 248
3.2 Proposed features of the measures of protection for the cardholder.......... 252

CHAPTER V.......... 260

TOWARDS A REFORM OF CREDIT CARD LAW IN SINGAPORE.......... 260

1. EXISTING REGULATORY FRAMEWORK 260
1.1 Overview of consumer credit protection in Singapore.......... 260
1.2 Regulation of credit and charge card under the Banking Act.......... 264
1.3. Credit card and money lending.......... 270
1.4 Reform of credit card regulation in Singapore.......... 279

2. BILLING AND RESOLUTION OF DISPUTES 284
2.1 Card billing and cardholder's duty to verify statements.......... 284
2.2 Timely response to cardholders' disputes by the issuers.......... 288
2.3 Attorneys fees in disputes resolution.......... 291
2.4 Combination or account, set-off, closing of account and credit reporting during disputes resolution.......... 293

3. METHODS OF IMPLEMENTATION OF REFORM 296
3.1 Issuance of new regulations by the MAS.......... 296
3.2 Self-regulation.......... 299

Table of Cases.......... 302
Bibliography.......... 307

SUMMARY

This paper is a result of my research on the law of credit, debit, and charge cards. Although these cards are relatively important in Singapore as a consumers' means of cashless payment and a source of income for the banks, the topic has not received much attention. The topic seems interesting to me as it concerns a relatively modern phenomena of banking law while still requires analysis of the fundamental principles of the common law.

The paper began with an introductory Chapter I, which described the credit, debit, and charge cards in comparison with other types of payment cards, and analyzed the organization of the system and mechanism of transactions. The chapter completed with some analysis of statistics demonstrating the primary functions of the credit card system and its relative importance in Singapore.

The analysis of the legal relationship between the parties in a credit card transaction began in Chapter II with the theories of characterization. Based on the conclusion on characterization we went on to analyze the features of the relationship between the cardholder, the merchant and the issuer. The chapter completed with a discussion on the finality of a credit card transactions.

Chapter III is an attempt to apply the fundamental principles of the common law, including agency, bailment, estoppel, and negligence, to answer questions relating to liabilities for unauthorized card transactions. The analysis of the case law is necessary because there is no statute on this issue in Singapore. After that, we reviewed the risk shifting clauses in the standard credit card agreements of Singapore banks, and discussed the impacts of the UCTA on such terms. The chapter concluded with some practical suggestions for reforming the law relating to the allocation of fraud losses.

Chapter IV focused on the sale contract between the cardholder and the merchant. The chapter began with an analysis of situations of disputes between them, possible claims of the cardholder, and the resolution of disputes via the card associations. In the second section, we shifted attention to the questions of issuer's liability to the cardholder for the merchant's default. The issuer's liabilities in tort and contract under Singapore law were compared with that imposed by statutes in Britain and America resulting in a proposal of a reform in this area.

The final chapter V started with a review of the existing regulatory framework of credit, debit, and charge cards in Singapore with an evaluation of the necessity and likelihood of a reform in the related area of consumer credit protection. In the second section, we analyzed several issues concerning card billing and resolution of disputes, for which regulatory controls should be introduced to ensure fair dealings between the banks and the cardholders. The final section concluded by summarizing the desirable features of a reform in the area of credit card law and proposing two possible methods of implementation, namely by issuance of a regulation under the Banking Act, or amendments of the Banking Code of the Association of Banks of Singapore.

CHAPTER I

INTRODUCTION

1. PAYMENT CARDS AND PAYMENT SYSTEMS

The payment card is a relatively popular means of cashless retail payment in Singapore. The country has the highest number of payment cards per inhabitant in the world. On average, each of its residents has more than eight stored value cards and three credit or charge cards (please refer to detailed statistics below). In this section, we will briefly describe all types of payment cards, their features and the underlying payment systems to define the focus of this paper.

1.1 Concept of payment cards

'Payment card' is the term commonly used to denote pieces of plastic sized about 8.5 x 5.4cm, fitting a wallet, that may be used to make payment for goods or services without using cash. Payment made by cards is usually known as payment by plastic.

As technologies and business methods evolve, payment cards takes on various physical forms such as *"token, coupon, stamp, form, booklet or other document or thing"*[1] or even intangible *"electronic"*[2] form. *'Payment cards',* therefore, include not only the plastic cards but also other things or even pieces of information that can be used to avoid transportation of notes and coins when making payment.

[1] Definition of stored value card, Section 78(9) Banking Act (Cap 19).
[2] Definition of credit or charge card, Regulation 2(1), Banking (Credit card and Charge card) Regulations 2004.

As a means of making payment, the payment cards usually involve three parties, a cardholder, a merchant, and a card-issuer. One simple way to elaborate on the concept of payment cards is by describing the various types of cards that are used. We will do that very briefly in the next section.

1.2 Types of payment cards

(a) ATM cards

ATM cards are issued by banks to their customers. The ATM cards can be used to make balance enquiry, initiate electronic fund transfer at ATMs as well as making electronic fund transfer at point of sales (EFTPOS) terminals locally. The cardholder uses the ATM card together with a personal identification number (PIN), known only to the cardholder and the issuing bank, which must be keyed in on the key pad of the ATMs or POS terminals before any payment takes place. The issuance and use of ATM cards are based on the relationship between banks and account holders created prior to or at the point of issuance of the card. Upon the completion of each payment transaction at ATMs or EFTPOS terminals the cardholder's account is debited with the amount of cash issued or the funds are transferred instantaneously. Each payment transaction can be effected only if there is available balance in the bank account to be deducted. Because the cardholder deposits funds with the bank before using the card, the ATM card is also called *PIN-based debit card*.

(b) Stored value card

The stored value cards are storage devices that work like *digital purses* to keep value of money in the form of encrypted digital information. Payment by stored value cards involves transmission of digital value between devices that requires only the card without any passwords, PIN, or cardholder's signature. Stored value cards comprise of (i) *single purpose stored value card* (SPSVC) that can only be used to pay the card issuer (i.e. the issuer is also the merchant) and (ii) *multi purpose stored value card* (MPSVC) that can be used to pay all merchants that have the necessary arrangements with the card-issuer to accept payment. Beside plastic cards, digital money can be stored in other electronic devices such as personal computers or handheld computers and controlled by appropriate computer software. In this case, value can be transmitted via the linkage between computers such as the internet.

(c) Credit cards

Credit cards are issued by banks and financial institution under the payment systems maintained by international card associations such as Visa or MasterCard and bearing the insignia of the respective card association.

When a credit card is used at a point of sale terminal, the merchant swipes the credit card presented by the cardholder in a card-reader device. The cardholder then signs on a transaction receipt printed by the reader. The merchant supplies goods or services to the cardholder and then submits the transaction receipt to an acquirer to obtain payment from the issuer.

A revolving line of credit is granted by the issuer to each cardholder. The issuer sends periodical statements of the card account (usually monthly) to the cardholder. The cardholder has options to either settle the debt in full (in which case he incurs no finance charge) or settle an amount equal or greater than the minimum payment required but smaller than the total amount owing (in which case the cardholder incurs finance charges from the due date specified in the statement). The cardholder may obtain cash from the counter of the card issuer or at ATMs, in which case he incurs finance charges from the date the amount is posted to his card account.

In addition to usage at point of sale terminals, the credit cards can be used to make payment without the presence of the physical card and without signature by remote methods such as by telephone, mail or the internet.

(d) Charge card

The charge card, also known as travel and entertainment or *T&E card,* may be considered a variance of the credit card because the procedure for its use is the same. The cardholder also makes purchases first and only pays after the monthly statements are delivered to him later. The difference with credit card is that the cardholder of a charge card is required to settle the *entire* amount owed under each statement on or before the due date.

(e) Debit cards (signature based)

In effect, this variance of the credit card looks almost the same as the credit card, and is used in the same manner. The difference is that with debit cards, the

cardholder uses the card to spend money out of the balance of his bank account linked with the card. Because of the popular use of signature in card-present transactions, this type of debit card is also called *signature based debit card* to distinguish with the PIN based debit card described in section (a) above. This may cause confusion because this type of debit card may be used without both the card and the signature.

(f) Prepaid card

The prepaid card is a new type of card that is also used in the same payment system of the credit, charge, and debit cards. The prepaid cards look nearly identical to the normal credit, charge or debit card. The difference lies in that the amount available on each card is paid for in advance either by debiting from a bank account of the purchaser of the card or by a payment transaction by another credit card. Prepaid cards come in several forms, some with the cardholder's name embossed on the card and some without, some are *rechargeable* (*i.e.* cardholder can add money to the card) and others *non-rechargeable*. The prepaid cards offer a more secure option for people who wish to limit the maximum amount of losses due to loss of cards or fraud. The prepaid cards also represent a convenient way of giving a gift to teenagers to help them become familiar with the most popular retail payment methods while limiting the risks. In terms of payment mechanism, the prepaid card works in the same way as the credit card, charge card or debit card except that the cardholders of prepaid cards have no bank account and, in most cases, no agreement signed with the issuer.

(g) Proprietary card

The proprietary cards are issued by department stores to save time evaluating credit worthiness of purchasers upon every purchase. This is a predecessor of the credit card introduced in the United States in 1914[3]. Similar to the single purpose stored value card, the proprietary cards can only be used at retail outlets of the issuers. Because the issuer is also the merchant, this card involves only two parties. As a result, the procedure of use as well as the nature of the relationship between the parties is considerably simpler.

(h) Other names for cards

The individual cardholders of credit, debit, or charge card may request additional cards to be issued to other individuals such as their spouse or children. The additional cards are called *supplementary cards* (as opposed to *principal card*) and the additional holders are called *cardusers*. Payments made by supplementary cards are charged to the same account as those of the cardholder. The cardholders are made liable for all such usage and frequently the cardusers are made jointly liable for their own usage.

When a credit, debit, or charge card is issued to a company, the company is the cardholder but no principal card is issued. All the cards are issued to the cardusers, usually employees or officers of the company. Where the cards are restricted for use with travel and entertainment purposes they are known as *corporate cards*. In Singapore, if the cardholder is a sole proprietor or

[3] A.C. Drury and C.W. Ferrier, '*Credit Cards*', Butterworth 1984 at page 19. The first credit card was issued in 1914 by General Petroleum Corporation of California (now Mobil Oil) to employees and selected customers.

partnership the card is called a *business card*. In Singapore, the cardholders and the cardusers are typically made jointly and severally liable for card transactions effected by corporate and business cards. In case the purposes of use of the credit, debit or charge card is restricted to purchases of goods or services on behalf of a corporation, a partnership or a sole proprietorship other than travel and entertainment purposes the card will be referred to as a *purchasing card*.

1.3 Features of payment cards

(a) Credit extension

Credit extension by issuer to cardholder is one of the features that can be attached to certain types of payment cards. The credit card is the one that most likely involves extension of credit. The cardholder is granted a revolving line of credit, an option to borrow from the issuer up to a certain limit by deferring payment due under the monthly statement. In this respect, the proprietary card is similar to the credit card as it also allows the cardholder to defer payment due to the issuer under the card statement.

The charge card involves the provision of very short-term credit within the period from the point of each card transaction to the due date of the next monthly statement. The cardholders of charge cards are usually not allowed to defer payments due in each statement.

The debit card (both PIN and signature based) generally does not involve the extension of credit, except when an overdraft facility is granted to an account linked to the debit card. The prepaid card and stored value card do not involve

any extension of credit by the issuer as the value available for each card is paid for in advance.

The credit extension feature, even when attached to a credit card is only an option left open to the cardholder. He may chose to pay the entire amount due under the monthly statement or to pay less than that and incur finance charge.

(b) Methods of use

There are several methods by which a payment card can be used. The ATM cards can be used at ATM and EFTPOS terminals located within a limited geographical area. Most ATM cards issued in Singapore can only be used at a few hundreds ATMs owned by the issuing bank or shared between a few banks in Singapore. The EFTPOS acceptance function is limited within a local EFTPOS network (known as NETS) jointly operated by the major local banks within Singapore. ATM cards cannot be used without the presence of the card.

In contrast, the credit card, charge card, and debit card can be used at millions of ATMs that display the insignia of the respective credit card network worldwide. When used at the point of sale these cards are swiped through separate reader equipment connected to a network separate from the local EFTPOS system. In addition, the card issued under the credit card system can be used to effect a card-absence transaction by remote method such as telephone, mail, facsimile, or internet.

The multi-purpose stored value cards in Singapore can be issued, recharged or refunded at ATMs with the use of another ATM card but can not be used to

withdraw cash at the ATMs. The network for payment transaction by stored value cards is smaller than the EFTPOS network and is limited within Singapore. Currently the stored value cards are used mainly to make payments for small amounts such as road tolls, parking charges, library fees and for purchases at fast food restaurants. The stored value cards, however, may be used to make payment via the internet with an appropriate card reader device and publicly available software.

(c) Primary function of the instrument

Payment cards can be classified into three broad categories according to the primary function of the instrument, the card. The stored value card plays the function of a *storage device* to keep value of money in the form of digital information. It does not matter who is the cardholder, any bearer of a stored value card can use the card together with the value encoded in it.

The ATM card primary function is an *identification device*, a security measure to control access to bank accounts. It is a digital substitute for a deposit passbook booklet issued to holders of bank saving-accounts. The ATM card is only a modern extension of the traditional methods by which banks already transact with their account holders.

The usage of all the cards used in the credit card payment system, including credit cards, charge cards, signature-based debit cards and prepaid cards represents *an undertaking* by the issuer to pay the merchant regardless of the ability or willingness to pay by the cardholder, provided the procedures of effecting the transaction are complied with. In effect, this function is the *substitution of the*

credit of the cardholder with that of the card-issuer. The merchant supplies goods in exchange for only a piece of paper or information because he chose to trust the card association and the issuer of the card instead of the cardholder[4]. For this reason, the word *'credit'* when used with *'credit card payment system'* signifies the substitution of credit rather than the extension of credit by the issuer to the cardholder. While the credit, charge or debit card may be considered a means of identification (*e.g.* with the cardholder's name, signature, and photograph on the card) the identification function is not essential. Such a function may be dispensed with in card-absent transactions.

1.4 The payment systems of payment cards

(a) The concept of payment systems

The concept of a payment system bases on the concept of money (*i.e.* coins and bank notes). The distinctive feature of money is that money passes *"freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or to apply it to any other use than in turn tender it to others in discharge of debts or payment for commodities"*[5]. Payment is the delivery of money by the payor to the payee in settlement of a debt. If a debtor makes payment otherwise than by money, he will not be seen to have made a valid tender of payment to the creditor, unless the parties have agreed

[4] Please refer to the discussion of the conditional/unconditional discharge of the cardholder's payment by credit card at Section 5.4 below at page 92.
[5] *Moss v Hancock [1899] 2 QB 111* at 116 per Darling J.

upon that mode of payment before[6]. A payment system is an arrangement to facilitate the payment by payors to payees without tendering physical money. Professor Geva defined payment system as follow: *"Any machinery facilitating the transmission of money which bypasses the transportation of money and its physical delivery from the payor to the payee is a payment mechanism. A payment mechanism facilitating a standard method of payment through a banking system is frequently referred to as a payment system. Payment over a payment mechanism is initiated by payment instructions, given by the payor or under the payor's authority, and is often referred to as a transfer of funds"*[7].

(b) Classification of payment system

A payment system involves transactions between at least three parties, namely the payor, the payee, and the system operator. It has been suggested[8] that, generally all payment systems can be categorized into two categories: (i) the *'embodied rights system',* the operation of which is functionally equivalent to the physical transfer of money without the intervention of a payment system provider; and (ii) the *'account-based system'* which is essentially a system of transmission of instructions to effect the debiting or crediting of accounts which a user maintains with a system provider.

According to this classification, the payment system of stored value cards can be placed into the *'embodied rights system'* because (i) the value encoded in each card is transferred from device to device without the intervention of the system

[6] Roy Goode, *Payment Obligations in Commercial and Financial Transactions*, Sweet & Maxwell, London 1983 at page 9.
[7] Geva Benjamin, *"The law of Electronic Funds Transfer",* Release No. 7, October 1999, Matthew Bender at §1.03, page 1-11.
[8] David Kreltszheim, *"The legal nature of "electronic money""* (2003)14 JBFLP 161.

provider and (ii) the identity of the cardholder is not verified or relevant in each transaction. Stored value cards are digital purses, storage devices, as opposed to identification device facilitating the transmission of *'instructions'* between parties.

In contrast, all the other electronic payment system including the ATM/EFTPOS system and the credit card system are *'account-based system'*. Though these are usually referred to as electronic payment system, no value is transferred electronically. The term *'electronic'* is used whenever any electronic means is used for transmission of instructions between the banks. Identifying the payment system of the credit cards as an account-based system may be a helpful point to assist the characterization of card transaction.

In the next section, we will describe transactional aspects of the credit card system and distinguish them with the system of the ATM cards.

2. TRANSACTIONAL ASPECTS OF CREDIT CARD PAYMENT SYSTEM

2.1 Organization of credit card payment system

(a) Credit card associations and its relationship with the issuer and acquirer

The organizations that create, maintain, and promote the credit card payment system are consortiums of banks and financial institutions usually known as the credit card associations. These associations hold the insignia of the card and facilitate card transactions via their clearing and settlement systems. As with any

association, the credit card consortiums are owned, controlled, and managed by the joint efforts of their members under a common set of bylaws and regulations. We will come back to the analysis of the contents, validity, and effect of these bylaws and regulations later. It suffices to note here that the rules of each credit card association generally stipulate:-

(i) The conditions that a party must satisfy to become a member of the association, usually by being licensed as a bank or financial institution with certain capital adequacy;

(ii) The requirements of card issuance from necessary terms of agreement to technical specification of cards;

(iii) The procedures to effect and process card transactions by various methods from ATMs, point of sale to e-commerce transaction, clearing and settlement procedure;

(iv) The fees and sharing of costs and revenue for issuing cards and processing transactions; and

(v) The procedures to correct mistakes and resolve disputes relating to unauthorized transactions, liability for products and services.

Members of the card associations include *issuers* that issue cards and *acquirers* that assist the merchants to process payment transaction and obtain payments made by credit cards. To obtain the right to issue credit cards bearing the insignia of a particular card association or to accept payment by such cards, issuers and

acquirers have to accede to the rules of the respective card association. The relationship between members of credit card associations is maintained by *'indemnification'* method. This means the consortium undertakes to indemnify the acquiring members in the event the issuing member is unwilling or unable to make payment, provided the association's rules were fully complied with. In terms of revenue, the acquirer earns revenue from credit card transaction in the form of a *discount* out of the transaction amount. A portion of this revenue is shared with the issuer by way of a percentage fee called the *exchange fee*.

(b) Relationship with merchant and cardholder

To obtain a credit, debit or charge card the cardholder must enter into an agreement with the issuer. We will analyze the relationship between the cardholder and the issuer in section 3 of chapter II. As a simple description, the cardholders are allowed to use the card to obtain cash at ATMs worldwide or to make payments to merchants that display the insignia of the respective card association. The cardholders undertake to reimburse the issuer the amount of such payments together with applicable fees and finance charges.

To obtain the ability to accept payment by credit cards and other cards issued in the credit card system the merchants also need to enter into agreement with the acquirers. Under a merchant agreement, the merchant agrees to display the insignia of the respective card association and accept payment by cards in its ordinary course of business. The merchants must comply with the procedure to accept payments such as obtaining approval from the acquirer if a transaction amount exceeds a floor limit, verify the cardholder's signature, and submit the transaction slip to the acquirer on time. For each card transaction, the acquirer

agrees to pay the merchant the transaction amount less a discount at a rate agreed between them.

2.2 Typical payment transaction in a credit card system

(a) Transaction stage

In a typical card-present transaction effected by a credit card, charge card or signature-based debit card the merchant swipes the card through a card-reader. The equipment extracts information including the name of the issuer, the card account number and expiration date encoded in the magnetic stripe of the card. The equipment then contacts the acquirer via a telephone line or internet connection and sends an encrypted message identifying the card number, expiration date, amount of transaction, location of the merchant and merchant code. The acquirer, normally, routes that message to the card issuer via the card association. The issuer determines whether the credit card numbers are valid and whether the transaction amount is within the credit limit or the balance of the cardholder's account in the case of a debit card. The issuer's computer may also consider other information such as patterns of multiple transactions effected by the same card, location of card transactions and merchant code to measure the risk of fraud by the use of anti-fraud software. If the computer software determines that the transaction is legitimate, it sends an encrypted message back to the merchant's terminal (via the card association's and the acquirer's computer systems) approving the transaction[9]. The merchant's terminal then prints a transaction receipt, which contain the cardholder's authorization for the issuer to

[9] The issuer may engage an agent to process card transaction ("card processor"), in which case it is submitted that the issuer's approval for the transaction is granted by the agent on behalf of the issuer.

charge the transaction amount to his card account. The cardholder is required to put his signature on the transaction receipt, which will be compared against the specimen on the back of the card by the merchant. The cardholder is then given the original transaction receipt for reference and the merchant keeps the carbon copy, which will be used in the collection stage. Increasingly merchants use terminals that have electronic pads that can capture the cardholders' signatures electronically, in which event the payment slip may be transmitted to the acquirer electronically.

(b) Collection stage

In the collection stage, the merchant delivers the transaction receipts to the acquirer, usually on a daily basis. Increasingly the terminal that conducted the authorization transaction stores the information of all the transactions during a day, and, at the end of the day, transmits a batched message to the acquirer that describes all of the day's transactions. A few days later the acquirer will credit the transaction amount to the account of the merchant with them less a certain discount as the fees for the acquirer's services. Even though the fund is available in the merchant's account, the acquirer usually reserves the right to charge back the amount in a number of circumstances prescribed in the agreement between merchant and acquirer.

From the other side of the transaction, the issuer debits the credit card account and the transaction is posted to the monthly statement to be sent to the cardholder.

For debit cards, the procedure of collection is slightly different. When the merchant swipes the debit card to obtain approval, an amount equal or equivalent to the transaction amount (if in different currencies) of the account linked with the card will be put *'on hold'*. The money '*on hold'* is not yet deducted from the cardholder's account but he cannot use it. The transaction amount will be deducted when the transaction is submitted by the merchant to the acquirer (typically by submitting the transaction receipt). If after certain time limit the transaction is not presented, the *'hold'* will be removed.

2.3 Effecting a payment transaction in credit card system remotely

Besides the common method of swiping cards at point of sale terminals, there are several other methods to effect payment, some of which do not require the production of the card and the signature of the cardholder. These methods may be used with charge card and signature-based debit card as well as credit cards.

(a) Telephone method

In a transaction over the telephone, the cardholder only gives the merchant the card number and expiry date of the card. In this case, the merchant does not have the transaction receipt with the signature of the cardholder. He, however, may use the same equipment as that used in card-present method to obtain approval for the transaction from the issuer. The difference is that the card and transaction particulars are keyed in manually.

(b) Mail and fax method

When a transaction is made through mail or fax order, the cardholder fills in a printed form describing his name, card number, expiry date and signs the form. Authentication through the acquirer is usually required but the merchant does not have the obligation to compare signatures since he cannot see the specimen signature on the card.

(c) Offline method (Imprinter)

In the rare case where the merchant has no electronic terminal or where it is not possible or practicable to establish a connection between a terminal and the acquirer (*e.g.* when the merchant is moving or the sale occurs in a remote area), offline methods may be used. In the offline method, the merchant may use an imprinter, which is a simple tool to take a carbon copy of the card (because the card number and the cardholder's name are embossed on the card) and obtain the cardholder's signature. The difference in this case is that the authentication steps between the merchant and the issuer or the acquirer may not be conducted at the point of sale. Sometimes an electronic card reader may replace the imprinter but if a connection is not present and authentication is not conducted with the issuer, the transaction remains an offline transaction. Offline transactions have higher risks of fraud and the merchant may have to pay higher fees.

(d) Internet method

In a transaction by internet, the cardholder provides cardholder's name, card number, and expiry date via an electronic form. In a less secured way, the merchant may collect the information through an internet-based form and then submit it to the acquirer in the same way as for a telephone transaction. Recently due to the concerns that merchants or their staffs may abuse credit card numbers, secured socket layer (SSL) methods have been developed whereby the card number is concealed from the merchant except for the last 4 digits for identification purposes. In this case, the transaction information collected from the web site of the merchant is submitted directly to the acquirer through a third party payment service provider. As an additional security measure for internet transactions, certain acquirer or merchant may require that the cardholder provide card billing address and a security code printed on the back of the card. In such case, the acquirer's computer interacts with the issuer's computer to find a match of those additional criteria and the possibility of fraud is better prevented. This is especially helpful for merchants that deliver physical goods to the billing address of the cardholders as the cardholder's defence may be limited if he benefits from the goods he receives.

(e) Recurring transaction

Merchants that provide continuous services such as telephone or public utilities companies offer their customers the option to make recurring payment by credit card. The cardholder signs a form to authorize the merchant to charge to his credit card account such amount that will be due in the future. Without the need to give individual authorization, all the future recurring payments will be made automatically between the merchant and the acquirer until the cardholder's authorization is revoked.

2.4 Reversing a credit card transaction

A credit card transaction may be reversed through the same channels that were used to effect the payment. There are two cases where a transaction may be reversed: refund and chargeback. Essentially the result of a reverse transaction is a refund or re-credit to the card account of the transaction amount. As a result, the fee paid by the merchant to the acquirer by way of discount is also refunded.

(a) Refund

Usually the agreement between the acquirer and the merchant prohibits the merchant from giving cash refunds to their customer. This is probably because that cash refunds may cause difficulty in ascertaining the discount fees. Assuming a merchant has a refunds policy and a cardholder returned the goods purchased and request for a refund, the merchant needs to do a reverse transaction by issuing a credit receipt and send it to the acquirer via the same channel that was used when the original transaction was effected. The acquirer then routes the message back to the issuer via the card network and the transaction amount will be re-credited to the card account.

(b) Chargeback

In the case of chargeback, the reverse transaction is initiated by the cardholder through the issuer, which does not require the merchant's consent. The basis for the cardholder to claim for chargeback can be divided into two categories: unauthorized transaction and breach of sale contract by the merchant. Unauthorized transactions can occur if the cardholder claims that the transaction

charged to his account was not authorized by him such as the case of lost card, stolen card numbers, or cancelled recurring transactions. Breach of contract by the merchant may include misrepresentation, non-delivery of merchandise or defective merchandise. The grounds for lodging a chargeback may be specified in the cardholder agreement, the bylaws, and regulations of the card association and the merchant agreement. When a chargeback is lodged by the cardholder, regulations of card association usually requires the issuer to immediately credit the transaction amount back to the card account pending resolution of the dispute. If the chargeback claim is valid, the bank account of the merchant with the acquirer will be debited.

2.5 Comparison with ATM/EFTPOS system

(a) Typical ATM/EFTPOS transactions

A EFTPOS transaction effected by an ATM card is very similar to a card-present transaction effected by a credit card. The card is also presented and swiped in a reader device. The difference is that, instead of giving a signature, holders of ATM cards key in a secret personal identification number (PIN). The terminal then transmits an encrypted electronic signal, tagged with the PIN to the issuing bank via the card association, with a request to transfer funds from cardholder's account with the issuing bank to the credit of the merchant. The issuer's computer examines the signal, matches the PIN with the records of the designated account. If the account has sufficient funds, the issuing bank ordinarily sends a message back to the merchant's terminal via the computer network approving the transaction. The merchant, in return, delivers the goods or services to the cardholder. The issuer's obligation to pay the amount usually

becomes final when the *'approval'* message is received at the merchant's terminal and the account of the cardholder is debited with the transaction amount instantaneously. In the collection stage, the merchant receives actual payment of all card transactions to its bank account periodically, usually in a single daily deposit on the next working day.

(b) Comparison between credit card system and the ATM/ EFTPOS system

Besides the similar physical appearance of a plastic card, the ATM/EFTPOS system and the credit card system are similar in many respects. Both systems involve the cardholder, the merchant, the issuer, the acquirer and the card network being an association between issuers and acquirers. Both networks perform the function of facilitating the transmission of *'messages'* or *'instructions'* electronically between the merchant's point of sale terminals and the issuers via the acquirer. Both types of cards can be used at ATMs and point of sale terminals. However, there are fundamental differences between the two systems that may require different rules of law to apply to them, thus require further attention.

The simple analysis partially made in previous sections shows several functional differences:

(i) In terms of method of authentication, a transaction made with the ATM card, whether at the point of sale or at the ATMs always requires the presence of the card together with a secret PIN. In contrast, credit card transactions at the point of sale require the cardholder's signature instead of PIN. In several

circumstances, transactions in the credit card system can be effected without the card and even without the cardholder's signature.

(ii) With respect to the nature of the network, the systems of ATM/EFTPOS cards are local while credit card systems are international[10]. Even where a merchant is able to accept both credit cards and ATM/EFTPOS cards at the same point of sale, the different cards use different equipment connecting to separate network of transmissions.

The above differences, though easy to identify, may not sufficiently distinguish between the two systems. Firstly, several credit card association today give the cardholder the option to attach a secret PIN to their credit, debit or charge card (e.g. *'Verified by Visa'* or *'MasterCard SecureCode'*) for use with internet transactions. This feature makes the PIN vs. signature difference less significant. Secondly, one might argue that the size and coverage of a card network has little to do with its legal nature. In the very beginning, the network of credit and charge card did not cover the world as it does today.

A more thorough analysis, however, shows that the important difference between the two systems lies in the way the cardholders settle the transaction with the issuer. In ATM/EFTPOS system, the bank account of the cardholder is deducted with the transaction amount immediately when the transaction completes at the point of sale. In contrast, in the credit card system the cardholder settle the amount due to the issuer in a separate transaction that occurs days after the

[10] Some ATM/EFTPOS cards issued in one country may be used in another country, for instance, Singapore NETS cards and Malaysian MEPS cards may be used in both countries. This, however, has happened only as individual bilateral arrangement and ATM/EFTPOS should still be considered "local" by nature.

payment transaction. Even with the signature-based debit card, the transaction amount is not deducted on the spot, but only put *'on hold'* until the merchant duly submits the transaction slip to the issuer via the acquirer. Because of the instantaneous debit requirement, a transaction with an ATM/EFTPOS card cannot proceed without a live communication linkage between the issuer and the merchant. In contrast, a transaction in the credit card system can be effected offline. Furthermore, the holders of credit cards usually have certain recourse against the merchant in case of misrepresentation, defective products, which recourse is not available to holders of ATM/EFTPOS at all.

Because of these differences, it is submitted that the transactions in the ATM/EFTPOS card system is characterized as an *'electronic fund transfer'*, in the same way as a *'money transfer order'* or *'wire transfer'* transaction are. In contrast, a transaction in the credit card system should be characterized not as a *'fund transfer'* but in a way similar to documentary credit. This submission is supported by further analysis in section 1.3 in chapter II.

3. ECONOMICS ASPECTS OF CREDIT CARD PAYMENT SYSTEM

3.1 Costs and revenue sharing in the credit card system

(a) Merchant's discount and exchange fee

As mentioned above, in return for the ability to attract more customers by offering the options to make payment by credit cards, the merchant has to pay the acquirer a fee for the payment service expressed as a *discount* deducted from the sale proceeds (hence the use of the expressions *'discounting or acquiring*

transaction receipts' and *'acquirer'*). The rate of such discount varies from about 2% to 7% depending on the method of effecting card transaction and the nature of the goods or services sold. Ultimately, the rate of discount depends on the level of risk of fraud in the card transactions of the merchant. The rate is lower if the merchant only accepts card-present payment and is higher when merchant accepts payment by telephone, facsimile, mail order, or internet. The discount rate is higher if the merchant accepts payment via internet and will probably be highest if the merchant supplies virtual services (e.g. internet telephony, digital music, digital books) instead of supplying physical goods (the delivery of which can be proved by airway bills). The merchant's discount is a major source of revenue for the acquirer as well as the credit card system.

For every card transaction, the fee collected from the merchant is divided between the acquirer and the issuer by way of an *exchange fee*, paid by the acquirer to the issuer also in the form of a discount. For each transaction the issuer is entitled to charge the entire transaction amount to the account of the cardholder but it need to pay the acquirer the transaction amount less the exchange fee. The difference between the merchant's discount and the exchange fee is the actual revenue of the acquirer.

(b) Annual fee and finance charge

In addition to the exchange fee, the issuers have two other sources of revenue, the annual fee, and the finance charge paid by the cardholder. There are several indications that the annual fee is not significant revenue for the issuers. When the credit and charge card was first introduced in America it was not a tradiction to charge any annual fee. The annual fee was said to be a result of low usury ceiling

imposed by states law in a time of inflation in America[11]. Most banks in Singapore waive the annual fee for the first few years when accepting new card applications. The waiver can continue if the cardholders can maintain a sufficient level of spending on the cards. Besides the waiver of annual fee, most banks give the cardholder benefits such as discounts at restaurants and bonus points for purchases at qualified merchants to encourage cardholders to spend more with their cards. For an average cardholder the value of such freebies is about the equivalent of the annual fee paid to the card issuers.

The issuer's main source of income is, therefore, the exchange fee, and the finance charges. If the consumers use the credit card system more for reasons other than borrowing at super high interest rates the revenue from finance charge would shrink while the exchange fee would grow. The card associations cover their costs of operation from both issuer and acquirer by assessment of their members, usually quarterly.

From the above analysis, it is found that the two main contributors to the credit card system are the cardholder and the merchant. The cardholders contribute more by paying finance charges where the system is used as a means of extending credit. The merchants contribute more if the system is used as a means of making cashless payment. We will attempt to find out which is the main function of the credit card system in section 3.4.

3.2 The importance of the credit card system in Singapore

[11] Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards*, Third Edition, Warrant, Gorham & Lamont, 1991, at 11.02: *"... bank cards have generally not involved any annual membership fee, such as the fee imposed by the travel and entertainment cards, low usury ceiling in a time of inflation have caused some issuers to impose such a fee."*

This section attempts to demonstrate the relative importance of the credit card system in Singapore in comparison with other countries, other payment cards system, and other cashless payment methods.

(a) Payment cards usage in comparison with other countries

In the comparison with other developed countries, the statistics of the Bank of International settlement in 1999 shows that the number of payment cards per 1000 inhabitants of Singapore is the highest in the world.

Chart 1: Number of payment cards in circulation per 1,000 inhabitants – 1999 [12].

	Stored value cards	Credit/debit cards	Cheque guarantee cards	Proprietary cards
Singapore	8,043	2,978	na	na
Belgium	1,308	1,308	436	156
Canada	2,027	2,482	na	na
France	636	567	na	na
Germany	1,200	1,297	552	97
Italy	369	565	5.5	na
Japan	2,388	na	na	503
Netherlands	1,527	1,527	na	na
Sweden	830	799	na	na
Switzerland	1,106	1,142	729	na
United Kingdom	1,881	1,529	911	na
United States	2,658	2,793	na	2,177

Not only that the country has the largest number of payment cards per inhabitants, the plastic is used more frequently than in any other country, except for Canada.

[12] *Payment Systems in Singapore 2001*, Bank for International Settlement, Table 7, page 39.

Chart 2: Percentage of payment card transactions out of total number of all cashless transactions from 1995 to 1999 [13].

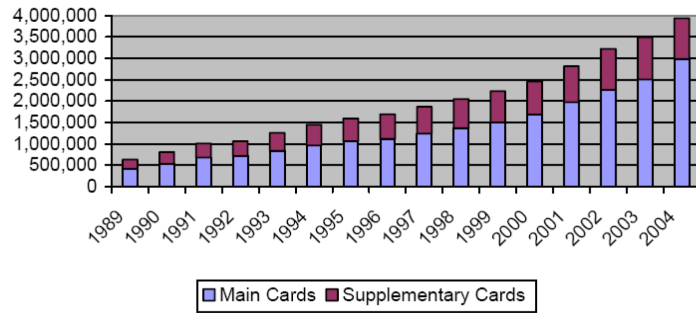
	1995	1996	1997	1998	1999
Singapore	30.3	32.6	34.4	37.2	38.0
Belgium	19.7	21.4	23.4	27.4	28.9
Canada	33.3	38.8	44.5	48.4	51.7
France	17.6	18.3	16.9	18.2	na
Germany	3.6	4.2	4.1	5.1	5.2
Italy	6.6	8.6	11.2	14.2	17.6
Netherlands	13.4	19.5	23.2	26.2	28.6
Sweden	14.2	14.8	18.9	23.0	24.1
Switzerland	18.4	20.7	22.8	23.4	27.3
United Kingdom	24.1	27.1	29.6	31.7	34.6
United States	20.0	21.4	22.9	24.6	26.6

(b) Credit card and charge card capacity and growth

There are a large number of credit and charge card in Singapore. As at October 2006, there were 3,854,930 main credit and charge cards and 1,110,191 supplementary cards with a total card billing of approximately SGD16 billion in year 2005[14]. Chart 3 and 4 below show the growth of the credit card and charge card in Singapore in terms of number of active cards and aggregate value of card transactions.

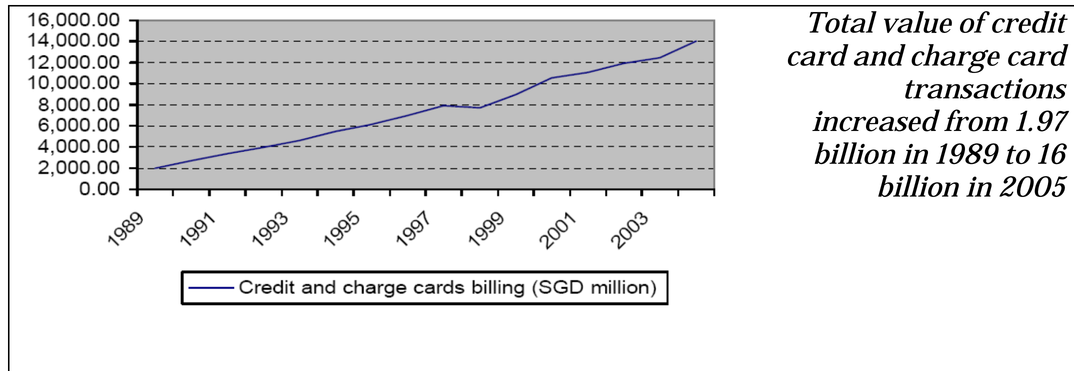
[13] *Payment Systems in Singapore 2001*, Bank for International Settlement, Table 8, page 40.
[14] MAS' Monthly Statistical Bulletin at https://secure.mas.gov.sg/frames/msb/msbIndexpage.html

Chart 3: Number of credit and charge cards in Singapore 1989-2004[15]



Number of credit and charge cards in circulation increased steadily from 631,737 cards in 1989 to 4,509,708 cards in 2005

Chart 4: Credit and charge cards transaction value 1989-2004[16]



Total value of credit card and charge card transactions increased from 1.97 billion in 1989 to 16 billion in 2005

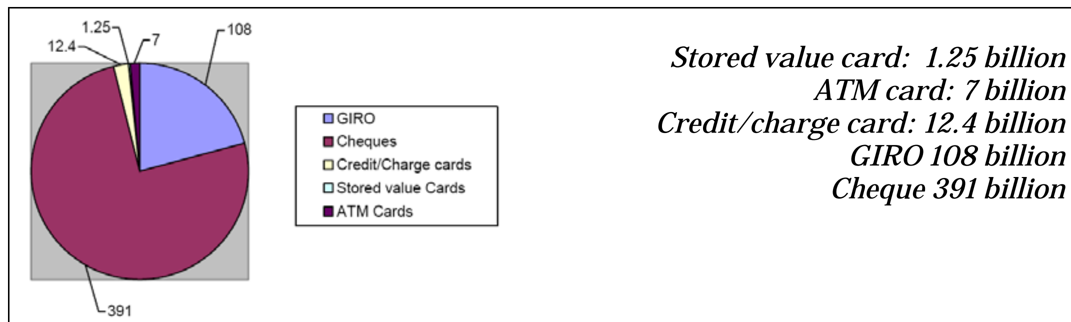
(c) Credit and charge card usage in comparison with other payment cards and other means of cashless payment

In the comparison with other methods of cashless payment, the payment cards (including credit/charge cards, ATM cards and stored value cards) are used more often than any other means. The MAS reported that in 2003 there were about 87 million SGD cheques and 550,000 USD cheques cleared, 62 million GIRO transactions effected while there were 106 million EFTPOS transactions and 1,536 million stored value cards transactions.

[15] Ibid note 11.
[16] Ibid note 12.

However, in terms of transaction value the cheque is still the dominating method. Chart 5 below illustrates the proportion of transaction value by credit cards in comparison with GIRO, cheque and other payment cards.

Chart 5: Value of payment transactions (in SGD billion) – 2003



The credit card system, however, is outpacing other means of payment in growth rate. Chart 6 below shows a constant decrease in the use of cheques, a slight increase in use of GIRO, very little increase in the use of ATM cards but a sharp increase of credit/charge cards usage.

Chart 6: Value of payment processed from 1996 to 2000 (SGD billion) [17].

	1996	1997	1998	1999	2000
Cheques	586	619	471	504	474
ATM cards	6	7	7	7	7
Credit cards	7	8	8	9	11
GIRO	45	55	54	51	53

[17] *Payment Systems in Singapore 2001*, Bank for International Settlement, Table 13, page 28.

3.3 Potential of the credit card system

(a) Capacity of major credit card networks

The global credit card market is highly concentrated with only two giant credit card networks: Visa and MasterCard, sharing almost the entire market in approximately equal proportions. To illustrate the capacity of Visa and MasterCard, the table below shows the approximate statistics of network coverage, number of members, cards, transactions and the dollar value of payment processed as at end of 2004.

Chart 7: Capacity of Visa and MasterCard as at end of 2004[18].

Criteria	Visa	MasterCard
Number of members	21,000 banks and financial institutions	25,000 banks and financial institutions
Number of cards	Over 1 billion cards	Over 700 million cards
Number of transactions	43 billion per year	16.7 billion per year
Dollar value of payment processed	Total of USD3.3 trillion per year	Total USD1.5 trillion per year
Number of merchants	Over 20 million	Over 23 million
Number of ATMs	Approx. 944,000 ATMs	Approx. 1 million ATMs

The networks of major credit card associations are enormous. Considering the number of banks and financial institutions that have joined the association as members, the number of ATMs and merchants ready to accept cards from the credit cards system, the number of card in circulation and the value of transaction, it seems fair to say that the credit card system is the most matured and established system for electronic retail payment worldwide. The business of issuing and accepting payment by credit, debit, and charge card is an important avenue for bank to generate revenue and to acquire and retain customers.

[18] Data source: Visa and MasterCard worldwide report 2004.

Besides, the credit card system has several unique capabilities, which we will discuss further below.

(b) Electronic commerce

While the credit card system continues to be the most favored means of making payments for travel and entertainment purposes, it is the only system capable for use in retail transaction on the internet. The ATM/EFTPOS cards cannot be used for internet transaction[19]. The stored value card may be used to make payment over the internet but is not capable to compete with the credit card in the near future because (i) it requires additional card reader device and software (ii) there is no stored value card network that operate internationally and (iii) the transaction mechanism of the stored value card gives the cardholder no recourse in case of merchant's fraud.

The *Visa worldwide report 2004* reported that more than 50% of all internet payments were made with their credit and debit cards and their e-commerce sales grew 56%, exceeded USD150 billion in annual sales. E-commerce is growing fast as consumers worldwide become more accustomed to making purchase over the internet. Visa estimated that almost 20% of global Personal Consumer Expenditure (estimated at approximately USD 24 trillion in 2004) takes place using electronic payment method.

(b) Expenditure management

---

[19] The use of the ATM card to make payment on the internet should be distinguished with the use of the bank account number. The ATM card number cannot be used to make payment on the internet in a way similar to using the credit/debit card numbers. There is also no facility to use the ATM card with a card reader connected to a personal computer.

Credit, debit, and charge cards are not only used by individuals. Increasingly, governments and companies use these cards as a means to manage expenditure and risk by the use of corporate cards for T&E purposes, purchasing cards for office supplies and payroll prepaid cards for salary payment. According to statistic recorded by Visa and presented at its conference organized in 2005[20], the value of transaction made by credit and debit cards issued to companies and government exceeded USD 210 billion in year 2004, a 25% growth compared to previous year. The Visa Payroll card in America helps employers reduce the cost of processing pay cheques and allows workers without bank accounts to receive their salaries. Many countries are using debit cards to pay government workers, deliver pensions and benefits, and help enable their procurement processes. The technological power of credit/debit card system helps government and companies to keep track of expenditure at low costs and at the same time increase transparency and reduce the opportunities for corruption. Visa debit cards are now used by more than 2,000 departments and agencies at all levels in over 20 countries. In Singapore, Visa debit cards are used by 38 government agencies with over 2,300 cards issued under 45 corporate or purchasing card programs. The use of Visa card by Singapore government grew 80% from 2000 to 2004.

(c) Electronic government

The credit, debit, and charge cards are becoming more and more popular means of making payment to the Singapore government in line with its effort to provide more services electronically. Currently, Singapore residents are allowed to make

---

[20] Presentation by Michael Cannon, General Manager, Commercial Solutions, Visa Asia Pacific at Visa Conference 2005.

payment for various services such as application for visas, licences (*e.g.* various types of business licence, TV licence), purchasing of information (*e.g.* company and business registration search, bankruptcy search) by credit/debit cards. Unlike ATM and stored value card, payment by credit/debit card does not require any additional card-reader equipment or installation of software. Hence, the credit/debit cards are increasingly preferred by the consumers to make payment to government, in the same familiar way they pay other merchants. It is possible to say that the use of credit/debit cards makes electronic government easier to implement.

3.4 Primary function of credit card system

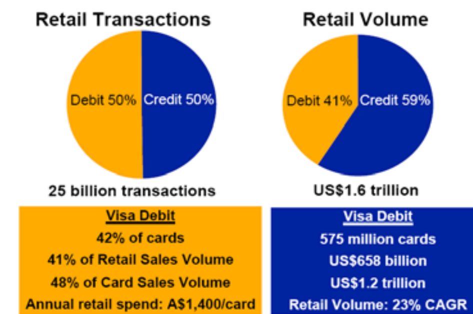
The primary function of the credit card, charge card, or signature based debit card is a means of making electronic retail payment. The credit extension aspect is only an optional secondary function. The holder of charge card obtains credit on a term shorter than the billing cycle of the card, mainly for convenience, not as a means of obtaining financial accommodation. The holder of debit card clearly does not use any finance from the card issuer. Even for the credit card, if the cardholder always pays his bill on or before the due date, the credit extension aspect does not surface at all.

The dominating trend of the payment function in the of credit card system can be illustrated by two facts: (i) that debit card is becoming more popular than credit card, and (ii) that consumer uses credit card to make payment more than to borrow.

(a) Comparison between credit and debit card importance

As MAS does not publish statistic on debit card, we had to use the data made publicly available by Visa. It is, however, submitted that the data is reliable enough for our enquiry because about 60% of credit cards in Singapore were reportedly issued by Visa. Chart 8 below illustrates that, in the Visa system, the debit card is nearly as important as the credit card worldwide. During a period of 1 year ending June 2003, about 42% of cards bearing Visa brands are debit cards and 50% of the total 25 billion Visa transactions worldwide were made with debit card. The sale volume of Visa debit cards accounts for about 48% of total sale volume of all Visa cards.

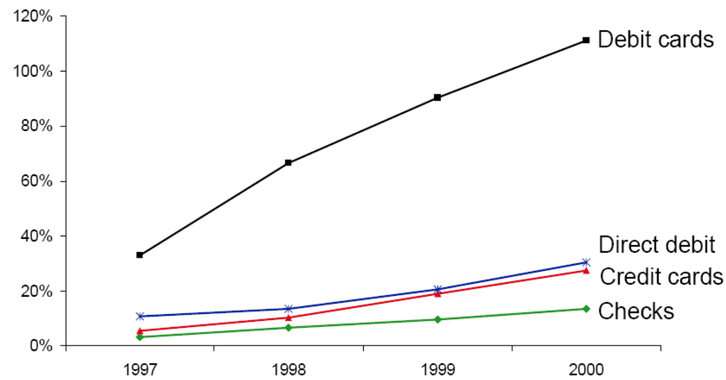
Chart 8: Comparison of credit card and debit card importance [21]



Just 6 months later than the date of the above statistics, the Visa's Worldwide Association Report announced that its debit business grew 19% in one year and have exceeded credit business in total card sale volume. This is explained by the fact that debit card is growing at exceptionally high speed. Chart 9 below (extracted from the same source quoted above at note 17) shows a comparison of growth rates of debit card in comparison with that of credit card and cheque from 1997 to 2000.

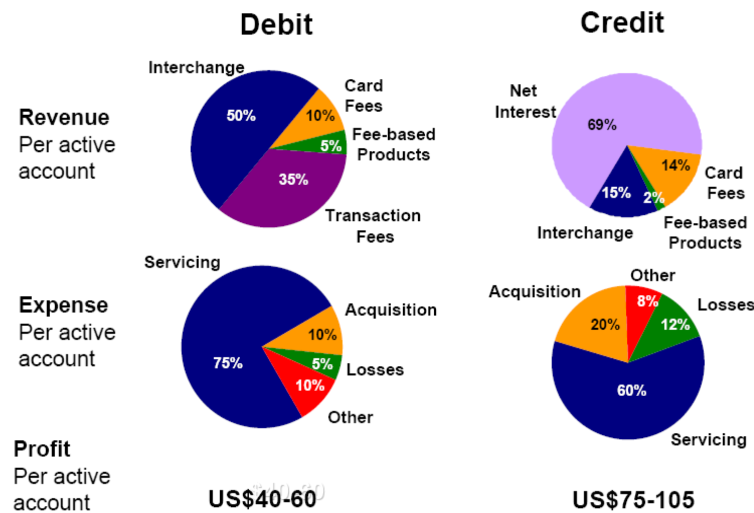
[21] The chart was extracted from the presentation by Rahul Khosla, a consultant of Visa International at the Visa Conference 2005, which was then made available on Visa's internet website.

Chart 9: Aggregate growth rate of payment 1997 - 2000



The increasing importance of debit card over credit card may be due to many reasons. From the consumers' point of view, obtaining a debit card is much easier as they do not have to qualify for the minimum income barrier. The card is also cheaper to maintain and there is no interest costs while performing the same essential features as credit card. From the bank's viewpoint, debit card represents an opportunity to acquire customers who do not meet the minimum income requirements. Therefore, the debit card may be used by the banks as a channel to penetrate into younger generation of customers. More importantly, the debit card has high potential for banks to increase revenue. Chart 10 below shows the proportions of revenue, costs, and profit of card issuers in respect of an average credit and debit card.

Chart 10: Issuer's revenue, costs and profit for of average credit and debit card[22]



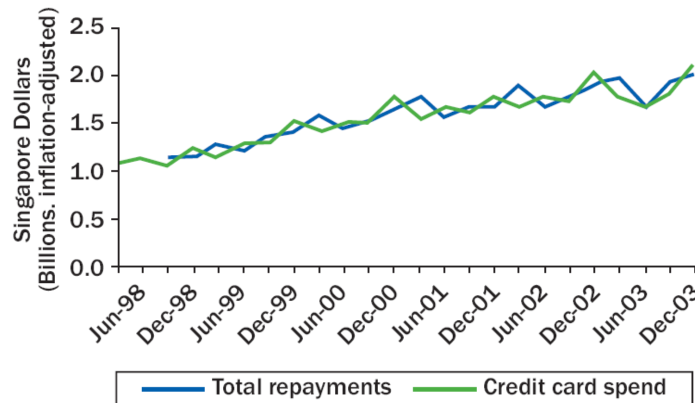
Although on average, each active debit card brings about only about US$40-60 compared to US$75-100 profit for the bank, the source of profit may be more stable. Revenue from debit card comes in the form of interchange fees and transaction fees, which would increase when the cards are used more often. The revenue in respect of credit card comes from interest may be less stable and may decrease when the use of credit function decline. Finally, from the viewpoint of the regulators the debit card should be favored over the credit card. Because the debit card does not involve lending, if debit card replaces credit card, there would be lower systemic risk. In addition, the consumer's preference of spending money they already have over borrowing too easily at impoverishing rates is something that should be encouraged.

[22] This chart was extracted from the same source of chart 9.

(b) Credit card no longer a means of extending credit

While the number of credit card in circulation and value of transaction continue to increase as shown in chart 8 and 9 above, statistics shows that Singapore consumers increasingly use the credit card to make payment without borrowing money. The *"Credit Card Report"* published by Visa International (Visa) in July 2004 reported that for every S$100 that Singaporean cardholder spends in 2003 they repaid about S$96 and only borrow S$4. Chart 11 below (which was extracted from the above Visa's report) shows the amount of spending in comparison with the amount of repayment of all Visa credit cardholders in Singapore from 1998 to 2003. The green line representing spending closely intertwines with the blue line indicating repayment. In several periods, repayment exceeded spending.

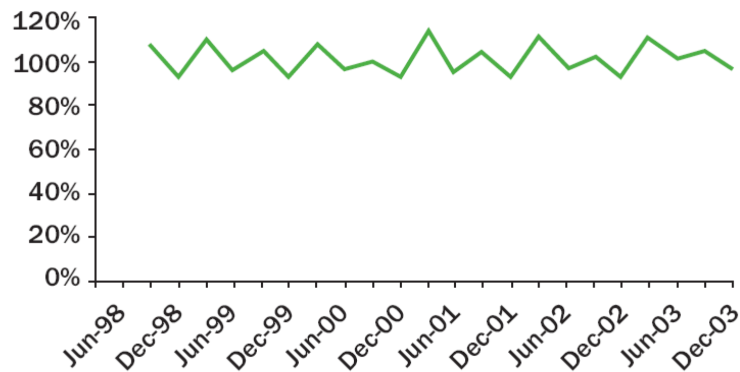
Chart 11: Visa credit card spending versus repayment in Singapore 1998-2003



In chart 12 below (also extracted from the same Visa's report), the relative ratio of repayment over spending was shown to fluctuate between 90% and 115%. As noted in that report, the time series exhibits a saw-tooth pattern corresponding

with seasonal pattern of spending and repayment. The ratio usually decline during holiday seasons such as Christmas and quickly jumps as soon as the shopping seasons is over. In a long period from 1998 to 2003, the overall trend of the ratio remained stable along a straight line. This shows that the credit card has been and will continue to be a rarely used channel of obtaining financial accommodation in Singapore.

Chart 12: Visa credit card repayment relative to spending 1998 -2003



Data source: Visa International 2004

The above tendency of the consumers may be explained by the fact that the current MAS' regulations only allow issuance of credit card to income earners of more than $30,000 p.a. People earning this level of income have many other sources of finance readily available at much lower costs that the credit cards are seldom seen as a viable option. With overdraft interest rates as low as 7% or 8% p.a. and the common credit card interest rate at 24% p.a. it is obvious that few people would take the option of borrowing at a rate that, if charged by a moneylender, would constitute harsh and unconscionable bargain.

As the debit card is overtaking the credit card at high speed and the consumers continue to cut down borrowing by credit card even if they have one, it is fair to

conclude that the credit card payment system today (e.g. Visa, MasterCard) is primarily an electronic payment system with an optional secondary function of extending short term credit. This conclusion will be used in our discussion on the treatment of credit and debit card transactions in the next few chapters.

CHAPTER II

RELATIONSHIP BETWEEN THE PARTIES

1. CHARACTERIZATION THEORIES

1.1 Contractual structure

Banking law textbooks generally view the contractual structure underlying the credit card as a tripartite arrangement[23]. This proposition has its root in the decision of *Re Charge Card Services Ltd*[24] (*Re Charge Card*) where Millett J. analyzed the typical credit card and charge card schemes as three separate bilateral contracts:

"On the use of the card, three separate contracts come into operation. First, there is the contract of supply between the supplier and the cardholder (either in his own right or as agent for the account holder); second, there is the contract between the supplier and the card-issuing company, which undertakes to honour the card by paying the supplier on presentation of the sales voucher and, third, there is the contract between the card-issuing company and the account holder by which the account holder undertakes to reimburse the card-issuing company for payments made or liabilities incurred by the card-issuing company to the supplier as a result of his or his cardholder's use of the card. There are thus three separate contracts and three separate parties, each being party to two of the three contracts but neither party nor privy to the third. While

[23] For example, in *Modern Banking Law* 3rd Edition by E.P. Ellinger, E. Lomnicka and R.J.A. Holley the Visa, MasterCard schemes were called *'tripartite credit cards'* and analyzed as essentially tripartite arrangement at pages 532 to 535.
[24] First instance [1987] 1 Ch. 150.

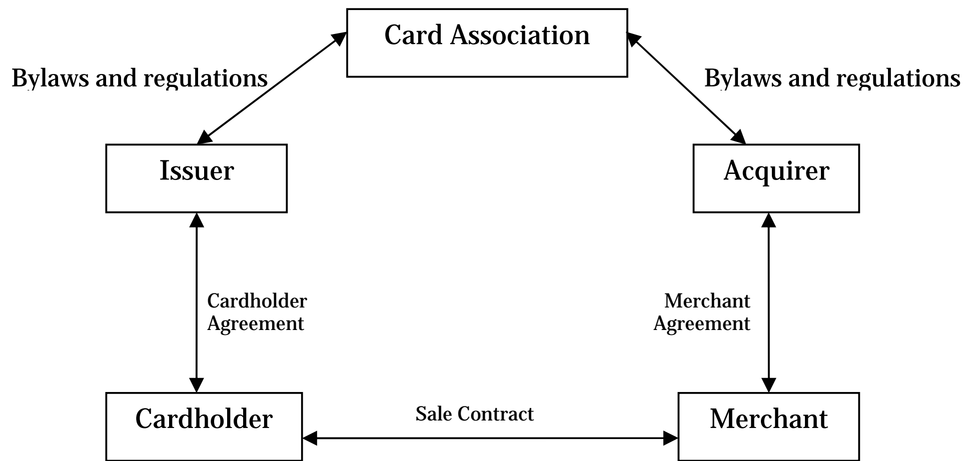
the legal consequences of these arrangements must depend on the terms of the particular contracts employed, one would expect each contract to be separate and independent and to be entered into between principals. In particular, one would expect the card-issuing company to enter into both its contract with the supplier and its contract with the account holder as a principal in its own right and not merely as agent for the account holder and the supplier respectively."[25]

Because the credit card scheme is characterized as separate bilateral agreements, a sale paid by credit, debit, or charge card is clearly distinguishable with the tripartite arrangement in a credit sale or hire purchase situation. Although the cardholder only gives his signature or the card particulars to the merchant to make payment for the sale instead of paying cash, and the payment is expected from the issuer, the issuer never takes ownership of the goods purchased. The transaction, therefore, is distinguishable from a tripartite hire purchase arrangement.

As the first case that analyzed the credit cards relationship in details, a landmark decision, Re Charge Card has frequently been relied on as an undisputed source of the law on credit cards. However, a comparison between the charge card scheme in that case and the credit, debit, and charge cards arrangement today shows considerable differences. The organization of a typical credit card payment system, which was described in chapter I, shows that there are five parties involved in the system. The chart below shows the agreements entered into between them.

---

[25] Ibid at 158 C-D. The analysis was subsequently approved by the Court of Appeal [1989] Ch 497.



In addition to the issuer, the cardholder, and the merchant, there are two new parties namely the card association and the acquirer. The agreement between the cardholder and the issuer created when the cardholder applied for the card and the sale contract entered into between the cardholder and the merchant when the cardholder makes purchase of goods or services from the merchant remain essentially the same as in Re Charge Card. The difference is that in today's credit card schemes the issuers no longer enter into an agreement directly with the merchants. Before accepting payment by credit cards, the merchants must enter into the merchant agreement with the acquirer but there appears to be no contract between the merchant and the issuer. In practice, the merchant has the first contact with the issuer via the computer network of the card association when he attempts to authenticate the card transaction. In many cases (e.g. internet merchants), the identity of the issuer is not revealed to the merchant at all.

The role of the card association as a separate party in this contractual structure seems less significant if a direct contractual link can be created between the issuer and the acquirer. Such an agreement may be deemed to be created between the

issuer and the acquirer when both of them agreed to the bylaws and regulations of the respective card associations. Although there is no bilateral agreement signed between them the contractual relationship may be created by virtue of their submission to the same set of rules and regulations of the card associations. There are English authorities to support this view[26].

However, even with the card association taken out of the picture, it is difficult to ignore the role of the acquirer. As the merchant only signs agreement with the acquirer, there is no basis for him to take action directly against the issuer or the card association. In practice, in a dispute with the issuer, the merchant usually has to pursue his claim to the acquirer and the dispute has to be resolved through the resolution procedure of the card association. To adapt the new structure to the three-bilateral-agreements framework of Re Charge Card, it may be necessary to regard the acquirer as an agent of either the issuer or the merchant.

Our preliminary conclusion is that the three-bilateral-agreements analysis of Re Charge Card remains applicable to the credit card system today. However, to support such an application further analysis into the typical terms of agreements between the parties, the different theories of characterization and the practices of effecting and settling credit card transactions is necessary. In the next few sections in this chapter we will attempt to conduct such analysis based on a triangular structure between the issuer, the merchant and the cardholder with the acquirer and the card association only acting as agents or facilitator of the card transactions.

[26] For example in *The Satanita* [1895] p. 248 and *Clarke v. Dunraven (Earl)* [1897] A.C. 59A members of clubs submitting to the same set of rules and regulations have been considered having direct contractual relationship.

1.2 Assignment vs. direct obligation theories

The result of the sale contract is that the cardholder becomes obliged to pay the merchant the price of the sale, which in a cash transaction he pays by tendering notes and coins. However, when the sale is paid by credit, debit, or charge card, the cardholder becomes liable to pay the issuer instead of the merchant. There is clearly a connection between the cardholder's liability towards the issuer and his liability to the merchant in the sale transaction. This can be characterized by applying two different theories.

Under *'assignment theory'*, the cardholder's liability is characterized as a claim for unpaid goods or services, which is *'assigned'* by the merchant to the issuer. Alternatively, if the card is a debit card, the cardholder can be said to assign part of his property right (chose in action) owed by the issuer to him, to the merchant in satisfaction of the debt that arise from the sale. Alternatively, under *'direct obligation theory'*, the cardholder's liability can be considered as arising directly from his relationship with the issuer. We will look at the application of both theories below.

(a) Assignment theory

Under the assignment theory, a credit card transaction is viewed as a factoring of the merchant's book debt or account receivable. Accordingly, the presentment of transaction receipts by the merchant to the issuer constitutes assignment of book debt at a discount. The legal consequence of this is the cardholder becomes liable to pay the issuer instead of the merchant.

It has been suggested that it is theoretically possible to apply the assignment theory to the credit card arrangement in Singapore[27]. According to that analysis, the merchant's claim against the cardholder arise from the sale transaction is a legal chose in action that is not assignable at common law but is assignable in equity. Where a legal chose in action is assigned in equity, the assignor needs to join with the assignee as plaintiff or defendant in an action against the debtor. An assignment of a debt in equity requires no special form since a contract to assign is tantamount to an assignment[28]. For the assignment to be valid and complete in equity, no notice to the debtor is necessary[29]. The issuer, as equitable assignee takes the debt *'subject to equities'*, *i.e.* subject to all defences which the cardholder may have against the merchant including any cross-claims which might have prevailed against the merchant before the notice of assignment was given to the cardholder. Because the merchant assigns the whole debt owed by the cardholder to the issuer absolutely, the assignment may qualify to be considered a statutory assignment under Section 4(8) of the Civil Law Act[30] - the equivalence of Section 136 of the Law of Property Act 1925 of England. The Section enables assignees to bring action against debtors in respect of assigned debt if the assignment was an absolute assignment made in writing and an express notice has been given to the debtors. The merchant agreement does not constitute the assignment of the debts because future properties cannot be assigned until it comes into existence[31]. However, the delivery of transaction receipts by the merchant to the issuer may

[27] See C.Y. Lee, *"Law on Consumer Credit"*, 1990, page 81, 82.
[28] *Marchant v. Morton Down & Co* [1901] 2 K.B.829.
[29] *William Brandt's Sons & Co v. Dunlop Rubber Co. Ltd* [1905] A.C.454.
[30] Cap. 30, Section 4(8): *"Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed before 23rd July 1909, to pass and transfer the legal right to such debt or chose in action, from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."*
[31] *Collyer v Isaacs* (1881) 19 Ch.D. 342. *Chitty on Contracts*, 28th Edition, Volume 1 at 21-047.

constitute statutory assignment if the receipts are attached with a written instrument under hand stating that the debts are thereby assigned absolutely to the issuer. The statement of account rendered by the issuer to the cardholder may constitute such a notice of assignment.

Alternatively, the cardholder's act of presenting the card to the merchant may also be characterized as an equitable assignment of his chose in action against the issuer to the merchant. The submission of the transaction receipt by the merchant to the issuer may constitute notice of assignment. A practical difficulty is that, in this case, the assignment is likely to be an assignment of part of the debt (unless the cardholder of the debit card pay exactly the amount he has in the account) which is not sanctioned by the Civil Law Act thus will not qualify as a statutory assignment. Therefore, in this case the merchant will need to join with the cardholder as to enable the action against the issuer. The equitable assignment, however, remains valid[32].

According to the above analysis, it is theoretically possible to apply the assignment theory to the credit card arrangement. Both the debt owed by the cardholder to the merchant, and the debt owed by the issuer to the cardholder (in case of debit card) are assignable chose in action. However, the assignment theory should not be followed because the operation of credit card system is inconsistent with the rules of the assignment of debts.

[32] There are many cases to illustrate that the amount deposited by a customer in a bank constitutes an assignable chose in action. See for example *Deposit Protection Board v. Dalia* [1994] 2 AC 367 at 380-381, 392. There is also an American case that support this view: *Delbruek v Manufacturers Hanover Trust Co.*, 609 F 2d. 1047, 1051 (1979). See also Ellinger, Lomnicka and Hooley, *"Modern Banking Law"* 3rd Edition, at page 495.

Firstly, the cardholder agreement invariably provides that the cardholder is liable to the issuer for not only all payment transaction, but also other late payment charges, fees, and other charges incurred regardless of any dispute with the merchant. When the card is used at the point of sale, the typical transaction receipt states *"I agree to pay the above total amount according to the card issuer agreement."*[33] In mail order or internet transaction, similar statements are used. Such a statement indicates acknowledgment of the debt owed by the cardholder to the issuers, not to the merchant. In case of debit card, the same transaction receipt is used, which does not indicate assignment of any debt owed by the issuer to the cardholder.

Secondly, in the processing of card transactions, even when the merchant agreement uses the assignment approach, credit card debts are not assigned to the acquirer in accordance with the requirements of the Civil Law Act. There is no practice of giving written assignment instrument under hand for each batch of transaction receipts. Because the acquirers usually have recourse against the merchants in the event the merchant is in breach of the sale contracts for reasons like misrepresentation or defective products, an assignment, if any, is not absolute. Alternatively, even when the transaction between the merchant to acquirer is considered an assignment in equity, the common practice of issuers is that they do not join with the merchant to take actions against cardholder. The issuer simply relies on the direct obligation clause in the cardholder agreement to sue the cardholder and avoid the complicated route to involve multiple merchants that may be located in another country.

[33] Page 62 of the *"Rules for Visa Merchants, Card Acceptance and Chargeback Management Guideline".*

Furthermore, the application of assignment theory to credit card transaction may cause even bigger practical difficulties in other jurisdictions. For example in the United States, Article 9 of the UCC requires the assignee to file a financing statement indicating each assignor to perfect security interest in most types of personal property collateral, including *"any sale of accounts, contract rights or chattel paper"*[34]. For this practical difficulty, it has been commented that if credit card transaction is viewed as assignment, *"the results under the UCC are devastating."*[35] The legislations in the United States had adopted direct obligation theory and rejected the assignment theory officially.

Because the credit card system is international by nature, it has to avoid any practical problem relating to the enforcement of the bank's right to be paid. The choice of direct obligation method of characterization is natural. As a result, the systems of popular card associations have been built around direct obligation approach. The common understanding of credit card system is that the cardholder accepts liability to pay the issuer and the merchant expects payment from the issuers from the point when the card transaction takes place regardless of whether the card was a credit, debit, or charge card.

(b) Direct obligation theory

The main legal consequence of the *'direct obligation'* approach is the separation of the cardholder's obligation toward the issuer and the issuer's obligation toward the merchant from the sale. On the one hand, the cardholder's obligation to pay the issuer is not subject to any claims that the cardholder may have against the

[34] UCC §9-102(1)(b).
[35] Barkley Clark, *"The Law of Bank Deposits, Collections and Credit Cards"*, 3rd Edition at 11.02[5].

merchant under the sale transaction. Even if the goods purchased by the cardholder are defective, the cardholder must still pay the issuer. The cardholder cannot make a claim against the issuer for damages caused by the defective goods and must look to the merchant alone for any remedy. The issuer's claim against the cardholder is not conditional upon his payment to the merchant. If the issuer has to sue the cardholder to enforce his claim, he does not need to join the merchant as a plaintiff. On the other hand, the issuer is liable to pay the merchant regardless of the cardholder's ability or willingness to pay the issuer.

The application of the direct obligation theory instead of the assignment theory has been supported by some English authorities. The last sentence in the analysis by Millett J. in *Re Charge Card* cited above seems to favor the direct obligation theory, where it was stated that "*the supplier to be entitled to be paid whether or not the card-issuing company is able to obtain reimbursement from the account holder, and the card-issuing company to be entitled to be paid whether or not the goods or services supplied by the supplier are satisfactory".* In a subsequent case, *Customs and Excise Commissioners v Diners Club Ltd* [36], even though the merchant agreement used by Diners Club Ltd expressly structured their scheme as assignment of debts from the merchant to the issuer, the court cited *Re Charge Card* and held that the nature of the relationship between Diners Club and the merchant was that of provision of services to facilitate payments and not factoring of debt[37]. Based on these authorities and the analysis of the credit card system in (a) above, it seems safe to avoid the assignment arguments and adopt the direct obligation theory.

---

[36] [1989] 2 All ER 385.

[37] It should, however be noted that this decision was based on the principle that for the purposes of value added tax the Crown was not necessarily bound by the words used by the contracting parties. Had the questions in the case were for purposes other than taxation, the outcome could have been different because it may be hard for the court to ignore the terms of the agreements between the parties.

The *'direct obligation theory'* essentially requires that the cardholder's liability must arise from the relationship between the cardholder and the issuer. Here, we are faced with a further question of characterization, because there is more than one way to view this relationship. If the issuer is considered a paying agent for the cardholder similar to a banker-customer relationship, the cardholder's liability would be viewed as the liability to *'reimburse'* the issuer after the issuer has paid the merchant on his behalf pursuant to his *'instruction'* given to the issuer as his paying agent. Alternatively, the cardholder's liability can be considered as arise by virtue of a contractual *'undertaking'* made by the cardholder to the issuer either under the cardholder agreement or at the point of each card transaction. We will consider both the *'agency'* approach and the *'undertaking'* approach below.

1.3 Cardholder-Issuer relationship: Agency vs. Undertaking approach

(a) Agency approach

In the majority of credit, debit, and charge card arrangement, the issuers open and maintain a separate account for each card. Therefore, the relationship between the issuer and the cardholder may be characterized in a way similar to the relationship between a bank and an account holder. In this view, the card is considered an identification device to give the customer access to his account. It follows that when the customer uses the card, he is considered to give *'instructions'* to the issuer to make payment to the merchant. The issuer, acting as a paying agent of the cardholder, would be entitled to deduct from the account in accordance with the mandate given by the cardholder. In the early American case

of *Thomas v. Central Charge Service Inc*[38], this model of characterization was adopted. In that case, it was held that, because the issuer needs to have the cardholder's mandate to deduct the card-account, the issuer would be reimbursed only if the transaction has been sanctioned by the cardholder. It is, however, submitted that this *'agency'* approach is not a correct way to characterize the cardholder-issuer relationship because credit card transaction differs significantly from both payment by cheque and by money transfer orders.

Credit card payment distinguished from cheque payment

The relationship between the cardholder and the issuer of credit card is substantially different to that between a cheque book holder and his bank. The difference between cheque and credit card has been confirmed in *Re Charge Card: "A cheque is a revocable mandate by the customer to his bank which authorises the bank, as his agent, to make payment out of the moneys standing to the credit of his account or which the bank is willing to advance to him."* In honouring the cheque and making payment to the merchant, the bank acts as an agent for the customer. In contrast, as indicated in the decision of Millett J. cited above, the issuer acts in its own capacity *as principal* when dealing with the merchant in a credit card transaction. While a cheque can be a negotiable instrument if drawn in a certain way, the cardholder authorization (by giving the card particulars or signing the transaction receipt) does not constitute a negotiable instrument even if electronic record is deemed to be writing. A negotiable instrument is payable to the payee's order who can determine by transfer or endorsement to whom the instrument is to be paid[39]. In contrast, the

[38] 212 A 2d. 533 (DC Cir. 1965).
[39] Bill of Exchange Act 1882, Section 3(1).

cardholder's '*authorization'* nominates the merchant as a specific payee to whose account the money is to be paid. The transaction receipt is not a subject of transfer or negotiation in itself. The transfer of fund is made by the arrangement between the issuers and the merchant via the card association and the acquirer, not by giving the transaction receipt some special attributes. Therefore, when using a card, the cardholder should not be considered as giving any mandate to the issuer to pay the merchant. If a mandate were to exist at all, it would be the mandate by the issuer given to the merchant to accept the card in place of cash for payment.

Credit card payment distinguished from money transfer order

In *Re Charge Card*, Millett J. seems to refer to some analogy between the credit card payment and a money transfer order when he held that: *"The essence of the transaction, which in my view has no close analogy, is that the supplier and customer have for their mutual convenience each previously arranged to open an account with the same company, and agree that any account between themselves may, if the customer wishes, be settled by crediting the supplier's and debiting the customer's account with that company."*[40] If we apply this analogy to characterize a credit card payment as the processing of a money transfer order, the cardholder's authorization will be regarded as an authority and instruction to the issuer (as the cardholder's agent) to transfer the amount standing to the credit of the cardholder (or the amount the issuer is prepared to advance) to the account of the merchant with the acquirer. The acquirer acts as an agent for the issuer to receive and hold the fund and becomes an agent for the merchant upon crediting the merchant's account. However, it is submitted that the credit card system is

[40] [1987] 1 Ch. 150 at page 304.

substantially different from the money transfer order that they should not be characterized in the same way.

First, the analysis from transactional aspects in chapter I shows that the credit card system is different to the ATM/EFTPOS system (which is essentially the same as the money transfer order system) in the way the cardholder settle the transaction with the issuer. While payment by ATM/EFTPOS is immediately deducted from the cardholder's account when the transaction completes, the liability of the holder of credit, debit, or charge cards is deferred until the monthly statement is delivered to the cardholder. Secondly, in the money transfer order system there is no direct undertaking by the originator to make payment to the beneficiary. A payment by money transfer order only complete when the funds transferred becomes available to the beneficiary[41]. In contrast, the credit card system guarantees that the merchant will be paid by the issuer, and the issuer's liability becomes irrevocable as soon as the merchant accepts the transaction receipt signed by the cardholder. In the credit card system, the cardholder usually has certain recourse against the merchant for defective products or non-performance of services. No similar recourse may be available to the originator in the money transfer order at all.

At a higher level of abstraction the conceptual difference between the credit card system and the money transfer order system (and other similar system such as GIRO, EFTPOS/ATM system) lies in that, the former consists of *'undertakings'* to make payment while the latter is a mechanism to facilitate the payor's access to his funds. Although electronic means may be used to transmit messages between

[41] Please refer to section 5.1 below for a comparison of 'finality' in a credit card transaction and a money transfer order.

the parties in the credit card system, the arrangement does not enable the cardholder to give electronic *'instructions'* to initiate fund transfer. In the words of Professor Geva:

"Check guaranty and credit cards are not true payment mechanism. A check guarantee card only enhances the acceptability of paper-based checks and has never been widely used in United States. A credit card does not result in a direct transfer of funds from the payor to the payee; however, credit cards displace payment transactions by aggregating them into single daily or weekly payments to payee-merchants and monthly payments to consumers. In any event, inasmuch as the credit card payment does not facilitate access to the cardholder's funds on the basis of electronic communication, it is not an electronic initiator of a fund transfer"[42].

Because credit card payment is distinguishable from payment by cheque or money transfer order, the cardholder's liability to pay the issuer has to arise from an undertaking by the cardholder.

(b) Direct undertaking approach

There are two ways to characterize the making of the cardholder's undertaking. The first way is to consider the undertaking to be made by the terms of the cardholder agreement whereby the cardholder is liable to pay the issuer for any items that will appear on the monthly statement rendered to him. The other way is to consider the undertaking to be made at the point of each card transaction

[42] Geva Benjamin, *"The law of Electronic Funds Transfer"*, Release No. 7, October 1999, Matthew Bender at §1.04[5], emphasis added.

based on the terms of the cardholder agreement, as a master-agreement. It is submitted that the second view should be preferred because the cardholder's obligation cannot be established in a vacuum but requires a connection with a sale transaction. If the monthly statement shown an erroneous debit due to a computer malfunction, the cardholder should not be liable to make payment for such an item.

To this point, the credit card transaction appears to be very similar to the arrangement of irrevocable letter of credit. The similarities have been summarized in an American textbook[43] as follow *"The function of the bank credit card, like the letter of credit, is to substitute the credit of the issuing bank for the credit of the purchaser, thus encouraging the seller to enter the transaction. Just as the issuer of a letter of credit is under the obligation to honor drafts without reference to whether it will ultimately be paid by the customer, so is the issuer of a bank credit card under a duty to remit sales draft proceed upstream to the merchant bank in spite of the cardholder's inability to pay his credit card bill. The credit card, like the letter of credit, involves at least three separate parties and at least three independent contracts. In both situations, the customer is able to extract goods or services from a third party seller by presenting the direct obligation of an issuing bank to pay the bill if proper documents are presented through the bank collection system."* It has been suggested in an English textbook that the closest analogy to credit card payment is the traveler's letter of credit[44]. The analysis of the similarities and differences between the two arrangements may be relevant to the discussion of finality of credit card transaction. We will

[43] Barkley Clark, *The law of Bank Deposits, Collections and Credit Cards*, Warren, Gorham & Lamont 1990 at 11.02[5].
[44] E. P. Ellinger, E. Lomnicka and R.J.A. Hooley, *Modern Banking Law*, 3rd Edition, at page 534.

consider the analysis in *Re Charge Card* further in conjunction with questions of finality in section 5.4 below. In the next three sections, we will look into the nature of the relationship between the cardholder, the issuer, and the merchant based on the typical contractual terms between them.

2. RELATIONSHIP BETWEEN THE CARDHOLDER AND THE MERCHANT

The relationship between the cardholder and the merchant is a contract of sale of goods or services, which may be made in writing but most frequently verbally and sometimes in complete silence. The difference in a sale paid by credit, debit, or charge cards is that the money paid in consideration of the goods or services does not come from the cardholder but from the issuer. Therefore, we thought that it might be helpful to try to explain in legal terms how the debt owed by the cardholder to the merchant became the debt owed by the issuer upon the completion of the payment transaction. This seems to be a challenge in the application of the direct obligation theory. The analysis may help clarify the nature of the relationship between not only the cardholder and the merchant but also the issuer and the third party that uses the card.

2.1 Nature of the consideration

Our enquiry begins with the nature of the consideration in the sale contract. In *Re Charge Card,* Millett J. rejected the suggestions that the consideration for the supply of goods or services to the cardholder be characterized as anything other than *'the price'* when he held that:

"Three possibilities have been canvassed. The first is that the consideration for the supply is not the price (which is to be paid by the card-issuing company, a stranger to the contract of supply) but production of the card and signature of the voucher. I reject this analysis, which is quite unrealistic. Production of the card and signature of a voucher are not the consideration itself but the means of obtaining it. Moreover, a sale of goods requires a monetary consideration: see s 2(1) of the Sale of Good Act 1979. This analysis would thus lead to the conclusion that, where payment is to be made by credit or charge card, the contract of supply is not a sale of goods, with the result that the statutory conditions and warranties are not implied. The second possibility which has been suggested is that there is a sale of goods, but the contract is a tripartite contract under which the consideration for the supply to the cardholder is the undertaking of the card-issuing company to pay the price to the supplier. I reject this analysis, which confuses the result of all the arrangements made with the legal means employed to achieve it. On the use of the card, there is no tripartite agreement, but three separate bilateral contracts come into operation. In my judgment, <u>the true consideration in the contract of supply is the price</u>, to be satisfied by the cardholder if he wishes by means of the card."

As indicated in the above passage, the main reason to characterize the consideration to be *'the price'* is that it was considered necessary to bring the sale transaction under the ambit of the Sale of Goods Act or the Supply of Goods and Services Act. Because the Sale of Goods Act requires the consideration to be a *'money consideration'*[45], it follows that the consideration must be *'the price'*.

---

[45] The Sale of Goods Act 1979 and the Supply of Goods and Services 1982 are part of Singapore law from 12th November 1993 by virtue of the Application of English Law Act (Cap. 7A). The current version of the Sale of Goods Act (Chapter 393) Section 2. (1) provides that: *"A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".*

There has been much support for the decision not to draw distinction between sale transactions paid for by cash and by credit card[46], which we fully agree with.

The next question is whether the cardholder ever became liable to pay the merchant *'the price'*. The decision in *Re Charge Card* seems to suggest that because the consideration of the sale was the price, the obligation of the cardholder came into existence at some point, but, because of the merchant's prior agreement with the issuer, the obligation was discharged at the latest when the sale voucher was completed. Millett J. explained how this happened by saying that: *"The essence of the transaction, which in my view has no close analogy, is that the supplier and customer have for their mutual convenience each previously arranged to open an account with the same company, and agree that any account between themselves may, if the customer wishes, be settled by crediting the supplier's and debiting the customer's account with that company."* [47] This view is very similar to the characterization of a money transfer order adopted in *R. v. Preddy*[48]. Subsequently, in *Re Charge Card*, the Court of Appeal arrived at the same conclusion by adopting the view that the payment transaction was a *'quasi-novation'*:

"One way of looking at the matter is to say that there was a quasi-novation of the purchaser's liability. By the underlying scheme, the company had bound the garage to accept the card and had authorised the cardholder to pledge the company's credit. By the signature of the voucher all parties became bound: the

---

[46] For example, Marcus Smith and Patricia Robertson, Chapter 4, *Law of Bank Payments*, Editor Michael Brindle and Raymond Cox, 3rd Edition, 2004, para 4-014 at page 200.
[47] [1987] 1 Ch. 150, page 304
[48] [1996] AC 815, a landmark case often cited to confirm that money transfer order does not involve the transfer of property, but that the payor's chose in action against his bank reduced or extinguished and the payee's chose in action against his bank created or increased simultaneously.

garage was bound to accept the card in payment; the company was bound to pay the garage; and the cardholder was bound to pay the company. The garage, knowing that the cardholder was bound to pay the company and knowing that it was entitled to payment from the company which the garage itself had elected to do business with, must in my judgment be taken to have accepted the company's obligation to pay in place of any liability on the customer to pay the garage direct."[49]

The Court of Appeal did not address itself to the issue of whether credit card transactions constitute *'money consideration'* for the purposes of the Sale of Goods Act. The question of whether the cardholder's obligation to pay the merchant ever came into existence was also left in doubt.

The above analysis by the English courts was criticized by S.A. Jones[50]. According to her analysis, when the cardholder settles the monthly statement, he does not intend to pay for the goods or services. He, instead, intends to pay for the items posted to his account with the issuer. The Sale of Good Act does not require that the buyer promise to pay for the price of the goods. The Act only requires the consideration to be money. Since payment by cheque has been considered money consideration for this purpose, it would not be straining the language to include payment by credit card in the definition of money consideration under the Sale of Good Act. Therefore, the real question was not whether the consideration was money, but whether its move from the issuer to the merchant is sufficient to create a contract between the cardholder and the merchant. According to *Chitty on Contract*, in a sale contract, it is not necessary that a consideration have to

---

[49] [1989] Ch 497, per Sir Nicolas Browne-Wilkinson V.-C.
[50] S.A. Jones, *'Credit Cards, Card Users and Account Holders'*, [1988] JBL 457, at 461.

move from the purchaser[51]. Alternatively, as it is only by the act of the cardholder that the merchant is able to claim payment from the issuer, consideration does move from the cardholder when he provides the merchant with the means to obtain payment. It is submitted that S.A. Jones' observation is correct. What we can draw from this analysis are that:

(i) The contract of sale between the cardholder and the merchant should be treated in the same way as a sale paid by cash under the Sale of Good Act or the Supply of Goods and Services Act.

(ii) The consideration of the sale contract was money, which emanates from the issuer from the outset. The cardholder was not under an obligation to pay the merchant but only obliged to provide a means by which the merchant can obtain payment from the issuer. Because the cardholder's obligation to pay the merchant never came into existence, it does not need to be *'discharged'* or *'quasi-novated'*.

2.2 Position of the carduser

The above analysis has an additional advantage when applied to the case where a card transaction was effected by an authorized carduser who is not an account-holder. In the article cited above, S.A. Jones pointed out[52] that *"If, as Millett J. suggests, <u>the consideration is a promise to pay the price of the goods</u>, clearly the card user would not be providing consideration as he never promises to pay for*

---

[51] *"Chitty on Contract"* Volume I, 28th Edition at 3-037: "*This possibility is illustrated by the case in which goods are bought and paid for by the use of a cheque card or credit card. The issuer of the card makes a promise to the supplier of the goods that the cheque will be honored or that the supplier will be paid, and the supplier provides consideration for this promise by supplying the goods to the customers".*

[52] S.A. Jones, *'Credit Cards, Card Users and Account Holders'*, [1988] JBL 457, at 463.

the goods; and moreover he knows that he is under no obligation to pay the supplier for the goods, as the only contractual obligation regarding payment is for the holder to pay the creditor. It might be possible to argue that where the user and holder have some agreement between themselves regarding payment such may constitute a promise to pay by the user sufficient to support the contract of supply, but it would be impossible to argue this where the user and the holder has no such agreement." S.A. Jones went on to explore an alternative interpretation that *"the user had no contract of supply with the supplier (being an agreement not supported by consideration), but that the supplier always makes his contracts with the account holder whether or not that person is the person apparently contracting with him"*. Indication of this interpretation may be found in the following analysis by Millett J.:

"In the present case there are four, since cards were issued to account holders, who were entitled to authorise their employees or other authorised signatories (cardholders) to make use of the cards. This is an added complication which can be <u>ignored for present purposes</u>, since in such a case the <u>account holder is liable as principal, disclosed or undisclosed</u>, to pay for the goods or services obtained by the use of the card, whether or not the cardholder is also liable."

The observation by S.A. Jones follows that *"If one were to conclude that the only contract made were one between the account holder and the supplier, the nature of this contract would also need to be considered. It would be a contract of supply of goods or services if the device of undisclosed principal were adopted, i.e. the card user was in all cases acting as agent for the holder. It would be a contract of indemnity if it were based on the idea that the holder impliedly agrees to indemnify the supplier for the user's use of the card which results in*

loss to the supplier." The former interpretation may not always be correct because the application of undisclosed principal requires that in entering into the contract the agent must intend to do that on the principal behalf[53]. The latter interpretation, as was correctly pointed out by S.A. Jones, *"... has in fact been thwarted by the decision in Re Charge Card Services Ltd. In that case, it was held that the holder's liability on the contract of supply is exhausted at the latest when the supplier accepts the card as payment for the supply. As a general rule a contract of indemnity can only exist if there is a principal obligation in existence. A contract of indemnity is designed to protect a person in case the obligations under the main contract are broken; if liability is exhausted under the main contract, there can be no indemnity."*

Therefore, S.A. Jones suggested that *"The most logical conclusion is that the user contracts with the supplier as principal, the consideration being the provision of the means by which payment will be obtained, which is good consideration for this contract despite the fact that actual payment is to come from a third party (i.e. the creditor), which of course is no different than when the account holder makes a purchase. The acceptance by the supplier of payment by credit card exhausted the card user's liability to pay on the contract of supply."* This adaptation of the rules in *Re Charge Card*, though seems small, helps to clarify the position of the carduser and avoid confusion in the analysis of credit card transaction.

---

[53] *Chitty on Contract,* 29th Edition, Volume 2, 31-063, note 373. *Siu Yin Kwan v. Eastern Insurance Co. Ltd.* [1994] 2 A.C. 199, 207.

3. RELATIONSHIP BETWEEN THE CARDHOLDER AND THE ISSUER

In contrast with the sale contract, the relationship between the cardholder and the issuer is defined in much more detail in the agreement made between them. We will begin with the typical terms of this agreement.

3.1 The cardholder agreement

(a) Card application form

Typically, the making of the cardholder agreement begins with the cardholder's submission of an application to the issuer. The application must be made in a standard form printed by the issuers and usually available at public places like shopping malls or lift lobbies. To assist the issuer in evaluating the credit worthiness of the applicant, usually the applicant must enclose with the application documents that prove his income, such as an income tax assessment or letter of employment. The typical application form used in Singapore contains the followings provisions:

(i) The applicant's request for the issuance of the card (and replacement, renewal cards), which request may be declined by the issuer without giving any reason;

(ii) The applicant's representation and warranty that the information declared in the form is true and complete in all respects, including the representation that he is not an un-discharged bankrupt and no statutory

demand has been served on him nor any legal proceedings commenced against him;

(iii) The applicant's agreement to be bound by the set of standard terms and conditions of the card (a copy of which will be sent to the applicant with the card); other terms and condition relating to electronic services (a copy of which will not be sent but can be obtained at the issuer's branch);

(iv) The applicant's agreement to bear the risk of sending the card and PIN to him by post;

(v) The applicant's undertaking to pay the annual fee and other charges related to the use of the card and be responsible for all liabilities which may be incurred in respect of the card; and

(vi) The applicant's agreement that the issuer may obtain and verify any information about the applicant from any party as the issuer deems fit at its absolute discretion.

After receipt of the application form and supporting documents, the issuer evaluates the credit worthiness of the applicant with the information provided, obtains further information and verifies its accuracy with other sources (e.g. credit bureau, applicant's employer). If the issuer agrees to issue a card, it will send the card to the applicant together with a printed set of standard terms and conditions governing the card (the *'standard T&C'*). Both the application form and the standard T&C usually state that the applicant will be deemed to have read

and agreed to the standard T&C if he retains signs or uses the card. He is required to cut the card in half and return it to the issuer if he does not agree.

(b) The standard T&C

The typical standard T&C governing a card in Singapore includes the following provisions, which are put in groups for ease of reference:

(i) Provisions relating to normal use of the card:

- Upon receipt of the card, the cardholder must sign the card immediately and not allow any other person to use the card. The cardholder is authorized to use the card to make payment to merchants or to obtain cash advances from ATMs or the counters of the issuers.

- The issuer provides monthly statement of account, which specifies a total amount due, a minimum payment and a due date. The cardholder can choose to settle total amount by the due date or only pay a sum larger than minimum payment and smaller than the total amount due and incurs finance charges. The finance charge for payment to merchants starts from the due date under each statement while finance charge for cash advances start from the date of the cash advance.

- The issuer is entitled to charge annual fees, finance charges, and late payment charges at the rates decided by the issuer from time to time. The cardholder undertakes to settle charges for all purchases and cash advances together with all finance charges and other fees.

(ii) Credit limit:

- The aggregate amount of payment to merchant and cash advances is subject to a credit limit, which limit may be different for payment to merchant and cash advances.

- The issuer has absolute discretion to change any credit limit at any time without giving any notice or reason to the cardholder.

- Notwithstanding the credit limit, the issuer has the right to allow or disallow any attempted transactions or cash advances. The cardholder is liable to repay the amount of payment and cash advance even if the applicable credit limit was exceeded.

(iii) Liabilities for use by carduser:

- Where a supplementary card, business card or corporate card is issued, charges incurred by the use of the cards are posted to the account of the cardholder. Both the cardholder and the carduser are jointly and severally liable to the issuer. The cardholder is liable for the total amount posted to the card account while the carduser is liable only to the amount he incurs.

(iv) Liabilities for unauthorized transaction:

- If the card is lost, the cardholder must inform the issuer immediately.

- The cardholder is liable for all card transactions whether with our without his authorization. The card-issuer is liable only for card transactions that occur after its receipt of the notification by the cardholder that a card was lost.

(v) Amendments and termination

- The issuer can change any terms and conditions of the agreement by giving notice to the cardholder by publishing the new terms in newspaper or the internet website of the issuer. Any changes will become binding on the cardholder after being so published.

- The cardholder can terminate the agreement at any time by giving notice to the issuer, return the card to the issuer cut in half and repaying all amounts owed to the issuer. The issuer can terminate the agreement, disable the use of the card, cancel all credit facilities, demand immediate repayment of all amount owed, and demand the surrender of the card at any time without giving any prior notice or reason.

(vi) Relationship with the merchants

- The issuer is not responsible for any claims or complaints by the cardholders in any sale transaction with any merchants. The cardholder is liable to pay the issuer regardless of any disputes with the merchants.

(vii) Provisions to assist enforcement of issuer's rights

- The issuer can combine the card account with any other accounts that the cardholder may have with the issuer or any of their branches anywhere in the world, in any currency, convert to Singapore currency at any rate and set off any amount owed by the issuer to the cardholder in any way the issuer deems fit.

- The records of the issuer certified by any of its officers are conclusive evidence for the cardholder's indebtedness and binding on the cardholders.

- The issuer may rely on any instructions it believes emanate from the cardholder without verification. The cardholder is liable for all such instructions even if he has never actually given those instructions.

- If the issuer has to sue the cardholder, the cardholder bears all costs incurred by the issuer, including lawyers' fees on a full indemnity basis.

(c) The card

In addition to the provisions contained in the application form and the standard T&C, there are usually several provisions printed on the back of the card. Typically, these provisions state that:

(i) The card is the property of the issuer and must be returned to the issuer if found;

(ii) The card is not valid for use unless there is a signature of the cardholder on the signature stripe of the card; and

(iii) The use of the card constitutes the acceptance by the cardholder of the standard T&C and other terms and conditions governing electronic services.

The 3 documents namely the application form, the standard T&C and the several provisions printed at the back of the card together form the cardholder agreement governing the dealings between them.

3.2 Cardholder agreements are standing offers

As shown above, under the terms of the cardholder agreement, the cardholder is under no obligation to use the card for payment or to take up any credit at all. Therefore, even after the cardholder agreement has been entered into between the cardholder and the issuer, the cardholder has the option not to use the card to make any payment. If the cardholder only uses the card to play guitar or to scratch ice on the windshield of his car, the only obligations that arise from the cardholder agreement are to safeguard the card, to report loss of card and to pay the nominal annual fee during the validity of the card. If no card transaction occurs, the provisions relating to liability for card transactions will not have any real effect.

The first sentence of Millett J.'s decision in Re Charge Card cited at the beginning of section 1.1 above indicates that the cardholder agreement *'comes into operation'* only *'on the use of the card'*. It has been suggested by Professor

Dobson[54] that, the cardholder agreement only constitutes a standing offer by the issuer to provide credit in case of a credit card or to provide payment service in case of a debit or charge card. The issuer's offer is revocable because, as described above, the issuer reserves the right to decline any card transaction, to terminate the use of the card or credit facility and demand the return of the card at any time. The issuer's standing offer, even if irrevocable is no more than an option that only bind both sides when accepted, by the act of the cardholder presenting the card to a merchant. The annual fee paid by the cardholder may be considered an option fee for the option to borrow money or to use the payment services. Each time the cardholder uses the card, he accepts the offer *pro tanto* and each card transaction should be considered a separate contract made in the terms and conditions stated in the master agreement. While there is no English authority to support this view, the suggestion seems to be valid and was supported by an American authority [55].

Therefore, it is submitted that the contractual relationship between the cardholder and the issuer consists of not one contract but multiple contracts. The cardholder agreement should be considered as a master agreement that consists of (i) the cardholder obligations to safeguard the card, to report loss of card and to pay annual fee even if no card transaction occurs; and (ii) a set of terms that will be incorporated into individual contracts to be made between them at the point of each card transaction.

There are several legal consequences of this analysis. First, it makes the rules of contract creation applicable to not only the making of the master agreement when

[54] See A.P. Dobson, *'Credit Cards'* [1979] JBL 332.
[55] *City Stores Co. v. Henderson*, 116 Ga. App. 114, 156 S.E.2d 818 (1967).

the card was issued, but also the making of individual contracts at the point of a transaction. Secondly, the unilateral changes of certain terms of the master agreement that only relates to the rights and obligations of the parties in the card transactions may be viewed as amendments of a standing offer instead of a binding contractual obligation.

In any case, the validity of the master agreement is an important factor to determine the capacity in which the cardholder acts in the relationship with the issuer. We will consider this issue in the next section.

3.3 Validity of the cardholder agreement and position of the cardholder

(a) Solicited card

In the majority of credit, debit, or charge card issuance, the issuer only sends a card to a person in response to his application for the card after considering the credit worthiness of the application. In this case, the card is generally referred to as a *solicited card*, as opposed to an *unsolicited card*, which is issued without request. Several different situations may occur in this process:

First, if the solicited card was received by the applicant and duly accepted by him in accordance with the terms of the cardholder agreement (e.g. by signing a form acknowledging receipt of the card and acceptance of the standard T&C and returning it to the issuer), the master agreement will be formed between them. Because the majority of standard T&C provide that the cardholder's keeping, using or signing of the card constitutes his acceptance of the agreement, the terms

and conditions of the cardholder agreement would generally become binding upon the card-applicant upon his receipt of the card, without any form of acknowledgement. Even in case the cardholder agreement provides that the making of the master agreement is conditional upon a condition (*e.g.* the cardholder returning of an acceptance form) which the cardholder did not fulfill the cardholder inaction would not likely be considered *mere silence* resulting in a failure of acceptance. As will be explained in section (b) below, because the cardholder made the application for the card, he may be under a positive duty to speak. The cardholder's silence in this case would be tantamount to a representation, which operates to estop him from denying the existence of a state of facts, that he has accepted the offer from the issuer.

The second situation is where the solicited card was lost or stolen before reaching the applicant. In this case, if the standard cardholder agreement was given to the applicant when he applied for the card, the application may be treated as an offer. The contract between the issuer and the applicant would be made upon the issuer's acceptance by posting the card to the cardholder. According to the general rules of contract formation by post, the acceptance takes effect even though it never reach the applicant[56], except where the applicant deliver a notice to withdraw his application to the issuer before the issuer's posting of the acceptance[57]. The standard T&C would be binding on the cardholder in this case. If the lost card were used to make payment, the applicant would be liable for the transactions pursuant to the terms of the standard T&C. If the card were lost due to the negligence of the postman the applicant would also be liable because the postman would normally be treated as the applicant's agent.

---

[56] *Household Fire Insurance Co. Ltd v. Grant*, (1879) 4 Ex. D. 216.
[57] *Re London & Northern Bank* [1900] 1 Ch. 200.

However, in the current practice of Singapore banks the standard cardholder agreement is not given to the applicant when he makes the application. Therefore, the submitted application only constitutes an invitation to treat. The issuer's posting of the card and the agreement to the applicant would, therefore, constitute an offer. If the offer was lost or stolen in the mail, there can be no contract between the issuer and the applicant. The standard T&C would have no effect on the card-applicant. As a result, the applicant would be liable neither for any card transaction effected with the lost card nor for any negligence of the postman (who is treated as the issuer's agent in this case).

To protect the banks, many card application forms used in Singapore contain an undertaking by the applicant to bear the risk entailed with loss of the card to be sent to him by post. Therefore, even if both the card and the cardholder agreement were lost in the mail, the applicant's undertaking to bear the risk of lost cards would be binding on him after he has signed the form. The applicant's liability is founded on his contractual undertaking contained in the application form, but not the terms of the cardholder agreement. Some card application forms attempts to make the entire standard T&C binding on the cardholder by incorporating into the application form by reference to an electronic version of the standard T&C published on the issuer's internet web site. While such an attempt would fail in Europe[58], it may succeed in Singapore due to the absence of any regulation on this point.

[58] EC Directive 2002/65 on Distance Marketing of Financial Services [2002] O.J. L 271/16. requires terms and conditions to be communicated in a *'durable medium'*, the definition of which excludes information displayed on the financial service provider's web site.

(b) Unsolicited card

Where an issuer sends a new card to a person without his prior request the card is considered as an *unsolicited card*. Although this situation rarely happen in Singapore because the regulations of the MAS prohibits the issuance of unsolicited credit and charge cards by banks and financial institutions[59] the situation deserves some attention because the regulations only affect banks and financial institutions. Theoretically, unsolicited card may still be issued by a non-bank entity[60].

Whether an agreement is formed between the issuer and the card-recipient in this case depends on the application of the general principles of contract making to the circumstances. The card and the standard T&C only constitutes an offer by the issuer to the card-recipient. Generally, under the principles of contract acceptance in *Felthouse v Bindley*[61], if the card-recipient kept the card and did nothing about it, no contract is formed between them, because *mere silence* does not constitute acceptance.

If, in contrast, the card-recipient signed a form confirming his agreement to the standard T&C that accompanied the card, or sign or use the card to make payment and settle the card bills, such course of action would constitute acceptance of the issuer's offer, sufficient to form a valid agreement between them, in the terms of the standard T&C. Difficult question arise where the card-recipient did not expressly accept the offer, but his course of action amounts to

[59] Regulation 7, Banking (Credit Card and Charge Card) Regulation 2004.
[60] The question whether the issuance of credit, charge card, debit card necessarily requires any licence will be discussed further in chapter V.
[61] *Felthouse v Bindley* (1862) 11 C.B.N.S. 869.

something more than *'mere silence'*. In the recent case of *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd*[62], the Singapore courts took a rather practical approach on the issue of contract acceptance. In this case, the plaintiff's property had for several years been leased to the defendant and the contractual relationship was governed by written agreements. Although the parties had commenced negotiations on the renewal of the lease prior to that date and had agreed on a reduced rent, no written agreement was executed due solely to the defendant's omission. However, the defendant continued to occupy the leased premises after the expiry of the written agreements, and made regular payments of the adjusted rent. The question arose whether the parties were bound by a two-year term lease in such a circumstance. Rajah J.C. held on the facts, that an oral contract had been formed notwithstanding the absence of the formality of a written lease. The learned judge explained (at [50] and [51]):

"Silence is a midwife that may ultimately deliver a contractual offspring that is stillborn or live. Silence and implicit acceptance are not invariably antagonistic concepts. Silence can signify affirmation at one end of the spectrum, disinterestedness or abandonment at the other end of the spectrum. It is a chameleon utterly coloured by its contextual environment. Silence will usually be equivocal in unilateral contracts or arrangements; in bilateral arrangements or negotiations on the other hand, there will usually never be true or perfect silence. In many such cases, while there may not be actual communication of acceptance, the parties' positive, negative or even neutral conduct can evince rejection, acceptance or even variation of an existing offer."

[62] [2004] 4 SLR 258.

Relying on the authority of *Spiro v Lintern*[63] and "*The Law Relating to Estoppel by Representation*"[64], Rajah J.C. expressed the view that there could be instances where a party is placed under a positive duty to speak, and his silence in such circumstance would be tantamount to a representation which operates to estop him from denying the existence of a state of facts. The principle laid down was that the court would look at the entire circumstances and the conduct of the parties to determine whether a party's silence could amount to the absence of acceptance. In the particular case it was found that a contract was formed because the defendant's conduct to remain in possession of the property and continuing to pay the rent.

Therefore, if the circumstance placed the card-recipient under a positive duty to speak his silence would be tantamount to a representation, which operates to estop him from denying the existence of a state of facts, that he has accepted the offer from the issuer. The facts that credit cards are popular means of payment that almost everyone knows of the purchasing power of the cards and the conditions of use of the card was given to the card-recipient together with the card lend weight to the argument that the card-recipient is under a positive duty to speak. However, it is also possible to argue for the opposite view based on the fact that there were no pre-existing relationship between the issuer and the card-recipient to impose a duty to speak on the card-recipient. He might not actually know how a credit card may be used and he is under no obligation to read the documents accompanying the card. If the cardholder never read the documents and kept the card without the intention to ever use it to make payment, it seems difficult to impose on him a duty to speak. The outcome would depend on the

[63] [1973] 1 WLR 1002 per Buckley L.J.
[64] *G Bower & A Turner*, 3rd Ed, 1977.

court's analysis of the entire circumstances. The cardholder's knowledge of the purchasing power of the card and the content of the standard T&C seems to be a relevant factor.

Because of this uncertainty, there are two possible outcomes. If the card-recipient's act constitutes valid acceptance of the issuer's offer, the rights and obligations between him and the issuer would be the same as the case of solicited card discussed above. Alternatively, if there is no acceptance, the relationship between them may be characterized as a bailment of the card, because there is a transfer of possession of the plastic, a personal chattel, to the card-recipient while the ownership of the card remains with the issuer. In this case, the card-recipient may be liable to the issuer, not on the terms of the cardholder agreement, but on other grounds such as breach of implied terms of bailment contract, negligence in taking care of the card, conversion or conspiracy.

Because all credit, debit, and charge card in Singapore are issued in plastic, even where the cardholder agreement has been validly formed the cardholder may be characterized as a bailee of the card[65]. We will look into the issue of the cardholder's liability as a bailee of the card or in the tort of conversion, negligence, or conspiracy in Chapter III.

(c) Termination of the cardholder agreement

The cardholder agreement will cease to have legal effect after it has been terminated in accordance with its terms. Terms relating to termination of cardholder agreement vary between banks in Singapore. DBS, for example, only

[65] He is an involuntary bailee. Please refer to the discussion at page 138.

requires a written notice to be given while UOB requires both written notice and return of the card to the bank cut in half. The cardholder agreement will be terminated only when the conditions required by the standard T&C for a valid termination have been fully satisfied. Therefore, the cardholder may be liable for card transactions effected before the written notice of termination (and the cut card) is delivered to the issuer. The requirement that the card be cut in half only prevents it being used in retail card-present transactions. Because the card may be lost after the notice has been sent and two halves of a card fully reveal all the particulars required to effect fraudulent transaction via internet or telephone (including the card number, validity period and card verification number), the possibility that fraudulent transactions occur after the notice of termination has been sent is present. Pursuant to the terms of typical cardholder agreement, the risk in this case is placed on the cardholder.

In practice, the cancellation of credit, debit, and charge card is treated in a way similar to a report of loss of a card. Whether the card was lost or the cardholder wishes to terminate the card, he would typically make a telephone call to the call centre of the card issuer. The computer systems of all issuers are capable of instantly deactivating the use of the particular card. After deactivation, any request to authenticate a card transaction, whether by card-present or card-absent method would be automatically declined. Therefore, it would be safer for a cardholder to make the telephone call to terminate the card before sending the notice of termination and the cut card to the issuer to complete the process of termination.

4. RELATIONSHIP BETWEEN THE ISSUER AND THE MERCHANT

4.1 Making of issuer-merchant contract

A major obstacle to the application of the analysis in *Re Charge Card* to the modern credit card transaction is the difficulty to establish the contractual relationship between the issuer and the merchant. In that case, a basis of the rules laid down was that the issuer entered into direct contract with the merchant. Because the issuer-merchant agreement in that case existed long *before* the cardholder presented the card to the merchant, it was easier to hold that the cardholder's act resulted in a binding contractual obligation of the issuer. The credit card system today is not the same as the arrangement in *Re Charge Card*. The system involves a huge number of banks participating as both issuers and acquirers (e.g. more than 20,000 banks in Visa and MasterCard systems as shown in chapter I). Although the merchant agreements were made before card transactions occur, they were not made between the issuer and the merchant. Although the merchant invariably makes an undertaking to accept any card bearing the insignia of the respective card association, this undertaking is not sufficient to create a contract between the merchant and the issuer, whose identity is unknown to the merchant before the relevant card is presented to him. The merchant has no means to know which of the over 20,000 issuers he will be contracting with. In many cases, even after a card transaction has been effected, the merchant is precluded from knowing the identity of the issuer. For example, merchants accepting payment by internet only see the last 4 digits of the card number while only the first 4 digits reveal the identity of the issuer. It is,

therefore, impossible to hold that the contractual relationship between the merchant and the issuer existed *before* the card transaction.

The contractual relationship between the issuers and the merchant has to be created when the card transaction completes. The majority of credit card transactions today are effected by *'online'* method where the merchant use a near instantaneous communication linkage to obtain an *'approval'* from the issuer for each transaction. The *'approval'* is required where the card transaction amount exceeds the merchant's floor limit specified in the merchant agreement in accordance with the prevailing rules of the card network. The most common facility used by merchants to communicate with the issuer is the card reader terminal, which transmits the transaction amount and the card particulars extracted from the card to the issuer and displays the *'approval'* signal a few seconds later. Where the data link with the issuer is not present, the merchant is required to use automated telephone system to obtain the *'approval'* from the issuer. For card-absent transactions (*e.g.* by mail order, telephone order or internet) the issuer's *'approval'* is always required as the merchant floor limit is zero. The process of authenticating card-absent transaction is essentially the same except that the card particulars are keyed in manually by the merchant.

Therefore, in the majority of card transactions, the issuer's *'approval'* may be sufficient to constitute an undertaking by the issuer to pay the merchant for the transaction amount. However, there is a small portion of card transactions in which *'approval'* was not obtained from the issuer. The cardholder's act of signing the transaction receipt has the same effect as the *'approval'* signal from the issuer. In this case, to explain the creation of the contract between the issuer and the merchant, it is submitted that the card or its particulars may constitute the

issuer's authorization for the cardholder to make a direct undertaking, as an agent on behalf of the issuer, to pay the merchant. There is no direct authority to support this suggestion. However, there are two authorities, which indirectly support this view.

First, it will be recalled that, in the case of cheque card the issuer also make a direct undertaking to the merchant to honor the cheque upon presentation. The purpose of the cheque card is to provide the payee with the assurance that he can look to someone else other than the person who drawn the cheque for payment. The nature of the cheque card was summarized by Millett J. in *Re Charge Card* that: *"The obligation undertaken by the bank to the supplier, which it enters into through the agency of its customers when he uses the bank card, is not to dishonour the cheque on presentation for want of funds in the account, so that it is obliged if necessary to advance moneys to the customer to meet it. If the cheque is met, the bank honours its own undertaking as principal to the supplier and, as agent for the customer, makes payment on its behalf out of his own moneys, whether or not this have been advanced to him for the purpose"*[66]. The first sentence in the above passage confirmed that the holder of cheque card has the authority to convey the offer of the bank to the payee and that effectively created a valid contract between the issuer and the payee. This proposition was subsequently confirmed by the Court of Appeal in *First Sport Ltd v. Barclays Bank Plc: "The bearer must have the authority to convey the offer on behalf of the bank. The authorized signatory has actual authority to do this, and even if this authority has been terminated, or is limited in any way, he will continue to have ostensible authority to convey the bank's offer on its behalf"*[67]. While a

[66] [1987] I Ch. 150 at 166 C-F.
[67] [1993] 3 All E.R. 789, per Evans L. J. at 794 F.

credit card transaction receipt is different to a cheque, it is possible to suggest that when it is necessary to infer an undertaking by a payment card issuer and the party accepting card payment, it is possible to consider the cardholder an agent for the issuer.

The second authority that also supports this view is the case of *R.v. Lambie*[68]. In that case, Ms. Lambie was issued a credit card known as Barclaycard by Barclays Bank. She exceeded the credit limit, ignored the issuer's demand to stop using the card. The card was nevertheless accepted for payment at several merchants. The merchants were subsequently paid by the bank. Ms. Lambie was convicted for obtaining a pecuniary advantage by deception contrary to the Theft Act. The House of Lord held Ms. Lambie liable for falsely representing to the merchant that she had authority to use the card. The conduct of Ms. Lambie was considered to have constituted the deception that she was an agent of Barclays Bank and authorized by them to enter into contract with the merchant's on the bank's behalf. Although this is a criminal law case, it is submitted that it could and should be applied to clarify the nature of the relationship between the parties.

The content of the issuer-merchant contract has to be inferred from the combination of (i) the merchant agreement; and (ii) the agreements between the issuer and the acquirer in the form of the card associations' bylaws and regulations. We will look at the content of these agreements below.

[68] (1982). In this case the House of Lord applied *Metropolitan Police Commissioner v. Charles (1977).*

4.2 Content of the contract between the issuer and the merchant

(a) The merchant agreement

The agreement signed between the acquirer and the merchant often contains the following provisions:

(i) The merchant must display the insignia of the credit card association and accept payment by cardholder by the respective credit card in the ordinary course of business. The acquirer agrees to pay the merchant the amount of the validly effected transactions less an agreed discount by crediting the account of the merchant with the acquirer.

(ii) Before accepting a card, the merchant must check the card number against a list of stolen cards given by the acquirer. Where the amount of a transaction exceeds a floor limit, the merchant must obtain an authorization from the acquirer. The merchant cannot split a transaction into multiple transactions to avoid obtaining authorization from the acquirer.

(iii) In card-present transaction, each sale transaction must be evidenced by a transaction receipt signed by the cardholder. The merchant must check the signature of the cardholder against the signature on the back of the card and warrants to the acquirer that the transaction receipt was signed by the person presenting the card.

(iv) The transaction receipt for all types of transactions must be submitted to the acquirer within a specified time limit. By submitting the transaction receipt the merchant warrants to the issuer that it represent a bona fide sale, that the merchandize was actually delivered to the person effecting the transaction and the obligation of the cardholder is not subject to any disputes, set-off or counterclaim.

(v) The merchant must not impose any surcharge upon the cardholder solely because of the fact that payment is made by credit card or to give discount to customer paying by other means such as cheque or cash to discriminate against customers using the cards.

(vi) Even after the acquirer has paid the merchant for a card transaction, the acquirer has the right to "chargeback" and deduct the amount of the transaction from the account of the merchant with the acquirer if (i) there are mistakes in the transaction receipts or non-compliance with the procedure to effect card transaction by the merchant (ii) the transaction was allegedly not authorized by the cardholder (iii) the cardholder has claims against the merchant for breach of contract with the cardholder, e.g. non delivery or defect of products, misrepresentation or breach of warranty (iv) the sale transaction was in violation or voidable under applicable law.

(b) The bylaws and regulations of the card association

Each the card association has a set of regulations that all of its members must comply with. The regulations of a typical card association contain the following:

(i) General regulations include: requirements that a party must satisfy to become a member (e.g. banking licence, capital adequacy); member's agreement to all the regulations of the association relating to obligations and penalty; and a recognition of acquiring member's right to be indemnified by the association in the event the issuing member is unwilling or unable to make payment, provided the association's rules are fully complied with.

(ii) Requirements to issuers relating to the issuance of cards, terms and conditions of agreement with cardholder, payment services, risk management and customer support services.

(iii) Requirements to acquirer relating to terms and conditions of agreement between acquirer and merchant, transaction receipt, point of sale terminals, authorization, clearing, and settlement, cash disbursement, ATMs acquirer standards, electronic commerce, other transaction processing requirements, interchange reimbursement fees, and risk management.

(iv) Payment acceptance rules specify requirements for merchants, including acceptance requirements, transaction receipt completion and processing, special merchant payment acceptance services, and risk management.

(v) Payment services rules specify requirements for payment processing between members, including authorization, clearing and settlement.

(vi) Dispute resolution rules govern the transaction receipt retrieval process, member's attempts to resolve disputes and the procedures available if resolution efforts are unsuccessful, including chargeback, arbitration, mediation, and compliance.

(vii) Fees rules specify international fees applicable to issuers and acquirers, and procedures for collection, disbursement, and problem resolution.

(viii) Risk management rules specify general security requirements, the rights and responsibilities of card association and members related to risk management and security, allocation of counterfeit losses.

(ix) Card and marks rules specify requirements for reproduction of the trademarks owned by the card association, responsibilities for the production of cards, and responsibilities for use of the trademarks.

The card association's bylaws and regulations have direct legal effect binding upon its members because each member has to agree to them when joining the association. Because the business of issuing and acquiring cards is an important channel for banks and financial institutions to generate revenue and to acquire

and retain customers while there are only a few large card associations having monopoly power, members of the card association have great incentive to comply with the regulations of card associations.

The regulations of card associations have no direct binding effect on the cardholder even though they contain many requirements relating to the cardholders. Several issuers attempt to make the regulations binding on the cardholders by inserting a provision in the cardholder agreement or the merchant agreement whereby the cardholder undertakes to comply with the regulations of the card associations. The validity of such a provision may be doubtful unless the entire set of rules and regulations has been given to the cardholder. Presently, the regulations of all card associations (*e.g.* Visa and MasterCard) are treated as confidential documents with access limited to authorized personnel of their members. Therefore, at present, the regulations of card associations cannot be incorporated into the cardholder agreement by reference.

The effect of the regulations of card associations on the merchant is also indirectly achieved via the terms of the merchant agreement. However, recently a portion of the regulations of two major card associations, Visa and MasterCard relating to usage of trademark, card acceptance, and chargeback procedures has been disclosed to the public via the internet. Even in this case, only the disclosed parts of the regulations may be considered binding on the merchant if they have been properly incorporated into the merchant agreement by reference. We will analyze the chargeback procedures of Visa further in chapter III and IV.

Our analysis in the last four sections serves to reveal major characteristics of the relationships between the three main parties in a credit card relationship.

Because all of the three bilateral contracts between them came into existence at the point when the card transaction completes, an analysis of the contractual relationship will not be complete without a closer look at the point when a credit card transaction becomes final.

5. FINALITY OF CREDIT CARD PAYMENT

5.1 Meaning of finality

The conclusion we arrived at in section 1.3 above was that a credit card payment is distinguishable from payment by cheque, money transfer order, and electronic fund transfer. Accordingly, when a cardholder effects a transaction, his act should be viewed as an *'undertaking'* to pay the issuer the transaction amount, distinguishable from an *'instruction'* to the issuer, as a paying agent, to make a fund transfer to the merchant in case of a fund transfer. In comparison with a sale paid by electronic fund transfer, the cardholder seems to be doing the same thing that is procuring the discharge of the debt owed by him to the merchant, not by the physical delivery of cash, but by substitution with a debt of nearly the same amount, which the issuer will owe to the merchant. As with any payment arrangement, a common question is when the payment becomes final. However, because of the nature of the credit card arrangement is about *'undertaking'* as opposed to *'instruction'* to pay, *'finality'* bears a different meaning. A system of instructions, whether or not communicated by electronic means is built upon principles of agency. As an instruction may be revoked before a certain point, the notion of finality in the fund transfer system relates to the moment (i) when the payor's obligation to pay is discharged (ii) when payment is regarded as complete, (iii) when countermand ceases to be available, (iv) when the funds transferred

become available to the beneficiary and (v) when the bank cannot reverse a transfer on its own volition, depending on the party to whom the question of finality is posed or the parties between whom that question is in controversy. In the fund transfer system, the general principle is that the transaction becomes final when the fund transferred is available to the beneficiary unconditionally at his bank[69].

In contrast with fund transfer, in the credit card system the critical moment of *'finality'* is when the merchant accepts the signed transaction receipt from the cardholder, in case of face-to-face transaction. After this moment, the cardholder has no right to reverse the transaction and neither the issuer nor the acquirer is entitled to reverse the payment, except in the event of a *'chargeback'*. It is not relevant when the funds become available to the merchant. Questions relating to the so-called *'finality'* of the payment transaction can be made from two different angles. From the merchant's point of view, it is whether the cardholder is entitled to reverse the payment transaction after this final point. To the cardholder, it is whether his obligation to pay is unconditionally discharged at that point.

5.2 The final point in card-absent transaction

In addition to retail card-present transactions where the card is swiped to a card reader terminal, the cards in the credit card system can be used in many other

[69] As the focus of this paper is not fund transfer, for simplicity, this general statement was taken from the article by Eric Chan, *"All about time: finality and completion of Payment by funds transfer"*, (2005) 17 SAcLJ. In our opinion, this is an outstanding article that has successfully summarized the finality rules of funds transfer in the leading cases and in various textbooks such as Michael Brindle & Raymond Cox, *Law of Bank Payments* (Sweet & Maxwell, 2nd Ed, 1999), E. P. Ellinger, E. Lomnicka & R. Hooley, *Modern Banking Law* (Oxford University Press, 3rd Ed, 2002), R. M. Goode, *Payment Obligations in Commercial and Financial Transactions* (2nd Ed, 1995) and Mark Hapgood, *Paget's Law of Banking* (LexisNexis, 11th Ed, 1996) which we choose not to mention in details.

ways. The final point of card transaction may be different in each case. When a card transaction is effected by telephone, mail order or facsimile the merchant obtains all the card particulars and he usually needs to obtain an *'approval'* from the acquirer either by telephone, but most frequently by a computer terminal. Only upon getting the *'approval'* signal from the issuer, will the merchant deliver the goods or services, because he is assured of getting payment. If for some reasons the *'approval'* is declined, the merchant will not deliver the goods or service but will revert to the cardholder to ask for another payment. In the case of internet transactions, although the merchant usually does not see all of the card particulars (i.e. the card number is masked except for the last 4 numbers, the card verification value is not disclosed to the merchant) but the merchant must always obtain the *'approval'* signal from the acquirer and/or the issuer before acting on any internet purchase order. In the rare case where credit card number is taken as security, for instance by hotel for charges of room services, booking of rooms, the obligation of the issuer only arise when the merchant submits the charge to the acquirer. Therefore, it is submitted that the credit card payment transaction by card-absent methods should only becomes final when the merchant receive the *'approval'* signal from the acquirer and rely on it to supply goods or services to the cardholder.

5.3 Reversing of payment by the cardholder

As far as the merchant is concerned, credit card payment becomes final upon the point when the issuer becomes bound to pay the merchant. Beyond this point, the cardholder is not entitled to reverse the payment even if he changed his mind. In

the unreported case of *American Express Europe Limited v. McCluskey*[70] a credit cardholder had used his card in Barbados but, before the records of the transaction arrived at the issuer in Britain, he purported to give instruction to the card issuer, American Express, to countermand payment. The High Court in England held that the cardholder has no right to stop the amount of the transaction being charged to his account. After looking at the terms of the contract between the cardholder and American Express, Kenneth Jones J. held that once the card has been used for the purchase of goods or services there came into being a payment incurred on the card account, which could not be stopped.

5.4 Discharge of cardholder's obligation

To the cardholder, question of finality concerns with whether his obligation to pay the merchant becomes unconditionally discharged at the final point of the card transaction. If his obligation had not been discharged unconditionally at that point, the merchant would have a claim against the cardholder in case the issuer is unable or unwilling to pay the merchant.

The answer to this question obviously depends on the terms of the sale contract. If under the sale contract, the cardholder's obligation was to make payment or to provide a means of obtaining payment that must not fail the merchant may pursue action against the cardholder when the issuer fails to pay. If the sale contract only required the cardholder to provide a means of obtaining payment, which might not work, then the merchant may not have a claim against the cardholder even if he is unable to obtain payment from the issuer. Unfortunately,

---

[70] See Peter E. Sayer, *'Credit Cards and The Law, an Introduction'*, the case was cited at page 13.

the majority of sales transactions for which payment were made by credit card were made orally or by conduct instead of written contracts. Therefore, it is often necessary for the courts to infer in the sale contract terms implied by the conducts of the parties and the surrounding circumstances. In this case, the terms of the cardholder agreement and the merchant agreement seems to be the most important factors because the court often presumes that both the cardholder and the merchant would not contract with each other on terms that contradict with the pre-existing agreements with the issuer and the acquirer.

As discussed in section 1.3, the arrangement of credit card is very similar to the irrevocable letter of credit. The law of documentary credit contains an established rule that payment by letter of credit is presumed to constitute only a *conditional discharge* of the payor's obligation, unless the contrary was provided for by the expressed terms of the sale contract[71]. If we follow the analogy with documentary credit, the presumption of conditional discharge should be applied to the credit card payment. However, in *Re Charge Card Services Ltd*, Millett J. held that the credit card relationship was so different to the irrevocable letter of credit relationship that not only it was sufficient to displace any presumption that payment was conditional, but to support a presumption to the contrary:

"Letters of credit are employed to finance international commercial transactions between traders who are normally known to each other, and the terms of which will have been the subject of negotiation. The contract will usually provide merely for payment to be made by letter of credit, the identity of the issuing bank being left to be nominated by the buyer after the contract has been concluded, and being a matter of indifference to the seller. Even where the

[71] *W. J. Alan & Co. Ltd. v. El Nasr Export and Import Co. [1972] 2 Q.B. 189, 210A.*

identity of the issuing bank is agreed between the parties, there is no prior contract between the issuing bank and the seller its obligations to the seller arise under the letter of credit itself. The sole purpose of the letter of credit is to provide security to the seller to replace that represented by the shipping documents which he gives up in exchange for the credit. Finally, the terms on which the seller is entitled to payment must be identical to those to which he is entitled under the contract with the buyer. By contrast, credit and charge cards are used mainly to facilitate payment of small consumer debts arising out of transactions between parties who may well not be known to each other, and the terms of which are usually not the subject of negotiation. The identity of the card-issuing company is necessarily a matter for agreement, since the card must be one which the customer is authorised to use and the supplier has the necessary equipment to accept. The machinery of payment by charge or credit card does not require the disclosure of the customer's address to the supplier, and in the absence of special precautions, which are seldom taken, at least in the case of small transactions, and which were not taken in the present case, the supplier might well have difficulty in identifying the customer without the co-operation of the card-issuing company. The availability of the card as a method of payment is advantageous to both parties: the customer obtains free credit for a period longer than that which the supplier is prepared to give even to the card-issuing company, or than he himself would obtain from the use of a cheque, with or without a bank card while the supplier obtains not only better security (as he hopes) but the convenience of having a single debtor in place of many, and the prospect of extra trade by reason of the credit facilities which he is able to extend (without providing them himself) to the customer. Finally, the terms on which the supplier is entitled to payment from the card-issuing company are quite different from those on which the card-issuing company is entitled to

payment from the customer and both differ from those on which the supplier would be entitled to payment from the customer if he were subject to any residual liability not discharged by the use of the card. The card-issuing company is liable to pay the supplier very shortly after the receipt of the sales vouchers and claim form, but is entitled to deduct its commission while the customer is liable to pay the full face value of the voucher, but is entitled to much longer credit. If the customer is liable to pay the supplier on the failure or default of the card-issuing company, it is on terms more onerous than either, for he must be liable to make immediate payment of the full face value of the voucher. It is difficult to find any justification for imputing to the customer an intention to undertake any such liability."

The Court of Appeal arrived at the same conclusion based on the differences in *commercial contexts* of the two types of transaction:

"The letter of credit is primarily an instrument of international trade issued pursuant to an individually negotiated contract of considerable substance made in writing: the credit card is used for small, over-the-counter transactions between strangers there being, at best, an oral agreement and more often an agreement by conduct. In the case of credit card sales, the seller does not even know the address of the purchaser, which makes it hard to infer an intention that he will have a right of recourse against the purchaser. <u>It is normally the buyer, not the seller, who selects the bank issuing the letter of credit: if, unusually, the seller does select the bank, this factor may rebut the presumption of conditional payment by letter of credit</u>: see W. J. Alan & Co. Ltd. v. El Nasr Export and Import Co. [1972] 2 Q.B. 189, 210A. In contrast, in a credit card transaction <u>the seller has decided long before the specific supply contract</u> is

made whether or not to accept the cards of the credit card company and has entered into an overall contract with it, under which the seller is obliged to accept the card and the credit card company is bound to pay him. With letters of credit, the issuing bank is the agent of the buyer and not the seller and it is the buyer who pays for the facility: in credit card transactions the credit card company is in a contractual relationship with both but it is the seller who pays for the facility by allowing the deduction of the commission. These differences are, in my judgment, so fundamental that the law affecting letters of credit is not of great assistance in deciding what law should apply to credit card transactions."[72]

With the confirmation by the Court of Appeal, the presumption that credit card payment *unconditionally discharges* the cardholder's obligation to pay the merchant has been cited in subsequent cases and commentaries as an *established uncontested rule* of English law relating to credit, debit and charge card. However, the modern credit card system shows a difference with the arrangement examined in *Re Charge Card*, which, it is submitted that, may be sufficient to raise doubt to the *unconditional discharge* rules laid down in that case. Most of the *'differences'* enumerated and relied on by the judges have become questionable in the context of modern credit card system:

(i) The observation that credit card is only used in small, over-the-counter retail sale between strangers where the merchant does not care to know the identity and address of the cardholder may no longer hold true. Modern credit cards are frequently used in international transaction between buyers and sellers living in different countries. In card-absent

[72] [1989] Ch 497, per Sir Nicolas Browne-Wilkinson V-C, emphasis added.

transactions, the merchant usually takes note of the identity and billing address of the cardholder for the dual purposes of goods delivery and prevention of chargeback.

(ii) While the majority of sale contracts paid with credit card may remain oral contracts (as opposed to sale contracts paid by letter of credit that are usually written contract of some substance), there are increasing number of credit card sales that are well documented, such as sale contracts made on the internet.

(iii) The observation that it is the merchant who not only selects the issuer of credit card but had entered into a contract with the user *long before* the making of the sale contract (as opposed to the selection of issuing bank of letter of credit by the buyer, which is a matter of indifference to the seller) may no longer hold true. When entering into the merchant agreement with the acquirer, the merchant nowadays only choose the card association, not the issuer. In fact, the merchant seems to be quite indifferent with the choice of the issuing bank. As long as the card bears the logo of Visa or MasterCard, he can accept the card without ever enquiring about the issuer. This fact is strikingly similar to the letter of credit, not a factor to distinguish it from a letter of credit.

(iv) Another factor relied on in *Re Charge Card* is that "*it is the seller who pays for the facility by allowing the deduction of the commission*", in contrast with letter of credit where the buyer bears the fees incurred to arrange the payment transaction. This is not entirely correct as in many cases the cardholder practically bears part if not all of the commission paid

to the issuer and the acquirer. Despite the fact that the rules of Visa and MasterCard prohibit merchants to discriminate between customers paying in cash and by card, in reality, the cardholders usually pay a higher price when he settles by credit card. This is especially true when the card is used in America and Britain, where the non-discrimination rule of Visa and MasterCard has been prohibited for competition law purposes[73]. Many retail merchants in Singapore charge an extra 3% for sales paid by credit card to recoup their cost of paying the commission fee to the acquirer. Even if the merchant is the only party that bears the costs of the credit card payment arrangement, this fact is not sufficient to infer that the issuer acts as the merchant's agent in the card transaction. To hold that, because the merchant bears the costs for the facility of credit card payment he should be deprived of the right to claim against the cardholder when the issuer fails to pay him seems unreasonable.

The main basis for their Lordship's decision to reverse the presumption of conditionality is the close relationship between the issuer and the merchant. Because the merchant chooses to accept the card *long before* the payment transaction by entering into direct agreement with the issuer it was inferred that the merchant intended to bear the losses incurred because of his choice. The analysis of Sir Nicolas Browne-Wilkinson V-C quoted above seems to suggest that only if the issuer is the choice of the seller, which choice must be made *long before* the payment transaction, then the *unconditional discharge* rule should apply. On the contrary, if the issuer is the choice of the buyer, then the normal rule of letter of credit should apply and payment should be *conditional*.

[73] For example US Code § 1666f invalidated the Visa and MasterCard non-discrimination rule. http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001666---f000-.html

Therefore, it is submitted that the *unconditional discharge* presumption laid down in *Re Charge Card* should be confined within schemes where the merchant enters into *direct agreement* with the issuer *before* actual transaction occur and the cards must be used in *over-the-counter* sale transaction.

However, as courts continue to cite *Re Charge Card* as a rule generally applicable to all credit card and charge card transactions, it may be necessary to use legislative measures to limit the rule of the case. In the mean time, merchants can reserve their claims against the cardholder in the sale contract by stating the condition in the written contract or displaying at the sale counter a notice that credit card payment only constitutes conditional payment.

6. CONCLUSION AND OVERVIEW OF THE NEXT TWO CHAPTERS

6.1 Conclusions on the relationship between the parties

We conclude the analysis on the nature of the relationship between the parties in a credit card system by summarizing the result into two stages as follows:

In the first stage before the cardholder uses the card to make payment to the merchant all of the 3 essential bilateral contracts between the cardholder, the issuer and the merchant have yet to be made. There were 3 master agreements in place, namely the cardholder agreement (which is primarily a standing offer by the issuer to provide payment services and/or credit for a fee); the agreement between the acquirer and the merchant; and the bylaws and regulations of the card association to which both the issuer and the acquirer subscribe to. The card not only represents the agreement between the issuer and the cardholder but also

serves as a representation by the issuer that the person legally holding the card has the power to render the issuer liable for the cardholder' use of the card for payment in situations where an approval by the issuer of the card transaction is not required (i.e. transactions below merchant's floor limit). At this stage, there is no direct contractual relation between the merchant and the issuer or the cardholder.

In the second stage when the cardholder presents the card to the merchant to make payment, three bilateral contracts came into existence. First, there is a contract made between the issuer and the merchant whereby the issuer undertakes to pay the merchant the transaction amount provided the merchant complies with the procedure of card acceptance set out by the card association and the contract of sale with the cardholder. This contract is most often made by electronic telecommunication based on the terms and conditions of the acquirer-merchant agreement and the regulations of the card association. In less common cases, this contract may be made through the agency of the cardholder where the amount of the transaction was less than the merchant's floor limit. Secondly, there is a contract between the cardholder and the issuer made on the terms and conditions of the master cardholder agreement whereby the cardholder undertakes to pay the issuer the amount of the transaction, which will be re-confirmed in the monthly statement to be delivered to the cardholder. In return, the issuer sends the *'approval'* signal to the merchant, based on which undertaking the merchant supplies the goods or services to the cardholder. Finally, there is the sale contract between the cardholder and the merchant, which should be treated in the same way as a sale contract paid by cash. Under this contract, the merchant supplies goods or services on credit of the issuer instead of the cardholder. The cardholder's obligation is to provide the means by

which the merchant can obtain the money consideration from a third party, being the issuer.

In terms of finality, the issuer's liability to pay the merchant becomes final and irrevocable after the *'approval'* signal is received by the merchant and after the cardholder signed the transaction receipt and handed it over to the merchant. After this moment, the cardholder's liability to pay the issuer also becomes final. He is not entitled to demand that the issuer stops payment to the merchant except in the case of chargeback. The merchant is entitled to enforce his right to obtain payment from the issuer by submitting the transaction receipt to the acquirer provided goods or services were supplied and the payment for which was not made by any other means.

Even after a payment transaction has become final, if the transaction was found to have been made without the cardholder's authorization, or if the merchant fails to deliver the goods or services, the goods delivered were defective or not as described in the contract of sale or if the payment for the sale was made by other means, the cardholder is usually entitled to request the issuer to give him his money back, by charging the sale amount back to the merchant.

The acquirer is involved as an agent for the merchant in the payment transaction to verify the validity of the card with the issuer, to obtain payment from the issuer via the card association network and to hold the funds and credit it to the account of the merchant. The contract between the acquirer and the merchant is that of an agency. The content of this contract is only relevant for our analysis to determine the terms of the contract between the merchant and the issuer.

The key in this analysis is separating the sale contract and the payment transaction. For example, the dealing between the cardholder and the merchant is separated into two contracts. The cardholder acts as issuer's agent in the payment transaction and at the same time acts as principal in the sale transaction. In the next section, we will outline the situations in which disputes may arise between the parties and their possible causes of action. The outline serves as an agenda for our discussion in the next 2 chapters.

6.2 Situations of disputes and causes of action

(a) Disputes relating to the sale contract

In chapter IV, we will discuss the rights and obligations of the parties in the situation of a dispute relating to the sale contract. Such a dispute generally concerns either the quality of goods or services or the non-performance of the sale contract by the merchant. The rights and obligations of the parties first depend on the proper law of the sale contract and we will consider this issue further in chapter III.

If the proper law of the sale contract is Singapore law, the cardholder may have causes of action in both tort and contract. The cardholder may sue the merchant for breach of contract or breach of express or implied warranty if the product is defective or if the merchant is otherwise in breach of a condition of the sale contract. He may also claim for damages if he suffered injury or damages as a result of a defect in the goods or services purchased.

Because of the practical difficulties and expenses in the various steps involved in the pursuit of legal action against the merchant, from establishing jurisdiction and governing law to obtaining recognition and enforcement of judgments, the majority of cardholders would generally prefer to request assistance from the issuer via the chargeback procedure than taking action in the courts of law. In Singapore, due to the absence of any regulation on credit card or consumer credit protection the issuers of all types of cards are generally not responsible to their customers for any disputes with the merchants. The only cause of action that may be available to the cardholder is negligent misrepresentation under the *Hedley Byrne* rule. However, the application of this rule is limited because of the exclusion of liability clauses carefully drafted in the banks' standard terms.

The main purpose of chapter IV will be the proposal of a reform in the area of issuer's liability towards the cardholder for defaults or misrepresentation by the merchant in the sale contract without incurring excessive liabilities or expenses to the banks.

(b) Disputes relating to the payment transaction

There are two types of disputes relating to the payment transaction, the first of which concerns alleged errors by the merchant to either charge to the cardholder the correct amount, to charge the same amount multiple times while there was only one transaction, to charge the cardholder after recurring payment arrangement has been terminated or after services purchased have been cancelled or failing to process credit for the cardholder after products has been returned. These types of situations will be analyzed in chapter IV together with merchant-

cardholder disputes because these mainly involve these two parties and the issue of authority of the person who effects the payment transaction is not relevant.

The chapter III will focus on the situation where the cardholder alleges that the transaction was made without his authority. These are situations usually referred to as unauthorized transactions.

As between the merchant and the cardholder, because of the presumption that the transaction was effected by a third party without the cardholder's authority there cannot be any contract between them. If the merchant has any claim against the cardholder, that claim has to be founded in the tort of negligence if the cardholder owes a duty of care to the merchant. Pursuant to the neighbor principle of *Donoghue v Stevenson*[74], as the merchant is a person who is directly affected by the cardholder's want of care, such duty of care may exist. If the cardholder is found negligent in safeguarding the card (*e.g.* leaving the card unsigned facilitating forgery) the cardholder may be liable to the merchant. The merchant would not supply goods or services if he knew the person presenting card or card particulars was not the genuine cardholder. Because the merchant's loss is goods delivered for which no payment is received, the damage caused to the merchant is physical damage, which is probably recoverable[75]. On the other hand, the cardholder may have a claim against the merchant for negligence in accepting the card (*e.g.* failure to conduct the security checks, failure to find obvious forgery of signature). However, the damage caused to the cardholder is likely to be pure economic loss, which may be more difficult to recover.

[74] [1932] All E.R. Rep. 1 (H.L.).
[75] As suggested by C.Y.Lee: "...if the issuer had merely refused to pay the supplier his charges on the fraudulent purchase, when the supplier would have lost are his goods, i.e. a physical chattel or thing, and not the *value* of his goods. Physical loss has always been a recoverable head of damage" at page 97, Law of Consumer Credit, 1990.

As between the merchant and the issuer, there is obviously a contract between them. However, most, if not all, of the rights or obligations arise from this contract are enforced via the card association. There are two reasons for this. First, it is difficult for the parties to establish the contents of the contract between them. For example, in a card-present transaction, the only word that readily represents the nature of the relationship between them is the word *'approved'* displayed on the merchant's terminal. Secondly, the rules and regulations of the card association are effective enough to ensure the compliance by all of its members. Therefore, the need for any issuer or merchant to pursue action in court is near zero.

Therefore, disputes between the cardholder and the issuer will be the focus of the next chapter III because this is the subject matter of the legislation concerning credit card or consumer credit protection.

CHAPTER III

DISPUTES RELATING TO THE PAYMENT TRANSACTION

Once issued, a credit debit or charge card may be used not only by the cardholder (i.e. the account-holder) but also by anybody who is in the possession of the card or the card particulars. A man can use a woman's card and a child can use its parent's card without the merchant, the acquirer, or the issuer ever noticing any difference. As these cards are increasingly used to effect payment remotely by telecommunications such as facsimile, telephone, or internet, the issue of allocation of financial losses due to unauthorized use of cards is becoming more important. In this chapter, we attempt to describe the state of the law relating to the question of cardholder's liability for unauthorized use of credit, debit, or charge card in Singapore. In the absence of any legislation on the subject matter, the analysis will focus on the application of common law doctrines to the various situations of credit card usage. At the end of the chapter, we will suggest some measures of protection for the cardholder with reference to the legislation in Britain and America on fraud loss allocation.

1. GENERAL ANALYSIS

Where the card is used by a party other than the cardholder (*carduser*), the liability of the cardholder for the card transaction may be established based on the analysis of two different relationships. Firstly, the liability of the cardholder may arise from the contract between him and the issuer or some other duty owed by him to the issuer based on the relationship between them. Secondly, the cardholder may be liable for the act of the carduser if the nature of the relationship between them is capable of making the cardholder liable. We will

look into each analysis below, bearing in mind that each of them may operate in the absence of the other but they often overlap in reality.

1.1 Nature of the cardholder's liability to the issuer

(a) Contractual liability

The most prominent basis for the cardholder's liability towards the issuer is the contractual relationship between them. The features of any credit, debit or charge card scheme, as described earlier, invariably require the cardholder to reimburse the issuer the amount of card-transactions effected by the card. The nature of the cardholder's liability, however, remains a question, subject to different models of characterization.

As discussed in section 1.2 and 1.3 of previous chapter the cardholder-issuer relationship should neither be characterized as an assignment of the merchant's unpaid debt to the issuer or assignment of the cardholder's chose in action to the merchant, nor in a way similar to the relationship between a bank and a customer using a cheque.

The correct characterization model, which we submit in this paper, considers the cardholder's liability arises from his bilateral contract with the issuer. This contract is made at the point of each card transaction based on the terms of the master agreement made between them when the card was issued. The main term of this contract establishes the cardholder's liability to repay the issuer the amount of the card transaction. Where the undertaking is made by a third party, the carduser, the cardholder's liability towards the issuer depends on the

authority of the carduser to bind the cardholder. The application of the principles of agency to the relationship will be analyzed further in the next section. It suffices to note here that, in order for the issuer to succeed in its claim against the cardholder based on this bilateral contract, it is necessary to prove that the carduser either has the actual or apparent authority of the cardholder to use the card.

As will be discussed in section 2, the process of proving the carduser's authority may be difficult, especially when it involves proving a deliberate action, knowledge or consent of the cardholder. The results may be uncertain, if achievable at all. As profit making organizations, the issuers would naturally attempt to shift the burden of loss due to fraudulent card transactions to another party. In the absence of a prohibition by statutes, which is the case in Singapore, card issuers tend to deploy a series of *'risk shifting'* terms in their standard application forms and cardholder agreements to make the cardholders liable for unauthorized transactions. Common risk shifting terms includes disclaimer of issuer's liability and cardholder's express undertaking to take liability for not only authorized transactions but also some or all of the unauthorized transactions. If the risk shifting terms were valid and enforceable, the cardholder would be contractually bound to pay the issuer. The basis for the cardholder's liability is the master agreement, as opposed to the contract made at the point of each transaction.

(b) Account-holder's liability as a bailee

Because credit, debit and charge cards in virtual forms, which have been issued in some other jurisdictions, have yet to be issued in Singapore, there is always the

presence of physical cards given to the cardholders. The cardholder agreement invariably stipulates, in both the standard terms and the several provisions printed on the card, that the card remains the property of the issuer and must be returned upon demand by the issuer. For this reason, there is always an option to characterize the cardholder as a bailee of the card. The relationship of bailment may be contractual if there is a contract between the issuer and the cardholder. It may also be a relationship of involuntary bailment for no rewards in case of unsolicited cards. As a bailee, the cardholder owes certain duties to the issuer, as the owner of the card, and may be liable for any loss suffered by the issuer as a result of the cardholder's breach of his duties.

Although this model of characterization has not been tested in the courts, arguments supporting it may be found in some commentaries[76]. Therefore, it is thought that the analysis of the cardholder's liability for unauthorized card transactions would not be complete without considering the application of the law of bailment in this relationship. However, as will be shown in section 3 below, to base the liability of the cardholder on the duty of a bailee of the card, while theoretically possible, is not entirely effective in all cases.

(c) Account-holder's liability in tort

The issuer may have several cause of action in tort against the cardholder. If the cardholder is characterized as a bailee of the card, the tort of conversion may be applicable where the cardholder refuses to return the card to the issuer upon demand. A recipient of an unsolicited card who turns the card to another person to cause damage to the issuer may be liable in the tort of conspiracy. These

[76] For example, C.Y. Lee, *Law of Consumer Credit*, 1990.

possibilities will be considered together with the cardholder's liability as bailee in section 3 below.

The relationship between the cardholder and the issuer may give rise to a duty of care owed by the cardholder (as a debtor, an agent, a bank's customer or a bailee) to the issuer. A breach of such duty of care by negligent conduct of the cardholder resulting in consequential loss suffered by the issuer may entitle the issuer damages in actionable negligence or estop the cardholder from denying liability to the issuer for the card transaction. The questions relating to the application of the tort of negligence to credit card situation will be considered in section 5 below.

The existence of a contract between the cardholder and the issuer does not prevent the issuer seeking remedies in tort[77]. However, the terms of the cardholder agreement usually give the issuer better protection compared to remedies in tort. Therefore, there is less practical need for the issuer to base their claim in tort and, as a result, there is a dearth of authority directly applicable to cardholder's liability as a tortfeasor. However, an analysis of this area is still necessary for completeness.

Whether the issuer claim is based on contract, bailment or tort, the determination of the cardholder's liability for usage of a card by a third party usually involves analysis of the relationship between the cardholder and the carduser. We will look into this relationship in the next section.

---

[77] *Henderson v. Merrett Syndicates Ltd* [1952] 2 AC 145.

1.2 Account-holder's liability for the act of the carduser

(a) The situations

In practice, there are wide ranges of third parties other than the cardholder who may use the card to effect a card transaction. For convenience, the cardusers can be divided into three groups based on the way they obtain the card.

First, there are the holders of supplementary cards issued to individuals and the holders of corporate cards and business cards issued to employees, managers, or directors of sole proprietorships, partnerships, or companies. These cardusers are allowed to use the cards both for the purposes of the cardholder and for the cardusers' own purposes. Cardusers in this group are usually referred to as the co-applicants because they are required to sign the application form, pursuant to the regulations issued by the MAS and the practice of issuing cards in Singapore. As these cardusers enter into the cardholder agreement directly with the issuer, they are liable to the issuer for all card transactions effected with the card issued to them in the same way as individual cardholders. The respective account-holders bear joint and several liability with the carduser by a contractual undertaking in the cardholder agreement.

Secondly, there are the purchasing cards issued to employee of corporations and government agencies. Holders of purchasing cards are not required to take joint liability with the cardholder but the purchasing card can be used for the purposes of the cardholder at a limited number of merchants only.

Thirdly, there are the *card-bearers,* which include any person who is in the possession of a card or its particulars, with or without the authority or consent of the cardholders to use the cards to make payment.

(b) The applicable doctrines

With the first group of cardusers, the liability of the cardholder may be characterized as liability for charges incurred by an authorized agent with express authority written in the cardholder agreement. Alternatively, the cardholder's liability may be characterized as a guarantee or indemnity given by the cardholder to the issuer.

With the second group, the carduser is not directly liable to the issuer for charges made with the card. However, the authority given by the cardholder to the carduser is expressed in writing in the cardholder agreement. The cardholder is liable for the act of his agent within the scope of his express actual authority.

In the third situation, there may be difficulty to define liability of the cardholder because the relationship between him and the card-bearer is not clear. There is apparently no contract between the card-bearer and the issuer, and usually, no contract between the cardholder and the card-bearer either. Where the card was obtained from the cardholder with his consent, the card-bearer may be characterized as an agent of the cardholder, or as a sub-bailee of the card. Where the card was stolen from the cardholder, there is no actual authority given by him to the card-bearer. However, the cardholder may still be held liable to the issuer for the act of the card-bearer under the doctrines of apparent authority or agency by estopel.

The liability of the cardholder for the use of the card by the carduser is founded mainly on the principles of agency law. We will look at the application of the doctrines of agency law to credit card relationship in section 2 below. Alternatively, the cardholder may be liable for the act of the card-bearer as a sub-bailee of the physical card. This will be discussed in section 3.

2. APPLICATION OF PRINCIPLES OF AGENCY

Because the issuer's claim against the cardholder is mainly founded on contract, the application of the principles of agency is of primary importance to decide whether the cardholder would be liable for a particular card transaction. In this section, we will briefly summarize the relevant doctrines of agency law as reflected in leading cases and textbooks[78] and attempt to apply the doctrines to the situation of credit card.

2.1 Actual authority

In *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd,* Diplock L.J. defined actual authority as follows*:*

"An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of constructions of contracts,

[78] We select to rely on the classification and definitions of different types of authority adopted in *Boustead & Reynolds on Agency*, 17th Edition Sweet & Maxwell 2001 as our primary source of authority on agency law while some quotes were taken directly from the transcripts of the cases.

including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger: he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor"[79]

Actual authority is usually divided into express and implied authority[80]. **Express authority** is the authority, which the cardholder has given the carduser by means of words or writing. The most obvious case of express authority in credit card usage is found in respect of holders of supplementary cards, business cards and purchasing cards because the authority is written in standard forms drafted by the issuer and signed by both the cardholder and the carduser. Express authority may also be established if an agreement exists between the cardholder and the card-bearer relating to the use of the card by the card-bearer.

As opposed to express authority, **implied authority** is that inferred from the relationship and dealings of the two parties by interpretation by the law. Implied authority may be found in the form of **incidental authority**, which is the authority for the agent to do whatever is necessary or normally incidental to the activity expressly authorized[81]. An agent authorized to buy shares has implied authority to do everything in the usual course of business necessary to complete the bargain, e.g. make payment to the seller[82]. In case of credit card, if a card-bearer has express authority to do something, which requires the use of the card,

---

[79] [1964] 2 Q.B. 480 at 502.
[80] *Bowstead and Reynolds on Agency* 17th Edition, 2001 at 3-003.
[81] *Bowstead and Reynolds on Agency* 17th Edition, 2001 at 3-018.
[82] *Bayley v. Wilkins* (1849) 7 C.B. 886.

e.g. make a purchase for the cardholder, which card he may have obtained from the cardholder without express instructions to use, implied incidental authority to use the card may be inferred. Another form of implied authority is **usual authority**, which is the authority for the agent to do whatever the agent of the type concerned would usually have authority to do[83]. The typical example of usual authority, as a type of implied authority, is the authority which arises from appointment to a particular managerial post. When the board of directors of a company appoints one of their members to be a managing director, *"they thereby impliedly authorize him to do all such things as fall within the usual scope of that office"*[84]. Therefore, usual authority may be relied on to hold a corporate cardholder liable for card transaction made by its director. Usual authority may be found where an agent who has been authorized to do any act in the course of his trade, profession or business has implied authority to do whatever is normally incidental, in the ordinary course of such trade, profession or business, to the execution of his express authority. In this case, the usual authority arises from the occupation of the agent, not from a post of managerial nature. The application of usual authority in this sense to credit card is limited, because card-bearer does not encompass any occupation of any particular trade. It should be noted that the word 'usual authority' used here as a type of actual authority. If the actual authority of the carduser does not exist or has been terminated, the applicable doctrine is apparent authority, which will be discussed in the next section 2.2.

The next type of implied authority is **customary authority**, which is authority to act in accordance with applicable business customs in the sphere in which he operates, in the execution of his express authority, provided that the custom is

[83] *Bowstead and Reynolds on Agency* 17th Edition, 2001 at 3-006.
[84] *Hely-Hutchinson v. Brayhead Ltd* [1968] 1 Q.B. 549 at 583, per Lord Denning M.R.

not unreasonable or unlawful[85]. The rules concerning proof of customs for the application of customary authority are strict. To establish the existence of a custom it must be shown that the custom is certain, reasonable, lawful, universally accepted by the particular trade or profession or place and not inconsistent with expressed or implied term of the contract between the parties[86]. Customary authority is of limited application to the situation of credit card not only because of the requirement to prove custom, but also because of its limited application to particular trade or profession.

Another avenue to establish implied authority is **presumed authority**. The term does not denote a separate type of authority, but *"simply refers to the fact that the existence of actual authority may sometimes be presumed, subject to rebuttal"*[87]. Originally, the principles of presumed authority arise with authority of married English women, who, until the late 19th century was unable to own separate property and to be liable on contracts. Together with the evolution of the law on women's rights, the principles of presumed authority now based on cohabitation and housekeeping, not on marriage and applied to men and women equally. According to presumed authority rules, a person who cohabitate in a domestic establishment[88] with, or acts as a housekeeper for another person, would be presumed to have implied authority to enter into contracts on behalf of the latter for *"the reasonable supply of goods and services"*[89] for the household. The presumption may be rebutted by evidence that the alleged principal has forbidden the agent to pledge his credit or that the agent was provided with

---

[85] *Bowstead and Reynolds on Agency* 17th Edition, 2001 at 3-030.
[86] *Oricon Waren-Handels GmbH v. Intergraan NV* [1967] 2 Lloyd's Rep. 82 at 96.
[87] *Bowstead and Reynolds on Agency* 17th Edition, 2001 at 3-040.
[88] *Debenham v. Mellon* (1880) 6 App. Cas. 24. The existence of a marriage between principal and agent is no longer a requirement. It is also not necessary that the principal is a man and the agent a women. A domestic establishment cannot be a hotel. But a husband who is absent on military services is considered as cohabiting with his wife.
[89] *Miss Gray Ltd v. Earl Cathcard* (1922) 38 T.L.R. 562 at 565.

adequate necessaries or sufficient and agreed allowance for such necessaries. The doctrine of presumed authority based on cohabitation may be applicable to credit cards issued to individuals even though it was noted in *Chitty on Contract* that *"In contemporary English conditions, it is doubtful whether it has much relevance"*[90].

Incidental authority, usual authority and customary authority are the most frequently used doctrines to infer the implications of the relationship and dealings between the alleged principal and agent. The task of ascertaining such implications involves the application of ordinary principles of constructions of contracts to the entire circumstances of the agent's position. Therefore, there is often said to be a residual category of implied authority called *"authority derived from the circumstances of the case"*[91]. However, this is not a separate category of authority as it is not clear what the other circumstances are that may give rise to implied authority. The existence of the terms seems to be a reminder that although existing categories of implied authority (e.g. incidental authority, usual authority and custom authority) may be established, the court would take into account the entire surrounding circumstances and the course of dealings to either widen or narrow the agent's authority[92]. The notion of authority derived from the circumstances of the case, therefore, concerns with scope of authority rather than its existence.

Agent's consent. The passage from Diplock L.J. statement above suggests that the agent's consent is required in respect of actual authority. Such consent is

---

[90] 29th Edition, Volume 2, at 31-048.
[91] Chitty on Contract, 29th Edition, Volume 2 at 31-047.
[92] *Hely-Hutchinson v. Brayhead Ltd* [1968] 1 Q.B. 549; *Bowstead and Reynolds on Agency* 17th Edition, Sweet & Maxwell 2001 at 3-039.

certainly relevant in the relationship between the cardholder and the carduser. Consent is needed to hold the carduser liable to the cardholder for non-performance or breach of the agreement with the principal. However, as the main question is the relationship between the cardholder and the issuer, the relevant act is the conferring of authority. It has been suggested that the basis of agency is a unilateral manifestation of will and that it is not necessary that the agent's consent have been manifested at all when the issue is whether the agent's act was authorized[93].

2.2 Apparent authority

(a) Notion of apparent authority

When the cardholder has not authorized a carduser or has even forbidden the use of the card the cardholder may be bound by the act of the carduser under the doctrine of apparent authority. Apparent authority is usually treated separately from actual authority because there is an assumption that there is in fact *no authority at all* in the reasoning behind the doctrine of apparent authority[94]. While actual authority is created by an agreement between principal and agent to which they alone are parties, *"ostensible or apparent authority is the authority of an agent as it appears to others"*[95]. In a leading case of agency law, Diplock L.J. defined apparent authority as follows[96]:

---

[93] *Bowstead and Reynolds on Agency* 17th Edition, 2001, at 1-006 and 2-033.
[94] *"Apparent authority, which negatives the existence of actual authority" Rama Corp. v. Proved tin & General Investments* [1952] 2 Q.B. 147 at 149, per Slade J; *Bowstead and Reynolds on Agency* 17th Edition, 2001, at 1-013.
[95] *Hely-Hutchinson v. Brayhead Ltd* [1968] 1 Q.B. 549 at 583, per Lord Denning M.R.
[96] *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 at 503.

*"An 'apparent' or 'ostensible' authority ... is a legal relationship between the principal and the contractor created by **a representation**, made by the principal to the contractor, **intended to be and in fact acted upon** by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, **operates as an estopel**, preventing the principal from asserting that he is not bound by the contract. **It is irrelevant whether the agent had actual authority to enter into the contract**."*

The dictum of Diplock L.J. suggests that the doctrine of apparent authority is based on the doctrine of estoppel. There have been clearer statements of the same view, such as that made by Slade J.: "*Ostensible or apparent authority ... is merely a form of estoppel, indeed, it has been termed agency by estoppel, and you cannot call in aid an estoppel unless you have three ingredients: (i) a representation (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance'*[97]. There is still much argument whether apparent authority should be regarded as based on estoppel or not because (i) the representation giving rise to apparent authority may be more general than the representation required for estoppel and (ii) the detriment incurred to the third party required by apparent authority may be smaller than that required by estoppel. In respect of credit card transactions, there may be

[97] *Rama Corp. v. Proved tin & General Investments* [1952] 2 Q.B. 147 at 149-150.

little problem establishing the reliance by the issuer and the detriment incurred by it. The problem would most likely arise in respect of the representation. If the words or conducts of the cardholder constitute or is deemed by the law as constituting a representation to the issuer that the carduser has authority to act on behalf of the cardholder, it is not difficult to prove that the issuer relied on such representation to pay or undertake to pay the merchant, which results in a financial loss to the issuer if the cardholder later refuses to reimburse the issuer. The focus of our analysis should, therefore, be the *representation*.

(b) Nature of the representation

According to *Bowstead & Reynolds*[98], the cases on apparent authority may be divided into two categories based on the nature of the representation. Firstly, there are cases where a *'genuine representation'* was made by the principal of the agent's authority, which may be:

(i) expressed orally or in writing;

(ii) implied from a course of dealing between the parties[99];

(iii) implied from the principal's *"permitting the agent to act in some way in the conduct of the principal's business with other person"*[100]*;*

(iv) entrusting the agent with the conduct of a particular negotiation[101];

---

[98] *Bowstead and Reynolds on Agency* 17th Edition, 2001, at 8-018.

[99] In *Debenham v. Mellon* (1880) 16 App. Cas. 24 at 36. A husband who has regularly paid for contract made by his wife later revoked his wife's authority to pledge his credit. He was found liable when his wife ordered goods from the usual tradesmen who did not know about the revocation. Course of dealing, however, requires a multiple transactions with repetition of pattern. If the husband only paid for one transaction, or if the goods were supplied to a different address there may not be a course of dealing as held in *Durrant v. Holdsworth* (1886) 2 T.L.R. 763 and *Swan & Edgar Ltd v. Mathieson* (1910) 103 L. T. 832.

[100] *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 at 503. Permitting someone to act as a managing director of a company without proper appointment as director gave rise to apparent authority in this case. *Panorama Developments (Guildford) Ltd v. Fidelis Furnishing Fabrics Ltd* [1971] 2 Q.B. 711 (company secretary).

(v) using the agent as a medium of communication[102]; or

(vi) entrusting the agent with the indicia of ownership of property.

The secondly category, according to *Bowstead & Reynold*[103], includes *"cases where the representation is only of very general nature, and arise only from the principal's putting the agent in a position carrying with it usual authority, e.g. making him a partner, appointing him managing director*[104]*, or using the services of a professional agent*[105]*, viz., some one whose occupation normally gives him a usual authority to do things of a certain type, e.g. a solicitor … Here, the notion of representation to the third party seems more artificial and the connection of the principal's liability with estoppel much more difficult to maintain. It seems further that in this category the authority which the third party is entitled to infer is that which would normally be implied between principal and agent, and it is of this that the court receives evidence"*.

In relation to this category of representation, it has been suggested in *Chitty on Contract*[106] that *"Sometimes negligence conduct is relied on as constituting a holding out: this is principally so in the case of property transactions. In that*

---

[101] In *Crabb v Arun* D.C. [1976] Ch. 179 at 183, the directors of a company permit the chairman and majority shareholder to conduct negotiation, together with the company's solicitor, to enter into a contract to sell shares. The contract held to bind the company. In *Egyptian International Foreign Trade Co. v. P.S. Refson & Co. Ltd (The Raffaella)* [1985] 1 Lloyd's Rep. 36 at 41, a documentary credit manage or a trading bank signed a guarantee without obtaining the director's ascent, the bank was bound because the evidence showed that the bank entrusted the handling of the matter to the manager.
[102] *Magripilis v. Baird* [1926] St. R. Qd. 89 at 96.
[103] *Bowstead and Reynold on Agency* 17th Edition, Sweet & Maxwell 2001 at 8.018.
[104] *Hely-Hutchinson v. Brayhead Ltd* [1968] 1 Q.B. 549 at 583.
[105] A professional agent is someone whose occupation normally gives him a usual authority to do things of a certain types. For example in *Waugh v. H.B. Clifford & Sons Ltd* [1982] Ch. 374, a law firm was entrusted with the conduct of litigation for clients, which involves a compromise in the purchase of a property by the client. The clients instructed the firm not to agree to the appointment of a valuer, which instruction failed to reach the person handling the matter. The clients were bound by the appointment of the valuer and the compromise because the agent was put in a position carrying with it usual authority of a solicitor.
[106] Chitty on Contract, 29th Edition, Volume 2 at 31-056, page [34].

context, it is often said that there must be a duty of care towards the third party[107]*, but here again it appears that such a duty can be owed to a wide class of persons. It does not seem that the third party's reliance need have been to his detriment: although it is clear that if he did not rely on the representation at all, or ignored the opportunity of ascertaining the agent's authority, or was put on inquiry by the facts of the transaction, he cannot hold the principal liable, it is probably sufficient reliance merely to enter into transaction on the faith of the representation."* We will consider the issue of cardholder's duty of care towards the issuer further in Section 3 below.

(c) Application to credit cards

To apply the doctrines of apparent authority to credit card we will attempt to analyse situations of credit card usage in which the words or conduct of the cardholder constitute a representation to the third party. The cardholder's express representation may be easily established in respect of supplementary cards, corporate cards or purchasing cards. The application form, which specifies the identity of the carduser, evidently constitutes its express representation in writing of the carduser's authority to the issuer. In this case, because actual express authority exists, apparent authority does not arise. Apparent authority, however, assists the issuer to hold the cardholder liable for transactions in case the authority of the carduser has been terminated or limited without notice to the issuer. Even where no separate card was issued to the carduser apparent authority may be established if the cardholder informed the issuer (orally or in writing) that the card would be used by a specific card-bearer. This situation,

[107] *Swan v North British Australasian Co* (1863) 2 H. & C. 175 at 182; *Mercantile Bank of India v Central Bank of India Ltd* [1938] A.C. 287 at 298-299; *Mercantile Credit Co. Ltd v. Hamblin* [1965] 2 Q.B. 242 at 271; *Moorgate Mercantile Co. Ltd. v. Twitchings* [1977] A.C. 890.

however, rarely occurs in Singapore because standard cardholder agreements usually prohibit the cardholders from giving the cards or card particulars to others[108]. The issuer would not be entitled to rely on apparent authority if it had knowledge of the limit or the lack of the carduser's actual authority[109]. Any termination or qualification of the cardholder's authority does not have to be contained in the application form or the cardholder agreement as a notice given by the cardholder should suffice to limit the scope of apparent authority.

The remaining categories enumerated in (b) above do not seem to be applicable where a card-bearer uses the card. First, the cardholder representation may not be implied from the course of dealings between him and the issuer. As Singapore standard cardholder agreements usually prohibit the cardholders from giving the cards or card particulars to others, it seems illogical to infer that the cardholder repeatedly allows the card to be used by another person. The course of dealing cannot contradict with the express terms of agreement. For the same reason, it is also difficult to say that the cardholder permits the card-bearer to act in some way in the conduct of the cardholder's usual business dealing with the issuer. Secondly, the card-bearer does not appear to be entrusted with the indicia of ownership of any property. The card remains the property of the issuer, as usually stated on the card itself. Thirdly, the cardholder does not seem to be using the agent as a medium of communication. Fourthly, the cardholder's act of giving the card or card particulars to a card-bearer may fit within the category of entrusting the agent with the conduct of a particular negotiation if the act of using the card

[108] For this reason, the act of giving the card to other may constitute a breach of the cardholder agreement. We will consider the liability of the cardholder as a breach of contract in section 5 below as we are only considering the application of agency principles in this section.
[109] As was said in the American case of *Home Owners Loan Corp. v. Thornburgh* 106 P 2d 511 at 512: *"Apparent authority loses all of its apparency when the third party knows that actual authority is lacking"*

to effect a card transaction is considered a negotiation of a contract between the card-bearer and the issuer. It seems that a deliberate act of the cardholder to give the card or card particulars is necessary to establish apparent authority.

Under the last category labeled 'artificial, non-genuine representation' by *Bowstead & Reynolds*, a principal may be deemed by the law as making a representation by putting the agent in a position, which in normal circumstance would give rise to a relationship of implied usual authority. As discussed in section 2.1 above, usual authority, as a type of implied actual authority typically arises from (i) the agent's appointment to a particular managerial post or (ii) the agent's occupation in a certain trade, profession, or business. In the prior type of case, apparent authority may not arise because actual implied authority may be established. The latter situation may not be applicable because there is no occupation or profession that usually involves the use of credit card of other persons.

The above analysis shows that the doctrine of apparent authority is most helpful in the situation where the pre-existing actual express authority of the carduser is terminated or limited without notice to the issuer. Where the cardholder did not make any express representation to the issuer, it is possible to establish apparent authority where the cardholder gives the card to the card-bearer or the cardholder appoints the card-bearer into a managerial post involving use of the credit card. Both of these situations seem to require a deliberate act of the cardholder. The dictum of Diplock L.J. quoted in section 2.1 above[110] seems to suggest that the representation by a principal needs to be *'intended to be acted upon'*. Although it has been said that, generally, in respect of apparent authority, the representation

[110] *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 at 502.

need not be deliberate[111], it is submitted, based on the above analysis *a deliberate voluntary act* of the cardholder is necessary to establish apparent authority of the card-bearer.

2.3 Usual authority and agency by estoppel

(a) Usual authority as a third category

In sections 2.1 the term *'usual authority'* referred to the situation where the agent is put in a position which normally carried with it authority. The principal is deemed to have given implied authority unless the authority is withdrawn from the agent. In this sense, usual authority is a type of actual implied authority. In section 2.2, the same term was used again to refer to cases where the principal's representation is inferred from putting the agent in a position carrying with it usual authority while, in fact the authority may have been withdrawn. In this sense, usual authority is a type of apparent authority.

It was further suggested in *Bowstead & Reynolds*[112] that a case may be made out for considering the notion of *'usual authority'* as a third type of authority, which is neither actual nor apparent. For completeness, this third meaning will be discussed below.

As an independent category of authority, *'usual authority'* arose in the exceptional case of *Watteau v. Fenwick*[113]*,* where an undisclosed principal was held liable for a contract made by his agent within such authority as would

---

[111] *Bowstead and Reynolds on Agency* 17th Edition, 2001, para 8-020 at page 310.
[112] *Bowstead and Reynolds on Agency* 17th Edition, 2001, para 3-006 at page 92.
[113] [1893] 1 Q.B. 346.

usually be possessed by a person in such a situation, but the authority has in fact been withdrawn. The fact that the authority was withdrawn by the principal suggests that the case cannot base on actual authority. On the other hand, the undisclosed principal cannot be considered as making any representation to the third party, because even his existence is not known to the third party. Therefore, the principal's liability cannot be based either on actual nor apparent authority doctrine.

The *Watteau v. Fenwick* type of usual authority can only be found in situations of an undisclosed principal, because if the principal's existence is disclosed to the third party, then the case should base on apparent authority. The application of this situation to credit card is not likely to occur because the identity of the cardholder is well known to the card-issuer (acting in the position of the third party in this case). It is, therefore, safe to conclude that the credit card cardholder liability can only be based on actual or apparent authority.

(b) Agency by estoppel

The situation of *an agency by estoppel* arises where a principal, as a result of his representation or conduct, is estopped from denying the authority of his agent. It might seem that, in this situation, estoppel and apparent authority coincide. However, it has long been confirmed that *agency by estoppel* is not agency[114]. Because *agency by estoppel* is distinguishable from agency in general and *apparent authority* in particular, *agency by estoppel* must be a form of estoppel. We will analyse the application of the doctrine of estoppel in section 4 below.

---

[114] *Pole v. Leask* (1863) 33 LJ CH 155, per Lord Cranworth at 161-2.

2.4 Conclusion on the application of agency doctrines to credit card

In respect of supplementary cards, corporate cards and the purchasing cards the authority given by the cardholder to the carduser constitutes actual express authority. In case actual authority is withdrawn or limited by the cardholder, the cardholder remains liable for usage of the card based on apparent authority if the issuer has no notice of the withdrawal or limitation of the carduser's authority.

Where no separate card is issued to the carduser the liability of the cardholder may be based on several different grounds. First, the authority of the card-bearer may be established based on his appointment in a managerial post in the company of the cardholder. The fact of the card-bearer appointment may serve both as a basis for usual authority or a representation giving rise to apparent authority. Secondly, if the cardholder voluntarily gives the card to the card-bearer for a specific transaction, both implied incidental authority to carry out a transaction and apparent authority for entrusting the card-bearer with the conduct of a negotiation of contract with the issuer may be established. Thirdly, the authority given by individual cardholder to the card-bearer may be presumed based on fact of co-habitation or housekeeping if the card was used for purchasing necessity for the household, subject to rebuttal.

In some cases, the issuer may also rely on the cardholder's negligent conduct (e.g. carelessness in keeping the card) to establish the holding out of a representation giving rise to apparent authority. However, to establish apparent authority in this case it is necessary to prove the existence of the duty of care owed by the cardholder to the issuer. The analysis of the cardholder's duty of care will be made in section 5 below together with the question of cardholder's duty in tort.

2.5 Unauthorized card transaction in Britain and America

Although not directly applicable to Singapore, the legislation concerning credit cards in America and Britain may help to clarify and confirm some of the points we have considered in the previous sections.

(a) Britain

The Consumer Credit Act 1974 (CCA) is often said to confirm the common law position relating to authority to use credit card in its Section 83, which provides that: *"The debtor under a regulated consumer credit agreement shall not be liable to the creditor for any loss arising from use of the credit facility by another person not acting, or to be treated as acting, as the debtor's agent."* The word *'acting'* in the section seems to refer to actual authority and the words *'to be treated as acting'* refers to the doctrine of apparent authority. Under Section 173 of the act, contracting out of Section 83 is prohibited. The issuers' practice to use *'risk shifting'* terms to place the burden of fraud loss to the cardholder were, therefore, defeated conclusively. The effect of section 83 extends to issuer's claims in both contract and tort. Thanks to the Section 83, the application of agency law doctrines works both ways, to render the cardholder liable for transaction effected by other person with actual or apparent authority and to help him escape liability otherwise.

More interesting for our purposes is Section 84, which specifically deals with the questions of cardholder's liability for misuse of credit card by a card-bearer. The treatment in this section is achieved based on the notion of *'authorized person'*:

Section 84 (1): *"Section 83 does not prevent the debtor under a credit--token agreement from being made liable to the extent of £50 (or the credit limit if lower) for loss to the creditor arising from use of the credit-token by other persons during a period beginning when the credit-token ceases to be in the possession of any* ***authorised person*** *and ending when the credit-token is once more in the possession of an* ***authorised person****."*

The words *'authorized person'* is defined in Section 84 (7) as: *"The* ***debtor****, the* ***creditor****, and any person authorised by the* ***debtor*** *to use the credit-token, shall be* ***authorised persons*** *for the purposes of subsection (1)."*

Therefore, if the card remains in the possession of the cardholder or his authorized agent, the £50 limitation does not apply. However, the issuer will be liable for losses caused by use of card before the card reaches the cardholder, because the card is in the possession of the issuer in the possession of a person authorised by the issuer. This position has been further confirmed by Section 66, which provides that the cardholder cannot be liable until the card is accepted by him. Where acceptance by the cardholder is by his first use, the cardholder's liability during the period after he received the card and before his first use will also be limited to £50. Under section 84(8) the limitation of £50 is applicable for each card in circulation.

In addition to the qualification in Section 84(1), the protection afforded under Section 83 is not applicable if the card-bearer acquired the card with the cardholder's consent. Section 84(2) provides that *"Section 83 does not prevent the debtor under a credit-token agreement from being made* ***liable to any***

extent *for loss to the creditor from use of the credit-token by a person who acquired possession of it with the debtor's* ***consent****."*

Therefore, as long as the cardholder has **consented** to the possession of the card by the card-bearer the cardholder will be liable for the total amount of all card transactions effected. Therefore, the section is applicable when an authorized card-bearer exceeds his authority as well as to the situation of a mere bearer of the card who used the card by forging the cardholder's signature. A literal interpretation of section 84 (2) suggests that the cardholder will be liable even if the card was obtained by the card-bearer by a fraud or trick (e.g. the card-bearer borrowed the card to play guitar but used it to make payment). To minimize the liability under sections 84 (1) and (2) the cardholder needs to give a notice (oral or written) to the issuer that the card was lost, in which case the cardholder would not be liable for card transaction effected after the notice. Under sub-section (5) the notice takes effect when received, but if given orally, must be re-confirmed in writing within 7 days.

(b) United States

In America, the federal Consumer Credit Protection Act addressed the problems relating to allocation of fraud losses from its 1970 amendment. The Act, now codified as 15 USC §1643[115], placed a strict limit of $50 to the maximum liability of credit and charge card holders for unauthorized use of their cards. To be entitled to the claim of the amount of $50, the issuer must satisfy various requirements such as providing a method whereby the cardholder can be

[115] 15 USC §1643 http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001643----000-.html.

identified as the person authorized to use the card, giving adequate notice of potential liability, providing the cardholder with a description of a means by which the issuer may be notified of loss or theft of the card, proving the cardholder has accepted the card and that the unauthorized use occurs before the cardholder has notified the issuer of the loss or theft. We will come back to these specific requirements at the end of this chapter. What we are concerned with here is the application of the doctrines of agency law under the legislation. The Act preserved the common law position by a definition of '*unauthorized use*' of card as follows:

"(o) The term "unauthorized use," as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit."[116]

The Official Commentary to Regulation Z[117] subsequently clarified that the question whether such authority exist is determined by applicable law. By using the words *"actual, implied, or apparent authority"* the definition enabled both the application of the established doctrines of agency law and the continuing evolution of such doctrines in the circumstance of credit card usage. In the leading case of *Minskoff v American Express Travel Related Services Co.*[118], it was clarified that actual authority concerns the manner in which the cardholder communicates with the carduser, whether the carduser can infer the principal's consent for the carduser's action by words (express) or conduct (implied) of the

---

[116] 15 U.S.C. § 1602(o) and Regulation Z §226.12(b)(5)-2 http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001602----000-.html.
[117] Official Staff Commentary on Regulation Z §226.12(b)(1)-1.
[118] 98 F.3d 703, 708.

principal. Apparent or ostensible authority lies in behaviour of the principal that led the third party dealing with the agent to believe the agent acted with the authority. The demarcation line between actual and apparent authority was further clarified in *Martin v American Express, Inc.*[119]. This case involved unauthorised use by an authorized carduser. A company gave a card to an employee with instruction to limit purchases to $500, which instructions were not known to the issuer. It was held that the employee had actual authority for the first $500 and apparent authority for the amount that exceeded $500. Application of apparent authority was again confirmed in *American Express Travel Related Services Co. v. Web, Inc.*[120] where misuse of a card by an authorized carduser was held to constitute authorized use.

The situation where the card was used by a mere card-bearer was considered in *Tower World Airways Inc. v. PHH Aviation Systems Inc.*[121]. In this case, the use was held to be authorized because the card was obtained voluntarily from the cardholder. More interesting situation was considered in *Blaisdell Lumber Co. v Horton*[122]. In this case, a former boyfriend stole his girl friend's card with only a name on it, signed it and used it. The court found no apparent authority because no action of the girl friend was present. Therefore, as a matter of American law, as long as the card or card number was obtained by a *voluntary act* of the cardholder, the card transactions effected by the card-bearer will be deemed authorized and the cardholder will be made liable for all the charges incurred[123]. It does not matter whether a separate card was issued to the carduser. The usage

---

[119] 361 So. 2d 597 (ala. 1978).
[120] 261 Ga. 480, 405 S.E.2d 652 (1991).
[121] 933 F.2d 174 (2d Cir. 1991).
[122] 242NJ Super 98, 575 A.2d 1386 (1990)
[123] Mark Budnitz and Margot Saunders, *Consumer banking and payments law : credit, debit & stored value cards, checks, money orders, e-sign, electronic banking and benefit payments*, 2nd Edition, National Consumer Law Center, 2002 at § 3.3.3.2 at page 58-60.

of *'cardholder's voluntary act'* as an indication of authority is similar to our conclusion on the question of authority in respect of card-bearer.

The $50 limit imposed by §1643 applies to both consumer and corporate credit and charge cards. Corporate cardholders issued with more than 10 cards have the option to contract out of the limit. In the absence of any contracting out arrangement, the limit applies equally to both consumer and corporate cards. The limit appears to be an absolute ceiling as provided for in its sub-section (d)[124]. Therefore, even if the cardholder knows that the card has been stolen and failed to notify the issuer of the loss, his liability would not exceed $50. However, the courts have refused to apply this ceiling limit the in several cases where the cardholder was found to be so grossly negligent. Two leading authorities are considered below.

In *Minskoff v. American Express Travel Related Services Co*[125], a personal secretary of the CEO of a company cardholder forged the boss' signatures on the application for the Amex card, cheques made in payment of the card statements and card transaction receipts. The company was held liable for the entire amount of all the card transactions effected by the employee, which went far beyond the $50 ceiling. Interestingly for our purposes, the basis for the court's decision in this case is the cardholder's *negligent conduct resulting in apparent authority*. The court applied the rule of New York law that cardholders are obligated to exercise reasonable care and promptness to examine bank statements to discover any unauthorized signature and alteration[126] and held that the cardholder was in

---

[124] *"Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card."*
[125] 98 F.3d 703 (2d Cir. 1996)
[126] N.Y.U.C.C. §4-406, *Woods v. MONY Legacy Life Ins. Co.*,641 N.E.2d 1070,1071 (1994). The bank's customer duty to discover and report unauthorized transaction is now stipulated in

a superior position to determine whether the charges reflected on his regular billing statements were legitimate. The cardholder's failure to examine the monthly card statement for an exceptionally long period of several years, therefore, constituted *negligent omission* that creates apparent authority for the charges that would otherwise be considered unauthorized under the Consumer Credit Protection Act.

In the exceptional case of *Walker Bank & Trust Co. v. Jones*[127], both the principal cardholder and a supplementary carduser were held liable when they retained their card and continued to make charges to the card account after having given notice to the issuer to terminate the agreement with the issuer. The basis for the court's decision in this case was that the use of the card even after notice of termination constitutes an *express representation* giving rise to *apparent authority* for the charges to be considered authorized.

In this section 2 we have looked at the application of relevant principles of agency law to answer the questions of liability for card transaction effected by a party other than the cardholder. In the next section, we will consider the next alternative to answer the question of liability for card transaction based on the criteria of possession of the physical card.

3. APPLICATION OF THE RULES OF LAW PROTECTING PERSONAL CHATTEL

As discussed in chapter I, credit, debit, and charge cards usually take the physical form of a plastic cards, paper coupons. Credit card issuers in several countries

---

Uniform Commercial Code Article 4 at § 4-406 (electronic version of the Code is available at http://www.law.cornell.edu/ucc/4/4-406.html).

[127] 672 P2d 73 (Utah 1983).

have started to issue credit card in virtual form. An example of virtual credit cards is the single use credit card numbers, which automatically expire within a few months, issued by major issuers such as Citibank for use solely on the internet. While this fact has been recognized in the current regulations on credit and charge card of Singapore legislations[128], credit cards in electronic virtual form have not been issued in Singapore. As the cards continue to be issued in plastic, the body of law that affect the rights and obligations of the issuer and the cardholder as bailor and bailee of the card remains applicable. In this section, we attempt to find out how the existing rules of law may be applied or adapted to protect the issuer's rights, as the owner of the physical card in the relationship with the holder of the card. The analysis in this section will be divided in two different situations of unsolicited card and solicited card.

3.1 Unsolicited card

Where an issuer sends a new card to a person without his prior request the card is considered an unsolicited card. Although this situation rarely happen in Singapore because the regulations of the MAS prohibit the issuance of unsolicited credit and charge cards by banks and financial institutions[129] the situation deserves some attention because the regulations only affect banks and financial institutions. Theoretically, unsolicited card may still be issued by a non-bank entity[130].

---

[128] Regulation 2(1), Banking (Credit card and Charge card) Regulations 2004 defined credit card as *"any article, whether in physical or electronic form, of a kind commonly known as a credit card or charge card or any similar article intended for use in purchasing goods or services on credit".*

[129] Regulation 7, Banking (Credit Card and Charge Card) Regulation 2004.

[130] The question whether the issuance of credit, charge card, debit card necessarily requires any licence will be discussed further in chapter V.

(a) Contractual relationship

The analysis in section 1.1(d) in chapter II shows that in case of unsolicited card the contract between the card-recipient and the issuer may or may not exist, depending on the circumstances. First, the contract may be formed if the recipient confirmed his acceptance of the issuer's offer or simply use the card and settle the monthly bills. Secondly, if there were no express or implied acceptance, but the entire circumstance satisfies the requirements to put the recipient under a *positive duty to speak*[131], his silence may be tantamount to a representation, which operates to estop him from denying the fact that he has accepted the offer from the issuer. Thirdly, if the recipient were under no duty to speak, his silence may not constitute acceptance.

If a contract existed between the recipient and the issuer, on the terms of the standard cardholder agreement, the rights and obligation between him and the issuer would be the same as the case of solicited card. We will analyze this situation in section 3.2 below.

If the contract was not formed, the relationship between them may be characterized as a bailment of the card, because there was a transfer of possession of the plastic, a personal chattel, to the recipient. In this case, the card-recipient may be liable to the issuer, not on the terms of the cardholder agreement, but on other grounds such as breach of implied terms of bailment, negligence in taking care of the card, conversions or conspiracy. We will consider this question in the next section.

[131] Such as in the case of *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd,* [2004] 4 SLR 258.

(b) Conversion

As a tangible chattel, in appropriate circumstances the plastic card may give the issuer a cause of action against the card-recipient in conversion. The most obvious case of conversion arise where the recipient destroyed the card or refused to return the card to the issuer because, as a bailee, he is not allowed to destroy the card and obliged to return the card to the issuer upon his demand[132]. However, the more interesting case arises where the card-recipient did not destroy the card but dealt with it in a manner, which may also amount to conversion. This is due to the special characteristics of the card.

The credit card is special in that it is almost useless as a piece of plastic, which may be used to play guitar or scratch ice on the car windshield in winter but when activated, can be used as a device of identification and a powerful means of payment. While a credit card is clearly not a document of title or an instrument with some value embedded in it like a negotiable instrument, it does carry with it certain intangible purchasing power that cannot be ignored. The 18th Report (1971) of the Law Reform Committee of Britain on conversion and detinue placed *'bank and other credit card'* in the category of *'token'* along with ship, rail, air tickets, theatre and luggage tickets, travelers' cheques, club membership cards, car log books, book tokens, trading coupons, stamps and gaming chips[133]. It is interesting to see how the law of conversion may be adapted to protect the rights of the owner of these items of little intrinsic value but may be considerable intangible value. Secondly, there are cases and commentaries suggesting that

---

[132] *Mitchell v. Ealing London B.C.* [1979] Q.B. 1.
[133] Cmnd 4774 at para 91, Chairman Lord Pearson.

conduct other than the physical destruction of the card may constitute conversion. There are cases in respect of conversion of cheques, documents of title or tokens, which suggest that conducts other than total destruction of such items may constitute conversion. In the Canadian case of *Borden Chemical Co. (Canada) Ltd v. J.G. Beukers Ltd*[134] a creditor who was handed a list of customers as part of a charge over book debt, used the contact information stored in the list to conduct its own marketing campaign. The creditor's act was held to constitute conversion even though the list was not physically destroyed or impaired and its return to the owner was not entirely necessary. The level of damages granted in this case was not only the value of the converted property, but also the damages for its detention and usage. Professor Palmer, in his excellent book on the law of bailment regarded the approach taken in the *Borden* case as a *'desirable'* approach to adapt the tort of conversion to accommodate new and unusual circumstances. If the court follows this approach in a case of an unsolicited card, it may be possible to hold a card-recipient liable in conversion if he did not destroy the card, but uses the card in some way that causes financial loss to the issuer (*e.g.* use the card number for internet transaction or simply show the number to a third party). However, there has been some doubt raised as to the court's readiness to apply conversion in such a flexible manner[135]:

"But there are limits to its efficacy and it seems unlikely that a court would readily characterize ***every misuse of intellectual or economic property*** *as a conversion of the document which symbolises or contains it. To do so would involve the artificiality not only of equating the intangible benefits of a document with the material personality of that document itself, but of asserting*

[134] (1973) 29 D.L.R. (3d) 337, Supreme Court of British Columbia.
[135] N.E. Palmer, *"Bailment"*, 2nd Edition at page 231-232, emphasis added.

that conduct which may involve ***no physical touching or impairment of that document*** *(for example, allowing a third party to look at it) can of itself constitute conversion. In the absence of any specific principle of restitution,* ***it may be preferable to construct the plaintiff's remedy around the terms****, both expressed and implied, or the bailment under which the document was originally delivered and to hold that any loss sustained by the bailor, as a result of a breach of that bailment is recoverable from the bailee".*

In the dearth of authority directly on the point, it is not certain what course of action of the card-recipient constitutes conversion of an unsolicited card. It is, however, worthwhile to note that there is a possibility to hold the recipient of an unsolicited card liable based on the adaptation of the tort of conversion to the category of chattel known as token. The next question is what kind of damages may be recoverable by the issuer.

Many cases in respect of conversion of cheque, negotiable instrument and document of title suggest that the bailors of such instruments have been entitled not only to sue for the value of a piece of paper but also to recover as damages the interest represented by the instrument[136]. It has been accepted in a textbook on tort that *"in all actions for a conversion the plaintiff may recover, in addition to the value of the property or of his interest in it, any additional damage which he may have sustained by reason of the conversion which is not too remote."*[137] The 18th Report of the Law Reform Committee on conversion and detinue, cited above, suggests that *"the true measure of damages in respect of a token may vary according to the circumstances* ***from a face value to a trivial cost of***

[136] For example *Lloyd's Bank Ltd v. Chartered Bank of India etc.* [1929] 1 K.B. 40. For many other cases see note 98 at page 228, N.E. Palmer, *"Bailment"*, 2nd Edition.
[137] *Salmond & Heuston on the Law of Tort*, 21st Edition, Sweet & Maxwell, at page 115.

replacing the token itself". Based on these authorities, it is possible to suggest that, if an issuer of unsolicited credit cards succeeded in proving the recipient's act constitutes conversion, it may be entitled to recover damages beyond the production cost of the plastic.

The limitation of the approach based on conversion is that *"there can only be conversion of a chattel, and not of an intangible thing"*[138]. The tort of conversion does not apply to virtual card. The adaptation of the tort of conversion to cover misuse not of the physical card, but of the information contained in it is doubtful. As suggested by Professor Palmer, the preferred alternative is to construct the issuer's liability on the terms of the bailment under which the card was delivered and to base the card-recipient's liability for loss sustained by the issuer on breach of that bailment instead of conversion. We will look at the recipient's obligations as a bailee in the next sections.

(c) Bailment

A recipient of an unsolicited card should be categorized as an involuntary bailee for no reward. The standards of care expected from an involuntary bailee appear to be lower than that of a voluntary bailee. The dicta in *Hiort v. Bott* [139] suggested that an involuntary bailee for no reward would be liable for *gross negligence* or *deliberate injury*, but would not be liable for *mere negligence*. Generally, *gross negligence* has been said to be no more than negligence with a vituperative epithet[140]. The involuntary bailee is not entitled to turn the property to the street,

---

[138] *R. v. Handsford* (1974) 8 S.A.S.R. 164 at 169, per Bray C.J.
[139] (1874) L.R. 9 Ex. 86
[140] *Wilson v. Brett* (1843) 11 M.&W. 113 per Rolfe B. at 115. The determination of fixed standards of care for different types of case (similar to principle of *diligentia quam suis rebus*

but he needs not warehouse the goods received. Accordingly, it is unlikely that the cardholder is under an obligation to keep the unsolicited card under lock and key. In *Elvin & Power Ltd v. Plummer Roddis Ltd* it was held that *"If persons were involuntary bailees and had done everything reasonable they were not liable to pay damages if something which they did resulted in the loss of the property"*[141]. A person who has received an unsolicited card is not required to make sure the card is not lost. He may not be held liable even if the card was lost or damage was caused to the issuer, if he has done everything reasonable without being put to unreasonable expenses and trouble. It seems that keeping the unsolicited card in an unlocked drawer or sending it by post instead of registered mail or courier should satisfy the standard of care of an involuntary bailee.

Therefore, to succeed in an action against a recipient of unsolicited recipient the card issuer needs to prove that the recipient was grossly negligent or deliberately caused damage to the issuer. If the recipient gave the card to a third party, he may be considered grossly negligent or have deliberately caused injury to the issuer.

(d) Conspiracy

In case a recipient of an unsolicited card gave the card to a third party, he may be liable for the tort of conspiracy in appropriate circumstances. As the predominant purpose of using the card would be for the benefit of the cardholder and/or the party to whom the card was given, not to injure the issuer, the circumstance seems to fit in the category of *'conspiracy to use unlawful means'* rather than

---

in Roman law) is no longer a technique used by English law, see Houghland v. R.R. Low (Luxury Coaches) Ltd. [1962] 1 Q.B. 694 per Ormerod L. J. at 698.

[141] (1933) 50 T.L.R. 158 per Bramwell J. at 90.

'conspiracy to injure'[142]. The tort of conspiracy requires the *'combination'* between the conspirators with a common intention. Thus if the cardholder gave the card to another person asking the person to keep the card for him a conspiracy would not arise. If the cardholder and the other person agree with each other to use the card in some ways, a *'combination'* may be said to exist. The usage of the card needs to constitute an *'unlawful means'* to enable the action in conspiracy. Cases in respect of the tort of conspiracy suggest that an act, which a defendant is not at liberty to commit, such as breach of contract or intentional misuse of confidential information, would constitute an *'unlawful means*[143]. The act of allowing a third party to use the card to make payment, thus causing financial loss to the issuer seems to satisfy the requirement of unlawful means. The onus of proof for the combination of the alleged conspirators is on the plaintiff. In case of unsolicited credit card, it seems very difficult for an issuer to prove both the unlawful acts and the combination between the card-recipient and the party that used the card. Where the plaintiff can prove that the unlawful acts were done in a conspiracy, the burden of justifying the acts would pass to the defendant[144]. If it is necessary to base on a breach of a penal statute as *'unlawful means'*, it is necessary to show that the statute, on its proper construction afford the plaintiff a civil action[145]. The tort of conspiracy is an alternative to hold the recipient of unsolicited card liable for use of the card by third party that seems more difficult to use. Where it is not possible to prove a combination, the issuer may fall back to conversion or breach of duty of an involuntary bailee.

---

[142] We follow the classification of conspiracy adopted in *Clerk & Lindsell on Tort*, 17th Edition, Sweet & Maxwell 1995 at 23-76, page 1267.
[143] *Torquay Hotel Co. Ltd v. Cousins* [1969] 2 Ch. 106, per Lord Denning at 139. *Rookes v. Barnard* [1964] A.C. 1129, House of Lords.
[144] *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch* [1942] A.C. 435.
[145] *Lornho Ltd v. Shell Petroleum Co. (No. 2)* 1982 A.C. 173, House of Lord per Lord Diplock and *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc* [1990] 1 Q.B. 391, Court of Appeal. See detail discussion in *"Clerk & Lindsel on Tort"*, 17th Ed., 1995 at para 23-81.

3.2 Solicited card

Where an issuer sends a card to a person in response to his application for a credit, debit or charge card, the card is a solicited card. As soon as the card is delivered to the card applicant, he becomes a bailee of the card. Where the card are lost or stolen or the card particulars were used by a third party to cause losses to the issuer, the issuer's claim against the cardholder may theoretically base on:-

(i) The cardholder's breach of an express or implied term of the contract of bailment between them;

(ii) The cardholder's breach of a duty of care imposed on a bailee; or

(iii) The cardholder's committing the tort of conversion or conspiracy.

As discussed in section 1.1(d) in chapter I, the issuer's act of sending the card in response to the request contained in the card application may constitute either an offer or an acceptance of the applicant's offer. In the latter case, a contract is formed even if the card never reaches the applicant. Even if the issuance of the card only constitutes an offer, when the card is delivered to the applicant it is likely that a contract will be formed between them. The application for the card lends weight to the argument that imposes on the card-applicant a duty to speak if he no longer wishes to continue with a contractual relationship with the issuer. The card-applicant's act of keeping the card, even without any confirmation with the issuer would constitute acceptance resulting in the standard cardholder agreement becoming binding upon him.

As discussed in section 3.1(b) above, to hold the cardholder liable for more than the production costs of the card based on the tort of conversion, it seems necessary to establish that either the cardholder deliberately used the card or its particulars for his own benefits; or that the cardholder allowed a third party to possess the card or the card particular. If that can be proved, it would be more convenient and probably easier to construct the issuer's claim based on the terms of the cardholder agreement. The analysis in section 2 above shows that based on principles of agency the cardholder would be liable where the card is used by himself or a third party with his consent. Similarly, to hold the cardholder liable for the tort of conspiracy it is necessary to establish elements of combination to use unlawful means. While that is possible, since giving the card or its particular to a third party to use may be prohibited under the terms of the cardholder agreement, something the cardholder is not at liberty to do, it appears more convenient to base the issuer's claim on contract rather than tort in this case. The tort of conspiracy and conversion, therefore, is not practically applicable to the situation of unauthorized use of solicited cards.

The contract between the issuer and the cardholder is not primarily a contract of bailment. The cardholder is liable to the issuer for unauthorized transactions under this contract in more than one way. For example, by the application of apparent authority doctrine, as seen in section 2 above or by the effect of a risk shifting clause, which we will look at in section 5 below. Here, we are concerned with the cardholder's liability as a contractual bailee of the card.

The bailment should be categorized as a gratuitous bailment because the cardholder receives no reward for keeping the card. The cardholder agreement usually stipulates that (i) the card remains the property of the issuer and must be

returned upon demand by the issuer; (ii) the cardholder must sign the card immediately upon receipt unless he wishes to return the card to the issuer; (iii) the cardholder must not give the card to a third party; and (iv) the cardholder must inform the issuer immediately after the card is lost or stolen. If the cardholder is in breach of any of these express terms, the issuer will certainly be entitled to sue in contract. However, unauthorized transactions and consequential loss to the issuer may still occur even if the cardholder is not in breach of any express terms. For example, the cardholder may be careless in keeping the card and, as a result, the card or the card particulars were stolen and used to effect an unauthorized transaction. In this case, the issuer's claim, if any, may be based on a duty of care owed by the cardholder either by an implied term of the bailment contract or a general duty imposed on a bailee.

Principles of bailment law require that a bailee must take *reasonable care* of the bailed goods. If the goods is damaged, lost or stolen, the onus of proof is on the bailee to show that he was not negligent in his care of the bailed goods. The problem is that in case of credit card the issuer is not interested in damage made to the card, but the loss caused by the unauthorized use of the card or its particulars. It is, therefore, important to ascertain the standard of care imposed on the cardholder.

The standard of care generally depends on the circumstances. The fact that the bailment is gratuitous is a relevant circumstance, but the standard of care expected from a gratuitous bailee is not necessarily lower than that imposed on a bailee for rewards[146]. The standard of care is usually said to depend on two factors, the nature of the bailed goods and the manner in which the bailee keeps

[146] *Houghland v. R. R. Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694, 698.

his own things. If the cardholder keeps the card together with his other payment cards, he should be considered taking adequate care of the card. In the normal practice of using credit cards, the cards are usually given to the merchants and their servants and the particulars may be given across telephone conversation or internet. During this process, the card particulars are entirely visible to all and may be recorded easily by others without the cardholder's knowledge or consent. Therefore, the duty of care of the cardholder should not include protecting the card particulars in a way so that it will not be revealed to any other person. In any event, the cardholder duty of care should end as soon as his notice that the card was lost, or that he no longer wishes to use the card reaches the issuer. The reason is that the issuer has the option, by technological power to disable the usability of any card for purpose of making payment almost instantly upon a notice by the cardholder.

It is, therefore, submitted that, if the issuer claim is based on the terms of the contract of bailment, whether expressed or implied, the cardholder's liability should be limited to (i) the production costs of the card, if it is destroyed, lost or stolen and no unauthorized transaction occurred before the cardholder notice of lost card reached the issuer; or (ii) consequential loss due to unauthorized transaction occurred before the cardholder notice of lost card reached the issuer or if the cardholder gave the card to others.

If the issuer claim is based on the tort of negligence, the issuer has more chance of success where the card is lost and the cardholder failed to give prompt notice to the issuer of such loss. The damage caused to the issuer in this case is economic loss consequential upon the loss of physical property, namely the card, a head of

damage recoverable in the tort of negligence[147]. In case the card is not lost but the card particulars are stolen and used to effect unauthorized transactions, it is submitted that the issuer is not likely to succeed because (i) the loss is a pure economic loss not directly inflicted by the cardholder or immediately caused by the loss of the card (the card was not lost); and (ii) the cardholder may not owe the issuer a duty of care to protect the card particulars. We will come back to the issue of cardholder liability in negligence and the recoverability of economic loss in section 5 at page 173.

Conclusion

The analysis in this section 3 shows that by characterizing the cardholder as a bailee of the physical card, it is possible to apply certain rules of law protecting personal chattel to clarify the question of cardholder's liability. The application of these rules appears most useful in case of unsolicited cards that were not accepted by recipients. The application of the bailment characterization, however, is dependent upon the cardholder having possession of the card. It fails to apply to the case where the card get lost before reaching the cardholder (for both solicited and unsolicited cards) and where the card was not lost but the particulars was used for remote transactions.

[147] Please refer to more detailed discussion on economic loss at page 173.

4. ESTOPPEL

4.1 The doctrines of estoppel

Although estoppel is generally regarded as an evidentiary doctrine that does not create substantive rights[148], it is relevant to the analysis of liability for unauthorized card transaction. In previous parts of this paper, we have mentioned the doctrines of estoppel several times in the analysis on liability for unauthorized card transaction. In respect of the making of the contract between the issuer and the cardholder, certain circumstances may give rise to a duty to speak of the card-applicant and his silence after receiving a card may constitute a representation that estops him from denying the state of fact that a contract has been formed[149]. In respect of a transaction effected by an agent of the cardholder with apparent authority it was argued that certain acts of the cardholder may constitute a representation to the issuer that later estops him from denying the existence of an agency relationship between him and the carduser. The doctrine of apparent authority so closely resembles estoppel that it was said to be a form of estoppel[150]. We have even come across the notion of agency by estoppel in section 2.3 above, where it was said that agency by estoppel is not agency but a form of estoppel. Therefore, it is thought that a more systematic analysis of the possible application of the doctrines of estoppel may be helpful.

Estoppel may be raised in various circumstances in a dispute between an issuer and a cardholder on the issue of liability for an unauthorized transaction, whether

---

[148] We adopt the definitions and classification of estoppel by Sean Wilken and Theresa Villiers in *"Waiver, Variation and Estoppel"*, New York, J. Wiley 1998.
[149] See Section 1.1(d) of chapter I above.
[150] See section 2.2(a) of chapter III above.

the card is a credit, debit or charge card. As with debit cards, a transaction, whether authorized or unauthorized may only occur if there is money standing to the credit of the card account. A cardholder may allege that a certain transaction was not authorized by him and because of that the issuer is not entitled to deduct the card account and the cardholder may sue the issuer to get his money back. In case of credit or charge card, the cardholder's liability to reimburse the issuer only arises when the card statement is delivered to the cardholder. If the cardholder denies liability for certain alleged unauthorized transaction, the issuer may have to sue the cardholder to enforce his right under the cardholder agreement. In either case, the issuer may rely on estoppel to prevent the cardholder from denying his liability in respect of a card transaction. The cardholder may also rely on estoppel to prevent the issuer from charging a transaction to the card account in contradiction with a card statement previously issued to the cardholder. The first question is which of the species of estoppel applies here.

Historically, estoppel was divided into three categories[151]: (i) estoppel by record, which covers the principles of *res judicata* which determines when parties will be bound by judgments in previous proceedings between them; (ii) estoppel by deed which operates to estop a party from adducing evidence contradicting a statement in a deed he executed and (iii) estoppel in pais. Estoppel in pais may be further divided into estoppel by convention, which originated in common law; and estoppel by representation, which originated in equity and subsequently recognized in common law. Estoppel in pais is now commonly regarded as including the equitable doctrines of promissory estoppel and proprietary

---

[151] We adopt the classification of estoppel by Sean Wilken and Theresa Villiers, *"Waiver, Variation and Estoppel"*, 1998, Chapter 8, Section 8.002 to 8.006 at page 104-105.

estoppel. Estoppel in pais generally operates to prevent a party (*'the estopped party'*) from denying: (i) the existence of a state of fact contradicting his previous representation (*estoppel by representation*); (ii) the existence of an assumption of fact or of law shared between the parties (*estoppel by convention*); (iii) the truth of a belief that the estopped party's legal rights will not be enforced, which belief was formed or fortified by a conduct of the estopped party (*promissory estoppel*); or (iv) the truth of a belief that the party seeking to raise estoppel has or will obtain an interest or right over the property of the estopped party, which belief was formed or fortified by a conduct of the estopped party (*proprietary estoppel or estoppel by acquiescence*). From this brief description, it appears that, among the various species of estoppel, estoppel by record, estoppel by deed, promissory estoppel and proprietary estoppel are not relevant in the analysis of liability for unauthorized credit transaction. The only two doctrines that may be relevant are *estoppel by representation* and *estoppel by convention*, the application of which we will consider below.

4.2 Estoppel by convention

To apply the doctrine of estoppel by convention there are two requirements, the first of which is that there must be a shared assumption. *"When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed."*[152]. The conduct of the estopped party which creates a belief or expectation in the mind of the other party must be a *"mutually manifest*

[152] Spencer Bower and Turner, *Estoppel by Representation*, 3rd ed. (1977), p. 157.

conduct"[153], which if it is not the formation of contract must be *"something very close to it"*[154]. Estoppel by convention can arise out of conduct or silence[155]. The second requirement of estoppel by convention is that it must be unconscionable to allow one party to resile from the shared assumption[156].

The above requirement may be satisfied in the situations where a cardholder failed to inform the issuer of unauthorized transaction, the details of which were disclosed in a periodical statement of the card account, or where the cardholder failed to notify the issuer after the card was lost or stolen. In both situations, estoppel by convention may arise out of the cardholder's silence based on the shared assumption that (i) all card transactions reflected in the statement were genuine if the cardholder did not raise a dispute after a period of time sufficient for him to find out about any fraudulent transactions; or that (i) the assumption that the card remains in the cardholder's possession as long as no notice of its loss was received by the issuer. The cardholder's silence led the issuer to believe that all the transactions are genuine. If the issuer relied on such assumption to act to its detriment, *i.e.* to make payment to the merchant, and/or caused the issuer to lose the opportunity to lodge a chargeback claim within prescribed time limit

[153] *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt* [1985] 2 Lloyd's Rep 28, *per Kerr LJ at 34-35: "... in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption."*. The requirement has been accepted as correct by Bingham LJ in *The Vistafjord* [1988] 2 Lloyd's Rep 343 at 351.

[154] *The Indian Endurance (No 2) Republic of India and another v India Steamship Co Ltd* [1996] 3 All ER 641, per Staughton LJ at 652e: *"It appears to us to be the very least that can be required to constitute convention, which in this context must mean agreement or something very close to it."*

[155] *The Indian Endurance (No 2) Republic of India and another v India Steamship Co Ltd* [1996] 3 All ER 641, per Staughton LJ at 652e: *"In our judgment it is essential that the assumption be agreed for there to be an estoppel by convention; but agreement need not be express and may be inferred from conduct, or even from silence."*

[156] *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd, The Amazonia* [1990] 1 Lloyd's Rep 236 at per Dillon LJ at 251: *"The modern formulation of the question to be asked where there is a question of estoppel by convention is that the Court should ask whether in the particular circumstances it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly he has allowed or encouraged another to assume to his detriment."*

(usually 6 months), then it would be unconscionable to allow the cardholder to deny liability to repay the issuer for the card transaction. The fact that estoppel by convention may apply where the terms of a contract signed between the parties is replaced by a subsequent shared assumption[157] does not prevent estoppel by convention to apply in the case where the parties do not deviate from the contract, as in the case of credit card considered here.

4.3 Estoppel by representation

To establish an estoppel by representation it is necessary to show that a representation was made by the party sought to be estopped. There is authority supporting this requirement: *"... estoppel normally depends upon the existence of a representation by one party, in reliance upon which the representee has so changed his position that it is inequitable for the representor to go back upon his representation."*[158] It has also been held that the representation must be clear and unequivocal[159] or alternatively that the representation must be clear, unqualified, precise and unambiguous[160]. The requirement as to the content of a representation was further refined by the House of Lord in *Woodhouse AC Israel Cocoa Ltd v. Nigerian Produce Marketing Co Ltd*, where it was held that it was not necessary to show that the representation was capable of only one possible

---

[157] *Amalgamated Investment & Property Co. Ltd. (in liquidation) v. Texas Commerce International Bank Ltd* [1982] QB 84, Per Lord Denning M.R. at: *"When the parties to a contract are both under a common mistake as to the meaning or effect of it - and thereafter embark on a course of dealing on the footing of that mistake - thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them."*
[158] *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 AC 548 per Lord Goff at 578.
[159] *Sidney Bolsom Investment Trust Ltd. v. E. Karmios & Co. (London) Ltd* [1956] 1 QB 529, CA per Denning L.J. at 540; *Lowe v. Lombank* [1960] 1 WLR 196, CA per Diplock J. at 205.
[160] *Canada and Dominion Sugar Company, Limited v. Canadian National (West Indies) Steamships, Limited* [1947] AC 46 at 56.

interpretation[161]. It was sufficient if any interpretation, other than that formed by the representee was far fetched and strained[162]. The representation had to be sufficiently clear to justify the representee's having no doubt what the words meant what it took them to mean[163].

The issuer may succeed to estop the cardholder from denying the liability for unauthorized card transaction based on the cardholder's failure to dispute a certain transaction or to inform the issuer of lost or stolen card if it can show that the cardholder has made a representation to it by words or conduct. This may be an alternative to the doctrines of implied or apparent authority discussed in section 2 above. The problem remains in cases where it is impossible or difficult to prove the existence of a representation. In this case, the issuer may have to establish a representation either by silence or by negligence.

Cases in which a representation may be deemed to have been made by passive conduct or silence are often referred to as estoppel by silence or estoppel by acquiescence. The term estoppel by acquiescence is usually used to denote a proprietary estoppel case, which is not relevant to our analysis of unauthorized transaction. What we are concerned with here is when an estoppel by representation case can be made out of a party's silence. In the case of *Moorgate Mercantile Co Ltd v Twitchings,* Lord Wilberforce held that: "*In order that silence or inaction may acquire a positive content it is usually said that there must be a* ***duty to speak or to act in a particular way, owed to the person prejudiced*** *... What I think we are looking for here is an answer to the question whether, having regard to the situation in which the relevant*

---

[161] [1972] AC 741, per Lord Salmon at 771.
[162] Per Lord Hailsham L.C. at 756.
[163] Per Lord Cross at 768.

transaction occurred, as known to both parties, ***a reasonable man****, in the position of the "acquirer" of the property, would expect the "owner" acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known to, and discoverable by, the 'acquirer' and whether, in the face of an omission to do so, the 'acquirer' could reasonably assume that no such title was claimed."*[164]

In *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)*[165], the dictum of Lord Wilberforce was further refined into the following formula: *"... the duty necessary to raise an estoppel by silence or acquiescence arise where a* ***reasonable man*** *would* ***expect*** *person against whom the estoppel is raised, acting honestly and responsibly* ***to bring the true facts*** *to the attention of the other party* ***known by him*** *to be under a mistake as to their respective rights."* The *Pacol* test was approved in subsequent decisions and has been generally accepted as a correct statement of the law[166].

Applying the *Pacol* test to the situation of unauthorized card transaction, the duty to speak of the cardholder may be inferred from the circumstances of the case and the relationship of the parties but not necessary from a pre-existing duty in tort or contract. However, it is necessary to show that the cardholder knew or suspected of a mistake in the belief of the issuer. In other words, the cardholder must have known or suspected that the unauthorized transaction occurred or that the card was lost or its particulars stolen. As the test seems to refer to actual, not constructive knowledge, if the cardholder was actually unaware of the fact that

---

[164] [1976] 2 All ER 641 at 645-646, [1977] AC 890 at 903.
[165] [1982] 1 Lloyd's Rep 456, per Webster J.
[166] *The Stolt Loyalty* [1993] 2 Lloyd's Rep 281, *The Indian Endurance (No 2) Republic of India and another v India Steamship Co Ltd* [1996] 3 All ER 641. See also Wilken & Villiers, "*Waiver, Variation and Estoppel"*, 1998, at section 8.061.

the unauthorized transaction occurred or the card was stolen, it is not possible to impose on him a duty to speak in order to establish estoppel by representation.

There have been a number of cases in which a representation was inferred from negligence. Such cases are usually referred to as estoppel by negligence. We will consider this doctrine in the next section.

4.4 Estoppel by negligence

To establish estoppel by neglicence it is necessary to show that: (i) the representor owes a duty of care to the representee; (ii) the representor negligently failed to perform the duty[167]; (iii) the representor's negligence has led the representee to believe a state of facts[168]; and (iv) the negligence was the proximate cause of loss to the representee. Where estoppel by negligence is established the representor will be estopped from denying the state of facts that the representee was led to believe. Some authorities suggest that only duty-breach-damage will suffice[169]. To apply estoppel by negligence the most difficult task is to determine when a duty of care will be imposed in the absence of any established principle to do so.

The doctrine of estoppel by negligence has been applied in the context of banking law in the case of *London Joint Stock Bank v. Macmillan*[170]. The House of Lords held that a customer owed a duty to his bank to exercise reasonable care in drawing a cheque to prevent the bank being misled. If the customer's negligence in drawing the cheque led the bank to believe the instruction contained in the

---

[167] The requirements (i), (ii) and (iv) was laid down in *Moorgate Mercantile Co Ltd v. Twitchings* [1977] AC 890 per Lord Fraser at 924 and per Lord Salmon at 912.
[168] *Dixon v. Kennaway & Co* [1900] 1 Ch 833 per Farwell J. at 238.
[169] *Mercantile Credit v. Hamblin* [1965] 2 Q.B. 242, per Pearson L.J. at 271.
[170] [1918] AC 777.

cheque was valid, which result in the bank's loss, the customer would be estopped from denying the validity of the payment instructions and the liability incurred after it. This suggests that estoppel by negligence is potentially applicable to the situation of unauthorized credit card transactions.

Whether a cardholder owes a duty of care to the issuer remains a question. In section 5 below we will consider the possibility of establishing such a duty of care in connection with the tort of negligence. What we are concerned with here is whether it is necessary or useful to use the doctrine of estoppel by negligence to determine the question of liability for unauthorized transaction. We suspect that that is not the case.

Estoppel by negligence itself is a controversial concept that has caused considerable difficulty. In *Greenwood v. Martins Bank Ltd,* Greer L.J. has said, *"Estoppel by negligence is representation of fact by conduct, and if it is right to infer representation from conduct, it must have the same effect as representation by direct statement."* [171] According to this analysis, estoppel by negligence may be considered a variant of estoppel by representation. However, the analysis by Greer L.J. is not conclusive because the application of estoppel by negligence does not seem to fit with the framework of either estoppel in general or estoppel by representation in particular. *Wilken and Villiers*[172] commented that *"estoppel by negligence is neither a valid legal principle nor one that falls within the law of estoppel or of estoppel by representation"*. The reasons for this comments is that it is difficult to find neither any *representation* made or *belief induced* nor any intention or *knowledge* of the estopped party that the other

---

[171] [1932] 1 KB 371, Court of Appeal per Greer L.J. at 388, the case was later confirmed by the House of Lords reported at [1933] AC 51.
[172] Wilken and Villiers, *Waiver, Variation and Estoppel*, 1998, at page 114.

party would act on its representation from the duty-breach-damage formula of estoppel by negligence. There is also difficulty ascertaining the content of the representation, necessary to establish estoppel. Furthermore, *Wilken and Villiers*[173] also suggested another practical reason that *"most, and probably all of the so-called estoppel by negligence cases are better explained by other legal principles".* According to this analysis, a case of estoppel by negligence in the context of banking law such as *London Joint Stock Bank v. Macmillan* may be interpreted in ways other than estoppel by negligence. Instead of establishing estoppel to prevent the customer from raising its claim against the bank for breach of the banking mandate, a better alternative is to hold that the bank has a claim for damages of the same amount arise from the customer's breach of duty in contract or tort, hence the customer's claim fails for circuity of action[174]. Another alternative is to hold that the bank was entitled to an indemnity under the mandatory relationship with the customer, which would operate to protect the bank in case the customer was in breach of his duty. The indemnity would equal and defeat the customer's claim in the same way as circuity does.

Several arguments against the above suggestion have been canvassed[175]. The most relevant of such arguments is that, it may be difficult to imply into the banking mandate a duty of the customer sufficient to create a cause of action in contract because of the more restrictive interpretation of the banking mandate under English law where customers are not obliged to examine bank statement[176]. However, a duty of care may exist in tort. If a duty of care can be established for the purposes of applying estoppel by negligence, it could be used as a basis in

---

[173] Wilken and Villiers, *Waiver, Variation and Estoppel*, 1998, at page 114.
[174] The alternative view was taken by Lord Finlay at 811, [1918] AC 777.
[175] See page 436 – 438, Wilken and Villiers, *Waiver, Variation and Estoppel*, 1998.
[176] *Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd [1986] AC 80* per Lord Scarman at 106E-7A

actionable negligence as well. The formula for estoppel by negligence is almost indistinguishable from actionable negligence. It has been suggested that, because negligent misstatement was recognized as a possible basis for estoppel long before it was recognized as a basis for actionable tort, perhaps, the duty of care required for estoppel is more limited than in tort[177]. This is, however, only a suggestion and there is no authority defining the difference in the extent of duty of care required for each doctrine.

For the purposes of our analysis relating to unauthorized card transaction, it is submitted that the analysis of duty-breach-damage formula should better be made in relation with principles of the tort of negligence, which we will do in the next section.

5. NEGLIGENCE

The requirements for establishing the issuer's cause of action against the cardholder in the tort of negligence is not much different to the requirements for estoppel by negligence (if any). The formula includes three basic elements of duty of care, negligent conduct, and proximate loss sustained by the issuer. Additional attention is also required as to the question whether the issuer's loss, which is likely a pure economic loss, is a recoverable head of damage.

5.1 Duty of care of the cardholder

To hold the cardholder liable for negligence it is necessary to establish a duty of care to the issuer first. To determine whether the cardholder has a duty of care

[177] C.Y. Lee, *Law of Consumer Credit*, 1990 at page 91.

and the extent of such duty it is necessary to look at who he is or what the law consider him to be in the relationship with the issuer. The most tempting analogy to establish the cardholder's duty of care is found in banking law.

(a) Duty of care by analogy with banking law

It has been suggested in a book on credit card law that, in the absence of any authority exactly on the point, the duty of care of the credit cardholder can be established by analogy with the relationship between banks and customers[178]. Cases in respect of banking law have established that the duty of a bank's customer includes (i) the duty to exercise reasonable care in drawing cheques to prevent the banker from being misled[179]; (ii) the duty to notify the bank when suspicious circumstances arise[180]. The duty to prevent forgery has been held to include not leaving unusual blank spaces in cheques[181] and giving reasonable assistance for the bank to recover against forgers[182]. However, the customer's duty is not extended to verifying all bank statements unless he is bound by contractual terms to do so[183].

If an analogy can be validly drawn here, the cardholder would have a duty not to behave in such a way as to facilitate forgery; to sign new card upon receipt from

---

[178] Peter E. Sayer, *"Credit Cards and The Law, an Introduction"* (1988).
[179] *London Joint Stock Bank Ltd v. Macmillan and Arthur* [1918] AC 777 which approved and applied *Young v. Grote* (1827) 4 Bing. 253, 130 ER 764
[180] *Greenwood v. Martins Bank Ltd* [1932] 1 KB 371, CA.
[181] *London Joint Stock Bank Ltd v. Macmillan and Arthur* [1918] AC 777 per Lord Finlay at 810. But, if the cheque was properly drawn except for one space there may be no breach, per Viscount Haldane at 814-815.
[182] *Fung Kai Sun v Chan Fui Hing* [1951] AC 489, PC at 506. Customer will be in breach of his duty of care if his silence gives the forger the chance to escape provided the customer was aware of the potential forgery.
[183] *Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd [1986] AC 80* per Lord Scarman at 106E-7A. But, according to *Canadian Pacific Hotels Ltd v. Bank of Montreal* (1981) 122 DLR (3d) 519, if the customer is a sophisticated commercial entity that is expected to monitor its finances strictly, it is under a duty to do so, per Mongomery J. at 532.

the issuer; to inform the issuer if he knew or suspect that unauthorized transactions occurs; and to give the issuer reasonable assistance to recover against unauthorized card users; but not necessarily to be obliged to check card statements. If the cardholder is in breach of any of these duties, he may be liable for the loss sustained by the issuer.

However, there is no authority suggesting that an analogy can be validly drawn between the duty of a cheque book holder and a credit cardholder. Reasonable doubt has been raised as to the validity of such an analogy for the main reason that the nature of relationship between the parties is significantly different[184]. Therefore, we need to look into the reasons behind the duty of care of a cheque book holder to find an answer. In *Young v. Grote*[185], a case decided nearly 200 years ago, a customer was held liable to the bank for gross negligence in issuing cheque in a manner that facilitated forgery. In *Scholfield v. The Earl of Londesborough*[186], the House of Lords carefully distinguished the duty of an acceptor of a bill of exchange to take precautions against fraudulent alterations in the bill after acceptance and the duty of care owed by a customer to his bank in drawing cheque. Lord Davey expressed his entire agreement with Lord Watson's judgment, and said: *"I only desire to say that, in my opinion, our judgment in this case is outside the case of Young v Grote (1). The doctrine of that case was one arising out of* ***the relation of mandant and mandatory****, which does*

---

[184] C.Y. Lee, *"Law on Consumer Credit"* (1990) at page 91-92.
[185] Court of Common Pleas, (1827) 4 Bing. 253, 130 ER 764. In this case, when leaving the home for a few days, Mr Young left with his wife five blank cheques signed by him. Mrs. Young delivered one cheque to her clerk, Worcester who filled up the amount of 50 pounds 2s 3d. Worcester filled the cheque up with several blank spaces allowing him to later insert numbers and letters to increase the amount to 350 pounds 2s 3d. Best CJ. (at 259, Park J. Burrough J. and Gaselle J. agreed with Best CJ's judgment) found that Mrs. Young was grossly negligent in the manner in which she had the cheque filled up. Her neglection of ordinary precautions induces the bankers to pay. Therefore, Mr. Young was liable to the banker for the loss.
[186] [1896] A.C.514(H.L.).

not exist in the pass of the acceptor and holder of a bill of exchange." In the more recent case of *London Joint Stock Bank Ltd v. Macmillan and Arthur*[187], the House of Lords, again, placed heavy emphasis on the mandate as the sole basis of the bank's customer's duty of care. Lord Finlay LC. Cited the above passage of Lord Davey's judgment and said: *"The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a **mandate** to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty".* From these authorities, it is safe to conclude that the customer's duty of care in drawing cheques stemmed from the special mandant-mandatory relationship between the customer and the bank, not from a duty of general care at law.

The nature of the relationship between a holder of credit, debit or charge card does not appear to be mandant-mandatory. In a typical swipe card transaction, the cardholder signs a transaction receipt which usually says *'I hereby authorized you to charge the above transaction to my card account'.* As discussed in chapter II, the transaction receipt is distinguishable from a cheque or negotiable instrument. When signing the transaction receipt the cardholder does not give any mandate to the issuer or the merchant. As most card transaction requires an *'approval'* from the issuer via the card network, neither the issuer nor the

[187] [1918] AC 777.

merchant is bound to honor the card when presented by the cardholder. If a mandate is to exist at all, it is the mandate from the issuer to the merchant to honor the cards for the payment transaction that has been approved through the card network.

Furthermore, as found in the *Scholfield* case, even the mandant-mandatory relationship between banker and customer does not give rise to a duty to keep the cheque book safe similar to the duty of an acceptor to safeguard a bill of exchange. It seems that the extent of the duty of a holder of a cheque book should be higher than the duty of the holder of a credit card, because a cheque may be a negotiable instrument when the credit card may not. A cheque requires the account holder's real signature, it is not issued by a customer in case of forgery. In contrast, credit card transactions do not always require the cardholder's signature. If a holder of a cheque book is not under a duty to safeguard the book, why should a cardholder have a duty to safeguard the card?

In conclusion, while the authorities relating to bank's customer's duty of care may be a strong suggestion that there exists a duty of care by the cardholder towards the issuer, it is difficult to infer or ascertain the extent of the cardholder's duty of care by analogy with the duty of a holder's of bank's chequebook.

(b) Duty of care by analogy with travelers cheques and circular notes

Because the analogy between the cardholder-issuer relationship and that of banker-customer is doubtful, it may be necessary to determine the extent of the cardholder's duty of care by analogy with other instruments having similar

features. It has been suggested that the closest analogy with credit card is the travelers letter of credit but there is a dearth of authority in respect of the duty of care of holders of travelers letter of credit. The types of instruments having features most similar to the credit cards for which judicial decisions have been made in respect of their holder's duty of care are circular notes and travelers cheque.

It has been suggested that circular note is an interesting parallel to the credit card[188]. We will look into this suggestion even though the instrument has become obsolete. Similar to credit cards, circular notes are non-negotiable instruments issued by banks to travelers, which allow the holders to draw money from one of the correspondent banks by signing a draft printed on the back of the notes. The correspondent banks usually compare signature on the draft with the signature on the letter of indication, which is usually dispatched separately from the notes. To prevent forgery the holders of circular notes are required to affix signature on the letter of indication immediately after its issuance and before setting out abroad and keep the letter separate from the notes. The several authorities in respect of circular notes held that the holder's breach of these requirements would estop the holder from a claim against the bank for loss arising from such a breach[189]. It was said that the requirements indicates certain duty of care of the holder implied in the contract between him and the issuer.

The authorities on circular notes were not concerned with the duty of care of the holder to prevent loss or theft of the notes or whether the bank has a claim in negligence. In this respect, the analogy with traveler cheques seems to be more

---

[188] C.Y. Lee, Law of Consumer Credit, 1990, page 92.
[189] *Rhodes v. London and County Bank* (1880) 1 Legal Decisions Affecting Bankers; *Hume-Dick v. Herries, Farquhar & Co* (1888) 4 T.L.R. 541.

helpful. The term '*travelers cheque'* is a misnomer because it is neither a cheque nor a negotiable instrument. Traveler cheques, issued by banks to travelers, essentially contain a conditional undertaking by the issuer to pay the specified amount to the holder if the signature affixed by the holder when he purchased the travelers cheques tally with the countersignature he executed when he cashes it. Because the issuer's undertaking is conditional, the traveler cheques should not be considered a bill of exchange, a cheque or a promissory note, even though there is an American authority suggesting that the travelers cheques are to be regarded as negotiable instruments[190]. There are two English authorities on travelers cheques that are relevant to our enquiry herein, both authorities concerned with the issuer's liability to give a refund to the holders for travelers cheques lost before the countersignature was affixed. In *Braithwaite v Thomas Cook Travellers Cheques Ltd* [191] the court gave effect to an express terms in the issuer-holder contract which made the holder's rights to reimbursement conditional upon his exercise of the duty to *"properly safeguard the cheques against loss or theft"*. Schiemann J. refused the suggestion by the plaintiff's counsel to base the analysis on the causal link between a failure to safeguard and the consequential loss. He instead considered that the conduct and behavior of the holder as a whole constitutes *carelessness* and based his judgment on a *foreseeability test*. In the subsequent case of *El Awadi v Bank of Credit and Commerce International S.A. Ltd*[192] it was held that there were express or implied terms in the contract between the issuer and the holder of travelers cheques that obliges the bank to refund the value of lost or stolen travelers cheques. It was further found that, in the absence of an express term in the

---

[190] *Emerson v American Express Company*, Municipal Court of Appeals of District of Columbia (United States of America), 6 Legal Decisions Affecting Bankers 337, per Cayton C.J. at 340.
[191] [1989] 1 QB 553, [1989] 1 All ER 235.
[192] [1989] 1 All ER 242.

contract, the holder was not liable for loss resulted from his negligence in safeguarding the cheques[193]. This ruling suggests that, generally, the holders of travelers cheques owe *no* duty to safeguard the instruments against loss or theft and a term to impose such duty of care may *not* be implied into the contract.

The similarity between travelers cheques and credit card cannot be ignored. Both of them are not negotiable instruments and both contain an undertaking by the issuer to make payment to a third party, who honoured the instruments. The arrangement of both requires the holder to affix the specimen signature on the instrument immediately upon issuance and the payment by both instruments requires the countersignature to tally with the specimen signature. The difference that traveler cheques are paid in cash while credit card are generally used to pay for goods and services is not relevant for the purposes of our enquiry. If an analogy is to be drawn between travelers cheques and credit cards, the cardholder would *not* owe a duty to safeguard the card against loss or theft. The *only* duties that may be imposed on the cardholder, by analogy to both circular notes and travelers cheques, are *to sign the new card* immediately upon its issuance and *to inform* the issuer after the card is lost or stolen.

(c) Duty of care as an agent for the issuer

As discussed in chapter II, at the point of each card transaction there are three bilateral contracts made between the issuer, the cardholder and the merchant.

---

[193] [1990] 1 QB 606 per Hutchison J. said "*I consider that the contract contained an express term obliging the bank to refund the value of lost or stolen cheques*", and shortly after that he said: *"If I am wrong in holding that there was an express term entitling the purchaser to a refund, I hold that there was an implied term. That term is subject to the same qualifications afforded by the discretionary right to resist a refund",* and *"neither the fact of want of care or recklessness nor the bank's belief in their existence, offered the bank grounds for refusing, in its discretion, to make refunds"*

The analysis at the beginning of this chapter have focused only on the relationship between the issuer and the cardholder. In respect of the issuer-merchant relationship, our analysis in section 4.1. in chapter II showed that there were no contract between them before the cardholder presents the card to the merchant[194]. At the point of the card transaction a contract is made whereby the issuer undertakes to pay the merchant the transaction amount (less a certain discount) and in return the merchant provides goods or services to the cardholder. The issuer's undertaking may be made in two different ways. In an *'online'* transaction, which is more common, the merchant sends a request from his computer or electronic data capture terminal to the issuer tagged with the card particulars and the transaction amount. The transaction can be effected only after an *'approval'* signal for the specific transaction is received from the issuer via the electronic communication linkage. In this case, it is possible to infer from the circumstances that, by sending the approval signal, the issuer makes an undertaking directly to the merchant in respect of the particular card transaction. In variations of the *'online'* method, where the merchant does not have a direct communication link with the acquirer, but he obtains the approval via telephone from the acquirer, the issuer's undertaking is made via the acquirer who acts as an agent of the merchant. In contrast, where the transaction amount is below the merchant's floor limit or it is impracticable to obtain approval from the issuer, *'offline'* method (e.g. imprinter) may be used. In this case, the issuer's undertaking can be made only if the cardholder is considered an agent of the issuer in the dealing with the merchant. Unlike travelers cheques, which specifies

[194] A contractual relationship may be established between the issuer and the acquirer because they are both submitted to the rules of the card association by analogy with the approach taken by English courts as to clubs in cases such as *The Satanita* [1895] P. 248 and Clarke *v. Dunraven (Earl)* [1897] A.C. 59. However, there is no pre-existing contractual link between the issuer and the merchant.

the amount on its face and an undertaking to pay, the card alone is not sufficient to constitute an undertaking without an act of the cardholder.

Accordingly, the issuance of a credit, debit or charge card constitutes an appointment of the cardholder as an agent of the issuer authorized to make undertakings that, in appropriate circumstances (e.g. offline transactions), would become binding upon the issuer. Authorities in respect of a gratuitous agent impose on him the duty *"that which may be reasonably expected of him in all the circumstances"*[195]. Generally, factors relevant to determine the standard of care for a gratuitous agent are the skills and experience which he has or represented himself as having.

While there is no authority to support the suggestion to determine the duty of the cardholder based on the characterization as an agent for the issuer, the suggestion remains a possible option. If the cardholder's duty of care is to be founded on the basis that he is a gratuitous agent of the issuer, it might include the duty not to exceed the authority granted with the card and the duty to stop using the card and return it to the issuer upon request. When the cardholder exceeds his authority or continue to use the card in contravene with the issuer's instructions or in breach of his duty he may be liable for any loss or damage suffered by the issuer. The liability may exist both in contract and in tort. There is an American authority suggesting that the cardholder must be liable for card transaction intentionally effected by him after he has given notice to terminate the use of the card and the issuer has demanded the return of the card[196]. In the English case of *R.v.*

---

[195] *Chaudhry v. Prabakhar* [1989] 1 W.L.R. 29, Court of Appeal, per Stuart-Smith L.J. at 34 and Stoker L.J. at 37.

[196] *Walker Bank & Trust Co. v. Jones,* 672 P2d 73 (Utah 1983). The basis for the decision in the case was that the intentional use of the card constitutes a representation of apparent authority giving rise to authorized transaction for which the cardholder is fully liable pursuant

Lambie[197], the House of Lords held that a cardholder who exceeded the credit limit and ignored the issuer's demand to stop using the card was liable criminally for falsely representing to the merchant that she has authority to use the card.

Where the cardholder gives the card or its particulars to a carduser, the carduser may be considered as a sub-agent of the issuer. In the absence of any notice to the issuer, the authority of the carduser as sub-agent) may be established by the application of apparent authority doctrine. The only difference is that, in this case the carduser's apparent authority is created not by a representation by the principal (the issuer), but by an authorized agent (the cardholder). The apparent authority doctrine does not require that the person making the representation must be the principal as long as that person is *"authorized in accordance with the law of agency."* However, an agent with apparent authority cannot, by his conduct give rise to apparent authority in a sub-agent[198]. Therefore, a carduser with apparent authority may not create apparent authority in a third party.

Another alternative in establishing the cardholder's duty of care, which has been explored in section 3.2 above, is by characterizing him as a bailee. It has been suggested that the cardholder, as a bailee, may be liable for loss resulting from his failure to give timely notice to the issuer when the card was lost or stolen.

---

to the Consumer Credit Protection Act of the United States. However, it is submitted that had the decision been made in the absence of such a legislation, it could have been based on principle of agency.

[197] (1982). In this case the House of Lord applied *Metropolitan Police Commissioner v. Charles (1977)* to hold that Ms. Lambie has by conduct induced the deception that she was an agent of the issuer, Barclays Bank, authorized by them to enter into contract with the merchant's on the bank's behalf.

[198] *Crabtree-Vickers Pty. Ltd. v. Australian Direct Mail Advertising and Addressing Co. Pty. Ltd* (1975) 133 C.L.R. *Chitty on Contract*, 29th Edition, Volume 2, 31-056 at note 317.

(d) Conclusion

The above analysis is an attempt to establish the existence and extent of the duty of care owed by the holder to the issuer of credit card. In the absence of authority directly on the point, it is submitted that following duty may be imposed on the cardholder based on the above analysis:

(i) The duty to sign the card immediately upon receipt from the issuer. This duty may be based on express contract term found in the cardholder agreement or as an implied term by analogy with circular notes and travelers cheques;

(ii) The duty to inform the issuer within a reasonable period of time after the card is lost or stolen or when the cardholder knew or suspected that unauthorized transactions have occurred. This duty may be founded on the analogy with travelers cheques;

(iii) The duty to not to exceed the card credit limit, to stop using the card and return it upon the issuer's demand. This duty is founded on the characterization of the cardholder as a gratuitous agent for the issuer in the dealing with the merchant; and

(iv) The duty to exercise reasonable care to prevent loss or theft of the card. This duty is based on the characterization of the cardholder as a gratuitous bailee of the card.

However, the cardholder's standard of care should not extend to examining and verifying card statements and preventing the card particulars from being revealed to others, unless he is contractually bound to do so.

5.2 Proximate loss and recovery of economic loss

Our next enquiry relates to the loss suffered by the issuer and comprises three questions: (i) when the loss is caused to the issuer (ii) whether the loss can be said to be proximately caused by the cardholder's breach of duty, and (iii) whether the issuer's pure economic loss is recoverable.

(a) Loss to the issuer

There are two kinds of loss that may be suffered by the issuer, the production cost of the card and the financial loss due to the liability to pay or actual payment of money to the merchant. The loss attributed to the replacement of the card is very nominal. Recent technology advances allow issuers to manufacture a smart card for fractions of a dollar. In practice, after a cardholder terminates the use of a card verbally or in writing and the use of the card was deactivated from the computer system of the issuer the card is generally treated as a worthless piece of plastic. Some issuers require the cardholder to return the card cut in half while others only ask the cardholder to destroy the card. However, in case a card is lost or stolen and the cardholder failed to inform the issuer, it is arguable that the issuer suffers both loss of a property, namely the card, and economic loss consequent upon the loss of property. This argument may be used to avoid the obstacle associated with recovery of pure economic loss not linked to damage of property.

The financial loss may be incurred by the issuer only when he makes payment to the merchant or was under a binding and irreversible obligation to make such payment. In practice, the charge-back rules of the credit card networks generally require (i) the issuer, upon receiving the cardholder's complaint of unauthorized transaction, to credit the transaction amount back to the card account pending further investigation, and (ii) allows the acquirer to recover the amount previously credited in the merchant's bank account in respect of the alleged unauthorized transaction. Usually the time limit to raise a charge-back is as long as 6 months, allowing the issuer very reliable option to avoid financial loss. Currently, the rules of the major credit card networks split the risk of unauthorized transaction between the issuer and the acquirer on the basis of the presence of the card and signature in the transaction. The issuer is usually bound to pay if the card was present and the signature on the transaction receipt corresponds with the cardholder's signature on the card. The acquirer takes the risk for unauthorized card transactions where the card was not present, such as transaction by telephone or internet.

Where the issuer was not bound to pay the merchant or was entitled to the reimbursement of the amount paid, as in the case of remote card transaction, it may suffer no loss. Therefore, it cannot succeed to claim for damages in tort[199].

(b) Causal link

---

[199] It is submitted here that the principle of *res inter alios acta* does not apply because the situation is not an arrangement between the issuer and a third party (merchant/acquirer) to cover the loss but that the issuer's liability toward the merchant/acquirer never arise in respect of unauthorized transactions.

The next question is whether the cardholder's carelessness of safeguarding the card or failure to give the issuer timely notice in respect of lost card or known unauthorized transaction can be said to have caused the issuer the loss. There are powerful authorities suggesting that this causal link may not exist. In *Scholfield v. The Earl of Londesborough*[200], Lord Halsbury L.C. and Lord Watson in the House of Lords cited the following analysis of Bovill C.J. in *Societé Générale v. Metropolitant Bank*[201] with approval: *"Persons are not to be supposed to commit forgery, and the protection against such a crime is the law of the land, not the vigilance of parties in excluding all possibility of committing it"*. The analysis was again approved by Viscount Haldane in *London Joint Stock Bank Ltd v. Macmillan and Arthur*[202]. According to these authorities, the proximate cause of the loss to the issuer seems to be the crime of fraud, but not the negligence of the cardholder. However, Lord Finlay L.C. in the latter case also said (at 811): *"... the fact that a crime has to intervene to cause the loss does not make it too remote. Indeed, forgery is the very thing against which the customer is bound to take reasonable precaution."* This appears to suggest the opposite view that the cardholder's negligence may be considered a not-too-remote or proximate cause of the issuer's financial loss.

In view of the expanding purchasing power of the credit card on the internet and the increase of credit card fraud, it is submitted that the view of Lord Finlay L.C. is to be preferred. An isolated momentary inadvertence by the cardholder may not appear to be the direct cause of a fraudulent card transaction, but his overall carelessness may be a foreseeable proximate cause of loss to the issuer.

---

[200] [1896] A.C.514(H.L.).
[201] 27 L.T. 849.
[202] *London Joint Stock Bank Ltd v. Macmillan and Arthur* [1918] AC 777.

(c) Recovery of economic loss

Assuming there was a negligent breach of duty by the cardholder in the relationship with the issuer, our next enquiry is whether the issuer's loss, as a primarily economic loss, may be a recoverable head of damages. As suggested above, a distinction may be made between (i) the case where the card was lost and the cardholder failed to give prompt notice to the issuer of such loss and (ii) the case where the card was not lost but the card particulars were intercepted and used to effect unauthorized transactions. In the first case, it can be said that the issuer's economic loss is consequential upon the loss of property in which it has an interest. In this case the economic loss is more likely to be recoverable than the case of pure economic loss in the second case[203]. Arguments can be made against this distinction. The carelessness of the cardholder in keeping the card only caused the issuer the loss of the plastic card and it may not be the main cause of the financial loss of the issuer. The main cause of the financial loss is the failure to inform the issuer promptly thus allowing the thief more time to use the card to effect unauthorized transaction. The economic loss of the issuer in this case may not be the immediate consequence of the physical loss or negligent missing of its property.

The principles governing liability for pure economic loss was first established in the landmark decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller &*

---

[203] *Wimpey Construction (UK) Limited (and others) v. Martin Black & Co (Wire Ropes) Limited* (1982) SLT 239. There were 2 plaintiffs who were engaged in a joint venture for a construction of a tanker terminal. They used a crane, which belonged to the 2nd plaintiff, which was negligently damaged by the defendant. Both plaintiff suffered substantial losses due to the 86 days delay of the project. The second plaintiff's claim succeeded but the 1st plaintiff's claim failed because it has no interest in the property that was damaged. This has been considered a clear statement of the general rule of recovery of economic loss. See also *Spartan Steel and Alloys Ltd v. Martin & Co (Contractor) Ltd* [1973] 1 QB 27 where Lord Denning refused economic loss suffered independently of physical damage.

Partners Ltd[204] ('*Hedley Byrne*'). The statements made by the law Lords in this case, although expressed in slightly different ways, demonstrate that the basis of a duty of care in the circumstances of the case (negligent misstatement) is actual or imputed knowledge or foreseeability by the defendant that a particular person or a class of persons would most probably place reliance on the defendant's statement, advice or services rendered without making further enquiries. In other words there must be an *assumption of responsibility* by the defendant when making the representation[205]. In *Smith v. Eric S. Bush*[206], *assumption of responsibility* was identified by Lord Templeman as the criterion for determining whether a duty of care arose. However, the criterion was doubted by Lord Griffiths in the same decision. His lordship formulated the threefold test of *'foreseeability'*, *'proximity'* and *'fairness'*.

In the subsequent case of *Caparo Industries plc v Dickman*[207], Lord Grififth's threefold test was approved by the House of Lords. In addition, it was held that the liability for economic loss due to negligent misstatement was confined to cases where the statement or advice is given to a known or direct recipient for a specific purpose which was made known to the author of the statement or advice and upon which the recipient relies upon and acts to his detriment[208]. However, in the same case, Lord Bridge doubted that the criteria of '*proximity*' and '*fairness*' are "*susceptible of any such precise definition as would be necessary to*

[204] [1964] AC 465.
[205] Lord Reid (at 486) said that the duty of care would arise *"where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him"*. Lord Morris, (at 502) said that *"it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise"*. Lord Devlin, (at 530) placed emphasis on the inquiry *"whether there is an express or implied undertaking of responsibility"* (emphasis added).
[206] [1990] 1 AC 831.
[207] [1990] 2 AC 605.
[208] Per Lord Oliver at 638. This is often referred to as Lord Oliver's four-stage test.

give them utility as practical tests"[209]. Therefore, his Lordship supported a third alternative, to use the traditional incremental approach to develop normal categories of negligence incrementally and by analogy with established categories, when he said: *"We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in Sutherland Shire Council v. Heyman (1985) 60 A.L.R. 1, 43-44, where he said: "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.""*

However, in *Henderson v Merrett Syndicates Ltd*[210], a case that extended the *Hedley Byrne* principle from provision of information and advice to performance of other services, '*assumption of responsibility'* and '*reliance'* resurfaced as the main criteria on which duty of care may be founded in exclusion of Lord Griffith threefold test. Lord Goff, said (at 181) *"… if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the Hedley Byrne principle, there should be no need to embark upon any further enquiry whether it is "fair, just and reasonable" to impose liability for economic loss"*.

[209] [1990] 2 AC 605 per Lord Bridge.
[210] [1995] 2 AC 145.

A brief recall of the history of development of the principles governing the issue of liability for pure economic loss for negligence in Britain shows that there have been 3 different approaches that takes turn in different cases: (i) Lord Griffith's threefold test of *'foreseeability'*, *'proximity'* and *'fairness'*; (ii) the *Hedley Byrne 'assumption of responsibility'* test; and (iii) the incremental approach proposed by Lord Bridge. In more recent cases the courts in Britain have chosen to apply all these tests in turn. In *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No 2)*, Sir Brian Neill applied all three tests and suggested that *"it may be useful to look at any new set of facts by using each of the three approaches in turn"*[211]. This approach was approved by the Court of Appeal in 2005[212] and accepted in standard textbooks[213]. This should be accepted as the law of Britain at present.

The courts of Singapore, however, have refused to follow the approach taken by the English courts, which was regarded as too uncertain. The principles governing liability for pure economic loss were comprehensively analysed and considered settled in the landmark case of *RSP Architects Planners & Engineers v MCST Plan No 1075*. In this case, L .P. Thean J.A. conducted thorough analysis of the authorities in England and other Commonwealth jurisdictions and concluded that[214]:

---

[211] [1998] Lloyd's Rep Bank 85 at [7.19]. He also commented that *"if the facts are properly analysed and the policy considerations correctly evaluated the several approaches will yield the same result"*

[212] *Commissioners for Customs and Excise v Barclays Bank Plc* [2005] 1 Lloyd's Rep 165, [2005] All E.R. 789. Three-test approach was approved by the Court of Appeal. Lindsay J. explained at [52] the inter-relationship between the 3 tests: *"In a case such as the one at hand, where the debate concerns an area in which a duty of care has not previously been found, each of the tests is best regarded as a check on the conclusion provisionally reached upon the application of the other two. It is only when one test has been verified as correctly conducted by the finding that it leads to the same conclusion as do the others that it can safely be taken to be reliable"*

[213] *Clerk & Lindsell on Torts,* Sweet & Maxwell, 19th Ed, 2006, at 8-90, 8-91.

[214] [1999] 2 SLR 449 at [31].

"Stripped of the verbiage, the crux of such approach is no more than this: the court first examines and considers the facts and factors to determine whether there is sufficient degree of ***proximity*** *in the relationship between the party who has sustained the loss and the party who is said to have caused the loss which would give rise to a duty of care on the part of the latter to avoid the kind of loss sustained by the former. This court in Ocean Front said at p 139: "... the approach of the court has been to examine a particular circumstance to determine whether there exists that degree of proximity between the plaintiff and the defendant as would give rise to a duty of care by the latter to the former with respect to the damage sustained by the former. Such* ***proximity is the 'determinant'*** *of the duty of care and also the scope of such duty".*

Next, having found such degree of proximity, the court next considers whether there is any material factor or ***policy*** *which precludes such duty from arising. Both on principle and on authority, we do not see why such an approach should not be taken in Ocean Front and in a case such as the one before us."*

The conclusion by L. P. Thean JA has been regarded in subsequent decisions as a restatement of the principles governing liability for pure economic loss caused by negligence to be applied in Singapore. The formula which has been simplified to two elements of *'proximity'* and *'policy'* should be distinguished from the two-stage test in *Anns v Merton London Borough Council*[215] which had been deprecated by subsequent decisions in Britain. The difference lies in that Lord Wilberforce's two-stage test focused entirely on '*foreseeability'* as the sole requirement to determine *'proximity'*. The concept of *'proximity'* propounded by

[215] [1978] AC 728.

L.P. Thean J.A. encompasses elements of assumption of duty, reliance on the skills of the defendant and relationship between the parties, in addition to foreseeability but without listing out the factors in an all-inclusive list, as noted at paragraph 42 of his judgment:

"It is important to understand that the concept of 'economic loss', just like the concept of 'reliance' does not run uniformly through the law of negligence. ***It may not be considered in abstraction****, but must be considered together with all the other 'labels' of liability, such as* ***'foreseeability', 'reliance', and 'reasonability'****. Thus, where the loss is economic in nature, different requirements are necessary – depending on the nature of the negligent act or omission – to give rise to liability. As this court emphasised in Ocean Front [RSP Architects Planners & Engineers v Ocean Front Pte Ltd [1996] 1 SLR 113], the question is not whether a duty was owed by A to B, but whether a duty was owed by A to B to avoid the loss incurred by B."*

In the recent case of *United Project Consultants Pte Ltd v Leong Kwok Onn* the Singapore Court of Appeal has approved the two-element test of *'proximity'* and *'policy'* as the law of Singapore by stating that:

"It becomes apparent that this court has regarded the touchstone for liability to be ***"proximity"****. In essence, before liability may be imposed upon a defendant for pure economic loss, a court must be satisfied that all the circumstances of the case give rise to a relationship whereby the defendant owes a duty to the plaintiff to avoid the particular loss suffered by the plaintiff. In doing so, the*

court must likewise be satisfied that there are no ***policy*** *reasons why such a duty ought not to be imposed."*[216]

Applying the principle as it stands in Singapore to the situation of liability for unauthorized credit card transaction, it seems likely that the economic loss of the issuer in this case is recoverable as all the elements required for *'proximity'* appears to be present. The cardholder carelessness in keeping the card or failure to sign the card upon issuance or to inform the issuer of lost card is a *foreseeable* cause of the issuer's loss. The issuer appears to *rely* on the care of the cardholder when issuing the card and when making payment to the merchant. The cardholder seems to *assume the responsibility* towards the issuer when keeping and using the card. There seems to be little or *no policy reason* not to impose such duty of care on the cardholder, given the purchasing power that accompanies the card.

The most important impact that the consumer credit protection legislations in Britain and America have made on the issue of liability for unauthorized card transaction is the confirmation that the cardholder has no liability for unauthorized transactions other than that provided in the Acts[217]. In this respect, the situation in Singapore is the opposite. In the absence of any legislation on the issue of liability for unauthorized card transaction, as shown above, the card issuer's claim may be based on the principles of apparent authority, bailment, estoppel or negligence. In the next section, we will consider the last, but most

---

[216] Singapore Court of Appeal, [2005] 4 SLR 214; [2005] SGCA 38, per Chief Justice Yong Pung How at [35], emphasis added.

[217] For example, sub-section (d) of §1643 of Consumer Credit Protection Act (Chapter 41) of the United States provides that *"Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card"*.

frequently used means by which the Singapore issuers place the burden of fraud loss to the cardholder, namely risk-shifting contractual terms.

6. RISK-SHIFTING TERMS IN THE CARDHOLDER AGREEMENT

Risk-shifting terms are contractual provisions inserted by the issuer in the cardholder agreement to make the cardholder liable for unauthorized transactions. In this section we will analyze some of the standard terms used by the three biggest local banks (DBS, UOB and OCBC) and two major foreign banks (Citibank and Standard Chartered) as at 29th September 2006, which place the liability for unauthorized card transactions on the cardholder or prevent the cardholder from holding the issuer liable for unauthorized transactions. The focus of our attention is whether some of aspects of the risk-shifting terms should be considered as excluding or restricting the issuer's liability, and whether the Unfair Contract Term Act (UCTA) imported from England[218] may be invoked to restrain the final effect of such terms. Generally, it is likely that the UCTA applies because the cardholder deals as a consumer in the relationship with the bank because the situation satisfies the criteria set out in section 12.1. of the UCTA. The cardholder *"neither makes the contract in the course of a business nor holds himself out as doing so";* the issuer *"does make the contract in the course of a business";* and the dealing was based on the issuer's standard terms of business. Our discussion will start with the main terms that may be seen as directly exclude or restrict the issuer's liability. After that, we will consider other terms that may create the same effect of excluding liability by indirectly making it difficult or impossible for the cardholder to win in a conflict with the issuer.

[218] The English Unfair Contract Term Act 1977 was made part of Singapore law from 12th November 1993 by Application of English Law Act (Cap 7A).

6.1 Terms that directly exclude or restrict the issuer's liability

In the bilateral contractual relationship between the cardholder and the issuer, there are two ways to achieve the same result of making the cardholder liable for unauthorized transaction. The first is to exclude the issuer's liability and the second is to make the cardholder liable.

(a) Exclusion of liability clause

This first type of clause may fall within the scope of the UCTA more easily because of the label that is used. All cardholder agreements contain extensive exclusion of liability clauses that seek to absolve the issuer's liability in various situations such as: (i) the merchant's breach or non-performance of the sale contract with the cardholder; (ii) the merchant's refusal to accept the card for payment; and (iii) issuer's inability or failure to perform contractual obligation due to machines, computers or telecommunication malfunctioning, loss of data stored in computers and devices and other events beyond the control of the issuer. These excluded situations will be considered in chapter V. What we are concerned with here is the clauses that exclude the issuer's liability for unauthorized transaction. Example of such a clause is found in the standard terms of both local and foreign banks issuing credit, debit, or charge cards in Singapore. For example, the standard terms of Standard Chartered contains two clauses, one to exclude the bank's responsibility relating to any use of the card and the other to prevent the cardholders from holding the bank responsible for unauthorized transactions[219].

---

[219] Standard Chartered standard terms, Clause 13.5: *"The Bank is not responsible in respect of any loss arising directly or indirectly out of the use of the Card in any manner whether or not as a result of any malfunction of an ATM."* Clause 13.7: *"The Cardmember and the Company shall <u>not</u> hold the Bank responsible in any way for any loss arising <u>directly or</u>*

The Citibank's Visa-MasterCard Cardmember's Agreement, uses one clause to exclude the bank's liability for loss, damage, cost or expenses arising in connection with the card account or with the agreement, coupled with another clause to exclude the bank's liability for the negligence or willful default by any agents or contractors engaged by the bank[220]. The standard *'Terms and Conditions Governing Card Account'* used by OCBC, one of the 3 biggest local banks also excludes the bank's liability for loss, theft, use of misuse of the card. The terms also disclaim the bank's liability for any fraud or forgery perpetrated on the bank or any merchants, including the situation where the card particulars or cardholder's information is intercepted[221].

These clauses fall well within the scope of the UCTA because the banks seek to exclude liabilities in various situations ranging from breach of contract by the bank to negligent conduct and even include situations of willful default by the bank's agents or contractors. Section 2.2 of the UCTA requires that the contract terms seeking to exclude or restrict a party's liability other than death or personal injury resulting from negligence must satisfy the reasonableness test of the UCTA. Section 3. 2 of the UCTA also applies to require the terms that allow a party to

---

indirectly out of any Card Transaction and the utilisation of any facilities in connection with the Card and/or the Card Account effected by a person not entitled to do so."

[220] Citibank's standard terms: Clause 16.3: *"Loss/damage in connection with your card account: Notwithstanding any other terms and conditions of this agreement, we are not liable to you for any loss, damage, inconvenience, embarrassment, cost and expense of any nature which in any way may be suffered or incurred by you or by any other person in respect of or in connection with your card account and/or this agreement"*. Clause 16.5 *"Act or default of agents/contractors: You agree that we have the absolute discretion to use such agents, contractors or correspondents as we deem fit to carry out or procure any of the matters or transactions governed by or contemplated in this agreement, and we are not liable to you for any act, omission, neglect or wilful default on the part of such agents, contractors and/or correspondents."*

[221] OCBC' standard terms: *"10.1 We are not liable in any way: .... e. (i) for any loss, theft, use or misuse of the Card or disclosure of your PIN and/or any breach of this Agreement (ii) for any fraud and/or forgery perpetrated on us or any merchant, ... f. for the interception by or disclosure to any person (whether unlawful or otherwise) of any data or information relating to you, any Card Transaction or your Card Account transmitted through or stored in any electronic system or medium, howsoever caused"*

render a contractual performance substantially different from a reasonable expectation, or terms that exclude a party's liability when he himself is in breach of a contract to satisfy the reasonableness test.

(b) Clauses making cardholder liable for unauthorized transactions

Concurrent with the use of the exclusion of liability clauses above, all banks in Singapore use express terms in the standard cardholder agreement to impose liability on the cardholder for both authorized and unauthorized card transactions that occur before the notice of lost or stolen card reaches the bank. A typical example of this clause is found in the DBS Card Agreement at its clause 3.3 *"Liability For Lost/Stolen Cards: You shall not be liable for any transactions carried out after we have been notified of the loss/theft/disclosure. However we shall debit the relevant Card Account <u>for all transactions</u> carried out before we are notified of the loss/theft/disclosure, even if such transactions were carried out <u>without your authorization</u>."*

OCBC uses similar provisions at clauses 3.3 and 4.3 of its standard terms, which states that the bank *"may charge and debit the relevant Card Account (whether before or after the termination of the use of any or all Cards) the amount of each and every Card Transaction made or effected, whether by you or any other person (whether with or without your knowledge or authority)"* but *"no amount shall be debited to the Card Account in respect of any Card Transaction effected without your knowledge or authority after notice of the loss or theft of that Card or the disclosure of the PIN of that Card has been given by you and received and acted upon by us".*

Standard Chartered uses similar terms at clause 11.3 of its standard terms, which provide that *"the Cardmember and/or the Company shall remain liable for all unauthorised Card Transactions effected before the Bank receives written confirmation of such loss, theft or disclosure"*. The cardholder may not be liable for unauthorized transaction effected after the notification has been received by the bank *only if* the bank is satisfied that the cardholder has given *written* notification, and lodged a *police report* in respect of the lost card. Citibank's terms, at its clause 9.3, on the other hand, impose liability on the cardholder for *"all unauthorized card transactions effected following such loss, theft or disclosure, whether they are effected as a result of the unauthorized use of the card"* while retaining the bank's *"absolute discretion"* to charge the amount of the unauthorized transaction effected *even after* the bank's receipt of the cardholder's notification of lost card.

It may be more difficult to apply the UCTA to the above clauses because they do not appear to exclude the bank's liability. The same effect is achieved without using the exclusion of liability language. However, it is arguable that these clauses also fall within the scope of the last paragraph of UCTA Section 13, which reads *"To the extent that this Part prevents the exclusion or restriction of any liability … sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty."*

The effect of Section 13 seems to extend the scope of the UCTA to terms that take the form of a definition of the obligation. The drafting technique used in the above contractual clauses avoids using the form of an *'exclusion of liability clause'*

by disguising the terms in a *'definition of the cardholder's liability'* to achieve the same effect in substance. Therefore, it is submitted that the clauses are also subject to the reasonableness test of the UCTA.

(c) Clause allowing the issuer to rely on instructions without verification:

All major banks in Singapore include in their standard cardholder agreements a clause giving the bank the right to rely on any request, instructions or communications that the banks believe was made by the cardholder, whether orally, by telephone, fax, email, etc, without verifying the authenticity of the instructions, and yet incurring no responsibility towards the cardholder[222]. If these clauses are interpreted as wide as they appear to be, an unauthorized card

---

[222] DBS' Clause 15.4: "*We may choose to accept any instruction from you made through electronic mail, facsimile transmission and in the case of the telephone, such instruction that we believe is given by you <u>even if you had not actually given such instructions</u>. Any non-written instructions shall be given to us at your risk and <u>we shall not be responsible</u> for any loss or damage that you may suffer."* UOB's clause 19.7: *"We may rely and act on any communication or instructions which we believe originates from you (whether orally or in writing and whether in person or over the telephone or by facsimile or other means of telecommunication and whether genuine or with or <u>without your consent or authority</u>), and any action taken by us in reliance on this shall <u>bind you</u> and <u>we shall not be liable</u> to you for any loss or damage incurred or suffered by you as a result of such action. We shall not be under <u>any duty to verify the identity of any person communicating</u> purportedly as you or on your behalf."* Standard Chartered clause 21.10: *"the Bank is authorised to act on any telecommunication instructions which the Bank in its sole discretion believes emanate from the Cardmember or the Company and the Bank shall not be liable to the Cardmember and the Company for any loss or damage arising out of <u>the negligence or fraud of any party</u> or in the event that such telecommunication instructions emanate from <u>unauthorised individuals</u>."* OCBC Clause 18.3: *"we may but shall not be obliged to accept and act on any instruction or request by telex, facsimile transmission or through the telephone which is believed by our officer or employee attending to such instruction or request to have been given or made or authorised by any cardmember. Notwithstanding that such instruction or request <u>may not have been given or made or authorised</u> by such cardmember and notwithstanding any fraud that may exist in relation thereto, we shall not be liable for any loss or damage suffered as a consequence of its acting on or acceding to any such instruction or request."* Citibank's clause 14.3*(b): "Notwithstanding the aforesaid, we are entitled in our absolute discretion to rely and act on any communication, requests or instructions which we in our <u>sole discretion believe</u> to have been given, made or authorized by you, whether or not given with <u>your consent or authority</u> and whether it is given or made orally (whether in person or over the telephone and whether or not via TBS); or by facsimile transmission or telex or cable; or by other means of communication; and any act on our part pursuant to such communication, requests or instructions will be binding on you notwithstanding that it may not have been given by you or with your consent or authority."*

transaction whether by swipe-card or by mail, telephone, facsimile or internet methods may be considered a request, instruction or communication to the bank under these clauses. Therefore, the clauses may also be effective to exclude the bank's liability for unauthorized transaction.

Two major foreign banks went further to avoid any ambiguity in the interpretation of the usual *'reliance without verification clause'* by expressly providing in their standard terms another clause making the cardholder liable for all unauthorized transactions made by remote methods such as mail, telephone, facsimile or internet. Standard Chartered Bank's clause 21.9 reads: *"A request by mail, telephone, facsimile transmission or other means of communication to a merchant for the supply of goods and/or services to be charged to the Card Account, <u>whether or not made or authorised by the Cardmember</u> and whether a sales draft, voucher or document is signed by the Cardmember, is a valid Card Transaction and the Bank will debit the Card Account with such Card Transaction".* Citibank's clause 4.3 provides that: *"A request via mail, telephone, facsimile, internet or other means of communication to a merchant for the supply of goods and/or services to be charged to the card account, <u>whether made or authorized by you</u> and whether a sales draft, voucher or document is signed by you, <u>is a valid card transaction</u> and we will debit your card account with such card transaction."*

The statistics in section 7.2(d) below shows that unauthorized card transaction may be occasioned not only by the cardholder's fault but also by the bank's negligence or failure to protect their customer's information. Therefore, it is submitted that, to the extent that the above clauses seek to exclude the bank's liability for its own negligence the clauses fall within the scope of the UCTA.

(d) Indemnity clause

In the dealing with consumers, it is not uncommon that the banks insist on an indemnity clause making the consumer liable for the costs of the legal actions taken by the banks to enforce their rights under the contract with the consumer. We will look into the issue of legal costs further in chapter V. Here, we are concerned with indemnity clauses that were drafted so wide as to impose an obligation on the cardholder to indemnify the bank against any loss arising out of or in connection with the card, the contract, or the card account. Not all Singapore banks use this form of indemnity clauses but examples can be found in the terms of several foreign and local banks.

Clause 21.7 of the Standard Chartered Bank's standard terms provides that *"The Cardmember and/or the Company must indemnify and keep the Bank fully indemnified against all claims, demands, actions and proceedings which may be made against the Bank and all damage, liability, loss, cost and expense (including legal costs on a full indemnity basis) which the Bank may incur, sustain or suffer, <u>directly or indirectly, arising from or in connection with the use or misuse of the Card</u>, the PIN and/or the PIW with or <u>without the Cardmember or the Company' knowledge or authority</u>; and/or the negligence, misconduct or breach of any term and condition of this Agreement on the Cardmember or the Company part; and/or otherwise arising out of or in connection with this Agreement."* Citibank's clause 17.1 provides that *"You will fully indemnify us and hold us harmless against any loss, damage, liability, cost and expense (including legal costs on a full indemnity basis) which we may incur or suffer as a result of or in connection with your card account and/or this agreement".* UOB's clause 19.9 provides that *" You [the cardholder] must*

indemnify and keep indemnified us [UOB] against all claims, demands, action, proceedings, losses and damages of any nature suffered, incurred or sustained by us directly or indirectly, by reason of or in connection with this Agreement"

Although using different language the above clauses seek to do the same thing. The clauses enable the bank to recover damage, loss and expenses that the banks may suffer due to unauthorized transaction. On top of that, the banks are entitled to recover the same for other reasons directly or indirectly connected with the card, the account or the cardholder agreement, which may include situations of breach or negligence by themselves. Pursuant to Section 4 of the UCTA, to the extent that a consumer is made to indemnify the banks for their own negligence or breach of contract, the clause must also meet the requirement of reasonableness under the UCTA.

(e) The reasonableness test

The above analysis shows that all four categories of terms mentioned come under the reasonableness test of the UCTA. Section 11.1 of the act provides that: *"In relation to a contract term, the requirement of reasonableness for the purposes of this Part ... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made".*

In *'Modern Banking Law'*[223] it was suggested that *"It is, of course, clear that the honouring of an instruction issued by an impostor is a performance not contemplated by the parties to the card transaction. The American authorities support the view that a term which excuses such a performance is not reasonable, as it frees the issuer from the underlying duty of care. However, it has to be conceded that a term which exonerates the issuer from the liability where the cardholder fails to report the loss of the card is justifiable on the basis that forgeries are hard to detect."* While we submit that this suggestion is correct, we are interested to see how the Singapore courts apply the reasonableness test to the circumstances surrounding the issuer-cardholder relationship or the contemplation of the parties in making the cardholder agreement. In the dearth of authority directly on the point, it is necessary to consider recent decisions where the Singapore courts have applied the reasonableness test to the exclusion of liability clauses in the contracts between banks and their customers.

In *Ri Jong Son v Development Bank of Singapore Ltd*[224] *(Ri Jong Son),* a customer having a fixed deposit account with DBS Bank suffered loss due to a fraudulent funds transfer of ¥100 million out of his account. He then sued the bank for breach of the banking mandate. The High Court upheld the following exclusion of liability clause in the standard terms: *"The bank shall not be liable for any loss damage or expense suffered or incurred by the customer (whether as a result of computer breakdown, <u>forgery of signatory's signature</u>, material alteration of withdrawal/requests or other reasons of any kind whatsoever) through no fault of the bank".* Kan Ting Chiu J. decided that this clause meets the reasonableness test of the UCTA because it *"did not seek to restrict the bank's*

[223] E. P. Ellinger, E. Lomnicka, R.J.A Hooley, 3rd Edition, Oxford University Press 2002 at 536.
[224] [1998] 3 SLR 64.

liability for negligence." He went on to hold that even if the clause *"seek to exclude the bank's liability for its own negligence"*, it *"was reasonable within the context of a bank-customer relationship"*.

Even though it was proven beyond doubt that the signature was forged and the bank's officers failed to see the discrepancy between the forged signature and the customer's specimen signature, it was held that the customer failed to prove the bank's fault. This seems to set a very low standard of care on the bank's practice of dealing with customer's instructions. As long as the bank's employee did make the comparison of the signature, the bank is not at fault no matter how much different the signatures may be.

It seems possible that the above case will be applied to the situation of unauthorized card transaction because most cardholders are bank's customers and the issues concern with authority of instructions given to the bank. If that is the case, the exclusion of liability clause discussed in section (a) above would be upheld because in a bank-customer relationship it is reasonable for the bank to exclude liability, even for their own negligence. However, in the comparison with the exclusion of liability in a banking context, there are less convincing reasons to uphold the exclusion of liability clauses in credit card agreement for several reasons. First, in many instances of credit card usage, no signature is required. Even if it is, the bank is not the party verifying the signature on the payment slip. A cardholder may arguably be in a better position compared with other bank's customers because the cardholder-issuer relationship is of less than a mandant-mandatory nature.

In a more recent case of *Khoo Tian Hock & Anor v Oversea-Chinese Banking Corporation Limited*[225] *(Khoo Tian Hock)*, the tendency of the Singapore courts to favor the banks over their customers reached another height. In that case, two customers sued OCBC for wrongfully paying on five cheques amounting to $730,088.58, in which their signatures had been forged by their son. Woo J.C. decided to depart from the authority well established by the English courts and the Privy Council decision in *Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd*[226] and held that the duty of care that a customer owed to a bank included the duty to prevent the forgery of his signature. The customers in the case were considered to be in breach of such a duty by allowing their son access to their blank cheque books. Woo J.C. said (at 707): *"To draw a distinction between the drawing of cheques on the one hand and other steps or omissions on the other hand is to create an artificial and unrealistic distinction. After all, fraud is not facilitated by the careless drawing of cheques alone."*

The above decision was criticized by Professor Poh Chu Chai[227] as follows: *"With due respect to the learned judicial commissioner, there is indeed an obvious distinction between the material alteration of the instructions given by a customer and the forgery of his signature. The alteration of a customer's instructions may not be easily detected by the bank if the customer has been careless in drawing up his cheque. The bank is therefore entitled to require the customer to exercise care in writing out his instructions. The forgery of a customer's signature stands on an entirely different footing. A banker is expected to recognise the signature of a customer. An inability or a reluctance*

[225] [2000] 4 SLR 673.
[226] [1986] AC 80.
[227] Poh Chu Chai, Annual review of Singapore cases 1-2000, Banking Law.

by a bank to verify a customer's signature constitutes a serious breach of contract by the bank as the customer's signature constitutes the sole key to his bank account. One would be unduly favouring the banks if the banks are excused from carrying out this fundamental obligation merely because the customer has not taken steps to prevent the forgery of his signature. It would also undermine the confidence a customer has in the banking system if a banker is excused from carrying out the basic duty of recognising his own customer's signature." Notwithstanding the criticism, which we submit was accurate, the decision in *Khoo Tian Hock* remains valid authority as it has not been overruled in any subsequent decision.

The *Khoo Tian Hock* ruling may be applied to unauthorized credit card in two aspects. First, the cardholder who is also a bank's customer may owe the duty to prevent unauthorized use of the card, similar to the duty to prevent forgery of cheques by safeguarding blank chequebooks. If the cardholder allows somebody access to the card or its particulars, the cardholder may be in breach of his duty, and therefore he may be made liable for unauthorized transactions. Secondly, just as the bank is excused from the basic duty of recognizing a customer's signature because the cardholder has failed to safeguard the blank chequebook, the bank may also be excused from verifying the authenticity of a card transaction because if the transaction was not authorized, the cardholder must have failed to safeguard the card, or its particulars.

While *Ri Jong Son* and *Khoo Tian Hock* were not directly concerned with liability for unauthorized card transaction, they are powerful authorities to show the tendency in the Singapore courts to uphold exclusion of liability clauses in the

contracts between bankers and customers. It may, therefore, be anticipated that if a case concerning unauthorized credit card transaction come to the courts, the results would be similar. As long as the exclusion of liability clauses are drafted in clear and unambiguous manner, as it appears in the samples taken, it is likely that the cardholder will be made contractually bound to be liable for all the unauthorized card transactions. Our analysis of the standard terms of 3 biggest local banks and 2 major foreign banks shows that there is hardly any alternative means by which a cardholder can obtain a credit, debit or charge card in Singapore without accepting these sorts of exclusion of liability clauses. The strength of the bargaining positions between a bank and its customer is obviously imbalanced and the cardholders usually receive inducement to apply for new card by way of reward points for certain usage of the cards. This seems to satisfy paragraph (a) and (b) of the Guidelines for Application of Reasonableness Test in the Second Schedule of the UCTA. However, the Guidelines only apply for the purposes of section 6(3), 7(3) and 7 (4), which only concerns with sale, hire purchase and miscellaneous contract under which goods pass. In other words, the UCTA is not an effective means to restrict the power of the standard terms for the banks' interests in the dealing with their customers.

6.2 Terms with indirect effect of excluding or restricting the issuer's liability

Section 13(1) of the UCTA provides that:

"To the extent that this Part prevents the exclusion or restriction of any liability it also prevents —

> *(a) making the liability or its enforcement subject to <u>restrictive or onerous conditions</u>;*

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to <u>any prejudice</u> in consequence of his pursuing any such right or remedy;

(c) excluding or restricting rules of <u>evidence or procedure</u>"

Accordingly, there are two other types of clauses that may be subject to the UCTA, including:

(a) Clause limiting time to raise dispute

There is recognized English authority holding that a bank's customer does not owe a duty to verify all bank statements unless he is bound by contractual terms to do so[228]. Because of that, the standard terms used by banks invariably impose a duty on the cardholder to examine the card account statement and inform the issuer of any unauthorized transaction within a certain time limit. If the customer fails to do so, he will be held liable for the unauthorized transactions. This seems very normal until one look at the period that a cardholder is given to read the statement. When this period is too short, the cardholder's right to challenge an erroneous items or unauthorized transaction in the statement would almost diminish. For example, DBS Bank requires its cardholder to report errors, inaccuracies, or unauthorized transactions within 7 days from receiving the statement[229]. Citibank sets similar time limit at 10 days[230]. UOB sets it at 14 days[231] from the date of the statement.

---

[228] *Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd [1986] AC 80* per Lord Scarman at 106E-7A.

[229] DBS Card Agreement, Clause 9: *"You shall also notify us if you discover any errors or inaccuracies in any Card Account statement. If you fail to inform us of any error or inaccuracy in the Card Account statement within seven (7) days from your receiving it, the contents of the Card Account statement shall be conclusive and binding on you."*

The above clauses may fall within the scope of Section 13 (a) and (c) of the UCTA for making the enforcement of the cardholder's right subject to restrictive condition or restricting rules of procedure. There have been several authorities in Britain holding that a contractual clauses limiting the time for a consumer to make notification of a breach[232] or limiting the time for a consumer to make a claim[233] fall within the scope of the UCTA and are subject to the reasonableness test. The length of the period allowed for the cardholder may be a relevant factor to determine whether the clause satisfies the reasonableness test, which we will consider further below.

(b) Conclusive evidence clause:

In the standard terms of Singapore banks, the clauses discussed in (a) above are usually used together with a conclusive evidence clause, which seeks to make all the bank's records (as may be certified by any bank's officer) final and conclusive evidence binding upon the cardholder for all matters relating to the card account. The same clause also prevents the cardholder from challenging the accuracy of the bank's records, after the expiry of the short period allowed for the cardholder to dispute the accuracy of the records.

---

[230] Citibank Clause 5.2 *"You must inspect and examine the statement of account and notify us of any irregularity or error in the statement of account <u>within 10 days from the date of the statement of account</u>, failing which the statement of account is conclusive evidence of your liability in respect of the amounts stated therein, provided that we are entitled, at any time and without liability, to rectify any irregularity or error in the statement of account."*

[231] UOB's clause 19.4: *"Please check the Statement sent to you. If we do not receive any objection in writing from you within fourteen (14) days from the date of the Statement the contents of the Statement shall be taken as correct and conclusive unless we ourselves rectify it."*

[232] *Thomas Witter Ltd v. TBP Industries Ltd* (1994) 12 Tr LR 145.

[233] *Edmund Murray Ltd v. BSP International Foundation Ltd* (1992) 33 Con LR 1.

The conclusive evidence clause that is found in the standard terms of all bank-issuers of credit, debit or charge card[234] would clearly fall within sub-section (a) of Section 13 (1) of the UCTA as it seeks to exclude or restrict rules of evidence. If the clause is upheld, the bank's records would be deemed final, conclusive and binding upon the cardholder for any purposes whatsoever. If a record of an erroneous or unauthorized transaction is shown as an authorized transaction in the statement, and the cardholder is conclusively bound by that record, the end result would be that the cardholder being liable for the transaction. Alternatively, the conclusive evidence clause may fall within sub-section (a) of Section 13 of the UCTA as it prohibits the cardholder from enforcing their contractual rights.

There are English authorities that may be used to support the argument that the conclusive evidence clause is subject to the UCTA. In *Fred Chappell Ltd v National Car Parks Ltd*[235], a clause reversing the burden of proof was held to fall within the scope of the UCTA. In *Stewart Gill Ltd v Horatio Myer & Co Ltd*[236], a clause preventing a party from enforcing a right (right to set-off) was held to come within the UCTA. Therefore, it is submitted that the conclusive evidence clause should be subject to the reasonableness test of the UCTA.

(c) The reasonableness test

The application of the reasonableness test to conclusive evidence clause (including clauses limiting time to raise a dispute) has attracted a fair amount of the local judicial attention. *Consmat Singapore (Pte) Ltd v Bank of America*

---

[234] Citibank's clause 5.2; DBS's clause 9; UOB's clause 19.1, 19.3 and 19.4, which also prohibits the cardholder to challenge the accuracy of the bank's record for any purposes; Standard Chartered clause 21.1; OCBC clause 12.1.

[235] *The Times 22 May 1987, (Transcript:IV Gilbert).*

[236] [1992] All E.R. 257.

National Trust & Savings Association[237] (*Consmat*) was the first reported case in the Singapore High Court concerning the duty to verify account statements by customers of banks and reasonableness of the conclusive evidence clause. In that case, a customer took action against the Bank of America to recover payment by the bank for 15 forged cheques amounting to over S$94,000. The bank's standard terms contained the customer's undertaking to verify the statement and report discrepancy, omission or in accuracy within 7 days from the date of receipt. Although it was held that the Bills of Exchange Act was applicable to the case instead of the UCTA, L.P. Thean J. held [at 836H) that *"even if the UCTA applied"* the clause 3(c) (which contains the relevant customer's undertaking) *"satisfies the test of reasonableness as laid down in s 11 of that Act"*. The customer obligations imposed by the clause 3(c) was considered *"fair and reasonable having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the general agreement was entered into"* for several reasons. First, *"forgeries of cheques are extremely difficult for a bank to detect."* Secondly, the bank had *"adopted a practice of returning to their customers monthly the original cheques drawn or purported to have been drawn by their customers which have been cleared and paid and these are sent together with the monthly statements of accounts of the previous month."* The court also rejected the submission on behalf of the plaintiffs that the period of seven days prescribed was unreasonably short because the customer in the case were *"commercial organization and have the resources and means of verifying the statements and the cheques and notifying the defendants promptly and in time of any wrong debit or other error in their account"*.

[237] [1992] 2 SLR 828.

The *Consmat* case may be considered a landmark decision in this area as subsequent decisions have consistently applied and adapted its reasoning to other situations. In *Stephan Machinery Singapore Pte Ltd v Overseas-Chinese Banking Corp Ltd*[238] (*Stephan*) a conclusive evidence clause, which prevented the customer from disputing the bank's records after 14 days from the date of the monthly statement, was held to be reasonable. In *Elis Tjoa v United Overseas Bank*[239] *(Elis)*, UOB bank's standard term, which required *individual* customers to verify statements and report inaccuracies within 14 days from the date of the statement, was considered reasonable for purposes of the UCTA. In response to the submission that the period of 14 days was unreasonably short, given the evidence that some statement may not be delivered to the post office until the 5th day of next month, Woo Bih Li J.C. suggested [at 92] that UOB should consider revising the period to 21 days. However, the judicial commissioner did not hold the 14 days period as unreasonable on grounds that the plaintiff did not attempt to inform the bank of any inaccuracies. This seems to suggest that 21 days may be considered by the Singapore courts as reasonable.

The conclusive evidence clause has been criticized by Professor Poh Chu Chai[240] for its misleading form. He commented that just by reading the clause, it is difficult for a customer to realize that his right to raise the issue of forgery is effectively being taken away. Therefore, if a bank wishes to prevent its customers from raising a claim to recover loss due to fraudulent transaction if they fail to notify it of any discrepancies in their statements within a fixed time, the bank should insert an express term to that effect instead of a conclusive evidence

---

[238] [2000] 2 SLR 191.
[239] [2003] SGHC 1 [2003] 1 SLR 747.
[240] Professor Poh Chu Chai *Law of Banker and Customer*, Lexis Nexis, 5th Ed, 2004 at pages 897-907, 921.

clause. It has also been suggested that the *Consmat* case was so decided because the bank in the case had adopted the practice of returning the cheques paid by the bank to the customer in order for the customer to verify the signatures. Therefore, it was contended that in cases where no such practice was adopted there may be room for argument that a term requiring a customer to verify whether there has been forgery may be both unreasonable and unfair[241].

However, in the most recent case of *Pertamina Energy Trading Limited v Credit Suisse* (*Pertamina*) where the bank acted upon a forged charge and forged ratification resolution of a corporate customer, the Singapore Court of Appeal accepted that a conclusive evidence clause come within the UCTA. However, the courts rejected both the suggestions that such a clause is misleading or that the absence of the practice of returning paid cheques to customers for verification of signatures creates any possibility to suspect the reasonableness or fairness of the clause[242]. The decision seems to suggest [at 60] that the rule in *Consmat* is only directly applicable to the context of corporate customers. It suggests that the decision in *Pertamina* does not apply to individual customers, as it was held at [61]: *"we are not required to express a general opinion as to the reasonableness of conclusive evidence clauses as and when applied to individuals and non-corporate customers since the issue does not arise in the present context."*

The above cases shows the tendency of the Singapore courts to uphold conclusive evidence clauses which are tied with a period for the customer to verify monthly statement as short as 7 days from the date of receipt or 14 days from the date of the statement as satisfying the reasonableness test of the UCTA. However, it

[241] Ibid at page 922.
[242] [2006] SGCA 27 at [58-60].

should be noted that, the cases occurred so far only concerned with forged instructions. The fact that in some of these cases the customer shows no intention to verify the statement was contributory to the judges' decision. There is indication in one of the cases that the conclusive evidence clause may not hold as strong if a wrong debit was made without any purported instructions: *"However, this is not to say that if UOB had inadvertently and unilaterally made a wrong debit without any purported instruction whatsoever, it would still be entitled to rely on cl 13. In such a situation, it may be against public policy or may be unreasonable to allow UOB to rely on cl 13"*[243]

This means the current conclusive evidence clause may not be strong enough to hold the customer liable for computational errors. Extending towards this direction, if an unauthorized card transaction just occurs without the loss of a card, it may be impossible to prove who was at fault (whether it was the customer that did not use proper anti-spyware or the bank's computers were hacked). As a card transaction does not constitute an instruction to the bank, it might conversely be categorized as an error. Therefore, in this area the customer may be able to further arguments to succeed.

7. SUGGESTIONS FOR A REFORM

7.1 Risk-shifting practice in Singapore

The analysis in section 6 above shows that there are currently 5 types of risk shifting clauses used in the cardholder agreements of major banks in Singapore,

---

[243] *Elis Tjoa v United Overseas Bank* [2003] SGHC 1 [2003] 1 SLR 747 per Woo Bih Li JC at [96].

of which 4 types have the effect of making the cardholder liable for all unauthorized card transactions regardless of the situation in which it was effected:

(i) Exclusion of liability clause that disclaims all the bank's liabilities for any use of misuse of the card;

(ii) A clause that allows the bank to rely on instructions purported to emanate from the cardholder without any verification;

(iii) A conclusive evidence clause that makes all the bank's records final and conclusive evidence binding upon the cardholder for all matters relating to the card or the card account and the cardholder's undertaking not to challenge the accuracy of the bank's records in any event; and

(iv) An indemnity clause whereby the cardholder indemnify and hold the bank harmless against any loss, damage, liability, cost and expense (including legal costs on a full indemnity basis) which the bank may incur or suffer as a result of or in connection with the card account, the cardholder agreement or any use of misuse of the card.

In section 6, it has also been found that the UCTA has little effect to limit the above clauses. Any of the 4 types of clauses would effectively shift the entire burden of loss due to unauthorized card transactions to the cardholder if enforced to the full extent of their wording. However, there are 2 situations where the effect of the above clauses may be restricted:

(i) Where the bank's records were erroneous resulting in a deduction in the card-account not occasioned by any purported transaction. There is indication in one local authority that the cardholder should not be liable for erroneous entry; and

(ii) Where the unauthorized transaction occurred after the bank has received the notice by the cardholder that the card was lost or stolen. Most major banks in Singapore (except for Citibank) recognize in their standard terms that the cardholder is not liable in this situation. Therefore, even if the above 4 clauses make the cardholder liable for all unauthorized transaction regardless of any notice of loss or stolen card, their actual effect may be limited to the extend that they conflict with the clause that define the cardholder's liability for unauthorized transaction.

In Singapore, there is no law or regulation on the issue of cardholder's liability for use of credit card, charge card or debit card by a third party. The issue of unauthorized card transactions is left to be determined by the standard terms drafted by the issuers. The analysis of the risk shifting terms used by Singapore banks shows that the cardholders are currently liable for all unauthorized transactions that occur before the issuers have been notified that the cards have been lost or stolen. The issuers are only liable in the very unlikely case that a transaction was effected after the notice of lost or stolen card have been received by them.

The allocation of fraud loss under the standard terms of Singapore banks appears to be imbalanced by the cardholder taking too much risk and the issuers taking negligible risk. In the next section, we will look at the allocation of fraud loss

under the statutes and regulations in Britain and America and under the chargeback rules of a major card association to explore areas where some adjustments can be made to the allocation of credit card fraud loss in Singapore.

7.2 Allocation of fraud loss according to card possession and methods of effecting transaction

Credit card transactions can be categorized into card-present and card-absent depending on whether or not the plastic card was presented to the merchant. Because the credit and charge card was originally designed for use in card-present situation, the criteria of card possession has been reflected in the laws and practices as an important factor to determine liability for card transactions. Unauthorized transaction may occur: (i) while the card is lost or stolen after the cardholder's acceptance; (ii) while the card remains in the possession of the cardholder or his authorized agent; or (iii) when the card is lost or stolen in the mail either before reaching the cardholder or after being sent back to the issuer for cancellation.

(a) Card lost or stolen after cardholder's acceptance

In any jurisdiction, the cardholder is responsible either under the terms of the cardholder agreement or applicable statutes or both to inform the issuer when the card is lost or stolen to prevent loss due to fraudulent transaction. The notice by the cardholder to the issuer that the card was lost is relevant to the allocation of fraud losses.

For practical reasons, after the notice reaches the issuer, it is very unlikely that a card transaction may be effected. An *'approval'* from the issuer is required for all card-absent transactions as the merchant's floor limit is zero. Even in card-present transaction where the merchant's floor limit is higher than zero, most merchant still obtain the *'approval'* because the process of swiping the card is quick, simple, and effective to prevent chargeback. Upon the cardholder's notice of a lost card, it is very easy for the issuer to disable the use of the card instantly by an entry in the database stored in the issuer's computer systems. After the card has been invalidated, no *'approval'* will be given by the issuer for any transaction, regardless of the method of communication. Under the current chargeback rules of Visa and MasterCard, if the cardholder alleged that the transaction was unauthorized and no *'approval'* was obtained from the issuer, the merchant must accept the chargeback and bear the loss even if goods or services have been delivered. As the only case where the issuer is to bear the loss is a malfunction of its computer system resulting in an *'approval'* being given for an invalidated card, the risk that the issuer has to take is near zero. This explains why the majority of Singapore card issuers are willing to take this risk in their standard terms.

After the card was lost but before the issuer is informed that the card was lost, it is likely that an *'approval'* would be given to fraudulent card transactions attempted *if all the conditions* required during card acceptance were satisfied. For card-present transaction, besides the issuer's *'approval',* the remaining requirements seem quite easy to be satisfied. The Visa's rules only require that, in card-present transaction, either the card was swiped through a card reader terminal; or an imprint of the card was taken on the transaction receipt together with the signature of the card-bearer. The signature only needs to be spelled in the same way as the surname embossed on the card. For card-absent transaction,

the merchant would have the right to make a *'representment'* (i.e. to resist a chargeback) if the card verification code (known as CVV2 in Visa's system) was verified when the card transaction was effected. The CVV2 is a 3-digit number printed on the back of all Visa cards but not recorded in the magnetic or smart chip memory as a measure to verify that the person attempting to effect the transaction was actually in possession of the card. However, the CVV2 is not a foolproof measure because it is visible to anyone looking at the back of the card. The CVV2 can also be copied from the bank's database or the merchant's records. Therefore, CVV2 verification does not guarantee the merchant a success in defending a chargeback claim. The merchant would have a better chance to resist a chargeback if a billing address verification (known as AVS in Visa's system) was conducted during card acceptance. AVS verification is another method used by Visa to reduce chargeback whereby the street address and postal code of the cardholder submitted by the merchant is verified against his billing address in the issuer's records. The merchant would have a guaranteed success *only if* he can provide proof of delivery of physical goods to the billing address of the cardholder. This rule coincides with the requirement under US Code §1602(o) that the cardholder must not benefit from unauthorized use of the card.

In America, there is an absolute ceiling of $50 for the cardholder's liability for any card transaction effected without the cardholder's express, implied or apparent authority and from which the cardholder receives no benefit[244]. To make the cardholder liable for up to $50 the issuer must satisfy various requirements including providing a method whereby the cardholder can be identified as the

[244] Title 15 US Code §1643 applicable to credit card (http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001643----000-.html) and Title 15 US Code §1693g applicable to debit card (http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001693---g000-.html). For a definition of *'unauthorized use'* please refer to Title 15 US Code § 1602(o) (http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001602----000-.html)

person authorized to use the card, giving adequate notice of potential liability, providing the cardholder with a description of a means by which the issuer may be notified of loss or theft of the card, proving the cardholder has accepted the card and that the unauthorized use occurs after the cardholder has accepted the card but before the cardholder has notified the issuer of the loss or theft of the card.

In Britain, Section 83 of the Consumer Credit Act 1974 stipulates that cardholders are not liable for any unauthorized transaction, subject to 2 exceptions specified in Section 84. If the card was obtained with the cardholder's *'consent'*, he will be liable for the entire transaction under Section 84(2), even if no cardholder's authority of any form exist. If the transaction occurred when the card was not in the possession of an *'authorized person'* (i.e. the issuer, the cardholder or his authorized agent) the card -holder will be liable under Section 84(1) for not more than £50.

Although structured differently both of the American and the British acts render similar results. If the card was lost or stolen (i.e. not voluntarily given by the cardholder), the cardholders in America and Britain would be liable for not more than \$50 or £50 (respectively) per card issued[245]. Because the \$50 or £50 limits are absolute ceiling, the cardholder would not be liable for more than that amounts even if he knew that the card was lost or stolen and failed to notify the issuer[246].

---

[245] Section 84(8) of the British Consumer Credit Act provides that the 50 limitation applies per credit token issued. The American Act was not specific on this but it seems that the \$50 also apply per each card issued.
[246] Except for the liability for the cardholder's failure to verify card statements, which issue will be discussed in section 4 below.

To sum up, where a lost or stolen card is used fraudulently in card-present transaction of amount larger than the statutory limit, the card issuer in America and Britain would bear the loss of the transactions amount less the $50 or £50 to be paid by the cardholder. In the same situation, the cardholder in Singapore would be liable for the entire transaction amount.

If, on the other hand, the lost or stolen card were used in card-absent transaction, the card issuer would be required to pay the merchant only if the merchant can prove that physical goods purchased were delivered to the billing address of the cardholder. This situation rarely occurs since fraudsters are not likely to order goods to be delivered to the billing address of the cardholder. Where no AVS verification is conducted or the goods or services are intangible (e.g. software, internet telephony services, digital music, etc) the result of a dispute would depend on the evaluation of facts and evidence by the card association on a case-by-case basis. However, as the Singapore cardholders are liable for all unauthorized transaction effected before the notice of lost card reached the issuer, it seems that the Singapore issuers would have little incentive to pursue the chargeback for the benefit of the cardholder. In America or Britain, the card issuers would likely be more active in pursuing chargeback claim because it may be harder for them to satisfactorily prove that the transaction was authorized by the cardholder, in order to shift the fraud loss to the cardholder.

(b) Card in the possession of the cardholder

Even when the card is not lost, unauthorized transactions may occur in both forms of card-present and card-absent. A fraudulent card-present transaction may occur by counterfeit cards. A counterfeit card may be made by fraudsters

from the data extracted from a genuine card by a reader device or stolen from the database of the issuers or the merchants. The current chargeback rules of Visa place the fraud loss occasioned by counterfeit cards squarely on the merchants (chargeback reasons code 62). Because the issuer is entitled to chargeback the transaction amount to the merchant, the question of cardholder's liability should not arise in this case. Fraudulent transactions seem more likely to occur in card-absent form because it does not require usage of any special tools or devices to fabricate counterfeit cards. A fraudster that managed to copy the card particulars including the CVV2 number of any card would have no problem to effect card transactions by card-absent methods. As discussed above, as far as the Visa chargeback rules are concerned, where card-absent transaction is effected with both issuer's *'approval'* and CVV2 verification the result of a chargeback dispute depends on the evaluation of facts and evidence by the card association on a case-by-case basis.

Where the card remains in the possession of the cardholder, the situation does not fit perfectly within the frame of *'transaction occurred before notice of lost card'* because the issue of notice does not arise if the card was not lost. Therefore, the notice should *not* be a relevant factor to determine questions of liability for unauthorized transaction. This point appears quite clear in the British Consumer Credit Act. The £50 ceiling under section 84(1) only applies if the card was not in the possession of the issuer, the cardholder, or other person authorized by the cardholder. Sub-sections 3A, 3B and 3C, added to section 84 in 2000 and 2004 further clarify that sub-section (1) and (2) of section 84 do not apply to *'distance contract'* as defined in the Consumer Protection (Distance Selling) Regulations

2000[247] and the Financial Services (Distance Marketing) Regulations 2004[248]. Therefore, if card particulars were stolen and used to effect a card-absent transactions while the card remains in the possession of the cardholders, questions of liability would be determined solely under section 83. As the section 83 is a reconfirmation of the general principles of agency law, the result of its application is that the cardholder would not be liable unless the issuer satisfactorily proved that the transaction was effected with the cardholder's express, implied, or apparent authority. The American Act does not distinguish between card-present and card-absent transactions. Neither did it touch upon the situation of unauthorized transaction without loss of card. However, similar results would be achieved by the application of the provisions of §1643 and §1693(g).

As usual, the situation in Singapore is the opposite to the above with all of the banks using risk shifting clauses to place the loss of all unauthorized card transactions that occur before the notice of lost card on the cardholder. Furthermore, 2 major foreign banks (Citibank and Standard Chartered) use additional clauses to specifically make the cardholder liable for all unauthorized <u>card-absent</u> transactions[249]. As these contractual terms are likely to be fully enforceable, the Singapore cardholders are at a great disadvantage when compared to other countries.

---

[247] *""distance contract" means any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service provision scheme run by the supplier who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded". (http://www.opsi.gov.uk/si/si2000/20002334.htm).*

[248] *""distance contract" means any contract concerning one or more financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier or by an intermediary, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded". (http://www.opsi.gov.uk/si/si2005/20050689.htm)*

[249] Please refer to section 6.1(c) in chapter III for the contents of these clauses.

(c) Card lost or stolen in the mail

A credit, debit, or charge card may be lost or stolen after the issuer sent it to the cardholder but before the card-applicant's receipt or acceptance of the card. The analysis in section 3.3 of chapter II shows that, in the majority of cases the agreement between the cardholder and the issuer has not been formed before the applicant's receipt of the card. Therefore, the card-applicant may not be made liable for card transactions effected with the card that was lost or stolen before he has received the card under the cardholder agreement. However, the analysis also shows that, the card-applicant may be made liable by virtue of an undertaking in the application form. The standard application forms for credit and debit cards used by two biggest local banks of Singapore contain card-applicants undertaking to this effect. The DBS forms contain a declaration by the card-applicant that read: *'I agree that the Card will be sent to me by mail to my mailing address at my risk'.* The UOB forms contains similar declaration that *'I/we authorize you to send the Card(s), personal identification number, all statements of account, and other communications to the Principal Card applicant by ordinary mail at his sole risk'.* Therefore, if a card issued by DBS or UOB in response to an application was lost or stolen in the mail before reaching the card-applicant and subsequently used to effect a card transaction, the card-applicant would be liable for the fraud loss.

The above clause in the card application seems to be enforceable because it neither seeks to absolve the issuer's liability for its own fault nor fails the reasonableness test of the UCTA[250]. However, the clause should not be used because it is not necessary in practice. The majority of banks in Singapore adopt

---

[250] For further information on the application of the UCTA, please refer to section 6 above.

the practice of validating a card for use only after having received the confirmation form returned by the cardholder after acceptance of the card. Before the cards needs validation, even if it was lost or stolen, it cannot be used to effect any transaction. This is a good practice to avoid fraud, which practice should be used by all card issuers. Using a clause in the application form to allow banks to send validated cards to cardholders at their own risk does give the banks some extra flexibility and save a little cost of one validation step but significantly reduces the security of the card issuing process and places unnecessary risk on the cardholder.

In America, both US Code §1643 (credit card) and §1693(g) (debit card) make it a condition that the card must be accepted before any question of liability arise. In Britain, the same effect is achieved by including the *'creditor'* in the definition of *'authorized person'* in Section 84 (7) and further confirming at Section 66 that the holder of credit token cannot be made liable until the token is accepted by him. It may be time to adopt the same approach in Singapore to abandon the practice of sending validated card on the card-applicant's risk altogether. The change can be achieved at low cost to the banks while improving both the security of the card issuing process and avoiding unnecessary burden of risk on the cardholder.

As discussed in section 3.3 in Chapter II, the standard cardholder agreement used by some banks (UOB in particular) requires the cardholder to give the issuer a written notice of termination together with the card cut in half to effect the termination of the agreement. In this case, if the cut card was lost or stolen in the mail and used to effect card-absent transaction (which is possible because two halves of the card still reveal all particulars needed to effect a transaction), the cardholder would be liable to the issuer for the unauthorized transaction. The

cardholder would be liable even if the postman was negligent, since the postman would be treated as the cardholder's agent. The practice of requiring the return of the card cut in half should be abandoned because it is outdated and only adds unnecessary risk to the system. In practice, the cardholder could make a telephone call to the issuer's call centre and the card would be invalidated within a few seconds. If this has been done, requiring the return of the card is simply a trouble for both the cardholder and the bank since the card could not be used in any transaction, even if it was lost in the mail. After the card has been invalidated by telephone, it would be retained if inserted into any ATM of the issuer or presented to any of their branches. Keeping the practice of returning cards cut in half would leave a chance for an unaware cardholder to use mail instead of the telephone and take the risk of its loss. Therefore, it is submitted that Singapore card issuers should adopt the practice of instructing cardholders to terminate card by telephone followed by returning the card to the issuer by inserting the card into the ATM or simply destroying the card.

(d) Summary and suggestions

The above analysis shows that, there are at least 3 situations where the card issuers in Singapore can assume liability for unauthorized transaction without incurring any significant loss. The first is where the card was lost or stolen and the cardholder has already informed the issuer of such loss. Because it is unlikely that an unauthorized transaction may occur, this risk is near zero. The majority of Singapore card issuers have already assumed this liability in their standard terms. The second situation is where a new card or renewal/replacement card was lost or stolen in the mail before reaching the card-applicant/cardholder. This risk is avoidable if the issuers only send cards that are invalidated (i.e. not ready for

immediate use) by mail, pending the recipient's written confirmation. The third situation is where a card-present transaction occurs while the genuine card remains in the possession of the cardholder. This only happens when a counterfeit card was used and the chargeback rules of major card associations place the fraud loss on the merchant. The merchant should bear the loss if they fail to detect counterfeit cards. Because the issuers do not suffer any loss when a counterfeit transaction occurs, they should recognize that the cardholder is in no event liable for any counterfeit transaction.

That leaves us with only 2 difficult situations (i) where the card was lost and unauthorized transaction occurs before the cardholder informed the issuer; and (ii) where the card was not lost, but unauthorized transaction still occurred by card-absent method, because the card particulars was intercepted from somewhere. Under American and British laws, the cardholder's liability is limited to $50 and £50, respectively, in the prior case and zero in the latter. In Singapore, the cardholder is potentially liable for the entire amount of the unauthorized transaction under the banks' standard terms. Under the typical chargeback rules of the card association (Visa, is taken as example), the loss fall on the issuer in the prior case, while in the latter, it depends on the method of verifying transaction.

In the first case, there are more reasons to hold the cardholder liable. First, when the card was lost or stolen, the cardholder is under a duty to inform the issuer. Failure to fulfill the duty seems to be a good reason to make them liable. Even the most pro-consumer jurisdictions allow the issuer to claim for a certain amount, albeit quite small, to encourage the cardholder to give notice soon after the card was lost. Secondly, because the issuers have no means to protect themselves if they were not informed of the lost card, they should not bear the loss, which,

under the rules of card associations must fall on them or the cardholder. Thirdly, in terms of probability, the chance that a card gets lost without the cardholder knowing it is relatively small as most cardholders keep the card in their wallet together with cash and other important documents. An average cardholder will inform the issuer very soon after his card was lost or stolen. Considering the entire circumstances, it seems reasonable to make the cardholder liable for transaction occurring after the card was lost and before the notice was given to the issuer. A statutory limit to the amount of loss in Singapore, if one is to be enacted, may be set at a level higher than US$50. More importantly, the cardholder protection regulation should require the issuer to provide the cardholder with convenient means by which a notice of lost card can be given, most effectively by telephone followed by a written confirmation.

In the second case, however, there are more reasons to hold the issuer liable for the loss. First, the card particulars can be stolen very easily in various situations. A staff of the merchant in any card-present transaction may copy all the visible particulars, including the card verification code (CVV2 in Visa cards), which fully enable him to effect card-absent transaction. The card particulars may also be stolen from the cardholder by key-logging spy software installed on the cardholder's computer as a Trojan. Such a virus is capable of recording all the key strokes on the computer and sending the information to a hacker. The particulars may also be stolen from the database of the banks, the card associations, or the merchant. There have been many incidences where tens of millions of card particulars were reportedly stolen from banks or merchants[251]. The incidents

[251]. For example, in the issue dated 5th September 2005 of the *Newsweek*, 4 of such incidents were reported at page 42: (i) April 2005: DSW Shoe Warehouse, a merchant found its unencrypted database of 1.4 million credit and debit card transactions from its 108 stores in America was stolen by hackers; (ii) May 2004: CitiFinancial, a unit of Citigroup packed financial secrets of 3.9 million customers in boxes and put it in a mail truck, the boxes never

reported in one article may be only the tip of the iceberg. Because the loss of card particulars can be blamed on the issuers, the merchants, or the cardholders, it would be unreasonable to place the consequential loss solely on the cardholder. Secondly, even if the cardholder may have a duty to safeguard the card against loss there is no basis to impose on him a duty to protect the card particulars, either in contract or at law. Thirdly, under the current chargeback rules of the card associations, the issuer have much better chance to shift the loss back to the merchant, especially where the goods were not delivered to the billing address of the cardholder.

To prevent fraud in internet transactions, two major card associations namely Visa and MasterCard have come up with two solutions known as *'Verified by Visa'* and *'MasterCard SecureCode'.* Under these schemes, the cardholder may opt to use a PIN number to verify internet transactions. As the PIN is only known to the cardholder and far better protected than the visible CVV2 code or the billing address by encryption technologies, internet transaction verified with a PIN cannot be charged back by the usual *'unauthorized transaction'* reason codes of the card associations. There are more reasons to hold the cardholder liable for internet transaction verified with a PIN. It is possible to impose a duty to protect the PIN in the same way as a holder of an ATM card protecting the PIN used for EFTPOS payments. If the encryption technology is sufficiently strong, the party most likely to be blamed when a PIN was stolen is the cardholder. The solution seems to be good as it helps to reduce internet credit card fraud. However, the

---

arrived; (iii) CardSystem, a U.S. based data possessing company which processes approximately 15 billion credit card transactions a year between merchant and banks, held credit cards information for *'research'* purposes (in violation of agreement with Visa and MasterCard) and lost a database of about 40 millions credit cards issued in Japan, Hong Kong, Philippines and Australia; and (iv) April 2005: Michinoku Bank in Japan mistakenly threw out 3 CDs containing backup copies of the financial records of its entire customers base of 1.3 million.

solution would not be effective unless the PIN is designated as the only method to effect internet transactions after the cardholder has opted for it. If a card equipped with a PIN can still be used to effect transaction by using CVV2 or AVS, the risk of internet credit card is not reduced. While the Visa and MasterCard schemes are commendable as a method of preventing fraud, the solution has yet to be adopted by the banks in Singapore. A search in the *MasterCard SecureCode* directory[252] shows that no Singapore bank has participated. The *Verified by Visa* directory[253] shows only the name of Citibank Singapore.

A regulation on internet credit card fraud, if one could be issued in Singapore, needs to strike the right balance of loss allocation between the cardholder and the issuer, while encouraging the deployment of solutions such as *Verified by Visa* and *MasterCard SecureCode*. Taking into account the entire circumstances, the issuers appear to be the most suitable candidate to be responsible for internet credit card fraud. The banks and financial institutions together with the card associations in which they are members are the only parties financially and technologically capable to tackle the problem of internet credit card fraud. Allowing them to shift the loss to the cardholder as they have been doing under their current standard terms would only give them an incentive to resist investing in new technologies and solutions to prevent fraud. Therefore, it is submitted that a reform in this area should make it a goal to re-allocate the burden of fraud loss due to internet credit card transaction to the issuer.

The main argument against the idea of making the issuer liable for all unauthorized card-absent transaction where the card was not lost is that doing so

[252] http://www.mastercard.com/us/personal/en/cardholderservices/securecode/index.html.
[253] http://www.visa-asia.com/ap/sea/cardholders/security/activate.jsp.

may create opportunity for dishonest cardholders to use the card fraudulently at the cost of the issuers. Therefore, it is arguable that, the banks' standard terms were reasonable to make all cardholders liable for all unauthorized card-absent transactions so that dishonest cardholders should have no incentive to facilitate fraudulent use of the card, since they would be liable for the transaction anyway. This, however, may be a misleading argument. It is not reasonable to make the honest cardholders suffer losses to prevent fraudulent use of cards by dishonest cardholders. The prevention of fraudulent use of card by the cardholders should be done by criminal sanctions rather than by contractual means. The American legislation, while giving the cardholders the best protection against fraud losses also imposes heavy criminal penalties against fraudulent use of card by the cardholder. US Code §1644[254] imposes fined of up to $10,000 and imprisonment terms of up to 10 years or both on various activities relating to fraudulent use of cards.

7.3 Allocation of fraud loss according to type of cards and purposes of usage

The questions of fraud loss allocation may be determined according to the type of cards used (credit, debit or charge card) to effect the unauthorized transaction and the main purposes of use of such cards (consumer or business purposes).

---

[254] http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001644----000-.html

(a) Debit vs. credit card

Originally, the statutory confirmation that a cardholder is not liable for transactions other than those effected with his express, implied or apparent authority and the ceiling limit of his liability for unauthorized transaction in America and Britain only applies to credit cards. In America §1643[255] applicable to credit card was introduced first in Sub-chapter I of Chapter 41, Title 15. §1693(g)[256] applicable to debit card was enacted later in Sub-chapter VI of the same chapter. Currently, the same level of protection is afforded to both credit and debit card. In Britain, statutory protection is only afforded to holders of credit cards by virtue of sections 83 and 84 of the Consumer Credit Act 1974. The recent amendments by Consumer Credit Act 2006 did not make any change to these two sections. Because the Consumer Credit Act is only concerned with extension of credit, the protection measure under the Act could not be extended to cover debit card and charge card. However, similar protection has been achieved by the Banking Code issued by British Bankers' Association. While the Code is voluntary by nature, it has afforded the holders of debit and charge card the same practical protection. Currently Section 12.11 of the Banking Code 2005[257] provides that a bank's customers will be responsible for losses to his account only if the customers act fraudulently or without reasonable care (*e.g.* keep written records of PIN and security information; give the card or security information to other; or fail to take reasonable steps to protect the card and security information, under Section 12.5). Under Section 12.12, unless the bank can show that the customer have acted fraudulently or without reasonable care, the customer's liability for the misuse of his card will be limited to £50 if

---

[255] http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001643----000-.html.
[256] http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001693---g000-.html.
[257] http://www.bba.org.uk/content/1/c4/52/27/BankingCode2005.pdf.

someone else uses the card before the bank is informed that the card or PIN has been lost or stolen. If someone else uses the card particulars without the cardholder's permission and the card has not been lost or stolen, the cardholder will *not* have to pay anything. If the card is used before the cardholder has received it, he will not be liable.

(b) Consumer vs. business purposes

The measures of protection against fraud loss afforded by the American legislations are available to both consumer and corporate credit cards. US Code §1645[258] provides that §1643[259] is applicable to credit cards issued to business and organizations. In case the same issuer issues 10 or more cards to the employees of a business or organization, §1645 allows the business or organization to contract out of the protection of §1643. The effect of contracting out is limited to the business or organization taking on liability for unauthorized transaction but not to impose any liability upon any employee with respect to unauthorized use of such a credit card in contravention with §1643.

The British Consumer Credit Act 1974 only applies to consumer credit cards. Under section 189, the word *'debtor'* was clearly defined as *'the individual receiving credit under a consumer credit agreement'*. However, the same level of protection has been extended to cards issued to businesses by virtue of the Business Banking Code. The current version of 2005 of the code[260] provides at section 12.11 and 12.12 exactly the same protection afforded to individual customers of banks.

---

258 http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001645----000-.html.
259 http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001643----000-.html
260 http://www.bba.org.uk/content/1/c4/52/26/BusinessBankingCode2005.pdf.

Therefore, it is submitted that, as far as unauthorized card transaction is concerned, the same level of protection should be afforded to the holders of credit, debit, and charge cards issued to individual, business, or organization without distinguishing between type of card or the purposes of usage.

The measures of cardholder's protection that shift fraud losses to the issuer should be balanced with some responsibility on the part of the cardholder. The cardholder should be responsible to verify card account statements and inform the issuer of fraudulent use of card to enable the issuer to minimize its loss. We will discuss this issue in chapter V.

CHAPTER IV

DISPUTES RELATING TO THE SALE CONTRACT

1. DISPUTES BETWEEN THE CARDHOLDER AND THE MERCHANT

1.1 Situations of disputes

In chapter III we have dealt with the issue of liability for payment transactions effected by a third party that lack the authority of the cardholder. In this chapter, we are concerned with the disputes between the cardholder and the merchant arising from the sale contract. Generally, the disputes between the cardholders and the merchant may be divided into 3 categories:

The first category includes disputes based on the merchant's misrepresentation of goods or services, breach of express or implied warranties, breach or non-performance of terms and conditions of the sale contract. Situations leading to this type of disputes generally relates to either an alleged deficiency in the quality of goods or services or merchant's total failure to perform the sale contract. For example the goods or services purchased did not conform with the merchant's description (whether made verbally in face-to-face or telephone transaction or presented to the cardholder via the internet website); the goods delivered to the cardholder was damaged or defective; or the goods or services were not delivered to the cardholder at all. In most cases of this category the cardholder only claims for a full refund of the purchase price but it is possible that he claims for other loss or damage consequential upon the merchant's misrepresentation or breach warranties or conditions either in contract or in tort.

The second category includes disputes arising from an alleged wrongful or erroneous charge to the cardholder account attempted by the merchant. This category includes situations where: (i) the merchant effects multiple payment transactions for one sale transaction (which may be either an honest mistake to effect the same transaction more than one time or a dishonest attempt of the merchant to charge the cardholder for more than the sale transaction amount); (ii) the payment is a recurring transaction that has been cancelled by the cardholder; (iii) the charges that the merchant attempts to claim from the acquirer are of an amount different to the amount of the sale transaction (which may be made by an alteration of amount in a card-present transaction or input of wrong amount in card-absent transaction); or (iv) the card-transaction was attempted only as a security for payment (*e.g.* to book for hotel rooms or airfares) the actual payment for which has been made by other means but the merchant still effects the payment by credit card. In the first 2 situations the cardholder disputes the existence of the sale contract while in the last 2 situations the cardholder disputes the merchant's adherence to the payment term of the sale contract.

The last category relates to the cardholder's right to repudiate the sale contract in case the goods or services were not satisfactory. The cardholder's right may be a statutory right under the proper law of the sale contract or otherwise made available to him by an express term of the sale contract. Merchants supplying goods in card-present transaction usually state their refund policy clearly on the sale invoice near the cardholder signature. Such a policy might give customers rights to full refund within a certain period from date of delivery, no refund or return, in-store credit only, exchange only and may also includes special

circumstances such as the customer is allowed to return the goods but must bear the shipping costs. Merchants supplying goods and services over the telephone and internet increasingly have a policy that allows customer to cancel the services or return the goods within periods as long as 30 to 60 days to obtain a full refund. Normally, if the customers exercise the right to return goods or cancel services within the time limit allowed, the merchant is obliged to give a refund. The merchant's failure to do so would result in a dispute with the cardholder.

1.2 The cardholder's claim against the merchant

(a) Conflict of law question

When a dispute arises between the cardholder and the merchant, the first question to be addressed is which law applies and which court has jurisdiction over the dispute. The conflict of law is a very large topic and we will only attempt to outline here the major conflict of law rules that may be applied where the dispute is resolved in Singapore courts.

<u>If the merchant and the cardholder are both domiciled in Singapore,</u> the conflict of law issues may not arise. If the transaction was effected over the internet, the standard terms of the sale contract presented by a Singapore merchant would most likely select Singapore law. Even if no express choice of law were made (e.g. in a card-present transaction where no written contract was made), Singapore law would still apply as the system of law that has the closest and most real connection with the contract because all the connecting factors such as place of making contract, place of performance, place of residence of the parties and place of the forum points to Singapore. In terms of jurisdiction, the Singapore courts

certainly have jurisdiction to resolve the dispute because court documents can be served on both the merchant and the cardholder as both of them domiciles in Singapore[261].

The conflict of law questions arise where: (i) a foreign system of law was expressly selected to govern the contract between two Singapore parties; (ii) a foreign cardholder purchases goods or services from a merchant located in Singapore either through the internet or while he travels to Singapore, or (iii) a Singapore cardholder purchases goods or services from a merchant located overseas either through the internet or while he travels abroad.

The first case seems quite rare but it is likely that the choice will be upheld subject to the qualifications that the application of the foreign law should not be contrary to public policy, and the choice should be bona fide and legal[262].

In the second case, the foreign cardholder may sue the merchant in Singapore courts. Singapore law may apply in the majority of cases either as the governing law of choice in the contract or as the law of the place of performance[263] (if the goods or services were supplied in Singapore); the law of the place of making the contract (if the sale was made while the cardholder was in Singapore); or the law of the forum. In the unusual case where the contract was made via internet and no governing law was chosen, it is not certain that Singapore law would apply. If physical goods were to be shipped to the cardholder's residential address after payment, it seems likely that the law of the place of performance, which is also the

---

[261] Singapore Court of Judicature Act, chapter 322, Section 16(1).
[262] Rule 180 *Dicey and Morris on the Conflict of Law*, *Vita Food Products Incorporated v. Unus Shipping Company Ltd* [1939] AC 277, Privy Council per Lord Wright. The Vita Food rule has been applied in the Singapore case of *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148; [1999] SGCA 79.
[263] *Charternay v Brazillian Submarine Telegraph Co* [1891] 1 QB 79.

cardholder's place of residence, would apply[264]. If the goods were intangible (e.g. software, digital music or internet telephony services), the result is not certain as the place of making of the contract or the place of performance can be either Singapore or the cardholder's place of residence. In view of the lack of consumer protection in Singapore, a cardholder from a pro-consumer jurisdiction like Britain or America would probably prefer to sue the merchant in their own country and plead for application of the law of their residence to the contract. However, if Singapore courts have been expressly chosen under the contract, the Singapore merchant may apply for an anti-suit injunction to prevent future recognition and enforcement of the foreign judgment in Singapore.

In the third case, the Singapore cardholder may sue the foreign merchant in Singapore <u>only if</u> service of process may be made on the merchant while he was in Singapore or if the cardholder was granted leave to service outside jurisdiction[265]. Although difficult, such a leave may possibly be granted under Order 11, Rule 1 of the Rules of Court. Where the cardholder's claim was in contract, it is arguable that the sale contract was made as a result of an essential step taken by the cardholder in Singapore[266]. Where the claim was in tort the damage may be suffered in Singapore or the tort was constituted in part by an act of omission occurring in Singapore[267]. As discussed above, bona fide and legal express choice

---

[264] The same position is confirmed under the Brussel Regulation (European Council Regulation 44/2001) Article 5(1)(b).

[265] Section 16(1)(a)(ii) of the Singapore Court of Judicature Act (Cap 322).

[266] Rules of Court, Order 11, Rule 1, 1 (d)(i): *"service of an originating process out of Singapore is permissible with the leave of the Court if in the action … Where the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a <u>contract which was made in Singapore</u>, or was made as a result of an <u>essential step being taken in Singapore</u>". The cardholder's act of* clicking the mouse on a computer in Singapore to signify his acceptance of the contract may be considered an essential step in the making of the contract.

[267] Rules of Court, Order 11, Rule 1, 1 (d): *"service of an originating process out of Singapore is permissible with the leave of the Court if in the action … the claim is founded on a tort, wherever committed, which is <u>constituted, at least in part, by an act or omission occurring</u>*

of law would likely be upheld in Singapore court unless contrary to Singapore public policy.

Where the subject matter of the dispute is not of the performance of the sale contract but its formation (e.g. whether the sale contract has been formed between the cardholder and the merchant), the governing law will be the putative proper law of the alleged contract[268].

In the rare case where the cardholder's claim is not in contract but in tort (e.g. a Singapore cardholder purchased defective goods which caused injury for which the cardholder seek damages in tort), the double actionability rule would apply[269]. According to this rule, the alleged wrong must be actionable if committed in Singapore and it must not have been justifiable by the law of the location where the tort occurred. If the action were taken in Singapore, Singapore law as *lex fori* would apply to determine where in substance the tort occurred[270].

(b) The cardholder's claim against the merchant under Singapore law

Assuming that a dispute between the cardholder and the merchant is resolved in a Singapore court and Singapore law applies, the cardholder may have a cause of action in both tort and contract.

---

in Singapore; or (ii) the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring". If the goods were defective causing damage to the cardholder or if the goods were not delivered to the cardholder in Singapore one of these criteria may be satisfied.

[268] *Re Bonacina* [1912] 2 Ch 394,

[269] The double-actionability rule of *Phillips v Eyre* (1870) LR 6 QB 1 has been confirmed to be applied in Singapore, *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579.

[270] *Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391.

The cardholder may claim for damages if he suffers injury or damages as a result of a defect in the goods or services purchased. If the cardholder himself uses the card to make payment for a contract of sale, the cardholder may sue the merchant for breach of contract or breach of express or implied warranty when the product was defective or if the merchant was otherwise in breach of a condition of the sale contract. As discussed in chapter II, the sale contract between the cardholder and the merchant should be characterized in the same way as a sale paid by cash. Therefore, in addition to the general principles of ordinary contract law, the cardholder may also rely on the implied warranty imposed by the Sale of Good Act or the Supply of Services Act. Such warranty include (i) the seller has the right to sell the goods, free from encumbrances; (ii) the goods correspond with their description; (iii) the goods are of merchantable quality except for defect that the buyer ought to have known before the contract; and (iv) the goods supplied are reasonably fit for their purposes.

Where the cardholder did not use the card himself but authorized a carduser to use the card, the contract of sale is made between carduser and the merchant. The same remedy available to the cardholder in both contract and tort would be available to the carduser. In this case, because there is no contract between the cardholder and the merchant, the cardholder may not sue the merchant under the sale contract unless (i) the carduser represented to the merchant that he make the purchase as an agent on behalf of the cardholder or (ii) if the device of undisclosed principal is used, in which case it would be necessary to prove that the carduser intended to make the purchase on behalf of the cardholder and the cardholder must ratify the carduser's act.

1.3 Resolution of disputes via the issuer and card association

Resolution of merchant-cardholder dispute across different jurisdictions in a court of law is a challenging and expensive task. A Singapore cardholder in a dispute with a foreign merchant faces many difficulties. If he wishes to sue the merchant in the foreign country, he needs to incur the cost of hiring foreign lawyers and probably travel to the foreign country. If he wishes to sue in Singapore, he has to apply for leave to serve process outside jurisdiction, which is not an easy task. Even after a judgment has been granted in his favor the task of getting it recognized and enforced against the merchant is daunting, if not prohibitive. The process is not less challenging and expensive for a foreign cardholder to pursue action against a Singapore merchant, whether in foreign or Singapore courts. Even where both the cardholder and the merchant domicile in Singapore, disputes between them rarely come to court. In practice, the majority of disputes between cardholder and merchant, regardless of where they are located are resolved via the issuer, the acquirer, and the card association in which they are members.

Therefore, the chargeback rules of the card associations are relevant for our analysis. Traditionally all the rules and regulations of card associations are treated as confidential documents not publicly available, that makes it difficult to conduct analysis of card acceptance and resolution of disputes. Fortunately, recently Visa has disclosed several parts of its rules and regulations to the public. The relevant chargeback rules of Visa are now published on the internet website of Visa[271] as part of the *"Rules for Visa Merchants Card Acceptance and*

[271]http://usa.visa.com/download/business/accepting_visa/ops_risk_management/rules_for_visa_merchants.pdf#search=%22Visa%20Merchant%20Rules%20Manual%22.

Chargeback Management Guidelines" to entice merchants to join Visa card acceptance programs. Through this document, we can find out more about the practical aspects of disputes resolution within the Visa system. The MasterCard chargeback rules have also been disclosed in part[272]. However, we chose to analyze the Visa rules as they appear to be more systematic and comprehensible.

(a) Chargeback reason codes

Under the current Visa chargeback rules, the various disputes between the cardholders and the merchant in respect of both the sale (except tort claim) are categorized into *'reason codes'* with corresponding procedure for resolution.

(i) In the first category of disputes which arise from quality of goods or services or non-performance of the contract of sale there are 2 reason codes applicable. Reason code 53 allows the issuer to chargeback the transaction amount if the merchandise was defective or not as described. Code 53 is applicable to a wide range of situations such as: where the goods purchased from the internet were not as described in the sale receipt or other documentation presented to the cardholder at the time of the transaction; where the goods were not the same as the merchant's verbal description for telephone transaction; and where the goods shipped to the cardholder and received but were damaged or defective. In all these cases, the cardholder is required to return the alleged defective, misrepresented, or damaged goods to the merchant before the chargeback claim can be submitted. The merchant is required to accept the chargeback if it has received the returned goods or if the cardholder's claim was

[272] http://www.mastercard.com/us/wce/PDF/12999_MERC-Entire_Manual.pdf#search=%22MasterCard%20Merchant%20Rules%20Manual%22

considered by Visa as valid. In case of defective merchandise, the chargeback claim may include the shipping fee of the returned merchandise in addition to the amount of the sale transaction. Reason code 30 is applicable to the situation of merchant's non-performance of the sale contract. Under this code, the issuer may chargeback the transaction amount if services were not provided or merchandise were not received at the specified expected date of delivery or after 30 days from the date of the transaction. To resist the chargeback claim the merchant has to submit evidence of specified date of delivery if one has been indicated in the sale invoice, proof of delivery of goods or services, or evidence that it has informed the cardholder of delayed delivery. Merchant's failure to provide sufficient evidence will result in the chargeback claim being resolved in favour of the cardholder.

(ii) The second category of disputes arises from an alleged wrongful or erroneous charge to the cardholder account attempted by the merchant. Where the merchant effects multiple payment transactions for one sale transaction, two reason codes apply. Code 57 (fraudulent multiple transaction) applies to alleged dishonest attempt of the merchant to charge the cardholder for more than the sale transaction amount and code 82 (duplicate transaction) applies to resolve honest mistakes to effect the same transaction more than one time. Where the payment was a recurring transaction that has been cancelled by the cardholder, reason code 41 (cancelled recurring) applies. Where the charges that the merchant attempts to claim from the acquirer is of an amount different to the amount of the sale transaction (which may be made by an alteration of amount in a card-present transaction or input of wrong amount in card-absent transaction), reason code 80 (wrong or altered amount) applies. Where the card-transaction was attempted only as a security for payment (e.g. to book for hotel rooms or airfares), the actual payment for which has been made by other means but the

merchant still effects the payment by credit card, reason code 86 (paid by other means) applies. In all the situations listed in this category, the merchant has to accept the chargeback claim and the amount of the transaction will be credited back into the account of the cardholder if the merchant fails to disprove the cardholder's allegation. For example, if the cardholder claims for chargeback under reason code 57 or 82, the merchant is required to submit copies of invoices, delivery receipt and payment transaction receipt to prove that there were actually multiple sale transactions for which valid charges were made to resist the chargeback claim.

(iii) The third category relates to the cardholder's right to repudiate the sale contract in case the goods or services were not satisfactory. The Visa rules require that the merchant must state its refund/cancellation policy clearly on the sale invoice near the cardholder's signature and comply with such policy. The merchant is at liberty to fix its refund policy (e.g. full refund within a certain period from date of delivery, no refund or return, in-store credit only, exchange only, and special circumstances where the cardholder is allowed to return the goods but must bear the shipping costs, etc). If the cardholder cancels the services or returns the goods to the merchant within the period allowed for refund indicated in the sale invoice, the merchant is required to process a credit to return the transaction amount to the cardholder. If the merchant fails to process a credit, upon a request by the cardholder, the issuer is entitled to chargeback under either reason code 85 (credit not processed), or reason code 53 (returned merchandise received but credit not processed).

(b) Disputes resolution cycle in a card association

Typically, when a cardholder raises a dispute with a merchant, the issuer would make an enquiry into the nature of the dispute by asking the cardholder to fill in a standard form. The form is designed to clarify the nature of the dispute and categorize it in accordance with the applicable reason codes. The cardholder is usually required to provide documentary evidence to support his claim.

If the issuer were convinced that cardholder's claim was valid and supported by evidence, the issuer would accept the form and immediately credit the transaction amount back to the card account pending resolution of the dispute with the merchant. After that, the issuer would lodge a chargeback claim through the card association, giving the applicable reason code and details of the claim, information regarding the cardholder's attempt to resolve the dispute with the merchant and supporting evidence. There is a time limit to submit a chargeback claim for each type of transaction, which is usually about 6 months from the date of the transaction.

The issuer's chargeback request sent to the card association will then go through a screening process. Requests that involve technical errors such as wrong reason codes, non-compliance with chargeback rules (*e.g.* chargeback beyond time limit) would be rejected automatically. Chargeback requests that pass the screening stage will be forwarded to the acquirer, who then forwards the request to the merchant. The acquirer would then work with the merchant to retrieve originals or copies of relevant transaction documents and other supporting documents (such as invoice, proof of delivery) that may be used to resist the chargeback. The information and documents provided by the merchant will be forwarded back to

the cardholder via the issuer. Most disputes would be resolved at the end of this cycle because the chargeback rule is rather straightforward.

If the dispute is not resolved at the end of the first cycle, the issuer can make a second attempt to chargeback if further information and/or evidence can be deduced by the cardholder. If the parties fail to agree on a resolution of the dispute after the second cycle, the dispute will be finally resolved by an arbitration procedure within the card association. The arbitrator of the card association has authority under the association rules to resolve the dispute conclusively without going to courts.

(c) Effect of disputes resolution by the card associations

The decisions of the arbitrator are not binding on the cardholder and the merchant but it is binding between the issuer and the acquirer by virtue of the association's bylaw and regulations. The effectiveness of the rules is further enhanced by the indemnity given by the association to each member, whereby the association undertakes to indemnify rules abiding members against loss if another member is unable or unwilling to pay. Because the monopoly power of the card association, there is hardly any chance any issuer or acquirer refusing to comply with the arbitration decisions.

The effect of the dispute resolution mechanism on the cardholder and the merchant is indirect, but not less powerful. The issuer or acquirer that came out with a loss in a dispute may seek to recover the loss by charging it to the cardholder or the merchant respectively.

As shown in chapter II, a typical merchant agreement usually contains a lengthy chargeback clause which gives the acquirer the right to withhold payment to the merchant in respect of any transaction (or if it has been paid, to deduct the transaction amount from the account of the merchant), in case the cardholder refuses to pay based on the ground that the goods or services supplied were defective or that the merchant was in breach of the contract of sale. In addition to the chargeback clause that directly relates to disputes resolution, the merchant agreement usually states that the merchant is solely responsible to resolve any disputes with the cardholder without involving the acquirer; and that the merchant indemnifies the acquirer from any claim or liability relating to the sale. Acquirers specialize in serving electronic commerce merchants in Singapore such as eNets also have the practice of holding the funds received from internet transactions for 6 months before allowing the merchant to draw funds from the account. The practice guarantees the acquirer that funds are always available in the account even if all the transactions were charged-back.

On the other hand, a typical cardholder agreement in Singapore minimizes chargeback by avoiding to give any cause for the cardholder to raise a dispute with the issuer based on a misrepresentation or default by the merchant. As will be shown in the next section below, all cardholder agreements in Singapore contains clauses that exclude all issuer's liabilities in respect of any dispute between the cardholders and the merchants. Some cardholder agreements have additional clauses that make the cardholders liable for all internet transaction, whether or not authorized by the cardholder. Such clauses in the cardholder agreement have the effect of guaranteeing that the issuer will be entitled to charge the amount of the card transaction to the cardholder in the event the outcome of the dispute as resolution was in favor of the merchant.

The overall effect is that when dealing with the Singapore banks, whether as a cardholder or as a merchant, the customers are depending on the absolute discretion of the banks to resolve the dispute in any manner they think fit. The banks are granted wide flexibility at minimum risk possible. In terms of speed and costs, the disputes resolution mechanism under the card association is very efficient. Types of disputes are categorized systematically into comprehensive reason codes. Communication is faster with coded messages, which are often transmitted by electronic means. Processing of requests and documents is assisted by computer software to minimize invalid requests and errors.

Because of the practical difficulties and high costs to resolve a merchant-cardholder disputes in courts, the vast majority of such disputes are not resolved directly between the merchant and the cardholder but via the chargeback mechanism of the card associations. The problem with this is not about the fairness or efficiency of the card networks disputes resolution procedure but the bank's willingness to assist their customers in the situations of disputes. The analysis in the next section seeks to demonstrate the degree in which banks in Singapore are accountable to cardholders for a dispute with the merchant, in comparison with the degree of banks' accountability in other countries.

2. ISSUER'S LIABILITY FOR CARDHOLDER'S CLAIM IN THE SALE CONTRACT.

2.1 Issuer's involvement in the sale contract

The liability of an issuer of credit, debit, or charge cards to the cardholder for a claim the cardholder may have in the sale contract with the merchant depends on

the capacity in which the issuer is involved in the sale transaction and the degree of involvement. Generally, an issuer may be involved in the sale contract in several capacities. First, the issuer may be the same person as the merchant selling the goods or services to the cardholder. This situation is rare because the Singapore Banking Act prohibits banks from selling goods to customers. However, the situation may still arise if a subsidiary of the bank sells products such as an insurance policy to a cardholder, the payment for which is made by his card. Furthermore, a charge card issuer who is not licenced as a bank or financial institution is not prohibited from selling goods to customers. Secondly, the issuer may be involved as an advertiser who disseminates information on merchants and their products to entice cardholder to make purchases from the merchants by the card. This situation frequently occurs in Singapore. All Singapore banks send to their cardholders promotional booklets containing advertisements of hundreds of merchants who offer special discounts, free gifts or awards to cardholders of certain types of cards at least once a month together with the bank statements. Generally, banks only advertise for merchants who are also using the same bank as their acquirer. When a cardholder make purchase from such merchants, the banks earns the entire amount of the fee for processing the payment transaction collected from the merchant without having to share it with another bank. Thirdly, the issuers are involved as providers of credit who lend money for the cardholder to purchase the goods or services. This is applicable only if the holders of credit card do not settle in full the amount due under the monthly statements, or if the holders of debit card have an underlying overdraft facility available in the account linked with the card. Finally, the issuers are always involved as the providers of payment services by which the consideration for the sale contract is fulfilled regardless of the type of card used.

2.2 Issuer's liability in contract

The issuer's liability towards the cardholder depends on the terms of the cardholder agreement. As discussed in chapter II, the liabilities of the issuer first depend on how the cardholder's obligation to pay the issuer is characterized. If the card transaction is characterized as an assignment of book debts by the merchant, the issuer as assignee takes the debts subject to equities. The issuer's claim against the cardholder is subject to all defence the cardholder may have under the sale contract including cross-claims and cardholder's right to set off damages for merchant's misrepresentation or breach of the sale contract. However, the analysis in chapter II shows that the better way to characterize the cardholder's obligation is by *direct obligation* theory, which means the cardholder's obligation to pay the issuer is direct, separate and independent of any claims that he may have against the merchant. The analysis in chapter III shows that all cardholder agreements in Singapore invariably impose upon the cardholder a direct obligation to pay the issuer the charges that appear in the monthly card statement rendered to him. Therefore, the *assignment theory* of characterization cannot be applied to make the issuer liable for any claim the cardholder may have against the merchant in the sale contract.

As discussed earlier, cardholder agreements in Singapore were drafted to minimize the chance that a cardholder may have any cause of action or any basis to complaint to the issuers of any problems or disputes with any merchant. It is not possible to find the words *'chargeback'*, *'countermand'* or *'stop payment'* in any cardholder agreement. As far as a cardholder is concerned, once a card transaction is effected, the payment is complete and he is not entitled to ask the bank to stop payment, to re-credit the transaction amount to his card account or

to assist him in any dispute with the merchant. In addition, a typical Singapore cardholder agreement usually contains clauses that expressly disclaim issuer's liability in respect of any disputes between cardholder and merchant. The exclusion of liability clauses used by Singapore banks have been considered in some length in chapter III in respect of unauthorized transaction. The effect of the same clause that we considered in section 6.1(a) in chapter III is also extended to cover the situation of cardholder-merchant disputes[273]. The standard terms used by major foreign banks contains similar clauses. Two of them went further to specifically deal with transactions made by remote methods such as mail, telephone, facsimile, or internet[274].

By the usage of the above standard clauses, the banks not only exclude their liability for any disputes with the merchant but further express their indifferent attitude in respect of card-absent transaction. From the letters of the standard

---

[273] The clauses found in the cardholder agreements of 3 biggest Singapore local banks are as follows. **UOB bank**: *"We are not responsible for the quality of any goods supplied and the performance of any services provided by any establishment with the use of the Card."* **DBS bank**: *"We are not liable in any way should you encounter any problems with the goods and services that you obtain through the use of your Card nor are we responsible for any benefits, discounts or programmes of any merchant that we make available to you. In spite of the non-delivery or non-performance or defects in any such goods and services, you shall pay us the full amount shown in the Card Account statement."* **OCBC bank**: *"The Bank shall not be responsible for the goods or services covered by any Card Transaction or the delivery quality or performance thereof or the privileges, benefits, discounts or programmes of any Merchant (whether or not made available or introduced to any Cardmember by the Bank or under any Programme). The Bank shall be entitled to charge the Card Account in respect of that Card Transaction notwithstanding the non-delivery or non-performance of or any defect in those goods or services or the failure of any Merchant to provide or make available to any Cardmember any of those privileges, benefits, discounts or programmes. All Cardmembers shall seek redress in respect of such goods, services, privileges, benefits, discounts and programmes from the Merchant directly."*

[274] The clauses we analyzed in section 6.1(c) in chapter III are included here for ease of reference: **Standard Chartered Bank's Clause 21.9**: *"A request by <u>mail, telephone, facsimile transmission or other means of communication</u> to a merchant for the supply of goods and/or services to be charged to the Card Account, whether or not made or authorised by the Cardmember and <u>whether a sales draft, voucher or document is signed by the Cardmember</u>, is a valid Card Transaction and the Bank will debit the Card Account with such Card Transaction".* **Citibank's clause 4.3:** *"A <u>request via mail, telephone, facsimile, internet or other means of communication to a merchant</u> for the supply of goods and/or services to be charged to the card account, whether made or authorized by you and whether a sales draft, voucher or document is signed by you, is a valid card transaction and we will debit your card account with such card transaction."*

terms it appears that if a transaction is effected via card-absent methods the banks is entitled to charge the amount to the cardholder account. It does not matter to the bank whether or not the merchant was able to prove that the goods or services were supplied.

Our analysis in chapter III of the application of the English Unfair Contract Term Act 1977 in Singapore shows that it is quite unlikely that the exclusion of liability clauses would fail the reasonableness test under the Act. If the clauses pass the test of reasonableness in the situation of unauthorized transaction, the same clause would be even more likely to pass the test in the circumstances of disputes with the merchant. If the bank was only involved as the provider of payment services or credit without publishing advertisement for the merchant, the loss caused to the cardholder due to the merchant's misrepresentation or default of the sale contract cannot be said to have been caused by the bank's negligence. A clause excluding the bank's liability for damage not caused by its negligence would likely be considered reasonable under the Act.

If the bank negligently included untrue information about the merchant's products or services in the advertisement sent to the cardholder, which resulted in a loss to the cardholder there might be more reasons to make the bank liable. However, as reflected in several recent cases decided in the Singapore courts, a typical example is *Ri Jong Son v Development Bank of Singapore Ltd*[275], clauses that exclude the bank's liability for its own negligence were held to be reasonable

[275] [1998] 3 SLR 64. This clause used by UOB *"The bank shall not be liable for any loss damage or expense suffered or incurred by the customer (whether as a result of computer breakdown, forgery of signatory's signature, material alteration of withdrawal/requests or other reasons of any kind whatsoever) through no fault of the bank"* was held to be reasonable under the UCTA as it *"did not seek to restrict the bank's liability for negligence and* ***even if it did, the clause was reasonable within the context of a bank-customer relationship****"*.

within the context of bank-customer relationship. Therefore, it is very likely that under the current terms of cardholder agreements in Singapore the cardholder would not have any claim in contract against the issuer in the case of merchant's misrepresentation or breach of the sale contract.

2.3 Issuer's liability in tort

The above analysis shows that a Singapore cardholder would not stand a chance to hold the issuer liable for the merchant's non-performance or breach of the sale contract based on the cardholder agreement. Any available remedy has to be found in tort. Where the issuer makes no advertisement or representation of the merchant's goods or services it is unlikely that the cardholder can establish any involvement of the issuer in the merchant's conduct or foreseeability of damage to support his claim.

If the issuer was also the acquirer of the merchant and the advertisement by the issuer of the goods or services supplied by the merchant constitutes a misrepresentation, the cardholder may establish a claim against the issuer in tort. There is no local authority on this point but there are some American authorities that held creditors liable in negligence for not supervising the affairs of a seller whom they financed. In *Connor v. Great Western Savings & Loan Association*[276], the plaintiff was the owner of a home purchased from a developer financed by Great Western. Great Western was held liable for damage from structural defects due to the fault of the developer. If we follow the arguments in this case, a credit card issuer may be held liable for the merchant's breach on the ground that the display of the issuer's logo at the merchant's premises or the advertisement of the

[276] 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1969).

merchant's goods or services on the issuer's newsletter constitute a representation that the merchant has been selected by the issuer for dependability. The cardholder may contend that the issuer has a duty of care to investigate the merchants' business to ensure they were reliable, and that the issuer could have reasonably foreseen the risk of harm to the cardholder if the merchant failed to perform the sale contract or if the products advertised were misrepresented. The degree of the duty of care of the issuer (if any) depends on the degree of the issuer's involvement with the operation of the merchant and the foreseeability of damage caused to the cardholder. The dicta in *Hedley Byrne & Co Ltd v. Heller & Partners*[277] seems to be applicable as the circumstances also arise between bank and customers. The issuer may be liable to the cardholder for economic loss resulting from the negligent misrepresentation made in their advertisements or correspondence with the cardholder.

However, even if the cardholder succeeds in proving the issuer's negligence the disclaimer of liability clauses in the cardholder agreement, as described in previous sections would operate to defeat the cardholder's claim in tort. A court would not impose a duty in tort that is inconsistent with the terms of the contract between the cardholder and the issuer[278]. In *Hedley Byrne* itself, the customer also failed in the suit because of a disclaimer of liability in the relevant correspondence from the bank.

[277] *Hedley Byrne & Co Ltd v. Heller & Partners* [1963] 3 W.L.R. 101 (House of Lord).
[278] *Tai Hing Cotton Mill Ltd. V. Liu Chong Hing Bank Ltd* [1986] AC 80 PC.

2.4 Issuer's liability in Britain and America

The analysis in previous section shows that currently the Singapore cardholders have no right to assert any claim or defences against the issuer for any misrepresentation, default, or non-performance by the merchant, at either common law or contract. In order to propose a reform in this area, it is necessary to look at the relevant parts of the consumer credit protection legislations in Britain and America that deals with this issue. This analysis serves to show the deficiency in the regulatory regime of Singapore and to suggest desirable features if a reform may be attempted.

(a) Issuer's liabilities in America

The §1666(i) of US Code[279] grants credit cardholder the right to assert against the issuer claims (other than tort claims) or defenses arising out of the contract of sale with the merchant. According to §1666(i), the cardholder's right to assert claims or defenses is subject to several limitations. First, under sub-section (a)(1), he must has made a good faith attempt to obtain satisfactory resolution of the disagreement or problem relative to the transaction from the merchant directly. Secondly, the amount of the transaction must exceed $50. The third limitation is that the place where the initial transaction occurred was in the same State as the mailing address previously provided by the cardholder or was within 100 miles from such address. The third limitation does not apply if the merchant was the same person as the card issuer, was controlled by the card issuer, was under direct or indirect common control with the card issuer, was a franchised dealer in

[279] Title 15, Chapter 41, Sub-chapter I, Part D, http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001666---i000-.html.

the card issuer's products or services, or has obtained the order for such transaction through a mail or publication made by or participated by the card issuer by which the cardholder was solicited to enter into such transaction by using the credit card issued by the card issuer. Furthermore, the issuer may be considered as having waived its right to rely on the third limitation if it has agreed to render assistance to the cardholder to resolve the dispute with a merchant located outside the state or the 100miles distance[280].

Under sub-section (b) of §1666(i), the amount of claims or defenses the cardholder may assert *'may not exceed the amount of credit outstanding with respect to such transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of such claim or defense'.* Therefore, the nature of the cardholder's claim under §1666(i) is in effect a right to withhold payment, not a right to seek a refund or reimbursement. In other words, as soon as the cardholder makes payment of the credit card bill the amount of claims he is entitled to assert would reduced by the same amount of his payment. Therefore, the cardholder must find out about any defect in the merchandise and raise his claim before he makes payment of the credit card bill. The measure of protection under §1666(i) is only available to holders of credit cards, but not debit or charge cards.

(b) Issuer's liabilities in Britain and Europe

The British Consumer Credit Act 1974 imposes liability upon the issuers of credit cards in respect of the sale transaction by two sections: section 75 and section 56. Section 75 provides that the cardholder will have the *'like claims'* against the

[280] *Hyland v. First USA Bank*, 1995 WL 595861 (E.D. PA.Sept.28,1995).

issuer as the claim he has against the merchant in respect of misrepresentation or breach of contract if (i) the agreement is a regulated debtor-creditor-supplier agreement[281] (ii) the cardholder's claim is in relation to a transaction financed by the debtor-creditor-supplier agreement and (iii) the claim in respect of one item has a cash price attached to it by the merchant from £100 to £30,000. Because of the *'like claim'* formula, the cardholder's claim is not limited to the value of the goods supplied. He may claim damages for breach of contract or misrepresentation such as loss of profit, consequential loss or injury caused by defective goods. The cardholder may also have a restitutionary claim against the issuer if he has the same claim against the merchant, which depends on whether the merchant has received the benefit of the payment transaction from the issuer. Sub-section (4) provides that the cardholder's right is not affected even if, by entering into the transaction, he has exceeded the credit limit or otherwise contravened any terms of the agreement with the issuer. Sub-section (2) allows the issuer to recover from the merchant loss suffered by the issuer in satisfying his liability under section 75, including reasonable costs in defending the proceeding instituted by the cardholder.

Section 56 of the British Act allows cardholder to recover damages from the issuer in respect of contractual misrepresentation made by the merchant. The effect of section 56 is achieved in a way similar to section 29 of the British Hire Purchase Act 1965 by providing that the merchant is deemed as an agent for the issuer in addition to being a principal in the sale contract. The statutory *'deemed agency'* is not limited to the contract of sale. Hence, the issuer may be made liable for misrepresentation made by the merchant in respect of the credit agreement or even for tortuous or criminal liabilities. Unlike section 75, section 56 does not

[281] Please refer to the discussion at page 246 below (footnote 283).

contain any monetary limits of the transaction amount nor does it confer upon the issuer any right to seek indemnification from the merchant. The application of section 56 requires that the goods sold forms the subject matter of a regulated debtor-supplier-creditor agreement.

(c) Features of measures of protection

The statutes in both America and Britain both grant the cardholders the right to assert against the issuers claims arising out of the contract of sale with the merchant. The right is only granted to holders of credit card, not debit or charge cards.

In terms of the nature of the cardholder's right the British Act appears to be the most generous by giving the cardholder the right to claim for consequential damages, which might be in tort or contract and restitutionary claims in addition to the amount of the sale transaction. In America, the cardholder's claim in tort is excluded. In other part of Europe the Consumer Credit Directive only requires that member States give credit cardholders the right to pursue action against the creditor[282] but did not specify that the debtors should be entitled to claim for consequential damages. As the nature of the claim is different, the amount of the claim the cardholder may have in Britain may be bigger than in other parts of Europe and America. In terms of claim amount, the British Act does not limit the claim amount, but only requires that each item in which the cardholder has a dispute must have a cash price attached to it from £100 to £30,000. The American statute only requires the amount of each transaction to exceed $50

[282] Article 11, Consumer Credit Directive, Council Directive 87/102/EEC of 22 December 1986, Official Journal L 042 , 12/02/1987 P. 0048 – 0053. Please refer, also, to discussion at page 253 below.

without any ceiling limit of claim. However, the total amount of the cardholder's claim is limited to the amount of credit outstanding with respect to the same transaction at the time the cardholder first raise the dispute with the merchant or the issuer.

Generally, the cardholder's right to assert a claim or defence against the issuer in respect of the merchant's breach or default in the sale contract has to depend on the degree at which the issuer participate in the sale transaction. As discussed in section 2.1 above, the issuer may be involved in the sale transaction as a seller, an advertiser, a creditor or merely as a provider of payment services. The degree of involvement by the issuer may be defined by various criteria such as (i) the nature of the agreement between the issuer and the cardholder; (ii) the relationship between the issuer and the merchant whether by ownership, control, franchise or joint promotion; and (iii) the method of effecting the card transaction whether card-absent or card-present, which is also related to the place where the transaction occurs. The legislation in Britain and America differ in the criteria selected as the basis to hold the issuer liable to the cardholder.

The British statute emphasizes on two criteria: the creditor-debtor relationship between the issuer and the cardholder and a pre-existing arrangement between the issuer and the merchant. Section 75 only applies to card transaction financed by *"a debtor-creditor-supplier agreement"* which, by definition is *"made by the creditor under pre-existing <u>arrangement, or in contemplation of future arrangements</u>, between himself and the supplier"*[283]. The use of the word *"arrangement"* instead of *"agreement"* suggests that something short of a contractual relationship will suffice to render the issuer liable. Therefore, section

[283] Consumer Credit Act 1974, Section 75(1) and Section 12(b).

75 applies not only to card-present transaction effected in Britain but also to credit card transactions that occur outside the country. This proposition has been suggested by Professor Goode[284] and recently confirmed by the Court of Appeal in the case of *Office of Fair Trading v. Lloyds TSB Bank plc and others*[285]. Because of the English courts' tendency to interpret the word *'arrangement'* to include non-contractual relationship, there is little doubt that section 75 applies to internet credit card transaction in the same way as it applies to card-present transactions. The second criteria of issuer-merchant relationship has almost no real effect as it is only applied on the surface without taking into account location of the transaction, the merchant or method of effecting transaction.

The American statute also considers the creditor-debtor relationship as essential but differs in the selection of the second criteria of the place of transaction with an exception where the issuer is involved with the merchant's business by ownership, control, franchise, or joint-promotion activities. Because of the criteria of the place of transaction, the method of effecting card transactions (whether card-absent or card-present) seems to be a more relevant factor under the American law. While taking geographical location as a criteria seems to be more readily of application than an ambiguous word such as *'arrangement'*, the application of this criteria in practice also has some problems. In a card-absent transaction effected by mail, fax, telephone, or internet, it is difficult to determine the location of the transaction. Cases dealing with card-absent transaction have reached conflicting results with some cases considering the transaction takes place at the consumer's location and some other held that the transaction takes place at the merchant's place of business.

---

[284] R.M. Goode *"Consumer Credit Law and Practice"* (Butterworth), Ic, para 33.185 and III para 5.145.
[285] [2006] EWCA Civ 268, [2006] 1 All E.R. (Comm) 629.

3. SUGGESTIONS FOR REFORM

3.1 Basis for issuer's liability

The discussion in sections 1.1 and 1.2 above shows that it is very difficult for a cardholder in Singapore to pursue a legal action against the merchant even if the goods were defective or the merchant fails to deliver goods or services at all. Section 1.3 shows that there exists an effective mechanism of dispute resolution within the framework of the card associations rules and regulation, under which the cardholder can obtain a remedy at low costs. However, in section 2.2 and 2.3 it is found that the banks in Singapore are not willing to help their customers in any disputes between the cardholder and the merchant, which is the opposite of the position in America and Britain. Looking at the entire picture, we can see that the need of a reform in this area of law in Singapore is clear. The banks should not exclude all responsibility in an area where the consumers need help the most while, in fact, the banks have the facilities to help customers without incurring substantial additional costs. The big difference in the cardholder's rights in Singapore and other countries suggests that improvement can be made without adverse effect on the benefits of the banks. The main question here is why the issuer should be made liable for the merchant's default?

The analysis in section 2.4 above shows that in both America and Britain only holders of credit cards are given the right to assert against the issuer claims arising out of the contract of sale with the merchant. Therefore, creditor-debtor relationship was the most essential requirement. The second criteria relating to the issuer-merchant relationship adopted in the legislations were only secondary and reflecting part of this relationship. The criteria used by the American statute

relate to geographical proximity between the issuer and the merchant (e.g. location of transaction) while the British statute uses the vaguely defined *'arrangement'* between them. Both of the statutes concerned with the closeness business relationship between the issuer and the merchant or the issuer's involvement with the business activities of the merchant. The only reason that an issuer gets involved in the merchant business is for a financial gain. Therefore, it can be said that the issuers in America and Britain are made liable for the merchant's default because they derive profit from the sale transaction. The legislation in America and Britain may adopt different method and criteria of application but they were based on the same reasoning that if the issuers earn a profit from the sale transaction, they should be responsible to the cardholder to a certain extent in return for the revenue they earn. This conclusion is important to support the idea that the issuers in Singapore should be made responsible to the cardholder because they too derive revenue from the sale transaction.

In viewing the question of issuers' profit from a credit card transaction, the American and British legislations seem to take into account only one type of profit that is derived by the issuer from the sale transaction: the interest accumulated on the amount of credit extended to the cardholder. This is the only reason to explain why the right to assert a claim or defence is only available to holders of credit cards. As discussed in section 3.4 of chapter I, there is another source of revenue for the issuer besides interest for credit extended, namely the commission from the sale amount collected from the merchant. The issuer shares this commission with the acquirer by an *'exchange fee'* fixed at a percentage of the transaction amount. The figures in chart 10 in chapter I shows that this exchange fee account for approximately 50% of the issuer's average profit of US$40-60 earned from each debit card and 15% of the issuer's average profit of US$75-100

earned from each credit card in circulation worldwide. As the debit card is bypassing the credit card in both number and value of transactions, it can be envisaged that the exchange fee will become a major source of income for the issuers in the near future. If the revenue from exchange fee amounted to 50% or more of the issuers' revenue from all credit, debit or charge card, because there are more debit or charge card than credit card and there are too few credit cardholder borrowing from the issuer, there would be compelling reasons to extend the same statutory protection to holders of debit and charge card.

If the majority of credit cardholders only use the credit card as a convenient means of payment and always paying the card bill in full when due, the credit card works perfectly in the same way as a debit card. In this case, the issuers are held responsible to the cardholder for simply making a standing offer to extend credit, not for actually doing so. If the statutory protection in the American and British statutes is meant for credit protection only, then it is already misapplied to a considerable extent in reality.

Therefore, it is arguable that, the only reason for the American and British statutes to impose measures of protection on credit cards while excluding debit and charge cards is that the measures were historically conceived as part of the consumer credit protection. In other words, because the measures of protection were historically introduced within consumer credit legislations, it is now difficult for these countries to extend the same measure to holders of debit or charge card. Such a structural obstacle does not exist in Singapore because the country has no consumer credit act in place.

The approach that distinguishes between credit and debit cards in the American and British statutes reflects the old concept of the credit card as mainly an arrangement to extend credit. The credit card system today is not the same as that which existed over 30 years ago. The analysis in section 3.3-3.4 in chapter I shows that the primary function of the credit card system has shifted from credit extension to electronic payment. Because of this evolution, measures of credit protection have become less necessary in the context of credit card and additional protection for holders of debit and charge cards is becoming more important. The analysis of the chargeback procedure in the card networks in section 1.3 above shows that a typical chargeback rules of a card association treats cardholder-merchant disputes in a manner different to the treatment we find in the legislation currently effective in America and Britain. First, under the chargeback rules the relationship between the issuer and the merchant is not relevant, if not a matter of indifference. If the merchant is owned or controlled by the issuer in some ways (e.g. as a franchised dealer) or if the issuer chose to promote the merchant business in its advertisement accompanying monthly statements sent to the cardholder, it is likely that the issuer is also acting as the acquiring bank for the merchant. In this case, practically the resolution of disputes would be easier because the issuer is also the acquirer and the communication relating to the disputes does not have to go through the card association. The issuer would naturally have more power to procure the merchant's compliance with the chargeback rules. Secondly, the chargeback rules do not treat credit and debit cards differently. As long as a card is a Visa card, the Visa chargeback rules applies regardless of any credit extension involved. Thirdly, the chargeback rules do not take into account any geographical limitation as that found in the American legislation. The chargeback rules of the credit card associations focus on the issue of whether the merchant makes disclosure and complies with its

contractual obligations to the cardholder, not on any relationship between the issuer and the merchant. Therefore, a regulatory regime that distinguishes between credit and debit cards will result in under utilization of the issuer's capability to help cardholder to resolve disputes with the merchant under the card association's chargeback rules. Such a regulatory regime would be inadequate or at least fragmented.

There are three recommendations that may be drawn from the above analysis. Firstly, a reform in the area of issuers' responsibility towards cardholders for merchant's misrepresentation default should be separated from the reform of consumer credit protection. Secondly, the issuers' responsibility should correspond with the degree of their involvement in the business activities of the merchant and revenue earned from such involvement. Thirdly, the measure of protection should be designed in harmony with the existing chargeback rules of the credit card associations to minimize the adverse impact on the issuers.

In the next section, we will attempt to propose a suitable mechanism of protection for the cardholder in the situations of disputes with the merchant, keeping in mind the above recommendations as our guide.

3.2 Proposed features of the measures of protection for the cardholder

(a) Issuer's responsibility based on degree of involvement with the merchant's business

As discussed above, the issuers may be involved with the merchants' business and the sale transaction in four different capacities. The issuers are always involved as a provider of payment services. They are frequently involved as an advertiser and sometimes involved as a provider of credit or even a seller of goods or services. The issuer's liability towards the cardholder should correspond with the degree of involvement and the potential profit earned from the participation. If the issuer itself or its subsidiary sells goods or services to the cardholder, it would be liable to the cardholder for any misrepresentation or default in the sale contract because the issuer is also the merchant.

If the relationship between the issuer and the merchant were so close that the merchant acts as a credit intermediary for the issuer to solicit their customer to not only purchase goods or services but also to pay for such purchase by a credit facility obtained from the issuer, the issuer's position would be a connected lender. In this case, the issuer should be made jointly and severally liable to the cardholder for the misrepresentation or default by the merchant in the contract of sale. This has been accepted as a suitable treatment of connected lenders' liability in many jurisdictions such as the majority of countries in the European Union. This fact is reflected in the recent plan of the European Commission to enact a new Directive on Consumer Credit, which proposes to harmonize the regulation of connected lender liabilities across Europe. In the first draft of the new Directive it was proposed that all member States enact provisions imposing joint and several liability on lenders only in circumstances where the supplier acts as credit intermediary[286]. If a consumer credit protection act is to be enacted in Singapore, it is suggested that the new act should contain a provision making

[286] However, in the second draft it was proposed that the issue of creditor/supplier joint liability be left to the national legal systems, probably because of the resistance from Britain. COM(2005) 483 final, 7 October 2005, Para 5.11.

provider of credit jointly and severally liable for misrepresentation or default of the supplier if the supplier acts as a credit intermediary in connection with the sale transaction. However, before a new consumer credit act in Singapore is enacted (which does not seem likely to happen in the near future), a reform in this area may be contemplated by focusing on the issuer's involvement in capacities other than a connected lender.

If the issuer participates in soliciting its cardholders to make purchases from any merchants (which is most likely using its acquiring services), it is submitted that the issuer should not be allowed to exclude its liability for any misrepresentation in the mail solicitation by contractual terms in the cardholder agreement. If the issuer only acts as a provider of payment service without disseminating advertisement for the merchant, it is submitted that the issuer should be responsible to help the cardholder to resolve any disputes with the merchant relating to quality of goods or services or non-performance of the sale contract. It may be difficult to adopt the *'like claim'* formula of British law in Singapore but it appears necessary to make the issuer responsible to a certain extent for several reasons. First, the issuer gained financially when any cardholder uses his card to make payment. The exchange fee has been mistakenly viewed as a cost borne by the merchant (*e.g.* in the case of *Re Charge Card*) but in fact this fee is jointly borne by the cardholder. Despite the rules of Visa and MasterCard prohibiting merchant from discriminating between customers paying in cash and by card, in reality the cardholder usually pays a higher price when he settles by credit card. This is especially true when the card is used in America and Britain, where the non-discrimination rule of Visa and MasterCard has been held to violate competition law. Many retail merchants in Singapore charge a 3% extra for sale transaction paid by credit card to recoup their cost of paying the commission fee

to the acquirer. The only reason that the cardholder chose to pay the additional fee is that he expect the issuer to render certain assistance in case the merchandize was defective or the merchant fails to perform the sale contract. Therefore, it would be unfair to allow the issuer to point to a fine print in the cardholder agreement to excuse itself from all responsibility. Secondly, it is not difficult or expensive for the issuer to assist the cardholder in a situation of dispute with the merchant because all the issuer has to do is to utilize the chargeback procedure of the card association. The remaining question is how we construct the issuer's responsibility? We will consider this question in the next section.

(b) Nature and extent of the cardholder's right

As discussed above, the American and British law uses the *'like claim'* formula to give the cardholder the right to assert against the issuer the same claim he may have against the merchant in the sale contract as a basis to withhold payment to the issuer in respect of the disputed transaction or to seek compensation. The problem with this formula is that if the issuer, for any reason, were unable to pursue the claim against the merchant, it would have to bear a loss of not less than the disputed transaction amount. In Britain, as the debtors are entitled not only to make claim in both contract and tort, including claims in restitution and consequential damages, the potential loss the issuer may have to bear is substantial. For this reason, a very strong consumer lobby is needed to put the formula in place. Such a lobby does not yet to exist in Singapore. However, the purpose of the reform we propose is not to cause any loss to the banks. Quite the opposite, we wish to improve their business practices, which will ultimately result in their better business performance. What we need is that the Singapore banks

render reasonable assistance for their cardholders in situations of disputes with the merchant. Therefore, it is suggested that instead of a simple *'like claim'* formula a more elaborate set of rules and procedure in respect of the resolution of disputes between the cardholder and the merchant via the issuer should be put in place.

Firstly, all holders of credit, debit, or charge cards (including both consumers and corporate holders) should be entitled to request the issuer to lodge a chargeback claim to suspend the payment of the transaction amount to the merchant, or if it has already been paid, to recover the same to the card account, if the cardholder can adduce evidence that the following situations occurred:

(i) The contract of sale were for tangible goods, the delivery of which was not made within the period of time promised by the merchant (or in the absence of an indication of expected delivery 30 days from the date of purchase); or the goods delivered were defective or not as described in the contract of sale, in the merchant's written representation or the sale invoice;

(ii) The contract of sale was for services of a continuing nature (*e.g.* the storage and maintenance of an internet web site) and paid by card-absent method, the quality of which were not as described by the merchant in the sale contract;

(iii) The payment transaction was duplicated, the amount of the card-present transaction was altered, the amount of the card-absent transaction did not correspond with the correct purchase price, the payment for goods, services or

no-show fee was paid by other means or the recurring payment was cancelled by the cardholder; or

(iv) The cardholder has returned the goods purchased or cancelled the service within the period allowed as stated in the sale contract or invoice but the merchant has failed to process a refund.

It should be a condition precedent for the cardholder to become entitled to request the issuer to lodge a chargeback claim that he must have attempted to resolve the dispute directly with the merchant and that the defective or returned products have been delivered to the merchant. The cardholder's claim should be limited to claim in relation with the performance of the contract of sale in the above situations, and excluding claims in tort.

Secondly, within a reasonable period after the cardholder has requested the issuer to lodge a chargeback claim (e.g. 60 days) the issuer should be responsible to inform the cardholder of the outcome of his request. The dispute must be resolved in favor of the cardholder if:

(i) The issuer failed to respond to the cardholder request within the prescribed period;

(ii) The merchant failed to provide documentary evidence that the tangible goods purchased were delivered to the cardholder billing address or that intangible goods or services have been delivered;

(iii) The merchant failed to provide documentary evidence that the goods or services supplied were not defective, damaged or otherwise were the same as described in the sale contract or invoice; or

(iv) The merchant failed to provide evidence that a credit has been processed for returned goods or cancelled services.

Thirdly, if the merchant was successful to adduce evidence to disprove the cardholder's chargeback claim, the cardholder must provide further evidence to enable the issuer to pursue a second chargeback attempt, failing which the dispute would be resolved in favor of the merchant. After the second chargeback attempt, if the arbitration procedure under the rules of the card association decided in favor of the merchant, the cardholder should not be entitled to pursue further claim against the issuer. If the cardholder were dissatisfied with the dispute resolution outcome, he would have to pursue action against the merchant directly.

A dispute resolution procedure as the above may not cause any harm to the banks as it is constructed around the typical chargeback rules of the card associations. If the issuer comply with the associations' rules, it is guaranteed to be paid if the dispute was resolved in favor of the cardholder, even if the merchant or the acquirer were unable of unwilling to pay. If the dispute were resolved in favor of the merchant, the issuer would not suffer loss either, because it is not liable to the cardholder in this case. The only cost to the issuers is the efforts to submit the chargeback claims to the card associations. In fact, every card issuer is submitting chargeback claims to the card association on a daily basis. However, they only do so for certain cardholders, probably those who are determined enough to

overcome the obstacles in the banks' fine print and customers services. If the banks have to incur costs to make the chargeback efforts, that cost is only reasonable considering the fact that the banks are paid by the cardholder, not only by membership fee but also via the exchange fee out of every card transactions. The above suggestions simply make the existing chargeback procedure known to the cardholders but it can bring many benefits. The cardholders can make use of the chargeback procedure only if they know their rights. The issuers would be more accountable and responsible to its customers. The credit card, as a payment system would be a more transparent and reliable to all its users.

(c) Implementation

The above suggestions are relatively easy to implement. The cardholders can be better protected against merchants' default or misrepresentation without putting excessive burden on the issuers. Without having to wait for a consumer credit act to be enacted, the reform can be carried out either by a regulation to be issued by the MAS or by a voluntary code for credit card practices to be issued by the Association of Banks of Singapore (ABS). In the first way, the regulation would have a force of law. In the second way, the force of competition and the benefits of publicity will help to ensure the issuers adoptions of and compliance with good practices in doing credit cards businesses. We will look at the issue of implementation again in the next chapter.

CHAPTER V

TOWARDS A REFORM OF CREDIT CARD LAW IN SINGAPORE

In this chapter, we will attempt to propose a reform of the regulation of credit cards, charge cards, and debit cards in Singapore. We will first look at the current statutes and regulations that govern the licensing of card issuers and the regulatory requirements relating to issuance and use of cards. After that, we will consider problem areas of the current regulatory framework and the possible measures of improvement.

1. EXISTING REGULATORY FRAMEWORK

1.1 Overview of consumer credit protection in Singapore

In any society, there is the need to control and regulate the business activities of providing financial accommodation to individuals for his consumption as opposed to business purposes. That regulatory system is usually referred to as consumer credit protection.

The credit card not only enables the cardholder to make retail payment without carrying cash along, it allows him to do so without having the money. The credit card is a standing offer by the issuer to provide financial accommodation to the cardholders. Among the cardholders, there are companies, government agencies but the majority of cardholders are individuals. For this reason, the law on credit card closely relates to consumer credit protection. In many countries, such as Britain and America, the laws and regulations relating to credit card takes up a considerable proportion of the consumer credit legislations. As lending

transactions frequently entails security transactions, the law on consumer credit is also closely related to the law on security over personal property. Although not popular, there are credit cards secured by cardholder's property. In this case, the security transaction may be affected by the law on security. The law of security over personal property is, therefore, related to the law on credit card, albeit at a lesser extent compared to the law on consumer credit.

The law on consumer credit in Singapore has been developed on an *ad hoc* basis as new forms of consumer credit came into existence. The current system consists of separate components built around different models and approaches. As a result, the area of consumer credit law has long been in an unsatisfactory state marked by the lack of uniformity. The insufficiency of the consumer credit protection law has been thoroughly analyzed and possible paths of reform in the area have been proposed as early as 1978[287]. Within the limit of this paper, it is not intended to repeat or re-evaluate the entire analysis and proposal for a reform of consumer credit protection law. It is, however, necessary to briefly summarize the major problems of consumer credit law.

Consumer credit in Singapore takes various forms ranging from money-lending to credit accounts, credit sales, conditional sales, credit cards, hire-purchase and pawn-broking. Unlike most of other common law jurisdictions such as the United States and the United Kingdom where all forms of consumer credit have been regulated systematically in a unified manner, the consumer credit protection law of Singapore is old and complicated with a large volume of legislations, including: Moneylenders Act (discussed in Chapter 2), Pawnbrokers Act (Cap 222), Hire-

---

[287] See C.Y.Lee, *'Consumer Credit and Security over Personalty — The Law in Singapore'* (Ph.D. dissertation, University of London, 1978) and "*Towards new Consumer Credit Protection Legislation in Singapore'*, Mal. L.R. 266 (1979).

Purchase Act (Cap 125), Banking Act (Cap 19), Finance Companies Act (Cap 108). Each of the legislations provides a different treatment for the form of credit that it is concerned with. The deficiencies of the current legislations are evident both in individual statutes and when looking at the entire picture.

As a former colony, Singapore has *'inherited'* most of its legislation from the Britain. The Money Lender Act and the Pawnbrokers Act are patterned after old British acts, which date back to the late nineteenth and early twentieth centuries (Pawnbrokers Act, 1872 Moneylenders Act, 1900). Both of these British acts were repealed by the Consumer Credit Act 1974 (CCA). Before the enactment of the CCA, the regulation of consumer credit in the United Kingdom suffered from a disparity problem because separates legislations were enacted on an *ad hoc* basis when new forms of credit were invented. Singapore has chosen to inherit the old acts together with their problems, which have been well known since the Crowther Report in 1971. The Moneylenders Act and the Bills of Sale Act have long been criticized in Britain and Singapore for failing to distinguish between consumer and commercial transactions and excessively harsh civil consequence of statutory violation. A technical error under these acts (such as the change of business address of the lender) might render a transaction not only void but the loan irrecoverable. A double licensing system requiring the lender to be licensed under the Money Lender Act and the mortgage of chattel has to be registered under the Bill of Sale Act in order for a secured loan transaction to be valid is so rigid and time consuming that even legal practitioners prefer to avoid.

Along side with the above antique legislations, a series of newer legislations on various forms of consumer credit were created in late 1960s and early 1970s (Hire-Purchase Act in 1969, Banking Act in 1970, Finance Companies Act in 1967

and Insurance Act in 1966). The new acts used relatively more modern approach to regulation and controls. For example, the treatment of consumer credit under the Hire-Purchase Act, which was patterned after the Australian legislation contrasts sharply with the treatment of money-lending transaction under the Moneylenders Act. For example, a consumer needs financing to purchase a car. If the transaction is structured as a secured loan the lender must be licensed under the Moneylenders Act and the mortgage must be registered under the Bill of Sale Act to be valid. The same transaction if structured as a hire purchase would require no registration in respect of both the finance provider and the security. Besides the widely varied regulatory treatments, some forms of unsecured credit transactions such as revolving accounts and credit sales are not subject to regulation at all. The disparity in Singapore is greater than that which existed in United Kingdom before the CCA 1974 because of the piecemeal development of the law.

In the area of security over personal property, the position in Singapore is similar to the position in the UK. There are separate statutes regulating the different types of security according to their form and consequently there are multiple systems for determining priorities between creditors. The Companies Act, the Bills of Sale Act, the Policies of Assurance Act, the Hire-Purchase Act, the Sale of Good Act, the Factors Act and the Pawnbrokers Act each have devised different rules to determine priorities of creditors. Alongside with the systems of these acts are the common law and equitable rules and other rules to determine priorities in bankruptcy proceedings and distress.

In the next section, we will look into two regulatory regimes that most likely govern the credit card payment system, the Banking Act and the Money Lenders Act.

1.2 Regulation of credit and charge card under the Banking Act

(a) Licensing requirements

Because the majority of credit, charge and debit cards are issued by banks and financial institutions licensed under the Banking Act (Cap. 19), this Act and the regulations issued under it has the biggest influence on the issuance and use of these cards. The Banking Act was first enacted in 1970 to govern traditional commercial banking business conducted by banks and financial institutions in Singapore. The Act defined *"banking business"* as *"the business of receiving money on current or deposit account, paying and collecting cheques drawn by or paid in by customers, the making of advances to customers, and includes such other business as the Authority may prescribe for the purposes of this Act"*. The regulator of banking business is the Monetary Authority of Singapore (MAS) established under the MAS Act (Cap. 186). Pursuant to that Act, the MAS has power to grant many class of licence and to issue regulations and directions to control the operation of banks and other financial institutions. Under the Banking Act, there are *"banks"*, defined as companies licensed under Section 7, 11 and 79 of the Banking Act (including companies licensed to carry on banking business, banks owned by foreign governments and banks that existed in Singapore before 1/1/1971, respectively under the 3 sections) and *"other financial institutions"*. Unfortunately, the word "financial institution" was not defined in the Banking Act. The only definition of *"financial institution"* is found in Section 27A (6) of the

MAS Act (which was added in 1984) includes bank licensed under the Banking Act, finance companies licensed under Finance Companies Act (Cap. 108), merchant banks licensed as a financial institution under Section 28 of the MAS Act, money-changer licensed under the Money-changing and Remittance Businesses Act (Cap. 187), insurer registered or regulated under the Insurance Act (Cap. 142), insurance intermediary licensed under the Insurance Intermediaries Act (Cap. 142A); dealer or investment adviser licensed under the Securities Industry Act (Cap. 289); futures broker, futures trading adviser or futures pool operator licensed under the Futures Trading Act (Cap. 116); and any other person licensed, approved or regulated by the MAS under any written law. *'Financial institution'* also includes person who is exempted under the relevant law from being licensed, approved, registered or regulated.

The regulation of payment cards was not at all contemplated in the original text of the Banking Act. In 1993, two new sections were inserted relating to payment cards including Section 77A which prohibits the issuance of multi-purpose stored value cards by non-bank without approval of the MAS and Section 78(2) which delegates to the MAS the legislative power to issue *"regulations with respect to the operations and <u>activities of banks and other financial institutions</u> issuing credit and charge cards, including the minimum qualifying criteria for the issue of a credit or charge card"*.

Neither the Banking Act nor the MAS Act contains any prohibition of the issuance of credit, charge card or debit card by a person not licensed as a bank or financial institution or exempted from being licensed, approved, registered or regulated. However, if any bank or other financial institution issues such a card, they will have to comply with the requirements laid down by the MAS from time to time.

(b) Operational requirements

Based on the legislative power delegated under Section 78(2), on 15th October 1993 the MAS issued the first regulations on credit and charge cards called *'Banking (Unsolicited Credit and Charge Cards) Regulations'.* The 1993 regulations were a very simple document of less than one page that only prohibited the unsolicited issuance of credit and charge cards whether or not the card is valid for immediate use except where cards are issued under previously made agreement or for renewal of expired cards. Banks or financial institutions that contravene this regulation may be fined up to S$5.000 upon conviction.

On 19th February 2004, MAS issued longer Regulations labeled the *'Banking (Credit card and Charge card) Regulations'* to replace the 1993 Regulations. The content of the 2004 Regulations can be summarized as follows:

(i) While the prohibition of unsolicited mailing of credit and charge cards (except new card of the same type sent for replacement of old cards) were retained, an exception was made to allow the issuance of unsolicited cards to individual who are already a cardholder of a credit or charge card issued by the same issuer (albeit of a different type) provided that (i) the terms and conditions of the new card are disclosed fully to the cardholder, (ii) the cardholder bears no liability for any charge to the unsolicited card until his acceptance of the card is communicated to the issuer, and (iii) no additional credit is provided to the cardholder.

(ii) Issuers are prohibited to issue credit or charge card to Singapore citizens or permanent residents unless they have annual income of at least

S$30,000 (if they are under 55 years old) or S$15,000 (if they are above 55 years old) at the time of card application. As an exception, a corporate card or business card (i.e. cards issued to employees of companies and businesses where cardholder and cardusers are jointly and severally liable to all charges made to the cards) may be issued notwithstanding the carduser fails to meet the minimum income requirement if the carduser needs the card to pay for goods or services while travel or posted overseas for purposes of business of the cardholder. Card issuers are required to make sure the validity period of the corporate or business card so issued should not be longer than the reasonable period that the card is required for the purposes of its issuance.

(iii) Card issuers are prohibited from issuing any supplementary cards (in relation to a principal cardholder who are Singapore citizen or permanent resident) to person under 21 years old except where the person needs the card for overseas study (including employment or attachment for purpose of study). The same requirement as to the validity period applies.

(iv) Card issuers are prohibited from allowing the aggregate indebtedness (of all principal and supplementary cards issued by the same issuers and its related corporation) of any cardholder to exceed the maximum credit limit fixed at 2 months' income of the cardholder.

(v) Card issuers are required to furnish monthly reports to MAS to provide such information as may be required by the MAS from time to time.

(vi) Card issuers are required to use a standard wording in font size of at least 9pt in bold to disclose finance and late payment charges in monthly statements of credit cards and charge cards.

(vii) Any card issuers which contravenes the unsolicited card issuance prohibition, the minimum annual income and the maximum credit limit requirements of the Regulation may be liable on conviction to a fine of up to S$25,000 and, in the case of a continuing offence, to a further fine not exceeding S$2,500 for every day during which the offence continues after conviction.

On 15th April 2004 the MAS issued the *Banking (Credit card and Charge card) (Amendment) Regulations 2004* (No S198) to amend the February 2004 Regulations. The new Regulations retained the general structure and contents of the earlier version and only inserted some patches in several clauses including:-

(i) The introduction of the concept of *"secured credit limit"* of credit or charge card whereby the indebtedness (and the related credit limit) is secured by deposit(s) placed with the issuer, in the name of the cardholder together with a contractual set-off agreement with the issuer, where the deposit(s) cannot be withdrawn by the cardholder until and unless the amount charged to or outstanding on the card is fully paid up.

(ii) The requirement of a minimum of S$10,000 aggregate deposit to secure a secured credit limit before the issuance of a secured credit card.

(iii) The requirement that the credit limit of secured card not to exceed the aggregate amount of the deposit(s) used to secure the credit limit (or if the cardholder holds both secured and unsecured cards or a card with both secured and unsecured limit, the higher of the two amounts).

On 29th September 2005 another amendment was made to the 2004 Regulations by the *Banking (Credit and Charge Cards) (Amendment) Regulation 2005* (No. S439). The major change was allowing issuers to secure card indebtedness with deposits placed with any banks, finance companies or merchant banks in Singapore, in addition to deposits placed directly with the issuers. The only other change was to delete the words *"or obtaining cash on credit"* as one of the two intended usage of credit or charge card (besides *"purchasing goods or services on credit"*). This change means little in reality as holders of credit and charge cards apparently still have the option to obtain cash advances from card issuers either over the counter or at ATMs besides paying for purchases of goods and services. These cards are still known as credit or charge card notwithstanding that the cash advances option is not recognized by the Regulations as a feature of regulated credit or charge cards.

In 2004 the practice of conducting road shows to receive credit and charge card applications at promotion counters on the streets and at crowded places were booming in Singapore. It seemed that the MAS viewed this practice as undesirable. Based on the Section 55 of the Banking Act, which provides that the MAS is empowered to give notice to banks to *"give direction or impose requirements relating to the change of location of any place of business of*

banks"[288], the MAS issued Notice MAS603 dated 22nd December 2004 prohibiting banks *"to set up any temporary location where applications are received for credit cards, charge cards or any unsecured credit facilities"* without prior approval of the MAS, which approval "*would not ordinarily be granted"*. The MAS acted within its authority as the definition of *"place of business"* of banks includes any place used by bank for the conduct of banking business (including any business that the MAS may prescribe)[289] and the setting up of temporary location may be considered *"change of location"*. However, using the authority to approve change of location of place of business of banks as the basis to make regulation prohibiting conducting of road shows or street canvassing seems to be a situational solution. The authority was aiming at the act of conducting road shows and street canvassing while using locations as the basis for its prohibition.

1.3. Credit card and money lending

(a) Money Lenders Act (Cap. 188)

The Banking Act and the regulations made under it only apply to credit and charge card issued by banks and financial institutions. Credit or charge cards issued by other entities may be governed by other statutes. The only statute that is likely to apply in this case is the Money Lenders Act (MLA). The MLA requires *'moneylenders'* who reside and carry on the '*business of moneylending*' in Singapore to be either licensed or exempted. The group of exempted persons

[288] Section 55 (2) (n), Banking Act (Cap 19).
[289] The Banking Act defines *"place of business"* to includes *"a head or main office, a branch, an agency, a representative office, a mobile branch of the bank, any office established and maintained for a limited period only and any other place used by the bank for the dispensing or acceptance of money on account or for the conduct of other banking business"*; and *"banking business"* to include *"such other business as the Authority may prescribe"*.

includes the entities similar to the concept of '*financial institutions*' of the Banking Act. These include banks, insurance companies, finance companies, pawnbrokers, cooperative societies and governmental bodies. Non-exempted person carry on the business of moneylending without a licence will face severe consequences. The money lent may be irrecoverable as the contract may be unenforceable, and they may be subject to fines and a jail term.

Unfortunately, the scope of application of the MLA was not clearly defined due to the lack of a definition of *'business of moneylending'* although under Section 3 of the MLA there is a presumption that *"any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary is proven to be a moneylender".* Therefore, to find out whether MLA applies to credit card and charge card arrangement we will need to consult the case law that interprets the meanings of the MLA.

(b) Scope of application

The only local decision that directly addressed the question whether credit or charge card arrangement amount to *'moneylending business'* is the case of *Victor Kee Yong Poey v Diners Club Malaya Sdn. Bhd*[290]. In this case a holder of a charge card contended that the debt and service charge he owed to the charge card issuer, Diner Club was in fact a loan and thus the transaction was unenforceable as Diner Club did not have a moneylending licence. Chang Min Tat J. held that the transaction did not constitute money lending because interest was not charged since service charge did not constitute interest. If we rely on the

[290] [1976] 2 M.L.J 30.

ruling of this case, we could have come to a quick and easy conclusion that credit card does not fall under the MLA as long as no interest is charged.

However, several subsequent academic commentaries have criticized the decision of Chang Min Tat J. as erroneous[291]. The commentaries rightly pointed out that the decision had missed the central issue of the case, namely the characterization of charge card transaction. The question was not whether service fee constitutes interest but whether the charge card arrangement can be equated with a loan. Although a lender would be presumed to be a moneylender where interest is charged, it was a mistake to conclude that if no interest was charged, the transaction was not moneylending.

As discussed in Chapter II, the credit or charge card arrangement can be characterized either as a loan by the issuer to the cardholder or an assignment of debt by the merchant to the issuer. Although the legal analysis shows that the majority of opinion tends towards the *'direct obligation'* theory that characterizes the arrangement as a loan the possibility to characterize the credit card or charge card arrangement as an assignment has not been conclusively ruled out. If the credit card transaction is characterized as an assignment, the transaction will amount to the factoring of the merchant's book debt and not extension of loan by the issuer to the cardholder. According to the established rule created under the English MLA the transaction would not amount to moneylending[292].

---

[291] See Tan Keng Feng, *'Credit Cards and Money Lending'* [1976] 2 M.L.J. cxi; C.Y.Lee, *'Towards new Consumer Credit Protection Legislation in Singapore'*, Mal. L.R. 266 (1979), *'Consumer Credit and Security over Personalty — The Law in Singapore'* (Ph.D. dissertation, University of London, 1978)
[292] *Olds Discount Co Ltd. v. John Playfair Ltd* [1938] All E.R. 275.

On the other hand, even if the arrangement is characterized under the *'direct obligation'* theory there are contradictory authorities on the question whether the payment mechanism of credit card transaction constitutes lending of money. In the case of *In Re H.P.C. Production Ltd*[293], the court was faced with the question of interpreting the words *'lending'* and *'borrowing'* within the meaning of the Exchange Control Act, 1947, which prohibited the lending and borrowing of foreign currency by British residents from any person other than money dealer authorized under that Act. T.V., a company in Switzerland not being an authorized money dealer, made several payments to a third party at the request of K, a British citizen, which payment was later alleged to be a lending in foreign currency in contravention of the Act. While acknowledging that in most cases the payment made at a party's request to a third party constitutes lending, the court decided that there are cases where the paying party should be considered as an agent for the requesting party (such as in the case of solicitors or stock brokers) making payment on behalf of his principal. In the latter cases, the payment does not constitute lending of money. Plowman J. held that if the third party is not accountable to the requesting party for the money and is entitled to keep the money for himself, the payment to him was not lending. The amount of payment was recoverable not as a loan but as an indemnity by the principal. If we apply this *'accountability test'* to the similar credit card arrangement where the issuer makes payment to the merchant at the request of the cardholder, then the payment does not constitute lending of money to the cardholder because the merchant is not accountable to the cardholder and entitled to keep the money for himself.

---

[293] [1962] Ch 466. See also *Potts' Executors v. Inland Revenue Commissioners* [1951] A.C. 443, [1951] 1 All E.R. 76.

However, there are several decisions suggesting the opposite view. In the Malaysian case of *Associated Finance Corporation Ltd v. Poomani* [294], a finance company carrying on the business of moneylending made a payment of $7000 to a building society who was threatening to foreclose on the house of Poomani. In return Poomani executed a charge over her land as security for the loan borrowed from the finance company. The transaction was held unenforceable for technical infringements of the Money Lenders Ordinance. This case is not of much assistance because the fact that the transaction was moneylending was admitted and the creditor was a registered moneylender. However, it is worthy to note the rule laid down that in a moneylending transaction, the money lent need not be paid directly to the borrower as long as it is paid in the manner agreed to by the borrower.

In supporting the view that credit card payment constitutes moneylending, it is necessary to consider the several cases where arrangement closely similar to credit card was held as moneylending. It has been suggested[295] that the credit card arrangement may be likened to the check trading system in Britain since 1880 as described in the case of *Progressive Supply Co., Ltd v Dalton*[296]. In a check trading system, the check trader issues *trading orders* to its customers with specified face value such as £1, £3 or £4 on payment of a fee called *poundage* and in exchange for the customer's undertaking to pay the balance to the check trader by multiple weekly installments. The check trader enters into agreements with selected shopkeepers (on average about 100 shops) who supply goods to holders of the *trading orders* at cash values up to the face value of the orders. Similar to the way a credit card transaction is effected, holders of trading orders select the

[294] [1972] 1 MLJ 117.
[295] C.Y. Lee, *"Law of Consumer Credit"*, 1990.
[296] [1942] 2 All E.R. 646.

goods first and only present the *trading orders* to make payment at the till. When the *trading order* is presented, the shopkeeper writes the date of the transaction, his name, and the price of the goods obtained in the appropriate place provided, usually on the back of the order. If the *trading order* has not been wholly exhausted, the shopkeeper hands it back to the customer, who can continue to obtain goods from the same or other shops until it is finally exhausted. The shopkeeper at whose shop the trading order exhausted does not hand it back to the customer, but retains it and sends it back to the issuer. The check trader thereupon pays the shopkeeper the amount of his account, less the discount agreed between them. In *Premier Clothing & Supply Co. v. Hillcoat*[297], a check trading system was held to constitute money lending, and as a result the contract was unenforceable for want of registration. In the New Zealand case of *Goldberg v. Tait*[298] a *cash-order* arrangement similar to the check trading business was also held to be moneylending. In that case, the appellant issued to customers *cash-orders*, which when presented to the traders named in the cash-orders would be accepted for payment of goods purchases. The customer pays about 10% of the face value of the cash-orders upon issuance and undertakes to pay the full face value 20 weekly installments of 5% each. The trader then presents monthly accounts to the issuer to obtain payment of all cash-orders accepted for payment less a discount of 5%. The Supreme Court of New Zealand held that the substance of the transaction was in fact a loan. Stanton J. pointed out that it is inappropriate to characterize the arrangement as money paid by the cash-orders issuers at the request of the customer and to use the quasi-contract device to enable the action for money paid. The reasons were that the customer in this case pays the issuer a sum substantially greater than the amount paid by the issuer to the trader and the

---

[297] [1969] C.L.Y. 2279a.
[298] [1950] N.Z.L.R. 976 (Supreme Court).

issuer's right to sue the customer was independent of the payment to the trader. The authorities relating to cheque-trading and cash-order business in Britain and New Zealand suggest that the credit or charge card arrangement should constitute moneylending business.

It appears that the question whether or not the charge card scheme constitutes moneylending is not fully settled. While there is a reported local decision suggesting that charge card arrangement is not moneylending if interest is not charged, there are also persuasive authorities suggesting the opposite. The underlying problem is that, as noted in the Crowther report[299], the credit card and charge card arrangement is of a hybrid nature between moneylending and credit sale. Although the weight of opinion in the case law tends towards moneylending the uncertainty remains. If this uncertainty should ever be settled, it has to be done by Singapore legislation or judicial decision since the MLA system has been abandoned in Britain, New Zealand and Australia and the body of case law developed under the MLA system has ceased to evolve except in Singapore and Malaysia. In the next section, we will conduct a practical analysis to see whether the MLA system is suitable to regulate credit card and charge card arrangement even if it squarely fit under the ambit of this regulatory system.

(c) Regulatory regime:

The Singapore MLA is one of the oldest legislations of the country that dates back to 1959 and patterned after the English Money Lenders Act of 1900 and 1927. In addition to the uncertainty in the scope of application discussed above, the

[299] The Crowther Committee report on Consumer Credit (Cmnd 4596, 1971) at para 4.1.10 and 6.12.3.

system of the MLA is outdated and not suitable to govern credit card or charge card arrangement. After several minor amendments, the Singapore MLA remains pretty much the same as the MLA that existed in the U.K. in early 20th century. It deserves all the criticisms in the Crowther report in 1971 that were accepted as accurate. The biggest problem with the MLA is its failure to distinguish between consumer and commercial transaction. The MLA applies regardless of the status of the borrower. Reading the local suits involving the MLA, we can see that in most of these cases the MLA was utilized as the device for borrowers (many of which are companies) trying to escape paying their debt by alleging that the lenders were unlicensed moneylender.

As a regulatory system, the MLA controls moneylending activities by a scheme of moneylenders licensing. Currently there are 133 individuals, small firms and limited liability companies licensed as moneylenders. The Registrar of Moneylenders (together with Registrar of Pawn Brokers) is the Insolvency and Public Trustee Office under Ministry of Law, not the main authority supervising the entire financial services sector, which is the MAS. As a result, the supervision of the business of moneylending is not in any way similar to the supervision conducted by the MAS over banks and financial institutions. It seems that the MLA system is considered the tail end of the consumer credit business that does not deserve much attentions or active supervision. Licensed moneylenders are subject to many restrictions that are highly technical and strictly enforced. A slip in the process of registration, change of address or signing of contract may render the entire transaction unenforceable[300]. These restrictions include limits to which

[300] In *Hawkes Bay Investment and Finance Co. v. White* [1934] N.Z.L.R. 46 (Supreme Court), a failure to register change of address resulted in unenforceable transaction. In *Menaka v. Lum* [1977] 1 M.L.J. 91, usage of partner's name in moneylending transaction instead of registered firm's name resulted in void contract.

interest may be charged, prescribed form and detail of moneylending agreement, particulars to be shown on the licence and advertising of moneylenders. Section 23 (1) of MLA delegates power to fix maximum interest rate charged by a licensed moneylender. Currently Section 14 Money Lenders Rules fix the ceiling rate at 12% p.a. for secured loans and 18% p.a. for unsecured loans. In addition, Section 18 (1) prohibits the charging of compound interest. Section 23(5) provides that the sum recoverable by any person who has lent money but is not a licensed moneylender (or banks, financial institutions, pawnbroker, cooperative societies, governmental bodies) shall not exceed the aggregate of the amount lent and a simple interest at the rate of 20% p.a. A special feature of the Singapore MLA (not found in English, Australian and New Zealand legislations) is the extensive power of courts under Section 22 to reopen and strike down unconscionable and harsh moneylending transactions at common law. Interest higher than the ceiling rate is presumed to be harsh and unconscionable until the contrary is proven. All the rate limits prescribed under the MLA are lower than the current rate of 24% per annum usually charged by Singapore banks to their credit cardholders. The form of lending memorandum prescribed as Schedule to the Money Lenders Rules is not suitable to the credit card system. Furthermore, moneylenders are required to conduct their business strictly within only one location, the address of which must be registered with the registrar.

It is evident that the regime created by the MLA was neither intended to regulate credit card and charge card transaction nor suitable for such application. Due to the unsuitable regulatory system and the severe consequences of having unenforceable contracts and facing criminal charges, card issuers would, practically, try to avoid the MLA as far as possible by either becoming one of the

exempted persons named in the MLA or obtaining a certificate of exemption from the registrar.

1.4 Reform of credit card regulation in Singapore

(a) Existing regulatory controls

The above analysis shows that the MLA has little practical effect to regulate the issuance of credit, debit, or charge cards in Singapore. The issuance of credit cards by a company not licensed as a bank or a financial institution under the Banking Act is likely to fall under the MLA because interest is charged. However, the majority of credit cards are issued by banks and financial institution, which are exempted from the MLA. Furthermore, it is not certain whether issuance of charge cards comes under the MLA and the regulatory regime of the MLA seems unsuitable for application to credit or charge card.

Therefore, the main regulatory controls of credit, debit and charge card issuance are found under the Banking Act. There may be issuers who escape both the Banking Act and the MLA but this seems to be a rare[301]. So far, there have been three measures of regulatory control put in place by the ad-hoc Regulations and Notices issued by the MAS.

The first and probably most important control is the requirement of minimum annual income a Singapore resident must earn before he may obtain a credit card

[301] We have found one issuer of charge card (which now also issues credit cards), Diners Club Pte. Ltd. which is neither registered as a bank or financial institution nor as a moneylender. Our search shows that this company name is neither found in the MAS's official directory of banks and financial institutions nor in the current list of moneylenders licensed by the Moneylenders Registrar.

together with a ceiling limit of the amount of credit an issuer may extend to a cardholder currently fixed at two times of the cardholder's monthly income. This control seems peculiar to Singapore, as it is not commonly found in other major commonwealth jurisdictions.

The second control is the prohibition of unsolicited issuance of credit and charge card by banks and financial institutions. There are similar provisions found in the consumer credit legislations in Britain and America[302].

The third control is the prohibition of issuer's setting up temporary location to solicit applications for credit cards or charge cards. This control is comparable to the prohibition of off-trade-premise canvassing of debtor-creditor agreements under Section 49 of the British Consumer Credit Act. The control measure currently applied in Singapore seems more stringent because in Britain creditors are allowed to canvass debtor-creditor agreements in places where business is carried on by the creditor, the supplier, the canvasser or the consumer, regardless of whether it is on a permanent or temporary basis[303].

The comparisons we made throughout this paper between the current regulatory controls in Singapore and what has been in place in other commonwealth jurisdictions in the last 3 decades shows a sharp contrast. This indicates that in Singapore a reform of consumer credit protection may be an overdue task. In the next section, we will attempt to look at the likelihood that such a reform may

[302] US Code §1642 prohibits the issuance of unsolicited credit cards, §1693(i) prohibits the issuance of unsolicited debit card except where the card is not validated for use; Section 51 of the British Consumer Credit Act makes it an offence to issue unsolicited credit token.
[303] Section 48 of British Consumer Credit Act.

happen in Singapore in the near future. A consumer credit reform will likely entail substantial improvement of cardholder protection.

(b) Likelihood of a consumer credit reform

As early as 1979, an author who conducted a remarkable research on consumer credit protection in Singapore concluded that *"the picture* [of consumer credit law] *which unfolds reveals a chaotic state of the law"*[304]. In that research, it was proposed that a reform of consumer credit protection law should be conducted by the enactment of a Consumer Credit Act to replace the Hire Purchase Act, Money Lenders Act and Pawn Brokers Act. However, as was observed in the same proposal, there were much constraints and obstacles for reform in this area:

"There are certain constraints to which the reformer must address his mind when considering the shape and structure of consumer credit reform. Chief among these is that there is considerable <u>lack of manpower and funds</u> which may be allocated to the protection of consumer interests. There are <u>more pressing priorities</u> than consumer credit in a tiny republic with a population of 2.3 million and lacking natural resources. Moreover, the Government's aim in relation to finance is to make Singapore one of the <u>world's main financial centres</u>. Thus it is more concerned with upgrading the level of sophistication of credit facilities and services geared towards international banking and finance, international trade, the international money market, and industry. In the present financial structure, other credit providers like moneylenders, pawnbrokers and chit fund companies occupy only the tail end of the hierarchy.

---

[304] C.Y.Lee, *'Consumer Credit and Security over Personalty — The Law in Singapore'* (Ph.D. dissertation, University of London, 1978) and '*Towards new Consumer Credit Protection Legislation in Singapore'*, Mal. L.R. 266 (1979).

In moving ahead and improving the services of the higher ranking institutions, this fringe end is often ignored. This is deemed essential for Singapore's survival as a nation. Moreover, there is lack of a strong consumer lobby to press for improvements in the field of consumer credit. The average citizen is normally apathetic and unwilling to fight for his rights".

Some of the constraints may have become less significant today. Since 1979 Singapore has advanced much further in its efforts to establish itself as a major financial centre of the world. There have been signs that the awareness of consumer protection have improved and the issue of consumer protection now receives more attention, manpower and funds from the Government[305].

However, the prospect of a reform on such a large scale as an introduction of a new Consumer Credit Act seems unlikely in the foreseeable future. The current regulatory framework established by the major legislations including the Banking Act, the Hire Purchase Act and the Finance Companies Act seems to work fine, despite criticism of its disparate treatment of different forms of credit. As banks and financial institutions of Singapore grow steadily, credit is now easily available to consumers at costs lower than many other countries. The moneylending and pawnbroking businesses, which have been considered the tail end of consumer credit hierarchy are becoming less and less significant. The consolidation of the various components of consumer credit protection into one unified legislation, although seeming desirable and helpful, will cost a considerable investment of manpower and funds. Considering the costs and benefits of a reform, it seems that a large scale reform by the enactment of a new Consumer Credit Act in Singapore will not happen in the near future.

---

[305] Such as the enactment of the Consumer Protection (Fair Trading) Act (Cap 52A) in 2003.

In contrast with the shrinking tail end of consumer credit hierarchy of moneylending and pawnbroking businesses, as shown in chapter I, the business of issuing credit, debit, and charge cards is growing fast together with the process of globalization, the internet revolution and the unprecedented growth of electronic commerce. As the cards business is becoming more important, the reform in the area of law governing them is becoming so urgent that the task should not be left to wait until a large-scale reform of consumer credit become feasible. Therefore, a reform of the law relating to credit, debit and charge card could and should be separated from the area of consumer credit protection.

(c) Reform of credit, debit and charge card regulation

We have suggested a few times that a reform of the regulation of credit, debit and charge card can and should be done separately from the reform of consumer credit law. Because the current level of regulatory control of credit, debit and charge card in Singapore is primitive, the banks have the liberty to use standard terms agreements that shift all the risks and loss to the cardholder while giving the banks the greatest power and flexibility. Therefore, the introduction of any new measures that bring back some balance to the dealing between these two parties of unequal bargaining power, or to protect the cardholder should be desirable. We identify the 2 areas of cardholder's liability for unauthorized card transactions and issuer's liability for merchant's default as places where changes are most urgently needed. In chapters III and IV several suggestions and proposal has been made specifically in these 2 areas with a view to minimize the impact of changes on the banks thus increase the chance of a reform. In the next sections, we will suggest several other measures that should be taken together with the

changes proposed in chapter III and IV. The suggestions will focus in the areas of resolution of disputes.

2. BILLING AND RESOLUTION OF DISPUTES

2.1 Card billing and cardholder's duty to verify statements

As discussed in chapter III, the traditional rule of English law is that a bank's customer is not responsible for verifying the monthly statement unless contractually bound to do so. This rule however has little effect because all the banks' standard terms invariably include a conclusive evidence clause, which requires the customers to verify statement and to inform the banks of any errors or discrepancies within a short period, failing which the cardholder will be liable for all the charges posted to the card account. In section 6.2 of chapter III, we have analyzed the contents of the clauses and some judicial assessment of their reasonableness under the UCTA. The analysis shows that in general, Singapore courts are likely to uphold the banks' standard conclusive evidence clause. This tendency is attributable to the fact that the courts have come to recognize the duty of bank's customers to verify their statements. The judge in *Pertamina* case[306] cited §4-406 of the American Uniform Commercial Code[307] [at 64] to support the argument to impose such a duty on the customers. It is submitted that this divert from the traditional English law position is in the right direction. The banks' customers are at a better position than the banks to detect fraud and computational errors. Therefore, the cardholder should be responsible to verify card statement and report to the issuer of any suspicions, errors or disputes in a

[306] *Pertamina Energy Trading Limited v Credit Suisse* [2006] SGCA 27, the case has been analyzed in more detail in section 6 of chapter III.
[307] http://www.law.cornell.edu/ucc/4/4-406.html.

timely manner. However, we also submit that several regulatory controls should be put in place to prevent abuse of the conclusive evidence clauses.

First, the conclusive evidence clause should not be applied to all the situations of dispute between the issuer and the cardholder. There are 3 remarkably different types of disputes that a cardholder may wish to raise relating to (i) computational errors (ii) unauthorized card transaction disputes and (iii) disputes with the merchant relating to quality of goods or services. Even if the customer's duty to verify statement is recognized, such duty should confine itself to the task of detecting unauthorized transaction and timely reporting of fraud. If there is a computational error, the fault lies with the bank. It would be unreasonable to allow the bank to rely on the conclusive evidence clause to make the cardholder liable for the bank's error. The conclusive evidence clause should not be applied to the situation of cardholder's dispute with the merchant either because in this case the problem is not with the statement and the verification of it but a failure or deficiency of performance by the merchant. If the regulations or the issuers' standard terms allowed the cardholder to request for a chargeback (which was proposed in chapter IV), the situation must be separate from the conclusive evidence clause.

Secondly, the time limit for a cardholder to raise a dispute before the conclusive evidence clause kicks in to make the cardholder liable without more should not be too short. Singapore banks seem to realize the importance of the clause and they tend to shorten the time limit each time their standard terms were revised. They have an incentive to do so because the shorter the limit, the less likely the cardholders would raise a dispute. In the several judicial decisions where the time limit was mentioned, the courts seem to be reluctant to express a clear view on

how long a reasonable time limit should be. In the *Elis* case[308], the UOB bank's standard term which required *individual* customers to verify statements and report inaccuracy within 14 days from the date of the statement was considered reasonable for purposes of the UCTA. In response to the customer's submission that the period of 14 days was unreasonably short, given the evidence that some statement may not be delivered to the post office until the 5th day of next month, Woo Bih Li JC suggested [at 92] that UOB should consider revising the period to 21 days while refusing to hold 14 days as unreasonable because the plaintiff did not attempt to inform the bank of the inaccuracy at all. This seems to suggest that 21 days may be considered by the courts as reasonable. We suggest that even 21 days is unnecessarily short. The purpose of fixing the time limit is to give the issuer sufficient time to lodge a chargeback based on fraud reason codes to claim back the money. Currently the Visa and MasterCard rules allow the banks to chargeback within 6 months. Therefore, the only reason that the Singapore banks fix the time limit at 21 days or less (in fact most of them fixed the limit at 7 days from the date of receipt of 14 days from the date of the statement) is that they wish to deprive the customer of their right to raise disputes. The US Code §1693g[309] which concerned with consumer's duty to verify debit card statement allow the consumer 60 days to verify statement and to report fraud to the issuer, failing which the ceiling limit of the cardholder's liability for unauthorized transaction would be raised from $50 to $500. We suggest that 60 days is a fair and reasonable time limit for reporting of unauthorized transaction. Furthermore, the time limit should be extended in exceptional circumstances in which the cardholder is prevented from verifying the statement, such as extended overseas travel or hospitalization. The time limit applicable to the cardholder's

[308] *Elis Tjoa v United Overseas Bank* [2003] SGHC 1 [2003] 1 SLR 747.
[309] http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001693---g000-.html.

right to raise a dispute with the merchant for a chargeback claim should be fixed at not less than 30 days because the Visa chargeback rules does not allow the issuer to lodge a chargeback request based on failure of delivery of goods before 30 days. The period should be long enough to allow the cardholder to inspect the goods he received and recover any defects or damage.

Thirdly, the regulation should impose on the issuers (or alternatively the banks should voluntarily accept) the duty to send the statement to the cardholder in a timely manner. In the *Elis* case discussed above, there was evidence that monthly statements were not sent until the 5th day of the next month. If the time limit for the cardholder to raise a dispute is defined based on date of statement, the issuer would have more incentive to delay the delivery of the statement. The later they send the statement, the less chance the customer would be able to raise a dispute. The best practice should be fixing the time limit based on the date of delivery or transmission of the statement to the cardholder. Furthermore, the statement must disclose sufficient details of each payment transaction to allow the cardholder to detect any irregularities or inaccuracies. Currently the credit card regulation issued by MAS only requires that credit card issuer use the following template to disclose finance charge in the monthly statement: "*Please settle this statement promptly. If the minimum payment is not received by the due date, a late payment charge (calculated at ___% of minimum payment) will be levied. If payment is not made in full, a finance charge assessed at ___% per annum on the outstanding balance and all new purchases from this statement date will be levied*", which must be printed in bold type of at least 8 points in size[310].

[310] Regulation 9, Banking (Credit Card And Charge Card) Regulations 2004 amended edition.

2.2 Timely response to cardholders' disputes by the issuers

The cardholder's right to raise a dispute with the issuer would be meaningless if the issuer is not responsible to respond to the cardholder's complaint in a timely manner. In this section, we will consider the standard for timely response adopted by Singapore banks.

(a) Disputes resolution standards under the Banking Code

The *"Code of Consumer Banking Practice"* (Banking Code) issued by the Association of Banks Singapore (ABS), has one section (section 19) that generally deals with resolution of disputes between bankers and their customers. According to this section, banks are required to accept customer's complaint by telephone, email, mail, and personal visits. Upon receipt of a customer complaint the banks are to acknowledge the complaint in writing within two working days and assign a member of staff to investigate and handle the dispute within 14 working days (except where the dispute requires investigation by a third party). Customers dissatisfied with the outcome in this first step may contact the Quality Service Department of the bank, which is required to give a written response within 14 working days to inform the customers of further action the customer can take, including going to a third party.

If the customer remains dissatisfied with the response from the Quality Service Department of his bank, he may approach the Consumer Mediation Unit of the ABS for assessment of the case and/or mediation within 3 months from the date of the final response from the bank. The CMU is required to respond to the customer within 14 working days to inform him that the CMU will refer the case

back to the bank (in case the CMU decides not to give an assessment) or to mediate the case between the customer and the bank. If the dispute cannot be resolved at this stage, it may be referred to a Panel of Mediators on payment of a nominal fee. The Panel of Mediators will comprise a current banker, a solicitor and a non-bank professional who will consider the dispute and give an assessment based on interview with the customer and/or the bank. The customer will be informed of the Panel's decision within 14 working days, which decision will end the process of dispute resolution under the Banking Code. As far as the ABS is concerned, the case will be closed even if the customer does not accept the decision.

The CMU only deals with disputes involving consumer where the amount in dispute is less than $50,000. Cases involving corporate, sole proprietorship and partnership and complaints about banks' pricing policy and other policies (e.g. increase in interest rates, introduction of fees), complaints about commercial decisions of banks (e.g. facility denied, cessation of service or product) are expressly excluded.

The CMU is placed under the supervision of a Board of Advisors comprising at least 5 members including representatives from the Chairman bank of the ABS, a qualified full-licensed bank member of the ABS, a grassroots leader and a non-bank professional and chaired by a retired Judge or a retired senior civil servant. The Board of Advisors reviews the activities of the Unit on a periodic basis, monitors the key performance indicators of the CMU and provides an annual report to the ABS of the performance of the CMU.

The Banking Code is a plausible effort by the Singapore banks *"in reaching out to their customers"*. The Code has significantly improved the accountability of the banks in the relationship with their customers by setting out the minimum standards of good banking practice that the consumers can expect from the banks, including specific timelines for the bank to resolve consumer's complaints. In the next section we will suggested some changes that can be made to the Banking Code to improve its effectiveness.

(b) Suggestions for improvement

First, the legal effect of the Banking Code in its current form is limited. Although the Banking Code was addressed to the consumers and the banks are said to *"subscribe to the commitment of standards"* if a bank is in breach of a provision of the Code, the consumer does not have the right to take legal action against the bank, or the ABS. The banks' effort as reflected in the Code seems half-hearted. The practical effect of the Code is to prevent the consumer from taking legal action against the banks rather than giving them the right to do so. Therefore, the first improvement that can be made to the Code is to require the banks to incorporate relevant parts, if not all of the Code into their standard terms of agreement with their customers. Most ideally, the Code could specify model clauses ready to be incorporated in to the banks' standard terms either by reference but most effectively by copying the entire model clauses. This would give the Code real legal effectiveness and enhance the consumer's rights tremendously.

Secondly, section 19 of the Code fails to elaborate on the types of disputes in which a customer may complain to the bank. To be useful in the context of credit

card disputes, the section should specify that the banks must accept customers complaints relating to all of the 3 types of disputes, namely unauthorized transaction, billing computational errors and disputes with the merchants. Section 19 in its current form seems to suggest that the procedure of dispute resolution under the Code only concerns with disputes between banks and the customers. The banks may rely on that to refuse customers' request to chargeback a payment transaction in the event the goods were defective or the merchant failed to deliver the goods. If, as suggested in chapter IV, the cardholders are allowed to make such a request, the Banking Code should be amended to include this type of disputes.

Thirdly, if the timeline specified in the Code within which the issuer must respond to customers' disputes is given real legal effect, there must be a consequence in the event the banks fail to adhere to the requirements specified in the Code. Without specific consequences, the Code's requirements are just empty promise. The most effective and simple way is to provide that the customer's complaint would be automatically deemed as correct in the event the banks failed to respond to the customer's disputes within the specified timeline. This is exactly the approach taken by the legislations concerning credit and debit card in America to ensure timely respond by issuers to cardholder's disputes.

2.3 Attorneys fees in disputes resolution

In a contract entered into between parties of unequal bargaining power (e.g. tenancy agreements), a clause making one party bear the legal costs (e.g. attorney fees, court fee, etc) for the other is frequently found. This is also the case with credit card agreements in Singapore. All standard terms agreement drafted by

bank include a term similar to the following, which is currently used by DBS in its standard cardholder agreement:

"Clause 14.2: Any costs, fees or expenses (including legal costs) that are incurred by us as a result of your breach of the terms and conditions of this Agreement or arising out of our enforcement of any of our rights shall be recoverable by us from you on a full indemnity basis".

From the bank's point of view, the clause is necessary to cut the costs of debt recovery where the cardholder is unwilling to repay. The clause such as the above may be justified by the argument that it is only by the fault of the cardholder, who refuses or delays to repay debt when due, that the bank needs to commence action against the cardholder. Therefore, the cardholder should bear the legal costs incurred by the issuer in such action. However, because of the lack of agreement control in the regulations, some cardholder agreements contain wider indemnity clause covering not only full legal costs for enforcing the bank's rights, but also other costs or losses that bank may incur directly or indirectly by reasons or in connection with the cardholder agreement. An example of this type of clause is found in the UOB's cardholder agreement:

Clause 19.9: *"You must indemnify and keep indemnified us against all claims, demands, action, proceedings, losses and damages of any nature suffered, incurred or sustained by us directly or indirectly, by reason of or in connection with this Agreement."*

This type of clause allows the bank to recover legal costs in the event a dispute between the bank and the cardholder is resolved in the courts. As the bank is

guaranteed to have the legal costs covered as long as the cardholder is not yet bankrupt, it will have less incentive to negotiate and more incentive to commence legal action. The high costs of litigation in Singapore (generally ranging from one to tens of thousand dollars depending on the length of procedure) can easily exceed the cardholder's indebtedness (which may not exceed two times monthly salary). Therefore, the clause effectively gives the bank advantages and prevents the cardholder from taking legal action against the bank in the event of a dispute with the bank.

Therefore, a scheme of disputes resolution, whether adopted voluntarily by the Banking Code or imposed by a regulation, would not be fair without a provision that prevent the banks to recover their attorney fee from the cardholder in the event of a dispute between them. In America, the practice of recovering legal costs from customers by banks has been prohibited under the Uniform Consumer Credit Code[311], which was adopted by many states[312].

2.4 Combination or account, set-off, closing of account and credit reporting during disputes resolution

It is a well-established rule of English law that a bank is entitled to combine all and any accounts a customer has with that bank and set-off the outstanding debt in an account with the amount standing in credit in other accounts at any time

[311] U.C.C.C. S5.207: *"With respect to a consumer credit transaction, the agreement may not provide for the payment by the consumer of attorney's fees. A provision in violation of this subsection is unenforceable."*

[312] From 1968 to 1974 eleven states (Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin and Wyoming) have adopted the Code and enacted the code as state's acts.

without giving any notice to the customer[313]. All cardholder agreements in Singapore have a clause expressly reserving the banks' right to combine all accounts whether held in any branch in Singapore or overseas, in any currency, close the account and set-off in payment of any amount due in a card account. In contrast, US Code §1666h[314] prohibits card issuers to set off a credit cardholder's indebtedness against funds held on deposit with the issuer except where the issuer was previously authorized in writing by the cardholder to pay debts incurred by permitting the card issuer periodically to deduct all or a portion of such debt from the card holder's deposit account. Furthermore, US Code § 1666[315] prohibit banks to close account regarded by a customer as containing a billing error.

Although such a provision as the US Code §1666h and §1666 may be beneficial for the consumers, it seems unlikely that such a rule would be adopted in Singapore either by the Banking Code or the MAS regulation. What we suggest is that the banks should refrain from closing accounts and set off while a dispute between the banks and the cardholder has not been finally resolved. Allowing the banks to do so only gives them an additional advantage that may affect the fair resolution of the dispute with the cardholder.

Since 2002, the Banking Act has allowed banks, financial institutions and credit card issuers being members of the Credit Bureau Singapore Pte Ltd to share with each other credit related information for the purpose of checking on their existing

---

[313] *European Bank, Agra Bank Claims* (1872) LR 8 CH. App. 41; *Garnett v. M' Kewan* (1872) LR 8 Ex. 10; *James Kirkwood & Sons v. Clydesdale Bank Ltd.* 1908 SC 20; *Re Sutcliffe & Sons Ltd., ex p. Royal Bank* [1933] 1 DLR 562; *National Wesminster Bank Ltd. v. Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1971] 1 QB 1.

[314] http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001666---h000-.html.

[315] http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001666----000-.html.

and prospective customers' creditworthiness. A typical credit report provided by the credit bureau as illustrated by the sample report[316] includes various information relating to the creditworthiness of a banks' customer including a basis personal profile (name, date of birth, NRIC number and postal code of residence), records of all credit checks made on the consumer, latest 12 cycles of repayment trend showing the promptness of payments relative to their due dates (without amounts displayed); records of default and bankruptcy records. The information is frequently updated by all members of the bureau. The Code of Conduct published on the bureau's website[317] did not specify the manner in which each member supplies information to the common database of credit information. There is a chance that when a cardholder has a dispute with an issuer being a member of the bureau, and the cardholder suspends settlement of the credit card bill, the amount in dispute may be reflected in the credit report as a record of payment default. This will adversely affect the dealing of the cardholder with other banks. Therefore, reporting to a credit bureau may be another factor, which may be used to the advantage of the issuer in the situations of dispute with the cardholder. US Code §1666a[318] provides that a credit card issuer shall not report to any credit bureau or third party as delinquent any amount in dispute with the cardholder or reported by the cardholder as a billing error until the dispute or error has been finally resolved. It is suggested that either the Code of Conduct of the Singapore credit bureau or the Banking Code should be amended to include provisions similar to the US Code §1666a to prevent abuse of the credit bureau.

---

[316] http://www.creditbureau.com.sg/samplereport/smplreport1.htm.
[317] http://www.creditbureau.com.sg/cbs_CdeConduct.htm.
[318] http://www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001666---a000-.html.

3. Methods of implementation of reform

3.1 Issuance of new regulations by the MAS

The suggestions we made in chapter II, III, IV and section 2 above may be implemented by a credit, debit and charge card regulation to be issued by the MAS. The regulation should be applicable to all issuers of credit, debit or charge cards, regardless of whether they are licensed as bank or financial institution or not. Below is a list of possible components, which we have suggested to be included in the regulation.

(1) *Finality of card transaction:* Card-present transactions are presumed to be unconditionally discharge the cardholder's obligation to pay the merchant. Card-absent transactions only constitute a conditional discharge of the cardholder's obligation.

(2) *Liability for unauthorized transaction:*

Issuers will be liable for unauthorized transaction (whether credit, debit, charge card, consumer or corporate card) in 4 situations:

- A card was lost or stolen and the transaction occurred after the cardholder has already informed the issuer of such loss.
- A new card or renewal/replacement card was lost or stolen in the mail before reaching the card-applicant/cardholder.
- Card-present transaction occurred while the genuine card remained in the possession of the cardholder (not lost); and

- The card was not lost, but unauthorized transaction still occurred by card-absent method, because the card particulars were stolen from somewhere.

Cardholders will be liable for up to a certain limit (*e.g.* S$500) if the card was lost and unauthorized transaction occurs before the cardholder informed the issuer. The cardholder will be liable for all unauthorized transactions without any ceiling limit if he failed to report lost of card after 48 hours after he knew of the loss.

(3) *Liability for authorized transaction*: The cardholder will be liable for card transactions made with his express, implied or apparent authority (including situations where the card was voluntarily given by the cardholder)

(4) *Cardholder's duty to verify statement*: The cardholder has a duty to verify the card monthly statement provided the statement state clearly the amount and date of transaction, trading name of merchants, brief identification of goods or services purchased. The cardholder must inform the issuer of any suspected unauthorized transactions or billing error within 60 days from the date he received his card statements (the 60 days period may be extended in case of cardholder extended overseas travel, hospitalization). The issuer must acknowledge receipt of the cardholder notice in writing within 2 days and give feedback within 14 days (Banking Code), failing which the cardholder's complaint will be deemed correct.

(5) *Chargeback:* credit, debit or charge cardholder (including both consumers and corporate holders) are entitled to request a chargeback against the merchant to suspend or recover the payment amount to the card account if the cardholder can adduce evidence that the following situations occurred:

- The contract of sale was for a tangible goods which were not delivered to the cardholder within the period of time promised by the merchant (or in the absence of an indication of expected delivery 30 days from the date of purchase); or the goods delivered were defective or not as described in the contract of sale, in the merchant's written representation or the sale invoice;
- The contract of sale was for services of a continuing nature (e.g. the storage and maintenance of an internet web site) and paid by card-absent method, the quality of which were not as described by the merchant in the sale contract;
- The payment transaction was duplicated, the amount of the card-present transaction was altered, or the amount of the card-absent transaction did not correspond with the correct purchase price, the payment for goods, services or no-show fee was paid by other means or the recurring payment was cancelled by the cardholder; or
- The cardholder has returned the goods purchased or cancelled the service within the period allowed as stated in the sale contract or invoice but the merchant has failed to process a refund.

Before requesting for a chargeback, the cardholder must attempt to resolve the dispute with the merchant within 60 days from the date of the transaction. If after the chargeback has been resolved in accordance with the chargeback rule of the card association in favor of the merchant, the cardholder will not be entitled to pursue further claim against the issuer. If the issuer failed to assist the cardholder in attempting the chargeback, the issuer will be liable to the cardholder for the transaction amount.

(6) *No attorneys' fees, set-off, or credit report during dispute:* Card issuers must not recover from any cardholder legal costs incurred in the event of a dispute between the cardholder and the issuer. Issuers must not attempt to combine accounts, set-off, close accounts, or report as delinquent any disputed amount until after the dispute has been fully resolved.

(7) *Existing regulations to be retained:* the improved cardholder's protection may result in more cards being issued. Therefore, the existing regulation concerning Income barrier and credit limit should be retained to prevent low-income earner to obtain credit card and borrow at impoverishing interest rates.

(8) *No waiver, no contracting out, and disclosure of terms.* The cardholder should not have any liability except as provided in the regulation. Contractual clauses or notices with the effect that the cardholder waive any statutory rights or contract out of the regulatory protection shall be void. The rights of the cardholder must be disclosed clearly in the cardholder agreement.

3.2 Self-regulation

The alternative to the issuance of a regulation by the MAS is by using self-regulation method. Self-regulation is not new in Singapore, the Association of Bank of Singapore (ABS) was incorporated since 1973, and it has issued the Banking Code since 2002. More recently, the ABS published a *"Code of Practice for Banks - Credit Cards"* and the *"Consumer Guide: Credit Cards".* These two publications were meant for educational purposes only. They focused on guiding the banks in making sufficient disclosure of terms to the customers while on the other hand tell the customer what liabilities they may have in the relationship

with the banks. Where all the banks use similar terms that places as much liability on the cardholder as possible, reading the terms and even understanding them would not help the consumers because they do not have any viable alternative. As discussed in section 2.2 above, the Banking Code in its current form also lacks legal effect and is not specific enough to be capable of application. However, the very existence of the ABS and the Banking Code in itself is a good sign. The Banking Code may be improved to provide better protection for the consumer. The usefulness of self-regulation should not be underestimated. The British Consumer Banking Code and Business Banking Code 2005 are comprehensive documents that have real legal effects[319].

Most of the suggestions listed in the previous section (except for item number (1)) may be incorporated into the Banking Code. The only drawback is the Banking Code only applies to consumers. Therefore, if we wish to apply the suggestion to corporate and business cards, the document has to be separated from the existing document. Regardless of the form, if the banks incorporate the content of the banking code into their standard terms with customers either by reference but most effectively by copying the entire model clauses, the proposed changes will become effective, not much less so than a regulation. It is suggested that the ABS may draft a set of model clauses. There are not many of them, may be eight clauses labeled as best practice of credit card business. The banks may have more incentive to adopt such practices for the publicity benefit of being known as a consumer friendly financial institution. If some of the banks adopted the clauses, the competition will force the rest of them to join the club. The effect of self-regulation approach may take longer to be realised but the possibility is real.

[319] Please refer to pages 218, 219 and footnotes 255, 256 for a more detailed discussion of the two UK Banking Codes.

TABLE OF CASES

Cases	Page(s)
Anns v Merton London Borough Council [1978] AC 728. [1972] 1 MLJ 117	177
Amalgamated Investment & Property Co. Ltd. (in liquidation) v. Texas Commerce International Bank Ltd [1982] QB 84	152
American Express Europe Limited v. McCluskey (unreported)	92
American Express Travel Related Services Co. v. Web, Inc. 261 Ga. 480, 405 S.E.2d 652 (1991)	133
Associated Finance Corporation Ltd v. Poomani	274
Bank of Credit and Commerce International (Overseas)Ltd v Price Waterhouse [1998] Lloyd's Rep Bank 85	176
Bayley v. Wilkins (1849) 7 C.B. 886	114
Blaisdell Lumber Co. v Horton 242NJ Super 98, 575 A.2d 1386 (1990)	132
Borden Chemical Co. (Canada) Ltd v. J.G. Beukers Ltd (1973) 29 D.L.R. (3d) 337, Supreme Court of British Columbia	138
Braithwaite v Thomas Cook Travellers Cheques Ltd [1989] 1 QB 553, [1989] 1 All ER 235	164
Canada and Dominion Sugar Company, Limited v. Canadian National (West Indies) Steamships, Limited [1947] AC 46	152
Canadian Pacific Hotels Ltd v. Bank of Montreal (1981) 122 DLR (3d) 519	159
Caparo Industries plc v Dickman [1990] 2 AC 605	174
Charternay v Brazillian Submarine Telegraph Co [1891] 1 QB 79	224
Chaudhry v. Prabakhar [1989] 1 W.L.R. 29, Court of Appeal	167
City Stores Co. v. Henderson, 116 Ga. App. 114, 156 S.E.2d 818 (1967)	71
Clarke v. Dunraven (Earl) [1897] A.C. 59A	166
Collyer v Isaacs (1881) 19 Ch.D. 342	46
Commissioners for Customs and Excise v Barclays Bank Plc [2005] 1 Lloyd's Rep 165, [2005] All E.R. 789	176
Connor v. Great Western Savings & Loan Association 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1969)	240
Consmat Singapore (Pte) Ltd v Bank of American National Trust	196

& Savings Association [1992] 2 SLR 828	
Crabtree-Vickers Pty. Ltd. v. Australian Direct Mail Advertising and Addressing Co. Pty.Ltd (1975) 133 C.L.R.	168
Crabb v Arun D.C. [1976] Ch. 179	121
Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch [1942] A.C. 435	142
Customs And Excise Commissioners v Diners Club Ltd	50
Debenham v. Mellon (1880) 6 App. Cas. 24	116,120
Deposit Protection Board v. Dalia [1994] 2 AC 367	47
Delbruek v Manufacturers Hanover Trust Co., 609 F 2d. 1047, 1051 (1979)	47
Dixon v. Kennaway & Co [1990] 1 Ch 833	155
Donoghue v Stevenson [1932] All E.R. Rep. 1 (H.L.)	104
Durrant v. Holdsworth (1886) 2 T.L.R. 763	120
Edmund Murray Ltd v. BSP International Foundation Ltd (1992) 33 Con LR 1	195
Egyptian International Foreign Trade Co. v. P.S. Refson & Co. Ltd (The Raffaella) [1985] 1 Lloyd's Rep. 36	121
El Awadi v Bank of Credit and Commerce International S.A. Ltd. [1990] 1 QB 606	164
Elis Tjoa v United Overseas Bank [2003] SGHC 1 [2003] 1 SLR 747	198, 200, 286
Elvin & Power Ltd v. Plummer Roddis Ltd (1933) 50 T.L.R. 158	141
Emerson v American Express Company, Municipal Court of Appeals of District of Columbia (United States of America), 6 Legal Decisions Affecting Bankers 337	164
European Bank, Agra Bank Claims (1872) LR 8 CH. App. 41	294
Felthouse v Bindley (1862) 11 C.B.N.S. 869	75
First Sport Ltd v. Barclays Bank Plc [1993] 3 All E.R. 789	82
Fred Chappell Ltd v National Car Parks Ltd The Times 22 May 1987, (Transcript:IV Gilbert)	196
Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 480	113, 118, 120, 124
Fung Kai Sun v Chan Fui Hing [1951] AC 489	159
Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd	151

Garnett v. M' Kewan (1872) LR 8 Ex. 10	294
Goldberg v. Tait [1950] N.Z.L.R. 976 (Supreme Court)	225
Greenwood v. Martins Bank Ltd [1932] 1 KB 371, Court of Appeal	156, 159
Hawkes Bay Investment and Finance Co. v. White [1934] N.Z.L.R. 46 (Supreme Court)	227
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465	173, 241
Hely-Hutchinson v. Brayhead Ltd [1968] 1 Q.B. 549	115, 117, 118, 121
Henderson v. Merrett Syndicates Ltd [1952] 2 AC 145	110, 175
Hiort v. Bott (1874) L.R. 9 Ex. 86	140
Home Owners Loan Corp. v. Thornburgh 106 P 2d 511	123
Houghland v. R.R. Low (Luxury Coaches) Ltd. [1962] 1 Q.B. 694	145
Household Fire Insurance Co. Ltd v. Grant, (1879) 4 Ex. D. 216	73
Hume-Dick v. Herries, Farquhar & Co (1888) 4 T.L.R. 541	163
Hyland v. First USA Bank, 1995 WL 595861 (E.D. PA.Sept.28,1995)	243
In Re H.P.C. Production Ltd [1962] Ch 466	273
James Kirkwood & Sons v. Clydesdale Bank Ltd. 1908 SC 20	294
K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt [1985] 2 Lloyd's Rep 28	151
Khoo Tian Hock & Anor v Oversea-Chinese Banking Corporation Limited [2000] 4 SLR 673	191, 192
Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548 per Lord Goff at 578	152
Lloyd's Bank Ltd v. Chartered Bank of India etc. [1929] 1 K.B. 40	139
London Joint Stock Bank v. Macmillan and Arthur [1918] AC 777	155, 157, 159, 161, 172
Lornho Ltd v. Shell Petroleum Co. (No. 2) 1982 A.C. 173	142
Lowe v. Lombank [1960] 1 WLR 196	152
Magripilis v. Baird [1926] St. R. Qd. 89	121
Marchant v. Morton Down & Co [1901] 2 K.B.829	46
Martin v American Express, Inc. 361 So. 2d 597 (ala. 1978)	132
Menaka v. Lum [1977] 1 M.L.J. 91	277

Mercantile Bank of India v Central Bank of India Ltd [1938] A.C. 287	122
Mercantile Credit Co. Ltd v. Hamblin [1965] 2 Q.B. 242	122, 155
Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc [1990] 1 Q.B. 391	142, 226
Metropolitan Police Commissioner v. Charles (1977)	83, 186
Midlink Development Pte Ltd v The Stansfield Group Pte Ltd[2004] 4 SLR 258	76, 136
Minskoff v American Express Travel Related Services Co 98 F.3d 703, 708	131
Miss Gray Ltd v. Earl Cathcard (1922) 38 T.L.R. 562	116
Mitchell v. Ealing London B.C. [1979] Q.B. 1	137
Moorgate Mercantile Co. Ltd. v. Twitchings [1977] A.C. 890	122, 153
Moss v Hancock [1899] 2 QB 111	10
National Wesminster Bank Ltd. v. Halesowen Presswork and Assemblies Ltd [1972] AC 785, [1971] 1 QB 1	294
Office of Fair Trading v. Lloyds TSB Bank plc and others [2006] EWCA Civ 268, [2006] 1 All E.R. (Comm) 629	247
Olds Discount Co Ltd. v. John Playfair Ltd [1938] All E.R. 275	272
Oricon Waren-Handels GmbH v. Intergraan NV [1967] 2 Lloyd's Rep. 82	116
Pacol Ltd v Trade Lines Ltd (The Henrik Sif) [1982] 1 Lloyd's Rep 456	154
Panorama Developments (Guildford) Ltd v. Fidelis Furnishing Fabrics Ltd [1971] 2 Q.B. 711	120
Parno v SC Marine Pte Ltd [1999] 4 SLR 579	226
Peh Teck Quee v Bayerische Landesbank Girozentrale [2000] 1 SLR 148; [1999] SGCA 79	224
Pertamina Energy Trading Limited v Credit Suisse [2006] SGCA 27	199, 284
Phillips v Eyre (1870) LR 6 QB 1	220
Pole v. Leask (1863) 33 LJ CH 155	126
Potts' Executors v. Inland Revenue Commissioners [1951] A.C. 443, [1951] 1 All E.R. 76	273
Premier Clothing & Supply Co. v. Hillcoat [1969] C.L.Y. 2279a	275

Progressive Supply Co., Ltd v Dalton [1942] 2 All E.R. 646	274
R. v. Handsford (1974) 8 S.A.S.R. 164	140
R.v. Lambie (1982)	83
R. v. Preddy [1996] AC 815	59
Rama Corp. v. Proved tin & General Investments [1952] 2 Q.B. 147	118, 119
Rhodes v. London and County Bank (1880) 1 Legal Decisions Affecting Bankers	163
Re Bonacina [1912] 2 Ch 394	226
Re Charge Card Services Ltd [1987] 1 Ch. 150	41, 42, 53, 59, 82
Re Charge Card Services Ltd [1989] Ch 497 (CA)	60, 96
Re London & Northern Bank [1900] 1 Ch. 200	73
Re Sutcliffe & Sons Ltd., ex p. Royal Bank [1933] 1 DLR 562	294
Ri Jong Son v Development Bank of Singapore Ltd [1998] 3 SLR 64	189
Rookes v. Barnard [1964] A.C. 1129, House of Lords	142
RSP Architects Planners & Engineers v MCST Plan No 1075 [1999] 2 SLR 449 at [31]	176, 178
Scholfield v. The Earl of Londesborough [1896] A.C.514(H.L.)	160, 172
Siu Yin Kwan v. Eastern Insurance Co. Ltd. [1994] 2 A.C. 199, 207	63
Smith v. Eric S. Bush [1990] 1 AC 831	174
Spartan Steel and Alloys Ltd v. Martin & Co (Contractor) Ltd [1973] 1 QB 27	173
Spiro v Lintern [1973] 1 WLR 1002	77
Sidney Bolsom Investment Trust Ltd. v. E. Karmios & Co. (London) Ltd [1956] 1 QB 529, CA	152
Societé Générale v. Metropolitant Bank 27 L.T. 849	172
Stephan Machinery Singapore Pte Ltd v Overseas-ChineseBanking Corp Ltd [2000] 2 SLR 191	198
Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] All E.R. 257	196
Swan & Edgar Ltd v. Mathieson (1910) 103 L. T. 832	120, 122
Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd [1986] AC 80	157, 159, 191, 194, 241

The Amazonia [1990] 1 Lloyd's Rep 236	151
The Indian Endurance (No 2) Republic of India and another v India Steamship Co Ltd [1996] 3 All ER 641	151
The Satanita [1895] P. 248	44, 166
The Stolt Loyalty [1993] 2 Lloyd's Rep 281	154
The Vistafjord [1988] 2 Lloyd's Rep 343	151
Thomas v. Central Charge Service Inc, 212 A 2d. 533 (DC Cir. 1965)	52
Thomas Witter Ltd v. TBP Industries Ltd (1994) 12 Tr LR 145	195
Torquay Hotel Co. Ltd v. Cousins [1969] 2 Ch. 106	142
Tower World Airways Inc. v. PHH Aviation Systems Inc. 933 F.2d 174 (2d Cir. 1991)	132
United Project Consultants Pte Ltd v Leong Kwok Onn Singapore Court of Appeal, [2005] 4 SLR 214; [2005] SGCA 38	178
Victor Kee Yong Poey v Diners Club Malaya Sdn. Bhd [1976] 2 M.L.J. 30	271
W. J. Alan & Co. Ltd. v. El Nasr Export and Import Co. [1972] 2 Q.B. 189, 210A	93
Walker Bank & Trust Co. v. Jones 672 P2d 73 (Utah 1983)	134, 167
Watteau v. Fenwick [1893] 1 Q.B. 346	125
Waugh v. H.B. Clifford & Sons Ltd [1982] Ch. 374	121
William Brandt's Sons & Co v. Dunlop Rubber Co. Ltd [1905] A.C.454	46
Wilson v. Brett (1843) 11 M.&W. 113	140
Wimpey Construction (UK) Limited (and others) v. Martin Black & Co (Wire Ropes) Limited (1982) SLT 239	173
Woodhouse AC Israel Cocoa Ltd v. Nigerian Produce Marketing Co Ltd [1972] AC 741	152, 153
Woods v. MONY Legacy Life Ins. Co.,641 N.E.2d 1070,1071 (1994)	133
Young v. Grote Court of Common Pleas, (1827) 4 Bing. 253, 130 ER 764	159, 160

BIBLIOGRAPHY

1. A.C. Drury and C.W. Ferrier, '*Credit Cards*', Butterworth 1984.
2. A.P. Dobson, *'Credit Cards'* [1979] JBL 332.
3. Barkley Clark, *"The Law of Bank Deposits, Collections and Credit Cards"*, 3rd Edition.
4. *Boustead & Reynolds on Agency*, 17th Edition Sweet & Maxwell 2001.
5. C.Y. Lee, *"Law on Consumer Credit"*, 1990.
6. C.Y. Lee, "*Towards new Consumer Credit Protection Legislation in Singapore'*, Mal. L.R. 266 (1979).
7. *Chitty on Contracts*, 28th Edition.
8. *Clerk & Lindsell on Tort*, 17th Edition, Sweet & Maxwell 1995.
9. David Kreltszheim, *"The legal nature of electronic money"* (2003)14 JBFLP 161.
10. E. P. Ellinger, E. Lomnicka and R.J.A. Hooley, *Modern Banking Law*, 3rd Edition.
11. Eric Chan, *"All about time: finality and completion of Payment by funds transfer",* (2005) 17 SAcLJ
12. G Bower & A Turner "*The Law Relating to Estoppel by Representation"*, 3rd Ed, 1977.
13. Geva Benjamin, *"The law of Electronic Funds Transfer",* Release No. 7, October 1999, Matthew Bender
14. Marcus Smith and Patricia Robertson, Chapter 4, *Law of Bank Payments*, Editor Michael Brindle and Raymond Cox, 3rd Edition, 2004.
15. Mark Budnitz and Margot Saunders, *Consumer banking and payments law: credit, debit & stored value cards, checks, money orders, e-sign, electronic banking and benefit payments*, 2nd Edition, National Consumer Law Center, 2002.

16. Mark Hapgood, *Paget's Law of Banking* (LexisNexis, 11th Ed, 1996)
17. Michael Brindle & Raymond Cox, *Law of Bank Payments* (Sweet & Maxwell, 2nd Ed, 1999).
18. N.E. Palmer, *"Bailment"*, 2nd Edition.
19. *Payment Systems in Singapore 2001*, Bank for International Settlement.
20. Peter E. Sayer, *'Credit Cards and The Law, an Introduction'.*
21. Poh Chu Chai, *Law of Banker and Customer*, Lexis Nexis, 5th Ed, 2004.
22. Poh Chu Chai, Annual review of Singapore cases 1-2000, Banking Law.
23. R. M. Goode, *Payment Obligations in Commercial and Financial Transactions* (2nd Ed, 1995).
24. Roy Goode, *Payment Obligations in Commercial and Financial Transactions*, Sweet & Maxwell, London 1983.
25. S.A. Jones, *'Credit Cards, Card Users and Account Holders',* [1988] JBL 457.
26. *Salmond & Heuston on the Law of Tort*, 21st Edition, Sweet & Maxwell.
27. Sean Wilken and Theresa Villiers, *"Waiver, Variation and Estoppel"*, New York, J. Wiley 1998.
28. Spencer Bower and Turner, *Estoppel by Representation*, 3rd ed. (1977).
29. Tan Keng Feng, *'Credit Cards and Money Lending'* [1976] 2 M.L.J.