

**THE REGULATION OF CONSUMER
CREDIT TRANSACTIONS
Kuala Lumpur, Malaysia
4 - 5 October 1994**

**CURRENT ISSUES ON CREDIT CARD
TRANSACTIONS IN MALAYSIA**

Cheong May Fong

CURRENT ISSUES ON CREDIT CARD TRANSACTIONS IN MALAYSIA

A. INTRODUCTION

The credit card has increasingly become a common mode of payment in Malaysia. Initially perceived as an object of status for the rich, today the credit card is within the reach of a large segment of the population and is regarded as a convenient means of payment besides the credit that is also available. Despite the large number of credit cards in circulation, the credit card industry is subject to minimum supervision from the authorities. The legal position of the parties to a credit card transaction is largely based on the contracts entered into between them.

The aim of this paper is to consider three important aspects in a credit card transaction. These are:

- (1) whether the credit card transaction is a moneylending transaction and caught by the Moneylenders Act, 1951?¹
- (2) the liability for unauthorised transactions - who should bear the loss, the card issuer or the cardholder?
- (3) the liability for defective goods or services - should the card issuer bear part of the responsibility together with the supplier?

On the second and third aspects, the question is also whether current contractual terms are fair to the cardholder or whether some form of regulation should be introduced. In this regard, the provisions of the United Kingdom Consumers Credit Act 1974 would be considered as a possible model.

A discussion on credit card will be incomplete without reference to credit card fraud. This undesirable phenomena has caused much loss to credit card companies and cardholders and to the nation as a whole as it acquires the reputation of one of the world's largest credit card fraud centre. The question is whether the available penal laws are adequate to prosecute and deter offenders or whether new legislation is needed to combat credit card fraud.

¹ Revised 1989, Act 400.

B. THE REGULATORY FRAMEWORK

Credit card business is included as a "credit token business" under the Banking and Financial Institutions Act 1989 (BAFIA).² Section 2 of the BAFIA defines "credit token business" as any business where a token being a card, cheque, voucher, coupon, stamp, form, booklet or other document is given to a customer by the issuer whereby the issuer undertakes that on production of the token the issuer will supply cash, goods or services on credit or a third party will supply cash, goods or services with the issuer paying the third party and the customer paying to the issuer thereafter.

Credit token business is classified as a "scheduled business".³ Under section 19(1) a person carrying on a scheduled business is required to obtain a written acknowledgement from the Central Bank that it has complied with section 21(1). This section requires submission of documents, statements and information relating to such person or institution as specified in section 5(1) (a)-(c)⁴ together with fees as prescribed.

The Central Bank may at any time require a person carrying on credit card business to submit information relating to the person or institution, its business or affairs and such periodical returns as the Central Bank may specify.⁵ Further, if any amendment or alteration is made to any of its constituent documents, the credit card company shall within three months after such amendment or alteration, submit to the Central Bank particulars in writing of such amendment or alteration duly verified by statutory declaration by a director of the company.⁶

It is obvious that credit card companies are not tightly regulated under the BAFIA. They are required to obtain a written acknowledgement from the Central Bank and may have to submit information to the Central Bank when required. However it appears that the present regulatory structure is adequate as most credit card issuing institutions are banking institutions which are already supervised and

² Act 372.

³ Third Schedule of the BAFIA.

⁴ This section provides for submission of documents in an application for a licence to carry on any of the businesses referred to in section 4, that is, banking, finance company, merchant banking, discount house and moneybroking businesses.

⁵ Section 21(2).

⁶ Section 22.

regulated by the Central Bank. Thus, their credit operations are already under the purview of the Central Bank and any guideline⁷ issued is easily enforceable. In any event, there are enabling provisions in the BAFIA that can be invoked should the need for further regulation arises. The Minister of Finance may if he is satisfied that it is necessary to regulate any particular scheduled institution, on the recommendation of the Central Bank, declare that any or all the provisions of Parts V, VI, VII, VIII, IX, X, XI and XII of the BAFIA apply to such institution.⁸

C. LEGAL NATURE OF THE CREDIT CARD TRANSACTION

There are three parties involved in a credit card transaction: the card issuer, the cardholder and the supplier. The card issuer enrolls suppliers who agree to supply goods and services to persons who present the issuer's cards and to look to the issuer for payment of the amount involved less a discount. The agreement between them will be referred to as 'the supplier agreement'. At the same time, the card issuer issues a credit card to the cardholder which enables him to pay the price of goods or services rendered. In return, the cardholder agrees to pay the card issuer the full price of goods or services charged by the supplier. The agreement between the card issuer and the cardholder will be referred to as the 'cardholder agreement'. The above two separate contracts form the underlying scheme in a credit card transaction. When the cardholder purchases goods or services from the supplier, a third contract, that is the contract of sale takes place. This contract is usually oral. The cardholder tenders the card instead of cash and the supplier accepts it as payment based on the above two underlying contracts.

⁷ In December 1991, the Central Bank issued the following guidelines on credit card operations: (a) minimum income requirement of RM24,000 per annum; (b) minimum age requirement of 21 years; (c) minimum monthly payment of 10% of the total monthly outstanding balance.

⁸ Section 24. This may be done if it is necessary to (a) promote monetary stability and a sound financial structure or (b) influence the credit situation to the advantage of Malaysia or (c) protect the interest of the public in respect of the business carried on by such particular scheduled institution.

A full judicial analysis of the nature of the relationship between the parties in a credit card transaction was made in *In re Charge Card Services Ltd.*⁹ In this case, the issuer, *Charge Card Services Ltd* had issued cards to cardholders to obtain fuel from participating garages (called 'suppliers' in the judgments) who had agreed to accept the cards under the 'franchise agreement' with the issuer. The issuer had become insolvent without paying the suppliers who had supplied fuel to the cardholders. There were substantial sums owing to the issuer from the cardholders and the issuer had assigned all its receivables to the respondent, *Commercial Credit Services Ltd (C Ltd)*. The issue that arose was whether sums due from the cardholders were due to the suppliers (by virtue of the contract of sale with the cardholders and since the issuer had not paid the suppliers) or to C Ltd based on the assignment from the issuer.

The Court of Appeal affirming Millet J's decision, held that transactions using credit cards were made in the context of a pre-existing underlying scheme of bilateral contracts between the issuer and the suppliers and between the issuer and the cardholders. When the suppliers agree to accept the cards from the cardholders, each party knew of the underlying contractual scheme, that is that the suppliers would look to the issuer for payment.¹⁰

Furthermore, the cardholders' obligation to pay the issuer arose when transactions were debited on their accounts irrespective of whether the issuer paid the suppliers. Thus payment by the credit cards were taken as an absolute discharge of the cardholders' liability to the suppliers. Accordingly, the debts due from the cardholders were payable to the assignee, C Ltd.

⁹ Decided by Millet J at court of first instance at [1986] 3 All ER 289 and the Court of Appeal at [1988] 3 WLR 764.

¹⁰ Sir Brown-Wilkinson VC, delivering the judgment stated at page 722,

"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 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."

D. IS THE CREDIT CARD TRANSACTION MONEYLENDING?

Whether a credit card transaction amounts to moneylending is significant in some respects. If it is moneylending and falls within the Moneylenders Act 1951, the requirements of licensing and registration¹¹ as moneylenders would apply, thus providing a certain degree of statutory control over credit card companies. Secondly, no compound interest can be charged¹² and the rate of interest that can be charged on cardholders will be limited to the maximum 18 per centum per annum since it is an unsecured loan.¹³ Thirdly, a moneylending transaction can be reopened by the courts if it is proved that the interest charged is excessive and the transaction is harsh, unconscionable or substantially unfair.¹⁴

The position is not very clear as there are few authorities on credit card locally¹⁵ and not many English decisions either. In the first local case on credit card, *Victor Kee Yong Poey v Diners Club Malaya Sdn Bhd*, the appellant, a member of Diners Club contended that part of the sum claimed by Diners Club was interest and raised the defence of moneylending. The High Court held that the additional sum besides the principal sum was only for late payment and that the appellant had not shown the payment of interest so as to raise the issue of moneylending. A writer, Tan Keng Feng¹⁶ is of the view that the Court was wrong to hold that this transaction was not moneylending within the Moneylenders Ordinance 1951 because the appellant failed to prove the additional charge as interest¹⁷ and that the proper issues before the court was not considered. According to the writer, the Court should have considered first, whether credit card transaction is a

11 Section 5.

12 Section 17.

13 Section 22.

14 Section 21.

15 So far there are only two reported cases; *Victor Kee Yong Poey v Diners Club Malaya Sdn Bhd* [1976] 2 MLJ 30, *Bakmawar Sdn Bhd v Malayan Banking Bhd* [1991] 3 CLJ 1759.

16 "Credit Cards and Moneylending", [1976] 2 MLJ cxi.

17 A loan made without interest is still caught within the Moneylenders Ordinance 1951 if the lender is a moneylender within the meaning of the Ordinance. Once it is determined that a particular transaction is a moneylending transaction, the Moneylenders Ordinance 1951 will apply if the lender is a moneylender within the Ordinance. *Ibid*, p cxii.

moneylending transaction and if so, secondly, whether the card issuer was a moneylender within the Moneylenders Ordinance.

Whether the credit card transaction is moneylending depends on whether the debts representing purchases made on the credit card are assigned from the supplier to the issuer and the cardholder's obligation to pay the issuer arises from this assignment (the "pure assignment" theory) or whether there is a direct obligation of the cardholder to pay the issuer (the "direct obligation" theory).¹⁸ It has been argued that cases support the direct obligation theory, that is the moneylending analysis.¹⁹ In *In Re Charge Card Services Ltd*, the Court of Appeal recognised that the card issuer has a direct contractual relationship with the cardholder. The card issuer agrees to lend money and settle the card holder's debt owed to the supplier and the cardholder agrees to pay the card issuer the said amount. This is said to be based on the "direct obligation theory", the moneylending analysis as opposed to the "pure assignment theory".²⁰ Alternatively, it is said that the credit card transaction is not moneylending *simpliciter* but a hybrid form as the transaction involves not only the extension of credit but also the purchase of goods or services.²¹

While the issue of moneylending is significant, most credit card companies are not affected by virtue of the exemptions under the Moneylenders Act. Credit cards operated by banks are exempted by virtue of section 2A(1)(c). Two party cards issued by departmental stores or petrol stations would arguably be said to be *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money under section 2A(1)(h). However, for

¹⁸ Lee Chin Yen, *The Law of Consumer Credit*, (Singapore University Press, 1980), p 86.

¹⁹ Ho Peng Kee, "The Credit and Charge Card Transaction: Is It Moneylending?", [1993] 1 SJLS 1.

²⁰ See also *Customs and Excise Commissioners v Diners Club Ltd and Anor* [1989] 2 All ER 385.

²¹ *Supra*, n 19, p 12.

The Report of the (Crowther) Committee on Consumer Credit in England (Cmd. 4596, 1971) classifies the extension of credit by credit cards as a hybrid transaction between moneylending and selling. However, the Committee still prefers to view the relationship between the issuer and the holder as one of lender and borrower and classifies the issuer as a moneylender.

credit cards operated by non-banks, the issue of moneylending remains unless these companies obtain exemption under section 2A(2) of the Act.

In relation to credit card, the rate of interest charged for credit transactions is of some concern. The rate is determined solely by the credit card companies and it is said to be unreasonably high compared with the interest rates for loans, that is between 1 and 1.5 percent per month. Thus, the recent statement of the Deputy Finance Minister, Datuk Mustapha Mohamed that the Government is considering imposing a ceiling on interest rates charged by financial institutions in respect of outstanding credit card balances²² is most welcome.

E. LIABILITY FOR UNAUTHORISED TRANSACTIONS

One of the main issues that arises from the use of credit card is the question of who should bear the loss in the event of unauthorised transactions by third parties - the card issuer or the cardholder? Where there is no provision for this in the cardholder agreement, a cardholder should not be liable unless he is precluded from denying that the use was authorized.²³ This is based on an analogy with the law of banking that a bank cannot debit its customer's account for forged or unauthorised payments unless an estoppel is raised,²⁴ where the customer has drawn his cheques in such a way so as to facilitate fraud²⁵ or after knowing of a forgery, he fails to inform the bank of it.²⁶ However, it is clear that other than the above two duties, a customer owes no wider duty of care to the bank. In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*,²⁷ the Privy Council clearly ruled that customers owes a duty to

²² *New Straits Times*, August 29, 1994.

²³ Sayer PE, *Credit Cards and the Law: An Introduction*, (London, Fourmat Publishing 1988), p 101.

²⁴ Section 24, Bills of Exchange Act 1949 (Revised 1978), Act 204.

²⁵ A customer owes a duty to the bank to draw his cheques carefully so as not to facilitate fraud. *London Joint Stock Bank Ltd v MacMillan and Arthur* [1918] AC 777.

²⁶ A customer owes a duty to the bank to inform of any forgery after he is aware of it. *Greenwood v Martins Bank Ltd* [1932] 1 KB 371.

²⁷ [1986] AC 80.

the bank to take reasonable steps to prevent fraud. The Privy Council decision has recently been adopted locally in the Supreme Court case of *United Asian Bank v Tai Soon Heng Construction Sdn Bhd.*²⁸

However, in most cardholder's agreement, the issuer would have imposed a contractual clause providing that the cardholder will be wholly liable for all losses until notice is given to the issuer (liability until notice clause). This clause in effect attempts to shift the risk of loss to the cardholder. The question is how will our courts interpret this risk shifting clause. There is a dearth of authorities on this in the common law jurisdictions, though there are some American authorities which have provided some guidelines in this respect.²⁹ From the American cases that have been decided, two views may be extracted.

- (a) The first view construes a risk shifting clause literally and renders the holder liable for all purchases prior to receipt of notice and allows restitution to the issuer, notwithstanding the supplier's negligence to ascertain the bona fides of the purchaser. In *Texaco, Inc v Goldstein*,³⁰ the court held that when the terms of the contract are reasonable and represent an agreement to share the risk the holder will be responsible before notice is given to the issuer.
- (b) The second view acknowledges that certain circumstances may justify disregarding risk allocation clauses, for example where there is a lack of due care either by the issuer, the supplier or the holder. The leading case is *Union Oil Co v Lull*³¹ where the court also held that the issuer had the onus to show that the supplier did exercise reasonable care before extending credit.

²⁸ [1993] 1 MLJ 182.

²⁹ Much of the legal writings in the common law jurisdictions are based on an analysis of the American cases; see KM Sharma, "Credit Cards in Australia: Some Predictable Legal Problems", *Lawasia* [1972] Vol 3, 106; W J Chappenden, "Credit Cards: Some Legal Problems", *ALJ* (1974) Vol 48, 306, J F Corkery, "Credit Cards in New Zealand: Some Potential Problems", *NZLJ* 1 February 1977, 30.

³⁰ 34 MISC, 2d 751.

³¹ 220 Ore 412, 349 P 2d 243 (1960).

Should a case arise in Malaysia, the courts in deciding which view to adopt or the legislature in considering any possible reform may wish to consider the arguments for and against each of the above views.

In *Goldstein's* case the court was concerned that stringent security requirements for identification of customers would be time consuming and expensive, irritate honest customers and greatly impair the convenience of credit cards and cause credit cards to be no different from other commercial instruments. It has also been argued that it is the holder and not the issuer who has control over the card.³² Further shifting the loss to the holder would give him an incentive to take more care and to immediately notify the issuer of a lost or stolen card so that the issuer can promptly notify the supplier to dishonour the card.³³

While these are sound reasons to shift the burden of risk to the holder, other factors may tilt the balance in favour of the holder. Although it is true to say that it is the holder who has control over the card, it has been argued³⁴ that unauthorised purchases are easily made partly because the card is not individualized with more particulars of the holder, photo or the holder's voice. Alternatively, the issuer can adopt more sophisticated equipment at the point of sale to identify cardholders. These are matters within the issuer's control. Secondly, if the loss is caused by the negligence of the supplier, then the issuer should bear the loss as the issuer have control over the supplier. This control is enforced by the credit-rating of the supplier or by charging back the loss to the supplier (which is a provision found in most supplier agreement) if the supplier negligently accepts the card, or if the signature of the credit slip does not reasonably conform to that of the holder on the card.³⁵

³² See Spain, EO, "The Lost Credit Card: The Liability of the Parties", Albany Law Review (1966) Vol 30, p 79.

³³ Robinson, BK, "Applicability of Exculpatory Clause Principles to Credit Card Risk Shifting Clauses", Louisiana Law Review (1962) Vol XXII, p 640.

³⁴ Bergstein, EE, "Credit Cards - A Prelude to the Cashless Society", Boston College Industrial and Commercial Law Review (1967) Vol 8, p 485.

³⁵ The issue in the second local case on credit card, *Bakmawar Sdn Bhd v Malayan Banking Bhd* [1991] 3 CLJ 1759 was whether the card issuer could charge back and debit the suppliers account for purchases which its cardholders claimed were unauthorised. The High Court held that the issuer could do so based on provisions in the agreement between the card issuer and the supplier.

Another argument why the loss should be absorbed by the issuer is that the issuer also derives benefit from the credit card transaction - it may obtain a fee from the holder, it may buy the account receivables from the supplier at a discount and in some cases it may lend money at interest from the collections.³⁶

Finally, courts may be reluctant to enforce terms literally where the bargaining power of the party on whom the risk is placed is small compared to that of the other party who avoided the loss. This is clear in the case of the individual cardholder compared to the card issuer. In any event, the issuer may be better able to absorb the loss by virtue of its large scale operations or by taking up insurance.

There are valid arguments in favour of each view and undeniably a balance must be struck between the interest of the cardholder and issuer. The holder also obtains the benefit of credit through the use of the card. As decided in *O T B International Credit Card Ltd v Michael Au*,³⁷ the question to ask is whether a risk shifting clause is reasonably necessary for the protection of the legitimate interests of the card issuer and commensurate with the benefits secured to the cardholder. Bearing in mind all the opposing factors, it is submitted that the best solution is to have a clause which limits the liability of the holder. This is the approach taken in United States (The Truth-in-Lending Act, 1968)³⁸ and United Kingdom (Consumer Credit Act, 1974, sections 83 and 84)³⁹ (see attached Appendix A).

Another related issue is the question of notice of the risk shifting clause. An examination of some cardholder agreements currently in use in Malaysia shows that some agreements impose full liability on the holder until notice to the issuer and some agreements have a maximum liability limit clause. These clauses are included together with all the other numerous clauses in small print. Very few agreements have headings to each clause. It is submitted that these risk shifting clauses have the same effect as exclusion clauses and courts should impose the strict

³⁶ University of Miami Law Review (1967) Vol XXI, p 814.

³⁷ [1980] HKLR (Pt II) 296 (CA).

³⁸ For further discussion, see "Bank Credit Cards - Contemporary Problems", Fordham Law Review (1972) Vol 41, p 373.

³⁹ For further discussion, see Sayer, p 104; Goode RM, *Consumer Credit Law*, (Butterworths, London, 1989), p 621.

requirement that notice of exclusion clauses must be brought to the attention of the person affected.⁴⁰ The United States Truth-in-Lending Act provides for limited liability on the cardholder only if he is adequately notified of the potential liability.

F. LIABILITY FOR DEFECTIVE PURCHASES

Another area of major concern to a consumer using a credit card is the problem of defective purchases. While it is normally thought that a customer in a credit sale is in a better position than one who pays cash (since the credit customer may refuse to pay any outstanding balance pending the dispute of the defective goods), a credit cardholder does not enjoy this advantage. Most standard cardholder agreements contain a clause that the card issuer disclaims any liability for defective goods supplied by the supplier. Additionally, there may also be a clause precluding the cardholder from raising against the card issuer such defences as he would have against the supplier (waiver of defence clause).

Such clauses may not be fair to the cardholder who is required to pay the issuer immediately while having to sue the supplier. Further it appears inequitable to deny the cardholder defences against the issuer who can demand payment regardless of any deficiencies in the goods or services.⁴¹ A number of other policy reasons support the view that the issuer should not be allowed to enforce such clauses. The cardholder's inaction to sue the card issuer will cause the issuer to be less careful in vetting the suppliers and encourage them to deal fairly with the cardholder. On the other hand, if the cardholder is allowed to sue the issuer, this would give added leverage to the cardholder against unethical supplier since it is to the issuer's benefit to encourage suppliers to satisfy their customers.⁴² Moreover the close relationship that the issuer has with the supplier, the opportunity it has to investigate its business ethics and ability to protect

⁴⁰ *Olley v Marlborough Court Ltd* [1949] 1 KB 532; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.

⁴¹ *JF Corkery, supra*, n 29, p 34.

⁴² *Bergstein EE, supra*, n 34, p 516.

itself through recourse agreement against the merchant and through charge back provisions in the supplier agreement point to this direction.⁴³

Although policy reasons suggest that the issuer should assume some of the responsibilities for defective goods or services supplied by the supplier, it has been concluded that generally a cardholder has no right of action against the card issuer.⁴⁴ This is so whether the action is based

It has been suggested that legislation should go further and specifically provide that the conditions and warranties found in the Sale of Goods Act apply not only to the card holder/supplier dealing but also to the cardholder/issuer relationship.⁵¹

G. CREDIT CARD FRAUD

A discussion on credit card will be incomplete without reference to credit card fraud. This is particularly so in Malaysia where the statistics from 1991 to 1993 were quite worrying. In 1991, Malaysia ranked fifth in the list of Mastercard International's counterfeit losses worldwide, making up 5.5 per cent or US\$1.2 million.⁵² In 1992, Malaysia accounted for 22.9 per cent of Mastercard International's card fraud losses and 12.3 per cent for the first five months of 1993.⁵³

Credit card fraud can be perpetuated in many ways as follows:⁵⁴

- (a) Unauthorised use of cards reported lost or stolen;
- (b) Use of counterfeit cards;
- (c) Fraudulent use of genuine cards by third parties;
- (d) Used of cards obtained through false applications;
- (e) Extended use of facility by cardholder followed by delinquency of account;
- (f) Collusive suppliers accepting counterfeit cards;

Under section 75 of the Consumer Credit Act, a cardholder who has any claim against a supplier for misrepresentation or breach of contract shall have a like claim against the creditor (the card issuer) who with the supplier shall be jointly and severally liable to the debtor. This section is the 'connected lender liability' provision and there must normally be a pre-existing arrangement between the card issuer and the supplier. The card issuer's right of indemnity against the supplier is provided in section 75(2). It is, however, felt that section 75 is too wide as the issuer is liable without any limitation and may be exposed to enormous consequential loss claims and that the section should be amended to limit the liability of the card issuer to the amount of credit advanced only.⁴⁹

Another related provision is section 56 which provides that negotiations with the cardholder are deemed to be conducted by the supplier in the capacity of agent of the card issuer/creditor as well as in his actual capacity. Thus a cardholder may recover damages from the issuer in respect of contractual misstatements made by the supplier as these statements are deemed to have been made by the supplier as agent of the issuer.⁵⁰

cutting corners in construction, and that the purchasers were unable to discern any structural defects was sufficient to impose upon the defendant the duty to exercise reasonable care to prevent the construction and sale of seriously defective homes.

Hanberry v Hearst Corporation, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969). The case was brought by the purchaser of a pair of shoes for personal injuries sustained when she slipped on the vinyl floor of her kitchen while wearing shoes guaranteed by Hearst Corporation through the consumer guarantee service of one of its publications. Liability was imposed as a matter of public policy, 'Having voluntarily involved itself into [sic] the marketing process, [and] having ... loaned its reputation to promote and induce the sale of a given product ... we think [the] respondent ... has placed itself in the position where public policy imposes upon it the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm.' *Id.* at 684, 81 Cal. Rptr. at 522. See also *Fordham Law Review*, (1972) Vol 41, p 473.

⁴⁹ Sayer, *supra*, n 23, p 99.

⁵⁰ For a discussion on the interrelated use of sections 75 and 56, see A P Dobson, "Credit Cards", p 331.

It has been suggested that legislation should go further and specifically provide that the conditions and warranties found in the Sale of Goods Act apply not only to the card holder/supplier dealing but also to the cardholder/issuer relationship.⁵¹

G. CREDIT CARD FRAUD

A discussion on credit card will be incomplete without reference to credit card fraud. This is particularly so in Malaysia where the statistics from 1991 to 1993 were quite worrying. In 1991, Malaysia ranked fifth in the list of Mastercard International's counterfeit losses worldwide, making up 5.5 per cent or US\$1.2 million.⁵² In 1992, Malaysia accounted for 22.9 per cent of Mastercard International's card fraud losses and 12.3 per cent for the first five months of 1993.⁵³

Credit card fraud can be perpetuated in many ways as follows:⁵⁴

- (a) Unauthorised use of cards reported lost or stolen;
- (b) Use of counterfeit cards;
- (c) Fraudulent use of genuine cards by third parties;
- (d) Used of cards obtained through false applications;
- (e) Extended use of facility by cardholder followed by delinquency of account;
- (f) Collusive suppliers accepting counterfeit cards;

⁵¹ Corkery, *supra*, n 29, p 35.

⁵² *The Star*, July 1, 1992

⁵³ *Business Times*, July 1, 1992

⁵⁴ Hidzir bin Yahya, "Legal and Institutional Controls in the Context of Expanding Credit Card Industry", Sixth Annual Seminar on Law and Society with the theme "Law and The Malaysian Financial System," February 11, 1993, Auditorium DBKL, Kuala Lumpur organised by Law Society (Perundang), National University of Malaysia.

- (g) Making or possessing counterfeit seal or plate with intent to commit forgery.

Thus credit card fraud can be perpetrated by the cardholder himself or by third parties who may be offenders operating on their own or by large organised syndicates who may or may not act in collusion with suppliers.

Presently there is no specific legislation for the prosecution of credit card offenders. Provisions in the Penal Code⁵⁵ have been used and for lesser offences prosecution is made under the Minor Offences Act 1955.⁵⁶

The possible charges that may be brought in relation to credit card offences and the provisions in the Penal Code and the Minor Offences Act that may be used are listed below:⁵⁷

Possible Charges

Sentence

(i) Possession of Lost/Stolen cards

Penal Code

Section 379/378 - Theft 7 years imprisonment or fine or both

Section 511 - Attempting to commit an offence punishable by imprisonment 1/2 of the term imposed on the actual offence

Minor Offences Act 1955

Section 29(1) - Fraudulent possession of property 1 year imprisonment or RM1,000 fine or both

⁵⁵ FMS Cap 45.

⁵⁶ (Revised 1987), Act 336.

⁵⁷ Hidzir bin Yahya, *supra*, n 54, p. 9. See also A L R Joseph, "Credit Card Fraud and the Law" [1993] 2 CLJ xii.

(ii) Use of Lost/stolen cardsPenal Code

Section 379 - Theft

7 years imprisonment
or fine or both

Section 417 - Cheating

5 years imprisonment
or fine or bothSection 419 - Cheating by
Personation7 years imprisonment
or fine or bothSection 420 - Cheating and
dishonestly inducing delivery
of propertyimprisonment of not
less than 1 year and
not more than 10 years
and with whipping and
shall also be liable to
a fine(iii) Forged ApplicationPenal Code

Section 465 - Forgery

2 years imprisonment
or fine or bothSection 471 - Using as
genuine a forged document2 years imprisonment
or fine or both(iv) Possession of counterfeit or altered genuine cardsPenal CodeSection 511 - Attempting to
commit an offence punishable
by imprisonment1/2 of the term imposed
on the actual offenceThe Minor Offences ActSection 29(1) - Fraudulent
possession of property1 year imprisonment or
RM1,000 fine or both

(v) Use of counterfeit or altered genuine cards

Penal Code

Section 420 - Cheating and dishonestly inducing delivery of property imprisonment of not less than 1 year and not more than 10 years and with whipping and shall also be liable to a fine

(vi) Making or possessing a counterfeit seal, plate, etc. with intent to commit a forgery punishable under section 467

Penal Code

Section 472 Imprisonment for 20 years and shall also be liable to fine

While it appears that most credit card offences are taken care off under the Penal Code, a detailed examination of the provisions reveal inadequacies in the present framework to deal with credit card offences.

The first problem is the problem of terminology. The Penal Code is a code of general application and originated from the Indian Penal Code which is a nineteenth century legislation. The drafters of the Code certainly did not envisage its use in this respect.

While a credit card may successfully be argued as a "document"⁵⁸ for the offences of theft (Sections 378)

⁵⁸ Section 29(1) the word "document" means any matter expressed, described or howsoever represented, upon any substance, material thing or article, including any matter embodied in a disc, tape, film, soundtrack or other device whatsoever, by means of -

(a) letters, figures, marks, symbols, signals, sign, or other forms of expression, description, or representation whatsoever;

(b) any visual recording (whether of still or moving images);

and forgery (Sections 465 and 471); it may be difficult to convince a court that a credit card is a "seal, plate or other instrument" for prosecuting an offence under section 472 (making or possessing a counterfeit seal or plate with intent to commit forgery). In *PP v Gooi Joo Hai & Lee Kee Kean*,⁵⁹ the prosecution argued that the credit cards found in the possession of the two accused persons were "plates" within section 472, as merchants must use them to make impressions of the sales slip by running them through the imprinting machine. The court did not make a ruling on this. However, the case failed as the prosecution had not proved the ingredients of section 472.

A credit card may however be considered a "valuable security" for a charge under section 467 (forgery of a valuable security or will). In *Tio Tek Huat v Pendakwa Raya*,⁶⁰ the prosecution submitted that the credit cards in the possession of the accused were "valuable security" for an offence under section 467. This submission appeared to be accepted by the Court. However, the prosecution failed as the court was of the view that the said cards would not be considered valuable security as it had lost its validity when its use was cancelled.

For the charges of cheating and dishonestly inducing delivery of property under section 420, this can probably succeed against an unauthorised user who deceives and induces a supplier to deliver goods. However, if the card was used to pay for services, then it may not be considered as delivery of property. "Property" is not defined but

(c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds electronic impulses, or other data whatsoever;

(d) a recording or transmission, over a distance of any matter by any or any combination, of the means mentioned in paragraph (a), (b) or (c);

or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d) intended to be used or which may be used for the purpose of expressing, describing or howsoever representing, that matter.

⁵⁹ (Unreported) Sessions Court at Kuala Lumpur (Kang Hwee Gee, Sessions Court Judge) (March 30, 1983) Arrest case No 1-62-8-92 & 1-62-9-92.

⁶⁰ (Unreported) High Court of Malaya at Kuala Lumpur (LC Vohrah J) (April 15, 1993), Criminal Appeal No 42-73-91.

05
"movable property" is defined to include corporeal property of every description.⁶¹

The second problem that is faced is the proof required of the misuse of forged, counterfeit or altered cards. This is difficult to prove particularly the ingredient of dishonest intent. The case of *PP v Gooi Joo Hai & Lee Kee Kean* referred to earlier best illustrates this problem. The two accused were charged under section 472 with the offence of knowingly having in their possession counterfeit plates or instruments (namely forged credit cards) intending that they be used for the purpose of committing forgery punishable under section 467 of the Penal Code. Despite evidence produced that the first accused was in possession of 5 credit cards together with 5 credit sales transaction slips, the court held that mere possession of any seals or instruments without more is not an offence under section 472 and that the 5 credit cards and 5 transaction slips are insufficient to infer ill intention to use them to commit any forgeries. As such there have been calls by the police to make possession of forged credit cards an offence under the Penal Code.⁶²

Another aspect worrying card issuers is where cardholders exceed their credit limit intentionally by continuing to use the cards overseas (to avoid detection) although it is revoked or acting with collusive suppliers who defraud by transacting below floor limits. These are commonly known as "runaway accounts". It is not clear whether this should be made a criminal offence. It may be argued that this is merely a civil debt which card companies are assumed to have taken the risk. The closest to a credit runaway situation is a Hong Kong case in which a hotel attendant earning HK\$3700.00 per month obtained two credit cards and went on a spending spree in China for 3 weeks incurring a sum of HK\$356,000.00. He was convicted under section 18D of the Hong Kong Theft Ordinance (Cap. 210) on a charge of procuring false entry in certain records. Thus, although there is no specific provision to criminalise a credit runaway situation, other sections in the Penal Code may be used such as the offence of cheating (section 417) where a credit card is obtained through giving false particulars or possibly even section 422 (dishonestly or fraudulently preventing from being made available for creditors a debt due to the offender).

⁶¹ Except land and things attached to the earth or permanently fastened to anything which is attached to the earth. See section 22.

⁶² Criminal Investigation Director, Datuk Zaman Khan said he would recommend that the Attorney-General study the possibility of making it an offence. *New Straits Times*, November 25, 1993.

Another area of weakness is the penalty provided. The fines imposed are minimal compared to the financial gains the card offenders would have made. In this regard, the government's plan to make white collar criminals pay compensation to their victims failing which they would be declared bankrupts⁶³ would hopefully help to reduce white-collar crime. The number of years imprisonment for some offences are not heavy and mandatory custodial sentence applies only to some offences.⁶⁴

It has also been suggested that all card offences be made non-bailable offences as most offenders would have financial support from their syndicates and can easily post bail.⁶⁵

In view of the inadequacies above, it is timely to consider changes to the present framework. Two options are open; first to amend the Penal Code to take into consideration credit card offences or secondly, to have a separate legislation dealing with credit card offences alone. The latter option may be less complicating and will enable the drafters to consider afresh the criminal provisions on credit card offences of other jurisdictions⁶⁶ and draft an Act to suit the local situation. This will also not upset provisions in the Penal Code which is a code of general application and the long line of authorities which have grown with it.

CONCLUSION

From the preceding discussions, the regulatory framework on credit card companies appear satisfactory although it is at a minimal level. This is because most credit card companies are financial institutions and thus their credit businesses are already supervised under the BAFIA. However should there be a large increase of non-financial based credit card companies in future, a more permanent

⁶³ *New Straits Times*, September 28, 1993.

⁶⁴ For example, for an offence under section 420 (Cheating and dishonestly inducing delivery of property), the penalty is imprisonment of not less than 1 year but not more than 10 years and with whipping and shall also be liable to a fine.

⁶⁵ Hidzir Yahya, *supra*, n 54.

⁶⁶ Relevant provisions of the penal statutes of Canada, England, the United States and California can be found in the Appendix of Encik Hidzir's paper, *supra*, n 54.

regulatory structure may be required rather than the present 'indirect supervisory' mode. Possibly section 24 of the BAFIA may then be invoked.

A similar situation arises pertaining to the issue whether a credit card transaction is moneylending. While there is no clear judicial decision, currently this is not a grave problem since most credit card companies being financial institutions are exempted by the Moneylenders Act 1951. For non-financial based credit card companies, it would be advisable to seek exemption to avoid the defence of moneylending by cardholders.

The area of immediate concern is the terms of the contract between the card issuer and the cardholder. It is submitted that the current position is unsatisfactory and is an area deserving legislative reforms to protect the consumer cardholder. Current "liability until notice" clauses for unauthorised transactions shifts the burden unduly to the cardholder. Policy considerations discussed above show the advantage of a "maximum liability limit" clause. Similarly, contractual clauses disclaiming the issuer from liability for defective goods and the cardholder's waiver of defence clause are unfavourable to the cardholder. It is proposed that the concept of lender liability be introduced to impose liability on the issuer to be shared jointly with the supplier. Closely connected to these issues is the question of notice of the terms in the contract between the card issuer and the cardholder. The card issuer should be required to draw the attention of the holder to onerous terms affecting him such as exclusion or limitation of liability clauses. Such terms ought to be highlighted in bigger print or in bold letters or any other ways. It is proposed that the reforms already in force in the United States and the United Kingdom, particularly the Consumer Credit Act 1974 in respect of the above matters be adopted as possible models for us in drafting a local code.

The area of credit card fraud is also of serious concern. The existing penal legislation, not having drafted with credit card offences in mind, shows inadequacies in dealing with the many modes of credit card fraud. Any amendments to the existing law or any drafting of a new law should consider all the possible modes of credit card offences, take into account the terminology relevant to a credit card transaction, and matters pertaining to sentencing and bail.

PROVISIONS ON LIABILITY FOR UNAUTHORISED TRANSACTIONS**United Kingdom: Consumer Credit Act, 1974****Section 83 Liability for misuse of credit facilities**

- (1) 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.
- (2) This section does not apply to a non-commercial agreement, or to any loss in so far as it arises from misuse of an instrument to which section 4 or the Cheques Act 1957 applies.

Section 84 Misuse of credit-tokens

- (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.
- (2) 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.
- (3) Subsections (1) and (2) shall not apply to any use of the credit-token after the creditor has been given oral or written notice that it is lost or stolen, or is for any other reason liable to misuse.

- (4) Subsections (1) and (2) shall not apply unless there are contained in the credit-token agreement in the prescribed manner particulars of the name, address and telephone number of a person stated to be the person to whom notice is to be given under subsection (3).
- (5) Notice under subsection (3) takes effect when received, but where it is given orally, and the agreement so requires, it shall be treated as not taking effect if not confirmed in writing within seven days.
- (6) Any sum paid by the debtor for the issue of the credit-token, to the extent (if any) that it has not been previously offset by use made of the credit-token, shall be treated as paid towards satisfaction of any liability under subsection (1) or (2).
- (7) 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).
- (8) Where two or more credit-tokens are given under one credit-token agreement, the preceding provisions of this section apply to each credit-token separately.

United States; Truth-in-lending Act 1968

A cardholder shall be liable for the unauthorised use of a credit card only if liability is not in excess of \$50, the card issuer gives adequate notice to the cardholder of the potential liability, the card issuer has provided the cardholder with a self-addressed, prestamped notification to be mailed by the cardholder in the event of the loss or theft of the credit card, and the unauthorised use occurs before the cardholder has notified the card issuer ... Notwithstanding the foregoing, no cardholder shall be liable for the unauthorised use of any credit card which was issued on or after the effective date of this section, and, after the expiration of twelve months following such effective date, no cardholder shall be liable... regardless of the date of its issuance, unless (1) the conditions of liability specified in the preceding sentence are met, and (2) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

PROVISIONS ON LIABILITY FOR DEFECTIVE GOODS OR SERVICES

United Kingdom: Consumer Credit Act, 1974

Section 75 Liability of creditor for breaches by supplier

1. If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.

2. Subject to any agreement between them, the creditor shall be entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying his liability under subsection (1), including costs reasonably incurred by him in defending proceedings instituted by the debtor.

3. Subsection (1) does not apply to a claim-
(a) under a non-commercial agreement, or
(b) so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding [£100] or more than [£30,000].

4. This section applies notwithstanding that the debtor, in entering into the transaction, exceeded the credit limit or otherwise contravened any term of the agreement.

5. In an action brought against the creditor under subsection (1) he shall be entitled, in accordance with rules of court, to have the supplier made a party to the proceedings.

Section 56

Antecedent negotiations

1. In this Act "antecedent negotiations" means any negotiations with the debtor or hirer-

- (a) conducted by the creditor or owner in relation to the making of any regulated agreement, or
- (b) conducted by a credit-broker in relation to goods sold or proposed to be sold by the credit-broker to the creditor before forming the subject-matter of a debtor-creditor-supplier agreement within section 12(a), or
- (c) conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c),

and "negotiator" means the person by whom negotiations are so conducted with the debtor or hirer.

2. Negotiations with the debtor in a case falling within subsection (1) (b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity.

3. An agreement is void if, and to the extent that, it purports in relation to an actual or prospective regulated agreement-

- (a) to provide that a person acting as, or on behalf of, a negotiator is to be treated as the agent of the debtor or hirer, or
- (b) to relieve a person from liability for acts or omissions of any person acting as, or on behalf of, a negotiator.

4. For the purposes of this Act, antecedent negotiations shall be taken to begin when the negotiator and the debtor or hirer first enter into communication (including communication by advertisement), and to include any representations made by the negotiator to the debtor or hirer and any other dealings between them.

California Civil Code

[t]he right of a card issuer to recover any credit extended through use ... of a credit card ... shall be subject to the defenses which the cardholder has as a buyer against the retailer from whom the cardholder made the purchases...