
CREDIT CARDS : A BOON OR BANE FOR THE CUSTOMERS

INTRODUCTION

Your Diners Club Card offers you a world of privileges - privileges you can enjoy at over 2,000,000 fine establishments in more than 175 countries around the world - from restaurants to hotels to department stores. You can easily enjoy the good life with your Diners Club Card in hand ... purchase concert tickets or birthday gifts ... go out for an elegant dinner ... order flowers by phone ... reserve air tickets ... settle business lunches. The opportunities are endless with your Diners Club Card.¹

The last ten years have seen tremendous growth in the use of credit, debit and other similar cards. They now form an integral part of the contemporary payment system. Today an average adult Hong Konger carries 1.7 cards. Even eighteen year olds carry up to three cards. At least fifty per cent of the people in Hong Kong carry MasterCard and Visa cards. This popularity is due largely to the many advantages that such cards offer.

They are the most convenient way of making payments and having quick access to money and have considerably diminished the necessity to carry cash or chequebooks. There are no forms to be filled in. There is no need to apply for a loan. If there is any emergency, the cardholder can just go to an electronic teller machine and get cash advances.

¹Diners Club International, *Welcome to the Card that Gives You More Brochure.*

Depending upon the financial situation, the cardholder may repay the loan immediately and pay only some interest or pay over a period of time which would involve more interest. Likewise, where the cardholder makes payment by credit card for goods or services obtained, the cardholder may make the repayment immediately or within the interest free period² or spread it over a longer agreed period, but paying interest.

The card provides security to both the cardholder³ as well as the merchant, as neither has the risk of losing cash. Due to the bank guarantee of payments, merchants feel very safe in accepting credit cards. The merchant obtains not only better security but the convenience of having a single debtor in place of many, and the prospect of extra trade by the reason of the credit facilities which is extended not by the merchant but by the card issuer, who also takes the risk of non-payment by the cardholder.⁴ Credit cards can also be used to make payment on the telephone.⁵ Credit and debit cards and other cards of a similar nature provide the cardholder with access to pre-arranged finance. Some businesses (eg hotels) prefer payment by a credit card rather than by cheque or cash. Most credit and debit cards can be used, not only locally, but also overseas. They are a ready substitute for cash and travellers' cheques. In most cases, one card operates both as a credit and as a debit card.

Although, these cards fulfil the needs of today's consumer-oriented society, card issuers charge outrageously high interest rates and handling fees on unpaid amounts and cash advances, use unfavourable exchange rates, impose onerous reporting requirements for loss or theft of the card, impose unfair liability on the cardholder for unauthorised transactions and unfairly subject joint cardholders to joint and several

²In fact, the cardholder obtains free credit for a period longer than that he would have obtained from the use of a cheque. See *Re Charge Card Services Ltd* [1988] 3 All ER 702.

³If a card is lost or stolen the card-holder is not exposed to any great risk provided the cardholder has reported the loss or theft promptly to the card issuer. See Ghose, TK, *The Banking System of Hong Kong* (Butterworths, 1995), p 265.

⁴*Ibid.*

⁵See Weerasooria, W. S., *Banking Law and the Finance System in Australia*, (3rd edn, 1993), p103.

liability.⁶ Yet the supporters of a free market economy argue against the imposition of any controls on card issuers. There is considerable merit in that argument. These cards are interlinked with the success of trade and commerce and too much control or interference with the activities of card issuers could have detrimental effects on businesses and industries.

It is the contention of this article, that the development of credit, debit and other similar cards has not been matched by corresponding and necessary development of laws in Hong Kong. Cardholders need protection.⁷ The common law has proved inadequate to safeguard their interests and is heavily weighted in favour of the card issuers. Nor has there been any significant legislative reform in Hong Kong. These cards can prove to be traps for the unwary customer who seldom, if ever, realises the full implications of the financial liability incurred by using the card.

This article examines the contractual nature of credit cards, the problems connected with the use of credit cards in Hong Kong and the deficiencies and inadequacies of the common law and legislation. It suggests some improvements which need to be effected to protect the cardholder.

CONTRACTUAL NATURE OF CREDIT CARDS

Credit cards are another form of consumer credit, for goods and services are obtained without being paid for at once. Whenever a credit card holder obtains goods and services in an amount which is not repaid at the end of the agreed interest free repayment period, the cardholder has obtained credit. The situation is similar to that of overdrawing on a bank account.

⁶A survey of 18 card issuers carried out by the Consumer Council of Hong Kong revealed that card issuers frequently fail to state interest rates and service charges payable by the cardholder or the nature and extent of liability in the case of loss or theft of card. See *South China Morning Post*, 16 October 1996 p 5. See also *South China Morning Post*, 16 July 1997.

⁷See *South China Morning Post*, 30 October 1997, p 4.

According to their function, credit cards fall into three categories.⁸ The first category includes what is called merchant cards, which are issued by the supplier of goods and services itself, thus creating a contract between the merchant and the cardholder. Merchant cards stimulate sales due to impulse buying.⁹ They do not raise any complex legal issue, except those relating to disclosure and improper billing. The second category of credit cards comprises travel and entertainment cards. The third type of credit cards is often referred to as bank credit cards or lenders' credit cards. Travel and entertainment cards and bank credit or lenders' cards involve three parties.

The first category of cards is an example of a two-party situation and the relationship between card issuer and the cardholder is akin to that of buyer and seller. The second and the third categories of credit card raise several complex legal issues. Such cards involve three parties - the card issuer, the cardholder and the merchant. In a three-party transaction the card issuer is not the same person as the supplier of goods and services. Basically, there are three separate bilateral contracts.¹⁰ In chronological order, the first contract is between the card issuer and the cardholder. The contract sets out the credit terms,¹¹ such as credit limits, interest free repayment period, interest rates and liability for failing to report the loss or theft of the credit card.¹² The

⁸See, generally, Vol II *Chitty on Contracts* (27th edn. 1994) pp 678-679; Tyree, AA, *Banking Law in Australia* (Butterworths 1990), pp 250-253.

⁹See Goode, RM, *Consumer Credit Law*, (Butterworths, 1989), pp 623-624.

¹⁰See *Re Charge Card Services Ltd* [1988] 3 All ER 702 at 705, CA.

¹¹The Hong Kong Code of Banking Practice, a non-statutory code, issued jointly by the Hong Kong Association of Banks (HKAB) and the Deposit Taking Companies Association (DTCA), and endorsed by the Hong Kong Monetary Authority (HKMA), which came into effect on 14 July 1997, requires card issuers to include certain terms and conditions in their contracts with cardholders. See, especially, Chaps 1 and 3.

¹²Since payment by credit card is presumed to be absolute payment the merchant cannot pursue his claim against the cardholder even if the card issuer becomes bankrupt, eg the company issuing the card collapses. By contrast payments by means of bills of exchange, cheques or letters of credit are conditional payments. In case the bill, cheque or letter of credit is not honoured by the bank, the payer may be required to pay again. See *Re Charge Card Services Ltd* [1988] 3 All ER 702 at 705; *Customs and Excise Commissioners v Diners Club Ltd* [1989] 2 All ER 385; *R v DSS Overdrive Ltd* [1991] 1 WLR 634; Bradgate, R, *Commercial Law* (2nd edn 1995), p 490. See also Brindle, M and Cox, R, *Law of Bank Payments* (London: FT: Law & Tax, 1996), p20.

second contract is between the merchant and the card issuer. The card issuer has a master agreement with each merchant and it agrees to pay invoices submitted by the merchants, but the merchant has no recourse against the cardholder.¹³ The contract also stipulates certain conditions with which the merchant must comply, *eg* the merchant is prohibited from accepting a credit card which is not current or which is blacklisted, must verify the expiration date of the card and not accept any cards which exceed the credit limits prescribed by the card issuer and the transaction must be made by a sales slip signed by the cardholder. The third contract is between the cardholder and the merchant. It is a typical sale of goods contract except that the purchase price of the goods and services is collected by the merchant from the bank. The three-party situation appears to have all the characteristics of a loan contract, for payment by the card issuer to the merchant is a loan to the cardholder.¹⁴

HIGH INTEREST RATES AND UNFAVOURABLE EXCHANGE RATES¹⁵

Where the cardholder has failed to make any payment owing to the card issuer, his position is (as stated before) that of a borrower and the card issuer's position is that of a lender.¹⁶ In substance, there is a loan

¹³See *Re Charge Card Services Ltd* [1988] 3 All ER 702 at 705, CA; Bradgate, R, *Commercial Law* (2nd ed 1995), p 490.

¹⁴Goode, RM, *supra* note 9, pp. 67,68. Where a credit card is used to take out cash over the counter or from an automatic teller machine (ATM) of the card issuer only one contractual relationship is created, which is between the card issuer and the cardholder.

¹⁵This section and some comments in the concluding part of this article are based on the author's paper, "High Interest Rates on Credit Cards: Do Customers Need Protection?" (1998) 7 *Canterbury LR* (No 1). That paper was presented at the Asia Pacific Economic Law Forum Conference at Christchurch, New Zealand in December 1997.

¹⁶See *supra*, the section on Contractual Nature of Credit Cards.

of money by the card issuer to the cardholder,¹⁷ and therefore, the Money Lenders Ordinance (Cap 163) applies.¹⁸ The Ordinance provides that no person shall carry on business as a money lender or otherwise than in accordance with the conditions of a licence.¹⁹ The Ordinance further provides that

No money lender shall be entitled to recover in any court any money lent by him or any interest in respect thereof or to enforce any agreement made in respect of any loan made by him unless he satisfies the court by the production of his licence or otherwise that at the date of the loan or the making of the agreement he was licensed: Provided that if the court is satisfied that in all the circumstances it would be inequitable if a money lender who did not satisfy it that he was licensed at the relevant time was thereby not entitled to so recover such money or interest or to enforce such agreement, the court may order that the money lender is entitled to recover such money or interest or to enforce such agreement to such extent, and subject to such modifications or exceptions, as the court considers equitable.²⁰

However, this Ordinance permits charging of up to 60% per annum effective interest.²¹

¹⁷See the *Money Lenders Ordinance* (Cap 163), s 2, where "loan" has been defined to include "advance, discount, money paid for or on account of or on behalf of or at the request of any person, or the forbearance to require payment of money owing on any account whatsoever, and every agreement (whatever its terms or form may be) which is in substance or effect a loan of money, and also an agreement to secure the repayment of any such loan, and 'lend' and 'lender' shall be construed accordingly."

¹⁸In Crowther Report on Consumer Credit (UK), the view was taken that card issuers were money-lenders. See paragraph 6.12.3. See also *Allchurch v Popular Cash Order Co Ltd* [1929] SASR 212; *Goldberg v Tait* [1950] NZLR 976. The money Lenders Ordinance (Cap 163) does not apply to banks, restricted licence banks and deposited-taking banks. See s 3. See also the Banking Ordinance (Cap 155) s 3. According to one writer since the Money Lenders Ordinance (Cap 163) does not apply to banks, restricted licence banks and deposit-taking companies, "they are allowed to lend at any rate of interest". See Ko, SH, *Banking Regulations of Hong Kong* (City Polytechnic of Hong Kong, 1991), p 23.

¹⁹Section 7. See also s 18.

²⁰Section 23.

²¹See s 24.

The Money Lenders Ordinance recognises and embraces the concept of controlling a credit agreement, but the meaningful application of such principles have been hindered by the Ordinance having a maximum interest rate threshold (up to 60%) which is greatly in excess of maximum interest rate thresholds allowed in other countries. This is particularly surprising because interest rates on housing loans, overdrafts, and personal loans and prime lending rates respectively are quite comparable with other countries.

The Unconscionable Contracts Ordinance should apply to situations where the Money Lenders Ordinance (Cap 163) does not. The Ordinance came into effect in 1994. It was passed because there was a great need to control harsh and unconscionable contracts.²² This legislation was prompted by developments in other common law jurisdictions.²³

Whether the Ordinance applies to transactions such as between card issuers and cardholders however is not clear. It depends on whether card issuers provide a service or a facility. The judicial response as to the meaning of 'services' has been equivocal. In Hong Kong, the Unconscionable Contract Ordinance does not define the term services. It simply states that a contract of service or apprenticeship is not a contract for the supply of a service and a contract is a contract for the supply of a service whether or not goods are also transferred or to be transferred; or bailed or to be bailed by way of hire, under the contract, and whatever is the nature of the consideration for which the service is to be carried out.²⁴

If card issuers are regarded as rendering a 'service' to cardholders, the Unconscionable Contracts Ordinance will apply. The courts in

²²See the Law Commission of Hong Kong's Report on the Sale of Goods and Services, para 7.7.5.

²³See Ong, CA and Wickins, RJ "Unshackling Equity's Foot: The Unconscionable Contracts Ordinance 1994", 25 *HKLJ* (1995), pp321-343.

²⁴See s2(2). Although the *Supply of Services (Implied Terms) Ordinance* adopts the same approach as the *Unconscionable Contracts Ordinance*, it states that a contract for the supply of a service means, a contract under which a person agrees to carry out a service.

England interpreting the term 'service' in the Theft Act s 33a²⁵ have taken the view that banking facilities, including overdrafts and loans are not services but only facilities.²⁶ If that view were to be followed in Hong Kong, the Unconscionable Contracts Ordinance cannot prevent card issuers from charging high interest rates and service charges. The English judicial approach however has not been supported by many academic writers and the Law Commission of England.²⁷ They consider that banking facilities are services. Referring to this controversy, Ong and Wickins²⁸ have argued that the term, 'service' includes:

all forms of banking facilities and activities carried on by a bank which confers a benefit on a customer. Furthermore, it should be noted that banks are increasingly advertising their activities to the public as services, and implementing what they call service charges in connection with various activities and facilities.

There is considerable force in this criticism. Yet as mentioned earlier, both the House of Lords and the English Court of Appeal were not in favour of accepting a wide definition of 'services':

Even if the courts are prepared to accept that card issuers provide a range of services rather than any facilities, it would be difficult to argue that an agreement to charge an effective rate of interest under 48% per annum or up to 60% in special circumstances would be unconscionable.

²⁵Section 1 states that "A person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains services from another shall be guilty of an offence."

²⁶See *R v Halai* [1983] Crim LR 624, CA; *R v Preddy* [1996] 3 WLR 255, HL.

²⁷Smith J, *The Law of Theft*, 7th ed 1993, paras. 4-70 *et seq*; Griew, *The Theft Acts 1886 and 1978*, 6th ed, pp171-172, para. 8.08; Ong and Wickins, *supra*; UK: Law Commission's Report on Criminal Law: Conspiracy to Defraud, Law Com No 228, at pp39-40, paras. 4.30-4.33. Lord Lane C.J. described the Court of Appeal decision in *R v Halai*, *supra*, as bearing "all the hallmarks of being *per incuriam*", *R v Teong Sun Chuah* [1991] Crim. LR 463, at p464.

²⁸See *supra*, p 12.

A possible argument against the enforceability of exorbitant interest rates by card issuers could be that such interest rates are in the nature of penalties. The idea underlying payment of damages for breach of a contract is to put the parties in the same position as if the contract was not breached. This theory of contract finds support in the distinction drawn by the courts between liquidated damages and penalties. The law recognises that where the parties to a contract agree beforehand in regard to what damages will be payable by the guilty party in the event of breach, the sum fixed may be either a genuine pre-estimate of the loss of the injured party or in the nature of a threat or penalty. If it is found that the parties had made a genuine pre-estimate of the loss, the court will enforce the agreement. On the other hand, where the sum fixed was in the nature of a penalty, the court will refuse to enforce it.²⁹ In the case of credit cards, card issuers charge exorbitant interests where the cardholders have failed to make repayment within the interest free period. However, the argument that high interest rates of up to sixty per cent are unconscionable and extortionate, may not be accepted by the courts, for the Money Lenders Ordinance (Cap 163) itself permits charging of such high interests.

Moreover, the credit card issuers could argue that the payment of interest at the rate prescribed by the contract could not be construed as a breach of the contract and therefore no question of penalty could arise.³⁰

CARDHOLDER'S LIABILITY FOR LOSS AND UNAUTHORISED USE OF CREDIT CARDS

Cardholders' liability for an illegitimate use of their cards in the event the cards are stolen or lost raises other interesting legal issues which

²⁹See *Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Ltd.* [1915] AC 79; *Ford Motor Co. v Armstrong* (1915) 31 TLR 267.

³⁰See *Bridge v Campbell Discount Co. Ltd.* [1962] 1 All ER 385.

the common law is poorly equipped to deal with adequately.³¹ A credit or debit card is a valuable instrument and the cardholder has a reasonable duty to take precaution against its theft or loss. Although it is difficult to forge a signature on cheques, it is much easier to do so on a card. A person who is in possession of another's card and wants to forge the cardholder's signature can simply refer to the signature on the card. Where, due to the cardholder's negligence or otherwise, the card is lost or stolen or falls into the wrong hands and is misused between the period of loss or theft and effective notice of its loss or theft to the card issuer, the cardholder may be unable to exempt himself from liability for transactions made in that period. In *OTB International Card Ltd v Au Sai Chak Michael* [1990] HKLR 296, the respondent was the holder of a credit card issued by the appellant. The card was stolen from the respondent's car. Upon discovery of the theft the respondent immediately telephoned the appellant. A person at the appellant's end took down the details of the loss, recorded them and advised the respondent that he should confirm the loss in writing as soon as possible. The respondent did so the following morning. In the meantime someone had used the respondent's credit card to make several purchases to the value of \$3216.09, although the signature on the purchase slips did not resemble the respondent's signature on the back of the card. One of the clauses of the 'Terms and Conditions Governing the Use of OTB Card' was

In the event of loss or theft of the card, the Holder must immediately notify the Company by registered mail or telegram and until such notification is received by the Company the Holder will remain responsible for all purchases charged through the use of such Card.

The appellant billed the respondent for the cost of the purchases. The respondent refused to pay and the appellant brought an action against

³¹On the question of liability of a cardholder for the unauthorised use of a credit card, see Sharma, KM, "Credit Card in Australia: Some Predictable Legal Problems", 3, *Law Asia* (1972), pp 106-103; Ziegel, JS, "Recent Development of Canadian Consumer Law" 36 *MLR* (1973), pp 479-495; Chappenden, WJ, "Credit Cards: Some Legal Problems", 48 *ALJ* (1974), pp 306-315.

him. The Court of Appeal held that although the respondent had put his case skilfully and clearly, he was bound by the terms of his agreement and that until written notification was received by the appellant, the respondent was liable for all the purchases made on the card. The Court of Appeal entered judgment for the appellant in sum claimed with interest. It rejected the respondent's argument that it would have been unconscionable for the appellant to rely on the above clause of the agreement³² with the respondent.³³ In an American case, a person's card had been fraudulently used to make some fifty-five purchases of gas by a rogue who had stolen the card. The cardholder realised that the card was stolen only after receiving the statement of his account and copies of sales' slips. The Oregon Supreme Court held that the cardholder was liable whether or not the cardholder had read the fine print on the card agreement stipulating that his liability continued until the card issuer had been informed.³⁴ In Hong Kong a common practice used by thieves is to take out the victim's wallet

³²The lower court had earlier held that it would be unfair and unconscionable to apply the clause in question. It has been argued that where a merchant has failed to check that the signature on the credit card was not that of the cardholder, the cardholder may have a cause of action in negligence against the merchant:

It is clear that a duty of care which exists by way of contract may be extended to a third party who is directly contemplated as being likely to be injured by the breach of contractual duty (*Ross v Caunters* [1979] 3 WLR 605). The stores owed a duty to the issuing company to check the signature of the customer using the credit card and, if that person were an imposter, the true cardholder (a single individual whose name was known by the store) would be likely to suffer financial loss as a result. In this way the loss might fall on the stores, as it would do if they had accepted forged cheques in return for their goods.

See also 10 HKLJ (1980), p 336.

³³See *OTB International Credit Card Ltd v Wong Chun-bong* (1978) (unreported). There the Hong Kong District Court dismissed a card issuer's claim against the cardholder because the unauthorised use of the card had occurred by reason of the card issuer's neglect to take proper steps to prevent such unauthorised use.

³⁴*Union Oil Co v Lull*, 220 Or 412, 349 P2d 243 (1980). Cf *Gulf Refining v Williams Roofing*, 208 Ark 362, 186 SW2d 790 (1945).

from his pocket and then insert it back after taking away credit cards from it and replacing them with invalid ones. This is achieved with such finesse that the victim hardly notices it and by the time the theft is discovered, the thief has already used the cards many times.³⁵

Yet Hong Kong credit card issuers require the credit cardholder to inform the card issuer immediately after loss or theft of the card. If the cardholder fails to give proper notice to the issuer, the odds are against the cardholder. Agreements between card issuers and cardholders often contain terms imposing liabilities on cardholders for transactions made by another after the loss or theft of the card. Such terms and conditions, couched as they are in complex legal language, raise questions of interpretation. Diners Club International's, *Welcome to the Card that Gives You More*, states that 'if your card is lost or stolen, report immediately. Quick action will prevent unauthorised charges on your card.' Similar terms have been used by banks issuing Master and Visa cards, eg Hong Kong Bank Gold Credit Card booklet provides that 'no liability for fraudulent charges if the loss of your card is reported immediately.' In Diners Club International Rules of Membership and Conditions of use (Personal Cards), r.4 provides, *inter alia*

The Member must take care to prevent the Card being lost, stolen or misused. In the event of loss, damage, theft, unauthorised use or non-receipt when due of the Card, the Member shall give prompt notification thereof to Diners Club by telephone, telex or facsimile. (Notice may be given on the Diners Club telephone, telex, or facsimile number shown on Statements and elsewhere). *The Member shall not be responsible for any unauthorised use of the Card provided that the Member has in Diners Club's opinion acted in good faith and has exercised reasonable care and diligence in safeguarding the Card* (author's italics).

³⁵*Ming Pao* (a Hong Kong SAR newspaper) of 5 February 1996, p A2.

Although Citibank's Visa Card Welcome Guidebook states at p.3 that 'you are not liable for a single cent as long as you have notified us when you realised your card was lost or stolen', its Visa and Master Card Agreement, Terms and Conditions reads as follows

- 6.1 The Cardholder will inform Citibank immediately in such manner as may be required by Citibank if any Card is lost or stolen.
- 6.2 If (a) the Card is lost or stolen and the Cardholder has promptly informed Citibank of such loss, and (b) he has acted in good faith and has exercised reasonable care and diligence in safeguarding his Card, the Cardholder will not be responsible for any unauthorized transactions made.

In Hang Seng Bank's Credit Card Cardmember Agreement (Individual), term 14 states that:

In case of any loss or theft of the Card, the Cardmember shall immediately upon discovery of loss or theft give notice in writing to Hang Seng Bank addressed to the Hang Seng Credit Card Centre in Hong Kong at such location as Hang Seng may from time to time notify. Upon reporting the loss or theft, the Cardmember shall not be liable for any Card Transactions effected after Hang Seng actually receives the loss or theft report provided that the Cardmember has acted in good faith, exercised reasonable care and diligence in safe-keeping the Card and reported the loss or theft immediately. Notwithstanding the foregoing, Hang Seng may at its discretion act on any oral notice purportedly given by the Cardmember and any action so taken by Hang Seng shall not render Hang Seng howsoever liable to the Cardmember or otherwise discharge any liability of the Cardmember.

These provisions indicate, how the card issuers are taking advantage of the unawareness of the cardholders.³⁶ Four points need to be noted in this connection.

³⁶See *South China Morning Post*, 30 October 1997, p 4.

First, why should the notice of loss or theft be effective on its receipt by the card issuer? If the cardholder has done all that was necessary in the circumstances, that should be sufficient. There is a tendency on the part of card issuers to cast off their liability for any mishaps.

Secondly, the duty to report immediately is an onerous one, as is demonstrated by Hong Kong and American cases.³⁷ In the American case (as noted above), the cardholder did not realise that the card had been stolen until after receiving the statement of account. Sometimes where the cardholder is overseas, it may not be possible for the cardholder to see the statement immediately when it is delivered at the local address.

Thirdly, other contractual terms also put the cardholder in a position of disadvantage. The Diner's Club Rules of Membership, noted above, state that a member shall not be responsible for any unauthorised use of the card provided that the member in the Diners Club International's opinion, has 'acted in good faith and has exercised reasonable care and diligence in safeguarding the Card'. Why should the question of good faith and the exercise of reasonable care and diligence be left to be determined by the card issuer? Who would benefit if the card issuer were to find that the cardholder did not act in good faith and was negligent? A cardholder's good faith or negligence should not be determined by the card issuer itself.³⁸

Fourthly, another important question is how to resolve conflicts between terms and conditions set out in a card issuer's promotional brochure which states that the cardholder is not liable if the cardholder informs the card issuer of the loss or theft of the card as soon it is discovered and the terms and conditions set out in the agreement between a cardholder and a card issuer stating that the question of the

³⁷*OTB International Card Ltd v Au Sai Chak Michael* (1990) HKLR 296; *Union Oil Co v Lull* 220 Or 412, 349 p 29, 243 (1980).

³⁸The Citibank Visa and Master Card Agreement Terms and Conditions do not state that the question of the cardholders' good faith and negligence, will be decided by Citibank. The relevant provision is clause 6.2, which has been quoted before.

cardholder's exercise of reasonable care and good faith is to be decided by the card issuer. Arguably, there are two contracts here - the main and the collateral, the cardholder enters the main contract on the basis of assurances contained in the promotional brochure. Acting on those assurances constitutes a collateral contract separate from the main contract and the main contract is said to have been induced by it. But the card issuer in such cases could argue that the cardholder did not read the promotional brochure or, if he or she did, the cardholder did not rely on the assurances and statements contained in it. Moreover, courts are not easily persuaded to imply the existence of a collateral contract when it conflicts with the main contract.³⁹

RECOVERY PROCEDURES

Where a cardholder is unable to pay the debts, the card issuer can use its recovery procedures. There is an express or implied term to that effect in the contract between the card issuer and the cardholder.⁴⁰ The card issuer has two options. To bring a civil action or use the services of a debt collecting agency. Card issuing banks often choose the latter option. The cardholder is no doubt required to pay whatever service charges are incurred by the card issuer, but he can also be subjected to ridicule and humiliation. Many cases involving nuisance, intimidation and violence have been reported.⁴¹ Debt collecting agencies often try

³⁹See *City and Westminster Properties Ltd v Mudd* [1958] 2 All ER 733. In this case, however, the court enforced the terms of a collateral contract, although they were inconsistent with the terms of the main contract.

⁴⁰In the Citibank Visa and MasterCard Agreement Terms and Conditions, clause 5.2 says that if "the Company has incurred any legal or collection fees or other expenses for the purpose of demanding, collecting or suing to recover any sum payable hereunder from the Cardholder or for other remedies resulting from the breach or non-compliance of any terms of this Agreement, the Cardholder will fully reimburse the Company of all such legal fees and other fees and expenses incurred in that connection."

⁴¹See *Ming Pao* (newspaper of Hong Kong SAR), 11 August 1995, p A3; *South China Morning Post*, 31 October 1997, p 9.

to embarrass the cardholder⁴² (eg by painting his name on the wall with the words he owes money to the bank) which could cause family problems.⁴³ Bullying tactics are sometimes used even against referees⁴⁴ of the cardholder so that the outstanding payment is made.⁴⁵

JOINT CARDHOLDERS

When a cardholder obtains a credit card, he can also apply for an additional card or a supplementary card for a second party nominated by him, usually a spouse or family member. The spouse or family member is allowed to operate on the primary cardholder's account and withdraw money or make payments. Problems arise when the relationship between the primary and additional cardholders become strained or one of them cannot be found or has insufficient money to

⁴²There is no specific law in Hong Kong to protect people from harassment from debt collectors. England has recently passed its Protection from Harassment Act which came into force in June 1997. It creates two new offences to cover, among others, such situations. Canada, Australia and New Zealand also have anti-harassment laws. Some of these jurisdictions allow a civil remedy to sue for emotional distress caused by harassment and empowers judges to make wide-ranging orders. It is interesting to note that the Law Reform Commission of HKSAR is now considering proposals to make harassment a criminal offence to protect various kinds of people including those who have borrowed money, their families and other persons related with the loan transaction. See *South China Morning Post* of 9 October 1997, p 3.

⁴³*Ming Pao* (newspapers of Hong Kong SAR), 11 June 1996, p A4.

⁴⁴This is so whether or not the cardholder had obtained the referees' consent to forward his name. The Consumer Council is encouraging banks to make it compulsory for cardholders to obtain their referees' consent. See *Hong Kong Standard*, 16 April 1996, p 3. The Hong Kong Code of Banking Practice 1997 s8.4 provides, *inter alia* that if a referee is to be approached for information to help locate a cardholder or guarantor, this should be done, without causing nuisance to the referee. The Code also clarifies that referees have no legal or moral obligation to repay unless they have entered into a formal agreement to guarantee the liabilities of the cardholder. *Ibid*, s8.2.

⁴⁵In Hong Kong, exceeding the authorized credit limit by a holder of a bank card is an offence under the Crimes Ordinance (Cap 200). By s.85, exceeding the credit limit amounts to "procuring the making of an entry in the record of a bank by deception". A cardholder was recently sentenced to six months imprisonment under that provision.

pay the amount owing on the card. Are the primary and additional cardholders only jointly liable or are they liable jointly and severally? While in some common law countries, the primary cardholder is liable for all debts incurred by use of the card, whether by the primary or the additional cardholder,⁴⁶ the position in Hong Kong is not so clear. The Hang Seng Bank's Credit Card Cardmember Agreement provides.⁴⁷

Upon cancellation or termination of the Card by the Cardmember or by Hang Seng or on the Cardmember's bankruptcy or death, all sums owing by the Cardmember to Hang Seng under this Agreement (whether debited to the Credit Card Account or not and whether incurred or discovered before or subsequent to such cancellation or termination) shall become immediately due and payable without demand and (where applicable) upon incurrence or discovery of the relevant indebtedness. The Cardmember or (if applicable) the Cardmember's estate shall be liable for settling such sums. Hang Seng shall be entitled to charge interest at the rate(s) [currently 24 %] ... on any unpaid sums on a daily basis from the date of cancellation or termination of the Card or (where applicable) from the date of incurrence or discovery of the relevant indebtedness until Hang Seng shall have actually received payment ...

In the above agreement, the term cardholder or 'cardmember' is defined to mean any person to whom one or more credit cards are issued by the bank and, includes an additional cardholder, and their respective personal representatives and lawful successors.⁴⁸ Such provisions may be interpreted to mean that joint as well as several liability can be imposed on both the primary and secondary cardholders. Indeed, it

⁴⁶For the position in Australia see, Weaver, P.M. and Shanahan, K.M., *Banking & Lending Practice*, (Serendip Publication, 1994), p 129. For the position in England, see Brindle, M and Cox, R (eds), *Law of Bank Payments* (London: F&T Law & Tax, 1996), pp 501-502. It has been argued that the relationship between the primary and additional cardholder is that of the principal and agent and the former can terminate this relationship by giving notice to the card issuer that he has withdrawn the consent to the use of the additional card. *Ibid.* See also the U.K. Consumer Credit Act 1974, s84(3).

⁴⁷Clause 20.

⁴⁸See Hang Seng Bank's Credit Card Cardmember Agreement, clause 1.

will be in the interest of the card issuer to argue on these lines. Where the liability is joint, the card issuer can only sue the primary and additional cardholders together and there is no right of set-off whereby a debit balance of one could be set-off against credit balances of the other. Nor would the death of one of them allow the card issuer to pursue a claim against the estate of the deceased. Of course, a card issuer could sue the surviving cardholder. Such difficulties could also be faced if one of the cardholders goes bankrupt.⁴⁹ By contrast, where the liability is joint and several, the card issuer may sue the primary or the additional cardholder jointly or individually until the debt is satisfied. Joint and several liability would also permit set-offs, that is, the proceeds of a cardholder's personal account can be used to satisfy the debt owing to the card issuer.⁵⁰

In the Hang Seng Bank Credit Card Agreement (Individual), clause 19 states that

Termination of any Card for whatever reason and the suspension or termination of all or any of the Services shall be without prejudice to the right of Hang Seng to settle any Card Transaction entered into by or on behalf of the Cardmember prior to or after such termination or suspension. (emphasis added)

⁴⁹Hong Kong Code of Banking Practice 1997 s24(2) recommends that

Where subsidiary [additional] cards are issued, it should be made clear to both the principal and subsidiary cardholders whether the card issuer claims the right to set off the debit balance in the credit card account of any of the principal or subsidiary cardholders against the credit balance in other accounts which may be held by one or more of the principal or subsidiary cardholders.

See Lambert, J., *Banking the Legal Environment* (Routledge: London and New York, 1993), p.92.

⁵⁰See Lambert, J., *ibid.* Judgment recovered against one cardholder shall not be a bar to an action, or to the continuance of an action, against the other cardholder. See Civil Liability (Contribution) Ordinance (Cap 377), s5.

Arguably, the liability of a joint cardholder for debts incurred by the other cardholder does not cease after the termination of the former's card.

In one case, the primary cardholder was the husband of the additional cardholder. She divorced her husband in January 1991 and cancelled her additional card in July 1993. A sum of \$65,480 was deducted from her savings account without her consent six months after her additional Visa card was cancelled. She had not used her additional card to make any payments herself. Thus, \$65,480 was her ex-husband's debts on the primary card. However, the bank justified the deduction on the grounds that she and her ex-husband were jointly and severally liable for each other's unsettled claims under the agreement with the bank.⁵¹

Another problem with an additional card is that it may not be deemed cancelled until it is returned; this is because withdrawing the additional cardholder's authority to use the card by the primary cardholder is not sufficient to effect the cancellation of the card. Clause 18(a) of the Hang Seng Bank Credit Card Cardmember Agreement (Individual), provides

The Cardmember may cancel or terminate the Card at any time by giving written notice to Hang Seng and returning the Card and any supplementary Cards at the same time such cancellation or termination to be effective upon Hang Seng actually receiving such notice and Card(s). Where any supplementary Cards are issued in respect of the Card, the Cardmember or any Supplementary Cardmember may cancel or terminate, the relevant supplementary Card by giving written notice to Hang Seng and returning the relevant supplementary Card at the same time such cancellation or termination to be effective upon Hang Seng actually receiving such notice and Card.

This clause would make the primary cardholder liable for debts incurred by an additional cardholder where the latter does not surrender the card or his whereabouts are unknown. In an Australian case, the primary

⁵¹*Hong Kong Standard*, 23 May 1994.

cardholder gave her husband an additional card. They separated after some time. The wife cancelled her husband's additional card. But meanwhile, her husband had run up \$1047 on her Visa account in Europe. The matter was referred to the Ombudsman. The Ombudsman's investigations revealed that the bank had acted properly and it was found that the wife was responsible for the debts incurred by her husband on the additional card.⁵²

CONCLUSION

All is not well with the credit and debit card industry in Hong Kong. There have been considerable developments in this area in other jurisdictions. Whilst it is not possible to expect the law to keep pace with the fast changing financial and technological developments, nevertheless what little Hong Kong legislators and the Consumer Council have done is clearly insufficient. Surprisingly, the widespread misuse of credit and debit cards has elicited very little legislative response. Consumer Council spokesman Kenneth So Wai-sang said, 'in the absence of any law, we are trying our best to educate consumers.'⁵³

The author would like to make the following suggestions.

First, credit and debit cards should be standardised and should have some compulsory implied terms with a view to protecting the cardholder. Plain language should be used and the terms and conditions should be available in both Chinese and English.⁵⁴

⁵²Weerasooria, W. and Wallace, N., *Banker-Customer: Resolving Banking Disputes* (Longman Professional: 1994), pp.253-254. Now Hong Kong Code of Banking Practice 1997 s 22(b) provides, *inter alia*, 'Where the subsidiary [additional] card is not returned and if requested to do so by the primary cardholder, the card issuer should take prompt action to prevent further use of the subsidiary card, in line with the procedures which apply to lost cards.'

⁵³See *South China Morning Post*, 30 October 1997, p 4.

⁵⁴See Hong Kong's Code of Banking Practice 1997 s 5(3). See also *South China Morning Post*, 30 October 1997, p 4.

Secondly, the interest charged on credit cards should not be much higher than the highest percentage of interest that can be charged on a loan. It is totally unconscionable to do so. However, its legality cannot be challenged. This is a very unhappy situation. The Government has to do something about the high interest rates.

Thirdly, credit cardholders whose cards are lost or stolen require protection. If they are honest and have acted in good faith, no significant financial burden should be imposed on them. In England liability for misuse of a credit card between its loss or theft and notice of its misuse is usually restricted to a maximum of £50.⁵⁵ The underlying rationale of this limitation on the cardholder's liability is that it is the card issuer, and not the cardholder, who makes profit out of the provision of card, and who consequently should bear the risk of loss arising from the fraud of third parties.⁵⁶ There is a need for the enactment of legislation similar to that in England which would make card issuers take adequate measures to reduce unauthorised use of credit cards.⁵⁷ Moreover card issuers should cover themselves by insurance against loss or theft of cards by the cardholders.⁵⁸

⁵⁵Consumer Credit Act 1974 s 84(1). The position will be different where the cardholder acts fraudulently or the card is misused with the cardholder's consent. See *ibid*, ss 83, 84(2).

⁵⁶See see Rougeau, DV, "Discovering Usury: An Argument for Legal Controls On Credit Card Rates," 67 *University of Colorado Law Review* (1996), ppl-u6, pp 2, 3, 19, 20.

⁵⁷See *South China Morning Post*, 30 October 1997, p 4,

⁵⁸Canada gives adequate protection to cardholders who lose their cards. See the Consumer Protection Act (Manitoba), s 116; Consumer Protection Act (British Columbia), s 31. The legislation in Canada also protects the consumer against irritating or illegal billing practices. See Consumer Protection Act (British Columbia), ss 33-34.

Fourthly, where a card is stolen all the odds are against the cardholder. The rogue, after stealing the card, indulges in an 'orgy' of buying by forging the cardholder's signature. The bank takes its own time to discover the fraud and the supplier of goods or services are not too concerned so long as the payment has been made. In fact, most suppliers of goods or services are not at all keen to verify the cardholder's signature and even if they have a nagging suspicion, they accept payment for the sake of business.⁵⁹ Yet in many cases the burden of the rogue's fraud falls on the cardholder. Why should the financial burden completely and squarely be borne by the cardholder? Card issuers are in a better position to absorb the loss than the individual cardholders. In no case should a cardholder be liable for the loss of the card or failure to report the loss if it can be established that the cardholder acted in good faith and without gross negligence. Hong Kong Code of Banking Practice 1997 recommends that a cardholder's maximum liability for the loss of the card should be confined to a limit specified by the card issuer which should be reasonable.⁶⁰

Fifthly, it should be an offence to provide a credit card which aside from the standard means of identification do not have any other collateral means of identification. For instance, it should be made an offence to provide a credit card without the cardholder's photo. Alternately, other means of identification should be introduced. The responsibility of reducing the risk of erroneous identification should lie with card issuers.

Sixthly, it is a highly immoral practice on the part of credit card issuers to threaten to take action against a cardholder's referees. There is no moral or legal justification for doing this unless the referees have deliberately misled the card issuer or conspired with the cardholder,⁶¹ eg they have wrongly stated that the cardholder was in a sound financial

⁵⁹*South China Morning Post*, 13 January 1997.

⁶⁰Section 29(3).

⁶¹See *supra*, the discussions under Recovery Procedures.

position. The law should specifically forbid such practices and impose heavy civil penalties on those who indulge in them.

Seventhly, additional cardholders must be provided with separate statements. Both primary cardholders and additional cardholders must be given sufficient information on their respective liabilities on debts incurred. Once the primary cardholder has given proper notice to cancel or terminate the primary or additional card, the primary cardholder's liability on the primary or additional card as the case may be should cease. Likewise where the additional cardholder has given a similar notice, the additional cardholder's liability on any transactions made by the primary cardholder should cease. The card issuer could again protect itself against losses arising from misuse of a card after its termination or cancellation by obtaining insurance cover.⁶²

Eightly, the practice of unsolicited issuing of credit cards should be prohibited so as to protect the innocent. In Australia, the Trade Practices Act 1974 prohibits the unsolicited sending of credit cards of any kind by corporations.⁶³ A similar approach is noticeable in Canada.⁶⁴

Ninthly, card issuers should act responsibly when issuing credit cards to minors, full time students or persons who do not have independent financial means.⁶⁵

⁶²This rule, *eg* would protect a spouse who terminates or cancels the other spouse's card when there is a likelihood of their separation or misuse of the card by the other spouse. See Hong Kong Code of Banking Practice 1997 s 22.5.

⁶³See s.63A.

⁶⁴See *eg* the Unsolicited Goods and Credit Card Act (Saskatchewan); the Consumer Protection Act (Manitoba), ss 113-117; Consumer Protection Act (British Columbia), ss 31-34. The Hong Kong Code of Banking Practice 1997 s 22.2 also states that card issuers should issue cards only when they have been requested by the customers to do so.

⁶⁵See the Hong Kong Code of Banking Practice 1997, ss 10.1, 22.1.

Lastly, card issuers should explain with clarity the methods of exchange rates applied to transactions in foreign currencies.⁶⁶

There is a need to introduce legislation to ensure a fair and transparent relationship between banks and customers as well as with those who are associated with customers, *eg* referees or guarantors. This would foster customer confidence in the use of credit card facilities. Indeed a reasonable balance must be maintained between the cardholders' interests and the legitimate business interests of the card issuers.⁶⁷

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⁶⁶*Ibid.* ss 22.4(i).

⁶⁷See Hong Kong Code of Banking Practice 1997, s 22.1.