

## Consumer Protection against Unauthorised Use of Credit Cards in Malaysia: A Banking Law Perspective\*

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### *Abstract*

*This article examines protection afforded to consumers in the credit card industry with reference to guidelines issued by Bank Negara that govern 'unauthorised use' of credit cards in Malaysia. The first consumer protection guideline that governs plastic cards as well as other forms of electronic transactions (excluding internet banking) is 'BNM/GP 11'. The article discusses the scope of protection offered by the aforesaid guideline to credit card holders. However it is an omnibus guideline as it covers all forms of electronic transactions and not designed specifically for credit card usage. Another guideline analysed is the more recent guideline known as Credit Card Guidelines (BNM/RH/GL014-1), which is specifically designed for credit card usage in Malaysia. The credit card industry uses the Credit Card Guidelines (BNM/RH/GL014-1) as the standard to be implemented for credit card usage in Malaysia. The only set back in its implementation, has been the controversy as to whether such a guideline has the force of law.*

### **I. Introduction**

Plastic cards have invaded the monetary market as a payment instrument used to purchase goods and services. There are several types of plastic cards in the circulation, namely credit cards, debit cards, charge cards, stored value cards and smart cards. The first credit card used to eliminate the need to carry cash was the Mobil Oil, USA card, which was issued in 1914, while the first form of

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charge card was the Diners card, which was used by businessmen in the 1950's to purchase meals on an expense account. Since then, a variety of cards have been introduced to customers that have a multitude of functions for their daily transactional needs. The numbers of individuals that rely on cards have increased from year to year and indeed the plastic card has become an indispensable instrument in the money wallet. Among all the different types of plastic cards, the most favoured by customers is the credit card. Statistics provided by Bank Negara Malaysia indicate that in the year 2008, credit card holders numbered 10,812.4 million and the volume of transactions using credit cards totaled 261.4 million.<sup>1</sup> The credit card appears to be the most favourite plastic card among Malaysians. However the downside of owning a credit card is the risk of it being used by unauthorised third parties to illegally purchase goods/services or to withdraw moneys/credit advances from the automated teller machine. Are consumers protected from incurring the liability of such illegal transactions? This article discusses the extent of legal protection afforded by the banking laws in protecting innocent bank customers from being burdened with illegal transactions conducted in their names. The article first introduces the primary statutes relevant to the issues discussed. It then briefly explains the definitions for the terms credit cards, issuers, cardholder and the credit card scheme as set out in the famous landmark case of *Re Charge Card Services Limited*.<sup>2</sup> Next the paper explains the various types of unauthorised uses of credit cards, focusing on the Malaysian cases on the fraudulent use of credit cards. The crux of this part is the legal analysis of consumer protection measures provided by the Bank Negara guidelines, namely the Guidelines on Consumer Protection on Electronic Funds Transfer, BNM/GP11 and the Credit Card Guidelines (BNM/RH/GL014-1). This segment also discusses the recent landmark decision of *Diana Chee Yun Hsai v Citibank Berhad*<sup>3</sup> that held the aforesaid Credit Card Guidelines as having the force of law. The subsequent part of this paper discusses the credit card industry's endeavour to self regulate using the Code of Good Banking Practice. The aforesaid code does not have any legal force and are merely standard best practices implemented by the industry. The final part of the paper touches briefly on the Financial Mediation Bureau's procedure in resolving unauthorised use of credit card cases.

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<sup>1</sup> *Financial Stability and Payment Systems Report*, Bank Negara Malaysia, 2008 Tables A27 and A30.

<sup>2</sup> [1986] 3 All ER 289, [1986] 3 WLR 697 (lower court decision); [1988] 3 All ER 702, [1988] 3 WLR 764 (Court of Appeal).

<sup>3</sup> [2009] MLJU 0541, [2009] 1 LNS 573.

## II. Parent Statutes Governing Credit Cards in Malaysia

The main banking statute in Malaysia is the Banking and Financial Institutions Act 1989 (Act 372) (hereinafter referred to as 'BAFIA') which is a statute administered by the central bank, Bank Negara Malaysia (hereinafter referred to as 'Bank Negara'). The BAFIA was the banking legislation that governed traditional banking as well as electronic banking. However in the year 2003, amendments were made to the BAFIA to delete all references to electronic banking.<sup>4</sup> This was done in order to move all electronic banking provisions to a new Act designated to deal solely with such transactions. The new Act is the Payment Systems Act 2003 (Act 627) (hereinafter referred to as 'PSA') which came into force on 1 November 2003. The difference between the BAFIA and the PSA is that the BAFIA only applies to licensed banks and financial institutions whereas the PSA applies to banks, financial institutions and all other forms of non-banking/finance companies that are involved in the payment system. Indeed the PSA has broadened the supervision power of Bank Negara that historically only supervised banks/financial institutions.

## III. 'Credit Cards' and 'Issuers' Defined

'Credit Cards' have been classified as a 'designated payment instrument' in the PSA. A 'payment instrument' means any instrument, whether tangible or intangible, that enables a person to obtain money, goods or services or to otherwise make payment.<sup>5</sup> 'Designated payment instrument' means a payment instrument prescribed as a designated payment instrument under s 24(1) of the PSA. The Act also requires any institutions that issue a designated payment instrument to comply with the requirements of Part III therein. Part III, titled 'Payment Instruments', contains the aforesaid s 24 whereby pursuant to its subs (1), two criteria need to be fulfilled before Bank Negara may classify a particular instrument as a 'designated payment instrument'. The two criteria are first that the payment instrument is of widespread use as a means of making payment and may affect the payment systems of Malaysia;<sup>6</sup> and secondly, that it is necessary to protect the interest of the public or it is necessary to maintain the integrity, efficiency and reliability of a payment instrument.<sup>7</sup>

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<sup>4</sup> See the amending Act A1211.

<sup>5</sup> PSA, s 2.

<sup>6</sup> PSA, s 24(1)(a).

<sup>7</sup> PSA, s 24(1)(b).

A credit card is of widespread use as a means of making payment by customers and, apart from cash and cheques, is a popular mode of making small value payments by customers for retail purchases and services. The second criterion reflects Bank Negara's role as the custodian of consumer protection in the credit cards sector, for Bank Negara regulates the payment instrument in order to protect public interest and authenticates its integrity, efficiency and reliability.

Bank Negara, in exercise of the power conferred by s 24(1) and its subsidiary legislation making power pursuant to s 70, made the Payment Systems (Designated Payment Instruments) Order 2003.<sup>8</sup> Para 2(b) of the said Order expressly states that a credit card is a designated payment instrument. Most importantly, it defines that a credit card is a payment instrument which indicates a line of credit or financing granted by the issuer to the user and where any amount of the credit utilised by the user has not been settled in full on or before a specified date, the unsettled amount may be subject to interest, profit or other charges. In other words, a credit card allows the use of credit line to the customer wherein the customer has the option either to settle in full by a stipulated date or to defer payment in the form of minimum monthly installments.<sup>9</sup>

In this context, a bank that issues credit cards would be defined as an 'issuer'. An 'issuer' is defined in the PSA to mean any person acting alone or under an arrangement with another person, who undertakes to be responsible for the payment obligation in respect of a payment instrument resulting from the user being issued with or using the payment instrument.<sup>10</sup>

In June 2004 Bank Negara, pursuant to its subsidiary legislation making power under s 70 of the PSA, issued the most recent version of the Credit Card Guidelines (BNM/RH/GL014-1). This set of Guidelines is the latest version which supersedes all previous credit card guidelines issued in the past under the BAFIA. The aforesaid latest Guidelines actually incorporates important provisions from former guidelines by giving the provisions a new 'facelift' in line with the move by Bank Negara to transfer all credit card provisions from the BAFIA to the PSA.

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<sup>8</sup> PU(A) 398.

<sup>9</sup> A charge card is different from a credit card because the cardholder has to settle the amount of credit granted in full by a stipulated due date in the statement. 'Charge card' is defined in para 2(a) of the Payment Systems (Designated Payment Instruments) Order 2003.

<sup>10</sup> PSA, s 2.

Paragraph 3.1.1 of the latest Guidelines reiterates the definition of 'credit card' as that stipulated in the Payment Systems (Designated Payment Instrument) Order 2003, as discussed above. However the definition of 'issuer' in the Guidelines is more precise than the definition given in the PSA. The Guidelines defines 'issuer of credit card' in para 3.1.2 as:

- a. A licensed institution that issues credit cards; or
- b. A person who has obtained Bank Negara Malaysia's (BNM) approval to issue credit cards under subsection 25(1) of the PSA; and
  - (i) the line of credit is provided by a licensed institution; or
  - (ii) has its own line of credit; or
  - (iii) the issuance of the credit card is carried out through a joint venture arrangement with a licensed institution, hereinafter referred to as 'non-financial institution'.

The Guidelines also includes a definition of a 'licensed institution' in its para 3.1.3 to refer to any person licensed under subs 6(4) of the BAFIA to carry on banking business, banking and finance company or merchant banking business. Therefore 'licensed institutions' are bank issuers licensed to carry out banking business pursuant to BAFIA. Since most card issuers are licensed institutions, the general rule is that the majority of credit card holders in Malaysia are bank's customers.

As seen, the definition of 'issuer of credit cards' in the Credit Card Guidelines is indeed very wide as to include non-financial institutions that have obtained the approval of Bank Negara under subs 25(1) of the PSA. These non-financial institutions may be large corporations that have their own line of credit. An example of a non-financial institution that has been allowed to issue credit cards in Malaysia is AEON Credit Service M Sdn Bhd;<sup>11</sup> the company that manages the Jaya Jusco stores throughout Malaysia. AEON Credit Service M Sdn Bhd is a non-bank issuer and assumes all the legal obligations as an issuer under the PSA. However being a non-bank, such an entity does not fall within the purview of a financial institution as stipulated in the BAFIA. Neither does it come within the purview of the Guidelines on Consumer Protection on Electronic Funds Transfers Guidelines (BNM/GP 11) issued under the BAFIA.

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<sup>11</sup> See <http://www.aeonmalaysia.com.my> (accessed 21 July 2009).

All credit cards in Malaysia carry either the insignia of VISA,<sup>12</sup> MASTERCARD (US),<sup>13</sup> or JCB (Japan).<sup>14</sup> The licence granted by VISA, MASTERCARD (US) or JCB (Japan) to local banks is to use the international network's brand name and technology in the credit card business. Therefore VISA, MASTERCARD or JCB in Malaysia do not issue credit cards and are not issuers under the PSA. They are network operators. All local banks which subscribe to VISA, MASTERCARD or JCB have to comply with the 'first commandment' of the payment card industry, which is 'honour all cards'. This first commandment means merchants are not allowed to pick and choose which cards they wish to accept.<sup>15</sup> They are to accept all cards be it in blue, gold or silver colour as long as it has the VISA, MASTERCARD or JCB insignia.

A type of joint venture involving credit cards is the issuance of co-branded credit cards. Co-branded credit card holders are credit cards which are issued by the credit card issuer which is a licensed institution and a merchant under a well-known brand name.<sup>16</sup> The merchant offers additional benefits to the cardholders, such as discounts on certain products and reward points for purchases. The co-branded credit cards were first initiated by the airline industry for frequent travelers to collect points used to redeem gifts. Some examples of co-branded credit cards are Maybank-Sogo Visa, Public Bank-Esso, Visa RHB-Air Asia MasterCard, Citibank- Air Asia Cards. The agreement between the merchant and the issuer bank is that the merchant merely permits its brand name to be used and is not an 'issuer'. Therefore the merchant does not assume any legal obligation as an issuer under the PSA. The issuer bank enters into such a joint scheme with the merchant to tap on the merchant's customer base.

Another type of credit cards with an ethical slant is the 'affinity' credit cards. These cards are offered by issuers to members and supporters of a charitable organisation, educational institution, alumni or a sports association who have an affinity for such an institution. Such credit cards award a percentage of income derived from the credit card usage to the institution of choice. In

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<sup>12</sup> See <http://corporate.visa.com> for more information about VISA Inc (accessed 24 July 2009).

<sup>13</sup> See <http://www.mastercard.com/sea> (accessed 24 July 2009).

<sup>14</sup> See <http://www.jcbinternational.com> (accessed 24 July 2009).

<sup>15</sup> Evans, David & Schmalensee, Richard, 'Chapter 6: Honor All Payments' in *Paying with Plastic: The Digital Revolution in Buying and Borrowing* (Cambridge: MIT Press, 2001) at p 119.

<sup>16</sup> See the banking information booklet, *Card Transactions and You, Credit Cards*, a consumer education programme by Bank Negara and the Association of Banks in Malaysia, 21 January 2003, at p 12.

Malaysia, examples of affinity credit cards are, Alliance Bank and its affinity programme for the Chinese Independent Schools (CIS), University Putra Malaysia (UPM) Alumni affinity credit card issued by Direct Access (a division of CIMB Bank), and the Direct Access Malaysian Bar Master card issued specially for the legal profession.

#### IV. The Definition of Credit Cardholder

The Credit Card Guidelines does not contain the definition of 'credit card holder'. The Guidelines uses the terminology 'user' and 'cardholder' interchangeably throughout its clauses. Therefore, who is a card holder? A 'cardholder' has been defined as the person whose identity is listed on the credit application made to the issuer.<sup>17</sup> The writer submits that it is apt to refer to the legislation in the United States whilst defining our local banking guidelines. This is in light that Bank Negara has used United States as the benchmark for such guidelines. The consumer protection legislation in the United States for credit cards is the Truth in Lending Act and its Regulation Z.<sup>18</sup> The Truth in Lending Act defines 'cardholder' as 'any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person'.<sup>19</sup> Therefore it is important that our local guidelines make a distinction between 'user' and 'cardholder' as the terminology 'user' could include holders of supplementary cards.<sup>20</sup> According to para 14.1 of the Credit Card Guidelines:

The issuer of credit cards shall not hold the supplementary cardholder jointly or severally liable for the debts of the principal cardholder or other supplementary cardholders.

Therefore the writer is of the opinion that it is more apt to use the word 'cardholder' instead of the word 'user' in the definition of credit cards in para 2(b) of the Payment Systems (Designated Payment Instruments) Order 2003 and para 3.1.1. of the Credit Card Guidelines.

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<sup>17</sup> Szwak, David A, 'Credit Cards in America' *The John Marshall Journal of Computer and Information Law* (13 J Marshall J Computer & Info L 573) at p 576.

<sup>18</sup> Regulation Z is issued by the Board of Governors of the Federal Reserve System to implement the federal Truth in Lending Act, which is contained in Title I of the Consumer Credit Protection Act, as amended (15 USC 1601 *et seq*).

<sup>19</sup> *Ibid*.

<sup>20</sup> *Supra* n 17. Mere card users, bearers or holders of related cards, even if authorised to use the card, are not liable for such debts.

## V. The Features of a Credit Card Scheme

Section 5 of the Civil Law Act 1956 (revised 1972) allows the reception of English cases in resolving banking issues in Malaysia up until the cut-off date of 7 April 1956. Therefore English cases prior to the cut-off date are binding on the local courts. The local courts whilst resolving banking matters after the cut-off date still refer extensively to the English jurisdiction for guidance especially in areas of law that are bereft of any local pronouncements. One such area of the law is the underlying legal scheme for the operation of credit cards as described by Justice Millett in the English case of *Re Charge Card Services Limited*.<sup>21</sup> The Court of Appeal upheld the decision of the lower court that a credit card payment is an absolute payment to the supplier/merchant.<sup>22</sup> The whole scheme is not a tripartite agreement but a contractual scheme consisting of three separate bilateral contracts between (i) the credit company (issuer) and the supplier/merchant, (ii) the credit company (issuer) and the cardholder, and (iii) the cardholder and the supplier/merchant respectively; all of which predated the individual contracts of sale by credit card. The lower court and the Court of Appeal described the general features of a credit card scheme as follows:

- (i) There is an underlying contractual scheme which predates the individual contracts of sale. Under this scheme, the supplier/merchant has agreed to accept the card in payment of the price of the goods purchased and the purchaser is entitled to use the credit card to commit the credit card company to pay the supplier;
- (ii) That underlying scheme is established by two separate contracts. The first is made between the credit company (issuer) and the seller/merchant; the seller/merchant agrees to accept payment by use of the card from anyone holding the card and the credit company (issuer) agrees to pay to the supplier/merchant the price of the goods supplied less a discount. The second contract is between the credit card company (issuer) and the cardholder; the cardholder is provided with a card which enables him to pay the price by its use and in return agrees to pay the credit company the full amount of the price charged by the supplier/merchant.
- (iii) The underlying scheme is designed primarily for use in over-the-counter sales, ie sales where the only connection between the retailer/merchant and the purchaser (cardholder) is the sale transaction itself;

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<sup>21</sup> [1986] 3 All ER 289, [1986] 3 WLR 697 (lower court decision).

<sup>22</sup> [1988] 3 All ER 702, [1988] 3 WLR 764 (Court of Appeal).



- (iv) The actual sale and purchase of the goods is the subject of a third bilateral contract made between the buyer (cardholder] and seller/merchant (*ie* the sale contract itself]. In the majority of cases, this sale contract will be oral, over the counter sale. Tendering and acceptance of the credit card in payment is made on the tacit assumption that the legal consequences will be regulated by the separate underlying contractual obligations between the seller/merchant and the credit company (issuer), and the buyer (cardholder) and the credit company (issuer).
- (v) Since the transactions are over-the-counter sales, the card does not carry the address of the cardholder and the supplier/merchant will have no record of his address. The seller/merchant therefore has no means of tracing the purchaser except through the credit card company.
- (vi) Payment by credit card will usually be treated as absolute payment of the purchase price as between the supplier/merchant and the cardholder. Thus, if the credit card company goes into liquidation before it pays the supplier/merchant, the cardholder will not be liable to the supplier/merchant of services of goods. (But the cardholder is still liable to the credit card issuer.)

The principles enunciated in the above stated English case were applied in the Malaysian cases of *Tee Thian See v PP*<sup>23</sup> and *PP v Yap Seay Hai*.<sup>24</sup> In *PP v Yap Seay Hai*, the learned judge, Justice Dato' Ahmad Idid stated that a clearer picture of various transactions involved in a credit card transaction is shown by *Re-Charge Card Services Ltd*<sup>25</sup> and the learned judge had reported this case in his book titled *Judicial Decisions Affecting Bankers & Financiers*.<sup>26</sup>

In recent times, the abovementioned three party structure has in certain instances, evolved into a four party structure involving a 'merchant acquirer', whose function is to recruit new suppliers/merchants willing to accept the issuer's card.<sup>27</sup> Under the four party structure, instead of the agreement between the card issuer and the supplier, there are two further agreements, namely first, an agreement between the merchant acquirer and the supplier/merchant, under which the supplier undertook to honour the card and the merchant acquirer undertook to pay the supplier; and secondly, an agreement between the merchant acquirer and the card issuer, under which the merchant acquirer agreed to pay

<sup>23</sup> [1996] 3 MLJ 209 at pp 218 and 220, this case is discussed in Part VII.

<sup>24</sup> [1994] 1 MLJU 291.

<sup>25</sup> *Supra* n 22.

<sup>26</sup> Published by Butterworths Asia, in association with Institut Bank-Bank Malaysia, 1994, at p 906.

<sup>27</sup> See Headnote, *Office of Fair Trading v Lloyds TSB Bank plc and others* [2006] EWCA Civ 268, [2007] QB 1.

the supplier/merchant and the card issuer undertook to reimburse the merchant acquirer.<sup>28</sup>

The four party structure does not change the principle that the credit card payment is absolute payment to the merchant and the cardholder's payment obligation is directly to the issuer.

## **VI. The Terms and Conditions of the Credit Card Contract between the Issuer and the Cardholder**

### *A. Guidelines on Consumer Protection on Electronic Funds Transfers, BNM/GP 11*

The terms and conditions of the credit card contract between the Issuer and the cardholder should contain consumer protection measures imposed by Bank Negara. Other than the Credit Card Guidelines discussed earlier, the consumer protection guidelines issued pursuant to the BAFIA is known as the Guidelines on Consumer Protection on Electronic Funds Transfers (BNM/GP 11) (hereinafter referred to as 'BNM/GP 11'). The preamble of BNM/GP 11 states its aim 'to provide a basic framework to establish the rights, liabilities and responsibilities of customers and financial institutions relating to electronic funds transfers'. It is issued pursuant to s 119 (since deleted)<sup>29</sup> and s 126 (on power to issue guidelines) of the BAFIA. Section 77(4) of the PSA has the effect of ensuring that all guidelines on electronic banking that are issued under the BAFIA continue to be valid under PSA, even though the enabling s 119 in the BAFIA has been deleted.

Para 3 of Part I of BNM/GP 11, which is titled 'Definitions', states that the definition of 'Card' means any card, including an ATM card, EFTPOS card, debit card, credit card or stored value card, used by a customer to effect an electronic funds transfer. The terms and conditions of 'electronic funds transfer' contract are governed by Part III of BNM/GP 11. The definition of 'electronic

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<sup>28</sup> *Ibid.*

<sup>29</sup> Act A1211. The deleted s 119 (1) of the BAFIA stipulated that no person shall commence any electronic funds transfer system without the written approval of Bank Negara. Under the subsequent subsections of s119, Bank Negara had the power to impose terms and conditions for a payment scheme, alter a payment scheme, inspect the operations of a payment scheme and if dissatisfied, suspend or revoke such a scheme.

funds transfer' is set out in para 4 of the guidelines to include the following devices and channels:

- (i) Telegraphic transfer;
- (ii) Point-of sale terminal;
- (iii) Stored value card terminal;
- (iv) Cash dispensing machine;
- (v) Cash deposit machine;
- (vi) Telephonic instruments;
- (vii) Debit card.

BNM/GP 11 covers electronic fund transfer carried out through or by means of the above stated devices or channels. As seen the above stated lists of devices do not include the credit card. This creates confusion as to whether Part III of BNM/GP 11 governs credit cards as credit cards do not fall within the ambit of 'electronic funds transfer'. Yet, an examination of para 6(4)(a) of BNM/GP 11 suggests the inclusion of credit cards. This paragraph stipulates as a standard condition of an electronic funds transfer contract to include:

the customer's liability for any unauthorised electronic fund transfer and duty to report to the financial institution promptly any loss, misuse, theft or unauthorised use of, access code or a card;

As the definition of 'card' includes credit cards, the above stated para 6(4)(a) would by its reference to 'card' apply to all forms of uses of the credit card. However the subsequent sub-paragraphs in 6(4)(b), (d), (e) and (f)<sup>30</sup> do not expressly refer to the word 'card'. Therefore the aforesaid clauses would apply to the use of the PIN<sup>31</sup> to withdraw cash advances with the credit card. This is because a PIN is an 'access code'<sup>32</sup> that can be used to access a customer's credit card account to initiate an electronic fund transfer. Furthermore, a credit card PIN is used to withdraw cash advances from a 'cash dispensing machine' or in other words an ATM machine in compliance with the meaning of 'electronic funds transfer' in para 4(d). Credit cards are also used at point-of-sale terminals.

<sup>30</sup> Paragraph 6(4)(c) specifically deals with 'preauthorised electronic fund transfer'. This would mean transactions whereby the customer had earlier given a standing order to the bank to effect the transfer.

<sup>31</sup> PIN is the abbreviation for Personal Identification Number.

<sup>32</sup> Para 3 of BNM/GP 11 defines 'access code' as including pin, password or code which provides a means of access to customer's account for the purposes of initiating an electronic funds transfer.

The extent of BNM/GP 11 application to credit cards is confusing. However since the definition of 'card' in BNM/GP 11 includes credit cards, the writer has in subsequent paragraphs of this article discussed the scope of protection offered by BNM/GP 11 in the event of an unauthorised use of credit card. At this juncture, to support the writer's view, it is reproduced the observation of Professor Benjamin Geva on BNM/GP 11 in his research paper titled 'Consumer Protection in Electronic Funds Transfers' that was submitted to the Office of Consumer Affairs, Industry Canada, where he stated:<sup>33</sup>

These provisions [sections 14-19 of BNM/GP 11] cover electronic fund transfers authenticated by card and/or access code and "carried out through or by means of" a POS terminal, stored-value cash terminal, cash deposit machine, telephonic instrument, or debit card.

Professor Benjamin Geva in the footnote for the definition of 'card' stated:<sup>34</sup>

Broadly defined in Section 3 to cover any card used by a customer to effect an electronic fund transfer, which is stated to include *credit*, debit and stored-value card.

Therefore, although the credit card industry does not refer to these guidelines, the writer argues that it is applicable to regulate consumer protection for the Malaysian cardholder.

#### B. *The Credit Card Guidelines (BNM/RH/GL014-1)*

The discussion will now proceed to peruse the provisions of the Credit Card Guidelines (BNM/RH/GL14-1) that affords some protection to the consumer by regulating the terms and conditions of the credit card agreement. As has been alluded to earlier, the Credit Card Guidelines is applicable to all credit card issuers in Malaysia, including licensed institutions.<sup>35</sup>

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<sup>33</sup> See Geva, Benjamin, 'Consumer Protection in Electronic Funds Transfers', Research Paper for Office of Consumer Affairs, Industry Canada, 21 March 2002, under topic 'Consumer Protection Guidelines in Malaysia' p 79, at p 80.

<sup>34</sup> *Ibid*, fn 218.

<sup>35</sup> Refer to para 2.1 of the Credit Card Guidelines.

Paragraph 8 of the Credit Card Guidelines which is titled 'Terms and Conditions' of the credit card scheme, states the followings:

- 8.1 An issuer of credit cards shall specify in the terms and conditions the significant liabilities and obligations applicable to the principal and supplementary cardholder in bold print in its application brochures and web pages. Such terms and conditions should be described in plain language which is easily understood by the applicants.
- 8.2 An issuer of credit cards shall ensure that their customer service staffs are able to answer queries on the credit card terms and conditions. The hotlines for the customer service shall be published in brochures, monthly billing statements and web pages.

The above stated para 8 is mandatory and is aimed at ensuring that the consumer understands the credit card scheme and not left in the lurch upon becoming a cardholder. In addition to the aforesaid para 8, the Credit Card Guidelines contain paras 9-19 that specifically deal with several issues in relation to credit cards, including the liability of the cardholder for lost or stolen credit cards. Unfortunately the Guidelines is not readily available to the public and therefore a lay person is unaware of the protection contained in the Guidelines. A lay person is unable to use the Guidelines as a yardstick whilst entering into a credit card scheme with a particular issuer.

## VII. The Unauthorised Use of Credit Cards

An unauthorised use of the credit card in general terms refers to the use of the credit card not authorised by the cardholder. The BNM/GP 11 does not define unauthorised use or unauthorised transaction although the aforesaid terms appear in the guidelines. An overall analysis of BNM/GP 11 is indicative of the fact that it is structured after legislation in United States, namely the Electronic Funds Transfer Act (15 USC 1696 *et seq*) and its Regulation E<sup>36</sup> with the local draftsman's addition of the word 'card' that includes credit cards. The writer would again submit that it is apt to refer to US legislation whilst defining our local banking guidelines as Bank Negara has used United States as the bench mark for such guidelines.

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<sup>36</sup> The Electronic Funds Transfer Act governs the use of ATM and debit cards in the United States.

The Truth in Lending Act and its Regulation Z, which aim to provide consumer protection legislation for credit card use, have defined 'unauthorised use'. 'Unauthorised use' means 'the use of a credit card by a person, other than a cardholder, who does not have actual, implied or apparent authority for such use and from which the cardholder receives no benefit'.<sup>37</sup> The US *Official Staff Commentary* explains further that 'whether such authority exists must be determined under state or other applicable law.'<sup>38</sup> Nevertheless the use of the words 'actual, implied or apparent authority' has been criticised as confusing.<sup>39</sup> The Act would be consistent with the traditional law of agency terminology if it stated 'actual authority, *including* express and implied authority, or apparent authority.'<sup>40</sup> This is because under agency law, 'actual authority' consists of 'express' and 'implied authority'.<sup>41</sup> American courts have read the term 'actual' as including 'express' as well as 'implied', thus covering all types of authority.<sup>42</sup>

Apparent authority is also sometimes referred to as 'ostensible authority'.<sup>43</sup> The courts find apparent authority where the behavior of the principal leads a third party to believe the agent acts with the principal's authority;<sup>44</sup> whereas actual authority 'arises from what the principal reveals to the agent'.<sup>45</sup> Some primary cardholders have supplementary users who have been authorised to use the credit card. Therefore even if the principal cardholder may have forbidden the supplementary cardholder to use the card for a particular transaction, such use is not deemed 'unauthorised'. The principal cardholder is liable for charges for an unauthorised use even if a particular use has been forbidden between the cardholder and the authorised user.<sup>46</sup> For example, a parent who gives a child a credit card but forbids the child to use it exceeding fifty dollars without specific permission; the parent is liable for a debt incurred in excess of that amount vis-à-vis the card issuer.<sup>47</sup>

<sup>37</sup> 15 USC § 1602 (o). Refer to Regulation Z, 12 CFR § 226.12 n 22.

<sup>38</sup> *Official State Commentary on Regulation Z* § 226.12(b)(1)-1

<sup>39</sup> See Budnitz, Mark and Saunders, Margot, *Consumer Banking and Payments Law* (National Consumer Law Center, 2<sup>nd</sup> ed 2002) at p 58.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Id* at pp 58-59.

<sup>44</sup> *Id* at p 59; Reuschlein, Harold Gill & Gregory, William A, *The Law of Agency and Partnership* 37 (2d ed, 1990) at p 57.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Supra* n 39, at p 59.

<sup>47</sup> *Ibid.*

The unauthorised use of credit cards in Malaysia may occur in the following instances:

- (i) The cloning, counterfeiting and forgery of credit cards; as illustrated by the Malaysian cases stated below.<sup>48</sup>
- (ii) The 'access code',<sup>49</sup> meaning the PIN number, was stolen and the original credit card was used to withdraw cash advances.
- (iii) The credit card details were stolen and used on the internet, telephone, mail or fax to order goods. This is known as the 'card-not-present fraud' because the merchant/retailer does not view the physical card.
- (iv) The original credit card was removed, used and then replaced without the knowledge of the cardholder. In this situation, the cardholder was neither negligent nor careless in providing an opportunity for the unauthorised use of the card.

The most prevalent form of 'unauthorised use' is the cloning, counterfeiting and forgery of magnetic stripe credit cards. This article discusses some of the cases reported in Malaysia in this area of the law under the heading below titled fraudulent use of credit cards.

## VIII. The Fraudulent Use of Credit Cards

### A. *Malaysia the Centre of Credit Card Fraud*

The most prevalent problem that had plagued credit card users is the counterfeiting, forgery or skimming of cards by third party fraudsters. This problem arose because the credit cards were inserted with magnetic stripes. The first bankcard that contained a magnetic stripe was issued by Franklin National Bank of Long Island, New York in 1951.<sup>50</sup> Plastic cards contain between one and three magnetised tracks which permit the identification of the user and enable the user to conduct a transaction from a location distant from the central data base, such as a bank.<sup>51</sup> Some tracks allow information to be stored for

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<sup>48</sup> This was a major problem with the magnetic stripe cards.

<sup>49</sup> *Supra* n 32 for the definition of 'access code'.

<sup>50</sup> Grabosky, PN and Smith, Russell G, *Crime In The Digital Age, Controlling Telecommunications and Cyberspace Illegalities* (Sydney: The Federation Press, 1998) at p 154. Masuda, B, 'Credit Card Fraud Prevention: A Successful Retail Strategy' in Clarke, RV (ed), *Crime Prevention Studies, Vol 1* (New York: Criminal Justice Press, 1993) at pp 121-134.

<sup>51</sup> *Id.*, Grabosky & Smith at p 155.

passive use only (read only) and others permit information to be introduced (read and write).<sup>52</sup> Since credit cards could easily be counterfeited, Bank Negara issued a directive to covert all magnetic stripe credit cards to chip embedded smart cards beginning January 2005.<sup>53</sup> The writer will first trace the case law in the area of magnetic stripe credit cards before discussing the latest issue relating to chip embedded credit cards.

That Malaysia has become notoriously known as the centre for credit card forgery was admitted by the court in the local case of *Ooi Chai Kat v Public Prosecutor*.<sup>54</sup> The facts of this case are as follows. Upon receiving information on the use of a false credit card at a petrol station named Henry Shell Servicing Sdn Bhd at Damansara Endah, Kuala Lumpur, an arresting officer and two bank officers arrived at the said place. At about 6 pm a man got out of his car and started to fill up petrol by using a credit card. The officers approached him and then conducted a body search. They retrieved a false Visa Gold Standard Chartered Bank credit card and confiscated the petrol payment receipt after the petrol pump nozzle was replaced. The crime was investigated and the man was charged under s 471 (using as genuine a forged document) of the Penal Code (Act 574, revised 1997) (hereinafter referred to as the 'Penal Code').<sup>55</sup> Section 471 of the Penal Code stipulates that:

Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

The accused was convicted by the Sessions Court judge and sentenced to two years imprisonment. The accused then appealed to the High Court against the conviction and the sentence.

The learned High Court judge, Augustine Paul J dismissed the appeal. The learned judge took judicial notice that Malaysia had become the centre of credit card fraud by observing:<sup>56</sup>

It is not denied lately, crimes involving false credit cards have increased so much that there have been reports in the local newspapers that Malaysia

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<sup>52</sup> *Ibid.*

<sup>53</sup> BNM Directives are issued to banks directly and posted from time to time on its official website.

<sup>54</sup> [2003] 5 MLJ 248.

<sup>55</sup> This is the current version of the Penal Code in Malaysia.

<sup>56</sup> *Supra* n 54 at p 251 (in English) and at p 261 (Bahasa Malaysia).



has become a centre for producing and distributing false credit cards. The court took judicial notice that such crimes were rampant nowadays and threatened the safety and prosperity of Malaysia's economy. If not curbed, this would affect the economy and the country's reputation. Thus, public interest demands that such crimes be given deterrent sentences and the mitigating factors have to be considered with the background of public interest that has to be executed.

Another case that dealt with the criminal crime of counterfeiting credit cards is *Tee Thian See v PP*.<sup>57</sup> This is an interesting case whereby a US Secret Service agent was investigating the source of several counterfeit cards in New York. His investigation led him to a Malaysian residing in New York who agreed to lay a trap for the counterfeiter in Malaysia. The agent and the Malaysian then executed the plan by ordering 30 gold cards at the price of USD1,000 per card. The Malaysian met the counterfeiter in front of Hotel Equatorial, Kuala Lumpur and was shown 28 credit cards with specimen signatures. Subsequently the police intercepted and arrested the counterfeiter who later was charged with possession of counterfeit cards under s 467 (forgery of a valuable security or will) and punishable under s 472 (making or possessing a counterfeit seal, plate, etc, with intent to commit a forgery punishable under s 467) of the Penal Code (FMS Cap 45).<sup>58</sup> Section 467 states that:

Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property or valuable security, or any document purporting to be an acquittance or receipt, acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

While s 472 states that:

Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467, or with such intent has in his possession any such seal, plate or other

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<sup>57</sup> *Supra* n 23.

<sup>58</sup> This version of the FMS Penal Code has been superseded by the recent Penal Code (revised 1997), Act 574. Sections 467 and 472 have remained the same in the recent version of the Penal Code.

instrument, knowing the same to be counterfeit, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

The Sessions Court sentenced him to four years imprisonment, and a fine, in default, eight months imprisonment. The accused appealed to the High Court. The High Court upheld the decision of the Sessions Court.

The learned judge of the High Court, Justice KC Vohrah, applied the English case of *Re Charge Card Services Ltd*,<sup>59</sup> and observed that there are three parties to a sale transaction involving a credit card.<sup>60</sup> The parties are the cardholder, the retailer/merchant and the issuer of the card. The essence of a credit card transaction is that the retailer/merchant and the cardholder have for their mutual convenience, each previously arranged to open an account with the same company (the card issuer), and agreed that any account between themselves, if the cardholder so wished, be settled by crediting the retailer and debiting the cardholder's account with the issuer of the card. The learned judge continued as follows:<sup>61</sup>

In a sales transaction involving a credit card, the card holder will sign on a sales voucher after the cardholder has had his card used for imprinting on the sales voucher. The sales voucher will be in three copies: one for the cardholder, the other for the retailer and the third for the issuer. The card issuer, on receipt of the third copy, will in due course pay to the retailer the face value of the sales voucher less an agreed commission (see *Re Charge Card Services Ltd* at p 702). What the signed sales voucher does is to create a legal right in the retailer to be paid the face value of the sales voucher less an agreed commission and it is certainly a valuable security within the meaning of s 30 of the [Penal] Code. Thus, when any of the 28 counterfeit cards is used by a person for a credit card transaction for the purchase of goods or services, and the signature on the sales voucher is forged by him, he forges a document which purports to be a valuable security; and clearly, by his obtaining goods or services on the sale transaction through the deception, he wrongfully gains from the transaction.

Section 30 of the Penal Code defines 'valuable security' as a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any

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<sup>59</sup> *Supra*, n 22.

<sup>60</sup> *Supra*, n 23 at p 220.

<sup>61</sup> *Ibid*.

person acknowledges that he lies under legal liability, or has not a certain legal right. The 'Illustration' to this section gives the example of a bill of exchange that by being endorsed becomes negotiable and therefore the endorsement is a 'valuable security'. It must be noted that credit card sales vouchers are in fact not 'negotiable instruments' and therefore s 24 of the Bills of Exchange Act 1949 on forgery of signatures is not applicable to the vouchers.

There is no specific legislation to deal with credit card fraud in Malaysia and the above stated cases are examples of incidents where the prosecutors have to resort to charging the fraudsters under the Penal Code. The Penal Code, being a general legislation in this area of the law, regards credit cards crime as a 'forged document' or 'forgery of a valuable security'. The Penal Code in Malaysia originated from India (during the colonial times) and was enacted before the introduction of credit cards.<sup>62</sup> Therefore the Penal Code had envisaged the use of forged bills of exchange and the counterfeiting of bank notes<sup>63</sup> and coins, but not the use of counterfeit credit cards. Specific legislation must be passed that accurately deals with the problem.<sup>64</sup>

The above discussed cases prompted Bank Negara to take stringent action to prevent the fraudulent use of counterfeit cards. As said recently all credit cards have been converted from the magnetic stripe cards to smart cards with an embedded chip. The incidents of fraud have been reduced but even chip embedded cards have their own vulnerabilities.

#### B. *The Migration to Europay-Master-Visa (EMV) Standard Chip Cards and the Latest 'Contactless' Cards*

Currently all credit cards in Malaysia are embedded with the Europay-Master-Visa (EMV) standard chip. The data is encrypted at the point of use and before it is transmitted to the bank. This prevents fraudsters from capturing any credit card details and account numbers as only the intended receiver would be able to decode the data.

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<sup>62</sup> Joseph, ALR, 'Credit Card Fraud and the Law' [1993] 2 CLJ xvi (Apr).

<sup>63</sup> Ss 489A-489D.

<sup>64</sup> *Supra* n 61.

Bank Negara issued an official statement on 17 August 2005 denying a news report that the microchip for credit cards had been cloned. It assured the public that the EMV chip credit card security features adopted by banking institutions are secure. The statement further elaborates as follows:

For account the first half of the year 2005, statistics on credit card fraud showed that the number of cases and losses have declined by 43.2% and 33.5% respectively, compared with the same period in 2004. The EMV standards are set by the international credit card associations to curb counterfeiting fraud. Malaysia is the leading country in the region adopting EMV chip infrastructure to address counterfeit fraud.

In the recent *Financial Stability and Payment Systems Report 2008*, Bank Negara further asserted that credit card fraud remained insignificant as it accounted for 0.04% of the total credit card transactions during the year.<sup>65</sup> However, it still must be noted that although the migration from magnetic stripe cards to chip cards has reduced the incidences of fraud, it has not totally eliminated such incidents.

The EMV technology has also introduced another form of credit card usage which is known as the 'contactless' payment credit card. The customer just has to wave the credit card in front of a card reader terminal before making a purchase. This type of card stores its data in a microchip fitted with a radio antenna that is capable of transmitting the card's data to a card reader without physical contact.<sup>66</sup> Radio Frequency Identification (RFID) technology is used with ISO 14443 standard; a contactless credit card can transmit data to a special RFID card reader when the cardholder waves his card within a few inches of the receiver.<sup>67</sup> Examples of such contactless credit cards in the market are the Visa payWave and the Mastercard Paypass.

Researchers at the University of Massachusetts concluded in a research paper that data stored in contactless credit cards can be easily accessed by strangers. They conducted an experiment on 20 contactless credit cards from Visa, Mastercard and American Express; the cardholders' names and other data were being transmitted without encryption and in plain text. They could skim and store information from a contactless card with a device the size of a couple of paperback books, which they cobbled together from readily available

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<sup>65</sup> *Supra*, n 1 at p 78 and Chart 4.3.

<sup>66</sup> <http://www.contactlesscreditcards.org/>(accessed 21 July 2009).

<sup>67</sup> *Ibid.*

computer and radio components for USD150. They said that they could probably make one even smaller and cheaper: about the size of a pack of gum for less than USD50.<sup>68</sup>

The above stated experiment conducted by the University of Massachusetts is indicative of the fact that EMV technology used for credit cards has not been effective in totally eradicating fraud occurrences. From the consumer's perspective, it is still important to address the following issue: Is there any protection in law to prevent third party criminals from stealing the cardholder's identity? This is known as identity theft.

### C. Identity Theft

There is no specific civil definition for identity theft in Malaysia.<sup>69</sup> The simple definition is the appropriation of an individual's personal information to impersonate that person in a legal sense.<sup>70</sup> There are two instances when this could happen, one instance when card particulars and card numbers are used to make fraudulent purchases. Mails in the post from banks are intercepted by fraudsters' intent on stealing a person's identity details. Sometimes the fraudsters rummage through the trash to collect particulars and this is known as 'dumpster diving'.<sup>71</sup> Phishing sites on the internet have also been used to trick people into revealing their credit card details. At times, a fraudster may pose as an employee of the bank or a credit rating agency to extract personal particulars from the holder; this is known as 'pretexting'.<sup>72</sup> Then the illegally acquired credit card details can be used online to purchase goods. The second instance of identity theft is a situation where the fraudster totally assumes the credit card holder's identity and conducts all types of transactions as though the fraudster were the credit card holder. The fraudster may even apply for a new credit card in the name of the holder. This has far reaching consequences which can go beyond the whole payment scheme. The credit card holder's credit rating might be affected and he may have to defend claims from other third parties. In both the

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<sup>68</sup> Extracted from Schwartz, John, 'Researchers See Privacy Pitfalls in No-Swipe Credit Cards', *The New York Times*, 23 October 2006; <http://www.nytimes.com/2006/10/23/business/23card.html?scp=1&sq=No%20Swipe%20Credit%20Cards&st=cse> (accessed on 22/7/09).

<sup>69</sup> For the US definition of 'identity theft', refer to the report titled Putting an End to Account -- Hijacking Identity Theft', Background, at <http://www.fdic.gov> (accessed 24 July 2009).

<sup>70</sup> Vacca, JR, *Identity Theft, How to Minimize Your Risk of Becoming a Victim* (Prentice Hall PTR, 2003) at p 4.

<sup>71</sup> See brochure on identity theft at <http://www.bos.frb.org/consumer/identity/index.htm> (accessed 24 July 2009).

<sup>72</sup> *Ibid.*

aforesaid identity theft situations and in other situations where the card is stolen and used online, the merchants do not view the physical card and the fraud that occurs in such a situation is known as 'card-not present' fraud. According to the *Financial Stability and Payment Systems Report 2008*, more than 59% of total credit card fraud losses during the year were attributed to card-not-present (CNP) transactions which do not require the presence of physical cards, whilst 'lost and stolen incidences accounted for 24% of total credit card losses.'<sup>73</sup> The Governor of Bank Negara in her keynote speech at the Visa Asia Pacific Security Summit 2009 titled *Maintaining Trust in Payments* stated that:

Payment Fraud is not new. What is new is a surge in identity fraud as a source of payment fraud. Earlier this year, a major US credit and debit card and cheque payments processor, experienced a major data security breach in its system. This incident serves as a wake-up call for the other players to adopt effective measures to curb such security breaches, in order to maintain the public's trust in payment systems and instruments.<sup>74</sup>

The public's trust in this form of payment system can be enhanced by the knowledge that the law has been designed to afford them protection in the event of 'unauthorised use' incidents. The writer will next peruse the adequacy of such protection provided by current guidelines in this area of the law.

#### **IX. Statutory Protection for Unauthorised Use of Credit Cards**

The local cases discussed above relate to the criminal prosecution of credit card offenders under the Penal Code. This means that the authorities prosecute the offence as a crime against the State. As far as the consumer is concerned the, the criminal has been sent to jail and the crime perpetrated using his name has ceased. Nevertheless, the consumer would also be concerned to know if there are civil laws that protect him from unlawful use of his credit card details and the ensuing extent of his civil liability (if any).

The statutory protection for unauthorised use of credit cards in Malaysia is contained in two guidelines discussed earlier namely; the Guidelines on Consumer Protection on Electronic Funds Transfer, which has been referred to in this paper as BNM/GP 11 and the Credit Card Guidelines (BNM/RH/GL014-1).

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<sup>73</sup> *Supra* n 1.

<sup>74</sup> Governor of Bank Negara, 'Maintaining Trust in Payments', Keynote Address, the Visa Asia Pacific Security Summit 2009, 27 May 2009, at p 3.

The writer submits that both the guidelines should be read in light of the other and not read in isolation. However for purposes of clarity, the writer will discuss BNM/GP 11 first.

#### A. *Consumer Protection for Unauthorised Use in BNM/GP 11*

Part V of BNM/GP 11 titled 'Erroneous and Unauthorized Electronic Fund Transfer' contains paras 14-17 that deal with the customer's duty in the event of an unauthorised use or transfer using a credit card at point-of-sale terminals, cash dispensing machines or telephonic instruments.<sup>75</sup> It should be noted that home banking or Personal Computer (PC) banking is not covered by the scope of these guidelines.<sup>76</sup> This is evidently due to the fact that home banking was only recently introduced in Malaysia; subsequent to the implementation of these guidelines.

The structure provided by BNM/GP 11 to provide a grievance solving mechanism for the consumer can be divided into several components.

##### 1. *Customer's legal position in unauthorised transactions*

Firstly, the consumer will not be liable for the following losses incurred as a result of unauthorized use of a credit card in the following situations:<sup>77</sup>

- (i) not attributable to or not contributed by the customer;<sup>78</sup>
- (ii) caused by the fraudulent or negligent conduct of officers or agents of the financial institution and other network participants including merchant;<sup>79</sup>
- (iii) relating to a forged, faulty, expired or cancelled card;<sup>80</sup>
- (iv) occurring before the customer has received the card or access code; and<sup>81</sup>
- (v) occurring after the customer has notified the financial institution that the card has been lost, misused, stolen, or that the access code security has been breached.<sup>82</sup>

<sup>75</sup> This Part V is read together with para 3 of BNM/GP 11 that define the scope of gadgets covered by the terminology 'electronic funds transfer' in these guidelines.

<sup>76</sup> See Geva, Benjmain, *supra* n 33 at p 80.

<sup>77</sup> *Ibid*, Benjamin Geva discussed this point for all forms of losses of unauthorised electronic funds transfers in Malaysia.

<sup>78</sup> BNM/GP11, para 17(1) (a).

<sup>79</sup> BNM/GP11, para 17 (b).

<sup>80</sup> BNM/GP11, para 17(c).

<sup>81</sup> BNM/GP11, para 17 (d).

<sup>82</sup> BNM/GP 11, at para 15(3).

The above stated situation (i) is a statutory incorporation of the common law duty owed by the customer to its bank. Paragraph 15(1) of BNM/GP 11 indeed explains that a customer shall not:

- (a) directly or indirectly disclose to any person the access code of his card or any electronic device used to effect an electronic fund transfer; or
- (b) fail to take reasonable care to keep the access code secret.

Paragraph 15 is reflected by the common law *Mac Millan*<sup>83</sup> duty which was applied in the local cheques forgery case of *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd*.<sup>84</sup> A bank's customer is to take precautionary measures not to facilitate fraud or forgery of cheques. By analogy, the *Mac Millan* principle is applied in the context of credit cards, that a bank's customer is not to facilitate fraud or forgery of credit cards. A financial institution will be absolved from all liability if it can prove that the credit card holder has breached the *Mac Millan* duty.<sup>85</sup>

The above stated situation (ii) is self explanatory and the financial institution is vicariously liable for all fraudulent and negligent conduct of its own employees and all outsourcing agents. A fraudulent employee or agent of a merchant is also covered by paragraph (ii).

The above stated paragraph (iii) relating to forged cards has to be read in light of the earlier discussed *Mac Millan*'s duty not to facilitate fraud or forgery. Next it also must be read together with the current Credit Card Guidelines that does impose a maximum ceiling of RM250 for unauthorized transactions as a consequence of a lost or stolen card.<sup>86</sup> There is no corresponding maximum ceiling of liability in BNM/GP 11.

Situation (iv) is further supported by sub-paragraph 17(2) which states that if any dispute arises in relation to a customer's card, then the presumption is that the customer did not receive the card unless the financial institution can prove otherwise.

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<sup>83</sup> Common law case of *London Joint Stock Bank Ltd v Macmillan & Arthur* [1918] AC 777.

<sup>84</sup> [1993] 1 MLJ 182, (Supreme Court).

<sup>85</sup> BNM/GP 11, para 15(2).

<sup>86</sup> This provision will be discussed again in the next sub-topic.



Situation (v) is a reflection of the *Greenwood's*<sup>87</sup> duty imposed on the bank's customer to inform the bank of any fraudulent activity involving the credit card as soon as he becomes aware of the fraud. Any delay on the part of the cardholder would mean that he is estopped thereafter from bringing a claim against the bank. The common law *Greenwood* duty was approved by the Malaysian courts in the above mentioned cheques forgery case of *United Asian Bank*.<sup>88</sup> The customer should not delay notification once he has knowledge of any misuse, theft or loss of credit card or its PIN. The *Greenwood* duty cannot be imposed on him if he has no knowledge of the theft or unaware that his card has been stolen.

Para 16 of BNM/GP 11 provides for the customer's liability in the event he delays formal notification. In the context of credit cards, sub-para 16(a) applies. The sub-para states:

Where the customer has contributed to a loss resulting from an unauthorised transaction by, delaying notification of, lost, misused or theft of the card, or someone else knowing the access code of the card, the customer is liable for actual loss which occurred, except for:

- (a) that portion of the loss incurred on any one day which exceeds the daily transaction limit applicable to the card or account;

According to sub-para 16(a), the credit card holder will only be liable up to the limit of charges permitted by the bank. For example if the stolen card has a credit limit of RM15,000, and the unauthorised use exceeds the limit and amounts to RM17,000, the cardholder will only be liable until the stipulated limit of RM15,000 and therefore is protected from the excess RM2,000. The current Credit Card Guidelines does not have any corresponding provision to cap maximum liability for delayed notification by the cardholder.

## 2. *Customer's duty to give notification*

Paragraph 14(1) of BNM/GP 11 imposes a mandatory duty on the consumer to report to the bank any error in his statement of account or possible unauthorised transaction in relation to his card or access code. Paragraph 14(2) adds that the notification shall be made in writing 60 days from the date of the statement of account.

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<sup>87</sup> *Greenwood v Martins Bank* [1932] 1 KB 371.

<sup>88</sup> *Supra*, n 83.

The writer's criticism of the above stated paragraph is that:

- (i) The mode of informing the bank *via* telephone is more convenient, effective and fast. If the Bills of Exchange Act 1949 recognizes countermand of cheques via telephone or in other words an oral countermand,<sup>89</sup> the same mode should be adopted by credit card notification. If oral notification is accepted for a traditional mode of payment, then the same standard should be applicable to a modern mode of payment i.e. credit cards.
- (ii) The period of 60 days from the statement of account seems such a 'long' period in view of the fact that fraud had been perpetrated and may still be continuing during the 60 day period. At the surface, such a long period is beneficial to the customer but in view of the above discussed para 16 (discussed earlier) a delay in notification by the customer, could result in liability being incurred for actual losses.
- (iii) There are no consequences stated either for compliance or breach of the '60-day' notification requirement.<sup>90</sup> Does this mean that the statement of account or unauthorised transaction is conclusive as against the card holder in a court of law if he fails to give written notice within the 60-day period?

### 3. *Bank's duty on notification*

Part IV of BNM/GP 11 titled 'Duties of Financial Institution' contains paras 18 and 19 on the notification process. Paragraph 18 stipulates that a financial institution shall provide an effective and convenient means by which a customer can notify any loss, misuse, theft or unauthorised use of a card or breach of access of security. Accordingly most financial institutions have a hotline for lodging complaints. However the legal status of an oral complaint made to the hotline is debatable because of the written requirement in para 14(2). Nevertheless para 19 seems to permit telephone notification, in the following manner:

- (i) A financial institution shall provide procedures for acknowledging receipt of notifications including telephone notification, by a customer for loss, misuse or unauthorised use of a card or breach of access code security.
- (ii) The acknowledgement need not be in writing provided the financial institution has a means by which a customer can verify that he had made a notification and when such notification was made.

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<sup>89</sup> An oral countermand to stop a cheque is valid and effective in law. See the case of *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262.

<sup>90</sup> Geva, Benjmain, *supra* n 33 at p 81.

Further, subpara 19(2) states that the bank's acknowledgement can be oral; and the burden of notification (be it oral or written) is thrown back to the consumer by his verification.

4. *The financial institution's burden of proof easily shifted to the customer*

Subpara 14(3) discusses the financial institution's burden of proof once a customer has notified it of an unauthorised transaction. The aforesaid subpara places the burden of proof on the financial institution to show that the electronic fund transfer was authorised.

Subpara 14(4) states that the burden of proof in subpara (3) shall be satisfied if the financial institution proves that:

- (a) the access code, card and the security of the fund transfer system was fully functional on that day; and
- (b) the officers of or agents appointed by the financial institution were not fraudulent or negligent in carrying out the electronic fund transfer.

Pursuant to the aforesaid paragraphs, if the bank discharges its burden of proof, then this would mean the burden of proof shifts to the customer.

The other instance where the burden shifts to the customer is in the earlier discussed para 15. Professor Benjamin Geva in his commentary on paragraphs 14-19 of BNM/GP 11 has observed that:<sup>91</sup>

Other than in circumstances in [Paragraph 17(1)(a),(b)] under which the customer is exonerated from liability, when the financial institution meets the burden of proof under either [Paragraph 14(4) or Paragraph 15(1),(2)], the financial institution is not required to show any causal link between what was proven and the unauthorised transfer with respect to which loss has been incurred. Presumably, however in response to proof by the financial institution under [Paragraph 14(4) or Paragraph 15(1),(2)], the customer is always free to prove that any of the conditions enumerated in [Paragraph 17(1)] has been met, and thereby release himself or herself from liability. Regardless, there is no definition as to when a transfer is 'unauthorised'.

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<sup>91</sup> *Ibid.*

Professor Benjamin Geva has also noted the anomaly created by the guidelines being silent on any ceiling limit for the customer's liability in the event the financial institution is able to discharge its burden of proof under paras 14(4) or 15(1) and (2), unless the customer totally exonerates liability by virtue of para 17(1)(a) or (b).<sup>92</sup> The professor elaborates:<sup>93</sup>

However, where 'the customer has contributed to the loss resulting from an unauthorized transaction by, delaying notification' regarding loss or misuse or theft of the card or breach of code security, liability for actual loss is limited by withdrawal or transactions limits [in the case of credit cards and other forms of electronic funds transfers] as well as account balance [only in the other forms of electronic funds transfer]. This introduces ambiguity: it seems unreasonable to read the Guidelines as fastening unlimited liability when the customer contributed to the loss other than by delaying his or her notification, and limited liability when the customer has contributed to the loss by delaying notification. Under [paragraph 17(1)(a)(b)], the customer is under no liability unless loss has been attributed to or contributed by him or her.

Overall BNM/GP 11 seem to shift the burden of proof from the financial institutions to the customer with ease. There is evidently no clarity or comprehension from the consumer's angle given the fact that the consumer is not in a position to defend or proclaim his innocence if the banker alleges that he is privy to the unauthorised transaction. The only supposed right to information accorded to the 'accused customer' is stated in para 28 of BNM/GP 11 which is discussed below.

##### 5. *Financial institution to provide information*

Para 28 requires the financial institution to provide a customer found liable, with the necessary document in the possession of the financial institution. Para 28 provides:

Where a financial institution is of the view that the customer is liable for loss arising from any loss, misuse, theft or unauthorised use of a card or breach of access code security:

- (a) the financial institution is to make available to the customer, copies of any documents or other evidence relevant to the outcome of its investigation, including information from the log of transactions; and

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

- (b) the financial institution is also to refer to the systems log to establish whether there was any system or equipment malfunction at the time of the transactions, and advise the customer in writing of the outcome of its inquiry.

Provided always that the financial institution will not be required to furnish any information that has direct relation to or impacts the security of the financial institution or its system.

Para 28 is arbitrary as the 'financial institution is of the view that the customer is liable'. This means the financial institution is the judge and jury in this matter although it is a party to the whole scheme. The writer is of the opinion that this paragraph should be read together with the subsequent para 29 of the guidelines titled 'Breach of Duties':

Where the financial institution, its officers or agents appointed fail to observe the -

- (a) allocation of liability under paragraphs 16 and 17; or  
(b) procedures on complaint, investigation and resolution under paragraphs 25 and 26  
and where such a failure prejudiced the outcome of the complaint or resulted in delay in its resolution, the financial institution may be liable for the full amount of the transaction which is the subject of the complaint.

## 6. *Concluding Points on BNM/GP11*

In conclusion, the above stated discussion on BNM/GP 11 providing consumer protection against unauthorised use or transactions has yielded the following observations:

- (i) Firstly, most credit card users are unaware of these Guidelines; it has been termed as 'deadwood' by the banking industry. The new PSA in s 77(4) renders BNM/GP 11, which was issued pursuant to s 119(deleted) and s 126 BAFIA, as being lawfully issued under s 70 of PSA. BNM/GP 11 has not been amended, rescinded or replaced under the PSA; accordingly the Guidelines are still 'alive'.
- (ii) Secondly, the Guidelines are not coherent and are confusing to the consumer.
- (iii) Thirdly, almost all bank officers in the credit card department refer to the Credit Card Guidelines as the 'Consumer Protection' guidelines and not BNM/GP 11.

(iv) Lastly, BNM/GP 11 is a concoction for all ailments and therefore a remedy for none. BNM/GP 11 covers all forms of plastic cards although the nature of ATM/Debit cards is different from credit cards. The situation is worsened by the fact it also covers consumer protection for any other form of electronic funds transfers except PC banking.

B. *Consumer Protection against 'Unauthorised Use' in Credit Card Guidelines (BNM/RH/GL014-1)*

1. *The liability for lost or stolen cards*

Para 15 of the Credit Card Guidelines deals specifically with the liability for lost or stolen credit cards. Para 15.1 is similar to paras 18 and 19 of BNM/GP 11 that impose on the issuer a duty to provide an effective and convenient method to notify any lost, stolen or unauthorised use of his credit card. The issuers must implement in-house procedures for acknowledging receipt and verification of notification for lost, stolen or unauthorised use of credit card. Para 15.2 stipulates that:

The cardholder's maximum liability for unauthorised transactions as a consequence of a lost or stolen credit card shall be confined to a limit specified by the issuer of credit cards, which shall not exceed RM250.

There are two provisos to this paragraph, namely;

- (a) The cardholder has not acted fraudulently; or
- (b) The cardholder has not failed to inform the issuer of the credit cards as soon reasonably practicable after having found that his credit card is lost or stolen.

Therefore the Guidelines does impose a ceiling of liability for a *bona fide* consumer caught in an unauthorised transaction. At this juncture, it is noted that the Guidelines does not define the term 'unauthorised use'. The legal effect of the above stated para 15.2 of the Guidelines is considered in a recent High Court decision, *Diana Chee Yun Hsai v Citibank Berhad*.<sup>94</sup> In that case the learned judge held that the onus of proving loss and unreasonable delay to report loss of the card was upon the issuer of the credit card.<sup>95</sup> This is a

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<sup>94</sup> [2009]1 LNS 573.

<sup>95</sup> *Id* at p 31 (Lexis Nexis downloaded page).

commendable interpretation as the duty to report is an onerous duty to be placed upon the cardholder.<sup>96</sup> This case, being a landmark decision in this area of the law, is discussed below.

Para 15.3 permits the issuer to exceed the RM250 mark if it can prove either one of the above stated two provisos in para 15.2. Pursuant to para 15.5, this imposition of liability is notified to the cardholder in his monthly billing statement. However it is noted that the degree of action in both the provisos differ; the first proviso deals with a criminal intent namely fraud but the second proviso is merely carelessness or negligence of the consumer in delaying or not notifying the issuer. Since both the actions greatly differ in nature it is rather harsh not to impose any limitation for at least the second proviso. It is suggested that if the consumer has not grossly delayed notification, then it is fair to impose liability until the credit limit of his card corresponding to the provision in para 16(a) of BNM/GP 11 as discussed earlier. In this context, there appears to be a conflict between the Guidelines and BNM/GP11.

Lastly, para 15.4 ensures that the cardholder is not liable for any unauthorised transaction charged to the credit card after notification either verbally or in writing. The Guidelines does expressly allow oral notification (unlike BNM/GP11). Immediately upon notification, the issuer shall take action to prevent further use of the lost or stolen card. Nevertheless, apparently in practice (even with notification), the biggest discount credit cardholders had received was a 50% discount on disputed fraudulent amounts, which exceeded the ceiling of RM250.<sup>97</sup> At this juncture, it is pertinent to discuss the case of *Diana Chee Yun Hsai v Citibank Berhad*,<sup>98</sup> which has judicially thrown some light in this area of the law.

## 2. *The Credit Card Guidelines (BNM/RH/GL014-1) has the force of law*

The bravery of one credit card holder named Diana Chee to fight her cause in the High Court has finally created a dent in the armour of credit card issuers as a whole. Diana Chee had in the year 2008 visited the MATTA (Malaysian Association of Tour & Travel Agents) fair,<sup>99</sup> hoping to get an opportunity to supplement her income as a part-time travel sales person. Chee's credit cards,

<sup>96</sup> Refer to article by Stivastava, D K, 'Credit Card: A Boon or Bane For The Customers' (1997) 24 JMCL 143 at p 156.

<sup>97</sup> Interview of Darshan Singh, Director, National Consumer Complaint Centre, 'Dealing with credit card fraud', Personal Money, *The EDGE magazine*, Issue No 79, pp 34-35.

<sup>98</sup> *Supra* n 94.

<sup>99</sup> Pek Wan, 'Consumer Victory for Chee as court upholds RM250 cap on lost credit cards', 10 June, 2009, <http://www.mmail.com.my>(accessed 10 August 2009).

one from HSBC and another from Citibank, were stolen when her handbag was pick pocketed at the MATTA fair and she only discovered the theft the next day.<sup>100</sup> She promptly informed the respondent, Citibank on the same day being 7 September 2008 and lodged a police report on the following day. Subsequently the respondent debited her account for the sum of RM1, 859.01 being the charges incurred as a result of unauthorised use of her credit card on 6 September 2008. Chee's solicitors wrote to the respondent citing paras 15.1, 15.2 and 15.3 of the Credit Card Guidelines that limited the credit card holder's liability in the event of unauthorised use. The bank's solicitors in turn replied by a letter dated 11 December 2008 that the bank had not disregarded Bank Negara's guidelines but had incorporated the aforesaid guidelines with some modifications. It was explained that the bank had imposed a duty on the cardholder to notify the loss one hour prior to the unauthorised use and to provide proof of acting in good faith and exercising reasonable care and diligence to prevent such loss or theft or unauthorised use of the card before the bank can exercise its discretion whether to resolve the liability or not. The bank asserted that such a clause is not in contravention of the Bank Negara guidelines. In a concise form, Chee sought the following declarations:

- (i) A declaration that the Credit Card Guidelines (identified in this case as 'BNM/RH/GL-012-1') issued by Bank Negara pursuant to ss 25 and 70 of the PSA has the force of law.
- (ii) A declaration that the terms and conditions of the credit card agreement relied on by the respondent bank to deduct RM1,859.01 from her account was contrary to the above stated Guidelines and hence was illegal, void and contrary to public policy.
- (iii) A declaration that by acting and continuing to act upon the terms and conditions of the credit card agreement which was contrary to the Guidelines, the respondent bank has committed an offence under s 57 of the PSA.
- (iv) That in the absence of any fraud or failure by Chee to notify the respondent bank of the credit card loss, the bank was not entitled to deduct any sum exceeding RM250 from her account according to the Credit Card Guidelines.

The learned judge, Justice Datuk Mohamed Apandi Ali, reproduced in toto the Credit Card Guidelines in the written judgment. This is very commendable as the aforesaid Guidelines are not easily accessible to the public at large. The

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<sup>100</sup> *Ibid.*



judge found that Chee was neither fraudulent nor negligent in promptly informing the bank of her credit card loss in compliance with para 15.2 of the Credit Card Guidelines. The stipulation in the credit card agreement limiting liability to 'one hour prior to reporting of the loss card' was to the learned judge's mind not only unreasonable and ridiculous but also contrary to the aforesaid paragraph.<sup>101</sup> The learned judge further reminded the parties that the terms and conditions of the credit card agreement were in a contract deemed to be read, governed and construed in accordance with the laws of Malaysia, and in this case being the PSA.<sup>102</sup>

Next, the learned judge dealt with the main issue of whether the Credit Card Guidelines had the force of law. He opined that since the Guidelines were issued pursuant to the enabling s 70 of the PSA, it was a form of subsidiary legislation. Subsidiary legislation is defined under s 3 of the Interpretation Act 1948 and 1967 (Act 388) as follows;

Any proclamation, by law, rule, regulation, order, notification, by law or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect.

He elaborated that the Credit Card Guidelines came under the category of 'other instrument' and is therefore a subsidiary legislation having legislative effect and the force of law. He quoted Shakespeare in *Romeo and Juliet*, wherein Juliet said, 'what's in a name? That which we call a rose by any other name, would smell just as sweet.'

The judge further pointed out that the Guidelines contained a penalty, whereby pursuant to para 4.1, non compliance with the Guidelines was an offence punishable under s 57 of the PSA by a hefty fine up to RM500,000 and an extra RM1,000 for every day the offence continued. Section 26(1) of the PSA also provided that apart from the aforesaid penalty, Bank Negara could revoke the credit card issuer's approval if it failed to comply with any of the Guidelines issued by Bank Negara. The learned judge also cited the case of *Affin Bank Bhd v Datuk Ahmad Zahid bin Hamidi*<sup>103</sup> that treated certain guidelines issued pursuant to s 126 of the BAFIA as having the force of law.

<sup>101</sup> *Supra* n 94 at p 31 (CLJ online downloaded page.)

<sup>102</sup> *Id* at p 32.

<sup>103</sup> [2005] 3 MLJ 361, at p 372.

Overall, it is commendable that the court in *Diana Chee*'s<sup>104</sup> case gave legal enforceability to the Credit Card Guidelines since it has always been regarded as 'soft' law. This view is in line with *Affin*'s<sup>105</sup> case wherein Guidelines issued by Bank Negara have the force of law. However the judge in *Affin*'s case did not elaborate in detail the reason such guidelines have the force of law.

There is apparently no requirement for the Credit Card Guidelines to be gazetted or published or consultation to be held, although most types of subsidiary legislation are subject to one or more of such requirements. The publication of the Guidelines is not necessary if it is a Supplement 'B' subsidiary legislation. What Supplement 'B' subsidiary legislation means is discussed below. However such non-publication of Bank Negara guidelines has its drawback as the consumers and consumer organizations do not have an opportunity to view the guidelines and are denied easy access to such guidelines.

The Exchange Control Notices (ECM notices) issued by Bank Negara under the Exchange Control Act 1953 are also a form of administrative directives issued by Bank Negara. In the ECM notices case of *Development & Commercial Bank Bhd v Cheah Them*,<sup>106</sup> the learned judge referred to the administrative law book of the late Professor MP Jain.<sup>107</sup> Professor MP Jain's view was that s 18(1)(c) of the Interpretation Act 1967 did not make publication of Supplement 'B' subsidiary legislation mandatory due to the words 'as and when necessary' stated in the said section. Supplement 'B' subsidiary legislation are all other forms of subsidiary legislation other than those expressly stated in s 18(1)(b) of the Interpretation Act 1967;<sup>108</sup> namely Royal Proclamations, orders, rules, regulations and by-laws. It is pertinent to note that the Exchange Control Act 1953 has s 39(2)(c) which states that 'ECM Notices that have been issued, are valid for all purposes'. This particular wording in the Exchange Control Act 1953 strengthens the legal view that ECM notices are a form of administrative directive that on par with subsidiary legislation that possesses legal force.

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<sup>104</sup> *Supra* n 94.

<sup>105</sup> *Supra* n 103.

<sup>106</sup> [1989] 2 MLJ 496.

<sup>107</sup> Jain, MP, *Administrative Law of Malaysia and Singapore* (Kuala Lumpur: Malayan Law Journal, 1980) at p 117. The latest edition of the book is dated 1997.

<sup>108</sup> *Ibid*, MP Jain referred to the Interpretation Act 1967. The title of the current Act is the Interpretation Act 1948 and 1967 (Act 388). Section 18 remains the same as in the version referred to by Jain in his book.

The more accurate interpretation is that the Credit Card Guidelines fall within the category of quasi legislation, which in the context of administrative law is also known as 'directions'.<sup>109</sup> Directions, or more specifically called 'guidelines' in the field of banking, are created by the executive (Bank Negara) due to its need to administer the credit card industry pursuant to s 70 of the PSA. On the other hand, the power to create regulations, pursuant to s 69 of the PSA is derived from the legislature delegating rule making power to the executive, which is known as subsidiary legislation or delegated legislation. The difference is obvious when one reads s 69(3) of the PSA, which states:

Notwithstanding anything contained in any-

- (a) approval, directive, acknowledgement, notice, standard or guideline issued under this Act; or
- (b) rules and procedures governing a payment system or payment instrument, every operator or issuer shall comply with any regulations made under subsection (1) and where there is any conflict or inconsistency between anything contained in paragraph (a) or (b) and the regulations, the provisions of the regulations shall prevail and have full force and effect.

It should be observed that in s 69(3) of the PSA, if there is a conflict between regulations and guidelines, the regulations will prevail. This is because regulations are a higher hierarchy law than guidelines/directions. The legal enforceability of directions has long been a bone of contention among scholars.<sup>110</sup> The traditional view was that quasi legislation was a form of administrative pronouncement by the administrator which was flexible, issued with speed and lacked the enforceability of subsidiary legislation.

This traditional view, however, has changed with the onslaught of massive forms of quasi legislation in all administrative fields; prompted by the lack of diligence on the part of the administrator to comply with the tedious process of formulating subsidiary legislation or parent Acts of Parliament. The writer submits that the Indian courts' approach that have shifted the stand from non-enforceability to enforceability of directions that conferred benefits on the consumer is to be preferred, especially in an area wherein these guidelines are the only written pronouncements by the administrator. The Indian courts have

<sup>109</sup> See Jain, MP, *Administrative Law of Malaysia and Singapore* (Kuala Lumpur: Malayan Law Journal, 3<sup>rd</sup> ed, 1997) at p 81.

<sup>110</sup> Refer to Megarry, RE, 'Administrative Quasi Legislation' (1944)60 *LQR* 125; and Gantz, Gabriele, *Quasi Legislation: Recent Developments in Secondary Legislation* (London: Sweet & Maxwell, 1987).

realised the folly and misfortune to the consumers if they were to deny enforceability of certain directions.<sup>111</sup> Furthermore, credit cardholders have a legitimate expectation that such a guideline that limits their liability in the event of 'unauthorised use' has been implemented to benefit and protect him. Therefore the writer is urged to state that the Bank Negara Guidelines, being quasi-legislation, are enforceable considering that these guidelines are the only pronouncements in the field of credit card law in Malaysia.

In light of the above discussion on the Credit Card Guidelines, the overall concluding remarks are as follows:

- (i) The Guidelines is the guideline being currently and actively implemented by financial institutions.
- (ii) The aforesaid Guidelines is in essence a non consumer protection set of guidelines although it does contain some protection to the user. Para 16.1 stipulates that an issuer of credit cards shall conduct a consumer awareness and education programme on a continuing basis which shall include, *inter alia*, advice on fraud prevention measures, and potential liability for lost or stolen credit cards. The writer feels it is more a regulatory type of guidelines for providing a standard and efficient credit card scheme as credit card issuers have clearly transgressed the consumer protection stipulations in the aforesaid Guidelines.
- (iii) Where there is a conflict between BNM/GP 11 drafted in 1998 and the Credit Card Guidelines issued in 2004, which is to prevail? The banker says the Credit Card Guidelines but then again it is not strictly a consumer protection guideline. Nevertheless, *Diana Chee's*<sup>112</sup> case is a push to the right direction in favour of consumer protection in this area of the law.

## X. Self-Regulating - The Code of Good Banking Practice

The financial institutions in Malaysia have as a form of self regulation introduced the 'Code of Good Banking Practice'. The Code of Good Banking Practice was issued by the Association of Banks in Malaysia (ABM) in 1995. The Code sets out the manner banks are required to deal with their customers in areas such as account opening, charges and interest rates, complaints and disputes

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<sup>111</sup> Refer to Chapter VIII, Directions, Jain, MP, *Treatise on Administrative Law* (Wadhwa & Nagpur, 1996) Vol I at p190; Refer also to the latest edition of the book MP Jain & SN Jain, *Principles of Administrative Law - an exhaustive commentary on the subject containing case-law references (Indian & Foreign)* (Wadhwa & Nagpur, 6<sup>th</sup> enlarged ed, 2007), Vol II at Chapter VIII, Directions.

<sup>112</sup> *Supra* n 94.

confidentiality, marketing of services *etc.*<sup>113</sup> The Code is the banking industry standard implemented by ABM to implement 'good' or positive banking practices. In relation to credit cards, the Code requires banks to inform customers about their responsibilities of safeguarding their cards and PINs to prevent fraud. Customers should be clearly informed of their liabilities and the bank's liabilities in the event of unauthorised use or transactions using their credit cards.<sup>114</sup> However the Code has no legal enforceability and is merely an in-house measure to regulate the plastic card industry.

### **XI. The Financial Mediation Bureau**

Both the BNM/GP 11 and the Credit Card Guidelines stipulate that the bank provide an 'in house' procedure to resolve any dispute relating to the unauthorised use of credit cards. If the consumer is unhappy with the 'in-house' decision of the bank, he can lodge a complaint with the Financial Mediation Bureau. The Financial Mediation Bureau deals with claims relating to credit card fraud up to a limit of RM25,000. The customer has to exhaust the avenue provided by the bank first before resorting to the mediation process. Therefore the customer has to hand to the mediation bureau a 'final decision' letter from the bank indicating the matter has not been resolved. Then the customer has to complete and submit to the mediation bureau a Complaints Form and a Consent Form to permit the banker to disclose to the mediator all information in relation to his account.<sup>115</sup> This mediation bureau acts as a 'middle person' to resolve any conflict between the parties. The bank is bound by the decision of the mediator and cannot refer the matter to court. However if the customer is still unhappy with the mediation bureau's decision, he can then refer the matter to a court of law. Therefore the courts will be the final destination of a disgruntled customer.

### **XII. Conclusion**

Several years ago, the bankers in Malaysia initiated a campaign named 'Make the Switch' to promote the use of electronic banking and electronic devices. The move, not only in Malaysia but throughout the world, is to shift to a 'cashless' society. The credit card is the most favourite device actively used by consumers, mainly the younger generation who wish to avoid being burdened by heavy wallets as well as the danger of being mugged. The writer feels that the current

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<sup>113</sup> 'Promoting Good Banking Practice', <http://abm.org.my> (accessed 27 September 2007).

<sup>114</sup> *Ibid.*

<sup>115</sup> This is an exception to the banker's duty of secrecy provided by s 99(a) BAFIA.

banking consumer protection legislation in Malaysia is inadequate and not comprehensive enough to deal with the pitfalls of using a credit card especially in cases of fraudulent use. It is in the best interest of the banking fraternity to balance profits generated by the credit cards with the rights of the banking consumer. At the end of the day, consumers have to be assured that in time of a crisis they have an avenue to seek redress in a legal system which is uncomplicated, simple and easy to comprehend.

## **The Present Parameters of Promissory Estoppel and Its Changing Role in the English, Australian and Malaysian Contract Law**

**Wan Izatul Asma Wan Talaat\***

### *Abstract*

*As an equitable doctrine, promissory estoppel traditionally operates to prohibit a contracting party from going back on his earlier promise to suspend or alter his contractual right on the promisee, who has detrimentally acted in reliance on such promise. Nevertheless, the continuing evolution of this doctrine after its formal promulgation in 1947 through the High Trees case has led to the changing role of promissory estoppel in contract law. It is presently being applied more flexibly through the compromise made on four of its traditional limitations, which have affected its parameters and resulted in the following phenomenon - the use of promissory estoppel as a sword; the negation of pre-existing contractual relationship; the less stringent requirement of unconscionability in lieu of detrimental reliance; and its extinctive effect. This paper comparatively speaks on the changing role of promissory estoppel in contract law due to its continuing evolution in three common law countries, namely England, Australia and Malaysia.*

### **I. Introduction**

Promissory estoppel is meant to prevent any occurrence of inequity or injustice caused by the action of the promisor in backing out from his promise, which had initially led the promisee to act to his detriment. Traditionally, as an equitable doctrine, the scope of the doctrine of promissory estoppel is subject to five

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