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Allocating Unauthorised Credit Card Payment Losses: The Credit Card Guidelines and Consumer Protection

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ABSTRACT

Consumer with credit card payment facility faces the risk of unauthorised payment. Unauthorised payment occurs when a person initiated a credit card payment by using the consumer's access device without his consent. It causes losses which are basically allocated between the issuer and the consumer according to the laws governing the bank-customer relationship. Apart from the old laws, the credit card payment system which uses new technology involves new transaction format and possesses some distinctive characteristics also requires new form of regulation. Considering the need, Bank Negara Malaysia had issued the Credit Card Guidelines 2003 (the CC Guidelines) to regulate the consumer-issuer relationship, including regulating the allocation of unauthorised payment losses. Because of the importance of the CC Guidelines' loss allocation rules, this paper examines the rules to identify their impact on the consumer and also to give comments and suggest ideas for improvement. The findings revealed that the rules are ambiguous while at the same time failed to consider the impact of technological development on the payment systems. The ambiguities and weaknesses allow the issuer to allocate the losses by using the contract terms to the consumer's prejudice. Therefore, it is recommended that the consumer should be aware of the contract terms that allocate fraudulent payment losses, in particular, terms that prescribe his duties and liabilities in relation to the losses. Finally, Bank Negara should revise the CC Guidelines to remedy the weaknesses.

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INTRODUCTION

Credit cards are significantly popular as the payment method off line and online. The reasons include convenience, wide acceptance by merchant, local and international and the attraction of having purchase power despite lack of money. Being such a convenient and popular system, its users are however exposed to a higher risk of unauthorised payment. Nevertheless, risk always exists in contracting and regardless of the effort taken by the credit card networks to introduce Chip embedded card and PIN authorisation, unauthorised credit card payment problem is always an issue.[1]

One of the prevalent issues associated with unauthorised credit card payment is the allocation of the losses caused by that payment. Accordingly, the regulatory aspect of the consumer-issuer relationship must describe the method of and the conditions for allocating the losses to the contracting parties; either to one of them in entirety or to each ~~of~~ them in proportion. In view of the risk of the unauthorised payment and the consumer's potential liability, this paper examines rules governing the allocation of fraudulent credit card payment as provided by the CC Guidelines[2] in order to identify the impact of the rules on the consumer.

In discussing the allocation of unauthorised credit card payment losses it is essential to note two important issues. The first issue is the differences and the link between unauthorised transaction and unauthorised payment. Unauthorised credit card transaction refers to a card-linked transaction in which unauthorised individual uses a credit card to pay for his purchase. The transaction is unauthorised because it lacks the approval of the credit cardholder such as when the transaction involves a stolen or lost credit card. On the other hand, unauthorised payment refers to a payment made by the issuer to the merchant via the merchant bank after receiving a fraudulent payment request. In *National Westminster Bank Ltd v Barclays Bank International Ltd* 1975] Q.B. 654 at 666 and in *Barclays Bank Ltd v W.J. Simms Son*

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1 Bank Negara Malaysia reported that the number of credit card fraud increased in 2007 irrespective of the introduction of the EMV or chip embedded credit card. The reality is fraud cannot be totally eliminated by using this type of card since they are introduced to curb counterfeiting fraud only while credit card fraud is not limited to the use of counterfeit card. See Bank Negara, Financial Stability and Payment Systems Report 2007, pp. 113.

2 The CC Guidelines were initially issued by Bank Negara Malaysia under ss 19 and 126 of the Banking and Financial Institutions Act 1989. With the coming into force of the Payment Systems Act 2003, the CC Guidelines are deemed lawfully issued under s 70 of that Act. Subject to s 61(1) of the Payment Systems Act 2003, an issuer can be penalised for failing to observe the Guidelines.

& Cooke (Southern) Ltd, [1980] Q.B. 677, at 679, it was said that when the bankers paid money out of the customer's account within the given mandate, they acted in pursuant of their obligation to the customers and accordingly had discharged the duty they owed to the customers.

The second issue concerns with the validity of the payment request made by the card user and the payment made by the issuer upon receiving the request. Since the dispute over the validity of the credit card payment begins once the consumer claims that the payment was not made by him or any authorised person, it is necessary to determine the consumer's claim by questioning first the authority of the person who initiated the credit card payment and second the authority of the issuer when making the payment to the merchant.

A credit card payment system operates with the involvement of several contracting parties and requires different contracts. However, as the issue of unauthorised payment touches the consumer and the card issuer relationship it is necessary to describe the nature of their relationship. The characteristics of this relationship influence the type of rules used to allocate unauthorised payment losses.

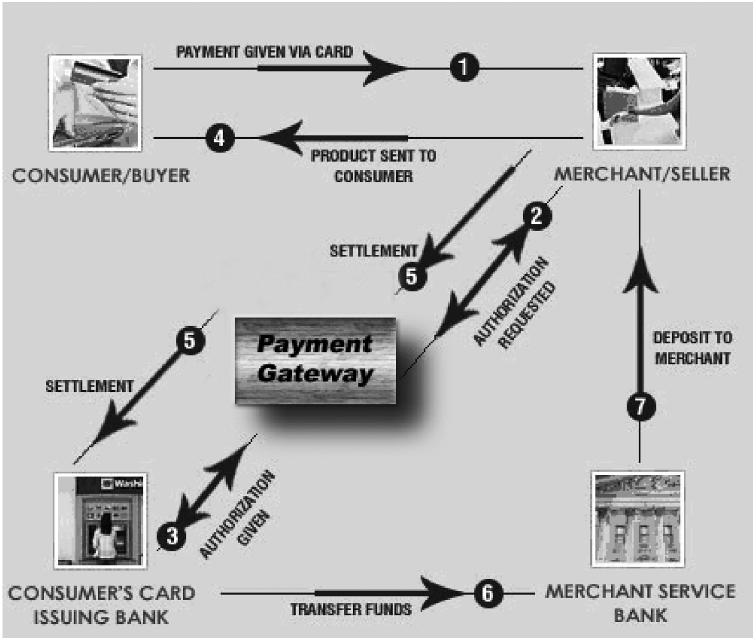
THE CONSUMER – ISSUER RELATIONSHIP

The allocation of unauthorised credit card payment being a payment made by the issuer upon receiving a fraudulent payment request is an important matter in the relationship between the consumer and the issuer. Therefore, it is necessary to establish the relationship between the issuer and the consumer before analysing the loss allocation rules.

Credit card payment facility is a payment system which involves a myriad of relationship between different parties. The parties involve in the whole process from the moment the consumer requests for the payment authorisation until the payment is settled and this includes the issuer, merchant, merchant bank, credit card network and other supporting systems.

As seen in Figure 1 the link between the consumer and the issuer is however missing as it was merely concern with the payment processing system. If the whole diagram is described in detail it will show a contractual relationship between the consumer and the issuer and also between other various parties. The contract between the consumer and the card issuer grants the consumer the benefits of using a credit card with or without supplementary card(s).

Millet J. in *Re Charge Card Services Ltd* [1989] Ch 497, at 158 noted that when a credit card issuer entered into a contract for credit card payment facility it was also acting as a principal on its own right and not merely as an agent for the accountholder. Hence, it can be derived that the consumer-issuer relationship is one of the contracts of an agency or a mandate relationship.



Source: Adopted with modification from http://www.usaepay.com/diagram.htm

Figure 1 Credit card payment system

A mandate is generally a roman form of gratuitous contract whereby a "mandant" required a "mandatory" to act on his behalf. However, a mandate is also defined as "a commission by which a party is entrusted to perform a service, especially without payment and with indemnity against loss by that party" and "a written authority enabling someone to carry out transactions on another's bank account". Most importantly, a mandate also refers to a relationship more like an agency where the agent received fees for his service (Zimmermann, 1996; Macgregor, 2002; Nicholas, 1976; *Copland v Brogan* [1916] S.L.T. 13, at 15). Looking at the practice of the card issuer it appears that the issuer acts as the consumer's mandatory or agent when making a credit card payment on behalf of the consumer.

Since the relationship between the consumer and the issuer is one of the contracts of a mandate, the primary source of the loss allocation rules would be the terms of the credit card agreement as supplemented by the agency rules. The consumer-issuer relationship is also governed by the CC Guidelines which imposed on the issuer rules governing the contents and also the pre and post-contractual stages of the contract.

THE LOSS ALLOCATION RULES AND METHOD OF AUTHENTICATING PAYMENT REQUEST

A discussion on the validity of a credit card payment must also focus on the link between the payment mandate, mode of authenticating the mandate and loss allocation rules. The credit agreement typically provides that a credit card payment is considered to have been requested by an authorised person if the prescribed mode of accessing the account is used. The usual mode of access is the credit card. The rule which binds the consumer to the use of the access mode is derived from the practise of the card industry which relies on the credit card to verify the identity of the card user and to authenticate his authority to use the card. Since the prescribed mode of access is given to the consumer, the issuer assumes that the payment request was made by an authorised individual. Accordingly, based on this understanding the payment made by the issuer upon receiving the request is considered to have been made according to its mandate although it may have been initiated by an unauthorised person. This payment binds the consumer and he must repay the card issuer.

The mode of accessing the credit card account which is also used as a mode to authenticate the payment request is usually described in the credit agreement. It varies depending on the payment infrastructure use by the merchants and the communication system used by the consumer. Traditionally, signature is sufficient. In the case of off-line credit card and face to face transaction, the authentication process relies on the use of the card which sometimes bears picture and the consumer's manuscript signature. However, if the payment is made at the merchant's terminal and it is online, the authentication process requires the payment card and the Personal Identification Number (PIN) (Robertson, 2004). Meanwhile if the electronic payments are for the internet or mobile-commerce (m-commerce) transaction, the process requires the consumer to type in the card details at the initial stage of registering as an accountholder with the payment system provider uses by the seller.[3] In subsequent transactions, the mandate is authenticated by using the PIN given to the consumer upon successful registration.

The diversity of the mode of access, and of issuing and authenticating the payment request influences the effectiveness of the rules used in allocating unauthorised credit card payment losses. Therefore, to protect the consumer against unauthorised payment, the credit card loss allocation scheme must have rules that are applicable to all available methods.

[3] For example Paypal is a payment system provider used by the famous online auction marketplace eBay.

UNAUTHORISED PAYMENT: ITS DEFINITION AND PROBLEM

The CC Guidelines contain a regime of loss allocation that apparently has traces of the mandate rules. Paragraph 13.2 of the CC Guidelines provides:

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

The reference to "unauthorised transaction" in Para 13.2 indicates the application of the mandate rules in the allocation of unauthorised payment losses. This conclusion can be deduced from the literal meaning of "unauthorised" which refers to an act of a person performed on behalf of another without the latter's permission or approval,(Pearsall, 2001).

The CC Guidelines do not define unauthorised payment. Similarly it does not clearly define unauthorised transaction. However, Para 13.2 of the Guidelines allocate losses by considering whether the transaction was "as a consequence of a lost[4] or stolen[5] credit card". Literally "consequence" means "a result or effect" (Pearsall, 2001 p 303). On the other hand, "result" as a noun refers to an "outcome" while in the verb form it means to "occur or follow as a result" (Pearsall, 2001, p 1221). Accordingly, "consequence" can be interpreted to refer to something or some events that happened as a result of certain actions or certain circumstances.[6] Thus, unauthorised transaction in Para 13.2 of the CC Guidelines can be understood to mean credit card transaction initiated by using a lost or stolen card. Accordingly, it is possible to define unauthorised payment as a payment made by the issuer upon receiving and authenticating a payment request made using a lost or stolen card.

Literal interpretation of Para 13.2 shows that when the payment is requested and authenticated by using the card the CC Guidelines' loss allocation scheme will apply to determine the consumer's and issuer's losses if the payment turned out to be unauthorised.

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[4] In *Kedai Pajak Fah Ngien & Ors v Public Prosecutor* [2002] 5 MLJ 613, at 622 the court summarised that lost occurred when the owner is deprived of an article without his voluntary action, conduct or prior knowledge.

[5] In *Shamsudin Bin Shaik Jamaludin v Kenwood Electronics Technologies (M) Sdn Bhd* [1999] 3 MLJ 438. at 477 the court held that to constitute theft under s.378 of the Malaysian Penal Code two elements must be proved, first "moving a moveable property of a person out of his possession without his consent", and second "the moving [is intended to take] the moveable property with a dishonest intention."

[6] Referred based on the principle of persuasive authority to the Singapore case of *Singatronics Ltd v Insurance Co of North America* [1994] 1 SLR 500, at 511.

Paragraph 13.2 however did not specifically employ the phrase "*unauthorised use of the card"*. Therefore, it is also possible to extend the rule in Para 13.2 to cover credit card payment requested and authenticated by using the card details. Furthermore, the word "consequence" as earlier said connotes the occurrence of certain event as a result of some previous events. As it is possible for credit card transaction to be performed using details obtained from a stolen or a lost card, the resulting transaction falls under the category of an "unauthorised transaction as a consequence" of the stealing or the loss of the card. Based on this interpretation, the validity of the credit card payment requested and authenticated by using the card details obtained from a lost or stolen card must also be assessed according to the CC Guidelines' loss allocation rules. However, if the details are obtained from other sources such as by rummaging someone's dustbin for personal financial information then the CC Guidelines' rules do not apply.

Regardless of the potential of extending the scope of unauthorised payment, in reality unauthorised payment in the CC Guidelines is constrained by its reference to the card as a mode of initiating the payment. This restriction affects the consumer as it allows the issuer to allocate all losses caused by fraudulent payment initiated without using the card to the consumer through its contract terms. The issuer may use this opportunity to the prejudice of the consumer because the CC Guidelines do not invalidate these types of contract terms.

From the above discussion it can be understood that when fraudulent payment does not fall within the scope of CC Guidelines' loss allocation scheme, the issuer is free to contractually allocate the whole amount of losses caused by unauthorised transaction to the consumer. Thus, when fraudster obtained the card details via activities such as online hacking or eavesdropping, the consumer is totally responsible for the losses.[7]

Such a practice can be observed from various credit card terms and conditions available in the market. For example, clause 8 of the Citibank credit agreement provides that the consumer is responsible for the loss incurred in online transaction without limitation.[8] The same clause gives the issuer the right to assume that the entering of credit card information on the internet is a proof that the payment was authorised by the consumer. This term does not take into account the fact that the person who initiated the payment may have not been authorised by the consumer.

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[7] Hacking was defined in *Creative Purpose Sdn Bhd vs Intergrated Trans Corp Sdn Bhd* (1997) 2 MLJ 449, as "unauthorized access to computer systems by those who simply enjoy using computers and experimenting with their abilities in trying to invade a computer system…In a software world, hacking means computer programming. It may also involve the de-compilation or reverse engineering of computer programs with the aim of changing the behaviour of the program."

[8] See Citibank credit terms and conditions at <http://www.citibank.com.my/APPS/portal/genericLoadPage .do?tabNo=3&htmlPageName=/info/det/creditcard_tnc.htm>. Accessed on 9 February 2009

Since the method of requesting and authenticating a credit card transaction varied, the rules used in examining the validity of the payment must cover all available method. If the rules are limited in scope and applicable to only card usage the introduction of any new access method such as PIN and card details may affect the consumer because the issuer may use its contract terms to allocate unauthorised payment initiated by using these new methods to the consumers. This loophole may jeopardise the consumer considering that the CC Guidelines do not invalidate this type of terms though they seem to be very unfair to the consumer. In view of these weaknesses, Bank Negara should revise the CC Guidelines and incorporate loss allocation rules that access liability by looking at the functionality of the rule. This can be done first, by having a clear definition of unauthorised payment whereby the validity of the transaction is examined from the perspective of the card user's authority or the lack of it and second, by avoiding reference to unauthorised payment as a payment made by using a certain form of access method.

UNAUTHORISED PAYMENT AND ACTUAL AUTHORITY

The CC Guidelines do not directly refer to the mandate rules in its loss allocation scheme. However, the word "unauthorised" which connotes the idea of acting on another's behalf without his consent or approval unmistakably shows its reliance on those rules. Furthermore, by referring to loss and theft of the card only, the Guidelines directly point to unauthorised payment as a payment made by the issuer upon receiving a payment request issued by a person who used the card without the consumer's consent.

Another argument to support the above view is found in the Guidelines reliance on the "lost" and "theft" of the card as the events which facilitate the occurrence of the unauthorised transaction. Voluntary transfer of the card by the consumer gives the user actual authority to use the card. Obviously, involuntary transfer by mean of loss or theft means that the user does not posses any authority to use the card. Under the law governing mandate relationship actual authority is defined as "a legal relationship between principal and agent created by a consensual agreement to which they alone are parties."[9]. Therefore, when the credit card is voluntarily given by the consumer to another person; creating a consensus transfer of the mode of accessing the account, the consumer will be responsible for the payment initiated using the card. This happens because the card user has now becomes an authorised person to access the credit card account. The consent can be expressed or implied.[10] By allocating the payment losses based on the authority of the card

[9] *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Limited* [1964] 2 QB 480 followed by Malaysian court in *Woodland Development Sdn Bhd v Chartered Bank; PJTV & Densun (M) Sdn Bhd (Third Party)* [1986] 1 MLJ 84.

[10] Section 175 of the Contracts Act 1950. See *Tan Tian Quee v Kuppusamy* [1967] 2 MLJ 66

user, the CC Guidelines' loss allocation scheme shows its reliance on the mandate rules to allocate unauthorised payment losses.

The above rule is however subject to Para 13.2 of the CC Guidelines which allows the issuer to allocate a maximum of RM250 to the consumer of the total amount of losses incurred before the consumer informs the issuer of the fraudulent payment.[11] The idea is that if a prescribed amount of losses is strictly imposed on the consumer he will be encouraged to take precautionary action to prevent the losses from occurring again in the future (Cooter and Rubin, 1987). Nevertheless, specific reference to lost or theft of the card had narrowed down the scope of the rule as it does not limit consumer losses when the card was not used to initiate the unauthorised payment.

The requirement that the consumer must give a notice of potential unauthorised payment to the issuer before his losses can be contained to RM250 is another branch of the mandate rules. The following paragraphs discuss that rule in detail.

UNAUTHORISED PAYMENT, APPARENT AUTHORITY AND FRAUD NOTIFICATION

Other than an actual authority, a principal is also bound by the act of an agent who possesses an apparent authority. Apparent authority is defined under s. 190 of the Contracts Act 1950 as an authority created by the acts or words of the principal which causes a third party dealing with the agent to believe that the agent is authorised to act.[12] Apparent authority requires a total examination of the circumstances that create a belief in the mind of the issuer that the person who issued the mandate was authorised to act on behalf of the consumer. For instance, a consumer may have terminated the authority of a supplementary cardholder to use the card but had failed to retrieve the card. Besides that, this could also happen if the consumer's failure to prevent the continuous possession of the card represents to other persons that the cardholder is an authorised card user.[13]

There is no direct reference to apparent authority in the CC Guidelines' loss allocation scheme just like there is no reference to actual authority. However, the apparent authority rule can be deduced from Para 13.2 of the CC Guidelines which

[11] Rahman, S. (2009) Consumer Victory for Chee as Court Upholds RM250 Caps on Lost Credit Card, Malay Mail at http://www.mmail.com.my/content/consumer-victory-chee-court-upholds-rm250-cap-lost-credit-cards Accessed 1st September 2009.

[12] The exact wordings of section 190 of the Contract Act are: "When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by those acts or obligations if he has by words or conduct induced such third persons to believe that those acts and obligations were within the scope of the agent's authority." See *MMC Power Sdn Bhd & Anor v Abdul Fattah B Mogawan & Anor* [2001] 1 MLJ 169, at 174.

[13] See an American case of *Walker Bank & Trust Co. v Jones* 672 P.2d 73, 1983.

requires the consumer to notify the issuer of loss or theft of the credit card before his losses can be capped at RM250.

A notification to limit one's responsibility for the act of another is a trait of the mandate rules. The rule as codified in s. 161 of the Contracts Act provides that the authority of an agent is terminated by giving a notice to that effect to the third party who deals with the agent.

Credit card user's apparent authority comes to an end when the consumer informs the issuer that his card is lost or stolen. The notice removes the appearance of the card user's authority. Thereafter, the consumer will not be responsible for the payment since the card user has neither actual nor apparent authority to use the card.[14] However, if the consumer failed to give the notice, his losses are unlimited because the payment is in law with an authorised payment. The law allocates the loss to the consumer because his failure to notify had caused the issuer, who had relied on the appearance of the authority of the card user, to change his position by making the payment.[15]

In line with the above agency rule, Para 13.2 of the CC Guidelines allocates the loss caused by unauthorised credit card payment which occurred as a consequence of the loss or theft of a credit card to the issuer if the payment was made after the issuer had been informed of the loss or theft of the credit card.

Literal reading of the above provision shows that notification to terminate the apparent authority of the card user will only work if the card is lost or stolen. Consequently, the rule cannot be extended to protect the consumer against payment initiated by a person who misused the card by going beyond the authorised limit or purpose because in those circumstances the card is neither lost nor stolen. Hence, a credit card payment initiated by an authorised person though disapproved by the consumer is treated as authorised. The notice to limit the authority is insufficient to protect the consumer against excess usage.

Apparently, the consumer cannot terminate the apparent authority of a person who was once authorised to use the card by giving a notice of potential misuse to the issuer. The issuer may qualify the protection of the consumer against unauthorised payment by requiring the return of the card and/or closing of the account. The issuer may also insert a clause which allows it to allocate all losses caused by card misuse to the consumer if the consumer fails to return the card.

The limited scope of the notification rule in Para 13.2 of the Guidelines means that the consumer is not entitled to the protection of the capped liability limit even if he had given the notice of potential misuse of the card by authorised user. This weakness equally affects the consumer who had consented to the issuance of a

[14] Sections 154 to 161 of the Contracts Act 1950. See *MMC Power Sdn Bhd & Anor v Abdul Fattah B Mogawan & Anor* [2001] 1 MLJ 169

[15] See *SPH De Silva v Is David* [1972] 2 MLJ 22, at 24.

supplementary card or allowed another person to use his credit card. It also cannot protect the consumer against payment made by a person to whom the supplementary cardholder had voluntarily transferred the supplementary card even if the consumer did not to the specific payment.

Some may argue that the rule in Para 13.1 which requires the issuer to provide an "effective and convenient means" of notification of "any lost, theft or unauthorised use" of the credit card indicates that notification of unauthorised payment covers all kind of fraudulent payment and is not limited to those initiated by using stolen or lost card. However, that effect is only achievable if the rule is read on its own. If the rules in paragraphs 13.1 and 13.2 are read together it appears that only a notice of loss or theft of the card can effectively limit the consumer's losses. Therefore, it is not an over statement to suggest that although the credit agreement may require the consumer to inform the issuer of the potential misuse of the credit card, the issuer may at the same time allocate the whole losses to the consumer until the supplementary card is returned to the consumer and/ or the account is closed. The issuer may do so irrespective of the capped liability limit in Para 13.2. This is because by failing to stop the card usage the consumer had clothed the card user with apparent authority to initiate credit card payment from the consumer's account.[16]

Another issue worth mentioning in relation to the notice of potential fraudulent payment is the fact that since the rule covers only cases of lost or theft of the card, it is questionable whether it can be extended to cover cases where the supplementary cardholder transferred only the card details to the person who initiated the payment.

Literal reading of the CC Guidelines' notification rule also does not benefit the consumer whose card details were fraudulently use in a card not present transaction. Unless the CC Guidelines specifically address this issue the loophole allows the issuer to allocate all losses caused by misuse of card details by unauthorised user to the consumer if the latter had failed to close the account. In view of these uncertainties it is prudent for every consumer to read the terms of the credit agreement before signing it. More importantly the CC Guidelines should be revised and the rules be amended.

Another problem associated with the notice of unauthorised payment is the lack of clear notification time frame. Paragraph 13.2 of the CC Guidelines requires "the notice to be given" as soon as reasonably practicable" after finding that the card is lost or stolen. This rule is ambiguous as it does not describe the exact time for notification. As a result, the consumer will not be able to determine the right time to inform the issuer of potential unauthorised payment. This ambiguity may cause him to loose the protection against fraudulent payment loss.

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[16] See for example Clause 9 of Maybank Gold Credit Card terms and conditions at http://www.maybank2u.com.my/consumer/online_cards/agreement_gold.pdf (Visited 29 May 2008).

The ambiguity of the notification time frame gives the issuer a wide discretionary power to decide the manner to apply the rules. For instance, the Maybank credit agreement required the notice to be given immediately, which completely contradicts the CC Guidelines rule.[17] There are also a few questions highlighted here; what factors should be considered in assessing whether the notice was given "as soon as reasonably practicable"? Would bad health or travelling abroad constitute sufficient excuse to delay notification?

Some issuers have taken advantage on the ambiguity of the phrase "as soon as reasonably practicable" to allocate fraudulent payment losses well beyond the capped limit to the consumer. For instance, the Citibank terms and conditions give the issuer an absolute discretion to cap the consumer loss only in case where the fraudulent payment was made one hour before the consumer reported the loss, theft or unauthorised transaction to the issuer. In other cases, the losses are totally the consumer's.[18] Here, the issuer regards one hour from the time the card is lost or stolen to the time of notification as the most "reasonably practicable" time to make a notification.

The failure of the CC Guidelines to specify the notification period in clear and exact terms severely affect the consumer as it becomes more difficult for the consumer to make an *ex ante* determination of the steps to be taken to protect himself against fraudulent payment before agreeing to accept the credit card. By leaving the consumer to figure out the best time to give the necessary notice, the rule imposed on the consumer on the burden to decide not from his own perspective but from the issuer's, the appropriate standard of behaviour to be exercised in preventing fraudulent payment is necessary. More importantly, it is difficult for the consumer to determine which notice will successfully terminate the apparent authority of the card user. The weaknesses of the rule contradict the purpose of the notification which is principally aimed at encouraging the consumer to act to prevent or reduce losses (Cooter and Rubin, 1987).

The restricted scope of the notification rule affects the consumer as the issuer may contractually impose on the consumer the duty to return the card and/or close the account before the apparent authority is successfully terminated. This term will affect the consumer severely if the cardholder absconded with the card. For example, clause 9.4 of the Maybank credit card agreement provides that if the consumer decided to cancel the supplementary card, the cancellation is effective if it is accompanied by the return of the supplementary card.[19] If the consumer failed

[17] Clause 11.3 of the Maybank visa Gold terms and conditions for instance requires the notice to be given immediately upon the discover of the loss or theft of the card http://www.maybank2u.com.my/maybank_docs/personal/cards/forms/gold.pdf. Accessed 29 April 2009

[18] Clause 10 of Citibank credit agreement terms and conditions. http://www.citibank.com.my/MYGCB/APPS/portal/loadPage.do?htmlPageName=/info/det/creditcard_tnc.htm&tabId=Credit%20Cards . Accessed on 29 April 2009.

[19] Maybank terms and conditions at: http://www.maybank2u.com.my/maybank_docs/personal/ cards/forms/gold.pdf. Accessed on 29th April 2009

to return the card together with the cancellation notice, he is liable for all payments made by the supplementary cardholder although a notice to terminate the latter's actual authority to use the card has been given to the issuer. This type of contract term shows that a notice of cancellation of a credit card cannot effectively terminate the supplementary card holder's apparent authority to use the supplementary card although it can effectively terminate his actual authority.

CONCLUSION

Losses caused by unauthorised payment are risk which the consumer must bear when he/she entered into a contract for credit card payment facility. Since the consumer-issuer relationship is based on contract, the freedom of contract theory and the use of standard form of contract allow the issuer to allocate the whole amount of losses to the consumer. However, the issuer's right is to some extent has been curbed by the issuance of the CC Guidelines. Nevertheless, the limited scope of the rule, the lack of certainty and clarity expose the consumer to uncertain risk.

In view of these weaknesses it is a must for the consumer to carefully read the terms and conditions of the credit agreement to identify the risk. Although some of the risks are unavoidable, unless the consumer chose not to have any credit card, he must know his duties and liabilities in relation to that risk. Moreover, each consumer should shop around for the best contract terms in the market. Most importantly, Bank Negara Malaysia should revise and amend the CC Guidelines to incorporate clear and comprehensive rules to overcome the loopholes.

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