

HIGH INTEREST RATES ON CREDIT CARDS: DO CUSTOMERS NEED PROTECTION?

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I. INTRODUCTION

In the last ten years debit, credit and other cards of a similar nature have experienced tremendous growth. They now form an integral part of any contemporary, developed economy, like that of Hong Kong. They are also interlinked with the operation of international financial transactions. It is now even possible to use credit cards over the Internet, to make instantaneous purchases in foreign countries. Yet in Hong Kong, the advent of credit cards has not been matched by corresponding and necessary developments of laws. The thrust of this article is specific: that the law has failed to protect card-users from exorbitant interest rates.

This article first examines the relevant law; and finds that there has been no significant attempt to protect credit cardholders in Hong Kong. The legislation that applies to credit cards, the *Money Lenders and Unconscionable Contracts Ordinances*, is incapable of protecting the cardholder because it was not specifically passed with a view to regulating their use, or to prevent credit card firms from taking advantage of their superior position. The *Money Lenders Ordinance* has restricted operation as the vast majority of financial institutions involved in the credit card business do not fall within its purview and in any event the interest rates ceiling under the Ordinance is too high to be a deterrent. Further the application of *Unconscionable Contracts Ordinance* to credit card borrowings remains doubtful. The common law has not done much to control or curb the activities of the card-issuing firms. While the courts in Hong Kong can do little to help cardholders from paying high interest rates, such interest rates would be struck out in the UK, Australia, Singapore and Malaysia.

As a consequence some firms in Hong Kong have taken advantage of the loopholes in the law and are charging over 50 per cent interest. In a jurisdiction where consumer protection forms part of our legal heritage this is not a satisfactory position. Further in the absence of protective laws all the Consumer Council can do is to warn cardholders of the potential consequences of card use.

This article concludes that there is an urgent need for the reform of the law and recommends measures that may be adopted to protect cardholders. These include the legislature lowering the ceiling on interest rates. If credit card companies in other countries can sustain a lower rate of interest, then prima facie there is no justification for higher interest rates in Hong Kong.

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II. WHAT’S HAPPENING IN THE HONG KONG SAR?

Cardholders in Hong Kong pay exceptionally high interest rates on their credit card borrowings. Such rates are about 100 per cent more than that paid by cardholders in the United States, the United Kingdom, Australia¹ and other Asian and Western countries.² In the majority of cases, the interest rates on the outstanding payments and cash advances, after the “interest free repayment period”, range between 24 to 60 per cent per annum. Hong Kong cardholders are charged 37 to 100 percent more than is charged in the United States (17.5 percent per annum) and more than three times than what is charged in Japan (13.2 percent per annum) and Australia (12.95 percent per annum).³ The rates in the United Kingdom are very similar to those in the United States. The Consumer Council of Hong Kong SAR has criticised interest rates as being “excruciatingly high” and has warned shoppers to think twice before choosing to borrow or buy on their cards.⁴ Lack of control on interest rates can result in the transfer of large sums of money from cardholders to card issuers. Not only are interest rates exorbitant, but they are also calculated in strange ways, resulting in the cardholder paying more. Interest rates also vary even for the same card; for example, different issuers of Master and Visa cards charge different rates. The average cardholders are not influenced by the high interest rates because they intend to pay the outstanding balance off

- 1 In July 1997, Australia’s ANZ Bank was charging holders of its own Mastercard interest at the rate of only 12.95 percent per annum.
- 2 The Consumer Council of Hong Kong SAR looked at the cost of obtaining credit cards and annual interest rates on unpaid amounts. The following table has the relevant details of the selected card issuers:

	Annual fee (\$) primary card	Annual fee (\$) supplementary card	Annual interest rate (%)	Annual Interest rate (%) compound basis
MBF Card Int'l	180	90	42	51.1
JCG	0	0	36.5	43.3
BOC Credit Card	220	110	30	34.5
Overseas Trust Bank	220	110	30	34.5
Standard Chartered	220	125	24.45	27.7
Hong Kong Bank	220	110	24.25	27.1
Hang Seng Bank	220	110	24	26.8
American Express (Green Card)	180	100	18	

Many card issuers waive the first year’s annual fee. A recent statement by the Consumer Council listed nine institutions who are charging annualised interest rates of up to 59.64 percent. These include, APE: Aeon Credit Service (Asia), Wing Hand Credit, Promise (HK), United Asia Finance, The Capita Corporation HK, GE Capital Finance, Avco Financial Services (Asia), Artley Finance (HK) and Miliconcept Credit. See *South China Morning Post*, 16 July 1997.

- 3 Consumer Council Report, 15 April 1996. Rita Hsu, Acting Chief Executive of leading card issuers Manhattan Card, said it was not fair to compare credit card interest with bank loans. “We give a pretty long interest-free period and more than half our customers pay their bills on time and don’t pay any interest.” See *South China Morning Post*, 30 October 1997, p 4.
- 4 The business of providing credit card facilities or services, according to Ghose, is a high risk business and consequently the rate of interest is also extremely high. See T Ghose, *Banking System of Hong Kong*, (1995) pp 264-65.

each month within the interest free repayment period. The monthly statements⁵ of some card issuers are also somewhat misleading. At the top of the monthly statement is inserted the minimum payment due. The reverse side of the statement usually refers to a number of things, beginning with **Payment Methods**, followed by a para. under the caption, **Minimum Payment**, which states:

- You may either make partial payment or full payment on or before the payment due date. The minimum payment is HK\$50 or 5% of the new balance, whichever is higher.
- If the statement balance exceeds your Credit Card limit, your minimum payment will be 5% of the limit plus the amount exceeding that limit.
- If the minimum payment of your previous statement has not been settled, any overdue minimum payment will be incorporated into the minimum payment of the current statement.

What follows then is a para under the caption, **Priority Payment**, stating in what sequence payments made will be used to settle the outstanding amount. **Fees and charges** are then described in a new para. It begins with the following words:

If you fail to make the minimum payment on or before the payment due date, a late charge of 5% of the minimum payment (minimum HK\$10/US\$1; maximum HK\$75/US\$12) will be made.

It goes on to state:

No finance charge [interest] will be levied if full payment of outstanding purchases is made on or before the payment due date. If only partial payment is made, a finance charge of 24% per annum will be applied to the outstanding amount and to all new transactions made prior to the next statement date. For cash advances, a finance charge [interest] of 24% per annum will be calculated from the transaction date to the date on which payment is received. A handling fee of 3% of the cash advance amount will also be charged for every cash advance transaction made.

For customers, it is most important to know what interest they have to pay on their credit card borrowings. One would expect that if a cardholder has to pay an exceptionally high interest rate, the card issuer would make an exceptional attempt to highlight this fact. The promotional leaflets of many financial institutions express “interest only in nominal terms without mentioning the real lending rate”.⁶ Moreover it would be difficult for an average cardholder to fully comprehend the nature of the liability from the statements and other materials supplied.⁷ The paragraph under the caption, **Minimum Payment** does not refer to interest rates or finance charges and another para, **Priority Payment**, is interposed before the **Fees and charges** para. This lay out does not really put the message across to the cardholder. The Vice-Chairman of the Consumer Council’s Publicity and Community Relations Committee has said, “we would urge the consumer to be aware when using credit cards. Don’t think that if you pay the minimum amount every month you will be alright. If you do this, you could end up paying it off for seven years.”⁸

5 Reference in this paper is to Hang Seng Bank’s Monthly Statements, but other banks have similar terms and conditions.

6 Statement by Mr Michael Tsui Fuk-sun, Vice-Chairman of the Consumer Council’s Publicity and Community Relations Committee. See *South China Morning Post*, 16 July 1997.

7 “Beware: Credit Card Charges High”, *Varsity*, January 1998 (The Chinese University of Hong Kong), p 7.

8 See *South China Morning Post*, 16 April 1996.

The guarantee that the cardholder has “Interest-free Repayment Period”⁹ for his spendings is somewhat misleading. It appears that there is no “Interest-free Period” between the “closing date” and the “payment due date”. The difference between the two dates could be about 30 days. The position is if the whole amount due is paid, then the cardholder does not have to pay any interest. If only partial payment is made, the cardholder is required to pay interest on the outstanding amount. Even if the cardholder has made the minimum payment, the cardholder is usually charged interest on the full amount from the day following the closing date until the day of payment. The benefit that the cardholder derives by making the minimum payment on or before the payment due date is that no interest is charged on that amount from the date of payment. If the cardholder fails to make the minimum payment, then the cardholder has to pay a late charge in addition to paying interest. Some card issuers state interest rates on a monthly basis, eg 2 percent per month, which works out to approximately 27 percent per annum on compound basis, not 24 percent per annum. Expressing interest rates on a monthly basis, perhaps, gives an impression to a less shrewd cardholder that the rate is not as high as it is. There is the possibility that many cardholders will not realise that interest is being calculated on a compound basis and will actually amount to 27 percent per annum. In the case of cash advances, a handling fee, eg 3 percent of the cash advance amount¹⁰, is also charged. This device of splitting interest rates and handling fees does not alert the average cardholders to the fact that the actual interest rate is 27 percent or more. It is interesting to note that the recently adopted Hong Kong Code of Banking Practice (not a statutory code) requires card issuers to quote “the annualized percentage rates of interest on deposit, loan or credit card products to facilitate comparison between different charging structures.”¹¹

Apart from high interest rates, the cardholder is also subjected to unfavourable exchange rates when using the card outside Hong Kong.¹² A good example is furnished by a Macau case. The local unit there is linked at 1.03 pataca to HK\$1 by the Macau Monetary and Foreign Exchange Authority. However, usually credit card users are charged HK\$1 for 1 pataca. This is 3 percent more than the “real” pataca exchange value. The cost to cardholders in Macau amounts to “tens of millions of patacas a year” which go into the coffers of the card issuers. The Hong Kong Code of Banking Practice 1997 now requires card issuers to inform cardholders the method of applying exchange rates to transaction in foreign currencies.¹³

Card issuers also impose surcharges for any small errors or delays made by the cardholders. Such charges appear to be unreasonable, but consumer protection activists have not come forward to support the cardholders’ cause.

Allowing the market alone to set interest rates on credit cards is a one-sided legal policy that promotes debt among consumers, while producing unusually high profits for credit card issuers. Moreover, adherence to this

9 See *Citibank Gold Visa / MasterCard’s Cardholder’s Guide*.

10 See, eg, *ibid*, clause 8.

11 ss10.3, 11.1, 22.4(j).

12 See *Hong Kong Economic Journal* of 16 April 1996, p A2.

13 See s22.2(i).

one-sided policy has allowed the law to become a tool of the special interests that benefit from the promotion of high consumer debt and consumption.¹⁴ Cardholders need more protection against high interest rates and unfavourable exchange rate calculations imposed by card issuers. However, consumer protection legislation in Hong Kong does not address the problem.

III. WHAT'S THE LAW IN THE HONG KONG SAR AND OTHER COMMON LAW JURISDICTIONS?

Where the cardholder has failed to make any payment owing to the card issuer, his position (as stated before) is that of a borrower and the card issuer's position is that of a lender.¹⁵ In substance, there is a loan of money by the card issuer to the cardholder¹⁶, and therefore, the *Money Lenders Ordinance* (Cap 163) applies.¹⁷ The Ordinance provides that no person shall carry on business as a money lender or otherwise than in accordance with the conditions of a licence.¹⁸ The Ordinance further provides that

No money lender shall be entitled to recover in any court any money lent by him or any interest in respect thereof or to enforce any agreement made in respect of any loan made by him unless he satisfies the court by the production of his licence or otherwise that at the date of the loan or the making of the agreement he was licensed: Provided that if the court is satisfied that in all the circumstances it would be inequitable if a money lender who did not satisfy it that he was licensed at the relevant time was thereby not entitled to so recover such money or interest or to enforce such agreement, the court may order that the money lender is entitled to recover such money or interest or to enforce such agreement to such extent, and subject to such modifications or exceptions, as the court considers equitable.¹⁹

However, this Ordinance permits charging of up to 60 percent per annum effective interest.²⁰

The *Money Lenders Ordinance* (Cap 163) was passed to provide a framework within which to tackle the problem of loan sharking. At that time a number of loan shark firms run by triad societies were frequently charging rates of interest of up to 300 percent per annum and cases had also come to light where people had been charged even up to 1400 percent per annum.²¹ At the same time many reputable companies were operating

14 See D Rougeau, "Discovering Usury: An Argument for Legal Controls on Credit Card Interest Rates", 67 *University of Colorado Law Review* (No. 1) (1996), pp. 1-46 at 3.

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

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

17 In Crowther Report on Consumer Credit (UK), the view was taken that card issuers were money-lenders. See paragraph 6.12.3. See also *Allchurch v Popular Cash Order Co Ltd* [1929] SASR 212. *Goldberg v Tait* [1950] NZLR 976. *Money Lenders Ordinance* (Cap 163) does not apply to banks, restricted licence banks and deposited-taking banks. See s 3. See also the Banking Ordinance (Cap 155) s 3. According to one writer since the Money Lenders Ordinance (Cap 163) does not apply to banks, restricted licence banks and deposit-taking companies, "they are allowed to lend at any rate of interest". See S Ko, *Banking Regulations of Hong Kong* (City Polytechnic of Hong Kong, 1991), p 23. In fact, during the monetary crisis towards the end of 1997, for a few days interbanking lending rates were about 300 percent.

18 Section 7. See also s 18.

19 Section 23.

20 See s 24.

21 In *Wong Kwai Fun v Li Fung* [1994] 1 HKC 549 the effective rate of interest charged on a loan given in April 1986 was in excess of 400 percent per annum.

in the field of unsecured personal loans. It was extremely important to allow them to carry on their business without unnecessary onerous and burdensome control. The Legislative Council's concern was not only to control the activities of loan sharking firms but to choose the maximum rates of interest high enough as not to inhibit the commercial activities of Hong Kong. At the time the *Money Lenders Ordinance* was before the Legislative Council, most reputable institutions in the personal loan field in Hong Kong were charging effective rates of interest between 34-44 percent per annum.²² The Ordinance has adopted a three-pronged approach to deal with the question of interest rates.²³ First, it declares that any agreement where the effective rate of interest exceeds 48 percent per annum will be presumed to be extortionate. Secondly, the courts have a discretion to declare that a rate of interest that effectively exceeds 48 percent, but is less than 60 percent is not extortionate. Thirdly, where the effective rate of interest is greater than 60 percent it is not only extortionate but the lender also commits an offence. The Ordinance allows the court to reopen any loan transactions so as to do justice between the parties and make such orders as the court may think fit.²⁴

The *Money Lenders Ordinance* lays down several criteria to determine whether a transaction where interest charged is above 48 percent is extortionate or not. These include interest rates prevailing at the time the transaction was made; the age, experience, and business capacity of the debtor; and the degree of risk accepted by the lender.²⁵

Many common law jurisdictions have legislated to control the practice of charging exorbitant interest rates and have allowed the courts to re-open agreements where the interest rates are found to be extortionate. In England the *Consumer Credit Act 1974*²⁶ lays down that a credit agreement is extortionate if it requires the debtor or a relative of the debtor to make payments which are grossly exorbitant or otherwise grossly contravene ordinary principles of fair dealing. In determining whether a credit contract is extortionate or not, the courts are also allowed in England to take into account interest rates prevailing at the time the contract was made.²⁷ The Act allows the courts to re-open extortionate agreements. They can virtually rewrite the contract, extinguishing liabilities of the debtor, order repayment of sums by the creditor and accounts to be taken.²⁸

In Australia all credit card lending by financial institutions other than credit unions and co-operative and building societies is now regulated by the *Australian Consumer Credit Code 1996*. The Code is also designed to

22 See Hong Kong Legislative Council Debates of 28 May 1980, pp 848-850.

23 See ss 24, 25.

24 See s25. See also *Wong Kwai Fun v Li Fung* [1994] 1 HKC 549 where the court declared an extortionate loan transaction unenforceable and void and ordered the borrower to return only the amount of capital lent to him and not any other sums by way of interest.

25 See s 26 (3), (4), (5).

26 The *Consumer Credit Act 1974* does not apply if the cardholder is a body corporate (not an individual) or where the credit provided exceeds £15,000; see s 8(1), (2). This limit of £15,000 is easy to apply where the agreement is one for the provision of a fixed sum credit but in the case of credit cards, the application of the £15,000 limit is by no means simple and there can be a consumer credit agreement even where the credit limit is in excess of £15,000 or where there is no credit limit at all. See n 7, p 529. For the definition of credit limit, see *Consumer Credit Act 1974* s 10(2), sch 2 Pt II.

27 See s 138(1), (2)(a). See also UK: Unfair Terms in Consumer Contracts Regulations 1994, which came in to force on 1 July 1995. It gives even more protection to the consumer in appropriate cases

28 See s139(2).

protect card holders. The Code allows re-opening of unjust contracts, and reducing of interest rates. The Australian approach however is different, in that in determining whether a contract between a card issuer and card holder is unjust or not, the court will have regard to public interest and several other considerations, including the relative bargaining power of the parties, whether the contractual provisions in question were the subject of negotiation and whether the terms of the agreement or the conduct of the card issuer was justified in light of the risks undertaken by the credit provider or card issuer.²⁹

In Malaysia and Singapore a money lender is not allowed to recover interest in an amount exceeding the principal debt due, unless a court, having regard to all the circumstances of the case, otherwise orders. Where interest charged is in excess of 12 percent per annum for a secured loan, or 18 percent per annum for an unsecured loan, any transaction of this kind will be regarded as harsh and unconscionable and the court is empowered to re-open such transactions.³⁰ The re-opening provisions empowering the courts to impose new terms on the parties are similar to those in force in Hong Kong.³¹

In the USA, as far back as 1968, the Truth in Lending Act required banks to disclose to customers at least four matters, namely the finance charge and its computation; other charges; security interest; and disclosure as to its billing rights.³²

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

The Unconscionable Contracts Ordinance should apply to situations where the Money Lenders Ordinance (Cap 163) does not apply. The Ordinance came into effect in 1994. It was passed because it was felt that there was a great need to control harsh and unconscionable contracts.³³ This legislation was prompted by developments in other common law jurisdictions.³⁴ The main provisions of the Ordinance are contained in ss5 and 6, which are as follows:

29 See the *Consumer Credit Code 1996* s 70(1); C Shum, 'The New Consumer Credit Law in Australia' *Overseas Business Law JBL* (1997) p 254 -265 at 263. See also NSW: *Contracts Review Act 1980* s 7(1); *Credit Act 1974*, Part 9.

30 Malaysia: *Money Lenders Act 1951 (Revised 1989)*, s22(4); Singapore: *Moneylenders Act (Cap 188)* s2.

31 See Malaysia: *Moneylenders Act 1951 (Revised 1989)*, s21(2); Singapore: *Moneylenders Act (Cap 188)* s2.

32 Similar recommendations have been made by the *Hong Kong Code of Banking Practice*, 1997, see Chaps 1 and 3.

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

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

5. RELIEF WHERE CONTRACT UNCONSCIONABLE

- (1) If, with respect to a contract for the sale of goods or supply of services in which one of the parties deals as consumer, the court finds the contract or any part of the contract to have been unconscionable in the circumstances relating to the contract at the time it was made, the court may -
- (a) refuse to enforce the contract;
 - (b) enforce the remainder of the contract without the unconscionable part;
 - (c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result.
- (2) It is for the person claiming that a contract or part of a contract is unconscionable to prove that it is.

6. MATTERS TO BE CONSIDERED BY THE COURT

- (1) In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made, the court may have regard to (among other things) -
- (a) the relative strengths of the bargaining positions of the consumer and the other party;
 - (b) whether, as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;
 - (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party.
- (2) In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made -
- (a) the court shall not have regard to any unconscionability arising from circumstances that were not reasonably foreseeable at the time the contract was made; and
 - (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this Ordinance.
- (3) In considering the exercise of its powers under section 5 to grant relief in respect of a contract or part of a contract found to be unconscionable, the court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

A party to a contract deals as consumer in relation to another party if (a) he neither makes the contract in the course of a business nor holds himself out as doing so; (b) the other party does make the contract in the course of a business; and (c) the goods passing or services provided under or in pursuance of the contract are of a type ordinarily supplied or provided for private use, consumption or benefit.³⁵

It is clear that the Ordinance applies to consumer transactions, such as to a contract between a card issuer and a cardholder and terms imposing high interest rates or service charges appear to be unconscionable. This may be so, because card issuers are in a position of advantage and the cardholder may not understand the terms and conditions of the contract, including credit card issuer's monthly statements.

The definition of "consumer" in the Ordinance is similar to the definition of "consumer" given by the *English Unfair Contract Terms Act 1977*, s12(1) (which is the equivalent of Hong Kong's *Control of Exemption Clauses Ordinance*). Although the English courts have tried to expand the definition

³⁵ See *Unconscionable Contracts Ordinance*, s3. See *Control of Exemption Clause Ordinance* (Cap 71), ss. 4, 8 and schedule 2.

of consumer,³⁶ their response as to the meaning of services has been equivocal. In Hong Kong, the *Unconscionable Contract Ordinance* does not define the term services. It simply states that a contract of service or apprenticeship is not a contract for the supply of a service and a contract is a contract for the supply of a service whether or not goods are also transferred or to be transferred; or bailed or to be bailed by way of hire, under the contract, and whatever is the nature of the consideration for which the service is to be carried out.³⁷

If card issuers are regarded as rendering a “service” to cardholders, the *Unconscionable Contracts Ordinance* will apply. The courts in England interpreting the term “service” in the *Theft Act* s 33a³⁸ have taken the view that banking facilities, including overdrafts and loans are not services but only facilities.³⁹ If that view were to be followed in Hong Kong, the *Unconscionable Contracts Ordinance* cannot prevent card issuers from charging high interest rates and service charges. The judicial approach however has not been supported by many academic writers and the Law Commission of England.⁴⁰ They consider that banking facilities are services. Referring to this controversy, Ong and Wickins⁴¹ have argued that the term, “service” includes:

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

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

It would stretch far beyond what is ordinarily included in the notion of services as generally understood. In particular, although we have become used to the expression “financial services” as describing a range of services available from those involved in that service industry, it is not altogether natural to think of the simple making of a loan upon interest as itself constituting a service.⁴²

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

A possible argument against the enforceability of exorbitant interest rates by card issuers could be that such interest rates are in the nature of

36 Judicial decisions in England establish that one off transactions between business people are not regarded as being in the course of business nor would the assignment of a contract by a consumer to a business person take the matter out of the preview of the legislation. *R & B Brokers Co Ltd v United Dominions*, [1988] 1 All ER 847, CA, per Dillon LJ at pp 854, 855.

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

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

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

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

41 See *supra*, p 12.

42 *R v Preddy* [1996] 3 WLR 225, HL at p269.

penalties. The idea underlying payment of damages for breach of a contract is to put the parties in the same position as if the contract was not breached. This theory of contract finds support in the distinction drawn by the courts between liquidated damages and penalties. The law recognises that where the parties to a contract agree beforehand in regard to what damages will be payable by the guilty party in the event of breach, the sum fixed may be either a genuine pre-estimate of the loss of the injured party or in the nature of a threat or penalty. If it is found that the parties had made a genuine pre-estimate of the loss, the court will enforce the agreement. On the other hand, where the sum fixed was in the nature of a penalty, the court will refuse to enforce it.⁴³ In the case of credit cards, it may be difficult to argue that high interest rates of up to sixty percent are unconscionable and extortionate, and therefore a penalty, for the *Money Lenders Ordinance (Cap 163)* itself permits charging of such high interest.

Moreover, the credit card issuers could contend that the payment of interest at the rate prescribed by the contract could not be construed as a breach of the contract. In *Bridge v Campbell Discount Co Ltd*,⁴⁴ the appellant wanted to obtain a second hand car from the respondents. The appellant signed a hire purchase contract. The total hire purchase price was £482 out of which £105 was to be paid at once and the balance by monthly installments. The appellant made the initial payment and the first installment but then discontinued payment of any further instalments and returned the car to the respondents. By Clause 9 of the contract, if the hiring was terminated for any reason before the vehicle became the property of the appellant, the appellant was required to pay the respondents two-thirds of the hiring purchase price. The respondents accordingly claimed two-thirds of the price, less the initial payment and the first instalment. The County Court judge held that Clause 9 imposed a penalty and therefore the respondents were not entitled to succeed. The judgment of the County Court was reversed by the Court of Appeal which held that the appellant had not broken his contract but had merely exercised his option under it to terminate the hiring contract and as there had been no breach of contract, no question of penalty arose; and that the appellant must pay the sum stipulated in the event of termination. The respondents appealed to the House of Lords, which restored the decision of the County Court. The House of Lords held that the contract had in fact been broken and the clause requiring payment of two-thirds of the hire purchase price was not a genuine pre-estimate of the respondents' loss but imposed a penalty. The House of Lords however did not deal with the difficult issue of whether the Court of Appeal was correct in holding that if there was no breach, there could be no penalty. Now, the question is when a cardholder is unable to make payment on time, is the cardholder in breach of his contractual obligation or merely paying exorbitant interest rates under the terms of the contract (without breaching it)? If the finding is that there is no breach of the contract, there is no question, as the Court of Appeal has said, of any penalty.

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

44 [1962] 1 All ER 385.

IV. CONCLUDING REMARKS

All is not well with the credit card industry in Hong Kong. The government has to do something to prevent charging of high interest rates by credit card companies.

The author would like to make the following suggestions.

First, terms and conditions offered by the card issuers to cardholders should be in plain language and available in both Chinese and English.⁴⁵

Secondly, the interest charged on credit cards should not be much higher than the highest percentage of interest that can be charged on a loan.

Thirdly, the *Unconscionable Contracts Ordinance* should be amended so that it could be applied to credit card borrowings.

Fourthly, the practice of unsolicited issuing of credit cards should be prohibited. In Australia, the *Trade Practices Act 1974* prohibits the unsolicited sending of credit cards of any kind by corporations.⁴⁶ A similar approach is noticeable in Canada.⁴⁷

Fifthly, card issuers should act responsibly when issuing credit cards to minors, full time students or persons who do not have independent financial means.⁴⁸

The financial structure is becoming increasingly dynamic. We have moved from exchange and barter, to money, to bills of exchange, (like cheques) and credit cards. The rate of change is increasing. As new payment systems emerge, the law will have to develop to protect the users of such systems. It is a sobering thought that the law has failed to keep pace with credit cards. If the law cannot keep pace now, how will it do so in the future?

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

46 See s.63A.

47 See eg the *Unsolicited Goods and Credit Card Act* (Sask); the *Consumer Protection Act* (Man), ss 113-117; *Consumer Protection Act* (British Columbia), ss 31-34. The Hong Kong Code of Banking Practice 1997

s 22.2 also states that card issuers should issue cards only when they have been requested by the customers to do so.

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