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Abstract
When new forms of money are introduced, do the laws of the countries or communities in which they originally developed follow in the wake of the new forms of payment?

Keywords
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DOES LAW FOLLOW MONEY?

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When new forms of money are introduced, do the laws of the countries or communities in which they originally developed follow in the wake of the new forms of payment?

When new payment instruments are introduced into a country they are used often without much thought being given to legal problems that they may engender. This article argues that if the country's legal system does not have an adequate solution to the problems a legal solution must be developed within that system or borrowed from elsewhere. In the case of payment instruments the country of origin where they have developed may already have a solution. It may even be present like a stowaway in the contractual system that supports the new payment instrument; in other words the new form of payment may be packaged in its own regulatory system. In short, the 'foreign' law follows the new physical form of money as an almost physical appendage and finds a new home.

This article argues that law does follow but that the process is neither entirely reflective of the mirror theory or transplant theory. To see how this happens it is proposed to look at a modern development in Australia, namely, credit card chargeback rights. Before examining this, an overview of the tension between the mirror theory and the transplant theories is apposite.

Mirror theory versus transplant

The issue of transplants of law is keenly debated in comparative law. On the one hand, there is a school of thought that law reflects society, the so-called mirror theory developed by Montesquieu.[1] Law is seen as a reflection of forces external to it, be it

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1 Montesquieu, for example, wrote in *De l'esprit des lois*, book 1, ch 3 (Des lois positives (1748)).

> The political and civil laws of each nation should be so closely tailored to the people for whom they are made, that it would be pure chance [*un grand hazard*] if the laws of one nation could meet the needs of another… They should be relative to the geography of the country, to its, whether cold or tropical or temperate; to the quality of the land, its situation, and its extent; to the form of life of the people, whether farmers, hunters, or shepherds; they should be relative to the degree of liberty that the constitution can tolerate; to the religion of the inhabitants, to their inclinations, wealth, number, commerce, customs, manners.

economics, class struggle and the like. Lawrence Friedman expressed this old idea thus:

> As long as the country endures, so will its system of law, coextensive with society, reflecting its wishes and needs, in all their irrationality, ambiguity, and inconsistency. It will follow every twist and turn of development. The law is a mirror held up against life.[2]

Modern writers have also, to a large extent, produced more subtle versions of the mirror theory; for example, Otto Kahn-Freud, argues that mechanical transplants are possible ('carburettor to engine'), but that ultimately the very nature of the host legal system will reject some foreign transplants ('organic'), especially if they are inconsistent with its political context.[3] A good example of this is labour law. Traditionally, there was always been some natural English resistance to foreign imports. Pierre Legrand writes:

> Yet, in the face of this incipient Romanization of European legal cultures, the common law elected to assert its Englishness … Resistance to the civil law tradition was expressed in several forms. In 1234, Henry III prohibited the teaching of Roman law in London. At the Merton Parliament of 1236, the English barons, in what has been depicted as an outburst of nationality and conservatism opposed the clergy's request to modify English marriage laws with the famous exclamation, *nolumus leges Angliae mutare* [we do not want our English laws changed].[4]

(It is perhaps a telling point that their famous objection was in Latin!)

In a radical departure from the classic mirror view Alan Watson argues in numerous articles that law is in the main the result of transplants.[5] His primary evidence to

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2 Lawrence Friedman, A *History of American Law* 12 (2d ed. 1985).

3 O'Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Revue* 1.

4 Pierre Legrand, 'Structuring European Community Law: How Tacit Knowledge Matters' (1998) 21 *Hastings International and Comparative Law Review* 871, 877.

5 Some of Alan Watson's articles relevant to transplants are: 'The Definition of Furtum and the Trichotomy,' (1960) *28 Revue d' Histoire de droit* 197 ; 'The Development of Marital Justifications for Malitiosa Desertio in Roman-Dutch Law,' *(1963) 79 Law Quarterly Review* 87; 'Some Cases of Distortion by the Past in Classical Roman Law,' (1963)31 *Revue d'Histoire de droit* 69; 'Roman Private Law and the Leges Regiae,' (1972) *82 Journal of Roman Studies* 100; 'Personal injuries in the XII Tables,' (1975) 43 *Tijdschrift voor rechtsgeschiednis* 213; 'Legal Transplants and Law Reform,' (1976) *92 Law Quarterly Review* 79; 'Comparative Law and Legal Change,' (1978) *37 Cambridge Law Journal* 1; 'Two-Tier Law - A New Approach to Law Making', (1978) *27 International & Comparative Law Quarterly* 552; 'The Notion of Equivalence of Contractual Obligation and Classical Roman Partnership,' (1981) *97 Law Quarterly Review* 275; 'Legal Change: Sources of Law And Legal Culture', (1983) 131

support this thesis is the role played by Justinian's *Corpus Juris Civilis*, a body of law that forms the private law basis of civil law systems not only in Europe but throughout South America and large parts of Asia.[6] That this ancient body of law performs this role, across different cultures and across different centuries from Julius Caesar's time to the present, demonstrates that law is somewhat autonomous and is not merely a reflection of society. Chilean society is a very different society from, say, Japanese society; yet both have the *Corpus Juris Civilis* as the basis of their private law system. Watson's writings abound with other examples that show that law is not in the main a reflection of society, but rather something independent. Law is a kingdom unto itself and the kings are the legal elites who by dint of their education and the nature of law itself create law mainly by importing foreign laws when needed. Thus, according to Watson, the mirror theory is not a satisfactory explanation for the development of the law since it ignores the autonomous nature of law itself as well as the law making aspects of lawyers themselves.

It could be broadly said that the common law adoption of the law merchant which had governed disputes over negotiable instruments in the merchants' courts in the middle ages demonstrates that these 'new' payment instruments brought foreign laws in their wake which were eventually modified and adapted to the English legal system.

Could the same process occur in modern times?

Historical development of credit cards

The genesis of the multi-outlet card was said to be the Diners Club Card. A New York business man having discovered that he had forgotten his wallet in a restaurant came up with the idea of a card that could be used at any number of restaurants on Manhattan Island, the Diners Club Card. Thus was born the multi-outlet card. This

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University of Pasadena Law Revue 1121; 'An Approach to Customary Law', (1984) *1984 University of Illinois Law Revue* 561; 'The Evolution of Law: The Roman System of Contracts', (1984) *2 Law & History Review* 1.

6 One of earliest landmarks in Roman legal history was the Twelve Tables from around 450 BC. These consisted of basic legal rules rather than legislation and basically reflected Latin customs and borrowings from the ancient Greeks. Another important landmark was the *Institutes* by Gaius in the 3rd century BC, a compilation of Roman law. In particular, the classification and subdivisions in this work (for example the classification of 'things, persons, and actions') still underpins modern civil law systems. In the 6th century Justinian reigning in the East after the collapse of the Western Roman Empire, decided to codify the existing Roman laws and this became known as the *Corpus Juris.* This consists of the *Institutes,* the *Digest* or *Pandects* (a compilation of Roman juristic writings), the *Codex* (a collection of edicts and legal decisions) and the *Novels* (a collection of imperial legislation).

card was actually not a credit card but a charge card since it did not offer a revolving credit facility, although there was a period of time after the cardholder receives the bill before it had to be paid. The addition of a credit facility to a multi-outlet card was the next step in the development of the modern credit card system.

The 'stand-alone' systems like Diners or American Express as the name implies do not rely on a network of banks or financial institutions that are franchised to issue cards to their consumer customers and merchant customers.

In contrast to the stand-alone card are those cards like Visa or MasterCard which license their cards to other financial institutions. This means that Visa and MasterCard could plug into existing national bank networks. There are pluses and minuses in this from the point of view of the participating institutions. First, it means that the brand name of Visa or MasterCard may appear prominently on the card issued by banks – the trend has been for this name and logo to appear smaller and smaller. Second, each bank competed with other banks for both merchants and cardholders. On the other hand, the nature of the credit card system involved co-operation and restrictions on competition. This fundamental tension has been the source of endless legal battles overseas and in Australia. What amounts to legitimate co-operation in terms of credit card operating systems and what can be regarded as a fetter upon competition itself is still a very blurred distinction

Both MasterCard and Visa started out as associations- any qualified financial institution could join. Members received the right to issue cards and enter into standard form agreements with merchants and consumers. In keeping with the co-operative nature of the organisations Visa and MasterCard developed and operated systems and advertised on a common basis. Making a profit was not the aim. Outside the agreed common core activities, the members competed with one another for merchants and consumers. But MasterCard began floating its shares on the market in May 2006 and the float was a huge success.

On the other hand, American Express and Diners started out as publicly listed companies in America and the shareholder members were, and still are, only passive equity owners. Shareholders elect directors in the normal way. American Express franchises its operations outside America, but this does not alter the fundamental nature of the organisation. Like all publicly listed companies it seeks to give good returns to its shareholders who typically do not have any business relationship with it. It develops its own systems and markets this free from any input by shareholders.

Over the last few years, American Express claimed Visa discouraged its members from issuing cards by other payment processors. This had significant anticompetitive

ramifications and there were reports of pending US legal action.[7] Partly in response to this and the commercial success of the Mastercard float, Visa in 2008 decided to go public. Member bank shareholding will be under fifty per cent, thus lowering exposure to legal risks.

In Australia credit cards have a very long history and certainly predate the modern world wide phenomenon. Many large retailers in Australia offered credit cards to their customers back in the 1960s; for example, Myers and David Jones to name two major stores offered these to valuable customers. These cards offered a revolving credit to customers and made the goods immediately available whereas with lay-by systems the customers did not obtain the goods until payment was made in whole. Most consumers wanted the goods immediately with the option of paying for them later. Moreover, the lay-by price often had some credit element worked into the price to cover the cost of holding the goods and insurance. Clearly a store credit card was clearly superior to lay-by from the customer's point of view. But there was a risk from the store's point of view, albeit slight, that with the purchase of goods on credit that the customer might sell the goods before payment in full, thus coming within the buyer in possession exception to the Nemo Dat rule. Under this exception a buyer who has possession of goods, even though the legal title is still vested in the store, may pass a good legal title to bona fide purchaser for value without notice.[8] This was something of a danger but store credit cards were only given to valued customers with a good credit record, so the possibility of fraud was minimal. Moreover, expensive items like white goods could be sold on hire purchase which was designed to circumvent the effect of the buyer in possession to the Nemo Dat rule. The store credit card had one obvious disadvantage: it could only be used at the particular store that issued it or at its branches. Nevertheless these cards had two key features of modern credit cards- immediate access to goods or services without cash and access to credit at the same time.

The first multi outlet credit card in Australia was Bankcard which was founded in 1974 and was issued by a consortium of banks but was only effective, that is, accepted by merchants in Australia and New Zealand and the Cook Islands. (Overseas Australian travellers in those days used traveller's cheques or a revolving letter of credit or the cash services of overseas correspondents of Australian banks.) Eighteen months after its launch it had 1,054,000 cardholders and 494 merchants had signed up. Each bank issued its own version of the 'universal' Bankcard and was solely responsible for credit rules and customer relations.[9] Bankcard had a virtual

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7 http://www.echolist.com/business/2006/october/news191456.html visited 24/3/2008.

8 *Goods Act 1958* (Vic), s 31.

9 http://www.bankcard.com.au/ visited 17/9/08.

monopoly in Australia up until the introduction of Visa and MasterCard in the 80s. In 2006 the Bankcard Association of Australia announced that it was closing down operations and by the end of 2006 no merchants in Australia were accepting Bankcard. It was closed down on the 24 April 2007.

The nature of the agreement between Australian banks and Bankcard holders as regards disputes

Typically most agreements for cardholders contained an undertaking by the cardholder not to raise against the bank any defence or counterclaim which the cardholder could raise against the merchant.[10] Chappenden in the early 1970s tentatively suggested that the direct obligation theory (the cardholder is a mere borrower from the bank – hence no set up of defences allowed) as opposed to the assignment theory (defences allowable) was 'generally accepted as being the one the courts will follow in the UK and in Australia'.[11] This probably explains such an undertaking by cardholders in their Bankcard contracts.

What is chargeback?

Chargeback involves debiting the merchant's credit card funds after the funds have been paid to the merchant. This may occur when a customer disputes a credit card transaction. The reason may be that it is an unauthorized transaction or it may relate to the quality of the goods and services supplied by the merchant. As a chargeback right for an unauthorised transaction is unremarkable, the emphasis will henceforth be about 'quality' chargebacks.

To understand what a chargeback involves a simplistic diagram will aid our understanding.

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10 W J Chappenden 'Bank Credit Cards' (1973) 5 *Commercial Law Association Bulletin* 19, 21.

11 W J Chappenden 'Bank Credit Cards' (1973) 5 *Commercial Law Association Bulletin* 19, 21; see also Report on Fair Consumer Credit Laws (The Molomby Report) 41.

Card holder → 3. Contract for purchase of goods/services from merchant ← **Merchant**

↓ ↓

1. Contract with terms & conditions for use by cardholder

2. Contract with terms & conditions for use by merchant.

↑ ↑

Card issuing Bank A →4. Contract between banks for payment & reimbursement. ← **Merchant's Bank B**

Taking a simple example of a credit card, there are at least four agreements. First, there is an agreement between the consumer and the bank (the card issuer) setting out the terms and conditions for use of the credit card.[12] Second, there is an agreement between the merchant and the bank (often called in credit card jargon the 'acquirer' since it acquires the signed vouchers or electronic equivalent from the cardholder and acquires the rights of the merchant to payment) and this details the merchant's responsibilities in terms of obtaining payment from the bank. Third, there is the agreement between the consumer and the merchant for the purchase of goods and services with the credit card. With a purchase over the internet using a credit card number there will be at least two banks involved: the cardholder's bank (the issuer) and the merchant's bank (the acquirer). These will not normally be branches of the same bank. Fourth, there will be the agreement between the banks for payment and reimbursement.

Chargebacks preferable to litigation

When a consumer has an argument with a merchant about the provision of goods and services, for example, that they do not comply with the contract, he or she can prevail upon the card issuing bank to ask the merchant's bank to reverse the payment already made to the merchant when the cardholder purchased the goods or services. The cardholder usually makes the request at the time when he or she receives the credit card bill but it may be made before this or sometime afterwards; for example, when the cardholder receives the goods dispatched to him or her. Being able to pull back payment is an obviously powerful weapon in the hands of the cardholder. Absent chargeback rights if the merchant has been paid, the consumer's remedy is only to litigate. Often the amount in question makes this a dubious

[12] The first credit card on the scene in Australia in 1974 was the bankcard. A flood of bankcards was unleashed by nine banks which constituted a consortium. In less than a year there were over half a million bankcard holders. These bankcards were not solicited by customers. They were sent out without any written or oral request. The *Trade Practices Act 1974* (Cth) which came into force shortly after this made the sending of unsolicited credit cards illegal: s 75.

possibility. Litigation is also a dubious possibility where there are Internet sales and the merchant is in a different country.

Strictly speaking the charge back is about the bank obtaining a refund from the merchant not about whether the card holder can stop payment, although from a practical point of view the cardholder may see it as amounting to the same. Even with the manual use of a card once it has been instigated there is no way that payment can be stopped. Typically banks' terms and conditions relating to credit cards point this out.

Credit card payment not an irrevocable payment

In some ways, the charge-back provisions detract from the attractiveness of credit card payment from the point of view of the merchant. In Australia when credit cards operated without charge-back provisions (or when cardholders were not aware of them) the merchant was assured of payment if it was an authorised transaction, all other things being equal. The introduction of charge-back provisions relegates credit card payment to a situation similar to that of payment by cheque: it is not an irrevocable payment if the cardholder can compel the card issuer to invoke the charge-back provision against the merchant.

Charge back rights more extensive than right to stop payment on a cheque

Clearly charge-back rights imply that payment is conditional. Moreover, the right to payment is arguably more tenuous than payment by cheque. Under Australian law a cheque can always be a countermanded by the drawer,[13] but this will not always prevent the drawer from being sued on the cheque, especially if the cheque has been passed onto a holder in due course who will be able to enforce it against the drawer free from any disputes between the drawer and the payee.[14] Even in a legal action by the payee against the drawer a defence by the drawer to the action is not easy to establish. The fact that the drawer has a right of set-off or a counterclaim against the payee stemming from the contract of sale will not necessarily provide a defence to a claim on the cheque. Judgment will be entered for the payee but the drawer can pursue his claims against the payee in another legal action. Leave to defend the claim will only be granted if the cheque is affected with fraud, illegality or failure of consideration.[15] Charge-back rights are more akin to a cheque being paid and then the drawer having the right to unravel the whole payment transaction. Clearly if

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13 Bills of Exchange Ordinance (Cap 23 Statutes of the Republic of Singapore), s 75; *Cheques Act 1986* (Cth), s 90.

14 Ibid ss29, 38; ss 49, 50.

15 *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GMbH* [1977] 1 Lloyd's Rep 463.

rights of charge-back can be invoked by the cardholder they are more extensive than those of a drawer of cheque since complaints about the quality of the goods and services will suffice to support the charge-back.

How did 'quality' chargebacks develop in America?

To understand how chargeback developed in America it is necessary to avert to some of the theoretical discussion of credit cards since this is relevant to their legislative genesis.

Despite credit cards being common throughout the world since the early 1970s their exact legal nature was, and still is, somewhat obscure in the common law world. There were a number of theoretical explanations in America (and in Australia) which informed the debate in America, some of them consistent with the proposition that defences against the merchant should be able to be set up against the issuing bank, others inconsistent with this idea.

The letter of credit analogy

There seems to be some similarity between letters of credit and credit cards. With a letter of credit the buyer in effect replaces himself with the credit worthiness of the issuer of the letter of credit. It has been described in Denning L J in *Pavia & Co SPA v Thurmann – Nielsen* in the following terms:

> The buyer requests his banker to open a credit in favour of the seller and in pursuance of that request the banker or his foreign agent issues a confirmed credit in favour of the seller. This credit is a promise by the banker to pay money to the seller in return for the shipping documents. Then the seller, when he presents the documents, gets paid the contract price. [16]

A letter of credit is used to provide sound financial banking to the buyer's undertaking to pay. Likewise with a credit card 'supplier and customer have for their mutual convenience each previously arranged to open an account with the same company, and agree that any account between themselves may, if the customer wishes, be settled by crediting the supplier's and debiting the customer's account with that company'.[17] With a letter of credit the thing that triggers liability to pay the beneficiary is the conformity of the documents with the principal's instructions- the applicant cannot interfere with payment if it is an irrevocable letter of credit unless clear fraud is established. Likewise, so it is argued, with a credit card: the vouchers or electronic equivalent submitted by the merchant give rise to an independent

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16 [1952] 2 QB 84 at 88.

17 *Re Charge Card Services* [1987] Ch 150; [1986] 3 ALL ER 298 at 303.

obligation on the card issuer to pay. It has, however, been doubted whether the credit card is really like a letter of credit.[18]

If a credit card is somewhat like a letter of credit it would follow that the credit card holder would not be able to set up against the issuing bank defences the cardholder may have against the merchant since letters of credit have always been considered independent of the underlying contract.

The assignment theory

The second plausible theoretical explanation of a credit card is that it involves an assignment by the merchant to the bank of 100 cents in the dollar of the debt owed by the consumer to the merchant and the merchant receives a lesser sum in return from the card issuer. With an assignment of a debt the assignee takes subject to defences and counterclaims that could have been raised by the debtor vis-à-vis the assignor.[19] However, if the assignment theory were valid- and there are considerable doubts about this- it would support the notion,[20] that a credit card holder would be able to set up against the issuing bank defences the cardholder may have against the merchant.[21]

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18 Ibid.

19 See *Roxburghe v Cox* (1881) 17 Ch D 520.

20 However, the assignment theory is not without its problems. What is there to assign? If one regards payment with a credit card as being final, with the cardholder debt not reviving if payment is not made by the card issuer, then there is nothing to assign. The terms of credit and the risk of non-payment are basically in the contract between the cardholder and the issuing bank. The merchant accepts payment by a credit worthy paymaster, not by the consumer and knows nothing about the credit terms: *Re Charge Card Services* [1987] Ch 150; [1986] 3 ALL ER 298. This case seems to hold that the bank is not acting as the cardholder's agent in paying the merchant. Rather the merchant accepts payment by the bank (subject to the terms and conditions between the bank and the merchant) in lieu of the cardholder's payment obligation. In other words *Re Charge Card* establishes that payment by credit card is not like payment with a cheque where if the cheque is not paid the debt revives and the drawer is still liable to pay for the goods and services. The merchant accepts payment by credit card in full discharge. This can create a problem if the card issuer becomes insolvent, as was the case in *Re Charge Card*. But some have doubted whether this interpretation is always correct: A L Tyree 'Riedell gets a credit card' (2002) 13 *Journal of Banking and Finance Law and Practice*, 301.

21 If the transaction were characterised as an assignment it could have caused grave problems under article 9 of the US Uniform Credit Code. If it was viewed as a sale of the merchant's receivables to the bank, the bank as a factor would have to file a financing statement indicating the merchant as a debtor.

The direct obligation theory

Under this theory there is a direct obligation by the issuing bank via the card holder to pay the merchant's bank which in turn pays the merchant .Thus according to this theory there is no debt from the cardholder to the merchant to assign – the paper may be assigned to the issuing bank but it is not the obligation that is assigned. Under this theory any complaints about the goods could not be set up against the card issuing bank. The rights and obligations of the cardholder stem from the contract between the card issuer and cardholder not from the contract between the cardholder and merchant for the purchase of goods and services. Of course, the contract between the cardholder and the issuing bank based on a direct obligation theory would not say that the issuing bank would always pay; for example, it would not pay for unauthorised purchases but, consistent with the direct obligation theory, any disputes between the merchant and cardholder could not be used by the cardholder to refuse to pay the credit card bill.

Consumers versus the banks in America

With no clear theoretical basis for credit cards consumers in the 1970s argued that defences should be able to be set up against the issuer for the following reasons.[22]

The close connection argument

Consumers argued that banks were in good position to monitor merchants than consumers since banks were the ones who decided to extend the credit card facility to the merchant.[23] Moreover it was argued that banks were in a good position to spread

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22 See, for example, Note 'Preserving Consumer Defenses in Credit Card Transactions' (1971) 81 *Yale Law Journal* 287.

23 This idea is frequently encountered in the common law world. The Singaporean Hire Purchase Act, for example, provides for liability for the financier for breach of implied terms[23] and for any misrepresentations including those of persons who are not agents of the financier but are acting for the dealer 'in connection with or in the course of negotiations leading to the entering into of a hire-purchase agreement'.[23] In Australia s 73 of the *Trade Practices Act 1974* (Cth) provides that a linked credit provider may also be liable for loss and damage resulting from misrepresentation, breach of contract, breach of the implied conditions and the like. The cardholder may also set this liability up as a defence against the card issuer. But the defences available to the credit provider will mean that it is unlikely that the credit card issuer will be liable. First, was the credit a result of approach induced by merchant? The credit supplier is only liable if the answer is positive. Moreover, the credit provider is only liable if it has actual or implied knowledge of 'bad reputation' of merchant.[23] Nevertheless, as a principle, it has already been adopted in Australian legislation, the rationale being that the supplier of credit will be able to monitor merchants and only have links with reputable ones.

losses from seller misconduct or take out insurance rather than having it fall upon an individual consumer.[24]

Substance not form

Consumers also argued that if a consumer buys goods on credit from the merchant and they are defective, the consumer can set up against the merchant defences stemming from the contract. If it is a third party that is supplying the credit, why should not the consumer be able to set up against that third party credit provider defences the consumer could set up against a direct supplier of credit?

Credit cards as cash not credit

Another argument was that often when a person pays with a credit card he or she uses it just as a convenient means of paying and avoiding having to carry cash. Such a person will pay their card bill on time and will not in fact want credit. The card is used as cash. If a cash paying consumer can set up defences against a merchant seeking to recover, why should not a person using a credit card as cash have the same rights?

Arguments by banks against defences being able to be set up against the issuer

Goods with the cardholder

The banks argued that the merchant has parted with possession of the goods or rendered the service; so, to allow the cardholder to set up defences against the card issuer would effectively mean that the merchant was not paid. This, they argued, was too draconian a solution. The merchant would have to bring legal proceedings against the cardholder and this might prove difficult, especially if the cardholder were in another jurisdiction. (This is especially true nowadays when goods or services are bought over the internet using a credit card number.)

Payment by credit card the only source of payment

The direct obligation theory and the English case of *Re Charge Card Services* supported the notion that, in the absence of fraud, the merchant is entitled to look only to the card issuer for payment. If this is correct and the debt does not revive, so argued the

[24] The idea is now perhaps somewhat dubious where a credit card is used over the internet and the merchant is on the other side of the world. The credit card issuer has no idea of the reliability of the merchant - the most that it can hope for is that the merchant's bank has wisely agreed that the merchant can have a card facility of the same mark.

banks, then an action for the price may not be legally possible, even setting aside the practical barriers to an action. There is no obligation of the cardholder to pay the merchant, since the latter only looks to the card issuer for ultimate payment. Hence to allow the cardholder to set up defences against the merchant against the card issuer is not consistent with the *Re Charge Card Services* principle that only the card issuer is responsible for payment.

The credit card issuer only providing payment

The banks also argued that they did not want to be involved in disputes about the quality of goods and services in regard to which they are not in position to make any judgment. (This is especially true now if the merchant is on the other side of the world and the goods have been bought over the internet with a credit card number- the card issuing bank will not be in a position to vouch for the integrity of the merchant or his goods.) Moreover, it was also argued that if the card issuer bank and the merchant's bank combine to blackball the merchant it might constitute a conspiracy at common law or breach of antitrust laws. Card issuers argued that they are not closely linked credit suppliers to the merchants[25] and should not have to bear any liability for breaches of the contract between the merchant and the cardholder. The letter of credit analogy somewhat supported this argument – the issuing bank of a letter of credit does not become embroiled in arguments regarding the goods.

Abuse by cardholders

The banks also argued that that if the law allows cardholders to set up against the issuing bank defences the card holder may have against the merchant it could be abused by the cardholder who could make spurious allegation about the goods which would result in the merchant having payment taken away. Unscrupulous cardholders could thus exploit the system and the merchant would have no effective remedy, especially if the cardholder is in another country.

The genesis of the American legislation

Since the nature of a credit card transaction was theoretically obscure and since the pro consumer arguments and those contra arguments of the banks were both compelling it seemed in the early 1970s that courts in America could go either way on the issue of whether cardholder complaints against the merchant could be set up against the card issuer.

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[25] Section 73 of the *Trade Practices Act 1974* (Cth), for example, provides that where there is a close link, for example, where the goods supplier regularly refers consumers to the credit provider, then such a credit provider also bears liability, amongst other things, for breach of implied conditions; see s 73 (14) for a definition of a linked credit provider.

Some states passed their own laws on it. In 1970 Massachusetts passed a law that allowed for cardholder defences against the merchant to be set up against the issuer irrespective of the amount of the purchase and the location of the purchase.[26] Arizona allowed defences to be set up but only in regard to consumer durables. The state of Vermont also allowed to defences to be set up against the issuer but the sale transaction had to take place in that state and the card issuer had to be a Vermont bank.

In 1971 Brandel and Leonard wrote an impressive article which balanced the arguments of consumer groups and the banks and suggested a statutory compromise which is remarkably similar to the one eventually adopted by Congress.[27]

The *Fair Credit Billing Act* of 1974 provides as follows:

> When a person who honors a credit card fails to resolve satisfactorily a dispute as to property or services purchased with the credit card in a consumer credit transaction, the cardholder *may assert against the card issuer all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the dispute*. The cardholder may withhold payment up to the amount of credit outstanding for the property or services that gave rise to the dispute and any finance or other charges imposed on that amount.[28] (italics added)

This is theoretically consonant with the assignment theory of credit cards, even though this is widely discredited explanation of credit cards. *The Fair Credit Billing Act* is a section of the *Truth-in-Lending Act*[29] that provides the bones that are then fleshed out by Regulation Z.[30] The main provision that governs chargebacks in relation to disputes is the *Truth-in-Lending Act* § 170 and Regulation Z, § 226. But there are serious limits to charge- backs in regard to claims stemming from the underlying transaction. First, the good faith requirement of trying to resolve the dispute with the merchant is meant to make the consumer seek out the primary cause of the problem. Second, creditors are not liable (and not therefore subject to charge-backs) in respect of disputed transactions of less than US$50. The rationale for this limitation is that anything smaller should be looked upon as the equivalent of a cash transaction. Nor are they liable in respect of dispute transactions that occur outside the cardholder's state or more than 100 miles from the cardholder's mailing address. The apparent rationale for this restriction is to make feasible the idea of the issuer

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26 Mass.Gen. Laws Ann, Ch 255, § 12 F.

27 Brandel and Leonard ' Bank Charge Cards: New Cash or New Credit' 69 *Michigan Law Review* 1033.

28 *Fair Credit Billing Act 15 USC§ 1666(i) (1974).* See also Regulation Z, 12 CFR part 226.12[c](1).

29 Title 1 of the *Consumer Credit Protection Act of 1968*, 15 USC §§ 1601-1667f.

30 12 CFR part 226 (1999).

policing merchants that honour cards. Nowadays this is a serious limitation with the widespread use of credit cards over the internet.

However, the American law does not stop there. There is also provision for a bill error system which allows cardholders to dispute a bill that has a charge for goods or services not accepted by the cardholder or not delivered (the cardholder must give written notice to the card issuer within 60 days of receiving the disputed bill).[31] Thus, it covers more than simple errors. It can be used to make a claim that the cardholder never made the purchase in the first place and can even be used to request further clarification about the charge. The card issuer must reply in writing within 30 days and make corrections to the account of the account holder within 90 days where an error is proven.[32] If the card issuer does not comply with these requirements, the right to collect is forfeited.[33] These procedures are repeated and amplified in Regulation Z.

Thus if a consumer buys with a credit card defective goods or services whether in person or using the phone, mail or internet and refuses to accept them or the goods or services are delivered late or not at all, and the merchant fails to resolve the dispute, the cardholder may notify the card issuer of a 'billing error' since this term includes a charge on the credit card statement for goods or services that the cardholder has paid for but never received or were different from those agreed upon. But if the consumer has accepted the merchant's goods or services but afterwards is not happy with their quality, he is no longer entitled to use this bill error procedure to remedy his dissatisfaction.

The above American laws seem to be the genesis of the charge-back clause to be found almost universally in merchant- bank agreements. Normally, credit card issuers (from whom the cardholder has obtained the card) and acquirer institutions (with whom the merchants deal) operate according to the bylaws and operating regulations of the credit card company, for example, Visa or MasterCard, and these rules are supposed to be then mirrored in the agreement between merchant and acquirer institution. This is, at least, supposed to be the situation in regard to international transactions but is not always the case in regard to local transactions. Nevertheless, charge-back provisions in the bank- merchant agreement to be used locally can be also found in jurisdictions that do not have the equivalent of Regulation Z.[34]

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31 *Truth-in-Lending Act* § 161; see also Regulation Z, § 226.13

32 *Truth-in-Lending Act* § 161; see also Regulation Z, § 226.13

33 *Truth-in-Lending Act* § 161; see also Regulation Z, § 226.13

34 The following from Hong Kong (where there is no equivalent of regulation Z) is an example of a charge-back clause in a merchant- acquirer bank agreement.

If the cardholder-issuing bank contract has a clause that prevents the cardholder from refusing to pay the bank if the consumer is not happy with the goods or services- and many jurisdictions still have this- then this is a real obstacle for the consumer. An alternative approach is for the consumer to try and access the charge-back rules contained in the contract between the bank and the merchant. The obvious problem is that the cardholder is not a party to this contract despite the fact that a bank's right to withhold or pull back a payment from a merchant if the goods or services are defective benefits the cardholder.

The transplant of the chargeback concept to Australia

The Banking and Financial Services Ombudsman has played a crucial role in changing the law in regard to credit cards in Australia. Therefore a sketch of this unique institution is appropriate, noting at the outset that it is not the result of any legislation or government initiative but is an industry initiative.

Although not part of the legal system the Ombudsman works according to the law; good banking practice (the use of the word 'good' indicates that not all banking practices will be given due weight – indeed some banking practices might be bad); and, finally, what is fair in all the circumstances (in this area the Ombudsman will at times be guided by non-legal codes, for example, the Advertising Industry Code of Ethics or the Electronic Funds Transfer Code).

In the Australian Banking Industry Ombudsman's 1996-7 Annual Report, the Ombudsman (now called the Banking and Financial Services Ombudsman**)** made the following point in regard to 'charge-backs':

> The Operating Rules are not part of the contract between the cardholder and the bank, but are part of the contract between the banks. They identify the rights and obligations of members of a scheme such as Visa or MasterCard worldwide. Their impact is felt when a customer disputes a transaction on a

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The Company (the acquirer bank) shall have the right at any time without notice *to charge the merchant's account, to withhold payment on any sales draft* (credit vouchers) presented to the company by the merchant at any time or to bill such bill to be payable on receipt thereof for the total value face amount of all sales drafts where …
(f) The cardholder *disputes the sale quality or delivery of the merchandise or the performance quality of services* in relation to such sales drafts;
(g) Such sales draft was drawn by or credit given to the merchant in circumstances constituting a breach of any term, condition, representation, warranty or duty of the merchant hereunder;
(h) sales of merchandise performance of services or use of the credit card involve a violation of law or the rules or regulations of any governmental agency local or otherwise.
(Italics added)

> credit card and the customer asks the bank to reject the charge made to the account. This is called a 'charge-back'. The Rules determine when a bank can make a charge-back and this restriction is often based on time limits within which the charge must be requested.
>
> It would be helpful if the need for strictly observed time limits, as contained in the conditions of use for the card, was specifically brought to a customer's attention. Consumers could then better appreciate that these time restrictions are vital. They are imposed on the bank by the Rules, and once the time has expired there is little more the bank can do.[35]

Codes in Australia that allow for chargeback

In Australia there are two initiatives that relate to charge-backs: the Electronic Funds Transfer Code (the EFT code) and the Code of Banking Practice.

The original Code of Banking Practice of 1993 was developed originally by a joint task force of the Treasury and the Trade Practices Commission (now called the Australian Competition and Consumer Commission) in response to a government inquiry into banking. There had been a lot of criticism of banks, especially in regard to guarantees. However, the original Code of Banking Practice made no mention of chargebacks.

The original Code of Banking Practice was reviewed in 2001 and the Australian Banking Industry Ombudsman (AIBO) – now called the Banking and Financial Services Ombusman- made a submission proposing the inclusion of an obligation on banks to place a stop on a cardholder's account when a customer has disputed the transactions debited by a merchant. The Ombudsman took the view that it would improve and clarify the banker/customer relationship if the Code could be expanded to identify as good banking practice that, in situations where a transaction was disputed, a customer would be offered the option of placing a stop on the account, if the banking system allowed it, similar to the stop effected when a card is reported lost or stolen.[36] This recommendation was not, however, taken up.

The Ombudsman's proposal is interesting in that it seems almost to consider the bank card issuer as the agent (this is dubious if Re Charge Card is correct), but even if this were correct, it does not take into account the fact that under the credit card scheme the card issuer is contractually liable to pay the merchant providing that the merchant fulfils his side of the bargain.

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35 Australian Banking Industry Ombudsman's Annual Report 96-97 at p 32.

36 Australian Banking Industry Ombudsman Review of the Code of Banking Practice, Issues Paper, February 2001 pp 3-5.

As mentioned the Ombudsman's experience is 'that member banks will attempt to charge-back disputed transactions where they can'.[37] It was the view of the Ombudsman that this was good banking practice and that this was one of the objectives of the Code, upholding standards of good practice and service, even though it may not be the cardholder's strict legal right.

In 2001 the Australian Securities and Investment Commission (ASIC), a Commonwealth body that is charged with protecting consumer's interests in regard to financial services, made this point about chargebacks in its submission:

> Consumer rights under the chargeback system have not previously been understood by consumer or consumer advocates, and in large part, this has been due to the lack of transparency about these arrangements. In turn this has had an impact on the extent that consumers have been able to utilize the arrangements. Making the chargeback system more transparent is a very important reform for consumers.

That consumers or consumer advocates have not understood consumer rights under the chargeback system is perhaps evidenced by the fact that a joint submission by the Consumer Credit Legal Centre (NSW), Consumer Credit Legal Service (VIC), Consumer Credit Legal Service (WA), Consumer Law Centre (VIC), Care Financial Counselling Service, Financial Services Consumer Policy Centre to the 2001Review of the Code of Banking Conduct does not even mention chargebacks.

Consumer and Business Affairs Victoria, a Victorian state funded body, in its submission merely stated it supported the Review interim recommendations in regard to chargebacks.[38]

The latest version of the Australian Code of Banking Practice that came into force in August 2003 (and was subject to some minor amendments in 2004) provides as follows in regard to charge-backs (s 20) and follows exactly the interim recommendations of the Review:

> Charge-backs
>
> We will, in relation to a credit card transaction:
>
> (a) claim a charge-back right where one exists and you have disputed the transaction with us within the required time frame;
>
> (b) claim the charge-back for the most appropriate reason;

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[37] Australian Banking Industry Ombudsman Review of the Code of Banking Practice, Issues Paper, February 2001, p 85.

[38] Consumer and Business Affairs Victoria submission to the Viney Review of the Code of Banking Conduct, 2001 p4.

(c) not accept a refusal of a charge-back by a merchant's financial institution unless it is consistent with the relevant card scheme rules; and

(d) include general information about charge-backs with credit card statements at least once every 12 months.[39]

It is interesting to read a major Australian bank's 'translation' of this into the terms and conditions between the cardholder and the bank.

> Each card scheme's rules allow us to dispute an authorised transaction for you in certain circumstances if we do so within strict time limits. If the credit card scheme's rules allow us to do so, we will claim a refund of a transaction ('chargeback') for you. Usually we can only do this if you tried to get a refund from the merchant first and were unsuccessful.[40] You should tell us if want us to chargeback a transaction for you within 30 days of the statement date so that we do not lose our chargeback rights. If you tell after this time, and we cannot chargeback the transaction, you will continue to be liable for that authorised transaction.[41]

The embodiment of chargeback rights into the Code is a welcome development. The problem with the use of credit cards is that the consumer will be at a gross disadvantage if the goods or services are not what the cardholder ordered. Usually the amount involved will not justify litigation and cross-border transactions involve jurisdictional problems. In the past the relative certainty of payment with credit cards meant that the risk in the transaction was effectively borne by the consumer cardholder. The cardholder paid with his card and hoped that the goods or services were in conformity with the contract. Various methods can be utilised to overcome or minimise the problem, for example, state enforcement of consumer rights,[42] consumer group enforcement,[43] self-regulation by merchants,[44] and external institutions that guarantee performance.[45] But it is submitted, however, that a right of

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39 The Code of Banking Practice is currently undergoing a Review (2007-2008) but the issue of chargebacks was not mentioned in the Review's Issues Paper.

40 Presumably there must be terms in the operating rules of some cards whereby the bank's right of charge-back is conditional upon the cardholder trying to obtain a refund from the merchant.

41 From the author's contract with his bank.

42 In Australia, for example, the Australian Competition and Consumer Commission (ACCC) can initiate proceedings to protect consumers; in the US the Federal Trade Commission (FTC) and the Attorneys General act as consumer protection agencies.

43 See, for example, article 11(2) of the European Commission Distance Contracts Directive which allows consumer organizations to take action to protect consumer interests.

44 See, for example, trade associations.

45 Some credit cards extend the normal manufacturer's warranty; see, for example, Commonwealth Bank of Australia, Platinum and Gold Credit cards. Gerling, a German

charge back that can be exercised by the cardholder is a simpler and more effective way of protecting cardholders.

Turning now to the Electronic Funds Transfer Code (EFT Code), this also has something to say about chargebacks. The EFT code was worked out by the banks, consumer groups and the Trade Practices Commission It was seen initially as an alternative to legislation, which is the path followed by the United States. Although it is described as a Code and as being voluntary those banks that decide to follow it must reproduce its terms in the contract between the card issuer and the cardholder and, moreover, they must warrant that they have incorporated the code's key features.

Amongst other things the EFT code applies to credit cards when they are used over the phone but not when a consumer uses a credit card manually, that is, by having the credit card swiped and signing a credit card voucher. The issue of charge-backs is relevant to the issue of liability and the EFT code refers in 5.11 to chargebacks where there are unauthorized transactions.

The explanatory endnote 21 to the new EFT code says in regard to the above:

> Account institutions may be able to resolve unauthorised transaction disputes on credit exercising rights (such as the right to charge-back a transaction) against other parties to credit card or charge card accounts. This clause does not require account institutions to exercise any such rights. However they cannot hold account holders liable under clause 5 for a greater amount than would apply if they had exercised those rights. The relevant rights are those that exist at the time the complaint were made. A delayed complaint may mean the rights have expired by the time of the complaint.

In short if there is a dispute as to liability in regard to an unauthorised use of a credit card over the phone and the bank is able to show that the cardholder has contributed to the loss, then the loss to be borne by the card holder will be no greater than had the bank exercised its charge-back rights against the merchant. There may be no obligation on the bank to exercise its rights against the merchant but there is a strong incentive for it do to so.

It is often overlooked that EFT chargeback rights only apply in regard to unauthorised transactions. If there is an authorised transaction and a dispute about the goods or services, the consumer must look to the Code of Banking Conduct for his or her rights.

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insurance company, has e-commerce insurance that covers defective goods and non-delivery: http://www.gerling.com/

Assessment of the American Transplant

Differences

There are some differences between how chargeback works in Australia compared to America. First, in regard to disputes over goods and services, the Australian source of charge back rights, the Code of Banking Conduct, makes no explicit mention of attempting to work out the problem with the merchant before using chargeback rights. However, in practice most consumers will go first to the merchant when there is a problem with goods or services before contemplating invoking chargeback rights. Moreover, before going to the Banking and Financial Services Ombudsman about chargeback rights it is a requirement that the consumer tries to work out the matter with the bank and the latter will always ask whether the consumer has tried to resolve the matter with the merchant. Thus this difference is more apparent than real.

The second difference in regard to disputes about goods and services is that there is no territorial restriction as there is in America. This is welcome. The purchase of goods over the internet makes such a restriction an almost insurmountable obstacle and its absence in Australia is sensible.

The third difference is that in Australia consumers have recourse in the final analysis to the Ombudsman to resolve the dispute. Apart from loss of time, there is no direct cost to the consumer. In America taking matters to court over consumer purchases can be costly and often will make the game not worth the candle.

The role of the Banking and Financial Services Ombudsman

The role of the Banking and Financial Services Ombudsman (formerly the Australian Banking Industry Ombudsman) in Australia in facilitating the adoption of the American idea of chargebacks has been fundamental. It initially brought up the problem of chargeback rights being in the merchant-acquirer bank contract and not in the cardholder-card issuing bank contract. This should be contrasted with courts which rarely take up causes to assist litigants. The Ombudsman's annual reports have played a key role here in this context.

The adoption of chargeback rights in Australia generally fits with Watson's thesis that law is changed by borrowing and that lawyers and scholars are central to this process. As regards chargebacks rights in Australia it was not a case of lawyers working, for example, for government or a law commission and actively looking elsewhere to find a solution. The chargebacks rights, as a result of US laws, were made part of the credit card system rules like those of Visa and Mastercard which were in turn part of the whole credit card system that was adopted by the banks in Australia. In a sense chargebacks were almost like a physical appendage to modern

US based credit cards. Certainly lawyers in the Banking and Financial Services Ombudsman realized that in Australia these rights in the Australian version of US credit system rules were only in the agreement between the merchant and the acquirer bank and that the credit card holders, because of privity of contract, did not have access to them. In short chargeback rights were already in Australia as part of US based credit card system rules, just not in the customer-credit card issuer contract, and lawyers via the Banking and Financial Services Ombudsman were instrumental in advocating the necessary changes to the Code of banking Practice to allow access.

Watson also argues that transfers occur somewhat independently of societal pressures and influences. The latter point has always been the contentious point about Watson's theory and is somewhat dubious in regard to chargeback rights in Australia. Certainly there were social pressures in Australia to provide some sort of remedies for credit card holders especially when credit card numbers were being used over the net and the cardholder did not receive the goods or services at all, or received non-conforming goods and services or where fraud was involved. This is precisely why the existence and importance of chargeback provisions was elaborated on by the Banking and Financial Services Ombudsman and access was advocated on the basis that it would represent good banking practice for banks to use these for the benefit of cardholders, even though at that point of time chargeback rights were not in the contract between the cardholder and the bank but in the contract between the merchant and his bank. Since there were (and still are) a small number of major banks in Australia this meant that in many cases the same bank was both the bank of the cardholder and the merchant. This may have facilitated the approach advocated by the Ombudsman.

This underscores the point that usually there is some very practical reason for the adoption or transplant of some foreign law or practice. We see this too with negotiable instruments. Holden surmises that the adoption by English merchants of the Italian bill of exchange and the attendant law merchant probably just reflects the fact that foreign trade became more and more concentrated in English merchant hands and that they needed an instrument capable of settling foreign accounts.[46]

Transplants a mistaken notion?

On the other hand, some argue that to talk of transplants is a mistaken notion. Le Grand, for example, argues that legal transplants are not really possible since the 'rule' that is transplanted comes from a different legal culture and when it is transplanted it loses this legal cultural context and acquires a completely different legal cultural context, so that, in effect, to speak of a transplant is spurious. Perhaps

[46] Holden *History of Negotiable Instruments in English Law* (1955) 22.

this takes things too far since Watson's concepts are multifaceted and somewhat slippery; for example, his idea of transplants also covers 'ideas' [47]just being borrowed rather that just the rule itself and that borrowing covers not only legal rules being borrowed but also institutions, legal concepts and structures.[48] Although the epistemological settings are different between America and Australia and business culture is less litigious in Australia, essentially the debate was the same in both countries: consumers and their advocates arguing that complaints about goods could be set up against payment to the card issuer and the card issuers being reluctant to accept this. Before the advent of chargeback in Australia, banks and financial institutions used to make it an express part of the card issuer – cardholder contract that any disputes over goods and services was not to mean that the cardholder did not pay his or her credit bill. However, the presence of chargebacks rights in the merchant- acquiring bank contract, stemming from US legislation, made banks and other financial institutions vulnerable to the argument that cardholders should have the benefit of this.

Phenomena of globalization

The Banking and Financial Services Ombudsman's references to credit card 'operating rules' also takes us to the phenomena of globalization. The American legislation that allows defences to be set up by the cardholder against the issuer bank was incorporated into the operating rules of American credit card systems which have spread like octopus tentacles across the world. Add to this the phenomena of the internet and the use of credit cards to buy goods and services over this and it is clear that technology has created a new form of money. The law has always followed money. Thus, negotiable instruments developed in Europe and migrated to England and the law relating to them also was eventually adopted in England. Similarly credit cards and the internet are American in origin and the American law has simply followed this new form of money as it has been adopted around the world. Card operating rules provide a template that allows for local modification. However, because chargeback provisions favour the merchant's bank when there are problems with the merchant these rights are typically retained even though local law may not even confer any chargeback rights on credit cardholders. Chargeback rights thus enter the backdoor and cardholders may not even be aware of their existence. This was certainly the position in Australia before changes to the Code of Banking Conduct.

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47 Watson, 'Comparative Law and Legal Change', (1978) 37 *Cambridge Law Journal* 313, 315.

48 Alan Watson, 'Legal Transplants and European Private Law' (2000) 4.4 *Electronic Journal of Comparative Law* < http://www.ejcl.org/44/art44-2.htmll> at 5 July 2006.

Overall, the case of the transfer of chargebacks to Australia is interesting for a number of reasons. US card system rules did not have consumer chargeback rights, especially those relating to disputes, as a result of any sense of generosity but directly as a result of US laws. The card system rules operate like a template and thus the rights are part of a 'universal' system. A bank funded dispute resolution system, the Banking and Financial Services Ombudsman, played a major role in their introduction. A code of conduct, rather than direct legislation, resulted in consumer cardholders, having access to them.

It can be concluded that foreign laws relating to new forms of payment do follow in the wake of the introduction of these but that significant modifications are made so that the 'foreign' law is able to thrive in a new environment. This has been the case in the past and also in the present.