

**THE CODE OF BANKING PRACTICE: A GOOD TIME AND PLACE TO
FORMALLY START RECOGNIZING CONSUMER CHARGEBACK RIGHTS IN
SOUTH AFRICA**

by

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Summary

In South Africa, the robust banking sector may be overwhelming to its clients and may even leave them vulnerable to their business practice. Banks support card purchases but some are reticent about their role in chargebacks. The Consumer Protection Act 68 of 2008 provides for some very noble refund remedies but if these remedies are not enforced by banks, they prove ineffective. The banks own the credit transfer process but neither the Consumer Protection Act 68 of 2008 nor the National Credit Act 34 of 2005 compels them to chargeback credit card transactions and the consumer is therefore left without protection. This means that if a customer buys a service using his credit card and seeks a chargeback from his bank for a valid reason, there is no recourse for the customer in terms of the contract with the bank and the customer is left at the mercy of the bank and the rules and regulations of the credit card operator with whom the customer does not have a contract.

Similarly debit card purchases and electronic fund transfers (EFT) also fall short of protection as the banks' reticence follows through to these as well. The bank is under no obligation to assist the client with disputed transactions and this can be appreciated from the wording in card agreements, some more notably than others. That been said, the Consumer Protection Act 68 of 2008 does contemplate payment for goods and services using a credit or a debit card but fails to call on the banks to assist the consumer. The code of banking practice does not come to the aid of the consumer either as the voluntary commitments are limited to some aspects of cheques, debit orders, foreign exchange, internet telephone and cell phone banking. The aforementioned payment services have chargeback references or provisions which protect the customer; however the code makes no mention of payment services linked to debit and credit card payments.

In practice, a third party card operator attends to dispute resolution and chargebacks but accrues no contractual responsibility towards the client, nor are the card operators subject to South African law and jurisdiction. In this paper, the client bank relationship is also examined as the bank is in the precarious position of having to make or break a client. The mechanics behind the real time gross settlement system of South Africa in order to understand what can and cannot be done is also discussed. Coming back to the refund provisions in the Consumer Protection Act 68 of 2008 only two of them stipulate a timeline within which to effect the refund but the international card operator is not bound by these timelines.

Also, there is no visibility as to the debit and credit mechanisms between the client's bank and the merchant's bank and if a dispute is resolved within 3 or 4 days there is nothing preventing the merchant's bank or the client's bank from taking 120 days to credit the client. The banks would then have the opportunity to create a healthy cash flow at the expense of the aggrieved customer. This dissertation also calls on the *Competition Commission* to test the code of banking practice against prohibited practices and it calls on the legislator to address consumer chargeback rights in appropriate legislation. Lastly a recommendation with regard to wording that must be introduced into the code of banking practice to enforce chargeback rights is made as well as a suggestion to the utilization of existing *Ombudsman* and registered paralegals.



Contents

Summary	- 2 -
Chapter 1	- 5 -
1.1. Introduction.....	- 5 -
1.2. What is a chargeback?	- 6 -
Chapter 2	- 10 -
2.1. Legislation	- 10 -
2.2. Codes of conduct and practice	- 11 -
2.2.1. Code of conduct for authorised financial services providers and representatives. -	12 -
2.2.2. The credit industry codes of conduct	- 13 -
2.2.3. The Code of Banking Practice.....	- 13 -
2.2.3.1. Cheques (paragraph 9.1 of the Code).....	- 13 -
2.2.3.2. Foreign exchange services and remittances (paragraph 9.2 of the Code)	- 14 -
2.2.3.3. Internet, telephone and cell-phone banking (paragraph 9.3 of the Code)	- 14 -
2.2.3.4. Debit orders (paragraph 9.4 of the Code)	- 14 -
2.2.3.5. The Code and payment services on debit and credit cards.....	- 15 -
Chapter 3	- 16 -
3.1. Bank-client relationship.....	- 16 -
3.2. The application of the RTGS paid versus delivered test to case law	- 20 -
3.3. The Code of Banking Practice and the Competition Commission	- 21 -
3.4. The rules of card operators and the contract between a consumer and the merchant ..	- 23 -
3.5. The rules of card operators and consumer protection legislation	- 27 -
3.6. The role of PASA.....	- 33 -
3.7. Friendly Fraud.....	- 33 -
3.8. Online dispute resolution (ODR)	- 34 -
Chapter 4	- 36 -
4.1. Recommendation.....	- 36 -
Bibliography	- 39 -
Schedule A	- 42 -

Chapter 1

1.1. Introduction

The Code of Banking Practice is a voluntary document which the banks affiliated to the Banking Association of South Africa (BASA) seek to uphold. One of the features of the Code is the promotion and protection of consumer interests. However, unlike other countries the Code does not recognize a consumer's right to a chargeback as a contractual remedy and does not put an obligation on banks as custodians of the payment process to assist the customer with the reversal of a transfer where a client is entitled to one. This dissertation seeks to investigate the feasibility of introducing such a consumer right in the Code which would work hand in hand with the Consumer Protection Act¹.

The structure of the dissertation is to first look at the definition of "chargeback" in the context of credit transfers in order to focus the reader's attention on the crux of the author's research. Secondly, legislation is investigated to ascertain if the concept of "chargeback" is embedded in any legislative provision. Thirdly, the Code of Banking Practice is examined for traces of "chargeback" provisions. The author then pauses to review the bank-customer relationship in relation to "chargebacks" through the cases and compares the rationale of the courts to the rationale followed by the banking industry when processing settlement. Next the author visits the role of card operators *vis a vis* commercial contracts, consumer protection legislation, and regulatory bodies. Lastly, as an ancillary to "chargebacks" the author touches on friendly fraud and dispute resolution.

The approach of this dissertation is pragmatic in that it entails a review of commercial contracts presently in use by banks and South African Airways (SAA). These contracts help to connect the theory of chargebacks to their practical aspects, the net effect being that the author is able to make a recommendation that has a basis in practice.

¹ 68 of 2008.

1.2. What is a chargeback?²

The word “chargeback” originally referred to bipartite charge cards where a retailer would extend a line of credit to a customer and if the customer returned goods for valid reasons the customer’s card would be charged back with the amount spent. As this was not a cash refund the retailer was assured that the customer would use the card again to buy another product. When oil companies and banks introduced tripartite or credit cards, the chargeback concept was also applied to them³. In order to understand chargeback and other forms of reversals in general it is necessary to understand the national settlement system.

The National Payment System Act⁴ provides that settlements are final and irrevocable⁵. A solid settlement system based on *quid pro quo* leads to a sound financial system. In order to ensure the latter, settlement risk must be mitigated. The two main risks are credit risk and liquidity risk. Credit risk is where no payment is received and liquidity risk is when payment is received only at a much later date than the due date. In reference to systemic risk the failure of one bank to meet their obligations when due could trigger instability in the payment system.⁶

An ad hoc study by the Bank of International Settlements (BIS) into the functioning of real time gross settlement⁷ in 1997, explains that the root of these risks is settlement lags in the form of (a) a time-lag between the execution of the transaction and its final completion and (b) a time-lag between the completion of the two legs of the transaction (i.e. any lag between payment leg and delivery leg)⁸. In the case of chargebacks and other forms of reversals the risk is not the failure to pay but the unwinding of a transaction. Therefore, a delivery versus paid check meaning that the obligations of the parties are compared before settlement, is a pre-requisite to a final and irrevocable settlement⁹. It must also be noted that the settlement of transactions is subject to the applicable bank having funds in their accounts. If they do not have funds a settlement instruction will need to be queued until funds are available or

² There is no legislation in South African law that makes reference to charge back but the term is commonly used in the agreements between banks and their clients. In terms of an unofficial draft “Interbank Card Debit Payment Instructions Clearing Rules of PASA version 17 of 2012” a chargeback means the return of a Card Debit Payment Instruction as a result of a dispute and is initiated by an Issuing participant to the Acquiring participant.

³ For a historical synopsis of the history of credit cards, see Stassen, “Legal aspects of credit cards I”(1978) *Businessman’s journal* 153.

⁴ 78 of 1998

⁵ sec 5(2) of Act.

⁶ p 7 of the study

⁷ In South Africa we use SAMOS – South African Multi Option Settlement system.

⁸ p 7 of the study.

⁹ p 11 of the study.

borrowed. In practice banks also anticipate settlement and proceed on that basis and if a reversal is required the necessary adjustments need to be made.

In South Africa *Bankservafrika* is tasked with processing or clearing of EFT payments before a settlement instruction is executed. *VISA* and *Mastercard* are the clearing agents in the case of card payments. Therefore a transaction can be reversed if a delivered versus payment check fails. It is submitted that typically high value transfers pass the delivery versus payment test as these transactions are normally highly regulated and are not reversed, while retail value transfers because of their nature are prone to reversals. High value transfers are done on a one on one basis as soon as possible whilst retail value transfers are deferred and done in batches.¹⁰ There is no legislation which provides for the instances and the timelines that transfers are done and the timelines and instances in which a reversal must be done as these are regulated by inter-banking service level agreements between the banks and supervised by the central bank. For operational reasons it is important for banks to maintain this flexibility in the system.

With a background of the national settlement system in mind a chargeback like any other reversal is therefore the unwinding of a transaction following the failure of a delivery versus payment test prior to final and irrevocable settlement. Reversals are standard occurrences the processing of which is monitored and analysed. The Reserve Bank gathers statistical information on all aspects of transactions through the NPS 100 return form which is populated on a periodic basis every 6 months.¹¹ The form requires banks to report on all transfers ranging from credit cards through to EFT payments. One of the standard items in the report is the number and value of transactions not cleared at *Bankservafrika*. There are a number of products and services that *Bankservafrika* offers to its customers¹². One of the services is dispute management services to facilitate the rapid and efficient resolution of disputes relating to credit card transactions. They also offer a bulk electronic transaction processing system for daily clearing and settlement of direct debit orders and direct credit payments. One of the features of electronic funds transfer is dispute management which enable banks to assist their clients in the resolution and refunding of disputed payments. For South Africa another feature is the automated return of transactions from the destination bank

¹⁰ p 42-43 of the study

¹¹ This form can be accessed at the website of the Reserve Bank [https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem\(NPS\)/ClearingAndSettlementParticipants/Pages/NPS100Return\(Statistics\).aspx](https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/ClearingAndSettlementParticipants/Pages/NPS100Return(Statistics).aspx). The guidelines to complete the national payment system information return on par D and Par E of p 4 provide for the reporting periods.

¹² www.bankservafrika.com.

including settlement reversal¹³. The banks get charged for each of these products and services that they purchase from *BankservAfrica*.¹⁴ They in turn pass these costs onto the merchants and individual consumers. It is submitted by the author that bearing Schulze's definition of credit transfer cited below, a chargeback could also be defined as the countermand of a credit transfer by the originator resulting in the restitution of his personal right to the credit, the intended beneficiary of which forfeits his personal right to the credit and the latter's account is debited in the same amount. In reports by the *European Union Commission*¹⁵ a chargeback has been defined as:

“the technical term used by international card schemes to name the refunding process for a transaction carried out by card following the violation of a rule¹⁶. This process takes place between 2 members of the card scheme, the issuer of the card and the acquirer (the merchant's bank). The final customers of these 2 schemes members, the cardholder for the issuer and the merchant for the acquirer, do not have any direct relationship in the chargeback process” –

In the end, a chargeback is a mere debit and credit transaction between the cardholder's bank and the merchant's bank. Schulze¹⁷ offers the following explanation to a credit transfer:

“A credit transfer is in effect a series of mandates resulting in the crediting of the beneficiary's account. The beneficiary (i.e the 'recipient' of the 'funds' so 'transferred') obtains a personal right against his bank to credit and pay the amount of the transfer to him. The originator (ie. the 'transferor' of the 'funds') in turn, has his bank account debited the amount of the transfer. Thus, a transfer of value takes place by way of electronic book entries, but there is no real transfer of any kind in the sense in which the concept 'transfer' is ordinarily used in the law of things or obligations (see Malan & Pretorius Part 1 op cit at 595). In practice it would mean that 'reversing' a credit transfer poses far less practical and

¹³ It is submitted by the author that these settlement reversals refer to reversals between banks and not settlement reversals with the reserve bank.

¹⁴ *BankservAfrica 2014 Bank for International Settlement Financial Markets Infrastructure (BIS FMI) Principles Self-Assessment* p13 “Between 2006 and 2009 such initiatives evolved into a diversification strategy aimed at developing products and services beyond *BankservAfrica*'s core interbank authorising/switching, clearing and settling services (“the regulated services”). The primary objective of diversification was to minimise the concentration risk which *BankservAfrica* faced from the majority of its income being derived from four customers (the four large retail banks) in respect of three main products.”

¹⁵ The European Consumer Centre “Chargeback in the EU/EEA - A solution to get your money back when a trader does not respect your consumer rights” 2005.

¹⁶ Return codes.

¹⁷ *Schulze* “Electronic fund transfers and the bank's right to reverse a credit transfer: One small step for banking law, one huge leap for banks” (2007) *SA Merc LJ* 379.

logistical problems than, say, 'reversing' a cash payment or payment of a cheque over the counter, provided of course that the beneficiary of the transfer has not yet withdrawn and absconded with the money...".

*Comte*¹⁸ proposes the following definition "A credit transfer is a species of "fund transfer" and is initiated by an order, subject (if the originator so requires) only to a stipulation regarding time of payment, transmitted orally, in writing or electronically by the originator (or sender) to a bank (the originator's bank or receiving bank), instructing the bank to pay, or cause the payment of, an amount of money to the beneficiary"

Coming back to the BIS study, the *quid pro quo*, and delivered versus paid checks make legal sense but whether this happens with every transaction is open to speculation as the members of public have no visibility into clearing house rules or process. In all likelihood these transactions are categorized and prioritized according to the type of beneficiaries. In this regard, FNB gives us a glimpse into these clearing house rules in their payment reversal form:¹⁹

"Reversals are not possible if you selected the Pay & Clear Now service type when processing the payment - Reversals cannot be performed for Scheduled Payments - Reversals cannot be performed for payments made to the following companies or account types: South African Revenue Services (PAYE, VAT, UIF etc.), Public recipients e.g. Edgars, Telkom, etc.; Investment Accounts (e.g. 32 Day Notice Accounts); Vehicle Finance Accounts; Loan Accounts; Credit Cards; e-Bucks; Suspense Accounts; Municipal Accounts; Estate Late Accounts; Recovery Accounts."

In addition the form states that the permission of the beneficiary is required except in fraud cases, in which case a different process is followed. The case law discussed in this paper illustrates what the position is in the case of fraud.

¹⁸ Comte, *The Reversal of credit transfers* (LLM-dissertation University of Johannesburg 2012) on p7.

¹⁹ This form can be accessed at https://www.online.fnb.co.za/rhelp_0_15/OB_SA.../Payment_Reversals.htm. Last accessed by author on 9 December 2016.

Chapter 2

2.1. Legislation

In South Africa, chargebacks or reversals are not specifically referenced in any legislation, not even the Electronic Communications and Transaction Act²⁰, although section 46 does provide for a refund if a supplier cannot comply with the order but does not prescribe that the client is entitled to a chargeback. The Consumer Protection Act²¹ under section 1, definition of “consideration” contemplates debit card and credit card payment but in section 5(2)(d) it exempts transactions that constitute credit agreements under the National Credit Act.²² Credit card accounts and transactional accounts fall under section 1, definition of “financial product” subsection (f) and (h) of the Financial Advisory and Intermediary Services Act²³. A credit facility however is a facility with a credit limit as defined in section 8(3) of the National Credit Act and constitutes a credit agreement under the National Credit Act as indicated in section 8 (1)(a). A credit transaction constitutes a credit agreement in section 8(1)(b) but once off credit purchases are excluded by section 4(6)(a)²⁴ on the basis that a “third party” is interpreted to mean a card operator and “person” means the supplier of goods or services.

In some countries²⁵ chargebacks are broadly governed by legislation and in others²⁶ not. In the UK, the *Consumer Rights Act of 2015*²⁷ does not mention card refunds but section 75 of the *Consumer Credit Act of 1974*²⁸ does put an obligation on the banks to ensure that

²⁰ 25 of 2002.

²¹ 68 of 2008.

²² 34 of 2005.

²³ 37 of 2002.

²⁴ Sec 4(6)(a) Despite any other provision of this Act-

(a) if a consumer pays fully or partially for goods or services through a charge against a credit facility that is provided by a third party, the person who sells the goods or services must not be regarded as having entered into a credit agreement with the consumer merely by virtue of that payment; and

(b) if an agreement provides that a supplier of a utility or other continuous service-

(i) will defer payment by the consumer until the supplier has provided a periodic statement of account for that utility or other continuous service; and

(ii) will not impose any charge contemplated in section 103 in respect of any amount so deferred, unless the consumer fails to pay the full amount due within at least 30 days after the date on which the periodic statement is delivered to the consumer, that agreement is not a credit facility within the meaning of section 8(3), but any overdue amount in terms of that agreement, as contemplated in subparagraph (ii), is incidental credit to which this Act applies to the extent set out in section 5.

²⁵ European Union, UK and USA.

²⁶ New Zealand, Australia, South Africa.

²⁷ Consumer Rights Act of 2015 Chapter 15.

²⁸ Consumer Credit Act of 1974 Chapter 39 See sec 75 Liability of creditor for breaches by supplier -

(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach

merchants have complied with their contractual obligation failing which a chargeback is authorized. In the European Union *Directive 2007/64/EC* on payment services in the internal market (PSD) provides for refund rights in the case of unauthorised debits, overcharging and incorrect processing²⁹. In the United States of America the *Fair Credit Billing Act*³⁰ which amends the *Truth in Lending Act*³¹, regulates disputed billing transactions whilst the *Electronic Funds Transfer Act of 1978*³² is intended to protect individual consumers.

2.2. Codes of conduct and practice

The author submits that a code of conduct or practice is a gentlemen's agreement to conduct business in a fair manner and is only applicable to the members of the club. The code is not enforceable because the same club that declares the code has the power to withdraw the code without consequence or explanation. It also does not have the power of legislation because a democratic consulting process with all affected stakeholders is not followed. It is also not a contractual document because it is a unilateral document. It is my submission that it has the same effect as a policy document that consumers may consult to better understand any concessions or indulgences that a sector may be prepared to grant the consumer. The Australian Code of Banking Practice provides³³ as follows:

“If you have disputed a card transaction with us within the required timeframe, we will, in relation to a credit card or, where relevant, a debit card transaction (including an unauthorised payment debited to your card account pursuant to a recurring payment arrangement): (a) claim a chargeback right, where one exists, for the most appropriate reason; and (b) not accept a refusal of a chargeback by a merchant's financial institution unless it is consistent with the relevant card scheme rules. We will make available general information about chargebacks on our website or by electronic communication to you and we will notify you of the availability of this information on or with the relevant card statement of account at least once every 12 months”.

of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.

(2) Subject to any agreement between them, the creditor shall be entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying his liability under subsection (1), including costs reasonably incurred by him in defending proceedings instituted by the debtor.

²⁹ See Lawack-Davids and Marx “Consumer protection measures for erroneous or unauthorized internet payments: some lessons from the European Union? (2010) *Obiter* 446.

³⁰ Fair Credit Billing Act 1974 15 USC 1601.

³¹ Truth in Lending Act of 1968.

³² Electronic Funds Transfers Act of 1978 15 USC 1693.

³³ sec 21.1-2 of the code.

What is noteworthy is that the code limits chargebacks to credit cards and debit cards and makes reference to card scheme rules. The Code of Banking Practice of New Zealand is similar³⁴:

“You may have a limited time to dispute a transaction. We will inform you of this time in our Card terms and conditions. Failure to report the incorrect, invalid or unauthorised transaction within that time will mean that we cannot reverse the transaction and you will have to pay for it. There are limited circumstances under which we can reverse a credit card transaction, particularly where the rules of a credit card company apply. For example, we cannot reverse a credit card transaction where there is a dispute with the Merchant as to the quality of the goods and services, or you have changed your mind about the quality of the goods and services or an error has been made by you or the Merchant on a Debit Card transaction; and if you notify us of an incorrect, invalid or unauthorised transaction charged to your Credit Card account within any prescribed time limit, we will investigate the matter. If the transaction is found to be incorrect, invalid or unauthorised we will reverse the transaction (this is sometimes called a Chargeback)”.

2.2.1. Code of conduct for authorised financial services providers and representatives

Considering that chargebacks take effect on the back of payment instruments and financial products that fall under the Financial Advisory and Intermediary Services Act³⁵, the provisions of this code are relevant, however they do not reference chargebacks nor do they exclude them. The Code expects service providers to have dispute resolution mechanisms available for the consumer and as a measure of last resort refers unresolved matters to the *Ombud for Financial Services Providers referred to in section 20(2) of the Act*. The National Credit Act³⁶ also makes reference to the *Ombudsman* in 134 (4) (b) (i) as a precursor to referring a dispute to the National Consumer Tribunal established by section 26 of the Act.

The Financial Services Board through its *Treating Customers Fairly* initiative³⁷ has a road map with objectives and outcomes. Outcome No 6, is that customers must not face unreasonable post-sale barriers to change products, switch providers, submit a claim or make

³⁴ sec 24 and 38 of the code.

³⁵ 37 of 2002.

³⁶ 34 of 2005.

³⁷ In April 2010, the Financial Services Board (FSB) published a discussion document entitled “Treating Customers Fairly” (The TCF Discussion Document) together with a brief history of the TCF approach as implemented by the Financial Services Authority (FSA) in the United Kingdom and stakeholders were invited to submit comment on the proposals.

a complaint. The aforesaid discussion paper touches very lightly on the refund of excess charges but not on chargeback rights.

2.2.2. The credit industry codes of conduct

These three specific codes of conduct namely the Debt Counsellors' Code of Conduct for Debt Review; The Credit Providers' Code of Conduct to Combat Over- indebtedness; and The Payment Distribution Agencies Code of Conduct for Debt Review were withdrawn in December 2012³⁸, however prior to their withdrawal none of them made references to chargebacks or reversals³⁹.

2.2.3. The Code of Banking Practice

This is a voluntary code and applies only to personal and small business customers.⁴⁰ Non-compliance with the Code by the bank may lead to reputational risk for a bank as the ombudsman for banking services may publish the bank's non-compliance.⁴¹ Paragraph 9 of the Code deals with payment services. Although payment services are not defined in the Code, it can be inferred from the section that this refers to the incidental bank services that are related to a payment instrument such as cheques, Internet, telephone and cell phone and debit orders and services such as foreign exchange services and remittances. All of these services attract a service fee or a commission and all of these services relate to the transfer of funds from one account to another account. In the same way that the services of a bank are used to transfer the funds onwards, the services of a bank are required to chargeback a transfer. Credits, refunds, returns of money and reversals are all part and parcel of the service as errors are often made by the party paying an amount forward and merchants who cannot keep to their commitments. The consumer chargeback rights of each payment service will now be reviewed.

2.2.3.1. Cheques (paragraph 9.1 of the Code)

This section deals with information relating to the opening and operating of a cheque account as well as information relating to the receipt of cheques as a form of deposit. Paragraph 9.1.2

³⁸ GG 35909: GN 999 November 2012.

³⁹ The author was only able to access the codes on cached web pages of www.Google.co.za and each code can be accessed by typing the name of the code. The links to the National Credit Regulator website are no longer valid but the documents in PDF format can still be downloaded.

⁴⁰ The Code defines "small business" as an association of natural or legal persons incorporated in or outside the Republic of South Africa, which has legal personality or enjoys a similar status in terms of which it may enter into contractual relations and legal proceedings in its own name and whose turnover for the last financial year was less than R5 million.

⁴¹ For further reading on the nature and the legal status of the code see Du Toit "Reflections on the South African Code of Banking Practice" (2014) *TSAR* 568-579.

read with paragraph 9.1.14 provides that a cheque may be stopped if it is lost or damaged. When receiving a cheque, Paragraph 9.1.12 contemplates the reversal of a credit if a cheque is not honoured. That author submits that the use of cheques as a method of payment has inherent safety features for the consumer in that if he does not receive the goods from a merchant, he can stop a cheque. A cheque also is not an immediate or instant form of payment and lends itself to cooling off periods and a reasonable opportunity for merchants to comply with their commitments.

2.2.3.2. Foreign exchange services and remittances (paragraph 9.2 of the Code)

The author submits that any payment instrument may be used when receiving and transferring money from and to abroad. In theory the same principles that apply to local chargebacks apply to international chargebacks however in practice a foreign merchant's bank is not subject to South African law and in the absence of a cooperation agreement between foreign banks, a foreign merchant's bank will be cautious in applying a charge back as their client will have limited recourse against the consumer. The merchant will need to address the issue of jurisdiction and the application of foreign law and will need to litigate by way *edictal citation*.

2.2.3.3. Internet, telephone and cell-phone banking (paragraph 9.3 of the Code)

In paragraph 9.3.1 the Code addresses liability for unauthorized transactions. It does not reference zero liability nor does it reference insurance options unlike the United States of America where customers are not held liable for unauthorised transactions nor are they forced to take insurance against unauthorized transactions. Paragraph 9.3.4 of the Code makes reference to procedures to report disputed transactions but does not mention the chargeback remedy. Nonetheless, this remedy is alluded to in paragraph 9.3.13 when double payments and refunds are addressed.

2.2.3.4. Debit orders (paragraph 9.4 of the Code)

The Code is more vociferous about chargeback rights in debit orders than in any other payment instruments and lists scenarios⁴² in which a chargeback would be applicable.

⁴² par 9.4.4 "...When a third party:

- a. Has withdrawn an amount before the specified date in the customer's instruction;
- b. Continues to collect a debit order that the customers has cancelled or is subject to a stop payment instruction;
- c. Debits the customer's account for an incorrect amount;
- d. Has collected a debit order the customer did not authorise or in a manner the customer did not authorize (e.g. split the collection amount or consolidate several debit orders); or
- e. Has collected a debit order that is not consistent with the customer's instruction..."



However with the advent of online banking, customers can now reverse debit orders themselves so the Code has become outdated in this respect⁴³.

2.2.3.5. *The Code and payment services on debit and credit cards*

The Code is not completely silent on debit and credit cards. In the definition section amongst others, it defines the term “card”⁴⁴ and “POS” (Point of Sale) which refers to debit and credit card purchases. The Code references the term “debit card” in the context of pin authorised transactions and references the term “credit card facility”. Reference is also made to disputes regarding credit card transactions in the context of unauthorised transactions where the bank accepts the onus to prove that the credit card was received by the customer⁴⁵ but not in the context of chargebacks. Therefore one can accept that it was not the intention of the banks to become involved with their clients with regard to chargebacks. Or at least not all of the banks as a review of debit and credit card agreements has revealed⁴⁶.

⁴³ www.absa.co.za/media-centre/press-statements/online-tool-helps-you-reverse-unauthorised-debit-orders/; <https://www.fnb.co.za/demos/stop-a-debit-order-PC.html>; www.iol.co.za/business/personal-finance/banking/easy-way-to-reverse-dodgy-debit-orders-1941979.

⁴⁴ In terms of the Code a “card” means a general term for any card used to give you access to banking services, including paying for goods and services and to perform functions at an ATM or point of sale device.

⁴⁵ par 7.8.5 of the Code.

⁴⁶ See *infra* schedule A of this paper.

Chapter 3

3.1. Bank-client relationship

Traditionally the bank-client relationship refers to the rights and obligations between a bank and its client. The relationship between a local bank and the cardholder; the relationship between the international card operator and the cardholder; the relationship between the local merchant and the local merchant bank; the relationship between the international card operator and the local merchant. For purposes of this paper it is necessary to distinguish between these relationships as the distinction is not always clear. *MasterCard* and *Visa* are international card operators. They are not local banks. They provide a service both to the customer and the merchant. However the card operator never bills the customer or the merchant directly. It bills them through their respective banks. This is perfectly illustrated by the *Bredenkamp* case⁴⁷: *MasterCard*, a US company, is not permitted by US law to conduct any business directly or indirectly with any listed person or entity, and the bank, by virtue of its relationship with *MasterCard*, could not permit *Bredenkamp*, a specially designated national,⁴⁸ to use a *MasterCard*. The bank was accordingly obliged to cancel the *MasterCard* account and *Bredenkamp* accepted that he was not entitled to any relief in relation to this account.⁴⁹

The banks repackage, add a mark-up and resell the services offered by *MasterCard* and *Visa* onto the local customer and merchant.⁵⁰ It is submitted that it would be incorrect for a bank to only resell the “onwards transfer” part of the service and not the chargeback part of the service as the international card operator provides a full service which comprises the onwards transfer and the chargeback. *MasterCard* and *Visa* card operators have rules in place for

⁴⁷ *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA).

⁴⁸ A specially designated national is an enemy of the state. See Harms DP in the case *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA) on pg 474 par 12 where reference is made to as 'specially designated nationals' (SDNs) by the US Department of Treasury's Office of Foreign Asset Control (OFAC) on 25 November 2008. OFAC administers and enforces economic and trade sanctions based on US foreign policy and national security goals.

⁴⁹ See Harms DP in *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA) on p 474 par 13 where he states that *Bredenkamp* accepts this without argument.

⁵⁰ *MasterCard* and *Visa* do not issue cards but banks issue *Visa* or *MasterCard* branded cards. The Board of Governors of the Federal Reserve System's report to the Congress on the Profitability of Credit Card Operations of Depository Institutions of June 2009 on p 5 footnote 7 “Currently, over 6,000 depository institutions issue *VISA* and *MasterCard* credit cards and independently set the terms and conditions on their plans. Close to 10,000 other institutions act as agents for card-issuing institutions. In addition to the firms issuing cards through the *VISA* and *MasterCard* networks, two large nonbank firms, American Express Co. and Discover Financial Services, issue independent general purpose credit cards to the public.” On p 6 of the report it is stated that the pricing of credit cards consists of interest rates, annual fees, fees for cash advances, rebates, minimum finance charges, over-the-limit fees, and late payment charges. Last accessed on 13 December 2016 at the official federal reserve website <https://www.federalreserve.gov/.../rptcongress/creditcard/2009/ccprofit2009.pdf>

chargebacks. As there is no contractual relationship between the international card operator and the local client there is no legal recourse for the local client should the card operator decide not to assist. The author submits, therefore, that in order to protect the consumer, provision must be made in the contract between the local client and the local bank for the card operator's terms and conditions (or rules and regulations to flow through to the consumer). This can be done by merely localising card operator's rules dealing with chargebacks in the terms and conditions between the bank and the customer. It must also be noted that when the merchant's bank has to effect the chargeback they will charge the merchant a fee. Also, the author submits that if the chargeback rate is too high on a particular merchant, the merchant's risk profile will change unfavourably. Similarly, the international card operator's chargeback terms and conditions will flow through the merchant bank through to the merchant.

Paragraph 9.1.11 of the Code of Banking Practice provides that when a client deposits a cheque the bank acts a collection agent on his behalf. It is submitted that if a bank is prepared to act as a collection agent in respect of cheques it is also capable of acting as agent in the case of chargebacks. The Supreme Court of Appeal has made a number of rulings with regard to the bank's role of agent in unauthorised transfers. In *Take and Save Trading*⁵¹, the bank transferred a large amount of money on behalf of the appellant to a third party (*Metro*) on the strength of uncleared cheques from *Highway Distributors* (a sister company to *Take and Save Trading*), which had later been dishonoured.⁵² The court held that the transfer between *Take and Save Trading* to *Metro* could not be reversed regardless of what the interbank clearing agreements stated as there was no agreement from the recipient of the funds (*Metro*) to do so.⁵³

In *Nissan v Marnitz*⁵⁴, the former erroneously transferred into the account of *Maple* a substantial amount of money. After some to and fro between the appellant and *Maple*, the latter declared itself bankrupt. The liquidators (*Marnitz*) who held a substantial portion of the money, were of the view that *Nissan* was a creditor who had to compete with other creditors.⁵⁵ The court held that *Maple's* conduct amounted to theft and ordered that the

⁵¹ *Take & Save Trading CC and Others v The Standard Bank of SA Ltd* [2004] ZASCA 1.

⁵² Par 7-9.

⁵³ Par 16 and 17.

⁵⁴ *Nissan South Africa (Pty) Ltd v Marnitz NO and Others* [2006] 4 All SA 120 (SCA).

⁵⁵ Par 2-8.

liquidators to release the money.⁵⁶ It is submitted by the author that laying a criminal charge against the members of *Maple* would have been the correct course to follow. It is important to note that an immediate reversal of funds was not possible as by the time the transferor realised his mistake the recipient of the transfer had already shifted the amounts to another account.

Another example of agency and reversal is in the case of the recovery of tax where the Income Tax Act makes provision for banks to act as agents for the receiver of revenue⁵⁷. A bank may be required to reverse a transaction at the behest of the receiver of revenue to the detriment of its client⁵⁸. In the *Pestana*⁵⁹ case the bank was appointed as agent to collect money for taxes from *Pestana*.⁶⁰ The client transferred the money to a third party (also *Pestana* who was the plaintiff in the matter).⁶¹ When *Nedbank* realised that it should never have allowed the transfer they reversed it on their own free will without the concurrence from the plaintiff. The plaintiff alleged that *Nedbank* never had the authority to reverse the transaction.⁶² The court gave consideration to the fact that a bank may pause and take a look at the true state of affairs of a transaction and further relied on the *Oneanate* case⁶³ which lists different scenarios in which a bank could reverse a credit namely that:

“[I]f a customer deposits a cheque into its bank account, the bank would upon receiving the deposit pass a credit entry to that customer’s account. If it is established that the drawer’s signature has been forged it cannot be suggested that the bank would be precluded from reversing the credit entry previously made. So, too, if a customer deposits bank notes into its account the bank would similarly pass a credit entry in respect thereof. If it subsequently transpires that the bank notes were forgeries it can again not be successfully contended that the bank would be precluded from reversing the credit entry”.

This case clearly shows that given the right circumstances a bank can even reverse an EFT transaction and disproves the myth that only credit card transactions can be reversed. In the end the court held that the transfer between the two *Pestanas* was a completed juristic act

⁵⁶ Par 26 and 29.

⁵⁷ Sec 151-164 of the Tax Administration Act 28 of 2011.

⁵⁸ For a full discussion on an example of this see Schulze “Electronic Fund Transfers and the Bank’s Right to Reverse a Credit Transfer: One Small Step for Banking Law, One Huge Leap for Banks” (2007) *SA Merc LJ* 379.

⁵⁹ *Nedbank v Pestana* 2008 (ZASCA) 140.

⁶⁰ Sec 99 of the Income Tax Act 58 of 1962.

⁶¹ Par14.

⁶² Par17.

⁶³ *Standard Bank of South Africa v Oneanate Investments (in Liquidation)* [1998]1 SCA 811.

which could not be reversed as there was no evidence of fraud. *Schulze*⁶⁴ submits that the court applied too narrow an approach to rule 33.1 and rule 33.2 of the Uniform Rules of Court which merely states that no evidence need to be led if the parties agree to the facts but have a dispute as to the interpretation of law. It is the submission of the author that if a bank has the power to look at the truth behind a transaction so does a court but it is surprising that no questions were asked as to why the Receiver of Revenue appointed the bank as an agent in the first place and whether or not there was any quid pro quo for the transfer from the first *Pestana* to the plaintiff.

The court also did not investigate the possibility of construing the transfer as an act of dissipation of assets to obstruct the collection of taxes. Uniform Rules 33.1 and Rule 33.2 appear to have completely undermined the power of the court to look behind a transaction. In addition the Income Tax Act⁶⁵ and now also the Tax Administration Act⁶⁶ provide strict liability by agents for the tax debts of the taxpayer meaning that if the taxpayer does not pay then the agent must pay. Notwithstanding the outcome of the *Pestana* case, if any bank were to find itself in a similar situation again, it will no doubt opt to err on the side of caution and reverse the transfer than to face consequences with the Receiver of Revenue specially when dealing with R 0.5 billion.

It is also submitted that if *Nedbank* was acting as agent then by implication the South African Revenue Service as principal should also have been party to the proceedings. Had this been the case then some consideration would have been given to the reason behind the transfer between the *Pestanas*.

In the case of *Hanley*⁶⁷ the bank accepted fraudulent documentation and made a credit transfer in an amount that was wrong to a third party who absconded with the money.⁶⁸ Hanley's forms were forged and the bank paid over a substantial unauthorised amount of money to a third party who was only entitled to a portion of the money. In this case the bank was held to be negligent and was held to be the approximate cause of loss and Malan JA stated: "A bank undertaking to transfer funds on the instructions of its customer acts as mandatory. The principal duty of the bank effecting a credit transfer is to perform its mandate

⁶⁴ *Schulze* "A final curtain call, but perhaps not the last word on the reversal of credit transfers: Nedbank Ltd v Pestana" *South African Mercantile Law Journal* 396.

⁶⁵ 58 of 1962.

⁶⁶ 28 of 2011.

⁶⁷ *ABSA bank Limited v Hanley* (1) 2014 1 All SA 249 (SCA).

⁶⁸ Par 1.

timeously, in good faith and without negligence”⁶⁹. By the time the bank realised the mistake it was too late to reverse the transfer. The facts of *ABSA and Firstrand v Lombard*⁷⁰ resonate with those of *Hanley* in that there was fraud and theft involved, however the thief (*Manickum*) used the money to pay off legal debts (mortgages and credit cards) that she had at the bank.⁷¹ The insurance company (*Lombard*) tried to recover the money from *ABSA* and *Firstrand* bank but failed due to the *Suum Recipit* principle by Voet⁷² which means:

“[t]his power of vindicating stolen property from a third party possessing in good faith fails nevertheless when stolen money has been paid by a thief to a creditor of his who receives it in good faith, or has been counted out by way of price for a thing sold, and has been either used up or mixed with other money; for cash is regarded as used up by the latter process; moreover cash of another which has been used up in good faith by a creditor can neither be vindicated nor claimed in a personal action”.

In addition the Court held that there was intention by Manickum to extinguish the debt and therefore there was consensus between Manickum and the bank to set off obligations in terms of the mortgage bond.⁷³ It must also be noted that the initial transfer could not be reversed as Manickum immediately transferred the money into other accounts.⁷⁴

An authorized payment effected by means of a credit transfer may be reversed where the beneficiary consents and also without the beneficiary’s consent if in the latter instance it transpires that the beneficiary was not entitled to the money so transferred, that is, that the credit transfer was not valid⁷⁵.

3.2. The application of the RTGS paid versus delivered test to case law

In the above section a number of cases each with their unique set of facts was discussed. In this section we shall take a look at those cases again in light of the paid versus delivered test of the national settlement system to see if a different outcome would be reached. It is important that each test be applied to each transfer.

⁶⁹ p 257-258.

⁷⁰ *ABSA and Firstrand v Lombard Insurance* [2012] ZASCA 139.

⁷¹ Par 5.

⁷² *The Selective Voet being the Commentary on the Pandects translated by Percival Gane* 6.1.8; Johannes Voet, 17th century Dutch jurist, authority of Roman-Dutch common law.

⁷³ Par 19.

⁷⁴ Par 4-6.

⁷⁵ *The Law of Banking and Payments in South Africa* (Juta) 2016 p 382.

Therefore when revisiting the facts of *Take and Save Trading* the author submits the transfer from *Highway Distributors* to *Take and Save Trading* (which was in the form of a cheque) was merely a flash electronic book keeping entry to induce the trust of the bank to electronically transfer the funds from *Take and Save Trading* to *Metro*. There was no transfer of funds from the *Highway Distributors* to *Take and Save Trading* therefore the paid vs delivered test cannot be applied. The transfer from *Take and Save Trading* to *Metro* would pass the delivery vs paid test as the money was paid and merchandise was delivered pursuant to a transaction. Therefore the transfer cannot be reversed.

In *Nissan v Maritz*, when one applies the test to the first transaction between Nissan and Maple, it is quite evident that the transfer does not pass the test because there was no *quid pro quo* therefore the test fails and the transfer can be reversed. In reference to the subsequent transfers to other accounts, they cannot be reversed because there is no reversal instruction from the recipient of the funds.

In *Pestana*, without evidence to the contrary it can be assumed there was no *quid pro quo* (eg a loan or a purchase or a profit share) between the *Pestanas* in which event the test fails and the transfer can be reversed. In the case of *Hanley* there was no *quid pro quo* from the investment agent and the test fails, therefore the transfer (had the thief not absconded) could have been reversed. In the case of *ABSA and Firstrand Bank v Lombard* the author submits that the first transfer from Lombard to Manickum fails the test and thus the transfer could have been reversed. Insofar as the transfers between Manickum and ABSA and Firstrand Bank are concerned they pass the test as the banks had previously advanced money to Manickum which was the corresponding *quid pro quo* for the money repaid by Manickum. The test is passed and the money cannot be reversed. Except for the *Pestana* case, it could be argued that the outcomes of the paid versus delivered test are substantially similar to those applied by the courts in the aforementioned cases. In addition the test requires banks to look behind the transaction which is in line with case law such as the *Pestana* cases.

3.3. *The Code of Banking Practice and the Competition Commission*

“The Competition Act⁷⁶ regulates horizontal agreements⁷⁷ because the economic rationale for the scrutiny of horizontal agreements by competition authorities is founded on the recognition

⁷⁶ 89 of 1998.

⁷⁷ A horizontal agreement is when competitors across the same market segment agree to a specific conduct which prevents competition.

that competitors seeking to maximise their profits have an incentive to co-ordinate their behaviour rather than compete vigorously with one another. As such horizontal agreements are generally thought to be more harmful than vertical agreements⁷⁸ and this behaviour may be to the detriment of consumers”⁷⁹. The trade conditions reflected in the Code of Banking Practice are yet to be tested by the Competition Commission. The Code of Banking Practice applies as much to the members of the banking association as it does to the consumers.

When applying the test in the *Association of Pretoria Attorneys* case⁸⁰, it could be argued that Banks which are established and regulated by the Banking Act⁸¹ and other legislation are in a horizontal relationship with one another (hence they are competitors for purposes of the Competition Act) and section 4(1)(b)(i) of the Competition Act⁸² therefore applies.

“4 Restrictive horizontal practices prohibited

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-

(a) it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

- (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
- (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- (iii) collusive tendering”.

It must be noted that an agreement need not be in writing and even an informal arrangement will suffice.⁸³ In reference to a concerted practice this means that the actions are orchestrated.⁸⁴ *Schulze*⁸⁵ argues that if a trade usage or a particular banking practice has been acknowledged and explained in the Code it is a strong indicator that it qualified or existed as

⁷⁸ Vertical agreements are illegal arrangements between suppliers, producers and retailers which have a negative effect on the choice of goods for the consumer.

⁷⁹ This wording is borrowed from a lecture on Competition Law presented by Adv AJ Coetzee at the University of Pretoria on 5 August 2015.

⁸⁰ Competition Commission vs the Association of Pretoria Attorneys Case No: 33/CR/Jun03.

⁸¹ 94 of 1990.

⁸² 89 of 1998.

⁸³ sec 1(1)(i) of the Competition Act.

⁸⁴ sec 1(1)(vi) of the Competition Act.

⁸⁵ Schulze “South African Sources of Banking Law: A 21st century perspective (Part 2)” (2002) *SA Merc LJ* 456.

a banking practice or a trade usage in its own right. A chargeback is a refund. The trade usage of a refund is an established terms and is acknowledged in the Code. It could be argued that the Code in its present form is a concerted effort by the banks to systematically attempt to limit, trivialise or otherwise hamper the consumer's right to a chargeback when using debit or credit cards. Similarly, the rules and regulations by the dominant credit card operators can be seen as a concerted effort to dictate other terms such as maximum timelines to wait for a chargeback which may be to the detriment of the consumer.

3.4. The rules of card operators and the contract between a consumer and the merchant

The rules of *VISA* and *MasterCard* are categorised according to types of chargebacks including but not limited to a) Fraud/No Authorization b) Cancel Recurring Billing and c) Products/Services⁸⁶. Each of these categories has a "reason code" allocated to them and each reason code has its own requirements especially with regard to timelines for processing a chargeback. A merchant may have a refund policy where a refund takes "x" days to be processed but the card operators may process the refund in "y" days. This discrepancy in days may benefit or prejudice the customer but it gets more complicated if the merchant has a no refund policy⁸⁷.

The contract between the customer and the merchant governs all the terms of the transaction and may be applicable even if the customer does not sign a contract but accepts such terms tacitly by transacting or by placing an order. In terms of refunds, the rules of card operators may be more equitable than the provisions of a contract. It could be argued that both the cardholder and the merchant submit to the card operator rules when they decide to be the respective clients of the issuer and acquiring bank. In this regard the rules of the card operator would supersede the refund provisions of the merchant.

Edwards⁸⁸ argues that it would be impractical if not impossible for a merchant to attempt to exclude chargeback rights because even though it may be able to do so with a waiver clause in the merchant-customer contract, it would not have *locus standi* to try to exclude a chargeback clause in a contract between the card holder and the issuer bank or the card operator. The merchant would be able to present the contractual evidence only after the consumer has initiated the chargeback process and if merchant's terms and conditions are

⁸⁶ See Prow S, *A guide to managing chargebacks in house*, 2016. These rules can be accessed at <https://www.mastercard.com> and <http://www.visa.co.za/>

⁸⁷ Edwards "Excluding cardholder chargeback rights" (2005) *Bond Law Review* 45.

⁸⁸ Edwards (2005) *Bond Law Review* 45.

against public policy, the merchants may be isolated by the card operators. Edwards comments on the position in Australia which has vociferous chargeback provisions in their code of banking practice.⁸⁹ In South Africa however this is not the case and chargeback rights make a very limited appearance in our Code, if at all. In essence what this means is that if South African banks were to honour any chargeback waiver or refund waivers in favour of the merchant, they would not exactly be betraying the commitments made to the clients in terms of the Code of Banking Practice.

The influence of the rules of card operators which are subject to the laws of the United States of America on contractual terms between retailer and customers can be appreciated in some contracts. In South Africa, this is illustrated by the double standards applied by *South African Airways* to customers from the United States of America as opposed to the customers from South Africa. Article 10 and 11 of the general conditions of carriage⁹⁰ applicable to all passengers make provision for cancellation of flights, involuntary and voluntary refunds. Involuntary refunds do not carry penalties for the customers whilst voluntary ones do, as appears from the aforementioned articles.

“Except as otherwise provided by the Convention and the EU Regulation 261 / 2004 where applicable, if we cancel a flight, fail to operate a flight reasonably according to the schedule, fail to stop at your destination or Stopover destination, or cause you to miss a connecting flight on which you hold a confirmed reservation, we shall, at your option, either: 10.2.2.1. carry you at the earliest opportunity on another of our scheduled services on which space is available without additional charge and, where necessary, extend the validity of your Ticket; or 10.2.2.2. within a reasonable period of time re-route you to the destination shown on your Ticket by our own services or those of another carrier, or by other mutually agreed means and class of transportation without additional charge. If the fare and charges for the revised routing are lower than what you have paid, we shall refund the difference; or 10.2.2.3. make a refund in accordance with the provisions of Article 11.2

11.2 Involuntary Refunds

11.2.1. If we cancel a flight, fail to operate a flight reasonably according to schedule, fail to stop at your destination or Stopover, or cause you to miss a connecting flight on which you hold a reservation, the amount of the refund shall be:

11.2.1.1. if no portion of the Ticket has been used, an amount equal to the fare paid;

⁸⁹ P 52.

⁹⁰ https://www.flysaa.com/za/en/conditions_of_Contract.action last accessed on 7 December 2016.

11.2.1.2. if a portion of the Ticket has been used, the refund will be not less than the difference between the fare paid and the applicable fare for travel between the points for which the Ticket has been used;

11.2.1.3. upon acceptance of a refund by the Passenger on the purchase of a ticket under these circumstances, we shall be released from any further liability.

11.3. Voluntary Refunds

11.3.1. If you are entitled to a refund of your Ticket for reasons other than those set out in 11.2, the amount of the refund shall be:

11.3.1.1. If no portion of the Ticket has been used, an amount equal to the fare paid, less any reasonable service charges or cancellation fees;

11.3.1.2. If a portion of the Ticket has been used, the refund will be an amount equal to the difference between the fare paid and the applicable fare for travel between the points for which the Ticket has been used, less any reasonable service charges or cancellation fees”.

In addition to these terms and conditions SAA makes voluntary commitments to customers who buy tickets from the USA, in their document called “Our South African Airways Customer Commitment” also available on their website.⁹¹ In article 4 and 5 of the aforementioned document they deal with chargebacks as follows:

“4. We will allow reservations to be cancelled for a certain period after purchase: When you book a reservation and purchase a ticket in the United States of America for South African Airways (SAA) flights to and from USA, through the SAA Customer Call Center, via www.flysaa.com, airport ticket counter or if you use Voyager miles to book an award ticket on SAA 7-days or more prior to your scheduled departure, we will allow you to cancel the ticketed reservation without penalty and receive a 100 percent refund provided that you cancel the reservation within 24 hours of purchase.

5. We will provide prompt ticket refunds: We will provide prompt ticket refunds for eligible tickets once we receive your request accompanied by any required documentation. When refunds are allowed, we will process requests in a timely manner and refund the purchase price, less any applicable service fees, to the original form of payment. You may seek a refund by sending a written request to:

South African Airways
Passenger Refunds
1200 South Pine Island Road, Suite 650
Plantation, FL 33324

Requests may also be made online at www.flysaa.com , by calling South African Airways Reservations toll-free on 1-800-722-9675, by sending an email to FLLRefunds@flysaa.com , by calling the number on the back of your Voyager card, or through your travel agent. If you

⁹¹ https://www.flysaa.com/za/en/conditions_of_Contract.action last accessed on 7 December 2016.

used a credit card to make your purchase, we will submit the request for a refund to the credit card issuer within seven business days of receiving your completed request for refund. The credit card issuer will refund the purchase price under the terms of the credit card agreement; your credit card statement may not immediately reflect the refund. For purchases made with cash, check or other forms of payment, we will issue your refund within 20 business days of receipt of your completed request for refund. Please make sure you have cancelled your reservation before requesting a refund and remember to provide the passenger's name, the address, the credit card number used for purchase, ticket number(s), the date of travel, and the departure and destination cities in your correspondence.”

The wording in the voluntary commitment document to customers, who purchase tickets from the USA, is chargeback friendly in line with US consumer legislation whilst the South African wording is not so accommodating. In addition, in the former the customers can complain to the Department of Transport Ombudsman of the United States:

“You may also share your comments about our services with the U.S. Department of Transportation, as follows:

*<http://www.dot.gov/airconsumer>
Aviation Consumer Protection Division, C-75
U.S. Department of Transportation
1200 New Jersey Ave., S.E.
Washington, D.C. 20590”*

When the website is accessed there is a provision for ticket refunds which takes the consumer to another page titled:

“PART 374—IMPLEMENTATION OF THE CONSUMER CREDIT PROTECTION ACT WITH RESPECT TO AIR CARRIERS AND FOREIGN AIR CARRIERS

(a) Each air carrier and **foreign air carrier** shall comply with the requirements of the Consumer Credit Protection Act, 15 U.S.C. 1601-1693r. Any violation of the following requirements of that Act will be a violation of 49 U.S.C. Subtitle VII, enforceable by the Department of Transportation:

(1) The Truth in Lending Act, as supplemented by the Fair Credit Billing Act, 15 U.S.C. 1601-1667, requiring disclosure of credit terms to the consumer and prohibiting inaccurate or unfair credit billing and credit card practices.

(2) The Fair Credit Reporting Act, 15 U.S.C. 1681-1681 setting forth requirements to be met by consumer credit reporting agencies and persons who use consumer credit reports.

(b) Each air carrier and foreign air carrier shall comply with the requirements of Regulation B, 12 CFR part 202, and Regulation Z, 12 CFR part 226, of the Board of Governors of the Federal Reserve Board. Any violation of the requirements of those regulations will be a violation of 49 U.S.C. Subtitle VII, enforceable by the Department of Transportation”.

The comparison of the above texts reveals exactly how far behind South Africa is in terms of the formal recognition of consumer chargeback rights. It also reveals how committed the US government is in enforcing consumer legislation even against foreign carriers.

3.5. The rules of card operators and consumer protection legislation

The refund provisions under the Consumer Protection Act⁹² for purposes of this paper have been categorized as follows:

- I. When it is impossible for the supplier to supply the agreed type and quality of goods or it is impossible to render the service in the agreed timelines⁹³ - It is impossible for the supplier to supply the agreed type and quality of goods purchased on lay by⁹⁴ - It is impossible for the supplier to render a service because it is closing a facility then the consumer will be entitled to a refund⁹⁵.
- II. When upon receipt and inspection of ordered goods they do not conform to the agreed timelines, type and quality⁹⁶ or there is material non-conformance with the specifications of a special order or the goods are not fit for the disclosed purpose⁹⁷. If the goods are unsafe the consumer will be entitled to a refund⁹⁸.
- III. When the goods are of inferior quality⁹⁹ than agreed or they do not conform to specifications and the supplier cannot make it conform the consumer will be entitled to a discount or a refund¹⁰⁰.

The first category deals with goods that were not received or services that could or were not be rendered. The second category deals with goods or services that were received but are materially defective. The third category deals with goods that were received or services that were rendered but such goods or service are non-materially defective. The more subjective the reason for a refund, the less likely a card operator will want to become involved with a refund dispute between the consumer and a merchant. In addition, the accuracy of the information presented by the consumer will impact the card operator's involvement in the chargeback. From a broader perspective, the number of refund requests made against a merchant or the chargeback rate will also be taken into consideration.

⁹² 68 of 2008.

⁹³ sec 47(3).

⁹⁴ sec 62(2)(b).

⁹⁵ sec 64(3)(b).

⁹⁶ sec 20(2)(b-c).

⁹⁷ sec 20(2)(d).

⁹⁸ sec 60(1)(e).

⁹⁹ sec 54(2)(b).

¹⁰⁰ sec 56(2)(b).

In all three categories, the normal principles of the law of contract apply. The more specific, the more explicit and the more detailed a consumer is about the product or service required the easier it will be for the consumer to prove breach of contract provided of course that the merchant is aware of all the specifics and has accepted or unequivocally undertaken to meet the request. There is a myriad of chargeback reason codes ranging from unauthorized transactions to fraudulent transactions to erroneous billing and the like but the two chargeback reason codes from *Visa/MasterCard* applicable to this discussion are 30/4855 (Services not provided or merchandise not received) and 53/4853 (Not as described or defective merchandise), which correspond with this paper's category 1 and category 2/3 as stated above respectively¹⁰¹. The processing of a chargeback request requires the inspection of evidence or representations made by the consumer and merchant. The card operators then make a judgement call on whether or not to allow the chargeback. In essence, the card operators are acting as adjudicators¹⁰² but they have limited time and resources to make decisions, and it is submitted that their conduct is in line with what is expected in a fast retail or consumer industry.

The chargeback reason codes are silent on whether or not the transaction value impacts the timelines or procedures to be followed by the card operators. A consumer cannot require a card operator to chargeback a transaction that was not transacted with a card as for example where a direct account to account transfer is done by way of a cash deposit or a direct online banking transfer. In this case the consumer needs to involve the bank to give effect to the refund provisions contemplated in the Consumer Protection Act. In practice, this is where the problem lies because the supplier is not concerned with where the money is coming from and the credit provider is not concerned with the quality of the goods it is financing. This is the case in all transactions where the supplier and the credit provider are not the same person and this is implied by section 5(2)(d)¹⁰³ of the Consumer Protection Act.

¹⁰¹ It must be noted that there is not a chargeback code for cooling off after direct marketing as contemplated by sec 20(2)(a) read with sec 16.

¹⁰² For a general discussion on traditional alternative dispute resolution, see Woker "Consumer protection and alternative dispute resolution" (2016) *SA Merc LJ* 21.

¹⁰³ See *MFC (a division of Nedbank Ltd) v Botha* 2013 (ZAWCHC) 107. Par 8 "The apparent object of s 5(2)(d) of the CPA is to distinguish the position of a credit provider from that of a supplier and to protect the contractual rights of a credit provider which has financed the supply of goods by a supplier to a consumer, while seeking at the same time to preserve the consumer's statutory protection against the supplier. However, I have been unable to identify (and nor could counsel) any provision in the Act that facilitates the achievement of the second of the aforementioned apparent objectives in the readily conceivable context of the facts of the current case".

Typically a finance agreement will contain a “come hell or high water” clause were the rights and obligations of the finance agreement are not linked to the rights and obligations of the supply agreement. It is submitted that any interpretation of such a clause or section 5(2)(d) for that matter, which deprives the consumer of any restitution rights is not intended by the legislator and is unconstitutional¹⁰⁴.

The structure and the terms and conditions of the transaction will determine if the warranties and limitation of liability flow automatically through from the supplier to the consumer or if cession is required. It is submitted that a credit provider will be acting in a supplier capacity if it is a cog in the supply chain of the product to the consumer¹⁰⁵. The situation regarding credit cards is somewhat different because in credit card transactions the bank relieves the consumer from the obligation to pay a lump sum to the supplier. In return the consumer must repay the lump sum in instalments with interest to the bank and the bank does not take ownership of the goods and therefore no section 5(2)(d) void is created.¹⁰⁶

Coming back to international card operators, they act in accordance with the law of the country where their head offices are registered or where their centre of operations is located, usually in the United States of America. It follows that the chargeback rules and regulations take into consideration such laws and abide by those laws. In principle these rules and regulations refer to commercial trade terms which only resonate in legal terms when something goes wrong as in the case of a chargeback. The consumer protection legislation in the United States of America is more bulky and solid than the South African legislation. Therefore in an indirect way South Africans benefit from the application of overseas

¹⁰⁴ For a different provision which curtails restitution rights see *National Credit Regulator v Opperman and others* 2012 (ZACC) 29. Par 88 “It follows that the High Court’s judgment and order cannot be faulted. Its interpretation of section 89(5)(c) is the most plausible of the interpretations advanced. The interpretation of the NCR cannot reasonably be applied to the provision. The alternative interpretation proposed is futile. The provision is also capable of interpretation and is thus not unconstitutionally vague. It results in the deprivation of Mr Opperman’s property because it extinguishes his right to claim restitution based on unjustified enrichment, without leaving any discretion to a court to consider a just and equitable order under the circumstances. This deprivation is arbitrary because sufficient reasons have not been given for it. The infringement of the right not to be arbitrarily deprived of property is disproportionate to the purpose of the provision. There are less restrictive means available to achieve the purpose. Therefore it is not a constitutionally acceptable limitation of the right”.

¹⁰⁵ For an in-depth discussion, See Otto, Van Heerden and Barnard “Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement” (2014) *SA Merc LJ*, p 247.

¹⁰⁶ See Cornelius “The legal nature of payment by credit card” (2003) *SA Merc LJ*, in par 13 on p17 he states the following: “...Payment by credit card is regulated by another antecedent multilateral contract in terms of which the credit card issuer substitutes for the card holder and assumes liability to the supplier, who, in turn, agrees to release the card holder from liability and claim payment from the credit card issuer. As such, payment by credit card constitutes novation”.



legislation. This may very well be one of the reasons why these foreign card operator rules and regulations cannot or are not being localised in South African contracts. The card operator will not want to apply double standards in different countries and secondly it may be impractical if not impossible to do so.

The South African Consumer Protection Act references the broad term of “refunds” in various provisions of the act (even though it fails to define it) but it is silent on the mechanism which is applicable to a refund. The mechanism will either be an EFT transfer or a chargeback. The National Credit Act in part D of chapter 5 addresses disputes on statements to be resolved in terms of section 111¹⁰⁷ failing which, a consumer may report the matter in terms of section 115. However the language in the act is so technical that it is difficult to discern when they are referring to a bank (tripartite cards) or to a fast moving consumer store (bipartite cards). The National Credit Act provides that if a consumer pays fully or partially for goods or services through a charge against a credit facility that is provided by a third party, the person who sells the goods or services must not be regarded as having entered into a credit agreement with the consumer merely by virtue of that payment, thus the transaction is excluded from the protection of the National Credit Act. This means that a cardholder who orders a product online and pays with his credit card, cannot dispute the transaction under the provisions of the National Credit Act.

Further, section 111 applies only to credit agreements and section 115¹⁰⁸, which deals with dispute resolution applies only in the case of disputed statements of credit agreements. Therefore a tripartite cardholder cannot avail himself of the provisions of the National Credit Act against a merchant but can do so against a bank. If a tripartite cardholder disputes a third

¹⁰⁷ sec 111(1): “A consumer may dispute all or part of any particular credit or debit entered
(2) A credit provider who receives a notice of dispute in terms of subsection (1)-
under a credit agreement, by delivering a written notice to the credit provider.
(a) must give the consumer a written notice either- 5
(i) explaining the entry in reasonable detail; or
(ii) confirming that the statement was in error either in whole or in part, and
setting out the revised entry; and”

¹⁰⁸ sec 115: “(1) A consumer who has unsuccessfully attempted to resolve a disputed entry directly with the credit provider in terms of section 111, and through alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to resolve-
(a) a disputed entry shown on a statement of account; or
(b) a dispute concerning a statement of the settlement amount.
(2) If the Tribunal is satisfied that an entry, or the settlement amount, as shown on a statement is in error, the Tribunal may determine the matters in dispute and may make any appropriate order to correct the statement that gave rise to the dispute.”

party entry in his credit card statement, the bank as a third party to the transaction can leave the cardholder to his own devices provided the cardholder's complaint or dispute does not attack the integrity of the bank's billing system. Strictly speaking, in terms of the National Credit Act the client would only be able to dispute the interest charges and the calculation of the bank's fees but not the merchant transactions. The only party that a client can resort to is the international card operator with whom he does not have a direct contract and to whom South African law does not apply.

The difference being that the card operators overseas have a bulk of legislation that supports their actions while in South Africa they only have to abide to the Payment Authority of South Africa's (PASA's) Payment Clearing House (PCH) service level agreements. PASA does not publish clearing rules and if they were published they would in any event need to be gazetted to carry any weight in South African law. There are only two provisions in the Consumer Protection Act which prescribe timelines within which a refund must take effect, namely section 16 and section 64(3)(b). It does not prescribe the method of the refunds. In terms of section 16 a refund must take place within 15 business days¹⁰⁹ and in terms of section 64(3)(b) a refund must take place within 5 business days after having met certain requirements. Section 16 deals with the cooling off period after direct marketing. If the consumer did not enter into the transaction pursuant to direct marketing then this right is not applicable. If a customer receives a cold call¹¹⁰ from an outbound call centre agent to buy a product, the customer can rescind the transaction within 5 days of the transaction and the supplier will have to refund the transaction within 15 days. In principle the customer has the right to request a chargeback from the bank or the card operator. However, the card operator may not have a reason code in the United States of America for a counterpart cooling off provision¹¹¹.

The author submits that in principle a chargeback should be successful as the merchant would have the onus to prove that the transaction was not pursuant to direct marketing. However as there is no cooling off chargeback reason code against which the card operator must resolve the issue the cardholder may have to wait up to a maximum of 120 business days. Therefore

¹⁰⁹ 30 days in terms of the Electronic communications and Transaction Act, sec 43.

¹¹⁰ Cold calling refers to outbound call centres which non-existing customers with the objective of convincing them to purchase a product or a service.

¹¹¹ In direct marketing the supplier approaches or targets the consumer at a time and place where he is not able to make a sound judgement call about the transaction. The cooling off period allows the consumer to contemplate the consequences of his actions. See Van Eeden, 2014 *Consumer protection law in South Africa*, chapter 8 "Discriminatory practices in the consumer market."

something that could be resolved in 15 business days in terms of South African law would take 120 business days when applying the rules of the card operator.

Section 64(3)(b) of the Consumer Protection Act is a little bit more complicated. If a client buys an air ticket using his credit card and the airline goes bankrupt, there are a number of requirements that have to be met before the client is entitled to a refund. According to the Consumer Protection Act a “facility¹¹²” meaning the airline in our example would need to close before a client can claim the refund. Therefore if the airline does not close but shows all the symptoms of not being able to provide the service, the client will have no recourse in terms of the Consumer Protection Act but will have to rely on the provisions of the international card operators who will have to exercise their discretion after taking into consideration the contract between the client and the airliner and any statement issued by the airliner or their creditors¹¹³. According to the card operator rules, the cut-off date for an airliner to meet their contractual obligations is the day that the client is supposed to fly.¹¹⁴

However the Consumer Protection Act states that the section 64(1)(b) is only applicable if a client bought a ticket, the flight date of which, is at least 25 business days away from the transaction date. It is not clear what would happen if the flight is to take place within the 25 business days but the deduction could be made that the refund policy of the airliner would apply. According to section 64(3)(b) of the Consumer Protection Act an airliner would need to warn a client 40 business days in advance before closing the airline. If the client has not given such warning then a client cannot claim that the airliner is in breach and must assume that it can still fulfil its obligations in terms of the agreement. If it has given 40 business days notice then the client can assume that the airliner will be able to provide the service till the day of closure, in which case the client can still not claim breach of contract provided the flight date is not scheduled beyond the closure date. Another scenario would be where the client buys a ticket in winter for the summer holidays but a month after buying the ticket the client is informed by the airline that it will close the facility in spring. In this case the client would be entitled to a refund within 5 days of the notice. The scenarios are too many to contemplate but the refund provisions of the Consumer Protection Act, the card operator rules, the refund policy of the airliner and the operational status of the airliner would all need to be taken into consideration when processing a chargeback. Only a local bank would be in a

¹¹² In terms of the Consumer Protection Act, facility means any premises, space or equipment set up to fulfil a particular function, or at, in, or on which a particular service is available.

¹¹³ <http://www.iol.co.za/the-star/1time-chargebacks--no-quick-fix-1425861> (accessed 5 August 2016).

¹¹⁴ *Visa/MasterCard*: 30/4855 (Services not provided or merchandise not received).

position to provide sound advice to a card operator for purposes of processing a chargeback but a bank is not obliged in terms of any consumer protection legislation or the Code of Banking Practice to assist the cardholder.

3.6. *The role of PASA*

The Payment Association of South Africa (PASA) is the recognised Payment System Management Body (PSMB) as appointed by the Reserve Bank in terms of the National Payment System Act¹¹⁵ is responsible and appointed to manage, organise and regulate its Members.¹¹⁶ Members of PASA currently include banks as registered in terms of the Banking Act¹¹⁷. To enable the processing of transactions, member banks will appoint Payment Clearing House (PCH) system operators in terms of the entry and participation criteria for PCH system operators.¹¹⁸ In the card environment, member banks have appointed three PCH system operators which are *BankservAfrica*, *MasterCard* and *Visa*. The appointment of PCH system operators is done by means of service level agreements. The PASA clearing rules and the rules and regulations of the PCH system operators co-exist. In some cases the PASA clearing rules will prevail but in other cases the rules of the PCH system operators will prevail.¹¹⁹

It is important to note that these rules arise from service level agreements and not regulations or legislation. As such it is submitted that they are similar in ranking to the Code of Banking practice which is also an agreement between member banks. The payment services provision¹²⁰ of the Code of Banking Practice is silent with reference to chargebacks and it is accordingly submitted that this void could be filled by incorporating some of the service level commitments made in the payment clearing house rules.

3.7. *Friendly Fraud*

In reference to fraud it is worthy of note to distinguish between fraud¹²¹ and “friendly fraud”. “Friendly fraud” is sometimes claimed against a merchant whose whereabouts can easily be

¹¹⁵ 78 of 1998

¹¹⁶ Sec 3(1)

¹¹⁷ 94 of 1990

¹¹⁸ <https://www.bis.org/publ/cpss105.pdf> BIS Payment, clearing and settlement systems in South Africa p 381.

¹¹⁹ The author engaged an official from PASA who confirmed in writing that the rules in Inter-bank Service Level Agreements and rules of PCH operators co-exist.

¹²⁰ *Supra* – The code and payment services on debit and credit cards, p7.

¹²¹ On the risk of internet transactions see Lawack-Davids and Marx “Consumer protection measures for erroneous or unauthorized internet payments: some lessons from the European Union?” (2010) *Obiter* 446.

established and who may have already dealt with the consumer's claim but not to the consumer's satisfaction or in the case where the consumer has initiated a refund process but the merchant is taking long to address it.¹²² It can be seen as an effective "cry wolf" tactic employed by a consumer whose complaints are falling on deaf ears. In some cases it may be unethical by the consumer to use this tactic but it may be the only means to get the problem resolved. Some clients however abuse this tactic which has led to the coining of the term "chargeback fraud" where a consumer that receives purchased goods denies receiving them, in which case he hopes that the merchant has not kept proof of delivery.¹²³ This has led to merchants having to take additional measures to fight friendly fraud. There are hundreds of articles on the internet on this subject but in the author's opinion all of these measures culminate in the need for merchants to act responsibly when billing and when delivering goods or services¹²⁴.

3.8. *Online dispute resolution (ODR)*

Woker¹²⁵ discusses the pros and cons of alternative dispute resolution but it is also necessary to establish what would be the best medium of resolution for retail disputes. Coteanu¹²⁶ addressed Online Dispute Resolution in 2005. Consideration must be given to the advance in technology from 2005 till present which implies that some of her criticism might no longer be valid today. However she did make strong points about computer literacy which may be to the detriment of a less sophisticated consumer.¹²⁷ Earlier¹²⁸ we touched upon the fact that *Visa* and *MasterCard* have a quasi-adjudication role in that they decide the fate of transactions. In order to claim, a client will need to fill out a form and the bank will send it onto the card operator or the consumer might be advised to call a toll free number. The consumer will get interviewed and be asked to provide evidence via email or by logging into a website. It is not necessary to argue face to face. The credit card operator then gives the

¹²² This concept is not defined in legislation or case law but it is a term coined by merchants as has been used extensively in articles.

¹²³ This concept is not defined in legislation or case law but it is a term coined by merchants as has been used extensively in articles.

¹²⁴ <http://www.creditcards.com/credit-card-news/8-steps-fighting-chargeback-fraud-1275.php>; last accessed on 9 December 2016 and <http://chargebacktech.eu/chargeback-fraud/> last accessed on 9 December 2016.

¹²⁵ Woker "Consumer Protection and alternative dispute resolution" 2016 *SA Merc LJ* 21.

¹²⁶ Coteanu, *Cyber consumer law and unfair trading practices*, (2005) chapter 5, p 87-106.

¹²⁷ On p94-103 Coteanu identifies 3 causes of Unequal Bargaining Power. The most applicable one to South Africa would be on p95 "Causes of UBP relating to the inadequacy of technical and technological abilities of consumers".

¹²⁸ Coteanu p16.



merchant an opportunity to respond and if necessary a right of reply is given to the consumer before deciding to approve a chargeback.¹²⁹

The process is effective and final in the eyes of the credit card operator. However, a consumer or a merchant may wish to appeal and it is in this sense that online dispute resolution can play a meaningful role. Currently the National Consumer Tribunal¹³⁰ handles some cases¹³¹ via Skype. This is a strong indicator that the technology is generally available and acceptable in consumer dispute mechanisms. The ultimate objective would be to integrate the online processes already being used by the banks and credit card companies to an online Ombudsman. This may be a question of merely granting third party or restricted access to the Ombudsman to the credit card operator's system. In theory it should even be possible to initiate a chargeback at an automatic teller machine (ATM) or point of service (POS) device via the transaction's unique tracking number which correctly identifies the parties, the date and amount of the transaction. Thereafter the process could be followed via the internet or at a bank branch office. Once both the consumer and the merchant has made representations and the adjudicator has made a decision, it is submitted that any such appeal could also be initiated via an ATM or POS device and followed up via the internet or at the local *Ombudsman* office. It is important to note that although online dispute resolution is encouraged, face to face alternative dispute resolution mechanisms cannot be excluded. The Ombudsman's online dispute resolution centre would need to be staffed by qualified staff with minimum banking or dispute resolution knowledge. It is suggested that registered paralegals¹³² could fill these positions. Complaints against banks not wanting to assist their customers with reversals could also be filed using ATM or POS devices.

¹²⁹ See MasterCard chargeback guide chapter 5 Arbitration procedures on p 381.

¹³⁰ Established in terms of section 26 of the National Credit Act 34 of 2005.

¹³¹ *Malgas and Malgas v Wesbank, a division of Firstrand Bank Limited* and others NCT/14627/2014/148(1)NCA; *Pettenburger-Perwald OBO Lindecke v Nedbank Limited*, and others NCT/14498/2014/148(1) (P) NCA.

¹³² In accordance with sec 34(9)(b) of the Legal Practice Act 28 of 2014.

Chapter 4

4.1. Recommendation

There are many factors that need to be taken into consideration when determining whether or not a country requires consumer protection measures in the context of chargebacks. To mention but a few, one could look at the market, for example in markets that are not heavily regulated by the government, billing procedures could be more aggressive. Also, one could look at the corruption index of the country. The level of sophistication of the consumer and whether or not a country is known for customer service also plays a role. In South Africa, the information technology infrastructure competes with the top developed countries and electronic fund transfers rely to a large extent on this infrastructure. Not all South Africans know how to transact electronically and this knowledge varies depending on the demographics of the users ranging from the poor to the rich to the young to the less sophisticated. In general education about consumer protection is vital but knowing one's consumer rights is not enough if they cannot be enforced.

Ideally, the Consumer Protection Act should be amended to formally involve banks in card chargebacks and the refund of direct electronic fund transfers. Section 5(2)(d) would need to be deleted and a new section 5(1)(e) would need to be inserted as follows:

“5(1) This Act applies to:

e) any transaction that constitutes a credit agreement in terms of the National Credit Act except that any provision which deals with the deferral of payment of money owed to a person, or a promise to defer such a payment; or a promise to advance or pay money to or at the direction of another person; shall be dealt with exclusively under the terms of the National Credit Act.”

Further a broad definition of refund would need to be inserted into the Act. Lastly, there should be a provision which compels the bank to assist the customer in the case of refunds and imposes a penalty for not assisting the customer. The amendment would need to be proposed in parliament by the National Consumer Commission and the banking sector would be invited to make representations to protect their interests.

Similarly provisions in the National Credit Act would need to be amended starting with addressing section 4(6)(a) which could remain in its present format but which could be derogated from for the purposes of section 111 and section 115 as follows (see underlined text):

“Despite any other provision of this Act-

(a) if a consumer pays fully or partially for goods or services through a charge against a credit facility that is provided by a third party, the person who sells the goods or services must not be regarded as having entered into a credit agreement with the consumer merely by virtue of that payment; and

(b) if an agreement provides that a supplier of a utility or other continuous service-

(i) will defer payment by the consumer until the supplier has provided a periodic statement of account for that utility or other continuous service;

and

(ii) will not impose any charge contemplated in section 103 in respect of any amount so deferred, unless the consumer fails to pay the full amount due within at least 30 days after the date on which the periodic statement is delivered to the consumer, that agreement is not a credit facility within the meaning of section 8(3), but any overdue amount in terms of that agreement, as contemplated in subparagraph (ii), is incidental credit to which this Act applies to the extent set out in section 5 except that disputes arising from "transactions" as defined in terms of the Consumer Protection Act, reflected in a statement of a credit facility provided by a third party for the partial or full supply of goods or services by the person in paragraph (a) of this sub-section shall be dealt with in terms of section 111 and section 115.”

In the alternative and with a view to avert legislative measures the banking sector may wish to introduce voluntary concessions to its customers in the Code of Banking Practice. Should the banking sector proceed in this fashion they would be taking the sting out of any consumer action and appease consumer concerns before they get out of hand. In all fairness, the banking sector in South Africa is reputable but the consumers should not be at their mercy. A voluntary amendment to the Code of Banking Practice would be less cumbersome than a legislative measure and such gesture of goodwill would be most welcomed by the consumers.

It is suggested that a paragraph 9.5 should be added with the heading *Card transactions* and a paragraph 9.6 should be added with a heading *Direct deposits and EFT transactions*. Each

section should briefly explain what that type of transaction entails as well as the incidental services offered by the bank for that payment instrument or financial product. Each section should provide for exclusions and the referral to the National Consumer Tribunal in a determined number of instances. Then a paragraph 9.7 which encompasses all the foregoing payment services should be added to the following effect:

“In refund procedures where we act as your collection agent our service is limited to disputed transactions where you have a clear right in law against the merchant such as where you want to exercise a rescission of a transaction in accordance with the cooling off provisions of the Consumer Protection Act, or where the merchant has not delivered the goods or rendered the service or where the merchant has billed you erroneously or where a formal process of liquidation has been commenced against the merchant. You have the right to seek recourse from the office of the Ombudsman for Banking Services should you feel that we did not exercise our discretion correctly in a disputed transaction. Should we not be able to succeed with a refund you will be liable for the charge and shall have to seek other recourse against the merchant.”

In the suggested wording the broad term of “refund” is used in order to cover direct deposits and other EFT transfers in addition to card chargebacks. In the event that client makes a direct deposit or an EFT transfer and the merchant bank is not able to refund the transaction because the merchant has already withdrawn the cash, the bank must provide the customer with evidence to this effect to enable the consumer to seek further direct recourse against the merchant. The Ombudsman would have to make the necessary operational changes to now accommodate complaints on refunds. Each bank would then have to align their contracts and procedures to the new refund commitments made in the Code of Banking Practice. The amended Code could then be tested in practice for a specific period and as the Code is not cast in stone, it can be tweaked as necessary.

If the Code applies to chargebacks then by implication the consumers will have recourse to the Banking Ombudsman. However, if the Consumer Protection Act or the National Credit Act is amended, the consumer will also have recourse to the National Consumer Commission and Tribunal. The bank’s obligations in terms of credit card chargebacks and EFT reversals could be limited to retail value transfers. In the case of high value transfers the bank’s

obligation would be to freeze¹³³ an account until a dispute is resolved by legal action. It is proposed that banks should take the initiative failing which consumers will need to take action.

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¹³³ See Comte “Credit Transfers” at p60 where he remarks “Possibly, where a bank is not certain that fraud has occurred, it might instead of reversing the credit transfer, freeze the fraudster’s account so that no further loss might be occasioned to the defrauded party”.

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Payment distribution agencies code of conduct for debt review.

General code of conduct for authorised financial services providers and representatives.

Schedule A

Debit and credit cards terms and conditions

This schedule was created in August 2016 to illustrate the terms and conditions of a small sample of major South African banks at a time when the code of banking practice of the Banking Association of South Africa was silent or did not provide for consumer chargeback rights for debit and credit card transactions. The sample documentation was publicly available and sourced from the websites of the respective banks.

Standard Bank - Credit/Debit card	
Consumer chargeback right in contract?	No



<p>General terms and conditions (terms) with ref 00151742 2013-05: These terms apply to all Standard Bank products. Here is an extract of clause 6.7 “You must resolve any dispute between you and a Merchant, as we will not get involved.” No other provisions for chargeback.</p> <p>Terms and conditions for Standard Bank credit card and / garage card with ref 00180933 2012-06: No provisions for chargeback.</p> <p>There are a number of transactional accounts terms and conditions but none of them make provision for chargebacks.</p>	
<p>ABSA - Credit/Debit card</p>	
<p>Consumer chargeback right in contract?</p>	<p>No</p>
<p>ABSA CREDIT CARD TERMS AND CONDITIONS with no reference or date.</p> <p>DISPUTES WITH SUPPLIERS</p> <p>No dispute between you and a Supplier will give you the right to: instruct us to do a charge-back of payment already made to the Supplier, for goods purchased or services obtained with your Card.</p> <p>When we receive a credit voucher issued by a Supplier for goods purchased or services obtained by you with your Card, we will credit your Card account with the amount of the credit voucher.</p> <p>You are required to notify Absa of any dispute with a Supplier via e-mail to disputes@absa.co.za or via telephone on 012 317 3000.</p>	
<p>FNB - Credit/Debit card</p>	
<p>Consumer chargeback right in contract?</p>	<p>Yes, they are in the rules which is part of the terms and conditions.</p>
<p>FNB TRANSACTIONAL BANK ACCOUNT TERMS & CONDITIONS Date last amended 1 March 2016</p> <p>Any payment that FNB have made to a supplier for any transaction is final and irreversible, unless: allowed by the VISA or MasterCard (as applicable) rules and regulations, as published by VISA or MasterCard (as applicable) from time to time, or there was duplication in payment due to human and/or technical error by the supplier. You can provide proof that you attempted to resolve the dispute with the supplier according to the agreement between you and the supplier. You must raise any card-related disputes within 30 (thirty) days after the transaction date. Disputes must be made at the branch where your account is held by completing the relevant dispute forms.</p>	
<p>Nedbank - Credit/Debit card</p>	
<p>Consumer chargeback right in contract?</p>	<p>Yes</p>
<p>TERMS AND CONDITIONS OF USE OF PERSONAL CARDS with reference PersonalCardTC 33 27 NED ENG.doc 09Feb12 SD2</p> <p>You irrevocably authorise us to:</p> <p>5.10.1 Pay for any purchases, services or cash advances in respect of which the Card or the Card number is used and debit the amount to your Card Account; and</p> <p>5.10.2 Make the necessary entries to do the above and to reverse these entries when appropriate.</p> <p>5.11 We will not be liable to you if any merchant does not accept the Card or your Card number or if we refuse</p>	



to authorise any Card Transaction.

5.12 No merchant is our agent. If there is any claim between you and a merchant in respect of the goods or services or in respect of any other matter, our rights to receive payment from you will not be affected nor will it give anyone a right of setoff or counterclaim against us. If you did not receive merchandise or the services you paid for, you must resolve the dispute with the merchant.

5.13 You have the right to charge back a transaction. If we are unsuccessful with the chargeback, you will remain liable for the amount owing on your Total Card Facility. An unsuccessful chargeback does not limit your right to claim directly from the merchant.

5.14 If a merchant gives you a refund, it will be credited to your Card Account when we receive a credit voucher.

5.15 You will not have the right to stop any payment we are about to make in respect of any Card Transaction nor will you have the right to instruct us to reverse a payment in respect of a Card Transaction that has been made, except as provided for by statute.