

Law Commission Consultation No 246 Consumer Sales Contracts: Transfer of Ownership

Date: 30 October 2020

Sent to: Ownership@lawcommission.gov.uk

UK Finance is the collective voice for the banking and finance industry.

Representing more than 250 firms across the industry, we act to enhance competitiveness, support customers and facilitate innovation.

1. **Response.** Following engagement with our cards and payments industry stakeholders, we are pleased to respond to the Law Commission Consultation 246 – Consumer Sales Contracts: Transfer of Ownerships (the “**Consultation**”).
2. **Key Response Points and Commentary.**

(i) Simplification. We broadly support the Law Commission’s recommendations set out in the Consultation. We support a simplification of the law by amending the Consumer Rights Act 2015 as proposed. The simplification will make it easier for consumers to understand their rights and is to be welcomed.

(ii) Contract Formation. We support the proposals relating to the formation of the contract at an earlier stage in the buying process so that consumers will not be denied their contractual rights. However, whilst supporting consumer rights, we do not wish to drive card claims disputes into the system where consumers, seeking the remedy of transfer of title first need to establish when and if a contract was formed and use the cards claims system as the forum to determine contract formation (which would require detailed analysis of the Consumer Rights Act amongst other things). The Bill at present would seem to allow transfer of title to occur on delivery, which as the Law Commission points out, would prevent consumers obtaining the benefit of the protection. We recommend this issue is dealt with in the Bill itself either by specifying clearly that contract formation on delivery is permitted or prohibited with exceptions (by and allowing for conditions to be met before the retailer is obliged to fulfil its contractual obligations). The card industry as whole requires clarity one way or the other so that a simplification exercise does not lead to a rise in complex card claims. We note that consumer cancellation and refund remedies will not be altered for distance selling contracts as they are covered by The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013). We do not expect the Bill will make any change to chargeback or Section 75 remedies relating to cancellation and refund rights as against the card issuer.

(iii) Title and identification. Similarly, we support the proposals relating to transferring title to the consumer when the merchant has identified the goods to be delivered to the consumer. We view this as an appropriate and fair balance between the rights of the consumer to have ownership of goods identified as belonging to that consumer and the rights of lenders to have access to a more general pool of inventory under their floating charge security.

(iv) Direct remedies. We support direct remedies being made available to consumers so that they can deal directly with the company in administration (through its administrators or other insolvency practitioner) rather than having to make a claim to their card issuer. We believe this would be a better outcome for consumers and is welcomed.

(v) Fewer card claims. UK Finance agrees that the draft Bill, if enacted, would reduce the aggregate value and the aggregate number of claims made to debit card issuers and credit card issuers. This will reduce the value and volume of chargeback claims under debit and credit cards and Section 75 Consumer Credit Act 1974 ("**Section 75**") claims. This will in turn reduce the financial exposure that merchant acquirers carry when processing card payments on behalf of retailers. We note caution however on the contract formation point noted at (ii) above and the requirement for clarity on the acceptance and rejection process at (ix) below.

(vi) Delivery fees. We think it is reasonable that the administrator may levy an administrative delivery charge to the consumer. In our view, where the consumer's purchase included "free" delivery, any such charge would not be eligible for a chargeback claim but could be eligible for a Section 75 claim (as a consequential loss). Where the purchase amount includes a charge for delivery, we think a chargeback claim could be made for the paid for delivery charge, but not any additional charge the administrator would levy. In contrast, the Section 75 claim would be for the administrator's additional charge only.

(vii) Rejection rights – loss mitigation. We think the consumer's rejection rights need to be considered further, in the context of a card claim. We think a credit card holder would have to mitigate the loss and it seems to us that would involve having to accept title to the goods, save where there was a statutory protection (such as "cooling off" rights under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013). In these circumstances, the credit card issuer would be able to recognise title transfer and then pay consequential losses such as delivery charges. Industry views vary as to whether chargeback claims would be treated similarly. The process would be different as the chargeback risk, upon merchant insolvency, falls to the merchant's payment processor, known in the industry as the "merchant acquirer". The issuer receives the cardholder's chargeback claim and via the card scheme (Visa, MasterCard etc) sends it to the merchant acquirer. The merchant acquirer could seek to defend the claim on the basis that the consumer has title and has received what he/she bargained for. However, the view of the major card schemes is that where delivery is the responsibility of the merchant under the contract, whether free or paid for by the consumer, the consumer would have the right to raise a chargeback for the full card transaction value, where delivery did not occur as a result of insolvency. Where the consumer agreed with the merchant that the consumer would arrange delivery or collection, then the delivery service would not have been part of the card payment made to the merchant. This means that if title has passed to the consumer, there would not be a chargeback right upon insolvency.

(viii) Clarity of title – administrator’s rights to deal with the goods. We also think the consumer’s rejection rights need to be considered to ensure that goods do not end up in “no-man’s land” where the administrator does not know if the consumer has accepted or rejected title. Consideration should be given to requiring an alignment of rejection requirements for distance selling and non distance selling contracts. At present distance selling contracts, under the Consumer Contract Regulations 2013 require a rejection notice where rejection occurs during the “cooling-off” period. In this way, the card providers and merchant acquirers could require a copy of the rejection notice as evidence the consumer has rejected the goods and further the administrator will know that he/she can deal with the goods free of any consumer claim. This may also reduce the opportunity for fraud.

(ix) Consumer clarity – This response is written during the Covid-19 pandemic. A key problem for consumers, particularly in the travel sector, is knowing how and where to make their claim when travel has been cancelled or their provider has become insolvent. Consumers report having been “bounced” between different protection providers. Indeed, the FCA and the CMA have intervened in 2020 with guidance and statements to mitigate some of these issues. Whilst we remain supportive of the Bill, we think there is a material risk that consumers could be “bounced” between the card issuer and the administrator if the acceptance and rejection processes are not clearly laid out. Furthermore, whilst beyond the scope of the Consultation, we think it is important that consumers should be made aware of their new rights and how they can be exercised or rejected prior to them automatically making claims to the card issuers by default. It should not be left to the card issuers to explain to the consumers that they may have the rights to take delivery of the goods and then receive adverse commentary of trying to avoid claims. A better outcome would be a clear mechanic the consumer would follow to accept the goods (and claim delivery charges under Section 75) or reject the goods and then claim for a chargeback/or Section 75 claim. Consumers, acquirers, card issuers and the insolvency practitioners all need clarity and certainty.

- 3. Questionnaire Responses.** Please find attached in the Annex our detailed responses to those questions. Our response to all other questions is “*No Comment*”. Please note that where we refer to Section 75, the responses assume that the underlying contract is one falling within the requisite eligibility requirements of Section 75 (such as transaction value limits, debtor-creditor-supplier relationships etc).

If you have any questions relating to this response, please contact **Adam Scarrott** (adam.scarrott@ukfinance.org.uk) or **Duncan McEwen** (Duncan.McEwen@ukfinance.org.uk)

Name

Adam Scarrott
Duncan McEwen

Q.	Paragraph	Question	UK Finance Response
1	3.39	Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been “identified for fulfilment of the contract” are drafted sufficiently clearly?	Yes
5	3.54	Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?	Yes
8	3.61	Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?	Yes
11	3.84	Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?	Yes. Providing a clear right to ownership in the limited circumstances where the goods have been “identified”, is a fair and reasonable outcome for consumers. The card industry is supportive of consumers and retailers resolving issues between them before making card based claims (chargebacks or Section 75). Ensuring that the consumer has a clear right against an insolvent company, will help to reduce consumer confusion and anxiety and remove the need for the

			<p>consumer to have to approach its card issuer for a remedy. A statutory consumer rights remedy, where the consumer obtains <i>possession</i> of the item they purchased is likely to lead to a better, faster and more practical remedy than a card based claim where there is a process to follow and forms to fill, where the only remedy is financial recompense.</p>
12	3.109	<p>On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?</p>	<p>We think the law needs to be clear, in the interests of consumers, card issuers, merchant acquirers (and schemes who would arbitrate disputes), the administrators appointed over insolvent companies and the purchasers of assets from an insolvent company. The commentary below relates to in store sales contracts only because The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013) provides cancellation rights to consumers who have contracted with a retailer on a distance selling basis (and inability to reject because a retailer is closed would be deemed to be a breach by the merchant and thus allowing a chargeback or Section 75 claim).</p> <p>In Store Contracts</p> <p>(a) If the consumer has received full performance of the contract no claim should automatically arise simply because of insolvency. Claims under chargebacks and Section 75 only arise as a result of a merchant's breach. If the insolvency caused the merchant's breach, the insolvency is likely to result in the consumer being able to claim under Section 75 or under chargebacks. Nuances depending on the circumstances and the stated delivery date at the time the contract was entered into, and the inclusion of contractual cancellation rights may lead to valid claims e.g. where the consumer suffered a delay in delivery such that the goods were no longer needed (such as a gazebo for a one-off celebration garden party). If an administrator, at no additional cost to the consumer, performs the contract and delivers promptly, it is unlikely that any breach has occurred. We should add that rights to claim for defective goods would not normally be impacted by insolvency. Receipt of defective goods would remain a breach.</p> <p>(b) We think card issuers would be able to defend wholly or partially Section 75 claims on the basis of the consumer's duty to mitigate a loss under the</p>

			<p>consumer's contract with the merchant, and/or on the basis, the consumer has title to goods and has received what they bargained for. Mitigating a loss would involve having to accept title to the goods save where there was a statutory protection or contractual cancellation right. In these circumstances, the credit card issuer would be able to recognise title transfer and then pay consequential losses such as delivery charges. Views differ as to whether chargeback claims would be treated similarly. The process would be different as the chargeback risk, upon merchant insolvency, falls to the merchant's payment processor, known in the industry as the "merchant acquirer". The issuer receives the cardholder's chargeback claim and via the card scheme (Visa, MasterCard etc) sends it to the merchant acquirer. The merchant acquirer could seek to defend the claim on the basis that the consumer has title and has received what he/she bargained for. However, having consulted with the major card schemes and their disputes teams (who ultimately arbitrate such disputes), chargebacks will be upheld where the merchant was responsible for delivery as part of the contract. If the consumer agreed on the contract to make the delivery arrangements or to collect, then the original card transaction for the purchase could not be chargebacked. Acquirers, who bear the financial risk of chargebacks, may decide to voluntarily fund the administrator's delivery costs to consumers as a means of mitigating the full chargeback claims and if this happened such that the merchant did not breach the contract, it is unlikely that a chargeback claim would succeed.</p> <p>(c) We also think the consumer's rejection rights need to be considered to ensure that goods do not end up in "<i>no-man's land</i>" and that administrations proceed smoothly and predictably:</p> <ol style="list-style-type: none"> i. One concern could be that a consumer does not wish to collect the goods or have them
--	--	--	--

			<p>delivered and does not have a statutory right to reject. That consumer might submit a card claim which is paid. The administrator is unable to sell the goods as he/she believes they belong to the consumer. The consumer may have no interest and neither confirms delivery nor rejects. How will title revert to the company in administration? How will the administrator know whether he/she can sell the goods lawfully? How will a purchaser, such a trade buyer of a bulk of inventory or upon an asset sale, know that they will have good title? What will happen when the administrator sells the goods that were mistakenly thought to have been rejected?</p> <ul style="list-style-type: none"> ii. The interplay of rejection rights, card claims, knowing who has title and the requirement of certainty for the administrator, may require further consideration or even a requirement that consumers must take delivery within a certain time period or “accept or reject”, else forfeit title and any right to a refund. iii. As many administrations are conducted on a “pre-pack” basis where a buyer is “lined up” prior to the commencement of the formal insolvency process, consideration should be given to ensuring the efficacy of any administration process and rescue of the business (albeit with a new owner) is not materially prejudiced by uncertainty relating to a small portion of the inventory.
13	3.110	If a consumer chooses to take possession of goods on a retailer’s insolvency, do	(1) Yes, to the extent Section 75 applies, which will be determined by a number of factors outside the scope of this response, including transaction value and the existence of necessary relationships set out in the

		<p>consultees agree that:</p> <p>(1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75?</p> <p>(2) these fees could not be claimed under chargeback rules?</p>	<p>Consumer Credit Act 1975 (debtor-creditor-supplier) .</p> <p>(2) Yes.</p> <p>We note that if there was a delivery charge as part of the contract, there would be a chargeback claim for the original delivery charge paid by the consumer, but not for any additional charges imposed by an administrator. We also think that where the delivery was “free” under the contract, there would not be a chargeback claim for any implied delivery charge in the contract.</p>
16	3.130	Do consultees agree that the draft Bill should come into force two months after it is passed into law?	Yes
22	4.43	Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract?	<p>Whilst we have not collected empirical evidence, we do not believe that consumers check terms and conditions and are unaware of this contractual tactic.</p> <p>We note the commentary on delaying formation of the contract for legitimate reasons (such as price errors and unavailable inventory). We think there is a risk that retailers may adopt this technique more generally to avoid the impact of Bill. We do not think it will be helpful to rely on existing legislation to determine the fairness of the tactic as otherwise card issuers and acquirers could become involved in very technical disputes. We would support an approach that forms the contract at an earlier stage in the process with appropriate conditions precedent. We think it is important that consumers are not prevented from enjoying the benefit of the Bill.</p> <p>We also think it is very important that consumers are made aware of their rights to accept or reject delivery and do not fall-back on the cards system as a first port of call for a remedy or information. See our comments at Q12.(c)(ii) above. The cards industry does not wish consumers to feel “bounced” between issuers and administrators.</p>
24	4.47	Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the	<p>We do not think this is a tactic routinely adopted by issuers or merchant acquirers.</p> <p>If additional remedies apply under formed contracts, it is possible that issuers would reject Section 75 claims if a contract is not formed. However we think chargebacks would apply to the payment itself, such that whether or not there was a contract, if the merchant defaulted the cardholder would have a remedy – either for breach of contract or for return of a prepayment/deposit where the “goods were not</p>

		Consumer Credit Act 1974? Are card issuers likely to take this point in future?	delivered” . We are concerned that the new title transfer remedy does not drive additional and unnecessary card claims where the card system becomes the forum to decide whether or not the contract was formed prior to insolvency.
29	5.24	We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer’s possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree?	Yes. We think the proposals will reduce consumers’ sense of unfairness, particularly where consumers have chosen specific items or have been informed of an impending delivery, that never happens. The impact of the Bill however will be relatively small as in most cases inventory will not have been identified for a particular consumer and title will not pass.

End.

