

**INTERNATIONAL ISLAMIC UNIVERSITY
ISLAMABAD.**

FACULTY OF SHARIAH & LAW

T04980

**THESIS FOR THE PARTIAL FULFILLMENT OF LL.M
(CORPORATE LAW) DEGREE.**

DATA ENTERED

**CRITICAL APPRAISAL AND SUGGESTIONS WITH REGARDS TO
THE PAYMENT SYSTEMS AND ELECTRONIC FUNDS TRANSFER
ACT 2007.**

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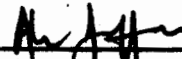
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- i Electronic funds transfers - Law and legislation
- ii Electronic funds transfers - Pakistan

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	i
ABSTRACT.....	ii
Chapter 1.INTRODUCTION.....	1
1.1.History and development of Electronic Commerce.....	2
1.2.Role of Electronic Banking and Electronic Money in Electronic Commerce.....	5
1.3.Payment Systems and Electronic Fund Transfers—technological challenges.....	8
1.4.Real Time Gross Settlement (RTGS) and legal issues.....	14
1.5.Is dematerialization of Commercial Documents necessary for electronic commerce and electronic banking?.....	18
Chapter 2.SURVEY AND ANALYSIS OF INTERNATIONAL LAWS AND FRAMEWORKS.....	21
2.1 UNCITRAL legal guide on Electronic Funds Transfer.....	22
2.2 Recommendations and Communications of the European Commission and the European Monetary Institute (EMI).....	28
2.3 Legislative structure of the United States of America.....	32
2.4 Relevant English Laws.....	38
2.5 Cross Border and International Electronic Banking in the light of the above legal frameworks.....	43
Chapter 3.IDENTIFICATION OF THE AREAS OF CONCERN WITH REGARDS TO PAKISTAN.....	48
3.1 Identification of key Electronic Fund Transfers (E.F.T.) products.....	50
3.2 Risk to Pakistani Banks from cross Border Electronic Banking.....	55
3.3 Risk to Pakistani consumers when dealing with foreign Internet banks.....	59
3.4 Technology Risks.....	68
Chapter 4.CONCLUSION AND SUGGESTIONS WITH REGARDS TO THE PROPOSED BILL OF THE PAYMENT SYSTEMS AND ELECTRONIC FUNDS TRANSFER ACT, 2005 AND THE PAYMENT SYSTEMS AND ELECTRONIC FUNDS TRANSFER ACT, 2007	71
4.1 Critical overview of the proposed bill of Payment Systems and	

Electronic Funds Transfer Act, 2005 and The Payment Systems and Electronic Funds Transfer Act, 2007.....	72
4.2 Required Legal Framework.....	80
4.3 A Legal Framework Suggested.....	87
4.4 Conclusion.....	111
BIBLIOGRAPHY.....	115

ANNEXURES:

- (i) **THE PAYMENT SYSTEMS AND ELECTRONIC FUND TRANSFERS
ACT 2007.**
- (ii) **PROPOSED BILL OF PAYMENT SYSTEMS AND ELECTRONIC FUND
TRANSFERS ACT 2005.**

LIST OF ABBREVIATIONS

1. ACH – Automated Clearing House
2. ADR – Alternative Dispute Resolution
3. ATM – Automated Teller Machine
4. B2B – Bank to Bank
5. B2C – Bank to Customer
6. C2B – Consumer to Business Transactions
7. C2C – Customer to Customer
8. E C – European Commission
9. E.D.I. – Electronic Data Interchange
10. E.F.T. – Electronic Funds Transfer
11. E.P.I. – Electronic Payment Instruments
12. EFAA – Expedited Funds Availability Act
13. EFTA – Electronic Funds Transfers Act.
14. EFTPOS – Electronic Funds Transfer at the Point of Sale
15. EMI – European Monetary Institute
16. E-SIGN Act – Electronic Signature Act
17. EU – European Union
18. EU Directive – European Union Directive
19. I. T. Act. – Information Technology Act
20. ISP – Internet Service Providers
21. NIFT – National Institutional Facilitation Technologies.
22. PIN – Personal Identification Number
23. POS – Point of Sale
24. RTGS – Real Time Gross Settlement System
25. UCC – Uniform Commercial Code
26. UN – United Nations
27. UNCITRAL – United Nations Commission on International Trade Law

ABSTRACT

This research has been undertaken to critically appraise and make suggestions with regards to the proposed bill of Payment System and Electronic Fund Transfers Act 2005 and The Payment System and Electronic Fund Transfers Act 2007. The question which arises in any mind is that why the proposed bill of Payment System and Electronic Fund Transfers Act 2005 and The Payment System and Electronic Fund Transfers Act 2007? Why not some other piece of legislation? It is in fact the answer to this question which was instrumental in further strengthening my resolve to go ahead with the said research.

When one has to make an academic effort which is research oriented, then the wish to be able to direct his or her energies towards the achievement of a goal which is not only self satisfying but also beneficial to humanity, is but natural. For the last several years we have noticed the growth and the increasing role of e-commerce in our country in its various forms. Whereas the last five of these have been witness to the focus towards electronic banking in Pakistan.

The State Bank of Pakistan started paying serious attention to the promotion of e-banking in Pakistan from the year 2002. The banks operating within the jurisdiction of the State Bank of Pakistan were directed to provide e-banking services to their customers. The banks have shown noticeable performance during 2005 – 2006, as a result of their increasing use of electronic funds transfer products and services. Electronic fund transfers in the sphere of e-banking tend to be increasingly global in nature. The ever changing financial scenario, confronts the banks and the regulatory and supervisory authorities in Pakistan with many risks, most of which result from cross-border transactions. With electronic banking crossing national boundaries, the question of jurisdiction amongst the concerned legal regimes arises.

We find that there is not only a need to regulate all such payments, transfers and transactions within our country but also internationally. A concerted effort is required to achieve a balance and harmony with the legislative frameworks proposed or in place in various jurisdictions around the globe to ensure interoperability, without compromising national requirements and policies.

It was this background which was the basis of my decision to dwell upon this research which is critical in nature and resultantly suggestive. To attain an understanding of the history and development of e-commerce and then to narrow down on various aspects of e-banking, with the focus of attention being on payment systems and electronic funds transfer is to be a general goal. The next and of course targeted attempt is the general understanding of various suggested or already implemented legislative structures, with regards to payment systems and electronic fund transfers around the globe. Moreover the concerns of all the parties involved have to be considered in detail.

Having achieved the above, an attempt is to be made to critically appraise and thereby make suggestions with regards to the proposed bill of Payment Systems and Electronic Fund Transfers Act 2005 and The Payment System and Electronic Fund Transfers Act 2007. The aim is to suggest improvements in the above said proposed bill and the subsequent act, which would render it all comprehensive to the maximum possible extent, in view of the ever changing and developing e-banking perspective in Pakistan and internationally.

In doing so certain major areas of payment systems and electronic fund transfers requiring legislation, which have either not been a concern of the drafters of the proposed bill of Payment System and Electronic Fund Transfer Act 2005 and The Payment System and Electronic Fund Transfers Act 2007 or have not been dwelt upon in a comprehensive and thus the required manner to render the said proposed bill and the ensuing act as a piece of legislation which serves the expected purposes, would be discussed. Moreover certain sections and chapters of the above said legislations would be scrutinized and suggestions with regards to the same would also be attempted. All such endeavours would be general in nature.

This extensive exercise is being taken up with the will and intention to make such suggestions which would render the subject matter of this research to be an adequate legislation with regards to payment systems and electronic fund transfers not only nationally but also in the cross border aspects. In this research we would make a conscious effort to stay

as far away as possible from assuming the role of the drafters. This research requires us to act as critical appraisers and suggetors only. May Allah be kind, "Aameen".

CHAPTER – 1

INTRODUCTION

The notational transfer of money and the associated movement of funds from one account to another by means of electronically communicated payment instructions are referred to as electronic funds transfer (E.F.T.). The legal rules relating to electronic funds transfers determine the particular legal implications of any such payment¹.

The absence of legislation pertaining to electronic funds transfer, especially in Pakistan, has led to a noticeable amount of uncertainty as to the relationship between the parties involved. The legislative liability structures of the United States of America and under the English and European laws, serve to regulate the legal position between the parties to an electronic funds transfer. Pakistan has no other legislative liability structure, particularly dealing with payment systems and electronic funds transfer in place but a draft bill of a proposed act to provide regulatory framework for payment systems and electronic funds transfers which has been passed as the “Payment Systems and Electronic Funds Transfer Act 2007”.

¹ UNCITRAL Legal Guide 12, 1992 United Nations (UN).

A critical study of the above stated proposed bill and act has been undertaken keeping in mind the challenge to suggest the creation of a new set of rules and procedures, as most of these payment systems and electronic funds transfers will be global in nature and the lack of legal uniformity between the proposed act and other such legal regimes already in place in other countries may give rise to many legal issues.

1.1 HISTORY AND DEVELOPMENT OF ELECTRONIC COMMERCE:

The legal uniformity between the recently promulgated Payment Systems and Electronic Funds Transfer Act 2007 and other such legal regimes already in place internationally, being instrumental for the purposeful implementation of the said act, the historical background and development of Electronic Commerce world wide has to be a looked at, in the said perspective.

Electronic Fund Transfers and Payment Systems are the backbone of every structure/system, raised on the premise of electronic commerce. Electronic Commerce is a new and certainly a trendy name, but the practice it denotes originated about half a century ago in the Berlin Airlift and came to be known as E.D.I., the computer to computer exchange of standardized electronic transaction documents. Thus the EDI technology emerged from

the airlift organized to supply Berlin, when the city was blockaded by the Soviet Union in 1948².

Electronic commerce is not only “here to stay” but is also growing and potentially almost all e-commerce transactions tend to be international in nature. Does the fact that commerce is electronic create any new legal issues? There are, of course many of the same issues in a electronic transactions as there are in paper-based transactions. However, they usually arise in a different context and need further analysis to resolve them in electronic transactions. This fact has led to a plethora of legislation at the national and international levels, which will be discussed in following chapter. Historically the path of development shows that the Trading Partner Agreements came first, then the state Digital Signature Statute, then the UNCITRAL Model Law on Electronic Commerce, followed by the federal E-SIGN Act. The UNCITRAL Model Law on Electronic Signature and the EU Directive came later.

An important issue that arises in electronic commerce is one of regulation by the governmental entities. What jurisdiction has the power to regulate what occurs on the internet? This is the problem that arises under issues like the privacy of personal information concerning individuals. How should one resolve disputes within the EU, which gives primacy to the free flow of information on the net? There are many other issues which

² Audacity: The Magazine of Business Experience (Spring 1996).

include the content of information, protection of intellectual property, the structure of the system, jurisdiction for private litigants, taxations and others.

There have been various international legal initiatives on the subject, wherein the 1987 UNCITRAL Legal Guide on electronic funds transfers is the most prominent and basic legal document on the matter. The arrival of the commercial use of the Internet driven by its World Wide Web subset, has been defining the new E-Commerce since 1993. In 1994 the EMI recommended that only credit institutions be allowed to issue multipurpose prepaid cards. The 1997 annual report by E.M.I. stated the minimum requirements to be met by the issuer of such instruments. In the United States of America the UCC was enacted to provide a uniform code of law for commercial purposes. The EFTA was enacted to protect parties to an electronic funds transfer.

The European Commission adopted a communication entitled "A European Initiative on Electronic Commerce", in 1997. In the United Kingdom a legal infrastructure regulates the question of liability to a noticeable extent. The Financial Institutions (Recovery of Finances) Ordinance 2001, does cover the credit card factor of the electronic funds transfer activities in Pakistan to a certain extent but the other elements of the topic need to be addressed in their legal perspective.

1.2 ROLE OF ELECTRONIC BANKING AND ELECTRONIC MONEY IN ELECTRONIC COMMERCE.

For many consumers, electronic banking means twenty four hour access to cash through an A.T.M. or the direct deposit of cheques into accounts. But electronic banking now involves many different type of transactions. Electronic Banking, also known as E.F.T. uses computer and electronic technology as a substitute for cheques and other paper transactions. E.F.T's are initiated through devices like cards or codes that let the user or someone authorized by the user to have access to his/her account. Many financial institutions use ATM or debit cards and PINs for this purpose. Some banks use other types of debit cards such as those that require at the most, the customers signature or a scan.

Electronic Banking offers several services that consumers may find practical;

- Automated Teller Machines or twenty four hour tellers are electronic terminals that let the customer bank almost any time. To withdraw cash, make deposits or transfer funds between accounts.
- Direct Deposits lets the consumer authorize specific deposits, such as pay cheques to his/her account on a regular basis. The customers may also pre-authorize direct withdrawals so that recurring bills such as insurance premiums, mortgages and utility bills, are paid automatically.

- Pay-by-Phone systems let you call your bank with instructions to pay certain bills or to transfer funds between accounts. There is a requirement of having an agreement with the financial institution to make such transfers.
- Personal Computer Banking lets the account holder handle many banking transactions via his/her personal computer.
- Point-of-Sale transfers allow the account holder to pay for purchases with a debit card, which also may be the ATM card.
- Electronic Cheque Conversion converts a paper cheque into an electronic payment at the point of sale. For example in a store when the consumer gives a cheque to the store cashier, the cheque is processed through an electronic system that captures the issuers banking information and the amount of the cheque. After the processing the client signs a receipt authorizing the merchant to present the cheque to the bank electronically for depositing the funds into the merchants account.

The point of concern here is that not all electronic fund transfers are covered by the legislation already in place in most countries. For example some banks and merchants issue cards with cash value stored electronically on the card itself. Examples include prepaid telephone cards, mass transit passes and some gift cards. We thus find that the implementation of payment systems for electronic commerce is still evolving especially in the field of Electronic Banking.

Online banks handle a visible portion of the world's financial transactions today, but as the reputation and reliability of online banks grows, more customers are accepting them as a good way to conduct their banking business and are as such allowing electronic commerce to grow beyond its beginnings in bank EFTs and business to business E.D.I's.

Electronic money (also known as electronic cash, electronic currency, digital currency, digital money and digital cash) refers to money which is exchanged only electronically. This involves the use of computer networks, the internet and digital stored value systems. Electronic Fund Transfers and direct deposit are examples of electronic money. Although credit cards dominate online payments today, electronic cash shows promise for the future. Electronic cash is a general term that describes any value storage and exchange system created by a private (non-government) entity that does not use paper documents or coins and that can serve as a substitute for government issued physical currency.

The concept of Electronic Wallet (sometimes called an e-wallet) has evolved in the realm of electronic commerce as a corollary of electronic money. An electronic wallet serves the purpose similar to a physical wallet by holding credit card numbers, electronic cash, owner identification and owner contact information and provides that information at an electronic commerce site's counter. Electronic wallets make shopping more efficient by practically eliminating on line form filling and secure by providing a storage place for credit cards data and electronic cash.

Most money in today's world is electronic and tangible cash is becoming less frequent with the introduction of internet/online banking, debit cards, on line bill payments and internet business, paper money is becoming a thing of the past. Banks now offer many services whereby a customer can transfer funds, purchase stocks, contribute to their retirement plans and offer a variety of other services, without having to handle physical cash or cheques. Customers do not have to wait in lines, this provides a lower-hassle environment. Debit Cards and online bill payments allow immediate transfer of funds from an individual's personal account to a business account without any actual paper transfer of money. This offers a great convenience to many people and businesses alike.

The benefits which are being and will be accrued from electronic banking and the advent of electronic money indicate that they are here to stay as the main ingredients of electronic commerce.

1.3 PAYMENT SYSTEMS AND ELECTRONIC FUNDS TRANSFERS- TECHNOLOGICAL CHALLENGES

With the passage of time, new E-commerce will present countless opportunities and challenges to our economies and societies. Expansion of commerce and technological innovations are two of the levers of economic growth³. These forces are combined in the

³ Maker. The lever of riches. Technological Creativity and Economic Progress. New York: Oxford University Press, 1990.

progress of E-Commerce. The macroeconomics effects of e-commerce on the national and regional economies and on international trade and its terms will need to be assessed and analyzed. The traditional institutions, such as banks of issue, commercial banks, established business intermediaries, universities, the media and publishing companies, will find it necessary to redefine their rules in the new environment.

The tension between the transactional efficiency of spot purchasing facilitated by electronic markets and the need for long term relationships of trust and forbearance, enabled by the technological developments in the electronic hierarchies, will persist and call for much study. The question which presents itself at this stage is that, are major changes in the law required by the technological development of payment systems and electronic funds transfer? The identification of the key technological areas which are posing various challenges may only be suggested at this stage, as all these issues will require further experience, observation, analysis and research. These may include;

- Vendor Risk Issues.
- Outsourcing.
- Security, data integrity and confidentiality.
- Authentication, Identity Verification and Authorization.
- Strategic and Business Risks.
- Permissibility, Compliance, Computer Crimes.
- Cross Border and International Banking.

Restricting ourselves to the question stated above we find that since the underlying funds transfer procedures remain the same whether the medium of communication is paper based or electronic, it could be expected that the law governing paper based funds transfers would remain fundamentally appropriate for electronic funds transfers. However, since electronic funds transfers are not carried out in a manner identical to paper based funds transfers, changes in the law to adjust to the new procedures should be looked into, as has already been pointed out in section 1.1 above. The following discussion suggests some of the major elements that would affect the extent to which the law written for paper based funds transfers might need to be adapted to make it appropriate for electronic funds transfers.

Since most electronic funds transfers are made by credit transfer, countries where funds transfers have been largely made by cheques, may have few legal rules which are directly applicable. Rules drafted for the issue, collection and payment of cheques, with their elements of negotiability are not applicable to credit transfers without significant modifications.

Even in countries with a satisfactory legal structure for paper based credit transfers, the new technology requires an adjustment of the law in regard to such matters as the periods of time within which various actions are to be taken, the presence or absence of liability arising out of computer failure at one of the banks, clearing houses or communication networks, the time when a funds transfer becomes final and the consequences of finality.

Modifications of this nature to the existing legal rules do not affect their structure but they may modify their content to an important degree.

We must also consider the fact that technical development of several alternative ways of making funds transfers and the continual change in the technology have started to lead towards new subdivisions in the law. These include the distinction between batch processed funds transfers and individual funds transfers sent by telecommunications, between transaction using debit cards and those using credit cards, between those initiated on customer activated terminals and those where the electronic communication is initiated at a bank. Some of these distinctions which fall outside the purview of bank-customer contracts and inter bank rules need to be expressed in the statutory law governing funds transfers. If the number of special rules which are the result of these distinctions is small then they can be handled within the general law of funds transfers. On the contrary if the number of these special rules is large then the adaptation of special laws may become a necessity.

Many aspects of electronic funds transfers are common to all forms of automatic data processing, thus entailing common legal rules. These include the evidential value of the computer records of funds transfer instructions and account records, of particular concern is the acceptability of the authorization used in electronic funds transfers. The concurrent growth of electronic funds transfers nationally and internationally, is leading to the

international standardization of funds transfers procedures and a growing interest in the international unification and harmonization of the governing laws⁴.

Another aspect presenting itself as a challenge to the legislators are the digital signatures, because the immediate analogue to the handwritten signature seems to be the electronic or digitized signature which often means a person's handwritten signature, password or some other identifier scanned, recorded or by some other means converted into electronic form for association with an electronic record or message or for other purposes. However an electronic or digitized signature might not be specific to a particular document and might be vulnerable to be attached or transferred to anything, anywhere at any time and therefore might not provide strong evidence about the intent of the signatory or the origin of the document. The value of an electronic signature depends very much on the circumstances and context of its application and the understandings (contractual or otherwise) of the parties involved.

Nevertheless even seemingly insecure digitized signatures can have their place in authentication with the appropriate technology, management and trust systems and are overwhelmingly the dominant method in the digital world with widespread use in, for example, e-mails, faxes, banking devices, building security entries, etc.

⁴ UNCITRAL Legal Guide 1987, United Nations (UN).

Electronic signatures are sometimes defined as exclusive of digital signatures, especially by technologists. However, it seems more meaningful to define electronic signatures as inclusive of digital signatures. Most electronic signature legislation is inclusive in this way and conceives of electronic signatures as a broad generic concept which can come in many forms. At this generic level digital signatures logically form a special subset. Thus while electronic signature legislation is inclusive of digital signatures, digital signature legislation is not inclusive of electronic signatures.

Digital signatures are not recognizable as ordinary traditional signatures. A digital signature is a technique for associating with a digital document a code that demonstrates that the document could reasonably only have come from someone or something accessing the signatory's secret or private key. A digital signature is intended to provide the legal equivalence of an individual's handwritten signature insofar as it is designed to be uniquely, irrefutably and unambiguously associated with a particular document and also authenticate that it could have been affixed only by that individual. (The individual could also be an organization or some other entity but the meaning is the same).

The use of digital signatures for commercial purposes faces a number of existing legal impediments that derive from both common and civil law treatment of form requirements for many types of commercial transactions. The currently perceived function of formalities has an important effect on their adaptability to electronic commerce.

Legal solutions to these problems are typically based on traditional legal instruments and concepts that are modified accordingly. Besides, the basic notions and norms of law, which have been created through and by the historical development of law and have been expressed by paper documents, cannot be changed. The introduction of electronic means of expression should only contribute to a simpler way of dealing and exchanging documents rather than eliminating the documentation or altering the basic concepts, norms and canons of law. Electronic means of documentation cannot alter the concept of justice. The introduction of new terminology can only serve the principles of law.

1.4 REAL TIME GROSS SETTLEMENT (RTGS) AND LEGAL ISSUES

At the heart of every nation with developed financial markets is a real time gross settlement system (RTGS), that is operated by the central bank. In such a system funds are wired by banks on the behalf of their customers to other banks. The banks actually transfer funds from and to their accounts on the books of the central bank. The “gross” feature of the system refers to the fact that each transaction is settled separately. An alternative that requires less liquidity for the banks involved in a netting system in which payments to and from banks accumulate and only the net difference is transferred. What that means is that, on receipt of the funds, the recipient bank and its customer do not have access to those funds until the accumulated inflows and outflows are netted and settled. The “real-time” feature of the system means that the funds recovered are available at exactly the time when they arrive.

There is no wait for accumulated inflows and outflows to largely offset each other, with only a smaller net amount transferred.

In view of the above an RTGS system may be defined as a gross settlement system in which both processing and final settlement of funds transfer instructions can take place continuously (i.e. in real time). As it is a gross settlement system, transfers are settled individually, that is, without netting debits against credits. On the other hand, it being a realtime settlement system effects final settlement continuously rather than periodically at pre-specified times, provided that a sending bank has the required balance or credit. Furthermore this settlement process is based on the realtime transfer of central bank money. An RTGS system can thus be characterized as transfer system that provides continuous intraday finality for individual transfers.⁵

With the above in mind the only structural impediment to continuous intraday finality which presents itself to my mind, is any liquidity constraint a sending bank may face during the day. A liquidity constraint in an RTGS environment has two basic characteristics, namely that it is a continuous constraint for settling funds transfers and that intraday liquidity requirement must be funded by central bank money, banks must therefore have sufficient balances in their central bank accounts throughout the processing day.⁶

⁵ A delegate at the Asian Banking: A paradigm Shift (Dawn Asia Finance Conference 2006) held on 13th & 14th of May 2006 at Karachi Sheraton Hotel.

⁶ Ibid.

The first automated RTGS system was Fedwire in the United States. The modern version of Fedwire based on a computerized, high speed electronic telecommunications and processing network, was launched in 1970. By the end of 1980s, six g 10 countries had introduced RTGS systems or large value transfer systems with an rtgs facility. These systems were FA in the Netherlands (1987), EILZV in Germany (1987), BOJNET in Japan (1988) and BISS in Italy (1989). In the 1990s, further new RTGS systems were introduced, while some of the existing systems upgraded their risk management capabilities and system architecture. New RTGS systems include CHAPS in the United Kingdom, which previously operated as a net settlement system but became an RTGS system in 1996 and ELLIPS in Belgium also came into operation in 1996.⁷

Keeping in mind the target of establishing a sound legal basis that is also able to accommodate technological advances the settlement system should have a well founded, clean and transparent legal basis in the relevant jurisdictions. For a settlement system to be operationally reliable and predictable there must be i) laws, rules and procedures that support the holding, transfer, pledging, and loading of securities and related payments and ii) how these laws, rules and procedures work in practice, that is , whether system operators, participants and their customers can enforce their rights. If the legal framework is inadequate or its application uncertain, it can give rise to credit or liquidity risks for system participants and their customers or to systemic risks for financial markets as a whole.

⁷ A delegate at the Asian Banking: A paradigm Shift (Dawn Asia Finance Conference 2006) held on 13th & 14th of May 2006 at Karachi Sheraton Hotel.

A variety of laws and legal concepts can affect the performance of clearing and settlement systems. Contract laws, company laws and bankruptcy & insolvency laws may impede the performance of a clearing system. The general need is to have an adequate legal basis that is able to accommodate technological advances and in this way, does not constitute a constraint for the operation or future development of the system. Key aspects of the settlement process that the legal framework should support include: enforceability of transactions, protection of customer assets (particularly against insolvency of custodians), immobilization or dematerialization of securities, netting arrangements, securities lending (including purchase agreements, and other economically equivalent transactions), finality of settlement, arrangements for achieving delivery versus payment, default rules, liquidation of assets pledged or transferred as collateral and protection of the interests of beneficial owners. The rules and contracts related to the operation of a settlement system should be enforceable in the event of the insolvency of a system participant, whether the participant is located in the jurisdiction whose laws govern the settlement system or in another jurisdiction.

Another important emerging issue is the legal status of digital signatures. If digital signatures are to substitute for hand written signatures, they must have the same legal status as hand written signatures i.e. they must be legally binding⁸. A critical need is to ensure that laws are both enforced and are enforceable in all relevant jurisdictions. In addition disputes should become the subject of court proceedings only as a last resort. This can be achieved

⁸ UNCITRAL—Model Law on Electronic Signatures 2001, United Nations (UN)

through the specification and acceptance of comprehensive and fair arbitration processes that are clear and not ambiguous.

1.5 IS DEMATERIALIZATION OF COMMERCIAL DOCUMENTS NECESSARY FOR ELECTRONIC COMMERCE AND ELECTRONIC BANKING?

For much of the last decade, a key philosophy underlying developments in the trade finance world has been that of “dematerialization”. Advances in the communication technology and a related re-examination of the role played by electronic banking in the realm of electronic commerce and in the sphere of trade, has led to a wide acceptance that the future direction of commerce and business would be predicated upon the ability of banks/financial institutions to drastically reduce the amount of paper documents used in their day to day servicing and financing activities.

Tremendous progress has been made in the area of the dematerialization of documents. The resulting efficiencies have allowed goods to flow more freely through the global channels of commerce, while providing market participants with access to more accurate and useful data on a more timely basis. These enhanced capabilities have also allowed banks and other financial institutions to more easily comply with the continuously strengthening regulatory environment, which requires a much higher level of due diligence and transactional acuteness.

The dematerialization of commercial transactions raises the question of the admissibility of electronic documents as evidence. The admission of electronic documents must be based upon harmonized provisions with respect to form. The admissibility of a document as evidence should be independent of the format that a document takes and the medium that is used. Continental legal systems provide that all means of evidence can be admitted as evidence in court. In some countries civil procedure law sets out a list of the acceptable means of evidence.

The term “dematerialization” pinpoints the gradual loss of physical substance on the part of traditionally paper-based bank records through replacement with electronic records. Dematerialization can thus be described as the direct result both of the gradual increase in computerized records management in the banking sector and of the replacement of conventional payment records with electronic records recognized by recent legislation as possessing full legal value.

Dematerialization offers a real possibility of progress in payment systems only when the recent legislative provisions governing electronic records are successfully combined with the more general provisions regarding the management and preservation of banking documentation. The rules and the practices underpinning the management cycle of computerized records systems – deduced from the traditional tools regulating the life of banking system archives – provide in fact for the precise application of principles such as

registration and marking, classification, archival arrangement, selection and preservation. It appears necessary to combine these procedures with the systematic introduction and application of tools to ensure the reliability of electronic records, so that the related legal issues can be positively identified and the resultant legislation, at the national and international level, can prove to be effective.

CHAPTER 2

SURVEY AND ANALYSIS OF INTERNATIONAL LAWS AND FRAMEWORKS

We have undertaken a critical study of the proposed draft bill of the “Payment Systems and Electronic Funds Transfer Act, 2005” and the “Payment Systems and Electronic Funds Transfer Act, 2007” in Pakistan and thus taken up the challenge to suggest the creation of a new set of laws having legal harmony with other such legal regimes already in place in other countries, as most of these payment systems and the ensuing electronic funds transfers are and will be increasingly global in nature.

The achievement of the above said purpose would not be possible without the knowledge and understanding of the legal frameworks (suggested or in place) in various jurisdictions around the world. In the present chapter we would thus attempt to outline all such major initiatives, directives, conventions, laws and rules at the international, regional (European) and certain national levels. As the contents indicate we shall be restricting our discussion to the major players and trend setters in the field of payment systems and electronic funds transfer within the realm of international e-commerce.

2.1 UNCITRAL LEGAL GUIDES AND MODEL LAWS ON ELECTRONIC FUNDS TRANSFER.

The UNCITRAL is a subsidiary organ established by the General Assembly of the United Nations in 1966 with the general mandate to further the progressive harmonization and unification of the laws of international trade. Since its establishment, UNCITRAL has become the core legal body of the United Nations in the field of International Trade Law. At its first session in 1968, after considering a number of suggestions by member states, the commission adopted nine subject areas as the basis of its work programme: international sale of goods, international commercial arbitration, transportation, insurance, international payments, intellectual property, elimination of discrimination in laws affecting international trade, agency and legalization of documents. Priority status was accorded to international sale of goods, international commercial arbitration and international payments.

The UNCITRAL at its fifteenth session in 1982 requested the secretariat to begin the preparation of a legal guide on electronic funds transfers in cooperation with the UNCITRAL Study Group on International Payments. Seven chapters of the draft legal guide were submitted to the commission at its seventeenth session in 1984 and the remaining chapters of the draft were submitted to the commission at its eighteenth session in 1985.

At its eighteenth session the commission requested the Secretary General to send the draft legal guide on Electronic Funds Transfers to Governments and interested international

organizations for comments. On the basis of the comments received, the secretariat proposed to the commission at its nineteenth session in 1986 a number of modifications to the draft.

At this session the commission authorized the secretariat to publish the legal guide as a product of the work of the secretariat. It was suggested in the commission that in setting forth the various practices world wide with respect to electronic funds transfer and in pointing out the legal issues arising from those practices, the Legal Guide would itself promote the international harmonization of practices and legal rules with respect to such funds transfers⁹.

The UNCITRAL legal guide on electronic funds transfers became the corner stone of a model structure of all such future frameworks under taken by UNCITRAL. The model laws on International Credits Transfers, drafted by the UNCITRAL Working Group on International Payments in 1992, finalized the most thorough law reform initiative regarding payments that had been discussed in an international frame work. The model law is designed to produce a comprehensive body of rules to govern relations between parties to funds transfer transactions. These rules are not intended to be part of an international convention but are designed for use by legislators. The model law has thus been addressed to legislative bodies (via the national Governments) for adoption as statutory law. As discussed in the Working Group, a model law would be more flexible than a convention because countries

⁹ UNCITRAL: Legal Guide on Electronic Funds Transfers 1987, United Nations (UN).

would be able to take those parts of it which they find useful and adopt them to their particulars needs.

As already discussed above in 1986, UNCITRAL decided to begin preparing model rules which were at first limited to electronic funds transfers. Later the draft model law was expanded to cover any form of credit transfer as long as such a transfer was “international”, wherein article 1 of the model law on International Payments 1992, applies to “credit transfers where any sending bank and its receiving bank are in different states. A “credit transfer” (as distinguished from a “debit transfer”) is understood to be made up of a series of operations that are initiated by a “payment order”, which is in turn defined as an “unconditional instruction, in any form, by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money...”¹⁰

The model law on International Credit Transfer has been divided into nineteen articles, which cover:

1. **GENERAL PROVISIONS:** Sphere of application, Definitions, Conditional instructions, Variation by agreement;
2. **OBLIGATIONS OF THE PARTIES:** Obligations of sender, Payment to receiving bank, Acceptance or rejection of a payment order by receiving bank that is not the beneficiary’s bank, Obligations of receiving bank other than the

¹⁰ HEINRICH – International Initiatives Towards Harmonization, Published in the Web Journal of current Legal Issues 1995.

beneficiary's bank, Acceptance or rejection of a payment order by the beneficiary's bank, Obligations of beneficiary's bank, Time for receiving bank to execute payment order and give notices, Revocations.

3. **CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS:** Assistance, Refund, Correction of under-payment, Restitution of overpayment, Liability for interest, Exclusivity of remedy's.
4. **COMPLETION OF CREDIT TRANSFERS¹¹:**

Another milestone initiative undertaken by the United Nations on the recognition of electronic documents is the Model Law on Electronic Commerce which was promulgated by the UNCITRAL in 1996. The UNCITRAL Model takes a straight forward and functional approach and establishes several principles of general applicability, with the recommendation that they be included in an I. T. Act:

- **Legal recognition of data messages:** Information shall not be denied legal effect, validity, or enforceability solely on the ground that it is in electronic form. (Article 5)
- **Writing:** Any time the law requires a writing, that requirement is met by information in electronic form if it is accessible so as to be useful for subsequent reference. (Article 6)
- **Signature:** Where the law requires the signature of a person, that requirement is met in relation to a data message if a method is used to identify that person

¹¹ Model Law on International Credit Transfers 1992, United Nations (UN).

and to indicate that person's approval of the information contained in the data message and that message is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of the circumstances, including any relevant agreement by the parties. (Article 7)

- **Original:** An electronic data message meeting certain functional criteria can be treated as an "original". (Article 8)
- **Retention of data messages:** Where the law requires that certain documents records or information be retained, the model law specifies that such requirement is met by retaining data messages, provided certain specified criteria are satisfied. (Article 10)¹²

Exceptions: The UNCITRAL Model Law recognizes that there might be some exceptions to the use of electronic documents, especially in cases of special sensitivity where the existence of a signed paper in original is still desirable. Examples include, land transactions, divorces, wills etc. These exceptions would depend upon the local considerations in every country.

The UNCITRAL Model Law is also the most appropriate starting point as far as the law of evidence is concerned. It specifies that, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of an electronic document in evidence on the sole ground that it is in electronic form or if it is the best of evidence that the person adducing it could reasonably be expected to obtain on the ground that it is not in original

¹² UNCITRAL – Model Law on Electronic Commerce 1996, United Nations (UN).

form. Model Law goes on to state that information in the from of a data message shall be given "due evidential weight". (Article 9)

The UNCITRAL Model Law also includes provisions on the formation of contracts:

- **Formation and validity of contracts:** In the context of contract formation, an offer and acceptance may be expressed by means of electronic messages and that a contract cannot be denied legal effect or enforceability on the sole ground that it was formed by electronic messages. (Article 11)
- **Recognition by parties and attribution of data messages:** (Articles 12-13)
- **Acknowledgement of receipt, time and place of despatch and receipt of data messages.** (Articles 14-15)¹³

The model laws and guides discussed above have a direct bearing upon the process of legislation with regards to payment systems and electronic funds transfer mechanism but are in no way the only initiatives by UNCITRAL which effect the area of our discussion. We will try to at least name the relevant initiatives by UNCITRAL on the subject in the last section of this chapter.

¹³UNCITRAL – Model Law on Electronic Commerce 1996, United Nations (UN).

2.2 RECOMMENDATIONS AND COMMUNICATIONS OF THE EUROPEAN COMMISSION AND THE EUROPEAN MONETARY INSTITUTE (EMI)

1. The European Commission: On the 16th of April 1997 the European Commission adopted a Communication entitled "A European Initiative on Electronic Commerce". The communication identified four keys areas where action had to be taken and implementation ensured by the year 2000 if Europe had to benefit from the new and rapidly developing way of doing business. First, widespread and affordable access to the infrastructure, products and services needed for electronic commerce had to be provided through secure and easy-to-use technologies & services and reliable & high-capacity telecommunications networks. Second, a coherent regulatory structure within the EU, based on Single Market principles had to be ensured. Third, a favourable business environment needed to be fostered by promoting relevant skills and raising awareness. Fourth, there had to be a compatible and coherent regulatory framework at the global level¹⁴.

If we trace the recommendations and communications of the European Commission in a reverse chronological order we find that the Commission's Recommendation on the transparency of banking conditions applicable to cross border financial transactions was issued in Brussels on the 14th of February 1990. The objective of the recommendation as laid

¹⁴ European Commission – A European Initiative on Electronic Commerce 1997.

down in its six principles was to increase the transparency of the information and invoicing regulations which the institutions (credit institutions and postal services) had to observe¹⁵.

The Commission's Recommendation concerning payment systems and in particular the relationship between card holder and card issuer was issued in 1988. The recommendation contained an annexure (8 paragraphs) with regards to financial consumer protection and is, inter alia, aimed at harmonizing the terms of contract and achieving the irrevocability of payment instructions communicated electronically. Issuers of payment cards and similar devices, as well as system providers had to conduct their activities in accordance with provisions of the Recommendation¹⁶.

74-4980
In the year 1987 we saw the Commission's Recommendation on a European Code of Conduct relating to electronic payments. The recommendation consisting of four sections addresses "all economic partners concerned" in the relations between financial institutions, traders & service establishments and consumers. They are limited, however to card payment systems or payment terminals and cover contracts, interoperability, equipment, data protection & security, fair access and relations between issuers/traders/consumers.

2. The European Monetary Institute (EMI): In 1994 the European Monetary Institute (EMI) recommended that only credit institutions be allowed to issue

¹⁵ Official Journal of the EC, No. L. 87/1 (15.03.1990)

¹⁶ Official Journal of the EC, No. L. 317/55 (24.11.1988)

multipurpose prepaid cards, in an effort to bring the operators of electronic money schemes under uniform regulations with these institutions¹⁷.

The 1997 Annual report by the EMI proceeded to state minimum requirements that must be fulfilled by issuers of electronic money, as guidelines for the development of effective regulations by the member states, which stated that:

- The meaning of “electronic money” must be clearly defined and distinguished from “single purpose” and “limited purpose” prepaid cards.
- Issuers of electronic money must be subject to prudential supervision.
- The issuance must be subject to solid and transparent legal arrangements, technical security, protection against criminal abuse and statistical reporting.
- A legal requirement must be imposed that electronic money be redeemable at par, implying that issuers must be in a position to convert electronic money into central bank money on the request of the holder of the electronic money.
- The possibility must exist for central banks to impose reserve requirements on all issuers of electronic money, in particular in order for a substantial development of electronic money with a material impact on monetary policy.
- An insurance scheme for electronic money schemes could be envisaged as a way to protect the public¹⁸.

¹⁷ EMI Report to the EMI Council Members 1994.

¹⁸ EMI Report to the EMI Council Members 1997.

These requirements were intended to be effective guidelines for the regulation of all electronic money systems within the national payment systems of member countries, regardless of the nature of the issuer. The EMI has reiterated that it favors the limitation of the issuance of electronic money to operators of "credit institutions" as defined in Article 1 of the First Banking Co-ordination Directive. The article requires a "credit institution" to "receive deposits or other payable funds from the public and grant credit from its own account". In this regard the Bank of International Settlements has stated that:

".....in any country, (regulation) involves a trade-off. If issuance of e-money is limited to banks, the regulatory framework already in place can be extended to cover the new products but the competition and innovation might be more limited. In contrast, if a greater variety of institutions can be issuers, a great degree of competition could yield commensurate benefits but a number of regulatory issues may be left unresolved.¹⁹"

It is obvious from the above quoted paragraph that the advantage of this approach would be to introduce electronic money systems to existing payment systems and the regulatory framework already in place. The challenge that electronic money has presented to governments world wide, is to effectively regulate it within the national economy. The foremost responsibility of the central banks in this endeavor has been to maintain monetary stability of the existing currencies within each monetary unit.

¹⁹ BIS Implications for Central Banks of the Development of Electronic Money 1996. (BIS)

The above is an outline of the relevant endeavours on the part of the European Union & the European Monetary Institute and their impact on international e-banking in comparison with other national, regional and international initiatives will be discussed at the end of this chapter.

2.3 LEGISLATIVE STRUCTURE OF THE UNITED STATES OF AMERICA.

In the United States, there are a number of different payments systems that have evolved overtime. These include the following:

- The system of cheque payments a debit transfer system which is presently paper based.
- The automated clearing house (ACH) system, which is an electronic batch-processing system in which most of the processing is done by Federal Reserve Banks. Transactions can either be debit or credit transfers.
- The debit and credit cards system, whose networks either have evolved from automated teller machine (ATM) networks or are owned and operated by a few major card organizations, primarily Visa and MasterCard.

1. **The Cheque System:** The cheque system is the oldest inter bank payment system in the United States. The legal framework for the cheque system comprises of both state and federal laws and regulations. The UCC represents an agreement amongst the states to adopt similar laws in the area of commerce. Within that code are several parts that deal with

payments and settlements. Article 3-negotiable instruments, Article 4-bank deposits and collections, and Article 4a-fund transfers, including wholesale ACH credit transfers. In addition, congress passed the Expedited Funds Availability Act of 1987 (EFAA), which gave the Federal Reserve System the responsibility of implementing improvements in the cheque collection system. When the Federal Reserve acts on that authority, it in effect supersedes the state laws. The Federal Reserve has several regulations that effect cheque collection. Regulation CC and Regulation J, both effect the processing of collections and returns through the Federal Reserve System. On October 28, 2003, Congress passed and the President signed the Cheque Truncation Act of 2003, which paves the way from the electronic presentment and collection of cheques, which is referred to as the dematerialization of documents and has been dealt with in the previous chapter.

The latest developments for cheque systems in the United States are related to what is being called the “electronification” of cheques. As such there is also a legal transformation in which the cheque is no longer a negotiable instrument governed by the UCC and Federal Reserve Regulations pertaining to cheques, but is instead a “source document” for an electronic transaction that is subject to the Federal Reserve Regulation E, a regulation promulgated as a result of the Electronic Fund Transfer Act of 1978. In a similar move the ACH system developed the accounts-receivable cheque (ARC) which is designed to transform cheques to “source documents”. Again the legal status of the cheque changes and the operative legal and regulatory environment changes from UCC/Federal Reserve cheque rules to Electronic Fund Transfer Act/Regulation E, electronic transaction rules. Another

area for cheque electronification is in returning cheque via the ACH system. That is when a customer pays with a cheque, he or she is notified that should the cheque be returned due to the insufficiency of funds, the payee will initiate debit transfer through the ACH system to collect the amount. Hence the ACH system has evolved to transform and process, several new types of applications, all designed to replace the paper movement of physical cheques with electronic collection.

Another step in the electronification of cheques in the United States was the Cheque Truncation Act of 2003. Instead of piecemeal ACH applications for point of sale or routine consumer bill payments, this step involves a complete transformation of the processing of paper. The Expedited Funds Availability Act of 1987 had given the Federal Reserve the task of making recommendations to improve the payment system, in effect, superceding the UCC and the Federal Reserve System and it thus proposed the cheque truncation legislation.

2. The Automated Clearing House (ACH) System: The ACH system is a batch processing system for small value payments. Unlike the large value payments systems like Fed wire, which processes only credit transfers, the ACH system processes both credit and debit transfer payments. There are a number of laws that provide the legal and regulatory framework for the ACH system in the United States. For corporate transactions, the UCC is the operative law. The Cheque Truncation Act of 2003 has implications on the ACH system as well. For consumer transactions, the Electronic Fund Transfer Act of 1978 is the operative law and Federal Reserve Regulation E is the operative regulation. In addition, the federal

government's role in electronic payments is governed by federal laws. According to the provisions of the EFT Expansion Act/Debt Collection Improvement Act of 1996, the U.S government has committed itself to using electronic payments for all payments to employees, vendors and recipients of benefits. Moreover the Federal tax collections are shifting to electronic form as well. Most states are following the lead of the federal government in this area.

3. Automated Teller Machines (ATM) and Payments by Debit Cards: One of the first electronic banking applications was the implementation of the ATM. In the early days of the implementation of ATM programmes, there were questions as to whether these would be considered branch offices and hence be regulated by the McFadden Act and the various state branching laws. In 1985 the U.S Supreme Court upheld a Circuit Court ruling that an ATM was not a branch. As a result of this ruling and the popularity of the ATM's with customers, the number of ATM's increased dramatically. As the deployment of ATM's continued, some banks started networks, that allowed customers of the other banks to access their accounts. Over time these networks expanded and merged. As these networks expanded, they negotiated reciprocity agreements with other networks and a result of both reciprocity and bridging they are national and also international as in the case of Visa and Master Card networks. As the ATM networks expanded, it became apparent that they could be used for other transactions as well. Thus, the ATM networks evolved into the POS networks accessed by debit cards. Customers became familiar with the process of accessing their accounts with a plastic card through the ATM and the use of the same cards and

networks at the POS evolved naturally. Debit card transactions have been growing rapidly since.

Within the debit card industry, there are two types of transactions. One is an online transaction activated by a PIN at the point of sale, with immediate debiting of the customer's account and crediting of the merchant's account. The other are point-of-sale transactions that are known as off-line or signature based transactions. In the online transaction, there is a PIN to identify the card holder, whereas in the off-line transaction the merchant is responsible for verifying the identity of the card holder. In the off-line transaction there is also a delay in transferring the funds. Moreover the merchant is charged a fee based on the size of the transaction and the fees to the bank are generally larger in that case. For that reason the banks have discouraged the use of online debit transaction in favour of the off-line debit card, where as the merchants have opposed this.

In 2003 a major court case involving Wal-Mart and Visa & Master Card was settled. In that case the retailers opposed the "honour all cards" rule that required that any merchant accepting either Visa or Master credit cards should also honour all their cards including the offline debit cards. The settlement that merchants no longer have to honour all cards has affected the structure of fees over all the varying debit card networks and moved volume to the PIN based transactions.

4. **Credit Cards:** Credit cards are the most mature electronic payments product. The general purpose credit card dates back to Diners Club in 1950. During the 1950's, a number of banks tried to introduce bank credit cards without much success. Not until 1958 did American Express, Carte Blanche, Chase Manhattan Bank and Bank of America enter the field. There was a shaky start that saw huge losses due to long scale unsolicited issuance of cards in the late 1960's (a practice that is now illegal), there was also a time when rampant inflation and high interest rates made the bank credit card business unprofitable. However the acceptance of bank credit cards at the point of sale became so widespread that it is difficult to imagine that this oldest of the widely used electronic payment systems is only about 50 years old.

The legal and regulatory environment for the bank credit card industry includes state law (mainly usury law), federal customer credit law and the outcome of court cases. The maximum rate that a lender can charge for consumer credit is established on a state-by-state basis. This became a difficult problem for the industry when interest rates were very high and in some states legal maxima was less than bank's cost of funds. In a landmark court decision in 1978, the U.S. Supreme Court ruled that the lender's location determined the operative state usury ceiling no matter where the customer may be living, even if the state in which the customer lived had a lower usury ceiling. This gave incentive to large card issuers to find a lender-friendly state in which to establish national operations. In the 1970s the Congress enacted a number of consumer credit protection laws, at least partly as a response to the marketing and other practices of the bank credit card industry. These laws include the

Truth in Lending Act of 1968, the Fair Credit Billing Act of 1974, the Equal Credit Opportunity Act of 1974, the Fair Credit Reporting Act of 1971, the Fair Debt Collection Practices Act of 1977 and the Electronic Funds Transfer Act of 1978. In addition federal bankruptcy law also affects bank credit card operations.

2.4 RELEVANT ENGLISH LAWS

Much of the U.K's current legislation in the area of e-commerce has arisen as a result of the need to implement EU Directives. The EU has issued a series of Directives over the past about ten years which either directly or indirectly have had the effect of placing e-commerce services within a tighter regulatory framework. These directives include the 1995 Data Protection Directive, the 1997 Distance Contracts Directive, the 1999 Electronic Signatures Directive, the 2000 E-Commerce Directive, the 2000 E-Money Directive and the 2002 Privacy and Electronic Communications Directive. The EU's legislative initiatives have thus put significant pressure on Member State governments to pass national measures to implement the directives.

E-Commerce related legislation in the U.K include: Data Protection Act 1998 (into force 2000, transposition of EU Data Protection Directive 1995/46/EC), Electronic Communications Act 2000- Completed by: Electronic Commerce Regulations 2002 (transposition from the EU Directive 2000/31/EC), Electronic Signatures Regulations 2002 (transposition from the EU Directive 1999/93/EC) and the Computer Misuse Act 1990. The

EU Distance Selling Directive was adopted in May 1997 and was implemented in the UK by means of the Consumer Protection (Distance Selling) Regulations 2000. These regulations apply only to contracts concluded in the context of organized distance sales or service provision schemes for the sale of goods or services to consumers:

- i) on the internet, ii) on interactive digital television, iii) by mail order, including catalogue shopping, iv) by telephone, v) by fax and vi) by advertising on television or radio, in news papers or magazines²⁰.

The EU E-Commerce Directive was adopted in June 2000 and has been implemented in the UK by means of the Electronic Commerce (EC Directive) regulations 2002. These Regulations came fully into force on the 23rd of October 2002. They apply to the provision of “information society services” e.g. Business to business (B2B) and business to consumer (B2C) services including:

- i) services provided free of charge to the recipient (e.g. funded by advertising or sponsorship revenue), ii) services allowing for online electronic transactions (e.g. on line banking services) and iii) online trade and advertising (e.g. on the internet, by e-mail or by mobile phone), regardless of whether the goods or services in question are themselves delivered electronically.

The Regulations treat business to business (B2B) and business to consumer (B2C) services differently, with wider discretion in business to business (B2B) services for

²⁰ Consumer Protection (Distance Selling) Regulations-2000, The Stationary Office Ltd. UK.

businesses to opt out of some of the measures designed primarily to protect consumers using business to consumer (B2C) services. The Regulations do not deal with contract formation, which remains subject to common law, existing statutory provisions or the law of another relevant Member State²¹ (jurisdictional issues within the EU, will be discussed in the next section of this chapter).

The EU law concerning electronic and digital signatures takes the form of the 1999 Electronic Signatures Directive, whilst in the UK the relevant implementing legislation is the Electronic Communications Act 2000 and Electronic Signatures Regulations 2002. The Electronic Communications Act 2000 provides:

- i) the government with powers to introduce a voluntary accreditation scheme for businesses which offer encryption and digital signature services,
- ii) the government with powers to amend references to “writing”, “signatures” and “paper” in existing legislation to make it clear that these requirements may be met with electronically and
- iii) that e-signatures are admissible in legal proceedings, although the weight given to them would depend on the technology used²².

The Electronic Signatures Regulations 2002 require:

²¹ Electronic Commerce (EC Directive) Regulations 2002, The European Commission.

²² The Electronic Communications Act 2000.

i) the Secretary of State for Trade and Industry to keep a public register of “certification service providers” (CSPs) who purport to offer “qualified certificates” and ii) the Certification Service Providers (CSPs) issuing or guaranteeing qualified certificates to the public liable to anyone who suffers a loss as a result of reasonably relying on such certificates and provides that the CSPs based in the UK can obtain only such personal data as they need to issue a certificate from the relevant data subject. They may only process this data to the extent necessary for the issuance of a certificate²³.

It has become clear that the EU sees the role of e-signatures continuing to grow, as demonstrated in the 2001 Invoicing Directive, implemented in the UK by the Value Added Tax (Amendment) (No. 6). Regulation 2003 on the 1st of January 2004. This allows for electronic invoicing provided that:

i) the customer accepts the electronic invoice and ii) the authenticity of the origin and the integrity of the contents of the invoice are guaranteed either by using an advanced electronic signature or Electronic Data Interchange (EDI)²⁴.

In the year 2000 the European Union introduced a directive to regulate the use of certain types of e-money--- the E-Money Directive. In 2002, this Directive was implemented in the UK vide the Financial Services and Markets Act 2000 (Regulated Activities)

²³ The Electronic Signatures Regulations 2002.

²⁴ The Value Added Tax Regulation 2003.

(Amendment) Order 2002 and the Electronic Money (miscellaneous amendments) Regulations 2002. Where an institution wishes to implement an e-money system it is important to determine whether that system may fall within the definition of “e-money” regulated by the UK laws. The effect of the UK legislation is that issuing e-money is a regulated activity under the Financial Services and Markets Act 2002 and may only be undertaken by institutions which are authorized by the Financial Services Authority (FSA) and all such institutions must comply with both the regulations and the FSA business rules²⁵.

It will be clear from the foregoing that especially within the last 5/7 years, the regulation of e-commerce has undergone a rapid and radical transformation in the UK. The activities of banks/financial institutions can in no manner be said to be immune from these changes. Indeed, the financial services providers community’s proactive engagement with new technologies may now leave its members exposed to legal risks that were unforeseen when these technologies were initially implemented or trialed.

The progress of the banking sector in the UK has been the result of the advance technological achievements, especially online payment systems based on electronic funds transfer principles. The most thorny issues associated with the contracts pertaining to electronic funds transfers have been addressed by the enactment of legislation discussed above, in this regard. Furthermore under the English law section 83 of the Consumer Credit Act 1974 imposes no liability against the customer by the bank except in the case of misuse,

²⁵ Electronic Money Regulations 2002.

for example in the case where the customer fails to keep his/her PIN secure. Section 84 also limits the liability of the customer for unauthorized use again dependent on notice given to the bank. The Unfair Contract Terms Act of 1977, further services to limit the extent to which the parties to an electronic funds transfer can unfairly and unreasonably regulate the question of liability by way of contract. In general, U.K. being a member of the EU as a matter of policy has endeavored to harmonize it's legislative initiatives with the trends being adopted by the European Union in accordance with the International developments on the matter.

2.5 CROSS-BORDER AND INTERNATIONAL ELECTRONIC BANKING IN THE LIGHT OF THE ABOVE LEGAL FRAMEWORKS:

Having discussed the major international legislative initiatives in the previous sections of this chapter, we are at a stage where certain trends in the perspective of Cross-Border and International e-banking, especially in the area of Funds Transfers and Payment Systems, may be identified to a certain extent and the outline of a broad legal and regulatory framework may possibly be suggested as a sketchy outline, which may cater for the ever increasing legal regulatory requirements of cross border payment services.

A particular consequence of increasing economic internationalism is a rising need for cross-border payment services. This growing market is, however, at present still small by comparison with markets for domestic retail payments. Reliable data on the number and

value of cross-border payments are very scarce. Possible types of responses from the payment industry to increasing demand include devising instruments and services to suit these expanding requirements, or improving infrastructures suitable for supporting a potentially “global” utilization of either existing or new payment instruments. The trends noted below relate to ways in which the industry can be seen in practice to be responding.

The market for cross-border retail payments is relatively fragmented. The main ways in which such payments are made include credit transfers, correspondent banking, payment cards and innovative services. The main distinction is between credit transfers on the one hand and payment cards and innovative services on the other.

Credit transfers are the less dynamic area. The trends in consolidation in in-house services and correspondent banking have facilitated cross-border credit transfer services in some instances. However, in the market as a whole, there have only been limited facilitative developments either towards common standards and best practices or in business and technical infrastructure. Possible infrastructure developments to facilitate cross-border credit transfers could include the creation of links among existing ACHs or the creation of an ACH serving several countries. The objective is to offer services complementary to those of the banking industry, as it already does at the domestic level. In response to demand for facilitation between the United States and Canada, the Federal Reserve began in 2001 to offer correspondent services to domestic financial institutions to enable them to make ACH payments into Canada.

Other methods of payment (notably card-based methods) are used in a widening range of cross-border contexts, made possible by interconnectivity and interoperability among national networks, most notably among the transaction networks for card payments - the ATM, credit and debit card networks. These conditions have been brought about either by bilateral or multilateral agreements between individual network operators in each country or by the development of transnational networks and clearing operations such as those of VISA, MasterCard and American Express. New services and delivery channels (often not specific to the cross-border context) have emerged and continue to be developed based on these arrangements²⁶.

A number of studies have been carried out for the European Commission of the charges, speed and transparency of payments across national borders within the European Union, both before and after the adoption of a common currency. They concentrate on payments denominated either in euro or in the predecessor currencies and explore credit transfers at the very low end of the range of values that make up the retail segment and some other low-value cross-border operations. They suggest that, even in the euro area, where special factors are present, there was little or no improvement in speed or price of service. There has since been a legislative reaction to this situation and the "Regulation on cross-border payments in euro" was adopted in 2001.

²⁶ E.P. Ellinger, E. Lomnicka, R.J.A. Hooley – Modern Banking Law 3rd Ed.

Some specific characteristics of the cross-border e-banking market may be relevant to efficiency and/or safety. In the first place, there may be additional legal impediments in the cross-border market. Second, the cross-border market tends to be characterized by more heterogeneous standards and business practices than domestic markets. Third, the relatively small size of this market may mean higher unit costs than in the domestic market. Finally, in some areas bank mergers may have had a significantly concentrating effect on the market for cross-border credit transfer services.

All for of these factors may have implications for the relative efficiency of current or potential retail payment solutions in the cross-border as compared with the domestic context. Some of these factors, particularly legal impediments, can also affect safety.

The trends in cross-border payments as discussed above, tend to indicate that any suggested legal and regulatory framework can present impediments to potentially positive developments in retail payments, for example the introduction of innovative services or processes or the entry of new market participants. Impediments to such developments can stem either from existing legal or regulatory provisions or from a proposed insufficient or inconsistent legal or regulatory framework. Inconsistency or incompatibility between legal or regulatory regimes in different jurisdictions may impede, in particular, cross-border payments. Inadequacies of the legal framework in changing circumstances may also facilitate the criminal use of retail payment systems and instruments, especially innovative instruments.

There may, however, be sound and current justifications on public interest grounds for particular legal or regulatory provisions, even though they present an impediment to developments that could have a positive effect on some aspects of efficiency or safety in retail payments. Such justifications could, for example, relate to the control of risk or the maintenance of competitive market conditions. Possible justifications would need to be taken into account in considering courses of action, underscoring the importance of cooperation between central banks and other authorities in analyzing the issues and proposing and furthering solutions.

Some central banks may be able, where this is warranted, to supplement activity as catalysts and facilitators with activity as overseers. In this capacity, some may have powers to make relevant changes to aspects of the legal and regulatory framework by removing, altering or introducing regulations. Others may be able to exercise discretion granted to them within the regulatory framework. A possible context for such changes or the exercise of discretion would be the tailoring of the type and intensity of oversight activity to suit the relative importance of particular systems or instruments²⁷.

²⁷ Committee on Payment and Settlement Systems, Banking for International Settlements – Policy issue for central banks in retail payments – March 2003.

CHAPTER 3

IDENTIFICATION OF THE AREAS OF CONCERN WITH REGARDS TO PAKISTAN.

In the preceding chapter, the major developments in the legislative frameworks applicable to e-commerce practices and related technologies (suggested or in place), in certain jurisdictions around the world, in the form of initiatives, directives, conventions, laws and rules, at the international regional and some national levels, have been looked into. As a consequence we find that the rapid growth and increasing role of e-commerce has resulted in significant activity on the part of governments and international organizations to ensure that it develops within a comprehensive and contemporary framework of legal regulations. This continual effort, on the part of the legislators involved in the process, to engage their capabilities to radically rethink about the existing regulatory mechanisms is in order to accommodate the unique features of new e-commerce related technologies.

We have seen in the concluding section of the second chapter that there has been substantial growth and development of cross-border banking activities in general. On the one hand, banks are increasingly seeking to establish subsidiaries, or at least branches, in countries other than their own. Furthermore the commercial activities of banks have expanded tremendously. These developments have resulted in greater uncertainty as regards the applicable rules or standards, and they have also contributed to a greater awareness of

risk. Even though there is a clear trend towards a “globalization” of markets and commerce, there is a real lack in harmony of the applicable rules in different jurisdictions.

The increase in cross-border banking activities is evident in particular with regard to payments and funds transfers. This growth has occurred in terms of both the total number of individual payments as well as of the total amounts involved in payments. An increase in the volume of payments and settlements brings with it an increase in risk. This applies also at the consumer level, where, inter-alia, the lack of transparency in conditions and techniques, the quality of performance of funds transfers and “double charging” by intermediary and beneficiary banks appear to be an ongoing issue. It would thus be many years before the entire infrastructure has been upgraded to the necessary standards. Self regulation would theoretically be an ideal solution for eradicating problems encountered in funds transfers. However, whenever a transaction is connected to more than one jurisdiction, additional uncertainties may exist as to specifically which rules may be applicable.

As regards laws and regulations, one way of solving potential conflicts is to harmonize applicable rules. Harmonization reduces the necessity to resort to domestic rules of private international law. At the same time, harmonization of rules reduces the risk that an issue be treated or resolved differently in other jurisdictions. The most obvious questions which arise at this stage in the context of our topic of discussion is that, “Would absolute harmonization be advisable in the case of Pakistan?” The answer to this question would somewhat present itself at the end of this chapter, when we have developed an understanding

of the Key Electronic Fund Transfer (EFT) products, looked at the risks to the Pakistani Banks from cross border Electronic Banking, weighed the risks to Pakistani consumers when dealing with foreign internet banks and the technology risks involved therein.

3.1 IDENTIFICATION OF KEY ELECTRONIC FUND TRANSFERS (E.F.T.) PRODUCTS.

During the past two to three years the telecom and IT sectors in Pakistan have shown an unprecedented growth, which has had a positive effect on the financial sector, which has also flourished. Most of the commercial banks are now on a single switch; this provides convenience to the customers as they are capable of accessing their accounts in any of the banks that are on the link infrastructure.

Pakistan has been among the late entrants into e-banking. The first ATM switch was set up in 1999 and internet banking was introduced in 2000. Focus towards electronic banking in Pakistan started in the year 2002, when the State Bank of Pakistan (SBP) started providing serious attention to the promotion of e-banking, by directing the banks to provide e-banking services to their customers and interconnecting their switches. The majority of the banks have made substantial progress in offering e-banking services/products to their customers²⁸.

²⁸ <http://www.jang.com.pk/thenews/may2005-daily> (last visited Jan-2006)

There has been a tremendous growth in the electronic transactions during the past two years. Currently there are networks of more than 1260 ATM's all over the country and the number of electronic transactions has grown to more than 3 million a month. Banks are providing electronic account management and phone-banking services to their clients. Another addition in electronic transactions has been to allow the customers to access their accounts for fund transfers and remittances from any ATM of any participating bank. Besides the above, the e-banking products being offered by banks to their customers include, credit cards, debit cards and EFTPOS. The banking sector of Pakistan is taking advantage of the global network of service providers²⁹.

The State Bank of Pakistan had set up a Task Force to facilitate the development and implementation of e-banking in the financial sector to promote e-commerce by;

- Evaluating the automation level in the banking sector.
- Identifying key EFT products.
- Phased product expansion and
- Building on the e-payment platform to introduce other e-banking products and services.³⁰

The Key Electronic Funds Transfer products were classified/identified by the Task Force as;

²⁹ A delegate at the Asian Banking: A paradigm Shift (Dawn Asia Finance Conference 2006) held on 13th & 14th of May 2006 at Karachi Sheraton Hotel.

³⁰ Ibid.

- Customer to Bank Transactions
- Consumer to Business Transactions (C2B)
- Business to Business Transactions (B2B)
- Consumer to Consumer Transactions (C2C) and
- Bank to Bank Transactions (Inter Bank Transactions)³¹

In the last chapter we have discussed in detail the development and implementation of laws with regards to these Electronic Funds Transfer products, in various regimes around the globe and would thus in this section try to remain within the parameters of the heading. World Bank funded US \$ 30 million (5 years) project was implemented at the State Bank of Pakistan to interlink countrywide regional office network of the central bank. RTGS project is underway with backward linkages to commercial banks and clearinghouses.³²

The commercial banks have shown robust performance during 2005-6, and average profitability has increased by 40%. Improved infrastructure and the increasing use of the Electronic Funds Transfer products and services being offered to their customers by the banks have played a key role in improving bank's performance and productivity. Almost 4000 commercial banks branches are online now; out of about 7000 branches in the country.

³¹ A delegate at the Asian Banking: A paradigm Shift (Dawn Asia Finance Conference 2006) held on 13th & 14th of May 2006 at Karachi Sheraton Hotel.

³² Ibid.

Ninety percent of the urban area branches are online. More or less 1100 bank branches are authorized to deal in foreign exchange³³.

Several licensed exchange companies are handling foreign exchange business, under guidance and rules of the State Bank of Pakistan. Plans are underway to link these companies for better control. Some of the companies have started offering online funds transfer for workers remittances and have had a good response.³⁴

Two ATM switches are operating with countrywide network of over 1260 ATMs. About 4.5 Million ATM / Debit cards have been issued with almost 18 Million credit cards. Smart cards, stored value cards, loyalty cards and pre-paid cards are becoming a part of the culture in urban cities. Five POS switch networks are operational with around 30,000 POS terminals, with Loyalty card networks.³⁵

Payment gateway by Citibank for Internet B2C transactions is in operation since the last more than four years. Airlines, mobile companies, ISPs and merchants are using these products/ service with a good turnover of Internet transactions.³⁶

³³ Ibid.

³⁴ A delegate at the Asian Banking: A paradigm Shift (Dawn Asia Finance Conference 2006) held on 13th & 14th of May 2006 at Karachi Sheraton Hotel.

³⁵ Ibid.

³⁶ Ibid.

Automated check clearing house (NIFT a Public-Private company owned 51% by banks) is operational in 14 cities of Pakistan, with a turnover of 60/m/checks/year. Efforts are underway in the private sector, to establish ECH, B2B EFT and B2C Payment Gateway³⁷.

Mobile phone banking services are available with a few of banks, where customers can use the service for payment of utility bills and perform several other transactions online³⁸.

Following projects are at various stages of implementation in private and public sectors;

- Utility billing with e-Payments
- E-Security Infrastructure
- Mobile Payment Gateway
- E-Money, Digital cash, Smart cards, Offline POS
- Payment Gateway for Internet/POS transactions
- Money Exchanges Reporting
- Workers Remittance project for Non Resident Pakistanis
- Foreign exchange reconciliation for Import / Exports and services
- Capital market integration with payment system³⁹

³⁷ Ibid.

³⁸ <http://www.is.org/review/ro605112c> (last visited March 2006)

3.2 RISKS TO PAKISTANI BANKS FROM CROSS BORDER ELECTRONIC BANKING.

The changing financial landscape brings with it new challenges for bank managements and regulatory and supervisory authorities in Pakistan. The major ones stem from increased cross-border transactions resulting from drastically lower transaction costs and the greater ease of banking activities, and from the reliance on technology to provide banking services with the necessary security.

1. **Regulatory risk.** Because the Internet allows services to be provided from anywhere in the world, there is a danger that banks will try to avoid regulation and supervision. What can the State Bank of Pakistan do? It can require banks that provide their services from a remote location through the Internet to be licensed. Licensing would be particularly appropriate where supervision is weak because the cooperation between a virtual bank and the home supervisor is not adequate. Licensing is the norm for example, in the United States and most of the countries of the European Union. A virtual bank licensed outside the Pakistani jurisdiction, that wishes to offer electronic banking services and take deposits in Pakistan, must first establish a licensed branch.

³⁹ A delegate at the Asian Banking: A paradigm Shift (Dawn Asia Finance Conference 2006) held on 13th & 14th of May 2006 at Karachi Sheraton Hotel.

Determining when a bank's electronic services trigger the need for a license can be difficult but indicators showing where banking services originate and where they are provided can help. For example, a virtual bank licensed in country X is not seen as taking deposits in country Y if customers make their deposits by posting cheques to an address in country X. If a customer makes a deposit at an automatic teller machine in country Y, however, that transaction would most likely be considered deposit taking in country Y. State Bank of Pakistan needs to establish guidelines to clarify the grey areas between these two cases.

2. Legal risk. Electronic banking carries heightened legal risks for Pakistani banks. Banks can potentially expand the geographical scope of their services faster through electronic banking than through traditional banking. In some cases however, the banks across the border might not be fully versed in the Pakistani jurisdiction's local laws and regulations before they begin to offer services here, either with a license or without a license, if one is not required. When a license is not required, a virtual bank—lacking contact with the State Bank of Pakistan—may find it even more difficult to stay abreast of regulatory changes. As a consequence, virtual banks could unknowingly violate customer protection laws, including on data collection and privacy and regulations on soliciting. In doing so, they may expose the banks in Pakistan and themselves to losses through lawsuits or crimes that may not be prosecuted because of jurisdictional disputes.

Money laundering is an age-old criminal activity that has been greatly facilitated by electronic banking because of the anonymity it affords. Once a customer opens an account, it is impossible for banks to identify whether the account holder is conducting a transaction or even where the transaction is taking place. To combat money laundering, many countries have issued specific guidelines on identifying customers. They typically comprise recommendations for verifying an individual's identity and address before a customer account is opened and for monitoring online transactions, which requires great vigilance.

Cross Border electronic banking raises another concern for Pakistani banks. With electronic banking crossing national boundaries, whose regulatory authorities will investigate and pursue money laundering violations? The answer, according to the current situation may lie in coordinating legislation and regulation internationally to avoid the creation of safe havens for criminal activities.

3. Operational risk. The reliance on new technology to provide services makes security and system availability the central operational risk of electronic banking. Security threats can come from inside or outside the system, so the State Bank of Pakistan must ensure that Pakistani banks have appropriate practices in place to guarantee the confidentiality of data, as well as the integrity of the system and the data. Banks' security practices should be regularly tested and reviewed by experts to analyze network vulnerabilities and recovery preparedness. Capacity planning to address increasing transaction volumes and new technological developments, the ability to attract staff with the

necessary expertise and potential dependence on external service providers. Managing heightened operational risks needs to become an integral part of banks' overall management of risk, and need to include operational risks in their safety and soundness evaluations.

4. Reputational risk. Breaches of security and disruptions to the system's availability can damage a bank's reputation. The more a bank relies on electronic delivery channels, the greater the potential for reputational risks. If one electronic bank encounters problems that cause customers to lose confidence in electronic delivery channels as a whole or to view bank failures as system wide supervisory deficiencies, these problems can potentially affect other providers of electronic banking services. In our country where electronic banking is becoming the trend, State Bank of Pakistan has put in place internal guidance notes and has released risk-management guidelines for banks.

Reputational risks also stem from customer misuse of security precautions or ignorance about the need for such precautions. Security risks can be amplified and may result in a loss of confidence in electronic delivery channels. The solution is consumer education—a process in which the State Bank of Pakistan must assist. For example, some bank supervisors provide links on their websites allowing customers to identify online banks with legitimate charters and deposit insurance. They also issue tips on Internet banking, offer consumer help lines, and issue warnings about specific entities that may be conducting unauthorized banking operations in the country. We thus would need such a system to be operative in Pakistan.

3.3 RISKS TO PAKISTANI CONSUMERS WHEN DEALING WITH FOREIGN INTRNET BANKS.

E-commerce has opened up an attractive vista for business owners and consumers alike. On the one hand, business faces the prospect of a truly global market for their products. On the other hand, there will be a massive increase in products available to the online consumer. Besides the obvious airline and hotel reservations, eventually day-to-day consumables will be routinely ordered online (perhaps even automatically by the refrigerator) and delivered to one's door. The growth of the global network of computers (the Internet) has been the catalyst for the development of e-commerce.

The risks to Pakistani consumers when dealing with foreign internet banks become clear when we look at the four fundamental requirements of a secure electronic transaction. They are: privacy, integrity, authentication and non-repudiation. The key issue regarding privacy is how would one ensure that the information transmitted is not intercepted by or transmitted to a third party without the knowledge or consent of the consumer. Integrity asks how one can be sure that the data sent onto the internet reaches its destination unchanged or unaltered. Authentication is vital for electronic contracts and brings in the issue of electronic signatures: how can each party to an electronic transaction prove their identity to the other?

Finally, non-repudiation is important from the point of view of legally proving that a message was actually sent and/or received⁴⁰.

Electronic payment systems are moving away from being only “alternative” modes of conducting financial transactions and will soon form one hub of the global economic infrastructure. At the consumers end of these new electronic payment systems, simplicity and security will be essential. These Electronic Payment Instruments or EPIs are and will increasingly enable the consumer in Pakistan to execute transfers of monetary value to any part of the globe.

Fundamental to all the E.P.I.’s or methods of electronic transfer is the idea that “money” or “value” is being exchanged. This can be visualized as physically moving a sum of paper money from point A to point B. This apparent familiarity leads to an important mode of legal questioning: can traditional legal methods be applied to protect the electronic-consumer, or do we need a whole new set of laws in order to fully cater to the complexities of the new economy? The next most obvious question: will there really be anything fundamentally different about the ways in which consumers will need protection in the new economy, or are we faced with old consumer protection issues dressed up in new digital clothes?

⁴⁰ <http://www.bis.org/bubl/bccbs.htm>. (last visited Feb-2007)

The kinds of consumer protection issues that are arising in the e-commerce sphere have largely to do with (1) the security of transactions and (2) the fraudulent execution thereof. Other risks such as malfunction risks, and risks of default (of more concern to the banks and merchants of course) are worthy of consideration also. Most of these issues can be broken down and viewed legally as reincarnations of the old problems. For example the execution of an ATM transaction can be viewed as being legally equivalent to a manual withdrawal.

Termed "systemic risk," these potential problems are derived from the interdependent nature of the entire system used by consumers, business, bank and government. Systemic risk is at issue now because of the large web-like infrastructure used daily in transactions. A failure in any one of the links required to execute a transaction (e.g. the telecommunications network or any one of the participants' internet service provider, or the physical equipment used for the transaction or any number of other pieces of the puzzle) may lead to the loss of an individual or packet/group of transactions. How to protect the consumer (or indeed the business) from systemic risk is of increasing importance, and offers yet another interesting legal question.

Therefore as far as the consumers in Pakistan are concerned problems remain to be solved. For example, in such a system the legal issue of time of payment may as yet be problematic. The problems associated with establishing time of payment with a transfer of funds include the determination of the time during which the payer's right to withhold/stop

payment may be exercised, and the determination of whether a particular payment is late. Such issues have traditionally been determined by the law of contract, but jurisdictional problems and time-difference issues regarding virtually instantaneous electronic payments across continents need resolution. Ultimately the consumer is vulnerable to the rules of the individual institutions also.

The need for an analysis of consumer protection in relation to common EPIs such as ATM cards and credit cards in Pakistan must not be underestimated. A credit card functions largely in the same manner as an overdraft facility, allowing a consumer to access money via a line of credit, and allowing the bank the pleasure of charging unusually high rates of interest for the facility. Regulations of credit card transactions in Pakistan have their focus not upon the operation of credit cards as EPI's, but as regulations for the ways in which credit cards function as a means for extending credit. They require that the basic details of the credit agreement must be expressly communicated by the issuer to the holder. These include the amount of credit being extended, the rate of interest being charged, etc. Besides this in the sphere of credit cards, banks and other credit institutions are largely self-regulated. Bank policy in Pakistan includes some consumer protection for credit card payments but is very thin when one compares the same to the modern electronic payment problems.⁴¹

⁴¹ A delegate at the Asian Banking: A paradigm Shift (Dawn Asia Finance Conference 2006) held on 13th & 14th of May 2006 at Karachi Sheraton Hotel.

The risks to Pakistani consumers when dealing with foreign internet banks next brings them to ATM cards. Here we find that there are a certain number of obligations, security measures in particular, imposed on the holder. However, consumers are rarely aware of these obligations and they are therefore regularly breached by them. These obligations are not statutory and are largely consequences of the applicability of standard form contract doctrine to ATM transactions. The ATM transaction is a form of consumer-activated Electronic Funds Transfer, specifically EFTPOS.

The legal nature of and EFTPOS payments has not been expressly dealt with by either the legislature or the State Bank of Pakistan. In case of Re Charge Card Services Ltd., it was held that payment by credit card set up three bilateral contracts: the contract between the card holder and the retailer, the contract between the card holder and the card issuer and the contract between the card issuer and the retailer⁴². Presumably a similar legal triangle could be seen to exist in the case of an EFTPOS transaction. What this means in effect is that as far as the cardholder is concerned absolute payment is presumed. Consequently this eliminates the potential for an action by the retailer against the customer in the event of the card issuer becoming insolvent. It is also worth noting that a clause prohibiting withholding/stop payment is also generally included in the standard form contract for the issue of an EFTPOS card.⁴³

⁴² R. Brownsword & J. Mac Gawan. "Credit Card Fund" 1997.

⁴³ A delegate at the Asian Banking: A paradigm Shift (Dawn Asia Finance Conference 2006) held on 13th & 14th of May 2006 at Karachi Sheraton Hotel.

Let us return now to our discussion of ATM transactions in order to examine them from a contractual perspective. In essence once the PIN number is correctly entered, an ATM transaction is no different from a face-to-face withdrawal at the consumer's bank branch, but the nature of the transaction does create some new consumer protection issues, predominantly revolving around the PIN number. How these consumer obligations will translate, if at all, to newer electronic payment methods is as yet unclear. Of course, the consumer will be obliged to keep certain elements private (e.g. a password used online may be viewed much like a PIN).

Such consumer responsibility may be warranted but more and more responsibility will have to be put at the doorstep of the larger institutions, as it is they who will have the capacity to encrypt the transaction and as such will have to guarantee the four requirements for a secure electronic transfer of cash as stated above. The current difficulties in "signing" an online credit card transaction highlight this point. Although the consumer takes a risk when using a website to make a purchase, it is the managers of the secure website who will have to be held responsible, when it comes to security measures. Presently because electronic signatures are not widely used, most credit cards purchases online are in effect unsigned.

There are a number of standard provisions in EFT contracts which may offer insight into the possible legal regulation of other modern electronic payment methods. Let us first take the example of an ATM contract. As already mentioned, the cardholder is obliged to

undertake a number of basic security measures, including the keeping secret of the PIN. This is because the credit institution receives authorization for the transfer by the use of the PIN. The standard form EFT contract will usually entitle the card issuer to debit the user's account up to a daily limit once the PIN is received.

The card issuer also faces problems with error and malfunctions, as well as the rising element of systemic risk mentioned above. Here, the practice is that the card issuer is responsible only for computer malfunctions within the control of the issuer. Extensive exclusion clauses will undoubtedly be utilized by institutions as systemic risk becomes more of a factor with electronic payment transactions. And so we see that without legislation, the institutions will do their utmost to protect themselves – but not the consumer. One can be sure, however, that in an area as fast-paced as the emerging electronic economy, disputes will arise and without appropriate statutes, prosecutors will be forced to rely on out-dated legislation. A somewhat suitable example here is the case titled *R v: Siu Tak-Chee*. In this Hong Kong case, in the absence of appropriate legislation to prosecute computer theft the defendant could only be charged with stealing electricity! In this respect, Europe has stepped in and does offer some regulatory protection⁴⁴.

The EC (Unfair Terms in Consumer Contracts) Regulations, 1995, exerts some control over the regulation of standard form contracts. Regulation 6(1) declares that an unfair term as per the regulations shall not be binding on consumers. An “unfair term” is defined as

⁴⁴ *Thomas vs Central Change Service Inc.* 212 A 2d.

something which creates a “significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.” Even these Regulations were considered inadequate within the European parliament. I feel that the consumers in Pakistan are losing ground and being left in weaker and weaker positions in agreements involving electronic payments with banks and other credit institutions.

Up to this point therefore, contract law principles may well be the last hope for a consumer in difficulty. Finally, there may be a duty of care owed by card issuers and institutions offering electronic payment facilities to their customers regarding the operation of the system itself. Take for example an electronic payment system that is continuously hacked-into by computer thieves while the owners do nothing to improve security measures. Consumers are regularly adversely affected (and perhaps unfairly so due to draconian exclusion clauses), one could argue that this as an example of foreseeable third party fraud and thus as grounds for an action in tort.

Where then do consumers in Pakistan look for protection in this ever-changing economic world? An obvious answer is to look to common law and basic principles of contract. While this sounds appealing *prima facie*, the reality of the situation is largely one of self regulation in an unlegislated domain riddled with exclusion clauses. Quite often online transactions may not even commence unless the consumer clicks on the words “I accept” at the bottom of a preliminary screen. Again, quite often the consumer neglects to read the conditions he/she has just accepted by clicking the required “I accept” link.

The problem then appears to be the need for legislation. Of course, the judicial system working within the confines of the common law will always do its part to rectify injustices as they happen but without forward-looking legislation, the courts as well as the consumers are at a disadvantage. The other problem for legislative drafters is the old and slow pace of change in the process of legislation. How does one adequately legislate for such a rapidly changing domain as electronic commerce? And how does one ensure that in such a relatively new area that the legislation does not stifle growth and do more harm than good? We return then to the question raised earlier: do we need an entirely new set of consumer protection legislation? The answer is that while there are some new ways in which the consumers will require protecting (e.g. from systemic risk, as already discussed), the majority are merely reincarnations of older legal issues. However the judicial system will need the appropriate tools with which to address them in their contemporary form. To date the courts have seen little help in this regard and the situation is only going to worsen as more and more complex problems arise. Therefore positive legislative action is needed, most urgently. Positive action by the legislature could rectify consumer vulnerabilities. To do this a firm stance must be assumed with regards to consumer protection within electronic payment. In the context of electronic banking in Pakistan, it may be said that "electronic banking is in its infancy; legislation could stifle it". The reality is that effective legislation can be most certainly achieved. Developing the existing scheme of self regulation could strengthen such legislation. By tightening the guidelines within which the banks currently work, certain elements of regulation could be evolved by the institutions themselves. The

legislation could also be given functional longevity in this ever-changing domain by leaving critical words undefined. There can be no doubt that life in the 21st century is going to get more technological and no doubt that electronic transactions are here to stay. Pakistan ought to be prepared. The consumer ought to be protected. The Law ought to be equipped⁴⁵.

3.4 TECHNOLOGY RISKS

In the previous two sections the key technology risks have been discussed in detail in the perspective of risks to Pakistani banks and consumers while dealing with cross border e-banks, we would thus dwell upon the topic in a comparatively concise manner so as to clarify our concepts from the view point of the technological aspects involved in e-banking.

1. Authentication of customers—Financial institutions should select reliable and effective authentication techniques to validate the identity and authority of their e-banking customers and should also have regard to the guidance provided in the State Bank of Pakistan. Guidelines on the Prevention of Money Laundering and Countering the Financing of Terrorism for verifying customer identity including instances where there is no face to face interaction with a customer. Moreover, a practical approach will be required to achieve a “single view of the customer” for non retail exposure thus demanding a consistent customer data.

⁴⁵ A delegate at the Asian Banking: A paradigm Shift (Dawn Asia Finance Conference 2006) held on 13th & 14th of May 2006 at Karachi Sheraton Hotel.

2. Confidentiality and Integrity of Information – E-banking services entail transmission of sensitive information over the Internet and banks' internal networks. Banks should therefore implement appropriate technologies to maintain confidentiality and integrity of sensitive information while it is being transmitted over the internal and external networks and also, when it is stored inside the banks' internal systems. Cryptographic technologies can be used to protect the confidentiality and integrity of sensitive information. Financial institutions should choose cryptographic technologies that are appropriate to the sensitivity and importance of information and the extent of protection needed.

3. Application Security – Inadequate application security in e-banking systems increases the risk of successful penetration or security attacks. Banks should ensure an appropriate level of application security in respect of their e-banking systems. When banks select system development tools or programming languages for developing e-banking application systems, they should evaluate the security features that can be provided by different tools or languages to ensure that effective application security can be implemented. In the case of selecting a third-party developed e-banking system, banks should take into account the appropriateness of the application security of the system.

4. Internet Infrastructure and Security Monitoring – Financial institutions should establish an appropriate operating environment that supports and protects their e-banking systems. Financial institutions should proactively monitor their e-banking systems and

internet infrastructure on an ongoing basis to detect and record any security breaches, suspected intrusions or weaknesses. Banks should ensure that sufficient physical controls are in place to deter unauthorized access to all critical e-banking systems, servers, databases and applications.

5. Technological Challenges – Basic II requires significant investment in technology, especially for institutions that plan to use the more sophisticated approaches to risk measurement. The same entails the use of the technologies for “Internal Ratings Based” approaches for credit risk and “Advanced Measurement Approach” for Operational Risk. In this perspective, amendments/changes in the existing credit scoring systems is required. Consequently a further step would be the implementation of new credit scoring applications for businesses with limited credit scoring capability. We can thus safely say that Base II will require the design and build of what will probably be the bank’s largest ever data warehouse initiative for collecting and storing customer data⁴⁶.

⁴⁶ Basel Committee on Risk Management Principle of EB e-banking 2003.

CHAPTER 4

CONCLUSION AND SUGGESTIONS WITH REGARDS TO THE PROPOSED BILL OF PAYMENT SYSTEMS AND ELECTRONIC FUND TRANSFERS ACT 2005 AND THE PAYMENT SYSTEMS AND ELECTRONIC FUND TRANSFERS ACT 2007.

The preceding three chapters of this thesis have helped us to develop an understanding of the factual and legal position with regards to Payment Systems and Electronic Fund Transfers suggested, partially operative and somewhat in place in various jurisdictions throughout the world. The same has been possible by our having in the first chapter, made the effort of comprehending the definition and benefits of Electronic Banking, in the background of the history and development of Electronic Commerce. We have further endeavoured to define Payment Systems and Electronic Fund Transfers. The concepts of Real Time Gross Settlements (RTGS) and the Dematerialization of Commercial Documents have been our concern towards the end of this chapter.

We have attempted to survey and analyze the guidelines, recommendations and communications on the ever increasingly important systems of payment and electronic fund transfers in the second chapter. Herein we have also undertaken to form a relatively comprehensive understanding of various laws, legislative structures and frameworks already in place in several jurisdictions around the globe and have tried to take an overall view of cross border Electronic Banking in the light of these legal frameworks.

The next chapter was an attempt to identify the areas of concern with regards to Pakistan, wherein the key Electronic Fund Transfers (EFT) products have been identified. The risks to Pakistani consumers and banks from cross border Electronic Banking have been looked at and the Technology Risks involved in Payment Systems and Electronic Fund Transfers (EFT) have been weighed. The consequences of all the above referred risks have been dwelt upon, thus bringing us to this final chapter, wherein we would endeavour to critically overview the proposed bill of the Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Fund Transfers Act 2007. Consequently the required legal framework i.e. the proposed bill and the act would be critically appraised and recommendations/changes with regards to same would be attempted and after a legal framework most appropriate to the environment and requirements of Pakistan, as per the understanding of the author have been suggested in this chapter, the thesis would be concluded.

4.1 CRITICAL OVERVIEW OF THE PROPOSED BILL OF PAYMENT SYSTEMS AND ELECTRONIC FUND TRANSFERS ACT 2005 AND THE PAYMENT SYSTEMS AND ELECTRONIC FUND TRANSFERS ACT 2007.

Pakistan is currently running predominantly on a paper based payment system but the Payment Systems and Electronic Funds Transfer Act 2007 has been promulgated to provide the regulatory framework for Payment Systems and Electronic Fund Transfers (EFT). A

critical overview of the proposed bill and the act is being undertaken here keeping in mind the challenge to suggest the creation of a new set of rules and procedures, as most of these payment systems and electronic fund transfers are and will be increasingly global in nature and the lack of legal uniformity between the proposed act and other such legal frameworks already in place in various other jurisdictions of the world may raise many legal issues. We would attempt to critically analyse the proposed bill first and then to comment upon the improvements made in the act itself in comparison to the proposed bill. This approach would ensure that our critically analysis is comprehensive in nature.

We find that the proposed bill of the act to provide the regulatory framework for payment systems and electronic fund transfers has been divided into ten chapters.

These ten chapters are as follows;

- Chapter 1 - PRELIMINARY.
- Chapter 2 - PAYMENT SYSTEMS AND THEIR OPERATION
- Chapter 3 - PAYMENT INSTRUMENTS
- Chapter 4 - CLEARING AND OTHER OBLIGATIONS
- Chapter 5 - SUPERVISORY CONTROL OF THE STATE BANK
- Chapter 6 - DOCUMENTATION OF TRANSFERS
- Chapter 7 - NOTIFICATION OF ERROR
- Chapter 8 - LIABILITY OF PARTIES
- Chapter 9 - ACTION BEFORE THE COURT
- Chapter 10 - MISCELLANEOUS

The preamble is followed by the first chapter which has been titled as "Preliminary". This chapter consists of the sections regarding the title, extent and commencement of the proposed act and the definitions of thirty (30) words and phrases employed in the draft bill. We will comment upon some of these in the second last heading of this chapter of the thesis. The last section i.e. section (3) of this chapter outlines the powers of the State Bank of Pakistan.

The second chapter is given the title of "Payment Systems and Their Operation" and deals with the designation and revocation of designation of payment systems, Real Time Gross Settlement (RTGS) System, retention of Electronic Record, disqualification of staff & its effects and governance & operational arrangements with regards to payment systems. The required aspects/changes would be discussed under the second last heading of this chapter of our thesis.

"Payment Instruments" are subject matter of the next i.e. the third chapter of this draft bill which pertains to the designation, issuance and prohibitions consequencing from payment instruments. The last two sections deal with security and third parties who are not financial institutions.

Chapter four deals with “clearing and other obligations” and sets out the requirements of audits & inspections, significant changes, responsibility of participants, settlement provisions & rules, rights & their preservation and electronic money institutions.

The following chapter which is the fifth, is concerning the matters of “Supervisory Control of the State Bank” and entail model clauses, modification requirements, service providers, notices, terms of transfer and notification changes. The provisions which lack the required ingredients would be taken up in the second but last section of the chapter being attempted by us.

As we have seen above, chapter (6) has been devoted to the “Documentation of Transfers” and the aspects of the availability of documents & proof, periodic statement, documentation as evidence and pre-authorized transfers have been clarified. Chapter seven is regarding the “Notification of Error” wherein the correction & absence of error have been taken up and the entailing damages have been spelt out.

The eighth chapter is about the “Liability of Parties”, especially the consumers & financial institutions, with reference to the burden of proof, liability in case of extension of credit, Acts of God & malfunctions, prohibitions suspensions and waiver of rights.

“Action before the Court” is the subject matter of chapter Nine and matters such as damages, bonafide errors, actions in good and bad faith, notification to consumers,

jurisdiction of courts, criminal liability, violations regarding foreign commerce and cheating by use of electronic device have been taken up.

The last and the tenth chapter is about “miscellaneous” concerns. At the very outset this chapter takes up the modification of laws of Insolvency and the ensuing default arrangements. The aspects of an operator of a designated payment system becoming insolvent, the application of fine, power to investigate, trial of offence & its procedure, overriding effect of the proposed power to call for information, operation and the uniformity of State Bank and its employees form the subject matter of the rest of this concluding chapter.

The above outline of the Payment Systems and Electronic Funds Transfers Act 2007 cannot be considered a complete overview of all the laws on the subject, as it is possible to argue that all the other required aspects have taken care of in the Electronic Transaction Ordinance 2002. The conclusion of the said thought process being that both these legislations complements which any such legislation is supposed to fulfill.

My research forces me to differ from any such conclusion and a critical look at the Electronic Transactions Ordinance 2002 would be more than sufficient to endorse my views. This piece of legislation is made up nine chapters and a total of forty five sections. The first of these chapters is titled “preliminary” and primarily contains twenty seven definitions of the terms employed in the said ordinance. The second chapter has the heading,, “Recognition

and Presumption” and is made up of ten sections. These ten sections are an attempt to address the legal requirements of electronic forms, writing, retention of records, electronic signatures, attestation/notarization and certified copies thereof. Electronic Documents are the subject matter of the third of these chapters and has four sections which dwell upon the aspects of the attribution of communications, acknowledgement of receipt, time and place of the dispatch and receipt of electronic communication and the electronic documentation of appropriate authority. The fourth chapter is made up of only one section dealing with the Certification Service Providers and the title of the chapter is the same.

The central concern of the Electronic Transactions Ordinance 2002 seems to be the “Certification Council” which is addressed in the fifth chapter, composed of ten sections, they deal with establishment, qualification of members, funds, functions repository, grant of accreditation, certification practice statement, decision, appointment of officers employees and advisors and the exclusion of certain provisions of the Pakistan Telecommunication (Reorganization) Act 1996 with regards to the certification council. After the fifth chapter the ordinance seems to be geared towards its end. Chapter six has three sections and is termed as “amendments of certain laws and jurisdiction” and also consists of three editions. Chapter eight which is titled “Offences” has six sections, dealing with false information, false certificate, violation of privacy of information, damage to information system, the non-bailable, compoundable and cognizable nature of these offences and their prosecution and trial. The last and the ninth chapter deals with “Miscellaneous” concerns, such as limitation on liability of network service providers, immunity against disclosure of information, power

to make rules and regulations and their prior publication and the last and forty fifth section of the ninth chapter is regarding the removal of difficulties by the Federal Government.

We thus find that although the aspects of electronic form, electronic documents, records, electronic signatures attestations, electronic communication certification services providers, certification council, amendments in certain laws, jurisdiction, certain offences and their trial, but all these increasingly practically important aspects have been dealt with in a vary cursory manner and do not by any legal standard fulfill the requirements which any such legislation is supposed to, not only by itself but also when read in conjunction with the Payment System and Electronic Funds Transfer Act 2007.

The above overviews by virtue of the features which they have displayed before us, alongwith the fact that this section of the last chapter of this thesis casts upon me the self imposed responsibility of not refraining from an appraisal which is critically geared, lead me towards a critical bent in my arguments in the rest of this section.

A contemplative survey of the titles of the chapters and the provisions contained therein has resulted in the following observations;

a) The following areas of concern in my opinion should either have been addressed individually or are in need of further legislative concern:

i) Interbank Payment Systems

- ii) Electronic Contracts and Evidence
- iii) Electronic Signatures
- iv) Dispute resolution
- v) Jurisdiction and Harmonization

As we would also see under the following heading, the above are some of the basic concerns of payment systems and electronic fund transfers, especially in the background of the global nature of these payments and transfers.

- b) The provisions/clauses which are attempting the legal structuring and outlining of the concepts given hereunder need to be more comprehensive and encompassing such as:
 - i) Some of the definitions as given in section 2.
 - ii) Payment Instruments as given in chapter 3 seen not to attain a concrete and operative statue.
 - iii) Electronic money institution is the subject of section (23) and employs the nomenclature “electronic money” which leaves one unsure as to the very meaning of the concept contained therein.
 - iv) Violations affecting foreign commerce in section (56) are targeting the local violators only and no attempt is made to deter violators from other jurisdictions.

The first part of this critical overview of the proposed bill of the “Payment Systems and Electronic Fund Transfers Act 2007” has given us an overall picture of the areas which have been of importance to the drafters of the same whereas in the second half of this section we have identified the areas which should have been of concern to them. The above would

enable us now, in the next section of this chapter of our thesis to take a look at all the requirements which the proposed act ought to have necessarily fulfilled, which would have rendered the act as all comprehensive, atleast to the possible limits, keeping in mind the rapidly changing nature of Electronic Commerce.

4.2 REQUIRED LEGAL FRAMEWORK

This part is a summary of the requirements and the importance of having specific regulations related to Payment Systems and Electronic Fund Transfers. The adoption of the required regulations is highly recommended to ensure protection for the consumers, safe banking and business in particular for small and medium sized entrepreneurs, transparent government services in using electronic means for commercial transactions and minimizing its risks.

Regulations must ensure that no legal difficulty will arise in the smooth operation of Payment Systems and Electronic Fund Transfers resulting from an electronic contract and at the same time the electronic transactions are trustworthy and secure.

The following key issues are required to be addressed by national regulations:

- Inter bank payment systems
- Electronic Contracts and evidence
- Electronic Signature

- Dispute Resolution
- Jurisdiction and applicable laws in Internet Banking
- Consumer protection in Electronic Banking
- Cybercrime and Security
- Harmonization
- Digital cash
- Dematerialization
- Confidentiality and Data Protection

We would hereunder briefly divert our attention to the above stated eleven basic requirements, which in most probability seem to fulfill the requirements of any national legislation on the subject.

Inter bank payment systems The payment systems form the basis of all fund transfers and payments through electronic means between banks and as such there is a need to have a deeper look into the relations between financial institutions, traders and service establishments and consumers. Regarding transactions by electronic payment instruments, the relationship between card-holder and card issuer also needs to be well defined.

Electronic Contracts and Evidence The legal barriers to electronic contracts, such as: is an electronic contract binding and to what extent; could it be used as evidence in the event of

payment disputes etc., were effectively addressed in the work of the UNCITRAL and its Model Law on Electronic Commerce. But issues such as assent, time of effective payment, what rules apply, consumer protection, the occurrence of error in the contracting and transfer processes and how the law could accommodate negotiable transfer documents that are paperless need to be addressed.

Electronic Signature The term “electronic signature” refers to any methods which may be used to “sign” an electronic document. Examples are the name of the sender typed at the end of a document, a secret code, a PIN, an image of a handwritten signature, etc. a digital signature is only one type of electronic signature that involves the use of public key cryptography. A signature is above all a symbol signifying the “intent” that also serves to identify the person and to prove the soundness of the payment authorization document. This is especially important for electronic transactions consequencing from the operation of payment systems and electronic fund transfers.

E-signatures raise several legal issues: laws and regulations issued before the digital age do not take into account these new technologies. As a result, according to the laws and regulations in force, many payment authorization documents are required to be “written” and “signed”. Would e-signature comply with these requirements? Should we trust an electronic signature? The signing party should feel bound by the signature while the other party should be able to trust it and feel legally protected. Moreover, both parties must know the “rules”

such as which party is liable or which requirements need to be fulfilled. Therefore, specific regulations are necessary.

Dispute resolution Thanks to payment systems and electronic fund transfers mechanism of e-commerce consumers, banks' customers or other individuals can enter into commercial relationships without regard to geographic location but it raises the question of how disputes would be resolved, especially when the buyer and seller are physically distant. The issue of payment and fund transfer dispute resolution is extremely important as the dispute mechanism offered will largely influence the attitudes of banks, merchants, customers and consumers at large, which will foster the development of electronic commerce.

Disputes can be divided in two main categories: those with public interest involvement (regulation of controversial content, trademark law applied to domain names, etc.) and those of purely private nature (sales or services contracts). Three possibilities are available to resolve a dispute: court, arbitration or ADR (i.e. negotiation, mediation...). The two latter are generally preferred because of their greater effectiveness and speed.

Jurisdiction and applicable laws in Internet Banking In the payment systems and fund transfers context of e-commerce two difficulties arise. The first is the choice of the forum the second is the choice of the law. E-commerce payments and fund transfers have no boundaries, therefore it is difficult to determine the jurisdiction. Once the forum is chosen the judge has to determine which law should be applied. This is a major issue when a

payment funds transfer dispute arises between contracting parties of a cross-border electronic payment transfer. Has the merchant created a virtual storefront in the buyer's jurisdiction to make a sale, or has the purchaser virtually travelled to the seller's jurisdiction to make a purchase?

This may often not be an issue for bank to bank transactions because of the use of model contracts, which have been drafted by professionals and thus addressing almost all possible difficulties. It may however be problem for bank to customer payment transactions as customers are generally less aware and thus less cautious. In cross-border payment disputes, the eventual inability for national jurisdictions to enforce foreign judgments may be an additional complication.

Consumer Protection in Electronic Banking The success of payment system and electronic fund transfers in electronic commerce depends on the safe and attractive environment provided to consumers. Consumers' personal information should be kept private and protected, payments should be secured, the choice of law and jurisdiction should be clear for the user. Banks/businesses have been recently issuing detailed guidelines, addressing the following issues: accuracy and accessibility of information, bank contact information, marketing practices (example: avoiding misleading representations), disclosure of features, terms and conditions, price, cancellation, refund policies, opportunity to review, language, record of the transaction, security, privacy, self-regulatory programs, dispute resolution and effective enforcement.

In order to ensure that these requirements are respected by all parties and that an effective legal framework exists to settle eventual disputes, governments should consider issuing specific regulations and laws providing safe environment for electronic transactions.

Cybercrime and Security Cyber crimes are normally easy to commit because of the openness of the internet, the availability of new technologies, the lack of identification and the low level of users knowledge and understanding of cyber security. In many countries criminal law does not address cyber crimes and with the evolving technology progress, it needs to be updated frequently.

Usually, computer crimes are divided into two types: crimes committed by using computers (example: destroying or changing data) and legal actions implemented by using computers to commit a criminal action (example: extortion, blackmail). To meet the threat of electronic crime, countries have to create a positive environment including laws, policies, technical standards, law enforcement, cybercrime reporting and public training. International standards as well as international cooperation are necessary to address the global extent of Cybercrime, as the internet has no boundaries.

No e-commerce initiative can hold ground or survive unless there is a proper legal system to address the computer related crimes. In case of computer crime or cyber crime, it

is more important than ever to legislate so as to prevent unauthorized access to data or information.

Harmonization In order for payment systems and electronic transfers to be efficient, a certain interoperability of systems through the world must exist, including legal systems. For instance, mutual recognition of electronic data messages and digital signatures is necessary for cross-border-e-commerce.

Even though today many countries have drafted or issued laws concerning e-commerce, these regulations are too often limited to the domestic environment and do not take into account or fully address the issues that may result from cross-border electronic transactions. International cooperation should therefore be encouraged. A step forward in that direction as already stated in chapter (2) above, is the Model Laws issued by UNCITRAL (model law on electronic commerce 1996 and model law on electronic signature 2001).

It has been observed that even among countries that have based their laws on these models, a lack of interoperability and a high amount of variations exist. This is an important issue for the success of electronic fund transfers that should be addressed by the governments themselves with the help of relevant international organizations.

Digital Cash To make internet banking to happen, the legal principles for regulating financial services on the internet need to be framed and legal and technological infrastructures for electronic payment systems have to be in place. The subject of Digital Cash also sooner or later has to be recognized and regulated.

Dematerialization The legal and practical impact of the dematerialization of shipping documents, electronic bills of lading and its transmission and electronic banking documents has to be assessed and addressed comprehensively.

Confidentiality and Data Protection Confidentiality and Data Protection issues are equally important to the banking institutions especially in relation to document imaging (dematerialization) and liability for computer errors in online banking. Moreover as already seen above, the confidentiality of customer/consumer data and its protection form the basis of the most of the above stated requirements.

4.3 A LEGAL FRAMEWORK SUGGESTED

In the previous two sections of this chapter we have had an overview of the proposed draft bill of Payment Systems and Electronic Transfers Fund Transfers Act 2005 and the Payment Systems and Electronic Transfers Fund Transfers Act 2007 and outlined the requirements, which as per our understanding any such proposed law or regulation must embody, for it to be able to encompass and provide for all the foreseeable possible situations

and legal issues arising out of the implementation of the payment systems and electronic fund transfers. Having reached a stage where we find ourselves apprised to a reasonable degree, of the factual and legal aspects with regards to the development, implementation and future concerns which are and will be the consequence of the implementation and operation of payment systems and electronic fund transfers, we may now attempt to suggest a legal framework which would in most probabilities, be as appropriate as possible.

In attempting to suggest a legal framework for Pakistan, in the context of Payment Systems and Electronic Fund Transfers, we would not be assuming the role of the drafters of the proposed bill of the Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Transfers Fund Transfers Act 2007 but would restrict ourselves to suggestions only, as is the very purpose of this thesis. In doing so, an exercise would be undertaken to make suggestions with regards to the areas which though required, have not either been included or have not been dwelt upon in a manner to serve the required purposes, in the proposed bill and the act itself. We would then strive to identify the sections & chapters which are not in accordance with the requirements as outlined in the previous section.

We thus embark upon the task of suggesting a legal framework as per the above indicated pattern and as such initiate our efforts by identifying the areas of concern which should either have been addressed individually or are in need of further attention on the part of the drafters of the proposed bill of Payment Systems and Electronic Fund Transfers Act

2005 and the Payment Systems and Electronic Transfers Fund Transfers Act 2007. Having done so, we would then focus our attention on the chapters and sections which are either not as per the requirements identified in the preceding sections or are not serving the purposes of clarity, understanding and thus effective implementation of the Payment Systems and Electronic Funds Transfer Act 2007 which has been based upon the proposed Payment Systems and Electronic Funds Transfer Act 2005.

(a) We now turn our attention to the areas which either were not made a part of either the proposed bill of Payment Systems and Electronic Fund Transfer Act 2005 or the Payment Systems and Electronic Funds Transfer Act 2007 or have not been dealt with in a comprehensive manner. The issues which have not been dwelt upon in the manner, which comes up to the legal requirements and expectations which the Payment System and Funds Transfer Act 2007 was drafted to address, as has already been indicated above in section 4.1 are;

i) Interbank Payment Systems – As we have seen that the fund transfers and the payment systems (according to which the fund transfers effectually take place) are mostly interbank in nature and as such after having critically overviewed the entire draft of the proposed bill of the Payment System and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Funds Transfer Act 2007, I cannot but observe that there is a definite need for the legal streamlining of the relations between the banks/financial institutions traders/service establishment and the consumers/clients in this context. Further more the legal issues arising out of the transactions by electronic payment instruments and the relationship between the cardholders and the card issuers should also be well defined.

The legal issues expected to consequence from the operation of Interbank Payment Systems, in the realm of electronic banking have not been the concern of the drafters of the proposed bill of the Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Funds Transfer Act 2007. Some of these concerns have found some space in the said draft, wherein they have found their way due to their highly unavoidable and essentially interdependent nature within the context of the proposed draft bill. An example of the same, besides elsewhere, is available in Chapter IV titled as clearing and other obligations. We thus cannot but strongly suggest that this most essential aspect i.e. Interbank Payment Systems, within the context of Payment Systems and Electronic Fund Transfers should be taken up in the act with all the legal aspects which arise therefrom.

ii) Electronic Contracts and Evidence – Our entire deliberations upon the subject in the last three and a half chapters of this thesis have made us realize without any doubt that legally effective electronic contracts and evidence acceptable by the courts (in the matters of these contracts and otherwise), are two related areas of concern particularly identified in all Model Laws and specifically incorporated in all the major legislations on the subject, in place or in the process of being so, in various jurisdictions around the world. Moreover these two aspects not only demand legal clarifications on the national level but must be addressed in the global perspective also.

We find that, either may be consciously or due to the absence of the realization of the legal requirements which the Payment System and Electronic Funds Transfer Act 2007, was

supposed to fulfill or may be unconsciously, the drafters of the proposed bill for the same ignored the legal concerns with regards to electronic contracts and evidence in their proposed enterprise of the bill of Payment Systems and Electronic Fund Transfers Act 2005 and consequently in the Payment Systems and Electronic Funds Transfer Act 2007 also. The only reference to these legal concepts is found in sections 7, 24, 31, 32, 33 and 47 and except for section 33 the other of these sections have only indirect bearing on the issue of evidence and may be by the maximum possible stretch of the imagination of the drafters, somehow deem to have some bearing on the concern of contracts, which I must admit (if it is there) is beyond my legal acumen.

In the above perspective, in my humble opinion, the legal aspects of electronic contract and evidence as already stated in section 4.2 above, have been dealt with in a comprehensive manner in the work of the UNCITRAL and its model law on electronic commerce, especially the aspects of the binding nature of an electronic contract and its extent & whether the same could be used as evidence when payment disputes arise. We find that these most important legal issues despite the fact that they have been effectively addressed by UNCITRAL, were not of concern to the drafters of the proposed bill of Payments Systems and Electronic Fund Transfers Act 2005.

Furthermore legal issues such as assent, time of effective payment, which rules to apply and the legal accommodation of negotiable transfer documents (paperless/dematerialized) are in need of being addressed. We do find the drafters of the

proposed bill of Payment Systems and Electronic Fund Transfers Act 2005, covering the areas of consumer protection and the occurrence of error in the processes of contracting and transfer. We may thus suggest that the legal barriers to electronic contracts and the use of the same as evidence should be effectively addressed in the national and international legal perspective, in the light of the work of the UNCITRAL and its model law on electronic commerce. Whereas one cannot but particularly emphasize the critical legal importance of dwelling upon the matters of assent, time of effective payment, application of rules and the acceptability of negotiable transfer documents in the proposed bill of Payment Systems and Electronic Fund Transfers Act 2005 and the resultant Payment Systems and Electronic Funds Transfer Act 2007.

iii) Electronic Signature – The entire exercise which we have taken up in the form of the present thesis has led us to the irresistible conclusion that any electronic funds transfer which uses the medium of the payment systems in place, to become effective cannot even be initiated without an electronic signature, by the transferor on an electronic document. The drafters of the proposed bill of Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Funds Transfer Act 2007 may argue that they have not shown any legislative concern for the same as it is not in vogue in Pakistan. Any such argument would not stand ground because besides elsewhere, especially in sections 45 and 46 of the proposed bill of Payment Systems and Electronic Fund Transfers Act 2005, the drafters have been forced, by the very nature of electronic fund transfers to refer to electronic signatures as,

“.....any card, code or any other means of access to such consumer’s account for the purpose of initiating an electronic fund transfer.....”

We thus cannot but acknowledge that the term “electronic signature” not only needs to be defined but further developed in the legal sense with regards to the transferor, especially to establish his/her intent, identification and to further prove the validity of the payment authorization document. E. Signatures have raised several legal issues and the laws and regulations governing the paper based system are legally ineffective to resolve the issues of these new technologies. We know for a fact that generally the laws and regulations in force in Pakistan require most of the payment authorization documents to be in writing and “signed”.

The questions which thus need to be answered are that, would e-signatures comply with these requirements? Should we trust on electronic signature? Does the signing party (the transferor) feel legally bound by such signatures? Would the other party (the transferee) trust the e-signature and thus feel legally secure? Moreover both the parties should be aware of their respective and specific liabilities and requirements. The obvious conclusion of the above discussion is that the insertion of specific rules / regulation with regards to e-signatures, within the framework of the proposed bill of Payment System and Electronic Funds Transfer Act 2005 and thus the Payment Systems and Electronic Funds Transfer Act 2007 was most necessary

iv) **Dispute Resolution-** Within the realm of electronic funds transfer and by virtue of payment systems bank customers, consumers and other individuals further commercial relationships in disregard of their respective geographical locations. The global nature of electronic fund transfers and payment systems raises the question of dispute resolution, especially when the buyer and seller are in different jurisdictions. We can thus say that the extreme importance of the issue of payment and fund transfer dispute resolution cannot be but acknowledged. The (dispute resolution) legal mechanism would invariably influence the attitudes of the financial institutions, buyers, sellers and consumers at large, which would generate either a positive or negative effect on the development of electronic commerce.

As already discussed in the previous section, disputes would either be ones with public interest involvement or would be absolutely private in nature. We are aware that dispute resolution may be attempted by approaching the relevant court of law, by arbitration or by ADR – i.e. negotiation, mediation and in matters which are global in nature, the possibilities of arbitration and ADR are generally preferred. We find that no direct reference to even one of the above three means of dispute resolution has been made by the drafters either in the proposed bill of the Payment Systems and Electronic Fund Transfers Act 2005 or in the Payment Systems and Electronic Funds Transfer Act 2007, let aside the two preferred modes.

My above observation can be attempted to be declared as incorrect by stating that in the proposed bill of Payment Systems and Electronic Fund Transfers Act 2005, chapter IX

has been dedicated to atleast the first of these means of dispute resolution and has been titled “Action before the Court”. Here I would not refrain from categorically stating that the entire chapter IX of the Payment Systems and Electronic Fund Transfers Act 2007, has no reference to dispute resolution. The chapter comprises of nine sections, six of which deal with liabilities, two with punishments and one section i.e. 54, with the jurisdiction of courts which also absolutely lacks clarity. Section 62 of chapter X again refers to the “Trial of offence” and casts further cloud on the language and the very purpose of section 54. Before attempting to address the issue of “dispute resolution”, the drafters should have resolved the dispute arising out of sections 54 and 62, when read in juxtaposition to each other.

I thus cannot but strongly emphasize the need for the incorporation of a comprehensive section on the extremely important legal mechanism of dispute resolution, with regards to all the three available options for the same, in the Payment Systems and Electronic Fund Transfers Act 2007.

v) Jurisdiction and Harmonization – Two other important aspects which by any standard are required to be an essential part of any legislation, in the context of electronic fund transfers and payment systems are jurisdiction and harmonization. The choice of the forum and the choice of the law seem to be the basic issues which need to be addressed in any legislative attempt on the subject. As e-commerce payments and fund transfers are mostly global in nature, the choice of the forum raises the first hurdle which can be overcome with comparative ease, if provisions for the same have been incorporated in national legislations,

wherein a conscious effort has been made towards the harmonization of the same for the purposes of facilitating interoperability of these legal regimes.

Unfortunately the concept of harmonization seems to be far away from the minds of the drafters of the proposed bill of Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Funds Transfer Act 2007. The only reference to jurisdiction in the entire proposed act is section 54, as already discussed above. We cannot help observing that the said section deals specifically with the “.....amount in controversy....” and seems to be a conscious attempt on the part of the drafters to stay away from the complicated but most important legal issue of jurisdiction by using the following words;

“.....in any court of competent jurisdiction”

In most global transactions, the importance of the difficulty of determining the jurisdiction has been and is a major concern because of the virtual nature of these transactions and the inability of national jurisdictions to enforce foreign judgments further complicates matters. This calls for harmonization geared towards the interoperability of the legal systems to ensure the efficiency of payment systems and electronic fund transfers. As already stated in section 4.2, for example the mutual recognition of electronic data messages and digital signatures cannot be dispensed with in the context of cross-border e-commerce.

With the above observation in mind, it can be very safely said that the proposed draft bill of Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and

Electronic Funds Transfer Act 2007 are limited to the domestic environment and does not take into account or fully address the issues that may result from cross-border electronic transactions. It is thus suggested that these two interconnected issues of jurisdiction and harmonization should be included in the Payment System and Electronic Fund Transfers Act 2007, keeping in view the importance of international co-operation and as already pointed out in chapter 2 and elsewhere, taking guidance from the model laws issued by the UNCITRAL. It must be kept in mind that these model laws should serve as guide lines and not adopted as they have been presented. In this context, the adaptation of these laws to the local legal requirements of Pakistan has to be balanced with the attainment of the maximum degree of interpretability and lesser variations with the laws of other countries.

(b) In our attempt to suggest a legal framework we may now critically examine the sections and chapters which are not serving the purpose of clarity, understanding and as such the effective implementation of the "Payment Systems and Electronic Funds Transfer Act 2007". In my view, even the most liberal critic would have to include the following chapters and sections (in particular) in the above category, in his or her observations;

(i) As already indicated in section 4.1 above the provisions/clauses which are an attempt at the legal structuring and defining of the legal concepts are contained in section 2 which is termed "Definitions" and as many as thirty definitions have been given in this section. Critical overview of these definitions has necessitated the following observations with regards to four of these in the context of the requirements which this proposed act is expected to fulfill;

I. Critical Observation

The definitions of “Accepted Card” in subsection (a), “access Code” in subsection (b), “Card” in subsection (g) and “Debit Instrument” in subsection (k), seem to be overlapping each other to certain degrees, besides being not specific enough to clearly differentiate between these terms/phrases.

Suggestion

The above noted definitions of Accepted Card, Access Code, Card and Debit Instrument are in need of being re-drafted with the purpose that they are specific, comprehensive and individual in nature, so as to develop a precise understanding of all these terms/phrases, wherein they can be individually identified and understood.

II. Critical Observation

We also find that the definition of “Electronic Fund or Electronic Money” in subsection (o), seems like an attempt to explain the ancillary and related terms of these concepts and as such leaves the reader in a position of relative uncertainty as to the meaning of Electronic Fund and Electronic Money which connote different meanings and as such need to be defined separately. These concepts defy the use of the word “or” by any standard.

Suggestion

The concepts of Electronic Funds and Electronic Money are inherently different and thus need to be defined individually, enabling the effective implementation of the provisions of the Payment System and Electronic Fund Transfers Act 2007.

III. Critical Observation

Furthermore the attempt to define “Electronic Fund Transfers” in subsection (p), which is the central, pivotal and basic concept, upon which the entire understanding and

interpretation of the Payment Systems and Electronic Funds Transfer Act 2007 is dependant, seems to dwell more upon the exclusions and inclusions of the means of such transfers, rather than the precise and conscious definition of the concept itself.

Suggestion

The definition of “Electronic Fund Transfers” has to be attempted again/redrafted wherein a crystal clear, step by step and comprehensive understanding of this basic and pivotal concept is achieved.

IV. Critical Observation

While reading the definition of “Electronic Payment System” in subsection (r) as a student of law, I find that the said term has not been defined at all but has been declared to be a means of implementation only. We further find that an attempt is made to define “Payment System” in subsection (y) and the words “interalia” have been inserted at the very outset, probably to include, justify or supplement the definition of “Electronic Payment Systems” in clause (r) above. There seems to be a lack of effort to instill a complete comprehension with regards to both these concepts.

Suggestion

Payment Systems as we know them and Electronic Payment Systems as we are striving to know them as they are developing are referred to as “systems”. It is a matter of common sense that any system would be composed of various distinct parts and every such component/step would entail varied legal consequences. It is thus strongly suggested that the most comprehensive legal definitions of “Electronic Payment Systems” and “Payment Systems” which can identify/clarify their various parts are consciously drafted.

When one has some understanding of the most widely encompassing subject of law, he cannot but observe that the basis of all interpretation and implementation of any law and its various clauses is entirely dependant upon the definitions given therein at the very outset. We have in the above paras screened out only the seemingly unconcernedly drafted definitions, whereas there also exist certain mistakes of language which are in need of precision and finesse, especially in the realm of legal drafting. We would restrict our suggestion to the above four observations under the present heading of this chapter, as far as section (2) of the proposed draft bill is concerned. It is this suggested that these and many others terms should be redefined, with the intent and will to highlight the distinctions between them, coupled with an absolutely comprehensible clarity of these concepts.

(ii) The title of chapter (3) is payment instruments and contains five sections which are purporting to the designation of payment instruments, issuance of designated payment instruments, and prohibition of issuance of payment instruments, security and third party. We would restrict our observations to the first three sections and dwell upon the last two sections separately.

Laws/rules are a means of creating, sustaining and monitoring systems with regards to different aspects of life. The interaction of all concerned legal persons using the said system/systems or being a part of the same if not regulated would result in unchecked frictions causing the system to collapse. In this perspective it becomes clear that all laws/rules when drafted should embrace in their ambit amongst others the,

- i) Creation
- ii) Sustenance and
- iii) Monitoring

of the particular system to which they purport. Sections 12, 13 and 14 of the third chapter of the Payment Systems and Electronic Fund Transfers Act 2007 do not cater to all these three necessary elements and the shortfall renders these sections as not all embracing.

We note that the first section of chapter 3 i.e section 12 which has been given the heading “Designation of payment instrument “ at the very outset states that.,

“12.....(1) Where the State Bank is of the opinion that-

- i) a payment system is or may be in
widespread use as a means of
making payment.....”

and as such remains absolutely distant from the basic-functions it should have performed i.e creation of the system. The said section in effect purports to become operative when it is found by the State Bank of Pakistan that “a payment instrument is or maybe in widespread use.....”.

The second section of this chapter i.e. section 13 has been made subservient to section 12, as the last part of section 12 states,

“....the issuer of such designated payment instrument
shall comply with the requirements of section 13.....”

meaning thereby that the provisions of section 13 would have effect only on the payment instruments which have been designated as such by virtue of section 12 only and all other payment instruments have been excluded from the realm of section 13.

Diverting our attention to section 13 itself, we find that at the very outset there is either a mistake of language or the drafters have been unable to convey the sense which they had in mind. The said section begins as;

“....(1) No person shall be issued a designated payment instrument unless the issuer as.....”

My understanding of the language of law stresses upon me to suggest that the above was meant to be as follows:

“.....(1) No person shall issue a designated.....”

and if we accept this version, then the obvious conclusion is that herein a mistake of language, maybe unconsciously, has been committed by the drafters.

The said section goes on to lay down the conditions to be complied by the issuer as follows;

“.....i) complied with the requirements of this Act.....”

whereas one cannot but observe that the said section i.e. section 13, as already clarified at the end of section 12, is the only section which is supposed to identify and thus prescribe the requirements for the designation of a payment instrument in the entire course of the Payment Systems and Electronic Fund Transfers Act 2007. We are thus confronted by the most glaring and pertinent question that, “What are these requirements?” Clauses (ii), (iii) and (iv) of subsection (1) of section 13 then go on in a very vague manner to talk about the submission of documents and information to the State Bank, the payment of the fee

prescribed by the State Bank and the obtaining of a written approval from the State Bank for the purpose of issuing a designated payment instrument. In sub section (2) the State Bank has been empowered to ask for the modification /alteration of the documents submitted and the imposition of restrictions / limitations/conditions at its sweet will before giving approval. Sub section (3) refers to security and would be taken up towards the end our discussion of this chapter along with section 15. Section 14 is an attempt to out line the prohibitions of issuance of payment instrument, which do cover most legal aspects of the matter but are in definite need of being made a little accommodative towards the global perspective.

The second last section of this chapter i.e section (15) which has been titled “security” seems to be out of place. The section states;

“15. Security- Financial Institutions and other institutions providing funds transfer facilities shall.....”

We do agree that a payment instrument may be employed in funds transfer facilities but the insertion of this section in the chapter titled as “Payment Instruments” seems to be absolutely out of context, especially when sub-section (3) of section 13 above employs almost the same language and sense except for the fact that the same has payment instruments as its subject matter instead of fund transfers. Both the section and the subsection referred to above, cannot be termed as being effective at all as far as their subject i.e the aspect of security is concerned, because both subsection (3) of section 13 and section 15 of chapter 3, place the onus of security on “current international standards” without any regard to the circumstances and realities within Pakistan in the said context. One cannot but observe that subsection(3)

of section 13 and section 15 are a crude attempt to incorporate the phrase “international standards” to cater to the requirement that the Payment System and Electronic Fund Transfers Act 2007, had to be drafted in the purview of the global nature of fund transfers and payment systems.

The last section of chapter 3 i.e section 16 has “Third Party” as the heading and targets the persons other than financial institutions who hold consumer accounts. The section stipulates that the disclosures required to be made for electronic fund transfers and the protections, responsibilities and remedies created by this Act, are made applicable to such persons and services. Once again we find ourselves in a situation where the section purporting to fund transfers has been introduced in the context of payment instruments, thus rendering the same to be out of context.

The above observation necessitate the suggestion that the five sections of chapter 3 should be re-drafted with the purpose and intent to contain therein the creation of new payment instrument, their maintainability and monitoring being kept in mind. I would like to clarify here that chapter 3 has taken into its ambit the regularization of the payment instruments already employed and thus being issued but does not contain within its boundaries the process by which a new payment instrument which is currently not in use but is proposed to be created would be dealt with. This omission is an inherent flaw which seems to prohibit the proposition of the creation of a new payment instrument.

Moreover the sections should be drafted consciously and arranged in a manner which has reference to the context and as such do not fall out of the purview of the heading allotted to the chapter i.e. payment instruments. And thus attain a concrete and operative structure.

(iii) The chapter titled as 'Clearing and other obligations' is chapter 4 of the proposed draft bill of Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Funds Transfer Act 2007. Chapter 4 comprises of sections 17 to 24 all of which, except for section 24, deal with the various aspects of clearing, settlement and netting of interbank payments at the national level only. It would not be incorrect to suggest here that the said chapter should have comprised of seven sections and not eight, as section 24 is again out of context and foreign to the scope of the chapter. This section seems to have been inserted therein, maybe because the drafters had either overlooked the importance of the concept contained within the said section and have decided to place the same wherever the said concept would seem to adjust or more likely because the legal issues entailing from electronic money and electronic money institutions being extra ordinary in nature could not be dwelt upon in detail but had to be mentioned somewhere to be able to vouchsafe that the required ingredients as per the recipe have been added, although without regard to their quantity and quality.

Section 24 itself seems to be an attempt to instill in the proposed draft both the concepts of electronic money and electronic money institutions in the most general terms by employing nomenclature such as "electronic money activity." This section is vague about the very concepts which it is supposed to bring within a legal framework, one thus cannot

expect that it would meet the legal requirements arising out of the many characteristics of these concepts. I have no doubt in my mind that section 24 merits removal from the Payment Systems and Electronic Fund Transfers Act 2007 and calls for the incorporation of another chapter therein, wherein all the legal issues emanating from these two concepts are addressed with detailed clarity.

iv) While critically viewing the proposed draft bill of the Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Funds Transfer Act 2007, in view of the previous chapters of this thesis, section 56 highlights itself before the reader after section 24 discussed above, as a section which would most certainly incorporate in the proposed draft bill the reality that payment systems and electronic fund transfers are international in nature. Section 56 is a part of chapter IX which has been termed as "Action before the Court." The heading of section 56 is "Violations affecting foreign commerce," which does create the first impression that the same would not be out of context and may also cater to the cross border nature of the subject matter of the proposal draft bill in all its forms. This positive impression waivers of as one reads on and finds that although the language employed does refer to the element of foreign commerce and the violations in the said context but the overall impression of section 56 when read as whole, conveys the sense that the violations being referred to therein are in respect of the local violators only.

This provision may not be devoid of the cross border nature of these transactions but does most certainly target the local violators only and no attempt has been made therein to deter violators from other jurisdictions. It has no reference to foreign virtual banks,

institutions and individuals who have to be supervised and curtailed when operating within the jurisdiction of the State Bank of Pakistan.

It is thus suggested that as cross border cyber crimes are normally easy to commit therefore either a clause for the imposition of section 56 upon violators physically working from foreign jurisdictions but in effect committing the violation within the jurisdiction of the State Bank of Pakistan be incorporated in the said section or preferably another independent section either before or after section 56 be inserted which specifically brings within its framework the above said would be foreign violators.

This section bears the heading “A Legal Framework Suggested” and at the very outset of the same we had stated that we would not be assuming the role of the drafters of the proposed bill of the Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Funds Transfer Act 2007 but would bear upon us the burden of suggesting the required changes, as that is and has been the very purpose of this thesis. I have tried to comment critically upon only the most glaring and obvious aspects of the said draft which either do not fulfill the requirements as already given in the previous section or point out the areas which though required, have not been included and if found therein do not serve the required purpose.

My deliberation upon this thesis began in July 2006 and as I approached the end of this extensive exercise and initiated my work on the fourth and the last chapter of this thesis

in July 2007, the subject matter of this hectic effort appeared on the website of the State Bank of Pakistan as;

“Payment Systems and Electronic Funds Transfer Act 2007.”

This act boasts of some additions alterations and arrangements which have been most probably attempted to place a final layer of make up with the intent to hide as many of the most obvious discrepancies, as was possible. I would thus at the end of this section, before concluding the thesis in the next section make an attempt to overview the above said additions, alterations and arrangements and take a glance at their effect if any in removing the most obvious lackings inherent in the subject matter of our thesis.

As already stated above section 2 is titled as “Definitions”, wherein thirty definitions were attempted. We find that the some section in the Payment Systems and Fund Transfer Act 2007 now embodies thirty eight definitions, the same has been achieved by the removal the definition of “code” and the addition of the definitions of the following nine terms;

- i) Authorized ii) Automated Teller Machine (ATM) Card iii) Authorized Party iv) Bank v) Cheque in Electronic Form vi) Operator vii) Person viii) Service Provider ix) Truncated Cheque.

Moreover the definition of the term “netting” has been attempted again.

The removal of the definition of the term “code” seems to be a result of the realization that the same was unnecessary, whereas the nine additions on the other hand may

have become necessary due to the insertion of four new sections to the proposed bill of Payment Systems and Electronic Fund Transfer Act 2005.

This addition of four sections has brought the total number of sections which now comprise the Payment Systems & Electronic Fund Transfers Act 2007 to seventy four. The additional sections are;

- i) Section 17 – Payment by Truncated Cheques.
- ii) Section 64 – Application to acts done outside Pakistan.
- iii) Section 66 – Procedure and
- iv) Section 74 – Penalties.

The first section added to the above said act in section 17 and concerns itself with the negotiability of a truncated cheque. This is the very section which has been the cause of the addition of the definition of truncated cheque in section 2. It is pertinent to mention here that neither the definition nor the newly added section develop an understanding of the term truncated and the process/procedure ensuing therefrom.

The next section added in the Payment Systems and Electronic Funds Transfer Act 2007 is section 64 with the heading “Application to acts done outside Pakistan”, addresses our last critical observation regarding section 56 of the proposed bill of Payment System and Electronic Funds Transfer Act 2005. This new section has been incorporated in the chapter titled “Miscellaneous”.

The third section which has found its way into the Payment System and Electronic Funds Transfer Act 2007 is section 68 and is titled "Procedure" This section curtails the powers of the courts and empowers the State Bank of Pakistan further.

The fourth section the addition of which brings the total number of sections of which the Payment Systems and Electronic Funds Transfer Act 2007 is constituted to seventy four, is section 74 itself and is titled "Penalties" and serves the purpose of the imposition of penalties upon the service provider or financial institution who do not abide by the provision of the Act and the procedure of the recovery of the penalty.

Besides the above noted changes a few clauses and provisions of the already existing sections have been removed and added to cater to a few of the procedural and implementation lapses. Moreover the said act also encompasses certain language adjustments, which seem to have been inserted to make the requisite sections/clauses more comprehensive. We also find that the term "Authorized Party" which has found its way in the definitions, has been mostly added after the term "Financial Institution" with the insertion of "or" in most of the sections. Finally we also note that the punishments have been decreased and the fines increased manifold in the Payment Systems and Electronic Funds Transfer Act 2007.

I cannot but observe that the entire exercise of the writing of this thesis has consumed about sixteen months, during which period the subject matter of my thesis i.e. the proposed bill of Payment System and Electronic Funds Transfer Act 2005 has materialized into the Payment Systems and Electronic Funds Transfer Act 2007, but the major concerns which have been the result of our endeavour have not been addressed therein, except for section 64. We are now all set to conclude this "Thesis" by attempting to set forth the last section of the last chapter of this thesis and the same is titled as the "Conclusion"

4.4 CONCLUSION

In this last section of the last chapter of my thesis titled "Critical Appraisal and Suggestions with regards to the proposed bill of Payment System and Electronic Fund Transfers Act 2005" and the "Payment Systems and Electronic Transfers Fund Transfers Act 2007" I would attempt to conclude my opinions appearing in the form of critical appraisals and suggestions in the previous sections of this last chapter of my thesis.

Before embarking upon this hectic endeavour about sixteen months ago, I had feared that my efforts might not prove fruitful, if all that I had to criticize and give suggestions about, became a part of the legislation which would be passed after improvements in the subject matter of my thesis. Allah Ta'ala has been very kind to me. I have had the chance of taking a look at the improved and legislated form of the subject of my thesis and have found that the "Payment Systems and Electronic Fund Transfers Act 2007" has not been finalized in a

manner which would render the suggestions resulting from my observations on the same infructuos, as having been addressed therein. As already stated, at the end of the previous section of this chapter, the Payment Systems and Electronic Fund Transfers Act 2007 in its approved form, does address one of my concerns, i.e. with regards to violators operating from beyond the jurisdiction of Pakistan to some extent in a general manner, whereas all the other concerns highlighted by me in this thesis remain unaddressed.

The above fact has rendered the writing of the conclusion of this thesis as an easier task as compared to what I had perceived when initiating the thesis itself. We had undertaken an exercise to;

- a) make suggestions with regard to the areas which though required, have not either been included or have not been dealt with in a manner to serve the requirements which the proposed bill of the Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Transfers Fund Transfers Act 2007 was expected to fulfill and
- b) identify the chapters and sections which were not in accordance with the required legal framework as given in section 4.2 above or were not serving the purposes of clarity and understanding.

I would now not refrain from stating that the five areas identified in section 4.3 (a) of this thesis have not been addressed in the Payment Systems and Electronic Fund Transfers Act 2007. Thus the obvious conclusion with regards to the proposed bill of Payment Systems and Electronic Fund Transfers Act 2005 and the Payment System and Electronic Fund Transfers Act 2007 is that the following areas of concern have found no space in both the above documents;

- i) Interbank Payment Systems
- ii) Electronic Contracts and Evidence
- iii) Electronic Signature
- iv) Dispute Resolution and
- v) Jurisdiction and Harmonization

Moreover in section 4.3 (b)(i) our four critical observations and the suggestions thereto now stand on firmer ground and I cannot but conclude that the same should be heeded and addressed as per the suggestions given thereafter. Furthermore my critical appraisal and suggestions thereto in section 4.3 (b) (ii) (iii) and (iv) with regards to the chapters which have been discussed therein, have not been of any concern to the drafters of the newly enacted act.

The above stated five areas of concern and the four observations alongwith suggestions have been the result of an in depth study of the proposed bill of Payment Systems and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic

Transfers Fund Transfers Act 2007 and the comparison of the same with the legal frameworks (suggested or in place) in various jurisdictions around the world in the field of Payment Systems and Electronic Fund Transfers. These observations have been made keeping in mind the trends in cross-border payments which tend to indicate that any suggested legal and regulatory framework may cause hindrances in the way of healthy developments in payments and transfer systems. Impediments to such developments may result either from existing legal or regulatory provisions or from an insufficient or inconsistent legal framework.

Having observed that the proposed bill of Payment System and Electronic Fund Transfers Act 2005 and the Payment Systems and Electronic Transfers Fund Transfers Act 2007 fell into the second category of legal frameworks as stated at the very end of the preceding paragraph, the entire thesis was planned and has been written with the intent and will to propose changes in the same which would remove the subject matter of my thesis from this category. I am sure that of the above observation and suggestions are adhered to with regards to the proposed bill of Payment System and Electronic Fund Transfers Act 2005 and the newly enacted Payment System and Electronic Fund Transfers Act 2007 by way of amendments, the said legislation would be able to cater for the ever increasing legal regulatory requirements of national and cross border Fund Transfers and Payment Systems.

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"AN

ACT

to provide regulatory framework for payment systems and electronic fund transfers

WHEREAS it is necessary to supervise and regulate Payment Systems and Electronic Fund Transfers in Pakistan and to provide standards for protection of the consumer and to determine respective rights and liabilities of the financial institutions and other Service Providers, their consumers and participants;

It is hereby enacted as follows:-

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.- (1) This Act may be called the Payment Systems and Electronic Fund Transfers Act, 2007.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

2. Definitions.- (1) In this Act, unless there is anything repugnant in the subject or context,

(a) **"Accepted Card"** means a card, code or other means of access to a Consumer's Account for the purpose of initiating Electronic Fund Transfers;

(b) **"Access Code"** includes pin, password or code, which provides a means of access to a Consumer's Account for the purpose of initiating an Electronic Fund Transfer;

(c) **"Account"** means a current deposit, saving deposit, or any other account maintained by a consumer in a Financial Institution in which credits and debits may be effected by virtue of Electronic Fund Transfers;

(d) **"Authorized"** means authorized by the State Bank for the purposes of this Act;

(e) **"Automated Teller Machine (ATM) Card"** means any card for use at any ATM to initiate Electronic Fund Transfers.

(f) **"Authorized Party"** means a bank, a Financial Institution, a Clearing House, a Service Provider or any person authorized by the State

Bank to transact business under this Act in Pakistan;

- (g) **"Automated Teller Machine (ATM) Operator"** means any person or a Financial Institution operating any ATM at which consumers initiate Electronic Fund Transfers;
- (h) **"Bank"** means a banking company as defined in section 5 of the Banking Companies Ordinance, 1962 (LVII of 1962);
- (i) **"Book Entry Government Securities"** means any securities issued by the Government under any written law transferable by a book entry on a register or otherwise;
- (j) **"Business Day"** means any day on which offices of consumers, Financial Institutions, operators or Service Providers involved in Electronic Fund Transfer are open to the public;
- (k) **"Card"** means any card including an ATM card, Electronic Fund Transfer point of sale card, debit card, credit card or stored value card, used by a Consumer to effect an Electronic Fund Transfer;
- (l) **"Cheque in the Electronic Form"** means a cheque which contains the exact image of a paper cheque in electronic form and is generated, written and signed in a secure system ensuring minimum safety standards as may be prescribed by the State Bank;
- (m) **"Clearing House"** means corporation, company, association, partnership, agency or other entity that provides clearing or settlement services for a Payment System;
- (n) **"Consumer"** means any person who or which avails the facility of Electronic Fund Transfer;
- (o) **"Debit Instrument"** means a Card, Access Code, or other device other than a cheque, draft or similar paper instrument, by the use of which a person may initiate an Electronic Fund Transfer;
- (p) **"Designated Payment Instrument"** means a Payment Instrument designated by the State Bank as Payment Instrument under section 12.
- (q) **"Designated Payment System"** means a Payment System designated by the State Bank under section 4 to be a Designated Payment System for the purposes of this Act;
- (r) **"Electronic"** has the same meaning as assigned to it by the Electronic Transactions Ordinance, 2002 (LI of 2002);

- (s) **"Electronic Fund or Electronic Money"** means money transferred through an Electronic Terminal, ATM, telephone instrument, computer, magnetic medium or any other electronic device so as to order, instruct or authorize a banking company, a Financial Institution or any other company or person to debit or credit an account and includes monetary value as represented by a claim on the issuer which is stored in an electronic device or Payment Instrument, issued on receipt of funds of an amount not less in value than the monetary value issued, accepted as means of payment by undertakings other than the issuer and includes electronic store of monetary value on a electronic device that may be used for making payments or as may be prescribed by the State Bank;
- (t) **"Electronic Fund Transfer"** means any transfer of funds, other than a transaction originated by cheque, draft or similar paper instrument, which is initiated through an Electronic Terminal, telephonic instrument, point-of -sale Terminal, stored value card Terminal, debit card, ATM, computer magnetic tape or any other electronic device so as to order, instruct, or authorize a Financial Institution to debit or credit an Account;
- (u) **"Electronic Money Institution"** means an undertaking, that issues means of payment in the form of Electronic Money and is duly authorized to do so;
- (v) **"Electronic Payment System"** means implementation of Payment System Electronically;
- (w) **"Electronic Terminal"** means an electronic device, operated by a consumer, through which a consumer may initiate an Electronic Fund Transfer;
- (x) **"Financial Institution"** means a financial institution as defined in the Financial Institutions (Recovery of Finances) Ordinance, 2001(XLVI of 2001) and includes a banking company or any other Electronic Money Institution or person, authorized by the State Bank in this behalf, that directly or indirectly holds an account belonging to a consumer.
- (y) **"Government"** means the Federal Government or any Provincial Government;
- (z) **"Netting"** means the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant either issues to, or receives from, one or more other participants with the result that only a net claim can be

demanded or a net obligation be owed;

- (za) **"Operator"** means any financial or other institution or any person, authorized by the State Bank to operate any Designated Payment System;
- (zb) **"Participant"** means a party to an arrangement that establishes a Payment System;
- (zc) **"Payment Instrument"** means any instrument, whether tangible or intangible, that enables a person to obtain money, goods or services or to otherwise make payment; but excludes Payment Instruments prescribed in Negotiable Instrument Act, 1881 (XXVI of 1881);
- (zd) **"Payment System"** inter-alia means a system relating to payment instruments, or transfer, clearing, payment settlement, supervision, regulation or infrastructure thereof and includes clearing, settlement or transfer of Book Entry Government Securities;
- (ze) **"Person"** includes a legal person or a body of persons whether incorporated or not.
- (zf) **"Preauthorized Electronic Fund Transfer"** means an Electronic Fund Transfer Authorized in advance;
- (zg) **"Prescribed"** means prescribed by rules, circulars, directions, orders or bye-laws.
- (zh) **"Real Time Gross Settlement System"** means a Payment System which can effect final settlement of funds, payment obligations and Book Entry Government Securities and instruments on a continuous basis during such operating hours of a processing day as the State Bank may determine on a transaction-by-transaction basis;
- (zi) **"Service Provider"** includes an operator or any other Electronic Fund Transfer Service Provider.
- (zj) **"State Bank"** means the State Bank of Pakistan established under section 3 of the State Bank of Pakistan Act, 1956 (XXXIII of 1956);
- (zk) **"Systemic Risk"** means the risk that relates to the inability of a participant to meet its obligations in the Payment System as they become due or a disruption to the Payment System that could, for whatever reason, cause other participants in the Payment System to be unable to meet their obligations as they become due; and

- (zl) **"Truncated Cheque"** means a cheque which is truncated in a secure system, during the course of a clearing cycle, by an Authorized Party, whether paying or receiving payment, immediately on capture of a scanned image, substituting physical movement of the cheque in the original form, and includes a cheque in the electronic form.

3. Powers of the State Bank.- (1) The State Bank may, generally in respect of this Act, or in respect of any particular provision of this Act, or generally in respect of payment systems, the conduct of all or any of the Service Providers, Operators of Payment Systems or issuers of Payment Instruments, issue such rules, guidelines, circulars, bye-laws, standards or directions as it may consider appropriate.

- (2) The State Bank may, by written notice, require an operator of a Designated Payment System or issuer of Designated Payment Instrument to make modifications or alterations to –

- (i) the Designated Payment System or Designated Payment Instrument including governance arrangements;
- (ii) operational arrangements;
- (iii) documents and information submitted by operator of a Payment System or issuer of Payment Instruments;
- (iv) any other documents relating to the Designated Payment System or Designated Payment Instrument.

- (3) In exercising its powers under sub-section (1), the State Bank shall have regard to-

- (i) the Systemic Risk;
- (ii) the object of the State Bank to promote monetary stability and a sound financial structure;
- (iii) the interest of the public including market conditions and behaviour;
- (iv) the safety, integrity, efficiency or reliability of the Designated Payment System or Designated Payment Instrument including security and operating standards and infrastructure arrangements;
- (v) the interests of the current Participants of the Designated Payment System or users of the Designated Payment Instruments; or
- (vi) the interests of persons who, in the future, may want access to the Designated Payment System or may want to use the

Designated Payment Instrument.

CHAPTER II

Payment Systems And Their Operation

4. Designation of Payment System.- (1) The State Bank may, if it finds it to be necessary in the public interest, by a written order designate a Payment System as a Designated Payment System.

(2) The State Bank may, in considering whether to designate a Payment System as a Designated Payment System, inspect the premises, equipment, machinery, apparatus, books or other documents, or accounts and transactions relating to the Payment System.

5. Revocation of Designation of Payment System.- (1) The State Bank may revoke the designation of a Designated Payment System if it is satisfied that –

- (i) the Designated Payment System has ceased to operate effectively as a Payment System;
- (ii) the operator of the designated system has knowingly furnished information or documents to the State Bank in connection with the designation of the Payment System which is or are false or misleading in any material particular;
- (iii) the operator or settlement institution of the Designated Payment System is in the course of being wound up or otherwise dissolved, whether in Pakistan or elsewhere;
- (iv) any of the terms and conditions of the designation or requirements of this Act has been contravened; or
- (v) the State Bank considers that it is in the public interest to revoke the designation.

(2) The State Bank shall not revoke a designation without giving the operator of the Designated Payment System an opportunity to be heard.

Provided that the State Bank may, if an immediate systemic risk is involved, suspend the designation of a Payment System without notice pending the final order.

6. Real Time Gross Settlement (RTGS) System.- (1) The State Bank may establish and operate one or more Real Time Gross Settlement Systems for the transfer of funds and settlement of payment obligations as approved by it.

- (2) A settlement system may be linked to another Payment System in Pakistan or elsewhere for the clearing or settlement of payment obligations, securities or instruments, whether or not such Payment System is operated on a real time gross settlement basis.
- (3) The State Bank may enter into agreements with participants of a settlement system and issue to the participants, in writing, rules for the operation of the settlement system.
- (4) The State Bank may, if it considers it necessary in the interest of the Payment System, stop or suspend the operation of the Payment System or stop or suspend the privileges or right of any participant or class of participants;
- (5) Without prejudice to the generality of sub-section (3), the rules provided for in the said sub-section, may provide-
 - (i) for the conduct of participants;
 - (ii) for the authentication of transactions carried out electronically;
 - (iii) for the appointment of auditors or inspectors for the auditing or inspection of the operating systems of participants in respect of the settlement system; and
 - (iv) for the payment of fees to the State Bank.

7. Requirement For Retention of Electronic Record.- Financial Institutions or other Authorized Parties providing funds transfer facility shall be required to retain complete record of electronic transactions in electronic form in the same manner as provided in section 6 of the Electronic Transactions Ordinance, 2002 (LI of 2002) for a period as may be determined by the State Bank.

8. Disqualification of Staff.- (1) No person shall be appointed to serve in any capacity by an operator of a Designated Payment System if –

- (i) such person has been adjudged a bankrupt, or has suspended payments, or has compounded a debt with his creditors, whether in or outside Pakistan, within ten years prior to the date of the appointment; or
- (ii) such person has been convicted of an offence under this Act or committed any other offence involving moral turpitude or such an offence has been compounded against him.

(2) Any person being the chairman, director, chief executive, by whatever name called, or official liquidator, or an officer of a designated payment system mismanages the affairs of the payment system or misuses his position for gaining direct or indirect benefit for himself or any of his family members or any other person, shall be disqualified to serve in any capacity in a designated payment system.

9. Effect of Disqualification.- (1) Where a person becomes disqualified, as provided for in the foregoing provisions, after his appointment –

- (i) he shall immediately cease to hold office; and
 - (ii) the operator of the Designated Payment System shall immediately terminate his appointment.
- (2) Any person disqualified under section 8, notwithstanding any contract of service, shall not be entitled to claim any compensation for his loss of office or termination of appointment.

10. Governance Arrangements.- The operator of a Designated Payment System shall establish adequate governance arrangements which are effective, accountable and transparent or which may be required by the State Bank to ensure the continued integrity of such Designated Payment System.

11. Operational Arrangement.- An Operator of a Designated Payment System shall establish the following operational arrangements:

- (i) rules and procedures setting out the rights and liabilities of the operator and the participant and the financial risks the participants may incur;
- (ii) procedures, controls and measures for the management of credit, liquidity and settlement risk, including rules determining the time when a payment instruction and a settlement is final;
- (iii) criteria for participation in the Designated Payment System; and
- (iv) measures to ensure the safety, security and operational reliability of the Designated Payment System including contingency arrangements.

CHAPTER III

Payment Instruments

12. Designation of Payment Instrument.- (1) Where the State Bank is of the opinion that

- (i) a Payment Instrument is or may be in widespread use as a means of making payment and may affect the Payment Systems of Pakistan; and
- (ii) it is necessary to protect the interest of the public or it is necessary to maintain the integrity, efficiency and reliability of a Payment Instrument, the State Bank may prescribe such Payment Instrument as a Designated Payment Instrument.

2. Where a Payment Instrument is prescribed as a Designated Payment Instrument, the issuer of such Designated Payment Instrument

shall comply with the requirements of section 13 within such period as the State Bank may specify.

13. Issuing of Designated Payment Instruments.- (1) No person shall be issued a Designated Payment Instrument unless the issuer has –

- (i) complied with the requirements of this Act;
- (ii) submitted to the State Bank the documents and information as may be prescribed thereby;
- (iii) paid the fee Prescribed by the State Bank; and
- (iv) obtained a written approval from the State Bank to issue a Designated Payment Instrument.

2. The State Bank may in giving its approval –

- (i) require all or any of the documents submitted to be modified and altered as it may deem necessary; and
 - (ii) impose such restrictions, limitations or conditions as it may deem fit.
- (3) Any Payment Instrument so issued should carry minimum security features to make its usage secure as per the current international standards.

14. Prohibition of Issuance of Payment Instruments.- (1) The State Bank may, by a written order, prohibit any person from issuing or using any Payment Instrument if, in its opinion –

- (i) the issuing or use of the Payment Instrument is detrimental to the reliable, safe, efficient and smooth operation of the Payment Systems of Pakistan or monetary policy of the State Bank;
 - (ii) the prohibition is in the interest of the public; or
 - (iii) the Payment Instrument has been issued with an object to entice or defraud the public.
 - (iv) the Person has, in the opinion of the State Bank, failed to comply with the requirements of this Act.
- (2) The State Bank may, in considering whether to prohibit any Person from issuing or using any Payment Instrument, inspect the premises, equipment, machinery, apparatus, books or other documents, or accounts and transactions of the issuer of the Payment Instrument.
- (3) Any Person causing or attempting to cause obstruction to an officer or representative of the State Bank in inspection of the premises or equipment shall, upon complaint made to a court having jurisdiction, be liable to punishment which may extend to three

years imprisonment of either description or with fine which may extend to five million rupees or with both.

- (4) The State Bank shall before passing an order under this section, give such Person a reasonable opportunity to make representation before it.

Provided that State Bank may, in appropriate cases, without notice direct a Person to immediately stop issuing a Payment Instrument, pending the final order.

15. Security - Financial Institutions and other institutions providing Electronic Funds Transfer facilities shall ensure that secure means are used for transfer, compliant with current international standards and as may be prescribed by the State Bank from time to time.

16. Third Party.- If a person other than a Financial Institution is holding a Consumer's Account, the State Bank shall by instructions ensure that the disclosures, required to be made for Electronic Fund Transfers, and the protections, responsibilities and remedies created by this Act, are made applicable to such Persons and services.

17. Payment by Truncated Cheque.- (1) Notwithstanding anything to the contrary provided in the Negotiable Instruments Act, 1881 (XXVI of 1881), or any other law, for the time being in force, Electronic Fund Transfers may be initiated by an Authorized Party by means of a truncated cheque.

- (2) In case, any transfer of funds takes place in the manner as provided in sub-section (1), the original cheque shall cease to be negotiable.

- (3) Validity of a cheque shall not be affected if for any technical reason or otherwise, transfer of funds as provided in sub-section (1) fails to take effect.

- (4) If transfer of funds does not take effect as provided in sub-section (3), the Bank or the Authorized Financial Institution concerned may require physical delivery of the cheque from the originator.

CHAPTER IV

Clearing and Other Obligations

18. Clearing Houses, Audit and Inspection.- (1) The State Bank may nominate one or more Clearing Houses to provide clearing or settlement services for a Payment System on such terms and conditions as may be determined by it.

- (2) The State Bank may, for the purposes of carrying out its functions under this Act, conduct audits and inspections of Clearing Houses,

and the Clearing House shall, as required, assist the State Bank to the extent necessary to enable it to carry out an audit or inspection.

- (3) Auditors for carrying out the purposes provided for in sub-section (1) shall be appointed with prior approval in writing of the State Bank.

19. Notice Required of Significant Changes.- Every Clearing House shall, in respect of its Designated Payment System, provide the State Bank with reasonable notice of not less than fifteen Business Days in advance of any change to be made by the Clearing House that is of a significant nature in relation to the Designated Payment System and, without limiting the generality of the foregoing, the notice shall be provided in respect of any change affecting –

- (a) the legal documents and bye-laws of the Clearing House;
- (b) the operation of the Designated Payment System;
- (c) the bye-laws, agreements, rules, procedures, guides or other documentation governing the Designated Payment System;
- (d) the composition of a board of directors of the Clearing House due to resignation or otherwise; or
- (e) the appointed auditor of the Clearing House.

20. Participants Responsible Where Clearing House Fails to Comply, etc. .- Where a Clearing House fails to comply with the obligations imposed on it under this Act in respect of its Payment System or otherwise contravenes the provisions of this Act, the Participants jointly and severally shall comply with those obligations in the same manner and to the same extent as if the participants were the Clearing House on which the obligations are imposed or they committed the contravention.

21. Settlement Provisions.- (1) Notwithstanding anything to the contrary provided in this Act or any other law for the time being in force, the settlement rules of a Designated Payment System shall be valid and binding on the operator and the participants and any action may be taken or payment made in accordance with the settlement rules.

- (2) Where the settlement rules of a Designated Payment System provide that the settlement of a payment obligation through an entry to or a payment out of an Account of a Participant or a Clearing House at the State Bank is final and irrevocable the entry or payment shall not be required to be reversed, repaid or set aside.

22. Rights, etc., Not Subject to Stay .- (1) The rights and remedies of a participant, a Clearing House, or the State Bank in respect of collateral granted to it as security for a payment or the performance of an obligation incurred in a Designated Payment System may not be the subject of any stay to be granted by any court or order affecting the ability of creditors to exercise rights and remedies with respect to the collateral.

23. Settlement Rules .- (1) The State Bank may make "settlement rules" to provide the basis on which payment obligations are calculated, netted or settled including rules for the taking of action in the event that a participant is unable or likely to become unable to meet its obligations to the Clearing House, or to the other participants.

(2) Every participant and Clearing House shall, in respect of its Designated Payment System, provide the State Bank with such information, at such times and in such form as the State Bank may require in writing.

24. Electronic Money Institution.- (1) An applicant that wants to become an Electronic Money Institution shall submit an application to the State Bank for issue of a license to perform Electronic Money activity.

(2) An Electronic Money Institution may perform only such activities as are specified in its license;

25. Preservation of Rights, etc. .- (1) Except to the extent expressly provided, this Act shall not operate to limit, restrict or otherwise affect -

(i) any right, title, interest, privilege, obligation or liability of a person resulting from any transaction in respect of a transfer order which has been entered into a Designated Payment System; or

(ii) any investigation, legal proceeding or remedy in respect of any such right, title, interest, privilege, obligation or liability.

(2) Nothing in this Act shall be construed to require.

(i) the unwinding of any Netting done by the operator of a Designated Payment System, whether pursuant to its default arrangements or otherwise;

(ii) the revocation of any transfer order given by a participant which is entered into a Designated Payment System; or

(iii) the reversal of a payment or settlement made under the rules of a Designated Payment System.

CHAPTER V

Supervisory Control of the State Bank

26. Issuance of Model Clauses.- The State Bank may issue model clauses for use by the Financial Institutions and Authorized Parties to facilitate compliance with the disclosure requirements as specified in section 29 and to aid consumers in understanding the rights and responsibilities of participants in Electronic Fund

Transfers by utilizing readily understandable language.

27. Modification of Requirements.- Instructions issued by the State Bank may provide for such adjustments and exceptions for any class of Electronic Fund Transfers, as in the opinion of the State Bank are necessary or proper for the purposes of this Act, to prevent circumvention or evasion thereof, to facilitate compliance therewith and to alleviate any undue compliance burden on small Financial Institutions.

28. Service Providers Other Than Financial Institutions.- The State Bank shall determine, which provisions of this Act, subject to any modifications, adjustments or exceptions as provided for in section 26, shall apply to a person other than a Financial Institution, holding a Consumer's Account.

29. Requirement of Notice.- (1) The instructions issued by the State Bank under section 3 shall require any ATM Operator or any other Service Provider who imposes a fee on any consumer for providing services to such consumer, to provide notice in accordance with sub-sections (2) and (3) to the consumer of the fact that –

- (i) a fee is imposed by such operator or Service Provider for providing the service; and
- (ii) the amount of any such fee.
- (2) The notice required by sub-section (1) with respect to any fee shall be posted at a prominent and conspicuous location on or at the ATM or other Electronic Terminal at which the consumer initiates the Electronic Fund Transfer.
- (3) The notice required under sub-section (1) with respect to charging of fee shall appear on the conspicuous part of the ATM or Electronic Terminal in the manner as may be determined and notified by the State Bank in this behalf.
- (4) No fee may be imposed by any ATM Operator or other Service Provider, as the case may be, in connection with any Electronic Fund Transfer initiated by a consumer for which a notice is required under sub-section (1), unless the consumer receives such notice in accordance with sub-sections (2) and (3) and such consumer elects to continue in the manner necessary to effect the transaction after receiving such notice.

30. Terms and Conditions of Transfers.- (1) The terms and conditions of Electronic Fund Transfers involving a Consumer's Account shall be disclosed by a Financial Institution, operator or other Authorized Party in English and in a manner clearly understood by the consumer, at the time the Consumer contracts for an Electronic Fund Transfer service, in accordance with the instructions of the State Bank.

(2) Such disclosures may include the following, namely:-

- (i) the Consumer's liability for unauthorized Electronic Fund Transfers and, at the option of the Financial Institution or Authorized Party or Operator, notice of the advisability of prompt reporting of any loss, theft, or unauthorized use of a Card, Access Code or other means of access;**
- (ii) the telephone number and address of the Person or office to be notified in the event the Consumer believes that an unauthorized Electronic Fund Transfer has been or may be effected;**
- (iii) the kind and nature of Electronic Fund Transfers which the Consumer may initiate, including any limitations on the frequency or amount of such transfers;**
- (iv) any charges for Electronic Fund Transfers or for the right to make such transfers;**
- (v) the Consumer's right to stop payment of a Preauthorized Electronic Fund Transfer and the procedure to initiate such a stop payment order;**
- (vi) the Consumer's right to receive information of Electronic Fund Transfers under section 29;**
- (vii) a summary, in a form Prescribed by the State Bank, of the error resolution provisions of section 36 which, the Financial Institutions, Authorized Parties or Operators shall be required to transmit at least once per calendar year;**
- (viii) the Financial Institution's, Authorized Party's or Operator's liability to the Consumer;**
- (ix) the circumstances under which the Financial Institution, Authorized Party or Operator will in the ordinary course of business disclose information concerning the Consumer's Account to third Persons; and**
- (x) a notice to the Consumer that a fee may be imposed by an ATM Operator or Service Provider, if the Consumer initiates a transfer from an ATM or other Electronic Terminal that is not operated by the Person or the Financial Institution issuing the Card or other means of access.**

31. Notification of Changes.- (1) A Financial Institution or any other Authorized party, shall notify a Consumer in writing or such other means as may be

prescribed by the State Bank from time to time, at least twenty-one days prior to the effective date of any material change in any term or condition of the Consumer's Account required to be disclosed under sub-section (1) of section 29, unless such change is immediately necessary to maintain or restore the security of an Electronic Fund Transfer system or a Consumer's Account.

- (2) Financial Institution shall be required to make a subsequent notification, provided for in sub-section (1), if such a change is made permanent.

CHAPTER VI

Documentation of Transfers

32. Availability of Documentation and Proof.- For each Electronic Fund Transfer initiated by a Consumer from an Electronic Terminal, the Financial Institution holding such Consumer's Account shall, directly or indirectly, at the time the transfer is initiated, make available to the Consumer documentation and proof of such transfer, clearly setting forth, as may be required by such transaction, the following particulars, namely –

- (i) the amount involved and the date on which the transfer is initiated;
- (ii) the type of transfer;
- (iii) the identity of the Consumer's Account with the Financial Institution from which or to which funds are transferred;
- (iv) the identity of any third party to whom or from whom funds are transferred;
- (v) the location or identification of the Electronic Terminal involved; and
- (vi) name of the Accountholder from or to which funds are transferred.

33. Periodic Statement.- (1) A Financial Institution shall provide each consumer with a periodic statement for each account of such consumer that may be accessed electronically.

- (2) Such statement shall be provided at least once every month, or as required by the consumer, or such other period as the State Bank may determine from time to time.
- (3) Such statement shall include all the necessary particulars in respect of the Consumer's Account and shall clearly set forth the balances in Consumer's Account at the beginning and the close of the period, the amount of any fee or charge assessed by the Financial Institution during the period, for whatever purpose and the address and telephone number to be used by the Financial Institution for the

purpose of receiving any enquiry or notice of account error from the Consumer.

34. Documentation as Evidence.- In any action involving a Consumer or any Participant, any documentation required by either section 31 or 32 of this Act to be given to the Consumer, which indicates that an Electronic Fund Transfer was made to another Person, shall be admissible as evidence of such transfer and shall constitute prima facie proof that such transfer was made.

35. Preauthorized Transfers.- (1) A preauthorized Electronic Fund Transfer from a Consumer's Account may be authorized by the Consumer either in writing, or in any other accepted form.

(2) A consumer may stop payment of a Preauthorized Electronic Fund Transfer by notifying the Financial Institution.

CHAPTER VII

Notification of Error

36. Notification of error.- (1) In this section, the following shall be construed as error, namely –

- (i) an unauthorized Electronic Fund Transfer;
 - (ii) an incorrect Electronic Fund Transfer to or from the Consumer's Account.
 - (iii) the omission of an Electronic Fund Transfer from a periodic statement;
 - (iv) a computational or book keeping error made by the Financial Institution relating to an Electronic Fund Transfer;
 - (v) the Consumer's receipt of an incorrect amount of money from an Electronic Terminal; or
 - (vi) any other error as determined by the State Bank.
- (2) When an error has occurred, the Financial Institution or the Authorized Party shall investigate the alleged error to determine whether an error has occurred, and report in writing the result of such investigation to the consumer within ten Business Days.
- (3) The Financial Institution may require written confirmation to be provided to it within ten Business Days of an oral notification of error.
- (4) A Financial Institution or Authorized Party shall not be liable to credit a Consumer's Account in accordance with the provisions of section 37 in case no error is found pursuant to investigation under sub-

section (2) and or the written confirmation required by it is not received by it within the ten days period, provided for in sub-section (3).

37. Correcting Error.- If the Financial Institution or Authorized Party determines that an error did occur, it shall promptly, and in no event later than one Business Day after such determination, correct the error, including the crediting of a Consumer's Account with mark up where applicable:

Provided that such investigation shall be concluded not later than ten Business Days after receipt of notice of the error

38. Absence of Error.- If the Financial Institution or the Authorized Party determines after its investigation that an error did not occur, it shall deliver or mail to the consumer an explanation of its findings within three Business Days after the conclusion of its investigation, and upon request of the consumer promptly deliver or mail to the consumer copies of all documents which the Financial Institution or the Authorized Party relied on to conclude that such error did not occur.

39. Triple Damages.- (1) If in any case filed under section 50 of this Act, the court finds that a Financial Institution and/or an Authorized Party is guilty of the commission of any act, provided for in sub-section (2) or (3) of this section, the Financial Institution, shall in addition to costs incurred by the consumer, be further liable to pay to the Consumer, triple damages determined under section 50.

(2) The Financial Institution or the Authorized Party shall be liable to pay damages, provided for in sub-section (1), if it did not re-credit a Consumer's Account within the ten days period specified in section 37 and the Financial Institution and/ or the Authorized Party did not make a good faith investigation of the alleged error or it did not have reasonable basis for believing that the Consumer's Account was not in error.

(3) The Financial Institution or the Authorized Party shall also be liable to pay damages, provided in sub-section (1), if it knowingly and willfully concluded that the Consumer's Account was not in error when such conclusion could not reasonably have been drawn from the evidence available to the Financial Institution or the Authorized Party at the time of its investigation.

CHAPTER VIII

Liability of Parties

40. Consumer's Liability.- A consumer shall be liable for any unauthorized Electronic Fund Transfer involving the Account of such consumer only if the card or other means of access utilized for such transfer was an Accepted Card or

other means of access and if the issuer of such card, code or other means of access has provided a means whereby the user of such card, code or other means of access can be identified as the person authorized to use it, such as by signature, photograph, or finger print or by electronic or mechanical confirmation.

41. Burden of Proof.- In any action which involves a consumer's liability for an unauthorized Electronic Fund Transfer, the burden of proof shall be upon the Financial Institution or the Authorized Party to show that the Electronic Fund Transfer was authorized or, if the Electronic Fund Transfer was authorized, then the burden of proof shall be upon the Financial Institution or the Authorized Party to establish that the conditions of liability set forth in this Act were met, and the disclosures required to be made to the consumer under this Act were in fact made in accordance with the provision thereof.

42. Liability in Case of Extension of Credit.- In the event of transaction which involves both an unauthorized Electronic Fund Transfer and an extension of credit limit pursuant to an agreement between the consumer and the Financial Institution or the Authorized Party, nothing shall impose liability upon a consumer for an unauthorized Electronic Fund Transfer in excess of his liability for such transfer under any other applicable law or under any agreement with the Consumer's Financial Institution or Authorized Party.

43. Liability of Financial Institutions/ Authorized Parties.- Subject to what is provided in this section or section 44, a Financial Institution or the Authorized Party shall be liable to a consumer for all damages proximately caused by –

- (i) the Financial Institution's or Authorized Party's failure to make an Electronic Fund Transfer, in accordance with the terms and conditions of an Account, in the correct amount or in a timely manner when properly instructed to do so by the consumer, except where-
 - (a) the Consumer's Account has insufficient funds;
 - (b) the funds are subject to legal process or other encumbrance restricting such transfer;
 - (c) such transfer would exceed an established credit limit;
 - (d) as otherwise provided in instructions by the State Bank.
- (ii) the Financial Institution's or Authorized Party's failure to make an Electronic Fund Transfer due to insufficient funds when the Financial Institution or Authorized Party failed to credit, in accordance with the terms and conditions of an Account, a deposit of funds to the Consumer's Account which would have provided sufficient funds to make the transfer, and

- (iii) the Financial Institution's or Authorized Party's failure to stop payment of Preauthorized transfer from a Consumer's Account when instructed to do so in accordance with the terms and conditions of Account.

44. Force Majeure.- A Financial Institution, an Authorized Party, Operator or a Participant shall not be liable under clauses (i) and (ii) of section 43 if it shows by a preponderance of evidence that its action or failure to act resulted from –

- (i) force majeure or other circumstance beyond its control, that it exercised reasonable care to prevent such an occurrence, and that it exercised such diligence as the circumstances required;
- (ii) a technical malfunction which was known to the Consumer at the time he attempted to initiate an Electronic Fund Transfer or, in case of Preauthorized transfer, at the time such transfer should have occurred

45. Intent.- In case of failure described in clauses (i) and (ii) of section 43 was not intentional and it resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid any such error, the Financial Institution, Authorized Party, operator or the participant shall be liable for actual damages proved.

46. Prohibition on Improper Issuance.- No person may issue to a Consumer any Card, code or other means of access to such Consumer's Account for the purpose of initiating an Electronic Funds Transfer other than in response to a request or application therefor; or as a renewal of, or in substitution for, an Accepted Card, code or other means of access, whether issued by the initial issuer or a successor.

47. Exceptions.- (1) Notwithstanding the provisions of section 46, a person may distribute to a consumer on an unsolicited basis a card, code or other means of access for use in initiating an Electronic Fund Transfer from such Consumer's account if –

- (i) such card, code or other means of access is not validated;
- (ii) such distribution is accompanied by a complete disclosure, in accordance with section 29 of the Consumers' rights and liabilities which will apply if such Card, code or other means of access is validated;
- (iii) such distribution is accompanied by a clear explanation, in accordance with instructions of the State Bank, that such card, code, or other means of access is not validated and how the Consumer may dispose of such code, card, or other means of access if validation is not desired and such Card, code, or other means of access is validated only in response to a request or application from the

Consumer, upon verification of the Consumer's identity.

- (2) For the purpose of this section, a card, code, or other means of access is validated when it may be used to initiate an Electronic Fund Transfer.

48. Suspension of Obligation - If a technical malfunction prevents the effectuation of an Electronic Fund Transfer initiated by a consumer to another person, and such other person has agreed to accept payment by such means, the Consumer's obligation to the other person shall be suspended until the malfunction is corrected and the Electronic Fund Transfer may be completed, unless such other Person has subsequently, by written request, demanded payment by means other than an Electronic Fund Transfer.

49. Waiver of Rights.- No writing or other agreement between a Consumer and any other Person may contain any provision which constitutes a waiver of any right conferred or cause of action created by this Act, and any such writing waiving any right or cause of action shall be void and of no legal effect.

CHAPTER IX

Action Before the Court

50. Damages.- Except as otherwise provided by this section or the provisions of this Act, any person who fails to comply with any provision of this Act with respect to any other person, except for an error resolved in accordance with the provisions of this Act, shall, upon an action brought before a court, be liable to such person for payment of an amount equal to the sum of any actual damage sustained by that person as a result of such failure.

51. Bonafide Error. - Except as provided by section 50, a person may not be held liable in any action brought under this chapter for any violation of this Act if the person shows by preponderance of evidence that the violation was not intentional and resulted from a bonafide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error.

52. Actions Taken in Good Faith.- (1) The provisions of section 50 shall not apply to any act done or omitted in good faith, or purported to be done in conformity with any rule, instruction or interpretation of approval by an official of the State Bank duly authorized to issue such interpretations or approvals under such procedure of the State Bank as may be prescribed for.

- (2) A Financial Institution or an Authorized Party shall not incur any liability under section 50 on account of any failure to make a disclosure in proper form, if such institution utilized an appropriate model clause issued by the State Bank, notwithstanding the fact that after such act, omission, or failure has occurred, such rule, instruction, approval or model clause

under sub-section (1) was amended, rescinded or determined by judicial or other authority as invalid for any reason.

53. Notification to Consumer Prior to Action.- A person shall not incur any liability for any failure to comply with any requirement under this Act, if prior to the institution of an action under this Act, such person notifies the consumer concerned of the failure, complies with the requirements of this Act and makes an appropriate adjustment to the Consumer's account and pays actual damages or, where applicable, damages in accordance with section 39.

54. Action in Bad Faith.- On finding by the court that an unsuccessful action for any alleged failure was brought in bad faith or for the purposes of harassment, the court may award to the defendant(s) costs of such litigation and the attorney's fees found reasonable in relation to the work.

55. Jurisdiction of Courts.- (1) With regard to the amount in controversy, any civil action under this Act may be brought in any court of competent jurisdiction.

(2) The court exercising jurisdiction shall not adjourn the case for more than ten days at a time; provided that the aggregate of adjournments granted to the defendant shall not exceed three.

(3) The court shall announce its judgment within ninety days after notice upon the defendant in the case was first served.

56. Criminal Liability.- Whoever knowingly and willfully gives false information or inaccurate information or fails to provide information which he is required to disclose by this Act or any instruction issued thereunder, or otherwise fails to comply with any provision of this Act shall be punished with imprisonment of either description which may extend to three years, or with fine which may extend to three million rupees, or with both.

57. Violations Affecting Electronic Commerce.- Whoever –

(1) knowingly, in a transaction effected by electronic commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained Debit Instrument to obtain money, goods, services or anything else of value aggregating five thousand rupees or more, or

(2) knowingly receives, conceals, uses or transports money, goods, services or anything else of value aggregating five thousand rupees or more obtained by use of any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained Debit Instrument, or

(3) knowingly receives, conceals, uses, sells, or transports one or more tickets for transportation, and which have been purchased or obtained with one or more counterfeit, fictitious, altered, forged,

lost, stolen or fraudulently obtained Debit Instrument,

shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine which may extend to one million rupees, or with both.

Explanation.-For the purpose of this section e-commerce means the activity of buying, selling or contracting for goods, services and making payments using internet or worldwide web through communication networks including of wireless networks, within or outside Pakistan.

58. Cheating by Use of Electronic Device.- Whosoever cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is, or by cheating by impersonation, fraudulently or dishonestly uses any credit or debit card, or code or any other means of access to an Electronic Fund Transfer device, and thereby causes any wrongful gain to himself or any wrongful loss to any other person, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine which shall not be less than the wrongful loss caused to any person, or with both.

CHAPTER X

Miscellaneous

59. Act to override Law of Insolvency: (1) Notwithstanding anything to the contrary provided in the law of insolvency, rights and liabilities of persons arising from transfer orders in this Act shall be governed subject to the provisions of this section, in case such person is a participant.

- (2) No transfer order passed under this Act, any disposition of property in pursuance of such order, or the default arrangements of a designated system shall be regarded to any extent as invalid on the ground of inconsistency with the law of insolvency.
- (3) No order of the court or any office holder acting under the law of insolvency shall interfere with settlement of a transfer order passed in accordance with the rules of the designated system.
- (4) A debt or other liability arising out of a transfer order which is the subject of action taken under default arrangements, may not be proved in a bankruptcy or winding up proceedings, or may not be taken into account for the purpose of any set-off until the completion of the action taken under default arrangements.
- (5) The Netting arrangement shall be valid and enforceable and an operator or participant of a designated system shall be required to

give effect to such arrangement.

- (6) Nothing in this section shall be construed to require the unwinding of any netting or gross payment done by the operator of a Designated Payment System, whether pursuant to its default arrangements or otherwise:

Provided that this section shall not apply in relation to any transfer order which is entered into a Designated Payment System after the expiry of the day on which a court made an order for insolvency, judicial management or winding up in respect of the participant, or after a resolution for voluntary winding up of the participant was passed.

Explanation.- In this section "Default Arrangements" means the arrangements put in place by a designated system to limit systemic and other kinds of risks which arise in the event of a participant appearing to be unable, or likely to become unable, to meet its obligations in respect of a transfer order, including any arrangements for netting.

60. Operator of Designated Payment System Insolvent: (1) Where the State Bank is satisfied that any operator of a Designated Payment System is insolvent or likely to become insolvent, or has become or likely to become unable to meet all or any of his obligations, or has suspended payments or compounded with his creditors, or where it is in the public interest, State Bank may:

- (i) assume control of the whole of the property, business and affairs of the operator of the Designated Payment System and carry on the whole of his business and affairs and appoint its own officers, or assume control of such part of its property, business and affairs and carry on such part of its business and affairs as the State Bank may determine, and it may further order that the cost and expenses of the State Bank or the remuneration of any Person so appointed by the State Bank, may be paid out of the funds and properties of the operator of the Designated Payment System which shall be regarded as the first charge thereon; and
 - (ii) take any action or initiate any proceedings against the operator under the law of insolvency, whether or not an order has been made under the preceding sub-section
- (2) No order under this section shall be made unless the operator of a Designated Payment System or any director or officer of the operator of the Designated Payment System in respect of which an order is to be made, or who in pursuance of such order is to be removed from office, has been given a reasonable opportunity of making representation against the proposed order.

Provided that State Bank may, if an immediate systemic risk is

involved, take immediate action under this section pending the final order.

61. Application of Fine.- A court imposing any fine under this Act may direct that the whole or any part thereof shall be applied towards compensation to the aggrieved person for any loss caused by the person committing an offence under this Act.

62. Power to Investigate.- (1) Notwithstanding anything to the contrary provided by any other law for the time being in force, any information relating to commission of an offence under this Act shall be recorded in writing by an officer-in-charge of a police station, generally empowered in this behalf under the Code of Criminal Procedure, 1898 (Act V of 1898).

(2) Investigation of offences committed under this Act shall be carried out by an officer-in-charge of the police station empowered under the Code of Criminal Procedure, 1898 (Act V of 1898) to exercise such powers, including power to examine witnesses, to arrest any person or to seize any document or thing or search any place, and do all other acts or things necessary for such purpose;

Provided that such officer shall be subject to the same restrictions in respect of any document or record of a financial or Electronic Money Institution as is provided in respect of documents in custody of a Bank or a banker in section 94 of the Code of Criminal Procedure 1898 (Act V of 1898).

63. Trial of Offence.- (1) Notwithstanding anything to the contrary provided by any other law for the time being in force, offences provided for in Chapter IX of this Act shall be tried by the Court of Sessions, having territorial jurisdiction in the case, which shall observe the same procedure as provided for trial of offences by the Code of Criminal Procedure, 1898 (Act V of 1898).

(2) Cognizance shall be taken by the court upon a report of facts made in writing by a police officer or upon receiving a complaint of facts which constitute the offence.

(3) In case of a complaint, the court may postpone the issue of process for attendance of the person complained against and refer the complaint to the officer-in-charge of a police station for investigation and report.

64. Application to acts done outside Pakistan.- The provisions of this Act shall apply notwithstanding the matters being the subject hereof occurring outside Pakistan, in so far as they are directly or indirectly connected to, or have an effect on or bearing in relation to persons, Payment Systems or events within the territorial jurisdiction of Pakistan.

65. Offences to be non-cognizable etc. – Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), all offences under this Act are bailable, non-cognizable and compoundable with the permission of the court.

66. Procedure.- (1) Notwithstanding anything to the contrary provided in this Act or any other law for the time being in force, no Court or authority or officer shall take cognizance of any offence against this Act which is alleged to have been committed by any person, party, participant, Service Provider, operator or Financial Institution or any officer or auditor thereof, who is authorized, licensed or designated under the Act, except on the complaint in writing of the State Bank:

Provided that nothing in this sub-section shall apply to a prosecution by a person, party, participant, Service Provider, operator or Financial Institution or any of its officers or employees:

Provided further that, where the State Bank is itself empowered to impose a penalty or fine, it may take cognizance of the offence and start proceedings on the basis of a memorandum of allegations placed on record by an officer of State Bank

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), the personal attendance of the complainant before the Court or authority trying the offence shall not be necessary unless the Court, for reasons to be recorded, requires his personal attendance at the trial.

67. Overriding Effect.- This Act shall have effect notwithstanding anything to the contrary provided in any other law for the time being in force or any agreement, contract, memorandum or articles of association.

68. Removal of Difficulties.- If any difficulty arises in giving effect to any provision of this Act, the Federal Government may, in consultation with the State Bank, make such order as appears to it to be necessary for the purpose of removing the difficulty.

69. Power to Call For Information.- (1) The State Bank may direct any Financial Institution or Service Provider or any other Authorized Party to give or furnish to the State Bank, within such time as the State Bank may specify in this behalf, such information, documents or records in respect of any business carried on by such institution or Service Provider or other Authorized Party, as may be within its knowledge or under its possession, custody or control.

(2) If such institution or Service Provider or other Authorized party fails or omits to furnish any information required by the State Bank under sub-section (1) or willfully makes a statement which is false in any material particular it shall be liable to get its license under section 24 withdrawn by the State Bank and to pay a fine which may extend to one million rupees.

- (3) Any party or person aggrieved by an order passed under sub-section (2) may appeal within fifteen days of such order to the Governor of the State Bank, who shall dispose of the appeal within sixty days.

70. Secrecy and Privacy.- (1) A Financial Institution or any other Authorized party shall, except as otherwise required by law, not divulge any information relating to an Electronic Fund Transfer, affairs or account of its consumer, except in circumstances in which, according to the practice and usage customary among bankers, it is necessary or appropriate for a Financial Institution to divulge such information, or the consumer has given consent therefor.

- (2) No person other than an officer or agent appointed by the Financial Institution that maintains the account of a consumer may have access through an Electronic Terminal to information relating to Electronic Fund Transfer, the affairs, or the account of the consumer.

- (3) The rules governing the operation of individual accounts will be

applicable to Electronic Fund Transfers in relation to disclosure of information to third parties.

71. Complaint Resolution.- (1) A consumer, not satisfied with the outcome of a complaint made to a Financial Institution in relation to any Electronic Fund Transfer or disclosure made by a Financial Institution to a third party, without prejudice to any right to seek any other remedy under the law, may make a complaint to the State Bank.

- (2) The State Bank after hearing the parties may pass such order as it deems fit under the circumstances of the case.

72. Suspension of Operation.- (1) The Federal Government in consultation with the State Bank may by a general order, for the time being suspend operation of any provision of this Act, and from the date of such order, such provision shall cease to apply.

- (2) When the order made under sub-section (1) is withdrawn by the Federal

Government such suspension shall cease to operate with effect from the date specified by the Federal Government in this behalf.

73. Immunity of the State Bank and its Employees, etc. .- (1) No suit or other legal proceedings shall lie against the State Bank or any officer or employee thereof or any person acting under its direction:

- (i) for any act done in good faith,-

- (a) in the performance, or intended performance, of any function or duty; or

(b) in the exercise, or intended exercise, of any power, in the capacity of the State Bank as the designated Bank under this Act; or

(ii) for any neglect or default in the performance or exercise in good faith of such function, duty or power.

74. Penalties.- (1) Any financial Institution or Service Provider, who willfully fails to comply with any provision of this Act or rules, circulars, directions, orders or bye-laws issued under this Act or any provision thereof, shall be liable to pay fine to the State Bank which may extend to one million rupees.

(2) In case of failure to pay the fine, State Bank may suspend or revoke the license of the Service Provider or Financial Institution concerned, as the case may be.

(3) If any amount of fine under sub-section (1) remains unpaid, it may be recovered as arrears of land revenue."

***PAYMENT SYSTEMS
AND ELECTRONIC
FUND TRANSFERS
ACT, 2005***

A BILL

AN ACT TO PROVIDE REGULATORY FRAMEWORK FOR PAYMENT SYSTEMS AND ELECTRONIC FUND TRANSFERS.

WHEREAS it is necessary to supervise and regulate payment systems and electronic fund transfers in Pakistan and to provide minimum standards for protection of the customers and to determine respective rights and liabilities of the financial institutions, their customers and participants;

It is hereby enacted as follows:-

CHAPTER I PRELIMINARY

1. **Short title, extent and commencement.**- (1) This Act may be called the Payment Systems and Electronic Fund Transfers Act, 2005.
 - (2) It extends to the whole of Pakistan.
 - (3) It shall come into force at once.
2. **Definitions.**- In this Act, unless there is anything repugnant in the subject or context –
 - (a) “Accepted Card” means a card, code or other means of access to a consumer’s account for the purpose of initiating electronic fund transfers;
 - (b) “Access code” includes pin, password or code, which provides a means of access to a consumer’s account for the purpose of initiating an electronic fund transfer;
 - (c) “Account” means a current deposit, saving deposit, or any other account maintained by a consumer in a financial institution in which credits and debits may be effected by virtue of electronic fund transfers;

- (d) **"Automated teller machine operator"** means any person or a financial institution operating any automated teller machine at which consumers initiate electronic fund transfers;
- (e) **"Book-Entry Government securities"** means any securities issued by the Government under any written law transferable by a book-entry on a register or otherwise;
- (f) **"Business day"** means any day on which the offices of the consumer's financial institution involved in electronic fund transfer are open to the public;
- (g) **"Card"** means any card including an ATM card, EFT POS card, debit card, credit card or stored value card, used by a consumer to effect an electronic fund transfer;
- (h) **"Clearing House"** means a corporation, association, partnership, agency or other entity that provides clearing or settlement services for a payment system;
- (i) **"Code"** for the purposes of investigation and trial of offences under this Act means the Code of Criminal Procedure (Act V of 1898);
- (j) **"Consumer"** means any person including a legal person;
- (k) **"Debit instrument"** means a card, code, or other device other than a cheque, draft or similar paper instrument, by the use of which a person may initiate an electronic fund transfer;
- (l) **"Designated Payment Instrument"** means a payment instrument designated as payment instrument under section 12 to be a designated payment instrument for the purposes of this Act;
- (m) **"Designated payment system"** means a payment system designated by the State Bank under section 4 to be a designated payment system for the purposes of this Act;
- (n) **"Electronic"** has the same meaning as assigned to it by Electronic Transactions Ordinance, 2002;

- (o) **"Electronic fund or Electronic money"** means money transferred through an electronic terminal, telephone instrument, computer, magnetic medium or any other electronic device so as to order, instruct or authorize a banking company, a financial institution or any other company or person to debit or credit an account and includes monetary value as represented by a claim on the issuer which is stored in an electronic device or payment instrument, issued on receipt of funds of an amount not less in value than the monetary value issued, accepted as means of payment by undertakings other than the issuer and includes electronic store of monetary value on a technical device that may be used for making payments;
- (p) **"Electronic fund transfer"** means any transfer of funds, other than a transaction originated by cheque, draft or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, point-of-sale terminal, stored value card terminal, debit card, automated teller machine, computer magnetic tape or any other electronic device so as to order, instruct, or authorize a financial institution to debit or credit an account;
- (q) **"Electronic Money institution"** means an undertaking, that issues means of payment in the form of electronic money and is duly authorized to do so ;
- (r) **"Electronic Payment System"** means implementation of payment system electronically;
- (s) **"Electronic terminal"** means an electronic device, other than a telephone, operated by a consumer, through which a consumer may initiate an electronic fund transfer;
- (t) **"Financial institution"** means an institution as is defined in the Financial Institutions (Recovery of Finances) Ordinance, 2001 or any other institution or person that directly or indirectly holds an account belonging to a consumer, or that issues a card and agrees with the consumer to provide electronic fund transfer services and includes a banking company as defined in the Banking Companies Ordinance, 1962.

- (u) **"Government"** means the Federal or any Provincial government of Pakistan;
- (v) **"Netting"** means the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant either issues to, or receives from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed;
- (w) **"Participant"** means a party to an arrangement that establishes a payment system;
- (x) **"Payment Instrument"** means any instrument, whether tangible or intangible, that enables a person to obtain money, goods or services or to otherwise make payment; but excludes payment instruments prescribed in Negotiable Instrument Act 1881;
- (y) **"Payment system"** inter-alia means a system relating to payment instruments, or transfer, clearing, payment settlement, supervision, regulation or infrastructure thereof and includes clearing, settlement or transfer of book entry government securities;
- (z) **"Pre-authorised electronic fund transfer"** means an electronic fund transfer authorised in advance;
- (aa) **"prescribed"** means prescribed by rules;
- (bb) **"State Bank"** means the State Bank of Pakistan established under section 3 of the State Bank of Pakistan Act, 1956;
- (cc) **"Systemic risk"** means the risk that the inability of a participant to meet its obligations in the payment system as they become due or a disruption to the payment system could, for whatever reason, cause other participants in the payment system to be unable to meet their obligations as they become due;
- (dd) **"Real-time gross settlement system"** means a payment system which can effect final settlement of funds, payment obligations and book entry securities and instruments on a continuous basis during such operating hours of a processing day as the State Bank may determine on a transaction-by-transaction basis;

3. **Powers of the State Bank.-** (1) The State Bank may, generally in respect of this Act, or in respect of any particular provision of this Act, or generally in respect of the conduct of all or any of the operators of payment systems or issuers of payment instruments, issue such rules, guidelines, circulars, standards or directions as it may consider desirable.
- (2) The guidelines, circulars or directions issued by the State Bank shall have the same force as rules made under this Act.
- (3) The State Bank may, by written notice, require an operator of a designated payment system or issuer of a designated payment instrument to make modifications or alterations to –
- (i) the designated payment system or designated payment instrument including governance arrangements;
 - (ii) operational arrangements;
 - (iii) documents and information submitted by operator of a payment system or issuer of payment instruments;
 - (iv) any other documents relating to the designated payment system or designated payment instrument.
- (4) In exercising its powers under sub-section (1), the State Bank shall have regard to-
- (i) Systemic risk;
 - (ii) The object of the Bank to promote monetary stability and a sound financial structure;
 - (iii) The interest of the public including market conditions and behaviour;
 - (iv) The safety, integrity, efficiency or reliability of the designated payment system or designated payment instrument including security and operating standards and infrastructure arrangements;
 - (v) The interests of the current participants of the designated payment system or users of the designated payment instruments; or

- (vi) The interests of persons who, in the future, may want access to the designated payment system or may want to use the designated payment instrument.

CHAPTER II

Payment Systems And Their Operation

4. **Designation of payment system.-** (1) The State Bank may, by order published in the Official Gazette, designate a payment system as a designated payment system, if it is of the opinion that --
 - (i) The payment system poses systemic risk; or
 - (ii) The designation is necessary to protect the interest of the public.

(2) The State Bank may, in considering whether to designate a payment system as a designated payment system, inspect the premises, equipment, machinery, apparatus, books or other documents, or accounts and transactions relating to the payment system.
5. **Revocation of designation of Payment System.-** (1) The State Bank may, by order published in the Official Gazette, revoke the designation of a designated payment system if it is satisfied that
 - (i) the designated payment system has ceased to operate as a payment system;
 - (ii) the operator of the designated system has knowingly furnished information or documents to the State Bank in connection with the designation of the payment system which is or are false or misleading in any material particular;
 - (iii) the operator or settlement institution of the designated payment system is in the course of being wound up or otherwise dissolved, whether in Pakistan or elsewhere;

- (iv) any of the terms and conditions of the designation has been contravened; or
- (v) the State Bank considers that it is in the public interest to revoke the designation.

- (2) The State Bank shall not revoke a designation without giving the operator of the designated payment system an opportunity to be heard.

6. Real-time Gross Settlement (RTGS) System.- (1) The State Bank may establish and operate one or more real-time gross settlement systems for the transfer of funds and settlement of payment obligations as approved by it.

- (2) A settlement system may be linked to another payment system in Pakistan or elsewhere for the clearing or settlement of payment obligations, securities or instruments, whether or not such payment system is operated on a real-time gross settlement basis.
- (3) The State Bank may enter into agreements with participants of a settlement system and issue to the participants in writing rules for the operation of the settlement system.
- (4) The State Bank may, if it considers it necessary in the interests of the payment system, stop or suspend the operation of the payment system or stop or suspend the privileges or right of any participant or class of participants;
- (5) Without prejudice to the generality of sub-section (3), the rules provided for in the said sub-section, may provide-
 - (i) for the conduct of participants;
 - (ii) for the authentication of transactions carried out electronically;
 - (iii) for the appointment of auditors or inspectors for the auditing or inspection of the operating systems of participants in respect of the settlement system; and

(iv) for the payment of fees to the State Bank.

7. **Requirement for retention of electronic record.-** Financial institutions or other institutions providing funds transfer facility shall be required to retain complete record of electronic transactions in electronic form in the same manner as provided in section 6 of the Electronic Transactions Ordinance, 2002 for a period as may be determined by the State Bank.

8. **Disqualification of staff.-** A person shall be disqualified from being appointed as an officer of an operator of a designated payment system if –

- (i) such person has been adjudged a bankrupt, or has suspended payments, or has compounded with his creditors, whether in or outside Pakistan, within ten years prior to the date of the appointment;
- (ii) such person has been convicted of an offence under this Act or committed any other offence involving moral turpitude or such an offence has been compounded against him.

9. **Effect of disqualification.-** (1) Where a person becomes disqualified, as provided for in the foregoing provisions, after his appointment –

- (i) He shall immediately cease to hold office; and
- (ii) The operator of the designated payment system shall immediately terminate his appointment.

(2) That person, notwithstanding any contract of service, shall not be entitled to claim any compensation for his loss of office or termination of appointment.

10. **Governance arrangements.-** The operator of a designated payment system shall establish adequate governance arrangements which are effective, accountable and transparent or which may be required by the State Bank to ensure the continued integrity of such designated payment system.

11. Operational arrangement.- An operator of a designated payment system shall establish the following operational arrangements:

- (i) rules and procedures setting out the rights and liabilities of the operator and the participant and the financial risks the participant may incur;
- (ii) procedures, controls and measures for the management of credit, liquidity and settlement risk, including rules determining the time when a payment instruction and a settlement is final;
- (iii) criteria for participation in the designated payment system; and
- (iv) measures to ensure the safety, security and operational reliability of the designated payment system including contingency arrangements.

CHAPTER III

Payment Instruments

12. Designation of Payment Instrument.- (1) Where the State Bank is of the opinion that

- (i) a payment instrument is or may be in widespread use as a means of making payment and may affect the payment systems of Pakistan; and
- (ii) It is necessary to protect the interest of the public or it is necessary to maintain the integrity, efficiency and reliability of a payment instrument, the State Bank may prescribe such payment instrument as a designated payment instrument.

(2) Where a payment instrument is prescribed as a designated payment instrument, the issuer of such designated payment instrument shall comply

with the requirements of section 13 within such period as the State Bank may specify.

13. Issuing of designated payment instruments.- (1) No person shall be issued a designated payment instrument unless the issuer has –

- (i) complied with the requirements of this Act;
- (ii) submitted to the State Bank the documents and information as may be prescribed thereby;
- (iii) paid the fee prescribed by the State Bank; and
- (iv) obtained a written approval from the State Bank to issue a designated payment instrument.

(2) The State Bank may in giving its approval –

- (i) require all or any of the documents submitted to be modified and altered as it may deem necessary; and
- (ii) impose such restrictions, limitations or conditions as it may deem fit.

(3) Any payment instrument so issued should carry minimum security features to make its usage secure as per the current international standards.

14. Prohibition of issuance of payment instruments.- (1) The State Bank may, by a written order, prohibit any person from issuing or using any payment instrument if, in its opinion –

- (i) the issuing or use of the payment instrument is detrimental to the reliable, safe, efficient and smooth operation of the payment systems of Pakistan or monetary policy of the State Bank;
- (ii) the prohibition is in the interest of the public; or
- (iii) the payment instrument has been issued with an object to entice and defraud the public.

- (2) The State Bank may, in considering whether to prohibit any person from issuing or using any payment instrument inspect the premises, equipment, machinery, apparatus, books or other documents, or accounts and transactions of the issuer of the payment instrument.
 - (3) Any person causing or attempting to cause obstruction to an officer or representative of the State Bank in inspection of the premises or equipment shall, upon complaint made to a court having jurisdiction, be liable to punishment which may extend to six months or with fine which may extend to fifty thousand rupees or with both.
 - (4) The State Bank shall before passing an order under this section, give such person a reasonable opportunity to make representation before it.
15. **Security.**- Financial Institutions and other institutions providing funds transfer facilities shall ensure that secure means are used for transfer, compliant with current international standards.
16. **Third Party.**- If a person other than a financial institution is holding a consumer's account, the State Bank shall by instructions ensure that the disclosures, required to be made for electronic fund transfers, and the protections, responsibilities and remedies created by this Act, are made applicable to such persons and services.

CHAPTER IV

Clearing and Other Obligations

17. **Audits and Inspections.**- (1) The State Bank may, for the purposes of carrying out its functions under this Act, conduct audits and inspections of clearing house, and clearing house shall, as required, assist the State Bank to the extent necessary to enable it to carry out an audit or inspection.

- (2) Auditors for carrying out the purposes provided for in sub-section (1) may be appointed with prior approval in writing of the State Bank.

18. Notice required of significant changes.- Every clearing house shall, in respect of its designated payment system, provide the State Bank with reasonable notice of not less than fifteen business days in advance of any change to be made by the clearing house that is of a significant nature in relation to the designated payment system and, without limiting the generality of the foregoing, the notice shall be provided in respect of any change affecting

- (a) the legal documents and by-laws of the clearing house;
- (b) the operation of the designated payment system;
- (c) the by-laws, agreements, rules procedures, guides or other documentation governing the designated payment system;
- (d) the composition of a board of directors of the clearing house due to resignation or otherwise; or
- (e) the appointed auditor of the clearing house.

19. Participants responsible where clearing house fails to comply etc. - Where a clearing house fails to comply with the obligations imposed on it under this Act in respect of its payment system or otherwise contravenes the provisions of this Act, the participants jointly and severally shall comply with those obligations in the same manner and to the same extent as if the participants were the clearing house on which the obligations are imposed or that committed the contravention.

20. Settlement Provisions.- (1) Notwithstanding anything to the contrary provided in this Act or any other law for the time being in force, the settlement rules of a designated Payments system shall be valid and binding on the Operator and the participants, and any action may be taken or payment made in accordance with the settlement rules.

- (2) Where the settlement rules of a designated payments system provide that the settlement of a payment obligation through an entry to or a payment out of an account of a participant, or a clearing house at the State Bank is final and irrevocable, the entry or payment shall not be required to be reversed, repaid or set aside.

21. Rights, etc., not subject to stay .- (1) The rights and remedies of a participant, a clearing house, or the State Bank in respect of collateral granted to it as security for a payment or the performance of an obligation incurred in a designated payment system may not be the subject of any stay to be granted by any court or order affecting the ability of creditors to exercise rights and remedies with respect to the collateral.

22. Settlement Rules .- (1) The State Bank may make "settlement rules" to provide the basis on which payment obligations are calculated, netted or settled including rules for the taking of action in the event that a participant is unable or likely to become unable to meet its obligations to the clearing house, or to the other participants.

- (2) Every participant and clearing house shall, in respect of its designated payment system, provide the State Bank with such information, at such times and in such form as it may in writing require.

23. Electronic Money Institution.- (1) An applicant that wants to become an electronic money institution shall submit an application to the State Bank for issue of a license to perform electronic money activity.

- (2) An electronic money institution may perform only such activities as are specified in its license to perform electronic money activity on the basis of such license;

Provided that no electronic money institution shall issue electronic money in excess of value of funds received by it from a consumer.

24. Preservation of rights, etc. - (1) Except to the extent expressly provided, this Act shall not operate to limit, restrict or otherwise affect -

- (i) any right, title, interest, privilege, obligation or liability of a person resulting from any transaction in respect of a transfer order which has been entered into a designated payment system; or
- (ii) any investigation, legal proceeding or remedy in respect of any such right, title, interest, privilege, obligation or liability.

(2) Nothing in this section shall be construed to require.

- (i) The unwinding of any netting done by the operator of a designated payment system, whether pursuant to its default arrangements or otherwise;
- (ii) The revocation of any transfer order given by a participant which is entered into a designated payment system; or
- (iii) The reversal of a payment or settlement made under the rules of a designated payment system.

CHAPTER V

Supervisory Control of the State Bank

25. Issuance of model clauses.- The State Bank may issue model clauses for use by the financial institutions to facilitate compliance with the disclosure requirements as specified in section 29 of this Act and to aid consumers in understanding the rights and responsibilities of participants in electronic fund transfers by utilizing readily understandable language.

26. **Modification of requirements.-** Instructions issued by the State Bank may provide for such adjustments and exceptions for any class of electronic fund transfers, as in the opinion of the State Bank are necessary or proper for the purposes of this Act, to prevent circumvention or evasion thereof, to facilitate compliance therewith and to alleviate any undue compliance burden on small financial institutions.

27. **Service providers other than financial institutions.-** The State Bank shall determine, whether any provision of this Act, subject to any modifications, adjustments or exceptions as provided for in section 26, shall apply to a person other than a financial institution, holding a consumer's account.

28. **Requirement of notice.-** (1) The instructions issued by the State Bank under section 3 shall require any automated teller machine operator who imposes a fee on any consumer for providing services to such consumer, to provide notice in accordance with sub-sections (2) and (3) to the consumer of the fact that –

- (i) a fee is imposed by such operator for providing the service; and
- (ii) the amount of any such fee.

(2) The notice required by clause (i) of sub-section (1) with respect to any fee shall be posted at a prominent and conspicuous location on or at the automated teller machine at which the consumer initiates the electronic fund transfer.

(3) The notice required under clauses (i) and (ii) of sub-section (1) with respect to charging of fee shall appear on the screen of the automated teller machine, in the manner as may be determined and notified by the State Bank in this behalf.

(4) No fee may be imposed by any automated teller machine operator in connection with any electronic fund transfer initiated by a consumer for

which a notice is required under sub-section (1), unless the consumer receives such notice in accordance with sub-sections (2) and (3) and such consumer elects to continue in the manner necessary to effect the transaction after receiving such notice.

29. **Terms and conditions of transfers.-** (1) The terms and conditions of electronic fund transfers involving a consumer's account shall be disclosed by a financial institution in English or if so required by the consumer, in Urdu language at the time the consumer contracts for an electronic fund transfer service, in accordance with the instructions of the State Bank.

(2) Such disclosures may include the following, namely-

- (i) The consumer's liability for unauthorized electronic transfers and, at the financial institution's option, notice of the advisability of prompt reporting of any loss, theft, or unauthorized use of a card, code or other means of access;
- (ii) the telephone number and address of the person or office to be notified in the event the consumer believes that an unauthorized electronic fund transfer has been or may be effected;
- (iii) the kind and nature of electronic fund transfers which the consumer may initiate, including any limitations on the frequency or amount of such transfers, except that the details of such limitations need not be disclosed if their confidentiality is necessary to maintain the security of all electronic fund transfer system, as determined by the State Bank;
- (iv) any charges for electronic fund transfers or for the right to make such transfers;
- (v) the consumer's right to stop payment of a preauthorized electronic fund transfer and the procedure to initiate such a stop payment order;

- (vi) the consumer's right to receive documentation of electronic fund transfers under section 29;
- (vii) a summary, in a form prescribed by the State Bank, of the error resolution provisions of section 36 which, the financial institutions shall be required to transmit at least once per calendar year;
- (viii) the financial institution's liability to the consumer;
- (ix) the circumstances under which the financial institution will in the ordinary course of business disclose information concerning the consumer's account to third persons; and
- (x) a notice to the consumer that a fee may be imposed by an automated teller machine operator, if the consumer initiates a transfer from an automated teller machine that is not operated by the person or the financial institution issuing the card or other means of access.

30. Notification of changes.- (1) A financial institution, shall notify a consumer in writing at least twenty-one days prior to the effective date of any material change in any term or condition of the consumer's account required to be disclosed under sub-section (1) of section 29, unless such change is immediately necessary to maintain or restore the security of an electronic fund transfer system or a consumer's account.

- (2) Such institution shall be required to make a subsequent notification, provided for in sub-section (1), if such a change is made permanent.

CHAPTER VI

Documentation of transfers

31. Availability of documentation and proof.- For each electronic fund transfer initiated by a consumer from an electronic terminal, the financial institution holding such consumer's account shall, directly or indirectly, at the time the transfer is initiated, make available to the consumer documentation and proof of such transfer, clearly setting forth, as may be required by such transaction, the following particulars, namely –

- (i) The amount involved and date or value date associated with the transfer;
- (ii) The type of transfer;
- (iii) The identity of the consumer's account with the financial institution from which or to which funds are transferred;
- (iv) The identity of any third party to whom or from whom funds are transferred; and
- (v) The location or identification of the electronic terminal involved.

32. Periodic statement.- (1) A financial institution shall provide each consumer with a periodic statement for each account of such consumer that may be accessed by means of an electronic fund transfer.

- (2) Such statement shall be provided at least once every month, or as required by the consumer, or such other period as the State Bank may determine.
- (3) Such statement shall include all the necessary particulars in respect of the consumer's account and shall clearly set forth the balances in consumer's account at the beginning and the close of the period, the amount of any fee or charge assessed by the financial institution during the period, for whatever purpose and the address and telephone number to be used by

the financial institution for the purpose of receiving any enquiry or notice of account error from the customer.

33. Documentation as evidence.- In any action involving a consumer, any documentation required by either section 31 or 32 of this Act to be given to the consumer, which indicates that an electronic fund transfer was made to another person, shall be admissible as evidence of such transfer and shall constitute prima facie proof that such transfer was made.

34. Preauthorized transfers.- (1) A preauthorized electronic fund transfer from a consumer's account may be authorized by the consumer only in writing, and a copy of such authorization shall be provided to the consumer when made.

(2) A consumer may stop payment of a preauthorized electronic fund transfer by notifying the financial institution orally or in writing at any time upto three business days preceding the scheduled date of such transfer.

(3) The financial institution may require written confirmation to be provided to it within fourteen days when the consumer receives advice in respect of such requirement and the address to which such confirmation should be sent.

CHAPTER VII

Notification of error

35. Notification of error.- (1) In this section, the following shall be construed as error, namely –

- (i) an unauthorized electronic fund transfer;
- (ii) an incorrect electronic fund transfer to or from the consumer's account.
- (iii) the omission of an electronic fund transfer from a periodic statement;

- (iv) a computational or book keeping error made by the financial institution relating to an electronic fund transfer;
 - (v) the consumer's receipt of an incorrect amount of money from an electronic terminal; or
 - (vi) any other error as determined by the State Bank.
- (2) When an error has occurred, the financial institution shall investigate the alleged error to determine whether an error has occurred, and report in writing the result of such investigation to the consumer within ten business days.
- (3) The financial institution may require written confirmation to be provided to it within ten business days of an oral notification of error.
- (4) A financial institution shall not be liable to credit a consumer's account in accordance with the provisions of section 36 in case the written confirmation is not received by it within the ten days period, provided for in sub-section (3).

36. Correcting error.- If the financial institution determines that an error did occur, it shall promptly, and in no event one business day after such determination, correct the error, including the crediting of mark up where applicable.

Provided that the financial institution may provisionally recredit the consumer's account for the amount alleged to be in error, including mark up where applicable, pending conclusion of its investigation and determination of whether an error has occurred.

Provided further that such investigation shall be concluded not later than ten business days after receipt of notice of the error and during the pendency of the investigation, the consumer shall have full use of the funds provisionally recredited.

37. **Absence of error.-** If the financial institution determines after its investigation that an error did not occur, it shall deliver or mail to the consumer an explanation of its findings within three business days after the conclusion of its investigation, and upon request of the consumer promptly deliver or mail to the consumer copies of all documents which the financial institution relied on to conclude that such error did not occur.

38. **Triple damages.-** (1) If in any case filed under section 49 of this Act, the court finds that a financial institution is guilty of the commission of any act, provided for in sub-section (2) or (3) of this section, the financial institution, shall be liable to pay to the consumer, triple damages determined under section 49.

(2) The financial institution shall be liable to pay damages, provided for in sub-section (1), if it did not provisionally recredit a consumer's account within the ten days period specified in section 35 and the financial institution did not make a good faith investigation of the alleged error or it did not have reasonable basis for believing that the consumer's account was not in error.

(3) The financial institution shall also be liable to pay damages, provided in sub-section (1), if it knowingly and willfully concluded that the consumer's account was not in error when such conclusion could not reasonably have been drawn from the evidence available to the financial institution at the time of its investigation.

CHAPTER VIII

Liability of parties

39. **Consumer's liability.-** A consumer shall be liable for any unauthorized electronic fund transfer involving the account of such consumer only if the card or other means of access utilized for such transfer was an accepted card or other

means of access and if the issuer of such card, code or other means of access has provided a means whereby the user of such card, code or other means of access can be identified as the person authorized to use it, such as by signature, photograph, or finger print or by electronic or mechanical confirmation.

40. Burden of proof.- In any action which involves a consumer's liability for an unauthorized electronic fund transfer, the burden of proof shall be upon the financial institution to show that the electronic fund transfer was authorized or, if the electronic fund transfer was unauthorized, then the burden of proof shall be upon the financial institution to establish that the conditions of liability set forth in section 39 were met, and the disclosures required to be made to the consumer under section 29 were in fact made in accordance with such section.

41. Liability in case of extension of credit.- In the event of transaction which involves both an unauthorized electronic fund transfer and an extension of credit limit pursuant to an agreement between the consumer and the financial institution, nothing shall impose liability upon a consumer for an unauthorized electronic fund transfer in excess of his liability for such transfer under any other applicable law or under any agreement with the consumer's financial institution.

42. Liability of financial institutions.- Subject to what is provided in section 43 or 44, a financial institution shall be liable to a consumer for all damages proximately caused by -

- (i) the financial institution's failure to make an electronic fund transfer, in accordance with the terms and conditions of an account, in the correct amount or in a timely manner when properly instructed to do so by the consumer, except where-
 - (a) the consumer's account has insufficient funds;
 - (b) the funds are subject to legal process or other encumbrance restricting such transfer;
 - (c) such transfer would exceed an established credit limit;

- (d) an electronic terminal has insufficient cash to complete the transaction; or
 - (e) as otherwise provided in instructions by the State Bank.
- (ii) the financial institution's failure to make an electronic fund transfer due to insufficient funds when the financial institution failed to credit, in accordance with the terms and conditions of an account, a deposit of funds to the consumer's account which would have provided sufficient funds to make the transfer, and
 - (iii) the financial institution's failure to stop payment of preauthorized transfer from a consumer's account when instructed to do so in accordance with the terms and conditions of account.

43. Acts of God and technical malfunctions.- A financial institution shall not be liable under clauses (i) and (ii) of section 42 if the financial institution shows by a preponderance of evidence that its action or failure to act resulted from –

- (i) an act of God or other circumstance beyond its control, that it exercised reasonable care to prevent such an occurrence, and that it exercised such diligence as the circumstances required; or
- (ii) a technical malfunction, which was known to the consumer at the time, he attempted to initiate an electronic fund transfer or, in case of preauthorized transfer, at the time such transfer should have occurred.

44. Intent.- In case of failure described in clause (i) of section 42, the failure was not intentional and it resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid any such error, the financial institution shall be liable for actual damages proved.

45. Prohibition on improper issuance.- No person may issue to a consumer any card, code or other means of access to such consumer's account for the purpose of initiating an electronic fund transfer other than in response to a request or

application therefor; or as a renewal of, or in substitution for, an accepted card, code or other means of access, whether issued by the initial issuer or a successor.

46. Exceptions.- (1) Notwithstanding the provisions of section 45, a person may distribute to a consumer on an unsolicited basis a card, code or other means of access for use in initiating an electronic fund transfer from such consumer's account if -

- (i) such card, code or other means of access is not validated;
- (ii) such distribution is accompanied by a complete disclosure, in accordance with section 29 of the consumers' rights and liabilities which will apply if such card, code or other means of access is validated;
- (iii) such distribution is accompanied by a clear explanation, in accordance with instructions of the State Bank, that such card, code, or other means of access is not validated and how the consumer may dispose of such code, card, or other means of access if validation is not desired and such card, code, or other means of access is validated only in response to a request or application from the consumer, upon verification of the consumer's identity.

(2) For the purpose of this section, a card, code, or other means of access is validated when it may be used to initiate an electronic fund transfer.

47. Suspension of obligation - If a technical malfunction prevents the effectuation of an electronic fund transfer initiated by a consumer to another person, and such other person has agreed to accept payment by such means, the consumer's obligation to the other person shall be suspended until the malfunction is corrected and the electronic fund transfer may be completed, unless such other person has subsequently, by written request, demanded payment by means other than an electronic fund transfer.

48. **Waiver of rights.**- No writing or other agreement between a consumer and any other person may contain any provision which constitutes a waiver of any right conferred or cause of action created by this Act, and any such writing waiving any right or cause of action shall be void and of no legal effect.

CHAPTER IX

Action before the Court

49. **Damages.**- Except as otherwise provided by this section or the provisions of this Act, any person who fails to comply with any provision of this Act with respect to any consumer, except for an error resolved in accordance with the provisions of this Act, shall, upon an action brought before a court by the consumer, be liable to such consumer for payment of an amount equal to the sum of any actual damage sustained by such consumer as a result of such failure.
50. **Bona fide error.**- Except as provided by section 43, a person may not be held liable in any action brought under this chapter for any violation of this Act if the person shows by preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
51. **Actions taken in good faith.**- (1) The provision of section 49 shall not apply to any act done or omitted in good faith, or purported to be done in conformity with any rule, instruction or interpretation of approval by an official of the State Bank duly authorized to issue such interpretations or approvals under such procedure of the State Bank as may be prescribed for.
- (2) A financial institution shall not incur any liability under section 49 on account of any failure to make a disclosure in proper form, if such institution utilized an appropriate model clause issued by the State Bank,

notwithstanding the fact that after such act, omission, or failure has occurred, such rule, instruction, approval or model clause under subsection (1) was amended, rescinded or determined by judicial or other authority as invalid for any reason.

52. Notification to consumer prior to action.- A person shall not incur any liability for any failure to comply with any requirement under this Act, if prior to the institution of an action under this Act, such person notifies the consumer concerned of the failure, complies with the requirements of this Act and makes an appropriate adjustment to the consumer's account and pays actual damages or, where applicable, damages in accordance with section 42.

53. Action in bad faith.- On finding by the court that an unsuccessful action for any alleged failure was brought in bad faith or for the purposes of harassment, the court shall award to the defendant costs of such litigation and the attorney's fees reasonable in relation to the work expended.

54. Jurisdiction of courts.- With regard to the amount in controversy, any action under this Act may be brought in any court of competent jurisdiction.

55. Criminal liability.- Whoever knowingly and willfully gives false information or inaccurate information or fails to provide information which he is required to disclose by this Act or any instruction issued thereunder, or otherwise fails to comply with any provision of this Act shall be punished with imprisonment which may extend to three years and may also be liable to pay fine which may extend to three hundred thousand rupees.

56. Violations affecting foreign commerce.- Whoever -

- (1) Knowingly, in a transaction affecting foreign commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or

fraudulently obtained debit instrument to obtain money, goods, services or anything else of value aggregating fifty thousand rupees or more, or

(2) Knowingly receives, conceals, uses or transports money, goods, services or anything else of value aggregating fifty thousand rupees or more obtained by use of any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument, or

(3) Knowingly receives, conceals, uses, sells, or transports one or more tickets for foreign transportation, which within one year period have a value aggregating thirty thousand rupees or more, and which have been purchased or obtained with one or more counterfeit, fictitious, altered, forged, lost, stolen or fraudulently obtained debit instrument, shall be punished with rigorous imprisonment for a term which may extend to ten years and may also be liable to pay fine which may extend to ten hundred thousand rupees.

57. Cheating by use of electronic device.- Whoever cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is, or by cheating by personation, fraudulently or dishonestly uses any credit or debit card, or code or any other means of access to an electronic fund transfer device, and thereby causes any wrongful gain to himself or any wrongful loss to any other person, shall be punished with rigorous imprisonment for a term which may extend to ten years and with fine which shall not be less than the wrongful loss caused to any person.

CHAPTER X

Miscellaneous

58. Modification of Law of Insolvency: (1) Notwithstanding anything to the contrary provided in the general law of insolvency, rights and liabilities of persons arising from transfer orders in this Act shall be governed subject to the provisions of this section, in case such person is a participant.

(2) No transfer order passed under this Act, any disposition of property in pursuance of such order, or the default arrangements of a designated system shall be regarded to any extent as invalid on the ground of inconsistency with the law of insolvency.

(3) No order of the court or any office holder acting under general law of insolvency shall interfere with settlement of a transfer order passed in accordance with the rules of the designated system.

(4) A debt or other liability arising out of a transfer order which is the subject of action taken under default arrangements, may not to be proved in a bankruptcy or winding up proceedings, or may not be taken into account for the purpose of any set-off until the completion of the action taken under default arrangements.

(5) The netting arrangement shall be valid and enforceable and an operator or participant of a designated system shall be required to give effect to such arrangement.

(6) This section shall not apply in relation to any transfer order which is entered into a designated payment system after the expiry of the day on which a court made an order for insolvency, judicial management or winding up in respect of the participant, or after a resolution for voluntary winding up of the participant was passed.

- (7) Nothing in this section shall be construed to require the unwinding of any netting done by the operator of a designated payment system, whether pursuant to its default arrangements or otherwise

"Default Arrangements" in this section means the arrangements put in place by a designated system to limit systemic and other kinds of risks which arise in the event of a participant appearing to be unable, or likely to become unable, to meet its obligations in respect of a transfer order, including any arrangements for netting.

59. Operator of Designated Payment System Insolvent: (1) Any operator of a designated payment system who is insolvent or likely to become insolvent, or has become or likely to become unable to meet all or any of his obligations, or has suspended payments or compounded with his creditors, shall immediately inform the State Bank.

- (2) When the State Bank receives information under sub-section (1), it may assume control of the whole of the property, business and affairs of the operator of the designated payment system and carry on the whole of his business and affairs and appoint its own officers, or assume control of such part of its property, business and affairs and carry on such part of its business and affairs as the State Bank may determine, and it may further order that the cost and expenses of the State Bank or the remuneration of any person so appointed by the State Bank, may be paid out of the funds and properties of the operator of the designated payment system which shall be regarded as the first charge thereon.

- (3) Whether or not an order has been made under the preceding sub-section, the State Bank may take any action or initiate any proceedings against the operator under the law of insolvency.

- (4) No order under this section shall be made unless the operator of a designated payment system or any director or officer of the operator of the designated payment system in respect of which an order is to be made, or who in pursuance of such order is to be removed from office, has been given a reasonable opportunity of making representation against the proposed order.

60. Application of fine.- A court imposing any fine under this Act may direct that the whole or any part thereof shall be applied towards compensation to the aggrieved person for any loss caused by the person committing an offence under this Act.

61. Power to investigate.- (1) Notwithstanding anything to the contrary provided by any other law for the time being in force, every information relating to commission of an offence under this Act shall be recorded in writing by an officer-in-charge of a police station, generally empowered in this behalf under the Code.

- (2) Investigation of offences committed under this Act shall be carried out by an officer-in-charge of the police station empowered under the Code to exercise such powers, including power to examine witnesses, to arrest any person or to seize any document or a thing or search any place, and do all other acts or things necessary for such purpose;

provided that such officer shall be subject to the same restrictions in respect of any document or record of a financial or electronic money institution as is provided in respect of documents in custody of a bank or a banker in section 94 of the Code

62. Trial of offence.- (1) Notwithstanding anything to the contrary provided by any other law for the time being in force, offences provided for in Chapter IX of this Act shall be tried by the Court of Sessions, having territorial jurisdiction in the case, which shall observe the same procedure as provided for trial of offences by the Code.

(2) Cognizance shall be taken by the court upon a report of facts made in writing by a police officer or upon receiving a complaint of facts which constitute the offence.

(3) In case of a complaint, the court may postpone the issue of process for attendance of the person complained against and refer the complaint to the officer-in-charge of a police station for investigation and report.

63. Procedure.- (1) Except for offences provided for in sections 56 or 57, all offences under this Act are bailable.

(2) All offences under the Act are cognizable and compoundable with permission of the court.

(3) Offences provided for in section 56 and 57 shall be non-bailable.

64. Overriding effect.- This Act shall have effect notwithstanding anything to the contrary provided in any other law for the time being in force or any agreement, contract, memorandum or articles of association.

65. Removal of difficulties.- If any difficulty arises in giving effect to any provision of this Act, the Federal Government may in consultation with the State Bank, make such order as appears to it to be necessary for the purpose of removing the difficulty.

66. Power to call for information.- (1) The State Bank may direct any financial institution or service provider other than a financial institution to give or furnish to the State Bank, within such time as the State Bank may specify in this behalf, such information, documents or records respecting any business carried on by such institution or service provider, as may be within its knowledge or under its possession, custody or control.

- (2) If such institution or service provider fails or omits to furnish any information required by the State Bank under sub-section (1) or willfully makes a statement which is false in any material particular, it shall be liable to get its licence under section 24 withdrawn by the State Bank and to pay a fine which may extend to one hundred thousand rupees.
- (3) Any party or person aggrieved by an order passed under sub-section (2) may appeal within 15 days of such order to the Central Board of Directors of the State Bank, which shall dispose of the appeal within 60 days.

67. Secrecy and Privacy.- (1) A financial institution shall, except as otherwise required by law, shall not divulge any information relating to an electronic fund transfer, affairs or account of its consumer, except in circumstances in which, according to the practice and usage customary among bankers, it is necessary or appropriate for a financial institution to divulge such information, or the consumer has given consent therefor.

- (2) No person other than an officer or agent appointed by the financial institution that maintains the account of a consumer, may have access through an electronic terminal to information relating to electronic fund transfer, the affairs, or the account of the consumer.
- (3) The rules governing the operation of individual accounts will be applicable to electronic fund transfers in relation to disclosure of information to third parties.

68. Complaint resolution.- A consumer who is not satisfied with the outcome of a complaint made to a financial institution in relation to any electronic fund transfer or disclosure made by a financial institution to a third party, without prejudice to any right to seek any other remedy under the law, he may make a complaint to the State Bank.

69. Suspension of operation.- (1) The Federal Government in consultation with the State Bank may, by a general order, for the time being suspend operation of any provision of this Act, and from the date of such order, such provision shall cease to apply.

(2) When the order made under sub-section (1) is withdrawn by the Federal Government such suspension shall cease to operate with effect from the date, specified by the Federal Government in this behalf.

70. Immunity of State Bank and its employees etc. - (1) No suit or other legal proceedings shall lie against the State Bank or any officer or employee thereof or any person acting under its direction:

(i) for any act done in good faith.

(a) in the performance, or intended performance, of any function or duty; or

(b) in the exercise, or intended exercise, of any power, in the capacity of the State Bank as the designated Bank under this Act; or

(ii) for any neglect or default in the performance or exercise in good faith of such function, duty or power.

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