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# Protecting the Israeli Consumer in the Electronic Age

Allen A. Zysblat\*

## I. Introduction

The new electronic age, we are assured, is a boon not only to business – whether suppliers, intermediaries or credit card companies – but to consumers as well. Consumers everywhere will suddenly have access to an unlimited variety of goods and services at prices that reflect not only this world-wide competition, but also the fact that the suppliers operate in cyberspace, rather than in the expensive, air-conditioned shopping malls of yesteryear.

In a 1999 publication, the *Microsoft Corporation* claimed that:

Consumers benefit from electronic commerce in many different ways. The most obvious benefit is broader choice. Every consumer that connects to the internet has access to every company engaging in electronic commerce. . . . According to Datamonitor, the number of retailers in Europe offering full online commerce will grow tenfold over the next five years. . . . Consumer choice expands every time a new retailer goes online – provided regulatory or other barriers do not inhibit trade.

But, of course, not everyone shares this optimistic perspective. In commenting on the Magaziner Report on Electronic Commerce released by the Clinton Administration in 1997, “which portrayed the private sector in its heroic mode, needing only to have moribund rules removed to allow its unleashed animal spirits to carry the day,” Professor Elizabeth Thornburg warned:

The ‘law’ becomes what is specified in the contract or programmed

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1. Microsoft Corporation, *WTO and Electronic Commerce: Issues for World Trade* (Sept. 8, 1999), available at <http://www.microsoft.com/issues/essays/11-15wto-b.asp>.

into the software, and courts lose the ability to enforce mandatory rules and to subject contractual 'law' to the needs of public policy. Public interests that balance private property rights under real world governments need not be included in these privatized systems.

Governments can sit back and let this happen, or they can choose to intervene.<sup>2</sup> Whatever the appropriate balance between private initiative and public regulation of the internet, it is clear that consumer advocates must remain vigilant to ensure that the risks inherent in this new electronic era are not all borne by consumers.

This paper will attempt to describe some of the recent measures that have been taken, or at least considered, to provide the Israeli consumer with basic protection against the principal risks inherent in electronic commerce.

## II. Credit cards and other forms of electronic payments

For the moment, the principal payment method of business to consumer electronic commerce is the credit card, and in this regard, the Israeli consumer is very well protected.

Credit and debit cards made their initial appearance in Israel in 1975 and immediately raised a number of important legal issues.<sup>3</sup> Primary among these was the fact that the credit card issuers provided in their standard form contracts that the card holder was liable for any use of his card, even when such use was unauthorized or completely without the card holder's knowledge.

The problem, and the fear of problems that had previously arisen in the United States from the unsolicited issue of credit cards and a whole range of criminal activities, prompted the Minister of Justice to appoint a special committee, chaired by Supreme Court Justice Aharon Barak, to examine all the legal issues arising out of the use and misuse of payment cards. The clear conclusion of the Barak Committee that special legislation was required to protect card holders, and in particular, *consumer* card holders, led to the passage of the Debit Card Law in 1986.

The Law deals with a number of issues that had previously been addressed in American legislation: it requires the card issuer to make full disclosure of the important terms and obtain the written consent of the card holder before his contractual liability even begins; it limits the card holder's liability in most cases of loss or theft of the card to a maximum

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2. Elizabeth Thornburg, *Privatization and Power: Dispute Resolution for the Internet*, Paper presented at the 8<sup>th</sup> Meeting of the International Association of Consumer Law, Auckland, New Zealand (April 9-11, 2001).

3. This chapter is based on another article by the author. Allen A. Zysblat, *Consumer Protection Legislation in Israel*, in *ESSAYS ON EUROPEAN LAW AND ISRAEL* (Hebrew University of Jerusalem, 1996).

sum of 75 shekels (the equivalent of 50 dollars in 1986, but less than 20 dollars today);<sup>4</sup> and it provides a series of criminal law sections designed to deal with the special nature of card-related crime.

Furthermore, in a highly controversial section 10, the Law permits a card holder to claim exemption from credit card liability whenever the supplier of goods or services has failed to deliver the relevant item under an installment-payment programme. Thus, Israel joined the very small number of jurisdictions where the credit card issuers must at least partially bear the burden of the suppliers' total failure to deliver.<sup>5</sup>

Two additional aspects of the Debit Card Law are also worthy of note. First, the Law in general provides a very consumer-oriented regime for dispute resolution. Thus, in any case where the card holder claims that certain charges were made to his account as a result of unauthorized or questionable use of his card or secret code, the card issuer must immediately credit the card holder's account with the appropriate sum and only then investigate the possibility of fraud or knowledge on the part of the card holder.

Secondly, credit card operators may begin to operate only after their standard contract forms with the card holders have been approved by Israel's Standard Contracts Tribunal. Thus, all the relevant terms of the consumer's contract can be examined and amended before they serve as a potential basis for abuse of the card issuer's economic superiority.

In a number of subsequent amendments,<sup>6</sup> changes were made to the Debit Card Law that had the effect of clarifying and strengthening the consumer protection provisions in this increasingly important area. Among other things, section 10 was changed to clarify that a consumer could raise against the card issuer the defense of non-delivery of goods or services, even when the installment credit was effectively provided by the card issuer rather than the supplier.

In light of the fact that the use of debit and credit cards in Israel is now among the highest in the world, the Ministry of Justice is determined to keep this legislation as current and consumer friendly as possible.

In the specific context of electronic commerce, the Israeli credit card holder, is indeed already well protected. In section 9 of the Israeli Law, when a card holder maintains that he has been charged with a credit card transaction for which there is no voucher signed by the card holder, obviously the case in any distance sale situation, the card holder is entitled to be immediately refunded for the whole amount of the charge. The credit card company can subsequently recharge the account if he can

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4. At the time of writing, the Israel shekel was worth some 22 cents U.S.

5. Including the United States and the United Kingdom.

6. In 1996 and 1998.

prove that the card holder did, in fact, make the disputed transaction. While section 9 was originally introduced to deal with the “older” types of distance credit card transactions, such as by telephone, it obviously provides consumer protection for internet transactions as well.

This situation has recently come under attack in Israel from the major credit card companies and the chartered banks that control them. They argue that now that distance credit card transactions have become so common, and internet transactions are the wave of the future, it is unfair to continue to put the burden of proof with respect to an electronic credit card transaction on the credit card issuer. Alternatively, they argue, some form of simple electronic confirmation by the consumer should be seen as the equivalent of a voucher signed by the consumer.

The more general question of electronic signatures in the consumer context will be dealt with later in this paper. But, suffice it to say at this point that the Israel government remains convinced that the protection of credit card holders currently granted against internet fraud or error is perfectly justified, and there is no intention to qualify it.

Stored value cards (“payment cards” in the language of the Debit Card Law Amendment) were, until 1998, not covered by the Israeli legislation because they do not fall into the definition of traditional credit cards or bank cards.<sup>7</sup> But these new stored value cards – which are typically issued with a set amount stored in them, and which can be reloaded with a similar amount when the original sum is used – can raise risks to the customer similar to that of the more traditional cards. Thus, a stored value card that can be reloaded from the customer’s bank account can also be reloaded by a thief, who might be able to use and reload a stolen card many times and thus create a major debt for the unsuspecting customer. There would seem to be a clear justification for protection of the consumer with respect to a stored value card of this kind, similar to the basic protection of the Law.

### III. Three Important Distinctions

In deciding to bring stored value cards or payment cards into the Debit Card Law regime, the Ministry of Justice and the Bank of Israel nonetheless recognized that such cards merited special attention and provisions. Thus, the 1998 amendment of the Debit Card Law recognized special characteristics of stored value cards that can be described under the heading of three important distinctions:

First, not all such “payment cards” are within the Law’s reach at all. Thus, rechargeable phone cards, photocopy cards and the like, are technically payment cards because they are reloadable cards for purchasing

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7. See the author’s note in 6 Cons. L.J. 491 (1998).

goods or services, but because they can be reloaded only by cash, and do not permit the direct access of the customer's account, they do not create risks that warrant subjecting them to special legislation, and are exempted under the new definition section.

Second, it is not necessary to require that every stored value card subject to the Law be preceded by a signed, written contract. Stand-alone cards that include access to the customer's account should require such formality; but simple types of cards, which can only access the customer's account with the aid of another debit card already requiring formal writing, will doubtlessly be sold more informally, and there is no need to intervene in such practices. Thus, the stored value card which can access a customer's account only with the use of another debit can be informally sold, so long as some written explanation of the card's use, as set out in subsequent regulations, accompanies the card.

Third, it should be remembered that the stored value card is intended essentially as a replacement for cash – a kind of “electronic purse.” As such, the device will obviously be of advantage to customers who will have to carry less cash, and to suppliers who will be spared the bother of dealing with large amounts of bills and coins. Thus, if someone's stored value card is stolen when it still has 50 Israeli shekels in it, it seems no more justified to require the card issuer to replace the 50 shekels than to require the State to compensate someone whose 50 shekels in cash are stolen. The function and the risk are the same.

As a consequence, the Law's arrangement for the customer's liability for the theft or loss of a stored value card is distinct: under Section 5(e), the customer will have to bear the loss of whatever value is stored on the card when it is lost or stolen. But, this special liability applies only to a card that can be stored to a value not exceeding 400 new shekels (something less than 100 dollars). If a stored value card is indeed the functional equivalent of cash, then it should not contain more than the typical customer would carry in cash – a sum the Law estimates at 400 shekels. If the card can be stored with a larger amount, then for the purposes of the customer's liability, he will be treated as having lost a credit card. Obviously, the Minister of Justice will be able to change this maximum sum by regulation whenever he feels it necessary.

It is probably too early to predict the effectiveness of the 1998 amendment to the Debit Card Law.<sup>8</sup> And it is argued by some that in light of the great variety of stored value cards that are likely to appear, and in light of new problems that they are likely to create, it would be better to delay legislative intervention for the time being – a position that

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8. Indeed, most of the planned programs for marketing stored value cards were shelved, and that form of payment is not a major factor in the Israeli economy.

many other countries have apparently adopted.

But the Israeli government felt strongly that the basic principles governing such devices should be established at the outset. Indeed, the decision to have early legislation again reflects the broader government philosophy in this area: that the special risks of error and misuse inherent in new electronic payment devices should, as much as possible, not be imposed on the individual consumer.

#### IV. Online Arbitration Agreements

Agreements to refer contractual disputes to arbitration – binding or otherwise – can be of great advantage in commercial transactions, but the dangers of such an agreement in a consumer contract have been well-documented.

As Professor Pridgen has written:

While informal dispute resolution can be advantageous to consumers if established with proper safeguards, the arbitration procedure ‘agreed’ to by the consumers in most standard form contracts is the private arbitration system traditionally used to settle disputes between commercial parties. The costs can be high, the forum may be inconveniently located, there may be an advantage to ‘repeat players,’ such as merchants, there is no guarantee that the arbitrator will apply statutory consumer protection measures, the proceedings are shielded from public view, and there is no right of appeal to a court. Furthermore, the consumers ‘agree’ to submit to this type of arbitration by virtue of a standard form contract in advance of the actual dispute.<sup>9</sup>

In effect, then, what appears to be a valuable alternative dispute resolution system can often be a consumer trap.

The judicial attitude to mandatory consumer arbitration arrangements has not everywhere been uniform. The American courts seem prepared to enforce online mandatory arbitration agreements,<sup>10</sup> while European jurisdictions would likely see such agreements, at least in standard form consumer contracts, as unfair and unenforceable.<sup>11</sup>

In Israel, the legal authorities have always been suspicious of arbitration arrangements in consumer contracts. The Attorney General’s department of the Ministry of Justice has regularly argued against such

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9. Pridgen, *Gateway to Injustice: Arbitration Imposed on U.S. Consumers by Adhesion Contracts*, Paper presented at the 8<sup>th</sup> International Consumer Law Conference, Auckland, New Zealand (April 9-11, 2001). Several other American participants at the Conference, including Professors Richard Alderman and Elizabeth Thornburg, described the same phenomenon and disappointing judicial response.

10. See *Hill v Gateway 2000, Inc* 105 F.3d 1147 (7<sup>th</sup> Cir. 1997).

11. Council Directive 93/13, 1993 O.J. (L95/29) on unfair terms in consumer contracts.

agreements when the issue has arisen in the Standard Contracts Tribunal, and that Tribunal has recently refused to endorse a compulsory arbitration provision in the standard form contract of Israel's largest dry-cleaning company.<sup>12</sup> Moreover, the Attorney General has urged Israel's Insurance Commissioner to discourage the use of such mandatory arbitration terms in standard form consumer insurance contracts.

The official public policy against mandatory consumer arbitration was, of course, developed before the special problems of online contracting. But if anything, the sense that such arrangements are contrary to the consumer's best interests is even stronger in the electronic context, where "fair disclosure" generally flashes by on a computer screen and "informed consent" takes the form of a "double click" on a computer mouse or the opening of "shrink-wrap" packaging.

Should Israel introduce legislation to deny effect to standard form consumer arbitration agreements, such as in the English model?<sup>13</sup> Is the appropriate solution a clearer presumption of unfairness in the standard contracts law? Should such legislation apply to other forms of alternative dispute resolution and not just arbitration agreements?

These and related questions are very much on Israel's agenda for consumer protection in the context of electronic commerce.

#### V. The Requirement of Writing in Consumer Transactions – The Electronic Assault

Any audience interested in the implications of electronic commerce will be familiar with the UNCITRAL Model Law on Electronic Commerce, its "functional-equivalent approach," and the outlines of its principal substantive provisions:

Any legal requirements that information be in 'writing' will be met by a data message if the information contained therein is accessible so as to be useable for subsequent reference;

Any legal requirement for 'signatures' may be satisfied by data messages.<sup>14</sup>

And any audience interested in the implications of the Model Law for consumers will have thought about the need to reconcile its principles with the general principles of the "Guidelines for Consumer Protection in the Context of Electronic Commerce" of the O.E.C.D.<sup>15</sup>

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12. *Keshet Dry Cleaning Co. v The Attorney General of Israel* (Israel Standard Contracts Trib., 1999).

13. Arbitration Act, 1996, c.23 (sections 89 – 91).

14. *Id.* At section 5. Similar provisions are contained in the European Council Directive 2000/31/EC, 2000 O.J. (L178/1), on electronic commerce

15. Issued by the Organization for Economic Co-operation and Development in 2000.



Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.

Time will not allow an in-depth examination of these issues, nor the enormous volume of commentary that they have generated.

Indeed, the debate about the requirement of writing in consumer transactions has taken on a certain urgency since the recent enactment of Israel's Electronic Signature Law<sup>16</sup> which provides:

2(a) Where a legislative enactment requires that a document include a signature, such requirement can be met, with respect to an electronic message, by an electronic signature, providing that such signature is an 'approved' signature.

2(b) The provisions of subsection (a) shall not apply to legislative enactments set out in Schedule A by the Minister of Justice, with the approval of the Constitution, Law and Justice Committee of the *Knesset* (Parliament).

The Minister of Justice has recently published the list of laws and enactments to be included in the Schedule A exemptions, but the issue of consumer protection provisions has been left to subsequent legislative initiatives.

Israel's Consumer Protection Act has used the European Directives as models for modern consumer provisions, including requirements of writing and signature.

## VI. Writing Requirements in Israel's Consumer Protection Act

### A. *Timeshare Contracts*<sup>17</sup>

The marketing of timeshare property interests has become a major business in Israel. It is estimated that at any one time, forty to fifty projects are marketed, mostly with respect to timeshare facilities being developed outside of Israel. And not surprisingly, both Government officials and consumer organizations have received complaints about especially aggressive marketing practices, often followed by an absolute refusal on the part of the timeshare marketers to agree to a cancellation of the contract, even if the request to cancel is made within hours of the signing of the contract.<sup>18</sup>

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16. Enacted on April 4, 2001.

17. These special provisions of the Consumer Protection Act are described in the author's paper: *Recent Consumer Protection Legislation in Israel*, presented at the 7<sup>th</sup> International Conference on Consumer Law, Helsinki, Finland, 1999.

18. Club Hotel Decision.

The complaints registered by consumers led to a Private Member's Bill being submitted to the *Knesset* in 1996, wherein a cancellation period was proposed for timeshare contracts. After considerable debate in the *Knesset*, and after considering the various models adopted in different jurisdictions, the Economic Committee decided to adopt the European model contained in the Timeshare Directive EC/94/97.

Thus, on March 31, 1998, a new section 14(a) was introduced in the Consumer Protection Act. The new section provides three basic remedies for a consumer with respect to timeshare marketing.

First, the new amendment requires the timeshare contract to be *in writing*, and accompanied by a separate disclosure form relating to fourteen relevant items of information, which the consumer must be asked to sign separately. Second, the consumer has an unqualified right of cancellation of the timeshare contract, for fourteen days from the date of the signing of the contract, or the signing of the separate disclosure form, whichever is later. Third, where the consumer has agreed to pay for the timeshare unit by credit card, the credit card issuer may not debit the consumer's account for any part of the purchase, until thirty days have passed during which no notice of the consumer's cancellation has been provided.

The new timeshare provisions apply to all timeshare marketing after April 1, 1998, and have already inspired attempts by timeshare marketers to avoid the protective provisions. Complaints have already been received about timeshare projects which the marketer claimed were outside the reach of the new provisions because: 1) the product sold was a "membership" and not a specific timeshare unit; 2) the product sold was the right to choose among a number of projects, and not a specific timeshare unit; and 3) the rights of the consumer were for less than the minimum three-year period, but rather a shorter period with an option to extend.

It is hoped that the Israeli courts will continue to find the appropriate answers to these claims. But in the meantime, the great importance of the law's requirement of clear and full disclosure of the key terms of the contract, and the special right of cancellation, is abundantly clear.<sup>19</sup>

Finally, the Ministry of Justice in Israel has promised to examine the possibility of further protective legislation on timeshare contracts, including mandatory protection of the consumer against the developer's potential bankruptcy both before and after the completion of the project, and mandatory trust arrangements to protect the interest of the timeshare owners during the life of the project.

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19. Indeed, numerous applications of the distance selling provisions to the internet have already made their way to Israeli courts.

### B. *Distance Contracts*

The marketing of consumer goods and services by means of distance contracts, especially through telemarketing and specialized mail order schemes, has become a major factor in Israel. And though the marketers have tended to introduce voluntary disclosure and cancellation rights, a broad range of complaints about the consumer's ability to enforce those rights in practice prompted discussions in the *Knesset* beginning in 1997.

As was the case with Israel's new provisions on timeshare contracts, the legislative model of the European Union was the principal guide for Israel's new distance contract provisions. Very much like European Directive 97/7/EC,<sup>20</sup> the new section 14(c) of the Consumer Protection Act – passed into law at the end of July 1998 – requires appropriate minimum disclosure prior to the conclusion of the distance contract, and additional information to be provided *in writing* no later than the date when the relevant goods or services are provided to the consumer.

With respect to the period during which the consumer has an unqualified right to withdraw from this distance contract, the *Knesset* decided to adopt the same period provided for withdrawal from timeshare contracts, a full fourteen days. Indeed, it was decided that the fourteen-day period should be provided for all the analogous cancellation periods in the law, and the relevant amendment provides a uniform fourteen-day cancellation period for contracts relating to door-to-door sales, timeshare agreements *and* distance selling.

While the new distance contracts provision does not apply to certain transactions, again very much based on the European model, there is *no* exception for financial services, and the provision specifically applies to contracts negotiated through electronic commerce, including by means of the internet.

Needless to say, timeshare, door-to-door and distance contracts are not the only consumer transactions in Israel that raise writing requirement issues. Other consumer transactions requiring special writing and/or signatures of the consumer are significant consumer credit transactions, guarantees, the basic credit card contract, and real estate brokerage agreements. Moreover, section 5 of Israel's Consumer Protection Act authorizes the Minister to determine, by regulation, those additional consumer transactions which, for relevant considerations of consumer protection, will be required to be in writing; the same provision also requires that the consumer be given a reasonable opportunity to examine the written contract, and then receive a copy after its signing.

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20. 1997 O.J. (1144/19).

Until recently, the assumption has been that the law is talking about a “paper” writing, which will be physically made available to the consumer.

Is there really a need for this to change in the new electronic age? Is the UNCITRAL Model Law not seeking to replace “evidentiary” requirements of writing rather than the “cautionary” and “informational” writing requirements of consumer protection? Will modern commerce really suffer if timeshare purchases must have a *paper* contract to use when consulting lawyers and bankers about exercising their right of withdrawal? Is it terrible to require that the written information that accompanies goods delivered under a distance contract continue to be on paper – physically and palpably reminding the purchaser that he has special rights?<sup>21</sup> Can we really assume that the typical consumer will print out every relevant document and notice, even when we assume that he has a computer somewhere in his home and theoretically has access to such documents and notices?

These questions go to one of the central issues in the debate about consumer protection in the electronic age: Assuming that written, paper-based disclosures and confirmations are the best way to achieve the “warning” or “cautionary” function of such requirements, is there a truly compelling reason to give them up in the electronic age?

This author is of the opinion that the traditional “hard-copy” disclosures and confirmations can be maintained without hampering the development of the every-day business-to-consumer electronic commerce that it is appropriate and important to encourage. Moreover, it is my view that this is only one view of a number of important issues where even the European experts seem too ready to yield to the electronic juggernaut.

Hopefully, at least in Israel, genuine needs of consumer protection require that the electronic revolution proceed at something less than the speed of light.

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21. Unfortunately, both the relevant European Union Directive and the research team assigned the task of examining the impact of the information age on European consumer law, seem prepared to answer this question in the affirmative.

