

3. Law of Property and Obligations

The Act Concerning Protection of a Depositor Against the Deposit being Fraudulently Repaid by Machine using a Forged Card and a Stolen Card

Law No. 94, August 10, 2005 (Effective on February 10, 2006).

Background:

The cases have recently been increasing that a deposit is fraudulently repaid by an ATM using a forged card or a stolen card. In these cases, treatment in law has hitherto followed Art. 478 of the Civil Code or the preformed term (the article was applied in the repayment by ATM. The Supreme Court, April 8, 2003, 57 (4) MINSHU 337.) so that, unless there was negligence by the banking institute, the repayment of the deposit was regarded as valid, so the depositor bore the loss. The sharp increase of these cases became an object of public concern, and there was discontent that the depositor bore the loss in principle.

Accordingly the Financial Services Agency set up the study-group for considering this problem. Each political party stated to consider the solution too, and the Government party, the Liberal Democratic Party, reached the conclusion that protection of depositor is need. This conclusion was based on the recognition that a banking institution may have neglected the construction of a safe system for it avoided the burden of a risk as a general rule.

The Government parties drafted a bill, and on June 21, 2005, submitted it to the Diet. The House of Representatives passed the bill on June 26, and the House of Councilors on August 3, and the act came into effect. The act came into force on February 10, 2006.

Main Provisions:

1. Ends and definitions:

This act has the purpose of protecting a depositor, and maintaining confidence in the deposit system [Art. 1]. A depositor who is protected by the act is restricted to individual [Art. 2(2)], because between a individual depositor and a banking institution, a great inequality of power in

the light of funds and staff exists. In this point, the act is based on the thinking of consumer protection.

For the purpose of this act, the term “genuine card” means a card or a bankbook for the repayment of a deposit passed to a depositor based on the deposit contract, which includes its function for the loan of money too [Art. 2(3)]. For the purpose of this act, the term “forged card” means a card (in the following, including a bankbook too) that is not genuine, and a similar thing. The latter means the functions for the repayment of deposit, but the bankbook [Art. 2(4)]. Protected by the act is not the repayment at a counter, but the repayment of deposit or loan of money by machine, ATM and cash dispenser (the repayment by machine: Art. 2(6) and (7)).

2. Repayment using a forged card:

Art. 478 of the Civil Code is not applied to the repayment by machine, unless in the case of a genuine card [Art. 3]. It means that Art. 4 shall be applied to repayment by a forged card, unless the banking institution shows that it is the repayment by a genuine card.

The repayment by a forged card is regarded as valid, (1) when the repayment has been requested by the depositor by design, or (2) when the banking institution has not known of the fraudulence of repayment negligently and the depositor has been seriously negligent [Art. 4]. The banking institution bears the burden of proof. That is because the responsibility of the bank using such a weak system that a card is easily forged is serious.

3. Repayment using a stolen card:

In the case of repayment using a stolen card, the banking institution shall make compensation for the whole loss, where the depositor satisfies the following conditions [Art. 5]. This compensation is based on a new right of claim, which the act gives irrespective of the effectiveness of the repayment.

In order to get the compensation, the depositor must;

- (1) give the banking institution notice of a theft of the card soon after knowing the fact,
- (2) explain the circumstances when it was stolen and so on, without delay, in answer to a request of the banking institution, and

- (3) show the banking institution a thing prescribed by the Cabinet Order as a fact that all of the presumption that a depositor has submitted a complaint report to police, a bill of complaint to a prosecutor.

Through the depositor doing so, the banking institution can grasp affairs, and prevent damage. The condition (2) and (3) makes for the prevention of identity theft.

The banking institution must compensate the depositor for the sum equal to that of repayment (which is made after a yardstick day), unless the bank shows that the repayment is not fraudulent using a stolen card, or that the repayment has been requested by the depositor by design [Art. 5(2)]. The yardstick day means 30 days before the notice of the above condition (1). Even if the depositor is negligent, he gets compensation of one quarter of the sum originally compensated, unless seriously negligent [Art. 5(2) *proviso*].

The depositor can have a claim of compensation based on the act and a claim of repayment based on the deposit contract. The provision is set that coordinates the relation between the claims in order that depositor is not satisfied with both claims in this case.

Editorial Note:

According to the previous case law, the validity of the repayment of deposit relied exclusively on the fault of a banking institution. On the contrary, in the act, there is a case in which the fault of a depositor comes into question. Further, in the case of a depositor's serious negligence, there is a case in which the repayment is regarded as valid, or in which a claim of compensation is not admitted. So it is important when the depositor is negligent or seriously negligent. It is said that in the light of the spirit of the act, negligence and serious negligence must be understood very strictly. There is a serious negligence in Art. 4, for instance, where the depositor has told the other the PIN, where the depositor has written the PIN on the card, or where the depositor has passed the card to an other and so on.

One of the features of the act is that in the case of a forged card a depositor is protected by a special rule of Art. 478 of the Civil Code, so has a claim of repayment based on deposit contract, on the other hand,

in the case of a stolen card, Art. 478 of the Civil Code is applied and a depositor has an other compensation claim that is different from the repayment claim. We might think that the reason why the legal construction in the case of a forged card is different from the case of a stolen card could be that for the case of the previous precedents related to a stolen card, the range in which Art. 478 of the Civil Code is applied could not extend over the case of a forged card, so the special rule of the act is not inconsistent with the previous precedents, on the other hand, in the case of a stolen card, in which Art. 478 of the Civil Code has been applied, the special rule in the act does not make a “revision” to the case law, but does add a supplement by the introduction of the new claim, and by doing so the act would ensure the continuity of the state of the law. Except for the difference in these legal constructions, the act follows a plan by the above study group. In contrast, the Democratic Party plan submitted to the Diet with the act prescribed positive protection of a depositor rather than the act.

Art. 478 of the Civil Code is still applied to repayment of a deposit except for repayment in the act. For example, it is repayment at a window and Internet banking. About these, prompt measures are necessary (Art. 3 the additional clauses).

4. Law of Civil Procedure and Bankruptcy

The Revision of the Special Liquidation and the Abolishment of the Arrangement of Business Corporation (Part of the Business Corporation Act)

Law No. 86, June 26, 2005 (effective on May 1, 2006).

Background:

In 1999, the Civil Rehabilitation Law was enacted, in 2002, the Corporate Reorganization Act was entirely revised, and, in 2004, the Bankruptcy Act was also revised completely. Then, the Special Liquidation and the Arrangement of Business Corporation, both of