

## ARTICLE:

# THE JAPANESE LAW ON UNAUTHORIZED ON-LINE CREDIT CARD AND BANKING TRANSACTIONS: ARE CURRENT LEGAL PRINCIPLES WITH RESPECT TO UNAUTHORIZED TRANSACTIONS ADEQUATE TO PROTECT CONSUMERS AGAINST INFORMATION TECHNOLOGY CRIMES IN CONTEMPORARY SOCIETY?

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## Introduction

This article discusses Japanese law with respect to issues pertaining to unauthorized on-line credit card transactions and internet banking transactions. It will address on-line contract formation where rules including web site terms of use to bind users to the terms of on-line transactions such as on-line shopping and banking, cases with respect to the validity of indemnity clauses between financial institutions and customers which relieve financial institutions for making payment to a person who appeared to be a creditor, and the Japanese Civil Code provision of relieving debtors who have made payment to a person who appeared to be a creditor.<sup>1</sup> It will then discuss the Act on Protection of Depositors Against Unauthorized Withdrawal of Money with Forged or Stolen Cards by Mechanical Process (Depositors Protection Act),<sup>2</sup> which provides rules for the indemnification of depositors' damages in cases where forged or stolen cash cards are used to withdraw or borrow from deposits as a result of their unauthorized use with an automatic cash dispenser (ATM). In addition, the article will cover the self-regulatory rules of the Japanese Bankers Association with respect to stolen passbooks and internet banking,<sup>3</sup> which are important in giving extra protection to customers of financial institutions. This article will also refer to the *Interpretative Guidelines on Electronic Commerce and Transactions of Information as Property* ('Interpretive Guidelines on Electronic Commerce'), published by the Ministry of Economy, Trade and Industry (METI),<sup>4</sup> as

necessary. The Interpretive Guidelines on Electronic Commerce carry no legal consequences, but provide useful guidance on new issues relating to electronic commerce. They were published to offer guidance on the interpretation of the Japanese civil law and other relevant laws to enhance predictability for the parties involved, and thus to promote electronic commerce transactions. They cover topics relating to electronic commerce such as on-line contract formation, unauthorized use of credit cards in internet trading, and unauthorized use of the identity of a customer in internet banking.

The legal principles derived from cases with respect to unauthorized transactions, together with the Depositors Protection Act and the self-regulatory rules of the Japanese Bankers Association, have made steady progress in protecting the assets of depositors and advance safety and security in the financial system. However, the legal principles derived from cases which applied the provisions of article 478 of the Civil Code, and also where the validity of indemnity clauses have been considered, may not be equipped to adequately protect consumers against new crimes involving unauthorized transactions using information technology. Arguably, there is too much burden placed on consumers, because they only question the fault of financial institutions, which means that depositors have to bear the loss in the absence of any negligence of the financial institution. A better system may be one based on the principle which questions the negligence of both the financial institutions and customers, where the customers are

<sup>1</sup> Civil Code (Law No. 89, 1896), article 478.

<sup>2</sup> 'Gizō Card tō oyobi Tōnan Card tō o Mochiite Okonawareru Fuseina Kikaishiki Yochokin Haraimodoshi tō Kara no Yochokinsha no Hogo ni Kansuru Hōritsu' (Law No. 94, 2005); See generally, and see for the translation of the Depositor's Protection

Act, Hironao Kaneko, 'How Bank Depositors are Protected in Japan' *Digital Evidence and Electronic Signature Law Review* 8 (2011) 92-106.

<sup>3</sup> Japanese Bankers Association, 'New Chairman Sugiyama, Inauguration Press Conference', 22 April 2008, available

at <http://www.zenginkyo.or.jp/en/news/2008/04/22000000.html>.

<sup>4</sup> METI, 'Interpretive Guidelines on Electronic Commerce' (2008, amended in 2012), available at <http://www.meti.go.jp/press/2012/11/20121120001/20121120001.html>.

liable for a certain limited amount of loss and the financial institutions are liable for the rest, on the condition that the financial institutions are notified of an unauthorized transaction in a timely manner,<sup>5</sup> as demonstrated in the United States by section 909 of Electronic Fund Transfer Act of 1978 (15 U.S.C. 1693 and following), codified to 15 U.S.C. 1693g, which provides:

(a) UNAUTHORIZED ELECTRONIC FUND TRANSFERS; LIMIT.--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 fingerprint or by electronic or mechanical confirmation. In no event, however, shall a consumer's liability for an unauthorized transfer exceed the lesser of:

(1) \$50; or

(2) the amount of money or value of property or services obtained in such unauthorized electronic fund transfer prior to the time the financial institution is notified of, or otherwise becomes aware of, circumstances which lead to the reasonable belief that an unauthorized electronic fund transfer involving the consumer's account has been or may be effected. Notice under this paragraph is sufficient when such steps have been taken as may be reasonably required in the ordinary course of business to provide the financial institution with the pertinent information, whether or not any particular officer, employee, or agent of the financial institution does in fact receive such information.

### On-line contract formation

In cases where there will be contracts between the parties to engage in on-line transactions such as internet trading, internet auctions and internet information services, contract terms between the users and providers of web

sites are intended to be incorporated into those contracts. The contracts for the use of web sites are often referred to as 'Web Site Terms of Use', a document which includes the terms and conditions for on-line transactions, such as 'terms of use' ('riyō-kiyaku'), 'terms and conditions' ('riyō-joken') or 'service contract' ('riyō-keiyaku'). According to the Interpretive Guidelines on Electronic Commerce, these contracts do not bind users unless the users are deemed to have agreed to the Web Site Terms of Use.<sup>6</sup>

If a user is not aware of the existence of the Web Site Terms of Use, or is not asked to click on the 'Agree' button to effect the Web Site Terms of Use, they are not bound by them.<sup>7</sup> The Interpretive Guidelines on Electronic Commerce state that the Web Site Terms of Use is incorporated into the terms and conditions if agreeing to it is a condition of using the services. In order to form binding contracts, a link to the terms and conditions of the Web Site Terms of Use should be clearly shown, along with clicking on the 'Agree' button as a condition to effect the transactions, and the Web Site Terms of Use should be structured so that users can easily gain access to the terms and conditions, which are fully disclosed to them. It has to be objectively indicated that the users have the intention to initiate transactions in accordance with the Web Site Terms of Use.<sup>8</sup>

However, the validity of the Web Site Terms of Use is not effective if a term breaches articles 8 and article 9 of the Consumer Contract Act,<sup>9</sup> or harms the interests of consumers unfairly under legal principles derived from cases with respect to validity of standard form contracts.<sup>10</sup> Articles 8 and 9 provide as follows:

Article 8 (Nullity of Clauses which Exempt a Business Operator from Liability for Damages)

(1) The following clauses of a consumer contract are void.

(i) Clauses which totally exclude a business operator from liability to compensate damages to a consumer arising from the business operator's default.

(ii) Clauses which partially exclude a business operator from liability to compensate damages to a consumer arising from the business operator's default (such default shall be limited to cases where same arises

5 Masao Okawa and Akihiko Yoshimura, 'Loss Allocation Rules Between an Individual Depositor and Her Bank in Case of Fraudulent Transactions', *Soft Law Research*, 15-1 (2010), 1-33 (at 22) – citing Robert D. Cooter and Edward L. Rubin, 'A Theory of Loss Allocation for Consumer Payments', 66 *Texas L. Rev.* (1987) 63-128, 90.

6 *Interpretive Guidelines on Electronic Commerce*, i.22.

7 *Interpretive Guidelines on Electronic Commerce*, i.22-23.

8 *Interpretive Guidelines on Electronic Commerce*, i.25-26.

9 *Interpretive Guidelines on Electronic Commerce*, i.23 and 30-32. See also article 3, paragraph 1 and article 4, paragraph 2

of the Consumer Act. For the translation of the Japanese Law, see <http://www.japaneselawtranslation.go.jp>.

10 *Interpretive Guidelines on Electronic Commerce* at i-32, some clauses of the standard form contracts may be deemed in breach of public order and good morals under article 90 of the Civil Code.

due to the intentional act or gross negligence on the part of the business operator, the business operator's representative or employee).

(iii) Clauses which totally exclude a business operator from liability to compensate damages to a consumer arising from a tort pursuant to the provisions of the Civil Code committed on occasion of the business operator's performance of a consumer contract.

(iv) Clauses which partially exclude a business operator from liability to compensate damages to a consumer arising from a tort (such torts shall be limited to cases where the same arises by intentional act or gross negligence on the part of the business operator, the business operator's representative or employee) pursuant to the provisions of the Civil Code committed on occasion of the business operator's performance of a consumer contract.

(v) When a consumer contract is a contract for value, and there exists a latent defect in the material subject of a consumer contract (when a consumer contract is a contract for work, and there exists a defect in the material subject of a consumer contract for work; the same shall apply in the following paragraph), Clauses which totally exclude a business operator from liability to compensate damages to a consumer caused by such defect.

(2) The provision of the preceding paragraph shall not apply to the clause provided in item (v) of the preceding paragraph which falls under the cases enumerated in the following items:

(i) In the case where a consumer contract provides that the business operator is responsible to deliver substitute goods without defects or repair the subject when there exists a latent defect in the material subject of the consumer contract;

(ii) In the case where a contract between the consumer and another business operator entrusted by the business operator or a contract between the business operator and another business operator for the benefit of the consumer, which is concluded before or simultaneously with the consumer contract, provides that the other business operator is responsible to compensate the whole or a part of the damage caused by the defect, deliver substitute goods without defects or repair the subject defect when there exists a latent defect in the material subject of the

consumer contract.

Article 9 (Nullity of Clauses which Stipulate the Amount of Damages Paid by Consumers and such Other Clauses)

The following clauses of a consumer contract are void to the extent provided in each respective item:

(i) As to a clause which stipulates the amount of liquidated damages in case of a cancellation or fixes the penalty, when the total amount of liquidated damages and the penalty exceeds the normal amount of damages to be caused by the cancellation of a contract of the same kind to the business operator in accordance with the reason, the time of the cancellation and such other things- the part that exceeds the normal amount.

(ii) As to the clauses in a consumer contract which stipulate the amount of damages or fix the penalty in the case of a total or partial default (if the number of payments is more than one, every failure of payment is a default in this item) of a consumer who is overdue, when the total amount of liquidated damages and the penalty exceeds the amount calculated by deducting the amount of money actually paid from the amount of money which should have been paid on the due date and multiplying by 14.6% a year in accordance with the number of days from the due date to the day on which the money is actually paid- the part that so exceeds.

In circumstances where an electronic commerce transaction between a buyer and seller without a prior agreement as to authentication procedures takes place, and the buyer is masquerading as another person, a contract is not formed between the victim and the seller, except in cases involving an application of the rule of apparent authority by analogy (Civil Code, articles 109, 110 and 112).<sup>11</sup> In circumstances where the parties agreed to use an authentication procedure (it is common where parties enter transactions on a continuing basis), the use of such an authentication procedure is attributed to the buyer when the contract is formed.

### **Cases where payment was made to a person who appeared to be a creditor**

To determine whether the financial institution is liable for the loss in cases where an unauthorized payment is made by a financial institution to a person who appeared to be a customer, the courts either consider the validity of the

<sup>11</sup> *Interpretive Guidelines on Electronic Commerce, i.41.*

indemnity clauses between the financial institution and the customer, or consider whether the financial institution can avoid liability based on the provisions of article 478 of the Civil Code for relieving debtors who made payment to a person who appeared to be a creditor. The courts consider (1) the fault of the financial institutions, and (2) the security of the payment system of the financial institutions to exclude unauthorized payments. Article 478 of the Civil Code provides that, 'A performance by a person to a quasi-possessor of a claim is valid, if the person is bona fide and without negligence concerning their performance.' This provision relieves debtors who make a payment to a person who appeared to be a creditor, and has been applied to variety of cases with respect to banking and insurance transactions.<sup>12</sup> The article was originally meant to protect payees who did not know who the creditor was in cases where there were multiple creditors, not when the payment was made to a person who had the appearance of a creditor, when the identity of the creditor was forged.<sup>13</sup> However, this article is still used to protect payees who make payments to persons who had the appearance of being creditors.

Prior to the enactment of the Depositors Protection Act, the legal principle derived from court cases which applied article 478 and which considered the validity of indemnity clauses, were applied to cases including those of unauthorized withdrawals using a cash card or passbook from ATM machines, unauthorized borrowing using a cash card against a fixed term savings account from an ATM machine, and unauthorized borrowing against a life insurance policy. This legal principle is still applicable to unauthorized withdrawals using a cash card or passbook at a retail counter with a teller, unauthorized borrowing against a life insurance policy, credit card transactions and internet banking. However, credit card members may be indemnified by the credit card membership terms and conditions unless there are circumstances indicating gross negligence of the card member, such as when a family member uses the card. As mentioned previously, bank customers may be indemnified under the self-regulatory rules of the Japanese Bankers Association with respect to stolen passbooks and internet banking.

In a Supreme Court decision of 19 July 1993,<sup>14</sup> the court considered the validity of an indemnity clause between

a bank and its customer, which stipulated that 'the Bank and Participating Banks accept no liability for any damage caused in the event that money is withdrawn from your account using a card or PIN (personal identification number) that has, for example, been forged, falsified or stolen, if the teller machine identified the card as yours and confirmed that the PIN used to operate the teller machine matched the number registered with the Bank.' The court determined that when a genuine cash card issued by a bank was used and the correct PIN was keyed in to allow the withdrawal using a teller machine provided by the bank, the bank is relieved from liability due to the indemnity clause in the absence of special circumstances such as where the bank provided inadequate security for the customer. In this case, the court did not refer to article 478, because it was hard to imagine negligence of the payee regarding the ATM. The court, instead, referred to the security measures taken by the bank. Therefore, with respect to an ATM withdrawal, the 'negligence' part of article 478 is replaced with an evaluation of the security of the payment system.<sup>15</sup>

Another Supreme Court decision in 2003 with respect to an unauthorized withdrawal using a stolen passbook,<sup>16</sup> determined that the validity of the payment made to the 'quasi-possessor' of the claim depends upon whether the machine operated properly and whether the bank exercised due care with respect to the installation, management and maintenance of the automatic payment system as a whole, to exclude unauthorized withdrawals via an ATM by maintaining the system as a whole. Such exercise of due care includes the act of informing depositors that payment is possible via an ATM. In this case, there was an indemnity clause relieving liability in cases when a cash card was used to make a withdrawal from an ATM, but it did not cover the circumstance where a withdrawal via an ATM was made with a passbook. Therefore, the court ruled that the bank did not exercise due care in notifying the depositors with respect to its system of automated payments that could accept depositors' passbooks, so as to be able to eliminate unauthorized withdrawals. This 2003 case held that the provisions of article 478 were applicable to cases despite the fact that the withdrawal was made via an ATM. These cases show that in order to consider whether

12 23 February 1984 *Minshu* 38:3, 445; *Saibansho Jiho* 886:1 (a case with respect to a fixed term deposit); 19 July 1993, *Saibansho Jiho* 1103:1, *Hanrei Jiho* 1489:111 (a case with respect to cash card transactions); 24 April 1997, *Minshu* 51:4, 1991, *Hanrei Jiho* No. 1603:69 (a case with respect to a contract for life insurance – the terms of the contract contained a provision that the policyholder could receive a loan

from an insurance company in an amount up to ninety per cent of the contracted reimbursement as a loan against the policy). For the English translation of some of the cases, see the Transparency of Japanese Law Project web site, [http://www2.osjpp.osaka-u.ac.jp/~nomura/project/inter\\_finance/eng/casesj%20English.html](http://www2.osjpp.osaka-u.ac.jp/~nomura/project/inter_finance/eng/casesj%20English.html).

13 Tsuneo Matsumoto, 'Legal Principles with Respect to Unauthorized Withdrawal of

Deposit and Depositors Protection Act' *Jurist*, 1308 (2006) 28, 30.

14 *Saibansho Jiho* 1103:1, *Hanrei Jiho* 1489:111.

15 See Matsumoto, 30.

16 Supreme Court decision of 8 April 2003, *Minshu* 57:4-337; *Hanrei-Times* 1121:96; Supreme Court decision of 19 July 1993, *Saibansho Jiho* 1103:1, *Hanrei Jiho* 1489:111.



unauthorized payments are valid, article 487 may be applied to determine whether there was negligence on the part of the bank, or, where there is an indemnity clause in the case of an unauthorized payment via an ATM, its validity is determined by evaluating whether the payment via the ATM system is constructed to eliminate, as much as possible, unauthorized payments and withdrawals.

In a 23 February 1984 Supreme Court Decision,<sup>17</sup> article 478 was applied by analogy to a case where a financial institution gave a loan to a third party against a fixed term deposit. Subsequently, the depositor demanded payment from the bank. The bank argued that the term deposit certificate and the seal impression on file were examined before the loan was given, and that the loan as well as the set-off from the fixed term deposit was valid. The court ruled that the financial institution exercised its duty of care in ascertaining the identity of the depositor, and that the set-off was valid through analogous application of article 478 of the Civil Code. The court ruled that the set-off of the loan against the fixed term deposit could be considered analogous to a pre-term cancellation of the fixed term deposit, by citing an earlier decision, which ruled that a transaction to cancel a fixed term deposit and payment of the money from the cancelled fixed term deposit was, overall, considered 'payment' to the 'quasi possessor' of the claim, as the detailed contents of such payment had already been ascertained by agreement between the parties at the time of contract.<sup>18</sup>

Article 478 was also applied by analogy in a Supreme Court Decision on 24 April 1997,<sup>19</sup> where an insurance company loaned money to the wife of a policy holder who presented the insurance company with a false power of attorney from the policy holder. According to the terms of the insurance contract, a policy holder could receive a loan from the insurance company in an amount up to ninety per cent of the contract reimbursement. The court ruled that, as economic reality, such loans may be regarded as similar to the prepayment of the insurance policy proceeds or the contracted reimbursement, because (1) such loans are effected as the performance of an obligation under contract; (2) the amount of the loan is limited to an amount not exceeding the contracted reimbursement, and (3) the principal and interest are to be calculated and deducted at the time of payment of the

insurance policy proceeds. The insurance company may claim the validity of such a loan against a policy holder as long as the insurance company exercised due care with respect to identifying the individual as the agent of the policy holder by application by analogy under article 478 of the Civil Code.

The legal principle derived from cases with respect to the application of article 478 and indemnity clauses only question the fault of the financial institutions, which means that depositors have to bear the loss in the absence of any negligence. The financial institutions have argued that the transactions with respect to bank deposits, especially current accounts, required prompt payments. They therefore may be held liable if they fail to pay promptly. However, this principle has been expanded to many cases, including cases of executing loans from a fixed term deposit where more than a simple payment was made to persons who had the appearance of a creditor.<sup>20</sup> Academic opinions rightfully argue that unauthorized borrowing may be beyond the scope of simple payment as contemplated by article 478 of the Civil Code.<sup>21</sup> With the rapid advance of technology and ever-increasing crimes which utilize it, this system that only questions the fault of financial institutions and places an undue burden upon the user or customer of the financial institution should be reconsidered in light of the distribution of loss in society, as well as the maintenance of stability and security of the financial system as a whole.

### Legislative process with respect to the Depositor's Protection Act

Unauthorized cash withdrawals using forged or stolen credit cards became a significant issue when large sums of money were taken using stolen or forged cash cards belonging to the users of lockers at golf clubs between 2003 and 2005. The thieves used an elaborate scheme to find the PINs, such as using a small surveillance camera to find out the combination of the locks. This worked, as many of the users used the same combination number for their PINs.<sup>22</sup> A study group on forged cash cards ('Study Group') was formed to consider these issues.<sup>23</sup> The Study Group concluded that the most important service that financial institutions could provide was that of the safe management of depositor's property, and therefore security with respect to the operation of the

17 *Minshu* 38: 3, 445; *Hanrei Jiho* 1108:82; *Saibansho Jiho* 445:886.

18 4 October 1966, *Minshu* 20:8-1565; *Hanrei Jiho* 466:21.

19 *Minshu* 51:4-1991; *Hanrei Jiho* 1603:69.

20 23 February 1984 Supreme Court Decision, *Minshu* 38:3, 445; *Hanrei Jiho* 1108:82; *Saibansho Jiho* 445: 886.

21 *The application of apparent agency under article 110 of the Civil Code was proposed with respect to unauthorized borrowing against fixed term deposits*, Yoshio Shiomi, 'Law of Obligation', (*Shinzansha*, 2012), 351.

22 *IT Pro*, 'Cases on Cash Card Phishing and Forgery' (2005) <http://itpro.nikkeibp.co.jp/>

*free/ITPro/OPINION/20050221/156434/*  
23 *Financial Services Agency, The Study Group with Respect to Forged Cash Card, 'Final Report by the Study Group with Respect to Forged Cash Card, (2005), available at [http://www.fsa.go.jp/singi/singi\\_fccsg/gaiyou/f-20050318-singi\\_fccsg.html](http://www.fsa.go.jp/singi/singi_fccsg/gaiyou/f-20050318-singi_fccsg.html)*.

ATM system should be maintained at a certain level to protect the depositors' safety.<sup>24</sup> In order to place priority on depositors' trust toward security with respect to deposits made with financial institutions, rather than having a system of relieving financial institutions from responsibility for unauthorized payments when they neither knew nor were negligent as to the payee's identity, as under article 478, a new system should protect depositors when they exercise ordinary care. Depositors should be indemnified in the cases of stolen cards, as long as they notify the financial institutions and investigative authorities in a timely manner.<sup>25</sup> As security measures should not be required only of financial institutions, but also of depositors, improved awareness of depositors of the proper management of cards and taking measures to ensure that depositors fulfil their duty of care (refraining from reckless or negligent card management because they are insured or indemnified), should also be considered.<sup>26</sup> The Study Group conducted research on the systems of other countries with respect to indemnity, where unauthorized withdrawals caused loss to depositors. It found that, in the majority of countries, depositors are indemnified fully, as the smooth operation of financial transactions and reputational risk of financial institutions are considered highly important.<sup>27</sup> Other factors include that it is not easy to prove whether a loss is caused due to forgery or theft, and that a limitation on the amount that can be withdrawn makes it manageable for the financial institutions to bear the loss. It has been commented that Japanese society is a cash society, where people more often use cash to pay for things other than credit cards and cheques.<sup>28</sup> The Study Group proposed that in constructing rules for the distribution of loss in cases of forged or stolen cash cards, both the financial institutions and depositors should be given appropriate incentives to prevent such crimes.<sup>29</sup>

The Study Group reached the conclusion that the responsibility of loss caused by forged cash cards should

be placed on the financial institutions, unless depositors were grossly negligent.<sup>30</sup> The burden of proof as to whether there was gross negligence should be on the financial institutions.<sup>31</sup>

Losses caused by stolen cash cards would be indemnified fully or partially by financial institutions, depending on the negligence of both parties, provided that the depositors fulfilled certain conditions. For example, depositors would be required to file a report with the financial institution and police, and a depositor's family member should not be responsible for the unauthorized use.<sup>32</sup> The burden of proof as to whether there was negligence should be on the financial institution.<sup>33</sup>

The Depositors Protection Act provides rules for the indemnity of depositors in cases where forged or stolen cash cards are used to withdraw or borrow from deposits as a result of their unauthorized use with an automatic cash dispenser (ATM). The amount of indemnity is reduced for stolen cash cards by 25 per cent if depositors are negligent: for example if the depositor used their birth date as a PIN, or placed the cash card close to any documents which contained information leading to identifying the PIN. If a depositor is grossly negligent, for example by giving their card to a third party, there is no indemnity for forged or stolen cash cards. The relevant provisions are as follows:

Section 4 (Effect of ATM withdrawal and loan by forged card or instrument):

1) The withdrawal by ATM using a forged card or other instrument is valid if

i) the withdrawal is based on the intention of the depositor who concludes the contract of deposits and savings relating to the withdrawal by ATM, or

ii) on condition that the financial institution

<sup>24</sup> *Final Report by the Study Group with Respect to Forged Cash Card*, 7.

<sup>25</sup> *The Study Group with Respect to Forged Cash Card*, 'Second Interim Report by the Study Group with Respect to Forged Cash Card—With Respect to Stolen Cash Card' 5-6 (2005), available at <http://www.fsa.go.jp/news/newsj/16/ginkou/f-20050513-3.html>.

<sup>26</sup> *Final Report by the Study Group with Respect to Forged Cash Card*, 7; *Second Interim Report by the Study Group with Respect to Forged Cash Card*, 5-7.

<sup>27</sup> *The Study Group with Respect to Forged Cash Card*, 'Interim Report by the Study Group with Respect to Forged Cash Card—With Respect to Forged Cash Card' (2005), 3, available at <http://www.fsa.go.jp/news/newsj/16/ginkou/f-20050331-3.html>; *Second Interim Report by the Study Group with*

*Respect to Forged Cash Card*, 4-5; *Regulation 5(2) of the Payment Services Regulations 2009* (S.I. No. 209); article 61 of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (Text with EEA relevance) OJ L319, 5.12.2007, p. 1-36).

<sup>28</sup> *Interim Report by the Study Group with Respect to Forged Cash Card—With Respect to Forged Cash Card*, 3.; *Second Interim Report by the Study Group with Respect to Forged Cash Card*, 4.

<sup>29</sup> *Interim Report by the Study Group with Respect to Forged Cash Card—With Respect to Forged Cash Card*, 4-5; *Second Interim Report by the Study Group with Respect to*

*Forged Cash Card—With Respect to Stolen Cash Card*, 5-6; *The Study Group with Respect to Forged Cash Card*, 'Final Report by the Study Group with Respect to Forged Cash Card', 7.

<sup>30</sup> *Interim Report by the Study Group with Respect to Forged Cash Card—With Respect to Forged Cash Card*, 5.

<sup>31</sup> *Interim Report by the Study Group with Respect to Forged Cash Card—With Respect to Forged Cash Card*, 5.

<sup>32</sup> *Second Interim Report by the Study Group with Respect to Forged Cash Card—With Respect to Stolen Cash Card*, 5.

<sup>33</sup> *Second Interim Report by the Study Group with Respect to Forged Cash Card—With Respect to Stolen Cash Card*, 5; Article 33 of Directive on Payment Services (PSD), 2007/64/EC).

concluding the contract of deposits and savings is acting in good faith and without negligence relating to the withdrawal by ATM,

and the withdrawal is based on the gross negligence of the depositor.

2) The depositor is responsible for a loan by ATM using a forged card or instrument if:

i) the loan is based on the intention of the depositor who concludes the contract of deposits and savings relating to the loan by ATM, or

ii) on condition that the financial institution concluding the contract of deposits and savings is acting in good faith and without negligence relating to the loan by ATM,

and the loan is based on the gross negligence of the depositor.

Section 5 (Indemnity of the amount of ATM withdrawal or loan using a stolen card)

(1) The depositor can request the financial institution to include in the deposits and savings contract an indemnity in the amount of the withdrawal by ATM using a stolen card or instrument, where his/her genuine card or instrument had been stolen and all conditions provided in the following subdivisions are fulfilled:

(i) the depositor gave quick notice to the financial institution after recognizing the fact of the theft of the genuine card or instrument;

(ii) the depositor explained the situation of the theft;

(iii) the depositor informed the financial institution that he/she had reported the theft to the investigation office or presented facts

inferring the theft as defined by the Rule of the Cabinet Office.

(2) A financial institution that is claimed against by a depositor with indemnity provided by subsection 1, should pay the amount of withdrawal by ATM to such depositor (this is limited to the amount of withdrawals by ATM within a standard day. Hereinafter ‘the

amount of acceptable indemnity’), unless the financial institution proves the fact that the withdrawal by ATM was not illegal, with the use of a stolen card or instrument or that the withdrawal was based on the intention of the depositor requesting the indemnity. If the financial institution proves that it is bona fide and not negligent relating to the illegality of the withdrawal by ATM using a stolen card or instrument, and that the withdrawal is based on the negligence (except for gross negligence) of the depositor, the financial institution should pay to the requesting depositor three fourths of the amount of acceptable indemnity.

Subsequent to the enactment of the Depositors Protection Act, banks lowered the amount customers can withdraw from ATMs, with options for the customer to change the amount of such limitation. Also, Biometric IC cards have been offered to secure safer authentication.<sup>34</sup>

### Credit card transactions

The validity of indemnity clauses in credit card transactions has been at issue in several court cases. A Tokyo District Court decision of 20 April 1984<sup>35</sup> considered the unauthorized use of a credit card by the brother of the credit card member. The plaintiff argued that the credit card company should not have taken action against them, because the credit limit was 500,000 yen, and the credit card receipt should have been signed with the card member’s signature. The court denied the plaintiff’s claim and held that such limitation is not a valid reason to limit the claim by the credit card company, as the credit card company cannot do anything when the card is used for a large sum of money in such a short period of time and in the light of difficulties in matching the Japanese letters in large quantities in speedy commercial transactions. In a 30 August 1995 case before the Sapporo District Court,<sup>36</sup> the credit card member argued that it was not her, but her husband who used the credit card, and claimed negligence on the part of the credit card company. The court ruled that shops accepting the credit card had a duty to confirm whether the person using the credit card was the actual owner of the credit card in circumstances where there was a reasonable doubt as to whether such person was the actual owner. In this case, a man was using the plaintiff’s card, who was a woman, therefore appropriate procedures were not taken, because there should have been a reasonable doubt as to the identity of the card member. The court held that the credit card company had

<sup>34</sup> Mitsubishi Tokyo UFJ Bank, ‘Daily Withdrawal Limit’ (2013) available at [http://www.bk.mufg.jp/info/gendogaku\\_initi\\_02.html](http://www.bk.mufg.jp/info/gendogaku_initi_02.html).

<sup>35</sup> Hanrei Times 531:174; Kinyu Shoji Hanrei 713:39; See Fukashi Miyagawa, ‘Usefulness of the Signature Check for Bank and Credit-Card Transactions: Establishing a Standard

of Care’, Kyoto Gakuen Hogaku 44 (2004), 1-27.

<sup>36</sup> Hanrei Times 902:119.

a duty to make shops confirm the identity of card users. The court reduced the claim of the credit company due to contributory negligence by 50 per cent.

In a case before the Nagoya District Court (29 August 2000),<sup>37</sup> the card member claimed that it is an abuse of right to claim payment for the unauthorized use of a credit card which was borrowed without consent of the credit card member. The court ruled that despite the fact that a duty to pay was incurred under the credit card contract, the signature made by the unauthorized person was obviously different from that of the card member, therefore the shop should have been able to prevent unauthorized use by comparing the signature of the credit card member with the unauthorized signature. The court reduced the claim of the credit company due to contributory negligence by 50 per cent.

With respect to credit card transactions on the internet, according to existing credit card membership terms and conditions, a card holder who is impersonated by a thief is not obliged to pay a fraudulently charged amount or damages, unless the victim fails to exercise due care with respect to the credit card and information pertaining to the credit card, and fails to report that the card was lost or stolen, or the victim's relative or cohabitant used his or her card, or the victim's intentional act or gross negligence caused the illegal act.<sup>38</sup> In the United States, the liability of the holder of a credit card is covered by § 1643 of the Truth in Lending Act (15 U.S.C. §1601 and following), which provides as follows:

(a) Limits on liability

(1) A cardholder shall be liable for the unauthorized use of a credit card only if:

- (A) the card is an accepted credit card;
- (B) the liability is not in excess of \$50;
- (C) the card issuer gives adequate notice to the cardholder of the potential liability;
- (D) the card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card, which description may be provided on the face or reverse side of the statement required by section 1637(b) of this title or on a separate notice accompanying such statement;

(E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise; and

(F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

(2) For purposes of this section, a card issuer has been notified when such steps as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information have been taken, whether or not any particular officer, employee, or agent of the card issuer does in fact receive such information.

(b) Burden of proof

In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the conditions of liability for the unauthorized use of a credit card, as set forth in subsection (a) of this section, have been met.

(c) Liability imposed by other laws or by agreement with issuer

Nothing in this section imposes liability upon a cardholder for the unauthorized use of a credit card in excess of his liability for such use under other applicable law or under any agreement with the card issuer.

(d) Exclusiveness of liability

Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

**Internet banking transactions**

Prior to the establishment of the self-regulatory rules of the 2008 Japanese Bankers Association with respect to stolen passbooks and internet banking, the legal principle derived from the validity of indemnity clauses was applied to cases where unauthorized bank transfers were made.

In a 13 July 2006 case before the Tokyo High Court,<sup>39</sup> the plaintiff claimed that the bank breached its duty of

<sup>37</sup> *Kinyu Shoji Hanrei* 1108: 54.

<sup>38</sup> *Interpretive Guidelines on Electronic Commerce*, i.44, 45; See also *Sasebo Brunch*, Nagasaki District Court decision on 24 April,

2008, the court ruled that a credit card member is not liable for the loss despite the fact that the illegal act was conducted by a family member if the card member was not

grossly negligent.  
<sup>39</sup> *Kinyu Homu Jijyo* 1785:45.



care under a deposit contract where one of the parties received a certain thing by promising that they would retain it for the other party.<sup>40</sup> The court upheld the validity of the indemnity clause, because there was no breach of duty under the deposit contract. It held that the bank did not breach its duty of care in constructing and operating the system, as it was constructed and managed to exclude unauthorized transfers as much as possible. Internet banking services are executed by determining automatically whether the person claiming to transfer funds has the proper authority to do so by checking whether the customer number, secret code and log in password match the corresponding data saved in the database of the bank. Therefore, with respect to internet banking transactions, when a person masquerades as a customer to make a withdrawal or to instruct a bank to transfer funds, such transactions are considered valid if there is an appearance that the person was authorized, and the bank is neither aware nor at fault about the fact that the person impersonating a customer was not authorized (article 478 of the Civil Code), provided that the system is designed and operated to exclude such unauthorized transactions as much as possible.<sup>41</sup>

The validity of indemnity clauses has thus been judged by assessing the level of the security system of the bank.<sup>42</sup> The Depositor's Protection Act is not applicable to internet banking. However, as previously mentioned, the Japanese Bankers Association published an agreement to indemnify depositors in cases when a thief impersonates a customer to make a withdrawal or to instruct a bank to transfer funds. The amount of indemnity is reduced by 25 per cent if the depositor is negligent. If the depositor is grossly negligent, there is no indemnity for forged or stolen cash cards. For internet banking, the evaluation as to whether a depositor is negligent or grossly negligent depends on the circumstances, as internet technology and the techniques used in such crimes are developing daily, and the services and security measures provided by each bank varies. Indemnity is conditional upon depositors notifying the financial institutions, explaining adequately to them, reporting to the investigative authorities (in the case of passbooks), and explaining to investigating

authorities with respect to matters concerning damages (in cases of internet banking). It should be noted that supplementary provisions and supplementary resolutions to the Depositors Protection Act provide that necessary steps should be taken to prevent crimes relating to stolen passbooks and internet banking, and that such matters should be considered two years subsequent to the date the law became effective.<sup>43</sup>

### Concluding remarks

With the advance of technology and ever increasing crimes that exploit the latest technology, the legal principles derived from cases that applied article 478 of the Civil Code and the validity of indemnity clauses, places an undue burden on the users or customers of financial institutions.<sup>44</sup> This system should be reconsidered in light of the distribution of loss in a society of rapidly advancing information technology and the maintenance of stability and security of the financial system as a whole. Principles derived from past cases will always place an undue burden on customers of financial institutions in holding indemnity clauses valid if there is no fault on the part of the financial institution, whenever new methods of transactions and new methods of crimes exploiting current information technology are invented. It has also to be noted that laws and self-regulatory rules do not cover some of the existing financial transactions, such as debit card transactions. New methods of high technology crimes may make it possible to present an appearance of the 'quasi possessor of claims'. The increasing reliance on new methods of entering transactions using high technology, means consumers are more vulnerable to new methods of committing crimes.<sup>45</sup> A better system may be one based on the principle which questions the negligence of both financial institutions and customers, where the customers are liable for a certain limited amount of loss and the financial institutions are liable for the rest, on the condition that the financial institutions are notified on a timely basis. This system may give both the financial institutions and the customers incentives to develop secure systems, to keep cards and information such as PINs safe, and to avoid litigation to determine

40 Article 657 provides that 'A deposit shall become effective when one of the parties receives a certain thing by promising that he/she will retain it for the other party.'

41 Interpretive Guidelines on Electronic Commerce, i. 46-48.

42 Interpretive Guidelines on Electronic Commerce, i. 46-48.

43 JBA, 'Responding to Illegal Withdrawals

from Depositor's Account' (2008), available at <http://www.zenginkyo.or.jp/news/2008/02/19160000.html>.

44 Matsumoto, 34, arguing that it is unfortunate that the legal principle derived from the application of article 478 and depositors contracts became so tightly connected. Banks should consider their duties under article 657, as providers of deposit contracts

to fulfill depositors' expectations for the safe keeping of their deposits.

45 Japanese Bar Association, 'Opinions With Respect to Unauthorized Electronic Fund Transfers' ('Opinions of Japanese Bar Association'), 4-5, available at [http://www.nichibenren.or.jp/activity/document/opinion/year/2005/2005\\_30.html](http://www.nichibenren.or.jp/activity/document/opinion/year/2005/2005_30.html).

if financial institutions or depositors were negligent.<sup>46</sup> Such a practice may be more appropriate than the current one, considering the time and expenses incurred in determining the negligence of the both parties, especially for customers, who may require a prompt solution to their cash flow problems; the difference in bargaining power between financial institutions and their customers, and for the credibility and maintenance of the security of the financial system as a whole.<sup>47</sup>

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<sup>46</sup> National Commission of Electronic Fund Transfers, 'EFT on the United States, Policy Recommendations and the Public Interest' (1977), 56-58, available at <http://catalog.hathitrust.org/Record/007396058>; Shoji Kawakami. 'Withdrawals from Cash Dispensers and Indemnification of Banks',

*in* Rokuya Suzuki & Shinichi Tokumoto, *New Development of Property Law* (Yuhikaku 1993), 341-368 (367-68); Stephen Mason, 'Debit cards, ATMs and negligence of the bank and customer' *Butterworths Journal of International Banking and Financial Law*, Volume 27, Number 3, March 2012, 163

– 173, 173, arguing that banking systems will always be subject to being successfully undermined by thieves, and judges ought to take a robust view in favour of the customer where a bank fails to provide a secure banking system.

<sup>47</sup> *Opinion of the Japanese Bar Association*, 5.