

ARTICLE:

THE LATEST CIVIL LEGAL PROCEEDINGS BETWEEN BANKS AND THEIR CUSTOMERS IN CHINA

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In recent years, the methods of payment adopted by banks have become increasingly diverse. In addition to withdrawing cash from a traditional deposit book, more customers choose to make inter-city, trans-city or trans-region withdraws of cash and to make inter-city, trans-city or trans-region payments and settlements by means of a bank card, cheque (check), internet bank and telephone bank. As a result, the number of disputes over unauthorized payment and settlement between banks and customers are increasing.

Typical examples of deposit disputes in China

Recently, many disputes have occurred over claims by customers of falsely withdrawing deposits from debit cards; deposit certificates being falsely claimed; national debt certificates being falsely claimed after reporting a loss, and other banking matters. The most recent judgments of the People's court are summarized for the reader below.

The customer fails to perform the obligations of confidentiality

In May of 2010, a message from Dehui Wu was sent to Weijia Wu's mobile telephone, announcing that two cars confiscated by customs were on sale. Weijia Wu contacted Dehui Wu, and they bargained and fixed the total price for the two cars at 680,000 yuan. In fact, Dehui Wu is the pseudonym of a farmer with the surname Yi in Fujian province, who lives on forging bank cards to steal money. Yi required Weijia Wu to apply for

a debit card in the Agricultural Bank and to deposit 680,000 yuan on the card. Shortly after Weijia Wu deposited the money, he told Yi the card number and the password. The latter immediately forged a corresponding debit card and sent his two accomplices, one of them with the surname Cai, to fly to Chengdu from Xiamen. Cai and the other accomplice withdrew the deposit from the card, which was over 670,000 yuan, with the false debit card and a false identity card at a bank in Chengdu. Weijia Wu reported the loss to the police as soon as he knew he had been swindled. However, after the criminal case was investigated and understood by the authorities responsible for the investigation, there was still 169,000 yuan missing. Therefore, Weijia Wu took legal action in the People's court in Yangpu district, Shanghai, requesting the People's court to order the Agricultural Bank, the bank in Chengdu and Yi to bear joint responsibility and to reimburse him for the loss of over 169,000 yuan and interest of 4,000 yuan.

During the trial, the People's court considered that as the false claimer of bank deposits, Yi and his two accomplices directly infringed upon the property rights of Weijia Wu. Yi expressed his willingness to compensate the economic loss that Weijia Wu suffered. The court did not hold the Agricultural Bank legally responsible for providing a safety warning to its customers. Weijia Wu disclosed his debit card number and password at his own discretion, and he voluntarily told the false claimer the password, neither of which are the responsibility of the bank in Chengdu. Therefore, it was decided that Weijia Wu should bear corresponding responsibilities for his acts. The first instance judgment

of the People's court ruled that Yi and his two accomplices return 169,000 yuan to Weijia Wu, and that neither bank was legally responsible for the acts that took place. Neither the plaintiff nor the defendant instituted an appeal with regard to the ruling, and the ruling has come into effect.

The bank fails to fulfill reasonable attention to its obligations

A customer with the surname Gu held a debit card of a certain bank. At around 8 o'clock on 22 May 2010, when Gu came to withdraw money from the card at an auto bank (an auto bank is where the customer has to enter through a door to gain access to an ATM) of another commercial bank, he saw a device on the access control of the auto bank, that read "Please swipe your card and enter password before you enter". Gu swiped his card and entered the password in accordance with the instructions, but the door of the auto bank failed to open, and he could not enter to withdraw money. He therefore left. On 10 June, when Gu withdrew money from an ATM machine, he found that 10,068 yuan was missing from the money on his debit card, so he reported this to the police. After an investigation, it was discovered that criminals had installed a device on the access control system of the auto bank to steal the codes entered by customers, and after they stole the information on the magnetic stripe of the card, together with the password, they forged a debit card and withdrew the money. Gu initiated legal action with the People's court, requiring the bank to pay 10,068 yuan as well as the interest of the current saving deposit.

The People's court maintained that the bank card business is one of electronic and automated deposit and withdrawal, and thus involves special risks. The launch of the auto banks brings convenience to card holders, improves the business environment and conditions of the bank, and provides opportunities and space for banks to take deposits and increase profits. Compared with the ordinary deposit and withdrawing business, banks should, with the purpose of ensuring the safety of deposits and preventing the occurrence of risks, adopt various means and methods to strengthen the risk management, fulfill the notice obligations, and obligations of providing safety information to depositors. Gu, an ordinary debit card holder, had sufficient reasons to believe that the device on the access control system of the auto bank that acted to

steal codes was installed by the bank, since no explanation had been given by the agency arm of the bank. It was difficult for him to determine whether it had been installed by the bank or by criminals. In the course of the case, when Gu found his money was stolen, he immediately reported to the police and took relevant precautionary measures; in addition, Gu did not lose his debit card or password, neither did he give it to another person. In this case Gu was not held to be at fault and did not bear responsibility for the loss. While the bank failed to fulfill its corresponding obligations with regard to the deposit agreement involved in the case, the People's court ruled that it should bear the legal responsibilities, and pay Gu 10,068 yuan with interest, together with the costs of the litigation.

Both the bank and the customer are at fault

In order to raise funds, Huanzhi Wu applied for a debit card at the Agricultural Bank Hubei Branch, Hongshan Sub-branch on 27 June 2010. On 5 July, there was 101,017.42 yuan on the card. During this period, when he negotiated business with a person on the telephone, he informed the other person of his bank account number. On 13 July of the same year, when Huanzhi Wu deposited money at the Hongshan Sub-branch, he was informed by the personnel of the bank that there was only 17.42 yuan on the card. After an investigation and verification, it was discovered that the deposits of Huanzhi Wu was falsely claimed by a person at the Agricultural Bank Shanghai Branch, comprising 2,000 yuan at the ATM and 98,000 yuan at the counter. This person also paid the handling charge of 980 yuan. Huanzhi Wu initiated legal action in the People's court in Hubei, requiring Shuanghai Agricultural Bank and Hongshan Sub-branch to jointly return the money. The first instance People's court considered that the Agricultural Bank Shanghai Branch violated the provisions of Notice on the 'Administration of Large-amount Cash Payments (No. 339 [1997]) of the People's Bank of China' in handling the payment of 98,000 yuan at the counter, and thus should bear responsibility for compensation. With regard to the 2,000 yuan drawn at ATM, the Agricultural Bank was not at fault. Meanwhile, the People's court considered that Hongshan Sub-branch was not at fault in the claim, and thus did not bear responsibility for compensation. The first instance People's court ruled that the Shanghai Agricultural Bank should pay Huanzhi Wu 98,000 yuan including interest,

and should refund the handling charge of 980 yuan.

The Shanghai Agricultural Bank appealed. The second instance People's court considered that the Shanghai Agricultural Bank did not perform the examination procedure strictly in accordance with the requirement of 'Notice on the Administration of Large-amount Cash Payments (No. 254 [2004]) of the People's Bank of China Shanghai Branch,' which led to the false claim against Huanzhi Wu's deposit account by another person in a different place, and should bear imperative responsibility. The Agricultural Bank was ordered to take responsibility for the civil compensation, and thus the second instance judgment sustained the original ruling. Although the Shanghai Agricultural Bank emphasized before the first instance and second instance People's courts that it did not issue the card and it was only an agency bank, and that if someone should bear the responsibility it should be the parent bank (the bank that issued the card), this opinion was not accepted by the People's court. In spite of the decision of the Agricultural Bank, the Hongshan Sub-branch was ordered to bear responsibility for the entire compensation.

Other disputes

In addition, disputes occur repeatedly over false claims of deposit certificates, because the operators at the counter cannot distinguish whether the identity certificate is true, or they cannot be sure whether the payee is identical with the picture on the identity certificate. In some cases, the deposit certificates are stolen together with the identity cards, and thieves immediately go to a bank to handle the procedure of withdrawing money in advance; in other cases, some criminals report the loss of deposit certificates with forged identity certificates and falsely claim the deposit.

Suggestions with regard to legislation on improving legal responsibilities between a bank and a customer

From the decisions set out above, it is clear that, without explicit provisions of law, the People's courts at each level and in different places have a different understanding of the obligations of a bank and a customer in deposit agreements and transaction agreements, which leads to inconsistency in the

judgments. Ideally, it is for the Supreme People's Court to provide detailed judicial interpretations to clearly prescribe the obligations of a bank and a customer and to accurately define the responsibilities of a bank and a customer, and to take a proper view towards the format clauses signed by and between a bank and a customer.

The banks' obligations

Fulfilling notice obligations to customers

This obligation is prescribed for the bank to ensure the safety of deposits and transactions of customers. With sufficient attention and alertness, the bank should evaluate the risks that may occur in the customer's transactions, and should remind the customers that they should pay sufficient attention to these risks. During the course of business, the bank should give attention to fulfilling this notice of obligation. When a customer handles deposit business, applies for a bank card or agrees to conducting banking business over the internet, the bank should inform the customer about the need to keep the relevant card, deposit book, digital movable certificate (USB KEY) and password properly and safely, and also inform the customer of the methods available to report incidents and how to contact the bank.

The bank should inform the customer that they need to check their bank statement carefully and to give timely feedback of exceptional transactions. The bank also should fully inform them of the risks that may possibly occur to the customer in electronic bank transactions. Furthermore, a written risk warning should be provided in auto banks, ATMs and other premises of banks, especially on how to guard against crimes.

Obligations to ensure the safety of transaction premises and the transaction environment

Commercial banks should, in accordance with the security and protection requirement for financial institutions, or the requirement for industry safety standard, or for the local safety standard, ensure that self-service premises and service machines are protected against devices that are placed for the purposes of illegal infringement and destruction, and they should take measures to protect the safety of the operation facilities and equipment of electronic bank as well as electronic data, which include: physical safety

control of tangible premises, including the installation of video monitoring systems; intrusion alarm systems and remote monitoring facilities; the set up and use of firewalls and other security products,¹ and techniques to make sure that the internet bank has adequate counter-attack capacity and anti-virus capacity; there should be a clear definition of power and division of responsibility and operational procedures over dismantling, examination, maintenance and emergency handling of important facilities and equipment; strict control over the power to dismantle the technical mechanisms in place to provide for the security of the communications between the bank and the customer, and the establishment of a system to adjust and modify the control of the technical mechanisms to prevent the disclosure of the technical mechanisms after important personnel have changed. In addition, the inspection and patrol of the self-service facilities should be strengthened.

Obligations to strictly implement relevant regulations of the supervision department

The obligations shouldered by a bank also embodies handling businesses such as deposit and withdrawal, deposit book, bank cards, certificates, reporting the loss of passwords, and concluding agreements on relevant service with a customer. There should be carried out strictly in accordance with the relevant regulations of the supervision department, such as systems of deposit with the real name, the safety management of bank cards, handling loss reporting, examination of form essentials of credentials. Where a bank fails to strictly perform these, it should be deemed at fault and should bear corresponding responsibilities.

The obligations of the customer

Obligations of properly keeping the deposit voucher, bank card and digital movable certificate

Customers should keep deposit certificate, bank card and other vouchers properly. The customer should bear full responsibility where vouchers are lost or stolen where they are lost or stolen because of the failure of the customer to keep the voucher safe, and where the money is claimed by another person before they report the loss.

Obligations of keeping the passwords confidential

Passwords are a very important means used by banks to manage deposits and accounts. Without a password, the customer cannot enquire, transfer or withdraw money. In addition, customers should not use their birth date, house number, lucky number or other numbers that are easy to decipher as a password. The password of an internet bank account should preferably be a combination of letters and numbers.²

Obligations of keeping deposit information confidential

Customer should bear the obligation of keeping deposit information confidential, including deposit accounts, deposit amounts and the date of deposit. The deposit information should be kept confidential not only against strangers, but also against colleagues, good friends and countrymen.

Obligations of timely reporting unauthorized transactions

If a customer discovers that the access control of the self-service business premises (where banking transactions can take place remotely) is unauthorized or the page of the internet bank is different from that of the past, or if they have any questions about the transactions recorded on bank statements or transaction information instructions that they have received, they should immediately contact the bank to explain the situation and try to provide relevant evidence as much as possible.

Bank exemption clauses

In order to improve the efficiency of transactions, banks will sometimes provide standard contracts for customers to sign. With regard to these types of contract, customers do not have to accept them. Banks will establish standard clauses based on guarding against transaction risks and alleviating or exempting the bank from responsibilities. Exemption clauses have become a major matter that financial consumers complain about, and consumer associations habitually call such exemption clauses “High-handed Clauses”. After objectively analyzing exemption clauses, the Regulator has concluded that exemption clauses are a

¹ *It is accepted that such products on their own are not perfect: Daniel Bilar, ‘Known knowns, known unknowns and unknown unknowns: anti-virus issues, malicious software and internet attacks for*

non-technical audiences’, Digital Evidence and Electronic Signature Law Review, 6 (2009) 123 – 131.

² *Wendy Moncur and Dr Grégory Leplâtre, ‘PINs,*

passwords and human memory’ Digital Evidence and Electronic Signature Law Review, 6 (2009) 116 – 122.

two-edged sword, which has both positive and negative values. It can bring both good effects and bad consequences. Exemption clauses have become a social problem as well as a legal problem, and have been given extensive attention by members of the public. Some control measures have been taken by each county with regard to exemption clauses, including legislative control, judicial control, administrative examination control, consumer organizations and pressure from public opinion.

In respect of legislative control, article 24 of Law of the People's Republic of China on the *Protection of Consumer Rights and Interests* provides:

“Business operators shall not, by means of format contracts, notices, announcements, entrance hall bulletins and other methods, impose unfair or unreasonable rules on consumers or relieve or exempt their civil liabilities for their infringement of the legitimate rights and interests of consumers.”

“Format contracts,³ notices, announcements, entrance hall bulletins and other methods with contents mentioned in the preceding paragraph shall be invalid.”

It can be seen that, in the *Law on the Protection of Consumer Rights and Interests*, the relief and exemption of responsibilities are classified into a category of prohibition. Article 40 and article 53 of *Contract Law* provide that a format clause is invalid if it excludes the liabilities of the party supplying such a clause, increases the liabilities of the other party, or deprives the other party of any of its material rights. An exemption clause is invalid if it excludes the party's liability for personal injury caused to the other party or if it excludes the party's liability for property loss caused to the other party due to its intentional misconduct or gross negligence. It can be seen that the *Contract Law* takes an attitude of making a difference between a responsibility-limiting clause and an exemption clause, which is reasonable to a certain degree.

In respect of judicial control, in the above mentioned case where Gu initiated legal action in the Shanghai People's court against the bank to require the payment of deposit stolen from a card, the judges reached their

judgment, notwithstanding the bank had supplied an application form when the customer applied for the bank card, on the back of which there was an article in the Instructions for Applying for an XX Debit Card indicating “All transactions that are carried out through the transaction password shall be deemed to be carried out by the card holder himself/herself and the bank shall not bear any responsibilities.” In addition, the criminals used the password that was controlled and held by Gu, and that the bank was not aware of the theft of the deposit from Gu's debit card.

But the People's court maintained that in the format clause, whether the depositor is at fault or not, this issue is not considered. The reasons for the disclosure of the password were not analyzed, and the responsibility of the depositor was aggravated, and thus the exempt clause was deemed to be unfair and its validity was not recognized.

The advantage of legislative controls are that provisions with regard to the exemption clause are made in the form of state law, and therefore it has the quality of solemnity, clearness, impersonality and stability; the disadvantage of legislative control is that it may bring unreasonable consequences if the compulsory regulations are not clear, in which case it may attend to one thing and lose another due to lack of flexibility. Though judicial control is the ultimate arbiter, the disadvantage is that judges deal with the matter in dispute after the fact, and the complexity of procedure makes the legal approach more expensive.

Consequently, it is suggested that the banking supervision institution should standardize and restrict exemption clauses by means of administrative control, that is, the supervision department may require commercial banks to submit the format contract that it intends to sign with the customer when it launches a telephone bank, internet bank and other new businesses, to restrict the exemption clause used by the bank, and to supervise and urge the bank to mark the exemption clause with a noticeable font and colour so that it can draw the customer's attention to the clauses. This administrative examination has the virtue of controlling the contract before it is issued, prevent the use of improper and unfair clauses, and overcome the disadvantages of requesting relief after the event. Meanwhile, the control over the format clause before it

³ Also known as standard contracts in other countries.

comes into use embodies the legislative ideas of the *Law on Regulation and Supervision over the Banking Industry* and the purposes of protecting the legitimate rights and interests of depositors and financial consumers established by the China Banking Regulatory Commission.

To sum up, in settling disputes over customers' deposits, when the People's courts attach an emphasis on protecting the interests of social individuals and following the principle of human-orientation, they should consider the necessity and urgency of reducing the risks of lowering the reputation of banks, promoting the steady development of banking industry and speeding up the introduction of innovative products. The responsibilities of the supervision institutions are, on the one hand, to protect the legitimate rights and interests of depositors and financial consumers, and, on

the other hand, to give emphasis to instructing and guiding financial consumers, enhancing the understanding of the public with regard to modern finance and helping consumers become more risk consciousness and contract consciousness.

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