

当代经济刑法研究丛书

总主编·顾肖荣 林荫茂

信用卡 犯罪研究



XIN YONG KA
FAN ZUI YAN JIU



当代经济刑法研究丛书

总主编·顾肖荣 林荫茂

信用卡 犯罪研究

李睿·著



XINYONGKA
FANZUIYANJIU



上海社会科学院出版社

图书在版编目(CIP)数据

信用卡犯罪研究/李睿著. —上海:上海社会科学院出版社, 2009

(当代经济刑法研究丛书)

ISBN 978-7-80745-383-3

I. 信… II. 李… III. 信用卡-经济犯罪-研究-中国 IV. D924.334

中国版本图书馆 CIP 数据核字(2009)第 129823 号

信用卡犯罪研究

(当代经济刑法研究丛书)

丛书总主编: 顾肖荣 林荫茂

本书著者: 李睿

责任编辑: 杨国

封面设计: 闵敏

出版发行: 上海社会科学院出版社

上海淮海中路 622 弄 7 号 电话 63875741 邮编 200020

<http://www.sassp.com> E-mail: sassp@sass.org.cn

经 销: 新华书店

刷: 上海社会科学院印刷厂

开 本: 890×1240 毫米 1/32 开

印 张: 10.25

插 页: 2

字 数: 268 千字

版 次: 2009 年 9 月第 1 版 2009 年 9 月第 1 次印刷

ISBN 978-7-80745-383-3/D·096

定价: 24.00 元

版权所有 翻印必究

摘 要

信用卡不仅是一种存在于我国银行和个人之间的信用凭证,也是银行为顾客提供更为简便、安全、迅速服务的一种现代化货币形式。它的出现使人们的经济往来更加简洁快速,它在保证经济发展高速稳定增长的同时,又为交易的安全性提供了可靠的屏障。虽然信用卡在高科技含量上远远甚于其他传统的支付工具,但由于它自身的技术、管理的缺陷,成为犯罪分子觊觎的对象。近年来,信用卡的犯罪呈现上升趋势,犯罪手法也层出不穷,世界各国都在为打击此类犯罪而努力进行着司法探索。

尽管信用卡在我国起步较晚,但由于经济成长较快,涉及信用卡的犯罪日益猖獗,社会危害性极大,给国家和社会造成了巨大的物质损失,也严重破坏了金融秩序。1997年《刑法》将信用卡诈骗罪以第一百九十六条的形式确立下来,可以说是中国立法对控制信用卡犯罪的最重要的尝试,《刑法修正案(五)》的颁布实施,进一步完善了信用卡犯罪的立法。相对于其他国家的立法例,我国刑法对信用卡犯罪作了较为全面的规定,在立法技术上比较领先。尽管如此,刑法学界对信用卡犯罪某些问题的研究还未能深挖细掘,新的信用卡犯罪手段、犯罪形式随着经济技术的发展不断涌现,困扰司法实务部门的一些疑难问题还远远未能解决,需要我们进一步关注对信用卡犯罪的深入研究。本书对信用卡及信用卡犯罪的发展历程、信用卡犯罪的成立要件、行为方式、发展趋势和司法实务等基本问题进行了一体化的研究,在分析信用卡概念的基础上,明确了信用卡的刑法内

涵、信用卡犯罪的罪质、主体及主观要件;对信用卡犯罪的几种主要的行为方式和疑难争议问题进行了研究;探索了信用卡犯罪的新趋向;论证分析了司法实务中信用卡犯罪法律适用的实体及程序问题,并提出一己之见;最后对信用卡犯罪的立法进行了反思和前瞻。

妨害信用卡管理罪与信用卡诈骗罪在刑法立法上分属不同的章节、因侵害的社会关系不同而被划分为不同的类别,然而从信用卡犯罪中信息—成卡—流转—使用这一过程来看,它们同属于信用卡犯罪链。当前,信用卡犯罪呈现出集团化、专业化、分工化和跨国化的发展特征,信用卡犯罪的立法进程也体现了从财产利益保护到信用工具制度保护再到卡身份信息保护的过程,信用卡犯罪的刑法规制,在表现形式上实现了从结果规制向行为链规制的转变,这一转变顺应信用卡发展的安全性要求,也是经济刑法学研究的科学之路。本书正是从这一角度出发,对整个信用卡犯罪链进行了系统研究。

本书开篇对信用卡的发展和起源作了必要的考察,介绍了信用卡的分类和功能。对国际及我国有关信用卡犯罪的立法史源进行了系统梳理,考察了信用卡犯罪的历史演进。通过对国外立法与我国信用卡犯罪的立法比较,从中借鉴某些对我们有启发的经验。

犯罪的成立要件,是要为犯罪的认定提供一种法律模型,信用卡犯罪的成立要件就是要为信用卡犯罪的认定提供一种法律模型。本书按照犯罪对象、犯罪客体、犯罪主体和主观方面来解释信用卡犯罪的成立要件。金融领域与刑法领域对信用卡的内涵有不同的界定。在现行法律环境下,在刑法领域信用卡应当涵盖借记卡、贷记卡和准贷记卡。但从信用卡犯罪性法规之发展的角度来说,应引进“银行卡”概念,并根据其不同的犯罪特征重新构建银行卡犯罪。罪质是犯罪行为的本质,信用卡犯罪的罪质以其罪名的不同而不同。信用卡诈骗罪侵害的主要客体是信用管理制度,次要客体是公私财产权。妨害信用卡管理罪的犯罪客体是信用管理制度。本书在分析犯罪主体问题时重点讨论了单位的主体法律地位,认为单位应当成为信用

卡犯罪的主体,在具体的责任承担上应当区分自然人犯罪和单位的主管人员、直接责任人员不同责任,区别从轻对待单位犯罪中的自然人责任。在主观要素上,妨害信用卡管理罪与信用卡诈骗罪同样有着区别,前者不以“非法占有目的”为要件,而后者虽然没有法律的明文规定,但从体系解释、目的解释等角度出发,均应作为构成犯罪的必要要素。

对信用卡犯罪的构成作总体概述后,在此后的三个章节中重点对信用卡犯罪的几种行为方式作了详细地阐述。其中,第三章着重对信用卡诈骗罪的几个难点争议问题进行了甄别,第四章将恶意透支这一原本归入信用卡诈骗罪的行为方式予以独立化,第五章结合《刑法修正案(五)》的修改,集中讨论了妨害信用卡管理的行为手段及司法适用。

在信用卡诈骗罪若干疑难问题探析中,笔者以信用卡法律关系的研究为起点,分析了 POS 机消费和 ATM 机取款法律关系的联系与区别,认为两者并没有本质的不同。POS 机、ATM 机都是根据人类设定的程序、部分或全部取代人类工作的电子代理人,行为对象的不同,不能成为犯罪区别认定的关键,两种行为方式在行为的手段、使用的犯罪工具、侵犯的社会关系上看都是一致的,因而应当以同样的罪名予以评价。冒用他人的信用卡无论是在 POS 机上消费,抑或是在 ATM 机上取款转账,都属于信用卡诈骗罪的范畴。盗窃信用卡并使用的行为有与其前行为“盗”的危害性不大,而实现其犯罪目的的关键在于后行为“骗”,因而其本质是冒用他人信用卡,应将其评价为信用卡诈骗罪。2008 年引发广泛争议的许霆案,是近年来信用卡犯罪社会影响最大的一起案件,这其中不仅涉及信用卡犯罪的一些基本问题,如 ATM 机的电子代理人问题、银行的错误与持卡人的非法占有等,还涉及不当得利的判断、秘密窃取的表现形式、期待可能性与量刑的公允度等诸多民法、刑法以及法律基础和社会伦理等方面的问题。对此,笔者进行了一定的探讨,并期待这一案件为我国

的法律发展和公众的法律意识培育起到积极的作用。

关于恶意透支,笔者从信用卡所独具的透支功能出发,通过阐释该功能以过渡到恶意透支的内涵,将犯罪性的恶意透支行为凸显出来;接着在比较国内外立法现状的基础上提出我国的恶意透支型信用卡诈骗罪的特性;进而详细论述该罪的犯罪构成,从客体、客观方面、主体、主观方面对该罪进行了深入的解剖,以确定其内涵;同时在横向上分析该罪的罪与非罪、此罪与彼罪及犯罪形态、共同犯罪等学界争议的问题;最后站在理论与实践、立法与司法的角度,回顾前文,得出应设立滥用信用卡罪的结论,以契合目前中国恶意透支型信用卡犯罪的现状。

妨害信用卡管理是《刑法修正案(五)》规定的一种新型的金融犯罪,它将本应作为信用卡诈骗罪预备处理的犯罪行为,单独规定为独立的实行行为,实现了结果犯立法向行为犯立法的转变。对于《刑法》第一百七十七条之确定的罪名,相关司法解释认为构成两罪;但笔者认为,妨害信用卡管理是本条各犯罪行为的高度概括,无论第1款、第2款,甚至还包括第一百七十七条伪造信用卡的行为,都是妨害信用卡管理的具体表现形式,该罪主观方面为故意,过失不构成本罪。具体规定中的“明知”要素属于法律的注意规定。客观方面笔者着重对“持有”、“运输”、“数量较大”等内涵作出界定以及对伪造信用卡与变造信用卡行为进行了分析。该章还对妨害信用卡管理罪与非罪、此罪与彼罪和司法实践中认定的一些难点问题进行了分析比较。

随着我国经济和科技的高速发展,信用卡犯罪呈现出网络化、智能化、跨国化等新趋向。笔者主要选择了当前已经引发一定的社会危害,并且即将成为信用卡犯罪未来发展导向的一些犯罪手法和形式,提出了问题和应对对策。主要围绕网络信用卡犯罪及刑事立法、身份信息犯罪的法律问题、信用卡非法套现及刑法规制、移动支付的安全问题等四个问题加以阐述,以期抛砖引玉,引起信用卡犯罪研究的新思考。

笔者在司法实务部门工作多年,深感理论探讨和实际运用过程之间尚有一定的鸿沟需要磨合。因而在本书的最后,对信用卡犯罪刑事司法实务中,实体和程序法律适用时遭遇的困惑和障碍逐一论述,以期为信用卡犯罪的司法实务明晰界限、找寻出路。因为法律终究是实践的,这也是法学研究的终极目的所在。

ABSTRACT

Credit Card, a kind of credit documents between banks and individuals, is playing a role as Modern Currency in which form banks provide simpler, safer, and quicker services for customers. The Credit Card makes economic communications among people more concisely and efficiently, which sets up a reliable protection for transactions while guarantees a stable and rapid growth in economy. Although Credit Card contains much more high-tech than other traditional payment instruments, there are more and more crimes in various methods on Credit Card rising due to some technical and managerial defects of its own and countries all over the world are endeavoring to fight against such crimes by carrying out judiciary reforms and innovations.

With the rapid development of economy, Credit Card, though with a relatively late beginning, develops quickly in China, while crimes on it grows rapidly at meantime, which lead to great losses to the country and society and undermine the financial order of China seriously. In 1997, the Criminal Law stipulated the crime of Credit Card Fraud in Article 196, which is one of the most important attempts to control and reduce the Crime of Credit Card Fraud in legislation of China. After that, the Amendment to the Criminal Law (V) was promulgated and came into force, further improving

legislations on crimes of Credit Card. Comparing to other countries' legislation, the Criminal Law of the mainland, China has made a relatively all-around and advanced legislation on Credit Card crimes. However, whereas there are still many issues unrevealed, and more and more crime methods and forms on Credit Card crimes arising with development of economy and technology, we shall get down to study on crimes of Credit Card more deeply. In this piece of article, some basic issues, such as development history of Credit Card and crimes of Credit Card, essentials of commitment of Credit Card crimes, behavior ways, developing trend and legal practices thereof, etc., shall be studied integratively. On basis of analyzing the concept of Credit Card, the definition of Credit Card in Criminal Law, nature of Credit Card crimes, and subject and subjective essentials thereof, shall be interpreted and clarified hereinafter. The author hereby shall study on several main behavior ways of Credit Card crimes and some disputes relevant, explore the new trend of Credit Card crimes, demonstrate and analyze substantive and procedural issues in law application of such crimes and put forward with views of the author's, and reflect and prospect the legislation of Credit Card crimes in the end.

Crime of Disrupting Administration of Credit Card and Crime of Credit Card Fraud shall be provided in different chapters, classified differently subject to different social relations undermined. However, from the normal course of Credit Card crimes, information—card—transfer—use, both of them shall belong to the chain of Credit Card crimes. Crimes of Credit Card have recently presented characteristics of collectivization, specialization, division and transnational, while legislation on such crimes embodies a course of

protection of property interests—protection of system of credit instruments—protection of identity information of the card, which reveals a change in criminal law from regulation on results to regulation on the chain or the course of crimes. Such change is an adaption to requirements of safety in development of Credit Card, and also a scientific way to the study of economic criminal law, from the view of which, the author hereby puts forward with a systemic study on the chain of the Credit Card crimes.

At the beginning of this article, the author reviews the origin and development of Credit Card, and introduces classifications and functions thereof. Through systemic analysis of domestic and international legislations on Credit Card crimes in history, historical development of Credit Card crimes shall be revealed. And we can draw enlightenment and experience from comparison between legislation of China and that of foreign countries on Credit Card crimes.

Essentials of establishment of a crime provide a legal model to determine a crime. Therefore, essentials of establishment of a Credit Card crime offer us a legal model for determining the crime thereof. In this article, essentials of establishment of a Credit Card crime shall be interpreted in four aspects, criminal target, criminal object, criminal subject and subjective aspect of a crime. There are different definitions of Credit Card in the financial field and the criminal law field. Under circumstances of current laws, Credit Card covers debit cards, credit cards and quasi credit cards in criminal law. However, from the development of legislations on Credit Card crimes, it is necessary that the concept of Bank Card shall be applied in criminal law field and Bank Card crimes shall be restructured and determined subject to different characteristics of the

crime. Essence of a crime is the nature of a crime, varying from different crime names. The primary object a Credit Card fraud crime violates is the credit administration system, while the secondary object is rights of public and private properties. The criminal object of a crime of disrupting Credit Card administration is also the credit administration system. When analyzing the issue of criminal subject, the unit's status as a legal subject shall be empathetically analyzed and interpreted hereinafter, which is that the unit shall be regarded as one of subjects of Credit Card crimes, and nature persons shall be varied from those persons in charge and other personnel who are directly responsible in a unit crime, when bearing responsibilities and liabilities, that nature persons in a unit crime shall be given a lesser punishment relatively. From the view of subjective essentials, a crime of disrupting Credit Card administration shall be different from a crime of Credit Card fraud that the former doesn't deem the Purpose of Illegal Possession as one of essentials of the crime, while, the latter, though without explicit stipulations of law, shall regard the Purpose of Illegal Possession as one of essentials, from views of systemic interpretation, and purpose interpretation etc. of the laws.

After a summary description of constitution of a Credit Card crime, the next three chapters will emphasize on several behavior patterns of committing a Credit Card crime, among which, Chapter Third analyzes several disputes on crimes of Credit Card fraud; Chapter Fourth separates the Overdrawing with Evil Intention from behaviors of crimes of Credit Card fraud; and Chapter Fifth discusses behaviors, methods and litigation applications of disrupting Credit Card administration, combined with modification of the

Amendment to the Criminal Law (V).

When analyzing disputes on crimes of Credit Card fraud, the author starts from the legal relations of Credit Card, analyzes the relations and differences between consumption with POS machines and drawing money from ATM, and deems no natural differences between the two above. Working in accordance with programs set by people; both POS and ATM are designed to take place of people partially or entirely to work. Both of them are the same in behavior pattern, tools of committing the crime, and social relations they disrupt, and differences in behavior target shall not be deemed as the key of distinguishing crimes. Therefore, such two behaviors shall be evaluated in the same criminal name. Uttering other people's Credit Card, no matter consumption on POS machines, or withdrawal or virement with ATM, shall be classified into crimes of Credit Card fraud. The behavior of fraud in Stealing a credit card and using it then is much more harmful than the behavior of stealing in that, for which the crime of stealing a credit card and using it then shall be deemed as a crime of Credit Card fraud. Xu Ting's case in 2008, is one of the most important cases of Credit Card crimes in recent years, which not only includes some basic issues on Credit Card crimes, such as electronic agency of ATM, banks' mistake, illegal possession and etc., but also involves various issues relevant to civil laws, criminal laws, legal foundation and social ethics, etc., such as judgment of unjust enrichments, behaviors of secret stealing, possibilities of expectation. The author hereby studies the foresaid case and hopes this case will play a positive role in legal development and improvement of legal consciousness of the public.

On Overdrawing with Evil Intention, the author will reveal the concept of Overdrawing with Evil Intention by interpreting the spe-

cial function of overdraft possessed by Credit Card, and then indicate the criminal nature thereof. The nature of the crime of Credit Card fraud of Overdrawing with Evil Intention type in China shall be disclosed by comparing legislation on it at home and abroad. The author shall discuss the constitution of the foresaid crime in details of its object, objective aspect, subject, and subjective aspect, in order to make certain the concept thereof. At the meantime, issues on distinguishing and recognizing crime and non-crime, the crime and another crime, criminal patterns, joint crimes and etc.. Finally, from the view of theory and practice, legislation and litigation, the author will review the article and draw the conclusion of setting the crime of abusing Credit Card in order to meet the current circumstances of Credit Card crimes of Overdrawing with Evil Intention type in present China.

Disrupting the Credit Card Administration is a new financial crime stipulated in the Amendment to the Criminal Law (V) which used to be regarded as one act of preparations for a crime of Credit Card fraud, and is provided as an independent crime at present, realizing the change of legislation on pattern of such crime from consequential offense to behavioral offense. In accordance with some judicial interpretation, the crimes under the criminal name provided in Article 177 of the Criminal Law shall be divided into two different crimes. However, the author assumes that Disrupting the Credit Card Administration is a general description for various Credit Card crimes, no matter Paragraph 1, Paragraph 2, or even Forging credit cards stipulated in Article 177, are manifestations of Disrupting the Credit Card Administration, in which crime the subjective aspect shall be intentional, while behavior with negligence shall not

be regarded as guilty. Essentials for the provisions of “Clearly Know” shall be subject to provisions of Care in laws. In objective aspect of such crimes, the author emphasizes on definitions about Possessing, Transportation, Large quantities and etc. , and analyses on behaviors of Forging credit cards and Altering credit cards. In this Chapter, issues on crimes of Disrupting the Credit Card Administration, such as crime and non-crime, the crime and another crime, and judicial practices, shall be analyzed in comparison.

With the rapid development of economy and technology of China, Credit Card crimes has presented trends of network, intelligentized and transnational. The author hereby puts forward with issues and resolutions thereto on methods and forms of crimes which have already given birth to damages to the society, and will be trends for the development of Credit Card crimes. In this article, the four issues, Credit Card crimes on network and criminal legislations thereof, issues on identity information crimes, drawing cash illegally with Credit Card and criminal legislations thereof, security about mobile payment, shall be mainly discussed and interpreted, in order to evoke new discussions and thoughts on researches of Credit Card crimes.

The author used to serve in judicial departments for many years, and realizes that there is still a long way for advanced criminal theories to be well exercised in legal practices. Therefore, in the end of this article, disputes on subject issue and applications of procedural laws in legal practice of Credit Card crimes shall be analyzed and interpreted one by one, in order to find out circumscriptions of such crimes and ways out of the disputes, for good application is the ultimate purpose of laws and researches therein.

目 录

摘要	1
ABSTRACT	1
第一章 概论	1
第一节 信用卡概述	1
一、信用卡的概念	3
二、信用卡的历史发展	5
三、信用卡的分类和功能	15
第二节 信用卡犯罪的立法規制	20
一、信用卡犯罪概念及现状	20
二、信用卡犯罪之立法模式	28
三、信用卡犯罪立法模式之比较研究	38
第二章 信用卡犯罪的构成	41
第一节 信用卡的刑法内涵	41
一、刑法解释位阶视域中信用卡含义的追问	41
二、不同语境下“信用卡”内涵的冲突与解决	46
第二节 信用卡犯罪的罪质	48
一、信用卡犯罪的犯罪客体	48
二、信用卡犯罪客体的机能	61
第三节 信用卡犯罪的主体——兼论单位信用卡犯罪的法律地位	68
一、单位信用卡犯罪的现实状况	68

二、单位信用卡犯罪的学界争议	69
三、单位信用卡犯罪的学说评述	70
四、单位信用卡犯罪的立法完善	71
第四节 信用卡犯罪的主观要素——非法占有目的探析	73
一、非法占有目的与信用卡犯罪	73
二、信用卡犯罪立法模式对金融欺诈犯罪的借鉴意义	79
第三章 信用卡诈骗罪若干疑难问题探析	88
第一节 信用卡诈骗的基础法律关系	88
一、信用卡法律关系的特殊性	88
二、三角诈骗理论的初步研究	93
第二节 冒用他人信用卡的行为探析	98
一、冒用他人信用卡在 ATM 机上提现行为的性质 认定问题存在的争议	98
二、ATM 机能否成为诈骗的对象	99
三、冒用他人信用卡在 ATM 机上取款的行为应定性为 信用卡诈骗罪	101
第四节 盗窃信用卡并使用行为之定性分析	105
一、盗窃信用卡并使用行为之定性争议	105
二、盗窃信用卡并使用不构成盗窃罪之论证	106
三、盗窃信用卡并使用应当成立信用卡诈骗罪	110
四、对《刑法》第一百九十六条第 3 款应改拟制规定为 注意规定	113
第五节 利用 ATM 机故障非法提款行为的性质 分析——许霆案再思考	114
一、刑法上的非法占有与民法上的不当得利	116
二、犯罪对象的属性	117
三、“秘密窃取”的实质内涵	118
四、ATM 机是否属于金融机构	119