

Criminal penalties for dishonoured cheques after legislation is repealed in UAE

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On 26 October 2020, the local press published news that the cabinet of UAE approved the proposed amendments to the Commercial Transactions Law ('CTL'). According to the press release, this decree approves fundamental amendments regarding matters relating to cheques, notably the repeal of Articles 401, 402, and 403 of the Federal Penal Code which provide punitive provisions for offences involving cheques. The amendments to the Commercial Transactions Law (Federal Decree Law 14 of 2020) was published in Federal Gazette supplement 687 dated 20 September 2020.

Given the nature of commercial transactions in the UAE, the cheque has been the ideal and preferred instrument of payment and credit for merchants and banks. The cheque is also the preferred instrument for individuals in their daily transactions, given the exemplary legal protection it enjoys when seeking redress in the criminal courts of the UAE.

The criminal justice system supports commercial transactions. The use of cheques as an instrument of credit in credit and instalment sales helps drive commercial transactions. However, the tremendous pressure on law enforcement agencies and their massive case backlog has proven to be a significant burden. There have been several attempts to pass criminal legislation to address the issue, starting with Federal Law No. 34 of 2005 which amended Article 401 of the Penal Code by adding a third paragraph stating that "The criminal case shall lapse if payment or waiver occurred after the crime was committed and before a final judgment has been delivered in the case. If this occurs after the judgment becomes final, its enforcement shall be stayed." In this way, the drawer can avoid penalties by paying the full value of the cheque or settling the matter, which in the past was not an option, especially once a final judgment had been delivered in the criminal case. With such amendments in place, convicted persons have been more inclined to settle their cheques, thereby reinforcing the position of the cheque and creating more confidence among creditors who are more concerned about recovering their debt as opposed to seeking legal redress per se.

Further amendments were made to criminal legislation in 2018 i.e. the Criminal Procedure Law (Decree Law No. 17 of 2018) which introduced the penal order, a previously unknown facet of the criminal justice system of the UAE. A penal order is a judicial order issued by the Public Prosecution for various minor offences, including bounced cheques, as a judgment of the criminal court in order to save time by bypassing the normal court procedures. Although this had a positive impact on the accused and helped ease the burden on the courts, the status of earlier issues remained the same.

New provisions introduced by the amendments to the Commercial Transactions Law

The law, has now been approved by the Cabinet, and the President of the UAE. It is important to highlight its most prominent features. The provisions amend Articles 600, 641, 642, 643, and 644 of the current law.

Partial payment

The press release mentioned that the most important of these amendments is the requirement that banks accept partial payment of the value of the cheque if its full value is not available in the drawer's account. The concept of partial payment is not new to the Commercial Transactions Law. Article 617(3) of the current law provides: "If the funds for payment are less than the cheque amount, the bearer shall demand from the drawee to make partial settlement to the extent of the amount available with him, and shall ask him to endorse such payment on the back of the cheque and to give him a certificate to this effect. The right of recourse for the balance amount shall be established either by this certificate or by making a protest." In practical terms however, this provision has not been implemented by the banks which, in their view, has been due to certain impediments despite several circulars issued by UAE Central Banks to banks. The current provision in the law, although explicit, has no compelling requirement for banks to accept partial payment and issue a relevant certificate to the holder of the cheque. For this reason, a fine has been added as a penalty against any bank that refuses to render partial payment of a cheque or issue a relevant certificate.

The Cheque return receipt: a writ of execution

The newly introduced provisions treat the insufficient funds' notice of the drawee as a writ of execution according to the executive regulations of the Civil Procedure Law. This dispenses with the need to obtain a judgment or order from the competent court. Instead, direct recourse is now available to the execution judge for compulsory enforcement against the drawer. This is a departure from the accepted practice regarding writs of execution which, as a bare minimum, would normally need to be approved by a public officer. It is important to note that the executive regulations recognise the specific documents which the law considers to be a writ of execution, although this is not applied in practice given the risk of putting acts under private signature in force as writs of execution on an equal footing as court rulings and orders. The current regime allows the bearer of the cheque to obtain, from the Judge of Summary Matters, a payment order for commercial papers, including cheques. These too, are fast track procedures, but taken under the supervision of the courts, leaving the execution courts to deal only with enforcement related disputes within narrow limits. The new amendments however, addresses this by stating that related disputes and enforcement procedures shall be in accordance with the rules set out in a Cabinet decision which will follow the issuance of the law. It is hoped that these rules grant the execution judge the authority to deny compulsory enforcement in cases where fraud is evident or the drawer has paid the full value of the cheque.

Amended scope of penalties for Cheques

As noted, the new amendments repeals Articles 401, 402, and 403 of the Penal Code dealing with cheque offences. The new amendments has narrowed the scope of prosecution of writing bad cheques, and instead lists specific cases which are prosecutable. In other words, not every bounced cheque can be the subject of a criminal complaint. There are specific criteria that must be fulfilled under the amended law. Article 641 bis 1 limits the scope of prosecution to any person who endorses a cheque in favour of another or gives him or her a bearer draft, knowing that there is no sufficient balance to honour the cheque or that it is not drawable. The same article prescribes imprisonment and a fine as a penalty for any drawer who orders the drawee, before the date of encashment, not to cash the cheque or withdraws its entire balance before presenting it to the drawee, or deliberately writes a cheque in a way that prevents it from being cashed.

Cheques issued by corporate entities

Under the current regime, the signatory of the dishonoured cheque bears criminal and civil liability jointly with the corporate entity. The relevant principles laid down by the courts presume that the authorised signatory knew that there was insufficient balance in the account of the corporate entity when the cheque was issued or on its due date. The amendments to the Commercial Transactions Law have removed such liability from the corporate entity's authorised signatory and limited the penalty to a fine for the corporate entity in addition to ancillary penalties such as a six-month suspension of their licence and its revocation in

the event of a repeated offence. The amendments expressly provide that the authorised signatory incurs no liability unless he or she is proven to have had knowledge of the offence or committed the same for his or her own ends or those of another. The authorised signatory's knowledge of the offence will be difficult to prove in practice unless it is clear that the authorised signatory is the one who ordered the bank not to cash the cheque or to close the account before the cheque's due date, which the creditor can only prove through the drawee bank; a very difficult proposition indeed given the bank's confidentiality obligations to its clients.

The introduction of new penalties

The amended law has introduced criminal penalties for violating the law and stipulates a fine for falsely declaring a lack of sufficient funds to cover a cheque or refusing, in bad faith, to honour a cheque drawn on the bank, or refraining from rendering partial payment of a cheque. The new amendments also provide for a penalty against a bank in the form of a fine in the event they fail to comply with any ancillary penalties the courts may issue against the convicted person in terms of suspending their cheque book privileges for a period of time as set out by the judgment.

Grace period for adjustment of status

The law provides for a one-year period from the date of its publication for the law to come into effect. This period, in the opinion of legal practitioners, is insufficient for banks and companies to put in place measures to safeguard against dishonoured cheques. It is expected the initial stages of the application of the new amendments will bring about uncertainty however, it is also expected the new amendments will offer new forms of protection for credit-based commercial transactions.

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