

# The legislative view on dishonoured cheques in the UAE: Has the status changed in the last seven years?

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Under Article 401 of the Penal Code of the UAE Federal Penal Code which was enacted in 1987, dishonoured cheques continue to be a crime under the UAE law.

Not only dishonoured cheques, but any action in which a person stops payment of the cheque is perceived as a crime. That includes making changes in the cheque which deprives the beneficiary from cashing it, signing the wrong signature or omitting one's signature or having insufficient funds in the account. Any act or omission that prevents the beneficiary from cashing the cheque is a crime punishable under UAE law.

Criminal proceedings are usually pursued against the person signing the cheque whether he is a lawyer, manager, accountant or any individual who has placed his signature on the cheque. Even if the dishonoured check is from a company owned by another person, the signatory of the cheque will be charged with criminal proceedings. This is based on the premise that as a responsible executive in the company, the signatory should have known that there are insufficient funds in the account before issuing the cheque. However, both the signatory of the cheque and the company may have civil liability to pay the money (a different topic from the subject matter of this article).

Any argument that the cheque was postponed or paid in the future or that the signatory could not know if there were sufficient funds in the account is not a valid defence. The intent to commit cheque fraud is not required to be found guilty.

Furthermore, the mere fact that the dishonoured cheque was signed and handed over for a legitimate transaction, subjects the signatory to criminal proceeding even if the transaction was not completed. The non-completion of the transaction will be considered a civil argument, and will not be a defence to the criminal prosecution. In other words, the fact that the service was not provided or was otherwise frustrated is not sufficient to stop a criminal proceeding or to acquit the signatory of cheque.

Two other arguments are also used, although they usually fail:

(1) that the cheque was not due for payment and was stolen (provided, most of the time, that a criminal complaint was filed to report the lost or stolen cheque before the beneficiary lodged the cheque with the police); or (2) if the transaction underlining the payment of the cheque was an illegal transaction contrary to UAE Public Policy, such as gambling. These two arguments require high standard proof and often need to be documented and the simple argument that the cheque was illegal or lost will not be enough. Of course, the argument that the cheque was obtained contrary to public policy could open the door for other prosecution against the signatory and beneficiary of the cheques if that argument came to be true.

The only way to prevent criminal prosecution is if payment of the cheque is made in full at the time of prosecution. In other words, the best way to avoid prosecution is to produce and pay a certified cheque or preferably cash in the full amount of the cheque. Usually the person has two options:

- To pay the beneficiary of the cheque the full amount (after which the case will be closed instantly);  
or
- To deposit the money with the Police or the Prosecutor as the case may be, and be granted bail subject to the outcome of the proceeding. However, as stated above, it is likely that the outcome of the proceeding will be a sentence so payment of the cheque to the beneficiary is a must if the person wishes to avoid prosecution.

## **Bail**

If the person wishes to resist the prosecution then it is advisable to put the full amount of the cheque as bail in court before the police or the prosecutor before the matter is transferred to court. Prior to 2008, it was almost impossible to bail a person out on a cheque matter unless the full amount was paid before the police or the prosecutor's office. It is likely that in most of the cases and especially where there is substantial amount of money, the person will stay in prison during the investigation and while the case is heard in court until final sentence. It is likely that the person will not be released until he serves the sentence. In most cases the sentence will be anything between 6 months to 3 years depending on the circumstances surrounding the cheque and the amount of the cheque. The higher the amount the longer the sentence. There were hardly any exceptions to this except pardon from the Ruler which was given in extreme and rare circumstances, and mainly for humanitarian reasons. In recent years there has been a relaxation of the strict rules and bail is granted more easily.

When deciding on bail the criminal court will not be focusing on the repayment of the amount. This often comes as a surprise to people not familiar with the legal system in the UAE and especially those that follow the civil law system. The police, prosecutor and the court in particular focus on the criminal aspect of a dishonored cheque. Although they would require the value of the cheque to be put as bail, the criminal court will focus on the criminal sentencing and will leave it to the civil court independently to award the beneficially the amount due. This is unless the party settles before the criminal court to repay the amount by mutual agreement. In such case the criminal sentence used to be a fine, but now the case will be closed if the amount is paid in full.

Since 2008 and because of the financial crisis and the sharp rise in the volume of dishonoured cheques, changes have occurred to the criminality of dishonoured cheques. In essence, all that is said above remains the same and dishonored cheques continue to be a crime and the police, the prosecutor and the court continue to prosecute. However:

- It is not uncommon to find people who have been released on bail by giving security of another passport or for a lesser amount than the value of the cheque until the case is judged. In other words, unlike in the past, the party on some occasions does not have to lodge the full amount of the cheque.
- Prior to 2008 it was in only very rare and exceptional situations that the sentence for a dishonoured check was limited to a fine. Whereas post 2008 there has been quite a few cases where despite the fact that the amount of the cheque was large, the sentence has been a fine and not imprisonment. This may be attributed to the large number of cases facing the police and the prosecutor and the volume of people being imprisoned.
- In the past paying the full amount of the dishonoured check before the court or the prosecutor changed the sentence from imprisonment to fine. However, today if the amount is paid in full the sentence will be waived entirely. In other words, if payment is made in full, the case will be closed by the police or the prosecutor. If the case has been transferred to court and sentence passed, the sentence will be waived by virtue of the fact that the amount has been paid. Payment of the amount will not only stop prosecution but the entire sentence.
- It is possible to obtain an Interpol warrant of arrest for a dishonoured cheque even if the accused is absconding and is not currently residing in the UAE provided that the dishonored cheque is not less than AED 37,000 (or if multiple cheques, that the total amount is not less than AED 37,000).

However, note that for such situations the police will not immediately issue an Interpol arrest warrant but will issue a circular for arrest internally and the file will remain with the police before issuing an Interpol arrest warrant.

- It is becoming more difficult to circulate a warrant of arrest through the Interpol based on prosecution of dishonoured cheques. This is not only because of the legal system in the UAE but also foreign countries are not willing to entertain arrest warrants based on financial liability.

The process has become slightly lenient and more accommodating. Bail is very much possible unlike with the old process and time extension is granted more than once to assist the party to reach amicable settlement.

While in principle dishonored cheques remain a criminal offence, there have been many debates on whether it should continue to be a crime or whether the UAE Federal criminal law should change to abolish Article 401 and to limit dishonored cheques to only civil liability. The opinion in the UAE seems to be split over the subject. Some think that although the criminal aspect of the dishonoured cheque exists in many other countries and currently in some parts of the developed western world, it is something of the past and is not conducive to commercial transactions. They feel that it does not fall within the meaning of a cheque as a commercial document and that the recovery potential should be limited only to civil commercial recovery and not extend to the prosecution of the signatory of the cheque. My view is that the UAE is an emerging market, with cheques being used on many occasions as security for payment including banks. It is the only flexible means of deferred payment, which numerous businesses use and depend upon. Various industries continue to have cheques as a good useful commercial instrument that is not only used for payment but also for an extra measure of security and that security is dependent on criminal protection.

In view of this, while the punishment for dishonored cheques has become more flexible and soft, such that the criminal sentence can be waived, the criminal protection against dishonoured cheques continues to exist and be useful. It is likely to continue to exist in the UAE for sometime in the future. The Central Bank seems to be aiding in mitigating the occurrences of dishonoured checks by making it difficult for parties who have more than one dishonored cheque to open a new bank account or possibly even closing the bank account. This will put increased pressure on businesses to ensure that cheques are honoured.