

# Jurisdiction Game of Bounced Cheques

**Khalid Al Hamrani** - Partner, Co-Head of White Collar Crime & Investigations - White Collar Crime & Investigations / Family Business

k.hamrani@tamimi.com - Dubai International Financial Centre

Katrin Villems-Charles

K.Villems-Charles@tamimi.com - DIFC, Dubai, UAE

Most of us have heard about the cases of bounced cheques being prosecuted as criminal offences in the United Arab Emirates (UAE), similarly to other Middle Eastern jurisdictions, including imprisonment and deportation as punishments for failing to honour one's payment undertakings. This is indeed still the case today as it is a criminal offence to default from payment as per the current law. The rationale, which may come as a surprise for those who have not dealt with Middle Eastern jurisdictions before, is that when it becomes apparent that there are not enough funds on the account to cover the cheque, fraudulent intent is presumed which triggers criminal liability. Failing settlement, there is no more proof needed for the fraudulent intent to be established regardless of the amounts involved.

Consequently, bounced cheques related criminal cases have overwhelmed the law enforcement institutions in the UAE as cheques are very much still being used as payment method, especially in the real estate sector. In addition to the constraints imposed on law enforcement, bounced cheques related criminal litigation has resulted in different interpretations of certain procedural regulations on limitation periods, rendering litigation in some Emirates more creditor friendly, whereas the position taken in others remains more debtor friendly.

In order to provide a more favourable economic environment for investors and release the capacity of the law enforcement to focus on more serious economic crimes, the UAE is about to issue a new law, which will enter into force on 2 January 2022. The Government has announced that the objective of the new law is to provide a civil mechanism for collecting the debt instead of criminal proceedings and thus decriminalise issuing bounced cheques. This would obviously provide leniency on the capacity constraints experienced by the law enforcement, but as far as the limitation periods related differences of interpretation are concerned, it seems that the tools included in the new law remain limited, or even non-existent.

In this article, we seek to demonstrate the differing interpretations adopted in different Emirates, namely Dubai and Abu Dhabi, and address the extent to which the new law will resolve the currently identified issues on bounced cheques related litigation in the UAE, noting, however, that the final version of the new law is not yet publicly available.

## Validity of a cheque

According to the current law, the cheque itself is valid for six months from the issue date, or longer if an application is made to the bank. The cheque does not have to be presented to the bank by the date written on the cheque, but the bearer has up to six months to have it paid in until the cheque becomes invalid. This rule is the same in each Emirate.

*The validity period* is not the same thing as *the limitation period*. If the cheque bounces and the creditor wants to file a claim against the debtor, the creditor must do so within the statutory limitation period. If the creditor files the claim after the limitation period, the claim will be automatically considered time barred and thus dismissed.

In order for the creditor to calculate the limitation period and to understand the time limit within which the claim needs to be brought, the creditor needs to know the moment on which the limitation period will start running which is called *the issue date* of the cheque. The Federal Civil Transactions Law (as amended) and Federal Penal Code remain harmonised in the UAE, as far as limitation periods are concerned, but as per recent case law, courts in Abu Dhabi and Dubai have adopted differing interpretations on the issue date. As a result of these differences, the moment on which the limitation period starts running causes the limitation period to expire at a different point of time in these Emirates.

## **Issue date question: running against the clock**

According to the Commercial Transactions Law (Federal Law No. 18 of 1993), in case of a dispute, the drawer of the cheque must prove that there were sufficient funds available on the account for payment at the time of drawing the cheque. If the drawer fails to do so, he or she shall be liable to pay the amount of the cheque after the prescribed time limits.

It is perfectly legal to issue a post-dated cheque to be cashed, for example, a couple of months or even several years after issuing the cheque. The Federal Law requires the funds to be on the account at the time of handing over the cheque to the bearer. The reasoning for this is that although a regular cheque itself cannot be encashed early, a manager's cheque can be paid in at the bank whenever convenient for the bearer, and once the bank has received the cheque, they reserve the funds on the account in the amount of the cheque.

Now, here is a part where the difference between the Emirates comes in: Dubai Courts start counting the limitation period from the day the cheque is handed over to the bearer, not from the day it is dated to be encashed. In Abu Dhabi, the date of issue is considered to be the date on the cheque being marked as payable to the bearer, which interpretation is based on a judgment issued by the Abu Dhabi Court of Cassation in March 2021. This means there are currently significant differences on how the issue date of the cheque is ascertained in different Emirates which, in turn, affects the expiry date of the limitation period.

This becomes a crucial element when calculating the limitation period for filing a claim when dealing with post-dated cheques. For example, a cheque handed over in 2015 but made out to be payable to the bearer in 2021, would become time barred in Dubai significantly sooner, because the calculation of the limitation period starts from the day the cheque is handed over which is 2015. In the Emirate of Abu Dhabi the limitation period starts running from the date marked on the cheque which is 2021, resulting in the limitation period starting to run from 2021.

Therefore, it seems that in Abu Dhabi, it should be safe to assume that the funds need to be on the account on the day when the cheque is due, not on the day when the cheque is handed over to the bearer. Consequently, issuing post-dated cheques in Abu Dhabi appears to be more favourable for the debtor.

## **Expiry of the Limitation period: jurisdiction game?**

Generally, in civil cases, according to Civil Transactions Law (Federal Law No. 5 of 1985, as amended), the victim has up to fifteen years from the date of becoming aware of the damage, to file a claim. In criminal cases, the limitation period for misdemeanours is up to five years as of the occurrence of the crime according to Criminal Procedures Law (Federal Law No. 35 of 1992, as amended). When a cheque gets dishonoured, the bank will issue a report, which will be used as the grounds for any claim, civil or criminal. The victim can file either a criminal complaint or a civil claim or both at the same time. However, the civil

case will usually be put on hold while a criminal investigation is ongoing.

In order to further demonstrate the differences in interpretation of the law between Emirates, let us have a closer look at the case law in question. In 2021, Abu Dhabi Court of Cassation dismissed an appeal which might have succeeded in Dubai. The appellant claimed he handed a post-dated cheque payable in December 2019 over to the bearer already in December 2013 and he had done so in the Emirate of Dubai. The appellant was hoping that the limitation period for the criminal case would have thus expired. However, as the fact that the cheque was handed over in the Dubai Emirate could not be proved, the case remained in Abu Dhabi. In Abu Dhabi, the date of issue for the cheque is considered to be the date on which the cheque is payable to the bearer, which in this case was December 2019. As a result, the limitation period of five years had not run out and the judgment was upheld.

In Dubai, the decisions are currently made following the 2007 Court of Cassation precedent, where the cassation in 2007 was denied on the grounds of the case being time barred as the cheque in question was handed over to the bearer in 1997 and the limitation period had expired. The Court of First Instance had decided that, as the undated cheque bounced in 2006, they found the defendant guilty and handed down a sentence of two month's imprisonment. The defendant appealed on the grounds that the cheque was handed over to the bearer in 1997 and the criminal case is therefore time barred. The Court of Appeal overturned the decision of the Court of First Instance because, the crime is considered committed on the date on which the cheque was handed over, not when it was dishonoured by the bank.

## **The New Law**

According to the current law, if the victim chooses to file a criminal complaint, the criminal judgment may not automatically include a restitution order, which means that once the criminal judgment is handed over the victim will need to file a follow-on claim before the civil court in order to get their money. The criminal judgment can be used before the civil court as an enforcement order. The new law will most likely remove the alternative of bringing criminal proceedings in bounced cheques related cases, unless there is evidence of bad faith, noting however, that we do not yet know the final wording of the new law.

Alternatively, as per the current law, the creditor may choose the civil route, in which the civil court's Case Management Office will issue a payment order to the drawer of the cheque providing an opportunity to settle the debt without court proceedings within ten days, according to Article 17 (8) Federal Cabinet Resolution No. 57 of 2018. This procedure may be replaced in the new law by using the dishonoured cheque report from the bank as an enforcement order as described below.

The main purpose of the legislative amendment is to decriminalise the offence of issuance of a cheque without sufficient funds to cover it, unless the cheque was indeed issued in bad faith, and to provide a simpler way to collect the payment. From 2022, the banks will be obligated to issue part-payment if the full amount is not available and if the cheque is dishonoured, the cheque return report issued by the bank can be directly enforced by the Execution Judge as a writ of execution without any proceedings, civil or criminal, whatsoever.

Avoiding criminal proceedings where there was no criminal intent involved would align the UAE with the regulatory frameworks of other jurisdictions. The amendments will also remove the joint liability of the signee and the legal entity on whose behalf the cheque was issued, unless the fraudulent intent can be proven. Bounced cheques that have been issued in bad faith with a fraudulent intent still remain within the realm of criminal law and proceedings.

## **Main Takeaway**

As a result of different interpretations of the Federal law, a case that fails in one Emirate can succeed in another, which triggers a certain amount of unpredictability in the litigation if the jurisdictional circumstances are not clear and there is room for the parties to bring the case in the Emirate that is the most favourable for their position. Based on the information provided by the legislator, it seems that the new law will not resolve this issue. Having said that, as the full extent of the amendments to the current law have not been made public yet, let us hope some clarity and unification will be added in terms of the issue date and the calculation of the limitation period.

Decriminalisation of the offence is a welcome improvement of the current situation in terms of alleviating the burden on the court system, simplifying the collection of the funds owed and also supporting the more modern business environment of the UAE. Especially, as it seems that the use of cheques in the UAE is not likely to become obsolete any time soon.

***For further information, please contact [Khalid Al Hamrani \(k.hamrani@tamimi.com\)](mailto:k.hamrani@tamimi.com).***