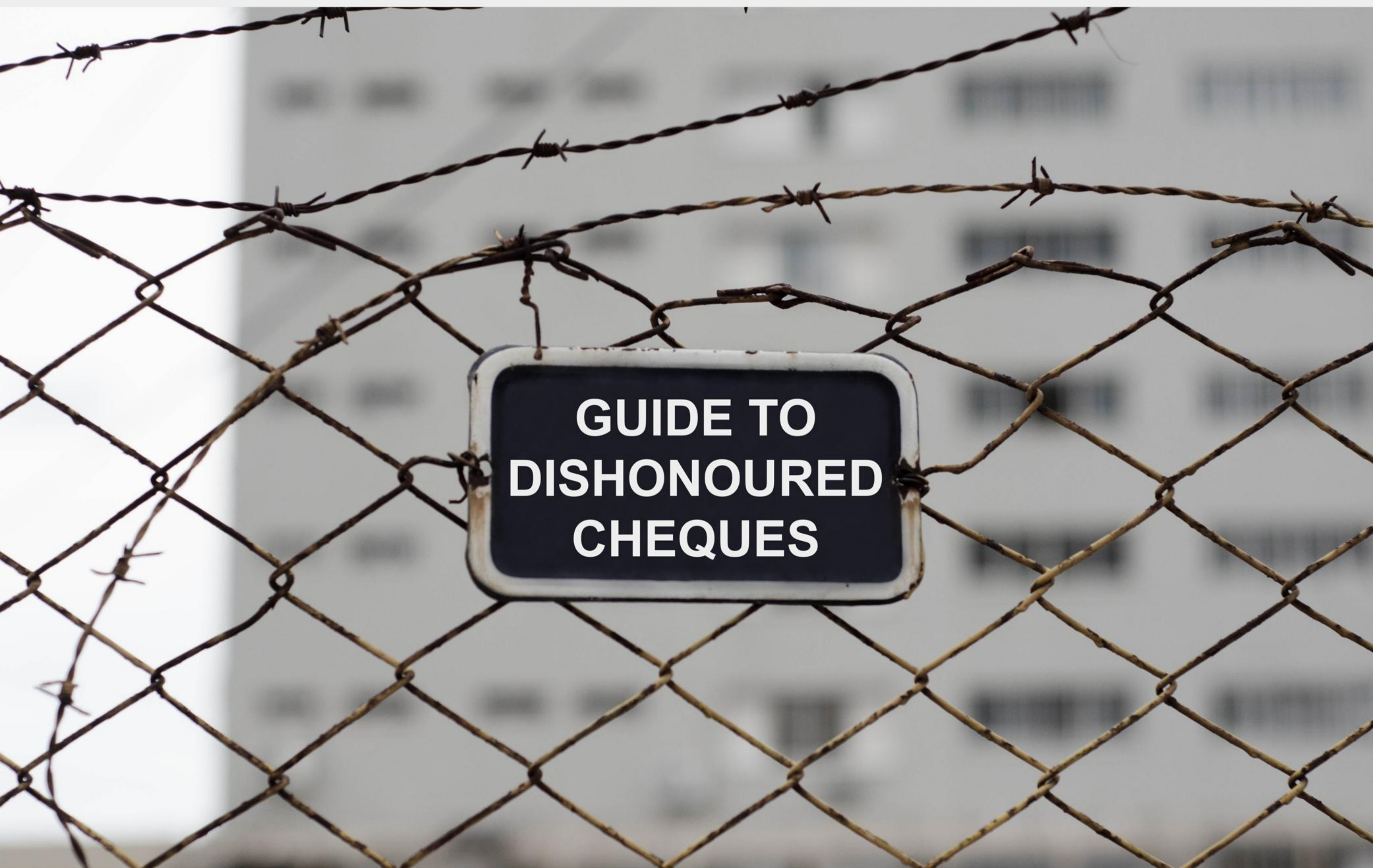


The Resolution

November 2017, Issue 1



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Guide to Dishonoured Cheques

Cheques are among the most common means of payment in commercial life and they are frequently dishonoured so that the cheque bearers are aggrieved. In this guide, we briefly summarised the necessary steps to be taken by the creditors holding dishonoured cheques.

1. You took your cheque and went to the bank but there were no sufficient funds in the drawer's account. Thus, your cheque was dishonoured. In this case, the bank shall pay a certain amount of the cheque sum to the beneficiary or the bearer if a bearer cheque is at issue. Under current Turkish legislation, this amount is determined to be 1410 TL.
2. The banks shall give the copy of the cheque to the person whom they made a partial payment such as the bearer or the beneficiary or the person who declares to be the creditor of the cheque by giving details of the cheque.
3. First option is to initiate execution proceedings. In this case, a method of execution proceedings special to the bills of change may be pursued. (*In this context, it should be emphasized that the creditors with a bill of change in their possession may also pursue an execution procedure through the general seizure.*)
4. As an alternative method, you may recourse to the execution court¹ along with the copy of the cheque. The court shall be applied within three months from the date dishonour of cheque is known and in any case within one year from the drawl of the cheque. Otherwise your application of complaint will be inconclusive.
5. What is the legal nature of the crime of drawing dishonoured cheques? The drawer is trusted that he/she is willing to pay at the time of drawl and will have the ability to pay within the period of legal presentation. In case such trust is exploited, it may be considered that the cheque drawer had intended to deceive and fraud the bearer. In this case, the nature of the crime may change and trial for the crime of fraud may come to the agenda.
6. Although a sentence of imprisonment is foreseen for dishonoured cheques under the Cheque Law, the proceedings shall be carried out in accordance with the provisions of the Law on Execution and Bankruptcy. The results of trial, may differ from the principles of the criminal law for both of the cheque bearer and its drawer. For example, in a trial regarding dishonoured cheque, the defendant may still be tried despite being in absentia if the defendant or his/her attorney does not appear in the court willingly or by the help of the law enforcement officers. Similarly, in case the plaintiff does not appear in a hearing, the case gets dismissed. Therefore, a plaintiff in such cases is required to follow the hearings for a good result.
7. Upon the complaint of the bearer, a monetary fine equivalent up to one thousand five hundred days may be given as a penalty. In case these monetary fines are not paid, the penalty will be converted to the imprisonment.

¹ 62nd article of 15/7/2016 dated ve 6728 numbered Code brought an amendment to this provision by replacing "claim to the Office of the Chief Public Prosecutor" with "complaint to the bankruptcy court" and it is given in the 76th of the same Code that this amendment will enter into force on **12/31/2017**.

Post-Dated Cheques

Issue date is an obligatory component of cheques. Cheques with an issue date stated to be a date later than the current date causes certain troubles in practice. Post-dated cheques create de facto terms, although it is not legally possible for cheques to include terms due to their nature as a means of payment.

Art. 795/1, Turkish Commercial Code regulates that a cheque shall be paid when seen, and all stipulations to the contrary shall be considered unwritten. Second clause of the same article sets forth that a cheque shall be paid when presented, thus terms are not allowed in cheques. The legislator considers cheques as a means of payment rather than a type of loan. However, to the contrary of the principles held under Turkish Commercial Code, Art. 3/8 and temporary article 3/5 of Cheque Law consist some provisions that allow post-dated cheques and thus de facto terms in cheques.

Temporary article 3/5 of Cheque Law declares early presentation of cheques to the addressee bank as null and void, until 31/12/2017. The cheque is not declared null and void itself but its presentation to the bank is hindered before its date of issue. The legislator, in a way, accepts and approves a situation with Cheque Law which is actually forbidden in Turkish Commercial Code. Although Art. 3/8 will apply instead of temporary article 3/5 after 31/12/2017, the contradictory situation hereby will not disappear. This provision regulates that there shall not be no execution proceedings in case the cheque is dishonoured either partially or completely. Nevertheless, the same provision enables the presentation of a post-dated cheque. Thereby the cheque bearer can legally pursue the cheque sum only after the issue date written on the cheque. Consequently, cheque bearer has to endure the consequences of the incorrect issue date while the cheque drawer is not subject to any sanction or responsibility on their behalf regarding the same matter.

Former Cheque Law set forth a criminal penalty for the early submission of a post-dated dishonoured cheque. Punishment of a fine as much as the amount of the dishonoured cheque and its transmission to prison sentence in case of a refusal of payment couldn't prevent the use of post-dated cheques. Along with the later alterations, only administrative sanction and legal responsibility were regulated. *Statute About Altering Some Codes In Order To Improve The Investment Environment* numbered 6728 has brought some amendments to the Code by reinforcing the criminal responsibility. New provisions will enter into force after 31/12/2017 though.

To sum up, post-dated cheques are present owing to the Art. 3/8 of Cheque Law, so there is still no possibility of appeal for the cheques that are submitted beforehand. But, criminal responsibility for the cheques dishonoured after the presentation date is instituted by applying the old method. Therefore, there is criticism that the interests of the cheque bearer are ignored to the benefit of the drawer and the situation in question is contrary to equality, because the ways of application are limited. As a result, the inter-law contradiction is not resolved and the former system of criminal liability for the dishonoured cheques which has not been successful in the past is reinstated. It is doubtful that these regulations will end the complications on the legal basis of the dishonoured cheques.

The Era of 2D-Codes for Cheques

The *Communiqué on the Application of 2D-Codes in Cheques* by the Ministry of Customs and Trade and the Prime Ministry (Undersecretariat of Treasury) was published in the Official Gazette dated 31.12.2016 and numbered 29935 for the purposes of the amendments made in Articles 780 et seq., Turkish Commercial Code on 15.07.2016. According to the Communiqué, financial information of the cheque drawer will be available to the bearer via 2D-Codes on the cheques. The use of 2D-Codes on cheques will become mandatory by December 31st, 2017.

Approximately 20-25 million cheques are issued every year in Turkey according to CNN data reports. The implementation of 2D-Codes aims to increase the use of cheques by providing further security. In this context, it becomes possible for the beneficiary or bearer to check the drawer's financial reliability on the basis of his/her financial statistics within the last five years and to determine the drawer's place in the risk index through the *2D-Code Cheque Report*.

What is a 2D-Code ?

A 2D-Code is a matrix barcode that can be printed on cheques as square or rectangular and allows access to drawer's financial information. Cheques including such barcode can be requested from all banks in Turkey which may give their customers a chequebook. 2D-Code Cheque Report is a report consisting information required by the law as to the drawer. It is accessible through the 2D-Code Reading and Information Sharing System.

System operators who process and report relevant data by taking them from data sources are not responsible for the correctness and currentness of this information; therefore, the cheque bearers may apply to the information providers in case they would like to confirm its correctness. In addition, beneficiary of the 2D-Coded cheque must record this cheque to the Data Code Reading and Information Sharing System at the latest by the date of submission.

#offtopic

What is “Business Judgment Rule” ?

The concept of a joint-stock company emerged from the necessity for the transfer of the responsibility from stockholders to a major legal entity. Sharing risks under a common roof with others, was more convenient for the entrepreneurs rather than undertaking all the risks on their own. However, is it possible to burden the entire responsibility on an abstract legal entity, in a system where the transactions are carried out by human hands?

Duty of care and duty of loyalty are essential key points regarding company managers' responsibility. But, in recent years, the Business Judgment Rule (BJR) becomes increasingly decisive owing to the influence of Common Law, for the purposes of the assessment of the evaluation of duty of care and duty of loyalty.

The requirements of a professional business life are often above the standards that courts can measure. For this reason, it is considered that the company executives should decide how to solve a problem in the best way for the company rather than the courts. The BJR expresses the trust in company managers and their competences and qualifications. The presumption laid down by this rule is that managers are to make the most beneficial decision for the partnership by acquiring the necessary knowledge. Therefore, the claimant will be obliged to prove that the manager has made decisions to the detriment of the company, that he or she does not have the ability to make reasonable judgments and should be held responsible. This principle seeks to protect the company managers against shareholders, company, and creditors looking for a scapegoat. This principle, which is called *commercial judgment rule* or *business man's decision* in our legal system, introduces that it is possible for the manager to make a mistake due to the inherent risks in his/her duties; but the responsibility arising therefrom must be determined according to objective measures.

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Answers. Not theories.

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Gokce Attorney Partnership is an Istanbul-based law firm offering legal services across a broad range of practice areas including mergers and acquisitions, venture capital and private equity transactions, banking and finance, capital markets, insurance, technology, media, telecoms and internet, e-commerce, data protection, intellectual property, regulatory, real property, commercial litigation and execution proceedings.

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