

Gökçe

Objection!

November 2018

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**FROM ADMINISTRATIVE SANCTION TO
CRIMINAL SANCTION: NEW ENFORCEMENT
CRIMINAL ERA OF DISHONoured CHEQUE**



FROM ADMINISTRATIVE SANCTION TO CRIMINAL SANCTION: NEW ENFORCEMENT CRIMINAL ERA OF DISHONoured CHEQUE

Although it has not been considered as a crime since 2012, with the Law Amending Certain Laws for Improvement of Investment Environment no. 6728 dated 09 August 2016; causing unrequited transaction with cheques or, as a commonly used concept, drawing of “dishonoured cheques” is accepted as an action requiring criminal liability. With the amendment; it is aimed to increase the reliance on cheques regarded as cash payment method on the market, to protect the cheque holders and to prevent the unrequited transactions by cheques. However, having sufficient information about the process of the stipulated enforcement-criminal procedure and managing the process have great importance for the relief of the creditors, and also the defendants although the legal requirements are not constitute for them.

DRAWER, CHEQUING ACCOUNT HOLDER OR BOTH? FINDING THE OFFENDER ON DISHONoured CHEQUES

One of the most confusing issues for the merchants and the public regarding the amendment is the subject of criminal liability of legal entities on drawing dishonoured cheques. The most important reason for such situation is that this crime is known as a crime of drawing dishonoured cheques, and therefore to draw a dishonoured cheque is considered as a criminal offense. However, in Article 5 (1) of the Cheque Law No. 5941 (Law), it is stipulated that the criminal liability will be on “the person who caused the unrequited transaction by drawing a cheque”. Therefore, it should be stated that the criminal liability of bouncing a cheque belongs to the person obligated to keep sufficient money in the account. This person has been identified as chequing account holder according to Article 6 of the Cheque Law. In accordance with the foregoing article, if the chequing account holder is a legal entity, the member of the managing body assigned to manage the financial affairs of the legal entity; if such an assignment is not made, the real person or persons constituting the managing body shall be liable to keep sufficient amount of money corresponding the amount of the cheque in the relevant bank account.

This issue is especially important in commercial life when the cheque is used as post-dated. Accordingly, in case the chequing account holder on the date of drawing is different on the date of payment, the criminal liability is not the drawer but the person is not keeping sufficient amount in the relevant bank account on the time determined as the payment day. However, knowingly drawing a cheque in the interest of his own or anyone else’s, although he is aware of that there will be no sufficient amount on the date of the payment day, may be discussed in terms of the crime of fraud.

COMPLAINT RIGHT, DEADLINE OF COMPLAINT, COMPETENT COURT, LAWSUIT PETITION, PROHIBITION OF DRAWING CHEQUE AND OPENING CHEQUE ACCOUNT, TRIAL: ENFORCEMENT CRIMINAL PROCEDURE ON DISHONOURED CHEQUES

Pursuant to Article 5 of the Law, the person committed the act of bouncing a cheque is to be punished upon the complaint of cheque holder. Cheque, is a currency bill unless stated otherwise on the bill. Therefore, while checking the authorized holder of the cheque, it is important to control the endorsements. In cases as the complainant is not made by the authorized holder, the complaint is rejected. However, in the light of the recent decisions of the Supreme Court of Appeals, it is now paved the way for the other endorsers to file complaints as authorized cheque holders. The complaint period for this offense is determined as three months from the date of the learning and one year in any case due to the reference to the Article 347 of Execution and Bankruptcy Law (EBL). It is regulated that the lawsuits initiated due to the crime will be heard in the Enforcement Courts and the provisions concerning the enforcement criminal procedure regulated in the EBL will be applicable for this crime. Accordingly, complaints of dishonoured cheques should be filed in the enforcement criminal courts and the proceedings should be strictly followed. Especially there are dangers in this procedure, due to there is no investigation phase in this procedure and the complaint petition is considered as the indictment. In case of making mistakes in the complaint petition, the complaint is rejected or the judicial proceedings might be based on mistaken complaints. Therefore, preparation and control of the complaint petition have great importance in terms of crime.

In the judgement process; the court has right to determine preventative measures ex-officio or upon a complaint for a real person or legal entity holding the cheque account; any person drawing a cheque on behalf of the legal entity; and if the cheque is drew on behalf of a capital company, managing body and authorized persons of the capital company registered at trade registry such as a prohibition of drawing cheque and opening cheque account. However there is right to make objection against the decision of the court.

Another important point of this procedure is the trials. In case the complainant or his attorney does not attend the trial without a valid excuse, the complaint might be dropped. For the defendant, the court is able to take the decision in his absence, if the defendant does not come to the trial and the necessary procedures have been made. Therefore, participation in the trial or representation by attorney has great importance for both parties in the enforcement criminal judgment.

DISHONoured CHEQUES IN THE CONCORDAT

Another issue that may be raised in terms of the crime is that the cheque debtor declares concordat and the cheque become unrequited in the concordat process. According to the EBL, the debtor not able to pay his debts or under the danger of not being able to pay, has been given the opportunity to request concordat to get rid of such situation. In the phase starting with announcement of temporary respite order, the execution proceedings shall not be commenced; or implementation of the execution decisions already taken such as preliminary injunctions and provisional attachments orders including public receivables against concordat applicant debtor shall be ceased. In this case, not paying debts is arising from a legally recognized right and the concordat is announced before this process. Therefore, since there will be a legal requirement that the cheques which have been draw before the concordat and need to be paid after the date of the temporary respite order are unrequited (the reason of compliance with laws), such cheques shall not be subject to the crime of bouncing cheque. However, it should be noted that there is the possibility to draw cheques within the period stated in respite order, and there is no hesitation in the occurrence of the crime if the bouncing cheque transaction is committed during the respite order period.

THE RISK OF PRISON AND THE CHANCE OF EFFECTIVE REPENTANCE

Upon the complaint, the person who issues a dishonoured cheque shall be sentenced one thousand and five hundred days judicial fine per dishonoured cheque. However, judicial fine shall not be less than the dishonoured cheque amount. In addition, the court gives a ruling about prohibition of drawing cheque and opening cheque account. In case of the existence of these prohibitions, court rules the continuation of the prohibitions. Another outstanding feature in the sanction of the crime is that the provisions regarding advance payment, reconciliation and suspension of pronouncement of judgment are not applicable. However, in terms of this crime the important feature is that if the judicial fines are not paid, this sentence shall be directly converted to imprisonment without a sentence to serve public service. The issue providing deterrence and attracting the attention of the public is that the crime may cause even imprisonment sentence at the end of the process. In spite of this serious sanction, it is also possible to benefit from the effective remorse regulations at various stages in terms of crime.

Hereunder; the following decisions shall be made about the person paying the unrequited amount of the dishonoured cheques with the default interest which is calculated using the default interest rate for commercial transactions stated in Law no. 3095 beginning from the legal submission date according to the written date of issuance of the cheque:

- In the trial stage, the case is dismissed by the court,
- After the verdict of the conviction is finalized, all the consequences of the judgment shall be eliminated by the court.

Answers. Not theories.

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