

Amendments to cheque regulations

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Introduction

On July 15 2016 Parliament enacted an omnibus act amending several laws. The Law on the Amendment of Some Laws to Improve the Investment Environment focuses on:

- reducing costs in relation to the investment environment;
- eliminating the legal differences in relation to R&D incentives;
- harmonising practices among financial institutions;
- encouraging foreign investment; and
- reducing the costs of establishing companies and opening branches.

Conversely, the law introduces new provisions regarding:

- the issuance of cheques;
- bounced cheques; and
- the postponement of bankruptcy.

This update focuses on the amendments regarding the issuance of cheques and bounced cheques. It also considered the liability of cheque issuers and banks in light of the latest legislative amendments.

2D barcode and information sharing system

The omnibus act amends the Commercial Code and introduces a serial number issued by the bank and a two-dimensional (2D) barcode to the mandatory elements on cheques. The 2D barcode is intended to enable cheque holders to discover information about the cheques they hold, as well as the cheque account owner and issuer.

For this purpose, the omnibus act commissions the Risk Centre of the Banks Association of Turkey to develop and operate a 2D barcode scanning and information sharing system, which will be open for third-party access without the consent of the cheque account holder and endorser. The 2D barcode on the cheque will enable the holder to find out information including:

- the identity of the cheque account owner;
- the number of banks at which the account owner holds cheque accounts;
- the number and amount of the cheques of the account owner which have been paid or have bounced in the past five years;
- whether the account owner has been prohibited from opening cheque accounts; and

- whether the account owner has ever been declared bankrupt.

According to amended Article 3/10 of the Cheque Law, the beneficiary of the cheque must register the cheque with the 2D barcode system. Cheques which have not been registered with the system will not be deemed invalid; in that case, the bank will not be responsible for paying the minimum amount provided for by the law on submission of the cheque.

The same article provides that any change made to the representatives of the legal entity on whose behalf the cheque was issued after the beneficiary registers the cheque with the 2D barcode system will not remove the legal entity's liability. Since it is common in Turkey to issue future-dated cheques, debtor legal entities mostly base a defence on the argument that the cheque was issued by an unauthorised person. Now, with this clear legal provision, it will not be possible to avoid such liability by relying on changes in the authority.

Banks' extended obligations regarding opening of cheque accounts

According to the Cheque Law, persons wishing to open a cheque account or be provided with a cheque book must give a written statement to the bank each time they apply, informing the bank whether:

- they are merchants, craftsmen or artisans; or
- they are prohibited from opening cheque accounts and issuing cheques.

Before the amendment, banks had no obligation to investigate the accuracy of such statements. However, the omnibus act imposes an obligation on banks to:

- investigate further and confirm whether real or legal persons who request to open cheque accounts, persons who manage stock corporations and company representatives who are registered with the Trade Registry are prohibited from opening cheque accounts; and
- keep the relevant records for 10 years.

Banks will carry out this further investigation through the 2D barcode system.

This amendment is substantial in terms of banks' liability when there is a bounced cheque. The Cheque Law states that the bank should act prudently and take into account the economic and social situation of the party which requested to open the cheque account. According to Court of Appeal precedent, the creditor, after having exhausted the legal remedies against the debtor, may file a compensation action against the relevant bank and claim its liability due to gross negligence and a lack of prudence. With this amendment, the creditor has an advantage in proving the bank's negligence in the absence of the necessary records showing that the account owner was prohibited from opening cheque accounts.

Bounced cheques and issuer liability

The latest amendment to the Cheque Law aims to make cheques a more reliable and stronger alternative for securing receivables. Ideally, a cheque should be honored and should enable its holder to receive the amount from the bank when it is submitted. Where the cheque bounces fully or partially, the Cheque Law sets out provisions on the liability of the cheque issuer and the bank.

The omnibus act reintroduces the previously abandoned criminal liability. Amended Article 5 of the Cheque Law prescribes a judicial fine of up to 1,500 days per bounced cheque for the cheque account owner following a complaint by the cheque holder. Under Article 5, the judicial fine cannot be less than the amount of the bounced cheque plus the accrued interest as of the submission date of the cheque and the total fees for execution and legal proceedings. If the cheque account owner does not pay the judicial fine, it is directly converted into a term of imprisonment without having recourse to compulsory public work (which is the general rule for the non-payment of judicial fines). Further, down payment, conciliation and deferment of the announcement of the verdict do not apply to the crime of issuing bounced cheques. The court also prohibits the account owner from issuing cheques and opening cheque accounts *ex officio* during the proceedings as a protection measure. Where the amount of the bounced cheque and the accrued interest are paid:

- the prohibition on issuing cheques and having a cheque account will be lifted;
- adjudication will be dismissed; and

- if there is a final conviction, the verdict will be fully withdrawn.

According to another provision introduced by the omnibus act, the owner of the cheque account is obliged to have the amount of the cheque in the relevant bank account. If the owner of the cheque account is a legal entity, liability rests with the relevant member of the managing body charged with the legal entity's financial affairs; if no one is assigned to such duty, the natural persons of the legal entity's managing body are responsible.

Comment

The amendments are intended to secure the receivables arising out of cheques so that cheques become a more reliable payment instrument in commercial activities. In this respect, the establishment of the 2D barcode system appears to be an efficient way for banks to track the cheques in circulation and for potential cheque holders to know about the capability of their debtors to pay the cheque amount when due. However, although the provisions regarding the criminal liability of the bounced cheque issuers' are strict, it is uncertain whether this will have the desired effect of securing the collection of cheque amounts.

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