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Inability to Pay as the Ground for Instituting Insolvency (Bankruptcy) Procedure

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The inability to pay concept and signs as one of the basic categories of insolvency institution is the subject matter of the article's research.

In Russian legislation on insolvency (bankruptcy) the concept «inability to pay» has comparatively recently been used, hence in this connection it is insufficiently researched in the doctrine

Inability to pay in the Russian doctrine, as a rule, is understood as a sign or criterion of insolvency. The article also suggests considering insolvency as the ground for instituting the procedure of supervision, financial improvement and external management. It is in this sense that German legislation uses the concept under analysis.

Estimating arbitration practice established in the Russian Federation, the author comes to conclusion about an essentially incorrect approach to an insolvency sign and necessity of the operating law on «Insolvency inconsistency (bankruptcy)» change in this part.

The article analyses the meaning of an «inability to pay» concept as a certain property condition of the debtor.

The author suggests that insolvency signs should be singled out, namely: the termination of payments, lasting character of the termination of payments, insufficiency of property to meet creditors' requirements.

The debtor's inability to pay condition cannot thus be narrowed exclusively to the termination of payments and to a certain term of delay of civil-law obligations or public duties execution, it is different in content and implies the debtor's absence of necessary property to repay the outstanding debts. In this connection the article proposes to differentiate concepts «inability to pay», «the termination of payments», «a delay of payments», «the suspension of payments», the author refers to the German doctrine where the specified concepts are researched more deeply and comprehensively. Criterion of the specified concepts differentiation is, first of all the term, as well as impossibility of obligation execution owing to property insufficiency.

Referring to the German doctrine and the established judiciary practice, the author analyzes criteria of differentiation of the researched concepts – term and substantiality of the debt. In addition it is emphasised that the German legislator establishes neither a certain term, nor the amount of a debt in the law. They are determined by judicial practice that allows to institute insolvency procedures over property of really insolvent debtors, and the Russian legislator formalized the specified criteria and allowed thereby the unfair subjects of a civil business practice to use an insolvency procedure over property of actually solvent debtors who have committed the delay of civil-law obligations and (or) public duties execution.

Keywords: inability to pay, the termination of payments, the substantiality of a debt, insolvency, a sign, criterion, the ground.

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The debtor's participating in insolvency procedures inability to satisfy the requirements of creditors due to property insufficiency is typical.

To designate an unsuccessful financial condition of the debtor such concepts of insolvency institution as «insolvency», «inability to pay», «inability to repay» («property insufficiency») are used. As legal concepts they require a legal definition.

The Law «On insolvency (bankruptcy)» has comparatively recently used the said concepts entirely.

It is necessary to research signs of these concepts, criteria of their differentiation as well as to give their analysis as the grounds for instituting insolvency procedures. In modern Russian bankruptcy law they are insufficiently researched.

The concept «inability to pay», «property insufficiency» appeared in the operating law «On insolvency (bankruptcy)» in April, 2009 (On amendments to separate legislative acts of the Russian Federation: Federal law on 28.04.2009 № 73-FL //SL the Russian Federation. 2009. № 18 (P. 1). Art. 2153).

The legislator in essence postulates inability to pay as an insolvency sign along with insufficiency of property (art.2 paragraph 34; art. 9, item 1, paragraph 6; art. 61.2 item 2, paragraph 1; art. 61.3, item 3, paragraph 1 of the Law) if to analyze concepts «inability to pay», «insufficiency of property» and «insolvency (bankruptcy)» in their parity though such a conclusion is not deemed unequivocal, proceeding from the sense of the Law.

Simultaneously the Law uses the concept «bankruptcy» and gives its signs (art. 3) which actually should be used for inability to pay and insufficiency of property. The legislator does not directly name the signs under analysis, though substantially they are the matter thereof in art.3 of the Law. It is necessary to emphasise that concepts

«insolvency» and «bankruptcy» of the Roman-German system differ, however in modern Russian legislation on insolvency treats them identically: the concept «bankruptcy» is used simultaneously with the concept «insolvency», while in some cases bankruptcy is used separately, that makes some authors judge that they have a different content (Zhilinskij, 1998. P. 587-589).

It is deemed, that the concept «bankruptcy» should not be used in civilistic aspect, it is a criminally-legal concept, «... has a narrow, strictly special meaning describing a private case of insolvency when an debtor unable to pay commits criminal acts, causing damage to creditors» (Vasilyev et al, 1993).

Insolvency procedures can be grounded on the presence of the signs specified in art. 6, item 2 of the Law. Analyzing the specified signs, it is necessary to say, that the legislator has not designated inability to pay as the ground for instituting insolvency procedures though has stressed out the presence of signs of bankruptcy established by article 3 of the law, and the certain amount of debts against creditors.

It is necessary to note some illogicality in regulation of the grounds for instituting insolvency procedure in the law as inability to pay is simultaneously specified in essence as a sign of insolvency and as one of the signs of inability to pay per se.

Absence of inability to pay in legislation as the ground for instituting insolvency procedures gives rise to a problem of instituting of procedures over property of quite solvent debtors.

In modern Russian literature inability to pay is rather seldom used to be considered as criterion of insolvency, but still it is presented as the ground for instituting insolvency procedures (Moskaleva, 2007).

In arbitration practice at instituting procedure of supervision courts only ascertain the termination of payments for term over 3

months and the amount of debts against creditors established by the law (see, e.g., East-Siberian district FCA regulation on 27.02.2007 № A78-2058/05-B-10-F02-192/07-C2 case № A-78-2558/05-B-10; Far East district FCA regulation on 14.01.2009 № A51-8565/200873/21), that does not prove the debtor's inability to pay in all cases, and for some of them only reflects temporary difficulty with payments.

Condition of the debtor who has failed to execute his obligations and (or) duties on due time are not analysed by courts being recognized that «... Presence of external signs of bankruptcy: debts not less than 100000 roubles and default of a duty within three months suffices instituting bankruptcy proceedings against the debtor: (the East-Siberian district FCA agency regulation on 27.02.2007 № A78-2058/05-B-10-F02-192/07-C2 case № A-78-2558/05-B-10; the Far East district FCA regulation on 14.01.2009 № A51-8565/200873/21 though in our opinion, property condition of the debtor is required to be analysed.

Arbitration courts analyze financial condition of the debtor when inability to repay is the ground for instituting insolvency proceedings as in this case it is necessary to compare assets and liabilities of the debtor's property. So, at establishing a sole proprietor insolvent the arbitration court of Altay territory determined and the court of cassation instance confirmed that the debtor's property is enough to repay the creditor's requirements, and refused to recognise the debtor failed to fulfill his obligations insolvent (the Western-Siberian district FCA regulation on 08.07.2008 № F04-4035/2008 (7552-A03-24) case № A03-6702/2007-B).

Said above means, that insolvency procedures can be used not only with a view of restoration of the debtor's ability to pay or his liquidation owing to insolvency, but on other purposes with which the Law actually does not interfere.

It is deemed, that inability to pay of the debtor should be the ground for instituting procedure of supervision, financial improvement and external management for legal entities as for the debtor, capable of fulfilling obligations there are legal means of compulsion to force him to fulfill obligations and duties.

Inability to pay and insolvency of the debtor means another legal mechanism action when participants of the business intercourse cannot apply them because of inability of the debtor to execute the obligation and duties. In this case insolvency procedures in the interests of participants of the business intercourse are instituted to eliminate that legal uncertainty which has developed between them. To institute insolvency procedures the law must designate the ground as it is made, for example, in § 17 of Insolvenzordnung (further InsO) where inability to pay is the general ground to institute Insolvenzverfahren (insolvency procedure) both for legal bodies, and for natural persons.

With a view of revealing unsuccessful financial condition of the debtor at early stages and his sanitization in Germany, for example, they also use such a ground as drohende Zahlungsunfähigkeit (threatening inability to pay) which is applied to legal bodies if the bankruptcy petition is submitted by the debtor (§ 18 InsO).

The Russian legislator, having designated inability to pay among used concepts in the Law «On insolvency (bankruptcy)» has offered only a palliative so far.

The legal definition of inability to pay specifies the termination of execution of a part of monetary obligations or duties on payment of obligatory payments caused by insufficiency of money resources. The law establishes a presumption of insufficiency of pecuniary resources (paragraph 34 art. 2 of the Law «On insolvency (bankruptcy)»).

Doctrine definition of inability to pay was offered by G.F.Sherstenevich in due time. He understood inability to pay as: «... such circumstances of the debtor where he appears to fail to satisfy his creditors' demands» (Sherstenevich, 1898).

The inability to pay concept under such understanding characterizes the debtor's property circumstances, reflects his inability to execute a debt in view of lack or absence of property that was betrayed to oblivion in the course of working out laws on insolvency in early 90-s' and in the future period. In his definition Sherstenevich G.F. does not focus attention on lack or absence of monetary resources though this very sign is the core in modern Russian legislation on insolvency.

Operating Russian legislation on insolvency considers inability to pay as the general sign of insolvency of legal bodies (item 2 art. 3 of the law). Along with inability to pay inability to repay is an insolvency sign both for legal bodies (in some cases), and citizens which is understood as excess of liabilities over assets in the debtor's property (item 1 of art. 3 of the Law «On insolvency (bankruptcy)», item 2 of art. 2 of the Law «On insolvency (bankruptcy) of credit organizations.»

Insolvency should be considered the ground for instituting supervision procedure, and not just an insolvency sign.

The court as a matter of fact should establish inability to pay signs at the instituting procedure stage prior to supervision during the judicial session in order to exclude instituting insolvency procedure of insolvency over property of an actually solvent debtor.

E.A.Vasilyev distinguishes practical and absolute inability to pay: the former is understood as usual difficulties with payments, while absolute – as an excess of liabilities over assets in the debtor's property and impossibility to pay off the debts under usual

business management (Vasilyev E.A, 1983). In his definition of inability to pay E.A.Vasilyev highlights two forms of difficulties with payments of the debtor. The first form means delay of the debtor. The property condition of the debtor can be thus quite problem-free, the lack or absence of pecuniary resources by due date is being discovered. Thus there is quite enough means to constraint the debtor to execute his debt to the creditor in a civil law arsenal. At such understanding of inability to pay the matter covers only inadequate execution of civil-law obligation concerning its execution term. The property circumstances of the debtor, his ability to execute obligation in due terms are not subject to estimation, the presumption of possibility of civil-law obligation execution operates, i.e. in this case there are no signs of an unsuccessful financial condition of the debtor. Delay, termination or suspension of payments takes place in this case.

For example, Public corporation concluded a credit contract with a commercial bank, having provided the obligation fulfillment term under the contract, however did not repay a debt in due term under the contract. Delay of obligation fulfillment under the credit contract does not mean that in all cases without any exception Public corporation is an unable to pay entity, as reasons for obligation default can be the most various, including those when a Public corporation has quite enough monetary resources for debt repayment though does not execute the obligation consciously, spending the means on other purposes. The inability to pay condition is possible, if a Public corporation does not have necessary monetary resources for debt repayment.

Under the second form the debtor's property circumstances are of the kind that he is incapable of executing his obligations due to property insufficiency. E.A.Vasilyev quite reasonably considers difference between absolute inability

to pay and insolvency to be in the fact determined by court.

It is deemed, that absolute inability to pay more readily designates inability to repay since E.A.Vasilyev ascertains excess of liabilities over assets to be more likely a characteristic for inability to repay which does not require a judicial recognition in contrast to insolvency.

E.A.Nefedev highlights actual and legal insolvency understanding the latter as «... complete business disarrangement recognised by court» (Nefedyev E.A., 2005). The judicial sanction serves a differentiation in this case.

In our opinion, there are rather essential distinctions between inability to pay and insolvency. Sometimes concept «inability to pay» and «insolvency» are identified in the literature (Dedov, 1999).

The inability to pay concept can be disclosed by indication on impossibility to fulfill the obligation at the moment which due date has already come owing to insufficiency of monetary resources.

The debtor's property circumstance can be various at the same time. The debtor can be capable of executing obligations at the expense of his property sale, being incapable of continuing doing entrepreneurial activity after such sale that proves his inability to pay as well as possible insolvency.

The debtor can experience difficulties with the payments proving unsuccessful property condition without entailing recognition of the debtor insolvent or application procedures of judicial sanitization to him which can be overcome in quite lawful ways: contracting a loan, collecting accounts receivable, selling a part of the debtor's property to name a few. Obligation default can be caused by the debtor's crisis already ensued.

Inability to pay reflects a certain stage of the debtor's financial crisis which differs from

usual delay of the obligation execution for which the ensued property trouble signs presence is not typical.

So, the concept «inability to pay» can be characterised by means of the following signs:

- *Termination of payments* (it is fixed by the bank with which the debtor is in legal relations under the bank account: at insufficiency of monetary resources on the account the bank carries out payments in order of precedence established by art. 855 the Russian Federation Civil code, or suspends payments).

External displays of the termination of payments are non-payments of wages, taxes, payments in the Pension fund, Fund of obligatory social insurance, non-payments for the transferred goods, the made works, the rendered services, protests of the majority of bills and the checks which have been given out by the debtor, execution upon the debtor's property not executed the obligations, statements of the debtor for inability to execute the obligation, the debtor's escape from his creditors etc. Only default of the payments due date can create an inability to pay condition (Bork, 2005). The term of civil-law obligations performance if it is not coordinated by the parties is determined by rules of art. 314 of the Russian Federation Civil code, the term of payment for execution of public duties execution is established by the RF Tax code, the R F Labour code, etc.;

- *Lasting character of the termination of payments* (the legislator establishes term of the termination of payments on the expiry of which the debtor faces certain legal consequences, according to the operating Russian law and under the general rule this term is three months). Thus, it is necessary to distinguish between inability to pay as the ground for instituting insolvency proceedings over the debtor's delay to execute obligation and duties.

Criterion for differentiation of the specified concepts is first of all the term as well as impossibility of obligation execution owing to insufficiency of property. In the German doctrine they differentiate between concepts *Zahlungsunfähigkeit* (insolvency), *Zahlungseinstellung* (termination, suspension of payments), *Zahlungsstockung* (delay of payments).

It is inability to pay that is the ground for instituting insolvency procedures over the debtor's property, the termination of payments serves as an inability to pay sign but the delay of payments as well as their termination are not considered the independent ground for instituting *Insolvenzverfahren* (insolvency procedure).

Differentiation of these concepts is necessary, as at the delay of payments or their termination at the debtor's will and in the absence of inability to pay signs instituting insolvency procedures is not provided by the law;

- A presumption of property insufficiency for execution of obligations and (or) public duties. The legislator selects the conditional amount of not executed or improperly executed obligation testifying to an unsuccessful property condition of the debtor (by the general rule this amount established by the Russian law accounts for not less than 100 thousand roubles for legal entities, and not less than 10 thousand roubles for the debtor-citizen (item 2 of art.6 of the Law «On insolvency (bankruptcy)»). The fixed sum of debts established for all debtors, irrespective of a property condition does not allow with sufficient certainty to establish, when the debtor is capable of executing obligations and public duties due date .

Delay of execution of obligations and public duties are also possible within the established sum of a debt. To institute insolvency (bankruptcy) procedures it is important to establish what property condition of the debtor and his ability to

execute obligations and duties are. If the debtor is in arrears making an essential part of his property it is hardly reasonable to count on his possibility to execute.

The presumption of insufficiency of property of the debtor is shown as an inability to pay sign in its legal definition however this sign is not reproduced by art. 3 of the Law «On insolvency (bankruptcy)». In this connection it is necessary to specify internal contradictions in the Law in this part.

The German doctrine absolutely reasonably emphasizes insufficiency of monetary resources for payments as signs of inability to pay (in legal definition – «unable to execute the liabilities») as well as considers strong-willed character of the debtor's actions though being in possession of monetary resources necessary to pay off, however not willing to make payments demanded by creditors (Harz M., et al, 2005) in order to define the debtor's ability to pay. Under inability to pay condition the debtor does not arrange for payment due to absence of monetary resources.

Let's consider foreign experience of regulation of inability to pay. So, in Germany as it has already been noted, it is the general ground for instituting insolvency procedure and is applied both to natural and to legal persons of private and public law (provided inadmissibility of insolvency procedure is not established for them by the law) as well as to the unions that are not subject to legal personality (§§ 16-19 InsO).

Thus, the legal definition of inability to pay emphasises inability of the debtor to execute liabilities (§ 17 Abs. 2 Satz 1 InsO), that was not fixed in the Law «On insolvency (bankruptcy)» till April, 2009. Inability to pay as a rule is assumed if the debtor stops payments (§ 17 Abs. 2 Satz 2 InsO).

Thus, the German legislator specifies the termination of payments as an inability to pay sign.

It should be noted that the German legislator has changed the legal definition of inability to pay in operating InsO in comparison with former Konkursordnung (further – KO). § 102 KO highlighted two basic signs – a sign of duration and a sign of substantiality. One of the most complicated problems is that of differentiation of inability to pay and termination of payments which is not subject to analysis in the Russian doctrine and in judiciary practice as well.

In the German doctrine they name two basic criteria of inability to pay in order to differentiate concepts «inability to pay» and «the termination of payments» – duration and substantiality.

It is clear, that the termination of payments in itself yet does not mean inability of the debtor to pay since suspension, termination of payments can occur at the debtor's will experiencing no difficulties to execute his obligations. Therefore, duration of the termination of payments reflects the debtor's financial problems.

According to H.Bekker, delay of payments for a period of three days already testifies to the debtor's inability to pay (Becker Chr., 2005). It is such a delay of payments that is used in the Russian legislation along with the credit organisations with a view of their pretrial sanitization. Duration of delay as criterion of differentiation causes heated discussions. InsO unlike the Law «On insolvency (bankruptcy)» does not establish such a term.

It was in 1974 when the Supreme court of Germany applying Konkursordnung in its decision on 27.11.1974 offered a definition of termination and delay of payments which imply the debtor's inability to execute the obligations any longer owing to alleged lasting lack of monetary resources but creditors demand it owing to the due date occurrence and provided this state is recognized by business intercourse participants (BGH, Urt v. 27.11.1974 – WM. 1975. S. 6).

The doctrine and judiciary practice highly value the duration of delay as criterion of differentiation of the analyzed concepts.

Versions from several days to one, two, three weeks are offered. (Harz M. et al, 2005). In judiciary practice the border between a delay of payments and inability to pay after InsO was put into effect from 1.01.1999 till 24.05.2005 was determined by the Supreme court of Germany within a monthly term, and by lower courts from two weeks to three months (OLG Koblenz – one month; LG Augsburg – three months; LG Bonn – from two to maximum three weeks) (Bork R., 2005). The Supreme Court of Germany acts on the premise that only a delay of payments is assumed, if the corresponding period of time which the solvent person requires to receive necessary monetary resources is not exceeded. As is known, the unable to pay debtor is capable of solving the financial problems if he is solvent. It is the purposes that insolvency procedure over his property is not instituted within the established period of time.

The Supreme Court of Germany determines in the decision on 24.05.2005 both a necessary and sufficient for this purpose period of time as being up to three weeks (BGH, Urt v. 24.05.2005 – IX ZR 123/04).

In our opinion, in the law «On insolvency (bankruptcy)» it is necessary to refuse a strictly fixed term of the three months termination of payments as an inability to pay sign by giving the arbitration court discretion to apply a term of outstanding debt recovery against counterparts taking into account the debtor's financial condition. The economic analysis of the debtor's condition is also of great importance. Delay of execution of liabilities cannot be established arbitrarily.

It is necessary to determine a necessary and sufficient term for a credit contract conclusion or a contract of a loan to pay off the arisen debt.

This term is likely to be less than three months that will allow to sanitize unable to pay debtors at earlier stages of a financial crisis.

In Germany along with term of the termination of payments, the second criterion of differentiation of the termination of payments and inability to pay, that is debt substantiality is also analyzed.

A substantiality sign also cannot be selected arbitrarily. In this case the economic calculations testifying to inability of execution of delayed obligations are necessary. In Germany a substantiality sign used to be a subject of heated discussions too. Various borders of substantiality were offered, namely: from 5 % to 15 % of the obligations amount which due date has come (Harz M., et al, 2005). The Supreme Court of Germany in the decision on 24.05.2005 established the border of a substantiality sign – 10 % (BGH, Urt v. 24.05.2005 – IX ZR 123/04).

In our opinion, the Law «On inconsistency (bankruptcy)» requires change in this part too. The established fixed debt amount does not allow to ascertain the debtor's inability to pay with due certainty. The uniform debt amount is established for all legal bodies not allowing them to recede from it even when the debtor is obviously able to pay, and admitted a 100 thousand roubles sum delay on his will within three months. It is obvious, that the substantiality sign as criterion of differentiation of the termination of payments and inability to pay should be used in the Russian arbitration practice too. Criteria of debt substantiality can be established by the law within certain borders and the court at its own discretion will determine the concrete amount of a debt proving the debtor's inability to pay.

Thus, it is necessary to understand inability to pay as the debtor's inability to execute liabilities and duties on due date, owing to insufficiency of monetary resources.

The arbitration court at a judicial session should establish a condition of the debtor's inability to pay at the judicial session, scheduled after the debtor's submitting a bankruptcy petition. A bankruptcy creditor or an authorised body submitted a bankruptcy petition only allege such a condition of the debtor not executing his liabilities. An inability to pay fact can be authentically established in court on the grounds of the signs fixed in the law.

Inability to pay is simultaneously an insolvency sign, i.e. it is likely to reflect inability of the debtor to fulfill all his obligations owing to insufficiency of property.

Insolvency recognised by court, means inability of the debtor to execute obligations and public duties entirely owing to the insufficiency of property established by court that entails instituting bankruptcy proceedings over property of the debtor and its liquidation provided the debtor is a legal entity.

Under Russian bankruptcy law till 1917 and under the law «On insolvency (bankruptcy) of the enterprises» 1992 another sign of legal bodies insolvency was used – inability to repay. D.Dedov suggests that *impossibility of the debtor's solvency restoration* be used as an insolvency sign (Dedov, 1999).

G.F.Shershenevich estimated inability to repay as an inexpedient criterion of insolvency as for instituting bankruptcy proceedings under such a criterion liabilities and assets in the debtor's property needed to be estimated that could not be performed in short terms, property sparseness could have caused difficulties, creditors thus could not have rendered any assistance, that, finally, caused considerable difficulties at instituting bankruptcy proceedings. V.V.Vitrijansky shares the same opinion in treating inability to repay as an insolvency sign (Vitrijansky V.V., 1998).

However, in operating Russian legislation on insolvency the inability to repay sign all the same

is applied to recognising legal bodies insolvent for some debtors' categories. This sign was used in the law «On insolvency (bankruptcy) features of subjects of fuel and energy complex natural monopolies».

The debtor's inability to pay does not automatically entail his recognition insolvent as it can be overcome by means of special sanitization procedures.

Sanitization procedures can be pretrial (art. 27 of the law «On insolvency (bankruptcy)»), the law article «On insolvency (bankruptcy) of credit organizations»), the law «On re-structuring the credit organization») or judicial. (Art. 68-96 of the law «On insolvency (bankruptcy)»). Financial improvement is applied to restore the debtor's ability to pay. Impossibility to achieve the purpose in question means recognition of the debtor insolvent and application to him a sole legal consequence – instituting bankruptcy proceedings.

Concerning legal bodies, sanitization is applied to prevent their liquidation on insolvency motives that will entail adverse social consequences. Sanitization of unable to pay debtors is possible to name the main idea of Russian legislation on insolvency. For this very reason legislation reform has been conducted, another criterion of insolvency has been selected, allowing to find out signs of financial trouble at earlier stages, allowing to apply improving procedures.

So, inability to pay is the ground to institute procedure of supervision and application external management procedure to the debtor to restore his ability to pay.

Inability to pay from an outer side characterises an unsuccessful financial position of the debtor which can be overcome in various ways allowing to avoid him to be recognized insolvent.

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Неплатежеспособность как основание введения процедур несостоятельности (банкротства)

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В статье исследуются понятие и признаки неплатежеспособности как одной из основных категорий института несостоятельности.

В российском законодательстве о несостоятельности (банкротстве) понятие «неплатежеспособность» используется сравнительно недавно, в связи с этим в доктрине оно мало исследовано.

Неплатежеспособность в российской доктрине, как правило, понимают как признак или критерий несостоятельности. В статье предложено также рассматривать неплатежеспособность в качестве основания для введения процедуры наблюдения, финансового оздоровления и внешнего управления. В таком смысле анализируемое понятие используется в законодательстве ФРГ.

Оценивая сложившуюся арбитражную практику в Российской Федерации, автор приходит к выводу о принципиально неверном подходе к признаку несостоятельности и необходимости изменения действующего закона «О несостоятельности (банкротстве)» в этой части.

В статье анализируется содержание понятия «неплатежеспособность» как определенного имущественного состояния должника.

Автор предлагает выделить признаки неплатежеспособности, а именно: прекращение платежей, являющийся характер прекращения платежей, недостаточность имущества для удовлетворения требований кредиторов.

Состояние неплатежеспособности должника не может быть при этом сведено исключительно к прекращению платежей и определенному сроку просрочки исполнения гражданско-правовых обязательств или публичных обязанностей, оно по содержанию иное и предполагает также отсутствие у должника необходимого имущества для погашения имеющихся у него долгов. В связи с этим в статье предлагается разграничивать понятия «неплатежеспособность», «прекращение платежей», «задержка платежей», «приостановка платежей», автор при этом обращается к немецкой доктрине, где указанные понятия исследованы более глубоко и всесторонне.

Критерием разграничения указанных понятий выступает, прежде всего, срок, а также невозможность исполнения обязательства вследствие недостаточности имущества.

Обращаясь к немецкой доктрине и сложившейся судебной практике, автор анализирует критерии разграничения исследуемых понятий – срок и существенность долга. При этом подчеркивается, что немецкий законодатель не устанавливает в законе ни определенного срока, ни размера долга. Они определяются судебной практикой, что позволяет вводить процедуры несостоятельности над имуществом действительно несостоятельных должников, а российский законодатель формализовал указанные критерии и позволил тем самым использовать недобросовестным субъектам гражданского оборота процедуры несостоятельности над имуществом фактически состоятельных должников, допустивших просрочку исполнения гражданско-правовых обязательств и (или) публичных обязанностей.

Ключевые слова: неплатежеспособность, прекращение платежей, существенность долга, несостоятельность, признак, критерий, основание.
