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José María Pino Suárez 400-2 esq a Lerdo de Tejada, Toluca, Estado de México. 7223898473*

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TÍTULO: Correlación de los conceptos de "insolvencia e incapacidad de pago" de un deudor en un procedimiento de quiebra en la Federación de Rusia.

AUTORES:

1. Ph.D. Vladimir S. Komarov.
2. Ph.D. Denis V. Petrovich.

RESUMEN: El artículo proporciona un análisis de las percepciones civiles y penales del estado legal del deudor al evaluarlo desde el punto de vista de la insolvencia y la incapacidad de insolvencia para pagar. Se considera la posición legal de los autores del artículo en relación con el procedimiento de quiebra en estos casos, considerando que los conceptos de "insolvencia" e "incapacidad de insolvencia para pagar", aunque similares en contenido, no son sinónimos.

PALABRAS CLAVES: quiebra, deudor, insolvencia, incapacidad de pago, acreedor.

TITLE: Correlation of the concepts of “insolvency and inability to pay” of a debtor in bankruptcy proceedings in the Russian Federation.

AUTHORS:

1. Ph.D. (Law) Vladimir S. Komarov
2. Ph.D. (Law) Denis V. Petrovich

ABSTRACT: The article provides an analysis of the civil and criminal perceptions of the legal status of the debtor in assessing it from the point of view of insolvency and insolvency inability to pay. The legal position of the authors of the article in relation to the bankruptcy procedure in these cases is considered, considering that the concepts of “insolvency” and “insolvency inability to pay”, although similar in content, are not synonymous.

KEY WORDS: bankruptcy, debtor, insolvency, insolvency inability to pay, creditor.

INTRODUCTION.

In modern Russian judicial practice, criminal cases of crimes are becoming more widespread, the responsibility for the commission of which is provided for in Articles 195 and 196 of the Criminal Code of the Russian Federation. This trend is primarily associated with an increase in the number of organizations and enterprises that, in the conditions of the economic crisis, become unable to satisfy, after the due date for their payment, the monetary claims of their creditors, in other words, become insolvent (bankrupt).

Meanwhile, law enforcers often have difficulties in correctly identifying the signs of the objective side of these offenses, which, of course, requires lawyers to exercise due attention and interpretation of all elements of such a complex mechanism as the bankruptcy procedure.

And often more and more spoken and written about the optimization of legal regulation of procedures for the prevention and implementation of bankruptcy not only legal entities but also individuals [Komarov V.S., Shestopalov A.A. (2004)].

DEVELOPMENT.

Research of methodology.

In the process of cognition of state-legal phenomena, based on the approach of S.A. Komarov, general scientific methods were used (formal-logical, sociological, systemic, structural-functional,

concrete-historical, statistical, ascension from abstract to concrete, etc.); general logical methods of theoretical analysis (analysis, synthesis, generalization, comparison, abstraction, analogy, modeling, etc.); private scientific methods (comparative law, technical and legal analysis, concretization, interpretation, etc.) [Komarov S.A. (2019), p. 33].

Study results.

The concept of bankruptcy (of legal entities or individuals) of individuals has several meanings: the economic (financial) condition of the person (insolvency) or the actual assessment procedure, how to satisfy the financial interests of creditors or state organizations [Komarov V.S., Komarova T.L. (2003)].

Bankruptcy is also considered sub-bankruptcy if planned bankruptcy is submitted by the person (self-bankruptcy); fictitious bankruptcy, intentional bankruptcy (resulting from the theft of funds or other schemes of deterioration of the financial position of a legal entity).

The last two options in the Russian Federation are considered crimes and entail criminal liability (up to the alienation of property and criminal punishment).

However, in legal practice, there are insufficiently well-developed issues that require not only theoretical, but also practical research.

So, for example, when considering criminal cases of heads of enterprises (organizations), the court often makes a decision on the re-qualification of the actions of the defendants with art. 196 at st. 195 of the Criminal Code [2]; for example, as a key argument for making such a decision, the court makes reference to the expert's opinion that the company was deprived of solvency before 01.01.2014, and disputed transactions on the transfer of the company's assets for rent were made by the head after 01.01.2014, t .e. after the creditors applied to the arbitration court with claims for declaring the debtor insolvent (bankrupt) due to the fact that the debtor company lost the ability to fulfill the creditors' claims for its obligations, and disputed transactions could not cause bankruptcy,

which does not allow the court to qualify these acts under art. 196 of the Criminal Code.

To the authors of the article, such a motivation of the court seems erroneous. The conviction in this is based on a misinterpretation by the court of the terms “insolvency” and “insolvency inability to pay”. In our opinion, these definitions are not identical, because insolvency has a more voluminous content than insolvency inability to pay, which is only one of its components.

The basis of the legal constructions of Articles 195 and 196 of the Criminal Code of the Russian Federation as a distinctive property is the insolvency of a legal entity or citizen, including an individual entrepreneur, - the inability to fully satisfy creditors' claims for monetary obligations and (or) to fulfill the obligation to pay mandatory payments.

In order to correctly apply these standards, one should understand the meaning of the term “insolvency”, as well as the ratio of the concepts “insolvency” and “insolvency inability to pay”.

Initially, it should be borne in mind that the objective side of the crime under Article. 196 of the Criminal Code of the Russian Federation is defined by the legislator as intentional bankruptcy, that is, the commission by the head or founder (participant) of a legal entity or citizen, including an individual entrepreneur, of actions (inaction) that obviously entail the inability of a legal entity or citizen, including an individual entrepreneur, to fully satisfy the creditors' claims for monetary obligations and (or) fulfill the obligation to pay mandatory payments if these actions (inaction) caused a major loss. The objective side of the crime under Article 195 of the Criminal Code is expressed in certain actions of the guilty person committed with signs of bankruptcy.

With this construction of the legal structure of both crimes, a logical and practical question arises - how to qualify the actions of the head of the enterprise, who concluded on behalf of the company agreements on extremely unfavorable conditions for it at a time when its organization was already insolvent to creditors, but this uncertainty of terminology is very significant for the head - either he will be convicted of a crime of minor gravity (Article 195 of the Criminal Code of the Russian

Federation), or serious, to which article 196 of the Criminal Code of the Russian Federation refers.

For a thorough interpretation, we note that the legislator uses the concepts of “insolvency”, “insolvency inability to pay”, and “insufficiency of property” to designate the unfavorable financial condition of the debtor organization.

In the Federal Law “On Insolvency (Bankruptcy)” dated October 26, 2002 No. 127-Φ3, the concept of “bankruptcy” and the concept of “insolvency” are used as identical and its features are given for legal entities (Article 3), for citizens (paragraph 3 of Article 213.6) [1].

A legal definition of these concepts is contained in Art. 2 of the aforementioned law, where it is said that insolvency inability to pay is the debtor’s inability recognized by the arbitration court to fully satisfy the creditors' claims for monetary obligations, for the payment of severance pay and (or) for the remuneration of persons working or working under an employment contract, and (or) to fulfill the obligation to pay mandatory payments [1, para. 2 tbsp. 2].

In the legislative definition of insolvency (bankruptcy), the following features are highlighted:

A) Inability to fully satisfy the claims of creditors on civil-law monetary obligations and (or) mandatory payments, as well as claims by employees and former employees for the payment of severance pay and (or) wages.

b) A certificate of fact of such failure by the arbitral tribunal.

So, the Russian legislator designates insolvency and insufficiency of property as signs of insolvency.

In the legal determination of insolvency [1, para. 37 tbsp. 2] signs of insolvency are highlighted: termination of payments and insufficiency of property to fulfill obligations and obligations.

Insolvency is, on the one hand, a sign of insolvency, i.e. in a probabilistic form reflects the inability of the debtor to fulfill all his obligations due to insufficient property, and on the other hand, the basis for the introduction of bankruptcy procedures.

The insolvency of the debtor does not automatically entail recognition as insolvent, since it can be overcome with the help of special rehabilitation procedures (monitoring, external management, etc.) aimed at restoring the solvency of the debtor. The impossibility of achieving this goal means recognition of the debtor insolvent and the application of the only legal consequence to it - the opening of bankruptcy proceedings.

Insolvency from the outside characterizes the financial situation of the debtor, which can be overcome in various ways to avoid recognizing it insolvent.

That is, according to the current legislation of the Russian Federation and economic theory, the concepts of “insolvency” and “insolvency inability to pay”, although similar in content, are not synonymous.

So, an insolvent organization that has not been able to overcome its difficulties in the course of external management can be declared insolvent by the decision of the arbitration court.

According to the disposition, Art. 196 of the Criminal Code, the legislator establishes criminal liability precisely for the deliberate creation of an organization’s insolvency for monetary obligations and (or) for the payment of mandatory payments if these actions (inaction) caused major damage [2]. So, the disposition repeats the legal definition of insolvency of the debtor.

In accordance with the Federal Law “On Insolvency (Bankruptcy)”, damage caused to the property rights of creditors is defined as a decrease in the value or size of the property of the debtor and (or) an increase in the amount of property claims against the debtor, as well as other consequences of transactions made by the debtor or legally significant actions or inaction leading to a complete or partial loss of the ability of creditors to obtain satisfaction of their claims for the obligations of the debtor at the expense of his property.

Of course, taking into account that the determination of the insolvency of the debtor belongs to the competence of economists who conduct a dynamic analysis of the coefficients characterizing the solvency of the debtor by establishing a significant deterioration in the financial condition based on the analysis of transactions and decisions of the debtor's governing bodies that led to such deterioration, then legal diagnosis and adoption final decision on insolvency (bankruptcy), establishing compliance of the debtor's transactions and actions of the organ in the management of the debtor, the legislation of the Russian Federation and the customs of business turnover, the identification of transactions that do not comply with market conditions that caused or increased insolvency is carried out by the court.

Transactions concluded on conditions that do not correspond to market conditions include:

- a) Transactions on the alienation of the property of the debtor that are not sales and purchase transactions aimed at replacing the property of the debtor with less liquid.
- b) Sale and purchase transactions carried out with the property of the debtor, concluded on conditions that are obviously unfavorable for the debtor, and also carried out with property, without which the principal activity of the debtor is impossible.
- c) Transactions related to the occurrence of obligations of the debtor that are not secured by property, as well as entailing the acquisition of illiquid property.
- d) Transactions on the replacement of one obligation by another, concluded on obviously unfavorable conditions.

In other words, if the guilty person committed actions as a result of which the business operations, personnel and assets of the company were actually transferred to a controlled organization, which in fact led to the cessation of entrepreneurial activity and the suspension of production of the debtor and did not allow the company to fulfill its obligations to creditors, then they may indicate about the existence of damage, expressed in a decrease in the value, size of the property of the debtor, which

could go towards the reimbursement of said creditor th debt.

For criminal prosecution under Art. 196 of the Criminal Code does not require a legal criterion - the introduction of bankruptcy proceedings and liquidation of the debtor.

The economic mechanism for changing the financial condition in the context of deliberate bankruptcy takes into account that the insufficiency of property, as a rule, firstly, is accompanied by a moderate decrease in liquidity; secondly, insolvency should be established by counterparties (signs of bankruptcy); thirdly, there is a recognition of the impossibility of restoring solvency during the monitoring procedure; fourthly, in the event of bankruptcy and liquidation, the requirements of bona fide creditors remain outstanding due to insufficient property.

CONCLUSIONS.

So, summarizing the foregoing, it should be concluded that transactions by the head of the enterprise on conditions that do not correspond to market conditions, at a time when the enterprise already had a sign of insolvency, form the objective side of the crime and fall under the disposition of article 196 of the Criminal Code of the Russian Federation “intentional bankruptcy” and not under Art. 195 of the Criminal Code of the Russian Federation “illegal actions in bankruptcy”.

Given that the guilty person, realizing the existence of accounts payable by the company to creditors, in order to cause damage to them, developed a criminal scheme for the withdrawal of company assets from property recovery of creditors, planned to continue its entrepreneurial activity using the withdrawn company assets for profit, transferring income from the firm’s production activities to another controlled organization to the detriment of the property rights of creditors, a similar qualification of the actions of the guilty person with t.196 of the Criminal Code does not allow him to avoid stricter liability, although in fact his actions were committed in a time of crisis for the enterprise and formally could not affect its solvency.

Conflict of interest.

The authors confirm the absence of a conflict of interest.

BIBLIOGRAPHIC REFERENCES.**(In Russian).**

1. Federal'nyy zakon ot 26.10.2002 № 127-FZ (red. ot 03.07.2019) «O nesostoyatel'nosti (bankrotstve)» // Sobraniye zakonodatel'stva Rossiyskoy Federatsii. 2002. № 43. St. 4190.
2. Ugolovnyy kodeks Rossiyskoy Federatsii ot 13.06.1996 № 63-FZ (red. ot 02.08.2019) // Sobraniye zakonodatel'stva Rossiyskoy Federatsii. 1996. № 25. St. 2954.
3. Komarov V.S., Komarova T.L. (2003) Grazhdansko-pravovyye sredstva preduprezhdeniya nesostoyatel'nosti (bankrotstva) kreditnykh organizatsiy. Monografiya. Sankt-Peterburg: Izd-vo «Yuridicheskiy institut». 174 s.
4. Komarov V.S., Shestopalov A.A. (2004) Optimizatsiya pravovogo regulirovaniya protsedur preduprezhdeniya i osushchestvleniya bankrotstva kreditnykh organizatsiy // Yuridicheskaya mysl'. № 5 (24). S. 65-68.
5. Komarov, S. A. (2019) Obshchaya teoriya gosudarstva i prava: uchebnyy dlya bakalavriata i magistratury /S. A. Komarov. 9-ye izd., ispr. i dop. Moskva: Izdatel'stvo Yurayt. 506 s. (Seriya: Bakalavr i magistr. Akademicheskiy kurs).

(In English).

1. Federal Law of October 26, 2002 No. 127-ФЗ (as amended on July 3, 2019) “On Insolvency (Bankruptcy)” // Collected Legislation of the Russian Federation. 2002. No. 43. Article 4190.
2. The Criminal Code of the Russian Federation of June 13, 1996 No. 63-FZ (as amended on August 2, 2019) // Collection of legislation of the Russian Federation. 1996. No. 25. Article 2954.

3. Komarov V.S., Komarova T.L. (2003) Civil remedies for the prevention of insolvency (bankruptcy) of credit organizations. Monograph. St. Petersburg: Publishing House "Law Institute". 174 c.
4. Komarov V.S., Shestopalov A.A. (2004) Optimization of the legal regulation of procedures for the prevention and implementation of bankruptcy of credit organizations // Legal Thought. No. 5 (24). S. 65-68.
5. Komarov, S. A. (2019) The general theory of state and law: a textbook for undergraduate and graduate programs / p. A. Komarov. 9th ed., Rev. and add. Moscow: Yurayt Publishing House. 506 p. (Series: Bachelor and Master. Academic Course).

DATA OF THE AUTHORS.

1. Komarov Vladimir Sergeevich. Ph.D. in Law. Senior Lecturer, Department of Civil Law and Procedure, Law Institute (St. Petersburg), Associate Professor. E-mail: wlaskom@mail.ru

2. Petrovich Denis Valer'evich. Ph.D. in Law. Associate Professor of the Department of Criminal Law and Criminology of the "State social and humanitarian University" (Moscow region). E-mail: denpetrovich82@mail.ru

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