



Summary of Bankruptcy Law VI

2013.10.03

We have been examining more closely insolvency proceeding from the previous summary. This time we are going to examine the causes for commencement of insolvency proceedings.

1. Debtors and Causes for Commencement of the Proceedings

In case of insolvency proceedings, the causes for commencement of the proceedings are different from debtors to debtors. Depending on which entity the debtor is categorized into, the court appropriately commences the proceedings when it finds that there exists the causes for commencement of the proceedings.

If a debtor is an existing legal entity (exclusive a partnership company and limited partnership company), **being unable to pay debts** or **being insolvent** are the causes for commencement of the insolvency proceedings (Article 16 of the Insolvency Act (“IA”).

Likewise, if a debtor is a trust assets, the insolvency proceedings is commenced given the fact that the debtor is found unable to pay debts or insolvent (Article 244-3 of “IA). When a debtor is categorized as an entity other than those above, **being unable to pay debts** is only the causes for commencement of the proceedings.

However, when it comes to the actual insolvency practice, the causes for commencement of insolvency proceedings does not matter to a great deal because it is easy to prove whether the causes for commencement of insolvency proceedings is present or absent. (It is not common where a debtor is inheritance property or trust assets, so please let us omit such cases to discuss in more details in this series of summaries.)

2. Details of Causes for Commencement of the Proceedings

(1) Unable to Pay Debts

The term “**unable to pay debts**” means the condition in which a debtor, due to the lack of ability to pay, is generally and continuously unable to pay his/.her debts as they become due (Article 2-11 of IA).

The term “**due to the lack of ability to pay**” means that a debtor does not have the ability to pay debts in terms of any aspects of assets, trust, or income from his/her labor



service. The term “**generally**” here means that a debtor does not have the ability to pay debts to not only some specific creditors but also all other creditors he/she owes. In addition, the term “**continuously**” here means that a debtor is continuously unable to pay debts, not temporary.

(2) Suspension of Payment

When a debtor has suspended payments, the debtor is presumed to be unable to pay debts (Article 15-2 of IA). However, even if the debtor has suspended payments and is presumed to be unable to pay debts, it is just only presumed in a legal aspect. Therefore, if the debtor is able to prove he/she is not unable to pay debts, the insolvency proceedings will not be commenced.

The term “**a debtor has suspended payments**” means the act of the debtor which obviously shows outward that the debtor, due to the lack of ability to pay, is generally and continuously unable to pay his/.her debts as they become due. For instance, any kind of acts such as dishonored notes and moonlight fit are considered to be a debtor’s implied statement to be unable to pay off the debts and will be presumed for the debtor to suspend payments.

(3) Insolvent

The term “**insolvent**” means, in case where a debtor is a legal entity, the condition in which a debtor is unable to pay its debts in full with its property (Article 16-1 of IA).

When determining whether a debtor is insolvent or not, debts which have not become due as well as debts which had already become due are both posted for the amount of debts. As “insolvent” means the objective condition which has lasted for a certain time, if a debtor got temporarily insolvent due to a sudden accident such as earthquakes, such situation does not considered to be the causes for commencement of insolvency proceedings unless the insolvent condition continues permanently.

The traditional Japanese companies have expanded their business by borrowing money, meaning such many companies are practically in insolvency and they could be applied to go through insolvency proceedings.

Hence, some suggest that if insolvent requirement should be determined based on **going concern value**, such above problems would be solved (insolvent condition beyond the scope of going concern value would not be worth protecting).

(Over)