

Poznámky (nekompletní)

Bez kontroly překlepů, vycházejte ze svých poznámek (hlavně u 2 hodin z minulého týdne není vše), toto je jen na doplnění a shrnutí, zkratky jsou stejné jako u předchozího souboru

Class 5

| Assets/property | Liabilities/debts/obligations |
|-----------------------------------|---|
| Land and buildings | money borrowed, accounts receivable |
| Equipment | unpaid wages to employees |
| Inventory | unpaid taxes |
| Bank accounts | unpaid suppliers |
| Leases, contracts (agreements) | secured and unsecured liabilities – lien or mortgage = first claim on all or part of property |

Reorganisation process and its players

Creditors committee (CCom) represents both types of C in CZ

X

US separation b/w secured and unsecured C – their own committee

Different interests and position - should be divided

Sometimes also equity committee in publicly traded companies, represents SH, also bondholders may come under specific regime (equity committee not always useful to have if there is not enough money, it only increases the costs)

Allows time for things to cool down – the automatic stay

C stopped, cannot sue D in court, everybody will be treated equally, stays actions in place

BUT cooling off period in CZ is quite short!

Time to steady business, think of plan, C talk together, build consensus (average period of 22 months for US reorganisation), resolution of disputes, centralizes it in bankruptcy court instead of many cases all around the country, D prepares a plan

USA 17% or reorg. result in a successful plan

Of that 22% later turned to liquidations

Insolvency tests – the balance sheet test – liabilities exceed assets

Not paying tests – C does not pay debts as they come due

Same in CZ and US

SC – collateral = secured lien on property

Hedge funds – short term view, quick profit, lenders, turn-arounds, they buy unsecured debt – gamble for power but may come short because they buy stock of financially troubled companies

USCCom separated – 7 largest USC or small business representatives negotiate plan w/D

No wages, only expenses paid

X CZ allows reasonable remuneration determined by court, it is better

Process: if CCom and D in disagreement, either party may file a motion and bankruptcy judge decides in the U.S.

X CZ CCom power to veto virtually any act by D – elect insolvency trustee, consent to any sales of property by trustee or D, can oppose reorganization, changes in D's management and supervisory board

Little incentive to negotiate, massive leverage, dictation to D

What is the likelihood of employees to be taken into account? The threat to continuing the business, far too much power in reorg. process.

Parties to executory contracts (K)

D's choice to assume and combine or reject the store lease, landlord may file for damages, 210 days limit to decide on that

Court agrees almost every time – business decision is reasonable

Timing in CZ – shorter, trustee has this power in liquidation, but no provision for D in reorg.

No power under insolvency act = great difficulty

U.S. trustee office – protects the public in bankruptcy cases, bureaucratic, monitor cases

searches for conflicts of interests lawyers may have, not very useful, no such office in CZ

Court can! appoint a trustee in reorg. case – but only in case of a fraud, mismanagement by D etc. = very rare

Delaware – pro debtor judges, 80 % filed there, judges shopping

Beauty contest for lawyers – D chooses a law firm of his liking

Automatic stay exceptions:

Criminal prosecution

Enforcement of laws (health etc.)

For “cause” - Pending court cases (how much is the claim worth)

No adequate protection for SC - Lack of equity for SC + assets not needed for reorganisation – if D does not need the assets, C can take the property

Similar in CZ

First day order

Permission to pay employees and critical suppliers (both outstanding and new cheques) – judge has to agree

No explicit authority for this in bankruptcy code BUT art. 105a (“any order necessary”) can be used to carry up the case, some courts however do not approve (it's Congress task)

Critical suppliers = e.g. jet fuel for Delta airlines – normally would be against the absolute priority rule, but under 105A it allows D to pay what he owes so that he could continue business, many courts approve this approach (pre-petition debt)

Some courts made reservations as to critical amount – K-Mart case – 300 mil. to pre-petition creditors is too much

Cash collateral

2005 Amendment – payment necessary to keep the CEO when compared to other services, they are essential to survival of business, should not be more than 10 X what is paid to non-management employees

but 105a allows to craft provision based on performance of CEO – e.g. based on annual turnover – courts are split on whether it is allowed

Reorganization operations

D needs cash to operate, filing itself does not solve the cash problem

Banks have liens on account receivables = tension about the use of cash coming from account receivables

Cushion - depends on negotiation b/w bank lender and D (value of account receivables)

Ordinary course of business suppliers – priority claims (costs and expenses of administration)

21. 4.

Subprime mortgage crisis

CZ protection period – 7 days after filing, for 3 months (+1) automatic stay remains in effect
If majority claims of C votes – they can end it! = lot of power but in general it is a good concept

Utilities (electric, telephone suppliers) – adequate assurance = D has to show how it will be able to pay during the case

Trade Unions – higher costs (example – pilots)

Procedure for changing of contract (K)

Proposal to union

Negotiation

If negotiation fails, D files a motion w/ court – asks authority to reject the K

Court decides

Equities favor rejection

Rejection forces the parties to negotiate again

X CZ – does not allow to reject the K – major defficiency!

Plus Ccom consent to any sale by D – almighty power in case of dispute – court should decide

In U.S. any sale is auction X CZ by or outside auction

Proposed buyer (stalking horse) wants:

Courts: YES

Break up fee (for its expenses if it does not close the deal)

Overbid protection (2nd bid must be xxx higher)

All bids on same terms except dollar amount (no apples and oranges) – may be confusing if judge does not stay firm on that

Courts: NO

Window shop provisions (D must no seek other bidders)

Bidder has to come w/ proof of financial ability

Bidding process in court room

Strong arm power by trustee to get transfers back to the estate

Preferences

| U.S. | CZ |
|--|-----------------------------|
| Transfers by insolvent D w/i 90 days (1 year for insiders) | same 1 year (3 years) |

gets more than in bankruptcy same
over 5000USD transfer no min amount limit

NOT in case of:

Oversecured C

New value – D pays C and C gives back new merchandise (equal value)

Subsequent advances – D pays and later C gives new higher value

Ordinary course of business – as it happened before but it is a very vague concept

Earmarking – money is destined to a particular party, it is like paid directly and not through D

CZ substantially same provisions

Fraudulent conveyances

US + CZ very similar

- actual fraud – intent of D
- constructive fraud – cannot prove intent but circumstances clearly show fraud

conditions:

insolvent at time of transfer

no equivalent value received for it

US – 2 years

CZ 1 year + 3 years for insiders

Summary of major differences b/w U.S. and Czech reorg. Provisions

- 1) CZ – trustee - in every case even reorg. X US debtor in most reorg. manages the case
- 2) Ccom (creditors committee) can elect trustee – great power X US court appoints him
- 3) No minimum size of D (debtor) to start reorg. X CZ 100.000 CZK annual turn-over, or more than 100 employees
- 4) CZ – D MUST file bankruptcy if insolvent X US – D does not have to file
- 5) CZ – D files, court must rule on petition and approve or disapprove the filing X US – it is automatic
- 6) D reorg. Method – C (creditors) must vote early to decide, vote is $\frac{1}{2}$ of USC (unsecured creditors) and $\frac{1}{2}$ of SC (secured creditors) claims, or 90 % of all claims = Creditors decide on method! X not in US
- 7) Ccom in CZ – members get reasonably paid + expenses = better X US Ccom gets only expenses
- 8) CZ Ccom has both SC and USC X US – only USC
- 9) CZ Ccom right to consent to any sale of property by D X US courts decide if Ccom disapproves

- 10) During reorg. If D wants to change supervisory board (SB) members of officers, needs Ccom consent, SB need approval for new president – great power of Ccom in CZ
- 11) Leases and Union K – rejection of executory K – CZ reorg. D does not have power to reject even w/ court approval – no mechanism provided by law for D, big handicap, decision to be made are important, need a procedure provisions to allow D to go to court and reject K in order to save money X US – yes
- 12) CZ Ccom consent to any material acts by D X US motion w/ court if Ccom objects – but no final decision
- 13) CH11 lender gets super priority lien over existing lender if he is adequately protected X CZ new lender can only get a share of collateral w/ existing lender, no superpriority
- 14) CZ business D can obtain up to 4 months protection period at the beginning of case, subject to termination by majority claims of C, good except of the power
- 15) If CZ C files a claim for more than 50 % of its true amount – the claim will be disregarded and C must pay D difference b/w the real amount owed and what C said it was – though provision that discourages C from filing impossible claims

Reorg. Plan

- 1) negotiation process (months)
- US D exclusive right to file plan for the first 120 days, up to 18 months (= C not allowed)
 In CZ D 120 days up to another 120 days (8 months) – very short time

Reason – not to drive things out, relieve the pressure on D

Differing objectives

SC want to keep their lien, stay a lender, change payment term, generally not interested in liquidation, long-term relationship

USC want cash, or less cash for on –going business

Bondholders – generally sophisticated investors, want something they can sell publicly, shares or new shares of reorganized D, new investment, give up bonds for controlling shares of company

Shareholders – mostly get nothing, sometimes C want them to stay and get new shares, rarely

Plan steps

- 1) negotiation
- 2) drafting
- 3) disclosure statement = report on the plan in CZ
- 4) solicitation process
- 5) confirmation process
- 6) going effective

ad 2) alternatives of dealint w/C:

pay debt overtime of secured lender or surrendering collateral to SL

D sells assts – proceeds go to pay C

Benefing leases or K – kept or rejected

New investment in company

Issuance of shares, elimination of existing shares

Different classes of claims X CZ own classes for SC and USC even if in Ccom they are together

D is discharged of all the rest of debt not included in plan

Ad 3) C vote – have to know all about company and plan, few people ever read it in fact

D not permitted to solicit acceptances by C until court decides to approve the plan

Informed judgment about plan

CZ sufficient info C and D have to know before approval

Conservative projection of future – has to meet it, not mislead C, have to show the plan is feasible

Court hearing – objections, changes needed etc

CZ court approves 15 days prior C meeting to decide on adoption of the plan

Ad 4) D solicits votes – sends plan + disclosure statement and ballot, letter from management of Ccom (recommendations)

Only uncontested claims may vote

It is possible to have mini-trial on disputed sum – preliminary decision solely for the purposes of voting (= is not final)

Only impaired claims may vote (= not paid in full)

If paid in full = presumed they agree w/plan (same in CZ)

Vote by classes: CZ and US majority in number of claims voting

Few large C cannot control voting w/i class – US 2/3 of amount X CZ majority in amount

Ad 5) requirements for approval

a) compliance w/ law (US, CZ)

b) good faith, no dishonest intent (US, CZ)

c) pay professional fees (US)

d) identify post-confirmation management of D /US)

e) any regulatory approval – utilities in US

f) satisfies best interests of C test = at least as much as in liquidation

g) approval of at least 1 impaired class

h) payments of other costs, expenses

i) feasible (doable) – likely not to be followed by liquidation or new reorg. -

Expert testimony, but this is no guarantee of success, low % of likelihood

j) satisfies cramdown rules = if class votes against plan it will still work out if:

SC keep lien, payment in full w/ market rate of interest = not low rate

Or USC payment in full or no lower class receives anything under plan (absolute priority rule is followed – shareholders)

Example: only 1 class vote for the plan, others not, courts still can approve under those 2 conditions above

Essentially same in CZ (fairness, security)

Summary

16) D exclusive period to filing plan up to 18 months in US X CZ only 8 months

17) Voting in class 2/3 X CZ majority

18) US creditor appeal on approval of plan – files w/court of appeals, cannot stop plan going forward unless it files a bond = to pay damages everybody suffers for delay

caused by appeal. It is a gamble for C, others can hold him responsible for delay. X in CZ no bond required, any C can appeal and stop anything until appeal is decided, C is not betting anything – major difference!