

The trend in US 363 Bankruptcy Sales and points of interest for the European Market

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Since the onset of the worldwide financial crisis, the nature and structure of Chapter 11 bankruptcies in the U.S. has changed, creating opportunities for foreign companies and investors to expand their footprint or break into the market. Historically, Chapter 11 debtors took advantage of the breathing room offered by the bankruptcy process to either restructure debt or sell assets over time. Today, the once frowned upon immediate sale following a filing has become the norm largely due to economic conditions: (i) lack of liquidity creating a cash crunch, (ii) increased bank regulation/oversight stymying bank lending, (iii) rise of non-traditional lenders who place greater restrictions on management's freedom to exercise business judgment, and (iv) opportunity for consolidation. Chapter 11 debtors now enter bankruptcy with: (i) a pre-packaged/pre-negotiated plan supported by its secured creditors, (ii) a proposed sale of substantially all assets, and/or (iii) a "new" loan or agreement with secured lenders to use cash only short-term, requiring a quick sale or liquidation. The sale process is quick, but open to any bidder who meets the qualifications set and therefore presents a great opportunity for foreign buyers.

363 Sale Benefits: The sale of assets described above is typically governed by Section 363 of Title 11, Chapter 11 of the United States Code (the "Code"). The hallmark of a "363 Sale" is the ability to sell assets free and clear of liens, claims and encumbrances on an expedited basis providing the buyer with a court order protecting it from future liabilities, provided the sale is properly documented.

The Process: Bid procedures establish: who may qualify as a prospective buyer, required deposits, due diligence review rights, minimum and overbid amounts, due dates for submission of a qualified bid, and the auction process, among other things. An existing foreign secured lender may "credit bid" its own secured debt towards the purchase, though additional investment will be necessary to cover the costs of a bankruptcy process (e.g. professional fees and administrative

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costs during bankruptcy). An interested buyer may seek to become the "stalking horse bidder", or benchmark bid and asset purchase agreement ("APA") against which all other competing bidders will be measured. A stalking horse typically is selected before bankruptcy so the debtor may enter bankruptcy with a buyer and "floor" price, and usually affords the stalking horse compensation if they are not ultimately the successful bidder. Alternatively, an interested purchaser may submit a qualified bid and attend the auction. Foreign buyers will, of course, need to address any regulatory or legal issues associated with owning the assets prior to closing, preferably during the diligence process. Also limited "outs" should be drafted in the form of proposed APA.

Timing: The 363 sale process is quick; potentially occurring in less than 1-3 months, from approval of the bid procedures to the court's entry of a sale order following an auction. An interested buyer must quickly evaluate the market and industry players, identify potentially appealing distressed assets (a buyer need not offer to buy all assets; the sale may be piecemeal), synergies that could be gained, and operational nuisances, as well as assess license rights, existing debtor contracts it wishes to have assigned including termination clauses, and employees needed for a transition. Due diligence is often access to a virtual document room with all of the debtor's documents, along with access to the debtor's investment banker or financial advisor who can answer questions, and potentially interviews with management/key employees, all of which need to occur within the tight time frame. Foreign buyers must also be cognizant of the political climate as transactions have fallen through based on regulatory restrictions that require time for approval. For example, the U.S. government can stop sales of U.S. assets on the grounds of national security. Although not mandatory, a review is conducted by the Committee on Foreign Investments in the U.S. (CFIUS), which has the authority to unwind transactions. Reviews can take 30-90 days, so it is critical to engage with CFIUS early.

More information on recent 363 sales with successful foreigner buyers

Sale of A123 Systems to Wanxiang Auto - A123 Systems, an American battery and energy storage systems developer, filed bankruptcy in October 2012. Wanxiang won the auction sale. Wanxiang's bid was subject to review by CFIUS, amid concerns that some of the technology being transferred would pose a national security risk, among other things. Wanxiang excluded the firm's government business from its bid, which was subsequently sold to a U.S. firm for \$2.25 million, resulting in approval of the bid following government review.

Sale of Brookstone to Sailing Innovation - Sailing was a consortium formed by Sailing Capital, an investment group backed by the Chinese government to help Chinese companies invest internationally, and Sanpower, a Chinese conglomerate that hoped to expand its retail presence. Brookstone was a retailer known for unique gadgets/gifts. This was a strategic acquisition for Sailing, as Sanpower could establish a U.S. presence and was able to do so quickly through an established company like Brookstone, with the expectation that Brookstone could likewise be expanded to the Asian and European markets.

Cancelled transactions: Creating "outs" in the asset purchase agreement was important in the case of Sichuan Tengzhong's attempt to purchase Hummer from General Motors in 2010. The deal was called off due to political and financial reasons based, among other things, on declining fuel prices, and the Chinese government's goals regarding reliance on foreign fuel and environmental concerns.

Conclusion: The rise in bankruptcy cases linked to quick sales necessitated in part by the financial climate, presents opportunities for foreign buyers who are able to quickly assess the assets and liabilities and willing to take advantage of the opportunity. Sales are never without risk, even sales that are free and clear of liens, and therefore any prospective buyer should consult professionals knowledgeable in the 363 sale process to avoid pitfalls and ensure they are getting the full benefit of the bargain.



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Financial Advisory in Unternehmenskrisen

Interview mit Finanzierungsexperten der
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Krisenursachen liegen meist in Führung, Absatz oder Kosten. Welchen Nutzen bringt ein Financial Advisor dann, Herr Servais?

Größte Herausforderung in Krisen ist die Sicherung der Zahlungsfähigkeit. Der Financial Advisor setzt hier an und verschafft dem Management die notwendige Zeit, um Krisenursachen zu bekämpfen und das Unternehmen wieder zum Erfolg zu führen. Er sucht interne Liquiditätsreserven und externe Finanzierungsquellen. Anhand einer plausiblen Darstellung der Handlungsoptionen entwickelt er eine vertrauensbildende Kommunikationsstrategie und übernimmt die Moderation zwischen dem Schuldner und seinen untereinander oft rivalisierenden Gläubigern. Darauf aufbauend erarbeitet er tragfähige Finanzierungslösungen und gewinnt Investoren.

Wieso sind Kommunikation und Vertrauen so wichtig, Herr Dr. Mentges?

Zu Krisenbeginn überwiegt meist die Hoffnung auf eine kurzfristige Lösung. Unternehmen kommunizieren entsprechend spät, zu optimistisch und bruchstückhaft. Wir erleben leider meist, dass in der Folge Konflikte zwischen Kreditnehmern und Gläubigern eskalieren, die eine konstruktive Lösungssuche erheblich erschweren. Diese Konflikte resultieren aus dem Vertrauensverlust der Gläubiger in das Management. Es ist

gut, sich an den lateinischen Ursprung des Wortes „Kredit“ zu erinnern, nämlich „credo“, also „Vertrauen schenken“ und sich in die Lage der Geldgeber zu versetzen. Financial Advisors sorgen durch adäquate Kommunikation für Vertrauen in das Unternehmen.

Kann der CFO das nicht auch, Herr von Maltzahn?

Grundsätzlich ja, allerdings haben wenige CFOs Erfahrung mit existentiellen Krisen. Wenn Bankakquisiteure durch Restrukturierer abgelöst werden und Lieferanten Vorkasse verlangen, weil Kreditversicherer Linien streichen, wenn unterschiedliche Stakeholder wöchentliches Reporting und Alternativszenarien verlangen, ist keine Zeit für Experimente. Das Arbeitspensum explodiert und berechnete Interessen müssen durchgesetzt werden. Gleichzeitig sind potentielle Liquiditätsquellen sowie Einsparpotentiale abzuklopfen. Und letztlich muss den Gläubigern der Weg aus der Krise glaubhaft dargelegt werden. Dabei helfen die Mitarbeit, die Erfahrung und das Netzwerk eines Financial Advisors.

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