

PE Pathways — Selling a Distressed Asset**Speakers: Thao Le, Don Readlinger, Alex Rovira****Recorded: December 12, 2025****Aired: January 6, 2025****Thao Le (00:05):**

Welcome to *PE Pathways*, our podcast series where experienced deal makers share their thoughts on current private equity and M&A trends and developments. Today is a second episode of our series, discussions around private equity and distressed assets with our friends from our Bankruptcy and Restructuring practice group. The focus of this series will be to unlock value in distressed M&A. My name is Thao Le and I'm a partner in the Private Equity practice of Troutman Pepper Locke. And joining me are my fellow partners from the Private Equity practice, Don Readlinger and Alex Rovira, our partner from our Bankruptcy and Restructuring practice group. Welcome gentlemen, Alex and Don, you want to just introduce yourself and tell us a little bit more about your practice and how you're involved in distressed assets.

Alex Rovira (00:51):

Sure. Thank you, Thao and happy to be on the *PE Pathways* podcast. Looking forward to our discussion. I'm a partner in the Bankruptcy and Restructuring practice group. I deal a lot with private equity and private credit on all types of distress situations, both from representing either the lender side or representing a sponsor portfolio company. So happy to talk a little bit more about some of the specifics of distressed asset sales.

Thao Le (01:18):

Great, thanks Don.

Don Readlinger (01:21):

Thanks Thao. Yes, and I'm Don Readlinger, a partner in the Private Equity group. I spend most of my practice dealing with the acquisition and disposition of portfolio companies for private equity groups, including in these just situations.

Thao Le (01:36):

Great, thanks. As I'm sure it's no surprise to anyone, we've had a pretty much tumultuous market over the last couple of years. Distressed M&A involving financially troubled companies or distressed companies is an area where private equity firms and their portfolio companies are increasingly active. The first podcast in the series focused on the state of play in navigating distressed middle-market M&A, and we encourage our listeners to go back and listen to that episode. If you haven't done so already. It was a pretty good discussion. Today we wanted to build on that discussion and get a little bit more technical and talk about two options for selling a distressed asset, what's commonly known as the Article 9 sale versus a 363 sale. And for me as

a more traditional M&A lawyer, that's just a lot of numbers, but Alex, can you give us a quick description of each process for our listeners?

Alex Rovira (02:32):

Yes, thank you, Thao. Happy to. And let me perhaps start with stating the obvious since that in the distress sale, it does and can provide opportunities to private equity either as buyers or sellers or if they're involved as the lender to a company. Often private equity can find value in being a buyer in either an Article 9 or an 363 sale process because assets are often discounted given the distress that the company is dealing with, and it provides an opportunity to pick up assets or a new business line or to add on to a current business line. Conversely as a seller, either process can provide a streamlined tool for disposing of distressed assets. So, to get to your question on a description of each with an Article 9, an Article 9 sale just for reference, it refers to Article 9 of the Uniform Commercial Code and that governs secured transactions and each state has adopted their version, but normally most stick to the uniform commercial code form.

Article 9 specifically part six provides a framework that allows a secured creditor to possess and sell collateral outside of judicial proceeding upon default of its loan to a borrower. An article sale does not involve a court process, nor is there any judicial oversight. For example, there's not a procedure in a bankruptcy case like a 363 is, and it's not an assignment for the benefit of creditors, which is a procedure under state law. As such, it provides for a more cost efficient and relatively streamlined process for sale by the lender of its collateral that was to secure its loan in order to satisfy and pardon and hold the debt that was owed to it. And it could be either through a private sale or through a public auction through the Article 9 process that requires particular notice requirements to parties as well as timeframes and safe harbors that provides an opportunity for a lender to enforce remedies and sell the collateral.

Thao Le (04:34):

So Alex, just another technical follow-up question for you then is, when you're facing an Article 9 or a 363 sale, does that mean that the owner of the assets is already in bankruptcy or is this one step before they go into bankruptcy?

Alex Rovira (04:48):

So that's a good segue to the distinction between the two. So, the Article 9 is before the company's in bankruptcy, the company's not in bankruptcy at all and may never go into bankruptcy. The company has defaulted on its loan and the lender is seeking to enforce its remedies to be able to pay off the debt that's owed to it by selling the collateral. But oftentimes they try to work with the company in order to avoid bankruptcy so that you have a process outside of bankruptcy that's more streamlined for parties to participate in. Conversely, on the other end of it, the 363, that's a sale that is a reference to section 363 of the bankruptcy code, and that's likely a more well-known procedure that is actually in a bankruptcy case. So there the debtor has filed for bankruptcy under the bankruptcy code and is seeking to restructure in most instances, it could also be liquidating, but Section 363 provides a mechanism for a sale of either some parts of its assets or substantially all of its assets through a judicial process that is overseen by a bankruptcy court. Specifically for 363, you have to file a motion to the bankruptcy

court, you have to request approval of the auction and sale procedures. Often it includes protections for a stalking horse bidder if there is one, as well as requirements for a qualified bidder, requirements for submitting a bid, it sets in the auction procedures minimum bids, subsequent bids, a time and place for the auction, as well as scheduling the sale hearing where the court will approve or bless the debtor's business judgment decision and deciding at the auction which bid was the highest and best bid.

Don Readlinger (06:30):

One of the things that I would sort of add to that, while the Section 363 sale is necessarily occurring in the bankruptcy, you can negotiate an agreement with a plan to file for bankruptcy and then follow through on the 363 sale. So, you can negotiate an agreement that says we intend to commence a bankruptcy case, part of that bankruptcy case will be this 363 sale. You can negotiate what you would like those bid procedures to look like, what the stalking horse agreement would look like, so that part of it can occur before the bankruptcy is filed.

Alex Rovira (07:11):

That, and that's something that private equity is actually or more sophisticated parties that don't want to spend a long time in bankruptcy. That's the difficulty with a 363 sale is that you're in a full-blown bankruptcy case. So, there's a lot of costs and other things involved. So, what Don is saying is exactly right. You can save a lot of time and more so you have bankruptcy cases that are 363 cases that are very quick and short because they spend so much time preparing beforehand and hiring a banker to market the assets, negotiating a stalking horse and having a data room. So when they go into court, one of the first things that they can file is that motion. And so you totally kind of teed up right away.

Thao Le (07:52):

Don, you were talking a little bit more about process of a 363 sale and Alex, I think that was very helpful to have the explanation of the distinction between an Article 9 and a 363 sale. But Don, given your extensive experience and in a transaction, both distressed and non-distressed assets, what is really the difference between these type of sales, which are governed by federal law and procedures in part versus your typical everyday M&A transaction where you have a buyer and a seller and an asset sale?

Don Readlinger (08:23):

Well, certainly in either case, you're going to have I think, greater complications in the process and in the parties involved. In the Article 9 sale, you get into a situation where really it's the secured party, the lender that's ultimately will need to agree to the terms of the transactions. And you run into situations where maybe you've got a management team, maybe you've got a sponsor who are trying to negotiate terms and you've got sort of this three-way negotiation going on between them and the lender. In an Article 9 obviously, you're subject to limitations in terms of where does the uniform commercial code apply. So if you've got foreign assets, if you've got assets where people have not perfected their security interests under the UCC that you need to worry about. And then in the 363 sale, there's a lot more formality. Alex made a couple comments about the Article 9 can be more streamlined. That obviously means that 363

is less streamlined. And then the question becomes, well, how much transaction cost am I putting into the bankruptcy and do I really need to do that? When you go into the 363 sale, then you've got the court supervision, which could provide a lot of benefits as it relates to the sale order and making sure that you're acquiring all of the assets that you are acquiring, free and clear of any kind of claims, encumbrances, trailing liabilities. But it does become a more burdensome process.

Thao Le (09:56):

Well, interestingly enough, because it is a process, we've been talking quite a bit about that, but in a typical M&A transaction, you'll negotiate as a buyer, right? You'll negotiate a scope of reps and warranties regarding the assets, and you have someone that would stand behind those representations. So whether it's an Article 9 or a 363 sale, you as a buyer, would you get any type of reps and warranties about the assets and the business and who's standing behind that or are you just buying these assets as is?

Alex Rovira (10:30):

Yeah, and that's a good point. I mean, one of the key differences I guess from an ordinary sale and either an Article 9 or 363 is how do you get title and what kind of protections you have behind it? And in an ordinary sale you get the reps and warranties and indemnities in an Article nine, it's as is where as, and you have very little of any reps and warranties, and so you receive clean title as to the lien holder because they are agreeing to lift their lien. And the Article 9 provides, and the benefit of an Article 9 is that any subordinate lien holders are also cleansed to the Article 9, but it's a foreclosure type title. There's no reps and warranties. So there's a key distinction there. And then with the 363 I think is probably one of the strongest benefits, and Don alluded to this, is you get title free and clear with the blessing of a court, there's been transparency, you get a lot of, and we'll go into some of the benefits, a lot of protections. So that title is almost kind of like pristine, clean, right, with the court saying you're good.

Don Readlinger (11:31):

One of the things, Alex, I know that you and I have had some experience with working together is trying to get some of the representation and warranties from the secured party in the Article 9 about the sale process and that the sale process was conducted in accordance with the UCC. So Thao to answer your question, that's not sort of the full blown scope of representations that you would expect in a normal M&A transaction, but it is sort of from the buyer's perspective trying to get the lender to say, yes, I actually followed the commercially reasonable procedures and requirements of the Article 9 sale. And sometimes you may be able to get that, but we've even encountered resistance about that. But to a certain extent, if you're relying on Article 9, you'd like to know you've got a good Article 9 sale.

Thao Le (12:19):

So what are some of the pitfalls and hurdles then because from a business perspective, I think one of the areas of caution, I don't want to say it's a pitfall or hurdle, is from a business perspective, a buyer has to be comfortable with knowing what they are buying. They have to do their own due diligence and get comfortable with it because they're getting very limited, if any

type of rep and warranty protection. So what other pitfalls and hurdles do you think that are there from a buyer perspective.

Alex Rovira (12:48):

With respect to an Article 9 that's kind of one of the keys and then you guys have kind of hit on that, is there's a statutory process that you could meet those statutory deadlines, notice requirements, but then what's really driving everything about protecting that sale is that everything was done in a commercially reasonable manner. And that's not really a well-defined concept, and it depends depending on the situation, the type of business, it looks at both kind of a vertical and horizontal view of what's commercially reasonable. And so you have a process where the company may not be even cooperating with you or you may be cooperating with them and trying to make sure that the difference Article 9, you could do either an auction process, which is a little bit more robust and protective of commercially reasonable because it was opened up to other parties. It was likely publicized in the newspaper to allow other parties to participate.

Where a private sale could also be done. But you have to make sure that they did do some kind of marketing to be able to see that they went out to other parties again to meet that commercial reasonableness, that this wasn't just a kind of inside deal or it wasn't out of the ordinary course. So the pitfall is really understanding that, and I think another pitfall of an Article 9 more and more, so Article 9 used to be kind of a liquidation, foreclosed, quick and dirty, take the assets, sell 'em, and one, now it's becoming more used by private credit, by middle market companies, private equity to do more of a wholesale business. And one of the pitfalls is understanding all the operations and the suppliers and the creditors that they don't come along, but you're probably going to need them for the business. So you need to resolve how you're going to deal with those creditors and you don't have the benefits and provisions of the bankruptcy code that gives you ability to assume and sign, that gives you all of these different rights. For example, in the 363 sale, there's a provision that invalidates anti-assignment clauses. In the Article 9, you don't have that. And so you have to work with getting the consent if you want to get that to a contract or that vendor to come along. So that is kind of one of the pitfalls that I think you really need to understand the industry, the business, the commercial reasonableness, really give thought and test that along the way, and then kind of understand the business risks that you're taking, and you mentioned it while you're taking it as is, where is, that's also kind of the benefit of being able to be quick and if you are more prepared and understanding the business, that is very key to be able to take advantage of coming in before others kind of get up to speed on that.

Don Readlinger (15:27):

And the same thing of having financing, right? I mean, you want to have readily available financing because it's difficult in a Article 9 situation to get your own lender up to speed and still kind of meet the requirements of the timing of the sale. On the sell side, I would also say the Article 9 does not provide any kind of resolution to the company for any sort of the trailing liabilities or the things that remain behind. In a 363. Alex mentioned it could either be part of a restructure, it could be part of liquidation, but the bankruptcy process allows you to get some kind of resolution on the other outstanding obligations and liabilities of the company. The Article 9 really only addresses it so far as it relates to the title to the collateral being sold.

Thao Le (16:16):

Yeah, there's limited protections from a buyer's perspective as to the reps and warranties about the business, but one of the things that says presumably you're able to get some of these assets at a discount, so question for you both, which is how quickly does a buyer need to move in order to participate in an Article 9 or a 363 sale? I mean, what's the timing process?

Alex Rovira (16:37):

And then Article 9 varies, and it depends on what efforts the company has done prior to the commencement of an Article 9. But on Article 9, the lender is in control and there's a default and they will issue a notice, and the statutory kind of safe harbor is 10 days before the sale could actually occur. So that's pretty quick, and so you have to kind of be aware of it and notice of it. Normally the lender will only give notice to the debtor and to other secured parties, but they'll probably publicize it, put it in a newspaper, put it in an online kind of industry newspaper that will touch other parties. So you have to be pretty quick. But typically a company or the lender may have hired a banker and reached out to other parties that might be interested. In a 363, it's a little bit different. Again, with what Don said early on, if the company is preparing early on, you'll have a banker that has reached out to multiple different parties, but when the bankruptcy commences, it used to be that a sale process could be three to six months from beginning to end. Now they could be as quick as well, we've seen sometimes that it's as short as a couple of weeks, but it's normally 30 to 60 days on an expedited basis. And so we've been monitoring that. We give opportunities to our clients to look at those assets. So it's a quick process, so you have to have people that are out and looking and aware of these opportunities.

Thao Le (18:01):

This is all really great information and a lot to consider, but I want to wrap this up with just a little bit of an open-ended question to you, Don and Alex, which is our audience here is often private equity firms or portfolio companies, people who are in the deal making process. So what are some key takeaways that you would give to a private equity firm that is considering a 363 or an Article 9 sale?

Don Readlinger (18:27):

Well, I guess I would start by saying it's going to vary, obviously, depending upon which side of the equation that you're on, and then it's going to be a function, I think also of resources available to conduct the process. I think that the 363 is preferable if there's resources available to conduct a 363 in time. The Article 9 sale, if you're on the sell side, you certainly lose control of the process and you've got trailing liabilities that you still need to deal with. I think you have a little bit more control, a little bit more resolution on the 363 transaction. On the buy side, there's great opportunities. You probably need to be more ready to act quickly for the article, and you have a little bit more time and process on the 363, but there's good opportunities, I think, to be had on the buy side of both transactions

Thao Le (19:20):

And Alex, our bankruptcy and restructuring guru. What nuggets of wisdom do you have for a private equity firm on this type of process?

Alex Rovira (19:27):

Yeah, I think on the 363 side, it provides a lot of benefit and it's transparent and it gives you a lot of protections finality on the sale. So, if you're looking at a particular industry or to add on to your business, it is a little bit more competitive in that it's more widely communicated and known about and processed, but you still have to act quickly and you get a lot of transparency and benefit from getting a clean asset. The Article 9 on the buy side, you have to act probably quicker, but there's probably much more if you're looking for a particular industry, I think there's real advantage of acting quickly. Also, there's opportunity on Article 9 side to buy into the debt and a lot of private equity, private credit or buy into some of the debt to control that Article 9 process and to exert influence on that process so that you can credit bid from that debt. And that's something we didn't talk about. Both processes would let you credit bid as a secure creditor the amount of obligations that are owed. Don touched on Article 9 having trailing liabilities. That's something to consider, but you want to kind of be thoughtful about that and have from a private equity perspective, if it's a portfolio company, understand that there's going to be some wind down cost and that's have a fund to deal with that. But that doesn't have to be extensive, but that's something that can be addressed and planned for. And it is, again, a streamlined way to kind of exit a business without the full on bankruptcy process that a 363 does. But a 363 gives you, you're probably going to get a higher price and higher value with the more transparency, more participants in it.

Thao Le (21:04):

Well, Alex, you used a term that I hadn't heard before or really associated with an Article 9 sale, which was this concept of credit bid. Can you actually talk a little bit more about that?

Alex Rovira (21:13):

Yeah, so when you're a secured creditor, you can bid the amount of debt to the value of the collateral. And so if you owed a hundred dollars and the assets are worth a hundred dollars or worth \$200, you can bid that value, a hundred dollars, and that can be a higher and better bid than \$50 of cash. It gives you a little bit of protection as to the sale of those assets, but really on the lender side, if you're not buying into the debt, you're likely going to get less than the amount of your debt or collateral in an Article 9 sale or in a 363 sale just because it's a discounted pricing. But that gives you a little bit more, that's where I mentioned if you are looking to for a own to loan strategy, credit bidding is a powerful tool that a secured lender has.

Thao Le (22:05):

Great. That was very helpful. This has been a great discussion, and I'm certainly looking forward to future installments in our series of Private Equity and Distressed Assets podcast. Future episodes in this series will cover topics such as some benefits and pitfalls of acquiring assets versus an assignment for the benefit of creditors transaction, also known as ABCs, Debt for Equity and Loan to Own Strategies, which Alex had just mentioned, and potential traps of the wary in M&A transactions. Thank you, Alex and Don for participating in this podcast. We also want to thank our audience for listening today. Please keep your eyes open for future episodes of *PE Pathways* where we bring experienced deal makers on to share their thoughts on current private equity and M&A trends and developments. You can find the latest episodes of *PE Pathways* wherever you get your podcast.

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