Selling a Used Aircraft Abroad: A Closer Look at the Unusual Business Issues

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The early years of the 21st century have seen exceptional growth in business aviation outside the United States, particularly in parts of Asia, Europe, Russia and the Middle-East. This trend is expected to continue for many years. One of the consequences is that a seller of a U.S.-registered aircraft is far more likely today than ever before to sell his or her aircraft to a foreign buyer. In many cases, foreign buyers will engage foreign counsel, brokers and advisors who are accustomed to putting together transactions according to the customary business practices and conventions in their own nations, and who may or may not be familiar with customary business practices in the United States' used aircraft marketplace.

This article will address some unusual business issues that may arise in negotiating a transaction for the sale of a used aircraft by a U.S. seller to a foreign buyer. GKG Law has been involved in numerous international transactions wherein one or more of these unusual business issues have arisen, and it has learned from experience that finding a way to resolve such issues to everyone's satisfaction is critical to moving a transaction from an offer to a closed sale.

Sacred Understanding?

The U.S. used aircraft marketplace holds as sacred the understanding that the buyer must conduct its own inspection of the aircraft to determine that the aircraft is in an airworthy condition, as determined by a mutually agreed upon inspection facility; is otherwise satisfactory to the buyer; and that following correction of any airworthiness discrepancies, the aircraft is sold "as is" without any representations or warranties from the seller concerning the condition of the aircraft. It has been a fundamental principle of U.S. transactions that once title transfers at closing, the new owner accepts all responsibility for the condition of the aircraft and its equipment, including discrepancies that the inspection facility may have failed to identify during the conduct of a pre-purchase inspection.

In contrast, our firm has been involved in many transactions with foreign buyers, wherein foreign counsel has attempted, initially at least, to require the survival of various representations and warranties post-closing. These representations and warranties often relate to the condition of the aircraft, and not just the status of clear title, assignment of existing manufacturer or avionics warranties, and payment of applicable taxes and other charges against the aircraft. As an example, we have repeatedly seen requests for survival of representations regarding the equipment list specified in any spec-sheet prepared in connection with the marketing of the aircraft, or survival of representations that the aircraft has no damage history and/or was in a fully airworthy condition at the time of closing.

Another significant issue that arises during the course of negotiations is a request for the seller to de-register the aircraft from the FAA Civil Aircraft Registry and obtain an Export Certificate of Airworthiness ("Export C of A"). We have also seen foreign lenders require the deregistration request, and the Export C of A, together with a re-registration request to be submitted to their local registry for approval as to form and substance of the paperwork prior to authorizing the release of their funds at closing.

Specifically, the lending institution will require that the foreign local registry have issued its acknowledgment and acceptance of the U.S. de-registration and local re-registration paperwork before it will allow the release of the purchase proceeds to the seller. There is tremendous risk in this procedural process, as once the U.S. seller files the de-registration request and/or delivers a bill of sale, it is no longer the owner of the aircraft, yet the closing will not have occurred and the seller will not be paid until such time as confirmation from the foreign local registry is issued. Given time differences between the U.S. and other parts of the world, the de-registration request, and the acknowledgment of the acceptability of the re-registration documentation by the foreign local registry may occur on different business days.

There exists a risk that the buyer may default on the contract after the de-registration and Export C of A have been accomplished, yet the seller will not have been paid. From a U.S. seller's perspective, the only thing that the U.S. seller should do is agree to file the deregistration request or bill of sale concurrent with being paid.

Extensive and Expensive

As a related matter, in order to obtain an Export C of A, the aircraft must undergo an inspection that is more extensive (and hence more expensive) than a typical pre-purchase inspection. Of course, a more extensive inspection typically results in a more extensive list of discrepancies and larger bill for repair and remediation costs. Consequently, sellers who agree to provide an Export C of A should expect to pay higher repair and remediation costs than they would pay in connection with a sale to a U.S. buyer. Therefore, the agreement to provide an Export C of A is not only an issue of risk related to the occurrence of a closing, but should also be considered an out-of-pocket expense item.

Additionally, the importing country may require the installation of certain additional equipment on the aircraft, and other costly matters associated with obtaining a new C of A and re-registration of the aircraft in the foreign country. There may be further delays and costs associated with obtaining a new C of A and re-registration of the aircraft in the foreign country. Again, the parties will be at odds as to whether such work should occur prior to the closing, or occur subsequent to the closing.

As a further related matter, many foreign buyers will request that the aircraft be delivered outside of the United States. Once again, this is a risk assessment issue, whereby the U.S. seller takes on significant monetary risk and logistical complications by agreeing to deliver an aircraft outside the United States.

Currency Matters

On a purely business matter, it is customary for aircraft transactions to be priced in U.S. Dollars. When a seller accepts a purchase price denominated in U.S. Dollars from a buyer who usually holds his or her funds in another currency, and there is a reasonable lag

time between the agreement on price and the closing, currency fluctuations can move either in favor or against either party. For some time, we have seen a continued decline in the U.S. Dollar against the Euro and other foreign currencies. However, exchange rates can fluctuate (we hope!) in favor of the U.S. Dollar.

If, during the period between the acceptance of a purchase offer for an aircraft and the closing of the transaction, the value of the U.S. Dollar rises as compared to the currency in which the buyer's funds are commonly held, the cost of a transaction to the foreign buyer will increase, and may become such that the buyer chooses to default and forfeit his or her deposit, rather than follow through on a transaction that is more costly than initially anticipated. The risk of an intentional default due to currency fluctuations can be minimized by increasing deposit amounts. In fact, foreign buyers are accustomed to placing deposits up to ten percent in escrow, whereas it is standard in U.S. transactions for deposits to range from three to five percent.

Choice of Law Provision

As a legal matter, it is always necessary to negotiate a choice of law provision in the event the parties have a dispute prior to, or subsequent to, the closing. It is rare that a foreign buyer would agree to use U.S. law, but to the extent that a foreign buyer can be persuaded to use U.S. law, the buyer is generally going to be unwilling to use the law of a state other than California or New York. Further, foreign buyers are not generally willing to submit to litigation in the courts of the United States and will generally prefer to use an international forum.

In order to participate in transactions with foreign buyers, U.S. lawyers, brokers and consultants must become familiar with, and anticipate, the commercial terms, that a foreign buyer may demand, and address these issues with the aircraft owner at an early stage in the process, rather than after significant effort has been expended in working on the transaction. Creativity to bridge the gap between a buyer's and seller's expectations is paramount in order to ensure that the transaction closes. A renewed assessment of acceptable risks outside the norm is needed in order for these deals to close. The lawyers at GKG Law are prepared to assist in these matters.

As the worldwide market matures, we will also begin to see an escalation of used aircraft being imported into the U.S. Our next article will focus on unique issues associated with used aircraft import transactions.

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