

# Time Kills Deals

Getting international aircraft buyers to say 'Yes', 'Dah', 'Si', 'Shi' and 'Hai'.

by Gregory Cirillo, Gary Horowitz & Cari Stinebower.

**O**ur U.S. clients are selling more aircraft and delivery positions to non-U.S. buyers, and this is both a blessing and a curse. When you sell your aircraft, you want the broadest possible buying audience, so selling internationally can get you the best price and fastest sale. However, international buyers and cross-border transactions have some unique legal and practical problems that can delay or derail your deal, so you need to be prepared. Here are some best practices for selling an aircraft to a non-U.S. buyer.

## TIME KILLS DEALS

First and foremost, keep the aircraft sale moving forward as quickly as possible, because time kills cross-border deals due to changes in the aircraft market, currency fluctuations and the buyer's own circumstances. If a deal is going to collapse due to an uncertain or unreliable buyer, it is better if it collapses sooner rather than later. Deals have a certain momentum that need to be maintained - and languishing deals lose energy and die.

## TIME ZONES

When the U.S. seller is in California, the seller's attorney is in Washington, D.C., the buyer lives in Russia and the buyer's lawyer is located in the United Kingdom, getting a conference call organized is no mean feat, and there can be days of delay in negotiating the Aircraft Sales Agreement.

To manage this, your lawyer must never put off until tomorrow what he can do today (or tonight), since tomorrow really means tomorrow's tomorrow by the time the buyer gets a re-drafted document or is informed that there is some issue.

Emails usually work best for communica-

tion, and your lawyer needs to know aircraft deals and all the issues that are coming up so that his/her emails can be as efficient as possible and touch on all of the matters that need to be managed. Most importantly, as seller, you and your advisors need to plan on working the night shift.

## LANGUAGE

Different native tongues wagging in a deal can cause delay, confusion and miscommunication. Ideally, everyone in the transaction speaks English, and this is (thankfully) usually the case. Even if the buyer is working through a translator, and reviewing a translated document, it must be clear that English is the governing language, and that the English language agreement is the governing document. Contracts for the sale of aircraft will include complex and subtle points, and these are often difficult to convey in translated text.

“Even if the buyer is working through a translator, and reviewing a translated document, it must be clear that English is the governing language.”

## CULTURE

Culture can have an unintended, unexpected impact on a deal. Different cultures have widely varying standards as to punctuality, responsiveness, veracity and respect for commitments and contracts. To make matters worse, cultures often have misconceptions about OTHER cultures' standards. As a result, there are often more misunderstandings than there are understandings. The solution is to remain open-minded, and in constant communication with your buyer.

## DEALS IN DOLLARS

The recent weakness of the U.S. dollar has been to the advantage of international aircraft buyers, effectively giving them a discount on U.S. owned aircraft. However, a non-U.S. buyer and his money are not easily parted. In some countries, it is very difficult to convert money into U.S. dollars and even harder to get the money out of the country - sometimes the foreign national bank will refuse to release funds, or will hold the funds for extended periods.

Moreover, the U.S. banking system will periodically freeze a payment based on the information associated with the transfer (i.e., nation of funds origin, intermediary nations, or party names). A U.S. banking freeze can take weeks, or even months to thaw.

Money delays can ruin a deal, and be costly to a seller that has incurred aircraft movement expenses and costs to rectify aircraft discrepancies. To avoid this problem, first know your buyer and the buyer's country.

You should also ask for a larger than normal deposit, a portion of which should go 'hard' (i.e., be non-refundable to the buyer) when the letter of intent is signed in order to cover the seller's aircraft movement costs and other seller expenses. ➤

In order to prevent a delay in the closing, the Aircraft Sales Agreement should require that the buyer's payment for the aircraft be placed into escrow with a U.S. escrow agent at least two business days before the closing.

Lastly, you need to document the right to abandon a transaction on a fixed date, even if the delays are completely outside the buyer's control. The vast majority of "form" purchase and sale agreements have a force majeure clause that would force the seller to wait indefinitely if funds were clogged as a result of government action.

### PLAN AHEAD FOR A FOREIGN SALE

Generally, aircraft brokers or buyers will draft the letters of intent for an aircraft purchase, and the lawyers will document the deal based on the agreed letter of intent. As noted above, with a non-U.S. buyer, there are some fundamental deal terms that need to be covered. If these terms are not in the letter of intent, the buyer is likely to have the ability to walk away rather than agree to the terms in definitive documents. Sellers should have their lawyers work with brokers to prepare a form letter of intent in advance that the sellers' brokers can then use.

### AIRCRAFT REGISTRATION

Non-U.S. buyers may decide to keep the aircraft registered in the U.S., or deregister the aircraft and register it in another country. Either way, the seller wants to make sure that the non-U.S. buyer decides early about the aircraft's future registration, since making that decision and then following the procedures for the required registration can be time-consuming and delay the closing.

This is a crucial issue if the buyer is going to finance the aircraft. The lending bank may refuse to release funds (your purchase price) until the lending bank has a perfected lien (mortgage) on the aircraft, which cannot occur until the aircraft is registered in the non-U.S. jurisdiction. In many cases, the time difference between the selling and buying jurisdiction precludes a smooth, continuous closing. In these cases, the careful use of independent escrows is your only option.

### USA PATRIOT ACT (ANTI-MONEY-LAUNDERING)

U.S. persons or entities engaged in the regular or recurring sale of aircraft should establish some level of due diligence to comply with U.S. anti-money-laundering (AML) laws and regulations. At this point, the compliance program is not mandatory, but advisable.

At a minimum, the seller of an aircraft should evaluate each buyer (including entities known to be affiliated with the buyer), including a check of the Office of Foreign

Asset Control (OFAC) Specially Designated Nationals list and other appropriate U.S. Government lists. In the unlikely event that the seller gets tangled in an AML enforcement action, the steps that were taken to address AML concerns will go a long way to limiting ultimate liability. The scope of your due diligence will be a matter of personal (and corporate) preference and priority.

### EXPORT CONTROL LAWS

U.S. export control laws prevent the sale of certain technologies to certain foreign countries and end-users. Selling directly to an individual from a prohibited nation (e.g. Cuba or Iran) is relatively simple to avoid. It becomes more complex if there is a back-to-back transaction taking place. If you plan to sell an aircraft to a French citizen (for example), and you have reason to believe that they intend to re-sell the aircraft to an Iranian purchaser, U.S. law treats this as a prohibited transaction, with civil penalties up to twice the value of the aircraft.

To avoid this problem, you need to 'know your customer' and make sure that your buyer's money is not coming from unlawful activities.

### COLLECTING WHEN A BUYER BREACHES

An Aircraft Sales Agreement with a non-U.S. buyer might not be worth the paper it's written on. A good contract will have U.S. law controlling, with jurisdiction and venue in the U.S. for any disputes. However, as a practical matter, lawsuits against non-U.S. persons are difficult and expensive, to say the least.

Even when you win, enforcing the judg-

ment and getting the defaulting non-U.S. buyer to pay-up can take you around the world, without any real certainty that you will collect your damages. The best solution is to have the buyer remit a substantial deposit to a U.S. escrow agent that goes 'hard' and is non-refundable to the buyer no later than when the Aircraft Sales Agreement is signed.

Selling an aircraft to a non-U.S. buyer can give a U.S. seller the best deal on its aircraft, and by following the above suggestions, any aircraft transaction with a non-U.S. buyer will be much more likely to close without the delays that are foreseeable and avoidable.



Greg Cirillo and Gary Horowitz are Members of the Bethesda, Maryland law firm HCH Legal, LLC, representing private and commercial operators, owners, lessors and financiers in structuring the sale, acquisition, ownership and operation of aircraft, and providing Federal tax and state sales and use tax planning services.

➤ Greg can be reached at Tel: +1 301-800-0001, email [gcirillo@hchlegal.com](mailto:gcirillo@hchlegal.com).

➤ Gary can be reached at Tel: +1 301-800-0001, email: [ghorowitz@hchlegal.com](mailto:ghorowitz@hchlegal.com). ■