

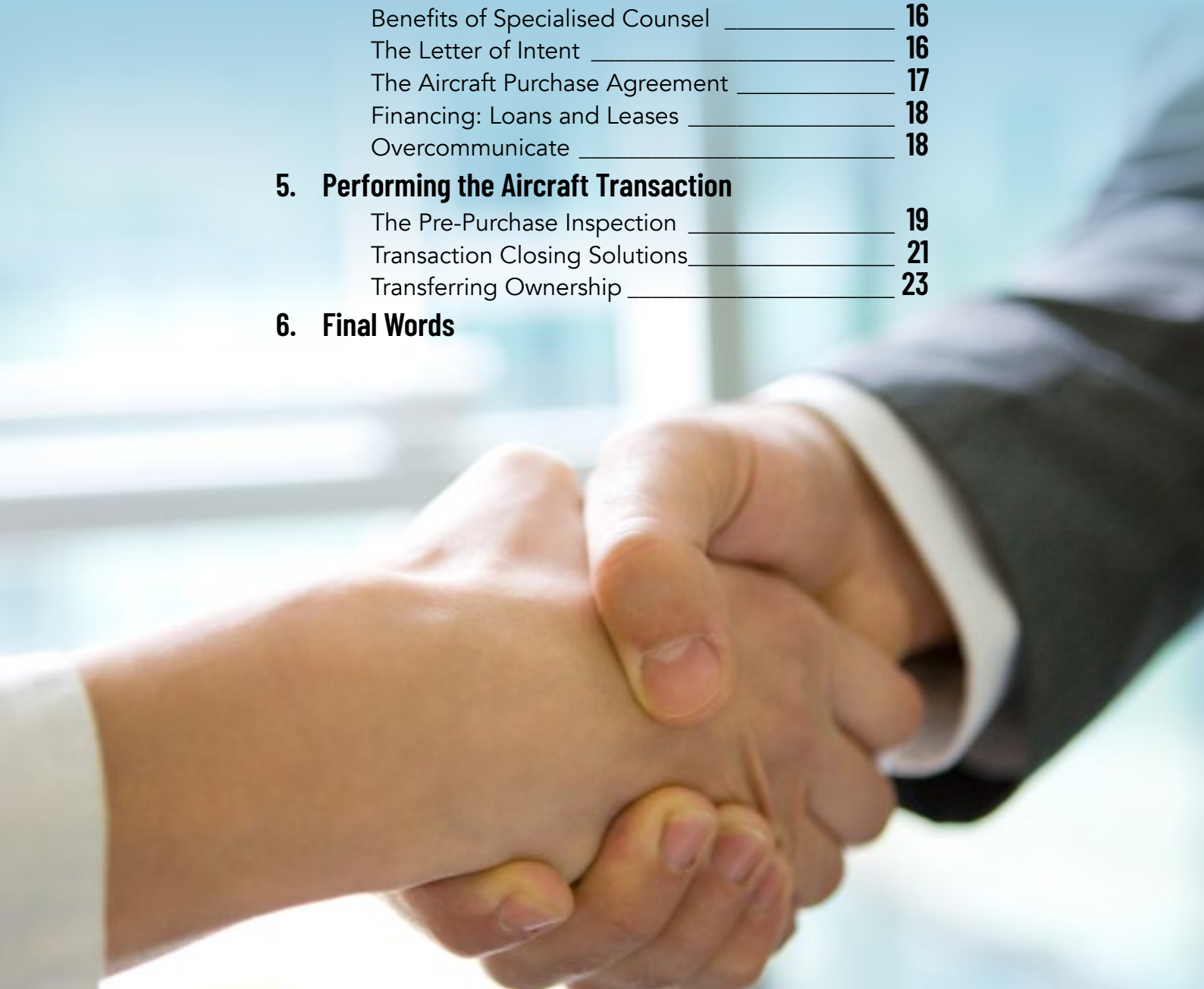
EUROPEAN BUSINESS AVIATION ASSOCIATION

# BUYING AND SELLING CORPORATE AND GENERAL USE AIRCRAFT

MARCH 2023

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# 1 Introduction

Whether you are buying or selling an aircraft, there is nothing more satisfying than a good deal: A smooth, timely transaction leaving both parties happy. It is rare, however, that good deals are sitting around waiting to be transacted. Hard work, combined with proper due diligence and transparency resulting in peace of mind for buyers and sellers that the deal is fair, and the right expertise facilitate good deals.

That is why this guide advocates for buyers and sellers to hire a knowledgeable and experienced team of aviation transaction specialists who can keep a transaction moving forward while filtering, organizing, and resolving issues as they arise. These teams should consist of subject matter experts where an experienced, reputable aircraft transaction broker is the linchpin to achieve success.

Aircraft transactions are fluid and multifaceted. Buyers and sellers need to consider multiple issues, typically in parallel. Frequently, the resolution of one issue will usually impact the resolution of other issues.

## ***Components to aircraft transactions include:***

- *The aircraft, the sale price and associated terms*
- *An agreed upon Purchase/Sale Price*
- *Due diligence inspection of the aircraft (aka prebuy inspection)*
- *Tax and customs considerations*
- *Aircraft delivery location*
- *Aircraft domicile*
- *Registration requirements*
- *Operation*
- *Insurance*

In some cases, financing – either to facilitate the acquisition or to be repaid with the sale proceeds – is involved. The interposition of a financier will materially impact the transaction execution and closing process.

In addition, all aircraft transactions are nuanced. Those nuances live in market conditions and the behaviour of the parties to the transaction and of their advisors, for example. These nuances can lead to crosscurrents that may befuddle even the most experienced buyers and sellers of aircraft.

Seasoned aviation professionals have contributed to this guide to share their deep, specialised knowledge with you.

This guide is, therefore, designed to be a framework that may assist prospective buyers and sellers of aircraft to consider the issues their transactions raise with the goal that they proceed as smoothly and as efficiently as possible.



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Chair



**Eric Lewin**  
Vice-Chair

**For and on behalf of**  
Sales and Acquisitions Committee | Associate Member Advisory Council  
European Business Aviation Association



## 2 Choosing a Broker; Forming a Team

### The Broker

Selecting a competent broker is critical because the broker's client's interests come first. An active broker will be

familiar with the current market trends that will impact the purchase of aircraft.

#### **Key questions to ask a prospective broker include:**

- *How long has the broker been in business?*
- *How does the broker balance its workload?*
- *Does this broker have expertise with this particular aircraft type, make, and/or model?*
- *Does the broker have access to adequate resources?*
- *Does the broker have access to a team of trusted professionals who can handle an international transaction?*
- *Who does the broker recommend for pre-buy inspections of the aircraft and its equipment?*
- *Does the broker engage in back-to-back transactions? If so, are they disclosed to the end-buyer and the end-seller?*

A broker working on an exclusive basis serves as the agent for either the seller or the buyer, but not both. A competent broker guides the client through a complex decision-making process, allowing the client to refine and define its goals, requirements, and constraints, while managing the pace and the cadence of the deal.

An important characteristic of a competent broker is the ability to provide data pertaining to current market status and reasonable comparisons that support a market valuation. A competent broker should be able to offer market research that in turn helps the client understand current market dynamics and drivers. When the client is buying an aircraft, the broker, working in conjunction with an operator (for example, an in-house flight department or a third-party management

company) may aid in deciding which aircraft is best for the client's present and future needs. When the client is selling an aircraft, the broker can help manage both expectations as to the sale price and the resolution of discrepancies that will invariably be identified as part of the pre-purchase inspection.

Brokers are compensated by either a flat fee or a percentage of the sales price pursuant to the broker's engagement agreement. All other terms are defined in the acquisition or sales agreement, under which the buyer or seller retains the broker as his/her exclusive representative to acquire/sell an aircraft. The period of engagement is subject to the project type and the then prevailing economic conditions. Typically, the buyer/seller has no obligation to pay any broker fees unless the transaction closes.

This guide is, therefore, designed to be a framework that may assist prospective buyers and sellers of aircraft to consider the issues their transactions raise with the goal that they proceed as smoothly and as efficiently as possible.

As with all due diligence questions, it's best to validate any information you receive with a third party. How can you do so? Ask the broker to provide several references.

### **Questions you may ask those referral clients:**

- *What was the reason behind hiring this broker?*
- *What of the broker's attributes stood out during the course of the transaction?*
- *Did you have any other buying/selling experiences and if so, how did this compare?*
- *Would you hire that broker again?*

## **Team Members**

Consider the aircraft broker as your project manager. He or she brings into the deal exactly those professionals necessary to complete the transaction in the most timely, beneficial manner for the client. Brokers, who from their vantage point survey the market, can make recommendations as to all of the team members who will be required before, during, and after the aircraft sale and purchase transaction.

Those team members whose services you may need to retain include:

- Lawyer
- Tax advisors
- Customs advisors
- The management company
- The aircraft inspection company
- Insurance advisors
- Financiers



## Market Intelligence

Business aircraft are an extremely complicated class of capital assets. One must understand what features the aircraft includes, and this data feeds into the aircraft's market value. A best practice is that brokers should seek out data from

primary information sources that they then verify with data from secondary sources. It is through this exercise that a buyer will understand the aircraft it is buying and whether the buyer is paying a fair price for it.

### *Primary data sources*

Obtaining data from primary sources is a laborious and painstaking task requiring meticulous review of all available on-the-ground market intelligence, including cold calling market participants. The

review includes careful analysis of all current for-sale listings and all recent sales of aircraft similar to that of the aircraft being purchased or sold.

### *Secondary data sources*

After gathering data from primary data sources, one should validate that data through a review of established and

industry recognized information services. These resources can be grouped into the four buckets described below:

#### **Market Reporting Services**

On-line services reporting in real-time status and developments of the aircraft markets including comprehensive listings of all aircraft for sale, complete transactional "pedigree" histories on aircraft and summarization of the market past and present.

#### **Aircraft Valuation Guides**

Print and on-line digests indexing aircraft models by year of manufacture with current average market value and supplements and deductions to market value for aircraft condition, airframe and engine time, major equipment,

enrollment in maintenance warranty programs, etc.

#### **Aircraft Reported Sales Price References**

Resources reporting on actual aircraft sales prices specific to aircraft serial number, date of transaction and other details relevant to the retail sale of whole aircraft.

#### **Business Aviation Forecast Services**

Reports employing market data, economic indicators and sound methodology to speculate the market for aircraft sales.

# 3 Structuring the Aircraft Acquisition

## Needs Assessment

An aircraft broker's first responsibility is to thoroughly understand the client's requirements; then to apply his or her skills, knowledge, experience, and network to generate the best possible outcome for the client.

A diligent broker might ask, "What make and model best fits this client's current and forecasted transportation requirements?" The answer determines whether the best match for the client is a new aircraft, a pre-owned aircraft or even a fractional share of one or more aircraft.

## Ownership Structure and Management

What is the best ownership structure – private or company owned? The short answer is that the way the client intends to use the aircraft should determine the ownership structure that holds the aircraft. The simplest ownership structure tends to be the acquisition of an aircraft by an owner for his or her exclusive personal or business use. The owner carries all the costs (including the large capital outlay), hires a crew, and is subject to regulation by the relevant aviation authority.

The financial benefits to the owner can include tax depreciation and asset retention as well as the tax deductibility of certain costs of operating and maintaining the investment. Many owners choose to create a specially formed legal entity to hold the asset. That legal entity, often a limited liability company (LLC) or Special Purpose Vehicle (SPV) is intended to insulate an individual owner or other companies in the same group from liability, but no structure is fool proof. Some owners choose the LLC or SPV structure for tax reasons or to fit into other corporate structures. In some cases, owners can use these structures to gain access to a particular aircraft registry. For example, in the U.S., non-U.S. citizens may not own a U.S.-registered aircraft. That said, they may hold the aircraft through a non-citizen U.S.

owner trust.

LLCs and SPVs can provide some distance between the actual owner of the aircraft and any liability incurred in the event of compliance issues or an incident or accident. It is naive (and sometimes illegal), however, to neglect providing the aircraft and its operators with proper liability insurance. The tax implications, for example VAT and Customs, must also be considered at an early stage, as this may affect the final choice of appropriate structure.

Another typical ownership structure is a dry lease. The owner of an aircraft leases the aircraft to a professional operator who assumes full responsibility and operational control of the aircraft. In corporate structures, a parent or SPV acquires the aircraft and leases it to a third-party operator.

To carry passengers, cargo, or mail for payment, an operator of an aircraft must carry an air operator's certificate. For instance, to qualify for an operating license in the UK, an operator must meet several requirements beyond those governing private operators, including those with respect to its safety and insurance arrangements, and its nationality of control.



This license provides an additional layer of regulatory protection for commercial passengers. For operators of aircraft with 20 or more seats there are also specific financial criteria that must be met.

The governing aviation authority always

## Aircraft Registration

All aircraft must be registered. An aircraft will be subject to the governing register's regulations concerning operation of the aircraft.

It is critical to know the country of registration for the aircraft from the onset of the deal. This decision may impact the choice of aircraft, as well as the cost associated with obtaining the Export Certificate of Airworthiness from the current country or registry, exportation, importation, and re-registration in the new country of registry.

Aircraft are typically registered where the entity that owns them principally resides or where the operator of the aircraft is established. Each jurisdiction has its own regulatory issues, some more lenient than others. EU countries are subject to

## Determining the Location of Delivery

The location of delivery under the purchase agreement is very important for many reasons, not the least of which is that in many a jurisdiction the place of delivery triggers the payment of taxes on the transaction. From the buyer's viewpoint, it is important that delivery of the aircraft be negotiated so that actual title transfer and physical delivery of the aircraft occurs in a tax friendly jurisdiction.

For example, in the U.S., sales or use tax is payable by the buyer in most states, unless an exemption applies. One such

wants to know who is responsible for operating the aircraft and holds that person or entity accountable to ensure compliance with the regulations. This is particularly true if the aircraft is being operated in commercial service under an operating license.

EU regulation as well as and individual country requirements. In most cases, the regulatory body needs to be satisfied on the key elements of ownership and operational control. Aside from these considerations, in some countries, registration may require the formation of a local company to gain access to that country's aircraft register. Furthermore, some registers only accept aircraft intended for private use.

In addition, if the use or operation of the aircraft will involve transporting passengers for hire or as part of a business in return for valuable consideration (such as commercial use), an air operator's certificate (AOC) may be required and may be granted only after a detailed examination of the operator's safety and management organization.

exemption is a "fly-away" exemption for non-resident buyers: the aircraft must be flown out of the jurisdiction within a certain time following delivery of the aircraft. A supporting affidavit must be signed by the buyer and filed with the tax authorities.

In the EU and the UK value added tax (VAT) is an issue that must be considered. International transactions are the most complex and demand skilled aviation professionals to avoid taxation pitfalls.

## Taxes, Import Duties, and Other Charges

There are two main transaction areas where taxes should be considered. The first is the location of title transfer, and the second is ownership and operational ramifications. Proper tax planning is closely related to, and heavily dependent

upon, understanding the legal and regulatory requirements for the ownership and operations of the aircraft. Generally speaking, the ultimate beneficial owner (“Owner”) will need to consider the following in advance of the purchase:

- ***Whether the Owner will hold title to the aircraft in its own name or through a separate business entity, such as an LLC, trust, corporation, other SPV?***
  - ***What is the main use of the aircraft? What is the split of business and/or private use?***
  - ***Whether the aircraft will be exported from one jurisdiction and imported into another?***
  - ***In which jurisdiction(s) will the aircraft be based and primarily operated?***
  - ***In which jurisdiction(s) the ownership and operations of the aircraft will be subject to income tax or similar taxes?***
  - ***In which jurisdiction(s) the ownership and operations of the aircraft will be subject to indirect taxes such as VAT, Goods and Services Taxes, Use Taxes, Property Taxes, or other Sales Taxes?***
  - ***Contractual arrangements around a sale/purchase transaction and where the prime liability for indirect or any other relevant taxes should fall.***
- 

The income associated with aircraft ownership may increase the Owner’s tax liability in one or more jurisdictions and the associated expenses may offset the taxable income. For example, the Owner may be receiving rent or other income but may also have incurred a variety of expenses relating to the operation of the aircraft. There may also be entitlement to tax deductions for depreciation during ownership and/or an income tax liability upon a sale in certain jurisdictions.

The Owner should also consider whether income and expenses from other business

activities may be offset against the income and expenses associated with the aircraft. If so, the Owner will need to take this into account in relation to the ownership structure for the aircraft so that any potential look through treatment is not impeded for the purposes of Owner’s taxes.

Owners and operators may be subject to a variety of other taxes. In the U.S., for example, while taxes on the import and export of aircraft are usually low, the operator of an aircraft may incur:

- ***Excise tax for carrying passengers or freight for hire***
  - ***Employment tax***
  - ***Fuel tax***
  - ***Tax on parts and labour***
-



In addition, purchasers are often subject to state specific taxes such as sales tax, which is triggered by the purchase or lease of an aircraft, or use tax, which arises from the use and storage of an aircraft. Sellers also have tax obligations. In most states that charge a sales tax, the seller is responsible for collecting the tax from the purchaser and remitting the amount to the state. Other states charge taxes directly to the seller, rather than the purchaser. Exemptions may apply to export sales from the U.S. Other common state taxes owed by aircraft owners are annual property taxes or registration fees, which are most often based on the value of the aircraft. The rules for these taxes can be complicated and vary from state to state. However, with proper planning, state taxes related to aircraft can be minimized and in certain cases avoided altogether.

While the U.S. does not charge significant duties or fees for most aircraft imports and exports, parties engaging in cross-border transactions involving the U.S. should retain qualified legal advisers and, where appropriate, licensed U.S. customs

brokers with aircraft experience to assure that all documents are timely filed and other steps taken to comply with U.S. law. Failure to do so may result in substantial penalties, including seizure of the aircraft.

In the EU the main tax issues are likely to relate to VAT, including import VAT (which is a duty of Customs and normally collected when the aircraft crosses the border) or local VAT for a particular member state, whether the aircraft will be supplied within or between member states. VAT can be charged on sales that take place in the EU but can also be recovered by companies using aircraft for business purposes. Sellers need to be aware of whether VAT applies to a transaction so that tax due can be correctly declared and buyers need to understand whether VAT will be charged and for businesses whether this VAT might be reclaimed. VAT exemption is also potentially available under certain circumstances for charter aircraft or for export sales. Other potentially relevant taxes for the owner also include income tax and employment taxes. Other key considerations are:

- ***In which EU member state the transaction will take place?***
  - ***EU status of the aircraft involved, i.e. EU free circulation (imported) or not***
  - ***Residency status of the parties involved***
  - ***Whether the aircraft will be used commercially and/or privately***
-

In the UK, which is no longer part of the EU post Brexit (1/1/21), the EU VAT and Customs laws have so far been mirrored in UK legislation, so the same principles apply. Currently legislation is going through the UK Parliament that may change this post 1/12/23 but it is not yet certain, and the legislation may be subject to significant change. Depending on the outcome, updates may be provided to this document as appropriate.

Due to the values of the assets involved it is always important to ensure that

qualified, legal, operational/regulatory and tax advisors are involved prior to entering into a transaction to ensure that the implications of any tax and other regulatory requirements are fully understood. Collaboration and direct communication among these various advisors tasked with managing risk can help ease the process for buyers and sellers. Given that dealing with the various tax and other regulatory authorities can take time it is also important to ensure that professional assistance is sought as soon as possible.

## Insurance

Most business aircraft owners understand the value of appropriate insurance coverage with respect to hull, liability (third party and passenger), collision, personal injury, and particularly employer's liability. There is high potential of exposure to significant third-party risks. Depending on the areas where the aircraft is to be operated, some owners/operators also insure against war risks. There are few entities with resources deep enough to self-insure large aircraft against all risks, and in any case, some governing bodies demand proof of third-party insurance for operations within their borders. Additionally, third party insurers frequently require pre-approval of pilots prior to ferry flights (for example, whether to a pre-purchase inspection location or

to the delivery location).

Insurance advisors should be brought into the deal early in the purchase process to avoid unexpected complications during closing. For example, it can be very difficult for aircraft registered in Switzerland and Lithuania to obtain insurance from Lloyds of London, as those nations require policies to be placed locally with their own country. Additionally, the insurance advisor needs to fully understand the intended aircraft ownership and operational structures and make sure the insurance addresses the requirements of third parties such as lenders, lessors, lessees, management companies and owner trustees.

## Financing

Many mid-size and large business aircraft are financed or leased, and for good reason. Most buyers prefer liquidity and are creditworthy. There are essentially two types of financiers for buyers of aircraft: lenders and lessors. Clients wishing to retain ownership of an aircraft typically opt for a loan or finance lease product provided by lenders. Clients that want flexibility to upgrade their aircraft, protect against value swings and have precise cost planning goals value an operating lease, where the aircraft is returned to a lessor at the end of the lease. In addition,

the privacy of an operating lease – the ownership appears under the name of the lessor – has attracted many wishing to acquire an aircraft.

Obtaining financing, whether from a regional bank, a private bank, or a specialized finance company can be complex and can take multiple weeks to close. The broker - as your project manager - will know to involve a financier at an early stage to assist with structuring and to aid in a timely closing

### Financing criteria includes:

- **Creditworthiness**
- **Structure**
- **Know Your Customer (“KYC”) & Anti-Money Laundering (“AML”) checks**
- **Aircraft**

## Credit

The financier wants to understand the creditworthiness of the borrower, lessee, and/or guarantor. For private and public companies, audited financial statements are suitable proof of credit worthiness. Financiers may wish to further understand the nature and operations of company activities if not obvious from the financial statements provided, particularly for

more complex corporate structures and business activities. Individuals need to provide a personal financial statement that outlines assets, liabilities and liquidity with supporting documentation, such as bank and brokerage statements and reference letters.

## **Structure**

Before a financier funds a deal, it generally wants to know how the entity owning or leasing the asset is structured. That structure, along with the desired financing or leasing term, desired amount of financing, repayment profile, interest rate structure, currency, legal framework, jurisdictions involved, as well as the desired transaction timing factor into the financier's decision-making process. Some lenders require an existing relationship and/or assets under management with the borrower. Other financial institutions and specialty business aircraft financiers forgo that requirement.

Financiers will take security over the aircraft. As part of the security package, those financiers often require the customer and the aircraft operator to enter into an agreement with the financier to ensure that the aircraft operator takes actions, expressly consented to by the customer, that protect the financier's rights as the secured party. This agreement is often referred to as a "Tripartite Agreement." Some financiers will also require formal confirmation of the tax implications for the structure or the purchase/sale for their records.

## **KYC & AML**

As required by international legal standards, financiers are obliged to understand a prospective client's background and source of wealth and income. Private companies are typically asked to disclose material shareholders and their background and activities. Individuals typically need to provide a curriculum vitae and a copy of their passport photo page so that the financier can perform a background check.

Any politically exposed person (PEP) that is, someone entrusted with a

prominent public office, who are involved in the client seeking tax advice, must be disclosed to and evaluated by the adviser's compliance team. A PEP who is involved in the transaction, must be disclosed to and evaluated by the financier. If the aircraft is pre-owned, similar kinds of disclosures to the financier will be required from the aircraft seller. Any brokers or third parties (especially those expecting to be compensated) must be disclosed to the financier and may also be subject to KYC review.



## **Aircraft**

Depending on the circumstances, a financier may require a physical inspection of the aircraft and records performed by an accredited appraiser prior to closing. Accredited appraisers specialize in business aircraft and often engage in appraisal assignments at the requests of lenders. At a minimum, expect financiers to require a detailed aircraft specification sheet, any management company plans, the desired aircraft registration information, and maintenance program details for the airframe, engines and/or APU (as applicable).

Financiers will also wish to review and operational plans that include how

many hours the aircraft might fly, its habitual base, hanger, typical mission profile, and whether the aircraft will be used only for business or will be made available for charter to other entities not associated with the owner or corporation. Financiers typically audit the selected aircraft manager (if not pre-approved), the aircraft, and the records prior to closing and on an ongoing basis for the duration of the financing relationship.

And, of course, financiers will perform a valuation of the aircraft they finance usually to determine collateral coverage.



# 4 Documenting the Aircraft Transaction

## Benefits of Specialized Counsel

Aircraft are expensive, and aircraft transactions are complex. The complexity increases when the transaction is conducted across borders. A typical aircraft transaction always involves a buyer and a seller, and there may be other parties who may contribute to the transaction, such as the maintenance organization that performs the PPI, a financier, the insurer.

The documentation should be clear, as it will legislate the acquisition process and the refundability of payments made. Due to the technical nature of aircraft as well as the unique customs and practices of

the aircraft market, the documentation will be intricate. One must also bear in mind that litigation could arise and a court may second-guess the substance of a transaction notwithstanding the language used in that transaction's documentation.

Therefore, a buyer or seller, irrespective of experience, should hire specialized aviation counsel. A specialized aviation counsel has the unique experience to identify and mitigate risks, and if necessary, resolve a crisis should it arise in accordance with the applicable laws and jurisdiction.

## The Letter of Intent

The letter of intent or offer to purchase ("LOI") is the first step in documenting a transaction. Even if an LOI is non-binding, it will typically have provisions that are legally binding, including as to deposit refundability. A definitive aircraft purchase agreement ("APA") based on the LOI will supersede the LOI, and the APA will be binding. Both the LOI and the APA are intricate, and buyers must ensure they fully understand these documents. Courts generally treat parties who fail to obtain legal representation unfavourably.

Market dynamics will govern who prepares the LOI. An LOI should include the important commercial and legal terms, such as the identity of the parties, aircraft description, deposit and escrow terms, purchase price, delivery condition and location, pre-purchase inspection scope, responsibility for movement expenses and taxes, and choice of law. It is ideal if the parties are able to identify unsurmountable points of conflict at the LOI stage so that they can move on quickly from one another.

## The Aircraft Purchase Agreement

After the parties sign the LOI, one of the parties prepares the APA. Always ask a lawyer to prepare the APA. The APA is a legally binding agreement and should be a unique definitive agreement based on the LOI. In addition to the LOI terms, which represent the core commercial transaction, the APA should contain all of the other material deal terms and conditions.

The APA should include a comprehensive description of the aircraft, engines, auxiliary power unit, spare parts, loose equipment, and documents. If a particular item is not specifically included in the aircraft description, then that item is not going to be sold. It is the buyer's responsibility to know what exactly it is buying and to confirm during the inspection the condition of the aircraft, engines, APU, documents, loose equipment, and spares. A good lawyer will work with the broker to ensure that the APA completely and correctly describes the aircraft.

The APA should be comprehensive and include, among other things, the deposit refundability terms/timing, purchase price, method of payment, pre-purchase inspection location/facility, work scope, acceptance/rejection terms, closing conditions, risk of loss, damage, or insurance, representations and warranties

of the parties, defaults and remedies, and various miscellaneous provisions. The APA must also have detailed provisions regarding the registration and closing process.

For cross-border transactions, the APA must provide which party is responsible for the legal and regulatory import and export requirements as well as the country-specific requirements. Also, cross-border transactions require special attention because of the export certificate of airworthiness and registration requirements, as well as the potential economic sanctions and export control issues. Cross border transactions are always more time-consuming, and the parties must take this into consideration, particularly for year-end deals, and the tax and default provisions must be fully understood. Miscellaneous provisions should include items such as confidentiality, choice of law, venue, arbitration or litigation, assignment options, whole agreements clarification, notifications for parties, registration number details, and payment of brokers. The legal risks associated with the miscellaneous provisions are often overlooked, and some parties may simply use whatever was in their broker's prior deal agreement without fully understanding the impact on their transactions.

## Financing: Loans and Leases

Financing documents are even more complex and intricate than the APA.

Typically, the finance documents will be for a loan or a lease. Both types of documents start with an advance of money. And yet, the rights and remedies of the financier and the obligor will be dictated both by who: holds title to the aircraft; and is the economic owner of the aircraft. The finance documents will include a robust set of provisions, such as operational covenants and limitations, financial covenants, events of default, and remedies.

Simply, if the financing is a loan, the

security documents will include a mortgage. Sometimes, the financing may include a guarantee.

Where the financier has a robust relationship with the buyer, such as one based on private banking, the security documents may include documents governing access to the buyer's funds following an event of default. Finally, where there is a third party operator, the financier will want to have a tripartite agreement in place to ensure that the operator follows the financier's instructions following notice by the financier to the operator that an event of default has occurred.

## Overcommunicate

Finally, the specialized aviation counsel should be constantly communicating with the transaction team to identify potential risks that may arise from the pre-purchase inspection, repair of the discrepancies, financing document progress or any other unique transaction details. The best way to ensure that nothing is missed is for the aviation counsel to prepare a comprehensive responsibility/closing checklist and to update it periodically at the various milestones. A well-qualified transaction team should have everything

covered, and for a client, the process should be seamless and uneventful. However, even comprehensive pre-planning may not address the unexpected, such as the Covid-19 pandemic, Russia's invasion of Ukraine or a global recession, which is why it is particularly important to hire transaction team members, particularly a specialized aviation counsel, who have decades of experience to manage any unexpected crisis that may arise.

# 5 Performing the Aircraft Transaction

## The Pre-Purchase Inspection

Although there may be an initial visual inspection before the parties sign an LOI, the substantive pre-purchase inspection is what determines whether a buyer will technically accept or reject an aircraft. The pre-purchase inspection scope and process should be defined in the aircraft sale and purchase agreement.

It is recommended to work with specific maintenance and repair facilities (MRO) that know the make/model of aircraft involved in the transaction. It is common for the seller to represent the aircraft as fully airworthy with up-to-date maintenance records. Only an independent MRO can verify these records through direct inspection. Do not consider location as the primary driver for selection of the facility that undertakes this critical part of the purchase. Proper oversight of the technical inspection is critical; each party needs to have full understanding of their responsibilities in this phase and therefore should rely on the expertise of a qualified technical advisor. It is recommended that a Director of Maintenance or CAMO be involved from the start, particularly if they are in one's employ.

The broker and maintenance advisor will liaise with the maintenance facility and the other parties' representatives to ensure that the inspection complies with the APA. Prepayment of the flat rate costs of the inspection is the norm and should be

insisted upon before work commences.

The maintenance facility will liaise with the designated airworthiness representative (DAR) of the responsible aviation authority in order to identify and perform additional work required to issue special flight permits or re-register the aircraft in the new country of registration.

The maintenance facility needs to know the participants to the transaction (buyer, seller, broker, representative, CAMO, crew, maintenance facility contact person, financier) and who should be granted access to information associated with the pre-purchase inspection (PPI). Additionally, the MRO needs to know who is paying for the inspection and any subsequent findings. If something is found that is regarded as unairworthy, the rectification cost is often borne by the seller. Before the aircraft will be allowed to leave the maintenance facility all bills related to the PPI and subsequent work scope must be paid in full. Any repair works may need to be completed under the Inward Processing Customs regime in the UK or the EU if the aircraft has not been imported. Many MRO's may not mention this or may expect the customer to be responsible for this without their assistance. This needs to be resolved prior to the works being started. Advice should be sought of a relevant Customs or tax expert in advance.



How will the PPI progress? An experienced maintenance facility begins the aircraft document review concurrent with the physical survey. Document review typically drives the date of completion. Equally important is the release of information to both buyer and seller regarding discrepancies progressively throughout the inspection. This helps to keep the inspection moving forward and helps to contemplate a timely return to service. One of the most frequently asked questions during the PPI process is whether the airworthiness findings should be handled right away or after completion of the PPI. The advice would be that the APA already addresses those questions and all participants will act in accordance with the agreed process.

Finally, the maintenance facility establishes a timeline for completion of the technical work and concentrates to

keep the downtime short to avoid delays in the aircraft transaction process.

Following the PPI the MRO releases a comprehensive report of findings, which will list any discrepancies that must be repaired to return the aircraft to service and for the buyer to technically accept the aircraft pursuant to the APA. In some cases, the report leads to renegotiation of the purchase price to account for rectification of maintenance discrepancies. It is recommended that the parties agree to request the MRO to release its report simultaneously to both parties.

A seasoned broker will be able to advise a buyer as to what the risks and benefits are to any given order of inspection and repairs, and these issues will be addressed in the purchase and sale agreement.





## Transaction Closing Solutions

Often, the APA will identify the transaction closing solution.

Solutions to close transactions on aircraft will, more likely than not, involve the

interposition of a third-party between the buyer and the seller to mitigate the risks posed by the exchange of documents, money, and other deliverables:

<i><b>Transaction Closing Issues</b></i>	<i><b>Examples of Risk</b></i>
<i>Does the buyer send a deposit directly to the seller, even if it is fully refundable?</i>	<i>A risk is that the seller fails to return the refundable deposit when the buyer in compliance with the transaction documents decides not to complete the transaction.</i>
<i>At closing, who performs first?</i>	<i>A risk is that the seller transfers title to the aircraft, but the buyer fails to pay.  Another risk is that the buyer pays the purchase price, but the seller fails to transfer title.</i>
<i>How can the transaction parties close remotely with confidence?</i>	<i>Absent appropriate remote closing solutions, a risk is that transactions parties will have to incur greater costs to close transactions physically.</i>

## Three Solutions for Closing European Transactions

- **Counsel**
- **Title companies**
- **Virtual closing solutions**

### ***Counsel***

In Europe and elsewhere, many aircraft transactions import practices originating in the real estate market: (1) rely on counsel to hold both the funds and the documents; or (2) rely on a counsel to hold documents and another counsel to hold funds in its client trust account.

Practice (1) results in a conflict of interest for the law firm that raises significant reputational and ethical risks, even if the parties to the transaction have waived the conflict. The manner in which counsel addresses this risk will be governed by the rules of professional responsibility imposed on it by its bar association.

Practice (2) merely displaces the issue by one degree without resolving it, since each counsel is an agent for its client.

Both practices raise ethical concerns: a

conflict of interest arises, notwithstanding that counsel holding funds must comply with the rules of professional responsibility concerning client trust accounts.

Both practices also raise administrative concerns: law firms are typically not set up to manage and track funds where the purpose is to facilitate transactions. There are some countries that rely on client trust account structures where the government, instead of the law firm, is the account custodian and/or manager. These solutions subject transaction parties to government performance risk.

The above considerations may apply to other classes of advisors who provide the same, or similar, services as those provided by counsel.

### ***Title companies***

For decades, parties to aircraft transactions (both that touch the United States and that otherwise have no nexus to it) have closed their transactions through aircraft title companies based in Oklahoma City (where the F.A.A. is located). The primary business of title companies is to perform title searches and underwrite title insurance. Title companies also offer, as ancillary services,

managing both documents and funds for buyers, sellers, and financiers. A title company can mitigate conflicts of interest through a common appointment made by all of the parties to a transaction and a requirement that the title company close the transaction in accordance with instructions given by all of the parties.

## ***Virtual closing solutions***

Some legacy and new market entrants combine internet-based platforms with ancillary business support services. The business support services are specific to each platform and may overlap with services provided by counsel and title companies. These platforms can be referred to as virtual closing solutions.

Virtual closing solutions can be available 24/7, unlike both advisors and title companies, who work during normal business hours.

Transaction parties and their advisors

should, therefore, be able to access their transactions at any time. This gives transaction parties and their advisors greater transparency into, and control over, their transactions. They may obtain transaction information when they need it and take appropriate action, instead of having to email or call one another and wait for responses. Also, these platforms can reduce, if not eliminate, the risk of a transaction being amended, supplemented, or varied spontaneously, which is a risk inherent to closing calls.

## **Transferring Ownership**

Ownership of an aircraft transfers with the transfer of title to the aircraft. A purchase of an aircraft is, therefore, not complete without proper and effective transfer of title, which is evidenced by the due execution of an aircraft bill of sale. The bill of sale will record the title transfer for registration purposes (but will not reveal the entire terms of the commercial transaction). Typically, the seller must sell to the purchaser good and marketable title to the aircraft.

Searches are carried out on the aircraft at the registry where the aircraft is currently registered. If the registry has a mortgage registry attached, the broker ascertains whether a charge attaches to the aircraft.

Buyers and sellers may, but are not legally required to, register their contracts of

sale under the Cape Town Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment (the "Cape Town Convention").

However, the rules change if there is a financing and the Cape Town Convention applies to that transaction. Registrations made pursuant to the Cape Town Convention are required for financiers to become senior secured creditors. International interests and contracts of sale are registered at the international registry.

The Cape Town Convention applies only where it has been ratified and to aircraft of a certain size, weight, or passenger capacity.

## 6 Final Words

Buying and selling an aircraft is distinctly more complicated than buying or selling other capital assets, which may serve personal or business interests. An entire team of specialized professionals is required to maximize the chances that a transaction will be properly structured,

executed, and closed. Market forces will operate as currents to drive the flow of the transaction, and the team of specialized aviation professionals will use their experience and expertise to help the principals to navigate those currents with a view to achieving a great deal.



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