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Challenges for Private Aviation Deals During Covid-19

Risk of exposure to COVID-19 in airports and on large aircraft has many businesses thinking about acquiring private aircraft. However, the pandemic requires a lessor to secure further protections in the charter, purchase, or finance of aircraft. This article outlines some of those considerations.

By Joel Charles Shapiro

Purchasing, financing, and chartering private aircraft during the current pandemic is presenting novel and significant challenges to various aspects of a deal that require all parties to be more flexible at all stages of the transaction. Given the COVID-19 flare-ups in various parts of the United States and the possibility of going back to partial or full lockdowns, one must plan and negotiate documents to address the significant uncertainty.

For purposes of this discussion, assume a company can charter a Challenger 350 (also known as a Bombardier BD-100-1A10) on an as-needed basis or purchase the same, and finance 90% of the purchase price.

CHARTERING

Charter bookings fell dramatically at the outset of the pandemic but

have increased in a meaningful way. Many individuals and businesses that need to travel are exploring the charter route in order to avoid increased exposure in airports and on larger aircraft.

Almost all charter operators have adopted protocols for disinfecting the aircraft after flights, together with crew and passenger safety regimes that can make a compelling case for use of private aviation. For example, a recent charter booking by a client during the pandemic has demonstrated that chartering an aircraft now has hidden financial complexities for a customer to consider.

Moreover, almost all charter agreements provide for a stepped-up forfeiture clause: as the user gets closer to the flight and cancels, the penalty becomes larger—and sometimes can even result in a complete loss of the advance payment made for the flights.

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Assume a company booked a round-trip flight from KPHL (Philadelphia airport) to KCHS (Charleston, S.C., airport) for a meeting with the head of sales for a prospective new client. Also assume that 15 days before the departure, the governor of South Carolina enters a stay-in-place order requiring all hotels, restaurants, and museums to cease operations. Moreover, any traveler arriving from Pennsylvania, New Jersey, or New York must self-quarantine for 14 days.

Ability to Terminate

Those executive orders render the trip virtually impossible to complete, so the company looks to terminate the charter. However, that ability to terminate (and receive a refund) under almost all current forms of charter agreements will be hard to do. The customer will look to the force majeure clause for an out but will most likely find no relief thereunder. (A force majeure clause permits a party to delay, defer, or decline providing or acquiring the goods or services for reasons beyond its control, such as an act of God, strikes, or government orders.) That is because the governor's order does not prevent the charter operator from providing the flight, because the aircraft is available, the private airport is open, and the pilots are available.

During the height of the current outbreak, almost all commercial airports remained open, although

many flights were canceled. In other words, the act of God (if the pandemic originates therefrom) or entry of government orders are not preventing the charter operator from performing under the contract.

Whereas either an act of God or government orders clearly impacts the planned trip (and its business and safety factor), neither prohibits the company from getting on the aircraft and traveling to KCHS. Therefore, in order to reduce the chances of this happening to a client, one might consider either (a) booking your charter last minute to make sure as best you can that the trip can be enjoyed and in a safe manner based on the current outbreak map and pending government orders, or (b) negotiating an addendum to the charter agreement that provides an out if the destination city is the subject of a stay-in-place order that materially impacts the trip.

The charter operator might also agree to delay the trip and rebook it within a certain period of time, rather than provide a refund, as a means of addressing the issue. There is no current industrywide way of addressing this issue; thus, diligence is required.

One last note on chartering during the pandemic: charter operators and brokers are not created equal. During a financial crisis like the one we are experiencing now, financial pressures are affecting parties differently. Knowing where

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If stay-in-place orders are entered after the execution of the purchase agreement, does the agreement allow for movement of the aircraft to another non-locked-down state?

the prepayment is being held (in escrow, a segregated account, or commingled with other funds) is recommended. The customer does not want to be a creditor of the party holding the funds if the operator or broker is forced to seek relief under Chapter 11 of the Bankruptcy Code.

THE ANATOMY OF THE PURCHASE AGREEMENT

Back to our Challenger 350 acquisition option. Assume the customer has signed the purchase agreement, provided the escrow agent with a deposit of, let us say, \$100,000 USD, and provided a copy of the agreement to the aviation finance company it has selected to finance the purchase. The COVID-19 outbreak will impact many points in the transaction that one can try to plan for, while other challenges will arise after execution of the contract that require all parties to have more flexibility in order to consummate the transaction.

Let us start at the very beginning. Your lender and your aviation consultant need to inspect the aircraft. Think about just that sentence. Who is going to be allowed to review records and the aircraft? In what city and state will that occur, and how will those professionals travel to the selected destination? If stay-in-place orders are entered after the execution of the purchase agreement, does the agreement allow for movement of

the aircraft to another non-locked-down state to accommodate the parties to inspect the aircraft and its records (probably not, as it never happened before)?

Inserting language in the letter of intent or the purchase agreement should be considered to cover this possibility and provide for the party that will pay the transportation costs associated with the movement of the aircraft and records under this fact pattern.

Pre-buy Inspection

Next, there is the pre-buy inspection at the inspection facility. First, the parties hope the facility does not experience an outbreak that—independent of a government order—would cause a shutdown of operations and shortage of employees. Should the selection of the inspection facility now require some due diligence on safety protocols at the location to reduce risk of issues?

Second, if the inspection uncovers a squawk that requires the ordering of parts from locations throughout the United States and Canada, where the plants or suppliers might be the subject of a lockdown order, will the parties look to the force majeure clause again for relief, and does it cover this fact scenario?

The parties should anticipate this event in the purchase agreement and provide for a delay (without a termination of the agreement) to allow the inspection facility some additional time to locate the parts

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required to remediate the issues discovered during the pre-buy inspection.

Pilots and Crews

The aircraft is now ready for a test-flight prior to the execution of the technical acceptance letter. But wait: who conducts that flight? The seller's crew (for insurance purposes) almost always conducts it, so now the seller needs to ferry its pilots back to the inspection facility to conduct the test-flight. But if the inspection facility is located in a state that requires people to quarantine for 14 days upon arrival from certain states (which includes the state where the seller's pilots are based), then does the seller risk sending its pilots for the test-flight but lose the ability to utilize them again for 14 days?

Some states have exemptions from their quarantine orders for pilots and crews, while other states are silent on the matter. For those states with exemptions, some are far from clear as to whether they apply to private pilots flying under Part 91 (aircraft that are operated by the owner for no compensation) of the Federal Aviation Regulations (FARs), so diligence is required before the parties commit. Should language be added in the purchase agreement to cover these issues or should the buyer consider deferring the test flight and acceptance?

Ready to Close

We have now arrived at the stage where the parties are ready to

close. The lender wires the closing funds into the escrow agent's account. Now the parties are moving the aircraft to the delivery location, which was selected based on favorable sales/use tax treatment for the transaction by that state.

The first problem is, you guessed it, the pilots. In a recent transaction, the parties had agreed in the purchase agreement to ferry the aircraft from the inspection facility to the state of New York, where the closing would occur. Then the purchaser would have its pilots ferry the aircraft to its new home base in Florida.

However, at that time in the pandemic cycle, travelers into Florida originating from New York were required to self-quarantine for 14 days upon arrival in Florida. (You get what you give, so now visitors from Florida entering New York must self-quarantine for 14 days.) That means the purchaser's pilots could be out of commission during their quarantine, which was not an acceptable outcome for the purchaser.

The parties addressed this situation by moving the delivery location to Delaware to avoid the pilot quarantine issue, but it required thought and planning (and a desire to consummate the transaction) to get that resolved. Again, expanding the language in the purchase agreement to allow for sudden changes to the delivery location, based on the COVID-19 outbreak

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At the inception of the pandemic in the United States in March 2020, the FAA window restricted filings and interactions between parties such that recordings for transfer of title and perfection of security interests after funding were substantially delayed.

map and restrictions, should be considered.

Flow of Funds, Document Recordation

The second issue regarding the closing is the flow of funds and document recordation. In a typical pre-pandemic transaction in February 2020, the purchase price was wired to the seller, and almost immediately thereafter the escrow agent recorded the (a) FAA Form 8050-2, Bill of Sale, (b) FAA Form 8050-1, Application for Registration, and (c) the Aircraft Security Agreement. These will be followed by the filing of an international interest in the airframe and engines in favor of the lender on the International Registry (IR), because perfection of a security interest in the airframe and engines may require dual filing in certain instances.

However, at the inception of the pandemic in the United States in March 2020, the FAA window restricted filings and interactions between parties such that recordings for transfer of title and perfection of security interests after funding were substantially delayed (sometimes more than a day), thus placing the parties at heightened risk all the way around.

During the gap following funding and before recordation, it is possible (but very unlikely) that an intervening lien could arise (but recordation of that should be behind the first lien unless it is

a possessory lien). Alternatively, the seller could file a Chapter 11 petition, thus raising the issue of whether title had completely passed to the buyer.

In the first Eclipse Aviation bankruptcy case,¹ a buyer wired the purchase price to Eclipse and agreed to overnight the FAA documents to Oklahoma City for recordation the next day. However, approximately 25 minutes after payment and as the purchased aircraft was taxiing out of the delivery location, Eclipse filed its Chapter 11 petition. Eclipse took the position that title had not been transferred at the time of its petition, since the FAA documents were in a FedEx envelope and had not been recorded.

Ultimately, the purchaser prevailed in the dispute. However, avoiding or minimizing a gap period between funding and recording is always advisable. The good news is that the FAA has worked hard to reduce the gap period and, depending on the time of month, it is now down substantially to a matter of an hour or hours at most. Still, we are not where we were before the pandemic started.

This means the company's standard language in the purchase agreement—that money is wired and documents are filed and stamped at the same time—needs possible modification or flexible interpretation in order to consummate the transaction.

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All parties must appreciate that further flexibility is required in order to consummate sales and financing. Charter of an aircraft under Part 135 of the FARs is readily available.

Some lenders are requesting the filing of a prospective international interest on the IR in order to note their lien earlier in the process. However, that action may violate a clause in the purchase agreement that prohibits the purchaser (and its lender) from filing any prospective interests prior to closing.

Therefore, it might be appropriate to consider additional or alternative language in the purchase agreement to cover these novel fact patterns that have arisen under COVID-19.

CONCLUSIONS

In the final analysis, transactions for the charter, purchase, and finance of aircraft are occurring with regularity in the marketplace, notwithstanding the complications

arising from COVID-19. At this point in the pandemic, those difficulties can be anticipated and addressed in the applicable agreements.

All parties must appreciate that further flexibility is required in order to consummate sales and financing. Charter of an aircraft under Part 135 of the FARs is readily available. That said, it requires the customer and the charter operator to have an honest discussion on possible limitations on travel, which can pop up at any time, including how the limitations are going to be handled in the applicable documents. ■

Endnote

1. *In re* Eclipse Aviation Corp., 08-13031-MFW (District of Delaware). A second case, pending, is *In re* One Aviation Corp., 18-12309-CSS (District of Delaware).



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