THE VALUE THAT SPECIAL PURPOSE VEHICLES ADD TO CORPORATE AND GENERAL AVIATION FINANCE TRANSACTIONS IS RELATIVE

This article surveys the use of special purpose vehicles (SPVs) in corporate and general aviation finance transactions to identify when they add value for both financiers and their clients. Among other things, it highlights how corporate and general aviation financings require an approach that differs from that used in standard commercial aviation financings. This article includes an examination of bankruptcy remoteness.

The value that an SPV adds to a transaction structure depends on the parties to that structure, their interests, and the approach that best resolves issues arising out of divergence among those interests. Clients of corporate and general aviation finance transactions (Transactions) require an approach to structuring and executing financings that differs from that used by airlines. To identify the different approaches, one must start by understanding the fundamental differences between clients and airlines. That understanding facilitates the subsequent survey and analysis of financing structures involving clients and airlines. Focusing on a single, relatively common aspect of those structures, such as SPVs, renders that survey and analysis manageable. SPVs are technical; yet, the approach taken in this article – consideration of the facts of the proposed structure married with a comprehensive understanding of the nature and interests of the parties to a Transaction – can facilitate solution identification on a broader panoply of issues to benefit financiers and clients alike.

This article is particularly important, considering that some Transaction structures have been informed or influenced by financing structures that airlines use. For example, financiers of both clients and airlines often require SPVs to be bankruptcy remote. Although "bankruptcy remoteness" may have a meaning common to an Airline and its financier, that is not necessarily true of a client and its financer. This article describes and comments on:

1. the general nature of airlines, clients, and SPVs;
2. SPVs that are owned or controlled by clients;
3. orphan SPVs and financier-owned and controlled SPVs;
4. housing aircraft purchase agreements in SPVs; and
5. security that may be taken over the various SPVs.

Finally, this article concludes by: summarizing the unique features of the corporate and general aviation market and its participants; and, in light of those features, describing how one may productively resolve issues financiers and clients raise during Transaction structuring and execution. [1]

[1] This article expresses a bias centered on the United States, but there are isolated comments relating to parties and Transaction elements outside of the United States. The approach, comments, and issues raised in this article can inform queries applicable to cross-border Transaction structures.

1. The general nature of airlines, clients, and SPVs

Airlines, which support commercial aviation finance transactions, may be publicly traded or privately held, are often rated by international ratings agencies and, in some instances, have explicit or implicit state support. Airlines routinely complete standardized finance transactions on one or multiple aircraft in transactions where the usual participants and their dedicated teams play the usual roles.

Like airlines, clients may be privately-held or publicly traded and rated by the international ratings agencies. Clients may even benefit from explicit or implicit state support, but the similarities end there. Clients hail from a variety of industries with a variety of identities. Clients may be individuals, companies, partnerships, trusts, foundations, or other legal entities. Clients may complete a Transaction once every five to seven years for a single aircraft. Each Transaction financier has a different theory that it applies. Those theories include: credit, unsecured; credit, secured; and asset-only, as well as an assets-under-management model. Unlike airlines, clients may have less familiarity with aviation finance, and they will require a greater degree of Transaction structure customization. This remains true even if the financings rely on relatively standard core structures, such as operating leases, finance leases, and loans.

SPVs appear in structures used to finance both airlines and clients. SPVs may be limited liability companies, trusts, or other, analogous corporate forms. Financiers and counsel may rely on "bankruptcy remoteness" to justify their requirement that an SPV appear in a financing structure. Airlines and their counsel share with their financiers a common definition for bankruptcy remoteness because their financings are conducted frequently and are standardized, and in some instances the ratings agencies evaluate the bankruptcy remoteness of a financing structure; clients typically do not, as Transactions are conducted infrequently and must be tailored to their idiosyncratic credit and business profiles. Therefore, financiers must explain to clients the value SPVs add to Transactions, and clients need counsel who understand both their and the financiers' concerns, and who have fluency navigating these complex issues. Otherwise, clients may perceive SPVs to add unnecessary complexity and costs with little, if any, corresponding benefit.

Supporting the need for an inquiry into what bankruptcy remoteness means is the fact that bankruptcy, like other litigation, is inherently unpredictable. Further, bankruptcy courts in the United States are courts of both law and equity where a guiding principle is fairness. In theory, then, outcomes that help both the debtor and the financier, including disregarding a bankruptcy remote SPV in a search for cash, are possible. That is why bankruptcy remoteness should not be the starting point for transaction structuring analysis, nor can it alone justify the presence of an SPV in a financing structure. Instead, the nature of the financier-client relationship, the Transaction theory, and the credit analysis should drive whether an SPV appears in the Transaction structure.

Surveying the presence of SPVs in Transaction structures reveals that:

1. SPVs can: protect assets; facilitate repossession of those assets; and facilitate syndication of the Transaction;
2. SPVs derive their solvency from other Transaction parties, either because cash is structured to flow through them or vicariously through the presence of a solvent guarantor;
3. the constitutional documents of the SPV may limit the SPV's ability to conduct business, or to take on debt, other than the financing, and the Transaction's finance documents may include corresponding representations, warranties, and covenants;
4. the management of orphan SPVs and SPVs that are trusts depends on the credit of an institutional manager, which adds credit and performance risk to a Transaction;
5. security taken over the SPV and/or its assets can enhance a secured financier's enforcement rights; and
6. colloquially, the term, bankruptcy remoteness, can express a conclusion that refers to the presence and degree of some or all of the foregoing features. More precisely, bankruptcy remoteness can refer to the expectation that the enhancement an SPV adds to a financing structure will reduce the likelihood that third-party creditors will be able to make claims that frustrate a senior secured creditor's ability to exercise its rights over the collateral in which the SPV has an interest because the SPV is structured to avoid inclusion in the debtor's bankruptcy proceedings. Bankruptcy remoteness is, therefore, a malleable, fact-dependent concept that presupposes the existence of a first priority security interest in collateral in which the SPV has an interest.

2. Client-owned or controlled SPV obligor

A client-owned or controlled SPV obligor structure presents the most straightforward example of an SPV that can appear in a Transaction. The client-owned SPV will be either a borrower or a lessee. Clients form wholly-owned SPV obligors because they are concerned with:

- anonymity: the SPV – not its owner(s) – is usually a part of the publicly searchable records maintained by the aircraft registry. In addition, the jurisdictions where these SPVs are formed typically also omit the identity of the owner(s) from their publicly searchable records;

- asset protection: the unsecured creditors of the client will be unable to seize the aircraft (or the right to use it) and, depending on the jurisdiction of the SPV, there may be statutes that protect the owners of the SPV from unsecured creditors who would try to seize their ownership interest in the SPV; and
- liability segregation: the SPV's counterparties should, in normal circumstances, be unable to pierce the veil of the SPV to pursue the SPV's owner(s) and/or affiliates for the SPV's liabilities, such as those associated with the maintenance, insurance, and operation of the aircraft.

Although the veil of the SPV should protect the aircraft from the bankruptcy of the owner(s) or affiliate(s) of the SPV, the securities of the SPV, whose value is a function of the aircraft's value, may form part of the bankruptcy estate of its owner(s) or affiliate(s). A limit on asset protection for the client is, of course, whether the SPV has granted security over its interest in the aircraft to a financier.

The SPV's solvency is a fundamental issue that impacts both this SPV structure and the other SPV structures discussed in this article. If the SPV is insolvent as of Transaction inception, then the Transaction the SPV is a party to may be unenforceable. Enforcement opinions provide little comfort, since they typically exclude consideration of bankruptcy laws from their scope while assuming obligor solvency. Although a client's concerns may lead it to overlook the SPV's solvency, one may expect a financier to perform a solvency analysis of the SPV as of Transaction inception. The solvency analysis will typically focus on cash flow solvency. Cash sufficient to service the obligations under the financing must either actually flow through the SPV, or be provided for in the Transaction documents, if cash flow netting is expected to occur. If, however, the Transaction is structured on the basis of a solvent guarantor or some other credit support, such as a letter of credit, one might ask whether the presence of the guarantor or credit support provides vicarious solvency to the SPV. If the SPV is vicariously solvent, the Transaction structure can avoid the gymnastics that can sometimes be required to cause the SPV to be cash flow solvent. As of Transaction inception, the aircraft itself will generally not render the SPV solvent because the debt on the aircraft will exceed the equity in the aircraft, and the aircraft is a depreciating, illiquid asset on the books of the SPV until it is sold.

3. Orphan SPVs and financier-owned SPVs

This section describes orphan SPVs and financier-owned SPVs that act as borrowers and lessors in Transactions.

Rationales for orphan SPVs and financier-owned SPVs

The secured financier requires these SPVs to hold title to aircraft in operating lease and finance lease (and analogous) transactions. An intended effect is to segregate the aircraft from the other assets of the lessee, and these SPVs and their assets should be insulated from the claims of the client's third-party creditors. In theory, following the default of the lessee or other obligor, the SPV lessor should be able to repossess the aircraft, irrespective of whether self-help is available. There may be, however, limits on a lessor's ability to repossess an aircraft, such as whether local law allows bankrupt lessees to retain assets that are essential to their ability to conduct business or whether a lessor must conduct a court-mandated repossession and auction process.

Both the financier and the lessee benefit by avoiding liability that may be associated with holding title to the aircraft. A lessee, however, may still be liable for damages resulting from the operation, maintenance, and insurance of the aircraft, even if the lessee has outsourced their performance to an operator. In that respect, one should consider to what extent an SPV will insulate an aircraft from fleet liens. As with client-owned or controlled SPVs, a financier can be expected to conduct a day-one solvency analysis, including whether vicarious solvency is available, and the financier can be expected to take security over such collateral as the lessee's interest in the aircraft and the insurance.

Orphan SPV

Use of the orphan SPV in Transaction structures has been informed by practices involving airlines. The financier or its counsel will instruct an institutional trustee to form a company (the form depends on the jurisdiction of the orphan SPV) for the purpose of a specific Transaction. That company acts as both a borrower and a lessor. The constitutional documents will typically include language limiting the business of the SPV to the Transaction only, and the finance documents will include representations, warranties and covenants that correspond to those limitations. The sole owner of the company will typically be a trust, also formed by the institutional trustee for the purpose of that transaction. The trustee of the trust will be the institutional trustee. The beneficiary of the trust will usually be a charity.

The term "orphan" refers to the facts that neither the financier nor the client (or its affiliates) owns the SPV (which should mitigate the risk that third-party creditors could make successful claims over the SPV and its assets), and the corresponding expectation that the SPV will neither be regarded as the subsidiary of, nor be consolidated with, either the financier, the lessee, or a guarantor (if any). The obligations to manage and operate the SPV are supported by the credit of the trustee, so financiers prefer to use institutional trustees with strong credit ratings. From an income tax perspective, the SPV should be tax transparent, and the lease income should match the payments owed under its loan, resulting in no net income or losses for the SPV. For tax treaty purposes, the SPV should qualify as a "person." In light of these contours, the cash flows under the finance lease and the loan are typically netted so that the financier receives all payments due under the financing directly from the lessee, which avoids the need for the SPV to open, manage, and pay for its own bank accounts.

Financier-owned and controlled SPVs

Some financiers based outside of the United States and other unregulated financiers based in the United States form wholly-owned or controlled SPVs. The financier, working with the client, chooses a mutually acceptable jurisdiction to create the SPV. Although the SPV is a creditor of the client, the SPV is not immune to credit events that will impact its financier parent since the financier parent has an interest in the SPV that may have value and be subject to liens. The use of such SPVs may also facilitate Transaction maturity issues, such as the return of the aircraft to a financing lessor and the deregistration and re-registration of the aircraft.

Financiers regulated in the United States are subject to great scrutiny if they form SPVs in which they may have an ownership interest. In fact, the process to form such SPVs can be so difficult that, as a practical matter, this class of financiers does not form such SPVs to support their financings.

4. SPVs to house aircraft purchase agreements

One may legitimately transfer to an SPV an interest in an aircraft purchase agreement to:

1. isolate the liabilities owed by a client to a manufacturer; and/or
2. facilitate aircraft trading activity.

Financing progress payments (PDPs) owed under a purchase agreement (PDP Transaction) adds complexity. One must first understand the nature of the collateral, essentially the purchase agreement, over which a financier would take a first priority security interest. Then one can determine whether an SPV to hold that collateral adds value to the PDP Transaction structure.

The value of a security interest in a purchase agreement, however, is impaired by: compelling business and legal reasons financiers have to avoid foreclosing on aircraft purchase agreements; and the fact that aircraft purchase agreements are assets, usually subject to contractual transfer restrictions, whose liquidity is dictated by broader market conditions. It is on this shaky ground that a senior secured financier considers the likelihood that third-party creditors could frustrate its ability to exercise its rights over its collateral securing the PDP Transaction. A factor that may impact the usefulness of a financier-imposed SPV is whether the buyer is a client-owned SPV or an operating company. Yet, even there, the imposition of an SPV, client-owned or financier imposed, will not necessarily prevent a bankruptcy court from piercing the formality of the structure in its search for liquid assets. This larger context explains why, all things being equal, bankruptcy remoteness, by itself, is not a compelling reason to transfer to the SPV an interest in the purchase agreement.

This section:

1. describes the cash flows under, and the accounting relating to, aircraft purchase agreements;
2. explains the commercial drivers for PDP Transactions;
3. explains how PDP Transaction structures work; and
4. explains how bankruptcy proceedings could disregard those SPVs in their search for cash.

Cash flows under the aircraft purchase agreement: liquidated damages and disbursements under the PDP Transaction

Manufacturers typically require buyers to pay to the manufacturers a non-refundable deposit on signature of the aircraft purchase agreement. All or a portion of that non-refundable deposit constitutes liquidated damages. The liquidated damages are intended to compensate the manufacturers for damages they expect to incur as a result of a buyer's breach of the aircraft purchase agreement. Manufacturers rely on liquidated damages to avoid requiring a guarantee from a creditworthy affiliate of the buyer (assuming the buyer is not creditworthy). Likewise, financiers rely on the presence of liquidated damages to reduce their exposure to the credit of the client. Of course, each time funds are disbursed under the PDP Transaction, the financier increases its exposure to the client accordingly.

From an accounting perspective, each time an amount is paid to the manufacturer according the payment schedule, the manufacturer credits a customer-specific account in its books (which may be a current or a non-current liability for the manufacturer), records the cash as an asset on its balance sheet, and uses the cash to continue to build the aircraft. The manufacturer recognizes the amounts paid under the purchase agreement as revenue only at delivery of the aircraft.

Commercial drivers for PDP Transactions

PDP Transactions are bridge loans, repaid either with equity or a term financing. Reasons financiers extend PDP Transactions include: assisting clients with cash flow management; incenting clients to use the PDP financier for the long-term lease or loan financing; and/or pure opportunism with no expectation of entering into a term financing.

PDP Transaction structures

The initial buyers under corporate aircraft purchase agreements are typically SPV affiliates of clients. Some financiers lend directly to a client's SPV affiliate that remains the buyer under the purchase agreement. Alternatively, some financiers require the buyer to transfer through a full recourse assignment the purchase agreement to an orphan SPV or an SPV that is owned by the financier. A primary purpose is to transfer to the SPV an interest in the purchase agreement that also forms collateral secured by the financier. The original buyer, however, retains its interest in the purchase agreement and incurs an obligation owed to the financier to continue to satisfy all of the obligations under the purchase agreement as though the full recourse assignment does not exist and to benefit from other rights under the purchase agreement. The full recourse assignment may even include provisions that permit the manufacturer to disclaim any knowledge of the state of the PDP Transaction (including incipient or actual defaults) until it receives notice from the financier. The SPV might be rendered cash flow solvent through the use of a fee paid by the original buyer to the SPV that is equal to the amounts that the SPV owes to the financier.

In both structures, the collateral typically includes the purchase agreement and the proceeds payable under it. All things being equal, an orphan SPV adds, at best, incremental value to a transaction where the initial buyer is a client-owned SPV, since both sets of finance documentation will almost certainly include restrictions on what the SPV, whether client-owned or orphan, can do. On the other hand, an orphan SPV might be justified where third party creditors are more of a concern, such as for an operating company buyer, but that is a business decision.

Irrespective of which structure is used, the cash associated with the equity in the purchase agreement has been paid to the manufacturer and converted into the partially-built aircraft. The financier is, thus, taking credit and performance risk on the manufacturer in addition to the client's credit risk. The manufacturer must be able to complete the aircraft, and the manufacturer should not be insolvent or, worse, go into bankruptcy. Some financiers may determine that additional credit enhancements covering manufacturer risk are desirable.

Notwithstanding these considerations, the financier, client, and manufacturer have strong commercial incentives to work together when a PDP Transaction becomes distressed.

Financiers, clients, and manufacturers have commercial incentives to amicably resolve distressed PDP Transactions

In 2008, Mark Lessard – then an associate, now a partner, at Pillsbury Winthrop Shaw Pittman LLP – wrote an excellent article titled, The ABCs of PDPs: Advance Rates, Bankruptcy Risks and Collateral Management, that describes how the bankruptcy of a PDP borrower would work under US law. An expected outcome for both PDP financiers and manufacturers is that the buyer can reject the purchase agreement, and either the manufacturer, the financier, or both could incur losses. Lessard's law review revealed no case law in the United States covering adverse bankruptcy proceedings involving a PDP Transaction. Among other things, he surmised that absence might exist because, in a default situation, the interests of financiers and manufacturers are effectively aligned to find a new buyer to take out the incumbent buyer. Although Lessard's article focused on commercial aircraft purchase agreements with Airline buyers, the concepts apply by analogy to corporate aircraft purchase agreements because, at a minimum, both types of purchase agreements relate to aircraft and include stage payments that are due over time.

Even where an SPV is used to house a purchase agreement of corporate or general aircraft, the legal and commercial analysis advanced by Lessard likely does not change because: the original buyer remains the buyer under the purchase agreement in substance; and the commercial interests of financiers and manufacturers remain unchanged and continue to create a disincentive to litigation. If a financier seized the SPV with an interest in a purchase agreement, the financier could be required to consolidate the SPV and its assets and liabilities, and the financier would certainly be required to manage the SPV buyer's relationship with the manufacturer. Moreover, foreclosing on the purchase agreement or the SPV makes sense for only those financiers whose business model includes aircraft trading, or if the market for new aircraft is so buoyant that a financier could be assured of selling the purchase agreement to a new buyer. Manufacturers will seek to avoid buying out the financier because of the impact this action could have on its cash management and accounting, and, thereafter, the manufacturer may find itself having to apply a discount to the purchase price to transfer the purchase agreement to a new buyer. Therefore, irrespective of the specific rights each of the manufacturer and the financier has under the PDP Transaction documents, the simplest solution for both commercially remains to work with the incumbent buyer to seek a new buyer to assume the purchase agreement.

Claw back risk could vitiate the bankruptcy remoteness of SPVs in PDP Transactions

In his article, Lessard briefly touches on "claw back" risk, which he defined as the bankruptcy court's forcing the manufacturer to disgorge the PDP proceeds. Considering whether the manufacturer or an incumbent financier would have to disgorge the loan proceeds as part of a bankruptcy proceeding of the buyer builds on Lessard's discussion. Disgorgement is conceptually dramatic, but it should be unlikely to occur under normal circumstances.

Disgorgement is an equitable remedy that is used in extraordinary circumstances, and it can disregard transaction structures and corporate forms in its search for cash. Although disgorgement is a standalone remedy, it can also show up as a component of transaction avoidance, which is a remedy for fraudulent transfers. Disgorgement is available when the underlying circumstances include illegal or wrongful conduct, and the party against whom disgorgement is being sought would be unjustly enriched by keeping the cash. The party against whom disgorgement is being sought need not to have acted illegally or wrongfully, and that party may also be ignorant as to the illegal or wrongful conduct. As a practical matter in a PDP Transaction, this means that one would need to show that any of the obligor, financier, or manufacturer (or all of them) had acted illegally or wrongfully (e.g., fraud or negligent misrepresentation) when it entered into the financing and/or paid or received the funds that were supposed to be used to construct the aircraft.

Alternatively, the rules covering fraudulent transfers might form the basis for a bankruptcy court to unwind a financing. There, the remedy is avoidance of a transaction, of which disgorgement may be a part. Whether a fraudulent transfer occurs is highly fact-specific, but, abstractly, a fraudulent transfer might arise where a new financier refinances the incumbent financing following a degradation of the client's credit quality and, subsequently, the client files for bankruptcy. There, the incumbent financier might be required to disgorge the rescue financing proceeds as part of the avoidance of the financing.

Assuming disgorgement of PDP loan proceeds were a meaningful risk, manufacturers would need to study whether to alter how they conduct business. Initially, this might mean that manufacturers would need to revisit their cash management practices, but, in more extreme circumstances, they might need to restructure their purchase agreements and pricing, and revise their accounting practices. Additionally, manufacturers may be incented to increase pre-purchase diligence, including an analysis of the buyer's credit quality. One could imagine that, for non-creditworthy buyers, such as SPV buyers, manufacturers might require guarantees from their creditworthy affiliates to secure the buyers' obligations under purchase agreements. This structure would almost certainly result in intercreditor arrangements with the PDP financier that add little to no value to the solution suggested by Lessard's article, and which are already practiced in the corporate and general aviation market: if the buyer of the aircraft defaults on the aircraft purchase agreement, the manufacturer and the financier, at a minimum, should work together to find a new buyer who can assume the purchase agreement. Considering the economy as a whole, an increased incidence of disgorgement under normal circumstances could significantly impair the value of leverage.

5. Security over the SPV

The security available to financiers with respect to an SPV varies with each jurisdiction, but there are really two types of collateral over which a financier would take security: the SPV's securities; and the management and other interests in the SPV. The security package will also include an obligation for the SPV and the grantor of security over it to accept and follow the financier's instructions. Secured financiers exercise their rights under the security documents to seize SPVs by dating signed, but theretofore undated, transfer certificates.

In principle, financiers with security over the SPV should be senior to other junior or unsecured creditors of the SPV's parent and affiliates. The practical usefulness of security over the SPV will vary among financiers, however. Regulated US financiers may have difficulty seizing the SPV due to the same rules that discourage them from forming SPVs. Unregulated US and non-US financiers that can form SPVs to facilitate Transactions will likely not encounter the same difficulty. These financiers may, however, encounter friction, such as internal policies that prevent them from owning SPVs to avoid consolidation of the SPVs on these financiers' balance sheets.

Irrespective of whether the Transaction is intended to be a book-and-hold transaction or the likelihood that a financier can seize the SPV in a default situation, financiers will look to take security over the SPV at Transaction inception as part of a risk management exercise. Among other things, security over the SPV can facilitate syndication. New financiers may join the transaction without incurring the expense and logistics of transferring security or taking security in their own name. Other considerations might include a determination that a particular jurisdiction grants secured lenders repossession rights over aircraft that pale in comparison to those granted to aircraft owners. Additionally, security over the SPV may become mandatory for the financier in those jurisdictions where the laws prohibit unsecured creditors from seizing the equity securities of the SPV.

Client-owned SPV

Not every financier takes security over a client-owned SPV borrower, and taking security over a client-owned SPV lessee would be unusual. Financiers analyze the value the security over the SPV adds to the Transaction. Part of the financier's analysis will include consideration of its relationship with the client and the client's affiliates in light of the Transaction theory. And, a financier should consider whether, if the owner of the SPV has become insolvent but has not yet filed for bankruptcy protection, the financier's unilaterally exercising its rights under the security over the SPV itself would result in a fraudulent transfer. Moreover, a financier that has a deep relationship with the client and its affiliates may determine that relationship is so deep that the financier does not require security over the SPV. There, the financier has multiple avenues to pursue, should there be a default under the Transaction, which probably represents a minor fraction of the total exposure to the client.

A financier might conclude, however, that security over the SPV is warranted because, for example, it has determined that the laws of the aircraft's registration or the jurisdiction where the aircraft is habitually based, which are not always the same, are such that from a practical perspective the financier may want to become the aircraft owner to repossess the aircraft. One might expect, consequently, that a financier for which the Transaction is a one-off is asset play will be significantly more concerned with taking security over the SPV. There is, of course, an entire spectrum of structures that a financier may consider in light of its lending criteria to arrive at an outcome that works for it and its client.

Financier-imposed SPVs

Security is typically taken over both orphan SPVs and financier-owned SPVs to facilitate syndication. Managing client exposure is a fundamental concern for financiers, so there is typically little room to negotiate this issue. The requirement for security over an orphan SPV structure is also intuitive: absent security over the orphan SPV, the financier to take control over the orphan SPV if the institutional trustee becomes non-compliant, irrespective of whether the Transaction documentation includes obligations for the orphan SPV to comply with the financier's instructions. In a financier-owned SPV structure, however, there might be more room to negotiate the requirement for security, because the financier already owns and manages the SPV, and the syndication might be blind.

6. Moving forward

At the 2017 Corporate Jet Investor Conference in London, Don Dwyer of Guardian Jet, speaking on a panel in front of delegates, characterized the corporate aircraft market as an incredibly sophisticated "cottage industry." As he noted, for a Transaction to be successful, one must balance the complexity that many Transactions involve with the level of intimacy that exists among market participants.

In that respect, the typical Transaction involves assets worth millions whose use is highly regulated and at least four parties (client, financier, operator, and registry) and, in cross-border Transactions, two, and often three or four, jurisdictions. Further dimensions of this analysis include: the nature of the financier; the nature of the client; whether the Transaction is isolated or fits within the context of a broader relationship; and the theory of the Transaction.

Financier flexibility will be determined to the extent that they either are regulated or, if unregulated, have constraints placed on them by their investors, and, of course their clients' credit profiles. Financiers, however, must be sensitive to clients' expectations and other sensitivities. Financers should take the time to explain the rationale for every single component of a Transaction, if that is what a client has requested – or, in the financier's judgment, needs – to gain comfort with a Transaction. Financiers also benefit from the use of simpler structures: their clients tend to be happier; and less time is spent internally analyzing the constituent parts of the Transaction.

By the same token, clients must recognize and appreciate that financiers must manage their risks in accordance with the environmental or existential constraints they are subject to as well as certain market conventions. clients should, therefore, be unafraid to ask for the rationale that underlies a purported financier requirement with a view to creatively and constructively solving issues that arise during a Transaction. Excellent financiers and their counsel will be able to explain succinctly why a particular structural item is required, and sophisticated, experienced counsel for that client will be able to help bridge the gap between those requirements and the contours of the client's business. When successful, all of the parties to a Transaction will navigate these complex issues in a constructive and collaborative manner to find a meaningful compromise.

Acknowledgements: The views expressed in this article result from my experiences as external and internal counsel and as a banker. I wish to thank Rochus Moenter, Vice President, Finance and Lease, Airbus Group; and Matthieu de Varax, Partner, Odi-sé Avocats for their review of, and comments on, this article. I also wish to thank Marie-Laure Gassier, Senior Advisor Business Jets and Yachts Finance, BNP Paribas; Sabrina Glimcher, Senior Counsel, Global Jet Capital, Inc.; Alexandre Piffard, Financing & Treasury, Dassault Aviation; and other individuals who wished to remain anonymous, all of whom graciously took their time to entertain my questions as I prepared this article.

Reprinted with permission from Corporate Jet Investor.

The Law Offices of Eric Lewin
Level 1, Devonshire House | 1 Mayfair Place | London W1J 8AJ | United Kingdom | www.ericlewin.net