LEGAL COLUMN

Deal – or no deal?

In this issue, Len Kirsch offers advice on how to get two contracting parties to agree.

The Art of the Deal is a term invariably used in major transactions, but in reality the concept can be applied to all areas of commercial law, especially when aviation services are involved. The term means arriving at an understanding with a party whose interests differ from yours, and implies compromise. Often there are important interests on both sides (or more than two sides in multi-party matters), and usually different, sometimes contrasting personalities, are involved.

The key to reaching the Art of the Deal is for each party to assess which goals are critical, which goals are worthy but not critical, and which goals can be given up at some point in negotiations because they are in the scheme of things, and are not really important. Amongst the long-accepted methods used in negotiations that sometimes work (but not always), are the following.

Never negotiate against yourself; do not make negotiations personal (where winning has more to do with satisfying one's own desires than what is necessary to reach a goal); remember that listening is sometimes more important than talking; show patience; treat everyone with respect; understand what may be critical to the other side or sides; understand the numbers and if relevant, the tax consequences; if you make a commitment, remember that once you renege, you lose credibility; do not make promises you cannot keep, or threats you cannot carry out; and lastly, bear in mind that winning is not a zero-sum game (this latter means you do not have to win every point).

Contract negotiations involve agreeing on terms and conditions that will govern the provision of services or supply of goods. Key elements of a service contract are term, price, service levels and indemnification. We know that airlines want short terms, low prices, high service levels and often try to limit Article 8 of the SGHA. A ground handler wants terms as long as possible, but at least long enough to amortise any investment; prices as high as possible but mostly fair pricing, which will allow it to recover expenses; service levels, which are reasonable given the manpower paid for; and either Article 8 indemnification or lesser indemnification for narrowbody aircraft.

The first thing you notice is that the interests of the airline and the handler are not completely contradictory. The key is to demonstrate why a term longer than 60 days is necessary; how prices are set; what type of service level can be promised based on price; and why the indemnification provisions are a way of ensuring that there is little double insurance. Of course, this does not always work, and the handler is left with trying to get the best deal under the circumstances.

Acquisitions involve sellers seeking the highest price with the most advantageous tax consequences and with the fewest indemnities. In the US there is less risk for the buyer in an asset purchase than in a stock sale, but the tax consequences for the seller are much more severe in an asset sale. Here, money can be used to pay the difference in tax consequences if the buyer has reason to be concerned about the liabilities inherited in a stock sale. When price is at issue in an acquisition, one way to resolve differences is the use of a more extensive earn-out, which offers a seller more money if profits continue or improve.

Where few people associate the Art of the Deal with litigation, the reality is that commercial litigation is often a means for a party to improve its negotiating position. This is because in most systems of jurisprudence, commercial litigations are often settled before trial. While both sides do not necessarily have to walk away unhappy, obviously if a win-win resolution was possible, the matter would not have ended up in litigation.

When assessing settlement, the key issues are whether the litigation can be summarily dismissed by motion and if not, what may be the chances of success at trial. The cost of taking a case to trial is a critical element in all this. And it's worth remembering, no matter how good the facts are, and no matter whether the law is really on your side, going to trial is always a gamble - and that, too, must be considered in the final analysis.

McBreen & Kopko
500 North Broadway
Suite 129
Jericho, New York 11753
Tel. (516) 364-1095
Fax (516) 364-0612
Mobile (516) 318-5991
LKirsch@mklawnyc.com
www.mklawnyc.com