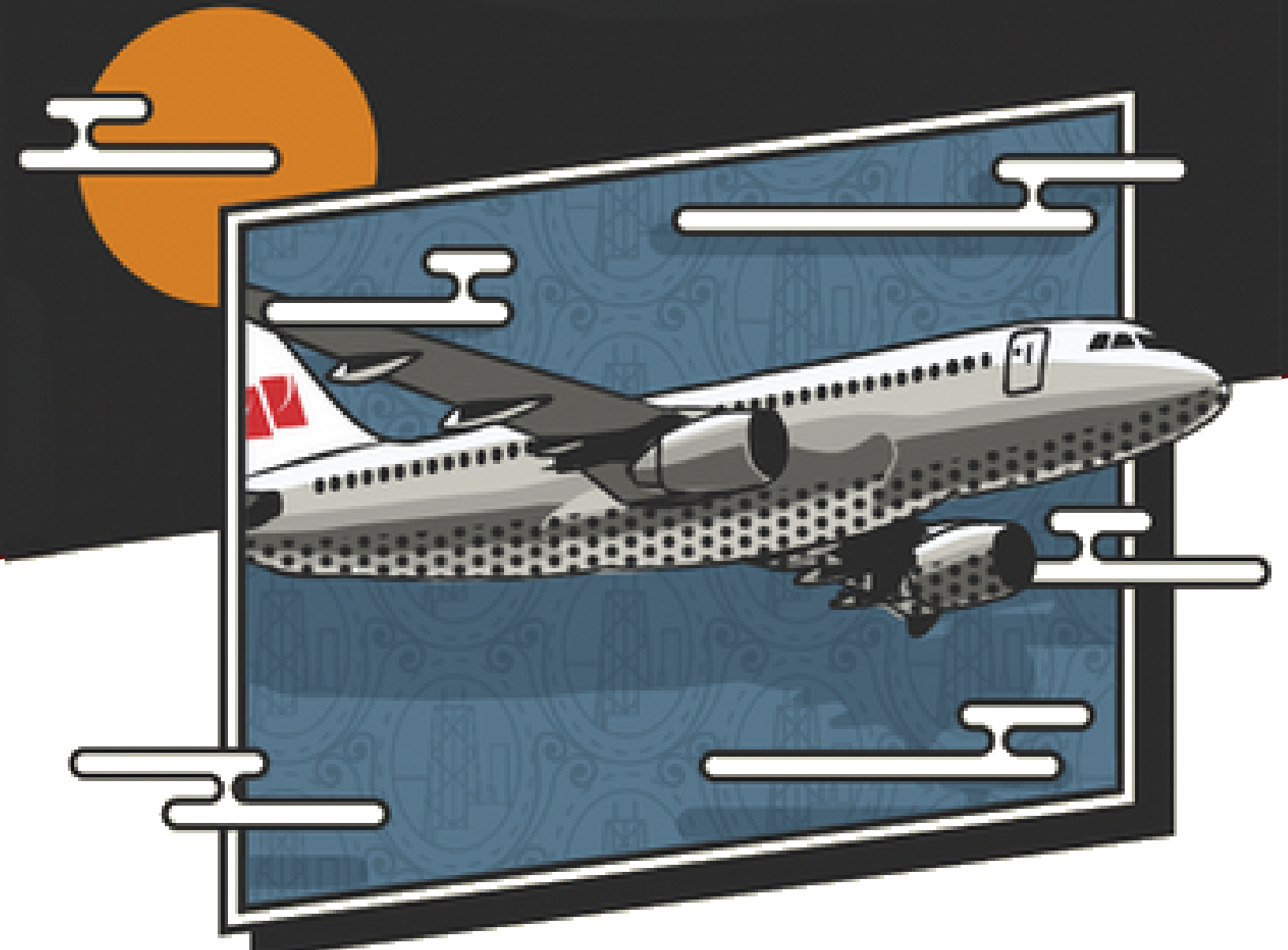


40th Annual
Airport Law Workshop



Session #14

Negotiation of Private Investment in Airports

Speakers

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Not Business As Usual

Distinguishing types of private investment:

Where do challenges arise?



Alternative forms of private investment

What makes some forms of private investment different, and why that matters?

Certain types of private investment in airports are well established

Other forms of private investment raise novel issues

- Limited prior airport experience
- Limited relevance of international examples
- Lack of individual airport sponsor's experience with such forms of investment



Alternative forms of private investment

Why deviate from the norm?

Factors to consider

- Long term and project goals
- Funding and finance plan
- Project-specific considerations, risk, and complexity
- State of design
- Schedule
- Legal and regulatory environment
- Market interest

Areas for caution

- Copying other airports
- Funding gaps and 'free money'
- Inability to advance design or manage complexity
- Blindly following market advice
- Not considering legal and regulatory constraints

Alternative forms of private investment

Examples of private investments in airports

Airside / aeronautical

- Terminal development
- Airport privatization (AIPP and non-AIPP)
- Airside cargo

Landside / non-aero

- ConRACs
- Ground transportation and parking
- APMs / rail and transit connectors
- Landside cargo
- Hotels

Formula for Success

Developing the context of the deal:

What are the key elements of innovative private investments?



Understanding the context

Key first-order lingo and common deal structures

Structures

- Public-private partnership (PPP / P3) vs. Privatization / monetization
- Progressive project delivery & PDAs
- Alliance contracting / integrated project delivery (IPD)

Key Commercial Terms

- Revenue-risk vs. payment for performance
- Revenue-sharing
- Equity commitments and economic returns
- Bankability
- The Financial model
- Best value vs. value for money

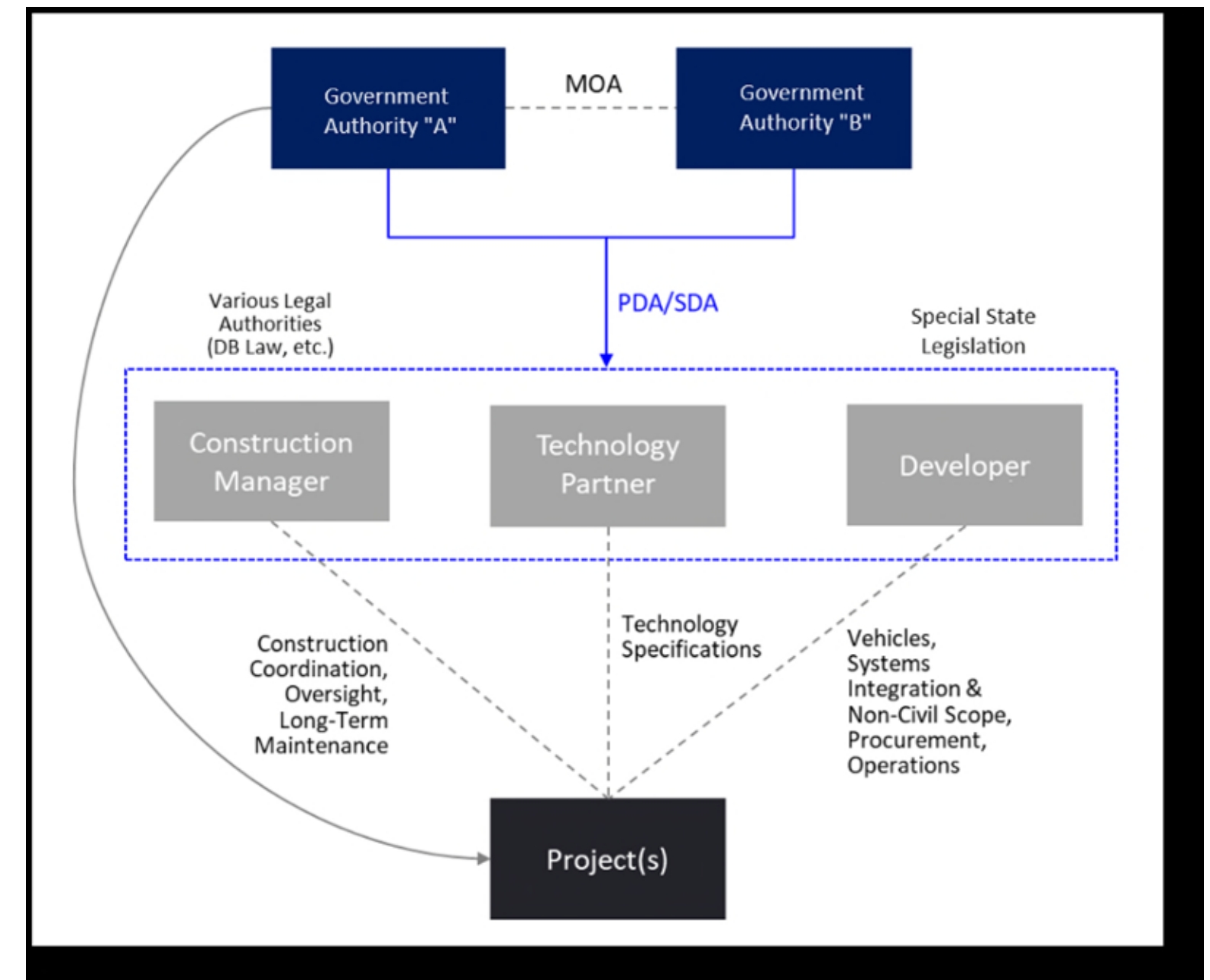
Understanding the context

Walk-through common deal structures

Apply label to project, not project to the label

- Terms and concepts are flexible
- Compare relative to a baseline
- Ask:
 - What are we doing, and why?
 - What is / are we are deviating from?
 - Can we do this?
 - What details are left to work out?

Real world examples



Alternative forms of private investment

Who is involved, and what is their motivation?

Need to start with understanding the private counterparties

- Identity shapes motives and expectations, willingness to engage
- Not (just) about the project or facility – deal structure also accounts for counterparties and the plan of funding and finance

Key parties to understand

- Infrastructure owner / developers / operators
- Infrastructure funds
- Non-conventional real estate developers
- Contractors as investors
- Private lenders

-and their advisors

Alternative forms of private investment

Seeking guidance (from people)

The role of advisors

- Categories of advisors – technical, financial, legal etc.
 - Integrating an existing advisor team (e.g. bond counsel)
- Scope of work and timing
- Listening and advising as a two-way street
- Counterparty advisors
- Continuing importance of internal capacity

Alternative forms of private investment

Seeking guidance (from documents)

The role of precedents

- Standard forms and templates
- Prior deals
- Precedent structures vs. precedent documents
- Risk / reward balance when following precedent
- Precedent vs. cutting edge
- Looking own precedents and standard practices

This **LEASE & DEVELOPMENT AGREEMENT FOR THE TWEED-NEW HAVEN AIRPORT** (including Annex A and each Schedule and Exhibit hereto, as amended from time to time in accordance with its terms, this “**Agreement**”) is made and entered into as of this [] day of [____], 2022 (the “**Effective Date**”) by and between (a) the Tweed-New Haven Airport Authority, a political subdivision of the State of Connecticut existing under the laws of the State of Connecticut and having its principal office at 155 Burr Street, New Haven, CT 06512 (the “**Authority**”), and (b) The New HVN LLC, a Delaware limited liability company having its principal offices at 45025 Aviation Drive, Suite 100, Dulles, VA 20166-7524 (“**Lessee**”).

RECITALS

WHEREAS, the Authority operates and manages Tweed-New Haven Airport (the “**Airport**”) pursuant to the provisions of Connecticut General Statutes, Sec. 15-120g *et seq.*, as amended, and holds the Airport pursuant to that certain Amended and Restated Lease and Operating Agreement by and between The City of New Haven, a municipal corporation, duly organized and validly existing under the laws of the State of Connecticut (the “**City**”) and the Authority dated [____], as amended, amended and restated, supplemented or otherwise modified from time to time (the “**Master Lease**”);

WHEREAS the Authority is the FAA sponsor of the Airport for purposes of federal regulation, federal grants-in-aid and obligations that attach to a federally obligated Airport, and nothing herein is intended to modify the Authority’s sponsorship status;

WHEREAS, the Authority and Lessee wish to enter into this Agreement to sublease to Lessee the Leased Property and to grant the right and obligation to Lessee to develop, operate, maintain and manage the Leased Property;

A Win-Win That's Not Also A Loss

Strategies for mitigating risk:

What are best practices for delivering successful private investment transactions?



Best practices

Words of caution

General challenges

- Failure to ask questions
- Acting without understanding
- Unbalanced risk allocation
- Poor economic bargain
- Overreliance on precedent
- Insufficient focus on the details
- Inattention to stakeholders and partners

Pre-procurement challenges

- Deciding on a structure
- Identifying sources of authority
- Timing of approvals, funding, design

During procurement

- Internal and advisory team issues
- “Wrong” shortlisting / award criteria
- Missed opportunities for feedback

Best practices

Setting the table

Ground rules

- Competitive procurement vs. negotiated deals
 - Not a binary distinction
 - Competition can provide more, or less, room to negotiate
- Determine how key pricing factors will be determined

Best practices

Private sector considerations

Market expectations

- Clarity on shortlisting and award
- Stipends / payment for work product
- Exclusivity
- Proposal security
- Confidentiality
- One-on-ones and response to comments
- Due diligence
- Political risk



Best practices

Understanding and negotiating novel terms

Economic terms

- Permissible and impermissible sources of revenue
- Rent and revenue-sharing
- Refinancing gains
- Equity return targets
- Use of financial models and “no better, no worse” concepts
- Responsibility for financing costs
- Market-value based termination compensation
- Off-ramps for failing to “pencil”
- Non-competes

Best practices

Understanding and negotiating novel terms (cont'd)

Risk Allocation Terms

- Relief events / adverse actions
- Owner-retained liabilities
- Site conditions
- Permitting and approvals
- Construction
- Design

Technical Terms

- Performance vs. prescriptive
- Warranties and other remedies
- KPIs / flexibility

Termination and Handback Terms

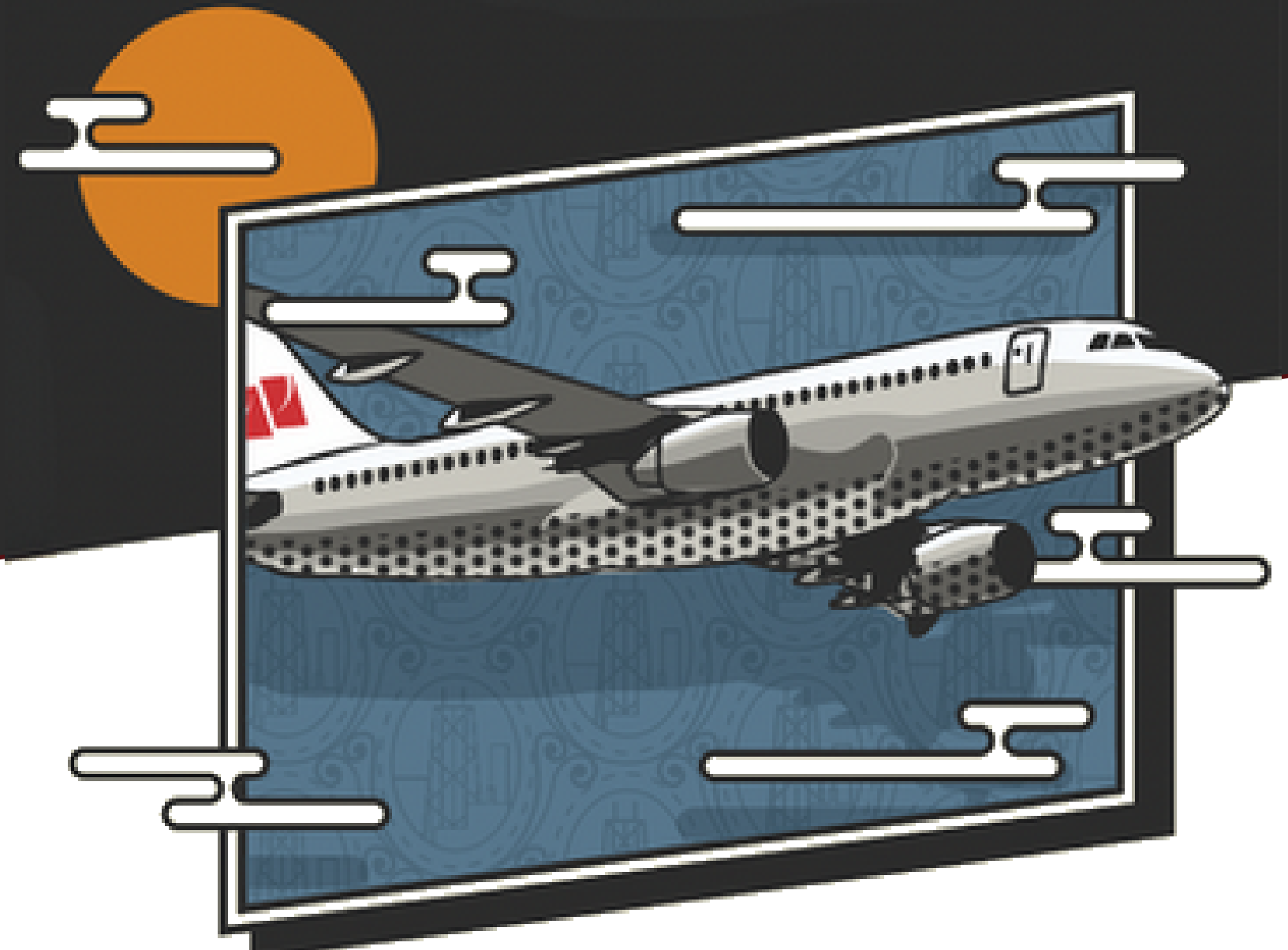
- Compensation and valuation
- Off-ramps
- IP, work product, and exclusivity
- Asset conditions

Best Practices

Seven rules for the practitioner

1. Filling in a structure chart is an active, not passive, exercise
2. Don't ignore technical matters
3. If you try something new, trust but verify
4. Remember some poor soul is going to have to apply this
4. Try it before you buy it
5. For private counterparties, with great power should come great responsibility
6. Believe in your ability to affect outcomes

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QUESTIONS?