Aircraft Purchase Agreements: Devils Lurk in the Details

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In a perfect world, the seller or buyer of a used aircraft would hire an experienced aviation attorney to draft a purchase agreement. The other side then negotiates modest revisions, and then everyone signs. That perfect world rarely exists. I'm frequently asked by fellow owners to review purchase or sales contracts that were drafted by others, and I'm still amazed by some of the dangerous language I find out there. Equally important is what is often missing in a purchase agreement to protect the parties from a financially painful experience.

Sellers: Limit Your Liability

Sellers have two simple objectives when selling an airplane: 1) Get the money; and 2) Never hear from the Buyer again. Or dare I include, subsequent buyer(s)? To help avoid any lingering liability, every seller should have this essential (or very similar) language in ever sales contract: ***"Except as provided otherwise in this agreement, this Aircraft is sold 'as is'. There are no warranties, either express or implied with respect to merchantability or fitness for a particular purpose applicable to the Aircraft or any installed equipment."*** Further, to ensure there are no inferences that the Seller was supposed to explain any part of the aircraft or its systems to the Buyer, also add: ***"Buyer (or its designated professional pilot) has the skills, training, and experience necessary to safely operate the Aircraft. Seller is not providing any transitional training for the Aircraft of any kind."***

Even though the basic rule of *caveat emptor* (let the buyer beware) usually prevails, it's better to be safe than sorry. As a seller's attorney, I still recommend disclosing any known defects, and answering truthfully any questions about the aircraft's known damage history. Having said that, there is one buyer's question that no seller should ever attempt to answer: *"Is this aircraft airworthy?"* The answer to this question is for the Seller to tell the Buyer: *"Ask your mechanic when he does the pre-buy exam"*. The last thing any seller should represent (either orally or in writing) is that their aircraft is "airworthy", as this has a distinct legal meaning that could create a

legal representation which will come back to haunt a seller. Millions of dollars in litigation have been spent on buy-sells gone wrong over what the term "airworthy" means.

With regard to a pre-buy examination, a seller's biggest fear is: What might the buyer's mechanic find? More importantly, if the Buyer doesn't like the inspection results and walks from the sale, what happens next? When a mechanic starts tearing apart an airplane for the pre-buy, it legally grounds the airplane until it is returned to service by a mechanic's signature. What if the mechanic discovers an airworthiness issue and won't sign it off for a return flight home? For the seller's protection, there should be a restoration clause, something to the effect of: ***"If Buyer elects not to proceed with the sale for any reason, Buyer is responsible for restoring the aircraft to its pre-inspection condition at the K_____ (Seller's) airport" within __ days of the commencement of the examination."*** Without this clause, the seller may have to go hire his own mechanic at some unknown airport just to get the bird home.

Other critical language that every seller needs is an integration clause, something to the effect of: ***"This Agreement constitutes the entire understanding among the parties hereto with respect to the subject matter hereof and supersedes any prior agreements or understandings, written or oral, with respect thereto. No statements, promises, or inducements made by any party (or their agents) to this Agreement, which are not contained in this written contract shall be valid or binding."***

Granted, this clause won't completely protect a seller from a claim of fraudulent concealment, but at the very least, it gives cover to a buyer's claim that: *"But the seller promised me the plane was…"*

Buyers: Keep the Seller Honest

When purchasing a used aircraft, buyers should seek certain reasonable representations from the seller to ensure some semblance of transparency in the transaction. For this reason, I prefer a couple of key clauses when representing buyers:
"Seller represents that all airframe, engine, and propeller logbooks are true and correct to the best of Seller's knowledge"; and
"No material maintenance or repairs have been performed on the aircraft during Seller's ownership which have not been entered into the aircraft logbooks".

As for the pre-buy examination itself, a buyer should never be required to use the seller's mechanic, and furthermore, should not use any mechanic who has worked on the aircraft before. Such a mechanic would have an inherent conflict of interest to inspect his own prior work, and not surprisingly, will be reluctant to report his own mistakes. Buyers should be free to use any

mechanic of their choice for the pre-buy, including one a reasonable distance from the aircraft's home base.

Deposits and Liquidated Damages

Every purchase agreement should contain a provision for the Buyer to place a good faith deposit (usually 5%) as security before moving the aircraft for a pre-buy examination. The deposit starts out as fully refundable, and then becomes non-refundable after the Buyer accepts the aircraft following the pre-buy. For reasons I cannot comprehend, I still see some buyers paying a deposit directly to a seller or their broker. Never! All aircraft transactions should use a reputable aviation escrow company to handle all funds, including FAA sale documents and a thorough title and records search.

Sometimes, even after an aircraft is "accepted", the Buyer fails to proceed with closing. This is no time for a Seller to start calculating what their actual damages might be. Instead, the Buyer's deposit should constitute liquidated damages: ***"Once Buyer has accepted the Aircraft following the Examination, and if for any reason other than a material breach by Seller, the Buyer fails to purchase the Aircraft as specified in this Agreement, Seller shall retain Buyer's Deposit as liquidated damages, and not as a penalty."***

What happens if there is a dispute?

Unlike used vehicle transactions in which the buyer and seller are usually close to each other, many aircraft buy-sells are hundreds (or thousands) of miles apart. If one party has a dispute, where shall it be heard? The general rule is that a lawsuit must be filed in the defendant's home court, which might be cost prohibitive for the other party. To streamline things and provide a level playing field, an arbitration clause with this basic language is helpful:

"All disputes concerning this Agreement and the sale of the aircraft shall be decided by arbitration, in accordance with the commercial arbitration rules of any alternative dispute resolution service agreed upon by the parties. All parties shall initially advance an equal share of the costs of arbitration (excluding each parties' own attorneys' fees), with the arbitrator awarding all costs (including attorney fees) to the prevailing party. The decision of the arbitrator shall be rendered within thirty (30) days after the submission of all evidence from all parties to the arbitrator for decision, and shall be binding upon the parties. If necessary a judgment upon the decision rendered by the arbitrator may be entered in any court chosen by the prevailing party. All mediations or arbitrations shall take place via videoconference without any physical appearance by the parties. Nothing in this section shall prohibit any party from seeking injunctive relief from any court to preserve the status quo pending arbitration.

While arbitrations are not free, the ability to appear via video or telephonically takes away the distance barrier of the initiating party is far away. Also, without an express provision for

attorney fees to the prevailing party, each side must pay their own legal fees win or lose. This causes many legitimate claims to become worthless when the cost of brining an action exceeds the potential recovery.

Brokers: No two are the same

There are a handful of reputable brokers who specialize in PA-46 aircraft, are active within MMOPA, and using them provides a higher level of professionalism to the entire transaction. However, there are still many lesser known brokers who insist that everyone uses that broker's own forms, which often contain very dangerous language: ***"In the event of any dispute, both the buyer and seller shall indemnify the broker from any claims made by any other party"***. Seriously? What if the broker was the one who caused the problem? While I respect any business that seeks to limit its exposure to liability, these clauses should never be agreed to. If the broker won't take it out, find another one.

LLCs and the Disappearing Act

It is common for aircraft owners to hold title in a Limited Liability Company, especially for liability protection when someone else is operating the aircraft. However, when the aircraft is sold, most of those single-purpose LLCs are dissolved as they no longer hold any assets. Likewise, many Buyer LLCs are newly formed with no assets of any kind. So, a purchase agreement between these entities could very well leave one side with no real remedy in the event of a dispute. For this reason, it is strongly recommended that all purchase agreements by personally guaranteed by the entities' principals with language such as: ***"Notwithstanding the status of any Buyer or Seller as a legal entity or trust, the signatures below are binding on the named parties as well as in the signatories in their individual capacities. These guarantees are limited to the parties to this Agreement; nothing herein shall be construed as an expansion of liabilities to any third parties."***

Buying and selling a used aircraft is never simple, and buyers and sellers alike should watch for certain legal landmines in their contracts.

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