

Business And Legal:

Not always one against the other.

I had the great pleasure of sharing a podium recently with a very skilled aviation tax attorney, Keith Swirsky, at the NBAA Regional Forum in Washington, D.C. The topic: 'Purchasing an Aircraft, The Contracting Process'. A very powerful topic, it was made even more powerful by looking at it from two very distinct and important sides: legal and business.

As buyers and sellers, the idea of creating offer letters and contracts is always somewhat daunting, since they're never created in a vacuum, and they must be created to account for both the legal and business needs of a transaction. Often, the buyer, or their representative, will create the Offer Letter or Letter of Intent (LOI), negotiate for some period of time back and forth, and then hopefully strike a meeting of the minds. This meeting is usually focused on business points such as price, terms, condition of the aircraft at closing and the deposit. The LOI is usually short, sweet and to the point.

Once completed and signed by both sides, the next piece is the Purchase Contract. It is usually at this stage that an aviation attorney is introduced to the process. The attorney is often given short notice and business terms that do not blend easily into the contract. Usually, at the time of drafting the Purchase Contract is when most feel the need to engage the attorney. Of course, there is no bad time to introduce the legal strategist into the process; there are just much better times to embrace this critical team member.

In this collaborative effort between brokers and attorneys, a careful balance needs to exist between legal issues and the reality of selling that legal issue to the other side. Hard work and constant communication between the client, the broker and the attorney will provide an outcome that is correct in its legal needs, yet thoughtful and saleable to the other side. Survivable reps and warranties are a perfect example of areas of collaborative consideration.

As a buyer, you would want everything to survive closing and as a seller there are only limited reps and warranties that will be

allowed to survive. Understanding the implications from both the legal and business side will be the key to creating this section of the contract. There are several areas that will require this kind of effort between all team members.

The attorney will create language that speaks to precedent conditions for closing. Words like "airworthy and system functioning" may be used here. The inspection facility that is chosen, however, may not use those words to describe deficiencies. The broker needs to help the attorney craft a document that incorporates the language that matches the deal. Gulfstream, for instance, does not tell you if a discrepancy is airworthy or not. It describes items as needing to be corrected to "return the aircraft to service." So the team marches on.

Actually, our entire speech was as much about team building and collaboration as it was about process and details. As I said in the speech, I often try to come into a new selling situation and act more like an eye doctor than a broker, working to give the other side peripheral vision so they can begin to see that our side is on their side, rather than opposing them.

Additionally, there are certain myths that pertain to attorneys, from the broker's perspective and myths about brokers from the attorney's perspective. We started our speech by joking about them. I'm sure you have heard them all, but you might not have ever considered them myths. A few of these myths follow:

ATTORNEY MYTH #1:

Lawyers are deal breakers.

This myth is why many wait so late to embrace the attorney into the process. The fear of adding the legal side to the Offer Letter, possibly scaring off the seller with "mumbo jumbo," keeps many brokers from suggesting that the attorney actually write the Offer Letter and in fact, add critical legal pieces to the LOI.

Introducing the attorney at this stage, however, prevents the later introduction of

foreign concepts that may be rebuked and create what sellers might feel are new terms.

ATTORNEY MYTH #2:

Attorneys are OK with using contract templates

provided by brokers from past deals.

Wrong again. Attorneys are not pushing back on this one because they want to charge the client more; they are pushing back because templates from past deals are just that. No two deals are alike. They have different state tax considerations, inspection criteria and many other components that make fitting a square peg into a round hole cumbersome and ineffective.

BROKER MYTH #1:

I work for you, Mr. Buyer, but the seller is paying my commission.

How could anyone possibly work for one side while being paid by the other side? That could be the definition of a spy. In fact, the greatest reason this occurs is not because of rogue brokers trying to work both sides, but because often buyers suggest to the broker that they get paid by the seller.

BROKER MYTH #2:

Brokers always do "back-to-back" deals. It is just what is expected and accepted.

Buyers should be sure that when doing a deal, they're dealing through their broker with the real owner of the aircraft. Back-to-back deals do not give you the contractual protection you must have.

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