

Usual And Customary: Is there such an expectation?

Today there are an amazing number of first time buyers coming into our market. These buyers are, of course, successful business people who have focused on our industry for all the smart reasons: efficiency, safety, creating competitive edges in their respective businesses and creating a level of service for their respective clients that is superior to their competition.

Having said that, these newcomers arrive on our doorstep with expectations of business practices that are borne typically from their own businesses or prior dealings in other transactional type deals, such as real estate or business acquisitions.

In most other types of transactions in other industries there are usual and customary practices and issues, including: who pays the commissions, how much the commissions are, and who represents whom. In aviation, these are only a few of the areas where usual and customary come to mind. With aviation deals, however, usual and customary practices are not the standard and some could liken us to the Wild West! Welcome to aviation.

I certainly do not want to insinuate in any way that we are not an industry with high ethical standards or solid legal footing. I just mean that the idea of getting things done a certain way based on usual and customary practices does not exist here, like in other business segments. For us, it is all a negotiation. Here are a few examples:

Let's start with the basic issues that deal with commission. First, who pays the broker's commission? I am still amazed that very often, I will get a call from a broker representing a buyer who asks my selling client to pay his or her commission. This brings up another issue that is not usual and customary in a purchase contract, and that is what the commission amount will be. If your broker is accepting a commission from the other side, at a minimum you should have the commission amounts disclosed in the Purchase Agreement.

Additionally, who pays to move an aircraft to a pre-buy or delivery location? Again, there is no right or wrong answer here. It is strictly a business point that tends to go

either way. Demonstrations are almost always paid by the buying side, but there are some exceptions if, after the demonstration, the prospect does in fact decide to purchase the aircraft. In some cases this continuance of a deal based on the demo may make the selling side waive the demo fees. This is especially true with new aircraft manufacturers.

Preparation of the Purchase Agreement is another point of negotiation, rather than an usual and customary formula. It really just comes down to who remembers to ask for the right to present the first draft. Typically, if both sides are using aviation attorneys, the documents can be worked by either side for a successful agreement. It is funny how the documents used today look so much alike, regardless of who presents them. While there are buyer or seller slanted nuances, a few back and forth volleys will result in agreements that take on a very balanced appearance.

To say that there are no usual and customary practices in the aviation industry would be inaccurate, yet even those usual and customary practices are typically packaged with mutual consent. For instance, in terms of the location of the pre-buy inspection, the buyer typically chooses this location with mutual consent. A seller would not want the plane taken to a shop that was not an authorized service center for that type of plane. The scope of the inspections is also typically outlined by the buyer, but is with mutual consent of the seller. It is reasonable for a buyer to review and understand upcoming inspections and incorporate those in a work scope for the pre-buy.

Further examples are test and repositioning flights. These flights are typically billed out at a direct out-of-pocket expense, or twice fuel, plus reasonable pilot expenses. In fact, this standard is actually a mandate from the FAA to keep the reimbursement in line with operational standards previously set by the use of the aircraft. If an aircraft is not on a 135 certificate, any reimbursement in addition to the one that is out-of-pocket or twice fuel is not considered a reimbursement and could be considered a charter rate, which would have serious consequences to the owner. An aviation attorney should be

consulted to determine appropriate charges.

Deposit terms are fairly well-defined in our industry. Typically, if a deposit is sent to the title company, it is held on a refundable basis only. It can only be held on a different basis upon the delivery to the title company of a Purchase Agreement signed by all parties. Only then will the disposition of the deposit be changed to match the agreed-upon terms of the transaction. One should insist on using a qualified aircraft escrow company to hold deposits and make filings with the FAA.

Typically LOIs are non-binding and are followed up with a binding Purchase Agreement. This can, of course, have exceptions if the LOI stipulates a different expectation. Aircraft are typically not removed from the market based on a signed LOI. One should be very clear as to the binding nature of the LOI so as to not be disappointed by an outcome that is different from the expectation.

These business points need to be carefully considered when formulating a transaction. The collaboration between the aircraft broker and the aviation attorney is key in the development of both the LOI as well as the final agreement.

Use these professionals wisely so as to create representation that provides the results that are expected. Nothing should be taken for granted or considered covered by usual and customary practices. There are best practices followed in our industry, they are just negotiated.

› Jay Mesinger is the CEO of J.Mesinger Corporate Jet Sales, Inc. He is on the Associate Member Advisor Council of the NBAA and the Duncan Aviation Customer Advisory Board. He also hosts the Aviation Leadership Roundtable found at www.jetsales.com ■

