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Deal or No Deal?

Practical Problems to Consider when Negotiating a LOI for the Purchase of an Aircraft

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It is good to hear happy stories about the closing of smoothly conducted transactions. Perhaps there is more to be learned, however, from unhappy stories about failed transactions; the ones that end in litigation.

Many known and unknown factors go into a transaction between strangers to buy and sell an aircraft. These strangers are represented by additional strangers, the brokers and title service and escrow companies. The parties have conflicting objectives, obtaining a high price or a low price. Brokers seek exclusive listings and, together with sellers, nonrefundable deposits and, sometimes, other compensation. Purchasers seek to retain control over their deposits. They view deposits as down payments on a purchase price, not as potential windfalls for the other parties. Escrow companies learn from disputes they are sometimes drawn into, and periodically update their terms and conditions in an effort to avoid liability.

There are recurring disputes in aircraft-related transactions that give rise to litigation. These disputes, in turn, afford lessons to be learned by all parties. Most litigation results in settlements, but frequently only after the parties have incurred heavy disappointments, unwelcome costs, and lengthy delays. In the case studies below, purchasers are referred to as "Purchasers", sellers, as "Sellers", escrow agents as "Escrow Company," and no actual parties are identified. Letters of Intent are "LOIs", and Aircraft Purchase and Sale Agreements are "APAs."

The disputes most often concern the ownership of deposits. Purchasers discover that their sizable down payments are caught up in a maze of competing claims. The "ownership right" to their money is unexpectedly in question in a game they did not realize they were playing, subjecting them to traps of which they were unaware, or which they had discounted.

The resulting court filings contain allegations of improper conduct and practices that follow certain patterns. There are regularly allegations of undisclosed conflicts of interest, bad faith, and breaches of fiduciary duties. Conspiracies to commit fraud are also alleged. Signature pages are presented

without adequate explanation of what has been changed in the text of a document. Often, the undisclosed edits convert deposits from refundable to nonrefundable.

Many cases also involve undisclosed back-to-back sales of multi-million-dollar aircraft, featuring undisclosed profits earned by middlemen, in addition to agreed agency fees. Purchasers discover they overpaid by hundreds of thousands, if not millions of dollars. There are allegations of abuse of the trust of Sellers by trusted persons who purchase an aircraft only to immediately resell the aircraft in a transaction undisclosed to the original seller for vast sums more than what the trusted person paid the seller.

Purchasers and Sellers are also sometimes duped into agreeing to the arbitration of disputes with ghost companies in faraway jurisdictions and under foreign law. In such cases, the cost of seeking to obtain justice and retain a deposit may be so high that a party's best option is to forfeit a large sum of money in a settlement rather than to incur costs, uncertainties and delays.

The following "lessons learned" are based on actual cases. In each instance, ask yourself, if you were the Purchaser, and you saw this potential "train wreck" coming, what provisions would you have included in the letter of intent to try to avoid such a result.

While the reader will certainly derive his or her own insights from the following stories, the following "practice points" are paramount, from a Purchaser's point of view:

1. Expressly state in the parties' letter of intent that the Purchaser's deposit is not to stand as the deposit for another transaction involving the subject aircraft, or for any other aircraft involved in any other transaction.

2. Expressly state in a transaction-specific escrow agreement (or in an amendment to the involved Escrow Company's standard terms and conditions) that the Purchaser's deposit is not to stand as the deposit for any other transaction involving the subject aircraft, or for any other aircraft in any other transaction.

3. A Purchaser should obtain satisfactory proof of what legal entity owns an aircraft at the outset of a transaction, prior to executing a letter of intent to purchase the aircraft. Ideally, such proof would include a copy of the bill of sale conveying title to the aircraft to the legal entity from which Purchaser is now to purchase the aircraft. A Purchaser should consider obtaining a title search report for an aircraft prior to executing an LOI, or obtaining copies of bills of sale going back to the original purchase of the aircraft from its manufacturer, or, at least, from a point in time far enough back to give the Purchaser confidence that it understands the history of ownership of the aircraft. The Seller should currently own an aircraft at the time an LOI is executed to sell the aircraft to a Purchaser. Similarly, a Purchaser should obtain information about prior changes in the beneficial ownership of a legal entity that owns an aircraft the Purchaser desires to acquire.

4. If a "back-to-back" deal is involved, require each Purchaser in each transaction to post its own deposit.

5. If possible, do not agree to dispute resolution by means of an arbitration proceeding in a jurisdiction outside of the United States. Instead, expressly state that any and all disputes are to be

resolved by the district court with jurisdiction over the involved Escrow Company, applying local law.

6. Seller and Purchaser should both be party to the escrow agreement, rather than the Seller's being a third-party beneficiary of an agreement between Purchaser and an Escrow Company.

7. Place the entire deposit with an Escrow Company. Do not split the deposit between a Broker and an Escrow Company. In this manner, only one legal proceeding should be required to recover a deposit in the event of a dispute.

8. Provide that, if aircraft records and documents are not to be delivered for inspection at the same time as the subject aircraft, all such records and documents must be made available, for example, not less than three or more weeks prior to a planned outside closing date. If the records and documents are not delivered by the agreed date, the outside closing date is automatically extended by the same number of days comprising the delay.

9. Alternatively, whenever possible, do not agree to an outside closing date, but instead agree that the closing will only occur when the conditions to closing have been satisfied.

10. Do not agree to "material" or "substantial" compliance by Seller with a provision of the LOI or APA, or for delivery of "material" records for inspection. Such needlessly opaque qualifiers only serve to invite controversy.

11. Require a statement in an LOI that no FAA Forms 337 ever were filed with the FAA regarding the subject aircraft, or, when such filings have been made, require production of any FAA Forms 337 that were filed prior to execution of an LOI. Form 337's may contain good news and disclose that improvements were made to an aircraft. Foreign aircraft do not have Forms 337s filed with the FAA, so associated tags for airworthiness should be requested, for example, an EASA Form 1 Authorized Release Certificate which is approximately equivalent to an FAA Form 8130-3.

12. Attach a detailed specifications sheet to an LOI that is an exact copy of the specifications and advertisements posted by Seller's aircraft Broker. Provide that any deviation between the actual condition and history of an aircraft and its advertised condition and history shall be a breach of representations made by Seller and that, in the event of such breach, Purchaser is entitled to the immediate refund of the entire deposit. Remove any qualification from a specifications sheet that a Seller is excused from responsibility for the accuracy of information because a Purchaser may have an opportunity to discover discrepancies between the facts presented in a specification sheet and the actual condition of an aircraft.

13. Include a provision that, if an APA is for any reason not executed by the parties by a date certain, or if an aircraft is not accepted by the Purchaser after a visual or technical inspection, the Purchaser is entitled to a refund of the entire deposit, upon an agreed number of days after expiration of the deadline, and the Escrow Company shall be obligated to return the deposit to the Purchaser and not to interplead the money into a court proceeding.

14. Amend the Escrow Company's terms and conditions, and/or enter into a separate escrow agreement, providing that the deposit shall be returned to the entity that made the deposit if the Escrow Company is not in receipt of a fully executed APA by a date certain. Do not agree to an Escrow Company's terms and conditions that it may itself elect whether, and to whom, to return a deposit.

15. An LOI should identify the legal entity that is to pay a deposit on behalf of a Purchaser and provide that, if a deposit is paid into escrow from a source other than directly from the Purchaser, the depositor should be party to an escrow agreement that subordinates the depositor's remedies to those of the Purchaser in the APA, or (ii) there should be an assignment of ownership of the deposit from the third party depositor to the Purchaser, and an acknowledgement by the depositor that the deposit may only be recovered by depositor if Purchaser would have been able to recover the deposit had Purchaser paid the deposit.

16. A LOI should provide that it is non-binding and that the deposit is refundable to the Purchaser within an agreed number of days after the deadline to execute an APA has passed.

17. The Purchaser alone shall decide whether to execute a Technical Acceptance Form based only upon a written inspection report and within an agreed number of business days after receipt of such inspection report.

18. The Purchaser and its financing company must have an escrow agreement with an Escrow Company to which they send purchase money, to a particular account confirmed by the Escrow Company, and the agreement must require written authorization from both the Purchaser and its financing company prior to any disbursement of money by the Escrow Company. No course of dealings and past practices should provide an exception from the requirement for such dual written authorization.

19. Append the aircraft specifications as advertised to the LOI and provide for an inspection by a knowledgeable representative prior to execution of an LOI or APA.

20. Purchaser should consider establishing a dual signature requirement for documents to be signed by its shareholder and director, and implement a policy prohibiting the execution of any document while he or she is hospitalized, on medication, or otherwise impaired or potentially impaired due to poor health or otherwise unforeseen circumstances.

21. An LOI should provide a short timeframe for the return of an entire deposit after a finding of Material Damage, as defined.

22. The Purchaser's LOI should state that Seller and Purchaser are each solely responsible for any Brokerage fee and require the disclosure of each party's Brokers and the specific nature and extent of the respective Brokers' interests in both the subject transaction as well as any other transaction involving the subject aircraft.

Case Studies

1. The Failure of Three "Back-to-Back-to-Back" Purchase and Sale Agreements.

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Seller and Purchaser One executed an APA ("Agreement One") for the purchase and sale of an aircraft.

In the same month, Purchaser One, as Seller, and Purchaser Two, as Purchaser, entered into another APA ("Agreement Two") for the purchase and sale of the same aircraft.

Shortly thereafter, Purchaser Two, as Seller, entered into another APA ("Agreement Three") with Purchaser Three, as Purchaser, to sell the same aircraft to Purchaser Three. The Escrow Company received deposits totaling $2,100,000. Further, Purchaser Three was trading in a second aircraft to its seller, Purchaser Two (the "Trade-In aircraft").

The purchases and sales of the aircraft were not consummated as contemplated by the agreements, and a dispute arose, as each of the four participants claimed the deposit.

Purchaser Three deposited $2,100,000 with the Escrow Company and, when the transactions failed to close, demanded the return of the entire sum. Purchaser Three argued that its seller, Purchaser Two, failed to perform and, therefore, under the terms of their contract, Purchaser Three was entitled to the return of the deposit. Purchaser Three also maintained that Purchaser One had no right, title, or interest in the deposit.

Faced with the competing claims, the Escrow Company initiated an interpleader action. As is standard in interpleader actions, the Escrow Company claimed there were conflicting claims to the deposit, and while it was willing to pay the deposit to the entity legally entitled to the deposit, it was unable to make that determination on the one hand and sought to avoid the cost and expense of defending itself in a multitude of lawsuits in which it faced the possibility of double or multiple payment of the amount of the deposit, on the other hand.

Seller countered that it was entitled to $1,000,000 of the deposit; the amount owed to it under its contract with Purchaser One. Seller argued that " Purchaser Three had knowledge that Purchaser One and/or Purchaser Two were going to use $1,000,000 of the deposit as the deposit for Agreement One, and that, as a result, Purchaser Three was estopped from receiving that $1,000,000.

Purchaser One countered that the Escrow Company had certified that the $2.1 million deposit under Agreement Two had been escrowed pursuant to Agreement Two. In reliance thereon, Purchaser One proceeded to perform Agreement Two. Also, the Escrow Company sent a similar confirmation to Seller for the $1 million deposit under Agreement One. Purchaser Two failed to perform and breached Agreement Two for reasons that were not fully known. If the deposit belonged to Purchaser Three, then Purchaser Two had also breached its representations and obligations under Agreement Two. Therefore, Purchaser One was entitled to recover either the $2.1 million deposit from Purchaser Two, or alternatively, the entire $3.5 million in revenues and profits that Purchaser One would otherwise have obtained had Agreements One and Two been fully performed.

Purchaser Three requested leave of the court to file additional claims against the Escrow Company for both civil conspiracy and Racketeer Influenced and Corrupt Organizations ("RICO") Act violations. The Escrow Company countered that such claims were factually unsupported, utterly baseless and, hence, frivolous. The court ruled that the amended claims were filed both without leave of court and the consent of opposing counsel and should, therefore, be stricken.

The court held, further, that Purchaser Two had breached its contract with Purchaser Three and, therefore, was not entitled to any of the deposit, and awarded the $2.1 million to Purchaser Three, and the funds were immediately disbursed by the court to Purchaser Three.

Seller appealed. The Oklahoma Court of Civil Appeals observed that an interpleader action is equitable in nature and held that the equitable result in this case was to award $1 million to Seller and $1.1 million to the depositor, Purchaser Three, and the state Supreme Court affirmed. However, a new judgment of the District Court was required reflecting the modified disposition of the interpleaded funds. Five years after the litigation commenced, the District Court amended its original decision to conform with the Appeals Court's rulings.

Purchaser Three then requested a stay of the amended District Court order, contending that the Appeals Court decision had the effect of binding Purchaser Three to specific terms of a contract to which it was not a party by holding Purchaser Three liable for breaches of the contract between the Seller and Purchaser One. None of the parties, as shown by evidence at trial, intended for Purchaser Three to be the insurer of Purchaser Two's and Purchaser One's compliance, nor for Purchaser One to "make" $1 million dollars by simply breaching its contract with Seller.

Purchaser Three argued that the result reached by the Appeals Court was both and contrary to the intent of the parties, and neither Purchaser One nor Purchaser Two had met their deposit obligations. The intent of the parties was to buy and/or sell aircraft, not to profit on a deposit. What appeared to be forgotten in the Appeals Court opinion was that the deposit was to be a credit towards the purchase price. It was not meant to provide a windfall. The Appeals Court decision holds Purchaser Three liable for the breach of Purchaser One under its contract with Seller. No evidence was ever presented that Purchaser Three intended to assume all of Purchaser One's obligations. In fact, the testimony at trial established that the existence of this contract was specifically withheld from Purchaser Three at the instruction of Purchaser One.

Purchaser One's chief argument was that Purchaser Three was both aware of and had consented to the use of its $2.1 million to stand as the one deposit for all three APAs. The substantial motivating reason why the transactions did not close was Purchaser Two's breach of the APAs, specifically when it failed to fund the remaining balance of purchase price under Agreement One. The trial court found that all delivery conditions for the Seller were timely satisfied, and that Purchaser One had not breached any of its obligations. Seller contended that Purchaser Three understood that it was to repay $1.0 million to Seller.

For its part, Seller argued that he would not be enriched unjustly; and that the only unjust action would be to allow Purchaser Three to keep the $1.0 million. Seller also argued that it should not be forced to litigate in a foreign country to attempt to recover $1.0 million of the deposit from Purchaser Three. The District Court issued a judgment in favor of Seller and against Purchaser

Three in the amount of $1.0 million, plus interest. In late 2018, Purchaser Three appealed that ruling to the state Supreme Court. That appeal is still pending.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

1. Expressly state in the parties' letter of intent that the Purchaser's deposit is not to stand as the deposit for any other transaction involving the subject aircraft, or for any other aircraft involved in any other transaction.

2. Expressly state in an escrow agreement (or in an amendment to the involved Escrow Company's standard terms and conditions) that the Purchaser's deposit is not to stand as the deposit for any other transaction involving the subject aircraft, or for any other aircraft in any other transaction.

3. A Purchaser should obtain satisfactory proof of what legal entity owns an aircraft at the outset of a transaction, prior to executing a letter of intent to purchase the aircraft. Ideally, such proof would include a copy of the bill of sale conveying title to the aircraft to the legal entity from which Purchaser is now to purchase the aircraft.

4. If a "back-to-back" deal is involved, require each Purchaser in each transaction to post its own deposit.

2. An Undisclosed Flip Sale

Broker learned that a company, Purchaser, was planning to purchase a private jet. Broker ingratiated himself with Purchaser's principals and proposed a particular model of aircraft. Even before Broker initiated the communications with Purchaser, Broker knew that a particular aircraft of that model was available for purchase from a particular owner that Seller, whose identity Broker did not disclose to Purchaser. Broker suggested to Purchaser to purchase this particular aircraft for a price between $3.6 and $3.7 million. Broker represented to Purchaser that he was researching four separate aircraft of the model in question, and Broker nonetheless pushed Purchaser toward the particular aircraft he had in mind, saying it was his first choice for Purchaser.

Purchaser was persuaded to pursue the recommended aircraft. Broker needed Purchaser to commit to the process. Under the guise of seeking to help Purchaser, Broker convinced Purchaser to enter into an Agent Agreement for Broker's brokerage and consulting services to locate and purchase an aircraft for a flat fee commission of $121,000. Broker concocted a plan, with assistance from Escrow Company, to overcharge Purchaser on the purchase of the aircraft.

Broker then sent Purchaser a series of communications that contained false and misleading statements, amounting to a campaign of disinformation to mislead Purchaser regarding the ownership of the aircraft, and to cause Purchaser to over-pay for the aircraft. Broker advised the "buy number goal" should be approximately $3.6 million, and reported that he was negotiating with the owner, as Seller, who made a "final counteroffer" of $3,775,000. Purchaser authorized a counteroffer of $3,550,000. Broker reported Seller agreed to a price of $3,550,000 and did not disclose the identity of Seller to Purchaser. Two days later, Broker entered into a LOI with Seller

to himself purchase the aircraft for $3,300,000. Through deception, and unbeknownst to Purchaser, Broker was to pocket an additional $250,000 from Purchaser.

Purchaser placed a deposit of $100,000 with Escrow Company, and Escrow Company advised Seller that $100,000 had been placed in the escrow account by Broker for the purchase of the aircraft. Broker, with the help of Escrow Company, used Purchaser's money to satisfy Broker's own down payment obligation to Seller. Escrow Company and Broker kept Seller in the dark about the fact that Purchaser was the ultimate Purchaser of the aircraft. Broker created a legal entity to act as Purchaser of the aircraft from Seller, and to act as seller of the aircraft in a follow-on sale to Purchaser. Escrow Company expanded its role and assisted Broker in overcharging Purchaser. The two transactions closed as planned by Broker.

Purchaser later learned what had transpired. Had any of the foregoing information been disclosed, Purchaser contended that it and its principals would never have agreed to enter any of the series of transactions, nor entrusted its money to Escrow Company. Purchaser contended that Escrow Company assisted Broker in a scheme to defraud Purchaser of several hundred thousand dollars.

Purchaser alleged there had been a breach of the escrow agreement, contending that Purchaser and Escrow Company had a valid and enforceable agreement under which Escrow Company agreed to act as Escrow Company and Purchaser provided funds to Escrow Company solely for Purchaser's purposes - in fact, this is the common basis of every escrow. Purchaser denied that it had provided Escrow Company with funds for the purpose of allowing others to use them to illegally profit at the expense of Purchaser. Purchaser also alleged a breach of fiduciary duty by Escrow Company and that there had been fraud, fraudulent concealment, negligent misrepresentation, negligence or gross negligence, and a civil conspiracy.

Escrow company defended that Purchaser's petition failed to state a claim upon which relief could be granted, and that Purchaser's own actions and/or inactions had caused or contributed to any loss or damage that Purchaser may have suffered. Escrow Company further argued that all of Purchaser's claims were unenforceable as a matter of law, and that any damage was the result of a superseding cause for which Escrow Company was not responsible (i.e., the actions of a third party over whom Escrow Company had no control), and that none of Purchaser's alleged injuries were caused by the Escrow Company.

Some fifteen months later, the case was settled on undisclosed terms.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

The proposed lessons learned are the same as in 1, above.

3. A Stay of an Order to Return a Deposit until Final Award of a Judgment in an Arbitration Action in a US State

A court issued an Order granting a transaction participant's Motion for a Temporary Stay until the Final Resolution between the parties in an Indiana arbitration. "Final Resolution" was to include one or more of the following: (i) entry of a final arbitration decision, ruling or award; or (ii) a

settlement agreement by the parties involved in the arbitration; or (iii) any other lawful action by a party to the arbitration.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

5. If possible, do not agree to dispute resolution by means of an arbitration proceeding. Instead, expressly state that any and all disputes are to be resolved by the district court with jurisdiction over the involved Escrow Company, applying local law.

4. Escrow Company Mistakenly Returns a Deposit of $250,000 to Purchaser

Seller was selling an aircraft to two named purchasers (hereafter the "Purchaser.") A deposit of $250,000 was paid to Escrow Company. The APA provided, if Purchaser did not perform its obligation to purchase the aircraft, the deposit would belong to Seller. The deposit was "non-refundable" pending completion of certain repairs to address airworthiness discrepancies, and Seller completed the needed repairs. Purchaser was acting in concert with another company (the "Actual Purchaser"). Actual Purchaser failed to close the purchase of the aircraft, and Seller claimed the deposit had become the property of Seller.

The Escrow Company commenced an interpleader action contending it was in "great doubt" as to whom the money should be paid. Purchaser engaged a lawyer, who demanded the deposit from the Escrow Company. The Escrow Company "by mistake," and because facts were "misrepresented," wired the money to the lawyer who forwarded the money to Actual Purchaser, who was located overseas.

Seller contended that the Escrow Company had improperly released money to the lawyer which was no longer refundable to the Purchaser or the Actual Purchaser, and that Escrow Company's refund of nonrefundable money to Purchaser's lawyer after the parties had declared the deposit to be nonrefundable breached the contract of which Actual Purchaser was a third-party beneficiary and caused Seller harm. Seller also maintained that its subsequent sale of the aircraft to another purchaser was irrelevant because Seller was only attempting to recover what the parties had agreed was due to Seller pursuant to industry custom.

The Escrow Company was never told by either the Seller or the Purchaser that the deposit was nonrefundable. There was no written escrow agreement. Seller contended that Escrow Company held deposits in a fiduciary capacity until certain conditions were met, and that the Escrow Company could be liable to the depositor for damages should it violate the instructions of the depositor. (See A, Jur. Escrow Sections 29 and 30, providing, "When the conditions upon which an instrument deposited in escrow is to be delivered [are] not complied with, the depository is obligated to deliver the instrument to the depositor." "Since the depository is bound by the terms of the deposit and charged with the duties voluntarily assumed by him or her, liability attaches to him or her for failing to follow his or her instructions, whether done deliberately or negligently.")

The District Court ordered the Escrow Company to deposit $249,640 with the court out of the Escrow Company's own funds. The Escrow Company argued that there was no contract between Seller and the Purchaser or Actual Purchaser, but, instead, there was only a signed letter of intent, and, as such, the Escrow Company could permissibly return the money to the Purchasers. In this

case, as opposed to most other cases, the Escrow Company argued that it made the unilateral decision who was entitled to receive the funds and acted accordingly.

The state court flatly rejected the Escrow Company's position, finding that the company had acted both negligently and in breach of trust in returning the deposit, and ordered the Escrow Company to make up the entirety of the improperly-refunded deposit from its own funds. The state court ordered the Escrow Company to make up the lost deposit.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

6. Seller and Purchaser should both be party to an escrow agreement, rather than the Seller's being a third-party beneficiary of an agreement between Purchaser and an Escrow Company.

5. A Seller Withholds Documents Necessary for Inspection, then says a Purchaser is Unable to Specify any Defects in the Delivery Conditions

Seller and Purchaser entered into a transaction for the sale and purchase of an aircraft. Purchaser placed $1.0 million in escrow with the Escrow Company, thereby engaging in conduct sufficient to establish jurisdiction of a state court. Purchaser and Seller entered into a LOI for the aircraft including "the Engines, [and] the related documents, records and manuals." Purchaser paid a $500,000 cash deposit (the "Initial deposit") to Seller to "be held by Seller pending the execution of a mutually agreeable Sale Agreement." Purchaser could conduct a visual inspection prior to execution of the final sale agreement. The LOI provided Purchaser could conduct a further inspection (the "Pre-Purchase Inspection") prior to delivery and technical acceptance of the aircraft. The LOI further provided that "[u]pon completion of the Pre-Purchase Inspection, [Purchaser] may in its sole discretion accept or reject the aircraft." The Delivery Conditions included that "[t]he aircraft records and documents shall be delivered at the same time as the aircraft and shall provide 'back to birth' traceability for engine life limited parts" and that the Purchaser was not obligated to accept delivery of the aircraft unless the conditions were satisfied.

Purchaser sent a letter to Seller expressing Purchaser's "intention to proceed with the purchase of the aircraft following Visual Inspection." The letter further provided that Seller was to "continue to hold the [Initial] deposit against the aircraft until execution of the APA" and that an "Additional deposit contemplated by the LOI shall be payable to the Escrow Company on execution of the Sales Agreement." Purchaser and Seller entered into the contemplated APA. The APA stated, in pertinent part, "Seller wishes to sell and Purchaser wishes to purchase from Seller all of Seller's right, title, and interest in and to the aircraft and Technical Records, as defined." Purchaser placed an additional cash deposit of $1.0 million (the "Additional Deposit") in escrow with the Escrow Company.

Under the APA, the Initial deposit and the Additional deposit (collectively, the "deposits") were to "become non-refundable subject to the performance of Seller under the Agreement, except in the event this Agreement is terminated pursuant" to certain provisions of the APA. Purchaser could terminate the APA by giving written notice of such termination to Seller only if (i) Seller did not rectify the Delivery Conditions Discrepancies within 30 days or (ii) Seller otherwise breached its obligations under the Agreement and such breach was not remedied within five business days, or

(iii) the Technical Acceptance did not occur on or prior to January 31 of the following year as a direct result of any act or failure to act on the part of the Seller.

In December of the year in which the APA was executed, a representative of Purchaser traveled to Asia to inspect the aircraft, but the aircraft was not ready for inspection. Purchaser then informed Seller that not all items were available for inspection and, consequently, Purchaser could not perform its inspection. The Purchaser also attached two Technical Acceptance Reports which listed the records needed for inspection but not yet received. In response, Seller's technical team stated that the aircraft records would not be ready for inspection before sometime in January of the next year. Purchaser then proposed an extension of the Technical Acceptance date to late January. Seller did not reply.

Purchaser subsequently informed Seller that Purchaser must, in order to safeguard its rights, issue a notice of default, and Purchaser did so on January 13. Seller also failed to paint the aircraft as required by the Agreement. Purchaser sent a Notice of Termination on January 22 and requested repayment of the deposit of $500,000 and $1,000,000 from the Escrow Company. In its Crossclaim, Purchaser stated that retention of the $500,000 by Seller would unjustly enrich Seller.

Seller replied that Seller took measures to ensure that all material records and the aircraft were available for inspection prior to the Outside Technical Acceptance Date of January 31, and both parties had agreed the purchase price would be reduced by the cost necessary for the aircraft to be painted after closing. On January 27, Seller advised Purchaser that its purported termination notice was not valid because Purchaser was unable to specify any defect in the Delivery Conditions that would entitle Purchaser to terminate the Agreement. Seller alleged Purchaser breached the Agreement by failing and refusing to timely close the transaction and failing and refusing to pay the balance of the purchase price, and that, under the terms of the Agreement, the deposit was non-refundable.

Purchaser denied Seller's statement that all material documents had been made available, and asserted that Seller failed to present the aircraft and its records in such a way that Purchaser was able to perform its inspection thereby causing Purchaser to be unable to meet the Outside Technical Acceptance Date. At this point, the litigation settled.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

7. Place the entire deposit with an Escrow Company. Do not split the deposit between a Broker and an Escrow Company. In this manner, only one legal proceeding should be required to recover a deposit in the event of a dispute.

8. Provide that, if aircraft records and documents are not to be delivered for inspection at the same time as the subject aircraft, all such records and documents must be made available, for example, not less than three or more weeks prior to a planned outside closing date. If the records and documents are not delivered by the agreed date, the outside closing date is automatically extended by the same number of days comprising the delay.

9. Similarly, whenever possible, do not agree to an outside closing date. A closing should occur when the conditions to closing are satisfied, not by a date certain.

10. Do not agree to "material" or "substantial" compliance by Seller with a provision of the LOI or APA, or for delivery of "material" records for inspection. Such needlessly opaque qualifiers only serve to invite controversy.

6. False Statements that an aircraft has no Damage History

Seller entered into an APA with Purchaser. Purchaser terminated the Agreement upon discovering the aircraft had a damage history and sought return of its earnest money. Seller and its agent had advertised the aircraft as having no damage history. But for the misrepresentations concerning the condition of the aircraft, Purchaser would not have entered into the Agreement. Purchaser alleged both breach of contract and that it had been fraudulently and negligently induced into entering into the Agreement by Seller.

The Agreement provided for a First Pre-Purchase Inspection of the aircraft within 7 days of the Agreement's execution during which Purchaser was entitled to conduct only a visual inspection, neither of which would have disclosed the damage history at the heart of this dispute. The Agreement provided that, following the cursory First Pre-Purchase Inspection, Purchaser's deposit became nonrefundable except under limited circumstances which permitted termination upon disclosure of damage history to the aircraft that had required the filing of an FAA Form 337 - Major Repair or Alteration. Multiple FAA Forms 337 were filed and disclosed to Purchaser for the first time in conjunction with the post-execution inspection. Seller argued that the repairs or alterations underlying the Form 337s were not significant enough to have required the filing of the forms and, therefore, that Purchaser was not within its rights to terminate the Agreement.

Purchaser's breach-of-contract claim was separate from its fraud and negligence claims. Damages under the breach-of-contract claim would be limited to the deposit less the cost of inspection. Damages for fraud and negligence would be measured by the Purchaser's economic loss that was caused by Seller's misrepresentations.

Seller made three arguments. First, because Purchaser had a right to inspect the aircraft, there could be no fraud because "a person is not entitled to rely on a vendor's allegedly false statements if a reasonable inspection would have revealed or disclosed the falsity of the statements." Second, Seller argued that, if there is a misrepresentation, but the Purchaser instead of relying upon it makes an independent examination and acts upon the result thereof without regard to the misrepresentation, there is no cause of action. Third, Seller argued that, because Purchaser had the right to and did inspect the aircraft before consummating its purchase, Purchaser's claims for fraud or negligent misrepresentation against Seller premised on its alleged pre-contract statements must fail. The case was then settled, and $175,000 was returned to Purchaser and $75,000 retained by Seller.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

11. Require a statement in an LOI that no FAA Forms 337 ever were filed with the FAA regarding the subject aircraft and require production of any FAA Forms 337 that were filed prior to execution of an LOI. Consider ordering a title search prior to executing an LOI.

12. Attach a detailed specifications sheet to an LOI that is an exact copy of the specifications and advertisements posted by Seller's aircraft Broker. Provide that any deviation between the actual condition and history of an aircraft and its advertised condition and history shall be a breach of representations made by Seller and, in the event of such breach, Purchaser is entitled to the immediate refund of the entire deposit.

7. Unilateral Modification of an Offer Letter by Seller to Create a Deadline to complete an APA

Purchaser executed an "Offer" to Seller to purchase an aircraft. The Offer included the language, "If the offer is acceptable, a deposit of US $150,000 will be paid to the Escrow Company." Seller accepted Purchaser's Offer, and the funds were deposited with the Escrow Company. The Offer required completion and execution of a purchase agreement. Despite good faith efforts by Seller, a purchase agreement was not executed, and Purchaser failed to conduct the relevant inspections. Seller claimed the deposit. Purchaser responded that Seller had accepted its Offer but modified the Offer to add the condition that a purchase agreement must be completed and executed by a certain date, a condition which was not met. The case ultimately settled.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

13. Include a provision that, if an APA is for any reason not executed by the parties by a date certain, the Purchaser is entitled to the refund of the entire deposit, upon an agreed number of days after expiration of the deadline.

14. Amend the Escrow Company's terms and conditions, and/or enter into a separate escrow agreement, providing that the deposit shall be returned to the company that made the deposit if the Escrow Company is not in receipt of a fully executed APA by a date certain. Do not agree to an Escrow Company's terms and conditions that it may itself elect whether, and to whom, to return a deposit.

8. The deposit was paid into Escrow by a Third Party with no Contractual Relation to the Seller

Seller, a Bermuda company, and Purchaser, a BVI Company, entered into an APA for the sale and purchase of an aircraft registered in Bermuda. Purchaser arranged for a deposit of $4.6 million to be placed with the Escrow Company. The deposit was placed with the Escrow Company by a company associated with Purchaser (herein "Affiliate"). The funds were to be held exclusively for the benefit of Purchaser and only to be released pursuant to further instructions of Purchaser.

A dispute arose and Purchaser alleged that Escrow Company had failed to perform its obligations as Escrow Company by not disclosing top Purchaser that it had received an executed copy of a certain amendment to the APA from Seller when, in fact, Purchaser was still negotiating the terms of such amendment. Purchaser contended that the counter signature in Escrow Company's possession related to a certain amendment which contained terms different from the terms in the amendment provided by Escrow Company. The transaction broke down over the undisclosed proposed "certain amendment" of the APA.

The contract provided that the Agreement was governed by Florida law, but provided, further, that any dispute, claim or litigation that the parties could not settle by mutual agreement was to be settled by arbitration under the rules of the International Chamber of Commerce, Paris, with the arbitration to take place in Zurich, Switzerland.

Litigation ensued. Purchaser and Affiliate filed a Motion to Dismiss or Stay Proceeding and to Compel Arbitration. The Escrow Company allegedly failed to disclose to Purchaser that the Escrow Company had received an executed copy of a certain amendment to the Agreement by Seller when, in fact, Purchaser was still negotiating the terms of such an amendment. When Purchaser was sent the amendment by the Escrow Company, Purchaser determined that it had never agreed to the amendment's term. In its motion, Purchaser sought both the dismissal of the interpleader action for lack of jurisdiction and that the matter be referred to arbitration.

Seller contended that Affiliate deposited money with the Escrow Company to induce Seller to take the aircraft off the market despite the Affiliate's lack of knowledge as to whether Purchaser could close the transaction to purchase the aircraft. Seller contended that the Affiliate was not a party to the APA and is not obligated to arbitrate any claims, and there was no separate agreement between Seller and Affiliate. Accordingly, Affiliate had no valid defense against the $4.6 million being paid by the Escrow Company to the court which would convey the $4.6 million to Seller. Seller requested $10 million of punitive damages from Affiliate as well. The case was settled on undisclosed terms.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

The central problem was that a deposit was accepted from a third party who was not a party to the APA. The Seller had no privity of contract with the depositor. Therefore, there was not agreement about the law governing the deposit, nor the venue for dispute resolution. The Purchaser itself had actually put in no money and was judgment proof.

15. An LOI should identify the legal entity that is to pay a deposit on behalf of a Purchaser and provide that, if a deposit is paid into escrow from a source other than directly from the Purchaser, the depositor should be party to an escrow agreement that subordinates the depositor's remedies to those of the Purchaser in the APA, or (ii) there should be an assignment of ownership of the deposit from the third party depositor to the Purchaser, and an acknowledgement by the depositor that the deposit may only be recovered by depositor if Purchaser would have been able to recover the deposit had Purchaser paid the deposit.

9. A LOI was not Superseded by an aircraft Purchase and Sale Agreement, and the deposit was Lost

Purchaser, a foreign corporation, entered into a LOI to purchase of an aircraft from Asia Universal Jet, an Isle of Mann company, as Seller. Purchaser deposited $100,000 with the Escrow Company in connection with the planned purchase. The purchase and sale was not consummated as provided in the LOI. The Escrow Company sought to deposit the $100,000 with the court and to be discharged from any liability. Purchaser made a claim to the Escrow Company for recovery of the deposit but failed to respond to the Escrow Company's petition to commence the interpleader action.

Seller claimed the deposit became nonrefundable under the LOI upon Purchaser's execution of an aircraft Acceptance Memorandum. The Escrow Company acknowledged in writing that the deposit had become non-refundable and copied Purchaser on the acknowledgement. Purchaser never made any attempt to dispute that the deposit had become non-refundable until it later refused to consummate the purchase and sale transaction. Seller caused an airworthiness inspection of the aircraft to be conducted at its own expense and obtained an Export Certificate of Airworthiness from the Isle of Man. Purchaser provided a list of discrepancies to be corrected, and all corrective actions were completed at Seller's expense. Purchaser then refused to take delivery of the aircraft for unknown reasons. The court ruled in favor of the Seller.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

16. A LOI should provide that it is non-binding and that the deposit is refundable to the Purchaser within an agreed number of days after the deadline to execute an APA has passed.

10. Miscommunications about Whether an Aircraft was Airworthy

Purchaser and Seller began negotiations for the purchase of a Eurocopter. Seller represented that the aircraft was airworthy and available for immediate sale. Purchaser had a mechanic inspect the aircraft, who determined that it required maintenance, service and repairs. Seller flew the helicopter to a southern state for the repairs. The parties entered into an agreement which provided the escrow deposit of $100,000 would be refundable at any time and for any reason before execution of a Technical Acceptance Form, and that, following the execution of such a form, the deposit would still be refundable if Seller failed to deliver the aircraft in the condition required by the APA and within the timeframe required by the APA.

Purchaser was orally informed that the helicopter passed a turbine inspection and, based on that oral representation, Purchaser advised Seller it was willing to execute a Technical Acceptance Form. However, before Purchaser had executed a Technical Acceptance Form, Purchaser was informed that the helicopter's turbine was not in an airworthy condition and required further overhaul.

By the agreed delivery date, Purchaser had not received delivery of the helicopter in the condition required by the Agreement. Purchaser allowed more time for Seller's performance and then issued a notice of termination and informed Seller it would seek a return of the deposit. Seller instructed Escrow Company not to release the deposit, and litigation ensued.

The court subtracted the Escrow Company's legal fees from the deposit, leaving $97,500, and ordered the Escrow Company to pay this amount to the court clerk. The parties then reached a settlement pursuant to which Seller would receive 28.2% and Purchaser would recover 71.8% of the remaining deposit.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

17. The Purchaser alone shall decide whether to execute a Technical Acceptance Form based only upon a written inspection report and within an agreed number of business days after receipt of such inspection report.

11. Escrow Company Distributed the deposit and Installment Payments to Seller Prior to Closing, but the Closing Never Happened.

Purchaser entered into a LOI and an APA to purchase a helicopter from Seller. Purchaser placed a deposit of $100,000 into escrow. The deposit was refundable subject to inspection and acceptance of the aircraft by April 10, and the balance of the purchase price was to be paid into escrow as of April 10. A leasing company which was financing the purchase then wired $335,000 to Escrow Company at the direction of Purchaser.

The Escrow Company disbursed the $335,000 without any written or oral authorization from either the Purchaser or the leasing company. The Escrow Company website provided that the Escrow Company would, upon written authorization from a Purchaser, disburse funds to the appropriate parties with the simultaneous filing of documents with the FAA and International Registry if applicable. The planned purchase was never consummated, and Purchaser never received the helicopter.

Purchaser demanded the return of the $335,000, and argued that the Escrow Company had materially breached the express or implied contract that was made when the funds were delivered by the leasing company to the Escrow Company. Alternatively, the Purchaser argued that that Escrow Company breached its fiduciary duty both to the leasing company and the Purchaser, and/or acted negligently, by disbursing the funds without prior approval from the leasing company or the Purchaser.

The Escrow Company defended that its instructions had been to hold the funds for the benefit of both a named individual and a named company. The Escrow Company had disbursed the funds pursuant to written instructions from the named individual as follows: $55,000 to the named company, $260,000 to a trust, and the balance elsewhere. The Escrow Company claimed that it did not receive a copy of the Purchase Contract until March of the following year.

In further defense of its actions, the Escrow Company contended that, "By repeatedly allowing [named individual] to conduct and enter into aircraft purchase transactions on its behalf, Purchaser gave [named individual] actual and apparent authority to act as its agent for such transactions and is thus bound by [named individual's] actions in that scope. [Named individual] was managing partner of [named company], and a payment to Plaintiff's agent is equivalent to a payment to the principal. The purchase contract made [named company] its agent for the purpose of the transaction."

Further, the Escrow Company denied that it owed any duty, much less breached any duty, to the plaintiffs because it was not a party to the APA and was not requested to act as Escrow Company by or for the plaintiffs. The case was settled on undisclosed terms.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

18. The Purchaser and its financing company must have an escrow agreement with an Escrow Company to which they send purchase money, and the agreement must require written authorization from both the Purchaser and its financing company prior to any disbursement of money by the Escrow Company. No course of dealings and past practices should provide an exception from the requirement for such written authorization.

12. The aircraft was Not Equipped as Represented by Seller

Purchaser and Seller entered into an APA and Purchaser delivered a deposit of $100,000 to the Escrow Company. The APA provided the deposit was refundable until such time as the Purchaser executed and delivered a Post-Inspection Notice accepting the aircraft.

Purchaser had conducted a pre-purchase inspection and discovered the aircraft was not equipped as represented by Seller, as it did not have an APU, a warming oven, a DVD player, and audio-visual equipment. There had only been a brief cosmetic inspection of the aircraft prior to signing the Purchase Agreement. The Purchaser's representative was not technically capable of determining whether the aircraft had an APU. The missing equipment significantly lowered the aircraft's value.

Purchaser delivered a Post-Inspection Notice rejecting the aircraft, and the APA provided for a return of the deposit and termination of the APA. A week later, Purchaser offered to negotiate new terms including rectification of a lengthy list of discrepancies within 30 days and a price reduction. The revised offer was not accepted, and Purchaser rescinded the revised offer. Purchaser alleged it had been fraudulently induced into entering into the APA.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

19. Append the aircraft specifications as advertised to the LOI and provide for an inspection by a knowledgeable representative prior to execution of an APA.

13. Shareholder and Director of Purchaser, while hospitalized, signed a blank signature page of an APA, and Seller's Broker did not disclose that the APA made the Deposit Non-refundable.

Seller and Purchaser executed a LOI for the purchase of an aircraft. Purchaser wired $500,000 to the Escrow Company to be held in escrow pending, among other things, the execution of a mutually agreeable APA. An affiliate of Purchaser wired the funds which were later assigned to Purchaser. Seller and Purchaser allegedly later entered into the APA. The APA provided that the deposit became non-refundable immediately upon execution of the APA, subject only to breach or default by Seller. Airworthiness discrepancies revealed by an inspection were remediated, and the aircraft was returned to service.

Purchaser failed to deliver its Post-Inspection Notice to Seller as required by the APA indicating whether it had elected to accept or reject the aircraft. Nor did Purchaser give written notice of any

alleged breach or default by Seller. Seller then sent a Notice of Default to Purchaser and claimed the deposit and additional damages.

Purchaser defended that Seller had retained an aircraft brokerage company (Broker) and a particular agent at Broker was Seller's representative in the transaction, Agent. Purchaser contended that the LOI provided for a refundable deposit. The shareholder and director of Purchaser experienced a medical emergency and was hospitalized and heavily medicated. While he was hospitalized, Agent entered his hospital room and had the individual sign a blank signature page for an APA for the aircraft. The Agreement changed the nature of the deposit from refundable to non-refundable, and the Agent did not disclose the change. The sale of the aircraft did not close for various reasons.

Purchaser contended that the Agent knew the shareholder and director was ill and on medication, and under undue duress or influence when he signed the blank signature page, and, therefore, that the APA was void. Alternatively, Purchaser argued that the portion of APA rendering the deposit nonrefundable was unenforceable.

An Agreed Order issued by the court recorded a settlement pursuant to which Seller received 80% of the deposit and Purchaser received 20% of the deposit. As part of the settlement, all parties agreed that there were no acts or omissions by Broker or Agent that were in any way fraudulent, negligent, or otherwise improper.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

> 20. Purchaser should consider establishing a dual signature requirement for documents to be signed by its shareholder and director, and implement a policy prohibiting the execution of any document while he or she is hospitalized, on medication, or otherwise impaired or potentially impaired due to poor health or otherwise unforeseen circumstances.

14. An Inspection Revealed Material Damage but not an Airworthiness Discrepancy

Purchaser and Seller executed a LOI for the purchase of an aircraft. Purchaser had a right to conduct both a visual inspection and a demonstration, and then, within two days, was to inform Seller whether it intended to proceed with or terminate the transaction. Purchaser elected to proceed. The parties executed an APA which provided that $500,000 of the deposit was to be termed the "Damages deposit." Seller performed all of its obligations. Purchaser failed to perform its obligations. Seller terminated the agreement and requested that the involved Escrow Company release the Damages deposit to it. Upon release of the Damages deposit, Escrow Company was to release the balance of the deposit to Purchaser.

In response, Purchaser claimed that it had deposited $1.0 million with the Escrow Company and that one-half of the deposit comprised the "Damages deposit." Purchaser also claimed it validly rejected the aircraft and terminated the agreement based upon the existence of Material Damage, as defined in the APA. During the Pre-Purchase Inspection, Purchaser's representatives discovered the presence of corrosion in the aircraft's seat tracks, evidencing a significant water leak in the aircraft's interior, implicating other more serious issues and necessitating more comprehensive

inspections. As a result of the seat-track corrosion, certain seats had been removed from the aircraft and could not be re-installed without further repairs. The areas in which re-installation of seats was prohibited were placarded with a notice "NO INSTALLATION PERMITTED IN THIS AREA."

Section 2.4 of the APA gave Purchaser the right to reject the aircraft upon discovery of Material Damage, defined to include any damage or repair of damage that "requires any deviation from the original approved manufacturer's build specification." As such, the corrosion constituted Material Damage. The APA distinguished Material Damage from an Airworthiness Discrepancy, providing that Seller shall have an opportunity to repair or remediate any Airworthiness Discrepancy, but not Material Damage. Also, in the event of termination due to Material Damage, inspection and aircraft movement costs shifted to Seller, and the entire deposit was to be returned to Purchaser. Purchaser decided to reject the aircraft because of the Material Damage.

Two- and one-half years later, the court issued an Agreed Order under which Seller received 25% of the remaining deposit and Purchaser received 75% of the remaining deposit.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

21. An LOI should provide a short timeframe for the return of an entire deposit after a finding of Material Damage, as defined.

15. A brokerage agreement only placed an expiration date on the exclusivity of a Broker's efforts, not on its right to receive a commission upon any sale

Seller signed a written brokerage agreement with an aircraft broker. Broker was subsequently accused of circumventing the brokerage relationship, dealing directly and secretly with another Broker to complete a sale. The other Broker, knowing that Broker had a brokerage agreement for the aircraft, alerted Broker of the pending sale, leading to a lawsuit.

Broker claimed Seller owed it the agreed commission because: (a) except for the five months exclusive representation provided in the agreement, the balance of the brokerage agreement remained in effect and had not been terminated when the sale to the identified prospect occurred, (b) alternatively, the brokerage agreement was extended by the conduct of the parties, (c) even if the brokerage agreement expired at the end of the 5-months exclusivity period, the identification of protected prospects occurred within a commercially-reasonable time, and (d) Broker was entitled to compensation because its efforts were the procuring cause of the resulting sale, notwithstanding Seller's attempts to cut Broker out of the sales transaction "loop." A year later, Seller and Broker reached a settlement, and the disputed sum of $565,500 was deposited with the court and apportioned in an undisclosed manner.

Suggested Amendments to the LOI to Avoid the Central Problem(s):

22. The Purchaser's LOI should state that Seller and Purchaser are each solely responsible for any Brokerage fee and require the disclosure of each party's Brokers and the specific nature and extent of the respective Brokers' interests in the subject transaction.