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The Need to Execute an Escrow Agreement together with your LOI and APA

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In every business aircraft transaction, there is something significant to fight over if the transaction does not go forward. This is the deposit, commonly ranging in amount from $100,000 to $500,000, that is placed with an escrow company as a sign of good faith by the buyer.

There is a problematic state of affairs regarding the disposition of deposits. There are few written rules set out in letters of intent ("LOIs") for the handling of deposits. There are more detailed rules set out in Aircraft Purchase Agreements ("APAs"). In the absence of specific agreement among a buyer, seller and an escrow company about the handling of a deposit, the disposition of a deposit is governed by escrow company terms and conditions. Then in practice, escrow company terms of standard terms and conditions providing for the return of deposits are sometimes ignored. Needless prolonged and expensive litigation then frequently results, ending in expensive settlements when a more just outcome should have come much earlier.

A mostly unused tool that buyers, sellers and escrow companies may use to try to minimize the risk of a dispute over a deposit is a three-party escrow agreement. An escrow agreement, particularly one executed at the same time as an LOI, may set out clear rules for the disposition of a deposit.

An escrow agreement may protect an escrow company which is, arguably, ill-equipped to resolve a dispute itself. For example, an escrow agreement may provide an escrow company with additional legal comfort that it may return a deposit in accordance with the escrow company's own terms and conditions if an APA is never executed.

Escrow company terms and conditions typically state that a deposit shall be returned to the party that placed a deposit with an escrow company if an APA is never executed. Yet, in practice, escrow companies frequently take a decision not to return a deposit and, instead, to commence years-long litigation called an interpleader action. Interpleader actions, by their very nature, are costly, time-consuming, and frequently result in inequitable settlements

penalizing prospective aircraft purchasers. This is justice delayed and justice denied if the complaining party has made its claim on the basis of groundless claims that eventually could not withstand legal review.

As discussed below, a practice may be invoked from securities industry practice and a complaining party may be required to post an indemnification and guarantee to an escrow company if the complaining party wants to request the escrow company not to return a deposit. Right now, it is largely cost-free to block the return of a deposit, and this situation should be reconsidered. In the securities industry, escrow company discretion is limited, and escrow company costs are placed on a party to a transaction that requests an escrow company should not dispose of a deposit in accordance with the escrow company terms and conditions.

Currently, the cost of litigation over deposits is "externalized" and not borne by an escrow company nor by a party that would block the disbursement of a deposit. This externalization of costs and avoidance of the risk needs to be limited or removed in the interest of the fair handling of deposits. Today, it is enough for a complaining party to poke a stick in the wheels of the deposit return mechanism by alleging even a largely baseless and unprovable claim to a deposit, and the complaining party may expect that it will walk away with a portion of the deposit a year or two later as the cost of a settlement.

An APA contains more rules and clarity about the disposition of a deposit once an APA is executed. Arguably less benefit may be derived from a three-party escrow agreement once an APA has been executed. However, a review of court filings in multiple litigations may bring a reader to the conclusion that a three-party escrow agreement may help prevent many disputes from arising.

Escrow Agreements Help to Control Risk for All Parties

Today, an escrow company, if asked, will typically readily agree to be a party to a three-party escrow agreement and to enforce its terms. Yet, today, escrow companies are not frequently asked to enter into such agreements. This article contends that the best practice should become for parties to a planned transaction, including the escrow company involved, to agree to a three-party escrow agreement.

An escrow agreement would set out more clear rules and bright lines about when the escrow company may, and is obligated to, return a deposit to the buyer that placed the deposit. Or, in the alternative, the agreement may provide clear rules and bright lines for when some or all of a deposit should be transferred to the seller of an aircraft. The room for ambiguity and discretion about the future handling of a deposit should be minimized before a deposit is placed into escrow. The absence of an escrow agreement creates material risks for buyers, sellers, their brokers, and also for escrow companies.

Examples that May be Drawn from Litigation

As discussed below, a review of many court opinions and court filings in cases that were settled before court opinions were reached may bring one to the conclusion that buyers of aircraft are frequently intentionally placed at a legal disadvantage if they are encouraged not to obtain legal advice before signing a LOI and sending a deposit. On the other side of a transaction, a seller's right to claim a deposit may also be effectively put out of reach if there is inadequate clarity about the disposition of a deposit. A seller's rights are also made practically unenforceable if an LOI or APA includes overly expensive dispute resolution provisions, or provisions that are inconsistent with escrow company terms and conditions. For example, if an LOI or APA provides for arbitration or court proceedings outside the U.S. while a deposit is placed with an escrow company under Oklahoma law, in practice, any dispute must be ruled upon by an Oklahoma court.

In June 2020, I wrote an article entitled "Deal or No Deal - The Disposition of Deposits in Failed Transactions" which discusses many examples of litigation over deposits. See: https://atlanticaviationlegal.com/.

The reader may access court filings in the District Court of Oklahoma County, State of Oklahoma here: https://www1.odcr.com/. In the "Select a court" box, go to Go to Oklahoma. Enter the name of an escrow company as "Party name". A complete record will come up of all litigation filed in that court involving that escrow company.

The reader may read the filings, learn the facts, as presented, the attached transaction documents, follow the stories, and come to the reader's own conclusions about the merits of each situation. This makes interesting reading.

In this article, I am intentionally not naming any parties to any disputes so that the reader may focus more simply on a generic dispute to see how a dispute may have been avoided if there had been a three-party escrow agreement at the outset of the transaction. If a party to a transaction will not agree to clear rules and efficient dispute resolution provisions that are consistent with escrow company requirements, then this is a clear sign that a transaction may end badly and result in litigation.

A Telling Example from One Interpleader Action

If negotiation of a transaction for the purchase and sale of an aircraft stops, the question will be on the table what is going to happen to the deposit. If an escrow company is approached by a buyer and seller with conflicting claims on the deposit, today, in the absence of a three-party escrow agreement providing agreed rules for the disposition of the deposit, the escrow company will typically take the position that it will not take a position on the merits of a dispute over a deposit. The escrow company may not follow and enforce the plain meaning of its terms and conditions, nor the representations made to a depositor when a deposit was received by the

escrow company. If so, it will now become near to impossible for the depositor to bring the situation to a close and recover any portion of the deposit without significant delay and expense.

In one case I am familiar with, a seller never presented a bill of sale establishing that it had title to an aircraft it was selling that was registered outside the U.S. Normally, a review of title to an aircraft comes after an LOI or APA is signed. It is, normally, a given that a seller has a bill of sale showing that it acquired ownership of an aircraft it is selling. This issue may be left sleeping until it is too late. But this issue should be addressed at an earlier stage. It is a uniform requirement that a chain of clean title to an aircraft must be presented to a buyer.

In this instance, the seller also refused to give proof of the beneficial ownership of the legal entity and the identity of the beneficial owner indirectly selling the aircraft. The buyer could not conclude adequately that it would not be doing business indirectly with a person subject to sanctions, making the transaction illegal for the buyer.

Yet, when the transaction broke down, the escrow company would not return the deposit and commenced an interpleader action. Procedurally, the case commenced by the escrow company filing a Petition for Interpleader with a local court. The escrow company sued both the seller and the buyer, naming them both as defendants.

The escrow company recited to the court that it is holding a deposit in a particular amount, and it is ready and willing to pay the entity entitled to the deposit, but it is unable to do so because potential claims may be asserted by the parties to the deposit. The escrow company claimed that it cannot release the deposit without assuming responsibility for determining unknown questions of fact and/or law, and without being subjected itself to the cost and expense of defending itself in a multitude of lawsuits and the possibility of double or multiple payment of the amount of the Deposit. The situation the escrow company recited it feared is a very rare occurrence and may only create liability if it involves irregular actions by an escrow company. One example is discussed in the article referred to above, "Deal or No Deal - The Disposition of Deposits in Failed Transactions."

The escrow company requested the court order the parties settle among themselves their respective rights to the deposit. The escrow company requested the court rule that, upon payment of the deposit by the escrow agent to the court, the court discharge the escrow company - without any further liability to the parties, and that the escrow company recover its attorneys' fees and costs. In other words, the party that placed a deposit with an escrow company is to pay the cost of the escrow company's lawyers in filing an interpleader action by which the escrow company is excused from any responsibility for not returning the deposit to the depositor, even if this means the escrow company is not performing its stated duty to return the deposit to the depositor in defined circumstances.

Further, the escrow company asked the court to enjoin the parties form instituting or prosecuting any suit or proceeding against the escrow company in any court with regard to the deposit "or other service provided by the escrow company relating to the sale of the aircraft." In other words, the company that placed a deposit an escrow company is not to be allowed to sue the escrow company for not fulfilling the escrow company's terms and conditions which set out certain circumstances in which a depositor is to be returned to the party that places a deposit, for example, if an APA were never executed.

Next, attorneys for the buyer and seller of the aircraft entered their appearances and filed answers to the interpleader and cross claims, and answers to the pleadings of the other side. Typically, approaching a year later, a motion for summary judgment will be filed. Then, typically, a financial settlement will be arrived at, and a joint dismissal with prejudice is filed.

One can sometimes see reference to the terms of the settlement, and these are possibly 80/20 in favor of one party. Even the party with an unsubstantiated claim that initiated the dispute is a winner and, typically, walks away with 20 percent or more of the deposit as its compensation for commencing the legal action by telling the escrow company by email that it claims the deposit. This, notwithstanding, that the complaining party has no good grounds to claim the deposit.

One may come to the conclusion that even arguments made in bad faith from the outset are winners. Simply initiating a claim, which is currently nearly cost-free to the complaining side, aside from its own legal expenses, if it is actually ever compelled to make any court filings, initiates a legal process that may take approaching two years to resolve and result in a cash benefit for the complainant. The court filings, when made, are cursory and serve to draw out proceedings and impose costs on the other side until a settlement is reached to avoid further expenses.

In the instance discussed above, there was a signed LOI but there was no escrow agreement. The LOI provided that sale of the aircraft was subject to the execution of a definitive aircraft purchase agreement, to be signed not later than ten business days after acceptance of the offer herein and the timely receipt of the deposit, whichever occurs last.

While the APA was being negotiated, the problem came up that the seller would not disclose a chain of title to the aircraft, nor the identity of the ultimate beneficial owner, and other issues came up.

The buyer decided not to complete negotiations and not to enter into an APA and sent formal notice to the seller that the buyer was discontinuing work on the APA and an explanation why. The buyer advised that it would be seeking recovery of the deposit from the escrow company.

A technician working for the Buyer had flown on the aircraft. Seller claimed that an internal email message that it had a copy of from the technician to the buyer reporting on his flight on the aircraft amounted to Buyer's "technical acceptance" of the aircraft, notwithstanding that the LOI required an APA to be signed within ten days and all drafts of the APA provided for a detailed inspection process that was never commenced. No technical acceptance notification was ever delivered by buyer to seller. The deal had died.

The seller alleged that the LOI was an enforceable contract to purchase the aircraft and the aircraft had been accepted by buyer. Seller claimed, without citing any legal authority, that, notwithstanding the aircraft was never put through the intended inspection process set out in the draft APA. Though the aircraft had not been accepted by buyer in any communication by buyer to seller, seller argued that buyer had technically accepted the aircraft "as is" and the deposit had become non-refundable.

The seller alleged that buyer's refusal to continue negotiations and to enter into an APA was a constructive fraud and that, "upon information and belief", it is a matter of "standard practice" in aviation purchase/sale transactions that earnest money deposits typically become non-refundable under the transaction documents following the purchaser's technical acceptance of an aircraft. This statement disregarded that the aircraft had not been accepted by buyer in any communication by buyer to seller.

The seller argued that, if the buyer considered the deposit to remain refundable despite having flown on the aircraft, which seller regarded as technical acceptance though there had not been any inspection in an inspection facility, then buyer had a legal and equitable duty to disclose its position on that matter before causing seller to take the aircraft off the market. Seller alleged that buyer misled seller by allowing seller to believe the parties were aligned on the non-refundable status of the deposit.

The seller argued that because buyer and seller were engaged in arms-length negotiations surrounding the purchase of an aircraft with the expectation that a contractual relationship would be established by the execution of an APA (in addition to the alleged contractual relationship established by the LOI), buyer had a legal or equitable duty to disclose to seller its position regarding the non-refundable status of the deposit. Seller requested the entire deposit plus damages to be established at trial.

Against these claims by seller, buyer filed a motion for partial summary judgment establishing that the flight on the aircraft by the technician working for the buyer had been a preliminary inspection and resulted only in a willingness by buyer to proceed and negotiate an APA, which was to be done within ten days, as provided in the LOI. Buyer and Seller failed to execute an APA. Seller knew the deposit was refundable absent execution of an APA. The LOI did not state that the deposit shall at any point be deemed non-refundable.

Importantly, for the purposes of the argument presented in this article, the terms and conditions of the escrow agent provided that, until escrow company was provided with, and acknowledged receipt of, a fully executed APA between purchaser and seller governing any funds that escrow agent was provided, or written confirmation from the depositor of any funds that the funds delivered to the escrow agent had become nonrefundable, the escrow agent shall have the right to deliver and documents, moneys or instruments deposited or delivered to the escrow agent to the respective parties depositing such documents, moneys or instruments.

Further, the terms and conditions provided that redelivery of such documents, moneys or instruments shall relieve the escrow agent from any further liability with reference thereto; this provision, however, may at any time be waived by the escrow company.

Accordingly, the parties had agreed, by acknowledging the escrow company terms and conditions, that the escrow company was protected from liability if it returned the deposit to the depositor. The escrow company would not be liable to the seller if the escrow company returned the deposit to the buyer in the absence of a signed APA.

Yet, the escrow company had reserved for itself a discretionary right to waive its obligation to return the deposit to the depositor. This discretion lies at the root of the problematic state of affairs in existence regarding industry practices and cases and controversies over deposits placed in escrow toward the purchase of business aircraft. This discretion should be removed or limited in an escrow agreement.

The right of an escrow company to return a deposit should be made an obligation to return the deposit in agreed circumstances, such as when an APA is never executed. A deposit should be returned also, for example, if the seller will not provide a bill of sale showing its owns the aircraft is is selling, or if the seller will not reveal the identity of the ultimate beneficial owner of the legal entity selling the aircraft.

The escrow company wiring instructions also provided escrow deposits received are considered refundable to the depositor until the escrow company is notified otherwise by the depositor or until the escrow agent is in receipt of an APA that has been executed by both purchaser and seller outlining the terms and conditions of the funds held in escrow.

Confirmation of receipt of the deposit by the escrow company sent to buyer recited the same rule, that the deposit will be held in escrow refundable pending further instruction from the depositor or a fully executed purchase agreement outlining the terms and conditions of the funds held.

In this case where buyer and seller did not ever provide a fully executed APA to escrow agent, as one was never executed. Buyer never advised escrow agent that its deposit was to be considered non-refundable, yet the escrow agent nonetheless refused to return the deposit to buyer. This was notwithstanding that the escrow company was fully informed about the

situation, and had the LOI, the detailed written notice from buyer to seller about why it was ceasing negotiation of the APA and was aware that the escrow company had not received a copy of an executed APA because one did not exist.

Further, as buyer argued to the court in its motion for summary judgment, the LOI was a non-binding and unenforceable document incapable of breach. The undisputed material facts established that the LOI was subject to execution of an APA, which never occurred. The Deposit was fully refundable prior to the execution of an APA. Buyer never technically accepted the aircraft because it never executed an APA, and all drafts of an APA set out a detailed procedure for technical acceptance of the aircraft following a defined inspection. The technical representative who had flown on the aircraft was not authorized to sign a technical acceptance for the buyer, and never did so. Accordingly, buyer never breached any contract with seller and was entitled to the fully refundable deposit. After the foregoing filing of the motion for summary judgment, the case settled, and it is understood buyer was given 20% of the deposit as its price for agreeing to settle the matter.

Having the foregoing story in mind, as an example, one may conclude the non-fulfillment by the escrow company if its right to return the deposit in the absence of a signed APA, while at the same time being excused from any liability to seller or buyer, was a problem that may and should be addressed going forward.

A three-party escrow agreement executed at the same time as an LOI can help to address this problem and reduce the risks for all parties, including the escrow company. An escrow agreement can clarify the circumstances in which a seller, a buyer and an escrow company are agreeing that a deposit shall be returned to the depositor without the exercise of any discretion by an escrow company.

Additional Considerations

1. Inconsistencies with Escrow Company Terms and Conditions

Even if there is an escrow agreement, there may arise inconsistencies between the terms of an escrow agreement and an escrow company's terms and conditions if an escrow company adds to an escrow agreement that its agreement to execute the escrow agreement is subject to its standard terms and conditions. So, having an escrow agreement may not be a magic bullet. But, having an escrow agreement, as opposed to not having an escrow agreement, should help avoid disputes by setting out clearly a series of circumstances in which a buyer, seller and escrow company are agreeing that a deposit is to be returned to the depositor. This agreement should be reached and executed before a deposit is sent to an escrow company.

2. Use of an Escrow Agreement in conjunction with an APA

While the likely helpful role of an escrow agreement to accompany an LOI may become convincing upon reflection, the role of an escrow agreement to accompany an APA may be subject to additional questions.

An executed APA should contain a complete set of rules about how a deposit should be handled. However, the same potential exists that a defaulting party will cover up its default by alleging the depositor was at fault and the escrow company will take the position that it cannot take responsibility for coming to any factual conclusion.

A three-party escrow agreement may still be useful in conjunction with an APA, to provide clear rules about how a deposit is to be handled after an APA is executed and to protect the escrow company in carrying out its obligation under the APA to return the deposit in agreed circumstances. There is a need for provisions in the APA concerning the interrelationship of the APA, the escrow agreement, and the escrow company terms and conditions.

3. Governing Law

An escrow agreement should be governed by the law of Oklahoma and provide for dispute resolution in a venue consistent with the escrow company terms and conditions. Sellers and buyers are routinely wrongfooted, intentionally or unintentionally, by their opposite parties and by brokers into agreeing to dispute resolution in foreign and other jurisdictions.

For example, an APA may provide for dispute resolution through court proceedings or arbitration in England under English law, or in France under French law, disregarding that an escrow company will take a dispute into an Oklahoma courtroom. This conflict of governing law provisions creates the likelihood of extended delays, and a completely impractical level of expense, and magnifies that bargaining power of bad actors. Such dispute resolution traps for the unwary should be resisted in negotiations of LOIs, APAs and escrow agreements.

4. Escrow Agreement are Commonly Required in Other Industries

In other industries, escrow agreements are routinely used. Millions of dollars in deposits are not placed at risk and change hands based on escrow company terms and conditions that the parties to a transaction have typically not read and which terms and conditions give an escrow company broad discretion whether to return deposits.

5. Escrow Agreement are Used in Real Estate Transactions for Assets Costing Much Less than Aircraft

In real estate transactions in Oklahoma escrow agreements are commonly used, and the amounts at risk in deposits are much less than deposits in aircraft transactions. As an example, see this discussion:

> Understanding and Negotiating the Contract – Oklahoma's Real Estate Commission has promulgated a series of standard forms. In most residential transactions, these forms will work just fine; however, when dealing with commercial real estate or negotiating seller financing as part of the contract, lawyer drafted contracts will often replace the standard contract forms and you should retain local real estate counsel. The complexity of the contract and how much time respective counsel spend negotiating back and forth will largely be a question of how much earnest money is being put down. If a buyer only risks losing a $2,500 escrow deposit, then it doesn't make much economical sense to pay an attorney by the hour to develop the strongest possible contract for securing return of that money. However, if a buyer is putting down $50,000, then it makes sense to have a more complicated contract that allows clear exit strategies from the transaction with return of escrow money if due diligence reveals that the property is not as promised.

See: https://www.gossenschaller.com/blog/2020/january/oklahoma-real-estate-transactions-for-out-of-sta/

6. Strict Escrow Agreements are Required in Securities Transactions / Escrow Companies are Protected from Liability

In securities transactions, complex escrow agreements are commonly used and banks act as escrow agents. Escrow agreements in securities transactions are used to accumulate investor funds prior to a closing of an issuance of securities. Standard terms and conditions provide for prompt return of subscriber funds if a transaction does not proceed to closing. Sample escrow agreements are available through the SEC EDGAR website. Once minimum offering requirements are satisfied, escrow agents disburse investor funds. An escrow company protects itself from liability by clauses in escrow agreements that provide an escrow company shall not be liable except for willful misconduct, breach of trust or gross negligence, for any action taken or omitted by it in good faith. For example, see this clause:

> 4. Duties of the Escrow Agent. The Escrow Agent shall have no duties or responsibilities other than those expressly set forth in this Agreement, and no implied duties or obligations shall be read into this Agreement against the Escrow Agent. The Escrow Agent is not a party to, or bound by, any other agreement among the other parties hereto with respect to the subject matter hereof, and the Escrow Agent's duties shall be determined solely by reference to this Agreement. The Escrow Agent shall have no duty to enforce any obligation of any person, other than as provided herein. The Escrow Agent

shall be under no liability to anyone by reason of any failure on the part of any party hereto or any maker, endorser or other signatory of any document or any other person to perform such person's obligations under any such document.

5. Liability of the Escrow Agent: Indemnification. The Escrow Agent acts hereunder as a depository only. The Escrow Agent shall not be liable, except for willful misconduct, breach of trust, or gross negligence, for any action take nor omitted by it, or any action suffered by it to be taken or omitted, in good faith, and in the exercise of its own best judgment, and may rely conclusively and shall be protected in acting upon any order, notice, demand, certificate, opinion or advice of counsel (including counsel chosen by the Escrow Agent), statement, instrument, report or other paper or document (not only as to its due execution and the validity and effectiveness of its provisions, but also as to the truth and acceptability of any information therein contained) which is believed by the Escrow Agent to be genuine and to be signed or presented by the proper person(s). The Escrow Agent shall not be held liable for any error in judgment made in good faith by an officer or employee of either unless it shall be proved that such officer or employee was grossly negligent or reckless in ascertaining the pertinent facts or acted intentionally in bad faith or engaged in willful misconduct or a breach of trust. The Escrow Agent shall not be bound by any notice of demand, or any waiver, modification, termination, or rescission of this Agreement or any of the terms hereof, unless evidenced by a writing delivered to the Escrow Agent signed by the proper party or parties and, if the duties or rights of the Escrow Agent are affected, unless it shall give its prior written consent thereto.

The Escrow Agent may consult legal counsel and shall exercise reasonable care in the selection of such counsel, in the event of any dispute or question as to the construction of any provisions hereof or its duties hereunder, and it shall incur no liability and shall be fully protected in acting in accordance with the reasonable opinion or instructions of such counsel.

The Escrow Agent shall not be responsible, may conclusively rely upon and shall be protected, indemnified and held harmless by the Company, for the sufficiency or accuracy of the form of, or the execution, validity, value or genuineness of any document or property received, held or delivered by it hereunder, or of the signature or endorsement thereon, or for any description therein; nor shall the Escrow Agent be responsible or liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver any document, property or this Agreement.

In the event that the Escrow Agent shall become involved in any arbitration or litigation relating to the Investor Funds in the Escrow Account, each is authorized to comply with any decision reached through such arbitration or litigation.

The Company hereby agrees to indemnify the Escrow Agent for, and to hold each harmless against any loss, liability or expense incurred in connection herewith, except losses,

> damages or expenses due to gross negligence, breach of trust, recklessness, bad faith or willful misconduct on the part of the Escrow Agent, including without limitation, legal or other fees arising out of or in connection with its entering into this Agreement and carrying out its duties hereunder, including without limitation the costs and expenses of defending itself against any claim of liability in the premises or any action for interpleader. The Escrow Agent shall be under no obligation to institute or defend any action, suit, or legal proceeding in connection herewith, unless first indemnified and held harmless to its satisfaction in accordance with the foregoing, except that neither shall be indemnified against any loss, liability or expense arising out of its own gross negligence, recklessness, bad faith or willful misconduct. The terms of this Section shall survive the termination of the Escrow Agreement and the resignation or removal of the Escrow Agent.

See: EX-99(K)(5) Escrow Agreement among NexPoint Capital, Inc., Highland Capital Funds Distributor, Inc. and UMB Bank, N.A. as escrow agent. https://www.sec.gov/Archives/edgar/data/1588272/000119312516489531/d38462dex99k5.htm

7. A Complaining Side Should Be Required to Post an Indemnification and Guarantee

There are many interesting provisions in the foregoing limitation of liability for the Escrow Agent, including the last one that:

> "The Escrow Agent shall be under no obligation to institute or defend any action, suit, or legal proceeding in connection herewith, unless first indemnified and held harmless to its satisfaction in accordance with the foregoing, except that neither shall be indemnified against any loss, liability or expense arising out of its own gross negligence, recklessness, bad faith or willful misconduct."

In a business aviation transaction, if a complaining party were obligated to provide an indemnification, backed by some adequate security and guarantee of payment of the indemnified amount, the party that may want an escrow agent in Oklahoma to refuse to return a deposit to its depositor, an aircraft broker representing a seller, for example, would have to enter into an indemnification agreement with the escrow company. The indemnification agreement and related financial guarantee would compensate the escrow company and the depositor for any costs and expenses incurred in defending itself against any claim of liability.

If a broker wants to block the return of a deposit to a seller, the broker should have to do more than send an email to the escrow company saying the broker feels the seller is entitled to the deposit. The broker and/or seller should have to take on the economic risk of indemnifying the escrow company. This change in practice would undo the current situation where costs and risks are externalized, and a deposit may easily be held hostage for a year or two and should cause fewer disputes to come into existence.

In the absence of such an indemnification and guarantee from a complaining side, an escrow agent should not act on the complaining side's complaint and should return the deposit to the party that deposited the deposit or carry out the other terms of a three-party escrow agreement.

8. Perhaps Escrow Company Services Should Cost More

Escrow companies sometimes contend that they have a low margin business, and, for this reason, they need to externalize 100% of all conceivable risks and they will not return a deposit even if a claim made for the deposit by one party is plainly bogus, and the cost imposed on the depositor over the following year or two are unjust and disproportionate.

To this, one answer may be that escrow services should cost more. Escrow companies should be compensated for taking on a bit more risk and exercising their right to return a deposit to a depositor if an APA is never executed.

9. Banks May Be Used to Hold Deposits

Possibly, if escrow companies are not willing to amend their practices to help to avoid unnecessary litigation over deposits, parties to future business aviation transactions may choose to shift their practices. Banks and other licensed fiduciaries may be engaged to hold deposits in business aviation transaction according to escrow agreements, as banks and other fiduciaries do in real estate and securities transactions.