

AIRCRAFT PURCHASE CONTRACTS

(1) General

The purchase and sale of an aircraft is generally governed by ordinary sale of goods law (e.g. in the U.K., by the Sale of Goods Act 1979; in New York, by Article 2 of the Uniform Commercial Code; and in France, by Articles 1582 to 1701 of the French Civil Code, subject to Article L121-11 of the French Code of Civil Aviation).

(2) Purchase Contracts for New Aircraft

All the major manufacturers use their own standard form of purchase agreement and it is fair to say that, certainly in the case of the "big three" (Boeing, McDonnell Douglas and Airbus), the purely legal content of the agreement (e.g. clauses dealing with exclusion of liabilities, taxes and duties, excusable delay, assignment, termination and governing law) is not negotiable except perhaps in the case of particularly strong carriers taking advantage of a buyer's market. The commercial terms (e.g. pricing, product support and customer support) should always be negotiable.

(a) Typical provisions of a purchase contract for a new aircraft:

- Subject Matter of Sale
- Delivery of Aircraft; Title and Risk of Loss
- Price of Aircraft
- Taxes and Customs Duties
- Payment
- Excusable Delay
- Changes to Detail Specification
- Federal Aviation Administration Requirements
- Buyer Furnished Equipment
- Demonstration and Test Flights
- Assignment; Resale or Lease
- Termination for Insolvency
- Inspections - Plant Representative
- Product Assurance

- Customer Support
- Spare Parts
- Notices and Requests
- Miscellaneous

Exhibits

- Aircraft Configuration
- Product Assurance Document
- Customer Support Document
- Price Adjustment Due to Economic Fluctuations - Airframe and Engine
- Buyer Furnished Equipment Document

(b) Some key issues:

(i) Warranties and exclusions

- principal elements:

(aa) express warranty by seller that Aircraft is free from defects in materials, workmanship and design (subject to state-of-the-art defence). Warranty does not normally extend to BFE, engines or components purchased by manufacturer and not manufactured to its detailed design.

(bb) limitation of liability for defects - typically limited to repair or replacement of defective item and confined to defects appearing within 36 months of delivery

(cc) disclaimer by buyer of all other warranties, express or implied and exclusion of consequential or other damages

(dd) express acknowledgment by buyer that it fully understands the exclusions and that the purchase price was agreed accordingly

- enforceability

- Delta Airlines v. McDonnell Douglas Corporation (503 F.2d.239; 5th Cir. 1974) - limitation to replacement of defective nose gear upheld, the Court refusing to apply the strict liability theory of recovery under Section 402A of the Restatement of Torts (Second)

- Goldberg v. Kollsman Instrument Corp. (191 N.E.2d.81) - implied warranty theory enabled injured third party to recover in tort against manufacturer of defective altimeter
- Varig v. Boeing (641 F.2d. 746; 9th Cir. 1981) - exculpatory clause protected Boeing from negligence/strict liability claim by third party purchaser
- Continental Airlines v. McDonnell Douglas (216 Cal. App. 3d 388; 1989) - manufacturer held liable for negligent misrepresentation, notwithstanding exclusion clause. California Court of Appeals held that negligent misrepresentation constituted fraud within meaning of Section 1668 of California Civil Code and could not be excluded (specifically disagreeing with the earlier holding of the Second Circuit Court of Appeals in Tokyo Marine & Fire Ins. Co. v. McDonnell Douglas (617 F.2d. 936; 2d. Cir. 1980))
- Velasquez v. Northwest Airlines, Inc. (22 Av. Cas. 18,063 1989) - Michigan federal district court, applying California law, held that a claim for negligent misrepresentation is based on negligent conduct and MDC (who were joined in the action) were protected by their exclusion clause
- Manufacturer normally undertakes to obtain warranties in favour of buyer from manufacturers of installed components not manufactured to its detailed design. Engine manufacturer's warranties are normally assigned to buyer.
 - (ii) Assignability
 - (iii) Excusable Delay
 - will exclude manufacturer's liability for all force majeure circumstances and strikes, etc. Could be argued that the manufacturer should take the risk of industrial unrest amongst its own workforce, but the manufacturer will never accept this.
 - buyer must have a "drop dead" date, typically 12 months (see Boeing, Article 6.2(a)). Because of effect on buyer's operation, "drop dead" date should be earlier but manufacturer will never agree.
 - Eastern Airlines v. McDonnell Douglas (532 F.2d. 957; 5th Cir. 1976) - average delays of 80 days per aircraft held covered by excusable delay clause even though precise cause (Vietnam war commitments taking priority) not specifically included in excusable delay list and even though the delay was foreseeable

- (iv) Manufacturer credits
- (v) Manufacturer support (asset value guarantees and deficiency guarantees)
- (vi) Service life policy
- (vii) Product support
 - crew/engineers training
 - field service representatives
 - spares support
 - dispatch reliability ratios, "turnaround" time, covenant by Seller to maintain sufficient store of spares while specified minimum number of aircraft remain in commercial service
- (viii) Buyer Furnished Equipment
 - typically covers such items as galleys and seats. Title and risk of loss may be expressed to pass from buyer to seller on delivery of BFE to seller (e.g. McDonnell Douglas) or may be retained by buyer (e.g. Boeing and Airbus). Problems can arise when BFE supplier includes reservation of title clause in supply contract and buyer defaults in payment.
- (ix) Delivery, certification, registration
 - seller will obtain type certificate from country of manufacture and export certificate of airworthiness
 - sales or use taxes imposed by country of manufacture are for buyer's account, similarly customs duties on BFE and engine imported into country of manufacture for installation on the aircraft.
 - export licences to be obtained by seller, import licences by buyer
 - ferry flight
- (x) Governing law
 - the major manufacturers typically insist on the governing law being that of their "home" jurisdiction (e.g. Boeing - the State of Washington; McDonnell Douglas - the State of California; Airbus - France).
 - in the U.S, the local UCC and GOL usually provide that the parties are free to agree the applicable law provided the transaction bears a "reasonable relation" to the State in question (e.g. Section

1-105, New York UCC). In the case of large transactions, the "reasonable relationship" requirement does not apply and the parties are free to agree the applicable law (e.g. Section 5-1401, New York GOL).

- in relation to EC countries, Article 3 of the 1980 Rome Convention provides that a contract "shall be governed by the law chosen by the parties" and Article 4 provides that, in the absence of a chosen law, the contract shall be governed by the law of the country "with which it is most closely connected."

(3) Purchase Contracts for Used Aircraft

Unlike in the case of the purchase of new aircraft, these contracts tend to be less standardised and, subject to the particular market, are freely negotiable.

(a) Typical provisions of a purchase contract for a used aircraft:

- Definitions and Interpretation
- Agreement to Sell
- Delivery
 - Date and Place
 - Condition on Delivery
 - Inspection and Acceptance
 - Acceptance Flight Indemnity and Insurance
- Warranties
 - Seller's Warranties
 - Buyer's Warranties
- Assignment of Manufacturer's Warranties
- Limits to Seller's Liability
- Indemnities and Insurance
- Export and Import Licence
- Delay, Loss and Damage
- Notices
- Miscellaneous
 - Variation of Terms
 - Delay in Enforcement
 - Enforceability
 - Assignment
 - Time of the Essence
 - Governing Law
 - Jurisdiction
 - Brokers
 - Confidentiality

Schedules

- Aircraft Specification
- Manuals and Technical Records
- Acceptance Certificate
- Bill of Sale

(b) Some key issues:

(i) "As is, where is" (normal stipulation as to delivery condition of Aircraft)

- Effectiveness
 - UCC - Section 2-316 (USA)
 - Must be in writing and "conspicuous". In Boeing v. O'Mally (329 F.2d 585), the 8th Circuit Court of Appeals held that the implied warranty of fitness was not excluded because the disclaimer was not in "specific language" as required under the Pennsylvania UCC, nor was the writing "conspicuous". Similarly, in Holcomb v. Cessna Aircraft Co. (439 F.2d.1150), the 5th Circuit Court of Appeals, relying on Section 1-201 of the UCC in interpreting the "conspicuous" requirement of Section 2-316, held that a disclaimer had to be "in larger or other contrasting type or colour" to be effective.
 - Consequential damages may not be excluded if exclusion would be "unconscionable" (Section 2-719(3)) or if there is "failure of essential purpose" (Section 2-719(2))
 - Unfair Contract Terms Act 1977 (UK)
 - "Reasonableness" test (Section 11 and Schedule 2) but Act not applicable to international sales contracts (Section 26)
 - Under French law, exclusion clauses are generally valid subject to 3 principal grounds for invalidation:
 - where the excluded obligation is essential to the contract;
 - where the breach is "fautes lourdes" or "fautes dolosives";

- where the buyer is a consumer or "non-professional"

- Buyer's safeguards

- Important to specify detailed delivery conditions. Effect of this is to ensure that buyer is not legally obliged to accept the Aircraft unless those conditions are complied with. (This does not abrogate basic "as is" concept, but does protect the buyer).

(ii) Indemnities to be given by Buyer

- Generally very wide and, from buyer's perspective, totally unfair, but standard industry practice.

- Usually coupled with insurance obligation but beware of Lloyd's endorsements Aviation 29, AVN 53 and AVN 67B.

- Must exclude wilful misconduct and gross negligence. (Gross negligence can give rise to difficulties - in the U.K. it has been held that "gross negligence is ordinary negligence with a vituperative epithet" (Wilson v. Brett (1843) 11 M&W 113); in the U.S., different jurisdictions define it in different ways and others, such as California and Kansas, do not recognise it (Holman v. Southwestern Bell Telephone Co. 358 F. Supp. 727)).

(iii) Unrecorded liens

- Although the 1933 Rome Convention on the Precautionary Attachment of Aircraft exempts aircraft in scheduled service from attachment by creditors who are not able to rely on an immediately enforceable judgment, only France, Germany, Italy, Spain, Belgium and the Netherlands of the leading aviation states have either ratified it or acceded to it.

- Many jurisdictions allow the detention and eventual sale of an aircraft for unpaid airport and/or navigation charges but a court order is needed before detention can be effected and, in many cases, the remedy is not available if the defaulting debtor is not the current owner of the aircraft. However, the position varies considerably from country to country:

- In France, the Civil Aviation Code allows the detention of an aircraft pending payment of unpaid airport charges (Article R224-4) or Eurocontrol charges (Article R134-3).

- In the U.K., there are wide-ranging powers of detention and sale in respect of unpaid airport

charges (Section 88 of the Civil Aviation Act 1982) or navigation charges (various Regulations made pursuant to Sections 73 and 74 of the 1982 Act). An aircraft can be detained and sold even if the outstanding charges were incurred by a previous owner/operator.

- Protection: contact all relevant airport and navigation authorities prior to purchase (difficult in practice). Seller should indemnify Buyer against any and all unpaid charges.

- Most jurisdictions recognise repairer's liens, i.e. the right of a maintenance facility to retain an Aircraft until it has been paid for work carried out to the Aircraft. In the UK, the lien is only exercisable when the work has been completed, when the charges have become due and payable and when the work improved, rather than simply maintained, the condition of the Aircraft (Hatton v. Car Maintenance Co. Ltd. [1915] 1 Ch. 621). Such liens are normally dependent upon possession of the Aircraft and cannot be asserted after possession has been relinquished.