

Expert determination in aircraft sales and purchase agreements – a better alternative?



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Expert determination in aircraft sale and purchase agreements is about to take off. The usual dispute resolution clause currently used in aircraft sale and purchase transactions is unfit for purpose and this article, in my view, explains why there is time for a radical change.

Having joined Bargate Murray and now a member of its Aviation and Superyacht Group, it has been particularly interesting to me to work on, and compare, a number of yacht construction and aviation contracts for the firm's clients.

It has been particularly helpful that Quentin Bargate, the firm's Senior Partner, is himself an arbitrator and a leading advocate of expert determination for technical disputes in yacht construction contracts. He includes wording that provides *"All disputes relating to purely technical aspects of the construction of the yacht...which cannot be resolved by negotiation and agreement between the parties will at the written request of either party be submitted to and finally determined by an Independent Technical Expert."* Having worked with Quentin for almost two years, I have seen the benefits of this approach. Why should parties to a purely technical dispute spend a fortune on arbitration if it can quickly be resolved by an expert?

I have, therefore, recently started to include expert determination wording in aircraft sale and purchase agreements. In my view, aviation lawyers underestimate the practical consequences of a situation where there is a dispute between the buyer and the seller as to whether the buyer is entitled to reject an aircraft after the pre-buy inspection. In this article, I consider in more detail the use of expert determination wording in aircraft sale and purchase transactions and hope that this revised approach may simplify the already *"tedious, onerous and heavily negotiated"* process, which the pre-buy itself entails.

The Aircraft Sale and Purchase Agreement ("APA")

For anyone who has ever been involved in an aircraft sale or purchase transaction, they would surely agree that the heart and soul of the APA is the delivery condition of the aircraft. The APA usually provides that an aircraft must be delivered in an "airworthy" condition, but in reality, much more substantial protection is required for the buyer. This is because the pre-buy inspection may reveal items which may have a direct affect on the future value and maintenance of the aircraft. Certain items, for example, may not be working properly which have nothing to do with the airworthiness of the aircraft or the repair of a certain discrepancy may leave the buyer having to carry out non-standard recurring inspections.

Apart from the buyer being able to walk away if the aircraft is not delivered by the seller in an "airworthy" condition on the delivery date, it is common practice to have a provision in the APA which entails the buyer to reject the aircraft if any other items are discovered during the pre-buy inspection. In fact, the list of such items is usually drafted as narrowly as possible so that the buyer does not have an unfettered right to walk away after the seller has re-located his aircraft to the pre-buy location and has been left without its use.

So then what happens in a situation where the buyer rejects the aircraft and there is a dispute between the parties as to whether the buyer is entitled to reject? If the parties are unable to agree on a solution, industry practice is that the APA provides for a governing law and jurisdiction clause (usually English or New York law) and the parties have to commence proceedings in the local courts. This can be a lengthy and expensive process and what it further means for the buyer is that he will have his deposit frozen with an escrow agent until the court issues an award. This could take years.

Expert Determination

In brief, expert determination is an alternative process to court litigation or arbitration in which the parties appoint an expert in the relevant field to reach a binding decision on an issue which is often of a technical nature. Generally, apart from it being a quick and cheap way of resolving fairly narrow technical issues, it can also be used to resolve an entire dispute. There is no right of appeal from an expert's decision, and opportunities to challenge the decisions are very limited. Expert determination can therefore be an attractive option for commercial parties to reach a swift, final and cost-effective resolution whilst preserving their business relationship.

A key feature of expert determination is that the expert's jurisdiction to decide the dispute derives from the contractual provisions which have been agreed by the parties. Under English law, there is no stand alone set of procedural rules to support the expert determination process and the courts are generally reluctant to interfere with what has been agreed between the commercial parties. Interestingly, and there is a lack of awareness of this, the New York Legislature over 50 years ago enacted specific legislation governing expert determination as a form of dispute resolution apart from arbitration.

In view of the above, surely including expert determination wording in an APA is a superior alternative to commencing court or arbitration proceedings?

This only goes to show how outdated many commercial contracts are. Surely, it is up to us, as key advisors to our clients, to draft clauses (where appropriate) which would allow our clients to have flexibility, finality, and a cheaper and faster commercial alternative to the more traditional litigation and dispute resolution options.

Indeed, Quentin went even further when he identified just such a need for small contractual disputes and founded Ajuve in 2016 to resolve such disputes inexpensively. See www.Ajuve.com.

Conclusion

Despite the benefits of expert determination, I am not yet fully convinced that it should fully replace the traditional litigation and arbitration routes, which should be available to any party where more complex issues are involved.

Having said that, when it comes to purely technical disputes under an APA, the parties should start incorporating expert determination wording. As emphasised, if, for example, there is a dispute between the parties whether the buyer is able to reject an aircraft after the pre-buy inspection, an expert determination provision would allow for a quick binding resolution and save substantial costs for both parties.

Bargate Murray prides itself in finding innovative solutions to reflect our client's business needs. In my view, this is just another example where Bargate Murray is a step ahead of the current industry practice.

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