



## contract provisions you shouldn't ignore

FRACTIONAL PROVIDERS MAY DISMISS SOME FINE PRINT IN YOUR DEAL AS "JUST BOILERPLATE" THAT YOU CAN SKIM OVER. BAD IDEA. MANY OF THESE TERMS CAN BE CRITICALLY IMPORTANT. *by James D. Butler*

BLACK'S LAW DICTIONARY DEFINES "BOILERPLATE" in part as "standard language in a legal document." In fractional contracts, plenty of provisions appear to be just that, and the response from your salesperson when asked about such provisions is likely to be, "Oh, don't worry. That's just boilerplate."

In truth, however, all aspects of a fractional contract are important because in some way they define the investment and the rights and obligations of both you and your provider.

Here are five seemingly innocuous provisions that you should thoughtfully consider when negotiating a contract:

**1. Definition of "aircraft."** On its face, this seems like a straightforward concept. It's the "airplane" or "helicopter." But this definition in your purchase agreement and bill of sale is vital because it describes what you're paying all this money for. Make sure it covers not only the airframe, but also the engines, avionics, equipment and even the warranty rights and logbooks so that, in the event you want to sell your share or are forced to take possession of the aircraft, you'll hold all the necessary ownership rights.

**2. Liability limitations.** Standard contracts include several paragraphs that appear in all capital letters where your provider disclaims all warranties and makes clear that it won't

be liable for much of anything. These provisions often go too far and can insulate the provider from liability even if it doesn't perform the simplest obligations for which you're paying, like delivering, maintaining and insuring the aircraft and providing pilots. These provisions should be modified to make clear that they do not absolve the provider from liability if it fails to perform its basic obligations under the contract.

**3. Inspecting records.** This provision generally grants you the right to inspect records relating to your aircraft. That doesn't go far enough. You should have the right to inspect, audit and copy records relating not only to the aircraft, but also to the provider's performance of your contract and its operation of the program generally. This broader right will enable you to gain access to important information if your provider performs inadequately and you need to prove a default. Information is power, and the more information you have, the better.

**4. Assignment.** This provision, which generally prohibits you from assigning your share, significantly limits the liquidity of your investment and thus its value. It means that you'll be able to sell your share only to the provider. Because the value of your share in such a sale likely is based only on the aircraft's value, if you want to sell during the contract term you'll not be

able to capture the value of any concessions included in the contract or any below-market management fees and other charges that could be realized in a sale to a third party.

This restriction, like the others mentioned here, is not accidental. Rather, it enables the provider to control the market in its shares so that anyone who wants to get in or out of the program must buy and sell only from or to the provider. This gives the provider enormous pricing power at both ends of the investment.

The standard assignment provision usually says nothing about the provider's right to assign your contract. Generally, when a contract is silent on this point, it's assumed that it is freely assignable. Again, this is not an omission. It ensures that the provider can sell the program without your consent. Seem farfetched? Not so. Recall the sale of Raytheon's Travel Air program to Flight Options in 2002, which left Travel Air owners in a program many had rejected when joining Travel Air.

**5. Provider Defaults.** All fractional contracts specify owner defaults—failure to pay bills on time being the main one—as well as provider remedies—generally the right to repurchase the interest and deduct from the purchase price any amounts you owe as well as a large remarketing fee.

The contract doesn't specify provider defaults, but does

## ONE PROVISION GENERALLY PROHIBITS YOU FROM ASSIGNING YOUR SHARE, SIGNIFICANTLY LIMITING THE VALUE OF YOUR INVESTMENT.

limit your remedies to the right to demand that the provider repurchase your share. A well-negotiated contract lists provider defaults, including failure to provide an aircraft on a timely basis on a few occasions in any year for reasons other than force majeure; the fleet having suffered more than a couple of accidents in any year that are the provider's fault; bankruptcy; failure to maintain insurance; and any other failure to perform a material obligation under the contract.

If the provider defaults, you should have all the remedies that are available under the law, including the right to sue for damages. The right to demand that the provider repurchase your share should be included, but without any remarketing fee.

As I mentioned earlier, you shouldn't be distracted by the provider's claims that such provisions are "just standard stuff." Boilerplate matters. Indeed, it can matter as much as anything in your contract. ■

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