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Is it *Worthy?* Defining 'airworthy' plus ICAO vs. the Volcano

By Don Mitchell, Partner, Smith, Gambrell & Russell, LLP

Parties to aviation equipment transactions often require that the aircraft be delivered, returned or maintained in "airworthy" condition. They insist that engines and other parts be in "serviceable" condition. Each willingly draft these words into their contracts, but is it clear what they mean? What happens when it comes time to test them?

Enforceability demands specificity. This is especially true when dealing with a fundamental aspect of condition. While the statement, "clean by commercial aircraft standards," is also vague, it is arguably at least objectively measurable. A cabin littered with garbage is not "clean" by any measure. Yet *airworthy* and *serviceable*, words having the potential to swing a deal from profit to loss, are oftentimes left in lowercase and undefined for the parties to argue about later. While this could be beneficial strategy for some, it can be a huge and potentially costly trap for the unwary.

The ATA Common Support Dictionary contains no fewer than three definitions for airworthy. The U.S. Federal Aviation Regulations (FAR's) define airworthy with respect to aircraft as, "...conform[ing] to its original type design and...in a condition for safe operation."¹ The phrase "safe operation" is not defined. The common thread among most definitions generally available is some concept of conforming to type design and in a condition "fit" or "safe" for flight. What remains unclear is whether "fit" or "safe" is measured at a point in time (at delivery, for example) or for a period beyond that time.

Indeed, airworthy does not mean that the aircraft is without defect. We know broken aircraft can fly safely because aviation authorities issue ferry flight permits for them all the time. Aircraft in commercial service fly with engines having undiscovered missing or damaged blades, and continue to do so unless they show abnormal trends. Yet, if the engine were borescoped, the aircraft would be grounded as being "unairworthy"

until the "unserviceable" engine were removed and replaced. Corrosion is another example—if it's not seen, it doesn't exist. But the mere existence of corrosion doesn't mean the aircraft is not "airworthy" or fit for flight—it's a matter of degree.


Certainly if an aircraft has an airworthiness certificate, it *must* be airworthy, right? Not necessarily. An aircraft in storage may have an airworthiness certificate, even if it has timed out on maintenance or has flat tires. While it may be airworthy in the strictest sense (it conforms to its type certificate), it may not be capable of flight or be safe to fly.

The word "serviceable" is also without clear definition. While the parties might intend it to mean simply that the item works in accordance with its intended function, some might expect more. An APU can start an engine with gusto or chug it to life only with some moderate coaxing. In each case the APU is serviceable, but in the second example, it is barely functional.

Since these terms are so difficult to define and measure, it may be best *not* to use them and instead fashion objectively measurable conditions which can be verified through inspections. Using them also comes with the risk of implied post-delivery liability. If you must use them, why not say what you mean? Rather than leave it to chance, develop effective and objectively measurable definitions that clearly state the parties' intent. For example, the U.S. FAR's definition could be adopted and supplemented to define airworthy to mean, "...that the aircraft conforms to its type design and that such aircraft is in a condition for safe operation and certified by the [operator, etc.] for return to service in accordance with aviation authority, manufacturer and maintenance program requirements as the same are applicable to such aircraft." Similarly, serviceable, with respect to a part, could mean, "...suitable for installation and commercial use on [the aircraft] in accordance

with the maintenance program and applicable aviation authority and certificating authority regulations and certified by [the operator, etc.] as being 'serviceable' by affixing to the same an FAA Form 8130-3 or EASA Form One serviceable tag without exceptions or limitations."

These are sample definitions only and still may be too subjective. But, they are undoubtedly a better start than leaving the terms undefined. Aviation isn't Vegas—why gamble when you can put the odds strongly in your favor and just say what you mean.

Eyjaffallajökull Update: In the July/August 2010 issue of *Jetrader*, I wrote how this Iceland volcano wreaked havoc across western and northern Europe when the EU closed this airspace to travel. There was widespread industry concern that the EU acted too aggressively in closing airspace when a more measured approach could have been taken. On 5 March 2012, the ICAO announced the publication "Flight Safety and Volcanic Ash," a manual aimed at providing a scientific basis for decision-making in light of potential future volcanic eruptions. According to ICAO's press release, the manual, "may recommend to aircraft operators when there is forecast volcanic ash contamination, placing responsibility for such operations on the operator, under the oversight of the State regulatory authority." The manual is based primarily on the work of the ICAO International Volcanic Ash Task Force and is available in English at www.icao.int/publications/Pages/doc-series.aspx. 

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Endnote

1. 14 C.F.R. 3.5(a).

