

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay containing text. The foreground shows a paved plaza with geometric patterns and a few small trees.

Financing and Leasing of Aircraft in the British Virgin Islands

Preface

This publication has been prepared for the assistance of those who are interested in the financing and leasing of aircraft in the British Virgin Islands (sometimes herein referred to as the “BVI”). It deals in broad terms with the requirements of British Virgin Islands law. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in the BVI on their specific proposals before taking steps to implement them.

Likewise, before proceeding with the incorporation of a company in the BVI, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

Persons considering establishing companies to carry on insurance or mutual fund business should request separate publications prepared by this Firm on these topics.

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1. FINANCING AIRCRAFT IN THE BRITISH VIRGIN ISLANDS

1.1. Overview

The British Virgin Islands are becoming an increasingly popular jurisdiction for establishing asset holding entities, and in particular, special purpose vehicles (“SPVs”) for use in aircraft financing transactions. Political and economic stability, being a well regarded participant in international financial transparency and information exchange initiatives, the application of structural bankruptcy remoteness techniques, as well as having a respected judicial system, (the UK Privy Council being the highest court of appeal), a favourable legislative framework and tax regime, and the absence of exchange control and currency restrictions, make the BVI the ideal jurisdiction to play a consistent and reliable role in ownership and financing structures.

1.2. Structure

Generally, BVI business companies are incorporated under the BVI Business Companies Act (“BVIBC Act”) as SPVs to play a particular role within a financing or leasing transaction. The rationale for introducing the SPV into the structure will depend upon financing and leasing regulations in the jurisdictions of the participant airlines, lessors or sub-lessors and therefore the SPV’s role in each structure will be tailored to fit the particular transaction.

The issue that then arises is how the shares of an SPV should be held. It is often the case that it is not possible or desirable for any of the parties to own the SPV or include the SPV as a balance sheet asset. A solution is to establish a trust pursuant to which a trustee holds the shares of the SPV.

In the BVI purpose trusts are most often used. A purpose trust is normally established by way of a declaration of trust to carry out stated purposes. An enforcer of a purpose trust is required in the BVI.

Unlike other offshore jurisdictions where there can be a need for an “in principle” consent from the local regulator, setting up a BVI SPV is extremely flexible, quick and relatively inexpensive. The SPV can be formed in as little as 24 hours.

In aircraft financing, the transaction will involve the transfer of ownership of the asset to an SPV which will acquire it with a loan from the lender. The aircraft is then leased by the SPV to a third party such as an airline, via an operating or finance lease. For the lender, the off balance sheet structure has several advantages. In addition, the structure established in BVI is entirely tax neutral. The suitability of BVI SPVs for structures such as these is well established. The share capital of a BVI company may be denominated in any currency in order to simplify the accounting requirements, and there are no minimum capital adequacy requirements.

1.3. Security

A security interest may be granted over the assets of the SPV. In circumstances where the financial institution providing financing is located in one country and the buyer wishes to register the aircraft in another country, the financial institution must normally be satisfied that the specific laws of the country of registration will recognize the mortgage agreement in the event of default of payment by the mortgagor.

In a financing transaction where the SPV is the owner of the aircraft, the SPV must enter details of the mortgage in its register of charges required to be maintained at the registered office of the SPV or at the office of its registered agent pursuant to s.162 of the BVIBC Act. In addition to registration in the jurisdiction of registration of the aircraft, it is a common condition subsequent of a mortgage that the mortgagor also applies to the BVI Registrar of Corporate Affairs (the “BVI Registrar”) to register the mortgage. While there is no concept of perfection in the British Virgin Islands, s.166 of the BVIBC Act provides that in the event that a relevant charge on property of an SPV is registered under the BVIBC Act, it has priority over a relevant charge subsequently registered under the BVIBC Act and over any relevant charge on property that is not registered under the BVIBC Act. Third parties are deemed to have notice of security interests that are entered on the register and filed with the BVI Registrar. The charge may be registered by either the SPV or the chargee by filing an application in the approved form.

In addition, the shares of the SPV may be pledged in favour of the financiers. A notation is then made on the share register of the SPV which may be publicly filed with the BVI Registrar. While this filing does not necessarily establish priority pursuant to any statutory provision set out in the BVIBC Act the public filing of the share register with the security interest recorded helps to prevent any third party from obtaining priority pursuant to the common law and equitable principles. These principles provide that while as between competing equitable interests the first in time prevails, if the holder of the second interest, having advanced his money without notice of the first, gets in legal title, he obtains priority. The public filing of the share register assists in ensuring that no third party can obtain legal title over the shares without reasonable notice of such security interest.

In many instances the aircraft are owned by high net worth individuals through the BVI SPV and as such it is common for the financiers to require personal guarantees and corporate guarantees from other companies owned by the high net worth individuals.

2. TAXATION

The BVI has no corporation tax, income tax, capital gains tax, inheritance tax, gift tax, wealth tax, or any other tax applicable to a company conducting off-shore business.

3. REGISTRATION

Steps are being taken in the British Virgin Islands to make aircraft registration available.

The British Virgin Islands is a competitive jurisdiction for incorporations and international transactional work. It is anticipated that the availability of aircraft registration will see the jurisdiction at the forefront of aircraft financing and registration.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.