

## AIRFINANCE IN BERMUDA

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Bermuda is an offshore leader in a broad range of aviation matters, including aviation financing and aircraft registrations. This article looks at these two areas in detail as well as briefly discussing the Aviation Working Group which was established in Bermuda with the assistance of Conyers Dill & Pearman.

### **Aviation Finance**

#### ***Bermuda special purpose vehicles***

Bermuda continues to be the offshore leader in aviation finance and, in particular, aircraft leasing and innovative financings. By using a Bermuda special purpose vehicle ("SPV"), funding and leasing arrangements may obtain certain tax, regulatory and capital restriction relief through a reliable and trusted jurisdiction.

In recent years there has been increasing use of Bermuda structures organised with exempted companies, trusts or foreign sales corporations for the purpose of financing and leasing aircraft and other major capital equipment such as ships, locomotives, electricity generating equipment and satellites. The rationale for introducing an SPV into the structure is linked to financing and leasing regulations in the jurisdictions of the participant airlines, lessors or sub-lessors.

There are numerous benefits in establishing an SPV in Bermuda. Bermuda is a tax neutral jurisdiction (meaning there are no additional taxes in Bermuda that would affect or be harmful to the transaction) with appropriate, but not overly burdensome regulation. The legal framework of Bermuda is based on common law principles with English common law having a persuasive role. In addition, Bermuda is a British Overseas Territory and offers a stable political environment which provides consistency and certainty. The involvement of a Bermuda SPV can act as a counterbalance to operator jurisdictions where such stability might be less evident.

In the typical financing structure, a Bermuda SPV is formed to act as owner and lessor or as lessee and sub-lessor of the aircraft. The location of the company in a tax neutral and flexible jurisdiction may offer certain protections against the bankruptcy of other involved parties and facilitates innovative and cost-effective methods of asset finance, often utilising cross-back tax benefits.

#### ***Bankruptcy Remoteness***

In many finance transactions it is important to establish the SPV as a bankruptcy remote vehicle. The SPV is incorporated with restrictions in its charter documents, for example, to only raise funds by the issuance of notes in the context of a securitization and to enter into only such transactions as are related to the purchase and lease of the aircraft. The SPV will be a clean company with no operating history and will enter into various contractual restrictions that reduce the risk of bankruptcy. The investors are attracted to the deal as there are no concerns in connection with the creditworthiness of the airline.

Bermuda has in place legislative bankruptcy and corporate schemes which are particularly amenable to SPVs seeking to establish bankruptcy remoteness. Under Bermuda law it is only in specific cases (for the most part, where there is evidence of fraud) that the separate corporate personality of an SPV will be ignored so as to allow creditors of an SPV to commence proceedings against its shareholders or to allow creditors of shareholders to

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proceed against the SPV. English common law is highly persuasive in this context. Furthermore, investors, lenders, rating agencies and many service providers are familiar with the legal system in Bermuda and are willing to participate in such a structure with little added due diligence. In the case of rated transactions, SPVs formed in Bermuda have the opportunity to achieve the highest credit ratings, particularly where the asset pool in question is otherwise creditworthy.

### **Security**

Taking security over the shares of an owing or leasing SPV is often required in asset based financial transactions. In most cases, the secured party does not wish to have the shares registered in its name (as in the case of a legal mortgage) and prefers to have a charge granted over the shares. If a default occurs, the secured party then has the shares transferred to itself or its nominee. In order to ensure this outcome, special provisions can be added to the charter documents of the SPV, blank share transfer forms are executed and held by the secured party, as are undertakings by the directors of the SPV to transfer the shares (by updating the register of members of the SPV) upon demand of the secured party. In such a case it would be usual for all of the existing directors and officers to resign and their signed, undated resignations are obtained at the time the share charge is executed with a permission to date such resignations upon an identified default occurring.

The Registrar of Companies of Bermuda maintains a public register of mortgages and charges and the Bermuda Department of Civil Aviation (the "BDCA") a separate aircraft and engines mortgage register. Generally, the details of any such security interests would be filed on the relevant register. Registration constitutes notice to the public of the interest of the secured party in or over the charged assets and any registered charge will have priority over any subsequently registered charge and unregistered charge, to the extent that Bermuda law governs the priority.

### **Recent deals**

Conyers Dill & Pearman has represented a number of major aircraft lessors in connection with the structuring of aircraft portfolio securitizations, IPOs, acquisition financing and warehouse financing facilities, including Genesis Lease Limited, Aircastle Limited, AerCap B.V. and Babcock & Brown Air Limited, in addition to the financing and common registration of a diverse number of commercial operator aircraft fleets.

Over the last two years the firm has been particularly active in structuring SPVs for use within major aircraft portfolio securitizations and advising in connection with certain of these aircraft lessors listing on the New York Stock Exchange. As the market for portfolio securitizations has become more challenging, so the lessors and the major aviation financing banks have looked to new, innovative structures. Bermuda is able to offer the market a variety of flexible structuring choices and it appears that the SPV remains an attractive choice for financings and restructuring alike. Recent highlights include advising Aircastle in relation to a seven-year, US\$786.1 million term debt facility entered into by a newly incorporated SPV and an Irish special purpose entity as borrowers on a portfolio of 28 aircraft, arranged by Calyon, New York Branch. The firm also advised Babcock & Brown Air Limited in connection with its US\$1 billion warehouse facility on a portfolio of 22 aircraft.

Despite the challenging markets, the firm advised AerCap in relation to its US\$1 billion aircraft securitization, through Aircraft Lease Securitisation II Limited ("ALS II"), a Bermuda SPV, to provide long term non recourse funding for 30 new A320 family aircraft. ALS II has issued Class A-1 Floating Rate Asset Backed Notes Series 2008-1 to the Commitment Holders and Class A-2 Floating Rate Asset Backed Notes Series 2008-1, with an aggregate outstanding principal balance of up to US\$1 billion.

Most recently the firm advised AerCap acting through its consolidated joint venture AerVenture Limited in connection with its US\$846 million ECA A320 delivery funding facility with Calyon as lead syndicate bank. The financing is to be used to fund deliveries of A320 family aircraft under AerVenture Limited's forward order with Airbus through 2011.

The use of a Bermuda SPV in the structure is dependent upon the financing, legal and regulatory requirements in the home jurisdiction of the airline and as such, each transaction will be individually structured. Political and economic stability, an effective judicial system, a favourable tax regime and the absence of exchange control and currency restrictions make Bermuda the ideal jurisdiction for aircraft and other international financing transactions. Bermuda offers the aircraft industry a commercially flexible approach with considerable expertise.

### **Aircraft Registration in Bermuda**

There are presently in excess of 450 aircraft on the Bermuda Register of Aircraft (which has been in existence since 1931) (the "Register") and the majority of these are low age assets with significant value. Aircraft registered in Bermuda are registered either in the private or the commercial category. Many of the former are executive jets such as the Boeing Business Jet, Gulfstream GV, Gulfstream GIV Falcon 900B, Bombardier Global Express and Airbus Corporate Jetliner or commercial type aircraft such as the Boeing 757, Boeing 737, Boeing 727 and Airbus A319 registered for private use. Commercial aircraft operated by international airlines and presently registered in Bermuda include the full range of Airbus and Boeing aircraft. There has been a growing use of the Register for commercially operated aircraft and this category has become the fastest growing for the BDCA in recent years.

Registration in Bermuda is not subject to any requirements that demand the aircraft be based in or operate through Bermuda and Bermuda registered aircraft may be operated anywhere in the world, excluding war zones and the like or practically, areas restricted by its insurances. Aircraft that meet the standards of the BDCA may be registered by a Bermuda exempted owning company or on a lease through basis to a Bermuda exempted company lessee.

The BDCA has entered into a number of agreements with foreign jurisdictions regarding the transfer to operator states of certain regulatory oversight functions and duties under Article 83 *bis* of the Convention on International Civil Aviation (Chicago, 1944) to which the United Kingdom (representing Bermuda) is a party. In this way, certain functions and duties normally carried out by a state of registry are transferred, under strict guidelines, to an operator's state. The aim of this highly successful operational initiative is to ensure on the spot safety oversight and allow for greater efficiencies at both the government and operator level.

Presently active *bis* agreements are in place with the governments of Russia, Uzbekistan, Azerbaijan and Austria and the BDCA and relevant aviation authorities in each state enjoy close working relationships.

Owners and operators rely on a Bermudian administration which is rated as a Category 1 Aviation Regulatory Authority by the US Federal Aviation Administration and which is prepared to accept more than one internationally recognised set of airworthiness requirements, various flight crew licences for validation, and provides a "low-profile" registration mark which is valuable when operating in areas of the world subject to security risks or political instability. The Bermuda registration mark VP-B with two subsequent letters is seen as a neutral mark of high standard which is internationally accepted for operations worldwide. Due to the success of the mark, an additional designation, VQ-B, was introduced in May 2008.

Owners and operators have expressed satisfaction with the high level of responsiveness of the BDCA in dealing with their enquiries and requirements. This is supported by the full range of professional and administrative services necessary to ensure that the BDCA and the Register retain a high level of international respect and confidence.

### **Aviation Working Group**

Bermuda is the jurisdiction of choice for the Aviation Working Group ("AWG"), representative body for manufacturers, key operating lessors and key financiers in the aviation field. AWG began work in 1994, at the request of the International Institute for the Unification of Private

Law (**UNIDROIT**), as an ad hoc industry group to contribute to the development of the Cape Town Convention. Since that time, its scope of activity has significantly expanded and now addresses a wide range of topics affecting international aviation financing. In 2002, it formalised itself as a not-for-profit legal entity. For more information see [www.awg.aero](http://www.awg.aero).

*This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.*

#### **Notes to Editors**

Conyers Dill & Pearman has pioneered the field of offshore law since its establishment in 1928. It is the first law firm to have established an office outside of its home jurisdiction, setting up shop in Guernsey in 1982 as a base for servicing European clients (superseded by the London office in 1998). It is also the first to have expanded into Asia, with the opening of its Hong Kong office in 1988, and the first to establish a presence in Singapore in 2001. It is also the first to have an office in Russia with the launch of its Moscow office in 2008. Conyers has continued in this vein in 2009, becoming the first offshore firm to have a Brazil office, with the formation of its São Paulo partnership in March.

With a current complement in excess of 550 staff, with over 150 lawyers, Conyers Dill & Pearman advises on the laws of Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Mauritius from those islands and from Dubai, Hong Kong, London, Moscow, and Singapore. The firm has earned clients' trust, loyalty and respect by consistently providing responsive, timely and thorough advice on all aspects of offshore corporate, company and commercial law, commercial litigation and private client matters.

Affiliated companies (Codan) provide registered agent, registered office, corporate director and secretarial services, as well as specialised company management services. An affiliated global network of licensed trust companies undertakes a broad range of trust establishment and administration services. These services range from the administration of family trusts for private clients to the structuring of highly complex and innovative corporate ventures including special purpose trusts for ownership of securitization structures.

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