



VP-L** : AIRCRAFT REGISTRATION IN THE BVI



Historically, the British Virgin Islands has been an incorporation jurisdiction, often incorporating the holding company for an aircraft registered in another jurisdiction. The aircraft itself has typically not been registered in the British Virgin Islands. In fact, only one aircraft to date has been registered in the British Virgin Islands, which is the local police aircraft. This is about to change. The British Virgin Islands is about to compete head to head with other offshore jurisdictions for the registration of both private and commercial aircraft.

Offshore Aircraft Registration

As a preliminary point, it is worth considering why aircraft are registered offshore in the first place. The answer to this question is similar to why companies are incorporated in offshore jurisdictions – neutrality. Persons do not (or should not) choose to register their aircraft in an overseas territory to avoid regulation. The overseas territories are regulated to ICAO standards as a minimum, and often to higher United Kingdom standards.

However, aircraft are often leased or financed. The person providing the lease or financing is often in a jurisdiction other than the jurisdiction of the borrower or lessee. As a result, it is possible to make a decision as to where to register the aircraft.

The person providing the financing or lease will often not want to use the home jurisdiction of the borrower or lessee. In the event of the insolvency of the borrower or lessee, the lender may not feel sufficiently protected with the home jurisdiction as a result of an inadequate legal system to enforce security. Alternatively, the person providing the financing or the lease may simply feel that the home jurisdiction does not have adequate regulation

governing civil aviation or may fear an act of nationalism, war or other extraordinary event. A neutral jurisdiction, such as the BVI, fits the bill perfectly.

Another reason a person may not wish to register in their home jurisdiction is that unfortunately in this day and age, they may not want the registration of their home jurisdiction to show up on their aircraft. For example, an N registration for the United States is not always welcome around the world.

Benefits of the British Virgin Islands

The overseas territories have a strong legal history. It is this legal strength that gives lenders the comfort that they require in order to be certain that they will be able to realise on their assets if necessary.

The British Virgin Islands is particularly well known for its international business companies (recently renamed BVI business companies). The British Virgin Islands is the offshore equivalent of Delaware. It is expected and encouraged that an aircraft be owned by a British Virgin Islands business company. In fact, this is a necessary precondition unless the aircraft will be owned by an individual or company meeting certain specified requirements. Further, BVI companies do not pay any tax in the British Virgin Islands, and aircraft and their parts may be imported into the British Virgin Islands free of duty.



An important feature is the ability to delegate aircraft inspection to a competent authority in a competent jurisdiction. This contrasts with many onshore jurisdictions which require that an inspection of an aircraft be carried out in their home territory.

Mechanism to register in the British Virgin Islands

The Register of Aircrafts is managed and maintained by the Governor of the British Virgin Islands. These responsibilities have been delegated to the Director of Civil Aviation in the British Virgin Islands (the "Director") as overseen by Air Safety Support International ("ASSI"), a not-for-profit wholly owned subsidiary of the United Kingdom Civil Aviation Authority (the "CAA"). As such, the CAA is indirectly responsible for ensuring aircraft safety in the British Virgin Islands including with respect to such registry.

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There is a four step process to register an aircraft in the British Virgin Islands. ASSI recommends that prospective applicants seek BVI legal advice before proceeding with any application.

Step One (Due Diligence):

The process to register an aircraft in the British Virgin Islands starts with a written request to the Director. Upon receipt of the request, the Director will send the applicant an Aircraft Registration Application Form (BVI Form 001) which forms part of the due diligence process undertaken by the Director. The Director will ensure the applicant is eligible to register an aircraft in the British Virgin Islands. In particular, the aircraft must be owned by certain specified types of individuals or companies. The Director encourages the applicant to incorporate a British Virgin Islands business company for the purposes of owning the aircraft.

After the Director reviews the Aircraft Registration Application Form and determines that the applicant is suitable to proceed, the Director will send to the applicant a registration package which includes all the necessary application forms and additional guidance material as applicable to the applicant's operational and aircraft certification requirements.

Step Two (Operation of the Aircraft):

The registration package will contain information required for the applicant to comply with the operational requirements and flight crew licencing and validation requirements. The applicant will need to demonstrate compliance with overseas territory navigation requirements ("OTARs") parts 91 and 125 for an aircraft being used for private or corporate use, and OTARs parts 119 in conjunction with OTARs parts 121 and 135, as applicable, in connection with an aircraft being used for commercial use. Further, the applicant will need to demonstrate compliance with the flight crew licencing requirements under OTARs part 61.

Step Three (Certificate of Airworthiness & Supporting Maintenance):

Once the operation of the aircraft is established, an application for a certificate of airworthiness is made on BVI Form 002. When sent to the applicant, BVI Form 002 will be accompanied

by guidance material as to the documentation, manuals and minimum equipment levels which will be required. In this regard, I note that the Director will accept type certificates from the FAA in the USA, Transport Canada, a full member state of the Joint Aviation Authorities (JAA) or the European Aviation Safety Agency (EASA) for any aircraft which is the first of its type on the BVI register.

The applicant will need to submit a BVI Form 003 to have a Technical Coordinator approved by the Director. The Technical Coordinator is the person responsible for ensuring suitable arrangements have been made for continued airworthiness management.

Step Four (Continuing Requirements):

The owner (applicant) has the ultimate responsibility for continuing airworthiness of the aircraft, with the Technical Coordinator being responsible on a day to day basis. Reference is made to OTARs Part 39 in this regard.

The registration mark for British Virgin Islands aircraft will be prefixed with VP-L**.

Conclusion

While ASSI is in the process of finalising the various supporting documents and determining fees, it is anticipated and hoped that aircraft registration in the British Virgin Islands will become effective over the next several months.

The British Virgin Islands is a competitive jurisdiction for offshore incorporation and transactional work. In fact, it is the leading jurisdiction for offshore incorporations and has recently become the second most popular jurisdiction to launch an offshore hedge fund. With the introduction of aircraft registration in the British Virgin Islands it is anticipated that the British Virgin Islands will soon be a world leader in this regard as well.



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CELEBRATION TIME!

2008 has turned out to be quite a celebratory year for the firm. In addition to reaching 80 years of age, the firm celebrated the official launch party of the new Moscow office on June 18th at the Ritz Carlton in Moscow. Not to be out-done, the party celebrating the London office turning ten years old (and moving to larger quarters!) on July 3rd drew an excellent crowd to Rhodes 24.

JAPAN'S MERGER/TAKEOVER PROVISIONS UNDER THE NEW CORPORATION LAW: A BERMUDA (TRIANGULAR) PERSPECTIVE



Japan's new Corporation Law (*kaisha-hou*) came into force on 1 May, 2006 representing the most revolutionary change in Japanese corporate law since 1899 with far reaching impact and consequences on corporate governances and transactions in Japan.

One of the most debated changes is the provisions dealing with mergers and acquisitions between Japanese and foreign companies and the concept of "triangular mergers" (*sankakku gappai*) or "triangular share exchanges" (*kabushiki-koukan*) which came into force on 1 May, 2007, after a one-year moratorium imposed at the behest of the Japanese Business Federation (*Nippon Keidanren*). These new provisions enable a foreign company to use its own shares as consideration for the takeover of a Japanese target company by a Japanese subsidiary of a foreign company and the subsequent merger of the Japanese subsidiary and the target.

The new provisions stem from a deregulatory initiative of the erstwhile Koizumi administration to attract foreign direct investments in Japanese companies by invigorating the cross-border M&A market in Japan – a policy continued by subsequent administrations. The liberalization of the consideration to be paid to the shareholders of a Japanese target company to include cash, debt securities, stocks of other companies (in particular the shares of the foreign corporation), options and other in kind considerations (or combination thereof) contrasts sharply with the previous 1899 Commercial Code whereby only the stocks of the surviving acquirer Japanese company were permitted as consideration paid to the target shareholders (accompanying cash payments were only permitted under limited circumstances). These "triangular mergers" or "share exchanges" moves Japan closer to a more globalized standard and platform in cross-border M&A making Japanese mergers more approachable to its global trading partners. It allows a foreign acquirer to save on premium cash payments and interest expenses in having to finance the merger offer which it can channel to operational objectives and also enable the shareholders of the target company to participate in potential upside in the growth in the merged entity - especially important for those owner/managers who will become management participants in the combined enterprise and for some companies, unlocking the benefits of its high PE ratio. This article will briefly examine the implications in a triangular merger or share exchange where the foreign acquirer company is a Bermuda exempted company possibly listed on an international stock exchange and how certain features of Bermuda company law will interface with the mechanics of such mergers or share exchanges.

In a typical forward "triangular merger", a foreign company seeking to acquire a Japanese target company first establishes or acquires a 100% wholly-owned Japanese operating subsidiary. The Japanese subsidiary acquires shares in its foreign parent to be distributed to the target shareholders as merger consideration. If the takeover offer is successful, the target company will merge into the surviving Japanese acquirer subsidiary, and shares in the foreign company will be distributed to shareholders of the target in exchange for target shares. The

merged entity becomes 100% owned by the foreign company and the target shareholders will become shareholders in the foreign company. All assets and liabilities of the target company (except government licenses which are not transferable) are transferred from target company to the Japanese acquirer subsidiary upon merger. A typical triangular "share exchange" is similar except that there is no merger and the target company survives as a subsidiary of the Japanese acquirer subsidiary - no transfer of assets or licences are therefore required. The Citigroup - Nikko Cordial Corporation merger in October 2007 was the first public triangular share exchange deal under the new Corporation Law.

One of the important requirements for a proper triangular merger/share exchange to work is that the Japanese subsidiary must be able to legally acquire shares of its foreign parent to be distributed as merger consideration. The laws of the foreign company must allow for its Japanese subsidiary to acquire its own shares. This could prove an obstacle for many foreign companies particularly with an English company law heritage (such as Singapore and Hong Kong companies) because it would offend the rule against unlawful reduction of capital and unlawful financial assistance.

This is not an issue for Bermuda companies. It was held in the Supreme Court of Bermuda in *Stena Finance BV vs. Sea Containers Ltd.* (1989) Civil Jurisdiction no. 178 of 1989 that it is not per se unlawful or improper for a subsidiary company to acquire shares in its parent company under Bermuda law. A Bermuda company may therefore issue shares to its Japanese subsidiary to be distributed as merger consideration to the shareholders of the target company. Furthermore, the Bermuda Companies Amendment Act 2006 which came into force in December 2006, allows a Bermuda company to acquire its own shares to be held as "treasury shares" instead of being cancelled. The treasury shares can be reissued and resold to the market. A cash-rich Bermuda foreign acquirer company may conduct a share buy back exercise and hold such repurchased shares as treasury shares and subsequently contribute or transfer these shares to its Japanese subsidiary as part of the merger offer.

To qualify as a Qualified Share Exchange ("QSE") under the 2007 reforms to the Japanese Tax Code to enjoy capital gains tax deferral status by the target shareholders, there are a host of criteria to be met; one of which is a requirement that the merger consideration may only comprise shares of the foreign company and no cash or other assets (known as a "boot" payment) are allowed. Typically, in domestic mergers, any fractional share entitlements are cashed out because Japanese company law do not allow Japanese companies to issue fractional shares. However, in a triangular merger, it is unclear whether such cash-outs could amount to a "boot" and hence may cause the merger to fail to qualify as a QSE. In contrast, a Bermuda company is permitted to issue fractional shares and, subject to Japanese tax and legal counsel, could conceivably avoid the "boot" issue by allowing fractional shares to be issued to the target shareholders. Consideration will have to be given as to the capability of the relevant depository agent to hold such fractional shares and the tradability of such fractional shares on the stock exchange in which the foreign company's shares are listed and traded.

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JAPAN'S MERGER/TAKEOVER PROVISIONS UNDER THE NEW CORPORATION LAW: A BERMUDA (TRIANGULAR) PERSPECTIVE *continued*

The new Corporation Law cuts both ways and may also facilitate outbound takeovers and mergers of foreign companies by Japan companies. Japanese corporations may now permit their subsidiaries to acquire the stocks of their Japanese parents to be distributed as merger consideration. As Japanese corporations begin to embrace foreign mergers/takeovers as a viable corporate growth strategy and appreciate the synergies, scale merits and increased efficiencies of combining with a global player, acquisitive Japanese companies are already looking beyond its shores to global merger opportunities utilizing similar triangular stock swaps in its takeover strategy – a trend which is set to grow if the economy is revitalized. A Bermuda company could serve as an ideal tax-neutral, operationally flexible offshore acquisition subsidiary vehicle, not to mention also that it is permitted under Bermuda law to purchase and offer shares of its Japanese parent as merger consideration. Bermuda also has a robust range of amalgamation/merger options by which Bermuda companies may succinctly amalgamate or merge with foreign companies (including US Delaware companies) essentially with only board director and shareholder approvals. Bermuda company law affords “squeeze out” provisions to allow majority shareholders to mandatorily acquire the shares of dissenting minority shareholders under certain circumstances.

A distinct advantage over Cayman companies in this respect is that the amalgamations/mergers of Bermuda companies do not usually require court order (Bermuda) to effect the same.

Bermuda companies now comprise a significant portion of non-US companies listed on the NYSE and NASDAQ and a far greater extent on HKSE and SGX. Its recognition as a choice listing vehicle in international bourses around the world (including the Tokyo SE) will facilitate the secondary listing of the shares forming part of merger consideration further enhancing the marketability and attractiveness of merger consideration. Listing of the foreign shares should further encourage the obtainment of the required special resolution target shareholder approval (*tokubetsu ketsugi*) in such mergers/takeovers - a critical ingredient in ensuring their success in Japan.



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CIMA - Investments Statistical Digest



As many of you will recall the Cayman Islands Mutual Funds Law was amended in late 2006 and one of the key amendments was the introduction of a requirement for each hedge fund registered with the Cayman Islands Monetary Authority (“CIMA”) to submit an annual report. The

annual reporting requirement was introduced with effect from 2007 which meant that all hedge funds that were required to submit to CIMA audited accounts for the financial year ending December 31, 2006 were also required to submit an annual report for the same period. CIMA has used the information gathered from the annual returns to generate what they have called the Investments Statistical Digest (the “Digest”) a copy of which appears on the CIMA website at: <http://www.cimoney.com.ky/section/regulatoryframework/sub/default.aspx?section=ISD&id=513>.

The Digest makes very interesting reading and the excellent presentation is both informative and concise. Given this, it is not our intention to summarize the contents of the Digest, but rather point out certain noteworthy aspects.

One of the most important things to note is that the Digest is based on the annual returns of 81% of the hedge funds that were due to submit annual returns. In other words 19% of registered hedge funds did not submit annual average returns and therefore one must bear in mind that the statistics generated are not absolute but merely indicative. It is thought that a significant percentage of the hedge funds that did not submit an annual return, failed

to do so as they are in the process of winding down their operations. Accordingly any annual return submitted by such hedge funds would not have had a significant effect on the statistics produced.

Of primary interest is the size, growth and performance of the industry. The combined net asset value of the hedge funds that filed annual returns was US\$1.38 trillion and the gross asset value was US\$2.316 trillion, showing a leverage ratio of 67% and an annual return on investment of 10%. Previous estimates of the size of the industry have varied significantly and while it is undoubtedly useful to now have a more reliable figure it must be remembered that not all hedge funds are required to be registered with CIMA and accordingly the actual figure is likely to be significantly higher. From the perspective of measuring the rate of growth of the hedge fund industry in Cayman, the net subscriptions figure for 2006 was a very healthy US\$277 billion.

On the asset allocation side an interesting statistic was that 11% of the assets were invested into other hedge funds, showing the development of the fund of funds industry. This is a figure that we would expect to continue to grow. Not surprisingly the two top investment strategies were Multi-Strategy and Long/Short Equity, with Fixed Income being a somewhat distant third.

Should you like any further information relating to the Digest, CIMA or the Mutual Funds Law, please do not hesitate to contact us.

NEW EXEMPTION REGIME FOR BVI PRIVATE TRUST COMPANIES



The Financial Services (Exemption) Regulations 2007 (“the Regulations”) which came into effect on 1 August 2007 amend the law in the BVI to provide a new exemption regime for private trust companies. Under the new Regulations companies incorporated in the BVI with the intention of acting as “unremunerated trustees” or carrying on “related trust business” must satisfy certain statutory conditions in order to be exempted from the requirement to obtain a trust licence under the Banks and Trusts Companies Act 1990 (“BTCA”). The Banks and Trusts Companies (Application Procedures) Directions, 1991 have been revoked and can no longer be relied upon.

Qualifications for a Private Trust Company (“PTC”)

To qualify for exemption the company must be a BVI business company limited by shares or guarantee. Companies which were originally BVI International Business Companies (and re-registered as BVI Business Companies on 1 January 2007) can qualify for the exemption, but must amend their memorandum of association to comply with sections of the BVI Business Companies Act 2004. A qualifying company must also satisfy the following conditions:

- it must amend its memorandum of association to state that it is a private trust company and incorporate the letters “PTC” at the end of its name (but before “Ltd”, “Corp”, “Inc” or “SA” as required by the BVI Business Companies (Company Name) Regulations, 2007).
- it must appoint a BVI registered agent in the BVI which also holds a Class 1 Trust Licence
- it must carry on business which is either “unremunerated trust business” or “related trust business”
- it must not carry on business other than that of being trustee, protector or administrator of trusts
- it must not solicit trust business from the general public

There is no requirement for the BVI Financial Services Commission to approve the exemption of a PTC.

What is “unremunerated” and “related trust business”?

Unremunerated trust business means no remuneration is payable to or received by the PTC or any person “associated” with it in consideration for or with respect to its services that constitute the trust business. “Remuneration” includes money or any other form of property and it is immaterial whether remuneration is received out of assets or underlying assets of a trust, or from the settlor or beneficiary. A person is “associated” with the PTC if he has an interest in the PTC (whether legal or beneficial) or he is a director or a former director of the PTC or he is an employee or former employee of the PTC.

Trust business has the same meaning as in the BTCA as follows:

- (a) acting as a professional trustee, protector or administrator of a trust or settlement
- (b) managing or administering any trust or settlement

Related trust business is trust business carried on for one or more related family trusts, defined as “a single qualifying trust” or a “group of related qualifying trusts.” A trust is a qualifying trust where each beneficiary of the trust is a “connected” person in relation to the settlor of the trust or a charity. A trust is related to another trust where the settlor is a “connected” person in relation to the settlor of the second trust.



Obligations of the registered agent

Although PTCs are not regulated, certain duties and obligations are imposed on the registered agent of the PTC. The BVI registered agent must hold a Class 1 trust licence and must keep certain information on its files relating to the PTC, including copies of trust documents such as the trust deed and any deed or document varying the terms of the trust. The registered agent must also satisfy itself on an ongoing basis that the PTC is in compliance with the Regulations and with its obligations as a PTC and that all the records relating to the PTC are kept at its registered office. If it is believed that the PTC is no longer complying with its obligations the registered agent must notify the BVI Financial Services Commission. Failure of the registered agent to carry out its obligations properly may result in an enforcement action by the Commission against the agent (and the PTC) and possibly, revocation of the agent’s trust license.

Prior to August 2007, the Banks and Trusts Companies (Application Procedures) Directions 1991 provided for limited exemptions to the licensing requirements; however these Directions were not well drafted and have now been revoked. The new Regulations have been welcomed by BVI trust practitioners as providing a sound and attractive new regime for setting up private trust companies. On the 27 December 2007 the Financial Services (Exemptions) (Amendment) Regulations 2007 were introduced in order to extend the deadline for compliance with the Regulations until 31 July 2008.



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