

## Commercial Aviation Finance in the British Virgin Islands

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The British Virgin Islands (“BVI”) is becoming an increasingly popular jurisdiction for aviation finance not only in the private and corporate jet sectors, but also in the commercial aircraft sector.

Although commercial aircraft are generally not operated out of or registered in the BVI, the BVI is playing an important role in the structuring of international transactions to acquire, finance and lease aircraft.

The BVIs political stability, tax neutrality, well developed English based legal system, bespoke commercial court, flexible and commercial legislation and adherence to international standards of compliance have led to the BVI becoming a popular jurisdiction to establish special purpose vehicles (“SPV”) to own or lease aircraft.

### Security

The SPV will typically own the aircraft. An SPV is so flexible it can be used to hold single or multiple aircraft. The acquisition of the aircraft by the SPV is most commonly financed by a third party lender who in turn will take a mortgage over the aircraft. Other security often includes granting security over the lease payments, separate security assignment(s) of the operator’s rights under the various contracts relating to the maintenance and operation of the aircraft – for example, the operating/management agreement, maintenance programs and policies of insurance and assignments of manufacturer’s warranties.

As a further protection for the lender in the context of the security provided by the SPV, a BVI business company is required to keep a register of all relevant charges created by the company. Where a company creates a relevant charge an application to register the charge may be made to the Registrar of Corporate Affairs in the BVI (the “Registrar”) pursuant to Section 163 of the *BVI Business Companies Act* (the “Act”). There is no concept of “perfection” of a charge but, to the extent that BVI law governs priority of the charge, a charge registered under Section 163 of the Act has priority over any subsequently registered and unregistered charges. Third parties are deemed to have notice of any publicly registered charge.

The BVI as a whole offers competitive pricing when compared to other jurisdictions. The fee in respect of filing a charge for registration is US\$100.00.

Additionally, the lender may take a charge over the shares of the SPV. As part of the share charge, the lender will also receive and retain certain ancillary “deliverables”, all designed to facilitate and allow the lender to take control of and potentially sell, the SPV and the underlying aircraft on an enforcement. These may consist of some or all of the following: (i) the original share certificate (if any) with respect to the charged shares, (ii) an executed, undated blank share transfer form, (iii) executed but

undated resignation letters from the SPV directors and accompanying letters of authority to date the same on an enforcement, (iv) an irrevocable proxy in favor of the lender permitting it to vote the shares in the SPV on an enforcement and (v) an undertaking from the SPV and, potentially an undertaking from the registered agent, *inter alia*, to co-operate with and take instructions directly from the lender on an enforcement. The SPV articles of association may also be amended to include certain share charge-related provisions. As a further protection for the lender in this context, it is standard practice for a notation that the shares have been charged to be placed on the register of members of the company and filed with the Registrar for registration, thereby putting third parties on notice that the shares of the company have been so charged.

Anybody can request a search to be carried out at the offices of the Registrar to ascertain whether any charges are registered over the assets of the subject company and to ascertain whether a notation has been placed on the register of members of the company.

## Orphan Trust Structure

In many financing transactions it is important to establish the SPV as a bankruptcy remote vehicle or “orphan trust structure”. The SPV is incorporated with limited objects in its memorandum of association. For example, to enter into only such transactions as are related to the purchase and lease of the aircraft. The SPV is a clean company with no operating history.

In a typical BVI orphan trust structure, a purpose trust is established to hold the shares of the SPV. An offshore trust company acts as trustee and the director(s) of the SPV will also be provided by the offshore trust company. Our affiliate companies Conyers Trust Company (BVI) Limited provide registered office and registered agent services to the SPV, Conyers Director (BVI) Limited acts as corporate director for the SPV and Conyers Trustee Services (BVI) Limited acts as trustee.

The SPV enters into the finance and leasing documents necessary to enable it to acquire the aircraft and lease it to the airline, as end user.

The SPV will limit its obligations both in amount and recourse to the value of the security granted by the SPV, namely the aircraft and its rights under the lease, as such the lender is not being deprived of recourse against any significant asset.

Following payment of all obligations to the lender under the finance documents, the trust property namely the shares of the SPV will be distributed as provided for in the trust deed and the trust terminates.

One of the main attractions of the orphan trust structure is that ownership of the aircraft does not vest in the airline but with the SPV controlled by the trust company. Lenders, therefore, have no concerns in connection with the creditworthiness of the airline.

## Conclusion

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

## Recent Deals

Over the recent years Conyers' BVI office has been particularly active in structuring SPVs for export development agencies to fund the acquisition of aircraft which were in turn leased to airlines particularly in developing countries such as Ethiopia, Rwanda and Kazakhstan. The Ethiopia transaction in which Conyers acted as BVI counsel for Export Development Canada in connection with the US\$250 million purchase and lease of four dual class Bombardier Q400 NextGen aircraft from Bombardier Aerospace leased ultimately to Ethiopia Airlines was awarded Africa Most Innovative Deal of the Year by *Airfinance Journal*. In addition, Conyers acted as BVI counsel to PK Air Finance in connection with an existing SPV structure in respect of two loans for the acquisition of two 787 Boeing aircraft which were ultimately leased to and operated by an affiliate of Norwegian Air Shuttle.

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