

Aviation Finance & Leasing

in British Virgin Islands

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CONYERS

OVERVIEW

Conventions

To which major air law treaties is your state a party?

The British Virgin Islands (BVI) is not a signatory (or a party by extension from the United Kingdom) to the Rome Convention, the Geneva Convention, the Chicago Convention or the Cape Town Convention.

In relation to the Chicago Convention, however, certain provisions of that Convention, with which the United Kingdom is obliged to ensure that its overseas territories (including the BVI) comply, are reflected in the Air Navigation (Overseas Territories) Order 2013.

The BVI is, by Order-in-Council from the United Kingdom, a party to the New York Convention.

Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation is:

- the Air Navigation (Overseas Territories) Order, 2013 as amended; and
- the Mortgaging of Aircraft and Aircraft Engine Act, 2011.

Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Save for public policy considerations, there are no restrictions under BVI law on the parties' freedom to choose the governing law of such arrangements.

TITLE TRANSFER

Transfer of aircraft

How is title in an aircraft transferred?

While there are no specific BVI formalities, title is invariably transferred by way of bill of sale.

Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

Save for general enforceability considerations, there are no specific formalities.

REGISTRATION OF AIRCRAFT OWNERSHIP AND LEASE INTERESTS

Aircraft registry

Identify and describe the aircraft registry.

The BVI is an overseas territory of the United Kingdom. As such, the Register of Aircraft is governed by a UK statute, the Air Navigation (Overseas Territories) Order 2013 (ANOTO). Air Safety Support International, a wholly owned subsidiary company of the Civil Aviation Authority of the United Kingdom, acts as the oversight regulatory body for the Overseas Territories of the United Kingdom in relation to aviation matters.

Aircraft may be registered in the BVI. There are currently only five aircraft registered in the BVI, all in the names of locally registered corporations. Requirements for registration of aircraft are fully set out in the ANOTO. This includes who is considered to be a qualified person for registration. Such qualified persons are:

- the Crown in right of Her Majesty's Government in the United Kingdom or in right of the government of the BVI;
- United Kingdom nationals;
- Commonwealth citizens;
- nationals of any European Economic Area (EEA) state;
- bodies incorporated in any part of the Commonwealth that have their registered office or principal place of business in any part of the Commonwealth; and
- undertakings formed in accordance with the law of an EEA state and that have their registered office, central administration or principal place of business within the EEA.

Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

The persons qualified to hold a legal or beneficial interest by way of ownership or by charter by demise in an aircraft registered in the BVI (or a share therein) are listed as follows:

- the Crown in right of Her Majesty's Government in the United Kingdom or in right of the government of the BVI;
- United Kingdom nationals;
- Commonwealth citizens;
- nationals of any European Economic Area (EEA) state;
- bodies incorporated in any part of the Commonwealth that have their registered office or principal place of business in any part of the Commonwealth; and
- undertakings formed in accordance with the law of an EEA state and that have their registered office, central administration or principal place of business within the EEA.

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). As a matter of BVI law there is no concept of 'perfection' of a charge, but, to the extent that such 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\$200.

The Mortgaging of Aircraft and Aircraft Engines Act 2011 and the Mortgaging of Aircraft and Aircraft Engines Regulations create a framework for registration in the BVI of security over aircraft, and separately aircraft engines.

Registration of ownership interests

Summarise the process to register an ownership interest.

The Governor is the authority for the registration of aircraft in the Territory and is responsible for maintaining the register in a legible form.

An application for registration of an aircraft in the Territory must be made in writing to the Governor and must include or be accompanied by the particulars and information specified in the Governor's published requirements.

Upon receiving an application for the registration of an aircraft in the Territory, the Governor must register the aircraft upon being satisfied that the aircraft may properly be so registered and must include in the register such particulars that the Governor may specify.

The Governor must supply to the registered owner a certificate of registration.

Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration and the issue of a certificate of registration indicates that the Governor considers the relevant applicant to be qualified for registration, and may therefore be considered prima facie evidence of ownership.

Registration of lease interests

Summarise the process to register a lease interest.

An application for registration of an aircraft in the Territory must be made in writing to the Governor. In general terms, the Governor will not concern himself or herself with the specifics of the lease itself.

Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The Certificate of Registration is issued by the Governor. It sets out the following information: registration mark, aircraft type and serial number, the name of registered owner (and whether such a registered 'owner' holds a charter by demise interest), and the nationality of the registered owner.

Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

1. When the mortgagor has issued an irrevocable de-registration and export request authorisation, substantially in the form set out in Form 6 of Schedule 1 to the mortgage registered, and has submitted such authorisation to the Registrar for recording in the register, it shall be so recorded.
2. An authorised party or its certified designee shall be the sole person entitled to exercise the remedies specified in paragraph (3) below and may do so only in accordance with the authorisation and applicable safety laws and regulations and such authorisation may not be revoked by the mortgagor without the consent in writing of the authorised party.
3. the Registrar shall remove an authorisation from the register on the written request of the authorised party.
4. The remedies available to an authorised party in whose favour an authorisation has been issued are:
 1. to procure the deregistration of the relevant aircraft without requiring the return of the original certificate of registration issued in relation to the aircraft; and
 2. to procure the export and physical transfer of the aircraft from the BVI.

Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Under BVI law, a deregistration power of attorney, when granted to secure an obligation owed, typically, to the finance parties, will be irrevocable until that obligation is discharged and will survive the insolvency of the grantor. The power of attorney may be granted to more than one attorney-in-fact on a joint or several basis, or both.

Further, under BVI law, a power of attorney governed by BVI law is required to be executed as a deed.

A deregistration power of attorney need not, however, be governed by BVI law. It will frequently have the same governing law as the other transaction documents: for example, English law or New York law. It is possible to submit the deregistration power of attorney to the Governor and obtain an acknowledgement from the Governor with respect to it.

With regard to the deregistration process itself, there is no specific form of deregistration request and deregistration will, therefore, typically consist principally of the return to the Governor of the original of the certificate of registration endorsed at section (iii) on the back and signed by the owner of the aircraft or an officer of the company (or by the relevant attorney-in-fact). The aircraft typically cannot be deregistered until the Governor receives the original of such a signed certificate.

Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

This is not applicable in the BVI.

SECURITY

Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

There is no statutory format with which the mortgage must comply. The mortgage itself need not be governed by BVI law. A certified copy of mortgage deed must be provided to the Governor.

Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft?
What are the documentary costs?

There are no specific documentary formalities under BVI law. The fees are on a sliding scale according to the value of the mortgage.

Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

Aircraft registered in the BVI or capable of being so registered and aircraft engines owned by or in the lawful possession of a BVI company may be made the subject of a mortgage for the purposes of registration. The application for registration of the mortgage must be in the prescribed form, and must be made to the registrar by or on behalf of the mortgagee in question. It must be accompanied by a certified true copy of the mortgage and the prescribed fees.

Registration of security

How is registration of a security interest certified?

The Governor will issue a notification of registration, which is generally available on the date of registration. The notification states the date and time of registration, whether it is the first or a subsequently registered mortgage with respect to the relevant aircraft, and the principal details of the mortgage, and acknowledges receipt of the relevant registration fee.

Effect of registration of a security interest

What is the effect of registration as to third parties?

A mortgage entered on the register has priority over any other mortgage or charge on that aircraft or aircraft engine. It is also possible for the priority of a mortgage to be fixed by filing a priority notice with the Registrar pursuant to which the priority of a yet to be executed mortgage may be fixed for a 14-day period. When entered in the register within the 14-day period, that mortgage shall be deemed to have priority from the time the priority notice was registered.

Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

A typical security package for a financing involving the BVI will consist of an aircraft mortgage, a security assignment of the borrowing party's contractual rights (eg, under the relevant lease arrangements, the lease rentals or insurances) and a deregistration power of attorney or IDERA. It is often the case that the lenders will take security over the shares of the (often BVI) owner or borrower. These documents will usually not be governed by BVI law but, for example, by

English or New York law, save that a share mortgage over the shares of a BVI company is often governed by local law. The secured party is often a security trustee or collateral agent for the financing parties from time to time.

Security over spare engines

What form does security over spare engines typically take and how does it operate?

A mortgage to be registered on the BVI Aircraft Mortgage Register may cover any store of spare parts (including engines) for the aircraft, but may not include a mortgage created as a floating charge or a mortgage of spare parts on their own. Parts that in the future may become attached to the aircraft can be part of a registered mortgage provided they are sufficiently identifiable when acquired by the mortgagor and value is given. The BVI is not party to the Cape Town Convention.

ENFORCEMENT MEASURES

Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Subject to enforceability considerations under the governing law, the lex situs and any other relevant laws (other than BVI law), the BVI courts will typically recognise and enforce contractual arrangements such as lease termination provisions created under foreign laws. The BVI courts would also generally recognise self-help remedies by which the counterparties may take possession of the aircraft.

Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Similarly, the BVI courts would typically recognise self-help remedies in the context of an enforcement of security interests over the aircraft (and often over the shares of the aircraft-owning vehicle), for example, by dealing directly with the Governor pursuant to a deregistration power of attorney or IDERA to effect a deregistration. BVI law will generally also respect the secured parties' security interests in the event of the insolvency of the relevant obligor.

Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

While not definitive, it is believed that the following aircraft liens exist under BVI law:

- possessory lien - a common law lien, which requires that the lienholder has continuous possession of an aircraft on which it has bestowed labour authorised by the owner which has improved the aircraft in some way; and
- contractual lien (including pledge) - a lien created by contract. For example, the owner of an aircraft may pledge it to a creditor as security for a debt, or a lien may arise as a result of a person expending labour on an aircraft that

improves its value in some way in accordance with a contractual agreement (such as frequently occurs in respect of aircraft repairs).

The law in the BVI with respect to salvage liens is unclear, since the BVI has no statutory provision similar to section 87 of the UK Civil Aviation Act 1982. It is uncertain whether an aircraft salvage lien can be asserted in the BVI or whether the maritime salvage liens established by the Merchant Shipping Act 2001 would be extended to apply to aircraft.

It is possible to register contractual liens in the BVI. Generally, an aircraft lienholder will not have to apply to the BVI courts to enforce its lien, since it will have a contractual right to undertake such action. An exception is a possessory lien where the lienholder has no general right to sell an aircraft without the consent of the court.

Enforcement of foreign judgments and arbitral awards

How are judgments of foreign courts enforced? Is your jurisdiction party to the 1958 New York Convention?

The BVI is, by Order-in-Council from the United Kingdom, a party to the New York Convention. In the BVI the recognition of a foreign judgment is either by registration, by an action at common law on the debt (if the judgment is for a sum of money) or by bringing a fresh action. Registration is only available in very limited circumstances prescribed by statute. The relevant act is the Reciprocal Enforcement of Judgments Act 1922 (the Act). Pursuant to the Act, to be eligible for registration a judgment must be obtained:

- in a court of superior jurisdiction;
- for a sum of money; and
- from a recognised jurisdiction.

TAXES AND PAYMENT RESTRICTIONS

Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

The BVI currently has no form of income, corporate or capital gains tax, and no estate duty, inheritance tax or gift tax.

Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There is no exchange control legislation under BVI law, and accordingly there are no exchange control regulations imposed under BVI law.

Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Arrangements that provide for a penal rate of interest may be unenforceable under English common law principles,

which are of persuasive, if not binding, authority before the courts of the BVI.

Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Where an aircraft is to be imported into the BVI, it would be subject to BVI import duty.

INSURANCE AND REINSURANCE

Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

No such regime exists in the BVI.

Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

There are no BVI statutory provisions in relation to such clauses. The position under BVI law will reflect English common law principles (which are of persuasive, if not binding, effect before the courts of the BVI).

Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Subject to the usual enforceability qualifications, such arrangements are effective under BVI law and are common in aircraft finance transactions.

Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

With respect to an owner, section 76(4) of the UK Civil Aviation Act, 1982 is extended to the BVI to the effect that loss or damage caused by an aircraft in flight or by a person in, or an article, animal or person falling from, such an aircraft, is transferred to the person to whom the owner has demised, let or hired out the aircraft, if the demise, let or hire is for more than 14 days and no crew member is employed by the owner.

In general terms, a lessor or financier would not otherwise be liable solely by operation of BVI law.

Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

With respect to an owner, section 76(4) of the UK Civil Aviation Act, 1982 is extended to the BVI to the effect that loss or damage caused by an aircraft in flight or by a person in, or an article, animal or person falling from, such an aircraft, is transferred to the person to whom the owner has demised, let or hired out the aircraft if the demise, let or hire is for more than 14 days and no crew member is employed by the owner.

In general terms, a lessor or financier would not otherwise be liable solely by operation of BVI law.

Apart from that, the owner of the aircraft would be subject to strict liability by virtue of section 40(2) of the UK Civil Aviation Act, 1949, extended to the BVI.

Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

There are no specific BVI law requirements.

UPDATE AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

No updates at this time.

LAW STATED DATE

Correct on

Give the date on which the information above is accurate.