

THE AVIATION LAW
REVIEW

FIFTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

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For further information please email
Nick.Barette@thelawreviews.co.uk

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BRITISH VIRGIN ISLANDS

*Audrey M Robertson*¹

I INTRODUCTION

The British Virgin Islands 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 British Virgin Islands, the British Virgin Islands is playing an important role in the structuring of international transactions to acquire, finance and lease aircraft.

II LOCAL REGISTRATION

i Registration of aircraft

The British Virgin Islands 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 can be registered in the British Virgin Islands. There are currently only five aircraft registered in the British Virgin Islands, 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:²

- a* the Crown in right of Her Majesty's Government in the United Kingdom or in right of the government of the British Virgin Islands;
- b* United Kingdom nationals;
- c* Commonwealth citizens;
- d* nationals of any European Economic Area state;
- e* bodies incorporated in any part of the Commonwealth and that have their registered office or principal place of business in any part of the Commonwealth; or
- f* undertakings formed in accordance with the law of a European Economic Area state and that have their registered office, central administration on principal place of business within the European Economic Area.

¹ Audrey Robertson is counsel at Conyers Dill & Pearman and is a member of their air finance group.

² Article 16(1) of the ANOTO.

The UK government permits and supports the establishment and running of aircraft registers in overseas territories, provided that:

- a* the full cost associated with the register, including providing safety regulation, is met by the territory concerned;
- b* the territory makes provision to cover in full all liabilities that arise, or could arise, from the running of the register, both directly and indirectly; and
- c* the territory establishes a safety regulatory body empowered to regulate against legislation and requirements designed to implement the annexes to the Chicago Convention and:
 - that has an appropriate and sustainable level of funding; and
 - meets in the view of the UK Department for Transport and its technical advisers the requirements and guidance laid down by the International Civil Aviation Organisation.

The register of aircraft forms the official public record relating to the registration of an aircraft and the particulars recorded in it are the only details that are publicly available. All other records relating to the owner, aircraft, etc, are treated as confidential.

The register of aircraft will include the following particulars:

- a* the registration certificate number;
- b* the registration mark assigned to it;³
- c* the name of the constructor of the aircraft and its designation;
- d* the aircraft serial number; and
- e* relevant dates, such as that of registration, change of ownership and cancellation of registration.

An aircraft registered in the British Virgin Islands can be operated commercially within the geographical boundaries specified in its air operating certificate (AOC). For the issue of an operator's certificate, the organisation must have its principal place of business in the British Virgin Islands.⁴

ii Security and aircraft mortgages

Parties to an aircraft financing may agree what governing law they want for an aircraft mortgage, and the norm is to use the same governing law as the loan documentation. A British Virgin Islands 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 British Virgin Islands (the Registrar), pursuant to Section 163 of the BVI Business Companies Act (the Act). As a matter of British Virgin Islands 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 British Virgin Islands as a whole offers competitive pricing when compared to other jurisdictions. The fee in respect of filing a charge for registration is US\$100.

3 The mark consists of five letters commencing with the nationality mark VP-L and followed by the two letters assigned to the specific aircraft.

4 Article 94 of the ANOTO.

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 British Virgin Islands of security over aircraft, and separately, aircraft engines.

Aircraft registered in the British Virgin Islands or capable of being so registered and aircraft engines owned by or in the lawful possession of a British Virgin Islands 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. 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 can 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.

iii Liens

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

- a* possessory lien – a common law lien that requires that the lienholder has continuous possession of an aircraft, on which it has bestowed labour authorised by the owner that has improved the aircraft in some way; and
- b* 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 British Virgin Islands with respect to salvage liens is unclear, since the British Virgin Islands has no statutory provision similar to the UK Civil Aviation Act 1982, Section 87. It is uncertain whether an aircraft salvage lien can be asserted in the British Virgin Islands 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 British Virgin Islands. Generally, an aircraft lienholder will not have to apply to the British Virgin Islands 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.

iv Rights of detention

As well as aircraft liens, there are various statutory rights of detention exercisable over aircraft. Under British Virgin Islands law, persons are granted a right to detain and, in some cases, to sell (or cause to be forfeited) aircraft in certain circumstances, such as:

- a* contravention of certain licensing and air navigation provisions of the ANOTO;⁵

5 Article 8 of Part I of the ANOTO.

- b forfeiture under British Virgin Islands customs law – forfeiture of an aircraft may occur if an aircraft has been adapted and used for the purpose of smuggling or concealing goods;
- c crimes;
- d drug trafficking – if an aircraft is used for drug trafficking purposes or purchased from the proceeds of crime, a court can order the aircraft to be forfeited;⁶ and
- e judgment enforcement rights.

The courts of the British Virgin Islands would recognise as a valid judgment a final and conclusive judgment *in personam* obtained in the foreign courts against the company based upon the documents under which a sum of money is payable (other than a sum of money payable in respect of multiple damages, taxes or other charges of a like nature or in respect of a fine or other penalty) and would give a judgment based thereon, provided that:

- a such courts had proper jurisdiction over the parties subject to such judgment;
- b such courts did not contravene the rules of natural justice of the British Virgin Islands;
- c such judgment was not obtained by fraud;
- d the enforcement of the judgment would not be contrary to the public policy of the British Virgin Islands;
- e no new admissible evidence relevant to the action is submitted prior to the rendering of the judgment by the courts of the British Virgin Islands; and
- f there is due compliance with the correct procedures under the laws of the British Virgin Islands.

A final and conclusive judgment in the superior courts of the foreign courts⁷ against the company, based upon the documents under which a sum of money is payable (not being in respect of multiple damages, or a fine, penalty, tax or other charge of similar nature), would, on registration in accordance with the provisions of The Reciprocal Enforcement of Judgments Act (or, where applicable, the Foreign Judgments (Reciprocal Enforcement) Act), be enforceable in the High Court of the British Virgin Islands against the company without the necessity of any retrial of the issues that are the subject of such judgment, or any re-examination of the underlying claims.

vi Emerging trends

The British Virgin Islands will soon have its first direct commercial flights to the United States with BVI Airways. BVI Airways is undergoing a certification process with the FAA, having received its certification from Air Safety Support International.

III INTERNATIONAL FINANCE TRANSACTIONS

The British Virgin Islands is an important jurisdiction for the complex cross-border finance structures often established for aircraft. Political and economic stability, recognised systems for international financial transparency and information exchange, a respected and

6 Drug Tracking Offences Act, the Drug Tracking Offences (Designated Criminal Conduct Countries and Territories Order) and the Proceeds of Criminal Conduct Act, 1997.

7 Australia, Bahamas, Barbados, Belize, Bermuda, Dominica, Grenada, Guyana, Jamaica, Nigeria, St Lucia, St Vincent and the United Kingdom.

consistent judicial system (where the Privy Council is the final court of appeal), a favourable legislative framework and tax regime, no exchange control or currency restrictions, and a strong commercial aircraft registration capability make the British Virgin Islands a popular jurisdiction for ownership, financing and securitisation structures.

The British Virgin Islands vehicles are also regularly used in both 'off-balance sheet' financing structures, where the owner of the aircraft is an 'orphan' and 'on-balance sheet' structures where the owner will own the aircraft directly in its own name.

Off-balance sheet structures are often used for asset-backed securitisations (ABS). Although many ABS transactions involve a Special Purpose Vehicle (SPV) that is directly owned by a parent, often a transaction will require an 'orphan' SPV, meaning that it is not part of the originator's corporate group. By selling the asset to the orphan SPV, the asset is removed from the originator's balance sheet. When an orphan structure is required, the SPV is incorporated with all the shares issued to a trustee (also offshore) pursuant to a charitable or purpose trust. A British Virgin Islands purpose trust is of particular benefit in an ABS transaction structured in this manner, as the purpose trust is established to fulfil purposes rather than in favour of beneficiaries, while a charitable trust has charities as the beneficiaries (where, depending on circumstances, a conflict of interest may arise).

The British Virgin Islands has in place legislative bankruptcy and corporate structures that are particularly suited to establishing the bankruptcy remoteness of the SPV often used for commercial financing structures. A valid British Virgin Islands purpose trust may be created if, among other things, its purposes are specific, reasonable and are not immoral, contrary to public policy or unlawful. At least one trustee must be a 'designated person', which means:

- a* a barrister or solicitor practising in the BVI;
- b* an accountant practising in the BVI who qualifies as an auditor under the Banks and Trust Companies Act 1990 (BTCA);
- c* a licensee under the BTCA; or
- d* such other person as the Minister of Finance may by order designate.

One of the areas where a number of such trusts have been used is aircraft financing. In the typical financing structure, a British Virgin Islands business company is incorporated 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 (such as the operator) and facilitates innovative and cost-effective methods of asset finance, often utilising cross-back tax benefits.

The issue that then arises is how the shares of the SPV should be held. It is often the case that it is not possible or desirable for any of the parties to the transaction to own the company or include the company as a balance sheet asset. In the past, one solution was to use a charitable trust as the shareholder. The purpose trust, however, provides certain distinct advantages.

With a charitable trust, the duties of the trustees are to invest the trust funds so that the return for charities is maximised and to make appropriate distributions. These duties can conflict with the requirements of the parties to the transaction. With a purpose trust, the duties are to fulfil the stated purposes which accord with the intentions of the parties. These purposes are normally to: (1) promote the incorporation of the British Virgin Islands business company; (2) subscribe for the shares of the company; (3) hold those shares; (4) support the

company in pursuing the activity of the particular transaction in question; and (5) enter into any agreements that may be appropriate in connection with the transaction. The trustee may also charge the shares of the British Virgin Islands business company by way of security.

The main advantages of the purpose trust are twofold. First, the duties of the trustees of a purpose trust are clear, being to fulfil the stated purposes. The duties of trustees of a charitable trust are to maximise the benefits for the charity or charitable purposes. Depending on circumstances, a conflict of interest may arise whereby it is in the interests of the party establishing the structure to minimise the profit of the trust's assets. Ideally, it is usually desired that the company only declare enough dividends to fund its ongoing expenses. The use of a purpose trust, where the stated purposes are to promote the use of a British Virgin Islands business company to meet the needs of the arrangements by subscribing for the shares of one or more such companies, holding those shares and supporting the efficient operation of the company or companies, avoids such a conflict.

Secondly, the British Virgin Islands, like most jurisdictions that follow English common law principles, would grant a common law jurisdiction to the Attorney-General (or some similar public official) to enforce charitable trusts that are not being properly administered for the benefit of charity. While we are not aware of any instance where the Attorney-General in the British Virgin Islands has sought to enforce a charitable trust that has been used in a commercial structure, the risk cannot be entirely discounted in any jurisdiction where such enforcement powers exist. In the case of purpose trusts, the legislation expressly provides for the selection of a person to enforce the obligations under a purpose trust. This person may be a representative of an interested party to the structure or transaction or any independent professional. The Attorney-General may only become involved to appoint an enforcer where the trustees are aware that the person designated by the trust instrument to enforce the trusts is not able to do so. A well-drafted trust instrument will normally provide for a mechanism to appoint successors to the original enforcer to ensure this problem never arises. In any event, the interest of anyone seeking to enforce the trust will be to ensure that the purposes are complied with, not that charitable benefits are maximised.

At the end of the financing period when the loan has been repaid, the orphan SPV will sell the aircraft for a nominal fee to the operator. The SPV is then liquidated and the purpose trust is terminated.

IV EMERGING TRENDS

As the leasing market tightens, the British Virgin Islands is becoming an increasingly alternative aviation finance jurisdiction for commercial aircraft lenders, as well as for private and corporate jet financing.

V THE YEAR IN REVIEW

i BVI's broad appeal

The British Virgin Islands has many attractive features, including political stability, tax neutrality and the absence of exchange control and currency restrictions, which make it an ideal jurisdiction for aircraft and other international financing transactions. From a legal perspective, it has a well-developed, English-based legal system, a bespoke commercial

court and flexible, highly commercial legislation. On top of this, it adheres to international standards of compliance. These are all factors that have led to the BVI becoming a popular jurisdiction in which to establish special-purpose vehicles for owning and leasing aircraft.

VI OUTLOOK

At a time of increasing price sensitivity, BVI stands head and shoulders above other jurisdictions in terms of being a far more economic jurisdiction. Cost is an increasingly important consideration, particularly in respect of long-term leases with significant annual costs in terms of provision of local directors and legal compliance. As such, it is expected that the use of the BVI SPV in aircraft financing transactions will continue to grow.

AUDREY M ROBERTSON

Conyers Dill & Pearman

Audrey M Robertson is counsel in the corporate department of Conyers Dill & Pearman in the British Virgin Islands.

Audrey's practice covers general corporate and commercial matters with particular focus on public offerings and joint ventures. She has extensive experience in a wide variety of international asset finance and corporate transactions. Audrey has particular expertise in financings involving aircraft, including aircraft acquisitions and dispositions, sale and leasebacks and pre-delivery payment and warehouse facilities. Audrey advises leading financial institutions, leasing companies, development agencies and companies.

Audrey is recognised in a number of international legal directories, including *Chambers Global*, *The Legal 500*, *Who's Who Legal*, *Legal Media Group Experts Guide* and *Women in Business Law* for her corporate and commercial and aviation law expertise.

CONYERS DILL & PEARMAN

Commerce House, Wickhams Cay 1

P.O. Box 3140, Road Town

Tortola

British Virgin Islands VG1110

Tel: +1 284 852 1000

Fax: +1 284 852 1001

audrey.robertson@conyersdill.com

www.conyersdill.com