

International **Comparative** Legal Guides



Aviation Finance & Leasing **2021**

A practical cross-border insight into aviation finance law

Second Edition

Featuring contributions from:

Blum&Grob Attorneys at Law Ltd
Galindo, Arias & López
Herbst Kinsky Rechtsanwälte
GmbH
IBA Group – Aviation
Intelligence and Advisory

Jurvneservice
K&L Gates LLP
Kartal Law Firm
Maples Group
Mori Hamada & Matsumoto

Pillsbury Winthrop Shaw
Pittman LLP
Stephenson Harwood
Veirano Advogados
Waselius & Wist

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British Virgin Islands



Michael Gagie



Ruairi Bourke



Rebecca Lee

Maples Group

1 General and Contractual

1.1 What are the typical structures available for financing the purchase of an aircraft?

The most common corporate structure used for financing the purchase of an aircraft involves the incorporation of a special-purpose vehicle (“SPV”) to hold title to the aircraft being financed. Popular jurisdictions for incorporations of these SPVs include the Cayman Islands and Ireland, with the British Virgin Islands (“BVI”) attracting more industry players recently given the flexibility of BVI business companies and the jurisdiction’s long-standing popularity (and use) in Asia. Further, recent amendments to the BVI Business Companies Act (the “BVI Act”) have expanded the use of segregated portfolio companies (“SPCs”) beyond licensed insurers and professional, private or public funds. SPCs can now engage in management of aircraft, providing additional structuring options for the aviation industry.

In addition to private jet financings, there has been an increase in the use of BVI vehicles in financing structures for commercial aircraft deals, notwithstanding that in those deals, the aircraft are generally not registered in the BVI, nor do such aircraft operate out of the BVI.

1.2 What are the key advantages/disadvantages and main issues arising in relation to these financing structures?

In the private jet space, an increasing number of transactions involving individuals and businesses in Asia has resulted in an increase in the frequency with which BVI vehicles, usually BVI business companies limited by shares, appear in the financing arrangements. Roughly 50% of all BVI companies on the corporate register are owned and operated from Asia, and the region is the largest single market for the jurisdiction’s financial services offering. The use of BVI vehicles for these deals enables lenders to take comfort in the jurisdiction’s stable political environment, reliable (and tested) court system and its long history of cross-border transactions. In addition, the BVI’s corporate legislation provides a public security registration system for lenders and a creditor-friendly stance under its insolvency law.

The capital structure and corporate governance aspects of the BVI Act provide parties to these deals with the opportunity to shape the constitution of the BVI SPV to suit the requirements of the deal. If, as part of the arrangements, security is to be provided over the shares of the SPV, the constitution can be tailored to ensure that the secured party’s interests are protected and that upon an enforcement of the security, mechanics are in place to enable the secured party to take ownership of the vehicle.

1.3 What types of leasing are possible under the laws of your jurisdiction? What are their essential characteristics?

Typically, lease arrangements involving BVI companies will be governed by foreign law – English law and New York law being the most common choices.

1.4 Are there any proposals for reform in the area of aviation finance?

There are no current proposals for reform in the area of aviation finance in the BVI.

1.5 Is it possible according to the laws in your jurisdiction to enter into non-binding or partially binding pre-contractual agreements (e.g. ‘letters of intent’) which will NOT take effect as fully enforceable agreements?

Yes, it is possible.

1.6 Is there a doctrine of ‘good faith’ in your jurisdiction that applies to all pre-contractual agreement, financing and leasing transaction documents, and the conduct of parties connected to them?

There is no general doctrine of good faith under BVI law.

2 Taxation and Related Matters

2.1 Which government authority in your jurisdiction has primary responsibility for the accounting for and regulation of revenue control and taxes?

The Inland Revenue Department of the BVI government, sitting under the Ministry of Finance, is responsible for administering the local taxation system for the territory. However, as detailed above, there are no local taxes applicable to the aviation-related transactions being described in this chapter, i.e. those that are taking place outside of the territory of the BVI and which do not involve a local presence or establishment within the BVI or employees within the BVI.

In relation to cross-border and international tax matters, the International Tax Authority (“ITA”) was established by the International Tax Authority Act, 2018. The primary responsibilities of the ITA are:

- to carry out the functions of the Competent Authority under the Mutual Legal Assistance (Tax Matters) Act, 2003, which were previously carried out by the BVI’s Financial Secretary;
- to take a proactive stance in relation to all cross-border tax matters that currently affect or have the potential to affect the BVI; and
- to ensure that the BVI is fully compliant with the international standards of transparency and exchange of information for tax purposes.

2.2 What are typically the taxes in your jurisdiction that may arise in relation to a sale, a lease or a financing of an aircraft or an engine?

Under local BVI law, VAT, GST and stamp duty are not applicable for aircraft trading, finance and leasing.

In addition, companies incorporated or registered under the BVI Act are exempt from local BVI income and corporate tax. Finally, the BVI does not levy capital gains tax on BVI companies.

2.3 Is the provision of a current tax-residency certificate by a payee sufficient for a lessee or a borrower potentially subject to withholding taxes in your jurisdiction on rental or interest payments to avail itself of treaty access and the mitigation of tax liability?

There are no withholding taxes applicable.

2.4 Has the advent of BEPS (the Base Erosion and Profit Shifting initiative of the OECD) had any effect as regards structures in aviation finance and leasing or their interpretation?

As a member of the Inclusive framework on BEPS, the BVI has committed to implement the minimum standards of the 15 Measures created to tackle tax avoidance, improve the coherence of international tax rules, and ensure a more transparent tax environment.

All jurisdictions that are members of the Inclusive framework participate in a peer review process, which allows members to review other members’ tax systems, and identify and remove elements that present a BEPS risk. Peer reviews ensure the BEPS minimum standards that are essential to effective implementation of the BEPS package are met.

2.5 What are the typical thresholds in your jurisdiction for which a permanent establishment may be triggered under the terms of any relevant double-tax treaty or similar?

The BVI is not a party to any double taxation treaties. Historically, parties have used the BVI in their financing arrangements partly because there has been no requirement to have a permanent establishment within the territory – the only nexus to the BVI required for BVI companies has been that all BVI companies are required to engage a registered agent for the company. The registered agent will be a corporate services business regulated by the Financial Services Commission (“FSC”), the BVI’s financial regulator, having physical operations located in the BVI. Recent OECD and European Union initiatives have resulted in some changes to this construct, the most relevant being the introduction of economic substance legislation to the BVI. The Economic Substance (Companies and Limited Partnerships) Act, 2018 (the “ES Act”) was introduced in the BVI, effective 1 January 2019. Under the ES Act, BVI entities subject to the legislation and conducting what are termed in the ES Act as “relevant activities” may be required to have, or to introduce, additional “substance” – primarily people, assets and premises – located in the BVI in order to conduct their business activities. The first reporting period under the ES Act has recently closed and we have yet to see what longer-term impact this legislation will have on the BVI and its use in financing structures.

2.6 Is the authority at question 2.1 likely to establish a ‘look-through’ right or similar as regards a lender or a lessor which is a special-purpose vehicle involved for the purpose of tax treaty access?

This is not applicable.

2.7 Will the import of an aircraft into your jurisdiction and/or the sale or leasing of the aircraft give rise to any VAT, sales or use taxes or any customs import or excise duties?

Please see question 2.2, noting that there will be customs import tax upon importation of the aircraft into the BVI.

2.8 Are there any documentary taxes (for example, stamp duty payable on the execution of documents)?

No. Please see question 2.2.

3 Registration and Deregistration

3.1 Which government authority in your jurisdiction has primary responsibility for the regulation of aviation and the registration of aircraft? Is it an owner registry or an operator registry? If the aircraft register is an operator register, is it possible to record the details of an owner or lessor and any financier with an aircraft mortgage?

The Air Navigation (Overseas Territories) Order 2013, as amended (“ANOTO”) is the highest level of civil aviation regulation applicable in the United Kingdom (“UK”) overseas

territories, including the BVI. It is administered by the Air Safety Support International (“ASSI”), a not-for-profit, wholly owned subsidiary company of the UK Civil Aviation Authority. As such, the ASSI is the government authority that has primary responsibility for the regulation of aviation.

It is possible to register aircraft in the BVI. The Virgin Islands Aircraft Register (the “**BVI Aircraft Register**”) is established through the ANOTO. Aircraft may be registered in the BVI bearing aircraft registration prefix “VP-L”. Under the ANOTO, the BVI Aircraft Register is managed and maintained by the Governor of the BVI. However, the Governor has, in turn, delegated these responsibilities to the Director of the Department of Civil Aviation, which is subject to oversight from the ASSI. Part 2 of the ANOTO describes the relevant registration and marking requirements, with guidance from Part 47 of the Overseas Territories Aviation Requirements (“**OTARs**”). This is an owner registry.

The BVI has U.S. Federal Aviation Administration (“**FAA**”) “Category One” aircraft register status. This means that the FAA regards the BVI’s aviation authority as complying with International Civil Aviation Organization (“**ICAO**”) standards for aviation safety oversight.

3.2 What is the effect of registration of the aircraft? Does registration on your national aircraft register confer proof of ownership of the aircraft and/or engine?

Where an aircraft is registered in the BVI, it is entitled to the rights and privileges under the ANOTO. Registration of title to the aircraft constitutes *prima facie* evidence of ownership of the aircraft. However, such evidence is not conclusive.

3.3 Can foreign-owned aircraft be registered on your national aircraft register and are there limits or restrictions on the age of aircraft that may be registered or operated?

The ANOTO governs which aircraft are eligible to be registered on the BVI Aircraft Register. Under the ANOTO, persons who are qualified to hold a legal or beneficial interest in an aircraft on the BVI Aircraft Register include: the Crown in right of the UK government or the BVI government; British nationals; Commonwealth citizens; European Economic Area (“**EEA**”) Member State nationals, 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 Member State and which have their registered office, central administration or principal place of business within the EEA.

3.4 Can aircraft leases be registered? If so, in what circumstances? Must the lease be in a particular form if it is to be valid and enforceable (for example, must it be in a particular language or be notarised, legalised or apostilled)?

It is not necessary for leases to be registered in order to be valid and enforceable. There is no specific register in the BVI for leases concerning aircraft or engines.

It is recommended that all relevant documentation be in English but there is no need for them to be notarised, legalised or apostilled. Any documentation in a foreign language should be accompanied by English translations.

3.5 How is deregistration affected and what steps can a lessor take to deregister the aircraft on termination of the lease?

An aircraft owner can deregister an aircraft from the BVI Aircraft Register by applying for its deregistration. A deregistration power of attorney can be used. The original certificate of registration must be returned for cancellation before a certificate of deregistration will be issued.

4 Security

4.1 Is it possible to create a mortgage over an aircraft or engine in your jurisdiction? If so, what are the types of aircraft mortgage and engine mortgage available and what formalities are required in order to perfect it?

The BVI’s framework for the registration of security over aircraft and, separately, aircraft engines, is principally governed by the Mortgaging of Aircraft and Aircraft Engines Act, 2011 and the Mortgaging of Aircraft and Aircraft Engines Regulations, 2012. A mortgage over an aircraft that is registered on the BVI Aircraft Register and owned by or otherwise in the lawful possession of a BVI company may be registered in the Register of Aircraft Mortgages. A mortgage over an aircraft engine that is owned by or in the lawful possession of a BVI company may be registered in the Register of Aircraft Engine Mortgages.

As regards formalities, an application to register a mortgage of an aircraft or an aircraft engine must be made to the registrar designated under the Mortgaging of Aircraft and Aircraft Engines Act, 2011 by or on behalf of the mortgagee. A form prescribed in the Mortgaging of Aircraft and Aircraft Engines Regulations, 2012 accompanied by a certified copy of the mortgage as well as the prescribed fees must be submitted. The regulations do not prescribe a particular format for the underlying mortgage.

A mortgage entered on either Register has priority over any other mortgage or charge on that aircraft or aircraft engine. The regulations also provide for filing of priority notices (such priority notices are to be entered into the Register of Aircraft Mortgages and/or the Register of Aircraft Engine Mortgages, as the case may be), which reserves and protects a particular priority position for a prospective mortgage for 14 days, i.e. this priority will be valid over any mortgages of that aircraft or aircraft engine made on or after the date of the priority notices.

Provided that the mortgagor is a BVI company, particulars of the charge created over the assets of the BVI company under the mortgage may be filed with the Registry of Corporate Affairs in the British Virgin Islands (the “**BVI Registry**”) for a fee of US\$200. The BVI Registry will then register the charge on its Register of Registered Charges. This puts third parties on constructive notice of the existence of such security. The filing also acts as a priority determinant *vis-à-vis* subsequent filed security in respect of the same secured asset and the claims of unsecured creditors.

Separately, a BVI company is required by law to enter details of a charge (including a charge that is an aircraft mortgage or mortgage over an aircraft engine) in its own Register of Charges, although entry of details of a mortgage in the Register of Charges does not act as a priority determinant. The Register of Charges must be kept at the BVI company’s registered office or the office of the BVI company’s registered agent in the BVI.

4.2 Can spare parts, including future parts, be subject to the aircraft mortgage or engine mortgage (as the case may be)? If not, are there any other forms of security that can be taken over spare parts?

All types of security can be taken over spare parts.

However, in relation to “future” parts, it is not possible to register a mortgage (or other form of security) created as a floating charge on the Register of Aircraft Mortgages and/or the Register of Aircraft Engine Mortgages.

Nonetheless, it is still possible for such a mortgage (or other form of security) to be taken over future spare parts to be registered on the Register of Registered Charges maintained by the BVI Registry. Please see question 4.1 for further details of registration on the Register of Registered Charges.

4.3 Is there a register of mortgages or rights over aircraft and/or engine?

Please see question 4.1.

4.4 What other forms of security can be taken over an aircraft and/or engine and can these other forms be registered?

In addition to mortgages over aircraft, security assignments (over leases and insurances) and share mortgages over an owner/borrower are common forms of security. Typically, mortgages over aircraft and security assignments are not governed by BVI law. English law or New York law would be more common. Share mortgages over a BVI incorporated owner/borrower company are often governed by BVI law.

Please see question 4.1 on registration. Should the share mortgage be granted over shares of a BVI business company, parties would typically enter a notation of such a charge on the relevant BVI company’s register of members that is filed with the BVI Registry to put third parties on notice.

4.5 What claims and rights would take priority in your jurisdiction over a registered mortgage?

Please see question 4.1.

4.6 What other forms of security can be granted over an aircraft and/or engine lease?

Please see question 4.4.

5 Enforcement and Repossession

5.1 What are the circumstances in which a mortgagee or owner can take possession of the aircraft and/or sell the aircraft? What requirements must the mortgagee or owner comply with?

The circumstances in which a mortgagee or owner can take possession of the aircraft and sell it may be affected by where the aircraft is physically situated. If the aircraft is physically situated outside the BVI, the laws of the jurisdiction in which the aircraft is situated would need to be taken into account. The provisions of the mortgage and the governing law of the mortgage will determine the requirements that the mortgagee or owner must comply with.

5.2 What is the procedure for repossession of the aircraft?

The provisions of the mortgage will govern the procedure for repossession of the aircraft.

5.3 Will local courts recognise a choice of foreign law in an aircraft mortgage? Are there any mandatory local rules that apply, despite a choice of foreign law?

Should the choice of a foreign law as the governing law of an aircraft mortgage be made in good faith and regarded as a valid and binding selection upheld by the courts of such foreign jurisdiction as a matter of its governing law, the BVI courts will observe and give effect to the choice of such foreign law.

5.4 Will local courts recognise and enforce a foreign court judgment in favour of a mortgagee or lessor? Are any interim relief measures available?

Any final and conclusive monetary judgment obtained against a BVI business company in the courts of the Bahamas, Barbados, Belize, Bermuda, England and Wales, Grenada, Guyana, Jamaica, New South Wales, Nigeria, St. Lucia, St. Vincent and Trinidad, for a definite sum, may be registered and enforced as a judgment of the BVI court if application is made for registration of the judgment within 12 months or such longer period as the court may allow, and if the BVI court considers it just and convenient that the judgment be so enforced. Alternatively, the judgment may be treated as a cause of action in itself so that no retrial of the issues would be necessary. In either case, it will be necessary that in respect of the foreign judgment:

- (a) the foreign court issuing the judgment had jurisdiction in the matter and the judgment debtor either submitted to such jurisdiction or was resident or carrying on business within such jurisdiction and was duly served with process;
- (b) the judgment given by the foreign court was not in respect of penalties, taxes, fines or similar fiscal or revenue obligations of the BVI business company;
- (c) in obtaining judgment, there was no fraud on the part of the person in whose favour judgment was given, or on the part of the foreign court;
- (d) recognition or enforcement of the judgment in the BVI would not be contrary to public policy;
- (e) the proceedings pursuant to which judgment was obtained were not contrary to natural justice; and
- (f) the judgment given by the foreign court is not the subject of an appeal.

As to any final and conclusive monetary judgment obtained against a BVI business company in the courts of any other jurisdiction, i.e. other than those mentioned above, for a definite sum, said judgment would be treated by the courts of the BVI as a cause of action in itself such that in seeking to have the courts of the BVI recognise and enforce such foreign judgment in the form of and by means of a corresponding judgment of the BVI court, no retrial of the issues would be necessary provided that in respect of such foreign judgment:

- (a) the foreign court issuing such foreign judgment had jurisdiction in the matter and the BVI business company either submitted to such jurisdiction or was resident or carrying on business within such jurisdiction and was duly served with process;
- (b) such foreign judgment given by the foreign court was not in respect of penalties, taxes, fines or similar fiscal or revenue obligations of the BVI business company;

- (c) in obtaining such foreign judgment, there was no fraud on the part of the person in whose favour such foreign judgment was given or on the part of the court;
- (d) recognition or enforcement of such foreign judgment in the BVI would not be contrary to public policy; and
- (e) the proceedings pursuant to which such foreign judgment was obtained were not contrary to natural justice.

5.5 Are powers of attorney from a local airline in favour of a lessor or mortgagee likely to be effective to allow the lessor or mortgagee to deregister the aircraft? Can such powers be irrevocable, be governed by a foreign law and/or do they need to be in any particular form for local recognition?

On the basis of an Irrevocable De-Registration and Export Request Authorisation (“**IDERA**”), a mortgagee may procure the deregistration of an aircraft registered on the BVI Aircraft Register. An IDERA should be substantially in the form set out in form 6 of schedule 1 to the Mortgaging of Aircraft and Aircraft Engines Regulations, 2012.

5.6 If recovery of the aircraft is contested by the lessee and a court judgment is obtained in favour of the lessor, how long is it likely to take to gain possession of the aircraft?

This has not been tested in the BVI.

5.7 Are there any restrictions on the ability of the lessor to export the aircraft from your jurisdiction on termination of the leasing?

There are no particular restrictions in the BVI.

5.8 Are exchange controls prevailing in your jurisdiction as regards payments in foreign currency? Will any consents be required for the remittance of the sale proceeds abroad?

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

5.9 If the lease is governed by English law and a judgment is obtained by the lessor in the English courts, can that judgment be automatically enforced in your jurisdiction or will the case have to be re-examined on its merits?

Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the BVI is, by order-in-council from the UK, a party. The BVI courts are required by law to enforce, without re-examination of the merits of the case or re-litigation of the matters arbitrated upon, such award. However, enforcement of such award may be refused if the person against whom it is invoked proves that:

- a party to the arbitration agreement was, under the law applicable to that party, under some incapacity;
- the arbitration agreement was not valid under the law to which the parties subjected it or, if there was no indication of the law to which the arbitration agreement was subject, under the law of the country where the award was made;

- the person was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, if there was no such agreement, with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

5.10 What is the applicable procedure for repossession of an aircraft under other forms of security interests?

As the aircraft may not be physically situated in the BVI, choosing a favourable jurisdiction in which to repossess the aircraft having regard to *lex situs* and other relevant foreign laws would be advisable.

6 Conventions

6.1 Has your jurisdiction ratified any of the following: (a) The Chicago Convention of 1944 on International Civil Aviation (the Chicago Convention); (b) The 1948 Convention on the International Recognition of Rights in Aircraft (the Geneva Convention); (c) The 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (the 1933 Rome Convention); and (d) The Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Convention) and the Protocol on the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment?

The BVI is neither signatory nor party by extension from the UK to the main international Conventions listed at (a), (b), (c) and (d).

However, in relation to (a), the Chicago Convention places responsibility on all contracting States (including the UK) to implement programmes as identified by the ICAO on developing frameworks within international air transport, i.e. ICAO's Standards and Recommended Practices (“**SARPs**”), and such provisions extend to the UK overseas territories (including the BVI) and are reflected in the ANOTO.

The OTARs are vehicles for the application of relevant SARPs within the BVI legal system. An example would be the State Safety Programme for the UK overseas territories of Anguilla, the BVI, Montserrat and St. Helena published by the ASSI.

6.2 Has ratification of the Cape Town Convention caused any conflicts or issues with local laws?

This is not applicable.

6.3 What is the legal position regarding non-consensual rights and interests under Article 39 of the Cape Town Convention?

This is not applicable.

6.4 Has your jurisdiction adopted the remedies on insolvency provided under Article XI of the Protocol to the Cape Town Convention?

This is not applicable.

6.5 What is the procedure to file an irrevocable deregistration and export request authorisation under the Cape Town Convention (IDERA)?

This is not applicable.

7 Liability for Damage and Environmental

7.1 Can the owner be strictly liable – liable without a requirement to prove fault or negligence – for any damage or loss caused by the aircraft assuming the owner is an innocent owner with no operational control of the aircraft?

The United Kingdom Civil Aviation Act, 1949 (the “**1949 Act**”), as extended to UK overseas territories including the BVI, is the primary legislation governing this area. Under section 40(2) of the 1949 Act, where an aircraft is chartered or demised for more than 14 days, the lessee rather than the owner (lessor) is liable for any damage or injury caused to any property or person on the ground by the chartered or demised aircraft.

7.2 Does the EU Emissions Trading System (EU ETS), or any similar scheme, apply to aircraft and aircraft operators in your jurisdiction? Will charges levied according to the EU ETS, or its equivalent, give rise to any *in rem* rights in relevant aircraft which are part of the fleet of the operator concerned and, if so, will such rights rank in priority ahead of any mortgage interests properly registered in the relevant aircraft and/or engine?

While the UK has introduced a new UK Emissions Trading Scheme (“**UK ETS**”) for aircraft operators as a replacement for the EU ETS, application of the UK ETS has not been extended to the BVI and there is no BVI equivalent.

7.3 What liabilities (actual or potential) could an owner, lessor or financier of an aircraft incur in your jurisdiction because of a failure to comply with local environmental law and/or regulations on the part of an operator of aircraft leased or financed by it?

In practice, a commercial owner, lessor or financier of an aircraft would appear unlikely to find itself in the position of having leased the aircraft to an operator who bases the aircraft in the BVI, owing to the small population and geography of the BVI. Given this, it may be expected that any claims for breaching environmental laws and regulations would likely be made in the jurisdictions where the incident occurs rather than in the BVI.

8 Insolvency and Searches

8.1 Are there any public registers in your jurisdiction where a search can be carried out to determine whether an order or resolution for any bankruptcy, bankruptcy protection or similar insolvency proceedings has been registered in relation to an operator or lessee?

Yes. Public searches can be conducted at the BVI Registry

and at the High Court Registry and the results will show (i) if there are any current valid orders or resolutions for the winding up of a BVI company, (ii) if there are any actions or petitions pending, and (iii) whether any current notice of appointment of a receiver over the BVI company, or any of its assets, appears on the records maintained in respect of the BVI company.

It is a requirement that notice of appointment of a receiver made under section 118 of the Insolvency Act, 2003 (“**IA**”) must be registered with the BVI Registry under section 118 of the IA. However, it should be noted that there is no mechanism to file with the BVI Registry notice of an appointment of a receiver made under foreign legislation.

8.2 In the event that an operator or lessee were to become insolvent either on a balance sheet basis (assets less than liabilities) or is unable to pay debts as fall due, would an operator or lessee be required to file for insolvency protection?

Under section 8 of the IA, a BVI company is insolvent if (i) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157 of the IA, (ii) execution or other process issued on a judgment, decree or order of a BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied, (iii) the value of the company’s liabilities exceeds its assets (the “balance sheet test”), or (iv) the company is unable to pay its debts as they fall due (the “cash flow test”).

If the directors suspect that the company is (or may become) insolvent, for example, because in their view the company fails the “balance sheet test” or it simply cannot meet its obligations on an ongoing basis, the directors must act in the best interests of the company. In those circumstances, the best interests of the company will be equated to the best interests of the company’s creditors. If the directors form the view that there is no reasonable prospect of the company trading out of its current difficulties, the most appropriate course of action will invariably be for the directors to take advice from an expert in insolvency and restructuring on the formal procedures that exist to protect the interests of creditors, and to reorganise the company’s affairs.

8.3 Do the available forms of insolvency protection in your jurisdiction involve the appointment of either an officer of the court or a specifically court-appointed official to take control of the operator or lessee (an ‘Insolvency Official’) while in insolvency protection?

A liquidator can be appointed either by: (i) a resolution of the shareholders of the debtor BVI company passed by a 75% majority (or such greater majority as is specified in the company’s articles of association); or (ii) the court following an application by the debtor BVI company, a creditor, a shareholder, a supervisor of a creditor’s arrangement, the FSC or the Attorney General.

The grounds for court appointment of a liquidator include that:

- the BVI company is insolvent;
- it is just and equitable to appoint a liquidator; or
- the liquidation is in the public interest.

Where an application is made to the BVI courts for the appointment of a liquidator, the BVI courts may, as an interim measure, appoint a provisional liquidator.

The grounds for the appointment of a provisional liquidator include that:

- it is in the public interest;
- the debtor BVI company consents to the appointment; or
- the appointment is necessary for the purpose of maintaining the value of the assets of the debtor BVI company.

8.4 Does the commencement of insolvency protection involving the appointment of an Insolvency Official in your jurisdiction have the effect of prohibiting the owner from taking the following actions to enforce the lease after commencement of such protection: (a) applying any security deposit held by the owner against any unpaid amounts due under the lease; (b) accepting payment of rent or other lease payments from the lessee, a guarantor or a shareholder; (c) giving notice of default under the lease; (d) obtaining a judgment or arbitral award for unpaid lease payments; (e) giving notice to terminate the leasing of the aircraft and/or engine; or (f) exercising rights to repossess the aircraft and/or engine?

The commencement of liquidation triggers an automatic stay of proceedings, including any action by an unsecured creditor to enforce its rights over the debtor BVI company's assets without the consent of the court. However, secured creditors retain their rights to enforce their security.

8.5 Can the commencement of insolvency proceedings have retrospective effect in relation to any such actions taken before commencement? If so, for what period can there be a look back?

BVI insolvency law provides for the setting aside of "insolvency transactions" in certain circumstances; these include (a) transactions at an undervalue, and (b) unfair preference transactions where a creditor has been put into a better position than they would have been under a liquidation. The company must have been insolvent (under BVI law) at the time that the relevant transaction was entered into, or entering into the transaction caused the company to become insolvent. The "vulnerability period" for these transactions runs for six months prior to the onset of insolvency and ends on the date of appointment of the liquidator. For transactions with "connected persons" (as defined in the legislation), the "look-back" period is much longer at two years prior to the onset of insolvency.

8.6 Is there, either under law or as a matter of practice in your jurisdiction, a period of time within which the Insolvency Official will either 'adopt' the lease and pay rent and other lease payments as an expense of the insolvency or 'reject' the lease and permit the owner to enforce such rights as it may have under the lease? (a) If the lease is 'adopted', will the Insolvency Official also pay any unpaid lease payments due as at commencement of the insolvency protection? (b) If not or if the lease is 'rejected', would the owner's claim for any outstanding sums rank equally with other ordinary unsecured creditors of the lessee?

This scenario is not catered for under BVI law.

8.7 Are there certain types of preferred creditors whose claims will rank above claims of the owner?

Preferred creditors under BVI law will rank ahead of unsecured creditors. Furthermore, all costs, charges and expenses properly incurred in the winding up of a BVI company, including the remuneration of the liquidators, are payable out of the assets of the BVI company in priority to all other unsecured claims.

8.8 If the aircraft is in the possession of a person other than the operator or lessee at the commencement of insolvency protection of the operator or lessee, for example, an independent maintenance facility, will such person be entitled, under the laws of your jurisdiction, to assert a lien arising under law or contract over the aircraft in respect of amounts then due and unpaid to such person by the operator or lessee?

As discussed above, the contractual arrangements for the aircraft will usually not be foreign law-governed and, as a consequence, this will be a matter for the governing law of the relevant contractual arrangements.

9 Detention and Confiscation

9.1 Other than insolvency laws (see section 8), are there any laws that may have the effect of defeating the owner's right in the aircraft – for example, government requisition? Do the laws of your jurisdiction provide for any compensation in such circumstances?

This is not a scenario that has been considered in the BVI.

9.2 Are there any rights in relation to third parties to detain or sell the aircraft pursuant to illegal activities, tax or any other laws if the operator or lessee fails to pay when due? If so, can the aircraft be forfeited and sold without the owner being made aware?

This is not a scenario that has been considered in the BVI.



Michael Gagie is Regional Managing Partner of Maples and Calder's Asia offices in Hong Kong and Singapore. He is also Global Head of the firm's British Virgin Islands ("BVI") practice. His experience and areas of practice cover both BVI and Cayman Islands law and include a broad range of banking and structured finance work acting as lender counsel for international and regional banks and borrower work for funds and corporates. In addition, Michael has significant corporate law experience (both public and private work) and regularly advises corporates and private equity funds on joint ventures, pre-IPO structures and downstream private equity acquisitions and disposals.

Maples Group

1 Raffles Place, #36-01
One Raffles Place
048616 Singapore

Tel: +65 6922 8402
Email: michael.gagie@maples.com
URL: www.maples.com



Ruairi Bourke is a Partner in the British Virgin Islands Corporate and Funds & Investment Management teams at Maples and Calder, the Maples Group's law firm. He advises on a wide range of corporate transactions including mergers, acquisitions, stock exchange listings, private equity structures, private placements, corporate restructuring and reorganisation transactions and the formation of joint ventures. On the finance side, Ruairi advises on acquisition, real estate, ship and aircraft finance transactions. He also has significant experience in capital markets transactions, both equity and debt.

Maples Group

Ritter House, PO Box 173
Road Town
Tortola VG1110
British Virgin Islands

Tel: +1 284 852 3038
Email: ruairi.bourke@maples.com
URL: www.maples.com



Rebecca Lee is an Associate in the Singapore Corporate and Finance team at Maples and Calder, the Maples Group's law firm. Rebecca advises on both finance and corporate matters, including asset finance, general banking, fund finance, as well as mergers and acquisitions. She has a particular focus on the aviation industry, having represented various financiers, borrowers and lessors on a wide range of asset financing and leasing transactions.

Maples Group

1 Raffles Place, #36-01
One Raffles Place
048616 Singapore

Tel: +65 6922 8405
Email: rebecca.lee@maples.com
URL: www.maples.com

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