

BRITISH VIRGIN ISLANDS

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The British Virgin Islands (“BVI”) is a British overseas territory and is recognised across the globe as the premier jurisdiction for the registration of asset holding companies. The BVI corporate legislation is generally regarded as non-prescriptive in that companies are able to devise the corporate structure and procedures applicable to their business, subject to certain limited statutory requirements. The corporate structure and procedures applicable to a BVI company are set out in the company’s constitutional documents (i.e. its memorandum and articles of association) which govern the relationship between the company, its members and its directors. The flexibilities inherent in such a system make BVI companies extremely attractive as part of asset holding structures. The BVI has an independent legal and judicial system based on English Common Law and the United Kingdom Privy Council is the final Court of Appeal. The attractiveness of the BVI, as a jurisdiction for asset holding structures, is further enhanced by the ability to register aircraft, as well as aircraft and aircraft engine mortgages.

REGISTRATION OF AIRCRAFT

VGB 1

Is there a register of aircraft?

VGB 1.1

The Virgin Islands Aircraft Register (the “Register”) was originally created under the Air Navigation (Overseas Territories) Order 2007 (as amended) which has since been repealed and replaced by The Air Navigation (Overseas Territories) Order 2013 (the “Order”). The Register is a US Federal Aviation Authority Category One aircraft register. Pursuant to the Order, the Register is managed and maintained by the Governor of the British Virgin Islands and these responsibilities have been delegated to the Director of the Department of Civil Aviation. The Department of Civil Aviation is subject to oversight by the Air Safety Support International (“ASSI”), a wholly owned non-profit subsidiary of the United Kingdom Civil Aviation Authority (the “CAA”). The CAA is therefore indirectly responsible for ensuring international aviation safety standards in the BVI as promulgated by the International Civil Aviation Organisation (“ICAO”).

What aircraft may be registered?

VGB 1.2

Both commercial and private aircraft may be registered in the BVI.

VGB 1.3 What documentation and contents are required for registration?

- *Step 1 (Due Diligence)*: The process begins with the submission of a written request to the Director of Civil Aviation (the “Director”). Upon receipt of the request from the applicant the Director will send the applicant an Aircraft Registration Application Form (“BVI Form 001”). The Director will then review the application to ensure that the applicant is eligible to register an aircraft in the BVI. The aircraft must be owned by certain specified types of individuals or companies,¹ and in this regard the Director encourages prospective applicants to incorporate a BVI business company for the purposes of owning the aircraft.
- *Step 2 (Operation of the Aircraft)*: If the Director is satisfied that the applicant is eligible to register an aircraft, the Director will send a registration package to the applicant, including all necessary forms and guidance material applicable to the applicant’s operational and aircraft certificate requirements. The applicant will be required to demonstrate compliance with:
 - (a) overseas territory navigation requirements (“OTARs”) Pts 91 and 125 for an aircraft being registered for private or corporate use, and Pts 119, 121 and 135 for an aircraft being registered for commercial use; and
 - (b) flight crew licensing requirements under OTARs Pt 61.
- *Step 3 (Certificate of Airworthiness and Supporting Maintenance)*: Upon satisfaction of the operational requirements outlined above, the applicant will submit BVI Form 002 for a certificate of airworthiness. A certificate of airworthiness will not be issued unless there is in force a Type Acceptance Certificate issued by the Director for that aircraft type. The Director will also accept a Type Acceptance Certificate from the FAA (USA), Transport Canada or European Aviation Safety Agency for any aircraft which is the first of its type on the Register.. The applicant will also submit BVI Form 3 for the approval of a technical coordinator, who is responsible for ensuring the aircraft’s continued airworthiness.

VGB 1.4 What particulars are recorded in the Register?

The following particulars will be recorded in the Register on registration of the aircraft:

- (a) the registration certificate number assigned to the aircraft;
- (b) the nationality and registration marks of the aircraft;
- (c) the manufacturer’s name and designation of the aircraft;
- (d) the serial number assigned to the aircraft;
- (e) the name and address of every person entitled as owner to a legal interest in the aircraft;

- (f) in the case of an aircraft which is the subject of a charter by demise, the name and address of the charterer; and
- (g) in the case of an aircraft which is registered under any other provision of the Order, an indication that it is so registered.

Once the above particulars have been entered the Registry will issue a Certificate of Registration with these details.

What are the opening hours and registration fees?

VGB 1.5

The Registry is open to the public between 8.30am and 4:30pm Mondays to Fridays, excluding public holidays.

The fee payable for registration is dependent on the maximum total weight of the aircraft in accordance with the following scale:

<i>Where maximum total weight</i>	<i>\$</i>
(a) does not exceed 6,000 lb	30.00
(b) exceeds 6,000 lb but does not exceed 12,500 lb	100.00
(c) exceeds 12,500 lb but does not exceed 30,000 lb	150.00
(d) exceeds 30,000 lb but does not exceed 100,000 lb	250.00
(e) exceeds 100,000 lb	157.00

Can the Register be amended?

VGB 1.6

Yes, upon an application in writing to the Director. The registered owner of an aircraft registered in the BVI must immediately inform the Director in writing of:

- (a) any change in the particulars provided as part of the registration of the aircraft;
- (b) the destruction of the aircraft, or its permanent withdrawal from use; or
- (c) the termination of the demise of the charter (where the aircraft is registered in the name of the charterer by demise).

The Director shall, at such time and in such manner as directed by the Civil Aviation Authority from time to time, submit to the Civil Aviation Authority particulars of all registrations, and changes in or cancellations of registrations, entered in the Register.

What is the effect of registration?

VGB 1.7

The aircraft is registered in the BVI and entitled to the rights and privileges under the Order. Registration of title to the aircraft constitutes prima facie evidence of ownership of the aircraft however, such evidence is not conclusive

VGB 1.8 How is deregistration affected?

The owner of an aircraft registered in the BVI may submit a written application requesting that the Director cancel the registration of the aircraft. The original Certificate of Registration and other documents issued at the time of registration must be returned to the Director for cancellation.

VGB 1.9 Can a deregistration certificate be obtained on registration?

There is no provision for the issuance of such a certificate.

VGB 2 REGISTRATION OF AIRCRAFT MORTGAGES

VGB 2.1 Is there a register of mortgages over rights of an aircraft?

The framework for registration of security over aircraft and separately, aircraft engines was established under the Mortgaging of Aircraft and Aircraft Act 2011 (the “Act”) and the Mortgaging of Aircraft and Aircraft Regulations 2012 (the “Regulations”). The Act makes provision for the appointment of a Registrar, who is responsible for the general administration, control and management of the register of aircraft and aircraft engine mortgages (the “Mortgage Register”). Neither the Act nor the Regulations place any limitations on a person or company who may be a mortgagee. A mortgage may cover any store of spare parts (including engines) for the aircraft; however, a mortgage created as a floating charge is not registrable.

In addition to the above registration, where the mortgagor is a BVI company the mortgagor must enter details of the mortgage over the aircraft and/or engine (as assets of the BVI company) in its private register of mortgages maintained at the company’s registered office in the BVI pursuant to BVI Business Companies Act 2004 (the “BCA”) s.162. The mortgagor or mortgagee may also register the mortgage under BCA s.163 with the Registrar of Corporate Affairs by entering the details of the mortgage in a register of charges and filing the register with the Registrar of Corporate Affairs. The public registration of the mortgage under s.163 may be desirable in order to protect the priority of such charge in the BVI, subject to any priority afforded to pre-existing registered charges. In the following sections, registration under the BCA shall not be discussed in any further detail.

VGB 2.2 What documentation and consents are required for registration?

An application for registration of a mortgage over an aircraft and/or aircraft engine under the Act shall be submitted by or on behalf of the mortgagee to the Registrar in the prescribed form (Form 1 of Sch.1 to the

Regulations) and accompanied by a certified true copy of the mortgage and the prescribed fee.

What are the opening hours and registration fees?

VGB 2.3

The opening hours (in Atlantic Standard Time) are as follows:

The Registry is open to the public between 8.30am and 4:30pm Mondays to Fridays, excluding public holidays.

Registration fees, as at today's date, are as follows:

Transaction	<i>Fee (US dollars)</i>
Registration of mortgage valued less than \$5 million	\$1,250
Registration of mortgage valued \$5 million to \$10 million	\$2,500
Registration of mortgage valued \$10 million to \$20 million	\$3,750
Registration of mortgage valued to exceed \$20 million	\$5,000
Registration of priority notice	\$100
Change in particulars of registered mortgage	\$100
Discharge of registered mortgage	\$100
Inspection of the register	\$50
Certified copy of an entry in the Register	\$40
Verification of mortgage registration	\$50
Transfer of mortgage	\$100
Transmission of interest in mortgage	\$100

Can the register be amended?

VGB 2.4

Any change in the person appearing in the Mortgage Register as mortgagee or as mortgagor or in the name or address of such person or in the description of the mortgaged property shall be notified to the Registrar by or on behalf of the mortgagee, in the form set out in the prescribed form (Form 3 of Sch.1 of the Regulations).

If the Registrar is satisfied that it is necessary or expedient to correct an error in the register, the Registrar may amend the Mortgage Register and shall enter a notation of the correction and the date of the correction on the Mortgage Register and shall notify the mortgagee, the mortgagor and the owner of the aircraft or aircraft engine of the correction..

Will registration secure priority for the mortgagee?

VGB 2.5

A mortgage of an aircraft or an aircraft engine entered in the Mortgage Register shall have priority over any other unregistered mortgage or

charge on that aircraft or aircraft engine. As between registered mortgages, priority is established based on the order of registration with previously registered mortgages taking priority over subsequently registered mortgages.

A notice of intention to make an application to enter a contemplated mortgage of an aircraft or an aircraft engine in the Register may also be entered in the Mortgage Register as a priority notice. An application to enter a priority notice in the Mortgage Register shall be made to the Registrar by or on behalf of the prospective mortgagee in the form set out in Form 2 of Sch.1, and shall be accompanied by the prescribed fees. Where a priority notice has been entered in the Mortgage Register and the contemplated mortgage referred to therein entered in the Mortgage Register within 14 days thereafter, that mortgage shall be deemed to have priority from the time when the priority notice was registered.

VGB 2.6 What is the effect of registration?

The principal effects of registration are as follows:

- (a) Registration of a mortgage affects priority as described at **VGB 2.4** above. A registered mortgage will not, ipso facto, have priority over possessory liens or statutory rights of detention on the express or implied authority of any party lawfully entitled to possession of the aircraft.
- (b) All persons shall at all times be taken to have express notice of all facts appearing in the register, but the registration of a mortgage shall not be evidence of its validity nor is it required to perfect the mortgage.
- (c) A registered mortgage will not be affected by any act of bankruptcy committed by the mortgagor after registration and the mortgagee will take priority over the rights and claims of other creditors over the aircraft.
- (d) Registered mortgages are not affected by the terms of any statutory provisions relating to bills of sale.
- (e) The Minister responsible for civil aviation will indemnify any person suffering loss by reason of any error or omission in the Mortgage Register or of any inaccuracy in a copy of an entry in the Mortgage Register supplied by the Department of Civil Aviation.

VGB 2.7 How is deregistration effected?

Where a mortgage of an aircraft or aircraft engine registered in the Register is discharged, the mortgagor or the mortgagee shall make an application to discharge the registered mortgage in the form set out in Form 4 of Sch.1 to the Regulations. The form must be duly completed and signed by or on behalf of the mortgagee, and be accompanied by a

copy of the document of discharge or receipt for the mortgage money, or of any other document which shows, to the satisfaction of the Registrar, that the mortgage has been discharged and payment of the prescribed fees.

AIRCRAFT MORTGAGES

TYPES OF AIRCRAFT MORTGAGES

VGB 3

What types of aircraft mortgage are possible under BVI law?

There are many different types of mortgages but they may be classified as either legal mortgages (where the legal title is transferred to the mortgagee until the mortgage is released) or equitable mortgages (where the legal title remains with the mortgagor).

Legal mortgage

A legal mortgage takes effect as an assignment of the mortgagor's title and interest in the aircraft to the mortgagee. The assignment is a conditional one since the mortgagor will retain the right to redeem the aircraft upon payment of the mortgage debt (the "equity of redemption"). That right cannot be excluded even by express provision.

Equitable mortgage

Equitable mortgages of aircraft constitute enforceable agreements to transfer legal title upon certain events of default. Thus there is no actual transfer of legal title upon entry into the equitable mortgage, though the mortgagee will have a right to call for such a transfer, which will be enforceable by the BVI courts in the exercise of their equitable jurisdiction. As in the case of a legal mortgage, the mortgagor shall have the right to redeem the aircraft upon payment of the mortgage debt, which may not be excluded by any express contractual provision. Whenever possible, mortgagees will require a legal mortgage.

Both legal and equitable mortgages are registrable in the BVI and the priority of such mortgages is discussed at **VGB 2.5** above.

Power of Sale

Mortgages typically contain a power of sale upon default by the mortgagor. Pursuant to such power of sale the mortgagor shall have the ability to dispose of any aircraft in respect of which he is registered and to give effectual receipts for the purchase money; however, where there are any prior mortgages the mortgagee may only exercise such power of sale subject to the rights of the prior mortgagees.

VGB 4 **LAW GOVERNING THE MORTGAGE**

What law will govern the validity of the mortgage?

The contractual effects of a mortgage must be distinguished from the transfer itself and its proprietary effects. The law which governs the interpretation of the terms of the mortgage and its performance is distinct from the law which will determine whether or not the mortgage is a valid means of passing title to the mortgagee.

The contractual effects of a mortgage

The law that will govern the contractual effects of a mortgage will be the applicable law. The applicable law will usually be an express or implied choice of law agreed upon by the parties to a mortgage or, failing that, the system of law with which the transaction has the closest connection.

The proprietary effects of the mortgage

Even if a mortgage is contractually valid it will be of little use if it does not have the effect of conditionally assigning title to an aircraft. The proprietary effect of the transfer typically depends on the place where the property is situated at the time of the transfer (the *lex situs*). In the case of aircraft which can be physically located within any number of jurisdictions (or none at all if in international airspace) at the relevant time, the location can be difficult to ascertain. Identification of the law to which the transfer is subject (and the particular requirements of that law in relation to a perfected transfer) is required to confirm the creation of the proprietary right from a common law perspective.

In practical terms, in order to ensure that an aircraft is physically located at the time of the creation of a mortgage in the same jurisdiction as that stipulated as the law governing the mortgage. As this is not always possible, a secondary option may be to ensure the aircraft is in international airspace at the time of the creation of the mortgage as this may result in the governing law of the contract being applied or alternatively, the law of the place of registration of the aircraft. If applied, the laws of the BVI would support the creation of the proprietary right in the same way it would be viewed from an English law perspective, and under BVI law further steps to perfect that right would not be required. It is to be noted that these statements in respect of the law governing the validity of the mortgage should not be regarded as conclusive. This area of the conflict of laws is complex and the issues yet to be fully resolved.

MORTGAGE GOVERNED BY FOREIGN LAW

VGB 5

If the parties to the mortgage stipulate that the mortgage will be governed by the laws of a foreign country, would a BVI court uphold such a clause?

Yes, a BVI court will usually uphold a clause stipulating that the mortgage will be governed by foreign law unless its selection was made in bad faith, was illegal or was contrary to BVI public policy.

MORTGAGE TERMS

VGB 6

What are the general terms of an aircraft mortgage under BVI law? Are there any special terms that a mortgage should contain?

There are no statutory requirements relating to the terms of aircraft mortgages in the BVI. It is typical for a mortgage to include provisions for the payment of the sum secured as well as covenants and remedies including possession in an event of default. For a discussion of specific terms see *Aircraft Finance England and Wales Aircraft Mortgages*.

SPARE PARTS

VGB 7

Under BVI law can spare parts, including future parts, be subject to mortgage? Are any special formalities required? If such parts cannot be mortgaged what other forms of security are available to the mortgagee in relation to them?

BVI law does not impose any restrictions on the ability to create a mortgage over spare parts, including future parts. No formalities are applicable at this time.

PERFECTION OF MORTGAGES

VGB 8

What additional formalities are required to perfect the status of the mortgage?

Under BVI law, there are no perfection formalities. Please refer to **VGB 2.2** above in relation to priority and the effect of registration under the BCA along with **VGB 2.5** and **VGB 2.6** above in relation to priority under the Act and the effect of registration of the mortgage.

VGB 9 STATUTORY FEES, CHARGES, TAXES

Are there any statutory fees, charges or taxes payable in respect of the creation of the mortgage?

Registration fees are set out in **VGB 2.3** above. Currently, no BVI income, corporate or capital gains taxes, estate duty, inheritance or gift tax are applicable. The BVI does not impose any withholding taxes.

VGB 10 RENEWAL OF REGISTRATION

Will the registration in respect of the mortgage remain valid throughout the tenure of the mortgage or will they require renewing? If so, what will be the approximate cost of renewal?

Registration of a mortgage, either (a) on the Register of Registered Charges filed with the Registrar of Corporate Affairs, or (b) on the Register of Aircraft Mortgages or Register of Aircraft Engine Mortgages, will remain valid throughout the tenure of the mortgage until such registration has been discharged.

VGB 11 CONVENTION

Has the BVI ratified:

(a) The Chicago Convention of 1944 on International Civil Aviation (the “Chicago Convention”)?

It has been signed by the United Kingdom which incorporates the BVI as an Overseas Territory.

(b) The 1948 Convention on the International Recognition of Rights of Aircraft (the “Geneva Convention”)?

It has been signed by the United Kingdom which incorporates the BVI as an Overseas Territory.

(c) The 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (the “1933 Rome Convention”)?

It has been signed by the United Kingdom which incorporates the BVI as an Overseas Territory.

On the occurrence of an event of default under the mortgage, can the mortgagee take the possession of the aircraft without judicial intervention?

Subject to the provisions of the mortgage and the default/remedy provisions contained therein the mortgagee may have the power to take possession of the aircraft without judicial intervention and under the Regulations a mortgagee shall have a power of sale. Under the power of sale, the mortgagee shall have the power absolutely to dispose of any aircraft or aircraft engine in respect of which the mortgage has been registered under the Regulations and to give effectual receipts for the purchase money. Where there are multiple registered mortgagees over the same aircraft or same aircraft engine (under the Regulations), a subsequent mortgagee shall not, except under the order of the court, sell the aircraft or aircraft engine without the concurrence of every prior mortgagee. However, there are good practical reasons for the mortgagee proceeding by way of court order instead, for example:

- (1) in the event of the wrongful taking of possession by the mortgagee, damages may be very high, especially those in relation to third parties, such as passengers and lessees, who incur loss or inconvenience as a result of such seizure;
- (2) the taking of possession may involve the mortgagee in the civil wrong of trespass (though it is often a term of the mortgage that the mortgagor indemnify the mortgagee for any liabilities incurred in this respect);
- (3) the CAA may refuse to grant to the mortgagee the requisite operating licences, airworthiness certificates and other permissions necessary for the continued flight of the aircraft;
- (4) the mortgagee in possession would be required to maintain the aircraft in necessary repair and be diligent in collecting revenues. It would be liable for sums lost through its own negligence and default. It would also be required to pay outgoings before applying the profits earned by the aircraft to discharge the debt owed to it by the mortgagor; and
- (5) a private sale by the mortgagee of the aircraft may be challenged on grounds such as the authority of the mortgagee to pass good title, the right to sell, the lack of a sale at best price and the infringement (or diminution in value) of the rights of other parties possessing security or other interests in and/or claims against either the aircraft or the mortgagor.

VBG 13 JURISDICTION

In what circumstances would a BVI court have jurisdiction over an action brought by the mortgagee to obtain possession of the aircraft and secure payment of the mortgage debt?

The BVI courts would have jurisdiction over an action brought by the mortgagee to obtain possession of the aircraft and secure payment of the mortgage debt if a mortgagor can be served in the BVI. A mortgagor can be served in the BVI if:

- (a) the mortgagor is present within the jurisdiction of BVI (e.g. if the mortgagor is incorporated as a BVI company);
- (b) the aircraft is physically in the BVI and/or the aircraft is registered in the BVI;
- (c) the mortgagor submits to the jurisdiction of the BVI; or
- (d) the BVI Court authorises service out of the jurisdiction.

The principal grounds for obtaining leave of the BVI Court for service outside the BVI in respect of the enforcement of an aircraft mortgage would be:

- (a) where the mortgagor is domiciled in the BVI but service within the jurisdiction was not presently possible;
- (b) in cases where a claim is brought against a person duly served, within or outside the BVI, and a person outside the BVI is a necessary or proper party thereto;
- (c) in cases where the mortgagee is claiming to assert his security rights over the mortgaged aircraft and the aircraft is situated in the BVI; and
- (d) in cases where the mortgage was entered into in the BVI or governed by BVI law or contained a BVI jurisdiction clause.

Depending on the facts, the BVI courts may decline jurisdiction when the mortgage contains a choice of foreign law, on the basis of *forum non conveniens* or where there is an agreement to submit to arbitration or to the courts of a foreign jurisdiction on an exclusive basis.

VBG 14 JUDICIAL PROCEDURE FOR POSSESSION

Upon an event of default under the mortgage, what is the judicial procedure for the mortgagee to obtain possession of the aircraft both before and subsequent to judgment?

What will be the cost of initiating proceedings? Will a bond or other security be required?

There are no statutory provisions which specifically relate to the taking of possession of an aircraft. The procedure for the taking of possession of

the aircraft and the enforcement of the mortgage is therefore similar to that of any other claim in respect of personal chattels. There is no general right of pre-trial attachment. Proceedings will be commenced by way of the issue of a claim form. The body of the claim form may contain, inter alia:

- (a) a claim by the mortgagee for the mortgage debt, interest thereon and costs;
- (b) a claim for such other charges as the mortgage provides are for the account of the mortgagor;
- (c) a claim for delivery up of possession of the mortgaged aircraft;
- (d) a claim for an injunction when necessary;
- (e) a claim for such further or other relief as the court may order.

An injunction will usually be sought by the mortgagee when there is a possibility that the aircraft will be removed from the jurisdiction or otherwise be dealt with by the mortgagor in such a manner so as to defeat the mortgagee's claim prior to judgment being given.

The injunction: legal principles

An application for the grant of an injunction may be made prior to the commencement of the action for the repayment of the debt and/or the taking of possession of the aircraft. In a case of urgency, it may even be sought before the issue of the claim form. In cases where the aircraft is within the jurisdiction of another court, it may be desirable to take proceedings in that jurisdiction instead. In such a case, the BVI Courts have recently recognised a jurisdiction to make orders for injunctive relief in support of foreign proceedings (notwithstanding the absence of substantive proceedings in the BVI) where a judgment in those proceedings would be enforceable in the British Virgin Islands. In the case of an ex parte application full disclosure must be made to the court.

The grant of an injunction is a discretionary remedy and it may be granted unconditionally or upon such terms as the court may impose. In exercising its jurisdiction, the court will not embark upon a pre-trial assessment of the mortgagee's claim. It will determine whether there is a serious issue to be tried. Providing that the court is satisfied that the claim is not frivolous or vexatious or that the mortgagee has no real prospect of success at trial, the court will determine whether the balance of convenience is in favour of the granting of an injunction. If damages would constitute an adequate remedy were the case to proceed to trial and the mortgagee to succeed in his claim no injunction will normally be granted. In determining whether to grant an injunction the court will consider the rights of any third parties which may be adversely affected by the grant of an injunction. If other factors appear to be evenly balanced in respect of whether an injunction is granted or not the court will maintain the status quo and not grant one.

Type of injunction

The injunction issued by the court will usually be a prohibitive one. In the case of aircraft it would probably take the form of a prohibition on the mortgagor from removing the aircraft from the jurisdiction or otherwise disposing of it without the permission of the court. The court may be slower to grant injunctive relief were it to be shown that the mortgagor would suffer, by disruption of passenger traffic and his business in general, unquantifiable damage for which it could not be adequately compensated were it to be successful at trial. However, if the mortgagor were to have no other assets within the jurisdiction and even if the evidence that it intended to remove the aircraft from the jurisdiction was slight the court might well grant an injunction if the damage to the mortgagee (were that asset to be removed) would be great, or the court were satisfied that the Mortgagee has an unimpeachable right to possession of the aircraft. In such a circumstance, it is likely to be unmoved by protests in relation to disruptive loss. The refusal of a party to obey the terms of an injunction constitutes a contempt of court.

The grant of injunctive relief is, in all cases, discretionary. Undue delay may therefore defeat an application – although a secured creditor is likely to be in a much stronger position because the court is likely to strive to give effect to the security.

Freezing Injunctions

Although the aircraft subject to the mortgage may not itself be physically situated in the BVI the mortgagee may in certain circumstances obtain a Freezing Injunction (the equivalent of a Mareva Injunction in other jurisdictions) against other assets of the mortgagor situated within the jurisdiction. The effect of the injunction is to prevent the mortgagor removing such assets from the jurisdiction or otherwise disposing of them or its interest in them so as to render ineffective any judgment given against it. The grant of a Freezing Injunction, like the grant of a normal injunction, is a discretionary matter for the BVI courts. An injunction may be granted *ex parte* in appropriate circumstances. Injunctive relief has traditionally been available in the British Virgin Islands only where a substantive proceeding is brought within the jurisdiction. The law remains in a state of some development, but recent authority has established that the court also has jurisdiction to grant relief in support of foreign proceedings where the judgment of the foreign court would be enforceable in the British Virgin Islands.

In cases of urgency a Freezing Injunction may be quickly obtained. Where injunctive relief is obtained, the applicant will typically have to provide an undertaking to the court to pay the reasonable costs of any third parties which are incurred in complying with the order. It may also require an indemnity in respect of the liabilities flowing from such compliance. The applicant is also required to provide an undertaking in

damages: namely, an undertaking that if the court were later to decide that the freezing order were wrongly obtained, and that it caused loss to any person, then the applicant will comply with any order which the court might make should it decide that this loss should be compensated. Typically, an applicant will be required to fortify that undertaking in damages, such as by making a payment into court or through the provision of a suitable bank guarantee. The mortgagee may also be required to provide an indemnity in respect of lost airport dues. The undertaking may therefore be quite substantial. Where the assets over which the Freezing Injunction is sought comprise other aircraft belonging to the mortgagor it is to be noted that the possibility of obtaining a Freezing Injunction in respect of them is less likely given that:

- (a) an injunction would not normally be granted when its effect would be to paralyse or substantially impede the daily commercial activities of the mortgagor;
- (b) an injunction would not usually be granted where the rights of third parties would be considerably affected or where provision for an adequate indemnity in respect of such parties could not be provided or could not be accurately calculated; and
- (c) where there was evidence that the aircraft was mortgaged to other parties it should be noted that a Freezing Injunction will not in itself create any title or interest over the assets subject to it and thus the secured creditors of those assets may apply to the court to have the injunction lifted.

Detention of the aircraft

Whether or not the mortgagee seeks an injunction providing the mortgagee has claimed for delivery up of the aircraft in the claim form it may request the court to make an order for the detention of the aircraft. For the purpose of achieving this, the court may authorise any person to enter upon any land in order to take possession of the aircraft. The order of the court will be made upon such terms as it thinks fit. Often, detention of the aircraft pursuant to an order of the court will have the same practical effect as the grant of an injunction.

Costs

The costs of the issue of a claim form or an application for an injunction are generally not large in proportion to the finance typically seen in aircraft financing transactions, although much would depend on the complexity of the facts and issues, the nature of the evidence required to be adduced, and the extent to which the defendant sought to contest the application.

Bond or other security

Generally, the mortgagee will not be required to provide a bond or other security, unless there is doubt as to his ability to indemnify the mortgagor or any relevant third parties if it is subsequently held that the taking of possession of the aircraft by the mortgagee was wrongful. When the mortgagee is ordinarily resident outside the jurisdiction of the BVI courts he may be required to provide security for the mortgagor's costs in respect of any proceedings he has brought against the mortgagor.

VGB 15 LENGTH OF TRIAL

How long will the trial of action take?

The period from the service of the claim form until the trial of the action (whether or not an injunction has been granted) depends upon whether the mortgagor has sought to raise a defence against the claim for payment of the debt or possession of the aircraft. It also depends on any other claims raised by third parties who assert their rights in respect of the mortgaged aircraft. However, there are three court procedures which may be used in certain circumstances by the mortgagee to obtain a swift judgment.

Failure to acknowledge claim form

If the debt is stipulated in the claim form as a quantifiable sum (which can include a claim for interest) and the mortgagor fails to give notice of an intention to enter a defence within 14 days or such longer period as may be specified in an order giving leave to serve out of the jurisdiction, and then to serve a defence within 28 days of the date of service of the claim form, or such longer period as may be specified in an order giving leave to serve out of the jurisdiction then the mortgagee may obtain judgment in default.

Summary judgment

Where proceedings are commenced by claim form, rather than by fixed date claim form, the mortgagee may make an application for summary judgment upon not less than 14 days notice. The application must be supported by an affidavit sworn by someone having knowledge of the relevant facts, verifying the mortgagee's cause of action and assenting to the belief that the mortgagor has no realistic prospect of succeeding on its defence. If the mortgagee is successful in demonstrating that there is no real defence to the claim (or some part of it), the court will grant a final judgment for the amount due including interest and legal costs. Summary judgment is unlikely to take less than six weeks from the date of serving the claim form.

Where the mortgagee cannot avail itself of any of these remedies, the case may take one or more years to come to trial depending upon the nature of the defences raised by the mortgagor. There may also be the possibility of an appeal by the mortgagor should it fail in the court of first instance.

DOCUMENTS FOR POSSESSION AND SALE

VGB 16

What documents will the court require for:

(a) The taking of possession of the aircraft?

The following documentation will be required:

- (i) the original mortgage or a certified copy thereof. Where the mortgage is in a foreign language a certified translation will be required. The loan agreement and any other agreements and documentation relating to the debt should also be provided.
- (ii) evidence of the non-payment of the debt on the due date or the occurrence of an event of default under the mortgage together with evidence of the service of a notice of default on the mortgagor.

(b) The sale of the aircraft?

As indicated in **VGB 12** above, a private sale of the aircraft is not ordinarily recommended. Judicial sale of the aircraft can be made pursuant to a court order and that order will be the only document required to effect the sale. However, it should be noted that we are not aware of such a case having come before the BVI courts, and no opinion can be expressed, in the abstract, as to the willingness of the BVI courts to give such an order. An express power of sale will have had to have been included in the original mortgage.

SALE OF THE AIRCRAFT

VGB 17

May the mortgagee sell the aircraft prior to judgment being given, and if so, what is the procedure?

Private sale

The mortgagee may affect a private sale of the aircraft on the occurrence of an event of default under the mortgage provided such a remedy has been stipulated for in the mortgage. However, for the reasons given in **VGB 12** above a private sale is generally inadvisable.

[Prejudgment court sale]

The sale of the aircraft may also be effected by court order prior to

judgment having been given if the court is satisfied that there is likely to be a deterioration in the condition of the aircraft or that for any good reason the sale of the aircraft is desirable. The order for sale will be on such terms as the court may specify. Such a process should be considered when it appears likely that proceedings for the repayment of the mortgagor's debt will not come to trial for a considerable period of time.

Sale after judgment

On judgment having been given in favour of the mortgagee for the debt and the mortgagee not having received payment the mortgagee may proceed to have the judgment enforced against the mortgagor. The process is by way of a claim form (known as a claim form of fieri facias). Such a claim form may be issued without the need to give notice of the judgment of the court in favour of the mortgagee to the mortgagor. It will empower an officer of the court to seize and sell such of the debtor's goods and chattels as are necessary to satisfy the judgment debt and the costs of execution. The claim form would not only apply to the mortgaged aircraft but to any of the assets of the mortgagor situated within the BVI. It may be issued even if the judgment debt was in a foreign currency. The mortgagor may appeal against such an order. If necessary a Freezing Injunction may additionally be obtained with the claim form to prevent the mortgagor disposing of his assets within the jurisdiction so as to render ineffective the judgment against him. Other methods for the enforcement of the judgment or for securing the repayment of the debt comprise, inter alia, the appointment of a receiver and the application for the winding up of the mortgagor company (or in the case of an individual) an application for an order in bankruptcy.

Winding up the mortgagor company

Where the mortgagee fails to secure repayment of his debt he should, in the case of a mortgagor company registered in the BVI, consider the possibility of making an application to the court for the winding up of the company. The petition to wind up will be addressed to the BVI Court and may be granted if the court finds that the mortgagor company is unable to pay its debts or if the court is otherwise of the opinion that it is just and equitable that the company should be wound up. A winding up petition can be brought instead of judgment being sought in respect of the mortgage debt. The petition may also be sought where judgment has been given in favour of the mortgagee and the winding up of the company is the only means of obtaining due execution. If a winding up petition has been brought no action can be commenced or continued against the company in liquidation unless the court gives its permission.

Procedure for sale of the aircraft

In respect of the judicial sale of the aircraft, the requirements as to the procedure for sale will be stipulated for in the court order. There is very little authority on what these might be in respect of the sale of an aircraft pursuant to the enforcement of a mortgage. However, the court would most likely impose conditions designed to secure a sale at market value, and to that end it would usually require that public notice be given announcing the sale a reasonable time before the holding of the sale. Such notice would usually be published both in the press and in relevant aviation publications so that all interested parties would be informed and have the opportunity to bid. The mortgagee would be entitled to bid for the aircraft. Expenses of sale would be deducted from the proceeds, prior to their being applied, to satisfy the mortgagee's claim. The mortgagee or an officer of the court may request the court to order a private sale. This would be granted if it could be shown that a higher price would be available.

CLAIMS RANKING PRIOR TO MORTGAGE

VGB 18

What claims would rank prior to the mortgage?

As a matter of BVI law and subject to the governing law of the mortgage, a mortgage registered on either the Register of Aircraft Mortgages or Register of Aircraft Engine Mortgages will take priority over any unregistered mortgage. As between registered mortgages, priority is established based on the order of registration with registered mortgages taking priority over subsequently registered mortgages. Any other registered security over the aircraft or aircraft engine, registered at the Registry of Corporate Affairs pursuant to the BVI Business Companies Act would rank in priority to any unregistered mortgage. Prior to all claims, including that of the mortgagee, the court bailiff will be entitled to recover his costs in respect of the enforcement and sale of the aircraft following the issue of the warrant of execution.

JUDGMENT CURRENCY

VGB 19

In the event of a judicial sale of the aircraft will judgment be given in the currency of the debt if that currency differs from the legal tender in the BVI?

It is a matter for the discretion of the judge to determine whether damages will be granted in a currency other than the official currency of the BVI.

VGB 20 **REMITTAL OF PROCEEDS ABROAD**

In the event of the mortgagor receiving the debt, whether through court process or by means of private sale, can the proceeds be freely remitted abroad? Is any foreign exchange control, central bank or other official consent required? If there is, under what circumstances would this be withheld? How long would such consent take to obtain? Will there be any export restrictions on the export of the aircraft?

There are no foreign exchange prohibitions in the BVI.

VGB 21 **RECOGNITION OF FOREIGN JUDGMENT**

Where the mortgage to be subject to the jurisdiction of a foreign court and were judgment to be given by that court, would the judgment be recognized and enforced by the courts of the British Virgin Islands? Are there any prerequisites to such enforcement? Would the BVI courts enforce such judgment without a rehearing of the issues? Would a BVI court enforce a foreign decree or other executive act confiscating the aircraft regardless of the mortgagee's security interest in it?

Enforcement of a foreign judgement

Subject to the jurisdiction of the foreign court, the judgement of such foreign court may be recognised and enforced by the courts of the British Virgin Islands under either the Foreign Judgments (Reciprocal Enforcement) Act 1964 or the Reciprocal Enforcement of Judgments Act 1922, or if neither Act applies to judgements of the relevant foreign court the foreign judgement may be enforced under the common law doctrine of obligation by action. Depending on which method of recognition is applicable to the jurisdiction of the foreign court, a number of prerequisites to such enforcement will apply.

Foreign confiscatory decree

The general rule is that the BVI courts will not enforce, either directly or indirectly, a penal, revenue, or other public law of a foreign state. A foreign decree or other executive act expropriating or confiscating an aircraft is likely to be treated as a public law of another foreign state. That being said, a BVI court is unlikely to refuse to recognise a foreign confiscatory decree over an aircraft even though it interfered with or even negated the mortgagee's security interest providing that the decree was valid and effective according to the law of the country where the aircraft was situated when the decree took effect. However, if the aircraft was situated outside that country at that time it is unlikely that a BVI court would recognise such a decree. Recognition of the decree might also be excluded on the grounds that it was contrary to BVI public policy,

though the ambits of public policy are uncertain. The recognition of a foreign confiscatory decree must be distinguished from a plea of sovereign immunity by the mortgagor.

GOVERNMENT INTERFERENCE

VGB 22

In what circumstances would the executive organs of government seize the aircraft or otherwise exercise a power of expropriation so as to defeat or substantially impede the mortgagee's entitlement?

In what circumstances would the executive order or refuse to permit the deregistration of the aircraft from the Virgin Islands Aircraft Register or refuse to permit the registration of the mortgage in the Aircraft Mortgage Register?

The circumstances upon which the executive organs of the BVI Government may seize an aircraft or otherwise exercise a power of expropriation are likely to be limited to matters of overriding public policy. The CAA may detain or prevent the flight of the aircraft in certain limited circumstances.

The removal of an aircraft from the Virgin Islands Aircraft Register shall not affect the rights of any mortgagee under any registered mortgage.

Assuming the application for registration of the mortgage complies with the Regulations (as described in **VGB 2.2** above), the executive organs of the BVI Government may only refuse to permit deregistration of the aircraft or registration of the mortgage based on matters of overriding public policy.

AIRCRAFT LEASING

LEASING OF AIRCRAFT

VGB 23

Is there a Register in which leases may be registered? May only certain types of lease be registered?

VGB 23.1

There are none at this time.

What documentation and consents are required for registration?

VGB 23.2

Not applicable.

What are the opening hours and registration fees?

VGB 23.3

Not applicable.

VGB 23.4 Can the register be amended?

Not applicable.

VGB 23.5 What is the effect of registration?

Not applicable.

VGB 23.6 How is deregistration effected?

Not applicable.

VGB 24 TYPES OF AIRCRAFT LEASE

What types of aircraft lease are possible under the laws of the BVI? What are their essential characteristics?

BVI is a favourable jurisdiction for a variety of cross-border lease financing structures. There are no statutory regulations on the form or characteristics of aircraft leases which can be entered into by BVI entities or governed by BVI law.

VGB 25 LAW GOVERNING THE LEASE

What law will govern the validity of the lease? If the parties to the lease stipulate that the lease will be governed by the laws of a foreign country, would the BVI courts uphold such a clause?

Provided that the choice of law clause is valid under the governing law of the mortgage, the choice of governing law would be upheld by the BVI courts. There are no BVI law requirements that stipulate that a lease must be governed by BVI law. It is standard practice for the choice of governing law in the case of aircraft leases to be a foreign law, such as English or New York law.

VGB 26 LEASE TERMS

Are there any special terms that an aircraft lease governed by BVI law should contain?

There are no specific terms required by legislation.

SPARE PARTS

VGB 27

Under the laws of BVI can spare parts, including future parts, be subject to the lease? Are any special formalities required?

BVI law does not impose any restrictions on the ability to create a lease over spare parts, including future parts. No formalities are applicable at this time.

PERFECTION OF LEASES

VGB 28

What additional formalities are required to perfect the status of the lease?

Under BVI law, there are no perfection formalities.

CHARGES AND TAXES

VGB 29

Are there any fees, charges or taxes payable in respect of the creation of an aircraft lease or its registration? What is the tax effect of different lease or its registration? What is the tax effect of different types of lease?

There are no fees, charges or taxes payable in the BVI respect of the creation of an aircraft lease by a BVI registered company.

RENEWAL OF REGISTRATION

VGB 30

Will any registrations in respect of the lease remain valid throughout the lease term or will they require renewing? If so, what will be the approximate cost of renewal?

This is not applicable.

POSSESSION BY THE LESSOR

VGB 31

On the occurrence of an event of default under the lease, can the lessor take possession of the aircraft without judicial intervention?

Typically, the terms of the aircraft lease will make provision for taking possession of the aircraft in the event of a default by the lessee in the terms of the lease. Unlike the situation of the mortgagee (see **VGB 12** above) it is usual for the lessor to recover possession without judicial intervention. Provision is usually also made in the lease for the indemnification of the lessor if the taking of possession will involve the lessor in the civil wrong of trespass. The lease generally provides that the lessee will have a right of quiet enjoyment of the use of the aircraft provided that it is not in default under the terms of the lease. Thus, if the

lessor attempts to recover possession of the aircraft and such recovery is, in the opinion of the lessee, unjustified an injunction will usually be sought to prevent it (for the nature of an injunction, see **VGB 14** above). Furthermore, if the retaking is unjustified then the lessor will usually be liable in damages.

VGB 32 JURISDICTION

In what circumstances would a BVI court have jurisdiction over an action brought by the lessor to obtain possession of the aircraft?

The BVI courts would have jurisdiction over an action brought by the lessor to obtain possession of the aircraft and secure payment of the debt if a lessee can be served in the BVI. A lessee can be served in the BVI if:

- (a) the lessee is present within the jurisdiction of BVI (e.g. if the lessee is incorporated as a BVI company);
- (b) the aircraft is physically in the BVI and/or the aircraft is registered in the BVI;
- (c) the lessee submits to the jurisdiction of the BVI; or
- (d) the BVI Court authorises service out of the jurisdiction.

The principal grounds for obtaining leave of the BVI Court for service outside the BVI in respect of the enforcement of an aircraft lease would be:

- (a) where the lessee is domiciled in the BVI but service within the jurisdiction was not presently possible;
- (b) in cases where a claim is brought against a person duly served, within or outside the BVI, and a person outside the BVI is a necessary or proper party thereto;
- (c) in cases where the lessor is claiming to assert his security rights over the leased aircraft and the aircraft is situated in the BVI; and
- (d) in cases where the lease was entered into in the BVI or governed by BVI law or contained a BVI jurisdiction clause.

Depending on the facts, the BVI courts may decline jurisdiction when the lease contains a choice of foreign law, on the basis of *forum non conveniens* or where there is an agreement to submit to arbitration or to the courts of a foreign jurisdiction on an exclusive basis.

JUDICIAL PROCEDURE FOR POSSESSION

VGB 33

Upon an event of default under the lease, what is the judicial procedure for the lessor to obtain possession of the aircraft both before and subsequent to judgment? What will be the cost of proceedings? Will a bond or other security be required?

Pursuant to the terms of the lease, the lessor will have the ability to retake possession of the aircraft upon the occurrence of an event of default. Where the lessee is not willing to hand over the aircraft and the lessor is not able to retake possession of the aircraft by peaceful means, the lessor will usually seek an injunction in which the BVI court will order the aircraft to be returned to its owner. (For the legal principles of an injunction see **VGB 14** above). In the case where it is feared that the lessee will dispose of its assets to defeat any judgment given against it a Freezing Injunction may be sought (see **VGB 14** above). Detention of the aircraft may also be sought (see **VGB 14**). The costs of the issue of a claim form or application for an injunction will not usually be large (see **VGB 14**). A bond or other security will not usually be required (see **VGB 14**). (In the references at **VGB 14**, a reference to “lessor” shall be substituted for the reference to “mortgagee” and “lessee” for the reference to “mortgagor”).

LENGTH OF TRIAL

VGB 34

How long will the trial of the action take?

As discussed at **VGB 33** above, the lessor will usually be able to recover the aircraft on a default by the lessee pursuant to the express terms of the lease. Trial of the action will only occur, therefore, where such recovery is contested.

For the trial of the action and its duration see **VGB 15** (changing the reference to “mortgagee” to “lessor” and those to “mortgagor” to “lessee”).

DOCUMENTS FOR POSSESSION

VGB 35

What documents will the court require for the taking of possession of the aircraft?

Where possession of the aircraft is sought by application for the court, the original or a certified copy of the lease will be required together with evidence that the lessee is in default of its obligations under the lease and evidence of the service of a notice of default on the lessee.

VGB 36 CLAIMS RANKING PRIOR TO THE LESSOR

What claims would rank prior to the lease?

The obligations owed by the lessee to the lessor under the lease would rank, *pari passu*, in priority of payment with all unsecured unsubordinated indebtedness of the lessee, other than indebtedness which is preferred by any provision of the laws of the BVI of general application.

VGB 37 JUDGMENT CURRENCY

In the event of damages being sought by the lessor under the lease, will judgment be given in the currency of the lease if that currency differs from legal tender in the BVI?

It is a matter for the discretion of the judge to determine whether damages will be granted in a currency other than the official currency of the BVI.

VGB 38 REMITTAL OF PROCEEDS ABROAD

In the event of the lessor recovering any debt under the lease, can the proceeds be freely remitted abroad? Is any foreign exchange control, central bank or other official consent required? If there is, under what circumstances would this be withheld? How long would such consent take to obtain? Will there be any export restrictions on the export of the aircraft?

There are no foreign exchange controls in place in the BVI.

VGB 39 RECOGNITION OF FOREIGN JUDGMENT

Were the lease to be subject to the jurisdiction of a foreign court and were judgment to be given by that court, would the judgment be recognised and enforced by the courts of England? Are there any prerequisites to such enforcement? Would the English courts enforce such a judgment without a rehearing of the issue?

Would a BVI court enforce a foreign decree or other executive act confiscating the aircraft regardless of the lessor's ownership of it?

See **VGB 21** above (changing the reference to "mortgagee" to "lessor" and the reference to "mortgagor" to "lessee").

GOVERNMENT INTERFERENCE

VGB 40

In what circumstances would the executive organs seize the aircraft or otherwise exercise a power of expropriation so as to defeat or substantially impede the lessor's ownership of it? In what circumstances would the executive order or refuse to permit the deregistration of the aircraft from the Virgin Islands Aircraft Register?

See **VGB 22** in relation to the executive interference (changing the reference to “mortgagee” to “lessor”).

In terms of deregistration of the aircraft, in practice the executive will not interfere with the valid title of the lessor on aspects of deregistration or registration.

ENDNOTES

¹ Under Air Navigation (Overseas Territories) Order 2013 s.16:

“the following persons are qualified to hold a legal or beneficial interest by way of ownership in an aircraft registered in the Territory or a share therein:

- (a) the Crown in right of Her Majesty's Government in the United Kingdom or in right of the Government of the Territory;
- (b) Commonwealth Citizens;
- (c) British protected citizens;
- (d) Bodies incorporated in some part of the Commonwealth and having their principal place of business in any part of the Commonwealth.”

