

## 公报文章

## Enforcement of share charges over Cayman Islands aircraft owning SPVs

### 对开曼群岛拥有飞机的特殊目的公司执行股份押记

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The aviation industry has been severely impacted by the COVID-19 pandemic. Although flying has now resumed in a limited capacity, airlines which have already been severely weakened by months of enforced inactivity are now facing a long, slow recovery, and for many the worst is not over yet. We have already seen a number of airlines enter into bankruptcy protection, and more are likely to follow over the coming months as passengers and operators adjust to the realities of flying in the post-COVID era. As a result, financiers and lessors are considering their position and looking at ways that they can improve their rights or enforce their security in a default situation. In particular, there has been an increased focus on the security that a financier would typically take over the shares in a Cayman Islands aircraft owning SPV and how, in practice, a financier can enforce their rights under this share security to gain control of an aircraft from a defaulting owner.

#### Introduction

In aviation finance transactions, it is very common for the financed aircraft to be held in a corporate structure by a Cayman Islands special purpose vehicle (“SPV”), rather than directly by the owner. The SPV will obtain third party financing from a commercial bank or other financier in order to enable it to acquire legal title to the aircraft, which the SPV will then lease on to the airline or intended operator. Although the shares in the SPV may be held directly by the owner or operator of the aircraft (whether an airline or a lessor), more typically the shares in an SPV established for the purposes of a secured aircraft financing transaction will be held in an orphan trust structure.

航空业受到了 COVID-19 (2019 冠状病毒病) 大流行的严重影响。虽然现在已经恢复了有限的飞行能力，但是数月来受到强制性停滞的航空公司正面临着漫长而缓慢的复苏，而对于许多航空公司来说，最坏的情况还没有结束。我们已经看到一些航空公司申请了破产保护，而且在未来几个月中，随着乘客和运营商适应了 COVID 疫后时期的飞行现实，更多的航空公司可能会申请破产保护。其结果是，融资方和租赁商目前都在考虑自己所处的位置，研究如何在发生违约的情况下提升自己的权力或强制执行其担保。特别是，关注点已越来越集中在担保上，即融资方通常会接管开曼群岛拥有飞机的特殊目的公司的股份，以及在实践中，融资方如何可在此股份担保下行使其权利以从违约的所有人手中获得飞机的控制权。

#### 简介

在航空金融交易中，一种很常见的做法是由一家开曼群岛特殊目的公司 (“SPV”) 以公司结构持有融资飞机，而不是由所有者直接持有。该 SPV 从商业银行或其他金融机构获得第三方融资，以使其能够获得飞机的合法所有权，然后将其租赁给航空公司或目标运营商。虽然 SPV 的股份可由飞机所有者或经营者 (无论是航空公司还是租赁商) 直接持有，但更典型的是，以担保飞机融资交易为目的而建立的 SPV 的股份由孤儿信托结构持有。

## What is an “orphan trust” structure?

held directly by the owner, operator or financier, but by a corporate trustee (the “Share Trustee”) pursuant to a charitable trust structure on and subject to the terms of a Cayman Islands charitable trust. As the SPV is ‘orphaned’ and not a direct subsidiary of any of the other transaction parties, the directors will typically be professional independent directors provided by a corporate service provider in the Cayman Islands or elsewhere (depending on where the SPV is intended to be tax resident). From an accounting perspective, the SPV will not typically form part of either the owner/operator or the financier’s group as neither of these parties will have a direct ownership interest in the SPV. This means that the aircraft can be held off their respective balance sheets (hence these structures are often referred to as being “off-balance sheet” SPVs).

## Why use SPV structures for Aircraft financing?

Financiers like SPV structures as they provide a greater degree of certainty and control over the asset, as well as offering bankruptcy remoteness. In addition to granting direct security over the asset and its associated income streams, which will usually take the form of a mortgage and security agreement, SPV financing transactions commonly feature a charge or mortgage over the shares of the asset owning SPV. In the event of a default this allows the financier to step in and take control of the SPV by enforcing the share security, enabling them to either transfer the SPV as a going concern or sell the asset out of the SPV untainted by any court process. This is generally quicker, simpler and cheaper than having to arrest the aircraft and sell it through a court sanctioned process, which can also involve practical issues (particularly around locating and taking physical possession of the aircraft).

## Bankruptcy Remoteness

A key benefit for financiers in using an orphan SPV is that it helps to make the structure “bankruptcy remote”. The primary purpose of a bankruptcy remote structure is to minimise any risk that the aircraft owned by the SPV will become subject to bankruptcy proceedings or form part of the bankruptcy estate’s property in the event of bankruptcy proceedings in connection with the airline or operator that is leasing the aircraft from the SPV. In order to achieve bankruptcy remoteness, the SPV will need to be structured in a way that ensures it is legally independent from both the originator/operator of the asset and the financier, and mechanisms will need to be put in place to ensure that none of the other transaction parties is able to exercise any direct control over the SPV.

The transaction documents will set out contractual restrictions limiting the ability of the shareholders of the SPV to take any action in relation to the liquidation of the SPV or actions in relation to the shares which may negatively impact a financier such as amending the

## 何谓“孤儿信托”结构?

在“孤儿信托”结构中，SPV 的股份不是由所有者、经营者或融资方直接持有，而是由公司信托人（下称“股份信托人”）根据开曼群岛公益信托的规定并受其约束的公益信托结构持有。由于 SPV 是“孤立的”，而不是任何其他交易方的直接子公司，因此董事通常是由开曼群岛或其他地区（取决于 SPV 拟成为何处的税收居民）的企业服务提供商提供的专业、独立董事。从会计角度来看，SPV 通常不会成为所有者/经营者或融资方的一部分，因为此双方均不拥有 SPV 的直接所有权益。这意味着飞机可以脱离各自的资产负债表（因此这些结构通常被称为“资产负债表外”的 SPV）。

## 为何使用 SPV 结构进行飞机融资?

融资方偏好 SPV 结构，因为此结构为资产提供了更大程度的确定性和控制性，并且提供了破产隔离。除了对资产及其相关收入流给予直接担保外（通常采取抵押担保协议的形式），SPV 融资交易通常还有一个特点，即对拥有资产的 SPV 的股份进行押记或抵押。在发生违约的情况下，这将允许融资方介入，并通过执行股份抵押来控制 SPV，从而使其能够将 SPV 作为持续经营的公司进行转让，或出售 SPV 的资产，而不受任何法庭程序的影响。与必须扣留飞机并通过法院批准的程序出售飞机相比，这样做更快、更简单、也更经济，前者也可能涉及一些实际问题（尤其是在为飞机寻找停靠地点和拥有飞机机体方面）。

## 破产隔离

对于融资方来说，使用孤儿 SPV 的一个主要好处是，它有助于使结构“与破产隔离”。破产隔离结构的主要目的是把以下风险降至最低：SPV 拥有的飞机将进入破产程序，或在与某家从 SPV 租赁飞机的航空公司或经营者有关的破产程序中，飞机将构成破产财产的一部分。为了实现破产隔离，SPV 的构建方式需要确保其在法律上既独立于资产的发起方/经营方也独立于融资方，并且需要建立机制以确保没有任何其他交易方能够对 SPV 行使任何直接控制权。

交易文件会规定合同性限制条件，限制 SPV 股东采取与清算 SPV 有关的任何行动的能力，或针对股份采取可能对融资方产生负面影响的行动的能力，比如修改公司大纲及章程（例如改变与股份有关的任何权利）或以其他方式处置股份，而不是

memorandum and articles of association (for example to vary any rights relating to the shares) or to otherwise dispose of the shares, other than in accordance with the terms of the transaction and financing documents.

Given the orphan nature of these SPV structures, and the independent nature of the directors, the SPV will need to enter into the transaction on a limited recourse basis. This means that any claims which may arise against the SPV (other than as a result of its own actual fraud or willful default) are limited solely to the assets which the SPV has available (being the aircraft and any income streams arising from the leasing of the aircraft).

In addition to the limited recourse provisions, the transaction documents should also contain non-petition language, whereby the transaction parties agree not to petition for a liquidation or winding up of the SPV until following the termination of the financing transaction. This is to ensure that none of the parties contracting with the SPV can take any action to wind-up the SPV during the life of the transaction, thereby collapsing the structure prematurely.

## Share Charge

As noted above, financiers will typically take security over the shares of a Cayman Islands SPV as part of their security package in connection with a secured aircraft financing transaction.

At the outset of the transaction, the Share Trustee, in its capacity as the registered holder of the shares in the SPV (the “**Charged Shares**”) on and subject to the terms of the charitable trust, will grant security over the Charged Shares in favour of the financier, or security trustee (where appointed) on behalf of the lenders. Given that the Charged Shares relate to a Cayman Islands company, this security would usually take the form of a Cayman Islands law governed charge over shares (the “**Share Charge**”) entered into by the Share Trustee in favour of the security trustee or financier.

Under the terms of the Share Charge, in addition to granting a security interest over the Charged Shares in favour of the security holder, the Share Trustee will agree to certain covenants, including not to:

- issue any further shares in the SPV;
- transfer any of the shares without the consent of the security holder;
- amend the memorandum and articles of association of the SPV;
- take any action to liquidate or wind up the SPV; or
- take any actions or do anything which may impact the security interest granted to the security holder under the Share Charge.

Shares in a Cayman Islands company are registered rather than certificated. This means the entry of a

按照交易条款和融资文件的条款进行。

鉴于这些 SPV 结构的孤立性以及董事的独立性，SPV 需要在有限追索权的基础上进行交易。这意味着，针对 SPV 可能产生的任何索赔（不是由于其自身的事实欺诈或故意违约造成的）仅限于 SPV 可提供的资产（飞机及飞机租赁产生的任何收入流）。

除了有限追索权的规定外，交易文件还应包含不呈请清盘的语言表达，即交易各方同意在融资交易终止之前不对 SPV 申请清算或清盘。这是为了确保与 SPV 签约的任何一方都不能在交易有效期内采取任何行动来清算 SPV，造成过早地破坏该结构。

## 股份押记

如上所述，融资方通常会对开曼群岛 SPV 的股份进行抵押，作为其担保飞机融资交易担保方案的一部分。

交易开始时，作为依照公益信托条款注册持有 SPV 股份（下称“**受押股份**”）并受公益信托条款约束的股份信托人，将对受押股份的抵押给予融资方或代表贷方的担保受托人（如果有所指定）。鉴于受押股份与开曼群岛公司有关，该抵押通常对股份信托人为担保受托人或融资方订立的股份采取开曼群岛法律管辖的押记形式（下称“**股份押记**”）。

根据股份押记的条款，除了为抵押品持有者授予受押股份的抵押权益外，股份信托人还同意某些契约，包括不同意以下行为：

- 发行 SPV 的任何进一步股份；
- 未经抵押品持有者的同意而转让任何股份；
- 修改 SPV 的大纲及章程；
- 采取任何行动来清算或清盘 SPV；或者
- 采取任何可能影响到依据股份押记授予抵押品持有者的抵押权益的行动或行为。

开曼群岛公司的股份是注册的，而不是认证的。这意味着将股东的详细信息输入公司的股东名册，而不是持有股票证书，构

shareholder's details in the register of members of the company, rather than possession of a share certificate, constitutes de-facto evidence of title to the shares. As a result, as a matter of Cayman Islands law, it is not possible to "perfect" a share charge in the way that term is understood in other jurisdictions. The only way to create a legal mortgage over the shares is for the security holder to be noted as the legal holder of the shares in the register of members of the SPV. Clearly this not something that is commercially acceptable to the SPV and nor is it something that the security holder would want unless an event of default has occurred and the security has been enforced. There are, however, a number of measures that would typically be included in the share charge in order to better protect the security holder's position and make it easier for title to the Charged Shares to be transferred on a default. These may include some or all of the following:

- The provision of a signed but undated share transfer form (with the name of the transferee left blank), together with an authorisation from the Share Trustee that this can be completed and dated upon the occurrence of an event of default. This enables the shares to be transferred to the security holder or their nominee once completed and presented to the directors of the SPV. Provisions would also typically be included in either the memorandum and articles of association or in a separate set of board resolutions of the SPV authorising the transfer of the shares upon presentation of the completed and dated share transfer form without the need for any further approvals.
- Obtaining signed but undated resignation letters from the directors of the SPV, which can be dated and presented following an event of default, enabling the security holder to remove the existing directors and replace them with their own nominees.
- The grant by the Share Trustee of an irrevocable proxy appointing the security holder as the Share Trustee's proxy to vote at any meeting of the shareholders of the SPV, giving the security holder a degree of control over the affairs of the company following an event of default.
- Including an annotation on the SPV's register of members confirming that the Charged Shares are subject to a security interest arising under the Share Charge. The purpose of this is to ensure that any interested parties are notified of the existence of the Share Charge and to minimise any risk that there are any competing interests in the shares from a third party who has acquired the shares for value without notice.

The net effect of a Share Charge is that on enforcement the security holder can exercise its right to step in and take ownership of the Charged Shares, or otherwise transfer

成了股份所有权的事实证据。其结果是，根据开曼群岛法律，不可能以其他司法管辖区对股份押记的理解方式来“完善”股份押记。唯一能合法抵押股份的办法是在 SPV 成员名册中将抵押品持有者注明为股份的合法持有人。显然，这不是 SPV 在商业上可以接受的东西，也不是抵押品持有者想要的东西，除非发生了违约事件，且抵押已强制执行。但是，股份押记通常会包括一些措施，以更好地保护抵押品持有者的处境，使其更容易在发生违约事件时转让受押股份的所有权。这些措施可能包括以下一些或全部：

- 提供一份已签名但未注明日期的股份转让表（受让人的名称留空），以及一份股份信托人的授权，说明此表可在发生违约事件时填妥并注明日期。这样，此表一旦填妥并呈交给 SPV 的董事，股份便可转让给抵押品持有者或其代名人。条款通常也会包含在公司大纲及章程中，或者包含在 SPV 的一套单独的董事会决议中，在呈交填妥且注明日期的股份转让表后，无需任何进一步批准，即可授权转让股份。
- 获得 SPV 董事已签名但未注明日期的辞职信，可在发生违约事件后标明日期并呈交上去，使抵押品持有者能够罢免现有的董事，用自己的代名人取代他们。
- 股份信托人授予不可撤销的代理人，任命抵押品持有者作为股份信托人的代理人，在 SPV 的任何股东大会上投票，在发生违约事件后，给予抵押品持有者对公司事务的一定程度的控制权。
- 在 SPV 的成员名册上添加注释，确认受押股份受股份押记下产生的抵押权益的规限。这样做的目的是确保将股份押记的存在通知所有利益相关方，并且最大程度地降低来自在未通知的情况下已获得股票价值的第三方的任何竞争性权益产生的风险。

股份押记的最终结果是，在强制执行时，抵押品持有者可以行使其权利，插手干预并取得受押股份的所有权，或者可以将其转让给代名人，赋予其对 SPV 的直接或间接控制权。作为临

them to a nominee, giving them direct or indirect control of the SPV. They can either be transferred to the security holder or an affiliate as an interim step pending the sale of the shares and/or a direct transfer of title to the underlying aircraft, or the shares in the company can be directly transferred to a buyer or transferee as nominee of the security holder directly as part of the enforcement process. Ultimately this will depend on the intention of the security holder and the arrangements it has made with its counterparties.

The Share Charge is potentially a useful tool for a financier in the case of an acceleration and enforcement relating to their loan, as it provides an alternative method for effectively gaining ownership of an aircraft without the need for a repossession and sale process under the aircraft mortgage.

## Summary

Conyers' aviation finance and FIG teams have a wealth of experience dealing with secured aircraft finance transactions, and in the establishment and enforcement of share charge arrangements, and would be happy to assist with any queries you may have.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information. The Chinese translation of this article has been adapted from the English original, please refer to the original in case of ambiguity.

时步骤，在出售股份和/或直接转让标的飞机所有权之前，受押股份可转让给抵押品持有者或关联公司，或者，作为执行程序的一部分，公司的股份可直接转让给作为抵押品持有者代名人的买方或受让人。最终，这将取决于抵押品持有者的意图及其与交易对手做出的安排。

对于与融资方贷款有关的加速和强制执行的情况，股份押记对融资方而言可能是一个有用的工具，因其为有效获得飞机所有权提供了一种替代方法，而无需在飞机抵押下进行收回和出售。

## 总结

康德明律师事务所的航空融资团队和金融机构集团团队在处理担保飞机融资交易以及建立和执行股份押记安排方面具有丰富的经验。我们非常乐意为您解答任何疑问。

本文的内容并非详尽无遗，旨在提供简要概述和一般资料，而不应用于替代法律建议或法律意见。中文译本仅供参考，如有歧义，请以英文原文为准。

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