



ICLG

The International Comparative Legal Guide to:

Aviation Law 2019

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British Virgin Islands



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1 General

1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.

The principal aviation legislation applicable in the British Virgin Islands (“BVI”) is as follows:

1. the Air Navigation (Overseas Territories) Order 2013, as amended (“ANOTO”);
2. the Overseas Territories Aviation Requirements (“OTAR”);
3. the Airports Act 2003 (“AA”);
4. the Mortgaging of Aircraft and Aircraft Engine Act, 2011; and
5. the Mortgaging of Aircraft and Aircraft Engines Regulations, 2012.

The 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 (“CAA”).

Historically, airports in the BVI were run by a government department (the Department of Civil Aviation in the Ministry of Communication), which handled both the operation and regulation of airports in the BVI. After the passing of the AA and incorporation of the BVI Airports Authority (“BVIAA”), a limited liability company, both functions are now separated with the BVIAA owning and operating all airports within the BVI, while the ASSI handles the regulation of airports in the BVI.

ASSI

The key functions performed by the ASSI are:

- overseeing the UK overseas territories in relation to aviation matters;
- providing a cohesive system of civil aviation safety regulation in the UK overseas territories; and
- supporting existing authorities in the UK overseas territories through processes by which aircraft operators, aviation personnel and providers of related services gain approvals, licences and certificates, including air traffic control (as described in the OTAR under the ANOTO).

BVIAA

The objectives of the BVIAA are (as described in s5 of the AA):

- to acquire, own, operate, control, manage, develop, administer and maintain the international airport and any extension

thereof, as a commercial undertaking, in a manner which recognises its role as an international airport and for the benefit of the economy of the BVI;

- to acquire, own, operate, control, manage, develop, administer and maintain any designated airport in the BVI as a commercial undertaking and for the benefit of the economy of the BVI;
- to provide and maintain on a commercial basis, facilities and services for air transport and such other facilities and services as are necessary or desirable for, or in connection with, the international airport or any designated airport;
- to collect such dues and charges as the BVIAA may be authorised (by an enactment) to collect;
- to use, develop and manage on a commercial basis, all lands vested in, transferred or leased to, the BVIAA;
- generally to carry out the provisions of the AA; and
- to do anything that is incidental to or connected with the objectives of the BVIAA.

1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

An air carrier must have its principal place of business in the BVI in order to apply for an air operator certificate (“AOC”) and be involved in commercial air transport. An AOC indicates that its holder is competent to secure the safe operation of aircraft (of the types specified thereunder) on flights (of the description and for the purposes specified thereunder).

The air carrier must complete its application for an AOC to the Governor (as defined below) not less than 90 days before the date of intended operation, unless a shorter period is acceptable to the Governor. In order to qualify for an AOC, the air carrier must satisfy all of the conditions under the ANOTO and requirements under the OTAR; that is, an AOC will be issued to an air carrier if:

1. its principal place of business is located within the BVI;
2. it meets the applicable requirements of Subpart B under the OTAR;
3. the accountable manager for the operation is a person competent to take overall responsibility for the operation and safety of each flight operated;
4. its nominated postholders required by the OTAR (paragraph 119.53(a)(1) and (2)) are fit and proper persons; and
5. the granting of such AOC is not contrary to the interests of aviation safety.

“Governor” means the person for the time being administering the government of the BVI and includes any person as being designated to such functions under the ANOTO.

1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?

The ASSI is the main air safety regulator responsible for overseeing the BVI's international aviation safety obligations and agreements, including the conduct of quality control activities, in accordance with the OTAR under the ANOTO.

1.4 Is air safety regulated separately for commercial, cargo and private carriers?

No, these fall under the ASSI.

1.5 Are air charters regulated separately for commercial, cargo and private carriers?

No, these fall under the ASSI.

1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with 'domestic' or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.

There are restrictions on foreign aircraft operations as described under Part 15 of the ANOTO. Restrictions with respect to carriage for valuable consideration in aircraft registered outside of the BVI and the applicable filing and approval of tariffs are detailed under s135 and s136, while s137 deals with restrictions on aerial photography, aerial survey and aerial work in aircraft registered outside of the BVI.

1.7 Are airports state or privately owned?

Airports in the British Virgin Islands are State owned. The BVIAA owns and operates all airports in the BVI (Terrance B. Lettsome International Airport, Taddy Bay Airport and Auguste George Airport), North Sound Water Aerodrome and various helipads.

1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

This is not applicable.

1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

Provisions under the ANOTO (including use of flight recording systems and preservation of records in the event of air accidents, as well as implementation of flight data monitoring programme and mandatory occurrence reporting) will apply together with regulations under the OTAR, in line with the requirements of ICAO Annex 13 (please see question 2.7 on the Chicago Convention).

Aircraft accident and incident investigations are required to be carried out by the ASSI in the BVI, supported by the UK Air Accidents Investigation Branch ("UK AAIB"). The objective of the UK AAIB is to determine circumstances and causes of an accident or incident in order to make safety recommendations for prevention purposes within the UK and its overseas territories.

1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

No, there have not been any recent cases of note regarding notable developments in the BVI.

2 Aircraft Trading, Finance and Leasing

2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

The BVI has a US Federal Aviation Authority Category One aircraft register status under the International Safety Assessment programme and aircraft may be registered in the BVI bearing aircraft registration prefix "VP-L" (namely, the Virgin Islands Aircraft Register). Part 2 of the ANOTO describes the relevant registration and marking requirements, with guidance from Part 47 of the OTAR.

Upon successful application to the Governor, a certificate of registration will be issued relating to an aircraft including details such as the relevant aircraft type, the manufacturer's serial number and registration mark, etc. Issuance of such certificate indicates that its holder is considered to be qualified for registration and may therefore be considered evidence of ownership.

2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

Following the implementation of the Mortgaging of Aircraft and Aircraft Engine Act, 2011 and the Mortgaging of Aircraft and Aircraft Engines Regulations, 2012, aircraft and engines (owned by or otherwise in the lawful possession of a BVI business company) may also be made the subject of a mortgage for the purposes of registration in the Register of Aircraft Mortgages and the Register of Aircraft Engine Mortgages, respectively. Note that a mortgagee in such circumstances shall not be deemed to be the owner of the relevant aircraft or aircraft engine.

The Mortgaging of Aircraft and Aircraft Engines Regulations, 2012 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. These are maintained by the registrar who is a public officer designated by the minister under the Mortgaging of Aircraft and Aircraft Engine Act, 2011.

In addition to the Register of Aircraft Mortgages and the Register of Aircraft Engine Mortgages, it is possible to further protect a lender in an aircraft transaction involving security created either by BVI holding companies owning aircraft ("BVI AC Holdco(s)"), or in respect of issued shares in a BVI AC Holdco, notwithstanding the absence of statutory perfection requirements to recognise the validity or enforceability of such security.

The following filings and notations will ensure that a lender is conferred with priority against unsecured creditors and subsequent secured creditors:

- where a BVI AC Holdco creates a relevant charge under section 163 of the BVI Business Companies Act (as amended) (the "BVI Act"), for example, an aircraft mortgage

– particulars of the charge may be filed with the Registry of Corporate Affairs (the “**Registry**”) for a fee of US\$200. The particulars of the charge will then be placed on the BVI AC Holdco’s corporate records at the Registry to put 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; and

- where a lender has taken security over the issued shares of a BVI AC Holdco then it is advisable for a notation to be placed on the BVI AC Holdco’s register of members which evidences the existence of the share security. Again, this acts as a method of giving notice to third parties of the existence of such share security if they review the register of members. It is also possible, where the commercial parties agree, for the annotated register of members of the BVI AC Holdco to be filed publicly with the Registry and thereby recorded on the BVI AC Holdco’s corporate records at the Registry.

2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

There are no regulatory requirements in the BVI outside of those described above.

2.4 As a matter of local law, is there any concept of title annexation, whereby ownership or security interests in a single engine are at risk of automatic transfer or other prejudice when installed ‘on-wing’ on an aircraft owned by another party? If so, what are the conditions to such title annexation and can owners and financiers of engines take pre-emptive steps to mitigate the risks?

There is no local law covering this issue.

2.5 What (if any) are the tax implications in your jurisdiction for aircraft trading as regards a) value-added tax (VAT) and/or goods and services tax (GST), and b) documentary taxes such as stamp duty; and (to the extent applicable) do exemptions exist as regards non-domestic purchasers and sellers of aircraft and/or particular aircraft types or operations?

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

Further, companies incorporated or registered under the BVI Act are currently exempt from income and corporate tax; in addition, the BVI does not levy capital gains tax on those companies.

2.6 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?

The BVI is neither signatory nor party by extension from the UK to the main international Conventions listed above.

2.7 How are the Conventions applied in your jurisdiction?

Though not listed under question 2.6, the Chicago Convention places responsibility on all contracting States (including the UK) to implement programmes as identified by the International

Civil Aviation Organisation on developing frameworks within international air transport (i.e. ICAO’s Standards and recommended Practices or SARPS) and such provisions extend to the UK overseas territories (including the BVI) and are reflected in the ANOTO.

The OTAR 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, BVI, Montserrat and St. Helena published by the ASSI.

Another notable convention would be the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 to which 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;
- that 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;
- that 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;
- that 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;
- that 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
- that 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.

2.8 Does your jurisdiction make use of any taxation benefits which enhance aircraft trading and leasing (either in-bound or out-bound leasing), for example access to an extensive network of Double Tax Treaties or similar, or favourable tax treatment on the disposal of aircraft?

No. Please see question 2.5.

3 Litigation and Dispute Resolution

3.1 What rights of detention are available in relation to aircraft and unpaid debts?

The rights of detention exercisable over aircraft in the BVI include aircraft liens and the right to detain, sell, or cause to be forfeited, under the ANOTO and Proceeds of Criminal Conduct Act, 1997.

3.2 Is there a regime of self-help available to a lessor or a financier of an aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

This is not applicable.

3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your jurisdiction regarding the courts in which civil and criminal cases are brought?

Commercially significant civil litigation is tried by a Judge sitting without a jury in the High Court of the Eastern Caribbean Supreme Court (the “ECSC”). The ECSC is the superior court of record for the BVI and eight other English common-law Caribbean jurisdictions. Aviation disputes would be heard in the ECSC and most likely within the Commercial Division of the Eastern Caribbean Supreme Court sitting in the BVI, which deals with commercial claims with a value of at least US\$500,000 or claims which the Commercial Division Judge considers to be of a commercial nature even if the monetary value requirement has not been satisfied. Commercial claims include claims relating to business contracts, companies, partnerships, insolvency, trusts, insurance and reinsurance, mercantile agency and usages, the carriage of goods by sea, air or pipeline, banking and financial services and arbitration. Court proceedings are conducted in accordance with the Eastern Caribbean Civil Procedure Rules 2000, as amended (“CPR”), and the Commercial Division has its own set of rules and practice directions which supplement the CPR for the effective resolution of commercial disputes.

For criminal cases, the Magistrates’ Court in the BVI has jurisdiction to try summary offences only, i.e. offences that are triable either way and that have not been committed up to the ECSC for trial. The ECSC, which usually sits to hear criminal matters three times a year, is the superior court of record for indictable offences where the defendant has been committed up for trial. There are no specialised criminal courts for particular crimes.

In November 2016, the BVI International Arbitration Centre opened for the purpose of facilitating commercial arbitration in the BVI.

3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?

For domestic airlines/parties, being a company incorporated in the BVI (“BVIco”), service of a document may be effected on the BVIco by addressing the document to the BVIco and leaving it at, or sending it by a prescribed method to (a) the BVIco’s registered office, or (b) the office of the BVIco’s registered agent. The prescribed methods are:

- a) by properly addressing, preparing and posting an envelope containing the document to the address for service;
- b) by personal service;
- c) by direct delivery to the secretary or clerk of the BVIco’s registered agent; and
- d) by email attaching the document provided that: (a) the original of the document shall be sent by post; and (b) it shall not matter whether the document was served in a scanned or other form so long as it is legible and in the form of the original document.

For foreign airlines/parties, being a company incorporated out of the BVI “Non-BVIco”, service of a claim form may be done out of the BVI with the permission of the ECSC. Once permission is obtained, the service process must comply with the laws and regulations of the Non-BVIco’s jurisdiction of incorporation or the country in which the Non-BVIco is to be served, which service may require the involvement of foreign government, judicial and consular authorities.

Civil proceedings are commenced by filing originating documents with the ECSC (including a claim form or originating application in the case of insolvency proceedings). A claimant has six months to serve the filed claim form in the BVI, or 12 months in the case of service outside the BVI.

3.5 What types of remedy are available from the courts or arbitral tribunals in your jurisdiction, both on i) an interim basis, and ii) a final basis?

The BVI court has jurisdiction to grant interim remedies which include:

- a) an interim declaration;
- b) an interim injunction;
- c) an interim freezing order;
- d) an order directing a party to provide information about the location of property which is the subject of a claim (“**relevant property**”) or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order;
- e) an order for a specified fund to be paid into court or otherwise secured where there is a dispute over a party’s right to the fund;
- f) an order directing a party to prepare and file accounts relating to the dispute;
- g) an order for interim costs;
- h) an order for the:
 - carrying out of an experiment on or with relevant property;
 - detention, custody or preservation of relevant property;
 - inspection of relevant property;
 - payment of income from relevant property until a claim is decided;
 - sale of relevant property (including land) which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and
 - taking of a sample of relevant property;
- i) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purpose of carrying out an order listed at (h) above;
- j) an order permitting a party seeking to recover personal property to pay a specified sum of money into court pending the outcome of the proceedings and directing that, if the party does so, the property must be given up to the party;
- k) an order restraining a party from:
 - dealing with any asset whether located within the jurisdiction or not; and
 - removing from the jurisdiction assets located there;
- l) an order to deliver up goods;
- m) an order requiring a party to admit another party to premises for the purpose of preserving evidence, etc.;
- n) the appointment of a receiver where it is just or convenient to do so; and
- o) an order for payment by a defendant on account of any damages, debt or other sum which the court may find the defendant liable to pay.

The BVI court can also grant free-standing injunctive relief in support of foreign court proceedings and foreign arbitrations without the need for substantive proceedings in the BVI.

As to final remedies, the BVI court can grant a wide variety of legal and equitable remedies including damages, injunctions, specific performance, rescission, rectification and declaratory relief.

Section 33 of the BVI Arbitration Act 2013 makes interim remedies available in arbitrations heard in the BVI unless the parties agree otherwise. Section 43 of the BVI Arbitration Act 2013 permits the ECSC to grant interim measures in relation to any arbitral proceeding which have need or are to be commenced in or outside the BVI and such interim measures are not subject to appeal.

3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal and, if so, in what circumstances do these rights arise?

Civil and criminal appeals from the ECSC are made to the Court of Appeal of the ECSC and then, ultimately, to the Judicial Committee of the Privy Council in England. Such appeals to the Privy Council are either as of right following a substantive appeal or require permission of the Court of Appeal of the ECSC. For the Court of Appeal of ECSC to grant such leave, the applicant needs to show that the question involved in the appeal is one of great general or public importance or otherwise ought to be submitted to the Privy Council for determination. It is possible to apply for special leave of Her Majesty in Counsel if permission from the Court of Appeal of the ECSC is not granted.

Appeals to the Court of Appeal of the ECSC are either as of right following a substantive decision that is determinative of the proceedings (e.g. following a trial) or require permission from the ECSC or the Court of Appeal of the ECSC in the case of interlocutory decisions.

Pursuant to the BVI Arbitration Act 2013, parties to an arbitration agreement can agree to include a provision on the right to appeal the final award to the ECSC on a question of law. However, such an appeal is only possible with the agreement of all the other parties to the arbitral proceedings or with leave of the ECSC and where the arbitral tribunal has given reasons for its award.

4 Commercial and Regulatory

4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?

There is no relevant competition or other regulatory law legislation in the BVI.

4.2 How do the competition authorities in your jurisdiction determine the 'relevant market' for the purposes of mergers and acquisitions?

The BVI does not have a competition authority.

4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

There is no such regime under the BVI law.

4.4 How does your jurisdiction approach mergers, acquisition mergers and full-function joint ventures?

Subject to the provisions of its memorandum of association and articles of association and the BVI Act, a BVI business company can merge with one or more BVI business companies, or foreign companies, and the surviving entity may be domiciled in the BVI or

in a foreign jurisdiction. BVI Companies are frequently parties to joint venture arrangements.

4.5 Please provide details of the procedure, including time frames for clearance and any costs of notifications.

This is not applicable.

4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?

The BVI does not have such rules.

4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

This is not applicable.

4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines and airports?

There is currently no data protection legislation in the BVI though the BVI courts will observe English common law principles (e.g. a duty on confidentiality and privacy) which are highly persuasive, though not binding.

The ASSI follows the information security policies and procedures of the CAA including measures to safeguard against unauthorised or unlawful processing of personal data, and against accidental loss or destruction of, or damage to, personal data. In particular, these policies cover the secure management and controlled access to information, business continuity, information rights, management and privacy, and cyber security – for example, policy statement 51 deals with safety data/information protection sharing and exchange consistent with ICAO Annex 19.

A user of the ASSI can request for information or make an enquiry about how the ASSI has processed his/her personal information under the General Data Protection Regulation (GDPR) and expect a response within a month following the date of receipt by the ASSI of all the information necessary to deal with such request.

4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

The ANOTO provisions for safety management system and flight data monitoring, including mandatory occurrence reporting, detail the obligations on airlines for proper data maintenance. These are supported by guidelines under the OTAR.

4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

The BVI has a local patents and trade marks registry.

The Patents Act 1906, together with the Patent Regulations 1906 set out the procedure and requirements for the registration of

patents and the rights and powers that those who register them hold, including those who may apply to register a patent and the form by which an application must be made. Patents accepted by the BVI Registrar of Trade Marks, Patents and Copyright will be advertised in the BVI Gazette.

The Trade Marks Act, 2013, together with the Trade Marks Rules, 2015 provide for the registration and protection of trade marks in the BVI, and related matters including the assignment and charge of trade marks. Trade Marks accepted by the BVI Registrar of Trade Marks, Patents and Copyright will be advertised in the BVI Gazette, and a certificate of registration will be issued to the relevant applicant which is *prima facie* evidence of such person's right to the exclusive use of the trade mark.

4.11 Is there any legislation governing the denial of boarding rights and/or cancelled flights?

This is not applicable.

4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

This is not applicable.

4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

Please see question 1.1 in relation to the BVIAA.

4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?

This is not applicable.

4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?

VI Airlink, also known as Virgin Islands Airlink, is a BVI airline with a fleet of three aircraft registered in the BVI which uses GCS (global consolidation services) under an agreement with Hahn Air Systems. Effectively, this allows VI Airlink which has no GDS presence of its own to be distributed in all GDSs under the reservation code H1 i.e. all VI Airlink flights marketed via H1 are therefore available on major GDSs including Amadeus, Apollo, Sabre and Travelsky.

4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?

This is not applicable.

4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?

This is not applicable.

4.18 Are there any nationality requirements for entities applying for an Air Operator's Certificate in your jurisdiction or operators of aircraft generally into and out of your jurisdiction?

Please see question 1.2 in relation to requirements for application of an AOC.

5 In Future

5.1 In your opinion, which pending legislative or regulatory changes (if any), or potential developments affecting the aviation industry more generally in your jurisdiction, are likely to feature or be worthy of attention in the next two years or so?

The BVI remains well placed to meet demand via its role as the vehicle (i.e. a BVI AC Holdco) in the financing, acquisition and leasing of aircraft. In addition to the use of a BVI business company in aircraft trading, finance and leasing structures, recent amendments to the BVI Act have expanded the use of segregated portfolio companies ("SPC") beyond licensed insurers and professional, private or public funds. The SPC can now, among other operations, engage in property development and management of an aircraft. This provides more options and flexibility for the aviation industry.

Brexit implications should be followed closely given the BVI's current commitments and obligations under its status as a European Union overseas country and territory via its UK overseas territory status.

Acknowledgment

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