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## 环球法律专递 Global Legal Updates



### ORPHAN STRUCTURES – BANKRUPTCY REMOTENESS UNDER IRISH LAW



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#### INTRODUCTION

Ireland is a key location for aircraft financing and leasing structures and is the headquarters for many leading aircraft and

### 爱尔兰法律项下的破产隔离 ——孤儿结构



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#### 简介

爱尔兰是飞机融资和租赁结构的核心所在地，也是许多国际顶级飞机和发动机出租



engine lessors worldwide. In addition to a very attractive tax regime, availability of highly educated and experienced aviation professionals and many other advantages as a jurisdiction, many Chinese leasing companies and airlines chose Ireland as their preferred aircraft financing and leasing jurisdiction structure transactions through Ireland because of the ease and cost efficiency of establishing a company in Ireland and the business friendly environment in Ireland. Use of an Irish structure assists in attracting lower cost financing and the company can benefit from the Ireland's excellent network of double tax treaties. Usually finance and leasing transactions are structured using a newly incorporated Irish company referred to regularly as an SPV (Special Purpose Vehicle) or SPC (Special Purpose Company).

#### WHAT IS AN SPV?

An SPV is a newly incorporated company and is usually a private limited liability company which is the standard company under Irish law. It is incorporated specifically for a particular transaction and will often own or lease a small number of aircraft or engines. An SPV is used to give the lender comfort that the company has no pre-existing obligations or liabilities. An SPV

人的总部所在地。除了极具吸引力的税收政策，高素质和经验丰富的航空专业人才以及作为一个司法管辖区的其他许多优势外，很多中国的租赁公司和航空公司优先考虑选择爱尔兰作为其飞机融资和租赁管辖结构交易架构的司法管辖地是因为在爱尔兰设立公司非常简便且成本经济，并且拥有对债权人友好的法制环境。采用爱尔兰结构有利于吸引低成本融资，并且公司还可以受益于爱尔兰优秀的避免双重征税条约体系。通常，融资和租赁交易使用新成立的爱尔兰公司构建交易结构，这种公司一般称为特殊目的工具（SPV）或特殊目的公司（SPC）。

#### 什么是 SPV?

SPV 是新设立的一个公司，通常是私人有限责任公司，这种公司类型是爱尔兰法律项下的标准公司。它是为了特定交易而特别设立的，通常仅拥有或者出租少量的飞机或发动机。使用 SPV 是为了安抚贷款人，公司没有先前存在的债务或义务。一般来讲，SPV 要么是借款人/出租人的子公司，要么以孤儿公司的形式设立。

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is usually either a subsidiary of the borrower/lessor or is established as an orphan company.

#### WHAT IS AN ORPHAN COMPANY?

The Irish orphan company is established as a usual limited liability company however its shares are held by a nominee share trustee company on trust for Irish charitable purposes pursuant to a Declaration of Trust. There are a number of professional share trustees in Ireland who usually offer the service through a corporate services provider. The Declaration of Trust creates a bare trust over the shares of the company in favour of the Irish charity which means the share trustee is the legal owner and the charity is the beneficial owner of the orphan company.

Although the ultimate beneficiary of an orphan company is an Irish charity the transaction is structured to provide adequate control and protection over the company and the assets to the lender or lessor as required through covenants in the documents. Due to the way the transaction and documents will be structured the assets of the company such as the aircraft will not go to the charity and instead only the residual amounts following liquidation of the company will go to the charity at the end of the transaction.

#### 什么是孤儿公司？

爱尔兰孤儿公司以普通的有限责任公司的形式设立，但其股份则由指定的股份受托公司根据一份信托声明以信托方式为爱尔兰慈善目的而持有。爱尔兰有许多专业的股份受托人，他们通常以公司服务提供商的身份提供服务。信托声明为爱尔兰慈善团体在公司股份上设立一项单纯信托，这意味着股份受托人是孤儿公司的法定所有人，而慈善团体则是孤儿公司的受益所有人。

虽然孤儿公司的最终受益人是爱尔兰慈善团体，但采用这种结构进行的交易却通过在相关文件中作出的承诺为贷款人或出租人就公司及其资产提供所需的充分的控制和保护。采用这种方式设计交易和文件，公司资产（比如飞机）将不会归于慈善团体，只有在交易结束时进行的公司清算后的剩余金额才归于慈善团体。中国航空公司或租赁公司可以采用以下方式从孤儿公司获取资产：

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The following are examples of some of the ways in which the Chinese airline or leasing company can extract the assets from the orphan company:

- a) an option over the aircraft is put in place such that the Chinese leasing company can acquire the aircraft at the end of the transaction.
- b) the aircraft is finance leased to the airline such that the airline purchases the aircraft at the end of the transaction.
- c) a loan agreement is put in place with the Chinese leasing company to extract principal and interest.

- a) 在飞机上设立选择权，以便中国租赁公司在交易结束时可以获得飞机。
- b) 飞机以融资租赁方式出租给航空公司，从而使得航空公司在交易结束时购买飞机。
- c) 与中国租赁公司之间达成贷款协议，以便从其获得本金和利息。

Corporate service providers in Ireland will offer the services of a company to act as share trustee. The directors of the company are also usually professional non-executive directors provided by a corporate services provider as part of the general administration services provided under the corporate services agreement entered into by the Company.

The orphan SPC will require two directors (which must be individuals) and a company secretary (which may be a corporate). The minimum capitalisation is EUR1/US\$1. The capital can be in any currency denomination

爱尔兰公司服务提供商将以公司股份受托人的身份提供服务。作为其与公司签署的公司服务协议项下的一般公司管理服务的一部分，其所提供的公司董事通常也是专业的非执行董事。

孤儿 SPC 要求有两名董事（必须为自然人）和一名公司秘书（可以为公司）。最低出资要求为 1 欧元/美元。出资可以采用任何币种（包括人民币），并至少由股份



(including RMB) and there must be at least one issued share held by the share trustee. The secretary should be a person or company familiar with the duties of a company secretary in Ireland in order to ensure the Company is in compliance with Irish company law and usually a professional secretary is appointed. The directors can be Chinese directors but it is important to note that under Irish company law at least one director must be resident in Ireland or a bond will need to be filed with the Companies Office and for tax reasons usually the majority of the directors need to be resident in Ireland.

#### WHY/WHEN IS AN ORPHAN COMPANY USED?

Orphan structures are growing in popularity and are no longer just required on export credit agency backed or rated transactions. Export credit agency transaction involved government backed support for the financing of an aircraft such as when the European export credit agencies like CoFace or Euler Hermes support the purchase and financing of Airbus aircraft. The structure is used where a lender requires the borrower to be bankruptcy remote from the rest of the group e.g. the aircraft lessor. In simple terms bankruptcy remoteness works to protect the orphan borrower from getting dragged into

受托人持有一份已发行股份。公司秘书应当由一个熟悉爱尔兰公司秘书职责的自然人或公司担任，以确保公司遵守爱尔兰公司法，通常会指定专业秘书担任该职。董事可以是中国人，但必须注意，根据爱尔兰公司法，至少一名公司董事应由爱尔兰居民担任，否则，将需要在公司注册处备案一份保证书，而且，基于税务原因，通常大多数董事由爱尔兰居民担任。

#### 为何/何时使用孤儿公司？

孤儿结构越来越受欢迎，并且不再是仅在出口信贷商支持或认定的交易中要求使用该结构。出口信贷商交易包含了政府背景支持的飞机融资，例如，欧洲出口信贷商例如 CoFace 或者 Euler Hermes 为空客飞机提供的购买和融资支持。该结构被用于贷款人要求借款人与其集团的其他成员进行破产隔离的情形，比如飞机出租人。通过简单的条款，破产隔离就可以保护孤儿借款人免于卷入主要经营集团的破产当中。孤儿 SPC 与交易的任何其他各方均无关联，因而得以不受任何其他各方的破产的影响。

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the insolvency of the main operating group. An orphan SPC is not connected with any of the other parties to the transaction and as a result should not be affected by the insolvency of any of the other parties.

When the orphan SPC is liquidated at the end of a transaction the proceeds will go to the charitable purposes specified which is why the structuring of a transaction where orphan SPCs are used is very important. It will be necessary to ensure that the assets of the orphan SPC are transferred from the orphan SPC at the end of the transaction. For example the orphan SPC will acquire the aircraft and finance lease the aircraft to the airline such that at the end of the financing the title to the aircraft will transfer to the airline.

The orphan SPC will be protected from insolvency in a number of ways including covenants which restrict the company's business to the particular transaction, limited recourse and non-petition covenants, separateness covenants and ensuring that the transaction is structured such that the orphan SPC should always be in a position to pay its debts as they fall due. Ensuring that the orphan SPC is always solvent protects the company from entering into an insolvency process such as examinership under Irish law which would disrupt the

在交易的结构中运用孤儿 SPCs 的意义在于，必须确保在交易结束清算时，孤儿 SPC 的收入将归于指明的慈善目的。这就需要确保孤儿 SPC 的资产在交易结束时能够从孤儿 SPC 转出。例如，孤儿 SPC 将在取得飞机后，以融资租赁方式租赁给航空公司在融资交易结束时飞机的所有权将转移给航空公司。

孤儿 SPC 将以很多方式得到免于破产的保护，包括承诺限制公司经营特殊交易，有限追索和不起诉承诺，隔离承诺，并且这样的交易设计，目的在于确保一旦出现到期债务，孤儿 SPC 总是处于能够及时清偿债务的地位。确保孤儿 SPC 始终有偿付能力，保障了公司免于进入资不抵债程序，例如爱尔兰法律项下将导致结构破坏的审查官程序。



structure.

### SPECIAL PURPOSE COVENANTS

Usually the transaction documents will provide that the orphan SPC is restricted by special purpose company covenants which will provide for example that:

- a) the business of the company is limited to that required by the transaction documents;
- b) the company may not incur any further indebtedness other than what is contemplated by the documents;
- c) the company may not take certain actions without the approval of the security trustee/lender.

### SEPARATENESS COVENANTS

The orphan SPC will also be subject to separateness covenants whereby it will covenant that it will conduct its business as a separate entity from the other parties to the transaction and that it will make clear at all times that it is not connected with any other party in the transaction. The following are examples of some of the usual separateness covenants which will be inserted into the documents:

### 特殊目的承诺

通常，交易文件将规定，孤儿 SPC 受特殊目的公司承诺的限制，例如：

- a) 公司业务经营范围受交易文件要求的限制；
- b) 除了文件中提及的债务，公司不得产生任何进一步债务；
- c) 未经担保受托人/贷款人同意，公司不得采取特定行动。

### 独立承诺

孤儿SPC还受限于独立承诺，它将承诺，以独立于交易其他各方的主体的身份开展业务，并在任何时候清晰表明不与交易的任何其他方产生关联关系。以下是加入文件中一些常见的独立承诺：

- a) 保持账簿和记录独立于任何其他人士或主体；
- b) 保持账户独立于任何其他人士或主体；

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- a) To maintain books and records separate from any other person or entity;
- b) To maintain its accounts separate from any other person or entity;
- c) To conduct its own business in its own name;
- d) To maintain separate financial statements;
- e) To pay its own liabilities out of its own funds;
- f) To observe all organisational formalities;
- g) To allocate fairly and reasonably any overhead for shared office space;
- h) To use separate stationery, invoices and checks;
- i) To hold itself out as a separate entity; and
- j) To correct any known misunderstanding regarding its separate

- c) 以其自身名义开展其业务;
- d) 保持独立的财务报告;
- e) 以其自有资金偿付其债务;
- f) 遵守所有组织性手续;
- g) 合理拨付办公场地分摊费用的日常开支;
- h) 使用独立的办公文具、发票和支票;
- i) 保持作为一个独立的主体; 以及
- j) 纠正所知悉的任何关于其独立性的误解。

#### LIMITED RE COURSE AND NON PETITION

#### 有限追索和不诉讼

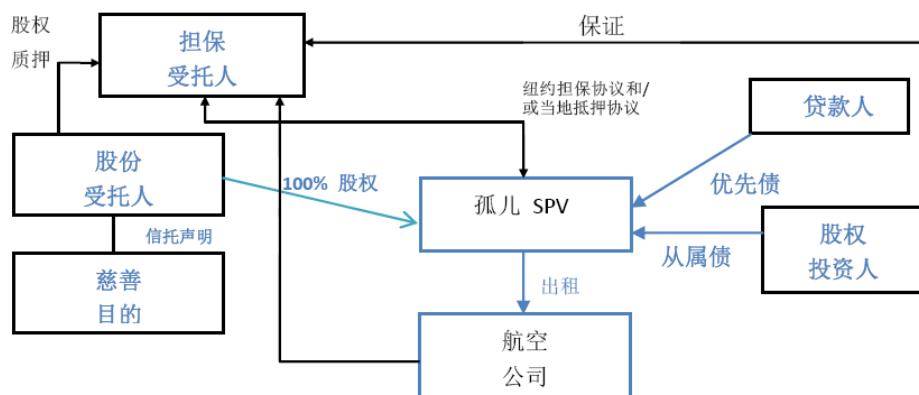
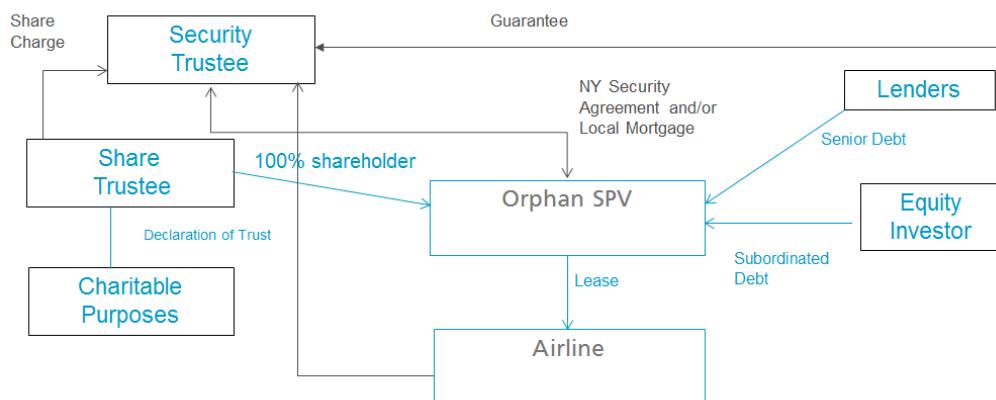
In order to protect the solvency of the orphan SPC all creditors of the company in the transaction will agree to limit their recourse against the orphan SPC to the assets of the orphan SPC and will agree not to petition for the liquidation, winding up, receivership or examinership of the orphan SPC.

为保护孤儿SPC的偿付能力, 交易中公司的所有债权人将同意限制其针对孤儿公司进行的对孤儿公司资产的追索, 并将同意不请求对孤儿公司的清算、停业、接管或监管。



TYPICAL ORPHAN TRUST STRUCTURE

典型的孤儿信托结构



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