



DISPUTE RESOLUTION IN BRITISH VIRGIN ISLANDS

Mo Haque QC is a partner in Campbells' litigation, insolvency and restructuring group. He is an English QC appointed at the age of 41. He is a very experienced commercial litigator and advocate. He has appeared in the entire range of courts and in arbitration proceedings. Mo studied at Oxford University and practised as a barrister then Silk in London before moving offshore with Campbells. He is now settled in the BVI where he is the lead partner in Campbells' office.

Recent matters of note:

- acting for the BVI Court appointed Liquidator in a complex international multi-million pound dispute involving European persons with applications and proceedings so far taking place in St Vincent and the Grenadines and St Kitts and Nevis; and
- acting on behalf the trustee of trusts the beneficiary of which are the Tchenguiz brothers in London.

Jeremy Lightfoot is a partner in Campbells' litigation, insolvency and restructuring group. He is an experienced commercial litigator and advocate who has litigated a wide range of international disputes in court and arbitration proceedings. Jeremy studied law at Oxford University and practised as a barrister at a leading chambers in London before moving offshore with Campbells. Jeremy was initially based in Campbells' BVI office and now operates from their Hong Kong office. Jeremy's recent matters have included high-value shareholder litigation, joint venture disputes, corporate disputes and urgent interim relief.

Recent matters of note:

- acting as BVI counsel for the joint receivers appointed by the BVI Court in a complex international matter that spawned multiple proceedings both in the BVI and in Singapore; and
- acting for respondents to claims exceeding US\$200 million arising out of a joint venture agreement.

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GTDT: *What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? To what extent are treaty claims increasing?*

Mo Haque QC and Jeremy Lightfoot: The BVI’s dedicated Commercial Court is by far the most popular dispute resolution venue for clients. Situated in Road Town, Tortola, it operates under the auspices of the Eastern Caribbean Supreme Court. Disputes are presided over by experienced judges and the Court has an international reputation for dealing fairly and efficiently with the most high-value and complex litigation.

Cases before the Commercial Court often have their roots in the BVI, it being one of the world’s foremost jurisdictions for the incorporation of companies: accordingly to latest available statistics, there are more than 400,000 active companies registered in the BVI. Typically disputes are international and we often cooperate with teams of dispute resolution professionals based in multiple jurisdictions. The Court sees a regular and heavy caseload of insolvency matters, shareholder disputes, joint venture issues and every manner of commercial and corporate litigation. With a significant portion of BVI cases originating from Asia, and specifically China, many of the leading firms, including Campbells, have established offices in the Hong Kong SAR to provide assistance to clients in their own time zone.

Clients have undoubted confidence in the BVI Commercial Court. Participants are assured that they will receive due process knowing that the BVI’s established legal framework is built upon the English common law and presided over by an independent judiciary. Appeals lie in the first instance to the Eastern Caribbean Court of Appeal, with any final appeal lying with the Board of the Privy Council of the United Kingdom. Although some clients may initially, and naturally, prefer to litigate in their domestic courts, those reluctant parties usually end the process satisfied by the BVI legal system. Given this, it is hardly a surprise that the Commercial Court is the destination of choice for potential litigants.

The BVI is not currently an active venue for treaty claims.

GTDT: *Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients’ preferences? Has Brexit affected choice of law and jurisdiction?*

MH & JL: For largely the same reasons why clients are willing to use the Commercial Court to resolve disputes, clients continue to wish to incorporate into their agreements clauses providing for BVI law and jurisdiction. The formulation of these clauses has been stable in the BVI. The traditional wordings have remained effective and it is not an area that has received, or required, particular attention.

There has been a strong recent drive to establish the BVI as a centre for alternative dispute resolution. This is evident in the building of the recently opened BVI International Arbitration Centre, with the self-stated aim to become the regional hub for arbitration. It has produced and published a model clause for clients to incorporate into their agreements, as well as its own set of Rules. Arbitration numbers in the BVI are definitely increasing.

Brexit has not affected the choice of law and jurisdiction in the BVI.

GTDT: *How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction?*

MH & JL: The legal market in the BVI remains highly competitive with a strong roster of leading firms operating within the territory.

This question cannot be answered without reference to the passage of Hurricanes Irma and Maria in September 2017. The former was the most powerful Atlantic hurricane ever with sustained 185-mph winds for a record 37 hours. The eye passed directly over Tortola, causing devastation. Many professionals were forced to leave and set up remote practices from all over the



Mo Haque QC



Jeremy Lightfoot

world. The Commercial Court briefly relocated to Saint Lucia but resumed business as usual in Tortola at the end of 2017. The BVI has shown remarkable resilience and, by virtue of a combined effort across government and the industry, those professional services continued with minimal disruption. Business is slowly but surely returning to normal.

Another significant change is the resolution of the debate over the extent to which the fees of overseas lawyers, not admitted to the BVI roll, may be recovered as costs in BVI proceedings. The BVI Court of Appeal has confirmed that, save in limited circumstances, overseas lawyers' fees are not recoverable in BVI proceedings. This is now an important consideration for clients in choosing its lawyers. To provide clients with more choice, Campbells has recently employed an English-appointed and BVI-called QC to be based permanently on the BVI. This may well be the start of a trend.

GTDT: What have been the most significant recent court cases and litigation topics in your jurisdiction?

MH & JL: It has been a busy time in the BVI, with a large number of significant decisions being published recently. One that has caught our attention is a further decision concerning Fairfield Sentry arising out of the Madoff Ponzi scheme. It addressed the BVI Court's interaction with other courts and jurisdictions around the world.

The case concerned an attempt to have a 'second bite' at former shareholders who had received redemptions from Fairfield Sentry. Despite claims having been dismissed in the BVI, the liquidators of Fairfield Sentry commenced fresh proceedings in the US. The former shareholders sought the BVI Court's assistance to restrain the US claims.

They were unsuccessful at first instance and appealed. The Court of Appeal dismissed their appeal and addressed two important points of principle.

First, it clarified the scope of the statutory right of 'persons aggrieved' by an insolvency office holder's actions to apply to the Court. It held that the words 'persons aggrieved' must take their meaning and colour from the context of the particular statute in which the words appear. It held that the shareholders did not fall within the definition because they did not have sufficient interest in the outcome of the act, omission or decision of the liquidator. Merely because a person may have technical capacity, which would otherwise entitle it to standing, that is not enough 'if the circumstances demonstrate that the relief is sought not in that capacity but in some other'. The Court of Appeal held that the shareholders were strangers to the liquidation as they would not be concerned or affected by the ultimate distribution of the estate.

Secondly, the Court considered whether the avoidance provisions in the BVI Insolvency Act 2003 were powers specific to the BVI Court and that accordingly could not be exercised by

“The BVI International Arbitration Centre has done extensive work to ensure that the process exceeds clients’ expectations.”

a foreign court. It found that the powers were not restricted to the BVI Court. In arriving at its decision the Court paid full regard to the importance of cross-border cooperation. It saw no good reason to prohibit the US Bankruptcy Court from rendering assistance to the BVI main insolvency proceedings. On a related issue, in response to submissions on issue estoppel and abuse of process, the Court found that the effect of the previous dismissal of claims in the BVI was also a matter that could be determined and adjudicated upon by the US Bankruptcy Court.

Leave to appeal this interesting decision to the Privy Council has been sought. It remains to be seen whether it will stand.

GTDT: What are clients’ attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

MH & JL: As we have already said, clients have justifiable confidence in the BVI courts. The robustly independent legal system with high-quality judges and advocates provide the foundations upon which the faith of clients is built. That, when allied with the fact that final appeals will be heard by Justices of the Supreme Court of the United Kingdom sitting as the Judicial Committee of the Privy Council, makes the BVI a very attractive jurisdiction in which to litigate.

The costs of litigating in the BVI courts are in line with comparable jurisdictions and are reasonable given the complexity and scale of the disputes in question. The concept of proportionate costs is enshrined in the Civil Procedural Rules, and we recommend that clients discuss costs with their legal representatives at the outset to ensure that there are no surprises and that litigation can be pursued in a manner proportionate to the resources available.

The duration of litigation is again in line with comparable jurisdictions and is heavily dependent on its nature and, to some extent, the manner in which it is fought. Our judiciary is not, however, afraid to take a forthright approach to case management where justice demands. A reluctant party drags its feet at considerable peril. Indeed, the ‘overriding objective’ of our

Civil Procedure Rules is to enable the court to deal with cases justly, which is expressly stated to include ensuring that expense is saved, cases are dealt with in a proportionate manner and are determined expeditiously.

It is too early to assess reliably attitudes to arbitral proceedings in the BVI under the auspices of the BVI International Arbitration Centre and its new Rules. The industry feedback has, however, been positive and the BVI International Arbitration Centre has done extensive work to ensure that the process exceeds clients’ expectations.

GTDT: Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

MH & JL: The Eastern Caribbean Supreme Court has commenced implementation of an e-litigation portal for all Courts in its jurisdiction, including the BVI. This is a significant initiative which will have a widespread impact upon the case management of disputes in the BVI. The integrated e-filing and case management web application is reported to be in an advanced stage of development and is expected to be operational by the end of 2018.

This launch is eagerly anticipated by practitioners and marks an important milestone in the continuing development of dispute resolution in the BVI, which ensures that the jurisdiction continues to offer industry-leading dispute resolution services to practitioners and clients alike.

GTDT: What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

MH & JL: The BVI International Arbitration Centre is now fully operational. It is an independent, not-for-profit institution, which was established with the aim of meeting the demands of the international business community for a neutral, impartial, efficient and reliable alternative dispute resolution institution in the Caribbean, Latin America and beyond. Lord Goldsmith QC, a former Attorney General of England, Wales and Northern Ireland, has singled out the BVI International Arbitration Centre as having the

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What is the most interesting dispute you have worked on recently and why?

We were recently instructed on a high-value commercial dispute which involved competing claims and interests between a large number of parties, with case handlers and clients based in five different jurisdictions. The complex inter-party dynamics, coupled with the calibre of legal professionals involved, made achieving the results our client sought challenging but all the more rewarding when they were secured. Our office in Hong Kong was a particular advantage: being 12 hours' time difference from the BVI it allowed our clients' needs to be serviced around the clock, crucial in a time pressured situation. As a long day in court in the Caribbean ended, we had fresh litigators available in Hong Kong to work 'overnight', an advantage that we would have welcomed in our previous careers at the Bar in England and Wales.

If you could reform one element of the dispute resolution process in your jurisdiction, what would it be?

We would be keen to see a comprehensive introduction of e-litigation, commencing with electronic filing at the outset of the case, continuing with electronic case management and culminating where possible in paperless courtrooms. Disputes in the BVI are particularly suited to e-litigation: they are often complex, document heavy disputes involving parties and dispute resolution professionals located around

the world. Operating from a beautiful island in the Caribbean, we are acutely conscious of the environmental benefits that e-litigation can bring.

The imminent introduction of the Eastern Caribbean Supreme Court's e-litigation portal is welcomed in this regard and we look forward to being able to report on its successful operation next year.

What piece of practical advice would you give to a potential claimant or defendant when a dispute is pending?

Early, detailed, engagement is crucial. The earlier clients approach us, the more options they have. When we are engaged where the dispute is in the air and not yet fully formed, we can offer clients a far wider range of proactive steps to strength their position, minimise the costs of the subsequent dispute and, to the extent desirable, prevent the dispute from arising at all. We find that early exchanges by email, telephone or video-conference are effective and cost efficient. However, some cases particularly benefit from an in-person meeting and we do all we can to achieve this. I (JL) recently covered 40,000km attending two such meetings.

**Mo Haque QC and Jeremy Lightfoot
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potential to become the 'best thought out and thus most popular' centre in the region.

Arbitration in the BVI is underpinned by our Arbitration Act 2013, which largely adopts the UNCITRAL Model Law. Importantly, the BVI has also acceded to the New York Convention.

As these developments are relatively recent, it is too early to discern trends in arbitral proceedings. It is, however, anticipated that the BVI International Arbitration Centre will be particularly popular with parties in Latin America.

GTDT: What are the most significant recent developments in arbitration in your jurisdiction?

MH & JL: The opening and launch of the BVI International Arbitration Centre marked a new chapter for arbitration in the BVI. The arbitration panel now features 190 highly regarded international arbitrators and other dispute resolution practitioners, drawn from both common law and civil law jurisdictions, who will be able to conduct arbitrations in a number of languages including English, Spanish, Portuguese, Russian, Chinese, French, German and Italian.

Immigration requirements have been eased to allow participants in arbitrations to enter the BVI easily.

GTDT: How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

MH & JL: Many disputes in the BVI are concluded by agreement without the need for determination by the Court. In the appropriate disputes, mediation can be effective and is occasionally used in the BVI, albeit that the mediation itself tends to be conducted outside of the BVI. Traditional, unstructured and unsupervised ADR is widely practised and is particularly effective as the BVI dispute resolution industry is built upon personal relationships.

We do not tend to see any particular commercial sectors preferring or avoiding ADR. We find that it is the clients' approaches, not the subject matter of their dispute, which dictates their willingness to consider ADR.