

# market intelligence

GETTING THE  
DEAL THROUGH 

## Dispute Resolution

Insolvency litigation  
looming large

*Simon Bushell leads the  
global interview panel*

# 2019

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# market intelligence

Welcome to GTDT: *Market Intelligence*.

This is the 2019 edition of *Dispute Resolution*.

**Getting the Deal Through** invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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# DISPUTE RESOLUTION IN THE BRITISH VIRGIN ISLANDS

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Brian Child is a partner in the litigation, insolvency and restructuring group with significant experience of complex

international insolvencies, restructurings and security enforcement. He has specific experience of contentious and non-contentious corporate liquidations, bankruptcies, receiverships, restructurings, reorganisations and related litigation matters. Brian also has experience of complex multi-jurisdiction fraud recovery, asset tracing and shareholder disputes including asset freezing injunctions, disclosure and search orders. Brian is ranked in *Chambers and Partners*.



**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? What is the balance between litigation and arbitration?**

**Jeremy Lightfoot and Brian Child:** Dispute resolution remains dominated by litigation in the Eastern Caribbean Supreme Court, which is the enduring clear preference for clients. The British Virgin Islands (BVI) has a dedicated Commercial Court which is situated in the capital, Road Town, Tortola. The Court is presided over by experienced judges and has a hard-earned reputation for dealing fairly and efficiently with high-value and complex litigation. Adding to its attractions for clients are that the BVI's established legal framework is built upon the English common law and that, after appeals in the first instance to the Eastern Caribbean Court of Appeal, any final appeal lies with the Judicial Committee of the Privy Council in London.

The Commercial Court's caseload is varied, but the cases tend to have their roots in the BVI being one of the world's foremost jurisdictions for the incorporation of companies. According to the latest available statistics, there are more than 422,500 active companies registered in the BVI, collectively holding some US\$1.5 trillion worth of investments. Notwithstanding the challenges facing the offshore market and BVI's specific challenges after being hit by hurricanes Irma and Maria in 2017, incorporation rates in the BVI have continued to rise, with the latest statistics recording a 5% quarter-on-quarter rise in the rate of new incorporations. There has also been rapid and substantial growth in the number of limited partnerships registered in the BVI following a reframing of the relevant legislation that came into force in early 2018. The new statute drew on practical lessons learned from how limited partnership structures were being used, particularly in the funds industry, and offered an innovative structure that drew on popular aspects of the BVI Business Companies Act, 2004.

This diverse pool of entities in BVI continues to drive a strong demand for dispute resolution, with the last year seeing significant ultra-high value, complex and hard fought litigation between participants with their roots all over the world. Typically, disputes are international and legal practitioners and insolvency practitioners in the BVI often participate 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 issues originating from Asia, and specifically China, many of the leading firms, including Campbells, have offices in Hong

Kong SAR to provide assistance on matters of BVI law to clients in their own time zone.

**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? Does Brexit continue to affect choice of law and jurisdiction?**

**JL & BC:** The approach to applicable law clauses and dispute resolution clauses has been stable. Given the attractions of litigating in the BVI, particularly where it is the incorporation jurisdiction of the corporate vehicles involved, we routinely see clients incorporating clauses providing for the application of BVI law and the jurisdiction of the Eastern Caribbean Supreme Court.

The BVI has taken a strong pro-arbitration stance, both in the legislature and in the courts. A state-of-the-art arbitration facility has also been established to remove impediments to holding arbitrations in BVI as a centre for alternative dispute resolution. The BVI International Arbitration Centre has produced and published a model clause for clients to incorporate into their agreements, as well as its own set of rules, all of which are available on its website free of charge. The addition of an arbitration option has been welcomed but has not yet displaced the majority preference for litigation in the courts.

Brexit issues have had no discernible impact upon clients' preferences when it comes to applicable law clauses and dispute resolution clauses.

**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? How is the trend towards 'niche' or specialist litigation firms reflected in your jurisdiction?**

**JL & BC:** The BVI continues to be well served by a significant number of leading offshore firms having a substantial presence in the BVI. There has been no specific 'new' trend towards 'niche' or specialist litigation firms in the BVI, but this is largely because the BVI was already ahead of this trend. The demands of the complex, international work arising out of the BVI require a high degree of specialism and the BVI market quickly recognised those needs and appropriately orientated itself some time ago.

Rules of admission and regulation of legal practitioners have been stable over the past year and there have been no substantial changes affecting the practices of dispute lawyers. The BVI Legal Profession Act, 2015 has been brought into force in various stages and remains a work



in progress, but it is working well on a practical basis and we do not anticipate that any substantial changes will be implemented in the forthcoming year.

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

**JL & BC:** There has been a raft of important decisions, both at first instance and on appeal, handed down in BVI over the past year and four topics stood out as worthy of particular mention.

The first concerns corporate restructuring. There is an increasing need for effective restructuring procedures and we regularly see disputes arising both where businesses are in difficulties and in respect of attempted restructurings. In a landmark decision handed down in February 2019 concerning *Constellation Overseas Ltd (and others)*, the BVI court confirmed for the first time that under BVI law provisional liquidators could be appointed in support of a restructuring. In appropriate circumstances a moratorium on creditors' actions may be imposed in connection with the same, giving the company breathing space to undergo its restructuring and, hopefully, preserve value for all stakeholders. We anticipate that many more such applications will be made during the course of this year.

The second concerns interim relief in the BVI in support of arbitration proceedings around the world. The Court of Appeal, in the matter of (1) *Koshigi Limited* (2) *Svoboda Corporation v Donna Union Foundation*, handed down a judgment in January of this year taking an expansive approach to assisting foreign arbitrations. The court held that interim relief could be granted in respect of foreign arbitration proceedings, including in support of the enforcement of a potential award, without the need for assets to be located

in the BVI. The court specifically commented that the relevant statute was 'very progressive' and 'comprehensively clothes the court with the jurisdiction to grant interim measures'. This is a welcome decision and approach. As BVI practitioners, we are regularly asked to obtain the court's assistance relating to arbitration proceedings occurring around the world and the clear, pragmatic signal from the Court of Appeal provides certainty and reassurance for clients as to their options and the assistance that is likely to be available.

The third topic that stands out is the perennially relevant question of directors' duties. The BVI has codified duties in the BVI Business Companies Act, 2004 that a director must comply with. Among these, a director 'in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company'. One example of litigation on this topic that caught our eye was the Court of Appeal's decision in *Antow Holdings Ltd v (1) Best Nation Investments Limited (2) East Crown Group Limited*. This case examined the subjective final part of this duty, that is, the director's belief that he or she is acting in the best interests of the company. The Court of Appeal found that this test only applies where the director did, in fact, consider the interest of the company. Accordingly, if a director either totally or partially failed to consider the interests of the company, the director cannot rely on his or her own subjective honesty as a defence. Rather, the question shifts to a separate test to ask whether an intelligent and honest person in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. This decision shows a continued focus on ensuring that standards of corporate governance are upheld and that the interests of



***“The Eastern Caribbean Supreme Court e-Litigation Portal is part of an initiative that will see e-litigation procedures being implemented in all of the states and territories that have the Eastern Caribbean Supreme Court as their superior court of record.”***

companies, their shareholders and their creditors, are protected from directorial abuses.

The final topic that stands out is jurisdiction (forum) disputes. These are continuing to generate difficult issues for determination and there has been a sequence of high value, hard fought disputes going through the BVI. Campbells’ BVI team noted particular success in acting for an appellant in the Court of Appeal in *Livingston Properties Equities Inc et al v JSC MCC Eurochem et al*. In this case, the Court of Appeal reaffirmed considerations to be taken into account by the court in relation to determining the proper forum of the dispute and related issues. This successful result will be heading to the Judicial Committee of the Privy Council in late 2019 or 2020. With that appeal pending and other applications before the Commercial Court, jurisdiction (forum) disputes are tipped to continue to be an important area for the coming year.

***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?***

***JL & BC:*** We find that in cases necessitating litigation, clients are generally open to litigation in the BVI. Levels of trust and confidence in the BVI courts are, justifiably, high and procedures are broadly familiar to clients who have litigated in major financial centres around the world.

The costs of litigating in the BVI courts are in line with comparable jurisdictions and are often more a product of the complexity and scale of the dispute than any specific issue arising out of the litigation being conducted in the BVI. Our procedural rules also enshrine the concept of recovery of proportionate costs to give protection

to successful litigants and avoid nuisance claims being filed in the hope of extracting settlements in weak cases. To avoid any surprises, we do, however, always recommend that clients discuss costs with their legal representatives at the outset and throughout any litigation. There is a degree of flexibility as to how litigation can proceed and strategy can be tailored depending on the client’s priorities and resources. It may also be possible to utilise litigation funding when litigating in the BVI, although this is currently a nuanced area.

As to the duration of litigation, this is, again, in line with comparable jurisdictions and tends to be governed by the nature of the dispute and, to some extent, the manner in which it is fought. The ‘overriding objective’ under our Civil Procedure Rules includes an express intent to ensure litigation is determined expeditiously.

It is not yet possible to compare these attitudes to those concerning arbitral proceedings in BVI as arbitration is currently in its relative infancy here.

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

***JL & BC:*** In November 2018, the Eastern Caribbean Supreme Court e-Litigation Portal was launched in the BVI, under the tag line ‘serving you on-time and online’. This is part of an initiative that will see e-litigation procedures being implemented in all of the states and territories that have the Eastern Caribbean Supreme Court as their superior court of record.

The e-Litigation Portal is a substantial departure from previous practice. Whereas court procedures in the BVI were previously manual, relying on physical attendance at the court office, this is now replaced (for new cases) by the fully functional e-Litigation Portal. The portal includes online document filing facilities, electronic

# THE INSIDE TRACK

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

Unfortunately, we can rarely talk in detail about our most interesting disputes. They tend to involve ultra-high net worth clients in disputes concerning issues arising in Asia, Russia and other jurisdictions. While we are unable to discuss such cases except to the extent they are in the public record, we find significant satisfaction when we are required to gain a rapid understanding of all of the legal, and personal, intricacies of how a business is operating and to formulate a strategy to resolve or litigate the dispute in short order while minimising disruption. It is not unusual for this to require us to work with teams of lawyers in multiple jurisdictions around the clock as each piece of the jigsaw starts to slot into place. We take pride in 'putting ourselves out of business' by resolving the disputes as early and quickly as possible on the best terms available for the client. Clients are thus able to get back to business as usual as soon as possible.

*Describe the approach adopted by the courts in your jurisdiction towards contractual interpretation: are the courts faithful to the actual words used, or do they seek to attribute a meaning that they believe the parties actually intended?*

Our courts generally follow a similar approach to the courts of England and Wales on contractual interpretation. The conflict between the

notion of commercial sense and plain meaning continues to arise and shows no sign of abating; it recently surfaced again in the Court of Appeal decision concerning *Fairfield Greenwich v Kenneth Krys (as liquidator)* handed down towards the end of 2018. However, on a practical note, in the BVI both the judges and often the underlying litigants are experienced specialists who regularly deal with similar types of contracts. In our experience, this tends to make it more difficult to succeed in a strained interpretation of a contract when the thrust of what the contract intended to achieve is clear to those who regularly deal in the industry.

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

We see time and time again the substantial advantages that come with early, detailed, engagement between a potential litigant and its lawyers. The earlier the potential issue is caught, the more options are available and the easier it is to devise a cost-effective strategy to achieve the client's aims as soon as possible. Conversely, where disputes come to us late, perhaps as a result of an understandable hope that they would not develop or in the desire to save costs, substantial work is often required to get the client back on track.

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access to case documents, management of case files through email and notifications, calendar management and a hearing management module intended to allow for greater flexibility in the selection of hearing dates.

We anticipate that further reforms are to follow that will continue progression towards e-litigation. This initiative is largely welcomed by practitioners and a benefit to clients. Litigation in the BVI is well suited to fully electronic procedures and courts: cases are often document heavy and involve teams of lawyers and clients based around the world and require continuous progression in all time zones.

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

**JL & BC:** It is not yet possible to discern any trends given the relative infancy of arbitration conducted in the BVI.

Of note are the provisions of the BVI Arbitration Act, 2013 (amended in 2015), which provide, where there is an arbitration agreement between the parties, then notwithstanding the initiation of a claim in the BVI court, a party to the litigation may apply to the court and seek a reference to arbitration at the earliest stages of the litigation and the court must stay the proceedings pending the outcome of the reference to arbitration. These provisions clearly elevate arbitration and a party's ability to have recourse to it. While an important provision and one which practitioners and parties must remain mindful of, reference to arbitration over litigation remains infrequent.

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

**JL & BC:** The establishment of the BVI International Arbitration Centre, which we have described, and the BVI's pro-arbitration stance, have set the tone for increased arbitration activity



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?*

**JL & BC:** ADR in the BVI is customarily informal. While many disputes in the BVI are concluded by agreement without the need for determination by the court (and although statistics are not available due to the nature of ADR), there are few formal mediations conducted in the BVI and other more innovative ADR approaches (such as early neutral evaluation) have not been popular. Traditional, unstructured and unsupervised ADR is widely practised and is particularly effective as the BVI dispute resolution industry is built upon personal relationships.

Where more formal ADR methods are adopted in BVI litigation, these tend to be conducted outside of the BVI. This is often based on clients' convenience as the parties to BVI litigation are rarely resident in the BVI. While the BVI International Arbitration Centre provides excellent facilities for ADR, in our experience, the pressures of time and convenience often mean that mediations take place in the clients' home jurisdictions.



**“In our experience, the pressures of time and convenience often mean that mediations take place in the clients’ home jurisdictions.”**

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