

Market
Intelligence

**DISPUTE
RESOLUTION
2021**

Global interview panel led by Simon Bushell of Seladore Legal

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British Virgin Islands

Brian Child is a partner in Campbells' litigation, insolvency and restructuring group and has significant experience in complex international insolvencies, restructurings and security enforcement. He has specific experience in contentious and non-contentious corporate liquidations, bankruptcies, receiverships, restructurings, reorganisations and related litigation matters. Brian also has experience in 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. He has been appointed by the Supreme Court of British Columbia as an independent supervising solicitor in relation to the service and execution of Anton Piller orders and has sat as an examiner on the oral boards for candidates examined for licences as trustees in bankruptcy (Industry Canada).

Liam Faulkner is a partner in Campbells' litigation, insolvency and restructuring group. He specialises in complex cross-border insolvency, shareholder and investment fund disputes, fraud litigation and asset recovery. Liam advises on Cayman Islands and BVI law, having spent several years in both jurisdictions. Notable instructions over the past year include advising ABRAAJ Investment Management Limited and its joint official liquidators on a wide range of issues arising out of the ABRAAJ liquidation, which is the largest insolvency ever of a private equity group.

1 | 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? What are the advantages and disadvantages of the most popular dispute resolution methods?

Dispute resolution in the British Virgin Islands remains dominated by litigation in the Eastern Caribbean Supreme Court (the ECSC), which is the enduring clear preference for clients. The BVI has a dedicated Commercial Division, best-suited in relation to high value, commercial disputes, which is situated in the capital, Road Town, Tortola. The court is presided over by experienced judges and has a well-earned reputation for dealing expertly, 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, with a significant body of decisions upon which to draw and give guidance, 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 400,000 active companies registered in the BVI, collectively holding an estimated US\$1.5 trillion worth of assets. In 2019, 26,150 new companies were incorporated in the BVI and 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 the BVI 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 the BVI continues to result in a strong demand for dispute resolution, with the past year seeing significant ultra-high value and complex litigation among parties with roots all over the world. Typically, disputes are international in nature and often involve corresponding proceedings 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 Special Administrative Region to provide assistance on matters of BVI law to clients in their own time zones and to provide a gateway to the litigators on the ground in the BVI.

**Brian Child****Liam Faulkner**

As an alternative to traditional litigation, the BVI has a dedicated arbitration centre and a statutory regime based largely on UNCITRAL Model Law. Arbitration is thus made readily available in the BVI. However, arbitration in the BVI remains very much secondary to litigation in the jurisdiction, with a comparatively small number of arbitrations taking place in the BVI since the Arbitration Act was enacted in 2014 compared to traditional litigation.

As a further alternative, mediation is similarly available in BVI and a number of BVI legal practitioners have significant expertise as both mediators and in relation to assisting clients with mediation. Due to the confidential nature of mediation, it is hard to estimate the volume of BVI disputes that have had recourse to mediation. However, it has been our experience that mediation cases have increased in volume in recent years.

The BVI's past experiences arising from the devastation caused by Hurricanes Irma and Maria in 2017, particularly with regard to the use of remote hearings when in-person hearings were neither possible nor practical, meant that the BVI court was well-placed to respond to covid-19 restrictions, resulting in minimum disruption

“The BVI has taken a strong pro-arbitration stance, both in the legislature and the courts.”

compared to other international financial centres. As at the time of writing, court hearings continue to be held efficiently and effectively via video link.

- 2 | 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? What effect has Brexit had on choice of law and jurisdiction clauses?

The approach to applicable law and dispute resolution clauses regarding BVI-related matters has been stable. Given the attractions of litigating in the BVI, particularly where it is the incorporation jurisdiction of the corporations involved, we routinely see clients incorporating dispute clauses providing for the application of BVI law and for the exclusive jurisdiction of the Eastern Caribbean Supreme Court.

The BVI has taken a strong pro-arbitration stance, both in the legislature and the courts. A state-of-the-art arbitration facility has also been established to remove impediments to holding arbitrations in the BVI. While covid-19 has extinguished

in-person arbitrations for now, the BVI International Arbitration Centre remains available for such arbitrations after the pandemic passes. 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 significant preference for litigation in the courts. Brexit issues have had no discernible impact on clients' preferences when it comes to applicable law clauses and dispute resolution clauses.

3 | 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?

The BVI continues to be well-served by the significant number of expert legal 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 conducted in the BVI require a high degree of specialism and the BVI market quickly recognised those needs and appropriately orientated itself some time ago.

If anything, the BVI legal market is expanding. Some onshore firms have recognised the importance of the BVI to their clients and have recently opened offices in the BVI. Thus, while some jurisdictions and onshore firms have struggled lately, the BVI legal market has been expanding.

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

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

There has been a raft of important decisions, both at first instance and on appeal, handed down in BVI over the past year.

In a recent judgment in *Ciban Management Corporation v Citco (BVI) Ltd & Anor* [2020] UKPC 21, the Judicial Committee of the Privy Council (the BVI's final court of appeal) considered the application of the *Duomatic* principle and offered useful

guidance on its application to the question of which individuals have authority to provide instructions to a company. The decision is of particular importance to offshore centres such as the BVI when the ultimate beneficial owners (UBOs) of companies often hold their interests via intermediary companies or service providers.

In *Ciban*, the UBO instructed his US lawyer to acquire a BVI company. The registered agent (RA) was appointed and a corporate director was subsequently appointed to manage the day-to-day affairs of the company. The US lawyer was always the point of contact and the RA acted on his instructions. However, the US lawyer acted beyond the instructions provided by the UBO and arranged for a number of parcels of land to be sold without the UBO's authority. The UBO issued proceedings in the BVI Commercial Court alleging that the corporate director acted in breach of its tortious and fiduciary duty of care as a director by failing to ensure that the US lawyer had the authority to cause the land to be sold.

The Privy Council made two important findings. The first was that actual authority can be conferred informally by unanimous shareholder consent and the same should apply to ostensible authority. In this instance, the Privy Council found that the UBO's informal consent to representation by conduct, that the US lawyer had authority to instruct the corporate director, bound the UBO and he could not thereafter be allowed to deny that the US lawyer was authorised to provide instructions. Secondly, the Privy Council found that because the whole of the UBO's approach – and the clothing of the US lawyer with ostensible authority – was taking the risk on behalf of the company, albeit informally, the US lawyer would use that apparent authority for his own purposes, including dishonest purposes. This may be detrimental to any UBOs wishing to assert that their assets have been disposed of by an agent acting dishonestly in circumstances where the UBO intentionally gives full authority to that agent in an attempt to remain invisible from certain transactions. It is also an affirmation of the need to ensure that lines of corporate authority are clearly drawn and communicated to all relevant parties.

The second important decision is a decision of the ECSC Court of Appeal on 30 March 2020 in the case of *Convoy Collateral v Broad Idea*. In the BVI, the Commercial Court has a long standing and well recognised statutory jurisdiction to act in aid of foreign arbitral proceedings by granting injunctive relief or appointing a receiver. This power was extended to act in aid of foreign court proceedings in the case of *Black Swan Investments v Harvest View*. That case was decided in 2010 and, since then, the BVI courts have explored the limits of *Black Swan* relief.

In the *Broad Idea* case, the Court of Appeal held that the long-standing *Black Swan* relief cannot be developed and extended by the court to permit free-standing injunctions to be granted against persons that are not subject to the *in personam* jurisdiction of the BVI courts. The facts of the *Broad Idea* case did differ from *Black*



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Swan because *Black Swan* concerned a substantive action against a BVI company rather than a foreign individual who had not submitted to the jurisdiction. Therefore, the appellant needed to satisfy the relevant gateway in the rules for service out of the territory on a non-BVI resident, while *Black Swan* did not consider this point. With this in mind, the court considered the proper basis on which free-standing injunctions could be permitted in the BVI. The Court noted that other jurisdictions (including England and Wales and the Cayman Islands) had amended their rules to provide a foundation for free-standing injunctions and found that, until an equivalent legislative change in the BVI, there will be no jurisdictional basis to grant free-standing injunctions of this nature.

The case has advanced to the Privy Council for determination but, in the interim, the BVI government has acted quickly in response to the decision of the Court of Appeal by enacting an important amendment to the Eastern Caribbean Supreme Court (Virgin) Islands Act. The amendment provided that the BVI court now has jurisdiction to grant free-standing interim relief in aid of existing or anticipated foreign proceedings, therefore swiftly filling the void left by the Court of Appeal's decision.

The final topic of note relates to jurisdiction (forum) disputes. There continue to be hard-fought disputes regarding issues of whether, on any set of facts, the BVI has jurisdiction (or should take jurisdiction) in relation to complex, cross-border matters. Campbells' BVI litigation 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*. That case progressed to the Privy Council and on 30 November 2020 the Privy Council released its judgment, which reiterated a number of determining factors when deciding the relevant forum for a dispute including where the alleged acts took place, the presence of governing law provisions and the availability and suitability of another jurisdiction to hear any claim.

5 | 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?

While clients rarely relish recourse to court proceedings, where litigation is necessary 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 previously litigated in major financial centres around the world.

The costs of litigating in the BVI courts are in line with major financial centres 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 provide for 'loser pays' and thus also enshrine the concept of recovery of costs from an unsuccessful litigant and provide protection to parties against nuisance claims being filed in the hope of extracting settlements in weak cases. Notably, litigation funding is now confirmed as available when litigating in the BVI and is viewed as a growth area for appropriate cases.

As to the duration of litigation, this is, again, in line with comparable jurisdictions and tends to be governed by the complexity of the dispute (for example, how extensive will disclosure be, will expert witnesses be required, will a full trial be necessary) and, to some extent, the manner in which the litigation is conducted. The 'overriding objective' under our Civil Procedure Rules includes an express priority that litigation is determined expeditiously.

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

“While clients rarely relish recourse to court proceedings, where litigation is necessary clients are generally open to litigation in the BVI.”

6 | Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

As mentioned in question 5, on 7 January 2021, the BVI enacted an important amendment to the Eastern Caribbean Supreme Court (Virgin Islands) Act, which provides that the BVI court has jurisdiction to grant free-standing interim relief in aid of existing or anticipated foreign proceedings. This is a significant and welcome development that firmly entrenches, in statute, the *Black Swan* jurisdiction as it has come to be known.

Also as referred to in question 2, following the onset of the covid-19 pandemic, the BVI court acted quickly to enact emergency provisions that allowed court documents to be electronically served to minimise physical interaction between process servers, lawyers and court staff. All court hearings are currently taking place by video link (rather than in-person) and that system is working extremely well.

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, as cases are often document-heavy and involve teams of lawyers and clients based around the world and require continuous progression in all time zones.

7 | What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

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 and notwithstanding the initiation of a claim in the BVI court, that 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 protecting 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.

8 | What are the most significant recent developments in arbitration in your jurisdiction?

The establishment of the BVI International Arbitration Centre, which we have referred to above, and the BVI's pro-arbitration stance, have set the tone for increased arbitration activity in the BVI. The formal 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 physically enter the BVI easily, when post-covid travel resumes.

9 | 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?

ADR in the BVI is customarily informal, although provisions of the BVI Court Rules provide for diversion to mediation in the case of matters in the Civil Division of the ECSC.



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While many disputes in the BVI are concluded by agreement without the need for determination by the court (although statistics are not available due to the nature of ADR), there are few formal mediations conducted in the BVI in relation to complex commercial matters and other more innovative ADR approaches (such as early neutral evaluation) have not been perceived as popular. Traditional, unstructured and unsupervised ADR is widely practised and is particularly effective as the BVI dispute resolution industry is built upon personal relationships. As noted, anecdotal experience suggests that mediation is on the rise in the BVI in matters where the parties perceive an opportunity to resolve their differences quickly and quietly without recourse to the courts.

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 a resident of 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 parties' home jurisdictions.

10 | **What is the position in relation to litigation funding in your jurisdiction? Is funding available? Have there been any significant developments in this area in your jurisdiction?**

On 30 September 2020, the BVI Commercial Court issued an important decision approving third-party litigation funding in the BVI in the first reasoned written judgment from the court on the subject. In its judgment, which related to liquidation proceedings, the court held that third-party funding for litigation and other liquidation fees and expenses, in appropriate cases and on appropriate terms, is permissible as a matter of BVI law.

In his decision, Mr Justice Adrian Jack (Ag.) gave full consideration to the law of champerty and maintenance in other common law jurisdictions and found that the proposed funding agreement to be entered into by the funder and the joint liquidators was lawful and not contrary to public policy. This decision reinforces the BVI as a modern, pragmatic and commercial jurisdiction and that, in the right circumstances, litigation funding is available. We have also experienced a growth in entities offering to provide funding to litigants on varying terms. We expect these options to grow.

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The Inside Track

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

One satisfying dispute on which we worked was with Brian Child acting as mediator involving parties that were at significant odds regarding hotly-contested issues. After a day's mediation, the animosity between the parties was extinguished, all disputes were resolved to the satisfaction of both parties and the parties agreed to work with each other again. We take pride in resolving the disputes as quickly and cost-effectively as possible on the best terms available for the client.

What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?

The development of free-standing interim relief in aid of existing or anticipated foreign judgments. As explained in question 5, following the decisions in *Black Swan* and *Yukos*, the BVI courts proceeded for virtually a decade on the basis of this common law jurisdiction until the Court of Appeal found that *Black Swan* had been wrongly decided and opined that it was for the BVI legislature to provide the necessary authority by way of statute. Following this decision, the BVI Commercial Court Users' Committee, in concert with the Bar Association, mobilised to assist in drafting the necessary amendments, which were brought into force in early 2021.

What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?

The previous 12 months have been dominated by the covid-19 pandemic, which resulted in most of us being bound to work remotely. However, due to advances in videoconferencing, it has been shown that business and legal communities can continue to operate remotely and efficiently. In the BVI, the courts quickly put in steps to allow for the electronic service of documents and transitioning from in-person court appearances to videoconferencing. All hearings, including a number of lengthy trials, have been conducted via this method over the past 12 months and we anticipate that, going forward, a large number of applications will be dealt with via videoconferencing. This will save both time and cost to clients and legal practitioners alike.

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