

THE DISPUTE
RESOLUTION
REVIEW

TENTH EDITION

Editor
Damian Taylor

THE LAWREVIEWS

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This article was first published in March 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-14-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 37 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

In my home jurisdiction, all eyes have been fixed firmly on the progress of Brexit negotiations with the EU. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year. Hopefully we will be able to write in the next edition with more certainty about the future laws and procedures that will apply to cross-border litigation in the UK and across the EU, much of which will be affected by the outcome of the ongoing negotiations.

Attention has also focused on more common issues. The rules of disclosure tend to have a habit of coming under periodic review and proposed new rules are out for consultation in England and Wales once again. This raises questions that are relevant to all jurisdictions that strive towards the common goal of justice at a reasonable price. Has litigation become too document heavy and expensive? Is technology a help or a hindrance? How can its power be harnessed, without adding to the parties' burdens? Is full disclosure suitable for all cases; should a lighter-touch regime be available, with liberty to apply for specific documents – a solution which this book shows has been adopted in many other jurisdictions and in arbitrations?

This tenth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 585 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor

Slaughter and May

London

February 2018

GIBRALTAR

*Stephen V Catania*¹

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Gibraltar is a British overseas territory and can generally be described as an English common law jurisdiction.

The territory of Gibraltar has its own legislature, known as the Gibraltar parliament, whose powers are governed by the Constitution of Gibraltar 2006 (the Constitution), which empowers it to make laws subject to the Constitution.² The Constitution, *inter alia*, enshrines the fundamental rights and freedoms of the individual.³

Section 2(1) of the English Law (Application) Act (the Act) applies the common law and rules of equity to Gibraltar insofar as they are applicable to local circumstances.

Statutory law in Gibraltar mainly comprises laws passed by the Gibraltar parliament, but certain English statutes also apply.⁴

Gibraltar is part of the European Union through the United Kingdom's membership on the basis that it is a European territory for whose external affairs the United Kingdom is responsible for. European directives are transcribed into Gibraltar law by local acts of parliament. Pursuant to the European Communities Act⁵ EU legislation and decisions can have direct effect in Gibraltar.

Civil cases are commenced in the Supreme Court of Gibraltar, whose powers are largely contained in the Supreme Court Act, and importantly, Section 12 of the Act provides that the Supreme Court shall possess and exercise all the jurisdiction, powers and authorities of the High Court of Justice in England.⁶

The Supreme Court does not have any formal divisions. There are currently three Supreme Court judges – the Chief Justice and two puisne judges – one of whom hears predominantly family cases, and the other two judges hear a wide variety of civil and

1 Stephen V Catania is a partner at Attias & Levy.

2 Section 32 of the Constitution.

3 Sections 1 to 18 of the Constitution.

4 The English statutes that apply to Gibraltar are those listed in the Schedule to the Act, and any other statute extended to Gibraltar by Order in Council or by express provision in the Act – see Section 3(1) of the Act.

5 Sections 3 and 4.

6 It was held in the case of *Jones v. Simoni* [SC] 1995-96 Gib LR 45 that Section 12 was not restricted by the English Law (Application) Act, or the Interpretation and General Clauses Act, and was not confined to procedural matters.

sometimes criminal cases. English judges sometimes join the Gibraltar bench to hear specific cases. Additionally, the Registrar as an Acting Puisne Judge also hears cases in the Supreme Court.

Appeals from the Supreme Court lie with the Court of Appeal for Gibraltar, whose powers and procedure are governed by the Court of Appeal Act and the Court of Appeal Rules 2004.

The Court of Appeal is composed of recently retired English Court of Appeal judges, some of whom may still sit in the English Court of Appeal on an *ad hoc* basis. The Court usually sits twice a year, usually in February and September, but may sit on other occasions as required.

Decisions from the Court of Appeal may be appealed to Her Majesty's Judicial Committee of the Privy Council.⁷

Court proceedings are the principal method of dispute resolution, even though there are a number of English-qualified mediators in Gibraltar.

The Gibraltar Bar is mainly constituted by English-qualified barristers and solicitors who are then called to the Bar locally. The profession is a fused profession, whereby barristers can additionally act as solicitors and vice versa. It is not infrequent to call English specialist counsel and Queen's Counsel to the Gibraltar Bar to appear in the Gibraltar courts for specific cases.

II THE YEAR IN REVIEW

During 2017 the Supreme Court decided two cases⁸; the *Jyske* case and the *RBS* case.⁹ Both these decisions relate to accessory liability of banks connected with the Marrache fraud.¹⁰

In the *Jyske* case, the claimants were the joint liquidators of Marrache & Co who were appointed as representatives on behalf of 16 former clients who were defrauded by the firm. They were also acting in their capacity as trustees of the trust monies stolen by the Marrache brothers from those clients. The claimant sought to recover some of their losses from Jyske who were one of the banks with whom Marrache & Co had office and client accounts. Recovery was sought on the basis of allegations of dishonest assistance and knowing receipt of some of the stolen monies. The key issue at trial was whether Jyske was dishonest. In the *RBS* case, the claim was brought on behalf of a trustee and private individual. Again the key issue was whether RBS was dishonest or not.

7 See Section 66 of the Constitution and Section 22A of the Court of Appeal Act.

8 (1) *Jim Magner* (2) *T&T Trustees Ltd v. Royal Bank of Scotland International Ltd* (Claim No 2014-M-81) available at http://gcs.gov.gi/images/judgments/supremecourt/2017/jim_magner_and_anor_v_royal_bank_of_scotland_international_ltd.pdf accessed on 12 December 2017; and *Edgar Lavarello and Adrian Hyde (as representatives of certain clients of the Firm and/or as trustees) Jyske Bank (Gibraltar) Ltd* (Claim No. 2014-L-81) available at http://gcs.gov.gi/images/judgments/supremecourt/2017/edgar_lavarello_and_adrian_hyde_v_jyske_bank_gibraltar_ltd.pdf accessed on 12 December 2017.

9 It should be noted that both cases are each subject of an appeal to the Gibraltar Court of Appeal.

10 By way of background, *R v. Marrache* (2013/2014 GibLR 540) was the longest criminal trial ever in Gibraltar's history. Grigson J (Ag) found the Marrache brothers guilty of conspiracy to defraud. The brothers had stolen from the client account of the law firm Marrache & Co and the total deficit of the firm was approximately £30 million.

In both the cases, Jack J adopted a three-stage approach to the allegations of dishonest assistance: was the bank relevantly on notice under the test in *Rowlandson v. National Westminster Bank Limited*?¹¹ If yes, is the bank relieved of its liability under Section 85 of the Solicitors Act 1974 (UK)? If no, was the relevant individual dishonest given his or her knowledge and understanding?

The main issue in both cases was the extent of investigations which the relevant bank did or should have undertaken when acting as the firm's banks. Jack J considered the general duties of a bank regarding trust accounts and followed the approach taken in *Rowlandson*.¹² Jack J also held that section 85 applied to Gibraltar in the *Jyske* case pursuant to Section 33 of the Supreme Court Act 1960 (Gibraltar). It was held that a bank can in general rely on the presumption that a solicitor is operating his client account honestly and correctly. However, if a bank is sufficiently on notice of irregularities or matters which arouse suspicion, then it is under the normal duty to investigate. What amounts to sufficient notice will turn on the relevant facts.¹³ The judge then considered the law on dishonesty. In both cases, Jack J found that the two relationship managers concerned were experienced bankers and had a good understanding of the function of the office and client accounts and the need for segregation. Jack J found dishonesty in both cases on the basis of actual knowledge and Nelsonian knowledge in respect of the relationship manager concerned.

In the *Jyske* matter,¹⁴ the court has ordered a retrial of the claim as it found that the trial judge made a material error in refusing to have regard for expert and other banking evidence offered by Jyske Bank.

Claim No. 2017/ORD/31¹⁵ was the progeny of matrimonial proceedings that took place in London that concerned issues relating to a discretionary trust of which the husband was the settlor. The trust is governed by Gibraltar law. The trustee is a company registered in Gibraltar where the trust is administered. The trustee commenced a Part 8 Claim commenced which sought directions in relation to the validity of two deeds executed in 2012 and 2015 whereby certain beneficiaries, including the husband and the wife, were excluded as potential beneficiaries.

On 26 and 27 July the Chief Justice heard the trustee's substantive application and reserved judgment. The central issue for the Court of Appeal was whether the Chief Justice ought to have heard the substantive application at all. The Court of Appeal¹⁶ announced that, to the extent that the application sought to prevent the Chief Justice from handing down a judgment on jurisdiction, it refused leave to appeal but that leave to appeal was granted on the issue whether the Chief Justice should have proceeded to hear the merits of the Part 8 Claim prior to the achievement of finality on jurisdiction. The wife's submissions failed to have regard to the unique circumstances of this case, which uniqueness, was brought about

11 [1978] WLR 798.

12 See Paragraph 21 of the *Jyske* case and Paragraph 22 of the *RBS* case.

13 Paragraph 40 of the *Jyske* case.

14 *Edgar Lavarello and Adrian Hyde (as representatives of certain clients of the firm of Marrache & Co and/or as trustees) v. Jyske bank (Gibraltar) Ltd* (Civil Appeals Nos. 6 and 7 of 2017); available at http://gcs.gov.gi/images/judgments/coa/2018/edgar_lavarello_and_adrian_hyde_as_representatives_of_certain_clients_of_the_firm_of_marrache_and_co_and_or_trustees_and_jyske_bank_gibraltar_ltd.pdf.

15 http://gcs.gov.gi/images/judgments/supremecourt/2017/line_trust_corporation_v_w_and_ors.pdf accessed on 13/12/2017.

16 http://gcs.gov.gi/images/judgments/coa/2017/a_v_line_trust_corporation_and_ors.pdf accessed on 11/12/2017.

by the wife's recent approach to the litigation. In these circumstances, the court held that it was permissible, albeit unorthodox, for the Chief Justice to proceed with the merits hearing and that he did not act in a way which can be described as procedurally unfair, whether by reference to Article 6 ECHR or otherwise. Therefore, on this basis, the appeal was dismissed.

In respect of the wife's dispute as to whether the Supreme Court of Gibraltar had exclusive jurisdiction over it, the Chief Justice held that the Supreme Court did have jurisdiction as the trust instrument confers jurisdiction; the proceedings were brought against beneficiaries and the claim dealt with relations between the trustee and the beneficiaries and their rights. It follows that the claim is within the scope of article 25(3) and therefore the court had exclusive jurisdiction. In respect of the deeds of exclusions, the court held that they were valid, albeit the matter was unchallenged, on the ground that the trustees did not breach their duties and that it did not go against the trust instrument as it conferred a power to exclude.

III COURT PROCEDURE

i Overview of court procedure

The English Civil Procedure Rules (CPR) largely govern procedure in the Supreme Court. The CPR apply by default when there are no local rules and are also displaced when specific rules formerly in force in England are retained in Gibraltar.¹⁷

The main areas of difference with English practice and procedure are in relation to liquidation proceedings, bankruptcy and family cases.¹⁸ Service of documents within the jurisdiction is also covered by local rules.¹⁹

Civil cases may be commenced by the lodging of a claim form in the Supreme Court Registry pursuant to the CPR, winding-up petition or divorce petition.

Cases that are fully pleaded and proceed to a full trial may take between one and two years to get to trial.

Interlocutory applications for relatively non-urgent lengthy matters are usually given return dates six to eight weeks after the application is lodged.

The Supreme Court normally makes time to hear very urgent applications such as freezing orders and will usually grant a hearing date almost immediately upon the lodging of the application.

Applications to appoint a liquidator are usually given return dates of around two months from their lodging with the Supreme Court Registry.

ii Class actions

Gibraltar law and procedure on class actions are the same as in England given that the matter is governed by the Part 19 of the CPR.

17 See Section 15 of the Supreme Court Act, Rule 6(1) and (2) of the Supreme Court Rules 2000 (SCR).

18 Pursuant to Rule 6(2) of the SCR, the following former English Rules apply: Companies (Winding-up) Rules 1929 as amended, the Matrimonial Causes Rules 1957 as amended, and the Bankruptcy Rules 1952, as amended.

19 Rule 3 of the SCR.

iii Representation in proceedings

Any adult who is not suffering from a disability may commence proceedings and represent him or herself in court in civil proceedings. The Supreme Court, while not encouraging litigants in person, normally shows understanding to such litigants.

iv Service out of the jurisdiction

The Civil Jurisdiction and Judgments Act 1993 applies the Brussels Convention²⁰ and the Lugano Convention²¹ to Gibraltar. The CPR applies fully to proceedings under the Act and the position as regards law and procedure is therefore much the same as in England and Wales, with a few exceptions.

Generally, with regard to service out of the jurisdiction, the matter is determined in two ways, depending on whether the Conventions apply to the case.

If the Brussels or Lugano Conventions apply, a defendant may be served outside the jurisdiction without the permission of the Court if the provisions of CPR 6.33 are met and a statement setting out the grounds relied on to serve outside the jurisdiction is filed and served with the claim form.

If the claim does not fall under the Brussels or Lugano Conventions, permission to serve a defendant outside the jurisdiction is required. The application for permission is made *ex parte* to the Supreme Court. Like in England and Wales the claimant must stipulate what the grounds of CPR 6BP.3 are that he or she relies on,²² and the claimant must also establish that the claim on its merits has a reasonable prospect of success.²³

Additionally, pursuant to CPR 6.37(3) the claimant must establish that Gibraltar is the proper place in which to bring the claim, which the Court will determine in accordance with the English common law principles of *forum conveniens*.

v Enforcement of foreign judgments

In general terms there are four main ways to enforce foreign judgments in Gibraltar. These are as follows.

The Brussels and Lugano Conventions

Judgments can be enforced pursuant to the provisions of the Conventions as applied to Gibraltar by the Civil Jurisdictions and Judgments Act 1993 (CJJA) upon their registration in Gibraltar. Procedure is governed by CPR 74.3, which requires an application to be made to the Supreme Court for the registration of a judgment of a contracting state; the application may be made without notice. The grounds on which the registration of a judgment can be challenged are very limited and are generally contained in Articles 27 and 28 of the Brussels Convention.

The Recast Brussels Regulation

The Recast Brussels Regulation was implemented in Gibraltar and came into operation on 10 January 2015 by virtue of Legal Notice 3 of 2015, which amended the CJJA in order to

20 Section 4(1).

21 Section 4(3).

22 CPR 6.37(1)(a).

23 CPR 6.37 (1)(b).

implement the said regulation.²⁴ Article 36 of the Recast Brussels Regulation provides for automatic recognition resulting in no requirement for a special procedure. The grounds for the refusal to recognise and enforce a judgment are contained in Articles 45 and 46. Article 37 of the Recast Brussels Regulation provides the documentation that the applicant must produce for recognition of the judgment. Article 42 of the Recast Brussels Regulation provides the documentation that the applicant must produce for enforcement of the judgment.

Other statutes

Judgments may also be registered under the Judgments (Reciprocal Enforcement) Act 1935, which closely follows the 1933 English act of the same name. This Act applies in relation to judgments of various Commonwealth countries including the United Kingdom. These countries have entered into reciprocal enforcement agreements with Gibraltar. The procedure to be followed to register judgments and the grounds to challenge the registration of a judgment are, broadly speaking, similar to those under the CJJA.

Common law

Judgments from all other jurisdictions not covered by statute may be enforced at common law in the same way they are enforced in England and Wales. It requires the claimant to commence a fresh action to recover the judgment debt.

vi Assistance to foreign courts

The Gibraltar courts will assist foreign courts or tribunals in both civil and criminal matters. There are four relevant Gibraltar statutes: The Evidence Act, the Drug Trafficking Offences Act, the Mutual Legal Assistance (Schengen Convention) Act and the Mutual Legal Assistance (International) Act.

The Evidence Act includes procedures for the obtaining of evidence in Gibraltar to assist foreign civil and criminal proceedings. The process is begun by or on behalf of a foreign court or tribunal by way of letters of request and in civil (but not criminal) cases proceedings do not necessarily need to have been instituted in the foreign court, although grounds must be shown that civil proceedings are contemplated. The Supreme Court of Gibraltar's powers include making orders for the provision of oral or written testimony and the production of documents.

In relation to drug trafficking offences, the Gibraltar Drug Trafficking Offences Act confers upon Gibraltar's Attorney General the power to nominate a Gibraltar court to receive evidence (including documents) upon a letter of request being issued by a foreign court or tribunal exercising jurisdiction in a Convention state, a state to which the Vienna Convention has been extended or a country that appears to have the function of making such requests. Requests must be in connection with criminal proceedings or investigations in respect of offences of drug trafficking.

24 The preamble to LN 3 of 2015, made by the Minister for Justice reads, 'In exercise of the powers conferred upon it by Section 23(g) (ii) of the Interpretation and General Clauses Act, and in order to implement Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters (recast) the Government has made the following Regulations.' Regulations were then set out in the legal notice effecting amendments to the CJJA to implement the Recast Brussels Regulation.

The Mutual Legal Assistance (European Union) Act and the Mutual Legal Assistance (International) Act both concern only criminal proceedings; the former enables evidence to be taken in connection with criminal proceedings or investigations in an EU state and the latter in non-EU states. They empower Gibraltar's Attorney General, upon receipt of a letter of request from a foreign state to nominate a Gibraltar court to receive evidence. The appointed court also has the power to direct that a search warrant be applied for.

vii Access to court files

The Supreme Court Registry pursuant to CPR 5.4(1) keeps a publicly accessible register of claims, which any person may inspect upon payment of the prescribed fee.²⁵ As in England and Wales, members of the public may obtain copies of a statement of case but not of any documents filed with it. They may also obtain copies of a judgment or order made in public without permission once the defendants have filed acknowledgments of service. Any wider access to records requires the permission of the court.²⁶

viii Litigation funding

Third-party funding, the provision of funds by non-parties to a suit to fund litigation, is not illegal in Gibraltar, though if challenged the validity of funding arrangements is open to judicial scrutiny on the same grounds as in England and Wales.

This is so since Section 41 of the Contract and Tort Act, which mirrors Section 14 of the UK Criminal Law Act 1967, abolished criminal and civil liability for champerty (i.e., funding litigation for a share of any proceeds) and for maintenance (the provision of financial support for litigation, by a non-party); however, champerty and maintenance are retained as defences in contract, in the sense that such actions may render a contract void or voidable as being contrary to public policy or illegal.

Conditional fee agreements are enforceable in Gibraltar to the same extent as in England and Wales.²⁷

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

In Gibraltar conflicts of interest are governed by the rules contained in the Code of Conduct of the Bar of England and Wales and the Solicitor's Code of Conduct 2011 by virtue of Section 33 of the Supreme Court Act. The Code of Conduct is implemented through the Barristers and Solicitors Rules, which govern the making of any complaints and disciplinary proceedings that may arise.

Given that the disciplinary rules, as well as the case law in relation to client confidentiality, are the same as in England and Wales, information barriers may be set up by firms to deal with conflicts on the same terms and conditions as in England.

25 CPR 5.4(2).

26 CPR 5.4C(2).

27 In the matter of an application to the Chief Justice pursuant to the Supreme Court Rules, Rule 2 [2001-02 Gib LR 329].

ii Money laundering, proceeds of crime and funds related to terrorism

Gibraltar has fully implemented the Third Money Laundering Directive (the Directive),²⁸ the purpose of which is to provide a common EU basis for implementing the Financial Action Task Force 2003 Recommendations on Money Laundering. Gibraltar's Crime (Money Laundering and Proceeds) Act 2007 (the Money Laundering Act)²⁹ is the statute by which the Directive was implemented. However, the Proceeds of Crime Act 2015 (POCA) commenced in January 2016, which consolidated the legislation on money laundering in Gibraltar and created a single statutory regime, thus repealing the Money Laundering Act, dealing with the recovery of money from drugs offences in the same manner as the recovery of money from other criminal conduct. It also introduced a new procedure enabling the seizure and confiscation of assets arising from any criminal conduct, even where no criminal proceedings are brought against anyone, in a manner similar to those regimes that exist in other jurisdictions such as the United Kingdom.

POCA has created a number of money laundering offences. A person commits an offence under POCA if he or she:

- a enters into or is otherwise concerned in an arrangement whereby:
 - the retention or control by or on behalf of another (A) of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or
 - A's proceeds of criminal conduct are used to secure that funds are placed at A's disposal or are used for A's benefit to acquire property by way of investment, knowing or suspecting that A is a person who is or has been engaged in criminal conduct or who has benefited from criminal conduct;
- b knowing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he or she acquires or uses that property or has possession of it;
- c conceals or disguises any property that is, or in whole or in part directly or indirectly represents, his or her proceeds of criminal conduct; or converts or transfers that property or removes it from the jurisdiction, for the purpose of avoiding prosecution for an offence under POCA or the making or enforcement of a confiscation order;
- d he or she discloses any matter within subsection (2);³⁰ and the information on which the disclosure is based came to him or her in the course of a business or activity to which Section 9(1)³¹ applies; and
- e makes a disclosure concerning a state or territory that is prohibited.

28 2005/60/EC.

29 Formerly known as the Criminal Justice Act.

30 Section 5(2) of POCA:

The matters are (a) that either he or another person has made a disclosure under this Part (i) to a police officer; (ii) to a customs officer; (iii) the appropriate person under Section 28; or (iv) to the GFIU, of information that came to him in the course of a business or activity listed in Section 9(1); or (b) that an investigation into allegations that an offence under this Part has been committed, is being contemplated or is being carried out.

31 Relevant Financial Business is defined in Section 9(1) of POCA: www.gibraltarlaws.gov.gi/articles/2015-22o.pdf.

In addition, the expression ‘money laundering’ also includes any act that constitutes an offence, under Sections 5, 6, 7 or 8 of the Terrorism Act 2005 and any act that constitutes an offence under any other enactment that applies in Gibraltar and that relates to terrorism or the financing of terrorism.

Under POCA, responsibility for preventing and detecting money laundering or terrorist financing lies with relevant financial businesses, including entities licensed by the Financial Services Commission and other firms such as estate agents, tax advisers, banks, notaries and other independent legal professionals when they participate, by assisting in the planning or execution of transactions for their client, in matters concerning:

- a* buying and selling real property or business entities;
- b* managing client money, securities or other assets;
- c* opening or managing a bank, savings or securities accounts; and
- d* acting on behalf of and for their client in any financial or real estate transaction.

Firms must report or disclose suspicious transactions if they have reasonable grounds for knowing of or suspecting money laundering. POCA sets out standards that firms must meet relating to customer identification, the adoption of policies and procedures to deter and detect money laundering and terrorist financing, record-keeping and the training of staff.

iii Data protection

Data protection, and its governance, is supervised by the Gibraltar Regulatory Authority.³² As a statutory body, it is responsible for regulating data protection, the electronic communications sector, the gambling sector and, as from 2012, broadcasting in Gibraltar.³³

Pursuant to the principles underlined in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, the GRA is responsible for the implementation of data protection law and protection of individuals with regard to the handling of personal data and on the free movement of such data.

The Data Protection Commissioner, through the GRA, has ensured that a system is in place that monitors the executory function of the Data Protection Act.

The GRA works closely with its counterparts abroad, and through its website provides comprehensive advice on the implementation of the law in the workplace. Further, the complaints procedure in place allows for individuals, as well as corporations, to make data protection-related complaints to an extent such that it vastly extends the GRA’s continued responsibility to monitor the implementation of the law by corporations and individuals.

The basic principles that must be applied by businesses in relation to the handling of data are:

- a* the data must be obtained and processed fairly;
- b* it must only be used in relation to one or more specified and lawful purposes;
- c* data must be stored confidentially and only released to third parties with prior written consent from the individual permitting such release to third parties;
- d* it is a requirement that it be stored in a safe and secure manner;
- e* the data must be accurate and up to date;
- f* the data that is obtained must be exact and not excessive in consideration of the purpose for which it is held;

32 Gibraltar Regulatory Authority Act 2000.

33 Data Protection Act 2004.

- g* the data must be retained only for the period required for the specified purpose;
- b* copies of a client's personal data must be supplied to them on the client's request; and
- i* if requesting data on behalf of a client, this must be requested in writing together with written permission from the client permitting collection or receipt of that data.

In respect of legal practices in Gibraltar, the same principles apply regarding the handling of data in conjunction with the recognised principles in relation to the status of legally privileged documents.

However, data protection is due to change with the European General Data Protection Regulation (GDPR) which comes into force in May 2018. Under the GDPR, fines for serious breaches will be increased to a staggering maximum of €20 million or 4 per cent of a group's turnover (whichever is the highest). Increased compensatory rights for individuals who suffer damage are also being introduced, meaning that organisations should not discount the increased prospect of also having to deal with third-party actions where non-compliance causes damage to individuals.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

English common law is applied to the issue of privilege and in broad terms is divided between documents used or prepared when providing legal advice and those prepared or used in litigation or contemplated litigation.

ii Production of documents

The Civil Procedure Rules of England and Wales apply to Gibraltar by virtue of Section 38A of the Supreme Court Act 1960. As such, the rules governing the production of documents in litigated civil cases in Gibraltar is contained in these Civil Procedure Rules, more specifically Part 31, and mirrors the procedure followed in England and Wales.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration in Gibraltar is governed by the Arbitration Act 1895, which has undergone several amendments since its initial commencement. Schedule 1 contains certain provisions that are to be implied in all arbitration agreements, unless the arbitration agreement contains a provision expressly stating the contrary. These provisions are general in their nature and relate to the appointment of arbitrators, the nature of the award and the costs therein.

Part 1 of the Act deals with the general provisions that would generally apply to most arbitration agreements. Sections worth noting include:

- a* Section 3: makes an arbitration agreement irrevocable without the leave of the court and serves to give the agreement the same effect as an order of the court;
- b* Section 6: the provisions contained in Schedule 1 are deemed to be implied in all arbitration agreements unless the contrary is expressly stated within the agreement;
- c* Section 8: grants the courts powers to stay any proceedings to which there is an ongoing arbitration agreement so as to facilitate the arbitration;

- d* Section 21: this section allows for an arbitration award to be enforced in the same manner as a judgment or order, albeit with the leave of the court, and allows for judgment to be entered in terms of the actual award itself; and
- e* Section 22: allows for the award to carry interest equal to that of a judgment debt.

The Arbitration Act 1895 gives the New York Convention effect via Part IV, which contains the provisions for awards under the New York Convention. Section 48 allows for the courts to stay any ongoing court proceedings in relation to agreements that are not ‘domestic arbitration agreements’ and it serves as the equivalent of Section 8 to all agreements deemed not to be ‘domestic’. However, the factors the court may take into account in deciding whether to stay the proceedings differ from Section 8 in that they focus more on whether the agreement is capable of being performed rather than whether the applicant is ‘ready and willing to do all things necessary to the proper conduct of the arbitration’.

Part IV also allows the courts to enforce arbitration awards made pursuant to agreements outside of Gibraltar, albeit only among states that are a party to the New York Convention (Section 50). These are enforced in the same manner as those under Section 21 and carry equal weight and Section 51 states what must be produced by a party seeking to enforce such an award. Section 52 states the grounds upon which the courts may refuse to enforce an award under the New York Convention and these are self-explanatory in nature.

ii Mediation

In Gibraltar, there are no rules that make this course of action mandatory or that provide definitive guidelines on how mediations are to be conducted. Parties are generally free to agree between themselves all aspects of the mediation process as in England and Wales. Under the CPR mediation is encouraged; however, resorting to mediation is not common in Gibraltar.

VII OUTLOOK AND CONCLUSIONS

Formal methods of alternative dispute resolution have not taken root in Gibraltar, despite much encouragement by the judiciary after the CPR were introduced locally in 2001; however, the Gibraltar Bar has a long tradition of following a process of airing disputes informally and without prejudice between lawyers acting for opposing parties, which leads to many actions being settled before proceedings are issued or before trial.

In general, litigation in Gibraltar, as it is a small jurisdiction, is extremely varied and most of its experienced practitioners have very wide fields of practice and competence.

ABOUT THE AUTHORS

ATTIAS & LEVY

First Floor Suites
39 Irish Town
PO Box 466
Gibraltar
Tel: +350 2007 2150
Fax: +350 2007 4986
svc@attlev.gi
www.attiaslevy.gi

STEPHEN V CATANIA

Attias & Levy

Stephen V Catania is a partner at Attias & Levy and heads the firm's dispute resolution and litigation team. He has extensive experience in civil litigation, particularly in the areas of contract, commercial, administrative and professional negligence litigation. Mr Catania read law at the University of East Anglia and the Inns of Court School of Law, and was called to the Bar of England and Wales, and then to the Gibraltar Bar, in 1987.

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ISBN 978-1-912228-14-0