THE DISPUTE RESOLUTION REVIEW

Twelfth Edition

Editor
Damian Taylor

THE LAWREVIEWS

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TWELFTH EDITION

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This article was first published in February 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

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Damian Taylor

THE LAWREVIEWS

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-445-3

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 for their assistance throughout the preparation of this book:

ADVOKATFIRMAET SELMER AS

ADVOKATFIRMAN VINGE KB

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ATTIAS & LEVY

AZB & PARTNERS

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 32 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, as well as overcoming challenges that life and politics throws up along the way. 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 from those closer to home.

Sitting here in London at the start of 2020, we at least have a better idea of the immediate direction of travel for Brexit. The UK will have left the EU by the time this edition goes to print. The road has been long and twisting and it has thrown up novel problems of when politics and law clash head on. The Supreme Court in the UK – not so long ago having completed its metamorphosis from the old judicial committee of the House of Lords – confirmed that it was the ultimate check against the unlawful exercise of power by the Executive; declaring that Boris Johnson's advice to the Queen to prorogue Parliament was unlawful (see the case summary of *R (on the application of Miller) v. the Prime Minister* in the England and Wales chapter of this edition). Politicians cried foul. There was (and still is) talk of reassessing how Supreme Court judges are selected; talk of political appointments (as in the US) and a fundamental rewriting of the Constitution (except there cannot be, as no one has written it down in the first place). The same judiciary that is often praised for its independence and professional approach was at times along the tortuous road to Brexit branded in the media 'enemies of the people', part of the growing band of 'traitors' who allegedly opposed Brexit – that is despite all the judgments making clear that they were not deciding whether Brexit should happen or on what terms.

Looking back on events, far from the collapse of the Constitution, the year saw a reaffirmation of the constitutional balance of powers and the rule of law. The Supreme Court spoke and was respected. Parliament was recalled and took an October no-deal exit off the table.

But politics perhaps had the final say: an election was called later in the year, the people made their choice, and Mr Johnson's Conservative government was returned with a sufficient majority to 'get Brexit done'.

All this leaves me writing this preface five days before 'Brexit Day', after an exhausting 2019 in which clients have not known whether to plan for the 'May deal', 'No deal', 'Boris's deal', a referendum (on Brexit and/or Scottish independence), no Brexit, or the extensive nationalisation of private industries and tax rises outlined in Labour's manifesto. At least we now know at the end of it all that the UK will leave the EU on 31 January 2020.

That is not to say that everything will be plain sailing from now. The process of disentangling the UK from the EU legal and political framework will be long and complex. Fundamental questions remain. No doubt the Supreme Court will be called on to determine issues that no one had ever thought would need to be asked not so long ago. The transitional deal with the EU expires at the end of the year and the government's position is that it will not be extended. The same questions and uncertainties will surface as the clock ticks down if a deal is not apparent.

Whatever your views on Brexit, this is law in action. It happens every day of the year, but when the stakes are so large and politicised, the scrutiny so intense, it is hard not to see and feel it a little bit more. This edition therefore includes an updated Brexit chapter that charts the progress over the past year and what lies ahead.

There is of course much more to 2019 and beyond than Brexit – especially away from these shores (where it has occupied so much of Parliament's time, to the detriment of other legislative programmes). This 12th 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 can be found in Appendix 1 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 2020

Chapter 11

GIBRALTAR

Stephen V Catania[1]

I INTRODUCTION TO THE 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. European directives are transcribed into Gibraltar law by local acts of parliament. Pursuant to the European Communities Act[5] EU legislation and decisions can have direct effect in Gibraltar. Notwithstanding the United Kingdom's and Gibraltar's withdrawal from the European Union, the Government of Gibraltar has established a 'Withdrawal Bill' Team in preparing Gibraltar's legislation for Exit Day. The European Union (Withdrawal) Act 2019 came into force in Gibraltar on 31 January 2019. It is the principal piece of legislation in Gibraltar's statute book that will take Gibraltar out from the EU, with or without a deal. A whole raft of other legislative texts, technical notices and contingency measures have also been enacted and published.[6]

In June 2019, the Legal Services Act 2017 (LSA) was partly implemented, with its full implementation expected by early 2020. The implementation of the LSA is the first regulatory overhaul of Gibraltar's legal profession in 50 years The aim of this legislation is to promote and secure the rule of law and good standards of behaviour and services. The LSA

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) English Law (Application) Act.

5 Sections 3 and 4.

6 Attorney General's Speech at the 2019 Opening of the Legal Year available at http://www.gibraltarlawoffices.gov.gi/uploads/2019.pdf.

establishes the Law Council and the Legal Services Regulatory Authority, which has been given various powers previously held by the Chief Justice of Gibraltar and the Registrar of the Supreme Court of Gibraltar, such as in the context of issuing practising certificates to solicitors. The LSA also includes a full definition of legal services and defines 'reserved legal activity' and will cover in-house counsel, government lawyers, legal executives and law firms.

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.[7]

The Supreme Court does not have any formal divisions. There are currently four Supreme Court judges – the Chief Justice and three puisne judges; an increase of one from the previous edition. The decision to recruit a fourth judge comes against the backdrop of increased workload for the Supreme Court, which handles both criminal and complex commercial matters, as well as civil and family 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, primarily in smaller civil disputes.

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.[8]

Court proceedings are the principal method of dispute resolution, even though there are a number of English-qualified mediators in Gibraltar. However, in recent years, a number of cases have been settled via mediation.

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

In 2019, a number of important decisions were made by the Court of Appeal, namely *GibFibre Limited v. The Gibraltar Regulatory Authority* (*GibFibre No. 1*)[9] and *GibFibre Limited v. Gibraltar Regulatory Authority* (*GibFibre No. 2*).[10]

7 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.

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

9 (2018) Civil Appeal No. 7 dated 26 April 2019.

10 (2018) Civil Appeal No. 7 dated 15 November 2019.

In the *GibFibre* cases the claimants are GibFibre Limited (GFS) and the defendants are Gibtelecom Ltd (Gibtel) and the Gibraltar Regulatory Authority (GRA). Both Gibtel and GFS provide public communications network services. GFS wanted to enter into an agreement with Gibtel allowing GFS access to the data centre owned and controlled by Gibtel and where Gibtel hosts third-party servers under rack space rental agreements. GFS wanted this to connect directly via fibrelink with servers of potential customers to provide them with electronic communications services. Gibtel refused. GFS appealed to the GRA seeking the GRA to compel Gibtel to provide GFS access. The appeal proved unsuccessful. As such, the GRA started regulatory enforcement proceedings believing they had the power to compel Gibtel, but they concluded that they did not. GFS appealed against that decision but the Supreme Court, at first instance, decided in favour of GRA.

In *Gibfibre (No. 1)* GFS appealed Butler J's decision to the Court of Appeal. The Court of Appeal ruled in favour of GFS, stating that the GRA did have the power to enforce Gibtel to provide access. The reasoning relied on was Article 5(1)[11] of the Communications (Access) Regulations 2006, which implements Access Directive (Directive 2002/19/EC) on access to and interconnection of communications networks and associated facilities.

In *GibFibre (No. 2)* the GRA and Gibtel, both dissatisfied with the Court of Appeal decision, sought permission to appeal to the Judicial Committee of the Privy Council (the Privy Council).To obtain permission, you must satisfy the Court that the appeal raises arguable grounds and that it ought to be submitted to the Council 'by reason of its great general importance or otherwise'.[12] The GRA argued that the Court erred in the construction of Article 5, which provided three circumstances whereby access and interconnection can be required, and that it was wrong to state the list was not exhaustive of circumstances they can be required. It was conceded none of those three situations applied in the case and the GRA further submitted that if those three circumstances were the only ones, they were right to say the provision did not help GFS. It was held that the appeal gave rise to important issues regarding EU law which the Privy Council should scrutinise and stated that the issues are not of great general importance but of sufficient importance to grant permission.

In the Supreme Court, another significant case was decided. *Reclaim Ltd* (Reclaim) *v. Law Abogados Patrimonial SL* (LAP) *and Luis Garcia Fernandez*[13] (Fernandez) and *Reclaim Ltd v. Law Abogados Patrimonial SL and Luis Garcia Fernandez*.[14] The dispute relates to two companies related to Reclaim which were involved in a timeshare scheme in Spain. Reclaim operated a certificate scheme whereby purchasers were issued with certificates that, provided conditions were met, gave purchasers a refund of a proportion of the purchase price. The issue with the certificate scheme was that only a small percentage of holders would be able

11 Article 5(1) states:

An operator shall have -

(a) the right to negotiate interconnection with another operator for the purpose of providing publicly available electronic communications services;

(b) an obligation to negotiate interconnection with another operator for the purpose of providing publicly available electronic communications services when requested to do so by another operator whether authorised in Gibraltar pursuant to the Authorisation Regulations or in a Member State pursuant to Article 4 of the Authorisation Directive.

12 Section 66(2) of the Gibraltar Constitution Order 2006.

13 (2017) Comp 009.

14 (2017) ORD 003.

to claim the refund. LAP purchased a certificate. In 2014, Reclaim was wound up. The liquidators of Reclaim demanded account of monies held by LAP, but they refused, only paying a fee regarding distributed funds.

Reclaim issued a claim against LAP but LAP disputed the Court's jurisdiction stating that the claim did not deal solely with insolvency claims. LAP relied on Brussels Recast submitting the matter can only be dealt with in Spain, particularly due to the fact that the two contracts entered into by Reclaim and LAP contain clauses requiring them to submit to the exclusive jurisdiction of the Spanish courts. Additionally, LAP advanced that due to the nature of the claim, the domicile of LAP as well as their assets and trusts existing in Spain, the case should be heard by the Spanish courts. The Court held that it did have jurisdiction to deal with applications such as the instant one to disclaim the contracts and order the transmission of funds. The Court further emphasised that the Court's jurisdiction was not ousted by the contracts' terms and regardless of the fact that Spanish law may apply to performance of the contract, it does not affect the powers of local courts to disclaim the contract arising from liquidation.

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.[15]

Service of documents within the jurisdiction is also covered by local rules in conjunction with the CPR.[16]

Civil cases may be commenced by the lodging of a claim form in the Supreme Court Registry pursuant to the CPR, application to appoint a liquidator 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.

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

16 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 Convention[17] and the Lugano Convention[18] 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,[19] and the claimant must also establish that the claim on its merits has a reasonable prospect of success.[20]

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.

17 Section 4(1).

18 Section 4(3).

19 CPR 6.37(1)(a).

20 CPR 6.37 (1)(b).

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 implement the said regulation.[21] 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. Notwithstanding the implementation of the Recast Brussels Regulation, the Brussels Regulation (44/2001) still continues to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 that fall within the scope of that Regulation.[22]

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

21 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.

22 Article 66.3 of the Recast Brussels Regulation. This has been given effect through Regulation 4 of the Civil Jurisdiction and Judgments Act 1993 (Amendment) Regulations 2015.

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.

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.[23] 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.[24]

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.[25]

23 CPR 5.4(2).

24 CPR 5.4C(2).

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

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.

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

Gibraltar has fully implemented the Third Money Laundering Directive (the Directive),[26] 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)[27] 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;

26 2005/60/EC.

27 Formerly known as the Criminal Justice Act.

d he or she discloses any matter within subsection (2);[28] 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)[29] applies; and

e makes a disclosure concerning a state or territory that is prohibited.

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 (GRA).[30] 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.[31]

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

28 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.

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

30 Gibraltar Regulatory Authority Act 2000.

31 Data Protection Act 2004.

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;
g the data must be retained only for the period required for the specified purpose;
h 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.

Significant changes have entered the data protection framework in the form of the EU General Data Protection Regulation (2016/679) (GDPR). GDPR emphasises transparency, security and accountability by data controllers and processors, and imposes a significant number of additional obligations on them. The headline changes coming as a result of GDRP are, inter alia, as follows:

a data processors will be subject to specific direct legal obligations (rather than contractual only), including maintaining records of personal data and processing activities, and will have significantly more legal liability if they are responsible for a breach;
b data subjects will have the right to sue controllers and processors directly for material and non-material damage;
c the definition of 'personal data' in GDPR is more detailed and includes information such as online identifiers (e.g., IP addresses, device identifier tags and location identifier tags);
d GDPR requires further information to be provided to individuals before collecting data, including the legal basis for processing, retention periods and the right to complain;
e GDPR has much stricter requirements for using consent as a ground for legally processing data; and
f GDPR makes notifying the data protection commissioner of any breaches mandatory.

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 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 becoming more commonplace 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.

Appendix 1

ABOUT THE AUTHORS

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.

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

an LBR business

ISBN 978-1-83862-445-3