Complex Commercial Litigation

Contributing editors
Simon Bushell and Daniel Spendlove

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GETTING THE DEAL THROUGH

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Gibraltar

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Background

1 How common is commercial litigation as a method of resolving high-value, complex disputes?

It is common for high-value commercial disputes to end before the Supreme Court of Gibraltar (the Court), which has equivalent judicial status to that of the High Court in London. Alternative dispute resolution, such as mediation, is often preferred for low-value commercial matters.

2 Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

Gibraltar is known to be a litigious jurisdiction for commercial matters. The Court has both the availability and disposition to provide a fast-paced court process for complex high-value cases when the circumstances require it. Having an English judicial system and access to specialist counsel within a VAT-free regime renders Gibraltar a 'go-to' jurisdiction for high-value cases. It is, therefore, common for international parties to pursue litigious resolution for high-value commercial disputes. The size of the jurisdiction (6km^2) requires that all matters are disposed of by the Court.

3 What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Gibraltar is a common-law jurisdiction. As such, its laws not only derive from statute, but from case law. The Court can, in most circumstances, react and provide resolution to situations that have not been anticipated by the legislature. For instance, actionable torts (eg, negligence) developed from case law and not from statute. The common law is flexible in nature: precedents can be challenged and replaced by new cases.

Bringing a claim – initial considerations

4 What key issues should a party consider before bringing a claim?

There are a number of factors that a party should consider before issuing proceedings. These involve, for instance, considering whether it has sufficient information and evidence to be able to claim against the defendant (including whether any relevant evidence is retained by third parties who may be subject to *Norwich Pharmacal* orders).

5 How is jurisdiction established?

Gibraltar is part of the European Union under the United Kingdom. In the first instance, the rules on jurisdiction derive from EU laws and, if those do not apply, then traditional English rules on private international law will apply. Under EC Regulation No. 1215/2012 (Brussels I recast), the general rule is that jurisdiction is determined based on the defendant's country of domicile. The general domicile rule can be displaced: with contractual disputes, jurisdiction can be determined based on the country in which the contract is performed (ie, where the services are rendered or goods delivered). Further, there are mandatary rules on jurisdiction that cannot be displaced, even by contract: for example, if the dispute involves rights in rem in immoveable property, then courts of the member state in which the property is situated shall have exclusive jurisdiction to determine the proceedings.

If the EU laws on jurisdiction do not apply (generally these will be cases involving non-EU domiciled parties), then English traditional rules on jurisdiction will be relied upon. If a party is validly served with proceedings (eg, by personally serving an individual), then irrespective of that party's nationality or domicile, the Court will exercise jurisdiction. The served party can then dispute the Court's jurisdiction pursuant to Part 11 of the (English) Civil Procedure Rules 1998 (CPR). If that is the case, the Court will then consider whether Gibraltar is the appropriate forum in which to litigate the dispute based on 'forum non conveniens' principles, such as whether the contract or dispute is closely connected with Gibraltar.

Where a defendant has commenced proceedings outside the EU, the aggrieved party may apply for an anti-suit injunction. This is a useful tool previously used in Gibraltar where, for instance, a party has commenced proceedings in a non-EU country in breach of a jurisdiction clause.

However, if a party wrongfully commences proceedings in the EU (eg, sues in France in breach of a jurisdiction clause favouring the the Court) then the Court cannot issue an anti-suit injunction as that remedy has not been upheld when EC rules on jurisdiction apply. The court second seised must stay or decline jurisdiction until the court first seised determines whether or not it has jurisdiction to determine the dispute.

6 Res judicata: is preclusion applicable, and if so, how?

If proceedings have been adjudicated by a court of competent jurisdiction, then that decision becomes res judicata, estopping the unsuccessful party from bringing the same cause of action and against the same party in Gibraltar. It is generally available in two situations: first, where the claimant loses in a foreign country, in which case he or she cannot then commence proceedings afresh in Gibraltar against the same defendant; second, where the claimant wins abroad but does not obtain full compensation, in which case he or she is generally precluded from bringing an action in Gibraltar for the rest of the claim.

7 In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

Typically, foreign laws will be upheld before the Court if there is a binding applicable law clause in a contract. It is possible for jurisdiction to be exercised by the Court while applying foreign law to the dispute, in whole or in part. For instance, the principle of *dépaçage* allows for different parts of a contract to be governed by different laws. Foreign procedural laws allow for litigation to be drawn out for a longer period of time by, for example, having longer periods within which statements of case are to be lodged and served between the parties.

8 What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

A claimant should consider four overarching factors: first, whether the defendant is cash solvent to be able to compound any eventual judgment; second, whether any insurers can meet a judgment; third, whether the defendant has any assets within the jurisdiction that could

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be targeted in the event that judgment is not satisfied; and last, whether an eventual judgment or order can be enforced in any country in which the defendant has assets. Once proceedings are issued and jurisdiction established, it is difficult for the defendant to make himself or herself 'judgment proof'.

9 When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

Generally, in cases where there is a real risk that the defendant's assets can be dissipated, whether locally or internationally, the Court grants injunctions where it is 'just and convenient' to do so. The application could be refused if the prejudice caused to the respondent outweighs the benefit to be gained by the applicant. The applicant must show, inter alia, that it has acted reasonably and promptly, that it has a good prospective cause of action against the respondent and that the Court has jurisdiction to determine the dispute.

10 Are there requirements for pre-action conduct and what are the consequences of non-compliance?

Yes, the CPR requires parties to comply with the pre-action conduct and protocols. Generally, parties are required to exchange information and narrow down issues between them at an early stage of litigation. Non-compliance could, for example, result in adverse costs orders.

11 What other forms of interim relief can be sought?

The Court can also grant a number of interim relief measures, such as search orders (enabling the applicant to enter and search the respondent's premises to preserve evidence or property), *Norwich Pharmacal* orders (compelling the respondent to disclose information) and security for costs or payments into court. The relief measures available to parties in Gibraltar are, to a large extent, the same as those available in England.

12 Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

Parties are required to engage in alternative dispute resolution (ADR) at the pre-action stage following the CPR and failure to do so may result in adverse costs consequences even where the party that is the subject of the costs order succeeds in the lawsuit or application.

13 Are there different considerations for claims against natural persons as opposed to corporations?

The main distinction is that a corporate entity has a separate legal identity to that of its shareholders. Although a corporation is administered by individuals, it is regarded as an artificial person in law with the capacity to sue or be sued. Shareholders do not have personal liability for any wrongdoing by the corporation. If the wrongdoing is done by directors, the corporation would still be accountable against third parties (as it would be vicariously liable for the director's actions or omissions) but it is possible for the corporation to bring an action against directors under, for example, breach of fiduciary duties.

14 Are any of the considerations different for class actions, multiparty or group litigations?

The same principles apply to class actions. Class actions or group litigations are generally uncommon in Gibraltar, but the market has been growing on insolvency cases (eg, liquidators bringing claims as trustees on behalf of the unsecured creditors). There are number of technical and practical factors to consider when bringing a group litigation action: first, limitations periods are to be observed as it often takes more time to organise and issue a class action claim; second, it is important for a 'main solicitor' to be appointed to manage the group litigation (this could entail, for example, ensuring that the register of group claimants is up to date and that documents are filed on behalf of all claimants who have common issues.

The Court will provide directions as to, for example, which issues are shared between the group claimants to the action or how any adverse costs are to be met by the group.

15 What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

There are currently no restrictions in Gibraltar on litigation funding, but in practice, most funding is typically obtained through English registered funders. Litigation funders have recently been considering the possibility of setting up a presence in the jurisdiction. We expect litigation funding to start emerging in Gibraltar. At present, the most common type of funding available is 'after the event' insurance (the ATE insurance), which generally allows the recovery of disbursements and the opposing sides' costs in the event of defeat. The costs of taking out ATE insurance are typically not recoverable.

The claim

16 How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Claims are launched as soon as the Court issues the claim form. The claimant drafts the claim form and files it with the Court, which then issues it (in practice, it seals or stamps the claim form as evidence that the Court has been seised of the dispute). Before the Court issues the claim form, the claimant needs to meet the Court's fees, which largely depend on the value of the claim and the subject matter of the dispute.

The claim form is a short document, specifying the parties' names and addresses and a brief summary of what the claim is about. The claim form is supported (in the vast majority of proceedings) by the particulars of claim, which sets out in greater detail the subject matter of the dispute. The particulars of claim should be concise, although there is no definitive guideline as to how long it should be.

17 How are claims served on foreign parties?

Service of proceedings on foreign parties typically hinge on whether the Court has jurisdiction to determine the dispute, whether as a matter of common law or EU law (Brussels I recast) (see question 5). There are a number of ways in which claims can be served on foreign parties:

- by serving it on the opposing side's solicitors (if one is instructed to accept service on behalf of that party), which is the simplest method of service;
- if the opposing side is a foreign national (ie, individual), the claim form can be served on him or her personally; and
- if the Court has jurisdiction to determine the case pursuant to national statutory law or EU law (including the Brussels I recast), then proceedings can be served on the opposing side without permission of the Court. In every other case, permission to serve on foreign parties must first be granted. If the opposing side is domiciled outside Gibraltar but within the European Community (except Denmark), proceedings are usually served pursuant to EC Regulation No. 1397/2007. The proceedings would be provided to the Court's registrar (as the 'transmitting agency') who would then transmit it to the 'receiving agencies' in the member state in which the opposing side is located. In other cases, the service of documents would be determined by the applicable private international law rule.

18 What are the key causes of action that typically arise in commercial litigation?

The main causes of action that arise in commercial litigation include:

- Breach of contract. As a matter of common law, as long as there is an offer, acceptance, consideration (which is something of value for both parties) and an intention to create a legal relationship, a contract can be reached orally. Many disputes revolve around oral agreements which subsequently develop into written agreements.
- Breach of professional duties. Mainly, these involve claims in negligence or breach of fiduciary duties. Negligence claims involve a lack of proper care (whether by an action or omission) on the corporate's or individual's part (eg, accountants who perform audits without due care and attention). A fiduciary is a person or corporation who acts on behalf of another person. A special duty of care is placed on fiduciaries as there is an element of trust in the parties' relationship (eg, relationships between trustees or beneficiaries, or directors or corporate entities). Most actions on breach of fiduciary duties involve trustees or directors.

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- Unlawful interference. This occurs when one person intentionally jeopardises or damages another's contractual or business relationship with a third party, resulting in economic harm (eg, false representations made against a business to drive business away).
- Breach of trust. This is an act (or failure to act) by a trustee that goes against the powers contained in a trust document or by operation of law. A breach of trust can occur, for example, when a trustee distributes trust property to a beneficiary that is not entitled to it or invests in a way that is contrary to the powers contained in the trust document.
- Dishonest assistance or 'knowing receipt'. Dishonest assistance occurs when a party (a non-trustee) assists or is accessory to a breach of trust committed by a trustee and that assistance is given dishonestly. In order to establish dishonest assistance, there must be:
  - a breach of trust or fiduciary duty by someone (the trustee) other than the defendant;
  - the defendant must have assisted the trustee in committing the breach of trust; and
  - a dishonest state of mind on the defendant's part. Similarly, knowing receipt occurs where a non-trustee receives trust property (or holds trust property) in the knowledge (actual or imputed) that it is doing so in breach of trust.

19 Under what circumstances can amendments to claims be made?

A statement of case (eg, claim form or particulars of claim) can be amended at any time, provided that they have not been served on the opposing parties. Once served, a statement of case can be amended either by agreement or by court sanction. If amendments are made late in the proceedings, it is unlikely that the Court will approve them if, for example, it jeopardises a trial window.

20 What remedies are available to a claimant in your jurisdiction?

The most common types of remedies include the following:

- Damages. The Court will compensate the injured party for the harm or loss he or she has suffered. With contractual claims, damages aim to place the claimant in the same position had the contract been fully performed. With tortious actions (eg, negligence), damages aim to place the claimant in the same position had the tort not been committed.
- Account of profit. This is a discretionary remedy that requires the defendant to account to the claimant for any profits or gains acquired from his or her wrongdoing. Usually, these are awarded in cases involving breach of fiduciary duties (eg, a director who wrongfully uses his or her position for a personal gain).
- Specific performance. This a decree under which the Court will compel a party to adhere to his or her contractual obligations. It is therefore available in contractual claims, but it is not always available.
- Declarations. This is a remedy in which the claimant seeks to obtain a declaration of his or her legal rights over a subject matter, the existence of facts or a principle of law. Typically, declarations are sought in property or trust cases (eg, where an individual seeks a declaration over rights or interest he or she may have over real estate, or where an individual seeks a declaration of rights over shares of a company that is owned through declarations of trust).
- Injunctions. An injunction is an equitable remedy that principally takes two different forms: prohibitory injunction (which refrains a party from performing an act) or mandatory injunction (which compels a party to undertake a positive act).
- Rescission. At common law and equity, this remedy aims to set aside a contract. Typically, it involves cases of misrepresentation where the defendant induces (through fraudulent or negligent representations) the claimant to enter into a contract.

21 What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

As per question 20 above, damages awarded in contracts aims to place the claimant in the same position he or she would have been had the contract been performed (which is subject to the test of foreseeability). In tort, damages place the claimant in the same position had the tortious act not been committed or occurred (which is subject to the test of the losses not being too remote from the tortious act). A claimant generally has a duty to mitigate his or her losses, which requires the claimant to not make his or her position worse.

It is also possible for claimants to pursue damages for a loss of opportunity, which aims to compensate a claimant for loss of expectation (for example, a business that sues for loss of profit arising from a fire caused by a negligent plumbing contractor).

In fraudulent cases, a claimant can recover the losses arising from the fraudulent conduct, even if those losses were not reasonably foreseeable. This is an advantage of litigating fraudulent cases in Gibraltar.

Responding to the claim

22 What steps are open to a defendant in the early part of a case?

A defendant has two options when he or she is served with proceedings: (i) file an acknowledgement of service (AoS) or (ii) file a defence. If a defendant wishes to dispute the Court's jurisdiction, then he or she must file the AoS followed by an application to dispute jurisdiction. If a defendant files a defence and not an AoS, it will be a strong indication that he or she has submitted to the Court's jurisdiction.

A defendant can dispute jurisdiction by principally relying on two distinct set of private international law rules: (i) those provided under EU law (eg, the Brussels I recast) and (ii) those applicable at common law. Under the former, a defendant could argue, for example, that the courts of other member state have mandatory and exclusive jurisdiction over the subject matter of the dispute or that the courts of other member states have been first seised of the proceedings. At common law, a defendant will dispute jurisdiction on the ground of 'forum non conveniens' (eg, that the claim is more closely connected with the courts of another jurisdiction).

A defendant who wishes to make a counterclaim against the claimant can do so by including a particulars of counterclaim with his or her defence. He or she does not need court permission for including a counterclaim when it is filed with the defence, but permission is required at any other time.

It is also possible to make a counterclaim against a person other than the claimant, but an application for an order that that person be added as an additional party must be filed. Further, it is also possible to make an additional claim for contribution or indemnity against a person who is already a party to the proceedings by filing a notice containing a statement of the nature and grounds of his or her additional claim and serving the notice on that party.

23 How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

A defence must be filed within 14 days after service of the particulars of claim; or if the defendant files an AoS indicating that he or she wishes to defend the claim and not dispute jurisdiction, 28 days after the service of the particulars of claim. The defence must either admit, deny or require the claimant to prove each of the allegations included in the particulars of claim. As per question 22, if a defendant considers that is has a counterclaim against the claimant, he or she can include particulars of counterclaim with his or her defence.

24 Under what circumstances may a defendant change a defence at a later stage in the proceedings?

Once a defence is filed and served, amendments to the defence can be made if all parties consent to them. In the absence of agreement, court permission will be required.

25 How can a defendant establish the passing on or sharing of liability?

In negligence cases, a defendant can pass or share liability with the claimant if there is contributory negligence on the claimant's (or other third party's) part.

If the defendants enter into a 'joint and several' liability agreement (typically, each defendant is liable for the entire performance of the agreement irrespective of liability to the claimant), then the claimant may opt to proceed against the most resourced defendant.

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26 How can a defendant avoid trial?

A defendant could avoid trial by successfully disputing the Court's jurisdiction (see question 22) or, alternatively, by successfully striking out a claim. The CPR imposes a high threshold for strike-out applications. The defendant will need to show that:

- the statement of case (ie, claim form and particulars of claim) discloses no reasonable grounds for bringing or defending the claim;
- that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
- that there has been a failure to comply with any CPR rule, practice direction or court order.

In the absence of an application to dispute jurisdiction, strike out application or an out-of-court settlement, it is difficult for a defendant to avoid trial.

27 What happens in the case of a no-show or if no defence is offered?

If a defendant fails to enter an appearance (eg, by not filing an AoS or a defence within the time frame stipulated by the CPR) then the claimant can apply for judgment in default. A defendant may then apply to have the default judgment set aside, but he or she will need to show that he or she has a real prospect of successfully defending the claim or demonstrate that there is another good reason to allow him or her to file the defence.

28 Can a defendant claim security for costs? If so, what form of security can be provided?

Yes, once proceedings have commenced, a defendant (or respondent in an appeal) can apply for security for costs. A claimant can also apply for security for costs for his or her defence to any counterclaim. The application must be made promptly. The most common ground to apply is the belief that the respondent will be unable to pay the applicant's costs if ordered to do so. An application for security for costs can be an effective tool of litigation because the Court will generally not allow a party to continue with proceedings if he or she is unable to meet adverse costs orders. The form of security will typically involve a sum of money paid into the Court.

Progressing the case

29 What is the typical sequence of procedural steps in commercial litigation in this country?

A typical sequence is as follows:

- pre-action correspondence between the parties;
- issuing of a claim form by the claimant;
- acknowledgement of service by the defendant;
- service of particulars of claim by the claimant;
- service of defence by the defendant;
- allocation to a case management track by the Court;
- service of reply to defence by the claimant (an optional step);
- hearing: case management conference (only in large or complex claims);
- disclosure of documents by the parties;
- exchange of witness statements;
- exchange of expert reports (if necessary);
- hearing: pretrial review (only in large or complex claims);
- listing for trial by the Court;
- trial;
- any post-trial matters (eg, costs hearings, if not settled);
- appeal by the losing party (if permission granted);
- enforcement (if necessary); and
- hearing to determine amount of costs to be awarded (if necessary).

30 Can additional parties be brought into a case after commencement?

Yes, parties can be added after the case commences either by the Court's own initiative or by the parties' application.

31 Can proceedings be consolidated or split?

Yes, the Court has wide case-management powers, which includes the consolidation or splitting of proceedings. If there is more than one lawsuit relating to substantively the same parties and subject matter, the Court can consolidate them out of its own initiative or follow an application by the parties.

32 How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The Court will decide claims or allegations on a 'balance of probabilities', which is the civil burden of proof. The Court will determine which set of facts is more probable than the other, so it must be at least 51 per cent sure that one set is more probable than the other. Importantly, the Court does not infer a set of facts from a party's allegations; the Court will decide the case based on the pleaded facts and evidence presented before it.

33 How does a court decide what judgments, remedies and orders it will issue?

The Court will order the relief sought by the claimant or applicant in a given case. It will rarely grant an order or declaratory relief if it was not first sought by the claimant or applicant. It is, therefore, important for claimants or applicant to 'plead in the alternative' so that as many potential relief measures are covered as possible.

34 How is witness, documentary and expert evidence dealt with?

The Court will give directions as to which evidence is to be adduced, the timing of the evidence and the experts needed to determine the case. Usually, the Court will give directions on expert evidence if it lacks the technical knowledge to rule on the case. Evidence in civil proceedings are covered in the following stages of litigation:

Disclosure

The parties will agree (or the Court will order) the dates in which evidence is to be collated and exchanged between the parties. Usually, the parties will provide a list of documents that they require and the source in which those documents may be found (eg, a claimant may provide a list of 'key words' that the defendant will be required to search through its computing systems). This stage is probably the most time-consuming and expensive in a lawsuit as it often involves sifting through large volumes of information and evidence in order to build the case.

Witness statement

The parties will agree (or the Court will order) the dates on which the parties will be required to exchange witness statements of fact. The Court can provide directions as to, for example: the issues on which it requires evidence; the nature of the evidence that it requires to determine those issues; and the way in which the evidence is to be placed before the Court (eg, oral testimony versus written evidence). The statements must be accompanied by a statement of truth. At trial, the parties' counsels will attempt to undermine the credibility of the witness.

Expert report

The parties will agree (or the Court will order) the number of expert reports needed in the case. The Court will usually invite the parties to identify a single joint expert but that is rare in highly complex commercial litigation. The expert will need to follow the instructions given to him or her by the relevant party. The expert has an overriding duty to the Court, so no matter which party instructs him or her, his or her primary duty is towards the Court.

Trial

The Court will hear live oral evidence and will also be taken to the documentary evidence through the duration of the trial. The oral evidence is usually given in open court (ie, accessible to the public) unless there is a good reason to hear the case in private (eg, when minors are involved). The witnesses and experts are cross-examined by the parties' counsel who may be taken to give opinions on the evidence found during disclosure stage.

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35 How does the court deal with large volumes of commercial or technical evidence?

If the Court is minded that it needs technical expert to determine a case, it will direct the field in which the expert evidence is required and the issues which the expert evidence will address.

36 Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Yes, a witness in Gibraltar can be compelled to give evidence in support of foreign proceedings. The foreign court will need to make a formal written request in a prescribed form. Once the request is made, an application will then follow, typically ex parte.

It is also possible for the Court to seek assistance from foreign courts. The length of time it takes to obtain assistance will invariably depend on the jurisdiction from which the assistance is required.

37 How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

The witness and documentary evidence is tested at trial by way of cross examination. The parties' counsel will cross-examine the witnesses and experts and take them through the documentary evidence to build their case. The Court will place greater weight on the documentary evidence as opposed to witnesses' oral testimony. Experts can be asked (typically by the Court or by the party that is relying on that expert's testimony) to provide their opinion on the effect of the evidence (it could be, for example, scope of a written agreement) might have on a party's case.

38 How long do the proceedings typically last, and in what circumstances can they be expedited?

Usually, a complex commercial case lasts between 12 and 18 months from the date when the claim form is served on the opposing side. Depending on the subject matter, a case can be expedited through a Part 8 civil procedure as these proceedings are aimed at cases that do not involve a substantial dispute of fact (eg, declaratory relief by trustees on the manner in which a trust is to be administered). Also, the Court will typically expedite proceedings in the following cases:

- Preliminary issues. The Court will usually expedite the consideration of any preliminary issues as it does not usually involve the cross examination of witnesses. A preliminary issue may involve a point of law or fact that a party must overcome for him or her to be able to continue with his or her case.
- Injunctions. The Court may expedite trials if it considers that the requirements for an injunction (inter alia, that there is a 'serious issue to be tried') are not quite met.
- Insolvency proceedings. The Court will consider how a delay in court proceedings may prejudice a party in relation to a separate insolvency proceedings (eg, where the Court is asked to rule on a claim promptly so that the claimant may file a claim against a liquidated company before any distributions are made to the general body of creditors).

39 What other steps can a party take during proceedings to achieve tactical advantage in a case?

A party may apply for a strike out of another party's statement of case, in whole or in part – see question 26.

As an alternative, a party may apply for summary judgment under the CPR. The Court may give summary judgment against a claimant or defendant on the whole of a claim or on an isolated issue if it considers that:

- the claimant has no real prospect of succeeding on the claim or issue; or
- the defendant has no real prospect of successfully defending the claim or issue; and
- there is no other compelling reason why the case or issue should be disposed of at trial.

Trial

40 How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

The stages involved at trial typically include the following:

- The parties file:
  - a bundle of documents (ie, the evidence relied upon by the parties);
  - a bundle of authorities (ie, case-law or precedents which the parties will rely on to advance their case); and
  - skeleton arguments (written submissions by the parties' respective counsels). These documents are to be filed within three clear days from the commencement of the trial. This will allow the presiding judge to consider the documents (so far as it may be possible), skeleton and authorities in anticipation of the hearing; and
- the claimant's or applicant's counsel will introduce the parties and those representing them;
- the claimant's or applicant's counsel will set out a 'road map' or structure of the various matters which the Court will need to consider and determine. The claimant's counsel will also provide an opening speech to his or her client's overall case;
- the claimant's counsel will take the Court through the evidence and points of law (ie, through the bundle of documents and bundle of authorities);
- the defendant's counsel will be given the opportunity to reply to the claimant's counsel submissions;
- witness and expert evidence will be heard and cross-examined by the parties' counsel;
- closing speeches; and
- judgment and order.

41 Are jury trials the norm, and can they be denied?

Jury trials are not the norm in civil litigation, and especially in complex litigation as the matters that will be raised during trial will, in all likelihood, not be easily grasped by a lay person. Civil cases are heard by a single judge and any arising appeals are determined by the Court of Appeal (a panel of three judges) (which comprise a panel of English Lord Justices that fly in to Gibraltar twice a year).

42 How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

As in England and Wales, the Court in Gibraltar operates on the principle of open justice, so that hearings can be accessed by members of the public. The parties can, however, apply for hearings to be heard in private (the full trial or in part), for example, where the case involves minors. The Court will consider whether it is in the interest of justice for a case to be heard in private.

43 How is media interest dealt with? Is the media ever ordered not to report on certain information?

If the case is heard in public, the media will generally be able to report on the case but the Court has the power to limit or prohibit publications if it deems to do so in the interest of justice (eg, again, in cases involving minors).

44 How are monetary claims valued and proved?

A party can only recover the damages that apply under its cause of action (eg, cases in contract aim to place the claimant in the position he or she would have been had the contract been fully performed – see question 20). The assessment of damages takes place after the Court determines the trial on the merits. The value of the claim or the losses sustained is proved by the documentary evidence filed by the parties. Also, at times, an expert can be appointed to deal with the quantum of losses in a technically complex case.

Post-trial

45 How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

The general rule is that the unsuccessful party bears the costs of the successful party. In many cases, the costs liability is settled and agreed between the parties. If the parties cannot agree on a figure, the Court will assess the costs claimed and make a final order. A successful litigant should generally expect to recover approximately 60 per cent of its

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total costs, but if the opposing party has been particularly unreasonable throughout (or during a particular stage of) the proceedings, the Court could award a higher amount.

Costs are usually assessed on a standard basis (which essentially means costs which are proportionate and reasonably incurred), but if the opposing side has acted unreasonably, then costs can be awarded on an indemnity basis (here, there is a presumption of proportionality of costs in favour of the receiving party, which has the effect of putting the onus on the paying party to show that the costs claimed are unreasonable).

46 When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

A judgment can be appealed as soon as it has handed down by the Court (usually in open court). The application for leave to appeal is typically done orally in the first instance and, if refused, it can be renewed to the Court of Appeal for Gibraltar. If the Court of Appeal refuses leave to appeal or dismisses the substantive appeal, then the case can be appealed to the Judicial Committee of the Privy Council (predominantly Justices of the Supreme Court of England and Wales).

47 How enforceable internationally are judgments from the courts in your jurisdiction?

Whether a Gibraltar judgment is recognised and enforced is ultimately determined by the courts of the jurisdiction in which the recognition and enforcement is sought. In the EU or EEA in particular, judgments given in one member (or contracting) state ought to be recognised and enforced throughout the EU or EEA territory, whether under the Brussels I recast or, Brussels Convention 1968 (as amended) or Lugano Convention 1988. All these international regulations or Conventions apply to Gibraltar, so a judgment given in Gibraltar ought to be recognised throughout the EU or EEA. Gibraltar also enjoys reciprocity of treatments with other foreign countries so that a judgment given in one of those countries is enforceable in Gibraltar and vice versa.

48 How do the courts in your jurisdiction support the process of enforcing foreign judgments?

The Court will generally recognise foreign judgments as res judicata and enforce them (particularly if the judgment originates from a member or contract state under the Brussels I recast or relevant Convention) unless there is a compelling reason not to do so (eg, because the foreign judgment ought to be unenforceable on grounds of public policy).

Other considerations

49 Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

For the past five years or so, the Court has been stringent on the parties' compliance with the CPR rules or court orders and directions. While in the past the Court was more willing to grant relief from sanctions for any failure to (eg, adhere to the CPR rules or orders), we have seen a change in approach following the ruling of the well-known English case of Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537. For instance, the Court can order that a section of a party's claim be struck out following non-compliance with a CPR rule or court order.

The change in approach on case management has ensured that parties adhere to the CPR and court orders, which has, in many cases, expedited the litigation process as the Court are less willing to, for example, grant extension of time for a party to prepare and serve witness statements or to allow a party to file a statement of case (eg, particulars of claim or AoS) out of time.

50 Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

Although litigating in high-value commercial cases is expensive, the costs of doing so in Gibraltar is less than in England and Wales. As a small jurisdiction, there are a small number of litigators and specialist firms that have the experience and resources to manage and advise on highly complex commercial litigation. If there is a need for highly specialist counsel, then Gibraltar has access to London silks (Queens Counsel) for any specialist or expert advice and representation that might not be readily available from the pool of local talent.

51 Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

As above, the parties to an action must usually disclose a vast category of documents during the course of proceedings (whether as a pre-action disclosure exercise or during the proceedings). A document ought to be disclosed if it (subject to any rules of privilege):

- adversely affects a party's case;
- adversely affects another party's case;
- supports another party's case; and
- if the document is required to be disclosed by a relevant CPR practice direction.

The Court is experienced in dealing with highly complex commercial or admiralty matters, as Gibraltar is often the jurisdiction of choice to litigate those disputes, given that:

- it follows the English legal system, including, for instance, the application of the CPR;
- there is access to London specialist counsels when needed;
- it is less expensive to litigate in Gibraltar than it is in London;
- the Court generally has good availability to determine cases quickly; and
- appeals are heard by senior English judges.

SIGNATURE

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