

---

THE  
INSURANCE AND  
REINSURANCE  
LAW REVIEW

---

SECOND EDITION

EDITOR  
PETER ROGAN

LAW BUSINESS RESEARCH

# THE INSURANCE AND REINSURANCE LAW REVIEW

---

Reproduced with permission from Law Business Research Ltd.

This article was first published in *The Insurance and Reinsurance Review*, 2nd edition  
(published in April 2014 – editor Peter Rogan).

For further information please email  
[nick.barette@lbresearch.com](mailto:nick.barette@lbresearch.com)

THE  
INSURANCE AND  
REINSURANCE  
LAW REVIEW

---

Second Edition

Editor  
PETER ROGAN

LAW BUSINESS RESEARCH LTD

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND  
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND  
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

PUBLISHER  
Gideon Robertson

BUSINESS DEVELOPMENT MANAGERS  
Adam Sargent, Nick Barette

ACCOUNT MANAGERS  
Katherine Jablonowska, Thomas Lee, James Spearing, Felicity Bown

PUBLISHING ASSISTANT  
Lucy Brewer

MARKETING ASSISTANT  
Chloe Mclauchlan

EDITORIAL ASSISTANT  
Shani Bans

HEAD OF PRODUCTION  
Adam Myers

PRODUCTION EDITOR  
Timothy Beaver

SUBEDITOR  
Janina Godowska

MANAGING DIRECTOR  
Richard Davey

Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
© 2014 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of April 2014, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – [gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

ISBN 978-1-909830-00-4

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

# ACKNOWLEDGEMENTS

---

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

BECH-BRUUN

CHALFIN, GOLDBERG, VAINBOIM & FICHTNER  
ADVOGADOS ASSOCIADOS

CLYDE & CO LLP

CONYERS DILL & PEARMAN LIMITED

CROWELL & MORING LLP

ELVINGER, HOSS & PRUSSEN

FENXUN PARTNERS

GBF ATTORNEYS-AT-LAW

GROSS ORAD SCHLIMOFF & CO

INCE & CO

ISOLAS

JORQUIERA & ROZAS ABOGADOS

KIM & CHANG

LC RODRIGO ABOGADOS

LEE AND LI, ATTORNEYS-AT-LAW

MANZANO, LÓPEZ SAAVEDRA & RAMÍREZ CALVO (MLSRC)

MAPLES AND CALDER

MEHMET GÜN & PARTNERS LAW FIRM

NADER, HAYAUX & GOEBEL

NISHIMURA & ASAHI

ROSE-MARIE LUNDSTRÖM ADVOKAT AB

STEPTOE & JOHNSON LLP

STIKEMAN ELLIOTT LLP

STUDIO LEGALE GIORGETTI

TULI & CO

# CONTENTS

---

<b>Editor's Preface</b> .....	vii
<i>Peter Rogan</i>	
<b>Chapter 1</b> ARGENTINA .....	1
<i>Martín Manzano and Ignacio Shaw</i>	
<b>Chapter 2</b> BELGIUM .....	13
<i>Philip Woolfson</i>	
<b>Chapter 3</b> BERMUDA.....	25
<i>Christian Luthi and Michael Frith</i>	
<b>Chapter 4</b> BRAZIL.....	45
<i>Ilan Goldberg and Priscila Mathias de Moraes Fichtner</i>	
<b>Chapter 5</b> CANADA.....	60
<i>Stuart S Carruthers, Peter J Cullen, Ellen M Snow and Matthew Angelus</i>	
<b>Chapter 6</b> CAYMAN ISLANDS .....	74
<i>Tim Frawley and John Dykstra</i>	
<b>Chapter 7</b> CHILE .....	86
<i>Ricardo Rozas</i>	
<b>Chapter 8</b> CHINA .....	98
<i>Jianzhao Wang</i>	
<b>Chapter 9</b> COLOMBIA.....	112
<i>Neil Beresford and Raquel Rubio</i>	

<b>Chapter 10</b>	DENMARK.....	134
	<i>Anne Buhl Bjelke</i>	
<b>Chapter 11</b>	ENGLAND AND WALES .....	145
	<i>Simon Cooper and David Grantham</i>	
<b>Chapter 12</b>	EUROPEAN UNION .....	165
	<i>Philip Woolfson and Daniella Terruso</i>	
<b>Chapter 13</b>	GERMANY.....	178
	<i>Markus Eichhorst</i>	
<b>Chapter 14</b>	GIBRALTAR.....	197
	<i>Peter Albert Isola and Christian James Caetano</i>	
<b>Chapter 15</b>	GREECE.....	209
	<i>Dimitris Kapsis and Dimitris Giomelakis</i>	
<b>Chapter 16</b>	INDIA.....	220
	<i>Neeraj Tuli and Celia Jenkins</i>	
<b>Chapter 17</b>	ISRAEL .....	230
	<i>Harry Orad and Rena Egulsky</i>	
<b>Chapter 18</b>	ITALY.....	241
	<i>Alessandro P Giorgetti</i>	
<b>Chapter 19</b>	JAPAN.....	259
	<i>Shinichi Takahashi, Kenichiro Toda and Saki Sahara</i>	
<b>Chapter 20</b>	KOREA.....	276
	<i>Jay Ahn, Jae Ho Baek, Joon Young Kim and Brandon Bae</i>	
<b>Chapter 21</b>	LUXEMBOURG .....	287
	<i>Michel Marques Pereira and André Hoffmann</i>	

<b>Chapter 22</b>	MEXICO .....300 <i>Yves Hayaux-du-Tilly</i>
<b>Chapter 23</b>	SPAIN .....313 <i>Jorge Angell</i>
<b>Chapter 24</b>	SWEDEN .....329 <i>Rose-Marie Lundström</i>
<b>Chapter 25</b>	SWITZERLAND .....340 <i>Lars Gerspacher and Roger Thalmann</i>
<b>Chapter 26</b>	TAIWAN.....354 <i>C T Chang, Trisha Chang and Jessica Wang</i>
<b>Chapter 27</b>	TURKEY.....369 <i>Pelin Baysal and Nilsu Hazardađlı</i>
<b>Chapter 28</b>	UNITED STATES .....383 <i>Michael T Carolan, Paul W Kalish, William C O'Neill and Rachel P Raphael</i>
<b>Appendix 1</b>	ABOUT THE AUTHORS .....401
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS .....421

# EDITOR'S PREFACE

---

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant; it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with the emerging markets of Brazil, Russia, India and China developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all of the contributors for their work in compiling this volume.

Looking back on 2013, we are fortunate that the year did not bring natural catastrophes on the scale of the previous two years. However, we should not forget the tragedy of Typhoon Haiyan, which claimed more than 7,000 lives in the Philippines. Flooding caused extensive damage across all continents, with the June flooding in central and Eastern Europe ranking as the second-most expensive freshwater flood event ever. In the same month, rain-induced flooding hit Alberta, Canada, causing insured losses of nearly US\$2 billion, the highest ever recorded in the country for any disaster (all statistics from Swiss Re's Sigma database). There were also heavy rains and floods in Australia, India, China, Indonesia, southern Africa and Argentina and 2014 has seen extensive flooding in the UK.

Events such as these test not only insurers and reinsurers but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for the courts and arbitral tribunals to consider. I hope that you find this second edition of *The Insurance and Reinsurance Law Review* of use in seeking to understand them and I would like once again to thank all the contributors.

**Peter Rogan**  
Ince & Co  
London  
April 2014

## Chapter 14

---

# GIBRALTAR

*Peter Albert Isola and Christian James Caetano*<sup>1</sup>

### I INTRODUCTION

As a result of a concerted drive over recent decades, Gibraltar is now firmly established as a financial centre of choice within the EU, offering a wide range of products in banking, investment services and of course, insurance. The Gibraltar insurance industry as a whole continues to grow and develop, having enjoyed a period of unprecedented growth since the beginning of the millennium.

This initial growth was prompted primarily as a consequence of Gibraltar's accession to the Single European Market for insurance in 1997. This granted Gibraltar-based insurers the right to provide insurance services throughout the EU and EEA without the need for a separate licence or authorisation in 'host' EU Member States, known as 'passporting'. The ability to passport insurance services no doubt proved to be the catalyst for Gibraltar's insurance market and continues to be one of the jurisdiction's main draws.

The local industry is diverse, consisting of some 56 licensed insurers (both captive and retail), 34 insurance intermediaries and eight insurance managers.<sup>2</sup> It is also estimated that Gibraltar motor insurers underwriting UK risks account for approximately 10 per cent of the whole motor insurance market.<sup>3</sup> Furthermore, the industry is supported by an experienced professional infrastructure, comprised of the 'Big Four' audit firms, together with a whole range of accountancy firms, legal firms, banks and building societies.

In 2001, Gibraltar became the first EU jurisdiction to enact protected cell companies legislation for the structuring of investment funds and insurance companies.

---

1 Peter Albert Isola is the senior partner and Christian James Caetano is an associate at Isolas.

2 Gibraltar Financial Services Commission, Regulated Entities Register.

3 2013 Annual Report of the Gibraltar Financial Services Commission.

As a result, a number of Gibraltar general insurance and life insurance companies have been structured as PCCs, opening up the efficiencies of the PCC structure to the entire European market from their Gibraltar headquarters. The jurisdiction is home to what is believed to be the largest PCC in the EU, with some 50 cells incorporated under the umbrella of the 'core', providing fronting and captive solutions directly throughout Europe.

Most recently the Gibraltar government announced that it had successfully transposed all pending EU directives into Gibraltar law, a feat that many other EU Member States with infinitely greater levels of resources have not been able to achieve and which highlights Gibraltar's aspiration to remain at the forefront of financial services regulation.

## **II REGULATION**

### **i The insurance regulator**

The supervision and regulation of insurance business in Gibraltar is undertaken by the Gibraltar Financial Services Commission (FSC), an independent regulator established on a statutory footing and governed by a commission of members. The FSC has the following six statutory objectives:<sup>4</sup>

- a* the promotion of market confidence;
- b* the reduction of systemic risk;
- c* the promotion of public awareness;
- d* the protection of the good reputation of Gibraltar;
- e* the protection of consumers; and
- f* the reduction of financial crime.

In respect of EU legislation, the FSC is required by statute to establish and implement standards and supervisory practices that match the standards and supervisory practices governing the provision of financial services within the UK. As a result, the standard of supervision implemented by the FSC in Gibraltar matches the standards of the UK and is subject to independent audit, to ensure that Gibraltar meets EU and UK regulatory requirements. The FSC also works closely with the European Union & International Department which is responsible for drafting legislation for the Gibraltar government.

In terms of supervision, the FSC adopts a risk-based methodology consisting of a mixture of written submissions, quarterly and annual returns and compliance reports that licensed firms submit to the FSC on an ongoing basis. In addition, the FSC has an on-site inspection programme, whereby members of the relevant supervisory divisions, including senior members, attend to the offices of firms to conduct physical inspections of procedures and processes.

The FSC's responsibilities extend to all aspects of financial services business carried out from and within Gibraltar. It is widely considered to be a robust, yet accessible regulator, offering firms the opportunity to have face-to-face meetings within

---

4 The Financial Services Commission Act 2007.

short timeframes, something which is not possible in larger jurisdictions. It should be emphasised that Gibraltar's speed to market, one of the jurisdiction's hallmarks, is in no small measure down to the pragmatism and expertise of the FSC.

The Financial Services (Insurance Companies) Act (ICA) sets out licensing procedures and requirements, as well as providing for the FSC's supervisory powers in respect of insurance companies. In terms of insurance company applications, the FSC has service-level standards of 18 weeks from submission of the licence application and a statutory limit of six months.<sup>5</sup>

#### **ii Position of non-admitted insurers**

There is no specific definition of 'non-admitted insurers' in Gibraltar law. However, the ICA provides very clear restrictions on the right to conduct insurance business in Gibraltar. Under the ICA, Gibraltar-based insurers must be authorised by the FSC in specified classes and only carry on insurance business in or from within Gibraltar in compliance with their licence (subject to certain exemptions). A person who contravenes this is guilty of an offence and is liable to criminal sanctions.

#### **iii Position of brokers**

Gibraltar authorised insurance and reinsurance intermediaries are supervised by the FSC in accordance with the provisions of the Financial Services (Investment and Fiduciary Services) Act (FSIF) and regulations made thereunder. The FSIF defines an insurance or reinsurance intermediary as a person who, for remuneration, takes up or pursues insurance or reinsurance mediation. The FSC divides intermediaries into general insurance intermediaries and long-term business intermediaries. Regardless of classification, intermediaries can either operate as independents or as appointed agents of insurance companies.

Gibraltar has given effect to all relevant EU Directives and Regulations, including directives on insurance and reinsurance mediation. Insurance and reinsurance intermediaries are therefore required to comply with all EU requirements, such as those relating to solvency, professional indemnity insurance and client money handling.

Intermediaries are also subject to the Financial Services (Conduct of Business: Investment Firms & Insurance Intermediaries) Regulations 2006 (IIR), which set out the general conduct of business principles with which intermediaries must comply.

#### **iv Requirements for authorisation**

Gibraltar insurers (as defined in the ICA) are required to meet a number of requirements in order to be authorised. These include being incorporated in Gibraltar, as well as having their head office in Gibraltar. The question of whether an insurer has a Gibraltar head office is underpinned by the FSC's concept of 'mind and management', meaning that the management and control of licensed firms must be situated in Gibraltar at all times.

Furthermore, in order to carry on insurance business in another EU Member State by virtue of the single European passport for insurance services, a Gibraltar insurer

---

5 The Financial Services (Insurance Companies) Act.

must do so either on a branch or establishment basis or through a freedom of services basis. The ICA provides the procedure which a Gibraltar insurer must follow in order to fall under either limb of the EU passporting framework.

During the FSC application process, applicant insurers proposing to passport into the EU on a freedom of services basis will seek a legal opinion confirming among other things that its proposed method of operations would comply with the ICA and the FSC's regulatory requirements.

In addition to the provisions of the ICA, Gibraltar-based insurers are subject to a number of regulations relating to, *inter alia*, the preparation of accounts, solvency calculations, licensing and conduct of business requirements. Intermediaries and insurance managers are in turn subject to the FSIF and regulations made thereunder.

All licensed firms must also meet the FSC's criteria of 'sound and prudent management' on an ongoing basis, demonstrating that their regulated business is carried on with integrity, due care and the professional skills appropriate to the nature and scale of the activities. The local insurance industry therefore encourages a 'quality over quantity' policy which has served Gibraltar well in other well-regulated areas such as online gaming. However, small independent insurers can also make Gibraltar their home if they can demonstrate to the FSC a proven track record, a realistic business plan and sufficient financial resources.

#### **v Regulation of individuals employed by insurers**

The regulation of individuals involved in the management of insurers, insurance managers and intermediaries is subject to strict controls implemented and enforced by the FSC. Gibraltar's financial services legislation enshrines the concept of 'fit and proper persons', which although lacking a statutory definition, is related to considerations of honesty, solvency and competency.

When considering applications, the FSC requires applicants to demonstrate that all directors and associated senior persons are 'fit and proper'. Although this assessment will vary depending on the position of the person within the firm, the FSC will need to be satisfied of an applicant's integrity, reputation and competence as a minimum. The fit-and-proper assessment of individuals is an ongoing practice maintained by the FSC as part of its supervisory methodology and is not restricted to the application process.

#### **vi The distribution of products**

The distribution of insurance products throughout Gibraltar is subject to various conduct of business regulations, such as the IIR for insurance intermediaries. These regulations are designed to protect the interests of consumers as far as possible, as well as to provide firms with clear guidelines in the running of their business. The regulations cover a variety of topics including requirements for advertisements to be clear and not misleading, information on products, as well as commissions and charges payable on those products.

#### **vii Compulsory insurance**

In terms of financial services, the IIR require that company managers and professional trustees have a minimum cover of £500,000 and £1 million respectively. Such insurance

policies typically cover negligent or dishonest breaches of duty, loss of customer monies and liability resulting from loss of documentation and records.

Gibraltar's employer's liability insurance requirements are contained within the framework of social security insurance legislation and regulations. In addition, third party motor liability insurance cover is compulsory pursuant to the provisions of the Insurance (Motor Vehicles) (Third Party Risk) Act 1986.

Insurance intermediaries operating in or from within Gibraltar shall, on a permanent basis hold professional indemnity insurance (or some other comparable guarantee against liability arising from professional negligence) valid throughout the EEA for at least €1 million (or sterling equivalent) applying to each claim and in aggregate €1.5 million (or sterling equivalent) a year for all claims (unless such insurance or comparable guarantee is already provided by an insurance undertaking for example on whose behalf the intermediary is acting).

Furthermore, every solicitor practising in Gibraltar is required to take out and maintain professional indemnity insurance in the minimum sum of £1 million (as of 1 May 2014), although in practice the majority of law firms maintain a level of cover far in excess of this.

#### **viii Compensation and dispute resolution regimes (within the financial services context)**

##### ***Deposit Guarantee Scheme***

In 1997, Gibraltar introduced the Deposit Guarantee Scheme Act and made it a condition that FSC-authorized banks and branches of non-EEA banks operating in Gibraltar must be a member of the Gibraltar Deposit Guarantee Scheme. The scheme provides protection for qualifying depositors by guaranteeing to pay out compensation if a bank with whom he or she held a deposit is declared in default and a claim by the depositor has been verified. Any claimant which has a qualifying deposit will be entitled to receive the lesser amount of 100 per cent of the total of all qualifying deposits with the failed bank (including all branches), or €100,000 (or the sterling equivalent).

##### ***Investor Compensation Scheme***

All firms licensed by the FSC to provide investment services are required to be participants of the Gibraltar Investor Compensation Scheme. In instances where scheme participants are declared in default, the scheme pays out compensation to 'eligible investors' with certain types of 'eligible investments', such as transferable securities, money market instruments, options, futures and swaps. Life assurance or pension products, for example, are not covered by the scheme. In effect, the scheme caters for ordinary or retail investors and does not offer any protection to professional or institutional clients.

##### ***Compensation***

Conduct of business regulations require FSC licensees to have internal procedures to ensure the proper handling of complaints from customers, including a register of complaints received and action taken.

In terms of disputes between consumers and licensees, these are often handled directly by the licensee, although sometimes referred to the FSC. However, the FSC only

has responsibility for supervising financial services, it is not a financial ombudsman and does not mediate or adjudicate on complaints made against regulated firms.

At present consumers have recourse to the Department of Consumer Affairs, which assists complainants with disputes against licensed firms. The Gibraltar Government is however considering the implementation of a Financial Ombudsman Service in Gibraltar and is also close to announcing a new Office of Fair Trading, which will add further confidence to consumers of Gibraltar financial services products. Furthermore, a number of local law firms offer alternative dispute resolution and mediation services, although the majority of disputes are resolved through negotiation or commencement of legal action in the Gibraltar Courts.

#### **ix Taxation of premiums**

There is no insurance premium tax payable in Gibraltar, nor is there any tax for insurers on investment income. The rate of corporation tax is 10 per cent, except for utility companies and companies enjoying and abusing a dominant market position, who pay a higher rate of 20 per cent.

#### **x Other notable regulated aspects of the industry**

The acquisition of an insurer, or a change of control of an insurer, is subject to approval from the FSC. Any person who wishes to become a 'shareholder controller' of an insurer, will require prior approval from the FSC. Following the submission of a notification to the FSC with the prescribed particulars, the FSC then has three months in which to consider whether to object to the proposed acquisition or change on 'fit and proper' grounds, or with reference to the criteria of sound and prudent management. Prior FSC approval is also required in respect of an insurer's proposed managing director or chief executive.

Furthermore, the ICA requires 'notifiable positions', which include directors and senior managers, to be notified to the FSC. Although the FSC may not object directly to these appointments, it may use alternative enforcement actions should it become concerned about the fitness of any persons appointed to notifiable positions.

The ICA also provides a mechanism by which transfers of long-term and general insurance business to other insurers within the EEA can take place. These 'portfolio transfers' are subject to FSC approval (in the case of long-term business) or court approval (for general insurance business) depending on the nature of the book of business being transferred.

Gibraltar has also implemented the European Cross-Border Merger Directive (Directive 2005/56/EC) into Gibraltar law through the Companies (Cross-Border Mergers) Regulations 2010. These Regulations allow a Gibraltar company to merge with a company in the EEA and vice versa and involve various Court applications depending on the type of cross border merger taking place. Gibraltar also has redomiciliation legislation in the form of the Companies (Re-Domiciliation) Regulations 1996. This allows firms to redomicile abroad to jurisdictions with compatible redomiciliations frameworks, or for firms to establish themselves in Gibraltar.

### III INSURANCE AND REINSURANCE LAW

#### i Sources of law

Gibraltar's legal system is based on the common law and statute law of England. In 1962 Gibraltar passed the English Law (Application) Act declaring the extent to which English law is in force in Gibraltar. The common law and the rules of equity from time to time in force in England also apply to Gibraltar subject to certain modifications or exclusions.

Insurance law in Gibraltar is derived primarily from the general law of contract in England. In addition certain aspects of insurance law have been codified in the Insurance (Marine) Act 1960 (IMA), predominantly based on the English Marine Insurance Act 1906. The English Marine Insurance Act applies to all forms of insurance, and although the decisions of the English courts are not legally binding in Gibraltar, English case law is considered to be persuasive in the absence of local judicial authority.

#### ii Making the contract

There is no statutory definition of 'insurance' or 'insurance contract' under Gibraltar Law but there are principles of English case law that set out various characteristics of what comprises insurance. Insurance first of all requires a contract that involves the transfer and sharing of a risk. Furthermore, there should be an 'insurable interest' and there needs to be a degree of uncertainty about the risk being insured.<sup>6</sup>

Section 21 of the IMA states that 'the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured'. Material circumstances are widely defined and it is therefore clear that in Gibraltar, the burden of disclosure on the person seeking cover is onerous.

According to Section 24 of the IMA, a contract of 'marine insurance' is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not. For the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract.

However, according to Section 25 of the IMA, acting on the assumption that the IMA applies to all forms of insurance, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy. The insurance policy is therefore the written evidence of the contract between the proposer and the insurer.

#### iii Interpreting the contract

The interpretation of insurance contracts is subject to the general principles of construction in English contract law. Therefore, the substance of the insurance contract, rather than the form is likely to take precedence, with the intentions of the parties being assessed objectively from the viewpoint of the 'reasonable man'. In marine policies certain warranties are implied into the contract by the IMA. Furthermore, there are terms which can be implied by law into insurance contracts, just like any other contract.

---

6 *Prudential v. Commissioners of Inland Revenue* [1904] 2 KB 658.

iv **Intermediaries and the role of the broker**

*Conduct rules*

Insurance intermediaries authorised in Gibraltar are primarily subject to the conduct of business rules set out in the IIR (as well as further regulations relating to accounting, advertising and unsolicited calls). The IIR requires, as part of their authorisation, that intermediaries comply with certain statutory 'Statements of Principle', which include conducting business with integrity, due skill, care and diligence, avoiding conflicts of interest and treating customers fairly. Intermediaries must also ensure compliance with extensive 'Core Rules' relating to independence, promotion of products, customer dealing and customer relations.

*Agencies and contracting*

Intermediaries (brokers) have a duty of disclosure to insurance companies when effecting insurance on behalf of the assured. Section 22 of the IMA provides that the broker must disclose to the insurer every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance that in the ordinary course of business ought to be known by, or to have been communicated to, him or her; and every material circumstance that the assured is bound to disclose, unless it comes to his or her knowledge too late to communicate it to the agent.

The requirement of utmost good faith also extends to intermediaries since every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

Under Section 56 of the IMA, unless otherwise agreed, where a policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

In addition, Section 57 of the IMA provides that where a policy is effected on behalf of the assured by a broker, it acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

v **Claims**

Policies usually contain clauses imposing certain obligations regarding claims on the insured. Such obligations include the form of any claim that is to be made under the policy, such as certain particulars and details which should be provided. In addition, policies will often place a duty on the insured to give notice of his loss to the insurer or to advise of any potential claim under the policy, such as a claim from a third-party under a motor insurance policy.

**IV DISPUTE RESOLUTION**

i **Jurisdiction, choice of law and arbitration clauses**

The Rome Convention applies in Gibraltar under the Contracts (Applicable Law) Act 1993, although Articles 7(1) and 10(1)(e) of the Rome Convention do not have effect

in Gibraltar. Under Gibraltar law, parties have freedom to submit to their jurisdiction of choice or appropriate forum for disputes to be heard between them.

In terms of applicable law, where the parties have not exercised a choice of law under an insurance contract, the default position under the ICA is that the law applicable to the contract is the law of Gibraltar or of the EEA State, as the case may be, where the policy holder has his habitual residence or central administration within the territory where the risk is situated, whether in Gibraltar or in an EEA State. Therefore if a policyholder had their habitual residence in France and the risk was situated in France, the law of France could apply to the insurance contract by virtue of the above.

The ICA also provides that where no choice has been made, the contract shall be governed by the law of the country with which it is most closely connected and this is rebuttably presumed to be the territory in which the risk is situated, whether Gibraltar or an EEA State. In exceptional circumstances however, a severable part of the contract which has a closer connection with another country may, by way of exception, be governed by the law of that other country.

It is also common for arbitration clauses to be inserted into insurance contracts, particularly reinsurance contracts, whereby the parties agree for disputes to be heard in an arbitration forum rather than in the courts.

## ii Litigation

Generally, the common law and rules of equity from time to time in force in England apply in Gibraltar, to the extent applicable under Gibraltar law, and subject to such modifications as circumstances may require. The Civil Procedure Rules 1998 (CPR), introduced under the UK's Civil Procedure Act 1994, apply in Gibraltar and lay down the rules relating to *inter alia*, disclosure, assessment of costs, evidence and appeals.

Civil proceedings involving insurance matters would be heard at the Court of First Instance or the Ordinary (Chancery) Division of the Supreme Court (equivalent to that of the English High Court). The next highest court is the Court of Appeal. This court is composed of an odd number of judges but not less than three. The Chief Justice is an *ex officio* member of the Court of Appeal but may not hear appeals of his own decisions. The highest Court of Appeal for Gibraltar is the Judicial Committee of the Privy Council in London which hears appeals from the Gibraltar Court of Appeal.

## iii Arbitration

Gibraltar's Arbitration Act 1895 consolidates the law relating to arbitration and gives effect to international conventions relating thereto, such as the Geneva Convention or the New York Convention. This Act contains certain provisions relating to arbitrators, costs, and awards which are implied into all arbitration agreements, unless the agreement expressly provides for the contrary.

It is not uncommon for insurance contracts, especially high value reinsurance contracts to be inserted with arbitration clauses and these clauses can bind parties to arbitration institutions such as the UK ARIAS (Insurance and Reinsurance Arbitration Society). However, an arbitration award made in another jurisdiction would then need to be enforced in Gibraltar by way of application to the Supreme Court of Gibraltar.

**iv Alternative dispute resolution**

Alternative dispute resolution (ADR) is a well-known but perhaps underused option in Gibraltar, despite having numerous accredited mediators within the legal profession. The Gibraltar courts encourage ADR and mediation with the CPR making ample references to the advantages of avoiding litigation wherever possible.

**v Mediation**

The position in Gibraltar under the CPR with regard to mediation is analogous to that of the UK in that there is no legal obligation to use ADR, nor is there any detailed guidance as to how such a process would be directed. Disputes are therefore often deliberated between opposing legal advisors on a 'without prejudice' basis with a view to reaching out-of-court settlements.

**V YEAR IN REVIEW**

Gibraltar recently introduced the Financial Services (Information Gathering and Co-operation) Act, designed to strengthen the information gathering and cooperation powers of the FSC in relation to all licensees, not just insurance companies. The FSC has welcomed the harmonisation of their supervisory powers within a single piece of legislation, whereas previously there were significant divergences in this respect.

This year has also seen the FSC issue guidance regarding how often licensed firms' board meetings should take place and what form they should adopt.<sup>7</sup> This will provide certainty to existing insurance companies and prove useful to potential applicants wishing to structure their operation in compliance with the FSC's 'mind and management' requirements.

In the route to implementation of the Solvency II Directive, the FSC has published its 'Guidance Note on System of Governance – Insurance' based on guidelines issued by the European Insurance and Occupational Pensions Authority regarding corporate governance.<sup>8</sup> This measure is designed to ensure that both the FSC and insurance companies take active steps towards a consistent application of the Solvency II Directive's Pillar II requirements.

One very positive development announced by the government of Gibraltar has been the appointment of various senior executives to the Finance Centre Department to assist in the development of Gibraltar's financial services industry. Michael Ashton as one of these new senior development executives shall have special responsibility for business development in insurance. This is yet another sign of how committed the Gibraltar government is to the development of the insurance industry in Gibraltar.

Furthermore, the local insurance market can also rest assured that Gibraltar remains committed to remaining at the forefront of financial services regulation. It is to this end that Gibraltar has negotiated and signed a network of over 20 tax information

---

7 FSC Newsletter, No. 2, Year 2013, 'Frequency of Director's Board Meetings Held for Regulated Firms'.

8 FSC Insurance Guidance Note No. 14, 'System of Governance – Insurance'.

exchange agreements with OECD and EU Member States such as France, Germany, India, Italy, Ireland, the UK and the US. Gibraltar has also committed to entering into a Foreign Account Tax Compliance Act agreement with the US, which could have implications for local insurers considered to be 'Specified Insurance Companies' (as defined therein).

## **VI OUTLOOK AND CONCLUSIONS**

Gibraltar, along with the rest of the EU and further afar, eagerly awaits the implementation of the much-delayed Solvency II Directive, now expected to come fully into force no earlier than 1 January 2016. Accordingly, the FSC meets with insurers and reinsurers at least every six months in order to discuss preparations and monitor the steps being put in place by insurers for compliance with the new regime.

The 'pros and cons' of the Solvency II Directive are well documented, with the principle of 'proportionality' for example being of particular relevance to smaller sized players within the local market, such as captives. However, Gibraltar's body of insurance managers, which include two of the three leading global institutions, add expertise to the jurisdiction and offer local insurers ongoing guidance regarding Solvency II developments. In addition, the Gibraltar Insurance Association is highly active in this regard, having established a Solvency II subcommittee tasked with sharing knowledge between its members, organising seminars and courses, as well as liaising with the FSC.

Furthermore, one area which Gibraltar is keen to develop is that of the Insurance Linked Securities (ILS) market, a niche area that has experienced enormous global growth in recent years. The potential for the ILS market in Gibraltar cannot be underestimated given the apparent appetite for a new EU-compliant jurisdiction, in a market dominated by Bermuda and the Cayman Islands. The Gibraltar government has already commenced an industry-wide consultation process, particularly with a view to establishing a suitable framework for ILS offerings. Gibraltar already has the Insurance Companies (Special Purpose Vehicles) Regulations 2009 and Protected Cell Companies Act in place meaning that the first ILS set up in Gibraltar may not be too far off.

In addition, the Solvency II Directive should give insurers and reinsurers the possibility to use ILS SPVs in order to mitigate their capital requirements, as a form of 'alternative risk transfer'. ILS SPVs, if used in conjunction with Gibraltar's long-established PCC regime, could provide insurers with a much-needed form of relief in light of Pillar I's extensive capital requirements.

If established, the Gibraltar ILS regime could also have a positive effect locally across the entire financial services spectrum, particularly in terms of investment managers and advisors seeking alternative forms of risk transfer and investment for clients. A local ILS market could therefore complement Gibraltar's already-burgeoning investment management sector, particular following implementation of the Alternative Investment Fund Managers Directive. Marketing for ILS business is therefore likely to begin in earnest soon given Gibraltar's ability to develop this niche offering within its well-established EU financial services networks.

At a more general level, construction work on various delayed and new office developments is due to commence shortly, including the building of approximately

15,000 square metres of Category A office space in the form of a Gibraltar World Trade Centre. The anticipated influx of global companies ensuing from these developments over the coming years will no doubt continue to raise Gibraltar's international profile, with the local insurance market ready to meet all of their captive and other requirements. All in all, Gibraltar's attraction as an insurance domicile shows no sign of wavering given the jurisdiction's drive to improve regulation and develop new and exciting offerings, both at finance-centre level and within the insurance industry.

## Appendix 1

---

# ABOUT THE AUTHORS

### **PETER ALBERT ISOLA**

#### *Isolas*

Peter is recognised as an expert in financial services, corporate and trust law and has spoken at various conferences on corporate, trust, insurance and e-gaming matters. He is also Gibraltar's contributor to Tottel Publishing's *Planning and Administration of Offshore and Onshore Trusts* and Tottel Publishing's *International Succession Laws*.

Peter also specialises in gaming law and regulation and has been instrumental in the development of the law in this area. In addition to his advisory role, Peter is a director of various regulated entities involved in financial services including banking and insurance as well as telecoms and gaming.

As chairman of the local branch of the Society of Trust and Estate Practitioners, Peter has also addressed the annual Branch Chairmen Assembly of STEP in London, talking about the changes and impact of the Income Tax Act in Gibraltar which came into effect on 1 January 2011.

In addition to his numerous speaking events, Peter Isola has, in conjunction with Adrian Pilcher, written the Gibraltar chapter of *Private Client Tax – Jurisdictional Comparisons*, published by the European Lawyer reference series and in conjunction with Jonathan Garcia, the Gibraltar chapter of *Insurance & Reinsurance* for the same series.

### **CHRISTIAN JAMES CAETANO**

#### *Isolas*

Christian joined the Isolas commercial team in September 2008. He specialises in the fields of insurance and financial services, as well as advising in relation to gaming, e-commerce and mergers and acquisitions. Christian is also recommended by the *Legal 500* for his intellectual property practice.

In 2011, Christian undertook a six-month secondment within the Insurance Supervision Division of the Gibraltar Financial Services Commission (FSC), assisting

in licence applications, enforcement actions and in the transposition of the Solvency II Directive into Gibraltar law. During 2013, he was asked to return to the FSC on a short-term secondment in order to draft a proposal to the Gibraltar government for the establishment of a recovery and resolution regime within Gibraltar's financial services framework. Christian has also advised the Gibraltar Finance Centre in relation to its plans to position Gibraltar as an insurance linked securities jurisdiction within the European Union.

His recent transactions include advising in relation to the ongoing liquidation of two Gibraltar-licensed insurance companies, advising in relation to the first long-term insurance business transfer of a Gibraltar-based protected cell company (PCC) to a non-PCC entity, as well as advising in relation to a new general business insurer's application to the FSC.

### **ISOLAS**

Portland House, Glacis Road

Gibraltar

Tel: +350 2000 1892

Fax: +350 2007 8990

[peter.isola@isolas.gi](mailto:peter.isola@isolas.gi)

[christian.caetano@isolas.gi](mailto:christian.caetano@isolas.gi)

[www.gibraltarlawyers.com](http://www.gibraltarlawyers.com)