

It is often unclear as to how or why certain laws and rules apply in Gibraltar. Gibraltar occupies a unique position as a British Overseas Territory and as part of the European Union. What follows is an examination of the legal foundations of Gibraltar and the process by which matters become law in Gibraltar.

CONSTITUTIONAL POSITION IN RELATION TO THE UK

Gibraltar was ceded to “the Crown of Great Britain” in perpetuity by the Treaty of Utrecht in 1713, by virtue of this Gibraltar falls under the sovereignty of the United Kingdom.

Various terms have been used throughout Gibraltar’s history to refer to its status and relationship with the United Kingdom. However, under the provisions of the British Overseas Territory Act 2002 Gibraltar, along with other overseas territories, is termed a “British Overseas Territory”.

GIBRALTAR AND THE EUROPEAN UNION

Treaties of Rome

In 1972 the Crown, as a high contracting party on behalf of the United Kingdom, entered into the Acts of Accession Treaty (the “1972 Accession Treaty”). The 1972 Accession Treaty, in effect, made the United Kingdom (“UK”) a signatory to the Treaty Establishing the European Economic Community (1957) (“EEC Treaty”) and the European Atomic Energy Community Treaty (1957) (together the “Treaties of Rome”. These are the founding treaties of the European Community and form the basis of the UK’s membership.

Adoption of the Treaties into Domestic Law

Formally, the 1972 Accession Treaty was ratified and brought into UK law by an Act of parliament - the European Communities Act 1972 (the “EC Act”). Section 2(1) of the EC Act provides that rights, powers, liabilities and restrictions from time to time arising out of the 1972 Accession Treaty and other Treaties, are to be given legal effect in the United Kingdom.

Gibraltar as part of the EEC

Article 299(4)3 of the EEC Treaty provides that “the provisions of the EEC Treaty shall apply to the European territories for whose external relations a Member State is responsible”. As Gibraltar was and is a territory for which the United Kingdom is responsible, it formed part of the European Economic Community (renamed the European Community). As shall be seen, this also means that Gibraltar forms part of the European Union.

Development of the EEC, EC and the EU

In 1992 the Treaty on European Union (“TEU”) was signed in Maastricht. This was ratified by the Member States and formally the Treaty came into force on the 1 November 1993.

The TEU effected a number of changes:

- a. it brought into being the European Union (“EU”);
- b. it renamed the European Economic Community the “European Community”; and
- c. the EEC Treaty became known as the Treaty establishing the European Community (“TEC”).

With the creation of the EU the EC did not and does not cease to exist, rather the EC exists as a foundational part of the EU.

Customs; Free Movement; VAT; and CAP

Notwithstanding that Gibraltar is part of the EU, provisions relating to the Community Customs Territory, free movement of goods, Common Commercial Policy, Common Agricultural and Fisheries Policies and harmonisation of turnover taxes do not apply to Gibraltar.

GIBRALTAR CONSTITUTION

On the 30 November 2006 the people of Gibraltar voted, and accepted, a proposed Constitution (the 2006 Constitution). This new Constitution replaces the 1969 Constitution.

Formally, the mechanism by which the 2006 Constitution takes effect is an Order in Council and on the 14 December 2006 Her Majesty in Council made such an order “the Gibraltar Constitution Order 2006”. That Order provided that the Gibraltar 2006 Constitution was to come into effect on the date of publication in the Gibraltar Gazette.

Thus on the 28 December 2006 the new Constitution took effect.

GIBRALTAR LEGISLATURE

Under section 24 of the Constitution it is provided that there shall be a Legislature for Gibraltar. The Legislature consists of Her Majesty and the Gibraltar Parliament. Subject to the provisions of the Constitution the Legislature is empowered to make “laws for the peace, order and good government of Gibraltar”.

Subject to a general exception (below) the process of making laws is by bills passed by the Parliament and assent by the Governor or Her Majesty. The laws made by the Legislature are styled as “Acts” and the Legislature is specifically empowered to make retrospective laws and delayed effect laws. Although no law made by the Legislature may come into operation until it has been published in the Gazette.

The general exception (referred to above) is that the Governor possesses special legislative powers on certain areas of responsibility (including external affairs, defence, internal security, etc) and he may enact legislation unilaterally, in certain circumstances.

COMMON LAW

Common Law & Equity

Under the English Law (Application) Act the “common law and the rules of equity from time to time in force in England shall be in force in Gibraltar...subject to such modifications thereto as such circumstances may require”.

According to the English Law (Application) Act the common law and rules of equity may themselves be modified or excluded by:

- a. any Order of Her Majesty in Council which applies to Gibraltar;
- b. any Act of Parliament at Westminster which applies to Gibraltar or applies by express or necessary implication; and
- c. Any Act (made by the Legislature or Governor).

The Act also provides that where the common law and the rules of equity are at variance, the rules of equity prevail. This reflects the position within the UK.

ENGLISH ACTS

The English Law (Application) Act (the “Application Act”) applies certain laws of England to Gibraltar. These English Acts are listed in the schedule to the Act. By express provision these Acts continue to apply in Gibraltar notwithstanding that they may have been repealed by the Parliament at Westminster. There are circa 100 English Acts applied to Gibraltar under the Application Act, in whole or in part, and they stem from the whole history of England (covering the period 1267 – 1972).

The English Law (Application) Act also goes on to list other Acts which have been applied to Gibraltar by Order in Council, and Acts of Parliament at Westminster that have been disapplied to Gibraltar since 1962. These lists are detailed in appendices to the Act, however, neither list is authoritative, and as the notes make clear: the lists are published for convenience only.

These are not the only English Acts that Gibraltar applies, and, as stated earlier, Parliament at Westminster may apply legislation to Gibraltar.

EU LEGISLATION

The EU is able to formulate three types of binding instrument: regulations, directives, and decisions.

Regulations

Regulations have general application and are directly applicable. They are rules that become immediately enforceable as law in all member states. In essence, regulations are self-executing laws i.e. they come into effect without further action by Gibraltar.

Directives

Directives are binding upon member states. That is to say Member States are directed to implement a certain rule, and the Member States has autonomy over the form of implementation. If a Member State fails to implement directives then in certain situations the Directives themselves may take effect. This is known as direct effect and for it to occur certain criteria (Van Gend En Loos criteria) have to be satisfied.

Decisions

A decision is a binding instrument which is not of general application, and only applies to the addressee of the decision (be it Member States, companies or individuals).

SPECIAL & NOTABLE SITUATIONS

Civil Procedure Rules

The Civil Procedure Rules (CPR) apply in Gibraltar by virtue of section 38A(1) of the Supreme Court Act, which states that “the Civil Procedure Rules made...under the Civil Procedure Act 1997 in England and Wales shall apply in Gibraltar with such modifications...as the circumstances in Gibraltar may require.”

Non-Contentious Probate Rules

The Non-Contentious Probate Rules 1987 also apply in Gibraltar. These apply by virtue of their application under the CPR. Part 57, Practice Direction, Rule 1.2 states that “the rules and procedure relating to non-contentious probate proceedings (also known as “common form”) are the Non-Contentious Probate Rules 1987 as amended.”

Merchant Shipping Acts

It is also worth noting the application of the English Shipping Acts given Gibraltar’s substantial maritime interests. The Gibraltar Merchant Shipping Act contains a provision at section 221 that all the provisions of the Merchant Shipping Acts (1894 – 1986 and any Acts that repeal or amend those Acts) apply to Gibraltar in all matters relating to shipping and seamen that are not expressly provided for by the Gibraltar Act itself.

SPECIAL & NOTABLE SITUATIONS

Precedent

The Magistrates Court is bound by precedent set by all higher courts. Similarly, the Supreme Court in Gibraltar (equivalent to the High Court in England) is bound by judgments of the Court of Appeal for Gibraltar (first point of appeal) and judgements of the Judicial Committee of the Privy Council (ultimate court of appeal).

Strictly, lower courts are only bound by superior courts to the extent of the rationale for the higher court's decision (the ratio decidendi of the case). Thus lower courts may depart from higher court's decisions where the relevant aspect of the decision of the higher court was not central to its decision (obiter dictum) or where the facts of the lower court's case differ in some significant fashion causing a superior rule of law to supervene. This doctrine of binding precedent is known as stare decisis and forms part of the basis of the Common Law.

The decisions of many courts can form influential precedent and decisions of English Courts, courts of other Common Law territories, and the courts of other territories, form guiding precedent that the Gibraltar Courts will look to follow. Of course the weight attached to such precedent varies in relation to the eminence of the authority making the decision and its connection to the Common Law: thus decisions of the Supreme Court of England and Wales will create highly persuasive precedent while decisions of lower courts (and by extension those of other territories) creates precedent, the persuasiveness of which varies as a function of the cogency of the judgement and the position of the court making the judgement within its system legal hierarchy.

EU Courts

Formally matters with a European dimension can be referred to the EU Courts. The doctrine of precedent still stands however, and lower courts should look to their superior national courts for how to interpret questions of European law. Only courts of final appeal are bound to refer a question of EU law when such questions are raised.

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