

**THE LEGAL SYSTEM
OF GIBRALTAR**

by

JAMES LEVY, LL.B.

**J.A. Hassan & Partner
Barristers-at-Law
Gibraltar**

CHAPTER FOUR (A)

THE LEGAL SYSTEM OF GIBRALTAR

TABLE OF CONTENTS

- § 1.1. Introduction**
- § 1.2. Constitution, Government and the Legal System.**
- § 1.3. Economy.**
- § 1.4. Local Fiscal Position.**
 - § 1.4 (A). Personal Taxation.
 - § 1.4 (B). Corporation Tax.
 - § 1.4 (C). Exempt Companies.
 - § 1.4 (D). Qualifying Companies.
 - § 1.4 (E). Estate Duty.
 - § 1.4 (F). Stamp Duty.
- § 1.5. Trusts.**
- § 1.6. Partnership.**
 - § 1.6 (A). In Summary.
 - § 1.6 (B). Double Taxation Treaties.
 - § 1.6 (C). Anti-Avoidance Provision.
 - § 1.6 (D). Capital and Indirect Taxes.
 - § 1.6 (E). Exchange Control Regulations.
 - § 1.6 (F). Company Legislation and Structure.
- § 1.7. Banking.**
- § 1.8. Insurance.**
- § 1.9. Development Aid.**
- § 1.10. The Uses of Gibraltar.**
 - § 1.10 (A). In Summary.
 - § 1.10 (B). Inward Investment into Spain.
 - § 1.10 (C). Employment Companies.
 - § 1.10 (D). Trusts.
 - § 1.10 (E). Trading in Free Zone of Tangier.
 - § 1.10 (F). Financial Service Companies in Spain.
 - § 1.10 (G). Offshore Funds.
- § 1.11. Costs.**

CHAPTER FOUR (A)

THE LEGAL SYSTEM OF GIBRALTAR*

§ 1.1. Introduction.

The 'Rock' of Gibraltar has an area of two and a quarter square miles and is connected by a narrow isthmus to the southern coast of Spain. The thirty thousand strong population are bi-lingual, but the official language is English and the official currency the pound Sterling, with both UK and Gibraltar notes in circulation.

For many years it has been the subject of contention, with Spain claiming sovereignty, but recently Britain and Spain have agreed to negotiate on all their differences over Gibraltar. Relations between Gibraltar and Spain have greatly improved, and, particularly since the opening of the frontier in February 1985, the local economy has advanced considerably. In particular Gibraltar has, with the active encouragement of the authorities, developed as a financial center, with a number of major international banks and accountancy firms now represented and offering a full range of financial and commercial services. The legal profession consists of solicitors and barristers who have qualified in the United Kingdom and their number is increasing steadily.

Telecommunications between Gibraltar and the rest of the world are excellent and it is a valuable port of call for shipping lines. Since the re-opening of the Spanish frontier the airport has become increasingly important, and it is hoped that, in due course, other international airlines will be attracted to its use and that flights will connect with international traffic.

§ 1.2. Constitution, Government and the Legal System.

Constitutionally, Gibraltar is a Crown colony with internal self-government on domestic matters, and with the UK being responsible for defence, foreign affairs, financial stability and internal security. It has its own House of Assembly, which consists of fifteen elected members and two nominated members. The government is called the Council of Ministers and consists of the Chief Minister and not more than eight other ministers, who are responsible for 'defined' domestic matters such as trade, economic development, education, public works and services, housing, etc. 'Non-defined' domestic matters, i.e. those involving local and UK interests and grey areas not specified in the constitution, are discussed by the Gibraltar Council, consisting of the Governor, the Chief Minister, four Ministers, the Deputy Governor, the Attorney General, the Financial and Development Secretary and the Deputy Fortress commander.

Gibraltar has its own legal system, similar to that of the United Kingdom and based on English common law but with its own statutes, termed ordinances, which are passed by the House of Assembly. Some English Acts are extended to Gibraltar by Order in Council, others are enacted as ordinances and certain non-contentious legislation, such as areas of trust law, is applied directly by the House of Assembly under the Application of English Law Ordinance. Certain appeals go to the visiting Court of Appeal and then to the Privy Council in London.

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§ 1.3. Economy.

The full opening of the frontier with Spain in February 1985 has led to an increase in tourism and investment, and large international companies are linking with those resident in Gibraltar to build hotels, office blocks and other commercial and residential accommodation.

The 'Rock' has long been known for its port and dockyard facilities and although, following defence cuts, the naval dockyard was closed in 1984, the British government granted aid of over thirty million pounds for the conversion of the naval dockyard into a ship repair operation, Gibraltar Ship Repair Limited, which is now beginning to attract substantial international business.

Gibraltar became an associate member of the EEC when the UK joined in 1972 and is included for all matters except value added tax, the customs union and the common agricultural policy. Although there are immigration controls, both EEC and Commonwealth residents can apply to live and work in Gibraltar provided that they have independent means or an offer of employment.

Trades unions are in evidence, most of them branches of the UK unions, with the largest being the Transport and General Workers Union. The co-ordinating body is the Gibraltar Trade Council.

§ 1.4. Local Fiscal Position.

Gibraltar tax legislation is basically modelled on UK income tax legislation in the early 1950's, although there have been many amendments to cover recent developments in income tax. The Gibraltar tax year runs from 1 July to 30 June.

§ 1.4 (A). Personal Taxation.

Income tax is payable for each year of assessment upon the income of any person accruing in, derived from, or received in Gibraltar in respect of:

- (a) gains or profits from any trade, business, profession or vocation for whatever period of time such trade, business profession or vocation may have been carried on or exercised;
- (b) gains or profits from any employment including (subject to any deductions which may be a admissible) allowances, perquisites or benefits in kind;
- (c) dividends, interest, discounts;
- (d) any pension, charge, annuity, maintenance or alimony;
- (e) rents, royalties, premiums and any other profits arising from property; and
- (f) the income of any person from the occupation of premises for residential purposes.

Additionally, income tax is payable for each year of assessment upon the income in respect of dividends, interest, pension or emoluments of office accruing in, derived from or received in any place other than Gibraltar of any person ordinarily resident in Gibraltar. However, where the commissioner of Income Tax is satisfied that such dividends, interest, pension or emoluments of office have actually borne income tax or tax of a similar nature in the country where they have accrued, then he may exempt from payment of tax in Gibraltar only such part of such dividends, interest, pension or emoluments of office as has been proved to his satisfaction not to have been received in Gibraltar. For the purposes of income tax it is sufficient to constitute receipt of income in Gibraltar from sources outside Gibraltar if, notwithstanding the absence

of an actual remittance or transfer of income (or property being proceeds of income), a person assessed has, by virtue of any act or arrangement made by him or on his behalf, obtained a benefit in Gibraltar equivalent to the receipt by him in Gibraltar of income arising outside Gibraltar.

Gibraltar's standard rate of tax for individuals is 30 per cent, rising to a maximum of 50 per cent on taxable income in excess of £19,500. A reduced rate of 20 per cent applies to the first £1,500 of taxable income.

There are personal allowances for individuals, their spouses and a child, and for taxpayers in special situations such as one parent families and handicapped persons. There is also relief in respect of life insurance premiums and mortgage interest. Businesses, including companies, also have deductions under the relevant Ordinance.

There is also a deduction system on amounts paid by construction industry contractors to sub-contractors, unless the sub-contractor obtains a tax exemption certificate enabling the contractor to pay the amount owed in full, in which case the sub-contractor would account for any profits in his own income tax return.

Relief is given on interest paid on capital provided the capital on which that interest is paid has been employed to produce income for the taxpayer. Interest (other than bank or building society interest referred to below) paid to non-residents is subject to a 30 % withholding tax (35% if paid to a non-resident corporation), except for various Development Aid Concessions which are referred to below.

In the case of a person who is only temporarily resident in Gibraltar for less than 6 months in any tax year, any income remitted to Gibraltar is not liable to income tax.

Gibraltar operates a pay as you earn system, modelled on the UK system. Income paid within the pay as you earn system is assessable on the current year basis, but trading and professional profits are assessable on the preceding year basis.

Company tax in Gibraltar is at the rate of 35 per cent. However, there are no limits by law on the level of directors' salaries, other than a general requirement that they be based on actual work done by the directors. There is no special taxation legislation relating to 'close' companies. Further, the concept of mutuality is not recognised in Gibraltar tax legislation.

However, income and profits of the business of a company carried on wholly outside Gibraltar, which do not accrue in and are not derived from or remitted to Gibraltar, do not attract tax within Gibraltar provided the company is managed and controlled outside Gibraltar by non-residents of Gibraltar.

With regard to management fees, where any payment is due under an agreement for management or consultancy services, or services of a similar nature, to an individual who is not ordinarily resident in Gibraltar, or to a Company whose principal place of business is not in Gibraltar, the person responsible for making such payment is required, before payment is made, to deduct therefrom tax at the standard rate in the case of an individual and, in the case of a company, company tax. The commissioner of Income tax has a discretion either to exempt a taxpayer from having to deduct such tax or to refund any such tax paid if the relevant agreement is to be performed other than in Gibraltar and he is satisfied that the payment will bear income tax or tax of a similar nature in the Territory where the agreement has been or is to be performed.

§ 1.4 (B). Corporation Tax.

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§ 1.4 (C). Exempt Companies.

Gibraltar's main offshore vehicle is the exempt company, registered under the Companies (Taxation and concessions) Ordinance. Such a company may either be incorporated in Gibraltar under the Companies Ordinance (a 'Gibraltar Company') or incorporated in any other country and registered in Gibraltar as an overseas company (an 'Overseas Company'). A Gibraltar Company can be ordinarily resident in Gibraltar for income tax purposes and only pay £225 per annum on a flat rate basis regardless of profits. Gibraltar Companies which are not ordinarily resident in Gibraltar for tax purposes pay a £200 flat payment per annum in respect of tax regardless of profit. In the case of the Overseas Company it pays tax at an annual rate of £300 regardless of profit. The tax is payable in advance in two six-monthly installments on 1 April and 1 October in each year. A company which fails to pay the tax 30 days after its due date automatically ceases to be an exempt company and will only be reinstated on payment of a penalty of £25.

These companies are termed 'exempt' companies because they qualify for certain exemptions from income tax, estate duty and stamp duty. The exempt company, to qualify as such, must at all times have a paid-up share capital of not less than £100 or the foreign currency equivalent thereof. Gibraltarians or residents of Gibraltar may not hold any beneficial interest in any shares of an exempt company. Additionally, the Gibraltar Company must keep its register of shares within Gibraltar, and the Overseas Company must keep a true copy of its register of members in Gibraltar. The Memorandum or Articles of Association must include this restriction in the case of a Gibraltar Company. Gibraltarians can, of course, hold shares as nominees and trustees, and can also act as directors of exempt companies. The advantage of this is that one can have management and control of an exempt company in Gibraltar. It also enables residents of Gibraltar having expertise in a relevant business or trade to be appointed to the Board of Directors of the relevant exempt company, ensuring that the exempt company has that expertise in its Board to take decisions in Gibraltar.

Gibraltar is one of the few finance centers in Europe which can also be used by Overseas Companies requiring a seat of actual management and control without incurring a tax liability other than the £300 per annum referred to above. The exempt company may operate from Gibraltar and have an office and staff in Gibraltar but cannot, without prior consent from the Financial and Development Secretary, transact any business with Gibraltarians or residents of

Gibraltar (except in the case of other exempt companies and qualifying companies (see below)). If, with such consent, an exempt company does, however, undertake any business with Gibraltarians it must pay local company tax on the profits deriving from such transactions. An exempt company may invest in Gibraltar subject to similar conditions.

Shares in, loans made to, debentures held in or life assurance or annuity policies issued by an exempt company are free from estate duty in Gibraltar, provided that no Gibraltarian or resident of Gibraltar has any interest in them, or that such debentures or loans are not secured upon immovable property within Gibraltar. Remuneration, dividends and all other payments received by a non-resident from exempt companies are free from any form of Gibraltar taxation and there is therefore no requirement for tax to be deducted at source. Public companies can be registered as exempt companies.

Consent is required to transfer shares in an exempt company. This is usually a mere formality provided suitable references are supplied in respect of the transferee. If, however, the shares of an exempt company are registered in the name of trustees, no consent is required for the acquisition (by transfer, sale or otherwise) of an interest by a new or substituted beneficiary under the trust administered by the said trustees, provided that the exempt company does not, in the course of its trade or business, accept deposits of money or other assets from the public or a section of the public. Furthermore, the Financial and Development Secretary has a right to intervene if it comes to his notice that the beneficiary under a trust is a person or entity which would not have been acceptable to him as a shareholder on an application for an exemption certificate.

An exempt company may not alter its Memorandum and Articles of Association without the previous sanction of the Financial and Development Secretary, which is usually given if the change does not affect the conditions imposed by the ordinance. This also applies to a change of name or an increase of capital. Application for the issue of a Certificate granting a company exempt status is made to the Financial and Development Secretary. The application must contain certain basic details of the company and must be accompanied by a reference from a bank and a lawyer or a qualified accountant in respect of the beneficial shareholders. The Financial and Development Secretary and his department are bound to secrecy by law in respect of any information so provided. A search at the Companies Registry of Gibraltar will disclose that a particular company has been incorporated, but it does not necessarily disclose that it has been granted an exemption certificate.

§ 1.4 (D). Qualifying Companies.

This is a new concept in the development of Gibraltar as a finance center. A qualifying company can be one incorporated in Gibraltar or registered as an Overseas Company (see above under heading *Exempt companies*) under Part IX of the companies Ordinance. In order to be registered as a qualifying company and to keep such registration, no Gibraltarian nor resident of Gibraltar can hold a beneficial interest in its shares. The paid-up share capital must be £1,000 or the equivalent in foreign currency. The same provisions on Register of Shares apply for qualifying companies as for exempt companies. A qualifying company must deposit £1,000 with the Gibraltar Government as security for future taxes. The fee for obtaining a qualifying certificate, which is valid for 25 years, is £250. The tax payable on the profits of a qualifying company is 17 per cent on income remitted to Gibraltar and 2 per cent on income not so remitted. Directors' fees of non-resident directors and annual payments made by a qualifying company to a non-resident are subject to a 2% withholding tax. Dividends declared by such companies are subject to the deduction of withholding tax at the same rate as the

company is liable to pay. Interest paid by a qualifying company to a non-resident of Gibraltar on a loan is not liable to Gibraltar withholding tax.

As will be seen, qualifying companies have two rates of tax, 2% on income not remitted to Gibraltar and 17% on income remitted to Gibraltar. The reason for having two rates of tax is that the higher rate, now 17%, was originally introduced with a view to ensuring that the qualifying company paying it would not come within the UK controlled above). The rate has been reduced from 27% as the UK corporation tax rate has been successively reduced.

§ 1.4 (E). Estate Duty.

Although Gibraltar has no equivalent to the previous UK capital transfer tax, it still retains the old estate duty, which stands at 5% for an estate of £10,000 and rises gradually to a maximum of 25 per cent after £100,000. There is marginal relief in respect of an estate falling between the relevant percentages of the scale.

Estate duty is payable on all property whether settled or otherwise which passes on death. On the death of a person who is domiciled in Gibraltar, estate duty is payable on all real and personal property situate in Gibraltar and on the deceased's world-wide personal property. Under the Estate Duties Ordinance, estate duty is not payable in respect of real property situate outside Gibraltar even if the deceased was domiciled in Gibraltar. This property is, however, taken into account in the aggregation of the estate of the deceased to determine the rate of duty aggregation of the estate of the deceased to determine the rate of duty payable. Conversely duty is payable on the estate of a person who is not domiciled in Gibraltar on assets situate in Gibraltar (except shares and loans in an exempt or qualifying company and certain property deposited with banks or building societies). Relief is granted in certain cases where, on the death of one party to a marriage, estate duty has been paid or is payable in respect of settled property. There is also relief in respect of deaths in quick succession within five years on an estate consisting of land or business.

Gifts *inter vivos* of any property, made within a period of three years or more prior to death, render that property free from estate duty.

No duty is payable in respect of any property passing on the death of a non-resident person (not being property in the form of securities or other documents of title relating to property otherwise situated in Gibraltar) which is held on deposit in Gibraltar in any bank or building society. A non-resident person does not include any person who, immediately prior to his death, was treated as liable to taxation in Gibraltar by any rules made from time to time by the Governor in Council.

§ 1.4 (F). Stamp Duty.

Stamp duty is levied on legal documents transferring title to assets. It is payable on every document relating to assets situate in Gibraltar and in respect of documents executed in Gibraltar relating to assets wherever situated.

In transfers and conveyances, the *ad valorem* stamp duty is charged on a sliding scale, reaching a maximum of 63 pence per £50 or part thereof where the consideration exceeds £500. Stamp duty is also levied on legal charges at a rate of 13 pence per £100. There are certain exemptions from stamp duty for unit trusts, life assurance policies and exempt companies, discussed later.

Life assurance policies, including annuities issued by an exempt insurance company, are not liable to any stamp duty in Gibraltar, even if they be executed and kept within Gibraltar. Any

mortgage, charge or assignment of such policies is also free from stamp duty.

Unit trusts have been afforded stamp duty exemption in relation to issue and transfer of units on payment of an annual flat fee of £1,000.

All exempt and qualifying companies and non-resident trusts are relieved of liability to pay stamp duty in respect of any assets transferred by them. Furthermore, no stamp duty (other than nominal duty on authorized capital as referred to below) is payable on any document relating to the issue, allotment, renunciation, transfer, assignment or disposition of shares in exempt or qualifying companies. This new exemption from stamp duty was enacted by the Finance Ordinance 1987. Nominal duty at 1/2% is payable on the authorized capital of exempt and qualifying companies and non-resident trusts if it relates to the transfer of immovable property in Gibraltar.

§ 1.5. Trusts.

As Gibraltar law is based on English law, it recognizes and gives full legal effect to the concept of a trust. In fact the Trustee Ordinance, which is the main governing Ordinance, is based almost entirely on the Trustee Act 1893 in the UK. There have been amendments to the Ordinance, and the Variation of Trusts Act 1958 applies to Gibraltar. Trust law is therefore well established and very much an integral part of the legal system.

The concept of a discretionary trust is known and freely utilized in Gibraltar. One would hardly notice the difference between a Gibraltar trust deed and an English one.

The provisions of the Perpetuities and Accumulations Act 1964 in the UK apply to Gibraltar with some amendments. The perpetuity period is one hundred years, and the accumulation period has also been increased to one hundred years.

Trustees can be either persons or corporations, and under the provisions of the Trustee Ordinance the personal representative of the last surviving trustee has power to appoint additional trustees if the instrument does not make provision for such appointment. Units trusts can be set up in Gibraltar.

The income of a trust created by a non-resident of Gibraltar is exempt from Gibraltar tax even if the trustees are resident in Gibraltar. This concession requires that, under the provisions of the trust deed, no Gibraltarian or resident of Gibraltar is or may be a beneficiary thereof. Furthermore it requires that the income of the trust either accrues in, or is derived outside, Gibraltar, or in the case of income received by the trust in Gibraltar would, if it had been received directly by the beneficiary, not be liable to tax.

Under recent legislation exemption has been granted from estate duty in respect of interests held by non-residents in Gibraltar trusts. Some difficulties have been encountered in respect of the setting up of accumulation and maintenance settlements in Gibraltar. In the first instance, section 31 of the Trustee Act 1925 does not apply since trust legislation in Gibraltar is based on the 1893 Act. Furthermore, the exemption from income tax referred to above is worded in such a manner that it cannot be ascertained with certainty that the beneficiaries will take at the age of 26 as required by the taxation legislation. This matter is being looked into, and it is expected that amendments will be made to the legislation to cover this particular problem.

§ 1.6. Partnership.

§ 1.6 (A).. In Summary.

Apart from corporate and individual status, the other common type of trading arrangement

in Gibraltar is a partnership. This can be created simply by the execution of a deed by all the partners concerned, although there is no specific requirement in law for the registration of such deeds. The partnership may also be carried on by simple mutual verbal agreement. The Partnership Ordinance in Gibraltar is based on the Partnership Act in England.

If the partnership has a place of business within Gibraltar, and carries on business under a name which does not consist of the true names or surnames of all the partners, the name must be registered under the provisions of the Business Names (Registration) Ordinance. Registration is a simple procedure involving the filing at the Registry of Business Names at the Supreme Court of the prescribed form, containing particulars regarding the name of the business, its general nature and principal place of trading, and the names of the persons comprising the partnership. This form has to be filed within fourteen days of the commencement of the business. The only charge is a £10 filing fee. Changes in the particulars submitted must be filed at the Registry. Partnerships within Gibraltar are not treated as separate legal entities for taxation purposes. The partners are taxed on their share of the partnership profits, and non-resident partners do not enjoy any special exemption from Gibraltar tax similar to that accorded to exempt companies and their shareholders. However, if the partnership business is conducted outside Gibraltar, the profits are not liable to tax provided that they do not accrue in, are not derived from, or are not remitted to Gibraltar. Limited partnerships can also be formed in Gibraltar but must be registered under the Limited Partnerships Ordinance.

A company can register a business name if it is trading under such a name and it is not the name of the limited company. This is also done by the filing of a simple form at the Registry of Business Names.

§ 1.6 (B). Double Taxation Treaties.

No double taxation treaties exist between Gibraltar and any country in the world, although double taxation relief is in practice granted on a reciprocal basis in respect of certain UK and commonwealth income. This means that there is no disclosure between the local Revenue and any other Revenue authority in the world.

§ 1.6 (C). Anti-Avoidance Provision.

Gibraltar does not have sophisticated legislation for anti-avoidance. However, under section 12 of the Income Tax Ordinance, the Commissioner has power to disregard transactions if he feels that these are designed purely to avoid tax and are artificial in their purpose. Initially it was thought that this section did not provide much assistance to the Commissioner, since it would be difficult for him to prove that a transaction was just designed to avoid tax.

In view of recent case law in England, culminating in the case of *Furniss v Dawson*, local practitioners believe that this provision, which has in fact seldom been used by the authorities, could become much more effective. Although there is no formal clearance procedure, the Commissioner of Income Tax will give clearance to a particular transaction if a professional adviser feels that he may have any difficulty under the legislation.

§ 1.6 (D). Capital and Indirect Taxes.

Gibraltar does not have any investment income surcharge, capital gains tax, value added or sales tax or capital transfer tax. There is a varying scale of import duties for different merchandise, with relevant drawback concessions with a lower rate of duty applying in respect of goods imported for re-export, together with bonded store concessions for such merchandise.

§ 1.6 (E). Exchange Control Regulations.

Following the removal of all exchange controls in 1979 in the UK, the Government of Gibraltar likewise removed all exchange controls for operate bank accounts in any foreign currency and may purchase any real and personal property anywhere in the world without restriction. The Government of Gibraltar has not yet made any public statement of its stance in the event of the UK re-introducing exchange controls. However, it is believed that Gibraltar would not be part of any exchange controls introduced in the UK, particularly now that the border with Spain is open. In any event it is assumed that the whole matter would depend both on the circumstances in which Gibraltar found itself at the time, and on the form which such exchange controls might take.

§ 1.6 (F). Company Legislation and Structure.

The Gibraltar Companies Ordinance is based almost entirely on the Companies Act 1929 in England.

Company formation of any type takes between two days and a week, depending on whether standard or special types of Memorandum and Articles of Association are required, and on the approval of the proposed name by the Registrar of Companies. The Registrar has power in certain circumstances to refuse the registration of a company or to direct that a company change its name.

A company may change its name by special resolution and with the approval of the Registrar. There are four types of company that can be incorporated in Gibraltar.

- (a) A company limited by shares.
 - (b) A company limited by guarantee and having a share capital.
 - (c) A company limited by guarantee and not having a share capital.
 - (d) An unlimited company with or without a share capital.
- (Only companies having a share capital can apply for an exemption or qualifying certificate.)

The essential requirements for the incorporation of a private company limited by shares are a minimum of two subscribers; a minimum sum of £100 for the authorized share capital (issued and paid up in the case of an exempt company, and £1,000 in the case of a qualifying company); approval of the proposed name by the Registrar of Companies; and a registered office within Gibraltar. Under the Gibraltar legislation only barristers or acting solicitors of the Supreme Court of Gibraltar may incorporate companies for gain. Duty is payable on authorized share capital at half per centum. The other statutory requirements which have to be met by a company within Gibraltar are the filing of notices relating to the situation or registered office and changes thereof; the allotment of shares; the appointment of or changes in directors; and the registration of certain mortgages and charges, including a mortgage or charge on real property, ships and book debts. An annual return must also be filed stating the address of the registered office, and containing details of the share capital, showing the amount called up on share, and the total amount of indebtedness in respect of mortgages and other charges registered, together with the names and addresses of the actual directors and shareholders of the company. Every company has to submit an annual return, the first within fifteen months of incorporation and thereafter once in every year. The distinction between public and private companies is basically the same as in England and private companies for the purpose of the Ordinance are companies which

by their Memorandum or Articles:

- (a) restrict the transfer of shares; and
- (b) limit the number of their members to fifty, not including persons who are in the employment of the company and persons who, having formerly been in the employment of the company, were while in that employment, and have continued after the termination of employment being, a member of the company; and
- (c) restrict the right of the public to subscribe for any shares of the company.

There is no duty on any company other than a public company to file accounts at the Companies Registry. This is at present under review, since the EEC directives on company law require that certain types of private companies should file accounts. Since Gibraltar is part of the EEC these directives apply to Gibraltar, but they have yet to be implemented locally. The annual cost of maintaining the company depends primarily on the amount of work involved. Registered office fees and minimum secretarial services (including the filing of all necessary notices and annual returns) are also charged on a time basis. The provision of additional facilities in the form of local directors and management will increase the annual maintenance costs.

A Gibraltar company may alter its Articles of Association by special resolution, but any alteration to its Memorandum requires the sanction of the Supreme Court of Gibraltar. In fact the entire Companies Ordinance is at present being reconsidered with a view to amending the same in order to comply with the relevant EEC directives applicable to Gibraltar. This will require a major redraft of the existing Ordinance, and this is expected to be done in the near future. An increase of the capital of a company is effected by ordinary resolution but a reduction of its capital must also have the sanction of the Court.

The Articles of Association of a Gibraltar company limited by shares follow closely Table A of the Ordinance, which is identical to Table A of the 1929 Companies Act in England. Table A of the Companies Act 1948 is a guide to its counterpart in the Companies Ordinance of Gibraltar and one can hardly distinguish between a set of Memorandum and Articles of a Gibraltar company and those of its English counterpart.

Overseas companies may be registered in Gibraltar under Part IX of the Companies Ordinance if they are operating in the territory. For such registration the company has to file a notarized or suitably certified copy of its Memorandum and Articles of Association, a list of directors, and the name and address of the person authorized to accept service on behalf of the company in Gibraltar. These companies can now register as exempt and qualifying companies.

One salient point in the Companies Ordinance is that, in accordance with the 1929 Companies Act, the capital reserve account and share premium account can be reduced without having to make an application to the Court. It is not considered as a reduction of the share capital of the company as is the case under the Companies Act in England. However, unlike in England, a Gibraltar company cannot in any circumstances purchase its own shares. The procedure for liquidation of companies is very similar to that of the UK. A company may be wound up by the court if:

- (a) it has by special resolution resolved that the company be wound up by the Court;
- (b) default is made in delivering the statutory return to the Registrar or in holding the statutory meeting;
- (c) it does not commence its business within a year from its incorporation, or suspends its business for a whole year;

- (d) the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven;
- (e) it is unable to pay its debts; or
- (f) the Court is of the opinion that it is just and equitable that the company should be wound up.

§ 1.7. Banking.

There are twelve major international banks operating from Gibraltar, one of them having three branches. Three others have been authorized to commence business in 1988. Additionally, there are two private banks. The enactment of the Banking Ordinance in 1983 has resulted in a system of regular banking supervision. In order to set up in Gibraltar a bank must have a presence in the territory. There must be at least two persons, resident in Gibraltar and approved by the Banking Supervisor, with sufficient banking expertise to manage the business of the bank. The Banking Supervisor will allow the managers to live in the Spanish hinterland provided that this is within travelling distance to enable them to be present on a daily basis during banking hours. There are wide powers for the protection of depositors and the regulation of capital reserves and business of the bank. Gibraltar is encouraging applications, mainly from major international banks.

There are two types of licenses to operate banks. The full class 'A' licence is issued to a bank undertaking business with Gibraltarians or residents of Gibraltar. Such banks can also undertake all types of international banking business. There is also a limited class 'A' licence for deposit-taking institutions transacting business in the local market.

The other licence is the class 'B' licence. This entitles the bank to deal only with customers who are not Gibraltarians or residents of Gibraltar. The same provisions for full and limited licenses apply in respect of Class 'A' and 'B' licenses.

The main criteria for the issue of a licence is the reputation and expertise of the shareholders and the directors and managers of the proposed bank. The paid-up share capital and reserves required for a full class 'A' or class 'B' licence is £1,000,000 (or the equivalent in foreign currency). The minimum capital and reserves required for a limited class 'A' or class 'B' licence is £250,000 (or the foreign currency equivalent).

Companies can, however, undertake investment business and use the work 'Trust' in their names with the consent of the Banking Commissioner (which consent is usually granted to bona fide applicants subject to certain safeguards for proper management and accounting). Upon application to use the work 'Trust' the authorities are careful that no business which is outright banking or akin thereto will be undertaken by the company, and in fact a condition to this effect is stipulated when granting the consent.

§ 1.8. Insurance.

Gibraltar has gone through a transitional period, moving from inadequate insurance legislation to legislation in keeping with its status as a member of the European Economic Community.

On 26 February 1987 the Insurance Companies Ordinance 1987 became law in Gibraltar.

As Gibraltar forms part of the EEC, having joined through Great Britain under the Treaty of Rome, Gibraltar insurance legislation has been drafted in such a way as to embody EEC directives on insurance. The incorporation of these directives will enable Gibraltar licensed insurers to operate within the EEC member states.

Supplementary to the Ordinance, two sets of Regulations have been passed:

- (a) The Insurance Companies (Solvency Margins and Guarantee Funds) Regulation 1987; and
- (b) The Insurance Companies (Prescribed Particulars) Regulations 1987.

The Solvency Margin Regulations have to be read in conjunction with the Ordinance, and they deal with the funding aspects. The Gibraltar Authorities have moved away from the concept of share capital and are now requiring to be satisfied in respect of the liquidity of the entity seeking registration in Gibraltar. Every registered insurer will have to maintain a minimum guarantee fund in an amount which would vary, depending on the circumstances of each particular insurer and the type of business to be written. In the case of an insurer writing general business, the minimum guarantee fund will vary between 200,000 units of account (£ sterling 287,536 approx) and 400,000 units of account (£ sterling 574,712 approx), depending on the class of general business involved.

In the case of a registered insurer writing long term business, the minimum guarantee fund is:

- (i) in the case of a pure reinsurer, being the wholly-owned subsidiary of an insurer carrying on long term business, and which carries on only such reinsurance business as is ceded to it by the insurer, 200,000 units of account (£ sterling 287,356 approx);
- (ii) in the case of a mutual, 600,000 units of account (£ sterling 862,069 approx);
- (iii) in any other case, 800,000 units of account (£ sterling 1,149,425 approx).

The method of assessing the minimum guarantee fund and solvency margin will depend particularly on whether the applicant for a licence is a new insurer with no, or very little, claims experience, etc., or whether the applicant has a history of undertaking insurance business.

In the case of the former the minimum guarantee fund will be as above. In this situation the solvency margin and the minimum guarantee fund will be one and the same.

Should the registered insurer have a history, it would have a choice of calculating its solvency margin by one of two methods, either on a premium basis or on a claims basis, whichever is the higher. The regulations contain details on the method of calculation for both the premium and the claims basis.

Once the relevant solvency margin is calculated, one-third of that margin or the minimum guarantee fund prescribed by the Regulations (see above), whichever is the higher, is to be the minimum funding required by the company. This amount will, of course, fluctuate depending on the business written by the company.

The minimum guarantee fund and solvency margins required can be made up from various types of asset, including share capital, but not exclusively cash. The types of asset which would be acceptable to the Gibraltar Authorities is a matter which can be the subject of negotiation/discussion with the authorities and would be considered on a case by case basis.

As far as the regulations relating to prescribed particulars are concerned, these contain the forms of application which would have to be completed and submitted by would be applicants, and also include details of the proposed controllers and managers of the relevant insurance company. A business plan and projections will have to be submitted.

Pursuant to the legislation, the Governor of Gibraltar appoints a Commissioner of Insurance who, in effect, is the regulatory authority. The Commissioner at the moment is the Financial and Development Secretary of Gibraltar. The Ordinance also provides for the appointment of

a public officer to be the Insurance Supervisor, whose role will be to vet applications and to supervise all registered insurers. The Insurance Supervisor has now been officially appointed, and he is an official in the Treasury Department of the Government of Gibraltar. The Ordinance further provides for the establishment of a Committee to be known as the Insurance Advisory Committee, which Committee the commissioner has to consult in the exercise of his functions and powers under the Ordinance. The Committee consists of the Insurance Supervisor and three other persons to be appointed by the Governor.

A licence fee is envisaged the amount of which has not yet been fixed.

As far as reporting requirements are concerned, the Ordinance provides for every licensed insurer with respect to each financial year to prepare, as appropriate to its business:

- (A) a revenue account for each accounting class of insurance business that it carries on and a summary general business revenue account;
- (B) a long term business revenue account;
- (C) a profit and loss account; and
- (D) a balance sheet as at the end of the year.

These must be audited by a qualified auditor, i.e., a chartered or certified accountant or the international equivalent.

The legislation further provides that every licensed insurer is to publish every balance sheet and every profit and loss account which it is required by the Companies Ordinance to lay before the company in general meeting. The Governor may, however, by regulation exempt any class of insurer from any of the above requirements or modify any of those requirements in relation to any such class.

There will of course be certain types of registered insurers who will be applying to the Governor under this provision, for example, captive insurance companies.

The books of accounts of an insurance company must be kept in Gibraltar.

In the case of a company undertaking long term business, it must require its actuary, and it must be the duty of the actuary at least once a year, to conduct an actuarial investigation into that business, and the insurer is required to cause an abstract of the actuary's report to be prepared. This report must be submitted to the Commissioner.

As far as the directors and managers are concerned, they must be acceptable to the authorities as having the required insurance expertise and being persons of probity. They may not resign without first informing the Commissioner.

There is, of course, a transitional period built into the legislation which allows a company which, at the commencement of the new law, was authorized to carry on insurance business, to continue to carry on such business as the company was previously regularly transacting, for a period of twelve months from the commencement of the Ordinance or pending the determination of an application for a licence under the new law within that period.

As far as captive insurance companies are concerned, there is the political will on the part of the authorities in Gibraltar to foster this business and, subject to the legislative requirements being met, the authorities would look favorably at applications from serious institutions.

It is assumed that, since the legislation is based on EEC harmonisation law, the tax-free status of exempt insurance companies will be maintained. This opens up the possibility of a captive location where it is possible to write business in the EEC without having to go through the difficulties of being admitted in countries where insurance legislation is restrictive. Assuming that other EEC countries accept this position, Gibraltar registered insurance companies will be able to write business across the EEC boundaries without the need for becoming

authorized insurers in the individual territories.

Gibraltar is mentioned in the UK Financial Services Act 1986 to the effect that Gibraltar will be treated as if it were a member state of the Community in its own right for the purposes of authorization in other member states as far as the carrying on of insurance business is concerned, investment advertisements issued in the course of a business carried on in a member state, and exemption from insurance restrictions for member state companies.

The Act treats citizens of British dependent territories or companies incorporated in Gibraltar as nationals of a member state for this purpose.

Since Gibraltar has now adopted the EEC directives on insurance there is every intention further to develop this sector.

§ 1.9. Development Aid.

Under the provisions of the Development Aid Ordinance, the Governor may approve any development project which is, in his opinion, for the economic benefit of Gibraltar, provided that the scheme is one on which the developer will spend the sum of not less than £200,000, and provided that the scheme results in the provision of more than two additional units of housing accommodation in Gibraltar. This provision limiting the grant of development aid to projects which have a housing element was enacted in the Finance Ordinance 1987. This has imposed a serious limitation on the grant of development aid.

The scheme has to be completed within a limited period depending on the cost and nature of the development. If the cost of the scheme is £200,000 the development must be completed in two years. The time limit rises in respect of higher sums, e.g. a five year time limit for a project of £400,000 or over. Extensions to the period have to be approved by the Development Aid Advisory Committee, which also processes the applications on behalf of the Governor.

Once the development has been completed to the satisfaction of the Committee and the amount spent on the development has been agreed between the developer and the Authorities, the developer is not charged income tax in respect of the profits or gains arising from the project until such profits have exceeded the capital expenditure on the project.

Further, if a licence is granted to a limited company, dividends paid out of profits are not treated as assessable income of the shareholders.

No deductions are allowed in respect of depreciation of any development project the capital expenditure in respect of which has, in accordance with the provisions of the Ordinance, been wholly set off against the income arising from the project.

Under a recent amendment to the Income Tax Ordinance, interest payable on any loan (whether to a resident or a non-resident of Gibraltar provided for an approved Development Aid project can be paid free from any withholding tax and is not subject to Gibraltar income tax. Thus any local or financial institution wishing to invest in new developments in Gibraltar will be able to do so on a tax-free basis.

§ 1.10. The Uses of Gibraltar.

§ 1.10 (A). In Summary.

The main attraction of Gibraltar as a financial centre is that its exempt and qualifying companies can be managed and controlled from within Gibraltar. This contrasts with the position in other territories, particularly the Channel Islands and the Isle of Man where corporation tax and non-resident companies respectively have to be managed and controlled

outside the territory. The concept of residence, management and control has become vital not only in the UK tax code, but also in tax codes of other territories. Thus it is important to show that the actual management and control is within the territory, and it is much easier to do this in Gibraltar, particularly for trading companies. A trading company can for instance have a fully fledged office in Gibraltar, with full time resident employees, without this affecting its exempt or qualifying status. Thus an international trader may set up an office in Gibraltar with expert staff, and this is common in international oil trading, where there are companies set up locally selling oil on an international basis with resident expert staff. Since the opening of the border with Spain in 1985 it is now easier to accommodate company executives in Gibraltar, since they can work in Gibraltar and live in Spain. Until the Finance Ordinance 1987, officers and employees of exempt companies who were working in Gibraltar and living in Spain were not liable to income tax on their earnings. This has been changed, and any such officer or employee is now liable to income tax on his salary or other emoluments from his office or employment.

§ 1.10 (B). Inward Investment into Spain.

Gibraltar companies are often used for inward investment into Spain. Each transaction has to be considered very carefully, since one has to decide whether it would be more beneficial to structure and route the investment through a country with a double taxation treaty with Spain, for instance the Netherlands. However, a Gibraltar company very often features either at the beginning or at the end of a chain for inward investments into Spain. Gibraltar should, however, not allow itself to be used for Spanish tax or exchange control evasion. At present Gibraltar companies are mainly used by non-residents purchasing holiday homes in Spain. For a Gibraltar, or indeed any other foreign, company to own such a home, a bank certificate has to be obtained and the projected investment must be accepted by the Direccion General de Transacciones Extranjera. Gibraltar companies are also used to hold shares in Spanish companies under taking developments in Spain. Once again a great deal depends on the particular transactions, since sometimes it is more useful to have a Spanish company owned by a Netherlands company which in turn would be held by a Gibraltar company. This area of activity is growing and should expand considerably in the future.

§ 1.10 (C). Employment Companies.

Gibraltar exempt companies and qualifying companies are suitable as employment companies for foreign nationals employed abroad. Those employed by exempt companies are not liable to tax in Gibraltar, whilst employees of qualifying companies would be liable to a fixed rate of 2% tax. For instance, French nationals working abroad for periods in excess of 183 days are exempt from French income tax if they are employed in marketing, engineering work, industrial complexes, works on building sites and the construction of plant, research work and natural resources extraction. Belgian nationals employed abroad in countries with no double taxation agreements with Belgium, and who are liable to Belgian tax, may be entitled to claim a 50% reduction in their tax if they can show that they have suffered foreign tax on their employment income. Thus for a Belgian resident, a qualifying company would be used. Another example is that Australian nationals working abroad may be exempt from Australian tax in respect of remuneration earned outside Australia provided the earnings are taxed at source. Once again this would be a case for a qualifying company.

§ 1.10 (D). Trusts.

As stated above, a Gibraltar-resident trust is not liable to Gibraltar income tax provided it is set up by or on behalf of non-residents of Gibraltar. Thus Gibraltar discretionary trusts can be used by non-residents of the UK wishing to settle in the UK and to protect some of their assets outside the UK. They can also be used by expatriates returning to the UK.

Gibraltar discretionary trusts can also be used to mitigate death duties in the UK. Since there is no exchange control, it is easy for a UK settlor to set up a discretionary trust in Gibraltar and to shelter some of his wealth in the UK, and, provided he survives the required period, his capital is protected in a trust which is totally free from income tax and estate duty.

§ 1.10 (E). Trading in Free Zone of Tangier.

Gibraltar companies are also used for trading in the free zone of Tangier. Tangier has a free zone enabling companies not trading with Morocco to trade without liabilities to any taxes or import duty. Given the proximity of Gibraltar and Tangier, Gibraltar companies are often used for this purpose and are perfectly acceptable to the Moroccan authorities.

§ 1.10 (F). Financial Service Companies in Spain.

Many international financial service companies are setting up in Gibraltar and attracting visits from expatriates living in Spain. In some cases Gibraltar holding companies are used to incorporate subsidiaries in Spain in order for those financial companies to operate directly in Spain with the relevant consents.

§ 1.10 (G). Offshore Funds.

Recently there has been considerable interest shown in Gibraltar by investment and fund managers. Offshore funds can be set up in Gibraltar as unit trusts. However, the incorporation of open-ended investment companies in Gibraltar would create major difficulties. Under the existing company law there are two main difficulties which require a change in legislation. It is understood that such a change is being considered in the context of the updating of the Companies Ordinance. The difficulties both relate to the issue or redemption of redeemable preference shares. As the law now stands such preference shares can only be redeemed at the instance of the company and not of the shareholder. The second problem is that when such shares are redeemed the actual amount of the value of such shares has to be credited to the capital redemption reserve fund instead of the nominal amount as is the case in other territories. However, fund managers are considering incorporating such companies in other territories and having them registered as overseas and exempt companies in Gibraltar. Then the companies would be managed and controlled in Gibraltar, tax at the rate of £300 per annum would be payable and no stamp duty would be payable on the transfer of shares in such companies.

§ 1.11. Costs.

The costs of incorporating a Gibraltar company are in line with costs in other financial centres. Including professional fees and disbursements, they would be in the region of £400 for a company of £2,000 capital. If a higher authorized capital is required the fees would be higher since 1/2% duty is payable on the nominal authorized capital on a once off basis. Most Gibraltar lawyers and accountants have off-the-shelf companies which can be supplied on

demand with very wide objects clauses to enable the company to transact any business as required.

Annual running costs depends on the service provided.

If an exempt company is registered there is a tax of £225, £200 or £300 per annum as the case may be (see above). Directors are usually charged at about £150 per director per annum and registered offices and secretarial fees are usually in the region of £250. The auditors' fees in respect of the statutory audit to comply with the provisions of the exempt companies ordinance will be approximately £75, any other work being charged by professionals on a time scale basis. Gibraltar is probably cheaper than its competitors in respect of running costs, and an investment exempt company would usually not cost more than £1,000 per annum to run inclusive of the tax and auditors' fees.

Gibraltar is very well situated geographically for international trading activities, particularly now with the opening of the frontier, and offers the benefit of the bi-lingual professional community which often acts as a very effective bridge between Anglo-Saxon speaking countries and Spain, which is itself acquiring a much greater importance following its entry into the EEC.

