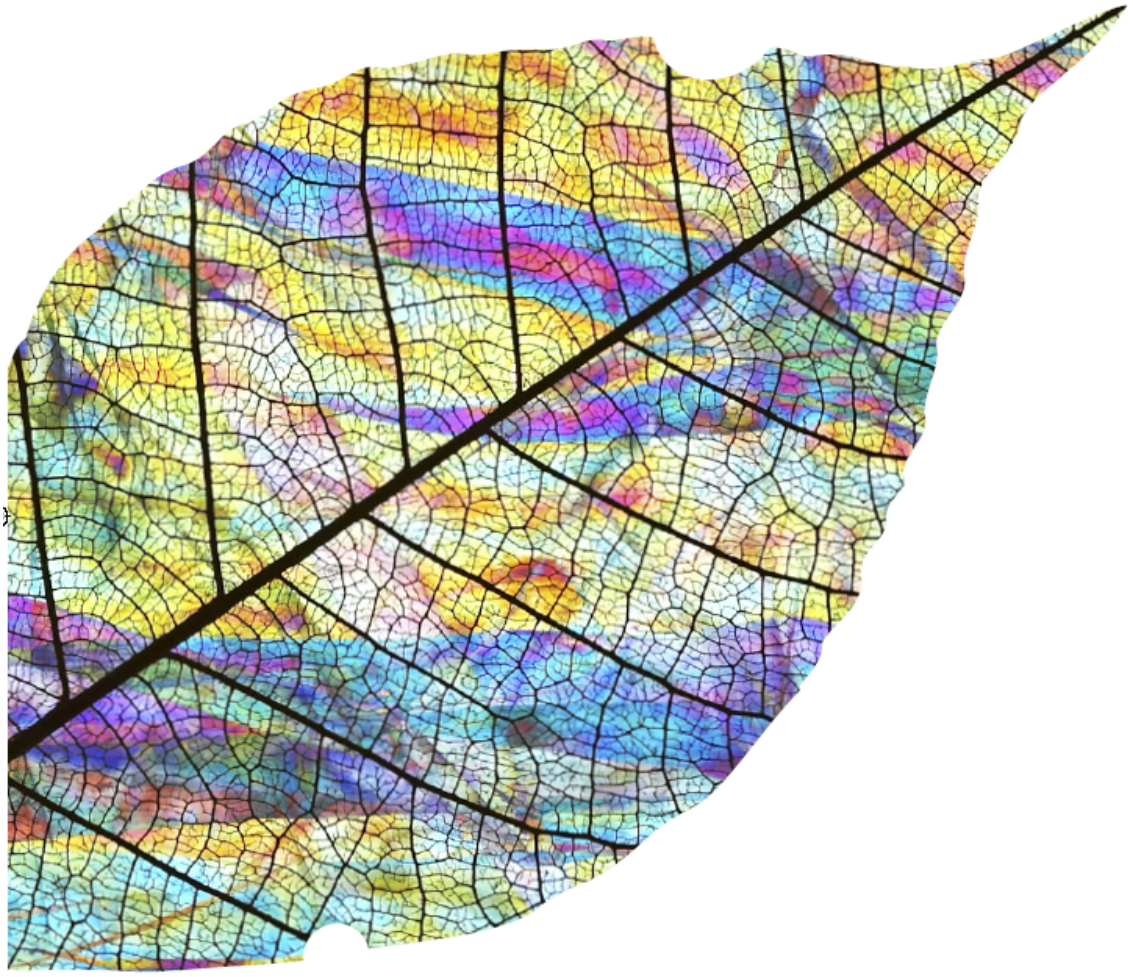
World Universities Comparative Law Project
Legal rating of Colombia
carried out by Universidad del Rosario

A production of the Allen & Overy Global Law Intelligence Unit



April, 2017

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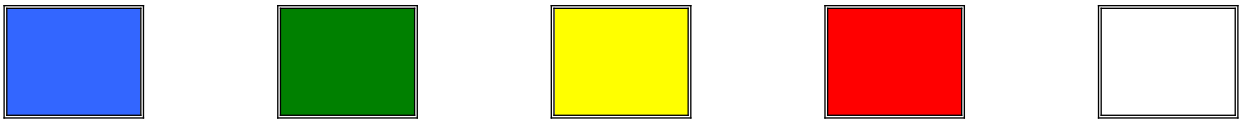

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World Universities Comparative Law Project

The World Universities Comparative Law Project is a set of legal ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal rating of Colombia was carried out by students at the Universidad del Rosario.

The members of the Rosario´s University Law Faculty who assisted the students were:

- Professor Camilo A. Rodríguez.
- Young Researcher Diana M. Sánchez
- Young Researcher Natalia Delgado

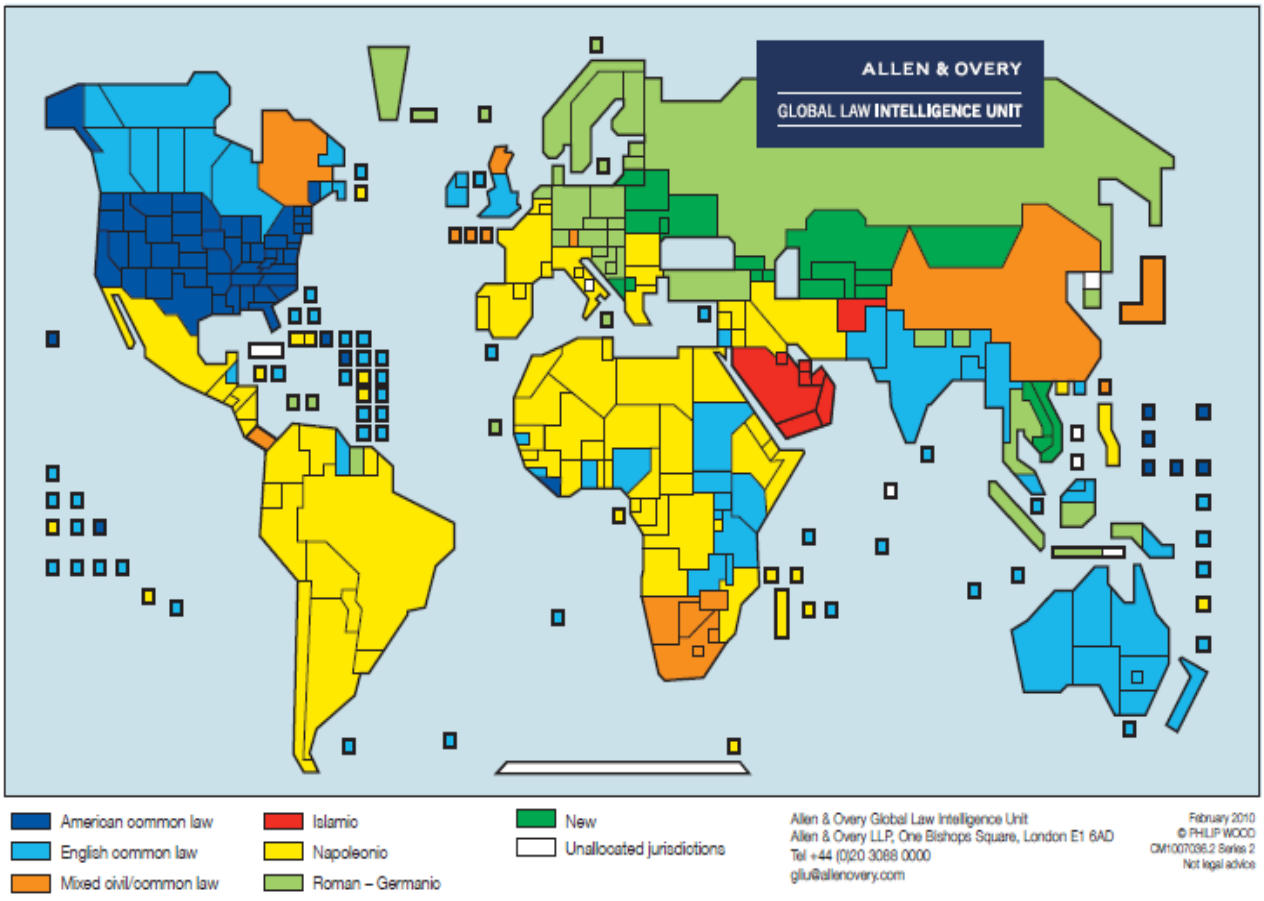
The members of the Practitioner Expert Panel with whom the students could discuss the questions in the survey were:

- Juan P. Cárdenas – Attorney, arbitrator and adjunct professor
- Antonio Aljure – Attorney, arbitrator and former Dean of the Law School - Universidad del Rosario
- Francisco Uribe – Attorney
- José R. Herrera – Attorney, arbitrator and former President of the Colombian Supreme Court of Justice
- Alfredo Sánchez – Attorney and adjunct professor
- Rafaél E. Wilches – Attorney and law school professor

The Allen & Overy Global Law Intelligence Unit produced this survey and is most grateful to the above for the work they did in bringing the survey to fruition.

All of those involved congratulate the students who carried out the work.

Families of law



Foreword

The Colombian legal system belongs to the legal family of the Continental law derived from French law. The Colombian Civil Code, is the same Chilean Civil Code, and follows the orientation of the French Civil Code, as well as Spanish and Roman law. The Commercial Code of 1971 follows the French, Spanish and Chilean law, as the Italian Civil Code of 1942. In addition, this Code incorporated novel figures for its time, such as the fiduciary contract, which has its roots in the Anglo-Saxon trust.

Colombian law has sought to keep its legislation in line with the increasing demands of international trade and has therefore adopted the United Nations Convention on International Sale and laws that follow or are inspired by Uncitral models in matters such as commercial international arbitration, electronic commerce and cross-border insolvency. Colombia has also issued other laws such as the law on secured transactions that follows other international benchmarks such as the model law of Secured Transactions of the OAS with the adjustments and modifications introduced to it in other American countries.

Colombian courts have also followed the trends of other courts from countries of the same legal family in order to develop and modernize the Colombian law, and in particular, has developed the scope and effects of the principle of good faith.

In this context, and as we can conclude from the research developed by the students, Colombian law contains solutions in its regulation that are harmonious with international trends and that take into account both the need to preserve freedom of business and the protection of good faith. Nevertheless it is also true that there are difficulties in the practical field, such as the cost and time required for the courts or judges to recognize the corresponding rights.

The Universidad del Rosario and especially, the Law School, is proud to present the investigation and conclusions reached by the Law School´s students. They all are all sample of what we think is the purpose of the Law School, which intends to educate people who have the necessary skills to analyse any legal problem and give an adequate solution, in a context of growing internationalization and with the capacity to make a critical judgment.

Juan P. Cárdenas
National and International Arbitrator
Adjunct professor at Universidad del Rosario

Description of the legal rating method

Introduction

This paper assesses aspects of the law in Colombia with a view to rating the law in the relevant areas. The survey is concerned primarily with wholesale financial and corporate law and transactions, not with retail law.

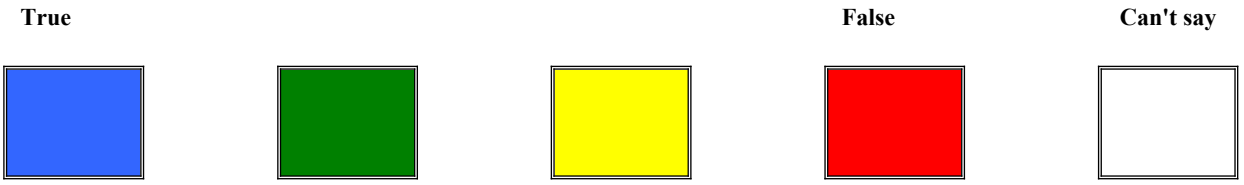
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes of our societies. Liabilities can be very large and reputational losses severe.

The survey was carried out by students at Universidad del Rosario. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of Universidad del Rosario, the members of the Practitioner Expert Panel or the Global Law Intelligence Unit, the members of Allen & Overy.

Methodology

The survey uses colour-coding as follows:



Blue generally means that the law does not intervene and the parties are free, ie the law is liberal and open.

Red generally means that there is intense legal intervention, usually in the form of a prohibition.

Green and **yellow** are in-between.

The purpose of this colour-coding is to synthesise and distil information in a dramatic way, rather than a legal treatise. The colours correspond to a rating of 1, 2, 3 or 4, or A, B, C or D.

The cross in the relevant box signifies the view of the students carrying out this assessment of the position of Colombia. This is followed by a brief comment, e.g. pointing out qualifications or expanding the point. These comments were written by the students.

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. The scale is from low legal intervention to intense legal intervention or control. This is not a policy or value judgment as to whether or not the law should or should not intervene. Jurisdictions often disagree on whether the law should intervene and how much. So one of the main purposes of this survey is to endeavour to identify some of the points of difference so as to promote fruitful debate.

Black letter law and how it is applied

This survey measures two aspects of law. The first is black letter law, ie what the law says or the written law or law in the books.

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is different.

Although there is a continuum, these two measures have to be kept separate. Otherwise we may end up with just a blur or noise or some bland platitude, eg that the law depends upon GDP per capita.

In fact, only the last two questions deal with legal infrastructure and how the law is applied. All of the others deal with the written law, without regard to enforcement or application.

Key indicators

The survey uses key indicators to carry out the assessment. It is not feasible to measure all the laws or even a tiny fraction of them. The law of most jurisdictions is vast and fills whole libraries.

The key indicators are intended to be symptomatic or symbolic of the general approach of the jurisdiction. To qualify as useful, the indicator must usually be (1) important in economic terms, (2) representative or symbolic and (3) measurable. In addition, the indicators seek to measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

An important question is whether this method is useful or not, and, if it is, whether the indicators are relevant.

Legal families of the world

Most of the 320 jurisdictions in the world, spread just under 200 sovereign states, can be grouped into legal families. The three most important of these are: (1) the common law group, originally championed by England; (2) the Napoleonic group, originally championed by France; and (3) the Roman-Germanic group, originally championed by Germany, with major contributions from other countries.

The balance of jurisdictions is made up of mixed, Islamic, new and unallocated jurisdictions.

Many aspects of private law are determined primarily by the family group, but this is not true of regulatory or economic law.

Excluded topics

This survey does not cover:

- transactions involving individuals
- personal law, such as family law or succession
- competition or antitrust law
- intellectual property
- auditing
- general taxation
- macroeconomic conditions, such as inflation, government debt, credit rating or savings rates
- human development, such as education, public health or life expectancy
- infrastructure, such as roads, ports, water supply, electricity supply
- personal security, such as crime rates, civil disorder or terrorism.

Banking and finance

Introduction

Banks and bondholders (typically also banks, but also insurance companies, pension funds and mutual funds) provide credit or capital. Their main risk is the insolvency of the debtor and therefore the key indicators intended to measure whether the law supports those habitual creditors or debtors, such as large corporations as borrowers, when it matters, ie on bankruptcy. This is when commercial law is at its most ruthless in deciding who survives and who drowns.

This debtor or creditor decision is implemented mainly through the bankruptcy ladder of priorities. A feature of common law systems is the presence of super-priority creditors who are paid before anyone else - creditors with a set-off or a security interest and beneficiaries under a trust. For example, if a bank has universal security over all the assets of a company, the bank is paid before all other creditors, including employees and trade creditors. This regime therefore protects significant creditors who such as banks.

Jurisdictions based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. Their bankruptcy ladder favours greater equality of creditors. Most traditional Roman-Germanic jurisdictions are in-between. They allow insolvency set-off and have quite wide security but most do not recognise the trust. There are wide exceptions to these generalisations.

Insolvency set-off

Generally If set-off of mutual debts is allowed on

insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures should be gross or net is a matter of policy as to who the law should protect.

Q1 In Colombia, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

True			False	Can't say
			X	

Comment:

Under the insolvency statute it is possible to identify three different moments when the insolvent creditor is limited on his disposal acts: the first one starts 18 months before the beginning of the reorganization process or judicial liquidation; the second one begins with the request of commencement of the process; and finally, the third moment starts after judge's decision of commencement of the process. All three moments have different effects related with credits set-off.

1. The acceptance of insolvency process by the judge:

   After the commencement of the insolvency process, it is not allowed to perform a set-off agreement, taking into account the principle of equality and universality.

2. The request of commencement of the procedure.

   Articles 13-17 of Law 1116 of 2006 regulates this moment, the request may be presented by the debtor or debtor's creditors or even both, the authorities may start an ex-officio proceeding. The principal effects produced with the presentation of the request are established on article 17.

   Therefore, it is clearly observed the prohibition for administrators to celebrate compensatory arrangements with creditors.

3. Before the start of any procedure:

   At this stage, managers have no restriction on holding events involving the disposal of assets. However, the insolvency law allows creditors to initiate an accessory process to the process of corporate reorganization, which allows the reconstruction of the debtor's assets when it has concluded agreements that have affected a creditor within a period known as the period of suspicion, which is determined by the law. The revocation action seeks to ensure the principles of universality and equality, reintegrating the debtor's assets goods left it unreasonably. Likewise, the revocation action constitutes an element that increases the possibility of economic survival of the company and simultaneously defends the rights of both debtor and creditor. Article 74 of Law 1116 of 2006 regulates this matter.

   Colombian insolvency law does not prohibit the holding of set–off agreements concluded before the commencement of the corporate reorganization procedure. However, if the compensation agreement violates the rights of other creditors and was conducted under a considered bad faith act, the other creditors may attend the revocatory action to roll back the effects of the set-off, if it was held during the period of suspicion established in the law. In the practice, judges tend to accept such claims. Therefore, provided a revocatory action, set-off agreements will be mostly voided by the judge.

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - typically wages and taxes. The security can be granted to a trustee for creditors. On a default there are no mandatory grace periods and the creditor can enforce out-of-court by appointing a receiver (a type of possessory manager) or by private sale. But in some common law jurisdictions there are freezes on enforcement in the event of a judicial rescue of the debtor. Also, in some of these jurisdictions there are stamp duties.

On the other hand, in many traditional Napoleonic jurisdictions, universal security is not possible, neither is security for all future debt. There is no trustee to hold the security. On enforcement, there are grace periods and no receiver. Sale is through the court and a public auction. Preferential creditors rank ahead. Some countries have a freeze on enforcement under a judicial rescue statute.

The main policy issue is therefore whether security should be encouraged or whether the law should intervene to impose greater equality.

The main tests are (1) scope of eligible assets, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs.

Q2 In Colombia, the law offers a security interest which is highly protective of the secured creditor.

True			False	Can't say
X				

Comment:

In Colombia, there are two types of guarantees for the creditors; personal and security interest. First, personal guarantees are characterized by a subject who ensures compliance of the obligation personally, so in this kind of guarantees the creditor has no real right to any of the assets of the guarantor, so the guarantee is not materialized in any specific good, but the guarantor must answer for the debt with all its assets. The co-signer, guarantor, guarantee and endorsement are types of personal guarantees.

On the other hand, the security interest are characterized by the existence of a particular good on which the guarantee will rest, this good is affected by the rights of persecution and creditor preference. Thus, the payment of the obligation is linked to the identification of good. Such guarantees may be constituted by the debtor or a third party, but it is necessary in all cases that the guarantor is the owner of the good. Security interests for excellence are the pledge and mortgage.

Law 1676 of 2013 develops the security interest, and has defined it as any operation which has the effect of guaranteeing an obligation to the movable property of the guarantor and includes, among others, contracts, agreements or clauses used to ensure obligations to movables, including sale with reservation of ownership, the pledge of commercial establishment, guarantees and transfers on accounts receivable, including purchases, security assignments, the provision for security purposes, amongst others.

This law provides high protection to the creditor, to the extent that it expands the type of property that can be covered by the guarantee, simplifies the constitution of guarantees, facilitates the enforceability of guarantees, establishes clear rules of priority of credits on security interest, and facilitates the execution of security interest. As a consequence of this Law, the national registry of security interest was created, and this is a registry that offers certainty and clarity for creditors as to the guarantees of their debtors. Additionally, in Colombia the secured creditors have priority in payment over other unsecured creditors.

In conclusion, it is true to affirm that in Colombia the law offers a security interest which is highly protective for the secured creditor.

Universal trusts

Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away from the debtor-trustee's bankrupt estate.

The main examples of trusts are custodianship of securities, pension funds, securities settlement systems and trustees of security for bondholders and syndicate banks. The amounts involved are enormous.

All jurisdictions have an effective trust of goods (called bailment or deposit). The common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship of securities. A few countries in this group have a universal trust by statute, e.g. France and China.

Q3 Colombia has a universal trust for all assets.

True			False	Can't say
	X			

Comment:

Commercial trust contract is incorporated on articles 1226 to 1244 of Commercial Code. It is defined as a legal business whereby one or more assets are transferred to a person with the instructions to manage or to alienate it and with the profit of the activity, serve a purpose established by the settlor on his behalf or on behalf of a third party.

The commercial trust is characterized as an adaptive tool to achieve any purpose in investment; currently this figure is used to structure any business involving large amounts of money. Article 1234 of the Commercial Code establishes the duty of the trustee to direct all their actions to accomplish the purpose for which it was created the business.

As provided in Article 1226 of the Commercial Code, the only people who can act as trustee are credit institutions and trust companies authorized by the Financial Supervision, thus not everyone can serve this role, perform all actions necessary to achieve the purpose for which the trust was created and maintain goods completely separate the trust of their own and other fiduciary business.

On Insolvency, it should be clear that the trust assets cannot be pursued by the trustee's creditors, nor can be pursued by the creditors of the settlor, unless the debts have been acquired prior to the constitution of the trust as Article 1238 of the Commercial Code states. In accordance with External Circular 029 of 2014, issued by the Financial Superintendency of Colombia, the creditor has the legal action to terminate the trust agreement and therefore request the restructuring of assets of the settlor. It must be proven that there are not more goods with which the settlor can pay his debts and that the constitution of the trusts was made fraudulently.

Finally, it should be mentioned that under Colombian law there is no restriction regarding the goods that can be subject to contract. Therefore, any type of property that is tradable can be in trust, including tangible such as movable and immovable property, and intangible property such as shares and rights to a contract. Additionally, future property subject to suspensive condition can part of a commercial trust contract as long as this condition is stated in the contract.

Other indicators

Other bankruptcy indicators not measured here include freezes on the termination of contracts, fraudulent preferences, the priority of rescue new money, the presence and intensity of corporate rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

Other financial law topics not covered in this survey include the regulatory regime, especially capital, liquidity, authorisation of financial business, conduct of business, control of prospectuses, control of market abuse and frauds, such as insider dealing, and the insolvency regime for banks. Financial regulation is a very large field.

Corporations

Introduction

Financial law involves competition between debtors and creditors so that jurisdictions can be positioned on a straight line. Corporate law however involves three main competitors: (1) shareholders, (2) creditors and (3) managers - a triangle. If the key indicators show that a jurisdiction strongly favours one or other of the parties at the points of the triangle, whether creditors, shareholders or management, then one can begin to build up a picture of the choices which the jurisdiction habitually makes in resolving the conflicting interests of the parties.

For example, a very tough prohibition on financial assistance (which is protective of creditors against shareholders) tends also to support an attitude to other principles of the maintenance of capital or to support the proposition that mergers by fusion are difficult (because they can prejudice creditors). This would be true of the English regime in 1948. Similarly, a view which easily imposes personal liability on directors for deepening an insolvency might also show a legal approach which is not supportive of the veil of incorporation in other areas, eg shareholder liability and substantive consolidation on insolvency.

The two extreme corporate law models are the Delaware model and the traditional English model, exemplified by the English Companies Act 1948 (now superseded). Napoleonic and Roman-Germanic models are in-between to varying degrees.

The Delaware regime is highly protective of management in the key areas. The traditional English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

Director liability for deepening an insolvency

Generally If the law imposes personal liability on directors for deepening an insolvency, eg carrying on business and incurring debts where there is no reasonable prospect of paying them, then the regime is hostile to the interests of management. The legal risks of management are increased.

There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, Australia, Ireland); (3) directors are liable for mere business misjudgements deepening the insolvency (France); and (4) directors are liable if they fail to file for an insolvency proceeding after the company becomes insolvent (France, Germany and others).

Q4 In Colombia the law rarely imposes personal liability on directors for deepening the insolvency and there is no rule that the directors must file for insolvency when the company is insolvent.

True		False	Can't say
		X		

Comment:

In Colombia, the liability of directors is contained in the general rules of Civil and Commercial Codes, in Law 222 of 1995 and especially with regard to insolvency in Law 1116 of 2006.

Law 1116 of 2006 establishes the liability of directors during the insolvency of the corporation. Specifically article 82 says that when the common pledge of creditors is deteriorated because of the behaviour, intentional or negligent, of partners, administrators, fiscal auditors, and employees, they shall be civilly liable for the missing payment of external liabilities. Members who have not been aware of the act or omission or voted against it, as long as they do not run it, are not subject to such liability. In cases of breach or abuse of office, violation of the law or regulations, directors shall be presumed guilty of the intervening.

In Colombia, contract terms that tend to acquit members, administrators, statutory auditors and employees of the above responsibilities or limiting the amount of bonds that have lent to exercise their duties will be taken as unwritten. Thus it is concluded that the liability of directors is a standard matter of public policy, so it cannot be modified or unknown.

Law 1116 of 2006 also provides another type of sanction for the conduct of directors that undermine the interests of the company during the insolvency; this is the inability to engage in commerce for up to 10 years.

There are some mechanisms of protection against actions and abuse of power of the directors, for compensation for damages to be effectively guaranteed. On the one hand there is the figure of social responsibility action, in which the company itself invokes this action against the administrator, to answer for the damages, that his act or omission would have caused to the company.

As for the second claim, article 224 of the Commercial Code holds that at the time when society is in a state of cessation of payments, directors must refrain from new operations and should convene immediately to partners, to inform them fully of the situation. If they do not act as ordered, administrators are jointly and severally liable for the damages caused to partners and third parties.

As we can see, in Colombia there is a very strict regime of liability of directors, so it would be wrong to say that the law rarely imposes personal liability of directors for the actions (actions or inactions) tending to undermine the company in its insolvency.

Financial assistance to buy own shares

Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure the guarantee. The commercial effect is similar to the repayment of the share capital of the target before its creditors are paid. Shareholders should be subordinated to creditors.

The prohibition therefore favours creditors against shareholders of the target.

The Delaware regime does not prohibit financial assistance. The traditional English regime has a wide prohibition (not England any more). Most Roman-Germanic regimes are against it, with Napoleonic regimes hesitant. The EU has a prohibition against financial assistance by public companies. Some countries allow financial assistance by private companies if solvency is established.

A contravening transaction is usually a criminal offence and void.

Q5 Colombia permits a company to grant financial assistance for the purchase of its own shares.

True			False	Can't say
	X			

Comment:

The Commercial Code of Colombia does not provide any prohibition by which a Company may not grant financial assistance to the purchase of its own shares. However, many types of Companies in Colombia are only authorized to develop the activities that are in their legal purpose established in the bylaws of each company. Therefore, if in the legal purpose of the company contemplates the possibility to grant loans or any financial assistance, the company may grant financial assistance to the purchase of its own shares.

In order to protect the funds collected from the public, the only exception that is contemplated in the law, is stated in article 10-C of the Organic Statute of the Financial System in which it is ruled that financial entities (i.e banks, insurance companies and others) may not grant, directly or indirectly financial assistance to any person for the purchase of its own shares or the acquisition of bounds convertible in shares, unless that assistance is related to a primary issuance an placement of shares or in a privatization process, and that the assistance is guaranteed by assets that represent 125% of the amount granted.

Public takeover regime

Generally A public takeover regime which is free and open tends to favour managers who can guard against takeovers by poison pills and the like and who have relative freedom to acquire other companies. An example is the Delaware regime. A restrictive regime on the lines of the British system tends to favour shareholders.

The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) proof of certain funds to implement the offer; (5) compulsory acquisition of dissenting minorities (squeeze-out); (6) fixed timetable; (7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and (8) control of the content of circulars, especially forecasts.

Q6 Apart from exchange controls and restrictions on foreign direct investments, the public takeover regime in Colombia is open and has few restrictions.

True			False	Can't say
		X		

Comment:

The public takeover regime in Colombia presents a strict regulation. According to the Decree 2555 of 2010, there is a figure called "takeover bid" ("Oferta Pública de Adquisición OPA") which is intended to protect the rights of the shareholders of companies listed on the stock market from a possible total or partial purchase of the company.

The main purpose of OPA, is to force the potential buyer to make a public offer addressed to the shareholders of a listed company proposing them to purchase their shares in certain instalments and conditions. All proceedings in the OPA must have the approval of the Financial Superintendence or the Colombian Stock Exchange, so the offeror cannot act on their free will but must abide by the parameters and procedures that these entities provide.

For this reason we can conclude that the public takeover regime is rigid, highly regulated and restricted.

Other indicators

Other important indicators are corporate governance (difficult to measure), free ability to merge companies by fusion, the one-share-one-vote rule, and, to a lesser extent, minority protections. Other indicators relate to quick and cheap incorporation, the *ultra vires* rule, maintenance of capital, no par value shares, shareholder liability, substantive consolidation on insolvency and disclosure. These are not measured here.

Commercial contracts

Introduction

Contract is at the heart of commercial life, and is everywhere. In fact, the main tenets of contract law across the main families of jurisdictions are consistent - it is in the fields of insolvency and property law where the main differences emerge. It is true that there are contract differences, for example, between writing requirements, open offers, the time of acceptance and specific performance, but often these differences are of lesser significance in practice in the business field.

The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties. A soft jurisdiction tends to give greater primacy to notions of good faith and the like.

Exclusion of contract formation

Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound.

Q7 In Colombia, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.

True		False		Can't say
	X			

Comment:

In Colombia, the freedom of the parties in heads of terms discussion should be subject to commercial equity and good faith. The pre-contractual relationship consists of a subjective element and an objective element. The subjective element is made by acts, conversations, documents and others that are part of the negotiation, and the objective element is the good faith, which is the duty to act loyally for the preliminary terms negotiation, that their statements and actions do not harm the counterparty. For example, if a “subject to contract, non-binding” clause is stated in preliminary documents, but the behaviour gives to understand or displays otherwise, it could bind the parties. In addition, the parties must be clear in the sense of disclosure of facts. In order to avoid possible errors they should also proceed with diligence, reporting all circumstances that may interest the other party. When a party hides crucial points or does not give the complete information throughout the negotiation, the duty of good faith stated in Article 863 of Commercial Code would be transgressed.

The legal basis for the preliminary negotiations is not expressly defined within Colombian law. However, interpreters have understood that it is immersed in articles like Article 863 of the Commercial Code which recognizes the existence of a pre-contract stage "The parties shall act in good faith free of guilt in the pre-contract period, failing to compensate the damages caused". In addition, taking into account Article 1618 of the Civil Code, the Supreme Court has identified preliminary treatment and previous documents as criteria of interpretation of the true will of the parties.

Termination clauses

Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these clauses and do not rewrite the contract according to the court's notions of what is fair. Other jurisdictions prefer good faith. We ignore consumer contracts - where there may be consumer protections.

Q8 In Colombia, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

True		False		Can't say
		X		

Comment:

In Colombia, the legislator has given great importance to the private party autonomy, granting individuals the possibility to arrange through their legal acts their relations, especially those of economic or financial content. By giving individuals the power to create relationships conventionally, also empowered them to amend or extinguish them the same way, it is why the autonomy in contractual matters is one of the prevailing principles of the Colombian private law.

Because of the prevalence of party autonomy, the stipulation of unilateral termination clauses of contracts are not themselves prohibited. However, the legislator allows these clauses only if they have been drafted in such a way that they are not the result of abuse of the weakness of the other contractual subject, or do not violate good faith. The unilateral termination clauses have to be very specific; they cannot be opened to any event.

According to Colombian's jurisprudence, termination clauses cannot be upheld over trivial events or obligations, since the termination of the contract has to be over the failure of an essential or principal obligation, which substantially affects the balance in the contract.

But on this issue it appears not to be an exact solution, because in the analysis of Colombian arbitral awards, there are cases in which the arbitration courts are widely protectors and declare the nullity of the termination clauses with abusive overtones or concerning trivial events, and there are other cases in which the arbitration courts do not support the declaration of invalidity of these clauses, considering that they are product of the party autonomy, so the terms of the clause have to be respected, even if the event concerned is relatively trivial.

That is why that the statement is partially false, since on the one hand, in Colombia unilateral termination clauses, specifically in a loan or sale of goods contract between sophisticated companies, cannot be upheld if they are focused on trivial obligations, but on the other hand, we see in practice that arbitration courts do not have uniform solutions in this matter, so it cannot be ensured that the statement is completely false.

Exclusion clauses

Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area.

Q9 In Colombia, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True			False	Can't say
	X			

Comment:

If exclusions of liability are agreed clearly in commercial contracts, they are fully respected by the parties and by those who hold jurisdiction to resolve controversies as referees and judges.

It is worth mentioning for clarity that the question referred to is understood in the Colombian legal system as a clause that does not seek the forgiveness of future fraud intention or gross negligence by the debtor, because that would violate public order, since the imperative normativity prohibits it; and further that it is aligned within the limits that doctrinal and jurisprudential developments produced. These may be summarized as not being against public order, morality, imperative norms or the principles of good faith and fair dealing, including a prohibition on clauses to limit liability for damages to the physical or mental integrity of the person, which is logical in a social and democratic state governed by law like ours.

On the other hand, it is necessary to refer to the obligation that the contracting parties have to inform, since these clauses must be agreed with the full knowledge of who may be affected by the non-indemnity of a total or partial breach.

The rigorousness of the limits of the pact for these clauses are based on the fact that keeping the absence of control over restrictive clauses of liability results in condemning the creditor to the abuses of his defaulted debtor. On the other hand, if the validity of the restrictive clauses of liability is eliminated, societies would be condemned to insolvencies, since they would become incompetent to the high costs that a regime of absolute liability would produce. This shows that although there is contractual freedom and party autonomy, these are not absolute.

In conclusion, our legal system allows parties to agree such clauses as long as they respect the limits given, which are not expressly consecrated in the law. In making a correct interpretation of Article 1604 of the Civil Code and the respective legal developments, these clauses (exclusions of liability) are thereby respected, since through them business benefits economic development.

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, penalties, specific performance and whether notice of assignment of the contract to the debtor is mandatory if the assignment is to be valid on the insolvency of the assignor.

Litigation

Introduction

The first three key indicators of governing law, jurisdiction and arbitration tend to show whether the jurisdiction does or does not place a high value on international comity and freedom of contract as opposed to national primacy.

The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business parties, both in terms of the incidence of costs and enforcement.

Governing law clauses

Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that the contract obligations may be different.

Q10 The Colombian courts will apply an express choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, but subject to Colombian public policy and mandatory statutes.

True		False	Can't say
		X		

Comment:

We must distinguish between two hypotheses: when the case has to be decided directly by a Colombian judge or arbitrator (i); and when the case comes to the knowledge of the Colombian judge as an award in order to recognize it in the Colombian jurisdiction (ii).

As for the first hypothesis, the Colombian judge, pursuant to the aphorism *lex loci solutionis* found in article 869 of the Commercial Code, in principle will apply his own *lex fori* when it comes to decide about the effects of a contract that will be performed in Colombia, without regard to the choice of law the parties have agreed on. Nonetheless, it has to be said, some authors and judges seem to defend a more liberal approach on this topic and find it possible to decide according to the law selected by the parties.

As for arbitrators resolving domestic cases, they must resolve the matter as mentioned above.

With regard to cases complying the conditions stated on the law to be considered as an international arbitration, they are allowed to be resolved according to the choice of law the parties have agreed on.

Regarding the second hypothesis, in order to obtain the exequatur of a foreign judicial award, the judge may not deny its recognition because the case involved a choice of foreign law, as it is not an express reason for non-recognition in Colombia. Nevertheless, it might be possible to deny the recognition of the judicial award because the choice of law might be considered to transgress public policy.

Finally, as regards to the recognition of a foreign arbitral award, it is less possible than in the case of foreign judicial awards for recognition to be denied based on the argument of the transgression of public policy by the choice of law.

Foreign jurisdiction clauses

Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

Q11 The Colombian courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True			False	Can't say
			X	

Comment:

As we did in the previous question, we must distinguish between two hypotheses: the case in which a Colombian judge has before him a claim involving a forum selection clause (i); and the case in which once the case has been decided abroad according to the forum selection clause, it is required to recognize the judicial award in Colombia (ii).

In the first hypothesis, if pursuant to the Colombian procedural regulations the Colombian judge is competent over the claim, then he is not allowed to refuse its competence, no matter the forum selection clause.

In the second hypothesis, if the Colombian judge decides whether to recognize or not a foreign judicial award involving a forum selection clause which attributes competence to a foreign jurisdiction, according to the article 606 of General Process Code, it is necessary that the claim is not subject to the exclusive jurisdiction of Colombian judges. In other words, if the claim is not subject to the exclusive jurisdiction of Colombian judges, the case decided abroad involving a forum selection clause will probably be recognized in Colombia.

Arbitration recognition

Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries have adhered.

Q12 In Colombia, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Colombian courts.

True			False	Can't say
X				

Comment:

It is possible to agree to submit the contract disputes to a foreign arbitral tribunal, not so much by reason of the parties being "sophisticated" but because the matter may be comprised by the conditions set forth in Article 62 of the Law 1563/2012:

"Article 62. Scope of application.[…] It is understood that an arbitration is international when:

a. The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
b. The place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected, is situated outside the State in which the parties have their domicile; or
c. The dispute submitted to an arbitral decision affects the interests of the international trade".

We must have into account that the Law 1563 through the paragraph of Article 21 enjoins the parties to assert the existence of an arbitration clause in order to exclude the competence of the judges. This rule is basically the domestic manifestation of the article II paragraph 3 of the New York Convention. Therefore, it is necessary for the parties to maintain the existence of an arbitration clause, otherwise the Colombian judges if competent, will resolve the dispute.

Class actions

Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound.

Q13 In Colombia class actions where the class is bound if they do not opt out are generally not allowed.

True			False	Can't say
			X	

Comment:

When it comes to decide what is a class action in Colombia, it might be possible to identify it in two actions: popular action and group action (acción popular y acción de grupo). Both of them are regulated directly by the Colombian Political Constitution. The former's goal is to protect the collective rights such as environment protection as well as other public values listed in the article 4 of Law 472/1998; and the latters goal is to indemnify a group of people whose tort was cause by a common cause.

So it is clear that in Colombia the class action is assimilated with the group action. This action is regulated by Law 472 too, and based upon article 66 it is possible to conclude that in Colombia the class is bound to the judicial award if they do not opt out in the stage enjoined by the Law 472 through its article 56.

Other indicators

Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, scope of disclosure (discovery of documents), efficacy of waivers of sovereign immunity and the enforceability of foreign judgments.

Real property

Ownership of land

Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction would be coloured green if citizens can lease land for a very long term without material restrictions, such as 999 years, and can also mortgage or sell the land or give it away or bequeath it under their wills without official consent because the ownership is a close proximate of absolute ownership. If on the other hand citizens are entitled only to a lease of, say, 70 years or less, or to similar rights of occupancy, and if there are limitations on dealing with the land without official consent, such as mortgaging, selling or bequeathing it, then the jurisdiction would be red.

Q14 In Colombia nationals and local corporations are entitled to own land absolutely.

True			False	Can't say
	X			

Comment:

Although the right of ownership empowers the owner by virtue of being a full, general, exclusive and perpetual right, it is characterized by certain limits on its exercise, among which are:
Some limits the actual content of the real right property are good faith, the theory of estoppel, abuse of law and the general duty of abstention. The limitations have been developed from the constitution and the concept of public order, which means the public utility, social interest, ecological function, urbanism regulations, land use regulations, administrative easements, sanitation and hygiene, among others.

However, in the context of the question to be solved it is important to mention that for national or local societies to be subjects of law they must have legal personality so that their rights and obligations equates with natural persons. So national and local societies in Colombia have the right to own land and immovable property by virtue of the guarantee that the Political Constitution gives, with the exception that our legal system has set limits, limitations and also figures to terminate the right of ownership, such as domain extinction and confiscation, the extinction of administrative domain and expropriation.

It is worth mentioning that, although it is not an absolute right, there is a general duty to abstain, by which one may unlawfully not reduce any of the faculties of the person who holds the title of ownership.

The transgression of duty to abstain may have of financial content, because prerogatives of persecution and preference, as well as actions for its defence, are attributed to the holder of the right.

Thus, as noted, the faculties of who even is the owner of this right may not unlawfully be decreased. This does not mean that there can be no decrease because the government is empowered to do so but only in precise scenarios where the social and democratic rule of law is observed. As in the case of extinction of dominion, which is protected by the legality principle, the government must never arbitrarily terminate the right of property: it must always be supported on the grounds that the legislator provides for it.

In conclusion, in Colombia, societies, both local and national are entitled to the right to own property as long as they are preceded by a proper constitution and representation. Although they will have full ownership, it may be limited by the government when it deems it necessary, but never for arbitrary reasons, but only where the laws so provide, always giving prevalence to social function and the purposes of the government.

Security of land title and land registers

Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

Most countries in the civil code groups do not have a title register but instead require documents concerning land to be notarised and filed at the registry so that they can be searched. The United States does not generally have title registers for land although there may be mortgage registers. They rely on title registration companies which provide title insurance.

Q15 Most land in Colombia is registered in a land register which records most major interests in land, eg ownership, mortgages and longer-term leases.

True			False	Can't say
X				

Comment:

The registration of property in Colombia is regulated by the Law 1579 of 2012, a legislative provision that defines that every act, contract, decision contained in public document, judicial, administrative or arbitral ruling that implies constitution, statement, clarification, adjudication, modification, limitation, assessment, precautionary measure, translation or domain extinction or other principal real right or accessory over an immovable will have to be registered.

The most important constitutive element of the registration which supports our approach to question 15 is the real estate registration number, which corresponds to a sheet designated for a specific property, which is distinguished by a code indicating the internal order of each official entry and the succession in which it is placed.
The real estate registration sheet consists of six sections or columns, which contains the following destinations:

1. The first column, to register the titles that involve acquisition modes, specifying the act, contract or ruling.
2. The second column to register liens: mortgages, agricultural or industrial liens, mobilization acts, decrees that award the benefit of separation.

3. The third column, for the annotation of the limitations and effects of the domain: usufruct, use and occupancy, easements, conditions, neighborly relations, condominium, horizontal property, unseizable family patrimony.

4. The fourth column for annotations of precautionary measures: foreclosures, civil lawsuits, prohibitions, valuations that affect alienability.

5. The fifth column to register tenancy titles constituted by a public document or judicial decision: leases, bailment, antichresis retention rights.

6. The sixth column for the registration of titles that carry the so-called false tradition, such as the alienation of another's property or the transference of incomplete law or without an own antecedent.

It is important to emphasize that the above-mentioned law added to the boxes above one for cancellations and one for all those legal acts that require publicity because it affects the real right of dominion.
For the registration of seizure, civil lawsuits, prohibitions, decrees for effective possession, purchase bid, and generally acts that relate to a specific immovable, the judicial or administrative measure will individualize the properties and the individuals, quoting clearly and precisely the real estate registration number or registration data of the property. When filing a precautionary measure, the person concerned will request simultaneously the certificate concerning the legal status of the property destined to the judge.
The registration foil points out the following;

1. The registration office. The department or national territory and the municipality of the location of the property.
2. The cadastral certificate that corresponds to the property within the respective municipality.
3. It indicates whether the property is urban or rural.
4. It describes boundaries, perimeter, area and other identification elements.

Registration of public documents relating to property will be verified in the registry office of public instruments in which circle the property is located.
The land registry is an inventory of properties made by the State, especially for tax purposes. The land registry determines the economic value of each property, in order to quantify the actual tax obligation. Each registration foil of real estate corresponds to a cadastral unity. (Art. 50 Law 1579 of 2012) The card or cadastral identity card is incorporated into the relevant page of registration. The land registry is constituted by a set of documents from which a list of the elements of real estate in the country, their physical description, their economic value and their legal status is obtained.

In Colombia the Superintendence of Notaries and Registry by Decree 2163 of 2011 has competence over inspection and vigilance in relation to the provision of public services for registration and notaries; So, it is responsible for keeping track of immovables.

Land development restrictions

Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In Colombia, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

True			False	Can't say
		X		

Comment:

The regulating laws on the issue of change of use of land and construction licenses are the Law 388 of 1997 and the Decree 1469 of 2010 respectively. As for the change of use of land, the Colombian territorial law establishes long-lasting and high regulated procedures in order to modify the destination given to certain portions of land. Taking that into account, in order to modify the Territorial Ordering Plan, which is the instrument regulating the use of land, one requires the Mayor's initiative before the Municipal Council once the civil organizations concerned have been heard. The Municipal Council must evaluate and, if it so considers, approve the modification proposal presented by the Mayor. This process may imply a real challenge in terms of time and political lobbying.

As for the construction licenses, as mentioned above, they are regulated by Decree 1469 of 2010, which establishes the procedures and expenses that must be covered by the interested person. It is important to take into account that pursuant to the Decree 1469 of 2010, the urban curator is the public officer responsible for evaluating and sublicensing according to his territorial competence. As for efficiency in the obtaining of construction licenses, according to the international benchmark fixed by the World Bank, on average ten (10) procedures and eleven (11) documents are required to obtain a construction license. In comparison with the rest of economies around the world, Colombia is classified as a country that sublicense construction permissions quickly, lasting up to seventy-three days (73) on average. This time is barely outperformed by fifteen economies in the world.

Conversely, as for the expenses that must be assumed, it is necessary to conclude that Colombia is one of the countries with the higher costs, that the interested person may pay up to 7,4% of the total cost of the construction. This value is undoubtedly high considering the world average of 2.4% of the total cost of a building construction.

Other indicators

Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

Q17 In Colombia, there are few controls on hiring and firing employees or on the terms of employment.

True			False	Can't say
		X		

Comment:

Employment regulation in Colombia is contained in the Employment Substantive Code and other laws. This set of rules regulates the issue of hiring and firing employees and the general clauses that must be included in an employment agreement.

Regarding the hiring of employees, the Colombian legislation sets some limitations to the extent that almost any person might be hired as an employee, except for foreigners and minors who can be employed only with a previous authorization issued by the migration Colombian authorities or the person who has legal custody, respectively of the minor.

As to dismissals, Colombian regulation protects the employee and, therefore, the employment regulation states the exclusive conditions under which it is allowed to fire employees. These conditions are known as “fair causes”, and if they are not met, the firing then is treated as a wrongful dismissal and it allows the employee to set a claim against his employer to be indemnified according to the amounts fixed by the Substantive Employment Code.

On the other hand, there is no doubt that, in general terms, the protection of the employee is the main function of the labour contract. This function is achieved through unchangeable terms and conditions for any of the parties involved in the labour relationship. It is worth highlighting that the Colombian Constitutional Court as understood in several cases that, as held that labour rights can have the same scope as fundamental rights such as life or decent life.

Nevertheless, despite the unchangeable terms, there is also space for agreement between the parties: thus for example one can negotiate the economic remuneration, or wage, for the labour, working time or the functions of the labour, all of it between the limits of the law.

Last but not least, it is important to point out the wide “enforced stability” that Colombian labour law gives to pregnant workers, workers in unions, and those who are sick or involved in union disputes and are subject to dismissal.

Environmental restrictions

Q18 In Colombia the rules governing the environment and liability for clean-up are very light and relaxed.

True			False	Can't say
			X	

Comment:

Colombia has such a complete and modern environmental legal system that if it were to be compared with the rest of environmental legislations could be considered as advanced in current environmental challenges. Conscientious and engaged in the future of the environment and repercussions it would generate in humans, it has developed a strong constitutional protection with a series of principles, duties, and rights. This can lead to the conclusion that the Colombian Constitution has not only a strong ecological content, that has created a system of coordinated environmental authorities with the objective of working together to reach the same purposes, but also a series of repercussions with a rigorous objective environmental responsibility where the presumed offender has to prove his innocence when accused of gross negligence or fraud.

Finally, the country has recently begun to implement a culture of social responsibility attempting to promote an ethic in environmental corporative development, that focuses on avoiding further damages and impacts in the environment through tax and public recognition incentives that value and recognize efforts. In conclusion, the situation lies in solving the problems that have emerged in the practice, that don't necessarily come from Colombia´s legal system, that lead to Colombia being considered as fully respectful and protective of the environment, not only legally, but also in the actual application of the law.

Openness to foreign business

Generally These indicators measure the degree to which the country is open to foreign businesses. The indicators are quite generic and therefore subjective.

Foreign direct investment

Q19 In Colombia foreigners may freely own and control local companies outside protected industries, such as media, banks and defence.

True			False	Can't say
	X			

Comment:

In general terms, foreign investment is allowed to be allocated among almost any Colombian economy sector, excepting for the investment in absolute terms in the defence and national security sector by one side, and on the other side a business related to the processing and disposal of toxic waste. Furthermore, there are limitations relating to the percentage of investment of foreign capital when it is to be allocated in TV concessionaire companies; in that it might go up to a 40% of the outstanding capital of the company(i); limitations relating to the incorporation of radio concessionaire companies, as long as they are incorporated under the laws of Colombia (ii); and finally, there are general limitations, non-exclusive for the investment of foreign capital, relating to the protection of the market competition (iii).

Exchange controls

Q20 In Colombia, there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True		False		Can't say
	X			

Comment:

Under Colombian law, there are two types of market, the open one, which is under no Exchange controls, and the Exchange one, where all the transactions must be channeled through some figures, which can be banks and other institutions, called Exchange agents or through clearing accounts. Also, Colombian legislation establishes a difference between resident and non-resident status. Non-resident is any natural or legal person, including non-profit organization who has no legal domicile in the country's, the non-resident status is also extended to foreigners that stay in the country for no longer than six months (continuous period) or twelve months (discontinuous period). Beside there notions, the exchange law sets out the transactions that must be considered as exchange transactions, direct investment or portfolio investment. All these transactions are under the control and supervision of the Colombian Republic Bank as the main exchange authority.

In that sense, the foreign investor should take into account all the processes, and requirements established by the Colombian Republic Bank in order to make an exchange transaction or any kind of foreign investment. It must be said that there are different processes and requirements, depending of the exchange transaction concerned.

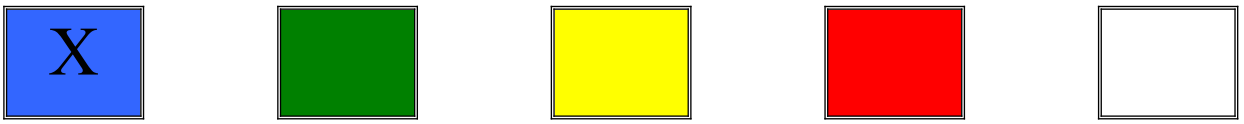
Even so, Colombian exchange law has several legal tools that allow non-residents to have bank deposits in foreign currency, borrow loans in foreign currency and repatriate their profits in foreign currency. The opening of bank deposits in foreign currency can be made through a clearing account. Loans in foreign currency are allowed only if the loan is by itself an exchange transaction, and the payment can be made in foreign currency without breaking the law.

Finally, those foreign investors who registered their investment in accordance with the exchange law are entitled to repatriate profits in any currency in accordance with the consolidated financial statements of the owner of the investment.

Alien ownership of land

Q21 In Colombia, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit.

True		False		Can't say



Comment:

The principle of equality among nationals and foreigners is instituted by the article 100 of the Colombian Political Constitution. This equality might be restricted by laws based upon public policy issues.

The Colombian Constitutional Court has stated in different decisions that the Colombian authorities must assure and maintain the equality among nationals and foreigners. In fact, certain regulations have been excluded from the legal regime where the purpose was to impose unequal treatment between nationals and foreigners.

As to foreigners owning or leasing land, the Colombian regulations barely have a restriction when it comes to the acquisition of non-previously owned lands located in the national borders and the coast zones inside Colombian territory.

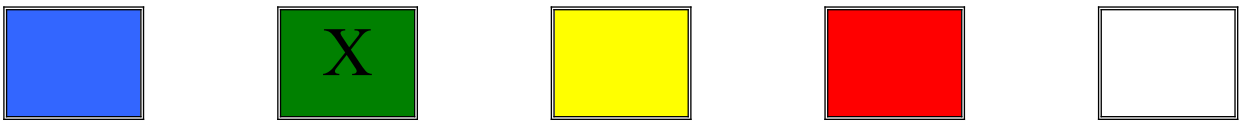
Finally, it is necessary to shed light on the issue of foreign control of national companies owning land as in Colombia these companies are considered as nationals as long as they are incorporated under the Colombian commercial law. Therefore, it does not matter whether the companies are controlled by foreigners or not in order to restrict their rights to own land in the terms just mentioned.

Application of the law

Generally These indicators deal with the application of the law, as opposed to what the law actually says. They are bound to be generic and subjective, a matter of impression.

Q22 In Colombia, the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True **False** **Can't say**



Comment:

In Colombia, the higher courts must treat big businesses in the same way they treat the individual matters. There must not be any preference based on the amount of money involved, competence or matter, as ruled by the article 228 of Colombian Political Constitution:

“Article 228. The Justice Administration is public function. Its decisions are independent. The proceedings will be public and permanent excepting the situations fixed by the Law, and they will make prevail the substantial law. The process terms will be abided by with diligence and the failure to comply with them will be punished. Its operation will be deconcentrated and autonomous”.

The public function with which the Justice Administration is vested with implies the guarantee of a public authority vested with State power to resolve – in a diligent, impartial and responsible way– the conflicts raised among people.

The Article 229 of Colombian Political Constitution states that it is a general right of the people to present before the Justice Administration their disputes without any distinction:

"Article 229. It is guaranteed the right to every person to access to the administration of justice. The law shall state the cases in which people may access without legal attorney".

In the same way, article 2 of law 1564 of 2012 "General Process Code" states the access to the justice administration:

"Article 2. Access to the justice. Every person or group of people has the right of effective jurisdictional protection for the protection of their rights and the defence of their interests, in compliance with a due process of reasonable length of time. The process terms will be abided by with diligence and the failure to comply with them without justification will be punished".

The right of equality, enshrined in the article 13 of our Constitution, serves as a strong basis for the access to the administration of justice. It is binding on the public authorities including the judges.

From this approach, when it comes to decide whether or not Colombia favours local interests above foreign ones, we must have into account that our system also contains a series of rules showing that Colombia is a country respectful of foreigners' rights, as both of them are treated in the same way excepting for public policy reasons, as stated by the article 100 of our Constitution:

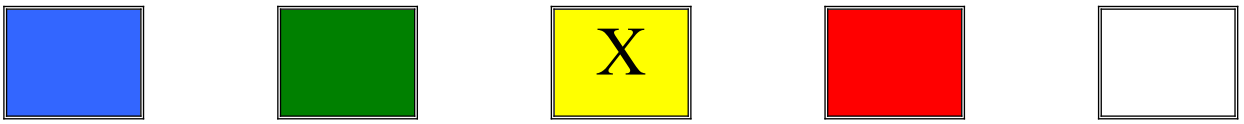
"Article 100. The foreigners will have in Colombia the same civil rights guaranteed to the Colombian people. Nonetheless, the Law may, by public policy reasons, condition to special circumstances or deny the exercise of certain civil rights to the foreigners".

We might conclude that the Colombian law and its constitutional jurisprudence has been clear in stating it is a duty of the judicial power to apply an egalitarian treatment, without regard to the matter, the amount of money involved or the nationality of the parties in conflict. Nevertheless, even there is no systematic study about it, in practical terms the length of time involved in resolving a claim implies high costs for every user of Colombian justice, no matter his nationality or quantity of money involved in the conflict, especially when they reach the high courts. This problem is caused by problems in the administration of resources which constrain effective and expeditious justice and not because of lack of guarantees to the access of justice.

Costs and delays of commercial litigation

Q23 The costs and delays of commercial litigation in the higher courts in Colombia are not considered materially greater than in other comparable countries.

True			False	Can't say
_____	_____	_____	_____	_____



Comment:

Colombia has a harmonized legislation in constitutional mandates and jurisprudential developments that seeks to guarantee real and effective access to justice and is characterized for being prompt to the governed. However, statistics indicate that the realization of that access to the ideal justice has not been possible since corruption and the precarious distribution of state resources have caused a high judicial congestion and its resulting costs.

Costs and delays in commercial litigation in Colombia, have been the reason for research in multiple studies, which were analyzed by us in order to accomplish the present conclusion. In Colombia compared to other countries with similar legal systems, delays in commercial disputes are quite elevated due to the high volume of cases submitted. Such is the magnitude that the administration of justice becomes in many cases a fundamental right of difficult access and application, a phenomenon that reaches High Courts, although recently there has been a trend towards reducing repressed proceedings in the Civil Chamber of the Supreme Court of Justice.

Regarding costs in order to access justice, either for commercial or other litigation, it is important to mention that the Colombian legal system has been harmonized with the principle of gratuitousness, to allow access to justice regardless of the expenses, agencies in law and judicial costs. These have also been influenced by corruption and deficient distribution of state resources, so that in some cases it may be said that gratuity goes to a second place.

Despite what the numbers from different studies show, it is necessary to point out that it should not be generalized, as there are legal acts which are carried by the judicial office where celerity and efficiency are the main progress.

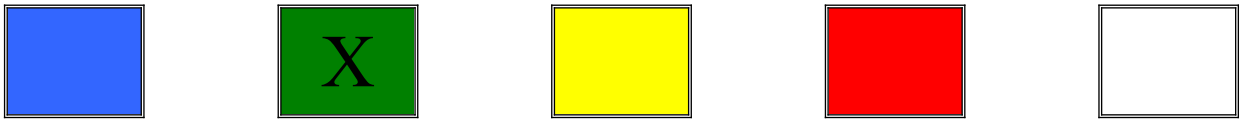
Although it seems complex for those wishing to invest in our country, these high costs and delays in litigation tend to improve considering that economic theory proves that investment levels of a country are directly related to their judicial capacity. The country has been reconsidering the judicial policy of the country by the practical strengthening of aspects such as management and administration of the resources of the judicial branch, avoiding corruption in the sector and, as stated by the Privy Council on Competitiveness in the National Competitiveness Report 2013-2014, "Monitoring the implementation of plans by execution indicators, and also designing strategies that generate cultural and thinking change by judicial operators therefore, be able to adopt each and every one of the new procedural reforms that Colombian legal system already has".

Overall ranking

This overall ranking is achieved by a survey of all the rankings as shown in this table:

	Question	Rating
1.	Insolvency set-off	
2.	Security interest	
3.	Universal trusts	
4.	Director liability for deepening insolvency	
5.	Financial assistance to buy own shares	
6.	Public takeover regime	
7.	Exclusion of contract formation	
8.	Termination clauses	
9.	Exclusion clauses	
10.	Governing law clauses	
11.	Foreign jurisdiction clauses	
12.	Arbitration recognition	
13.	Class action	
14.	Ownership of land	
15.	Security of land title and land registers	
16.	Land development restrictions	
17.	Employment law	
18.	Environmental restrictions	
19.	Foreign direct investment	
20.	Exchange controls	
21.	Alien ownership of land	
22.	Court treatment of foreign big business	
23.	Costs and delays of commercial litigation	

True **False** **Can't say**



Commentary and suggestions for change

Colombian law has sought to keep its legislation in line with the increasing demands of international trade and has therefore adopted the United Nations Convention on International Sale and laws that follow or are inspired by Uncitral models in matters such as commercial international arbitration, electronic commerce and cross-border insolvency. Colombia has also issued other laws such as the law on secured transactions that follows other international benchmarks such as the model law of Secured Transactions of the OAS with the adjustments and modifications introduced to it in other American countries.

Colombian courts have also followed the trends of other courts from countries of the same legal family in order to develop and modernize the Colombian law, and in particular, has developed the scope and effects of the principle of good faith.

In this context, and as we can conclude from the research developed by the students, Colombian law contains solutions in its regulation that are harmonious with international trends and that take into account both the need to preserve freedom of business and the protection of good faith. Nevertheless it is also true that there are difficulties in the practical field, such as the cost and time required for the courts or judges to recognize the corresponding rights.

Profiles

The survey was carried out by the following students:

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The Allen & Overy Global Law Intelligence Unit is part of the international firm of Allen & Overy and produces papers, surveys and other works on cross-border and international law within the field of its practice. Allen & Overy is one of the largest legal practices in the world with approximately 5,000 people, including some 512 partners, working in 40 offices worldwide. For further information, please contact Philip Wood, philip.wood@allenovery.com or Melissa Hunt, melissa.hunt@allenovery.com.

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Philip Wood is one of the world's leading comparative lawyers and practitioners. He has written about 18 books on financial law. He was formerly a partner and head of the banking department of Allen & Overy. For many years he has been developing innovative and pioneering methodologies for assessing legal jurisdictions and has produced a book of maps of world financial law. His university textbook on the Law and Practice of International Finance has been translated into Chinese and a Japanese version is forthcoming.

Melissa Hunt is project director of the Intelligence Unit and is responsible for the management of the project. She carries out other work for the Intelligence Unit, including the preparation of tables covering rule of law and legal infrastructure risks in the jurisdictions of the world.

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