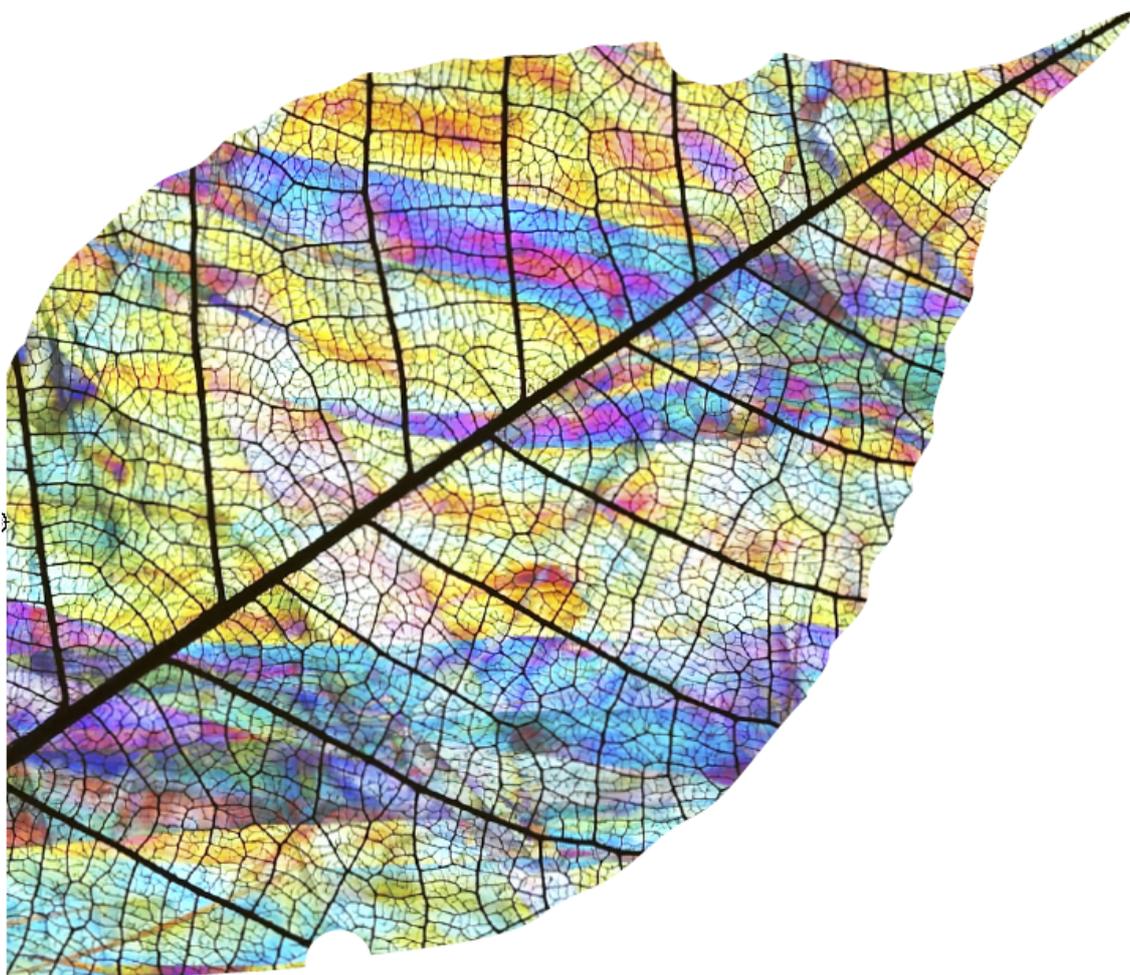


World Universities Comparative Law Project

Legal rating of Venezuela

carried out by students at the Andrés Bello Catholic
University, Caracas, Venezuela

A production of the Allen & Overy Global Law Intelligence Unit



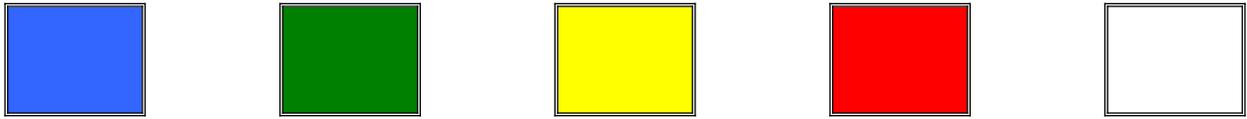
April 2014

World Universities Comparative Law Project

Legal rating of Venezuela

**carried out by students at the
University of the Andrés Bello Catholic University**

April 2014



Produced by the Allen & Overy Global Law Intelligence Unit

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 Venezuela was carried out by students at the University of the Andrés Bello Catholic University in Caracas, Venezuela.

The members of the Faculty of Law at the Andrés Bello Catholic University in Caracas Venezuela who assisted the students were

Mr. Luis García Montoya, graduated *Cum Laude* at the Andrés Bello Catholic University, Caracas, Venezuela. LL.M. Harvard University School of Law, professor of Corporate and Commercial Law. In addition, Mr. García is a practitioner in Corporate and Commercial Law, Arbitration, Banking and Contracts as partner of the law firm LMG & Associates in Caracas, Venezuela.

Mr. Pedro Luis Planchart P, graduated *Summa Cum Laude* at the Andrés Bello Catholic University, Caracas, Venezuela. Master in Comparative Jurisprudence, New York University School of Law, Fulbright scholar, professor of Contracts and Secured Transactions. In addition Mr. Planchart is a practitioner in Corporate and Commercial Law, Banking, Private International Law and Contracts as partner of the law firm ARAQUEREYNA in Caracas, Venezuela.

Mr. Andrés F. Guevara B., graduated *Summa Cum Laude* at the Andrés Bello Catholic University, Caracas, Venezuela. Professor of Civil Law. In addition, Mr. Guevara is a practitioner in Banking and Finance as an associate of the law firm Baker & McKenzie, Caracas, Venezuela.

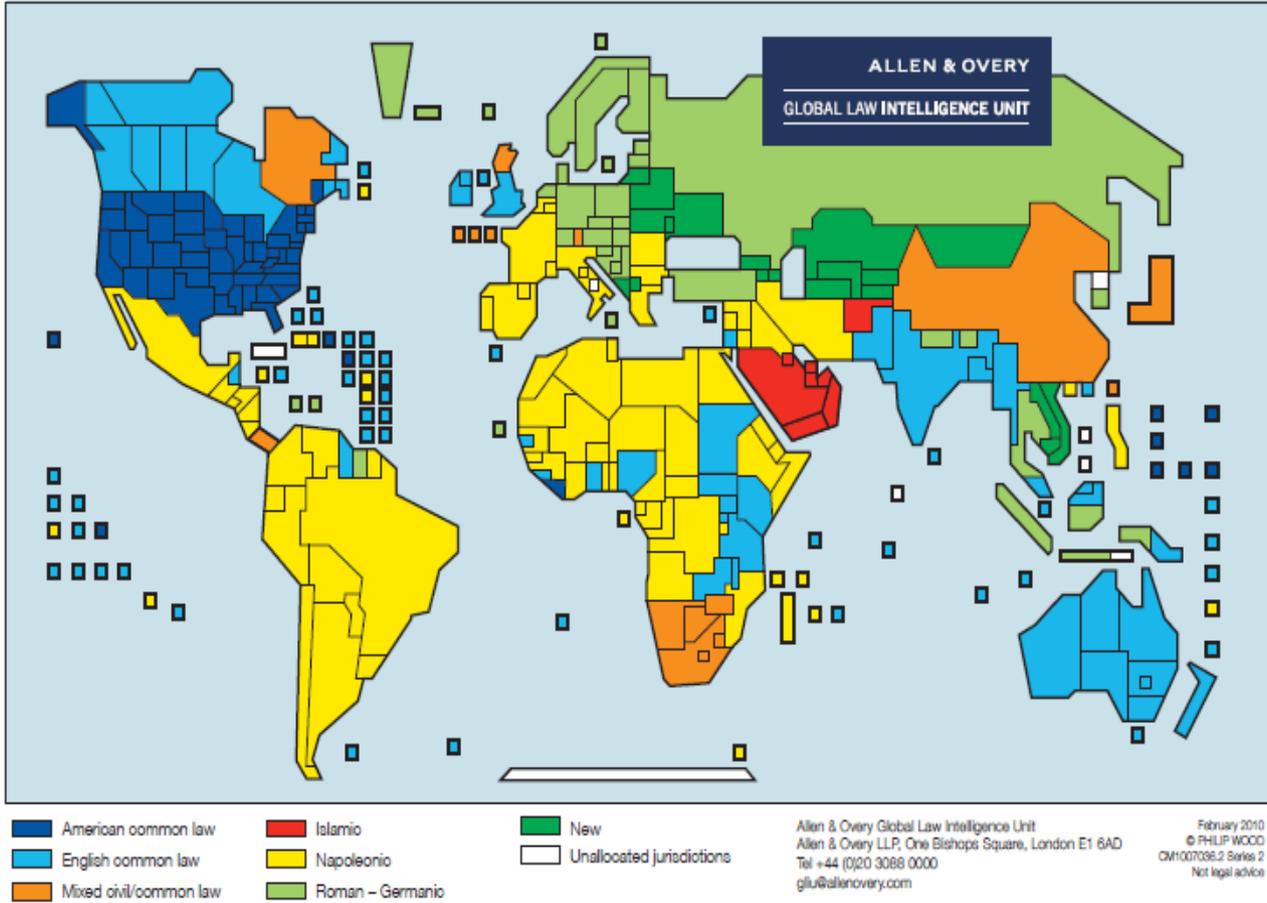
The members of the Practitioner Expert Panel with whom the students could discuss the questions in the survey were

Mr. Fernando Planchart M. Attorney at law, graduated at the Universidad Central de Venezuela, Caracas, Venezuela. Master in Commercial Law and Master in Labour Law at the Universidad Central de Venezuela, Caracas, Venezuela. He has a vast experience in Commercial Law and Litigation. He is the Main Director of the law firm Planchart & Pimentel in Caracas, Venezuela.

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 Andrés Bello Catholic University in Caracas, Venezuela, was founded in 1953, as a private University but with a profound social commitment. The Faculty of Law is among the original faculties of the University since the foundation in 1953. Since its very beginning, the Andrés Bello Catholic University has become one of the most important Universities in Venezuela. The Faculty of Law is considered one of the best and most prestigious law faculties in Venezuela.

The Faculty of Law of the Andrés Bello Catholic University feels pleased and honoured that some of its students get involved in projects such as the World Universities Comparative Law Project. The Faculty of Law has always encouraged the participation of its students in the exchange of knowledge with people from other cultures and legal systems.

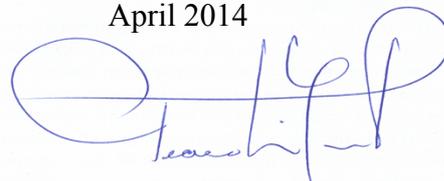
The World Universities Comparative Law Project has been an extremely challenging and interesting project; in which the students led, on their own initiative, the research in the different aspects of Venezuelan law related to the questionnaire. For our students, one of the most interesting aspects of the Project was that they had to go further beyond the topics usually analysed in their classes and research in topics that were completely new for them.

All of the students of the Faculty of Law who participated in the project are in the middle of their fourth year in their Law studies (Law studies in Venezuela last five years). We feel very proud of their work and their commitment carrying out their work.

One of the goals of the Andrés Bello Catholic University, generally, and more specifically of the Faculty of Law, is to prepare its students for the needs of the country and the world where they develop, now, as students and, afterwards, as professionals. It is important for them to understand that the world is globalised, that there are other cultures and legal systems that might have an impact on the work they will have to face now and in the future. Thus, there is a compelling need for them to interact with those cultures and systems from this very moment, when they are university students. The Andrés Bello Catholic University supports any initiative that helps its students to achieve that interaction.

As a member of the staff of professors of the Faculty of Law of the Andrés Bello Catholic University, I feel pleased, honoured and proud of the work conducted by our students in connection with the World Universities Comparative Law Project.

April 2014



Pedro Luis Planchart-Pocaterra
Law Professor
Andrés Bello Catholic University
Caracas, Venezuela

Description of the legal rating method

Introduction

This paper assesses aspects of the law in Venezuela 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 the Andrés Bello Catholic University in Caracas, Venezuela. 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, the Andrés Bello Catholic University, the members of the Practitioner Expert Panel or the Global Law Intelligence Unit, the members of Allen & Overy.

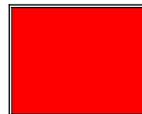
Methodology

The survey uses colour-coding as follows:

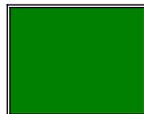
True



False



**Can't
say**



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 Venezuelan law. 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.

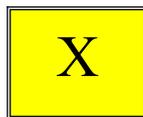
Jurisdictions based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. Their bankruptcy ladder favours greater equality of creditors. 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

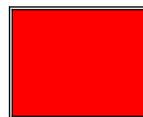
Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures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

Q1 In Venezuela, 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



Comment: Under the Venezuelan Civil Code, set-off (*compensación*) of debts between mutual debtors applies as a matter of law and to the full extent of the smaller debt provided that (i) both debts are for cash or for specific goods that may be interchangeable; and (ii) both debts are quantifiable and payable. Pursuant to Civil Code Article 1332, set-off takes place automatically at the very moment the two due and payable debts coexist, even without the debtors' knowledge. Based on the foregoing, and on the principle of law that presumes good faith, and requires bad faith to be proven, it follows that the set-off of mutual debts in an insolvency scenario should – at least in principle – be deemed valid, provided that the requirements of law are met. However, if there were factual bases to argue and prove that a set-off was attained through fraud to other creditors, then such set-off would be subject to avoidance. There are scholars who argue that the set-off is perfectly valid. Based on the above, the mere existence of a preference period preceding the notice of insolvency could not, by itself, negate the effects of the Civil Code Article 1332 that establishes the automatic (*ipso jure*) set-off of the coexisting debts. Even though there is no special netting statute in Venezuela in cases of bankruptcy, the issue is opened to discussion.

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 Venezuela, the law offers a security interest which is highly protective of the secured creditor.

True



False



Can't
say



Comment: The Venezuelan Civil Code (published in the Special Official Gazette No. 2.990 dated July 26, 1982) and other specific regulations such as the Chattel Mortgage Law (published in the Special Official Gazette No. 1.575 dated April 4, 1973) provide a secured transaction system whereby privileged and guaranteed creditors may collect their obligations by means of a secured asset.

Universal trusts

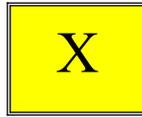
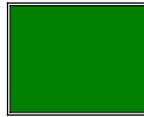
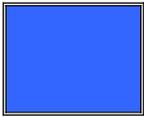
Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away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

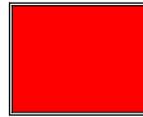
All jurisdictions have an effective trust of goods (called bailment or deposit). The common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship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

Q3 Venezuela has a universal trust for all assets.

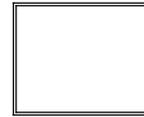
True



False



Can't
say



Comment: The law that regulates trusts in Venezuela, the Trust Law of 1956 ("*Ley de Fideicomisos*"), states in its sixth article that a trust can be established for all kinds of goods, except for those that, according to law, are strictly personal to its right-holder. Doubts might exist with respect to trusts in which the settlor transfers all his/her/its assets.

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.

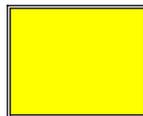
Director liability for deepening an insolvency

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.

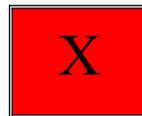
There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, 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 Venezuela 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



Comment: According to Venezuela's Commerce Code of 1955 ("*Código de Comercio*"), the directors and managers of a joint-stock and/or limited liability company are personally liable if they fail to comply with formal requirements demanded by law or if their conduct is negligent or fraudulent (art. 920). Moreover, the directors and managers of a stock company and/or limited liability company are required by law to declare the insolvency of the company before a Commerce Judge within three days after all payments have ceased, and to appear before the judge and the court appointed administrator every time they are requested to do so (art. 925).

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.

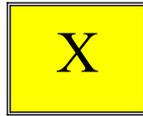
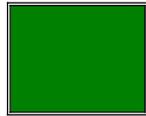
The prohibition therefore favours creditors against shareholders of the target.

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.

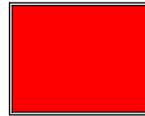
A contravening transaction is usually a criminal offence and void.

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

True



False



Can't
say



Comment: Hard to say. The issue is open to discussion.

Although the issue is not directly addressed by the Code of Commerce in Venezuela, the latter prohibits a company from acquiring its own shares (except with the approval of the shareholders' meeting and with actual earnings, in which case, the shares become treasury shares).

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.

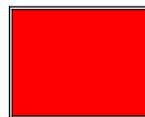
The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) 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 Venezuela is open and has few restrictions.

True



False



Can't
say



Comment: There is intense legal intervention, but not yet outright prohibition.

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 Venezuela, 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



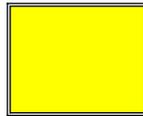
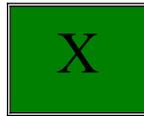
Comment: The parties are not obligated to comply with heads of terms if it is expressly stated that heads of terms are subject to contract. Even if the parties reach certain agreements, they are not bound by a contract, because a contract must be agreed upon as a whole. According to Venezuelan doctrine, the parties are only bound by a contract when: 1) they have given their technical consent (at least two different declarations of will, reciprocal and communicated declarations); and 2) their consent must fall upon the contract as a whole, a contract will not exist between the parties if there are secondary elements of the agreement missing. It is important to stress that the negotiations and the contract itself must be carried out in good faith.

Termination clauses

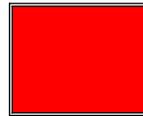
Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these 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 Venezuela, 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



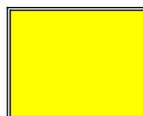
Comment: In certain cases clauses providing for termination of a contract are held valid. The issue in some cases is still open to discussion.

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 Venezuela, 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



Comment: Generally, the exclusion clauses are valid and enforceable when there is no evidence of gross negligence or willful misconduct.

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.

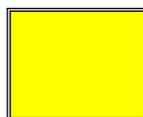
The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business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

Governing law clauses

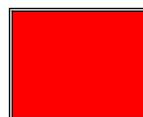
Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that the contract obligations may be different.

Q10 The Venezuelan 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 Venezuela's public policy and mandatory statutes.

True



False



Can't
say



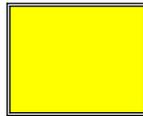
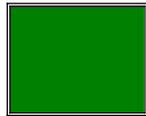
Comment: In this matter, the principle of contractual freedom is untouched. This principle is protected by Article 29 of the Private International Law Act, which establishes that it is possible for parties to agree that foreign law will be applicable, even if the contract has no connection with a foreign jurisdiction. However, the number of laws establishing rules as part of Venezuelan public policy has increased considerably in the last few years, which very much limits the range of contractual freedom and the possibility of applying foreign law in certain matters.

Foreign jurisdiction clauses

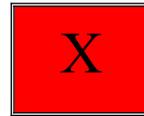
Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

Q11 The Venezuelan 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.

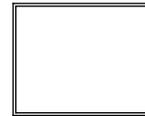
True



False



Can't
say



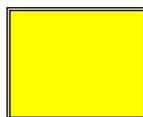
Comment: Pursuant to the Venezuelan Private International Law Act (published in the Official Gazette No. 36.511, dated 6 August, 1998) the referral of an agreement to a foreign court requires the existence of connecting factors to such jurisdiction.

Arbitration recognition

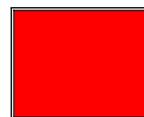
Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries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

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

True



False



Can't
say



Comment: Venezuela's Commercial Arbitration Law (1998), under Article 5, provides that arbitration agreements are excluding and exclusive from ordinary jurisdiction and in Article 11 it provides for the recognition of international institutions. That being said, our Constitution also promotes arbitration as an alternative method to solve disputes (Article 258) and, furthermore, Venezuela's Supreme Court also considers decisions emanated from arbitration as '*res iudicata*'.

As well as accepting decisions emanating from top Venezuelan institutions (*Centro Empresarial de Conciliación y Arbitraje* (CEDCA) and the Arbitration Centre of the Caracas Commercial Chamber), Venezuela also has ongoing disputes at the International Centre for Settlement of Investment Disputes (ICSID), which means that foreign parties contracting in Venezuelan soil could also settle disputes overseas in such institutions.

Nonetheless (regarding foreign investment in which the Venezuelan State takes part as a contracting party), it should be taken into account that, currently, almost all ongoing disputes in which Venezuela is being sued for violating clauses of a contract (and lost) are stalled at the assessment of damages. Thus, any foreign party

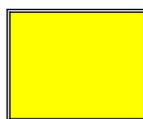
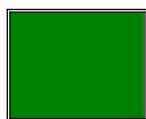
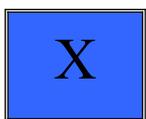
wishing to be compensated would have to wait a lengthy period of time before being rightfully paid by the Venezuelan government.

Class actions

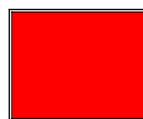
Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound.

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

True



False



**Can't
say**



Comment: Venezuelan procedural legislation does not provide for class actions. Since there is no procedural legislation for this matter, we do not have structured rules concerning these types of actions. However, there is a constitutional provision that entitles any citizen to act on behalf of a group when their rights have been violated. Recent case law from the Constitutional Chamber of the Supreme Court of Justice has drafted the legal requirements needed to file this kind of claim.

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.

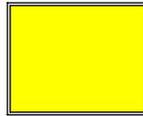
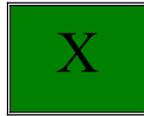
Real property

Ownership of land

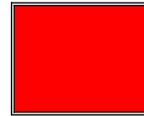
Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction 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 Venezuela nationals and local corporations are entitled to own land absolutely.

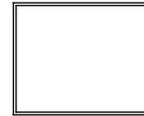
True



False



Can't
say



Comment: Both Venezuelan nationals and local corporations are allowed to own land, with no conditions other than those specified in our Civil Law Code, which also conceives land as of public dominance (both private and public use) and private dominance as well. It is also true that people can own specified portions of land for a very long period of time as well as to sell, lease, it, etc, as long as it doesn't contradict what the Law has specified as 'public dominance' – Articles 538 through 543 stipulate the very basics of these principles.

The only way this 'right to own land' can be changed in Venezuela is by fulfilling both a Civil Law rule (Article 547) and a Constitutional principle – Article 115 of the Constitution (and also detailed within its own Law since 2002: Expropriation for Social and Public Utility Law) in which the Venezuelan State can consider any portion of land owned by any national or local corporation as of 'public utility' when needed for the construction of a public service of huge importance for the country, such as a hospital or major motorway.

Therefore, when all legal proceedings (including fair payment for the land taken: compensation for the land and/or building, etc. that any national or corporation owns) are met, the Venezuelan State can legally take over the portion of land claimed as 'Public Utility', regardless of how long it has been owned by a national or corporation.

Although this is an out-of-the-ordinary and well-intentioned measure, in recent years, however, this legal and constitutional principle has been misused many times by the Venezuelan government as a punishment, failing to fulfill both the necessary requirements for the 'expropriation' to operate, as well as the true reason it was intended for.

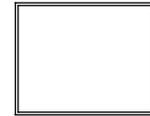
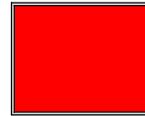
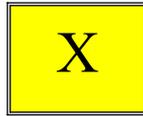
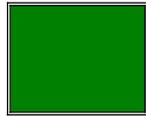
Security of land title and land registers

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 Venezuela 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

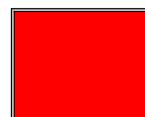
Comment: Although the principle is that land titles are registered with the Real Estate Registries in Venezuela, it is not possible to say that property rights are entirely stable in Venezuela. In several cases, the Public Administration carries out land appropriation methods without complying with the expropriation process that forms part of our 1999 Constitution. The most vivid example is The Land and Agrarian Development Act, which provides a figure called *Rescate de Tierras* (Land Rescue) allowing for the recovery of illegally occupied land that is property of the State. This figure has been misused in some cases, where the Administration seizes privately owned land and, when the owners oppose their public registered land titles, the effect of enforceability *vis-à-vis* third parties of registered land titles is many times ignored by the State.

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 Venezuela, 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

Comment: Depending on the type of commercial development and the change in use of the land, a significant bureaucratic process may be involved. In theory, any person may purchase land and commercial developments in Venezuela; however, the process of setting up a company in Venezuela and obtaining the relevant permits is, in practice, slow. Although not many authorisations are required (except with regard to certain environmental matters affecting certain types of developments), the process of obtaining the relevant permits is quite bureaucratic, time consuming and plagued with formalities.

As to whether these permits and authorisations are cheap to obtain, this should be the case (at least in theory) but it is not necessarily so in all instances. Actual costs depend on the amounts involved in the relevant transaction. Therefore, while not necessarily an expensive process, obtaining permits in Venezuela may not ultimately be cheap either.

Other indicators

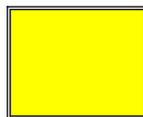
Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

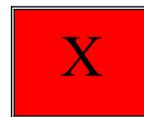
Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

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

True



False



Can't
say

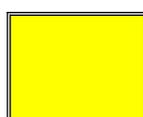


Comment: When it comes to firing employees, the legal reality tells otherwise. Every year the President signs a firing freeze decree, as a means to supposedly secure employment stability and tenure. This measure applies to all public and private sector employees and aims to protect workers from massive and unjustified dismissals. The response from employers has been very simple: businesses no longer hire people unless they are absolutely critical, due to the legal risks that can potentially arise, even if this means overloading the employees they already have with more work (within the maximum hours), or worse, making the company less productive. If an employer does eventually need to fire someone, they have three possible options: i) the legal route is for the company to ask for permission from the labour inspectorate in order to dismiss a certain employee. Then, the labour inspectorate – a government body – will determine whether or not the company can proceed; ii) the illegal route is for the company to fire the employee, disregarding the decree. However the employee can then report this incident to the labour inspectorate and as a result of this the company will most assuredly face a penalty, and be forced to reinstate the dismissed employee; and iii) the other way, also illegal, but probably the most common, is for the company to pay a large sum of money to the employee and suggest that they sign a resignation letter. This one also entails a risk for the company, as the employee can easily report this to the labour inspectorate, resulting in legal consequences for the company.

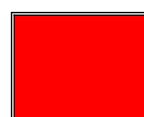
Environmental restrictions

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

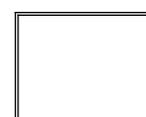
True



False



Can't
say



Comment: There are rules that regulate the environment and liability for clean up, but they are not as effective in reality as they should be. It appears that these rules are complied with in certain cases, especially where there are political interests, but supervision and oversight are not as adhered to as they are supposed to be.

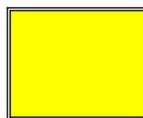
Openness to foreign business

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

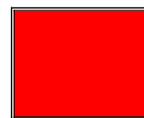
Foreign direct investment

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

True



False



Can't
say

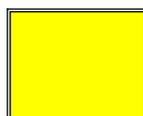


Comment: All foreign capital investments in Venezuela must be registered with the Superintendence of Foreign Investments (“SIEX”). Registered foreign investors have the same rights as national investors. Basically, these consist of the rights to remit dividends and repatriate capital, pursuant to the applicable laws and regulations on exchange control currently in force in Venezuela. According to their foreign capital participation, companies are classified as foreign, mixed, or national. To register the investment, the foreign investor must submit to SIEX evidence of the entry of foreign currency or physical or tangible goods or technological contributions, as a contribution to the capital stock of the company. Once the investment is registered, the investor must update the details of the investment each year and notify SIEX of any amendments regarding the investment.

Exchange controls

Q20 In Venezuela, 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.

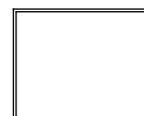
True



False



Can't
say



Comment: The Venezuelan government has restricted access to foreign currency which reduces local and foreign investment and limits the private sector. With the exchange control regime, along with the foreign

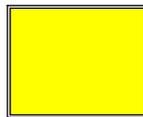
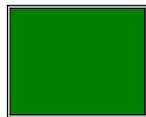
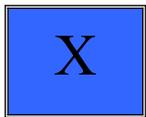
currency deficit, the overwhelming monetary liquidity, and the anti-capital flight politics implemented by the government, businesses are unable to repatriate profits, at least legally.

However, businesses may maintain accounts in foreign currency in foreign banks. Recently, the government has passed decrees (the new Foreign Exchange Regime Act) and regulations which, at least in appearance, make the exchange control system more flexible.

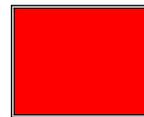
Alien ownership of land

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

True



False



Can't
say



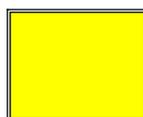
Comment: Venezuelan legislation does not have any restrictions on foreigners with regard to land ownership or lease, in that foreign-controlled companies are allowed to own and lease land on an equal basis to nationals. In this regard, the Venezuelan Civil Code establishes that foreigners in Venezuela may enjoy the same civil rights, with the only applicable exceptions in law.

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 Venezuela, 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

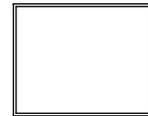
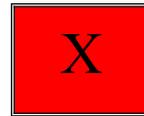
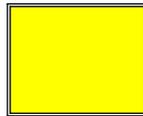
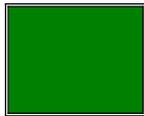


Comment: There are many examples of foreign companies that have been either expropriated or affected in some ways by an arbitrary decision. Venezuelan courts are not immune to government pressure and political interests.

Costs and delays of commercial litigation

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

True



False

Can't
say

Comment: The cost and delays are higher in Venezuela than in other developed countries. These deferments and higher expenditures are not limited to the higher courts, but are also present in most of the judicial system. Litigators have to face courts overloaded with work, and the judicial system is not entirely trustworthy. These delays have caused individuals to prefer arbitration over civil litigation.

Overall ranking

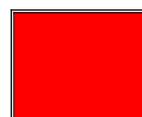
This overall ranking is achieved by a survey of all the rankings as shown this table:

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

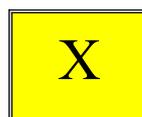
True



False



**Can't
say**



Commentary and suggestions for change

Venezuela is a Civil Law country belonging to the Napoleonic tradition. Its most important law is the 1999 Constitution. Theoretically, all laws, regulations, principles, governmental acts, instructions, rulings and decisions, including court decisions, must adapt and follow the rules and principles set forth in the Constitution.

Pursuant to the Constitution, the laws should, in principle, be passed by the National Assembly; but the President of the Republic has important legislative powers (through what are called law-decrees) if duly empowered by the National Assembly. It must be stressed that during the period of effectiveness of the 1999 Constitution, the President has been enabled several times to legislate through law-decrees. In addition, the President of the Republic is empowered to issue decrees, regulations, orders and instructions hierarchically lower than the laws passed by the National Assembly and the law-decrees. Governmental officers are empowered as well to issue orders, rulings and instructions, which, in principle, are subject to the laws and law-decrees. Summarizing all actions of the Government and the different powers are subject to the Rule of Law as a principle.

The Supreme Tribunal is the highest court and it is divided into five chambers: The Civil Chamber, the Criminal Chamber, the Political and Administrative Chamber, the Social Chamber and the Constitutional Chamber.

Court decisions, except for some decisions of the Constitutional Chamber of the Supreme Tribunal, are not binding. However, from a practical point of view, the trend is that the lower courts follow the decisions of the superior courts, especially those of the various chambers of the Supreme Tribunal.

Among the many laws and acts in full force and effect in Venezuela we must mention the Civil Code (reformed for the last time in 1982) and the Commercial Code (reformed for the last time in 1955). These two codes essentially recognise the principle of freedom of contract, the right of property and the right of free enterprise, principles and rights which are as well recognised by the 1999 Constitution. There is also legislation that, at least theoretically, protects and supports foreign investments.

In the Labour Law area there are important acts as the Labour Act (*Ley Orgánica del Trabajo de los Trabajadores y Trabajadoras*) of 2012, which is extremely protective of workers and employees' rights. In addition, there are other laws, decrees and regulations extremely protective of workers and employees.

In the area of foreign investment, as said, besides the Commercial Code, there are laws and regulations protective of foreign investments in diverse sectors.

With respect to the legal framework regarding conflict of laws issues, the fundamental act is the Private International Law Act of 1998. Furthermore, there are as well some international treaties and other laws that govern conflict of law issues.

In connection with legal proceedings, among many laws, we must remark the Code of Civil Procedure (reformed for the last time in 1990) and the Commercial Arbitration Act of 1998.

Even though, from a theoretical point of view, the legal framework in Venezuela protects property rights, contractual freedom and foreign investments, the truth, during the last fifteen (15) years, has been the increasing power of the Government in many areas of law, which has affected those rights.

The Government is continually intervening in, and controlling, all the areas of the economy and social as well as legal relationships in Venezuela. The Government in many occasions has growingly expropriated properties and rights of nationals and foreigners and has imposed strict exchange control regulations that have affected the economy inside the country and have affected the rights of foreign investors to repatriate dividends and capitals.

In spite of the fact that the regulations, in theory, protect property and contractual rights as well as foreign investments, the reality has become different in many instances.

Students

The survey was carried out by the following students:

| Students | E-mails |
|-----------------------------|----------------------------|
| Mr. Pierre Aivasovsky | pierreaivasovsky@gmail.com |
| Ms. Marianella Falcón | mariafalcon16@hotmail.com |
| Mr. Federico Fragachán | ffragachan@hotmail.com |
| Mr. Hernando Grisanti | benigri28@hotmail.com |
| Mr. Andrés Hobaica | andreshobaica@hotmail.com |
| Ms. Beatriz Melo | bmelo93@yahoo.com |
| Mr. Guillermo Olavarría | guilleolavarria@gmail.com |
| Ms. María Cecilia Planchart | mariplanchartp91@gmail.com |
| Ms. Liliana Reyes | liliana.reyes.1@gmail.com |
| Mr. Humberto Romero | hromeroc91@gmail.com |
| Mr. Didier Torres | torreskhaled@gmail.com |

All the students who carried out the survey are in their fourth year at the Andrés Bello Catholic University. Law studies at the Andrés Bello Catholic University last five (5) years.

Allen & Overy Global Law Intelligence Unit

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@allenoverly.com or Melissa Hunt, melissa.hunt@allenoverly.com.

Philip R Wood QC (Hon) BA (Cape Town), MA (Oxon) LLD (Lund, Hon)

Head, Allen & Overy Global Law Intelligence Unit

Special Global Counsel at Allen & Overy LLP

Visiting Professor in International Financial Law, University of Oxford

Yorke Distinguished Visiting Fellow, University of Cambridge

Visiting Professor, Queen Mary College, University of London

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.

Allen & Overy LLP

One Bishops Square

London E1 6AD

T: 00 44 (0)20 3088 0000

D: 00 44 (0)20 3088 2552

M: 00 44 (0)7785 500831

philip.wood@allenoverly.com

melissa.hunt@allenoverly.com

intelligence.unit@allenoverly.com

D: 00 44 (0)20 3088 2750

Allen & Overy LLP

One Bishops Square, London E1 6AD United Kingdom | Tel +44 (0)20 3088 0000 | Fax +44 (0)20 3088 0088 | www.allenoverly.com

In this document, Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings.

Allen & Overy LLP or an affiliated undertaking has an office in each of: Abu Dhabi, Amsterdam, Antwerp, Athens (representative office), Bangkok, Beijing, Belfast, Bratislava, Brussels, Bucharest (associated office), Budapest, Casablanca, Doha, Dubai, Düsseldorf, Frankfurt, Hamburg, Hanoi, Ho Chi Minh City, Hong Kong, Istanbul, Jakarta (associated office), London, Luxembourg, Madrid, Mannheim, Milan, Moscow, Munich, New York, Paris, Perth, Prague, Riyadh (associated office), Rome, São Paulo, Shanghai, Singapore, Sydney, Tokyo, Warsaw, Washington, D.C. and Yangon. | BK:27679535.3