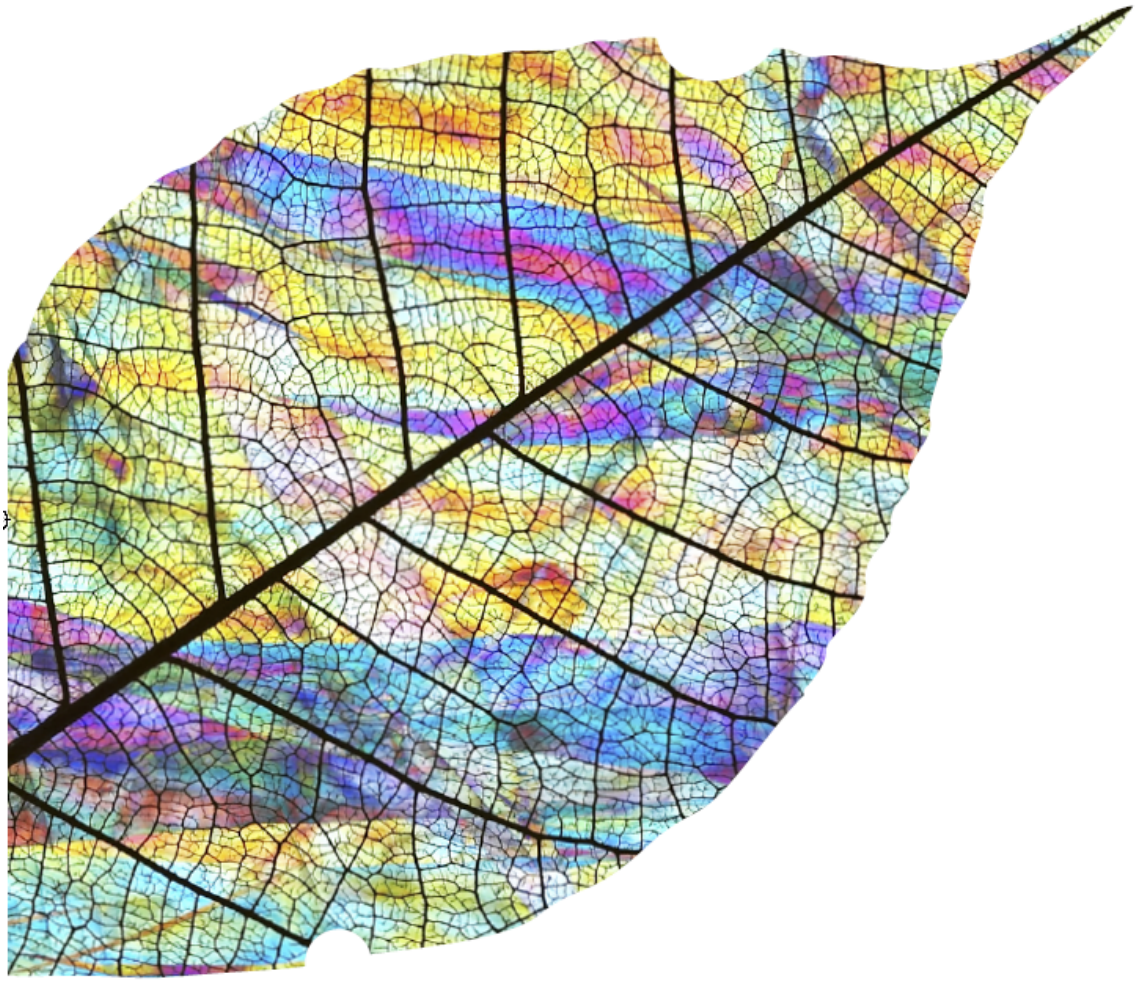
World Universities Comparative Law Project
Legal rating of Uganda

carried out by students at Makerere University

A production of the Allen & Overy Global Law Intelligence Unit



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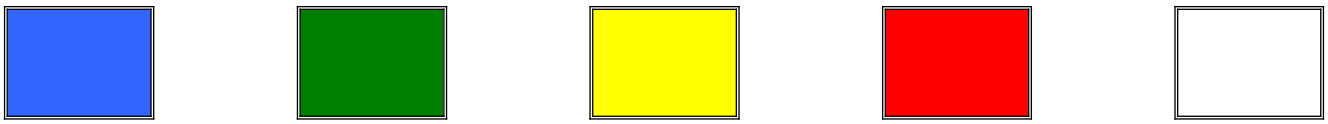

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World Universities Comparative Law Project

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 Uganda was carried out by students at **Makerere University** in Kampala.

The member of the **School of Law at Makerere University** who assisted the students was

Dr. Winifred Tarinyeba Kiryabwire

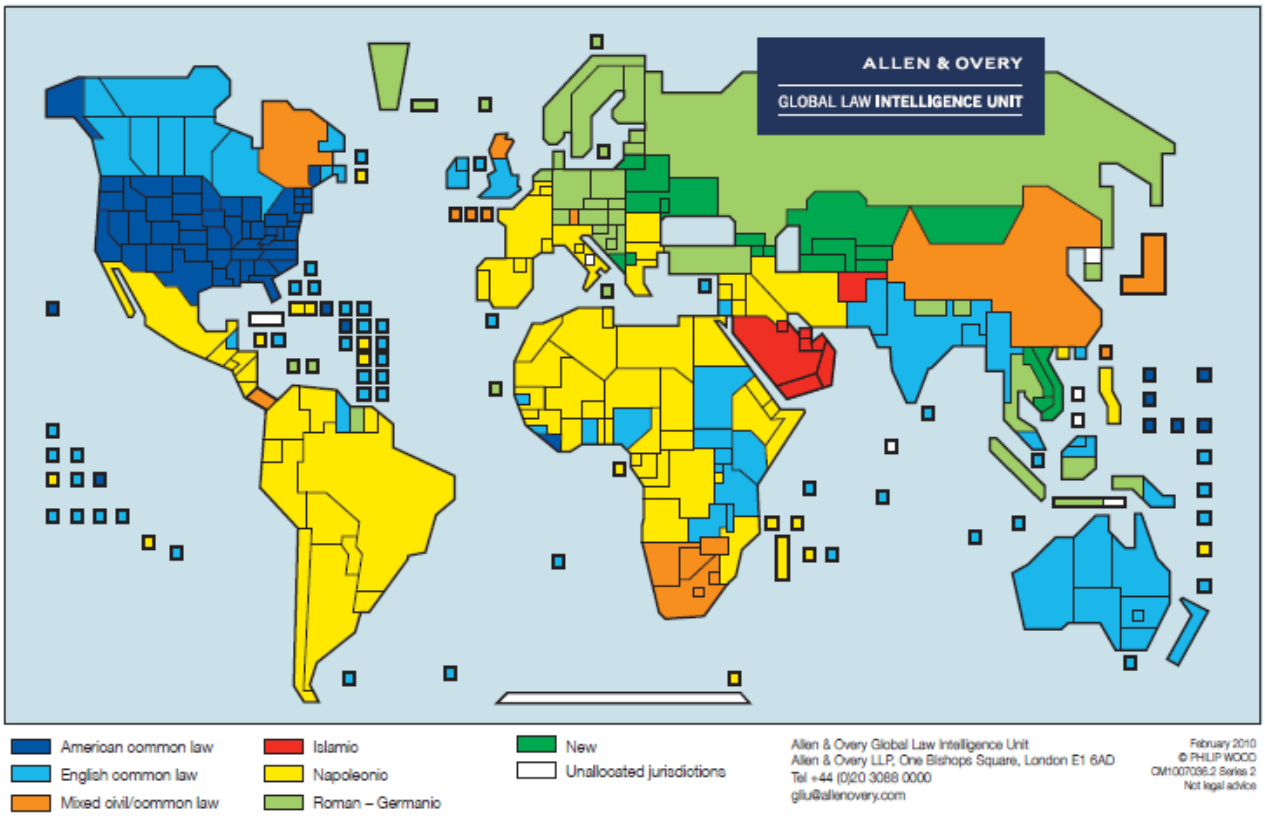
The members of the Practitioner Expert Panel with whom the students could discuss the questions in the survey were

Mr. Joshua Ogwal of Ligormarc Advocates

Mr. Richard Caesar Obonyo of KISMO Advocates

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

I am humbled to present this survey on the legal rating for Uganda. It provides a unique and quick reference document to many questions that are often asked by attorneys in international practice and their clients as to the state of financial and corporate law and litigation in any particular country.

This is an important addition to knowledge about the state of the law and practice in Uganda that readers will find useful in their initial evaluation of legal risk in Uganda.

Like other publications of a similar nature for other countries readers will find colour coded ratings together with the write-ups easy to follow and analyse. As a former corporate lawyer who practiced in the area of finance before joining the bench I found the survey a good tool for decision making. Uganda is a developing country with many prospects for finance, trade, construction, industry and mineral development. This is attracting foreign direct investment as well as partnerships which need the information in this survey.

I would like to thank the Allen and Overy Global Intelligence Unit for collaborating with Makerere University School of Law and its students to do this survey and thus provide this valuable skill which they will build on in the future.

Justice Geoffrey Kiryabwire

Justice of the Court of Appeal and Constitutional Court Uganda

Former Head of the Commercial Court Division of the High Court of Uganda

Patron Makerere University Law Society

Description of the legal rating method

Introduction

This paper assesses aspects of the law in Uganda 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.

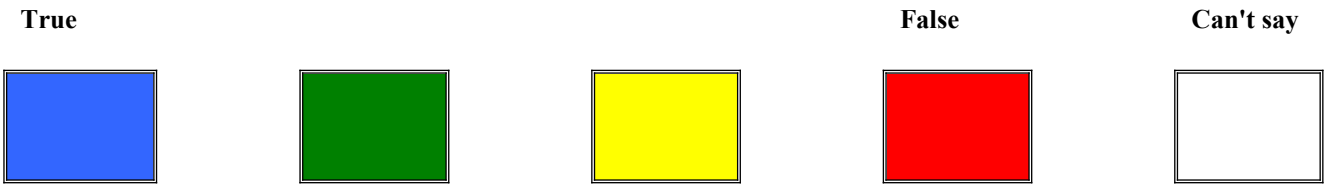
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes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

The survey was carried out by students at **Makerere University**. 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 Global Law Intelligence Unit, the members of Allen & Overy, Makerere University of or the member of the Practitioner Expert Panel.

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 law. This is 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. But if the law does intervene, this creates a risk because the law has to be complied with. If it is not complied with, there is generally some sanction in the form of liability, a penalty or the invalidity of a transaction.

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.

Jurisdiction 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. These 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 Uganda, 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:

s.9(1) Insolvency Act allows creditors to set off mutual debts. However this is subject to s.17 of the same Act where the creditors have to prove that the transactions or dealings that resulted into the claims sought to be set off was not a voidable charge.

Similarly in s.9(2) a creditor cannot seek to set off a debt owed by the debtor if he or she was reasonably expected to have foreseen that the debtor would likely to be unable to pay his or her debt at the time of giving credit to the debtor. In practice, the position of the courts is that the mutual debts should have been incurred before the notice of insolvency. [See *Central Purchasing Co. Ltd v Hon. Col. Kahinda Otafire (Bankruptcy Cause No. 23 of 2004)]*

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

True		False	Can't say
	X		

Comment:

S.11(2) Insolvency Act 2011 gives a secured creditor three options, (i) to realise an asset subject to a charge, (ii) to claim as a secured creditor, (iii) to surrender the charge for the general benefit of the creditors. In Uganda like any other jurisdiction the creditors have opted for realisation of the assets.

S. 11(3) (a), the secured creditor is allowed to claim as unsecured creditors for the balance after exercising any of the options in s.11(2) supra.

The mortgage Act 2009 also gives the secured creditor various remedies in case of default of the mortgagor namely sale of the mortgaged land and appointment of a receiver. See s. 20, 26 Mortgage Act.

S. 113 Contracts Act 2010 empowers the pledgee where the pledgor defaults the payment of the sum to sell the items pledged.

However, it should be noted that the interest of a secured creditor is not fully protected. S. 12(2) Insolvency Act subjects the interests of a secured creditor to preferential debts where the assets are insufficient to meet both.

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 Uganda has a universal trust for all assets.

True			False	Can't say
X				

Comment:

It's possible to create a universal trust in Uganda. A trust is both possible for movable and immovable property. Under s.1(k) Trustees Act, property that is subject matter of a trust includes immovable and movable property, any estate, share and interest in any property immovable or movable, interest and any other right or interest whether in possession or not.

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 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 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 Uganda 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:

The Companies Act 2012 imposes liabilities and duties on directors for non-disclosure and fraud but not for accelerating insolvency. [See s.213, 217, 218, 201 Companies Act 2012].

The Act further under s.198 imposes duties on directors to (1) act in a manner that promotes the success of the business of the company, (ii) exercise a degree of skill and care as a reasonable person will do, (iii) to act in utmost good faith in the interest of the company as a whole. Failure of the directors to discharge such duties under ordinary circumstances does attract liability on their part.

It is not mandatory for a director to file for insolvency but s. 199(1) (r) Companies Act imposes an obligation on the directors to file for insolvency because it clearly states the consequence of the directors being indifferent to the status of the company. It asserts that the director shall be disqualified for three years if he allows a company to trade while insolvent. The directors also if they so wish can petition for insolvency under s.62 Insolvency Act 2011 (members voluntary winding up).

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

True		False	Can't say
		X			

Comment:

S.63 (1) Companies Act prohibits a company from rendering financial assistance for any purpose connected with the purchase and subscription for shares. S.63(2) lists exceptional circumstances under which a company can render financial assistance**.**

S. 64(1) Companies Act, states that in case of public companies, financial assistance may only be given if the company has net assets which are not reduced by the financial assistance, if the assistance is provided out of the distributable profits. A private company on the other hand is not prohibited from giving financial assistance to do anything specified in s.65 (1) (a) (b). However there are strong restrictions under s.65 (2)(3)(4)(5)(6)

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 Uganda is open and has few restrictions.

True		False	Can't say
	X				

Comment:

Uganda has no specific law on takeovers, however the elements of a restrictive regime under which Uganda falls can be collected from the various Acts and regulations passed under them.

According to the Capital Markets (Takeover and Mergers) Regulations 2012 [S.I.NO.55/2012], a mandatory or voluntary public offer has to be made for shares that carry right to exercise or control the exercise of not

less than twenty five percent of the voting rights of the offeree for one to acquire effective control. The bidder must pay the same price to all share holders [see R.1& 12, second schedule S.I.NO.55/2012]. Following the public offer, the acquirer must create an escrow account as security for the performance of the obligation under the regulations and deposit into the escrow account 10% of the total consideration payable. [See R.24 S.I.NO.55/2012]. This can be in form of cash, bank guarantees or deposit of acceptable securities.R.24

R.11 second schedule S.I.NO.55/2012 states that at no time after a bona fide offer has been communicated to the board of the offeree company or after the board of the offeree company has reason to believe that a *bona fide* offer might be imminent, may any action be taken by the board of the offeree company in relation to the affairs of the company without the approval of shareholders at a general meeting. Therefore several elements of a restrictive regime do exist under the Ugandan legal system though from a practical point of view a public takeover in Uganda is not easy and it rarely occurs.

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 Uganda, 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:

The notion of freedom of contract is deeply rooted in the contract law of Uganda. It is always accepted that two consenting adults have the capacity to regulate their duties and obligations. Therefore it always depends on the intention of the parties whether they agree that the head of terms are binding on them or not.

s.54 Sale of Goods Act cap 82 states that where any rights, duty or liability would arise under a contract of sale by implication of the law may be negatived or varied by express agreement or by the course of dealing between the parties or by usage, if the usage is such as to bind both parties to the contract.

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. We ignore consumer contracts - where there may be consumer protections.

Q8 In Uganda, 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:

The Uganda legal system has classified breaches into two, that is to say: breach of a condition and breach of a warranty [see s.12 Sale of Goods Act]. A breach of a warranty only entitles an innocent party to damages whereas a breach of a condition entitles an innocent party to termination of the contract. So although the Ugandan courts have in fact up held the notion of freedom of contract, it is not every breach that will lead to termination of a contract despite the fact that parties have specifically so stated. The courts have stepped in to determine whether it's a breach of condition or warranty and awarded the appropriate remedies. *[See Kampala General Agency ltd v Mody E.A ltd (1963) E.A 549]*

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 Uganda, 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:

It's our considered view that the courts will uphold a clear exemption clause inserted in a contract between the parties. However the Uganda courts have rejected exclusion clauses that exclude liability for the breach of a fundamental term of the contract even if it is clearly worded arguing that to uphold it would tantamount to excluding the very thing that the party contracted to perform. [See: *Gentex Enterprises Ltd* v *Security Group* (u) *Ltd,* Civil suit No.45/2007, *Produce Marketing Board* v *Uganda Railways*, Civil suit No.161/2010]

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 Uganda 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 Uganda public policy and mandatory statutes.

True		False		Can't say
X				

Comment:

The Uganda courts are willing to uphold the express choice of the law under which the parties have contracted despite the fact that the contract has no connection with the foreign jurisdiction. The court of appeal in *Larco Concrete Products Ltd v Trans Air Ltd[1987]HCB 34,* stated that what matters is whether parties have unequivocally submitted to the exclusive jurisdiction of the foreign court.

The Ugandan courts have upheld the express choice of the foreign law between parties in the following cases. [see: *World Population Foundation Uganda v Youth Anti Aids Association Ltd. civil suit no.1037/2001, David Kayondo v The Cooperative Bank Ltd, civil appeal No.19/1991, Eastern and South African Trade and Anor v Hassan Basajjabalaba & Anor. Hcy-00-cc-cs-0512-2006.* It is important to note that this is subject Uganda public policy and mandatory policy.

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 Uganda 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:

The Ugandan courts have upheld a clear submission of a contract between companies to the exclusive jurisdiction of a court of a foreign country. In *World population Foundation Uganda v Youth Anti Aids Ltd civil suit No.1037/2001*, the court held that the law governing the contract is not the decisive factor, in determining whether a particular court has or should have exercise jurisdiction to certain disputes arising out of the contract, what matters is whether the parties have unequivocally submitted to the exclusive jurisdiction of a foreign court. [*See: Larco Concrete Products Ltd v Transair Ltd [1987] HCB 34]*

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 Uganda, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Ugandan courts.

True		False	Can't say
	X		

Comment:

S.20 Arbitration and Conciliation Act cap 4, allows parties to agree on the place of arbitration which can include a foreign arbitral tribunal. In the case of *Mungereza v Price Water Coopers Africa Central (2002)1 E.A 174* where the parties had submitted to a foreign arbitral tribunal, it was held that courts did not have the jurisdiction to intervene. It was further held that where parties clearly, voluntarily and willingly subscribe to arbitration agreements as a means of solving their differences, then to depart from it, they had to show good reason and impecuniosities were not a good reason. In this case the court emphasized that the appellant had to travel to the UK for arbitration.

However under s.40 Arbitration and Conciliation Act cap 4, an arbitration agreement cannot stand if it is null and void, inoperative or in capable of being performed. Where a matter is statutory and not contractual it cannot be referred to arbitration. *[See: Heritage Oil and Gas Ltd v Uganda Revenue Authority, Civil appeal No.14/2011].*

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

True		False	Can't say
		X	

Comment: Under Article 50 of the 1995 Constitution, the courts have taken a liberal approach with regard to locus stands to permit commencing a suit on behalf of the deprived section by a spirited member of society. Under public interest litigation, the members need not have similar interest in the matter. *[See: TEAN V BAT(H.C.MISC.Misc App No.27/2003, Green Watch V Attorney General, Misc.App.No.140/2002].* A member cannot commence the same matter once a competent court has adjudicated on it because of the principle of res judicata. *[see: Norbert Mao v Attorney General. Constitutional petition No.1/2000]*

O.1 r.8 Civil Procedure Rules provides for a representative suits where parties have the same interest. In a representative suits. The parties must have the same interest unlike in public interest litigation. The parties commencing the suit on behalf of the rest under O.1r.8 must seek their permission and the permission of court. *[see: Rwanyarere v Attorney General.HC, Misc App No.85/1993, Ibrahim Buwembo & ors v UTODA Ltd. HCCS. No.664/2003, Joseph Kasozi & ors v UMEME, HCCS No.188/2010].* Once the representatives are granted permission they must serve notice on the parties they are representing and if there is no objection from them then the outcome of the suit is binding on them.

S.20 companies Act 2012 allows derivative action on behalf of the company by members.*[see: Allied Bank International Ltd v Sadru Kara and Abdul Kara, civil suit No.191/2002, Salim-jamal v Uganda Oxygen Ltd.civil appeal No.64/1995.*

Other indicators

Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, 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 Uganda nationals and local corporations are entitled to own land absolutely.

True		False	Can't say
	X		

Comment: Article 237 1995 Constitution and s.2 Land Act, Cap 227 provide for four systems of land tenure which are freehold, mailo, customary and leasehold. Article 26 states that every person is entitled to own property. Article 237 restricts ownership of land to citizens. Nationals who are citizens are entitled to own land absolutely. Nationals who are not citizens can only hold land under leasehold for up to 99 years [S.40 (3) of Land Act Cap 227]. However citizens are allowed to own land under leasehold which is not absolute ownership.

A local corporation being a citizen is entitled to own land absolutely. *Greenwatch Vs A.G [misc. Application No.140/2002]* sets out the principle that a corporation can be a citizen or a non-citizen. s.40 (7) (b) Land Act states that a corporate is a citizen if the controlling interest lies within citizens.

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 Uganda 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 Titles Act (RTA), Cap 230 governs registration of land in Uganda. However, it does not apply to land held under customary tenure. Article 237(4) provides that all Uganda citizens owning land under customary tenure may acquire certificates of ownership or under Article 237 (4) (b) customary tenure may be converted to freehold land ownership by registration.

It is estimated that close to 80% of land in Uganda is held under customary tenure and thus not registered.

s.7 RTA brings mailo land under the application of the RTA. S.9 (3) deals with registration of all ownership of land by any person claiming to be the owner of few simple or term of years either at law or equity [see S.9 (3)a-d RTA cap.230]. S.36 deals with the registration of leasehold: any of lease of freehold or mailo land not less than 10 years may be brought under the operation of the Act. S.47 covers the registration of transfers of mortgages or mortgages of leases. All this land is registered in a land registry and the registrar records major interests in a book of registrar [S.37 RTA]

S. 59 of RTA states registration and certificate of title is conclusive evidence of title of the land.

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 Uganda, 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: There are two principal legislations that control commercial development i.e. the Town and Country Planning Act Cap 246, and the Physical Planning Act No. 8 of 2010.

s.6 of the Town and Country Planning Act, prohibits any person erecting any building or carrying out development of land without the permission of the committee in any areas declared a planning area.

The Physical Planning Act, 2012 also prohibits any person from carrying out any development within a planning area without obtaining development permission from physical Planning Committee [see s.33]. Anyone who contravenes the provision commits an offence and any dealings are null and void. That development shall be discontinued.

Any developer is required to apply for development permission [s.23] and the Planning Committee may grant or refuse the permission [s.38 PPA]. There are considerations taken into account besides environmental before issuing permission which are not light [see S.34 (3) PPA]. The application for permission also requires a specific form [6th schedule PPA]. The Kampala Capital City Act, 2010 specifically regulates commercial developments in metropolitan Kampala [see 21,22,46-48].

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

True			False	Can't say
			X	

Comment: There are numerous laws governing employment including the Employment Act which provides for conditions of employment including protection of wages, hours of work, rest and holidays, a contract of service and terminating a contract. Other relevant laws are the Worker's Compensation Act, Labour Unions Act, and Labour Disputes (Arbitration and Settlement) Act. The laws largely regulate formal sector employment. However, the key challenge is poor enforcement of the laws.

It is also important to note that a large section of the population are employed in the informal sector where the above mentioned laws are poorly enforced and there are limited controls.

Environmental restrictions

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

True			False	Can't say
			X	

Comment: The principal legislation is the National Environmental Act, cap 153. It provides for sustainable management of the environment and establishes the National Management Authority as the principal government agency for the management of the environment. *See Byabazaire Grace Thaddeous v Mukwano Industries (Misc. No.909 of 2000]*. The principal agency, NEMA has created lead agencies under various statutory regulations to enforce environmental standards and these include: National Environmental (Audit) Regulations, 2006 S.I No.12 of 2006, The National Environment (Access to Genetic Resources and Benefit Sharing) Regulations, 2005, The National Environmental (Control of Smoking in Public Places) Regulations 2001 S.I No.12 of 2004, The National Environment (Conduct and Certification of Environmental Practitioners) Regulations, No. 30 of 2003.

In addition to the NEMA Act, they are other legislations that regulate environmental cleanup; they include s.43 Land Act, Cap 222, National Forestry and Tree Planting Act, s.108 & 112, Mining Act, The Water Act S.15 &16, The Uganda Wildlife Act, Town and Country Act, Physical Planning Act, s.19 (1)d, Investment Code Act require a license to ensure that the operations of their business enterprises does not cause any injury to the ecology and the environment.

Article 39 of the 1995 Constitution provides for a right to a clean and healthy environment. This has been enforced through public interest litigation (Art.50). This can be seen through the following cases. In *The Environmental Action Network Ltd (TEAN) v British American Tobacco [Misc. Application No.70/2000 (High court of Uganda),* the court stated that although under N.E Act the powers to bring legal action against anyone degrading or polluting the environment is vested in NEMA or the local committee, the constitution vests such power in every Ugandan. *[See. Greenwatch Vs A.G, NEMA Misc. Application No.371 of 2002].*

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

True			False	Can't say
	X			

Comment: The Heritage Foundation's 2010 index of economic freedom report ranked Uganda's economy at 76 out of 179 countries and as the 5th freest economy of the 46 countries in Sub-Saharan Africa based on the ease of doing business, openness to trade, property, fiscal and monetary policy. In 2001 Uganda created the Uganda Investment Authority.

The Investment Code Act regulates foreign direct investment in Uganda and under s.10 (2), no foreign investor shall carry on the business of crop production, animal production or acquire or be granted or lease land for the purposes of crop production. S.13 (1) Investment Code Act provides that subject to s.10 (2) an investor may engage in any type of business enterprise.

The Investment Code allows foreign participation in an industrial sector except those touching on national security or requiring ownership of land. The Investment Code also allows licensing authorities to impose performance obligations. Foreign investors in Uganda should be aware that projects that impact on the environment require an impact assessment which is carried out by NEMA [see.19 of National Environmental Act, Land Act, and Physical Planning Act].

Exchange controls

Q20 In Uganda, 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: Although there is the Foreign Exchange Act that regulates foreign exchange controls, in practice exchange controls are liberal in Uganda. The Foreign Exchange Act which repealed the Exchange Control Act imposes various restrictions. S.5 of the Act restricts persons carrying on business of foreign exchange businesses to only persons who have licenses. The Bank of Uganda is allowed to impose restrictions on the importation into and exportation from Uganda of bank notes, coins travellers, checks, and securities denominated in the currency of Uganda or in foreign currency [S. 8].

S. 9 (1) of the Foreign Exchange Act provides that no person is permitted to engage in foreign exchange business without prior permission from the Bank of Uganda. Every transfer of foreign exchange to and from Uganda shall be through a person licensed to carry out the business of money transfers. All payments in foreign currency to or from Uganda shall be made through a bank.

S. 40 of Financial Institutions Act allows the central bank to prescribe rules applicable to financial institutions for the conduct of foreign exchange business.
S.7 Financial Institutions (Foreign Business Rules) 2010, imposes restrictions on foreign exchange lending.

Therefore Uganda law imposes no restrictions on capital transfers in and out of Uganda. However, Bank of Uganda prefers that investors make large transfers through the central bank itself. In order to help it monitor and maintain stability of the Uganda shilling, though it is not a requirement, payment of foreign currency is only possible through a bank. Under s.27 (3) Investment Code Act Cap 92, compensation arising out of compulsory acquisition by the government shall not be subject to the exchange control restrictions under the new Foreign Exchange Act or any law made under that Act.

Alien ownership of land

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

True			False	Can't say
		X		

Comment: The Land Act of 1998 codified many of the complex land laws in Uganda. Foreign companies or individuals may not own land but may hold it under a long term lease of not more than 99years [S.40 Land Act], Article 237(1)of the 1995 Constitution.

S. 253 Companies Act 2012, states that a foreign company shall have power to hold land subject to the Constitution, Land Act and Investment Code Act under s.10(2) Investment Code Act, no foreign investor shall acquire or be granted or lease land for the purpose of crop production or animal production. Foreigners must seek cabinet approval through the Uganda Investment Authority to lease land over 50 acres to be used for agricultural or animal production purposes. Therefore, freehold land is only available to citizens and investors can only hold leaseholds between 49-99 years.

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 Uganda, 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
	X			

Comment: There is no available data or statistics on this issue. However in practice the higher courts tend to treat local and foreign interests fairly and also treat individuals as fairly as big businesses *[see Fredrick Zabwe Vs Orient Bank ors [C.S No.17 of 1999].* The higher courts also treat big businesses on equal footing with small business. *[See Digital Solution Ltd Vs MTN Uganda Ltd (Misc. Application No. 546 of 2004].*

Costs and delays of commercial litigation

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

True		False	Can't say
	X		

Comment: Delays in litigation in Uganda have been an issue of concern for quite sometime. The Annual Report of the Commercial Court of 2012 defines case backlog to mean cases that have remained in the court for a period of two years from the time of filing without being disposed off. It reports that the backlog as per 2007 were 233 cases, 2008 (255) cases, 2009 (265) cases, 2010 (286), 2011(346), 2012 (391) cases.

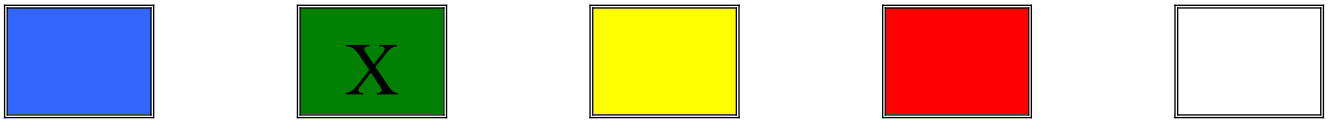
Various measures have been put into place to reduce the delays, that is, the Judicature (Commercial Court Division) Mediation rules, 2007 that make mediation compulsory for any commercial issue before the commercial court; The Judicature (Mediation) Rules 2013 R.4 make mediation compulsory in any civil action before proceeding to trial. This applies to all courts. The Judicature (Small Claims Procedure) Rules, 2011 provide for subject matter of less than 10 million excluding family disputes, issues of contract of and for services, claims against government, suits of defamation, wrongful arrest, wrongful imprisonment, malicious prosecutions and seduction petition for divorce and a claim in specific performance to be brought before small claims courts, which have been designated as magistrate's courts.

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

According to this research, it is concluded that Uganda has numerous legislation on almost all spheres, however, most of the laws are outdated. Therefore there is need to amend and revise various laws to make them relevant to the society as has been done to the Companies Act and Insolvency Act.

Most of the land in Uganda is not registered. Therefore there is a need to sensitize the public and build confidence in Ugandans that their land is safe while registered. Barriers to registrations have been holding land customarily by many people and fear of land grabbing.

Uganda has good employment laws. However, they are poorly enforced. In addition, most Ugandans are not employed under contracts of employment. They are casually employed, hence leading to abuse of the rights. Government needs to urge employers to employ professionals under contracts of employment.

The Labour (Dispute & Arbitration) Act provides for the industrial court. However, since 2006 when the law was enacted, the industrial court has never been established.

Uganda needs to strongly enforce its laws especially in the environmental sector.

There is a need improve efficiency in the courts in Uganda in order to reduce delays. This can be done by hiring more human resources to help the judges do research and equipment to automatically record the court proceedings so as to give the judge time to be more involved in the proceedings.

Profiles

The survey was carried out by the following students:

Wandabwa Joseph completed his law degree at Makerere University Law School in 2013 and is expected to graduate with an upper second class degree. He is currently studying for the bar at the Law Development Centre. He intends to specialize in commercial law.

Itogot Amy Amina completed her law degree at Makerere University Law School in 2013 and is expected to graduate with an upper second class degree. She is currently studying for the bar at the Law Development Centre.

Makerere University School of Law

The School of Law at Makerere University has been in existence for over 40 years and as the pioneer law school in Uganda, has established itself as a leading legal education institution. It prides itself in interdisciplinary legal scholarship and has both undergraduate and graduate programs.

Faculty Member Managing the Survey

Dr. Winifred Tarinyeba Kiryabwire

Dr Winifred Tarinyeba Kiryabwire is a senior lecturer at Makerere University School of Law and specialist in the area of financial markets regulation, corporate finance law and corporate governance.

Practitioner Expert Panel

Mr. Richard Caesar Obonyo is the founding partner of KSMO Advocates and specializes in the area of corporate and commercial law, including banking, securities and real estate.

Mr. Joshua Ogwal is lawyer with expertise in Financial Law (Banking and Finance) and Corporate Practice (Company law and Corporate Governance). He has participated in several complex financial and commercial transactions, and gained significant experience is several aspects of Banking and Finance practice, including: Syndications, Corporate and Project Finance, Public Private Partnerships and derivatives.

Allen & Overy Global Law Intelligence Unit

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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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