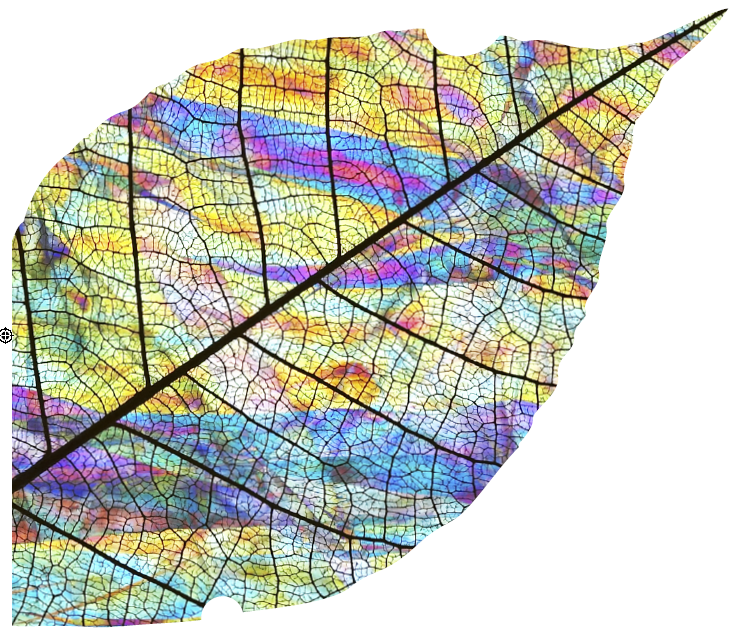
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| A production of the Allen & Overy Global Law Intelligence Unit |



1. February, 2018
   1. **World Universities Comparative Law Project**

**Legal rating of Nicaragua**

**carried out by students at the Universidad Americana (UAM)**

**February, 2018**

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Produced by the Allen & Overy Global Law Intelligence Unit

**World Universities Comparative Law Project**

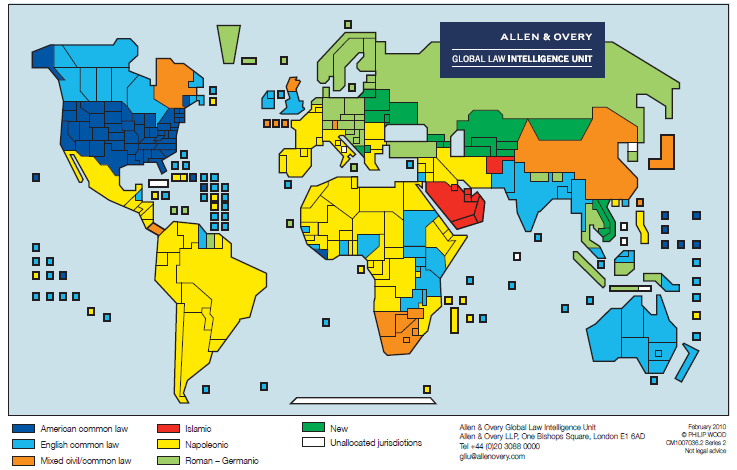
* + 1. The World Universities Comparative Law Project is a set of legal ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal rating of Nicaragua was carried out by students at Universidad Americana (UAM).
    2. The member of the Faculty of Law at the University who assisted the students was Professor Reynaldo Balladares – Saballos, Ph.D.

The member of the Practitioner Expert Panel with whom the students could discuss the questions in the survey was Eduardo Calderon (Supreme Court of Justice, Nicaragua).

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**



* + 1. **Foreword by the students**

In order to introduce the legal analysis of Nicaraguan law set forth below, we shall provide the readers a brief information about Nicaraguan Law in an American and international perspective.

As every Latin American country, the conceptual schemes of Nicaraguan law system is strongly based on the Napoleonic tradition, due to the codification process developed, mainly, at XIX Century and early years of XX, E.g. Civil Code, Commercial Code, Criminal Code, and others.

The Nicaraguan Constitution stablishes its primacy in order to create a rule of law that follows the European system. The branches of the Republic of Nicaragua are four: Executive, Legislative, Judicial and Electoral.

Due to its historical origin, Nicaragua is part of the Central American Integration System (SICA) as well as Guatemala, Honduras, El Salvador and Costa Rica. Panamá, República Dominicana and Belize are part of this entity. SICA follows the European Union system and tries to reach its level of integration and social and economic development.

The judicial branch has implemented an oral-based system that follows to improve the efficiency of legal administration and a fast application of justice. In this effort the legislative branch has recently approved new Codes that follow this new tendency: Code of criminal procedures, Code of labour and social security procedures, Code of civil procedures.

It is important to mention that these improvements do not imply a change regarding to Nicaraguan law conceptual schemes, where Napoleonic tradition is the base of the legal system.



Naimeh Suarez Siezar, Diana Fonseca Herrera, Karla Morales Barquero, Martín Aguilar Arevalo, Uriel Balladares Abaunza, students at the Faculty of Law of the Universidad Americana (UAM).

February, 2018

**Description of the legal rating method**

**Introduction**

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

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

The survey was carried out by students at Universidad Americana (UAM). 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 Universidad Americana (UAM), 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** arein-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 Nicaragua. 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 **Nicaragua**, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

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| **True** |  |  |  |  |  | **False** |  | **Can't say** |
|  |  |  |  |  |  | X |  |  |

**Comment:**

According to Nicaraguan Civil Code, when two persons are reciprocally debtors they are able to set-off their debts in order to discharge every obligation among them. It is not required for any party to be insolvent to set off mutual debts.

To set off mutual debts, it is only required for both of the parties to fulfil several conditions established in our legislation in order to freely execute the set off for the sake of preventing unfair situations between the creditors and to balance such debts.

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

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| **True** |  |  |  |  |  | **False** |  | **Can't say** |
|  |  |  |  | X |  |  |  |  |

**Comment:**

In Nicaragua the only jurisdiction applied is the traditional Napoleonic, since, in our country, universal security over present and future assets to secure debts, whether present or future, are not allowed and there is not legislation or regulation which covers such type of security.

However, Nicaraguan law offers a wide range of securities which may be used as guarantees for debts that are highly protective to the secured debtor. Each of the securities shall be applied in accordance with the scope or the purpose of the debt. However, more than one security may be applied to ensure a sole present debt in order for the debtor to cover the complete value of the loan.

On the other hand, not all securities are subject to their registration before the corresponding Public Registry. Based on the dispositions of the Nicaraguan Public Registry Law, only interest securities over real estate or mortgages must be registered for them to acquire validation against all creditors.

Additionally, in accordance with Law No. 902, Civil Procedural Code, the sale of the assets may be executed through both methods, public or private auction, depending on the resolution issued by the corresponding judge. Nonetheless, based on the dispositions of the Nicaraguan Civil Code, pactum commissorium is possible in our jurisdiction, that is to say, all secured creditors may automatically appropriate the encumbered asset upon default of the debtor, as a full or partial repayment of the debt by agreement. Such pactum commissorium shall be only considered under a resolute condition.

**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 Nicaragua** has a universal trust for all assets.

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| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment**:

Under Nicaraguan legislation, the figure universal trust is not regulated; however, the Trust Agreement Law covers five types of trusts which can be partially or totally constituted with the assets of the beneficiary. One of such trusts is the Security Trust.

The Security Trust regulated under our legislation is mostly constituted to guarantee any obligation acquired by the beneficiary through whom the beneficiary transfers the title of the assets in favor of the trustee in order for the trustee to pay the corresponding amount of the obligation acquired by the beneficiary.

Such Security Trust can be constituted with movable or immovable assets of the beneficiary and its entitlement over those assets is kept for a determined period of time, as long as the beneficiary fulfils its obligation.

**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 Nicaragua 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.

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| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **True** |  |  |  |  |  | **False** |  | **Can't say** |
|  |  |  |  | X |  |  |  |  |

**Comment:**

In accordance with the Nicaraguan Commerce Code, it is either the shareholders of a company or the creditors of the same who are entitled to file for insolvency when the company is in insolvency. Therefore, there is no obligation for the directors, or penalty, in case they do not start the process themselves.

Generally, directors do not acquire any personal or joint liability; however, they will have personal and joint liability before any third parties and the company, in the event of any failure to comply with the authorizations granted or per any violation of the articles of incorporation and bylaws of the corporation or Nicaraguan legislation. Nonetheless, in the case that a director does not participate in the resolution that violates the incorporation articles or applicable legislation, such directors shall be exempted of any liability. Moreover, a director may incur in criminal responsibilities while executing fraudulent actions that lead to the bankruptcy of a corporation.

According to Nicaraguan legislation, insolvency does not necessarily mean personal liability towards managers or directors, since not all losses can be perceived as fraudulent. It is up to the judicial authority to determine if there has been negligence or fraudulent actions in the managing of the corporation, which would originate personal liability.

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

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| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment:**

The Nicaraguan Code of Commerce does not contemplate or regulate the financial assistance for the purchase of its own shares, therefore is not prohibited by Nicaraguan legislation.

**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 **Nicaragua** is open and has few restrictions.

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| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment:**

The public takeover regime in Nicaragua does not favour any of the parties. In this procedure, information regarding offered shares and values must be published and registered and cannot be modified unless it has been authorized by the Regulator. The Regulator has also established strategies to verify the price of the shares and values placed in the market cannot be manipulated and such manipulation is perceived as a severe infringement of the provisions of the Stock Markets Law. Therefore, public takeover regime is highly transparent. However, the Regulator is entitled to modify the restrictions to such regime. Effective restrictions establish the minimum amount of values or shares that must be purchased compared to the percentage of capital stock the acquirer would own after the takeover takes place. However, defensive measures that may frustrate certain bids are not prohibited and would be subordinated to the Regulator´s approval for their validity.

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

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| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment:**

The parties are not bound by heads of terms such as Memorandum of Understanding, Letter of attendance or any other similar document.

Those are non-binding document outlining the main issues relevant to a tentative (partnership or other) agreement. A heads of agreement document will only be enforceable when it is adopted into a parent contract and subsequently agreed upon. Until that point, a heads of agreement will not be legally binding

In Nicaragua this criteria is uphold by the principle of party autonomy .according to the Commerce Code. The parties will be able to agree as many regulations as they desire as long as regulation does not contravene Nicaraguan law.

**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 **Nicaragua**, 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.

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| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment**:

In Nicaragua termination clauses will usually be upheld according to the general principle of freedom of contract even it is subscribed only between companies.

The clauses of early termination of contracts between companies are based on the circumstances. The Civil Code which consider two situations: fortuitous event or force majeure. The situations of fortuitous event are those that following norms of due diligence and supervision could have been avoided Instead the cases of force majeure are those phenomena caused by nature impossible to foresee or to mitigate.

Nicaraguan law also contemplates another way to end an agreement named prescription of obligations, which is no more than the termination of an obligation due to lack of requirement of the same. These types of cases are presented when there is a loan agreement, when the one that assigned the loan has stopped demanding the payment of the obligation. After a time the obligation is extinguished because the interested party did not promote the cause.

Finally this aspect is regulated in many ways but mainly it is regulated by the principle of autonomy of the parties.

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

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| **True** |  |  |  |  |  | **False** |  | **Can't say** |
|  |  | X |  |  |  |  |  |  |

**Comment:**

The exclusion of liability does not take place in Nicaraguan law, even if does exist an express clause no one can be excluded of an obligation.

The parties acquire obligations through an agreement and according to the Commercial Code of Nicaragua, each party has a responsibility related to the other. Exceptionally in those cases the law will uphold an exclusions if it is an accident out of the control of one of the parties.

**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 **Nicaraguan** 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 Nicaraguan public policy and mandatory statutes.

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| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **True** |  |  |  |  |  | **False** |  | **Can't say** |
|  |  |  |  | X |  |  |  |  |

**Comment:**

Nicaragua has an independent judicial system, headed by a supreme court. The Supreme Court is divided into four specialized chambers. Criminal cases are administered under the accusatory and oral systems, whilst civil and commercial procedures have just recently crossed over from lengthy written litigation to an oral trial system, whereas administrative procedures are conducted in writing.

Therefore, to resolve situations related to foreign countries, the courts must apply the national law. If the contract includes provisions which are not contained in Nicaraguan law, the courts can apply international jurisprudence and doctrine in order to sustain the relation between the contract and the Nicaraguan policy. The Constitution of Nicaragua provides that the courts are obligated to apply the national law and international treaties in force in the country.

The Nicaraguan courts do apply a foreign governing law when the contract is enforce but only if the foreign law according to the local public policy and mandatory rules of the country. A foreign law can also be applied if the manner of the contract is not regulated under our legislation.

**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 **Nicaraguan** 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.

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| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment:**

According with the constitution of Nicaragua, the court has to respond in these cases in favour of its jurisdiction in order to obey the principle of legality. The faculties granted to the Supreme Court do not involve the court accepting a foreign document into our jurisdiction. Therefore, there is an exception according with our Civil Code, the parties are free to choose the main law in charge to regulate the contract. Precisely, it is an obligation to resolve the complexion of a document with the national law and if the document is not related with the country it can be submitted to the court if the foreign law on the contract obeys morality, legality and Nicaraguan policy.

According to the Nicaraguan legislation, the parties are free to choose the jurisdiction. If the parties accept the authority of the Nicaraguan jurisdiction, then the case will be heard by a Nicaraguan Court.

**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 **Nicaragua**, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Nicaraguan courts.

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment:**

Nicaragua legislation allows both ways for the resolution of commercial disputes, and authorizes parties to choose the forum as long as it is established in the contract~~.~~

The country has subscribed several treaties for alternative dispute resolution, among these: International Center for Settlement of Investment Disputes (ICSID). Multilateral Investment Guarantee Agency (MIGA). Overseas Private Investment Corporation (OPIC). United Nations Commission on International Trade Law (UNCITRAL / New York Convention of 1958) Inter-American Convention of Commercial Arbitrage of Panama.

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

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **True** |  |  |  |  |  | **False** |  | **Can't say** |
|  |  | X |  |  |  |  |  |  |

**Comment:**

In Nicaragua class actions are regulated by the law and the claimants are authorized by the court to sue on behalf the other claimants but also, they do not have to opt out. Class actions were recently added to the jurisdiction of the country according to the new civil process code approved last year by the National Assembly. Therefore, class action is a new type of case in the courts of Nicaragua and is important to state that class actions can be sustained but only when the case is about consumer and labour matters. The civil process code point out and specifies use of the class actions which bind parties when the case is about consumer and labour matters.

**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 **Nicaragua** nationals and local corporations are entitled to own land absolutely.

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment**:

Nicaraguan legislation does not prohibit the free acquisition of properties from persons or any other legal entity (company, foundation, financiers, indigenous peoples, corporations, etc.); As long as you follow the corresponding procedure of acquiring such property and the owner is up to date with it taxes obligations.

Although, as far as the disposition of the ownership of properties, there is no prohibition that restricts this right. It is why companies are freely empowered to transfer, encumber, extinguish or any other disposition of their ownership.

It is important to mention that foreign companies and people are prohibited from acquiring property that is in the "border security zone", in accordance with Law No. 749, Law of Legal Regime of Borders.

Therefore, the right of property is open for its free disposal and acquisition.

**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 **Nicaragua** 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**:

Nicaragua has the "Public Registry of Property and Commercial Affairs" regulated by the General Public Registry Law No. 698, which includes: i) Registration of real estate, their mortgages, leases ships and aircraft (ships and aircraft in Nicaragua, are considered as property in accordance with Law No. 595, General Law of Civil Aviation, (ii) the Commercial Public Registry, which has information on companies, be they any type of company, foreign branch, etc.; iii) Public Registry of Persons, which registers natural persons as merchants and traders; and iv) the Registry of Secured Guarantees, which will maintain control of the movable property that may be given in guarantees. This new assignment of the registry came into effect in October 2017, in accordance with the provisions of Law No. 936, Law on Secured Transactions.

The registration of properties in this Registry has two characteristics: constitutive and declarative. The first refers to the fact that, in order to enjoy the benefits of a particular right, it must be registered to be able to alter it, therefore the inscription of the right creates such right; and the second, refers to the fact that the registration of such right has publicity effects before third parties. Consequently, it is a third party registry protected, by institutional law.

**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 **Nicaragua**, 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:**

In Nicaragua, to start a project you need the approval of the municipalities, always depending of the type of commercial development in the property, among others authorizations. However, this response is conditioned according to the type of project (complexity) that is intended to be developed and the area in which it is to be found.

In general, the projects that are intended to be developed on a property in the capital Managua, are handled with less accessibility. However, the projects that are intended to be developed outside the capital, are easier to obtain.

Many government institutions are prioritizing high-level investments that are intended to be carried out in Nicaragua, for which they offer more rapid registration mechanisms. However, the cost of these services is only increasing. As a result, the project in question would have to be thoroughly reviewed in order to be able to provide a concrete response to the case.

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

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment:**

The Labor Code of Nicaragua regulates the conditions under which an employee can be hired or fired. The way of hiring is really easy. The contract may be oral in those works related to the field, domestic work or temporary work not greater than ten days and will be written for all other cases, after a certain time. Currently practice indicates that there is no strict application in many cases the forms of recruitment even if it is verbal contract.

As for social benefits, all employees hired after three days of having started their work should be incorporated into the social security system, which ensures the protection of their health in terms of professional risk and provides for issues such as maternal health if this is the case.

For those different sectors, such as the community of disabled people who have broad right to be placed in the labor sector, the law requires companies to hire a minimum of people with this condition.

In no way does Nicaraguan regulation allow a person to be fired for discrimination because of age, race, sex, religion or any other condition. The companies which practice these violations of rights are forced to indemnify an employee. However, if all employees work is below requirements, the law allows dismissal without further restriction.

**Environmental restrictions**

**Q18** In **Nicaragua** the rules governing the environment and liability for clean-up is very light and relaxed.

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **True** |  |  |  |  |  | **False** |  | **Can't say** |
|  |  |  |  |  |  | X |  |  |

**Comment:**

In Nicaragua there are many legal authorizations according to the activity that companies plan to develop. For which there are different institutions that analyse each specific matter, but the main one in this issue is the Ministry of Environment and Natural Resources, known in abbreviated way as MARENA.

In addition, other institutions regulate different areas, for example from matters related to water resource development, it is necessary to apply for permission before the National Water Authority, also known as ANA, and its legal basis is Law No. 620, General Water Law and its Regulations.

Furthermore, in reference to protected areas we find the National System of Protected Areas, also known as SINAP, which is a totally different and more organized regime that maintains order for the protection of wild areas. In addition, the National Forestry Institute ensures the protection of forest resources.

It should also be mentioned that the municipality regulates many issues of permits, such as construction issues, urbanization permits, approval of infrastructure projects, and record of land use, among many others.

Consequently, in Nicaragua environmental matters are very complicated and the application processes can usually take a long time, influencing the start of business operations.

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

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **True** |  |  |  |  |  | **False** |  | **Can't say** |
| X |  |  |  |  |  |  |  |  |

**Comment:**

In accordance with Nicaraguan Political Constitution, applicable legislation, and trade and commerce policies, every foreigner residing or not in Nicaragua, as well as every Nicaraguan, has the same right to organize and control companies in local territory, which provide generous fiscal incentives and high degree of social cohesion.

That been said, our legislation allows foreigners to invest and participate in any type of commercial activities within the country and to promote and increase the economy in Nicaragua and support development without any restriction, with due respect for the sovereignty and for the legal and administrative system.

Notwithstanding the above, it is worth mentioning that our Nicaraguan Commerce Code establishes a set of regulations and policies that every trader or merchant must fulfil in order for them to freely own and register their businesses. For example, for tax matters, every local company owned by foreigners require must have a local legal representative.

**Exchange controls**

**Q20** In **Nicaragua**, 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**:

Nicaraguan legislation does not regulate or establish exchange controls for the prohibition of the use of foreign currency or restrictions on the amount of foreign currency that can be treated or purchased.

On the contrary, the Nicaraguan Foreign Investment Promotion Law (No. 344) offers foreigners or national investor fundamental guarantees for their businesses and investments, such as full currency convertibility, freedom to expatriate all capital and profits, and foreign bank deposit accounts.

Therefore, foreign currency in our country can be freely sold or bought, without any restriction or limit and can also be brought into our local territory for any purpose, including the set-up of companies which can be organized and constituted with 100 percent of foreign capital.

**Alien ownership of land**

**Q21** In **Nicaragua**, 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:**

It is established by law (Commercial Code) that any legal entity, national or foreigner, duly registered in accordance with applicable legislation may acquire any type of immovable property in local territory, and own the same right to dispose of such property.

Nevertheless, according to the Borders Legal Regime Law (No. 149) there is an inalienable area protected by law, which can only be acquired, transferred or sold by and in favor of nationals.

**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 **Nicaragua**, 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:**

The higher Nicaraguan courts are highly expected to apply the law equally to every party irrespective of the party´s status, underlying interests or nationality. The Political Constitution of Nicaragua establishes that the Law shall be applied to everyone equally and that no person shall be subjected to discriminatory acts with regards to their nationality, social condition, etc. Moreover, the Political Constitution establishes that foreigners have the same rights and obligations as Nicaraguans and that the State of Nicaragua shall guarantee the granting of these rights in favour of foreigners within its jurisdiction.

Therefore, the higher courts, as much as every other institution or official, are expected to base their reasoning and resolutions on objective factors and on the effective, applicable regulations, since they are subordinated and governed by the Political Constitution and the Laws of the Republic. However, there are cases in which the law establishes that certain interests must be favoured. For example, consumers and users are favoured over provider or supplier businesses—as stated in the Law of Protection of the Rights of Consumers and Users—and an employee is to be favoured over the employer—as stated in the Preliminary Title of the Labour Code. Nonetheless, the Supreme Court of Justice is known to base and reason its resolutions and sentences based upon the mandates of the Law.

Due to the scope and complexity of the question, no further, objective information can be provided.

**Costs and delays of commercial litigation**

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

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **True** |  |  |  |  |  | **False** |  | **Can't say** |
|  |  |  |  | X |  |  |  |  |

**Comment:**

The Nicaraguan judicial system establishes ordinary and executive procedures. While executive procedures are known to be expedited, the ordinary jurisdiction is recognized for its greater delays. When the cases reach the Supreme Court of Justice, the process has been known to take at least one year and up to five years, depending on the complexity of the case. Moreover, civil or commercial cases cannot be proceeded with ex officio, and the advance is based upon the parties´ impulse and petition or they may be abandoned. In any case, the costs of the judicial process are generally covered by the losing party, as requested by the opposing party. Nonetheless, the maximum reimbursement covered by the losing party is limited to a maximum of one third of the amount of the dispute. While comparing the Nicaraguan judicial system to other systems in the area (Central America), Nicaraguan judicial system is still in a transition process and it is known to be subjected to bureaucratic delays and, therefore, it may be costlier than the other judicial systems.

**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** |
| X |  |  |  |  |  |  |  |  |

**The Faculty of Law of the University**

Mission:

To form integral lawyers with a global vision, solid scientific knowledge and humanistic principles, business-oriented and able to learn permanently, to face the challenges of the contemporary society.

View:

To consolidate ourselves as a leading institution in the formation of integral, international class lawyers, committed to human development, equitable and sustainable, with the efficiency and competitiveness of a private organization of high performance.

To form integral lawyers who master the fundamental techniques and disciplines, especially those related to economic activity of a company, capable of successfully facing the challenges of globalization.

To develop in our students a critical and constructive spirit, creators of new forms of service, committed to justice and the rule of law.

To train professionals capable of making decisions, to argue with a precise legal language, excellent oral and written communication, with English proficiency, and extensive negotiating skills in conflict resolution.

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The law student of Universidad Americana (UAM) must have:

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· Interest in developing capacity for argumentation, analysis and synthesis.

**Profiles**

The survey was carried out by the following students:

**Naimeh Suárez-Siézar**

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Naimeh is a fifth year law student of Universidad Americana in the city of Managua, Nicaragua. During her degree she has been developing a concern with financial, corporate and tax law. When she was in fourth year of law school, she started working for one of the leading law firms in Central America, focusing her practice in the corporate department and tax matters. Naimeh can be reached at [naimehsuarez13@gmail.com](mailto:naimehsuarez13@gmail.com)

**Martin Aguilar-Arévalo**

****

Martin is a fifth year law student of Universidad Americana in the city of Managua, Nicaragua. During his degree he has been developing a concern with corporate law and real estate. When he was in third year of law school, he started working for a large law firm in Nicaragua, attending real estate and corporate area as a legal assistant. Martin can be reached at [martin\_12\_12@hotmail.es](mailto:martin_12_12@hotmail.es)

**Uriel Balladares-Abaunza**

****

Uriel Balladares graduated Valedictorian of Class 2017 in Universidad Americana. He began his career in 2014 with an internship in one of the most acknowledged financial institutions in Nicaragua. Afterwards, he joined on a large law firm in Nicaragua, where he has developed his career, focusing his practice in tax law, corporate Law, and real estate matters. Moreover, he was recently incorporated as a Lawyer before the Supreme Court of Justice of Nicaragua. Uriel can be reached at: [u\_balladares@hotmail.com](mailto:u_balladares@hotmail.com)

**Diana Fonseca-Herrera**

****

Diana is a fifth year law student of Universidad Americana in the city of Managua, Nicaragua. During her degree she has been developing a concern with corporate and contract law. When she was in third year of law school, she started working for a large law firm in Nicaragua, specifically in the corporate department, serving as a Paralegal in hydrocarbons and telecommunication matters. Diana can be reached at [dianafon007@hotmail.com](mailto:dianafon007@hotmail.com).

**Karla Morales-Barquero**



Karla is a fifth year law student of Universidad Americana, in the city of Managua. Since she was in fourth year she started focusing her practice on the areas of intellectual property and corporate law. Nowadays Karla has been working for one of the leading law firms in Central America, serving as a Paralegal in corporate law. Karla can be reached at: [karlamorales96@outlook.com](mailto:karlamorales96@outlook.com).

**The Faculty member managing the survey**

**PhD. Reynaldo Balladares Saballos**

Law degree from the Universidad Centroamericana (UCA, 2000). European PhD in Financial and Tax Law from the Universidad de Salamanca, Spain (2006), with postdoctoral stays at the Universidad de Castilla - La Mancha, Spain (2016) and Universidad Presbiteriana Mackenzie de Sao Paulo, Brazil (2017). Lawyer and Notary Public duly incorporated as such for 17 years to the Supreme Court of Justice of the Republic of Nicaragua. He serves as a business tax advisor for resident and non-resident taxpayers in Nicaragua. Currently, he holds the degree of Academic Coordinator of the Law Degree at the Universidad Americana (UAM), President of the Nicaraguan Institute of Financial and Tax Law, member entity of the Instituto Latinoamericano de Derecho Tributario (ILADT), where he presented the rapporteur ships national organizations representing Nicaragua at the ILADT study sessions in Genoa, Italy (2002), Santiago de Compostela, Spain (2012), Lima, Peru (2014) and Mexico City, Mexico (2015).

He has collaborated in the drafting and social validation processes of, among others, the following legal norms: Tax Code of the Republic of Nicaragua, Commercial Code of the Republic of Nicaragua, Law of Sustainable Rural Tourism of the Republic of Nicaragua, Law of Common Administrative Procedure, Law of Tax Incentives for the Generation of Electrical Energy with Renewable Sources for Public Use, Law of the Legal Digest of Public Finances.

On an international level, he has taught Master and Doctorate courses at the following institutions: Universidad Rafael Landívar de Guatemala, Universidad Galileo de Guatemala, Universidad de Santiago de Compostela and Universidad de Salamanca in Spain and "Federico II" University of Naples, Italy. He is author of more than ten works published nationally and internationally in tax matters and guest columnist in international journals specializing in tax matters. He can be reached at the following email: [rballadares@krestonnicaragua.com](mailto:rballadares@krestonnicaragua.com)

**Member of the Practitioner Expert Panel**

**Msc. Eduardo Calderón Marenco.**

Degree in Law from Universidad Centroamericana (UCA) in 2007 and Master's Degree in International Business Law from Universidad Iberoamericana (UIA) of Mexico City in 2012. Active Student of the Doctorate (PhD) in Law Program in its Second Edition given by Universidad Centroamericana (UCA).

For 10 years he has been working for the Supreme Court of Justice, where he has worked in different positions as General Coordinator of the Family Court, Coordinator of the areas of judicial and procedural support of the Court, and he is currently General Coordinator of the Labor and Social Security Court of Managua.

He teaches Business Law, Commercial Law, Tax Law and Monograph Seminar. Line of research: International Trade Law at Universidad Americana (UAM) and Universidad Centroamericana (UCA). Published an article: "*La aplicación normativa de la compraventa internacional de mercaderías*", in the Journal of Law of the Faculty of the Universidad Centroamericana (UCA), No. 22, 2017. Collaboration in the book “*Derecho y Revolución*” in the content: *"Las luchas de independencia. Su régimen en el derecho internacional”*, Editorial Porrúa, Mexico, 2017. He can be reached at the following email: [eduardo.calderon.marenco@gmail.com](mailto:eduardo.calderon.marenco@gmail.com)

**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@allenovery.com or Melissa Hunt, melissa.hunt@allenovery.com.

Philip R Wood CBE, 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 University, 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@allenovery.com

intelligence.unit@allenovery.com

D. 00 44 (0)20 3088 2750

[melissa.hunt@allenovery.com](mailto:melissa.hunt@allenovery.com)

Allen & Overy LLP

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

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