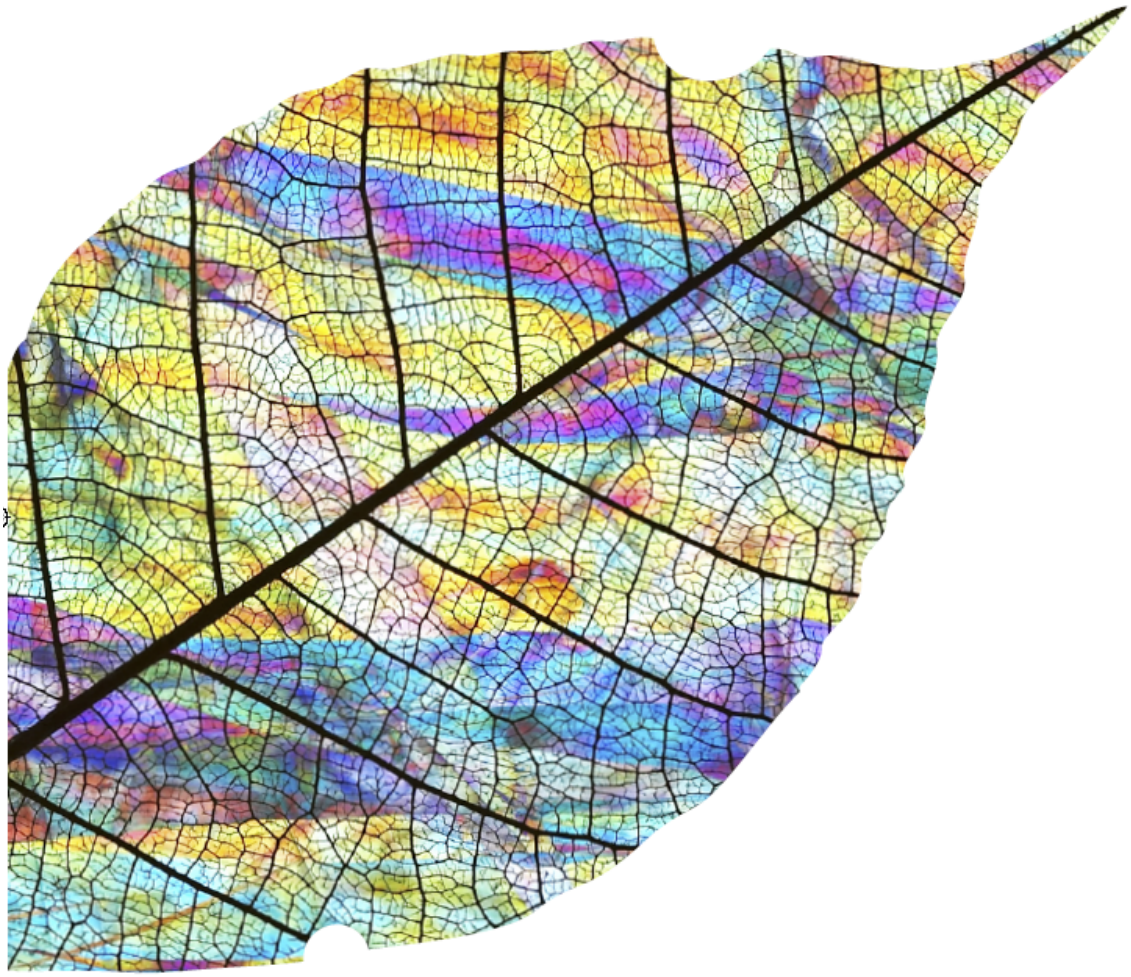
World Universities Comparative Law Project
Legal rating of England

carried out by students at Oxford University

A production of the Allen & Overy Global Law Intelligence Unit



January 2015

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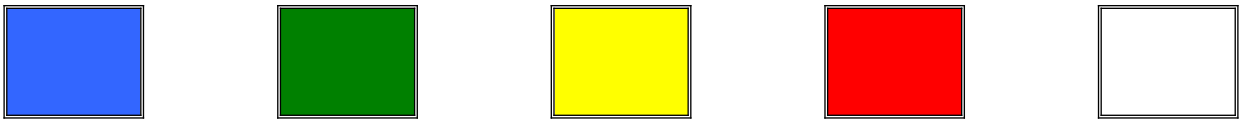

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World Universities Comparative Law Project

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 England was carried out by students at Oxford University.

The members of the Faculty of Law at Oxford University who assisted the students were:

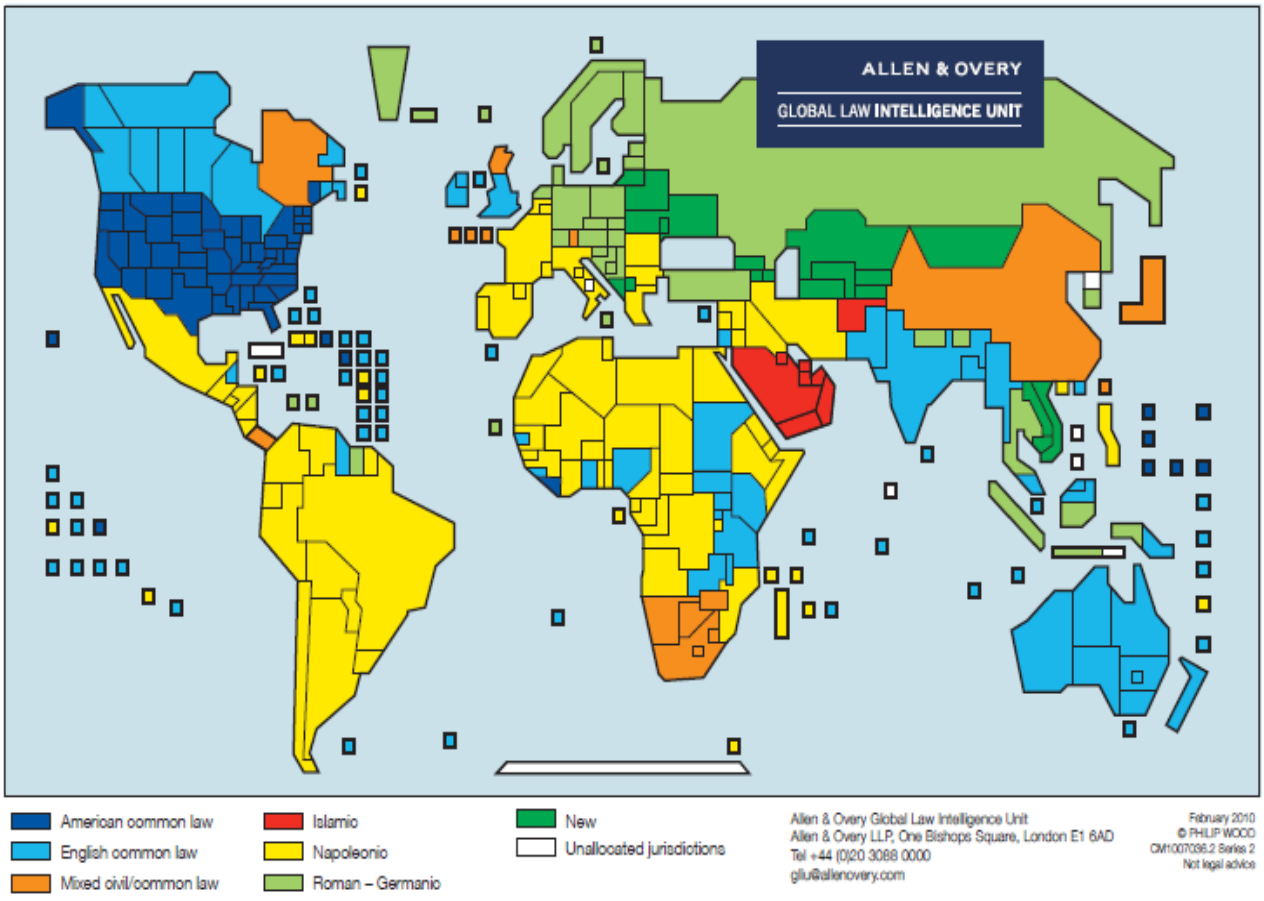
Louise Gullifer

Kristin van Zwieten

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

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

Families of law



Foreword

The World University Comparative Law Project is a remarkable initiative, offering students the opportunity to contribute to a wider understanding of the law in many jurisdictions around the world. The project reflects the massively transnational world of business enterprises in 2015 - not only in commercial transactions, but also in transactions involving corporate finance and governance. Businesses and their advisors constantly need to know what is going on in the variety of countries that may be involved in a particular infrastructure project, or corporate takeover, or sale of goods, or in an investment in any kind of business organisation or operation.

As a result, the Project covers an amazingly wide range of issues, including various aspects of insolvency law, legal protection for creditors, the law of trusts, directors' liabilities, regulation of corporate finance, takeovers, a wide variety of topics in the law of commercial transactions, the law and practice of arbitrations and class actions, registration of interests in land, planning law, environmental law and employment law.

Reading the contributions from our students, I have learned a great deal about the law of the United Kingdom! And I dare say that each of the students has improved his or her understanding of the law. So I am delighted that Oxford is one of more than thirty universities on five continents in which students are simultaneously learning and contributing to a worthwhile project.

I congratulate Philip Wood CBE QC (Hon), who not only came up with the idea, but got the initiative moving through infectious enthusiasm and his remarkable capacity for dealing with lawyers, academics and students in many different countries. Congratulations also to the Oxford participants who have produced this report: Han Tianyu, Lanto Sheridan, Tahira Kathpalia, Riina Roolaid, Jean Petreschi, Seth Kitson and Cassandra Russo. I greatly appreciate the work of my colleagues Professor Louise Gullifer and Dr Kristin van Zwieten, both of Harris Manchester College, who assisted the students.

Timothy Endicott
Dean of the Faculty of Law, University of Oxford

January 2015

Description of the legal rating method

Introduction

This paper assesses aspects of the law in England 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.

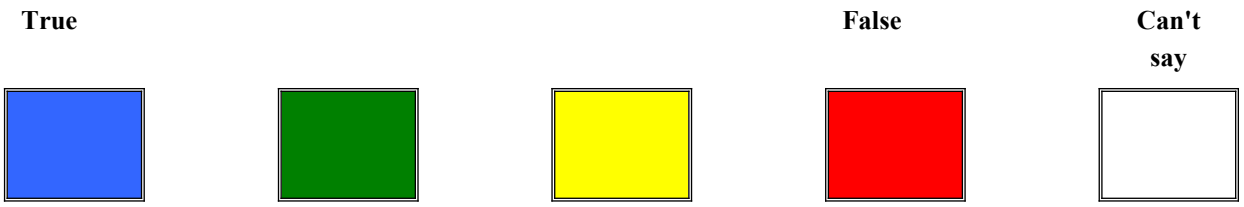
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes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

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

Methodology

The survey uses colour-coding as follows:



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 England. 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 England, 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:

Rule 4.90 of the Insolvency Rules 1986 applies 'where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation'. R.4.90(3) states that 'an account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other'. R.4.90(2) makes it clear that insolvency set-off does not apply where there is notice of the insolvency.

Insolvency set-off creates for the creditor a position analogous to that of a secured creditor; without the need for a property interest over the assets, it ensures that the creditors claim, after deduction of their obligation to the insolvent party, is paid in full. Furthermore, insolvency set off, being statutory, does not need to be bargained for as it occurs automatically (*Stein v Blake*). When a company is wound up, those with a security interest are first of all allowed to claim back their property. Out of the assets left over, the liquidators or administrators are paid their expenses, followed by the preferential creditors. Finally, the *pari passu* principle holds that the unsecured creditors are to each take an equal share in what is left over – almost always this will mean that they recover less than what they are owed. Insolvency set-off is contrary to the *pari passu* principle because it allows a class of unsecured creditors to recover their claim (up to the value of their obligations), rather than taking a proportionate share in the company's left over assets. Consequently, set-off

in insolvency operates to the disadvantage of other unsecured creditors by causing a diminution in the insolvent company's assets.

There are principled reasons for the difference in treatment between proprietary rights and personal rights in insolvency. It is not however clear why some contractual rights, which are not even bargained for, should have priority over other contractual rights. One argument is that insolvency set-off has been in English law since the time of Queen Elizabeth I. But longevity alone surely cannot be a sufficient justification. Parke B in *Forster v Wilson* argued that set-off was justified to 'do substantial justice between the parties'; it would not be fair for a creditor to have to pay back all of what he owed, and to receive in return, not what he was owed, but a share in the left over assets *pari passu*. However, set-off might do justice between the parties, but it does not do justice amongst unsecured creditors who all have contractual claims.

Philip Wood argues that insolvency set-off reduces creditor's exposure to risk, which has a positive impact on business. Lenders need less collateral to be held against exposure, which means that capital is more readily available. The considerable effect set-off can have is demonstrated by the example of Lehman Brothers: when it collapsed in 2008, it owed £400 billion to counterparties of credit default swaps, but, after netting, the amount payable was only $5.2 billion.

The question of whether to allow insolvency set-off is clearly one of policy. The law must decide who it is to protect: whether to favour the health of the financial markets or to insist on the principle of equality amongst creditors. English law seems to have chosen the former.

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

True		False	Can't say
	X		

Comment:

English law is generally highly protective of the secured creditor. A creditor with a security interest can often enforce its proprietary rights without having to resort to the courts, whereas an unsecured creditor has to obtain judgment on its claim and then execute it. Furthermore, there is a reduction in monitoring costs; there is no need to have various covenants to allow the creditor to monitor the borrowers business to ensure the safety of an unsecured loan. Instead, the creditor's monitoring can be focused solely on the secured assets.

It is possible to create a security interest over both tangible and intangible assets. This is important because many corporate assets, such as shares, are intangible. Mortgages and charges are both non-possessory security interests which can be held over such intangible asset. It is also possible to have a security interest over present and future property. Common law will only enforce security interests over existing assets, however, in the case of *Holyroyd v Marshall* it was held that an agreement to create a security interest over future assets is effective in equity.

A charge over an asset can be fixed or floating. With a fixed charge, the security interest attaches to the asset when the charge is created, or, with future assets, when the asset is acquired by the chargor. The distinction between fixed and floating charges was stated in *Re Spectrum Plus Ltd* where it was held that 'the hallmark of a floating charge is that a company is free to deal with the charged asset in the ordinary course of business'. A creditor with a fixed charge is better protected by law than a creditor with a floating charge; on insolvency a creditor with a fixed charge can remove the assets subject to their security interest. On the other hand, s.175 of the Insolvency Act 1986 holds that a creditor with a floating charge cannot claim the assets over which they have a charge until after the liquidators or administrators costs are paid, and the preferential creditors and unsecured creditors have recovered their share of the assets. This section of the 1986 Act was brought in to remedy the mischief which arose when floating charge holders took priority; they would often take all or most of the company's assets leaving the liquidators and administrators with an empty shell. Given the difference in treatment between fixed and floating charges, creditors should ensure so far as possible that their security falls within the former category and is therefore better protected.

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 England has a universal trust for all assets.

True			False	Can't say
X				

Comment:

Under English law a trust can be created over both tangible property, such as land, and intangible property, such as a chose in action (e.g. debt, Fletcher v Fletcher). A trust will be valid so long as there is certainty of intention, subject matter and objects, it is fully constituted and the relevant formalities have been complied with.

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.

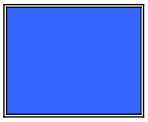
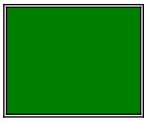
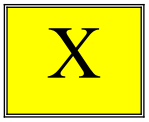
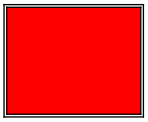
The Delaware regime is highly protective of management in the key areas. The traditional English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

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

True			False	Can't say
				

Comment:

Directors can be held liable for deepening an insolvency in English law, though it does not happen often in practice. There is no rule that directors must file for insolvency when the company is insolvent. Section 170(1) of the Companies Act 2006 states that duties 'are owed by a director of a company to the company'. These duties include, inter alia, the duty to act within powers (s.171), duty to promote the success of the company (s.171) and the duty to exercise reasonable care, skill and diligence (s.174). Given that the directors' duties are owed to the company, they do not generally owe fiduciary duties to individual shareholders (*Percival v Wright*). However, if directors do breach their general duties they are liable to pay damages to the company. This may indirectly benefit shareholders and creditors in insolvency because the company will have more assets available to be distributed.

In addition to liability for breach of their statutory duties under the Companies Act 2006, directors can also be held liable under the Insolvency Act 1986 for fraudulent and wrongful trading: section 213 prevents directors using the separate entity and limited liability doctrines to defraud creditors; and section 214 seeks to prevent directors acting negligently by taking risks to continue trading when it is in the creditors interest that the company is wound up. If a company is on the brink of insolvency and it only just has enough assets to meet its creditors, there is a chance that directors will gamble to improve their business, in the full knowledge that, if their risks do not pay off, the additional losses will fall on the creditors. The creditors are exposed to the downside risk, whilst the benefits will accrue almost entirely to the shareholders. Section 214 creates a disincentive for this, as if the court adjudges the directors to have acted negligently, they will be held personally liable for the debts of the company if the risks do not pay off. Negligence is satisfied if the

directors 'knew, or ought to have concluded, at some point before the winding-up commenced, that there was no reasonable prospect that the company would avoid going into insolvent liquidation'.

Financial assistance to buy own shares

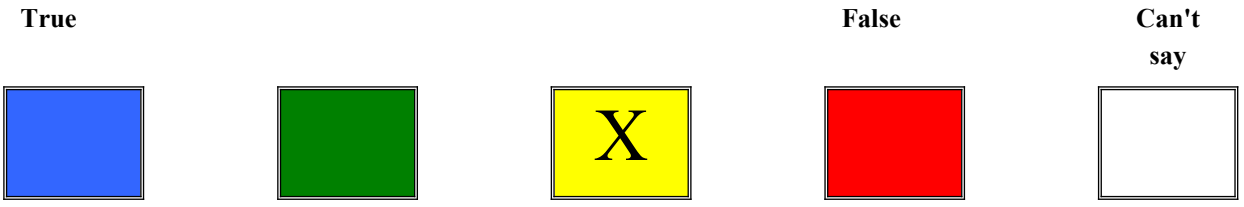
Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure 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 England permits a company to grant financial assistance for the purchase of its own shares.



Comment:

It is unlawful for a public company, or any of its subsidiaries (even where the subsidiary is private), to give financial assistance for the acquisition of shares in that company (s.677-683 of the Company's Act).
Under the Company's Act 2006 (which replaced the Company's Act 1985), a private company is no longer prohibited from providing direct or indirect financial assistance in connection with the acquisition of its shares or shares in its holding company. However, if a private company has a public subsidiary, the public company may not assist in the acquisition of shares in its private holding company.

Despite repealing the prohibition for private companies, certain actions remain unlawful. Rules on maintenance of capital continue to apply to private companies, restricting finance of shares. A saving provision in the current legislation, s.1296 provides that companies may continue to enter into transactions that they could lawfully have entered into through the whitewash procedure under the 1985 Act.

The general aim is that "the resources of the target company and its subsidiaries should not be used directly or indirectly to assist the purchaser financially to make the acquisition."[1] The prohibition on public companies financing the purchase of their own shares cannot be repealed as this would be against EU law.

[1] Palmer 6.901

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 England is open and has few restrictions.

True			False	Can't say
		X		

Comment:

The main sources of takeover regulation in England are: the Takeovers Directive 2004; the City Code on Takeover and Mergers; Companies Acts 1985-2006 and the Financial Services and Markets Act 2000.

The City Code on Takeovers and Mergers (the UK Takeover Code or the Code) governs the conduct of mergers and takeovers in the UK and applies where there is an acquisition of control of a UK public company which is listed on the UK Official List or of any other UK public company (including one whose shares are traded on AIM) which has its place of central management and control in the UK.

From the point at which a bid is first "actively considered," the Code requires secrecy to be maintained prior to announcement (rule 2.1), regulates offer terms, timetable and dealings in the securities, documentation, public statements and associated disclosures.

The UK market has maintained the view that shareholders, as the owners of a company, should be entitled to receive bids and determine whether or not they ultimately succeed.

Several elements of a restrictive regime are present.

1. The code requires a mandatory bid when a control threshold of 30% is reached and rule 8 needs disclosures to be made during the offer period.

2. The code requires that all holders of the securities of an offeree company of the same class must be afforded equivalent treatment - shareholders of the same class must receive the same bid and holders of different classes of equity security must receive comparable offers (rule 14.1).

3. A partial offer is only allowed with the consent of the panel.

4. Following a takeover offer for a UK company, a bidder has a squeeze-out right to acquire minority shareholdings on a compulsory basis, if it has acquired or contracted to acquire both of the following (s.979, Companies Act 2006):

    a. At least 90% in value of the shares to which the offer relates.

    b. At least 90% of the voting rights of the shares to which the offer relates.

5. The code establishes a fairly rigid timetable, which starts when a firm intention to bid is announced.

6. Rule 21 prohibits the board from taking action which could frustrate any bona fide offer or deny the shareholders an opportunity to decide on the merits of the offer.

Thus, the legal system could be characterized as restrictive

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 England, 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 phrase "subject to contract" negatives contractual intention *(Confetti Records v Warner Music UK Ltd*[2]*)*. In such cases, unless a formal contract is executed, the parties are not normally bound, as they did not intend to owe each other contract obligations in the absence of a formal contract.

Where circumstances evidence that both parties had acted on and taken steps with regard to their respective contractual obligations, then the courts may infer the parties to be bound, notwithstanding the agreement being subject to the execution to a formal contract as the parties are deemed to have waived the pre-condition of the agreement being subject to contract. Here the contract is in existence by conduct. In *Jirehouse Capital & Ors v Beller*[3], the parties were bound by the terms agreed despite the absence of any more formal contractual agreement.

However, the basic principle is that parties to a contract are free to determine for themselves what primary obligations they will accept remains and courts follow this unless exceptional circumstances are found.

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 England, 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				

[2] [2003] EWHC 1274
[3] [2009] EWHC 2538 (Ch)

Comment:

Contractual termination clauses include both an express classification of terms as conditions or warranties; or rights to terminate e.g. for 'material' or 'any' breach. The right of termination may be exercisable upon a breach of contract, or upon a specified event as expressed, or simply at the will of the party upon whom the right is conferred. When interpreting a termination clause, the court will have regard to the commercial purpose which is served by it and interpret it in the light of that purpose.

In principle, since the parties are free to incorporate whatever terms they wish for the termination of their agreement, no question arises at common law whether the provision is reasonable or whether it is reasonable for a party to enforce it.

However, certain statutes restrict the efficacy of such provisions, and in certain circumstances a term of this nature would have to be shown to be reasonable by virtue of the provisions of the Unfair Contract Terms Act 1977. Under s.3, the where the parties are dealing on the other's written standard terms of business, the term allowing for termination will have to be proven to be reasonable.

The sale of Goods Act, 1979 through provisions under s.13-15 prohibit parties form excluding liability in certain circumstances. As per s.12, where two sophisticated companies are contracting, there may not be as much protection afforded. The exclusion of terms implied in hire-purchase contracts is now subject to s.6 of the UCTA, which abrogates the power of a seller to exclude s12-15 of Sale of Goods Act 1979, either absolutely or subject to certain qualifications of reasonableness.

However, it is unlikely that courts apply these provisions to cases in the commercial context, where the parties involved are two sophisticated companies

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 England, 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:

In general complex parties are free to restrict liability as they see fit. However this is subject to several important caveats. The first is that the clause must not be seen to 'defeat the purpose of the contract' as per the recent case of *Kudos Catering (UK) Limited v Manchester Central Convention Complex Limited*.[4] Clause 18.6 of the agreement between these parties attempted to exclude MCC's liability for 'loss of goodwill, business, revenue or profits, anticipated savings or wasted expenditure [….] or indirect or consequential loss.' The Court of Appeal overturned the High Court's finding that this protected MCCC from a loss of profit. They did so *inter alia* because if effective clause 18 would have deprived Kudos of any real remedy

[4] [2013] EWCA Civ 38

in the event of a default. This would render the contract 'entirely devoid of contractual content' and was as such, contrary to business sense.

A second key issue is that of construction. In particular, clauses must be expressed in clear language without ambiguity. In *J. Gordon Alison & Co Ltd v Wallsend Shipway*,[5] it was held that a limitation for liability for consequential damage contained within a guarantee clause was not effective. The contract stated that the goods were sold 'subject to our usual guarantee clauses', which contained the liability limitation. However, the Court of Appeal held that a legal liability 'only be excluded 'by using clear words'.

Finally, every clause must extend to the 'exact contingency or loss which has occurred' if it is to protect the part relying on it (Chitty on Contracts). As such, in a sale of goods contract, a clause which states the goods are bought 'as seen', or one which excludes liability for 'latent defects' will not exclude terms as to quality and fitness implied by the Sale of Goods Act 1979 *(Henry Kendall & Sons v William Lillico & Sons* and *Cavendish-Woodhouse v Mancey*).[6] The Court of Appeal confirmed in *Kudos* (above) that there is no presumption that an exclusion clause will not apply to an intentional breach. However, the courts will most likely interpret draconian exclusions as narrowly as possible.

Thus if parties want to be confident in their exclusion of different heads of liability these should be clearly stated in different sub-clauses (*Markerstudy Insurance Company and Ors v Endsleigh Insurance*).[7]

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 English 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 English public policy and mandatory statutes.

[5] (1927) 43 T.L.R. 323
[6] [1969] A.C. 31 and (1984) 82 L.G.R. 376, respectively.
[7] [2010] EWCH 281

True			False	Can't say
X				

Comment:

Following The Rome I regulation, parties to a contract are free to choose their governing law, which need not have any connection with the location of the contracting parties or the content of their contract.

However, the Rome I regulations do not permit parties to circumvent certain rules of law by choosing the governing law of another jurisdiction. It does this through allowing the 'overriding mandatory provisions' and 'public policy' of the given Member State to override the law chosen by the contracting parties. Broadly this means that requirements for terms to be included in a contract (i.e. governing employee's rights) cannot be overridden. In addition 'public policy' will prevent any application of foreign law where, for example, the performance of an act in a foreign state is illegal under the law of that state.

A second point to be noted is that the courts must be willing to give effect to the 'legal system' selected by your contract. Under Rome I, the law of a 'country' is required. In *Beximco Pharmaceuticals Lrd v Samil Bank of Bahrain*,[8] a contract attempted to select 'the laws of England […] subject to the principles of the Glorious Sharia'a'. The Court of Appeal held that only the law of England governed the contract.

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 English 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:

In the majority of cases English law will give effect to a jurisdiction clause which vests jurisdiction in a foreign state. In these scenarios, issuing a civil lawsuit contrary to the terms of such a contractual clause is a breach of contract at English law. However there are circumstances which are sufficient to rebut this presumption.

The first is where the clause is included in a contract giving jurisdiction to a state, but there are other related contracts submitting to other jurisdictions. In this scenario it may be simply more straightforward for the litigation to proceed in this alternative forum. Alternatively the court may not give effect to the clause if

[8] [2004] EWCA Civ 19; [2004]

some intervening factor has occurred since it was agreed upon, which could not have been foreseen at the time the bargain was struck.

In addition to this, there are some disputes which European law stipulates have to be decided by certain courts. EU Regulation 44/2001 (often referred to as the Brussels Regulation) stipulates that exclusive jurisdiction is vested in the relevant court in select circumstances (for example disputes relating to the validity of a company decision). This can override any jurisdiction provision included in the contract. Finally, if the other party initiates proceedings in another EU state, the same regulations require that the initial must stay its procedures until the second court has decided whether or not it has jurisdiction. If these proceedings are taken in a non-EU country, an English court may grant an 'anti-suit' injunction restraining those proceedings.

A jurisdiction clause can be drafted so that one party submits to the exclusive jurisdiction of a particular court, and the other submits to the non-exclusive jurisdiction of a particular court. This is often known as a *hybrid clause for the benefit of one party* and often appears in loan agreements (limiting the borrower to suing in a particular forum). Asymmetric clauses like this are valid at English law. However, they can raise issues of enforceability in other jurisdictions. In *X v Banque Privée Edmond de Rothschild*, the French *Cour de Cassation* refused to uphold such a clause.[9] Similarly the Russian Supreme Commercial Court refused to recognise a hybrid benefit clause on the basis that it contravened the Russian law principle of procedural equality of parties (*Russian Telephone Company v Sony Ericsson*).[10]

To ensure the best chance of enforceability jurisdiction clauses should always be written into contracts. Care must be taken of relying on 'standard terms' if the contracting parties are domiciled in the EU. Article 23 of the Brussels Regulation requires consensus to any jurisdiction clause. As such it is essential that the attention of any counterparty is drawn to the clause and the choice of jurisdiction it purports to make.

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

True			False	Can't say
X				

Comment:

The general approach of the UK courts, encapsulated in the Arbitration Act 1996, is that where a valid arbitration clause exists, all issues falling within the jurisdiction of the arbitrators should be decided by the tribunal and the courts will not intervene. In most instances the enforcement of foreign arbitral awards will be governed by the New York Convention of 1958. In the English context this is generally done through the Arbitration Act 1996 which gives effect to the Convention at English law.

[9] Cass civ, 1ère, 26.9.2012, X v Banque Privée Edmond de Rothschild, No 11-26.022
[10] Russian Telephone Company v Sony Ericsson Mobile Communications Rus, No. A40-49223/11-112-401).

Under the New York Arbitration Convention of 1958, article II, it is provided that 'each contracting state shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any difference which have arisen or which may arise between them […] concerning a subject matter capable of arbitration'. The 1996 Act provides that any award made in the territory of a state (other than the UK) which is party to the Convention is binding on the parties to the arbitration.

However, there are several possible defences to this. As such it will not be enforced, if (*inter alia*): the agreement was not valid under the law which governs the arbitration (or exceptionally it was invalid under the law of the country in which the award was made); a party to the agreement was under a form of incapacity in the law applicable to it (e.g. if the relevant law disallowed certain sorts of parties from entering into arbitration agreements); the respondent wasn't given adequate notice of the appointment of an arbitrator; the award covers a dispute which is outwith the terms of the notice of intention to refer to arbitration; there were irregularities in the composition of the arbitral tribunal or inconsistency of the procedure with the agreement of the parties; the award is not yet binding on the parties or has been suspended by a competent authority; an application of review has been made to the supervising court; the award covers a matter which is not capable of settlement by arbitration at English law (i.e. custody of a child), and; the enforcement of the award would be contrary to English public policy.

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

True			False	Can't say
X				

Comment:

There are currently no statutes governing class action lawsuits in the UK. Generally the UK is governed by the opt-in principle — no one is bound by the findings unless they opt in within a time limit. The opt-in system means that possible claimants are barred from 'sitting on the fence' and watching the outcome of the case without incurring expense, and then seeking to cash in if the finding goes in their favour.

This, coupled with the fact that UK law firms can only recover 100% of their normal fee as their contingency fee, makes bringing class-action lawsuits a less attractive proposal in the UK than other nations with the opt-out system, such as the United States.

The new Consumer Rights Bill, which is currently making its way through parliament, will for the first time make an “opt out” mechanism available for class actions in the UK. As it stands, this mechanism will only be available in relation to anticompetitive practices, allowing private "representatives" to take alleged infringements to the Competition Appeals Tribunal (CAT) on behalf of a group of consumers that are automatically included in the lawsuit unless they actively opt out. The Bill has been met with some objections, namely that it will make the UK a less attractive place to do business, which will eventually harm consumers instead.

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 England nationals and local corporations are entitled to own land absolutely.

True			False	Can't say
	X			

Comment:

The basis of UK land law is the presumption that all land belongs to the Crown. Everybody else is a tenant of the Crown who holds their land from the Crown under the Land registration Act 2002. Of course, ownership of the land by the Crown is only purely theoretical and freehold owners would be considered to be absolute owners with regards to their rights over their land. Generally the same rules which apply to individuals hold with regard to corporations, except with regards to taxation (e.g commercial property transactions may be subject to value-added tax) The manner to which one can obtain a close proximate of absolute ownership is detailed below.

Through freehold and commonhold, one can obtain ownership of the land in perpetuity. The former allows the buyer to gain ownership the plot land and all the buildings thereon. The latter is usually more suited for owners of individual units in a building. The Unit Owner has 2 interests; firstly in his own individual unit, and secondly a collective interest as a member of a Commonhold Association, which owns and manages the shared parts of the property on behalf of the residents.

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 England 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 majority of land in England and Wales is registered at the Land Registry. The register is a matter of public record and the title is guaranteed. Most (but not all) third party rights will be shown on the register. It will usually be necessary to protect an equitable interest by some form of registration if it is to be binding on third parties.

It is now compulsory to register any land or property which changes ownership or has a mortgage taken out against it for the first time as part of the compulsory land registration process that has been extended gradually across the country over the past 90 years. Since 1990 when registration on sale was made compulsory in all areas of England and Wales, triggers for compulsory registration have been extended to include almost all situations where there is a change of ownership or creation of a first mortgage. There is still approximately 20% of land and property in England and Wales is not registered because no transactions affecting it have led to it being compulsory registered. Records of such unregistered land may be found in the National Archives, county record offices or the Middlesex and the Yorkshire Ridings deeds registries.

Source: http://www.landregistry.gov.uk/public/faqs/is-all-land-registered#sthash.xerSUC2x.dpuf

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 England, 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:

a. Permitted development

The Town & Country Planning (General Permitted Development) Order 1995 provides general planning permission known as 'permitted development rights' for certain types of development. Permitted developments are listed in Schedule 2 of the Order. However, the local authority may abstain from granting permission in those cases by making an Article 4 direction under the Town and Country Planning Act 1990. In that case, the developer will still need to make a planning application.

Article 4 directions are made when the character of an area of acknowledged importance would be threatened. They are most common in conservation areas.

Permits are required for changing the use of land from agricultural use; for erecting dwellings, and for most other uses except agricultural use.

b. Are permits quick and cheap to obtain?

For most planning applications, local planning authorities are to take their decisions in accordance with the National Planning Policy Framework. Permits are granted for permitted developments listed in Schedule 2 of the Town & Country Planning (General Permitted Development) Order 1995, save where an Article 4 direction has been issued.

However, some developments fall within the Planning Act 2008 scheme, which was originally used for major infrastructure projects, but has since been extended to certain commercial developments. While this report is not concerned with infrastructure developments, the Planning Act 2008, as amended by the Growth and Infrastructure Act 2013 and the Infrastructure Planning (Business or Commercial Projects) Regulations 2013 can be used for certain business and commercial projects as well. S 35ZA of the Planning Act enables the Secretary of State to direct that certain commercial and business developments require consent under the Act. The development must be in England or adjacent waters and be, or form part of, a prescribed business or commercial project. Consent from the Mayor of London will also be required if the development is in London. The government consulted on proposals for using this power in England in November 2012.

While the scheme has yet to become regularly used for commercial projects, the first major commercial project to use the scheme will be 'London Paramount', a theme park.

Confederation of British Industry has indicated that duplicate bodies deciding the planning applications create a problem. Some consents are given under the Planning Act 2008 scheme, others, such as a stopping up order on the road, from the local authority.

While permission for developments listed in Schedule 2 of the Order of 1995 is quick and easy to obtain (ie it is granted by the local authority), the power to restrict those permissions lies with the local authority and the Secretary of State. Other developments fall in the Planning Act 2008 scheme where the decision lies with

the Secretary of State at Department for Energy and Climate Change as advised by the Planning Inspectorate, and may further require the consent of the Mayor of London.

In conclusion, the control for commercial use of land is more than slight, as most developments apart from agricultural use of land require a permission. The local authority has some discretion in granting or restricting permissions by issuing an Article 4 direction. In those cases, permits may prove to be impossible to gain. Certain projects also fall within the scope of the Planning Act 2008, making the system less transparent for the developers.

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

True		False	Can't say
	X		

Comment:

According to the OECD Detailed Description of Employment Protection Legislation 2012-2013, the UK has one of the most lightly-regulated labour markets amongst developed countries (OECD Indicators of Employment Protection 2013), with only the US and Canada with lighter overall regulation concerning temporary contracts, and US, Canada and New Zealand with lighter protection of employees from dismissal.

a. Is it easy to hire?

1. An employer must comply with a set of statutory requirements before he can employ workers.

- An employer must check if someone has the legal right to work in the UK: under the Immigration, Asylum and Nationality Act 2006, to establish that an individual has the right to work in the UK an employer must check and copy or record one of a number of specified documents. An employer may be prosecuted for employing illegal workers.
- In certain fields, employers must also apply for a DBS check (formerly known as a CRB check) of the prospective employee, eg in cases where they work with vulnerable people or in security.
- Employers' liability insurance is compulsory for employers under the Employers' Liability (Compulsory Insurance) Act 1969.
- Details of the job must be communicated in writing to an employee; if they are hired for more than one month under the Employment Rights Act 1969 a written statement of employment must be given.
- Employers must be registered with HM Revenue & Customs (HMRC) up to 4 weeks before first paying them

2. Apprenticeships and co-operation with professional bodies

The Government has undertaken a reform of apprenticeships, a process engaging employers through implementing the recommendations set out in the 2012 report of the Federation of Small Businesses. An example of that is AGE (Apprenticeship grant for employers), the financial incentive provided by the government to employers taking on apprentices 16-24 years old. In co-operation with the Mayor of London, this sum was doubled for taking on an apprentice in the capital.

b. Is it easy to fire?

Individual termination: Employees with 2 years' continuous service have the right to receive from their employers, on request, a written statement of the reasons for their dismissal. Employees dismissed during pregnancy or statutory maternity leave are entitled to receive a statement regardless of whether they have asked for one and regardless of length of service.

Minimum wage:

Employees more than 21 years old have a right to a minimum wage of £6.31 under the National Minimum Wage Act 1998.

Maximum hours:

Employees can be subjected to no longer than 48 working hours, unless they consent under the Working Time Regulations 1998.

Minimum holidays:

Employees have a right to 28 paid holidays under the Working Time Regulations 1998.

Non-discrimination:

The primary legislation is the Equality Act 2010, which outlaws discrimination in access to education, public services, private goods and services or premises in addition to employment.

Severance costs:

Severance pay at different tenure durations is legally required only for redundancy cases with 2 years tenure: half a week per year of service (age up to 21); 1 week per year (ages 22 to 40); 1.5 weeks per year (ages 41 to 64), and limited to 30 weeks and £430 per week, indexed to inflation. 40% of firms reportedly exceed legal minima.

In conclusion, terms of employment and hiring and firing of employees is loosely regulated with most of the regulations relating to hiring, ie the employees' eligibility to work in the UK. There are minimum wages and maximum hours, but the latter can be opted out of. In the context of developed countries, UK has one of the least regulated labour markets.

Environmental restrictions

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

True			False	Can't say
			X	

Comment:

a. Rejection of permissions for environmental purposes

Under the Environmental Protection Act 1990, planning permission may be conditional on developers undertaking site investigations or remediation. Clean-up and remediation should remove unacceptable risks and make the site suitable for the proposed use. As a minimum, the land should not be capable of being determined as contaminated land under Part 2A of the Act after the development has been carried out and the new use commenced.

b. Issue with predictability of the law

Under the Planning Act 2008 regime, the key test that the IPC (or the Secretary of State) must apply in deciding whether or not to grant consent under the Planning Act is whether the 'adverse impact outweighs the benefits'. However, there is a High Court decision ([2010] EWHC 1742 (Admin)) and a later planning inspector decision from the same year ([2010] P.A.D. 40), concerning windfarm applications pointing opposite ways. The first granted application, because significant impact remained, but the benefits of the project outweighed it (as per statutory text) – and the late, their decision of a planning inspector, rejected application merely on the ground that 'significant impact' remained. Both decisions were made in 2010. This may have the effect of reducing the predictability of the law for developers.

c. Feedback from representative organisations

In regard to waste policy in UK, mostly in implementing EU law such as the EU Waste Framework Directive (Directive 2008/98/EC), EEF the Manufacturers' Organisation has in 2012 expressed the view that 'waste policy remains confusing to many businesses because of its complex and fragmented nature and because it is subject to frequent change.'

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 England 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 UK does not have any specific laws governing or restricting foreign investment. Foreigners are treated in law as UK-owned businesses - although a foreigner may need government approval for taking over nationally significant companies (as in the transport or energy sectors). Moreover, there are almost no limitations on the acquisition of real estate by foreigners.

Exchange controls

Q20 In England, 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:

There are no exchange control restrictions in the UK. This is true regarding inward or outward investments, the repatriation of income or capital, the holding of currency accounts, or the settlement of current trading transactions

Alien ownership of land

Q21 In England, 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:

Foreign-controlled companies can own and lease land in the same way as a UK national or resident. However, they are subject to different taxation laws.

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 England, 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:

In general, UK courts are highly regarded as providing a genuinely neutral, independent, and quality system of justice. The UK's judges have a reputation for their high quality and independence regarding different parties.

However, recent legal aid cuts have left defendants unrepresented as barristers are less inclined to take on very high cost cases. In the recent case of Operation Tabernula, four of the six defendants were left without representation from barristers, putting the case itself in jeopardy.

Costs and delays of commercial litigation

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

True			False	Can't say
		X		

Comment:

The costs and delays of commercial litigation in the UK are materially greater than other comparable countries. The Centre for Socio-Legal Studies and the Institute of European and Comparative Law at the University of Oxford held an *International Conference on Litigation Costs and Funding* in July 2009. The study concluded that the amount payable by litigants in legal costs is frequently high and disproportionate to the value of the claim. Costs of commercial litigation in the higher courts in the UK are materially greater than its European counterparts. Court costs tended to be high in England, Ireland, the Netherlands and Norway. Finally, commercial litigants, particularly at the smaller end of the spectrum, are increasingly struggling to pay their legal bills.

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				

Oxford University

Harris Manchester College is unique in Oxford, as it takes only students aged 21 and over (generally known as "mature students") to read for undergraduate and graduate degrees. It has a strong law school, taking on average 6 undergraduates a year, as well as about 6 graduates reading for taught courses. It has a commercial law research centre, whose aim is to provide an environment for high quality research in all aspects of law relating to commerce and finance, with scope for particular attention to be paid to emerging markets. As well as the college teaching and research fellows, it attracts eminent visiting scholars from around the world. It seeks to provide an opportunity for interaction between academics, practitioners, and policy makers by offering lectures and conferences on all aspects of domestic and global commercial law, and also aims to nurture and encourage the researchers of the future by attracting high quality graduate students and offering junior academic visitorships.

Profiles

The survey was carried out by the following students:

Han Tianyu

Tianyu is a second-year law student at Harris Manchester College. He is mainly interested in intellectual property, contract and commercial law as he was previously the co-founder of a small Singaporean based web-design start-up, Idesi9n. He has worked as a judicial clerk in the People's Court of Rui'an China and aspires to be a legal advisor to start-ups and tech firms in his future career.

Lanto Sheridan

Lanto is a third-year law student at Harris Manchester College. He is the first polo professional to study at Oxford or Cambridge for an undergraduate degree. Sheridan is also a keen member of the Harris Manchester College Pool Team while being a member of the Oxford University Polo Club. He is highly competent in all areas of law and aspires to achieve as much in a legal career as he has done as a sportsman.

Tahira Kathpalia

Tahira is a third-year law student at Harris Manchester College. She was the president of the President of the College Law Society and participates in a mentor scheme. She previously graduated with a BA Economics Hons from LSR, Delhi University and has worked at PRS Legislative Research, Centre for Policy Research as a Legislative Assistance for MPs Fellow.

Riina Roolaid

Riina is a second-year law student at Harris Manchester College with interests in intellectual property law and EU law. She had the opportunity to familiarise herself with the work of EU institutions during an internship at the EU Parliament in 2013. At HMC, she is together with another law student Co-President of the College Law Society, participates in a mentor scheme, and sings in the College choir. As a member of the HMC mooting team that won the Maitland Chambers University of Oxford Intercollegiate (Cuppers) Mooting Competition in 2015, Riina appeared in the 1st round, Semi-Final and Grand Final.

Before coming to Oxford, Riina graduated cum laude as a violinist from Estonian Academy of Music and Theatre. Riina has also gathered experience and international exposure through work in cultural management, being a member of the organising team of an international violinists' competition and a global orchestra symposium in 2012 and managing a classical music showcase at Tallinn Music Week 2013. She still enjoys listening to music in her free time and occasionally picks up the violin.

Jean Petreschi

Jean is a second-year law student at Harris Manchester College. He is highly interested in commercial law and very entrepreneurial, having co-founded U-blend, an event-planning start-up in the first year of his course.

Seth Kitson

Seth Kitson is a senior status law student at Harris Manchester College. After graduating he intends to pursue a career at the Bar

The faculty members managing the survey

Louise Gullifer is Professor of Commercial Law at Oxford University. She has been teaching at Oxford since 1991, and before that she practiced as a barrister. She teaches Roman law, Contract law, Commercial Law, Corporate Finance law and Legal Concepts in Financial Law and has been the senior law tutor at Harris Manchester College since 1999.

Her research interests focus broadly on commercial law and corporate finance. She writes extensively in areas such as security and title financing, corporate finance, corporate insolvency, personal property and set-off. Recent publications include *Set-off in Arbitration and Commercial Transactions* (co-authored with Pascal Pichonnaz), the 5th edition of *Goode on Legal Problems of Credit and Security and English and European Perspectives on Contract and Commercial Law* : essays in honour of Hugh Beale co-edited with Stefan Vogenauer. She is currently preparing a new edition of *Corporate Finance Law: Principles and Policy* which is co-authored with Jennifer Payne.

She is particularly interested in financial collateral and intermediated securities. She is executive director of the Secured Transaction Law Reform Project and is the Oxford Law Faculty Academic Lead for the Cape Town Convention Academic Project, and is a Bencher of Gray's Inn.

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

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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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