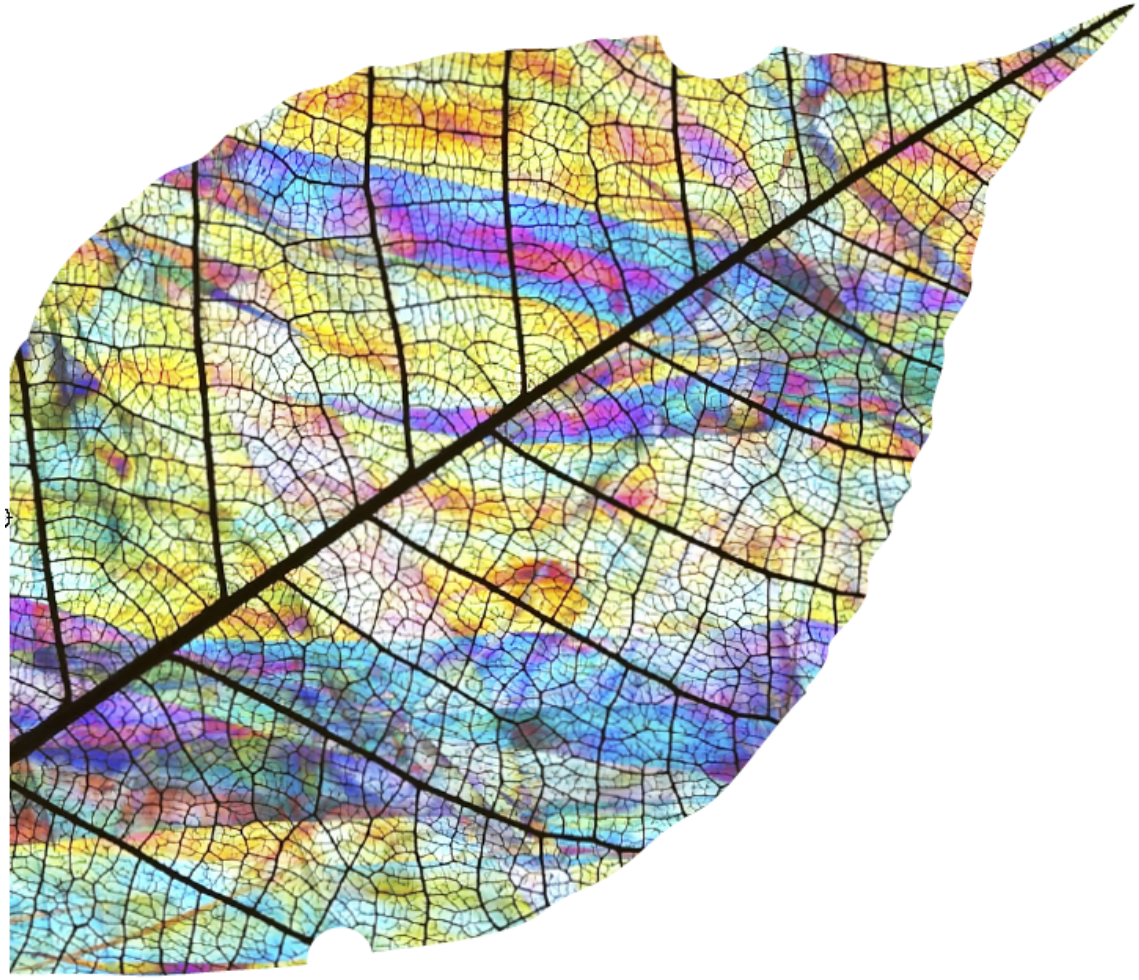
World Universities Comparative Law Project
Legal risk rating of France

carried out by students at the University Panthéon-Assas, Paris II

A production of the Allen & Overy Global Law Intelligence Unit



20 May 2014

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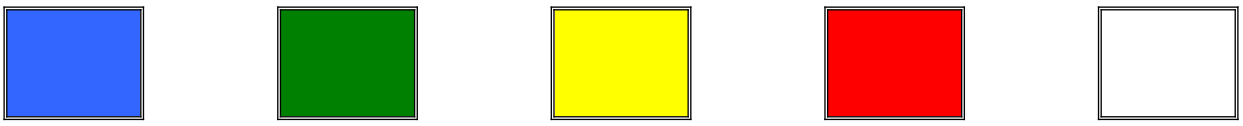

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World Universities Comparative Law Project

The World Universities Comparative Law Project is a set of legal risk ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal risk rating of France was carried out by students at the University Panthéon-Assas, Paris II.

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

Bénédicte Fauvarque-Cosson

Professor of law at the University Panthéon-Assas,Paris II, France. She is the Vice-President of the ELI and a member of the Executive, Projects and International Relations Committee(s)

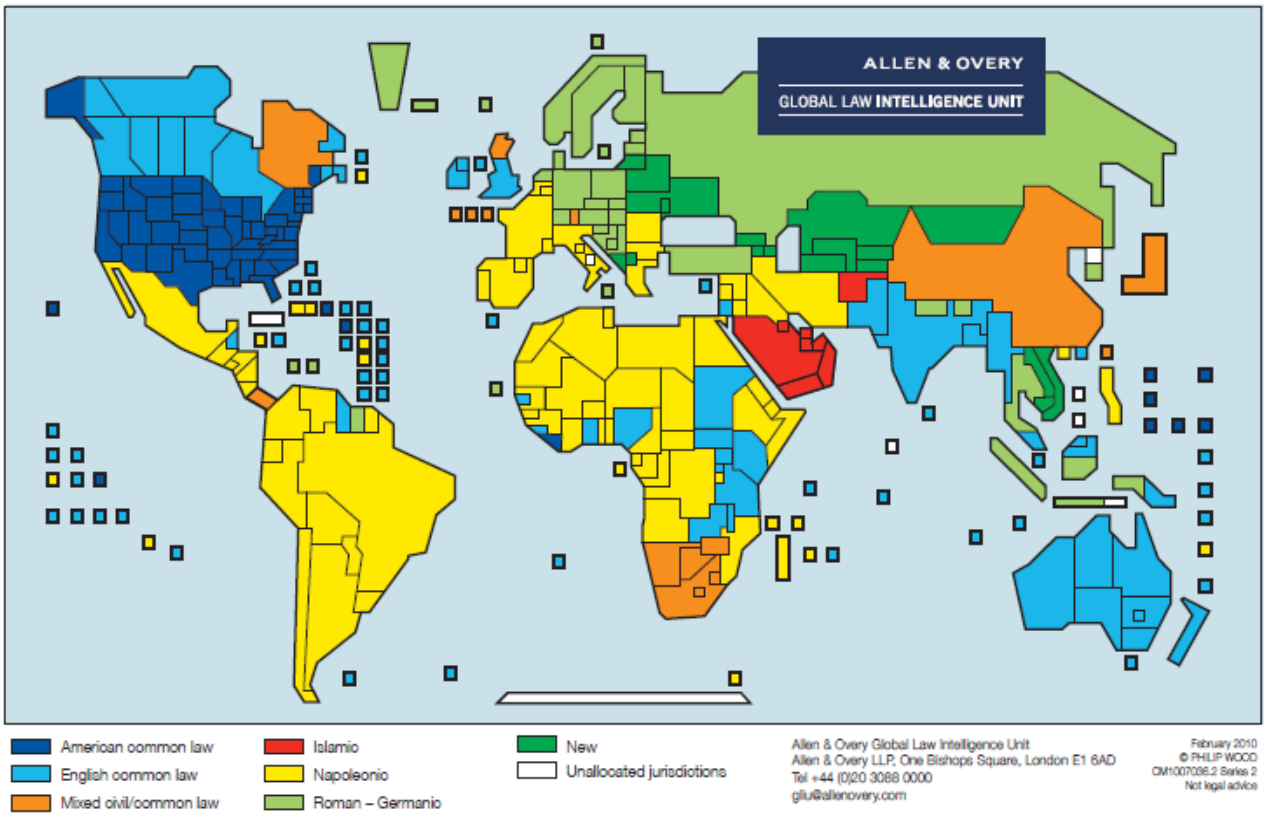
The members of the Practitioner Expert Panel with whom the students could discuss the questions in the survey were:

- Georges Dirani, GC at BNPP
- Pierre Minor, GC at Crédit Agricole

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

In past times, law was inseparable from the State that enacted it and from the territory in which it applied. Nowadays, however, it is appraised beyond boundaries. Globalisation has as much of an effect as economics, geopolitics or culture. Three phenomena - comparative law, European law and extraterritoriality of law - deserve more careful attention.

In spite of its salience in the legal thinking of the late 19th-early 20th Century, comparative law was somewhat neglected during the second half of the 20th Century, especially in administrative law. Nowadays, it has resumed its rightful place as an indispensable source of information and a means to reach understanding. Major legal questions cannot be solved without taking into account the questions, evolutions and orientations of our main partners.

A new legal order is blooming in Europe. Lively exchanges of views between the Court of Justice of the European Union, the European Court of Human Rights and national supreme courts feed on mutual interactions between EU law, European Courts of Human Rights law and domestic law. The hierarchy of norms of this new European order is taking shape and its principles are being asserted within a system that goes beyond the traditional cleavage between common law and civil law. It is giving birth to a novel model.

An increasing number of areas of law involve extraterritorial application. The Internet and digital networks are not impeded by boundaries. The same applies to environmental concerns and sustainable development. International trade as well as major sporting competitions rely on norms where the scope of application goes beyond states' jurisdictions. Even civil law raises questions that endorse and international dimension, in particular with regard to procreation, filiation and marriage.

In this context, international law and domestic laws permeate each other, sometimes confront each other but also enrich one another. Drawing on its history and enriched by its constructions and convictions, French law contributes to this movement. Whereas French law has nothing to fear from it, it cannot be ignored either. The common work led by the Ecole de droit d'Assas and *Allen and Overy's Global Law Intelligence Unit* come at the right time. It provides an important contribution and offers security in assessing the different criteria that touch upon both substantive law and litigation management. There is no doubt that it is a valuable account in better understanding the challenges our legal system is confronted with in the universe of global law.

Bernard Stirn
President of the litigation section of the French State Council
Professor of Public law at Sciences Po

Description of the legal risk rating method

Introduction

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

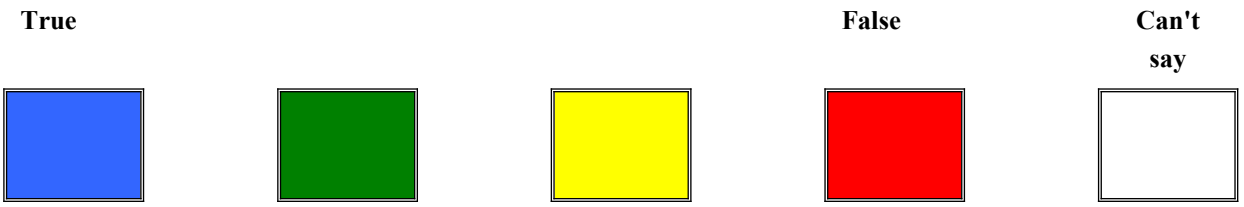
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes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

The survey was carried out by students at University Panthéon-Assas, Paris II. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of the Global Law Intelligence Unit, the members of Allen & Overy, University Panthéon-Assas, Paris II or the member of the Practitioner Expert Panel.

Methodology

The survey uses colour-coding as follows:



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

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

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

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

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

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. But if the law does intervene, this creates a risk because the law has to be complied with. If it is not complied with, there is generally some sanction in the form of liability, a penalty or the invalidity of a transaction.

Black letter law and how it is applied

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

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is very 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 usually measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

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 to enhance growth. Their main risk is the insolvency of the debtor and therefore the key indicators are whether the law supports creditors or debtors 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 notable 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 the largest creditors who are typically banks (who in turn represent depositors, ie the citizen) and the law is creditor-protective. Their legal risk is reduced and hence the risks of depositors with banks is reduced.

If the jurisdictions prioritises these three super-priority claimants, then the legal system of that jurisdiction is likely to be pro-creditor. If these super-priority risk mitigants are subordinated, this may also tell us whether the legal system is generally pro-debtor in its bankruptcy law. For example, one might be able to conjecture whether or not there is a tough rescue law and whether wholesale creditors are or are not favoured in the bankruptcy ladder of priorities. The result is that it would be much quicker to check the key points.

Jurisdiction based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. They are therefore debtor-protective. 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.

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. Hence insolvency set-off is creditor-protective. A prohibition is debtor-protective. 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 major aspect of legal risk.

Q1 In France, 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:

Mutual debts may be set off before notice of the debtor's insolvency.

According to article 1295 of the Civil code, a debtor who has accepted outright the assignment which a creditor made of his rights to a third party may no longer raise against the assignee a set-off which he might have raised against the assignor before the acceptance. With regard to an assignment which was not accepted by the debtor, but notice of which has been served upon him, it prevents only set-off as to claims subsequent to that notice.

The creditor can also set off mutual debts after notice of insolvency if the debts are interrelated. The interrelationship between mutual debts may be either generated by a sole contract or generated by a contractual framework, which is the basis of the business relationship between the parties.

These rules are intended to guarantee equality between creditors.

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 jurisdictions there are stamp duties.

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

The main tests are therefore (1) scope, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs. Security interests reduce the legal risk suffered by banks and hence strengthen the position of depositors with banks.

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

True			False	Can't say
	X			

Comment:

In France, there is no such thing as universal security, except for "fiducie" as explained in Question 3. Mortgages can secure present and future debts in some limited way. If a future debt is secured, the latter must be ascertainable at the time the mortgage is established, as provided by Article 2421 of the French Civil Code. Furthermore, mortgage only covers debts for an initially stated amount – Article 2423 of the French Civil Code - and is only effective for a said period of time. To overcome these requirements, Article 2422 of the French Civil Code allows the establishment of a « refillable » mortgage. In other words, it can be provided in the mortgage deed that the said mortgage could be re-used to secure future debts, either ascertainable or yet unknown at the time the deed is established. This may benefit to the same creditor of the original debt secured by the mortgage or to other creditors to be further identified. However, the mortgage can only be « refilled » up to the initial amount at most.

Furthermore, as for movable properties, the secured creditor may have a lien on the asset(s) securing the debt in cases stated by Article 2286 of the French Civil Code – in case of a possessory or even non-possessory pledge, to name a few. This enables the creditor to retain property until full payment of the debt. The creditor is ensured to have a priority over preferred creditors thanks to this mechanism.

As for creditors ranking, it should be noted that workmen's dues and claims are an overriding preferential claims, as provided by Articles 2331 and 2375 of the French Civil Code.

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 availability of the trust mitigates the legal risk of, for example, those who place their securities in the custodianship of banks and the users of securities settlement systems. The amounts involved are enormous.

All jurisdictions have an effective trust of goods (called bailment or deposit), but only 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.

Q3 France has a universal trust for all assets.

True			False	Can't say
X				

Comment:

Contrary to common belief, the law of 19 February 2007 introduced fiducie in French law, which is the continental equivalent of the trust. Article 2011 of the Civil code gives the following definition the fiducie is the operation whereby one or more settlor transfer goods, rights or securities, present or future, to one or more trustees who, keeping them apart from their own estate, act in an ascertained way in favour of one or more beneficiaries..

Since the LME law of 4th August 2008, any person or corporation may be a settlor. However, article 2015 provides that only banks, authorized institutions, investment companies, insurance companies and lawyers may act as fiduciaries.

As far as the object of the transfer is concerned, trusts are possible in respect of both movables immovables, both tangible and intangible property. The transfer may be of a security right in a personal context (bond, letter of intent...) or a property right (mortgage, collateral...).

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 rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

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

Corporations

Introduction

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

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

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

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

Director liability for deepening an insolvency

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

True		False	Can't say
		X			

Comment:

In the sole case of a company engaged in winding-up proceedings, Articles L651-1 and subsequent of the French Commercial Code impose liability on directors whenever a mismanagement has led to a shortfall in assets in the company.

Neither statutes nor case law give precisions about the mismanagement in question. It is merely said that it should be of a certain severity and that it is in no way linked to the corporate law conception of a wrongful management – which has to be « separable » from the directors' missions to incur their liability. Hence, directors' liability might be sought for a wrongful action, lack of action, negligence, and carelessness on their part, leading to a lack of assets in the company. Courts will assess the importance of the fault in abstracto.

Judges can rule that all or part of the debts incurred by the shortfall on assets will be borne by some or all of the directors, severally liable or not. It should be noted that any effort made towards the company in consequence on the part of a director – such as lowering his/her income, advances to current account, personal guarantees – is usually taken into account by the courts, leading to rarely holding liable the latter director on this ground.

Furthermore, there is normally no rule imposing that the directors file for insolvency when the company is insolvent. However, two sanctions may be inflicted to the directors when some irregularities have led to delay in filing for insolvency.

The first sanction is personal bankruptcy – governed by Articles L653-4 and subsequent of the French Commercial Code. The director pursued abusively - in his personal interest - operations at a deficit, which could lead to cessation of payments by the company. The courts will prohibit him from managing.

The second sanction is criminal bankruptcy – governed by Articles L654-1 and subsequent of the French Commercial Code. When the company is engaged in winding-up proceedings or a recovery procedure, the directors who intentionally concealed the company's difficulties – either by wanting to delay the filing up of the insolvency, or by concealing all or part of the company's assets or debts, or even by keeping incomplete or fictitious accounting reports – will be fined and may receive a jail sentence from the Court.

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, thereby exacerbating legal risk.

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

True			False	Can't say
			X	

Comment:

In France, a limited company is prohibited from granting financial assistance for the purchase of its own shares. Article L225-216 of the French Commercial Code prohibits that a company advances funds, allows loans or grants a security interest to a third party with the aim of buying its own shares.

Anyone acting otherwise will be penalised by way of a fine, as provided by Article L242-24 of the French Commercial Code.

However, one exception exists: the said provision does not apply to credit institutions and other companies dealing with loans activity.

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 France is open and has few restrictions.

True			False	Can't say
		X		

Comment:

When an investor holds, individually or with another person, 30% of the stocks as issued by a listed company at the stock exchange, he must issue a tender offer to all the shareholders of that company to purchase all the shares of the listed company (Article L.433-3 of the Monetary and Finance Code). The investor must also issue a tender offer when he possesses between 30% and 50% of the stocks and increases his share by 2% in a period of twelve months. As for consideration to the offer, cash or securities or both are allowed.

There is an obligation as to the price: it must be an equitable price. In other words, the price must be at least equal to the higher price paid by the investor for the shares during the last 12 months, in order to protect the shareholders.

There is a squeeze-out procedure when the investor possesses more than 95% of the capital after the tender offer. He has the right to request that the remaining shareholders sold him their shares for an equitable price. The idea is to equilibrate between two interests – that of the investor and that of the stock exchange which needs more than 5% to work properly.

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.

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. Legal risk is increased if parties are committed when they did not intend to be.

Q7 In France, 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:

According to article 1108 of the French Civil Code, both parties must agree in order to create a legally binding promise. Usually, the meeting of the minds forms a contract rather quickly when an offer (that must be firm and precise) is accepted. In business however, the establishment of informal negotiations, agreements, or preliminary contracts that impose obligations on the parties often extend the timeline for contract formation. The question, therefore, is to ascertain the moment when, during this process, the final contract is definitely formed. The general rule is that the contract is formed when the parties agree upon heads of terms. However, in French contract law, heads of terms can be either objective – according to what the law says in essence – or subjective – if parties indicate with a special clause that the conclusion of contract will be subject to an agreement on all the elements of the contract or upon certain conditions.

It is therefore possible for parties who agreed on heads of terms of the contract to subordinate their binding promises to specific clauses and conditions and a judge can't infer that the parties are bound even if the terms are sufficiently clear. Willingness of the parties and legal certainty are therefore truly respected in France.

Termination clauses

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

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

True			False	Can't say
	X			

Comment:

In France, termination clauses are valid in commercial contracts. Such clauses may provide that one party will terminate the contract "automatically" in the event of a breach of contract, even if the event is relatively trivial.

If the agreement stipulates that the contract is cancelled "automatically", the party does not need to file a suit before the judge.

Without such precision, the judge will uphold the clause but subsequently he may examine the importance of the gravity of the failure.

In order to be valid, its clause must respect certain conditions.

The termination clause must be clear and unambiguous; it must expressly include all obligations that will be sanctioned upon termination of the contract (if the clause is not clear, the judge recovers his ability to interpret the contract).

The clause must be implemented in good faith (specifically, the creditor must provide sufficient time to the defaulting party so that he or she can repair the breach of contract.)

If sufficient time is not provided, the clause is deemed never to have existed.

Finally, only the victim of the breach of contract can invoke the clause.

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. An ineffective clause increases legal risk.

Q9 In France, 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 order to exclude their liability for defective or non performance of the contract, parties often insert contractual limitation or exclusion of liability clauses. Under French contract law these clauses are valid in most commercial contracts between sophisticated companies. Companies may not, however, exclude or limit liability for "dol" (fraud) according to article 1150 of the French Civil Code (a "faute lourde" has the same effects as dol).

Over the years, French case law, has improved the effectiveness of such clauses between sophisticated companies. Such clauses are now valid even if they relate to an essential obligation. The French "Cour de

Cassation" in "Faurecia 2" (2010) ruled that theses clauses are valid except if, when they are related to an essential obligation, they contradict the scope and aim of the commitment.

Nowadays, these clauses are valid apart from very few exceptions and this contributes to legal certainty. One must note that all the different projects to reform French contract law take into account these case law solutions.

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, 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 an insistence on 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 legal risks are unexpectedly different.

Q10 The French 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 French public policy and mandatory statutes.

True			False	Can't say
X				

Comment:

Before the enactment of the Rome I Regulation, 17 June 2008, French courts constantly admitted the parties' freedom to choose the law applicable to their contract (landmark case on party autonomy : American Trading - Civ 1, 5 dec 1910).

Today, article 3 of the Rome I Regulation states that the parties can freely choose the law applicable to their contract, even if it has no connection with it. This choice must be certain and need not be express. This

freedom of choice is subject to mandatory rules as article 9 of the European Regulation provides but its application is strictly limited. It is also subject to public policy of the forum (art; 21, Rome I Regulation).

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 French 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:

Promoting the principle of party autonomy, the French courts have constantly admitted as a principle the validity of freely consented jurisdiction clauses even where there is no connection between the country and the contract (Civ, 19 février 1930, 27 janvier 1931 Mardelé et Dambricourt, Cass. 1re civ. 17 déc. 1985, CSEE c/Sté Sorelec).

The Brussels I Regulation being current law in France in that matter, its article 23 states that jurisdiction clauses are largely admitted if one of the parties is domiciled in the EU but this condition is not required anymore in the Brussels I Regulation Recast, 20 December 2012.

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

True			False	Can't say
X				

Comment:

The decree of 1981 promoted a liberal attitude toward arbitration, that has been strengthened by the Reform 2011. Article 1444 of the Code de procédure civile (CPC) states that the parties can submit their dispute to any foreign arbitral tribunal without restriction. This liberal attitude has lately been reasserted (Civ 1ère, 12 February 2014), but the validity of the arbitration clause has constantly been asserted as a principle by the French courts (Cass 1re civ, 5 january 1999 Zanzi, Cass. 1re civ., 11 july 2006, Cass. 1re civ., 8 july 2009) as well as its autonomy (article 1447 CPC).

This freedom of choice is given efficacy at the execution stage ; besides France has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Where the question includes a situation where one of the contracting parties is a public entity, it can be submitted to arbitration according to article 2060 French Civil Code. Any public entity, or even the State can be party to an arbitration clause (Cass, Civ. 1ère, 1966, Galakis).

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. The result can be enormous liabilities.

Q13 In France, 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 French law, according to the adage “nul ne plaide par procureur” (no one shall plead by proxy), class actions are generally not permitted.

Two forms of group actions exist in French consumer law – called “collective interest action” and “in joint representation action” – and are based on the opt in system (consumers willing to take part have to name themselves).

A specific and limited form of class action has recently been introduced, for consumers (L 17 mars 2014, n° 2014-344).

Other indicators

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

Real property

Ownership of land

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

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

True			False	Can't say
X				

Comment:

The right of ownership is absolute. In accordance with the 1789 Declaration of the Rights of Man and of the Citizen (article 17): “property is a sacred and inviolable right”. It is a constitutional principle. Thus, national and local corporations are entitled to own land and have full enjoyment of their right to own property without discrimination of any kind.

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.

The risk of losses is increased if title to land is unstable.

Q15 Most land in France 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:

Land registration is a deeply rooted tradition in France. Every right in rem relating to an immovable property is registered in a land register, failing which, these rights cannot be enforceable against third persons. It follows that any right, privilege or interest in, to, on, under or over a real estate property must be published in a land register in order to be opposable. This shows that land registration is at the very heart of the French system in relation to real property. It guarantees the security of real transactions and the proof of rights in rem. It constitutes also a fiscal service.

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 France, 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:

French towns individually manage their territory according to the French principle based on decentralization and the strengthening of local authorities. However, the municipalities are bound by many urban rules and regulations. Urban documents are either drawn up at a national level or at a local one. Whatever be the case, an urban document is compulsory and can not be broken. Categories of buildings can be forbidden or strictly regulated in certain areas to comply with local policies.

Article R. 123-9 in the Urban Planning Code sets out many restrictions about the use of land and the development of building. It distinguishes nine types of uses that an area could be dedicated to. A use, also called “an assignment”, is assigned to each piece of land in a town planning document. Each building project remains subject to the necessary regulatory approvals issued by the mayor which can be contested if the agreement is illegal pursuant to urban rules. Furthermore, change of use of land or modification of buildings

are subject to approval. These restrictions constitute a huge burden for commercial and industrial firms but they combat cities desertification and land degradation national development plans. This sectoral urban plan policy also provides France to become the world's third agricultural power. If a firm wants to establish itself in an area within which commercial activities are allowed, the final approval will be the outcome of few months of talks with the municipality in order to guarantee everyone rights. The time-limit for recourse to the courts against an authorization to build is two months. From a financial perspective, obtaining building permits requires a bond for the payment of a proportional tax whose amount is more than fair.

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.

Violation may lead to large liabilities. The legal risks increase costs.

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

True			False	Can't say
			X	

Comment:

In France, employees are highly protected by the law and the judge.

In many situations, the contract is not sufficient to preserve the rights of the employees, such that both labor law and the judge are strong legal barriers against employer's abuse.

The law covers many aspects of the labor relations between employer and employee at different stages of the relationship.

Firstly, the judge can determine whether the contract is valid by verifying that all the required elements are present.

The contract is regulated, meaning that the judge will verify the content and format of the employment contract to ensure that each clause is valid.

For instance, clauses regarding restrictions on geographic mobility must define an area. Equally, a non-competition clause must have a financial contribution.

Concerning the form of the contract in France, every contract that is not open-ended or full-time must be written. Otherwise, the judge can reformulate a contract of an open-ended nature.

A judge also supervises the hiring process. Employers are bound by a legal ratio. A company must have a number of disabled workers relative to staff size. Furthermore, hiring should happen without discrimination. An employer may not refuse to hire someone based on religious affiliation, gender, or union membership (L L1132-1, Labour Code)

Finally, the employer cannot let an employee go in any manner that he wants and for any reason that he wants. Rather, the employer must comply with specific deadlines and dismissal procedures (such as a preliminary interview, reflection period, termination letter and so on).

Environmental restrictions

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

True			False	Can't say
			X	

Comment:

The set of rules in that matter is far from being light and relaxed. Indeed, there is both a common regime and a special one that comes from European Union law (directive 2004-35 implemented in French though the law LRE: 2008/08/01). This legislation implements the so-called “polluter-pays” principle within French law. This principle requires operators to repair the damages resulting from their activity, even if there no evidence of a fault on the part of the polluter.

On the other hand, when it comes to its application, the body of rules relating to the environment is duly balanced with the needs of business development. The balance is struck between the responsibility of polluters and the liberty of investors.

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

True			False	Can't say
X				

Comment:

Foreign investment is in principle free in France according to article L151-1 of the Monetary and Financial Code (MFC). However, some investments are conditioned to a prior authorization in virtue of article L151-3 MFC as modified by the 7th May 2012 decree.

Moreover, an administrative declaration is required for operations enumerated by the decree of the 7th March 2003, such as the creation of a new corporation.

Exchange controls

Q20 In France, 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:

Article L 151-1 of the French Monetary and Financial Code (MFC) provides that a financial relationship between France and other countries is free. Under Article 151-2 of the MFC, capital movements can be subject to control, declaration or prior authorisation by the government where it can be justified by a necessary protection of national interests and where a decree has been made by the minister responsible for economic affairs.

Alien ownership of land

Q21 In France, 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 companies have exactly the same rights as nationals or residents to own or lease land. Hence, no specific administrative approval is required for a foreign national to own and enjoy property. Equality between nationals and foreign nationals is in fact a constitutional principle as the French Constitutional

Council has removed the right to levy in international successions. This right had provided that, where an applicable foreign law granted less rights to French heirs than French law would have done, these French heirs could levy the difference on all assets making up the estate located in France. Since the decision of the Constitutional Council (5 August 2011), such discrimination is now abolished; nationals and non-nationals are treated similarly.

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.

Unpredictability and arbitrariness in the application of the law can increase legal risks.

Q22 In France, 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 relation to French public law, it must be asserted that courts of the administrative order do not favour local interests over foreigners, neither overtly nor covertly. This first comes from the very purpose of the existence of separated set of rules for public entities in France. Indeed, as a general rule, public law only aimed at ensuring that public entities can carry out their activity of public interest the easiest and cheapest way. Preference will thus be given to the private contracting party that complies with those standards, regardless of its nationality.

In any case, should the courts attempt to stray from the above-stated principle of impartiality, the constraining set of rules inspired and controlled by European Union law would prevent or punish such misguided ways.

Costs and delays of commercial litigation

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

True			False	Can't say
X				

Comment:

In 2012, it took five-and-a-half months to rule on a given case before the commercial jurisdictions. This may be explained by the quality of the judges; indeed, they all are chosen among commercial peers. Before the

highest courts in France in commercial litigation (the Chambre commerciale de la Cour de cassation), it takes one year before the case is heard and ruled upon.

It is inexpensive to bring proceedings in France. It costs merely 82.44€ to bring proceedings before the commercial courts. To appeal a decision, it costs 150€. There is no fee to appeal on a point of law.

Therefore, one may say that the litigation delays and costs are considerably lower in France than in developed countries

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 interests	
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				

Commentary and suggestions for change

One core distinctive feature of the French legal system should be highlighted. It is known as legal dualism, both jurisdictional (there are an administrative order and a judicial, private one) and functional (the administrative supreme court, Conseil d'Etat, is also a counselor for the executive branch). Actually, this distinctive feature is shared by a majority of European countries (16 up to 28).

Regarding business opportunities, one should bear in mind that between a fifth and a quarter of the GNP is traditionally related to public sector. This dualism of jurisdiction sometimes lead to the application of different rules, for example, in contract law.

Profiles

The survey was carried out by the following students:

Olivier Blondel

Master Affaires publiques, Sciences Po Paris
Master 2 Droit public de l'économie, Université Paris II Panthéon-Assas
Diplôme de l'Ecole de droit d'Assas
Licence en droit
Diplôme du Collège de droit d'Assas, filière internationale

Aurore Martinelli

I was graduated in business law from University Pantheon-Assas in 2014 and I am currently doing a corporate and securities LLM in LSE. Moreover, I'm in the bar school in Paris and wish to become a lawyer afterwards. I also studied foreign languages in La Sorbonne.

Laure Surmont

After obtaining a Postgraduate Degree in General Private Law from the University of Paris II Pantheon Assas, Laure is currently studying at the Paris Bar School while working half time in a Law Firm. She intends to complete a Master of Laws Degree next year at McGill University. As a lawyer, she wishes to practise in the area of commercial litigation.

Aude Boisdron

Master 2 Droit des Affaires et Fiscalité
Institut de Droit des Affaires
Ecole de Droit
ESSEC Business School - MSc in management

Clémence Monteil

Clemence is a French law student completing a Master Degree in real estate and property development law at the Panthéon-Assas University in Paris. I have already completed a Master Degree in public economic law at the same university. In 2014, I passed the French bar examination because I intend to become a lawyer specialized in public and private construction.

Corinne Lainé

2015 Trainee solicitor

2014 Diploma in Ecole de droit (first degree), University Panthéon-Assas Paris II
2014 Master 2 – Private law, University Panthéon-Assas Paris II
2013 Master 1 – Private Law, University Panthéon-Assas Paris II
2012 Diploma in College de Droit, University Panthéon-Assas Paris II
2012 Licence (bachelor of law) – Private Law, University Panthéon-Assas Paris II

Manel Chibane (team leader)

Manel has studied a Master 1 in Comparative Law/ English Law during her Erasmus year in University College London and is a graduate from Panthéon-Assas University (Masters in Private International Law and International Trade Law). She is currently a law student at the Paris Bar School and specialises in International litigation and arbitration.

Alexandra Morancais

Alexandra Morançais is an LL.M graduate from UC Berkeley, School of Law. She previously graduated from University Paris 2 Panthéon-Assas with the LL.M degree of Magistère in Business Law. She passed the Paris bar exam and will soon be a qualified lawyer.

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.

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

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

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