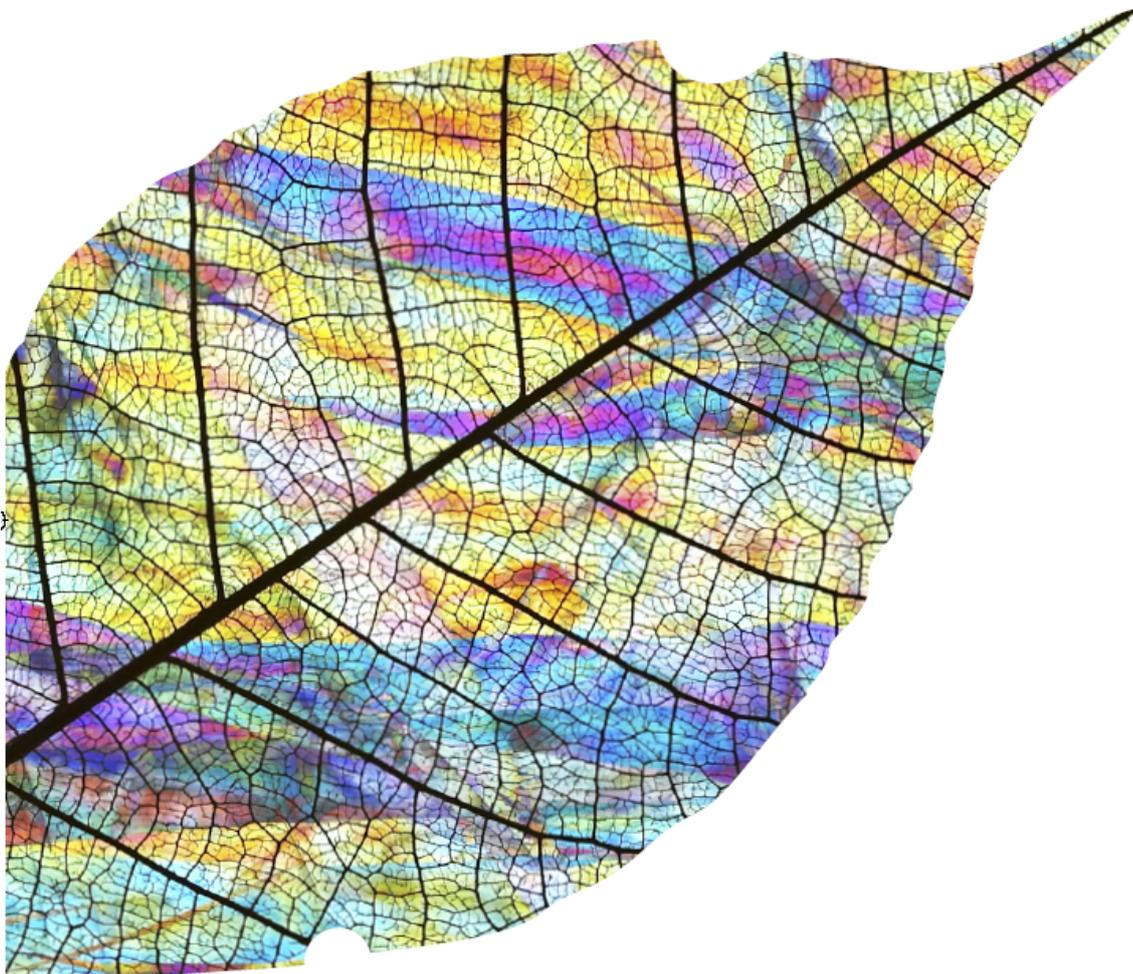


World Universities Comparative Law Project

Legal rating of South Africa

carried out by students at University of Cape Town

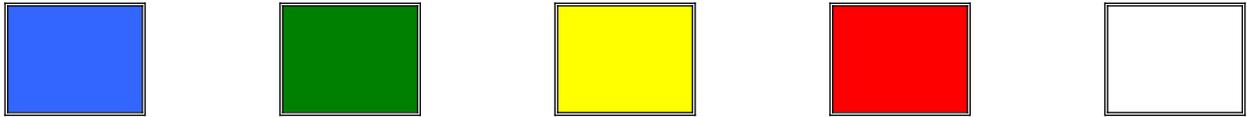
A production of the Allen & Overy Global Law Intelligence Unit



January 2014

World Universities Comparative Law Project
Legal risk rating of South Africa
carried out by students at the
University of Cape Town

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Produced by the Allen & Overy Global Law Intelligence Unit

World Universities Comparative Law Project

The World Universities Comparative Law Project is a set of legal risk ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions.

This legal risk rating of South Africa was carried out by students at the University of Cape Town, they were:

David Goldberg

Graham Evans

Jonathan Dean Singh

Pia Rabelo

Zinzile Mlambo

The members of the Faculty of **Law** at the University of Cape Town who assisted the students were:

Marumo Nkomo

Richard Bradstreet

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

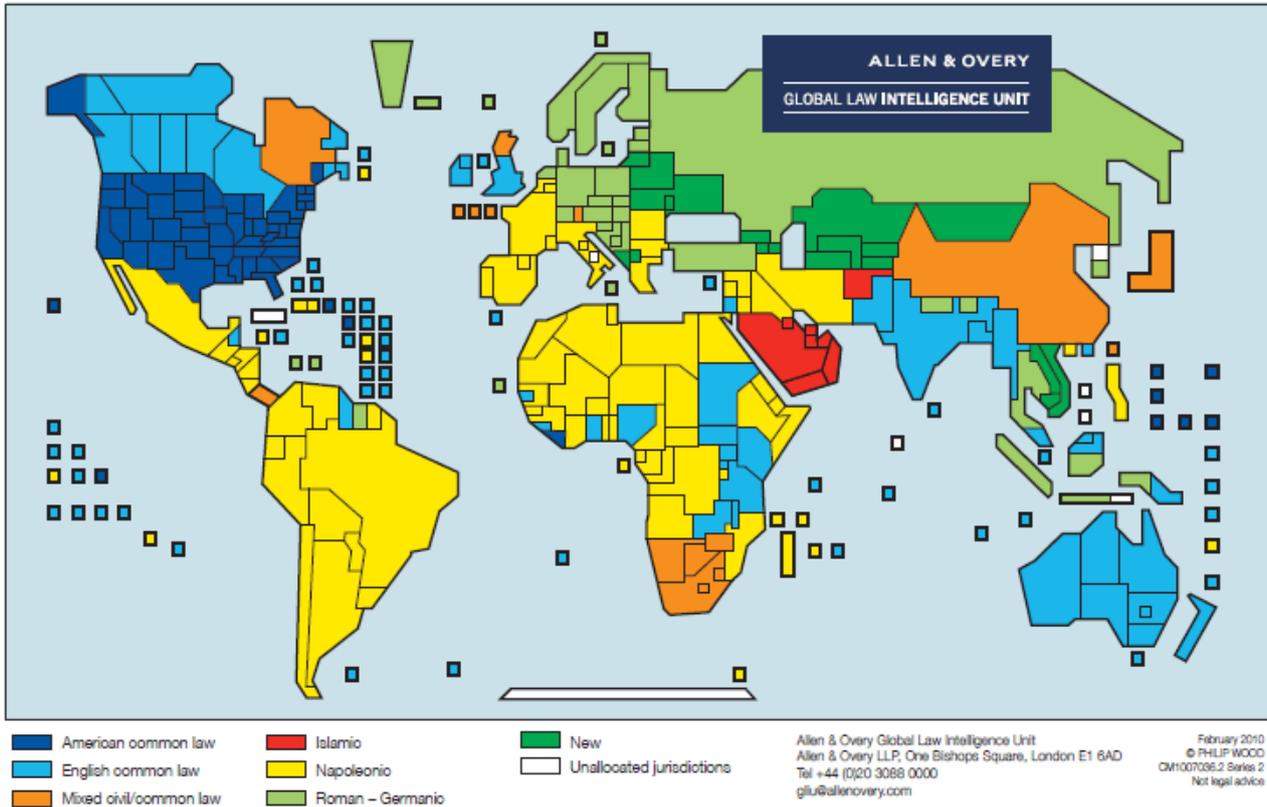
Joel Baepi - Old Mutual

Jonathan Lang

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 legal risk rating of South Africa conducted in this study is a timely and important addition to the body of knowledge on legal risks that corporations and other investors may face in this jurisdiction. It promotes the possibility of a rational debate concerning South Africa as an investment destination over the range of ‘urban myths’ that substitute misconception for justification.

The colour-coded methodology and concise explanatory notes offer a simple, user friendly analysis of corporate and financial law in South Africa. It is encouraging to note that research findings confirm that South Africa’s legal regime is supportive of international investment and that it complies, in the main, with the demanding standards needed to encourage investors. This is consistent with our engagement in multilateral institutions such as the World Trade Organization and the United Nations, as well as the ever-deepening cooperation with our partners in for a such as the BRICS group of countries.

I commend Allen & Overy and the University of Cape Town law faculty for conducting this research.

DM DAVIS
Judge President of the Competition Appeal Court, South Africa

With an official unemployment figure of 25% South Africa has a pressing need for increased and sustained foreign investment. Foreign investors considering investing or retaining their investments in this country need to be assured that what may be called our legal regime is supportive of international investment.

That is why the publication of this survey conducted for the World Universities Comparative Law Project on legal risk ratings of selected jurisdictions in the world, carried out for the Allan and Overy Global Law Intelligence Unit by students at the University of Cape Town, with the assistance of members of the UCT Law Faculty and a practitioner expert panel, takes place at a very appropriate time.

I am sure that investors who refer to the survey will be very encouraged to see that its findings confirm that, from a legal risk point of view, South Africa is a safe haven for investment.

Allan and Overy and the UCT Law Faculty are to be commended for producing this timely and useful publication.

Judge Ian Farlam, Retired Judge of the Supreme Court of Appeal, South Africa

Description of the legal risk rating method

Introduction

This paper assesses aspects of legal risk in South Africa 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.

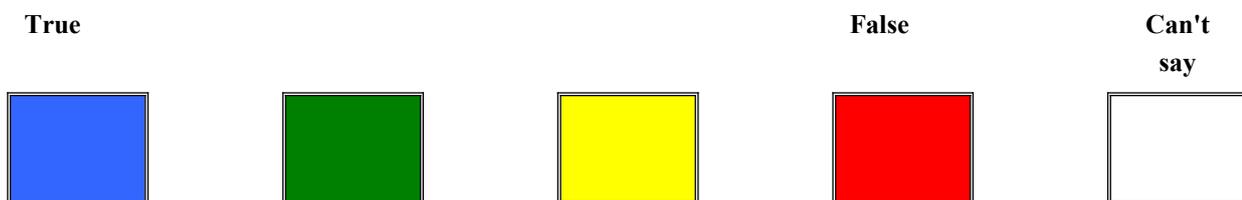
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes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

The survey was carried out by students at the University of Cape Town. 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, the University of Cape Town 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 South Africa. 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. 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

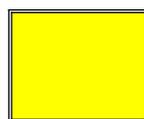
Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Hence insolvency set-off is creditor-protective. A prohibition is debtor-protective. Very large amounts are involved in markets for foreign exchange, securities, 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 South Africa creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

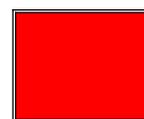
True



False



Can't say



Comment:

For set-off to validly operate, the debt must have matured before insolvency. Section 46 of the Insolvency Act provides that where set off occurs between parties and one of the parties' estates is subsequently sequestrated within six months after the taking place of such set off, then the trustee of the sequestrated

estate may either abide by the set off or he may, if the set-off was not effected in the ordinary course of business, set it aside and call upon the person concerned to pay to the estate, the debt which he would owe it but for the set off.

Importantly however, the trustee’s discretion to disregard the set off is removed where a securities exchange or a market participant as defined in section 35A, in accordance with the rules of the exchange, are party to the transaction or if the set-off takes place pursuant to a master agreement defined in section 35B.

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

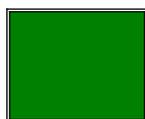
In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - 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.

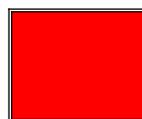
The main tests are therefore (1) scope, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs. Security interests reduce the legal risk suffered by banks and hence strengthen the position of depositors with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

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

True



False



Can't say



Comment:

Secured creditors are those who have a preferred right over the property of the insolvent by virtue of a special mortgage, a landlord’s legal hypothec, an instalment agreement hypothec, a pledge, or a right of retention. Special notarial bonds constitute a form of real security (a statutory pledge) over assets specially described and identified in the bond and give the secured creditor priority over preferred creditors (s 95 of the Insolvency Act).

A creditor whose security consists of immovable property may not realise the security himself- the trustee of the insolvent must take over the property at the value placed thereon by the creditor when his claim was proved (s 83(11)). A creditor whose security consists of movable property must give notice in writing of the fact to the Master and the trustee and then he may realise it himself if it consists of a marketable security, a

bill of exchange or a financial instrument (s 83 (2)). The cost of maintaining, conserving and realising any property shall be paid out of the proceeds of that property (s 89(1)).

Business rescue proceedings alter the ranking of creditors slightly. S135 of the Companies Act (71 of 2008) read with the case of *Merchant West Working Capital Solutions (Proprietary) Limited v Advanced Technologies; Engineering Company (Proprietary) Limited; Gainsford* (Unreported, Case no 2013/12406) make it clear that the claims of secured lenders prior to the commencement of business rescue rank after the claims of both secured and unsecured post-commencement financiers upon liquidation.

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.

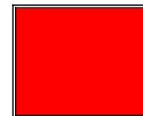
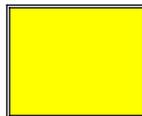
All jurisdictions have an effective trust of goods (called bailment or deposit), but only the common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship of securities.

Q3 South Africa has a universal trust for all assets.

True



False



Can't
say



Comment:

Section 1 of the Trust Property Control Act 57 of 1988 defines 'trust property' or 'property' as, 'movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee.'

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.

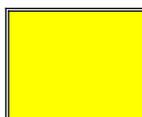
Director liability for deepening an insolvency

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 South Africa, 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:

Section 22 (1) of the Companies Act 71 of 2008 states that, ‘a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.’ Initially, this specifically prohibited trading under insolvent circumstances but now has a wider scope as trading under insolvent circumstances can be seen as reckless trading. This would lead to the director being held personally liable to the company for loss, damages or costs directly or indirectly sustained by the company as a result of a contravention of section 22 (1) (s 77(3)(b)). Section 22(2) is also aimed at deterring companies from carrying on business whilst commercially insolvent.

Financial assistance to buy own shares

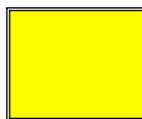
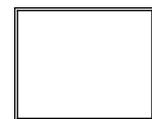
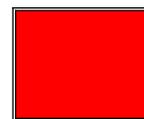
Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure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

True**False****Can't say****Comment:**

Section 44 of the Companies Act 71 of 2008 authorises a board to provide financial assistance to any person for the purchase of its own shares. However, the provision of financial assistance must be pursuant to an employee share scheme or pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category. Furthermore, immediately after providing the financial assistance, the company should still be able to satisfy a solvency and liquidity test; and the proposed terms of the financial assistance must be fair and reasonable to the company.

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.

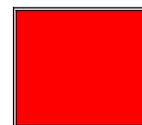
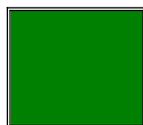
The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4)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

True

False

Can't say



Comment:

In terms of section 123(3) of the Companies Act 71 of 2008 (the Act), a bidder who acquires the prescribed percentage of voting rights (35%) must within one business day after the date of acquisition make an offer to acquire any remaining securities.

In terms of s 119(2) (b) of the Act, the Takeover Regulations Panel must regulate any affected transaction and ensure that holders of any particular class of voting securities are afforded equal treatment. Subsections 119(1)(b)(i), 119(2)(c) and (d) gives the holder of securities the right to “necessary” and “relevant” information from an offeror respectively which could cover both proof of funds, forecasts and content of circulars. Section 124 provides for the compulsory acquisition of minority shareholders and squeeze out. Section 125(3) provides for partial offers and section 126 places restrictions on the board not to frustrate an offer.

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.

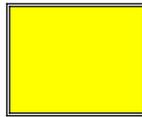
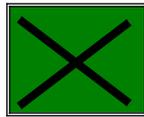
The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties.

Exclusion of contract formation

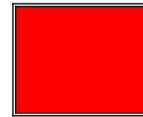
Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound. Legal risk is increased if parties are committed when they did not intend to be.

Q7 In South Africa, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.

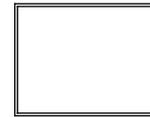
True



False



Can't
say



Comment:

If the party's intentions are that the overall agreement is concluded when no outstanding heads remain to be negotiated, then the parties are not bound by the contract (*OK Bazaars v Bloch* 1929 WLD 37). On the other hand, if the party's intentions are that once preliminary agreement is reached with heads A, B and C, and heads C and D remains to be negotiated, then the preliminary agreement will bind the parties and subsequent heads will be incorporated into the contract once negotiations are completed (*CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A)).

Generally, the South African law of contract follows the principle of reasonable reliance (*Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A)). Whether or not a contract will bind parties depends on whether a reasonable person in the position of the offeree would have accepted the offer believing it to be the true intention of the offeror.

Termination clauses

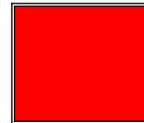
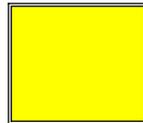
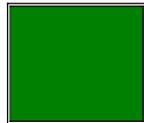
Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these 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 South Africa, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

True

False

Can't say



Comment:

Following the principle of sanctity of contract in South African law, if the parties enter a contract in which there is a termination clause (*lex commissoria*), regardless of the nature of breach, the innocent party is entitled to cancel the contract upon breach. Therefore, even a trivial breach may give rise to a right to cancel insofar as it falls within the scope of the termination clause (*Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A)).

Exclusion clauses

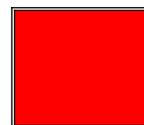
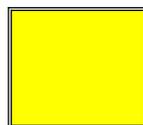
Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area. An ineffective clause increases legal risk.

Q9 In South Africa, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True

False

Can't say



Comment:

When interpreting an exclusion clause, the court will give effect to it if it is clear and unambiguous (*Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA)). However, if there is ambiguity the *contra proferentem* rule will apply and the court will interpret the clause in favour of the party agreeing to the exclusion of liability (*Durban's Water Wonderland (Pty) Ltd v Botha supra*).

On the other hand, if defective performance in terms of the contract is tantamount to total non-performance, then an exclusion clause will not apply (*Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA)). The merx must conform to the description presented in terms of the contract and must meet acceptable standards of quality. The question is where the distinction is drawn between defective and total non-performance.

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

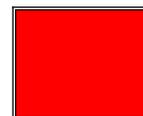
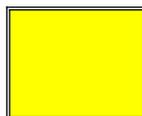
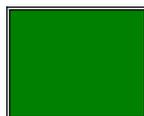
Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that legal risks are unexpectedly different.

Q10 The South African 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 South African public policy and mandatory statutes.

True



False



Can't say



Comment:

In a recent decision in the Supreme Court of Appeal of South Africa, *Representatives of Lloyds and others v Classic Sailing Adventures (Pty) Ltd* [2010] 4 All SA 366, it was held that South African 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, provided that the choice of governing law complies with South African public policy and mandatory statutes.

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 South African courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True



False



Can't say



Comment:

In *Foize Africa (Pty) Ltd v Foize Beheer Bv and Others* 2013 (3) SA 91 (SCA) the Supreme Court of Appeal of South Africa held that a foreign jurisdiction clause does not exclude the court's jurisdiction and that parties to a contract cannot exclude the jurisdiction of a court by their own agreement. When a party wishes to invoke the protection of a foreign jurisdiction clause, such party must serve and file a dilatory plea and adduce sufficient evidence in support of the enforcement of such clause. Only once this is done, can a court exercise its discretion on whether or not the exercise of jurisdiction should be stayed pending the outcome of foreign proceedings in a foreign jurisdiction. Thus, parties are not at liberty to oust the jurisdiction of South African courts by making use of a simple foreign jurisdiction clause.

Arbitration recognition

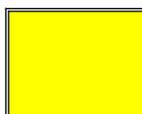
Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries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

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

True



False



Can't say



Comment:

South Africa acceded to the New York Arbitration Convention of 1958 in 1976. In a recent decision of the South African Supreme Court of Appeal, *Foize Africa (Pty) Ltd v Foize Beheer Bv and Others* 2013 (3) SA 91 (SCA), the Court held that an arbitration clause does not exclude the court's jurisdiction and that parties cannot exclude the jurisdiction of a court by their own agreement. When a party wishes to invoke an

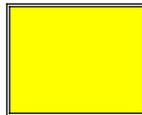
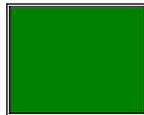
arbitration clause, such party must serve and file a dilatory plea and adduce evidence in support of the enforcement of such a clause. Only once this is done, can a court exercise its discretion on whether or not the exercise of jurisdiction should be stayed pending the outcome of arbitration in a foreign jurisdiction.

Class actions

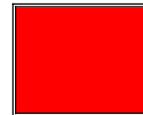
Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound. The result can be enormous liabilities.

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

True



False



Can't
say



Comment:

In a recent decision in the Supreme Court of Appeal of South Africa, *The Trustees for the time being of the Children Resource Centre & Others V Pioneer Food (Pty) Limited & Others*, the Court confirmed that class actions are possible in South Africa. At present class actions are somewhat of a novelty in South Africa; as such, this area of law is very much still in the process of being developed. However, in the aforementioned case the Court held that potential members of a class must be either given the opportunity to be excluded from the class (to opt out) or they must be required to join the class (to opt in). Thus, potential members of a class must be given the opportunity of electing whether they wish to be bound by a specific class action or not, and cannot by default be bound by a class action.

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

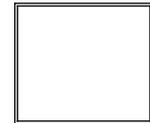
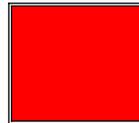
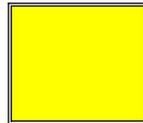
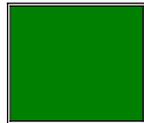
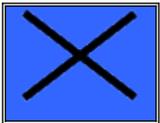
Ownership of land

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 South Africa, nationals and local corporations are entitled to own land absolutely.

True



False

Can't
say

Comment:

In South Africa the right to own property, including land, is protected under s25(1) of the Constitution, which states that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. Importantly, under s8(4) of the Constitution juristic persons, including corporations, are afforded the same rights, as far as possible, as that of natural persons. Thus, both nationals and local corporations are entitled to own land in South Africa. However, it must be noted that the extent of such ownership is subject to the conventional common law limitations imposed on land ownership by neighbour law as well as s25(2) of the Constitution, which allows for the expropriation of property provided certain requirements are met. As such, although nationals and local corporations are entitled to own land, their ownership is restricted in terms of the above two limitations.

Security of land title and land registers

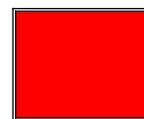
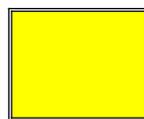
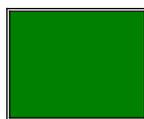
Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

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 South Africa is registered in a land register which records most major interests in land, eg ownership, mortgages and longer-term leases.

True



False

Can't
say

Comment:

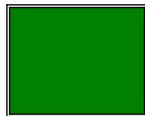
The Deeds Registries Act No. 47 of 1937 and the Sectional Titles Act No. 95 of 1986 prescribe the manner in which land and land rights must be registered and recorded. All land and land ownership is registered in various Deeds Registries across the country. Section 63(1) of the Deeds Registries Act provides that only real rights in land are registrable and personal rights may be registered only if, in the opinion of the Registrar, they are ancillary or otherwise complementary to registrable real rights. The Act also provides for the registration of mortgages, leases and sub-leases.

Land development restrictions

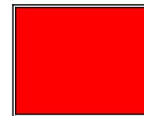
Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In South Africa, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

True



False



Can't say



Comment:

The Spatial Planning and Land Use Management Act No. 16 of 2013 provides a framework for the monitoring, coordination and review of the special planning and land use management system. Land-use and town planning is governed by the various Provincial Administrations and specifically the relevant Ordinances. The exact local land use and town planning requirements will differ from province to province, and from one Municipality or Council to the next. Land Use Management Systems in various areas can accept development applications for the rezoning of land to that of business commercial zones and industrial zones. Depending on the efficacy of the local government of an area, planning approval can sometimes be a lengthy process which may require expert legal assistance.

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.

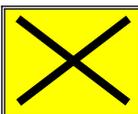
Violation may lead to large liabilities. The legal risks increase costs.

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

True

False

Can't say



Comment:

The Labour relations Act No. 66 of 1995 protects employee rights and provides for a code of good practice on the dismissal of employees. Schedule 8 of the Act prescribes the procedure for fair dismissals and governs the grounds upon which an employee can be dismissed. The Act also governs an employee's right to belong to a trade union to further enforce his or her rights and participation in the workplace. Furthermore, the Act establishes the Commission for Conciliation, Mediation and Arbitration, the Labour Court and the Labour Appeal Court to provide simple procedures for the resolution of labour disputes. In addition, section 51 of the Employment Equity Act 55 of 1998 protects employee rights and places a prohibition on unfair discrimination.

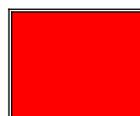
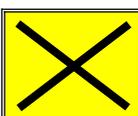
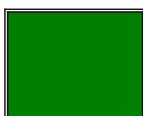
Environmental restrictions

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

True

False

Can't say



Comment:

The primary legislation in South African governing environmental rights and duties is the National Environmental Management Act 107 of 1998 (NEMA). Under section 28 of NEMA, the following persons can be held liable for the costs of cleaning up contaminated land; any person who can be causally linked to the pollution, the owner of the land or premises, a person in control of the land or premises, a person who has a right to use the land or premises.

The National Water Act 36 of 1998 places a duty on all persons to avoid pollution and degradation and gives the Minister of the DWEA the power to issue directives to persons to remedy any pollution or degradation.

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.

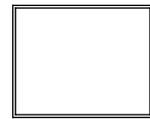
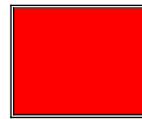
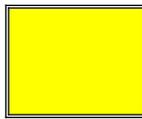
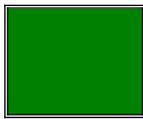
Foreign direct investment

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

True

False

Can't
say



Comment:

Foreign direct investment (FDI) in South Africa is encouraged by the Department of Trade and Industry (**the dti**) and in practice encounters few restrictions. Specific authorisations must be granted by **the dti** for investment in regulated sectors such as broadcasting, banking, insurance, defence and mining. The Companies Act 71 of 2008 (**the Act**) regulates business entities in South Africa. It recognises the incorporation of profit and non-profit companies. There is no requirement that there be local shareholders or directors of private companies. In terms of section 8 of the Act, a profit company is a private company if first, it is not state-owned and second, its Memorandum of Incorporation (MOI) prohibits the offering of any of its securities to the public and restricts the transferability of its securities.

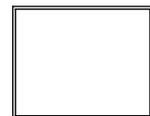
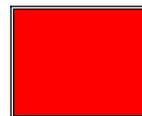
Exchange controls

Q20 In South Africa there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True

False

Can't
say



Comment:

Exchange controls in South Africa are governed by the Exchange Controls Regulations 1961 (the Regulations) which are established in terms of the Currency and Exchanges Act 9 of 1933. Exchange controls are administered by the South African Reserve Bank (SARB) and Authorised Dealers (banks) who oversee the controls on their behalf.

Exchange controls apply to all South African residents. Non-residents and foreign businesses are thus in principle not subject to exchange control under South African law. A ‘resident’ in terms of the Regulations includes any juristic person registered in South Africa in terms of the Companies Act 71 of 2008 (the Act). Transactions between local businesses or subsidiary foreign companies registered as an ‘external company’ in terms of the Act and foreign business are treated as being between a resident and a non-resident. As such, the acceptance and repayment of loans from foreign companies by South African residents is subject to exchange control and requires SARB approval. The remittance of license fees from resident to a non-resident also requires approval from SARB or the Department of Trade and Investment (the dti). There are no exchange controls on foreign direct investment in real estate, listed securities and equities.

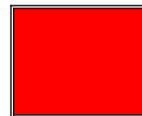
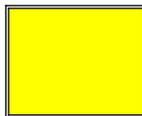
Alien ownership of land

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

True

False

Can't say



Comment:

There few legal limitations on the acquisition and leasing of immovable property by foreign companies in South Africa. Foreign companies wishing to acquire property must first register as an external company with the Companies Commission in terms section 23 of the Companies Act 71 of 2008 (the Act). Alternatively, a foreign company can have its registration changed from its foreign jurisdiction to a South African jurisdiction, and as such become a domesticated company in terms of with section 13 of the Act.

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.

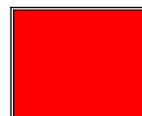
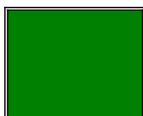
Unpredictability and arbitrariness in the application of the law can increase legal risks.

Q22 In South Africa the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True

False

Can't say



Comment:

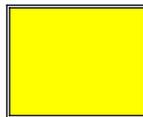
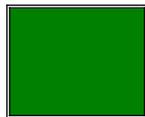
The absence of empirical data displaying judicial attitudes in South Africa towards corporation's *vis-à-vis* individuals, or South African interests *vis-à-vis* foreign interests, makes a definite answer to these issues elusive. It appears from cases such as *Sasol Oil (Pty) Ltd and Another v Metcalfe No 2004 (5) SA 161 (W)* that courts are willing to adopt a strict approach to businesses in finding their conduct inconsistent with legislative requirements, here in relation to written authorisation for to environmentally detrimental activities in terms the Environmental Conservation Act 73 of 1989.

Section 8(4) of Constitution of the Republic of South Africa, 1996 (the Constitution) confers on juristic person the rights contained in the Bill of Rights 'to the extent required by the nature of the rights and the nature of the juristic person.' South African law therefore in principle recognises the possibility of the Section 9 right to equality under law being applied in respect of juristic persons. In this regard, it can be expected of South African courts to treat businesses as fairly as individuals, and to treat foreigners as equal to South Africans.

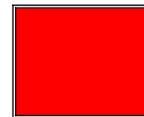
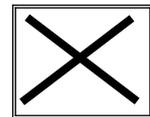
Costs and delays of commercial litigation

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

True



False

Can't
say**Comment:**

Practitioners and clients often complain of the costs and delays and a strong culture of commercial arbitration has emerged to ameliorate the effects of these issues. Having said this, the experience in most jurisdictions is similar, further empirical research is needed to give a definitive rating.

Overall ranking

This overall ranking is achieved by a survey of all the rankings as shown 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	Can't say

True



False



Can't say



Profiles

The survey was carried out by the following students:

David Goldberg

David Goldberg is a final year law student at the University of Cape Town (UCT). He has a Bachelor of Arts degree majoring in Psychology from the University of South Africa. He is also a committee member of one of UCT's eldest student organizations: the Black Law Students' Forum.

Graham Evans

Graham Evans is a third year BA and LLB student at the University of Cape Town, and is part of the graduating class of 2015. He has nascent interests in public international law and intellectual property law, which he hopes to refine throughout the course of his LLB, thereafter pursuing an LLM abroad

Jonathan Dean Singh

Jonathan Dean Singh is a Business Science graduate majoring in Law and Economics. He has interned at four out of the five Big Five law firms in South Africa and will do articles with Edward Nathan Sonnenbergs in 2015. In 2011 Jonathan was a finalist in the National Budget Speech Essay Writing Competition. In 2012 he was elected key note speaker at the University of Cape Town's Emerging Student Leadership Program. He was also a finalist in the Centre of Child Law Moot held at University of Pretoria in that year. In 2013 he served as Minister of Justice to the South African delegation at the Youth G8 Summit held in London. Jonathan also served as President of the Law Students' Council in 2012/2013. He is now reading his final year in LLB.

Pia Rabelo

In 2008 Pia was awarded one of four scholarships given to South African Students to study at a United World College. Upon graduation at Lester B. Pearson United World College of the Pacific in Canada she received funding to study at both Trinity College and New York University in the United States, but opted to study law in her home city at the University of Cape Town. Pia is currently in my final year of an LLB.

Zinzile Mlambo

Zinzile Mlambo was a final year LLB student at the commencement of the project but graduated from UCT in December 2013. She has a keen interest in Tax, Insolvency and Insurance Law. In 2013 she took first place in the Law Society of South Africa (LSSA) National Commercial Module.

Marumo Nkomo

Marumo Nkomo is a lecturer at University of Cape Town and is currently serving as the South African representative on the executive committee of the African Network of International Economic Law. His research interests include international trade, intellectual property and investment. Marumo has worked for leading law firms specializing in intellectual property and investment as well as the WTO secretariat. Marumo holds masters degrees in law and economics from universities in South Africa and Switzerland.

Richard Bradstreet

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