

Index of Legal Certainty

Report for the Civil Law Initiative (Fondation pour le droit continental)

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Work supervised by
Bruno Deffains and Catherine Kessedjian



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FOREWORD

“Ubi societas, ibi jus”....Since the origin of human societies law has always been an inherent part of how societies are organised. The various legal systems were originally set up to serve the ruling powers before, in democracies, being used to protect individuals and economic players from the excesses of the same ruling powers according to the choices societies made.

Nowadays law is no longer constructed purely by the influence of political powers but increasingly by that of the different players in the life of society, particularly corporations for which it lays down the essential “rules of the game”.

Since 2007 the Civil Law Initiative has brought together professionals of Romano-German influenced law from over thirty countries from all five continents. While the Foundation is convinced of the qualities of continental law, the “global law” that governs two-thirds of humanity and thirteen of the twenty most powerful economies (1), this does not mean it is hostile to the world’s other legal systems, particularly the various types of Common Law.

We are in fact convinced of the inevitable “hybridising” of the various legal systems in a globalised economy and of its corollary, namely the need to build bridges between these systems, a process to which we contribute with our annual Convention of Legal Professionals in the Mediterranean.

The first edition of the **Index of Legal Certainty** that we are now presenting is thus one of a series of measures the Foundation is undertaking to promote knowledge of continental law.

The first category of these measures is educative: funding professorships in a number of Universities all over the world and organising the Summer University in Paris which brings together students from nearly fifty countries. The second consists in ensuring the active presence of the Foundation in international “lawmaking” institutions, both as regards written law (the European Union) or “soft law” (the United Nations Commission on International Trade Law - UNCITRAL).

The Index illustrates a third aspect of our work, namely scientific research. This work targets all the economic players in law, particularly but not solely investors.

The aim of the Index is to help all these players to establish what system offers the most guarantees regarding legal certainty. On this point, the Foundation believes that well thought-out legal certainty is not synonymous with immobility or the equivalent of

either total lack of legislative or regulatory constraint or even minimal constraint. On the contrary, it presupposes the **accessibility** of the applicable law – contained in fully inclusive, validated, published form - its **predictability**, achieved through the *ranking of the norms* and the *predefined competencies of lawmakers and judges*, **reasonable stability over time**, and lastly a balance between economic interests and the parties concerned.

Legal certainty should enable States that choose to create new legal rules to question the credibility and validity of norms that have been tried and tested and recognised in the international community and to make informed choices. It should also help investors to assess the risks they will be running before they take definitive decisions about where to locate a factory or subsidiaries.

It was with this in mind that the Foundation commissioned an **independent scientific team** of legal specialists and economists supervised jointly by professor of law Ms Catherine Kessedjian and professor of economics Mr Bruno Deffains to devise a research method applicable for this first edition in 13 countries located in four areas of the world. In order to ensure we were as close as possible to economic reality, a questionnaire specific to the six sectors of law chosen in this first exercise (viz. contracts, liability, corporate law, property law, employment law and the settling of disputes, this last subdivided in turn into the court system and arbitration) was drawn up after discussions between researchers and legal professionals. In addition, in order to ensure that analysis was as objective as possible, two case studies were devised for each of the six sectors. The second stage – the most difficult – consisted in putting together a panel of respondents who were themselves legal professionals, sometimes nationals of the countries concerned, sometimes working closely with those countries, to whom the questionnaire was submitted. Finally the research team examined the responses, established averages weighted using certain criteria and performed aggregations in order to rank the systems. This entire methodology is accurately explained in the report.

An ad hoc working group chaired by Jean-Louis Dewost, monitored and supervised the researchers' work on behalf of the Civil Law Initiative.

How should we view the **results** of this exercise?

We first need to show a certain humility.... We know that any ranking is subject to imponderables related to the quality of the material it works with (in this case the responses) and the weightings chosen. Are there really no more than twenty global rankings in the field of law? The present case is our first exercise and the methods used can certainly be improved for future editions of this Index to include new countries and new legal sectors.

In order to improve transparency the joint directors of the team, at the request of the Civil Law Initiative, set out the choices of method (Chapter 4 of the report) they used to produce the final ranking so that readers might, if they saw fit, aggregate the results differently for each sector.

Nevertheless a few **bottom lines** stood out very clearly:

- a) groups of States emerged clearly that do not necessarily follow the distinction between Continental Law States and Common Law States.
Countries can be assigned to three groups: those where legal certainty is high, those where legal certainty could be increased, and those somewhere in between.
- b) legal certainty is one factor of economic appeal. Companies' needs for stability and predictability are greater at a time when the globalisation of trade is accompanied by greater competition. "Know and predict" have become major imperatives and risk evaluation – particularly of disputes – is a factor in any economic decision.
- c) certain sectors of law are more divisive than others; this is the case of corporate law and employment law.

From the preliminary conclusions of this first report and the feedback from questionnaires for each country, it would appear that sensitivity to legal certainty, if it results from choices by societies that are themselves governed by historical, geographical and cultural factors, in fact affects all public and private actors.

This first report should contribute to correcting certain judgements of the different legal systems, particularly the Continental Law system. It should also provide food for thought for those in public office concerning the economic appeal of the law. And finally it should stimulate dialogue between legal systems worldwide.

That is our hope and our ambition.

Jean-François Dubos

President of the Civil Law Initiative

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We are also grateful to the members of the scientific committee, chaired by Mr Jean-Louis Dewost, State Councillor, the Notary Maître Jean-François Humbert, the Lawyer Maître Bernard Chambel, Professor Jean du Bois de Gaudusson and Professor Michel Grimaldi, Chair of the scientific committee.

We would particularly like to thank the group of professions that helped validate the questionnaires: notaries, lawyers, corporate legal experts, administrators and legal agents, judicial officers, clerks of the commercial courts, representatives of the Ministries of Justice, Foreign Affairs, the Economy and Finance.

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We would like to thank all the members of the Management Board and Meeting of the Founder Members chaired by Mr Jean-François Dubos.

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Summary of results

This report is the result of 18 months' work intended to lay the basis of an empirical evaluation of legal certainty in a context of international comparisons. The work was performed by a multi-disciplinary team of legal specialists and economists. In permanent collaboration with the monitoring committee of the Foundation as well its various bodies, and a network of legal professionals, the team began by establishing a specific methodology before drawing up questionnaires to be distributed in the representative countries selected. Once the information had been collected from professionals who are recognised specialists in the sectors of law concerned by the particular situations, statistical processing yielded the results presented in this report. The team would like to emphasise that this work, which is aimed at measuring legal certainty, is a first stage intended to encourage debate in order to extend the discussion to more legal sectors and countries.

From a conceptual point of view, the report is based on the principle that reasonable legal certainty is not synonymous with immobility or equivalent to the absence of any legislative or regulatory constraints, even minimum constraints. On the other hand, it assumes the accessibility of the applicable law, its predictability due to the hierarchy of norms and predefined competencies of lawmakers and judges and reasonable stability over time and, lastly, a certain balance between economic interests and the parties concerned.

I. General rating

The general rating puts Norway in first position ahead of Germany, France and the United Kingdom.

Germany and France appear to be very close from the point of view of the overall legal certainty their systems offer, even though the details of the results for each sector reveal significant differences. Germany appears to be better rated than France concerning contract law and property law. On the contrary, the French system offers greater certainty, particularly in the field of corporate law.

Even though most countries appear to present a satisfactory level of legal certainty (they all achieve a score that is significantly higher than the weighted average), Argentina, the United States and Brazil seem less well rated.

On the whole there may be considered to be several groups of countries. Firstly, a group where legal certainty is high (Norway, Germany, France and the United Kingdom). Even though these countries may be located in the European Economic Area they nevertheless have different legal traditions. Then there is a group where certainty appears "satisfactory" and a last group where certainty "could be improved".

The following table gives the scores for each country in the six sectors studied as well as their general rating.

<i>Rank</i>	<i>Country</i>	<i>Average</i>	<i>Contract</i>	<i>Disputes</i>	<i>Property</i>	<i>Liability</i>	<i>Corporate</i>	<i>Employment</i>
1	Norway	7.07	7.76	6.34	7.77	5.98	6.86	8.36
2	Germany	6.93	8.13	7.03	8.28	6.59	5.43	6.11
3	France	6.82	5.31	6.96	7.54	6.54	7.79	6.80
4	United Kingdom	6.56	8.02	6.29	5.98	5.91	5.89	7.26
5	China	6.41	6.23	6.89	5.29	4.85	8.79	6.39
6	Morocco	6.46	6.56	7.08	7.09	4.54	6.88	6.14
7	Senegal	6.35	7.49	6.17	5.99	5.86	7.24	5.32
8	Italy	6.19	5.52	6.29	5.09	5.68	6.99	7.69
9	Canada	6.13	6.56	5.24	5.46	6.89		6.47
10	Japan	5.97	5.95	5.66	5.82	6.47	5.55	6.39
11	Argentina	5.89	5.46	6.21	6.60	6.07	5.69	
12	United States	5.75	7.03	5.93	5.90	4.91	6.24	4.48
13	Brazil	5.63	5.47	5.86	7.02	4.12	6.55	4.96

II. “Legal origins” and legal certainty

The overall results would appear to show that the legal certainty as measured for the various countries is not related to the “legal origin” of the country concerned¹.

Even though several civil law countries occupy the first positions, no groups stand out due to the origin of their law. Norway therefore occupies the first position and France is third, but Italy is rated eighth. Similarly, the United States is rated twelfth, but the United Kingdom occupies fourth place.

Furthermore, no convergence of scores is observed per sector according to legal origin. Italy has a good rating for employment law whereas Japan and Germany do less well. Similarly, for corporate law France and Italy occupy the second and fourth positions whereas Japan, Italy and Germany have lower scores. The same conclusions apply to common law countries. In employment law, for example, the United Kingdom is in third position and the United States comes last.

¹ The notion of legal origin is at the heart of the approach developed by Glaser and Shleifer (2002) which was discussed at length in the World Bank’s “Doing Business” programme. The notion of legal origin refers mainly to the distinction between common law countries and continental countries with a tradition of civil law.

Overall, the analysis reveals that there is no dominant model of a legal system in terms of legal certainty. On the contrary, legal certainty would appear to transcend legal systems because countries with different traditions achieve similar performances in terms of legal certainty. Legal diversity and plurality are not necessarily in contradiction with high levels of legal certainty.

III. Disparity of results according to sector

The average scores vary from one sector to another, which would suggest that the complexity of the situations was perceived differently by the specialists in each sector studied.

Thus, on the whole, the worst scores are obtained in situations concerning liability law. Canada, which comes first in this sector, has a score of 6.89 and Brazil, which is last, has 4.12. On the contrary, corporate law is the sector in which most countries obtain the best results. China, which comes first, has 8.79 and Germany, which has the worst rating, has “only” 5.43.

Even though it is not possible to draw definitive conclusions on the differences regarding the innovative and prospective nature of the indicator based on an original methodology, where there is by definition room for improvement, two explanations, neither of which is exclusive of the other, may be put forward: on the one hand, the specific questions posed in the various situations have not always been perceived with the same degree of “severity”; on the other, certain sectors of law could present a lower level of legal certainty overall.

IV. National legal certainty that is stable across the sectors

A comparison of the results obtained in each sector for a given country reveals relative uniformity of the level of legal certainty in all the components of the law in that country.

Japan, Argentina and Morocco are the most uniform countries from the point of view of legal certainty. The scores obtained in each sector are, in fact, very close and no sector stands out either positively or negatively.

Three countries stand out as exceptions: China, the United States and the United Kingdom. In the first two countries the scores for corporate law are high compared with all the other scores. Moreover, for the United Kingdom contract law would appear to be better rated than the other sectors.

Ultimately, this work reveals interesting results from the point of view of the importance of legal certainty in the different legal systems studied. These results are promising and will most likely lead to subsequent developments in order to widen the legal sectors and increase the number of countries considered to reinforce the credibility of the approach adopted to create a reference indicator of legal certainty.

Chapter 1 - Legal certainty – An analysis of the concept²

1. Nowadays nobody would deny that legal certainty is a *sine qua non* condition for a democratic society or a State governed by the rule of law³.
2. Nor can there be any doubt that investors, whether local or foreign, take account of legal certainty when taking investment decisions.
3. But once these two points, neither of which we could or would challenge, have been made, our work has barely begun. In particular we have to ask how we define the concept of legal certainty? What are the consequences of our definition? We will attempt to answer these two main questions in the rest of this chapter.
4. The need for legal certainty is nothing new⁴. In the past the expression “legal certainty” was considered a truism or tautologous: wasn’t certainty the same thing as the law, an attribute of law, an inherent component of its essence?⁵ This view was so widely held that the expression “legal certainty” was actually redundant. Because the law seeks certainty in the broad sense of social ties, legal certainty is a certainty within a certainty⁶.

² This chapter was supervised by Professor Catherine Kessedjian assisted by Séverine Menétrey, Tatiana Sachs and Catharine Titi.

³ Opening the conference “*Entreprise et sécurité juridique*” on 21 November 2014, Jean-Marc Sauvé, Vice-President of the French Council of State, quoted Doyen Vedel: “A State governed by the rule of law is no more than the (...)dose of law society can bear without being stifled”, G. Vedel, Proceedings of the Conference *L’Etat de droit au quotidien*, p. 65, cited by D. Labetoulle, “*Principe de légalité et principe de sécurité*”, in *Mélanges en l’honneur de Guy Braibant*, Dalloz, 1996, p. 403. J.-M. Sauvé’s speech can be accessed on the French Council of State website.

⁴ For the “obsession” with legal certainty shared by authors at the end of the 19th century and beginning of the 20th century, see P. Jestaz, C. Jamin, *La doctrine, Dalloz.*, 2004, p. 139 *et seq.*

⁵ J. Chevallier, “*Le droit économique : insécurité juridique ou nouvelle sécurité juridique*”, in *Sécurité juridique et droit économique*, supervised by L. Boy, J.-B. Racine, F. Siirainen, Larcier, 2008, p. 559.

⁶ G. Farjat, “*Observations sur la sécurité juridique, le lien social et le droit économique*”, in Boy, L., Racine, J.-B. and Siirainen, F. (dir.), *Sécurité juridique et droit économique*, Larcier 2007.

5. Most legal doctrine agrees that we are seeing “an unstoppable increase in the theme of legal certainty”⁷. Action taken by the highest legal bodies bear out this observation. The European Court of Justice recognised it as the underlying principle of the European legal order in 1962⁸ before elevating it to the status of “the fundamental principle of EU law” in 2005⁹. In 2004 the Court of Cassation received a report on how reversals of precedent were dealt with¹⁰. Two years later the Council of State devoted its annual report to a broad study of legal certainty¹¹ at the same time as giving legal certainty the status of the general principle of law¹². While the notion of legal certainty is as ancient as law itself, what is the significance of the new attention it is attracting? Given the multi-faceted nature of legal certainty, this is not easy to explain¹³. But two main tendencies stand out, both originating in the

⁷ *Ibid.* These statements taken from the summary of this thought-provoking work reflect the observations of all the authors.

⁸ ECJ, 6 April 1962, *Bosch*, case 13/61, *Rec. ECJ* 162, p. 89.

⁹ Case C-110/03, 14 April 2005. The Court set out the principle of legal certainty, stating that the rules of law should be clear, precise and have predictable effects so that people concerned can find their bearings in situations and legal relations governed by the legal order of the EU while allowing actors to apply the principle differently depending on how well-informed they are.

¹⁰ N. Molfessis, *Les Revirements de jurisprudence: Rapport remis à Monsieur le Premier Président Guy Canivet*, Litec, coll. “Cour de cassation”, 2005.

¹¹ “Sécurité juridique et complexité du droit”, Report by the Council of State 2006, *La Documentation française*, 2007. The Council of State had already published a first report in 1991, *Conseil d’Etat, rapport public annuel 1991*, entitled *De la sécurité juridique* (On Legal Certainty) *La documentation française*.

¹² CE Ass. 24 March 2006, *Société KPMG et autres*, No. 288460, 288465, 288474, 288485, *Rec. Lebon*; D. 2006 p. 1190, Chron. P. Cassia, “La sécurité juridique, un ‘nouveau’ principe général du droit aux multiples facettes” and p. 1226, the opinion of R. Damman; repr. (extract) with common government conclusions Y. Aguila in *Bull. Joly Sociétés*, June 2006, para. 157, p. 711, note J.-F. Barbiéri; *AJDA* 2006 p. 1028, Chron. C. Landais and F. Lénica; p. 827, tribune F. Melleray and 841, tribune B. Mathieu; *RJDA* 6/06, p. 545, Chron. Y. Aguila; *LPA* 3 April 2006, No. 66, p. 4, obs. O. Dufour; *RTD civ.* 2006, p. 527, obs. R. Encinas de Munagorri; *RDC* 2006, p. 1038, obs. C. Pérès; *JCP* 2006 p. 1343, note J.-M. Bélorgey, “Le Conseil d’État consacre le principe de sécurité juridique”; A. Met-Domestici, “La sécurité juridique: consécration nouvelle d’une exigence ancienne. Précisions sur les enjeux de la reconnaissance par le Conseil d’État du principe de sécurité juridique”, *RRJ*, 2007, No. 4, p. 1873. It will be seen, however, that legal certainty is not (yet?) a constitutional principle in French law, as J.L. Dewost observed in his closing remarks at the conference “*Entreprise et sécurité juridique*” held at the Council of State on 21 November 2014 (forthcoming), even though, he added, it constitutes an implied point of reference for checking constitutionality. This was the case when the Constitutional Council ruled on the retroactivity of laws, particularly tax laws: CC No. 98-404 DC dated 18 December 1998, *Loi de financement de la sécurité sociale pour 1999* and CC No. 2005-530 DC dated 29 December 2005, *Loi de finances pour 2006*. See other examples quoted by Jean-Marc Sauvé, opening the conference “*Entreprise et sécurité juridique*”, *op. cit. supra*.

¹³ On this subject it has been pointed out that a “sort of epistemological contagion is spreading and weakening the ‘remedy notion’ of the ill it is supposed to fight” (J. M. Soulas de Russel, P. Raimbault, “*Nature et racines du principe de sécurité juridique: une mise au point*”, *RIDC*, 2003, p. 86).

liberal conception of the world. On the one hand, legal certainty is demanded by freedom of choice and its counterpart, the legitimate expectation of subjects of the norm¹⁴. Without legal certainty, freedom of choice is a mere trap as subjects of the norm cannot exercise the freedom granted to them in full knowledge of the facts. On the other hand, the emphasis placed on legal certainty has a place in discussions of the economic function of legal regulation¹⁵. The book entitled "*Sécurité juridique et droit économique*"¹⁶ explains how concern with legal certainty is built into thinking about the relations the legal system has with its economic environment¹⁷. This type of thinking becomes particularly blatant when legal certainty is used as a criterion of economic attractiveness. This is precisely the status accorded to legal certainty by the *Doing Business* reports drawn up annually by the World Bank¹⁸. But for the World Bank team, legal certainty appears to be the equivalent of less regulation and ever-greater rapidity in the exercise of economic activities without taking into consideration the quality of regulation or how it is implemented.

¹⁴ This appears particularly clearly in investment law in the standards protecting investors against unexpected changes of legislation or against discriminatory treatment or what is conventionally referred to as "indirect expropriation", or the full protection and security clause. Among the many works on this aspect of law we might cite R. Kläger, *Fair and Equitable Treatment in International Investment Law*, Cambridge University Press, 2011, p.116-119; S. Robert-Cuendet, *Droits de l'investisseur étranger et protection de l'environnement: Contribution à l'analyse de l'expropriation indirecte*, Martinus Nijhoff, 2010, p.166 *et seq.* The legitimate expectations of the parties is also at the heart of the construction of European law by the Court of Justice. See J.-P. Puissechot, "*Vous avez dit confiance légitime? (le principe de confiance légitime en droit communautaire)*", *Mélanges en l'honneur de G. Braibant*, pub. Dalloz, 1996, p. 581. It was also recognised as a principle by the Council of State in France in December 2013. More generally, see S. Calmes, *Du principe de protection de la confiance légitime en droits allemand, communautaire et français*, thesis, Dalloz, 2001; P. Mouzouraki, *Le principe de confiance légitime en droit allemand, français et anglais: un exemple de convergence des droits administratifs des pays européens ?*, Bruylant, 2011.

¹⁵ On this point see J. Chevallier, "*Le droit économique: insécurité juridique ou nouvelle sécurité juridique*", in *Sécurité juridique et droit économique*, supervised by L. Boy, J.-B. Racine, F. Siirainen, Larcier, 2008, p. 559.

¹⁶ *Sécurité juridique et droit économique*, supervised by L. Boy, J.-B. Racine, F. Siirainen, Larcier, 2008.

¹⁷ Presenting the meaning of legal certainty in Germany, the cradle of this notion, H. Ullrich emphasises that "It is the socio-economic function of legal institutions and instruments that the State, through its rule of law and by granting individual rights to companies which should constitute the starting-point of any judgement about the need to ensure or limit legal certainty" ("*La sécurité juridique en droit économique allemand: observations d'un privatiste*", *Sécurité juridique et droit économique*, *op. cit.*, p. 75). In this observation the author suggests that the idea of legal certainty covers less an intrinsic quality of the legal system than its relations with its surroundings.

¹⁸ J.-B. Racine and F. Siirainen, "*Sécurité juridique et droit économique. Propos introductifs*", in *Sécurité juridique et droit économique*, *op. cit.*, p. 18. According to the authors, "international investment law therefore includes legal stability as an obligation imposed on the receiving State" (p. 18).

6. No system of law would claim insecurity as a base and objective. But while every legal system aims at security, such security is social, political and economic¹⁹. Legal certainty is from this viewpoint a term used exclusively by legal specialists, mainly from the civil law tradition, to describe the basis and objective of a legal system²⁰. Under these conditions it would seem difficult to try to conceptualise legal certainty and give it an unequivocal “purely” legal definition. But although the definition and scope of legal certainty are difficult to establish, its components do not seem impossible to grasp nor its measure impossible to take despite its extent, which is necessarily partly subjective, and despite the fact that it relates to values that may not all be measurable.
7. Legal certainty represents the qualitative value of a legal system resulting from demands “in terms of the quality of standards and the quality of the interpretation judges give them”²¹. The many studies devoted to legal certainty (which remains an expression used more in systems in the civil law tradition²²), like the work

¹⁹ N. Isaacs, “Business Security and Legal Security”, *Harv. L. Rev.* 37, 1923-1924; O. Raban, “Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism”, *Boston University Public Interest Law Journal*, 2010, p. 175.

²⁰ P. Rimbault, “La sécurité juridique, nouvelle ressource argumentative”, *La revue du notariat* 110, 2008, p. 517. “Legal certainty” has become a rhetorical tool for promoting the civil law model in opposition to the real or supposed effectiveness of common law in facilitating global trade. It is not surprising that the *Juristes de la Méditerranée* chose it as the theme for their 4th Convention in December 2012 (The Proceedings of Algiers Conference held on 9 and 10 December 2012, prefaced by the Minister of Justice Ms Christiane Taubira are published in a special supplement to No. 27 of *La Semaine juridique* dated 1st July 2013). The same theme of “Legal certainty, a factor for growth” was at the core of the 25th Congress of Notaries of the European Union in April 2013 (M. Pereira and R. Motin, “25th Congress of EU Notaries on legal certainty - a factor for growth”, *JCP N*, 24 May 2013, act. 615), while in 2013 the Civil Law Initiative (*Fondation pour le droit continental*) also launched a call for projects for a “Study relative to an Index of Legal Certainty” (P. Papazian, “Call for Projects. Study relative to an Index of Legal Certainty”, *JCP G*, 7 January 2013, doct. 37).

²¹ A. Levade, “La sécurité juridique. Propos introductifs”, *La sécurité juridique. Supplément La Semaine juridique*, 1st July 2013, p. 8.

²² The French term “*sécurité juridique*” is sometimes difficult to translate into other languages (see the three languages of the glossary apart from French: German, English and Spanish. It nevertheless evokes one quality of a legal system that does not have the same intensity in every legal system. In fact, “legal certainty” implies evaluating a legal system in a vacuum. This is an end in itself of the legal system that we find in French and German civil law type conceptions, but much less in the concept of law in the common law system in which law is seen more as a means than an end. The law is there to serve the economy, for example, and logically enough a *Doing Business* type of rating measures what the law contributes to the economy. In the civil law approach, taken to the extreme in the work produced by the Association Henri Capitant as a reaction to *Doing Business*, the legal system has inherent value and it is the quality of this legal system that is measured by the Index of Legal Certainty created for the Civil Law Initiative. See *Association Henri Capitant des Amis*

undertaken to establish the vocabulary, tend to explain legal certainty in terms of four virtues²³. Legal certainty implies that laws should be at least accessible, intelligible and stable and have predictable effects²⁴, i.e. both knowledge of the legal rule and its control over time²⁵.

8. We have chosen to give two specific examples in two different areas of law of the analysis that was at the origin of the work to construct the Index of Legal Certainty: the settling of disputes (section I) and employment law (section II).

I. Legal certainty and dispute settlement

9. The importance of dispute settlement as a component of legal certainty requires a few explanations of a theoretical nature (A) and has repercussions at the methodological level when drawing up the questionnaires that were used as the basis for creating the Index of Legal Certainty (B).

A. Legal certainty in the light of dispute settlement: theoretical aspects

10. Legal certainty cannot be dissociated from judicial security and, more widely, from institutional security. Let us imagine a normative corpus that can be accessed perfectly by all paper and electronic means, that is intelligible to the largest number and even translated into different languages; that is moreover stable in that its revision follows a procedure during which all the stakeholders can uphold their point of view under the protective eye of a constitutional body dedicated to the protection of vested rights and the legitimate expectations of subjects of law. This normative corpus would have all the virtues expected of legal certainty: accessibility, intelligibility and stability. Predictability is already more complex to judge given that it depends partially and indirectly on the interpretation and

de La Culture Juridique française, Les Droits de Tradition Civiliste en Question: Á Propos des Rapports Doing Business de la Banque Mondiale, Société de Législation Comparée, 2006.

²³ See attached bibliography and glossary.

²⁴ See in particular the 2006 report of the French Council of State on legal certainty, available on line at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/064000245/0000.pdf> (consulted 18.12.2014).

²⁵ On this point, when opening the work of the conference on 21 Nov. 2014, the Vice-President of the Council of State spoke of the need to “know” and “plan” demanded by businesses and also mentioned the major work undertaken by the Council of State to achieve an acceptable balance between allowing the norm to stagnate and its need to adapt, particularly via a genuine theory of how transition can be measured.

application of the law by a judge or arbitrator. What would be this normative corpus that is accessible, intelligible, stable, even predictable, if it is ineffectual²⁶? If legal certainty is taken as a value in itself, it can only be formal, but if its effectiveness is removed it becomes derisory²⁷. The weakness of a legal system and the insecurity it creates are certainly related to its content or methods, but also to its interpretation and application.

11. Legal certainty is meaningless unless a neutral, impartial third party is accessible, which can guarantee independence, which has the resources to take statements from the parties in public²⁸, equitably and within reasonable time, whose decisions are intelligible, accessible and predictable and with the binding authority of a final judgement. Without fair and equitable proceedings, without judicial remedy there can be no legal certainty.
12. Fairness and justice are certainly not intrinsic components of legal certainty. And from a point of view that tries to make the law ultra-secure, judges and the law they hand down may be misunderstood (and demands made for the judges' powers to be reduced). On this point, the working party was careful not to give statute-centred, written systems of law priority over common law systems in which the law places more emphasis on case-law. Predictability and stability are not in fact diminished in systems where a judge states the law in a binding manner according to the rule of precedent.
13. Reversals of precedent can just as easily be legislative as arising out of case-law²⁹. And changes in case-law are by nature neutral when it comes to legal certainty³⁰. This does not prevent the change over time of the effects of decisions or the announcement of a reversal of precedent in case-law being an important

²⁶ F. Rangeon, "*Réflexions sur l'effectivité du droit*", in *Les usages sociaux du droit*, Paris, PUF, 1989, p. 126.

²⁷ The case of OHADA (Organisation for the Harmonization of Business Law in Africa) highlights the derisory aspect of legal certainty promoted as a value in itself, dissociated from any demands regarding its effectiveness, "*Sécurité et effectivité du droit dans l'espace OHADA*", in *Droit, économie et valeurs. Liber amicorum Bernard Remiche*, Larcier, 2014.

²⁸ With arbitration this requirement is not always met. This is why arbitration is not suitable for every type of dispute, even though the 20th century saw an unprecedented rise in this method of settling disputes.

²⁹ French doctrine can sometimes be a little unsubtle on this point. See for example A. Hervieu, "*Observations sur l'insécurité de la règle jurisprudentielle*", *RRJ*, 1989, p. 257; X. Lagarde, "*L'exigence de sécurité juridique dans l'hypothèse d'un revirement de jurisprudence*", *JCP G*, 2009, p. 237.

³⁰ L. Leveneur, L. "*Evolution jurisprudentielle et sécurité juridique*", *CCC*, 2009, comm. 240.

component of legal certainty as contributing to non-retroactivity, whether as an *obiter dictum* or other preteritions to limit the effects of the reversal of precedent³¹.

14. Irrespective of the different ideas people may have of the part judges play in the production of norms, we cannot get away from the fact that no security (or feeling of security) including legal certainty can exist without access to justice, without procedural guarantee of laws and without the independence of the judiciary.
15. The public nature of justice is more “embarrassing”. It is certainly part of the just and fair process and probably also of legal certainty because it prevents the arbitrary and ensures the accessibility and intelligibility of the law, particularly by publishing judgements. Legal certainty (for all) is here totally disconnected from economic expectations (of the parties) because confidentiality is preferred in business disputes.
16. It will be seen that *settling of disputes* lies at the heart of legal certainty, but it throws up a number of difficulties when we leave the realms of conceptualisation to venture into measuring. In order to be possible, measuring needs a starting-point, a fulcrum. But this starting-point cannot be the system itself because it is the thing being measured. The point of view of the economic operator has been adopted. This being the case, gaps between the theoretical conception of legal certainty and its practical application from the point of view of the economic operator are not particularly excluded when it comes to the settling of disputes. Expressed in more general terms, the relation between legal certainty and the economic effectiveness of the law is neither simple nor neutral as regards measuring legal certainty through the prism of dispute settlement from the methodological angle³².

B. Legal certainty in the light of the settling of disputes: methodological aspects

17. The choice of offering questionnaires specific to the settling of disputes distinguishes the Index of Legal Certainty of the *Doing Business* rating which deals with the settling of disputes by taking each substantial point evaluated, for example the performance of contracts. But this difference should not be exaggerated. “The indicators relating to the performance of contracts [in the *Doing Business* rating] measure the effectiveness of the legal system in settling business disputes”³³. S.

³¹ N. Molfessis, *Les revirements de jurisprudence*, Paris, Litec, 2005.

³² Crawford, K., “The Paradoxical Relationship between Econometric Effectiveness and Legal Certainty”, *Osgoode CLPE Research Paper* No. 5/2011, 2011.

³³ “The data is obtained by following, stage by stage, the progress of a dispute for non-payment of a business debt in the local courts. The data was obtained by studying the codes

Djankov, R. La Porta, F. Lopez-de-Silanes and A. Shleifer have also published their specific work on measuring judicial proceedings³⁴ and H. Spamann has made a critical analysis of it, stressing the different conceptions of the procedure and its formalism in different legal systems³⁵. The positioning of the Index of Legal Certainty is nevertheless different from that of the *Doing Business* rating as the settling of a dispute is not seen in terms of economic efficiency but from that of legal certainty.

18. The balance is tricky given the inevitable difference between legal certainty in itself and how it is perceived by economic operators, particularly in terms of dispute settlement. The Index of Legal Certainty is also different from the evaluations of legal systems such as the *CEPEJ's Report on European judicial systems: efficiency and quality of justice*³⁶, or the EU Justice Scoreboard³⁷, and the *World Justice Project Rule of Law Index*³⁸.

19. The Index of Legal Certainty focuses on legal and arbitration procedures, but does not directly aim to assess how well justice is administered (even though this is an essential component of legal certainty). It should also be noted that a possible extension of the Index should deal with the prevention of conflicts and their amicable settlement, particularly through mediation³⁹. But it is not the mechanisms by which disputes are settled that are being assessed, but legal certainty in the light

of civil procedure and other legal regulations as well as from surveys undertaken of local judges and lawyers specialising in business disputes":
<http://francais.doingbusiness.org/methodology/enforcing-contracts>
 (consulted on 18.12.2014).

³⁴ Djankov, S., La Porta, R., Lopez-de-Silanes, F. and Shleifer, A., "Courts" *Quarterly Journal of Economics* 118, 2003, pp. 453-517.

³⁵ H. Spamann, "Legal Origin, Civil Procedure, and the Quality of Contract Enforcement", *Journal of Institutional and Theoretical Economics*, 2010, vol. 166, No. 1, pp. 149-165.

³⁶ See http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf (consulted 18.12.2014).

³⁷ This scoreboard is an information tool that presents data that is objective, reliable and comparable about the legal systems of the Member States, see http://europa.eu/rapid/press-release_IP-14-273_en.htm (consulted on 18.12.2014).

³⁸ See <http://worldjusticeproject.org> (consulted on 18.12.2014).

³⁹ The questionnaires do not overlook Alternative Dispute Resolution (ADR) mechanisms (Fr. MARD) and their contribution to legal certainty is extremely difficult to assess. In practical terms, a mediation agreement that is not officially recognised presents few guarantees. More theoretically, we know that the excessive use of ADRs can be perceived as a threat to the system of normative production. This is what lies behind the remarks by O. M. Fiss, "Against Settlement", *Yale Law Journal* 93, 1984, pp. 1073-1090; R.D., Cooter & L. Kornhauser, "Can Litigation Improve the Law without the Help of Judges?", *Journal of Legal Studies* 9, 1980, pp. 139-163.

of the settling of disputes. The aim is not to measure the degree of separation of the powers or the independence of the judge or the corruption of the judicial system.

20. This intermediary position – taking account of procedures and measuring their contribution to legal certainty from the operator’s point of view - has raised methodological difficulties.
21. For example the glossary contains references to class actions and other group proceedings (opt-in/opt-out). But while legal certainty is understood in itself for all subjects of law of a given system, none can consider that a class action (particularly as it is conceived at the European level) is a guarantee that the law will be implemented and its effective application. The legal certainty of a legal system in which this occurred would emerge strengthened. The point of view of economic operators is quite different. They fear the absence of predictability in terms of managing legal risks, the cost and economic threat of such proceedings. The same can be said of third parties who act as *amicus curiae* which can be seen as positive for the entire legal system, but which may harm the legitimate expectations of the parties⁴⁰. The current project does not take these more controversial aspects into consideration.
22. An intermediate position has also been taken on the marking of the question of the specialist judge and the professional judge which brings the Index of Legal Certainty close to evaluations of legal systems⁴¹. In contrast, it was also decided to take the cost of proceedings into consideration, thereby bringing the position of the Index closer to that of the *Doing Business* rating. Unless they constitute an obstacle to access to a judge, costs of proceedings and lawyers’ fees are neutral from the point of view of legal certainty. Only the regulation and hence predictability of the costs are an issue. The perception of economic operators is certainly very different⁴².
23. On the other questions there was no particular difficulty as regards proof, contradiction or the enforcement of legal decisions including enforced judgements,

⁴⁰ E.R. Elhauge, “Does Interest Group Theory Justify More Intrusive Judicial Review?”, *Yale Law Journal* 101, 1991, pp. 31-110.

⁴¹ Hanssen, A. F., “The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election versus Appointment of State Judges”, *Journal of Legal Studies* 28, 1999, pp. 205-232.

⁴² The *Law & Economics* literature is extensive on this question. Landes, W. M., “An Economic Analysis of the Courts”, *Journal of Law & Economics* 14, 1971, pp. 61-107; Priest, G. L., “Regulating the Content and the Volume of Litigation: An Economic Analysis”, *Supreme Court Economic Review* 1, 1982, pp. 163-183; Reinganum, J., and Wilde, L., “Settlement, Litigation, and the Allocation of Litigation Costs”, *RAND Journal of Economics* 17, 1986, pp. 557-566.

because these are measurable components of legal certainty, particularly as concerns the enforcement of legal decisions and arbitral awards.

II. Legal certainty in employment law

24. Inaugurating a special number of the review *Droit social* devoted to legal certainty in employment law⁴³, an author stressed the extent to which the demand for legal certainty prevails in a branch of law “in which the City, of which companies are an essential component, takes a close interest”⁴⁴. So for the past few years we can make one striking observation: the need for legal certainty is increasingly raised in public⁴⁵ and doctrinal⁴⁶ discussion, even though textual references to legal certainty in employment law are rare⁴⁷. The notion of legal uncertainty is often associated with employment law. The frequent changes to the content of such law, irrespective of whether such changes are legislative, judicial or from framework agreement in origin, are the subject of much criticism. To stress the importance assumed by the demand for legal certainty in employment law and also to appreciate the extent to which employment law constitutes an excellent vantage point from which to observe these phenomena, we should remember that the discussions that took place under the aegis of Professor N. Molfessis on reversals of precedent followed a famous judgement by the Employment Law Chamber of the Court of Cassation dated 11th July 2001⁴⁸. As applied to employment law, the demand for legal certainty reveals all its ambivalence and the fault-lines that run through it (A). The methodology adopted attempts to take such tensions into account (B).

A. Legal certainty in the light of employment law: a concept under tension

⁴³ On this theme, see the special number of the review *Droit social* in 2006 (p. 704 et seq.).

⁴⁴ B. Teyssié, “*Sur la sécurité juridique en droit du travail*”, *Dr. Soc.* 2006, p. 704.

⁴⁵ M. de Virville, “*Pour un Code du travail plus efficace*”, *La Documentation française*, 2004.

⁴⁶ G. Ph. Waquet, “*Droit du travail et sécurité juridique*”, *ENA mensuel* No. 307; 2001, p. 7; G. Canivet, “*L’approche économique du droit par la chambre sociale de la Cour de cassation*”, *Dr. soc.* 2005, p. 951; B. Teyssié, “*Sur la sécurité juridique en droit du travail*”, *Dr. Soc.* 2006, p. 703; P. Morvan, “*Le principe de sécurité juridique: l’antidote au poison de l’insécurité juridique*”, *Dr. Soc.* 2006, p. 707; P.-Y. Verkindt, “*La sécurité juridique et la confection de la loi*”, *Dr. Soc.* 2006, p. 720; A. Mazeaud, “*La sécurité juridique et les décisions du juge*”, *Dr. Soc.* 2006, p. 744; F. Favennec-Héry, “*Sécurité juridique et actes des partenaires sociaux*”, *Dr. Soc.* 2006, p. 766; V. Pontif, *La sécurité juridique et le droit du travail*, Thesis, 2011; F. Favennec & Héry (dir.), *La sécurité juridique en droit du travail*, Lexis-Nexis, 2014.

⁴⁷ On this point see V. Pontif, *La sécurité juridique et le droit du travail*, *op. cit.*, p. 38 et seq.

⁴⁸ N. Molfessis, *Les revirements de jurisprudence: Rapport remis à Monsieur le Premier Président Guy Canivet*, Litec, coll. “*Cour de cassation*”, 2005.

25. As one author points out, “The need for legal certainty is one point on which legal specialists are in greatest agreement”⁴⁹. It is at the heart of a classic understanding of the function of the law on “certainty of labour relations”⁵⁰. According to a report published under the aegis of the major French legal institutions “what is required of the legal systems in the developed world today, [...] is [...] above all to throw a permanent network of stabilising rules over the uncertain which will lower the general level of risk and unpredictability of our societies”⁵¹. Legal certainty is a “mechanism that ensures the predictability of the future”⁵². From this point of view, the need for certainty is the legal response to the uncertainty that reigns in the world as we experience it.
26. Once the function of this legal certainty is established, the implications for the legal order itself still need to be determined. What characteristics do the regulations need to adopt in order to perform this function? Legal doctrine and various national and European jurisdictions present a variety of responses to this question, multiplying the characteristics that the rule of law is assumed to include: accessibility, intelligibility, clarity, unambiguousness, simplicity, coherence, predictability⁵³. All these characteristics are aimed at ensuring that citizens may manage their behaviour in full awareness of the legal rules. They must not see their “legitimate trust” in the legal order betrayed, such that the pivot of legal certainty is the idea of predictability⁵⁴, more specifically “normative predictability”⁵⁵. Predictability clearly assumes rules remain stable over time⁵⁶. But it also requires that the law be “stated with sufficient accuracy to enable citizens to manage their

⁴⁹ P. Coppens, “La sécurité juridique comme expression de la normativité”, in *Sécurité juridique et droit économique*, op. cit., p. 153.

⁵⁰ J. M. Soulas de Russel, P. Raimbault, “Nature et racines du principe de sécurité juridique : une mise au point”, art. cit., p. 85.

⁵¹ *Le Traitement juridique et judiciaire de l’incertitude, sous l’égide de la Cour de cassation*, of the Bar at the Council of State and Court of cassation, the Institute of Advanced Legal Studies, the National Centre for Advanced Social Security Studies and the Centre for Advanced Insurance Studies, Dalloz, coll. “Thèmes et commentaires. Actes”, 2008, p. 8.

⁵² P. Coppens, “La sécurité juridique comme expression de la normativité”, art. cit., p. 168.

⁵³ P. Deumier, “Les qualités de la loi”, *RTD civ.* 2005, p. 93. See also, F. Favennec-Héry, *La sécurité juridique en droit du travail*, op. cit., p. 2.

⁵⁴ P. Coppens, “La sécurité juridique comme expression de la normativité”, *Sécurité juridique et droit économique*, ss. la dir. de L. Boy, J.-B. Racine, F. Siirainen, Larcier, 2008, p. 153.

⁵⁵ Peter Muzny, “Quelques considérations en faveur d’une meilleure prévisibilité de la loi”, *D.* 2006, p. 2214. By the same author, “La prévisibilité normative : une notion absolument relative”, *RRJ*, 2006, No. 1, p. 31.

⁵⁶ On this point see the debate on reversals of precedent; N. Molfessis, *Les Revirements de jurisprudence : Rapport remis à Monsieur le Premier Président Guy Canivet*, op. cit.; see also *RTD civ.* 2005, which, in issue No. 2, published an open forum dedicated to the retroactivity of case-law with contributions from professors S. Amrani Mekki, C. Atias, J.-L. Aubert, X. Bachellier et M.-N. Jobard-Bachellier, M.-A. Frison-Roche, P. Malinvaud, F. Melleray, J. Monéger, Y.-M. Sérinet.

behaviour, supported by all the necessary informed advice”⁵⁷ such that the legal interpretation does not contradict that of the citizens. In short, attributes are required which, as expressed by one author, guarantee “static certainty”⁵⁸.

27. There are limits to this strict static conception of legal certainty. Some are inherent to the very operation of law, which requires a certain suppleness, fluidity, “necessary flexibility”⁵⁹. This trend in law has clearly been assumed by the national⁶⁰ and international jurisdictions, the same which, nevertheless, acknowledge the need for legal certainty. Thus the ECHR, which has contributed significantly to the emergence of the demand for legal certainty, considers that the demand for predictability of law is not breached if “formulas of varying degrees of precision” are used because “law must be capable of adapting to changing situations”⁶¹.
28. In addition to these difficulties that arise out of how the law operates, others are due to its contemporary developments. Thus the growth in the branches of law of which “substantive rationality” is overtaking “formal rationality” is at odds with the principle of legal certainty in its traditional meaning. The promoters of economic law, which includes employment, have constantly insisted on the “the concrete nature of this law, its mobility”, “its changeability, plasticity, flexibility”, all these characteristics being explained by the object [of this branch]: the economy”⁶². What is at stake is the effectiveness of this law because “the smooth running of the economy implies that the economic players may exercise flexibility, responsiveness and a capacity to adapt, which excludes a rigid framework that would paralyse initiative and contribute to inertia”⁶³. On this point legal certainty would have to give way, at least a little⁶⁴, to economic efficiency⁶⁵. The balance between the imperatives of legal certainty and adaptability would then be modified.

⁵⁷ CEDH 29/03/1979, pt. 49 ; CEDH, 17/02/2004, *Maestri c./Italy*, req. No. 44158/98, pt. 40.

⁵⁸ J. Ghestin “*Les données positives du droit*”, *RTD civ.* 2002, p. 11.

⁵⁹ F. Pollaud-Dullian, “*À propos de la sécurité juridique*”, *RTD civ.* 2001, p. 488.

⁶⁰ *Ibid.*

⁶¹ CEDH 17/02/2004, *Gorzelic et al. vs. Poland*, req. No. 44158/98, pt. 64.

⁶² J. Chevallier, “*Le droit économique : insécurité juridique ou nouvelle sécurité juridique*”, art. cit. p. 567. The author uses the adjectives adopted by the major authors of economic law.

⁶³ *Ibid.*

⁶⁴ Most authors agree, however, that the smooth running of economic law requires legal certainty, in the traditional sense.

⁶⁵ J. Chevallier, “*Le droit économique : insécurité juridique ou nouvelle sécurité juridique*”, art. cit. p. 569 *et seq.* The author insists on the fact that “The rules of the game, [which are vital in order to ensure the smooth running of the market economy] only have any meaning provided they meet the demands that are inherent to the principle of legal certainty” (p. 570).

29. Fundamentally, the increasing doctrinal and legal recognition of the imperative of legal certainty raises other questions. “[Should not] a good legal system establish a balance between the imperatives of certainty and adaptability”⁶⁶? The first would not therefore be an absolute objective. It is however, difficult to find and specify such an objective. And if any proof were needed, the remedies proposed by legal doctrine merely have to be examined. For example, in order to improve the predictability of law, one author suggests ensuring greater “solidifying of the law”⁶⁷, i.e. a specification in a law of the facts that determine whether it applies⁶⁸. Limiting the margins of interpretative manoeuvre, the fact of specifying legislative statements would fight legal uncertainty. In a radically opposing point of view, one author suggests that “in theory, it could be thought that the more legal texts there are, the better judges are supported. In reality the opposite occurs: there are just as many interpretations as there are legal texts”⁶⁹. And the author misses the time when “judges worked with few texts, mainly the French Civil Code [...]”⁷⁰.
30. In order to avert them, it is necessary to take official note of the fact and adopt a relativist conception of legal certainty. In this search for a balance between fixedness and flexibility, certainty and indecision, legal doctrine, like judges⁷¹, turns to the standard of the “reasonable”: “it is important to maintain *reasonable* legal certainty, as may be legitimately expected from the law or agreements”⁷². The law must therefore be formulated “with sufficient accuracy to enable the people concerned to predict, given the circumstances of the case, the likely consequences of a given action”⁷³. In the same vein, the Council of State affirms that “once again, the balance must be achieved between the demand for legal certainty, on the one hand, and the necessities of adaptation and compliance with legality, on the other.

⁶⁶ F. Pollaud-Dullian, “À propos de la sécurité juridique”, *RTD civ.* 2001, p. 488.

⁶⁷ P. Muzny, “*Quelques considérations en faveur d’une meilleure prévisibilité de la loi*”, art. cit., p. 2214.

⁶⁸ According to the author, “at the qualification stage, normative predictability is optimal when the disputed facts identify exactly with the facts contained in the legal condition of the law concerned” (*ibid.*).

⁶⁹ X. Lagarde, “*Jurisprudence et insécurité juridique*”, *D.* 2006, p. 678.

⁷⁰ *Ibid.*

⁷¹ On the reasonable conception of legal certainty of CEDH, M. Da Salvia, “*La place de la sécurité juridique dans la jurisprudence de Cour européenne des droits de l’homme*”, *Cahier du Conseil constitutionnel*, 2001, No. 11.

⁷² L. Duong, “*La sécurité juridique et les standards du droit économique : la notion de raisonnable*”, art. cit., p. 216. In a similar perspective, see X. Lagarde, “*Jurisprudence et insécurité juridique*”, art. cit.

⁷³ M. Da Salvia, “*La place de la sécurité juridique dans la jurisprudence de Cour européenne des droits de l’homme*”, art. cit.

For the annulment of illegal acts, this balance is only achieved provided *reasonable* timelines are fixed⁷⁴. Making the “reasonable” the fulcrum of legal certainty does justice to modern changes in legal regulations which, instead of being based on substantive rules, which are imposed on subjects of law, are based on “proceduralisation of the construction of the norm”⁷⁵ by the players themselves as part of dialogues organised by law. Within this framework, the “reasonable” guarantees legal certainty to the extent that it meets their expectations⁷⁶.

31. In this context some people suggest that tensions of which the legal system is the subject should be handled outside of the law, particularly in terms of the economy.
32. The way in which the uncertainty produced by the law is handled is at the crux of legal and economic discussions for several reasons. On the one hand, the political and doctrinal debate on legal certainty is taking place as part of much broader discussions on the function and economic efficiency of the law. On the other, the economic sciences are paying increasing attention to the way uncertainty is handled⁷⁷.
33. Eradicating the uncertainty created by the legal norm is at the heart of the French economists’ reports on the efficiency of employment protection. Criticism of employment law, which has been recurrent since the 1973 crisis, now appears in a different guise. It is not only as a source of costs and constraints that employment law is criticised, but also as a factor of uncertainty that prevents employers from taking decisions that are economically and corporately effective. This twofold

⁷⁴ “Sécurité juridique et complexité du droit”, Council of State report 2006, *op. cit.*, p. 282.

⁷⁵ L. Boy, “Régulation et sécurité juridique”, in *Sécurité juridique et droit économique*, *op. cit.*, p. 338. Based on the work of J. Habermas and G. Teubner, the author points out “that the centre of gravity of legal certainty is shifting from imposed norms to norms arrived at through discussion” (p. 339).

⁷⁶ The European notion of “legitimate trust” adopts a similar approach. “The subjective dimension of the objective principle of legal certainty” (D. Simon, “*La confiance légitime en droit communautaire : vers un principe général de limitation de la volonté de l’auteur de l’acte ?*”, *Études à la mémoire du Professeur Alfred Rieg*, Brussels, Bruylant, 2000), it reconciles predictability with the necessary change in the law (see J.-B. Racine, F. Siirainen, “*Sécurité juridique et droit économique. Propos introductifs*”, *art. cit.*, p. 13). According to this principle, “it concerns not thwarting legitimate hopes” (R. Encinas de Munagorri, “*Application immédiate d’un décret à des contrats en cours : le Conseil d’État exige des mesures transitoires pour des motifs de sécurité juridique*”, note ss. CE Ass. 24 March 2006, *Société KPMG et al.*, *RTD civ.* 2006, p. 527) of the players while enabling the powers that set the norms to change them. From the point of view of the players, i.e. those who are subject to the norm (on the subject of the application over time of case-law, based on a difference in the point of view of the maker and the recipient of the norm, see M.-A. Frison-Roche, “*La théorie de l’action comme principe de l’application dans le temps des jurisprudences*”, *RTD civ.* 2005, p. 310 *et seq.*), European judges distinguish the changes in norms from their general level, their applicability to particular cases, especially legal situations that arose before they came into force. It is therefore by differentiating the setting of norms from their implementation to particular cases that reconciliation takes place between the demands of legal certainty and the adaptability of law.

⁷⁷ On this point, see N. Moureau, D. Rivaud-Danset, *L’incertitude dans les théories économiques*, La Découverte, coll. « Repères », 2004.

criticism places understanding the expectations of the players, particularly those of the employers, at the heart of the analysis. It merits special attention because the public authorities have paid it particular attention. Without contest, the criticism won, justifying the adoption of new legal provisions. Thus the 2008 Act on modernising the labour market, and that of 2013 known as the Job Security Act contains provisions that are directly inspired by the work of economists recommending that judges be excluded from labour relations⁷⁸.

34. In this respect the law on dismissal can be taken as a paradigm. As we are well aware, in recent years the law on dismissal has been the subject of harsh criticism by certain economists. Above and beyond the subtle differences that separate them, their work converges on the following proposal: do away with judicial control of dismissal on economic grounds. It will be remembered that the economists criticise French legislation for “job protection” that authorises legal control of the grounds for dismissal as well as the “collective” consultation procedure of staff representatives. Even though they may exercise caution⁷⁹, the authors suggest, each in their own way, that such control is detrimental to the smooth running of the labour market. More specifically, they argue that even though job protection measures are likely to limit the extent to which jobs are lost, they also hinder hiring. In other words, job protection measures help sustain the duality of the labour market, the split between people in jobs and those seeking employment.
35. Even though it may not be new, questioning employment law is based on the idea according to which redundancy procedures have a negative impact on unemployment, not only because it constitutes a source of constraint and cost for the companies concerned⁸⁰, but above all because employers no longer hire staff because they are afraid of not being able to make redundancies when they consider them necessary. More precisely, the authors of these reports criticise the existing rules for creating uncertainty that hijacks the calculations used as a basis for decisions over hiring staff or terminating contracts.

⁷⁸ The following may be mentioned: contractual termination, the shortening of statutes of limitation, setting up non-suspendable periods, setting aside inspections after redeployment obligations that have been replaced by control, in theory by the labour administration.

⁷⁹ Following a comparison with the performances of other industrialised countries, P. Cahuc concludes that no “empirical element indicates that job protection regulations promote employment. On the contrary, all the elements converge to suggest that job protection is in fact detrimental to employment. (*Pour une meilleure protection de l'emploi, rapport au Centre d'organisation économique*, CCIP, 2003, p. 22). On this point see O. Blanchard, J. Tirole, “*Protection de l'emploi et procédures de licenciement, Protection de l'emploi et procédures de licenciement*”, Report by the *Centre d'Analyse Economique, La Documentation française*, 2003, p. 15 et seq. Even though the authors exercise caution, the notion that legal control over dismissal on economic grounds is detrimental to the performances of the labour market has apparently been fully accepted.

⁸⁰ With this in mind, see all the reports referred to above.

36. If the situation is studied in detail, the reasoning used is in contradiction to free-market inspired criticism, which was the subject of this set of rules in the 1980s and 1990s. Within the framework of these criticisms, the influence of employment law on economic performances, in terms of employment, passed through those of the companies in the goods and services market⁸¹. Throughout these years, the dogma of flexibility put employment law under great strain⁸². The reasoning used in recent work is slightly different. In all the works the authors emphasise the unpredictability of judicial solutions which prevent employers, in theory, from determining the cost of terminating employment contracts. It proves impossible for them to take a rationally based decision and it is for this reason that the authors are against legal control over dismissals on economic grounds.
37. The authors put forward several arguments to back up their thesis. Firstly, certain empiric elements are put forward to support the theory that employers are wary of judicial uncertainty. The authors thus criticise the increased use of judges to challenge dismissal. In the same vein, they claim that employers conceal dismissals on economic grounds behind individual dismissals that replace the former which are more costly and uncertain as to outcome⁸³. Having established these observations, the authors put forward two main explanations for the much reviled uncertainty: the incompetence of the judges⁸⁴, the fact that they exceed their functions as mere “mouthpieces of the law”, thus becoming unpredictable. To sum up, it is the creative power of the judges which comes under the critics’ fire. With this argument the economists have found a legal debate that is never ending.
38. This argument, which is very appealing because it echoes the common perception of the rules on dismissal and its implementation, merits discussion on several points. Even the empirical justification of the increasing burden of judicial uncertainty in terms of dismissal on economic grounds is worth revising. Whether the diagnosis of an increase in the “litigiousness” of dismissals or that of replacing individual

⁸¹ In this context, the level of social security and tax contributions, the rigidity of the forms of employments were criticised for being costly and preventing companies from taking decisions and adapting rapidly, which consequently reduced their performance level on the goods and services market. With reduced performance level companies were then compelled to limit hiring and, in some situations, make redundancies.

⁸² A. Jeammaud, “*Flexibilité : le procès du droit du travail*”, *Flexibilité du droit du travail : objectif ou réalité*, Éditions législatives et administratives, 1986.

⁸³ For a discussion of this empirical information, see É. Serverin et alii, “*Évaluer le droit du licenciement*”, “*Evaluer le droit du licenciement : comparaison des droits et des procédures, mesure des actions*”, *Revue de l'OFCE*, No. 107, October 2008, p. 1.

⁸⁴ According to O. Blanchard and J. Tirole, “[judges] must not replace the company’s ruling in its management because they neither have the competence or, in general, the necessary information, without mentioning the lack of precise criteria to guide their intervention” (*Protection de l’emploi et procédures de licenciement*, report by the *Centre d’Analyse Économique*, op. cit., p. 7). The authors have found a *leitmotif* of the relations between law and the economy.

dismissals with dismissals on economic grounds, both observations are the subject of vigorous scientific discussion. The diagnosis of an increase in the number of legal disputes over dismissal does not bear close scrutiny⁸⁵. As for criticisms of the role of judges, it is difficult to invalidate them as such: judges have creative powers and their economic knowledge should not be overestimated. People are free, however, not to consider them annoyances that need to be fought.

39. The diversity of economic approaches to uncertainty invites such caution. According to authorised statements, “In the 1960s, the introduction of uncertainty in the neoclassical economic analysis resulted in a ‘revolution’”⁸⁶. It disturbs at a deep level the thinking behind rational choices and challenges thinking behind action based on perfectly calculated rationality. Responses to the challenge threw up deep splits between contemporary economists. Some remain faithful to the “standard” paradigm of rationality and work towards greater sophistication based on the use of probabilities and of calculated optimisation. Others consider that the presence of uncertainty should lead to the abandoning of the standard paradigm, with a view to adopting another form of rationality described as “limited” or “cognitive”, and coordination based on rules and institutions. The first group considers uncertainty to be a “killjoy”, the second sees a characteristic of any object that evades calculation⁸⁷. Without any doubt the works of which employment law has recently been the subject belong to the first category, highlighting the unpredictability of legal decisions that make any anticipation impossible, despite being necessary for decision-making. The authors are aware that uncertainty cannot be totally ruled out and make a basic distinction between uncertainty that is insurmountable, which has to be accepted, and inadmissible uncertainty that can be stamped out. Legal uncertainty belongs to the second category. Moreover, as we said above, the authors stipulate a way of stamping it out: replacing legal control over dismissal on economic grounds with a redundancy tax⁸⁸.
40. Despite their limitations, the criticisms aimed at employment law have made and justified a certain number of recent reforms. The idea thus prospered according to which “job security” is based mainly on legal certainty that the employers may claim. The link that is thus established becomes a reality through the adoption of

⁸⁵ P. Munoz, É. Serverin, *Le droit du travail en perspective contentieuse*, 1993-2004, Ministère de la Justice-Direction des Affaires civiles and Sceau-Cellule Études et Recherches, DACS 2005-2.

⁸⁶ N. Moureau, D. Rivaud-Danset, *L'incertitude dans les théories économiques*, *op. cit.*, p. 3. Here the authors rework the analyses of J. Stiglitz, “Information and the Change in the Paradigm in Economics”, *The American Economic Review*, 2002, 92, p. 460).

⁸⁷ On these divides, *ibid.*

⁸⁸ Even though the methods for determining the tax may differ according to the reports, most authors seem to agree that it should replace legal control over redundancy on economic grounds. For the difficulties on enforcing and calculating the tax, see O. Blanchard, J. Tirole, *Protection de l'emploi et procédures de licenciement*, report by the *Centre d'Analyse Économique*, *op. cit.*

different measures. Some, which are very classic, are aimed at making access to judges more difficult, like shortening statutes of limitation⁸⁹ or setting up non-suspendable periods in the information-consultation procedures of worker representatives⁹⁰. Others tend to highlight the wishes of the parties in a branch that traditionally reserves a choice position for public policy provisions⁹¹. The end result of certain provisions is to predict the outcome of the judge's intervention, as is the case with the reconciliation scales that the law set up for job security⁹². Lastly, certain measures such as replacing legal control over job protection plans with, in theory, work administration job certainty, are aimed at avoiding situations in which employers' decisions may be questioned at a later date⁹³.

B. Legal certainty in the light of employment law: methodological aspects

1. Measuring institutions: constructing indicators

41. Devising indicators to measure law is a tricky undertaking that requires a large number of methodological precautions. The first precaution is to define carefully what is being measured. On this point the indicators proposed in this project are different from the existing indicators in that what it attempts to grasp is not the effectiveness of the law, still less its efficiency, but the legal certainty provided by a set of rules.

42. This choice is particularly based on a criticism of the existing indicators. In the *Doing Business* reports, employment law is taken into consideration as one of the sub-indicators of the "ease of doing business". In order to undertake this assessment of employment law the authors fail to grasp a number of its functions: that of protecting employees from arbitrary decisions taken by the employer, that of contributing to the organisation of the company, that of facilitating good labour relations, etc. In short, without being genuinely discussed in the reports, the assessment of employment law is here based on a bias concerning the functions assigned to employment law⁹⁴.

⁸⁹ Art. L. 1471-1 and L. 1235-7 of the Employment Code.

⁹⁰ Art. L. 2323-3 of the Employment Code.

⁹¹ See, for example, the creation of contractual termination in 2008 (art. 1233-11 *et seq.* of the Employment Code).

⁹² Art. L. 1235-1 of the Employment Code.

⁹³ Art L. 1233-21 *et seq.* of the Employment Code.

⁹⁴ For a critique of the existing indicators, see S. Deakin, P. Sarkarn, "Assessing the Long-Run Economic Impact of Labour Law Systems: A theoretical Reappraisal and Analysis of New Time Series Data", CBR Working Paper, 2008, <http://www.cbr.cam.ac.uk/pdf/WP367.pdf>; R.

43. A second difficulty must be added to this first limitation: the failure to take account of contractual norms which, nevertheless, constitute an important source of regulation of employment law not only in France but in other countries such as Great Britain, Germany, etc.
44. Measuring legal certainty comes up against one major difficulty: it tries to grasp objectively a subjective relationship of players to the norm. It was to overcome this difficulty that the decision was taken to use a method in which a comparison undertaken using case-studies would be submitted to a diversified panel. Devising these specific cases is based on several methodological choices.

2. The methodological choices

45. A first methodological demand that is common to all the cases consists in taking account of a conception of security that is not static. The questionnaires aim to capture the ability of the normative system to change without betraying the legitimate confidence of the players. By doing this the questionnaires are in line with supra-legal norms, particularly those of the European Court of Human Rights, which reject any static notion of legal certainty.
46. A second demand, which is more specific to employment law, was to choose case study themes designed to prevent possible confusion between the assessment of effectiveness and that of legal certainty. It was thus that the two themes chosen, namely the transfer of employment contracts when a company relocates⁹⁵ and that of the use of fixed-term contracts⁹⁶, are particularly characterised by their ambivalence⁹⁷: they act to protect employees – particularly as far as their jobs are concerned – as well as contributing to the organisation and structuring of the companies. Hence, for example, the obligation on those taking over a company to maintain employment contracts where certain conditions are met, is intended not only to protect the jobs of the employees concerned but also to enable the new

Dalmasso and T. Kirat, *“Comparer, mesurer, classer: l’art périlleux de la léximétrie du licenciement”*, *Travail et emploi*, 2009, T. Sachs, *La raison économique en droit du travail*, LGDJ-Lextenso, coll. *“Bibliothèque de droit social”*, 2013.

⁹⁵ Art. L. 1224-1 of the *Code du travail*.

⁹⁶ Art L. 1241-1 *et seq.* of the *Code du travail*.

⁹⁷ On the ambivalence of employment law, see particularly G. Lyon-Caen, *Le droit du travail, une technique réversible*, Dalloz, coll. *“Connaissance du droit”*, 1997.

employer to draw upon experienced labour. This was why the employers brought a case to claim that this provision be applied⁹⁸.

47. A third demand was that we should take account of the plurality of legal sources present in employment law. So supra-legal, case-law and contractual norms were included without considering that the multiplicity of the sources constituted a source of uncertainty in itself. This is why the questions asked and the marks awarded try to encourage a logical organisation of the sources.

⁹⁸ See for example Soc. 18/07/2000, *Dr. soc.* 2000, p. 850, note. G. Couturier; rapp. B. Boubli, *S.S.L.* 2000 No. 992, p. 5; P. Waquet, “*Libres propos sur l’externalisation*”, *S.S.L.* 2000 No. 999, p. 7.

Chapter 2 – Economics and the law: what place is there for legal certainty?⁹⁹

48. Economic relations require a stable, predictable legal framework. But a global context that gives rise to new practices should also give rise to new guidelines and new legal tools. This particularly raises the question of the effectiveness of legal rules, especially those that are used in France. When asking the question of an economic law that is “open and realistic”, it is important to analyse the economic rationality at work in the texts and the decisions of justice. The objective of the economic analysis of law is to explain and evaluate the legal rules. The approach is both very general (determined by the law and political choices of which it is the expression) and very specific (which concrete legal solutions should be applied to given economic malfunctions).
49. But the relationship between economists and the law is as old as it is difficult. Modern economic theory recognises the importance of property law and the law of contract in the operation of a market economy. But most economists have no legal culture or experience and are usually relieved to be able to exclude this dimension from their work. The economic approach to law is a discipline for specialists. But institutions, regulation and competition between legal systems are often at the heart of current debates about economic policy. It is clear that the law holds an immense place in development and growth. And not simply because all the foundations, all the players and all the instruments of capitalism(s) take their strength from the legal system (freedom of enterprise and the freedom of contracts, private property, limited companies, etc.), but also because the law and regulation contain a profoundly economic dimension which makes it impossible to doubt their repercussions for one moment (“brake” or “lever”) in terms of effectiveness.
50. Until recently, thinking about law and economics seemed confined to microeconomics. The tools of price theory and game theory were widely used to describe and explain the effects of the rules of law on individual behaviour, even to justify changes of rule based on the judgement criteria used by economists. Undoubtedly the question of the economic effectiveness of law taken as a whole has been the subject of discussion (including in the United States like the controversies between Posner and Dworkin or between Posner and Tullock) but this process remained limited to a microeconomic analysis of the law.
51. Of this body of work on Law and Economics we would wish to highlight the work of the Nobel Prize Winner Ronald Coase who said that the law was an important institution for improving the organisation of economic activities in the context of companies and markets through its ability to reduce transaction costs. It was

⁹⁹ This chapter was supervised by Professor Bruno Deffains

probably this approach in terms of transaction costs which inspired a change of perspective by moving towards an ever-more macroeconomic approach¹⁰⁰.

52. In fact, for about the last fifteen years economists' thinking about law has unexpectedly focussed on the macroeconomic picture. The theoreticians of growth have suddenly taken an interest in institutions as understood by the meaning introduced by Douglass North as the "formal and informal constraints that structure political, economic and social interactions". For this economist, the law is an institution that may or may not facilitate the terms of trade between agents.

53. It is important here to measure the distance travelled in a very short time since the classic sources of economic growth were essentially geography (i.e. factorial endowments of raw materials, capital and labour) and international trade. It was this that restrained studies of growth theory until the 1990s. In modern macroeconomic literature the quality of legal and regulatory systems, measured using empirical indicators the relevance of which should also be questioned, is now considered a determining factor for growth.

54. We first need to ask how globalisation forces us to rethink the law and the role competition can play between legal norms. We then need to assess the relevance of work that aims to measure the respective merits of the different legal traditions.

I. The questioning of "legal frameworks"

55. The urgency with which the question of the effectiveness of the law is posed is the result of the destabilisation caused by the globalisation of markets. The phenomenon of globalisation in fact arises out of forces that are pulling in opposite directions. On the one hand progress in information technology is making the world smaller; large quantities of data can be sent from one end of the planet to the other; on the other hand, the world seems to be getting bigger with new market areas and new spaces for commerce and trade. While the global economy feeds off such paradoxes, the same is not true for law whose economic agents expect it to be stable, coherent and capable of ensuring the security of their decisions in time and space, particularly in terms of investments.

¹⁰⁰ From this point of view it is interesting to note that the economic effect of the law can usually be costed as a percentage of GDP. This makes the law not simply a major economic influence not only through its effects on the organisation of firms and markets but also in terms of jobs and the creation of wealth. On this point see the report entitled "A study of the economic effect of law in France", undertaken by Day One and Bruno Deffains in March 2015 at the request of the French In-house Lawyers Association (*Association Française des jurists d'entreprise* - AFJE), the *Cercle Montesquieu* and the EY law firm.

56. So globalisation is characterised both by competition between companies and a lack of any harmonisation of legal systems worldwide. This acts against any stability or uniformity in that from one country to another, economic players have to confront different legal systems. For example, an international group managing securities on the market is subject to procedures that may be contradictory depending on where they are listed. The same applies in Europe to the rules on takeover bids or mergers: when two companies wish to merge they have to decide where to locate their registered office, and which legal and tax system they should adopt. The law thus creates uncertainty in that the players have to try to reconcile their business and economic objectives with different legal environments. The juxtaposition of different systems may become a handicap if it results in disorderly competition between States.

57. To use a simple example, a survey funded by the Clifford Chance law firm gives us an idea of the situation¹⁰¹. This study surveyed 100 companies located in eight very different EU member countries where the markets were both large or small, in countries that were long standing members of the Union or had recently joined, countries with both “europhile” and “eurosceptic” traditions¹⁰². The companies surveyed also operated in a wide variety of sectors¹⁰³. Most of them were large companies (250 or more employees), approximately 20% were SMEs (which probably suffer the most from the current disparities between different nations’ systems of contract law). The results did not detect any significant divergence between Member States, between SMEs and large companies, or between different business sectors. Nearly two-thirds of the companies surveyed, particularly the large companies, considered the freedom to choose which legal system to operate under as an advantage¹⁰⁴. 83% of respondents replied that having the option of choosing a legal system other than European was important for their international trade even though two-thirds preferred to opt for their own national legal system (here proportions varied greatly from one country to another: 42% in Spain, 73% in France and 97% in the United Kingdom). More than 40% of companies choose, at least from time to time, foreign law because their own system of contract law did not seem suited to their objectives¹⁰⁵. To the question of which legal system was most

¹⁰¹ This study dates from 2008. Entitled “Civil Justice Systems in Europe: Implications for choice of forum and choice of contract law”, it was drawn up and implemented by the Oxford Institute of European and Comparative Law and the Oxford Centre for Socio-Legal Studies.

¹⁰² The companies were taken from the following countries: Germany (30 companies or 17.1%), Spain (12 companies or 6.9%), France (30 companies or 17.1%), Hungary (17 companies or 9.7%), Italy (20 companies or 11.4%), The Netherlands (21 companies or 12.0%), Poland (15 companies or 8.6%), and the United Kingdom (30 companies or 17.1%)

¹⁰³ Retailers (21.7%), energy and raw materials (6.3%), health and life sciences (9.1%), manufacturing and construction (24.0%), services (12.0%), technologies (15.4%), transport (9.1%), other (2.3%).

¹⁰⁴ 61% considered the freedom to choose an advantage (47% of SMEs, 65% of large companies; but only 38% in the Netherlands, 50% in the United Kingdom and 88% in Hungary), compared with 33% (41% of SMEs and 30% of large companies).

used for their international trade, a quarter of respondents replied “British law” (probably meaning English law) with French law in second place. When asked what characterises good contract law the companies surveyed replied that it should “encourage trade”, it should be “predictable” and “fair”¹⁰⁶.

58. It is interesting to note that 42% of European companies said they tended to avoid certain European countries because of their legal systems. The countries most frequently cited for this reason were Italy (32%), France (23%), United Kingdom (23%), Germany (16%), Spain (16%) and Greece (15%). The reasons given varied: some were very precise such as, for example “the way German law deals with the discharge of obligations”, but most proved extremely vague such as the assertion that Belgian judges are “arbitrary”, that transactions or legal proceedings in Italy or Spain are “too long”, or that French law is seen as “protectionist” or “too concerned with the interests of its own citizens”. It seems we still have to be wary of misunderstanding each other.

59. Almost two-thirds of the companies questioned mentioned the existence of obstacles to trade with the other Member States¹⁰⁷. These obstacles include taxes, differences between legal systems, the cost of obtaining legal advice on a foreign legal system, differences in the transposition of European directives into national law, and lastly bureaucracy or corruption. Cultural differences and language problems are mentioned again¹⁰⁸. It emerges fairly clearly from this survey that companies are most likely to express a need for “legal advice” if they are involved in international competition¹⁰⁹.

¹⁰⁵ 17% do this “often” (15% of SMEs and 17% of large companies), 26% “sometimes” (15% of SMEs and 29% of large companies), 29% “almost never” and 21% “never”.

¹⁰⁶ Encourage trade: 87%, being predictable: 79%, fair: 78%, flexible: 66%, concise: 61%, normative: 39%, other responses: 12%

¹⁰⁷ More in Poland (80% having experienced “major” or at least “certain” obstacles), in Germany (77%) or the United Kingdom (74%) than in The Netherlands (62%), Hungary (59%), Spain (59%), France (57%) or Italy (50%).

¹⁰⁸ On a scale from one to ten where one is a zero impact and ten maximum impact, the results break down as follows: taxes 5.64, differences between legal systems 5.35, cost of legal advice 5.16, differences in transposition 5.04, bureaucracy/corruption 4.53, cultural differences 4.37, language 4.05.

¹⁰⁹ This observation can be compared with that made by the French Ministry of Justice when giving the reasons for its planned order to reform the law on contracts (March 2015): “The Ministry of Justice is launching a public consultation on a preliminary draft of legislation to reform the law on contracts, the system and proof of obligations. This reform is expected and necessary. The basis of trade which is the ordinary law on contracts comes principally from the *Code Napoléon* of 1804. This document, which is used by citizens and economic players in their day-to-day lives, is no longer suitable for the reality of trade or the reality of social and economic activity. Simply reading the document no longer gives a clear, accurate view of the state of substantive law...”

60. Talking about competition between legal systems is nothing new (*“Vérité en deçà des Pyrénées, erreur au delà”* – “What is truth on this side of the Pyrenees is falsehood on the other” – Blaise Pascal (1623 –1662)) but the phenomenon is increasing perceptibly at the same time as it becomes more diversified through globalisation. In ever-increasing fields rules of every sort are brought into confrontation with one another through companies trading across borders and the mobility of capital and work. Do we therefore have to accept that the logic of the market is affecting the law in negative ways?
61. Economic theory compares the effects of the centralised production of legal norms with those of decentralised production that facilitates competition between legal systems. Economic analysis stresses two advantages of competition between legal systems¹¹⁰. In the first place, the activity of several lawmakers (legislators, for example) offers the possibility of meeting the greatest number of preferences. Secondly, competition between lawmakers makes it possible to compare the effects of disparate regulations and hence a major learning process. The chief argument is based on an analogy with the theory of local public assets which states that under certain conditions competition between jurisdictions encourages the production of services and public infrastructure that meets the expectations of citizens. Once legal rules can be seen as public assets, effectiveness can be achieved in a competitive legal framework that complies with the following conditions: those subjects of the law enjoy complete mobility and are well-informed, and there are a large enough number of lawmakers. In theory, when citizens’ preferences are disparate, the coexistence of different norms should contribute to satisfying more people than a single norm. Clearly the advantages of a decentralised process for producing rules are neutralised if these conditions are abandoned and harmonisation thus appears desirable to prevent competition made destructive by the urge to find the lowest common denominator.
62. With globalisation, law can therefore only be effective within harmonised legal frameworks that prevent opportunistic behaviour, for example delocalisation (forum shopping) that motivates companies to choose where they are located in terms of competitive advantages offered by local law. We are still left with the question of whether economic analysis can help us identify an ideal legal system.

II. Which efficient system for the new economic landscape?

63. The search for efficient law through the definition of common norms poses a problem in that the norm must not be adopted simply because it is that of the strongest. It is, however, feared that this process is already under way. The signs of such changes appear today in broad aspects of law. Whether in terms of trust

¹¹⁰ For a detailed analysis of the conditions and consequences of legal competition, see the series of articles (Crettez, Deffains and Musy, 2011, 2013).

management, corporate law (reference for example to the concept of trust) or the development of alternative methods of dispute settlement, there are many examples of legal transfers. The question is essentially that of comparing the common law system with that in place in continental countries that have a tradition of civil law.

64. From this point of view the conclusions of the World Bank's "Doing Business" programme point of view are not in favour of civil law. Law of French origin has often been presented as a handicap for developing countries, particularly because it is seen to be a source of formality that is detrimental to companies.

65. In common law countries, written law occupies an increasingly important place¹¹¹, but its conception is different because the purpose of a legal text is to make additions to case-law and not to state principles *ex-ante* or to express a legal system (example of the *guidelines* or *restatements of the law* in the United States). These differences in method also cover different conceptions of the function of law. Whereas the continental tradition is very influenced by theory, common law appears mainly to be a law of practitioners that requires techniques to be learnt in order to settle actual cases by finding the appropriate solutions¹¹². Ultimately, "*the law is an expression of sovereignty for the continental tradition, the observation of a social consensus for common law, a higher norm as against the rules of the game, which explains the preference of common law and its practitioners for rules that are negotiated or the constraining nature of which does not rely on external intervention*" (Council of State, 2001).

66. What makes the difference between civil law and common law is not as much the content of the law as its methodology and conditions of implementation. The structure of civil law may seem simpler to apply: comprising written rules and completed by a system of interpretation, it has its own efficiency which seems to be reflected by its dissemination throughout the world¹¹³.

67. Paradoxically, it is the system that is the least widespread and most difficult to access that is currently the most appealing, particularly as the United States has fully understood all the advantages of exporting its legal system.

¹¹¹ Similarly, whole areas of French law are based on case-law.

¹¹² The importance of legal realism for common law may be referred to. This realistic approach, the emblematic figure of which is Judge Holmes, is based on a largely consequentialist approach to the rules of law.

¹¹³ According to the University of Toronto, civil law tradition continues to correspond to 55% of legal systems. It may be noted, however, that the figure was of the order of 75% at the start of the 20th century.

68. The advantages of the French legal tradition therefore appear to be caught unaware by the new legal system that has arisen out of globalisation. Should it therefore be considered that the negotiated law of common law must replace the imposed law of the continental tradition? The response proposed by the economics of law regarding the “superiority” of one system over another must rely on the demonstration of greater efficiency. Certain authors such as Posner¹¹⁴ have attempted to make this kind of demonstration. Recent work, however, has put the scope of such analyses into perspective, insisting more on the capacity of each system to offer its own conditions of efficiency.

III. Does common law maximise social wealth?

69. According to Posner’s thesis the rules defined in Common Law are broadly efficient. In particular, he considers that by changing rules that are not efficient into rules that are, judges achieve the “*essential nature of Common Law*”.
70. The concept used is the Kaldor-Hicks criterion which implies, in practice, maximising the wealth of society. The economics of law concerns all legal systems, but the subject of Posner’s analysis is common law. The central hypothesis behind his thinking is that judges maximise social wealth by creating rules that are a source of efficiency.
71. The process concerned places great emphasis on the judges responsible for dispute settlement. In assuming this role they must rule on specific cases on the basis of pre-existing norms, but also – particularly in the Anglo-American legal systems – by creating new norms. Common law, Posner asserts, therefore brings together a large number of efficient rules such that this type of legal system presents “*remarkable (albeit incomplete) coherency in terms of the criterion of maximising social wealth*”. Posner acknowledges, however, that other factors such as ideology, pressure groups, political philosophy and relations with lawmakers, may influence – or even pervert – case-law and legal doctrine. Despite all this, in many sectors efficiency remains the “*dominant value*”, that which operates “*systematically*”.
72. One of the illustrations that Posner often puts forward to support his theses concerns liability law¹¹⁵. Everything starts with the rule of Judge Hand in which Posner identifies the cost/benefit logic stipulated by the Kaldor-Hicks criterion. This

¹¹⁴ Richard Posner has been one of the main leaders of the economics of law in the United States for the last thirty years or so. He is a Federal Judge and Professor at the University of Chicago and his work is aimed at demonstrating the efficiency of the common law provisions. His main work, *Economic Analysis of Law*, has been considered a reference on the subject since it was first published in 1973.

¹¹⁵ A convergence has recently been observed between the work of Posner and that of Schleifer.

rule, which was given in a famous decision in 1947 stipulates that “if π is the probability of accident, L the damage and C the cost of the precautions needed to avoid the accident, liability is incurred if π multiplied by L is greater than C ”. Considering that judges are often faced with this type of economic calculation, Posner then proposes to assess the changes observed in most industrialised countries in favour of liability without fault, particularly in the field of manufacturers’ liability. He shows that this change in systems of liability is widely compatible with the objective of minimising the social cost of accidents. Because products are increasingly technically complex, consumers are relatively less well placed to assess the risks of using them and participate in accident prevention. These observations therefore argue for objective liability of the manufacturer based on risk rather than fault.

73. Applied to most legal sectors (property, contracts, liability, etc.), the thesis of common law efficiency is supported by a series of arguments:

- efficiency is historically the least controversial value of public policy,
- judges clearly wish to avoid controversy,
- the independence of judges protects them from the influence of pressure groups, thus enabling them to pursue the objective of maximising social wealth,
- this independence coupled with the personal interest that motivates rational individuals (including judges) reinforces the incentive to create efficient rules (remembering that almost 80% of American judges are elected). The judges of Anglo-American courts take their decisions “as if” their implicit objective was economic efficiency.

74. Despite its interest, the “Posnerian” conception seems far too restrictive to account for all the wealth of the economics of law as a dynamic approach to law. The limits of judges as “creators of law” are particularly apparent. On the one hand, the realism of rules may be criticised that motivate the activity of judges because no objective criteria exist that are likely to ensure their behaviour is optimal. On the other hand, it is possible to criticise the fact of reducing the judges’ decisions to the consequences of their sentences, because it is highly unlikely that they know *ex ante* the effects of the rules applied (Dworkin, 1980).

75. In addition to this, the cost of Common Law is stressed. According to the *Council of Economic Advisers* (2009), the American civil law system apparently cost 233.4 billion dollars, i.e. 2.2% of American GDP. Furthermore, this observation of the cost is at the heart of the dispute between Posner and Tullock on the merits of American adversarial justice. For Posner, the adversarial debate is preferable because it enables the parties that bear the costs and advantages of the case to direct proceedings. This argument is criticised by Tullock¹¹⁶ for whom the adversarial procedure incites the parties to incur excessive expenses to find elements of proof and mislead the judge in their favour. According to this author, the inquisitorial procedure is more effective at reducing errors in judgement, because more of the resources are used to discover the truth than in the adversarial procedure. For

¹¹⁶ G. Tullock (1980), In Defence of the Napoleonic Code,

example, if an active judge uses 80% of the resources to conduct investigations and each party uses 10% to put forward its point of view, it may be legitimately thought that 90% of the resources spent in the proceedings are used to reveal the truth. Contrarily, if the judge is more passive and uses only 10% of the resources and each party uses 45% of the resources to create its strategy, 55% of the resources will be used to reveal the truth and 45% to mislead the court. A procedure in which the judge plays an active role would therefore seem more effective for allocating resources in order to reveal the truth about the circumstances of the conflict between the parties (Deffains, Demougin and Fluet, 2008).

IV. Importance of the legal framework for economic development

76. The important question is to determine whether or not the presence of a Civil Code facilitates the emergence of effective rules. Two responses are traditionally envisaged. To take Posner's thesis further, it may be considered that if common law is efficient, it implies that the codified civil law system is not. It may then be admitted that the competing forces described above at international level encourage legal systems to converge and therefore there is a general tendency to efficiency. This point of view, which is defended by certain authors in the field of corporate law¹¹⁷, predicts the convergence of corporate governance rules given the common concern shared by economic players to have a system of norms that are effective over and above specific national characteristics.
77. There is nothing, however, to confirm this view when differences in corporate governance rules between countries continue to persist. This observation gives rise to questions that certain works attempt to answer.
78. In a contribution that is as influential as disputed, Rafael La Porta, Florencio López-de-Silanes, Andrei Schleifer and Robert Vishny (LLSV, 1999) analysed the influence of the legal system in greater detail. In their opinion, countries that have a tradition of civil law inherited from continental Europe suffer from a cumbersome or even "spoliatory" State, from regulations that prevent economic initiative and, in general, from less flexible institutions – all characteristics that lead to slower development. On the contrary, the former British colonies that inherited Common Law based on case-law benefit from institutions that are more flexible and better protection of property rights. This is the theory of Legal Origins developed by Glaser and Schleifer (2002) that goes back to the respective situations of France and England¹¹⁸.

¹¹⁷ Easterbrook and Fischel (1989), *Economic Structure of Corporate Law*.

¹¹⁸ It is interesting to note that following the financial crisis of recent years, the same authors recognised that the system of continental law presents undeniable advantages for managing the consequences of the economic crisis.

79. These comparative studies therefore generally describe a situation in which common law countries offer investors better protection than civil law countries. This characteristic explains why English-speaking countries have financial markets that are more developed, ownership of capital that is more dispersed and greater equity than those that belong to the second group. This work also attempts to prove that the component of financial development, which is explained from the legal and regulatory environment, correlates positively with economic growth.
80. The analyses conclude that by providing greater legal protection, the common law system dominates civil law system(s) in a certain way. Dispersed share ownership and the system of corporate governance based on the markets is apparently “superior” to a system where the share ownership is concentrated and corporate governance is based on controlling interests. The explanation is based on the fact that dispersed share ownership goes hand in hand with crowded markets where the shares are liquid. At the same time, the development of capital markets facilitates economic growth, particularly during phases of innovation when the financial needs for “risky” investments are great.
81. This conclusion is clearly disputable. It is based on the idea that the law influences the economy via the quality of the legal rules, which is not enough to characterise the systems. All these analyses are based on the construction of quality indicators of the law that merit in-depth analysis¹¹⁹. In practice, French or German shareholders are given legal protection that is very similar to that of an American shareholder. The main differences between the legal systems lies at another level, that of how the rules are implemented. From this point of view the relation between law and the economy must be seen in another light, emphasising the importance of history and legal cultures. Certain authors have attempted to do this. According to one approach, despite “identical average qualities”, common law is capable of providing greater stability and predictability via respect for legal precedent. Another approach considers the capacity of legal systems to adapt to changes in the economic environment. Legal systems that adapt rapidly to reduce the differences between the needs of the economy and the capacities of the legal system contribute more efficiently to the economic and financial development of nations. From this point of view common law is of a fundamentally dynamic nature whereas a Civil Code, the objective of which was to create a perfect, unchangeable system, is more static. In addition to the fact that these various arguments are sometimes contradictory, attempts to prove the superiority of common law have all failed in turn because they ignore or underestimate the capacity of a codified legal system to adapt. In reality “trajectories” exist that are proper to each system and that make it impossible to prove the intrinsic superiority of one legal system over another. As the great legal specialist Georges Ripert showed long ago, the Napoleonic Civil Code undoubtedly contributed to the rise of the great capitalist enterprise. And we may add that common law has often been inspired by civil law solutions...

¹¹⁹ This will be the subject of the next chapter.

82. Other works have attempted to define the characteristics of the Civil Codes by attempting to promote the advantages of such a system in terms of economic efficiency. We will mention the work of Arrunada and Vertova (Market institutions and Judicial Rulemaking, 2005). These authors focused on the relations between the legal systems and economic growth by showing how the French Civil Code enabled the emergence and economic development in France and the rest of Europe. Arrunada and Andonova claim particularly that a legal system should be adapted to a society or an economy and that there is no single model. These authors also claim that civil law, which is produced mainly in a centralised way by voting laws, supported economic growth in continental Europe whereas a decentralised system such as that of common law which gives judges more power to create law, would have been unsuitable. The reasoning is based on the fact that *ancien régime* judges would have been hostile to the market economy whereas the political and economic elite that appeared after the revolution would have been far more in favour. Therefore, in order for a market economy to develop, it proved necessary to limit the power of judges and adopt a centralised approach to producing norms, which allowed for the adoption of the French Civil Code.
83. Another interesting work is that of Xavier Lagarde (*Juste Capitalisme*, 2009) about the separation between the French Civil Code and the Commercial Code, again a characteristic inherited from the time of Napoleon and which could also express a certain economic rationality. Based on reading Portalis, the author explains that the Civil Code defines models of legal relations in which the risk is minimal and which must therefore contribute, above all, to the stability of social relations. For this same reason, risky contracts are relegated to other codes, starting with the Commercial Code.
84. Claire Lemmercier (2012) points out that “even though Napoléon was criticised by the businessmen of his time, in reality it is because he believed, like most political leaders at the time, that the laws on bankruptcy should be particularly harsh on debtors. Throughout the 19th century, as crises occurred, the image of the bankrupt person as someone who was not dishonest, or even incompetent, but merely a victim of circumstances became increasingly common, which is why laws that were less unilaterally favourable to creditors came about. It was not until the 20th century that matters of employment were taken into consideration in many countries, favouring ways of enabling bankrupts to continue operating that La Porta, Lopez de Silanes, Schleifer and Vishny deplore from the point of view of the right of creditors. There was no continuity therefore between Napoléon’s France and a ‘French legal system’ that would be too indulgent to bankrupts.”
85. We agree with this author when we observe that “the burden of history” cannot be studied like a simple independent variable in regressions based on contemporary data. When economists take the time to consult the letter of the law for several dates in the past they see, on the one hand, that the French and English “traditions” have often been entirely reversed compared to the current situation and, on the other, that on the whole there has been far greater variety over time than the differences between traditions.

86. Overall, even though it may be true that the rules of law help shape the structures of economic governance (for example the division of power between the directors and shareholders in companies or the commercial relations between companies) and the conditions of economic and financial development, we would not be content with an approach where the law remains an exogenous factor. The changes in legal systems should also be considered by attempting to explain the origin of the rules. They are often the fruit of complex interactions between those giving and those receiving rights. Rights do not fall from heaven. It may be useful to remember that the first stock exchanges followed and did not precede the emergence of the financial markets, thereby meeting the needs of the investors

V. The place of legal certainty in the discussion

87. Specialists in comparative law have had an easy time of criticising the vision, which is a caricature to say the least, of the legal groups as developed by the work at the heart of studies of “legal origins”. The often simplistic character of the oppositions between the two main legal traditions in the west has often been criticised (Merryman, 1985, 1996; Damaska, 1986; Mattei, 1997; Lasser, 2004; Dam, 2006).

88. We must not, however, throw the baby out with the bathwater, and it must be recognised that these analyses had the merit of giving rise to potentially fruitful discussions on the method and suitability of an evaluation of the economic effects of the means used to regulate economic activities, particularly through law.

89. As Kerhuel and Renouard (2010) observe, it is necessary to “go beyond reasoning attached to the characteristics of systems that are related to a legal family (codification and interpretation, reference to precedent and law-creation) that are no longer in phase with the reality of these systems. The result is that not only has the distinction between continental law and common law been exaggerated but also that it no longer conveys the theoretical or practical reality of the law as applied: whether or not we approve, it has to be said that it is the paradoxical result of globalisation and regionalisation that have been the driving force behind the dissemination of models and ideas without any movement of unification being created, and that even convergence remains limited (Garoupa and Ogus, 2006; Fairgrieve and Muir-Watt, 2006). Even though differences clearly remain, the explanation must therefore lie elsewhere than in the identification of the systems, which are no longer sufficiently singular to constitute a significant explanatory factor”.

90. It is from this point of view that we should tackle the notion of legal certainty as defined in the previous chapter of this report. We observe that many social institutions aim to guarantee ownership (appropriation of property) or the enforcement of contracts (compliance with commitments). From an economic point of view, certain mechanisms are said to be private or informal in nature and are based on reputation or negotiation without the intervention of a central authority,

while others are said to be formal when the regulations and legal institutions are of State origin.

91. In any event, certainty is considered a central element given that the fact of holding certain rights (particularly of ownership) provides access to credit, for example, and contracts by guaranteeing the possession of assets offered as security, on the one hand, and the capacity to meet commitments on the other. In a certain way legal certainty may therefore be considered to constitute a form of positive externality in that it benefits all the players, holders of rights and contracting parties. This idea is at the heart of many discussions on the importance of legal certainty in the interdisciplinary works of the economics of law¹²⁰.
92. The importance of legal certainty for economic and social relations is easily understood, particularly in the field of commercial and financial exchanges. This observation in itself does not, however, make it possible to determine the best means of achieving such a result and even less so to establish a direct link between legal traditions and levels of growth or economic development.
93. On this subject, a lot of works break away from the theory of legal origins either by emphasising the impossibility of revealing significant differences in terms of the economic impact of different legal systems (see for example Spamann 2010 on legal procedures) or the fact that different legal solutions may lead to comparable economic performances in terms of economic efficiency or level of development (Hadfield, 2009; Roe, 2011). In other words, it should be possible to analyse the capacity of a system to generate solutions that are socially optimal and therefore suited to requirements, independently of legal tradition. From this point of view, the notion of legal origin would lose some of its relevance when reasoning in terms of the notion of legal certainty.
94. It would therefore seem more pertinent to use as a basis an analysis of the empirical measurement of uncertainty as developed by certain authors (Pyndick, 1991; Dixit and Pyndick, 1994; Brunetti, Kisunko and Weder, 1997; Brunetti and Weder, 1998). These works, which are partly based on an evaluation of the “credibility of legal rules”, attempted to show that a lack of credibility is detrimental to growth and investment. What stands out is the extent to which they have helped reveal the importance of the “trust” factor in law as a condition for economic development. These studies remain insufficient, however, in that legal uncertainty is assessed solely through an analysis of the subjective perception of the agents. Even though it is undoubtedly difficult to use as a basis assessment instruments that are purely objective, it would appear possible to develop other methods by drawing up questionnaires based on specific legal cases, which are the methods adopted in our report.
95. This observation aside, it is important to note that not all the economic works dedicated to the notion of legal certainty always see uncertainty as an unfavourable

¹²⁰ For a summary of the literature on the subject, see Dari Mattiacci and Deffains (2007).

element. A certain number of studies point out that under some conditions a given level of uncertainty could also present advantages. Even though this approach may not be dominant, it must lead to tempering the conclusions of research that concentrates on the potentially beneficial side of this notion. We will give two examples.

96. Matthias Lang (2014) focuses on the impact of legal uncertainty on social wellbeing. His analysis is based on the fact that the uncertainty of legal rules may have contradictory effects on the behaviour of individuals. On the one hand, uncertainty in terms of the scope of the rules may prevent certain actions that are beneficial to society from being performed, which results in reduced social wellbeing. The author notes nevertheless that this uncertainty may also prevent harmful behaviour that would be at the limit of legality if the legal norm had been clearly stated. As justice is not in fact a binary mechanism, such behaviour could have been conducted in a “certain” legal system. Legal uncertainty may therefore increase the probability of sanctions for this type of behaviour, which results in an overall drop in the rate of illegal acts. The author also highlights the fact that, in such a context, legal uncertainty encourages individuals who would benefit the least from potentially prohibited conduct not to act: the cost of being found guilty would be greater than the potential profit. This results in a phenomenon of selection where only people with great profits at stake decide to act. Matthias Lang concludes that this change in the profile of defendants may, under certain conditions, particularly if the parties hold private information, lead to improved social wellbeing. The scope of this argument may, however, be questioned given the very specific nature of the hypotheses under which this theoretical result is obtained.
97. Raskolnikov (2014) claims to adopt a practical approach to law and focuses on sectors of the law where legal uncertainty is not random but, on the contrary, actively sought by lawmakers. The author attaches this notion to elements that are generally considered part of judges’ interpretations, such as a lexical field that depends on the subjectivity and judgement of the person responsible for ensuring compliance with the norm. This article does not include any analysis of social wellbeing but proposes, on the contrary, a descriptive reading of the strategic behaviours of defendants in the presence of legal uncertainty.
98. The model created by Raskolnikov considers a situation in which economic agents may adopt costly behaviour to increase the chances of their actions being legal. In this context, legal uncertainty is expressed specifically by the difference in uncertainty linked to the legality of certain actions. The model concludes that increasing legal certainty does not necessarily result in a drop in the number of illegal activities. Reduced legal uncertainty may cause individuals to reduce their efforts to comply with rules, which could well increase the number of convictions. Once again this conclusion should be put into perspective as it is highly dependent on hypotheses that were originally based on a very restrictive conception of the notion of legal certainty.

99. Ultimately, the economics of law therefore highlight the importance of the legal framework, particularly legal certainty, in order for the economy to run smoothly. In a complex society, the definition of individual rights makes it possible to predict the behaviour of agents. For example, it makes it possible to calculate in advance the profitability of an investment or to determine the terms of an exchange more easily. Resources are wasted when rights are poorly defined. In an “elementary” society, customs and traditions may clearly be enough to reassure each member of the society about the behaviour of others. But when the society grows larger and becomes more complex, such informal procedures are no longer efficient enough: the interactions between individuals become more complicated and it becomes more difficult to obtain information on the acts of each individual. This is when new legal rules emerge and the social advantage of a specialist legal power becomes apparent¹²¹, certain individuals devoting all their time to the mission of ensuring the rights of others are respected. It becomes more advantageous to draw up a more precise, formal definition of these rights despite the resulting costs. The creation of a centralised legal system may therefore be interpreted as an “institutional innovation” that encourages economic development. In this context, the State maintains a vital role, because it guarantees the creation and running of the legal framework.

100. An illustration of this observation is provided by the work of De Soto (*The Mystery of Capital*, 2000). The author asked himself one very simple question: why are some countries rich and others poor? In his view, the difference in wealth between the West and the rest of the world is far too large to be explained solely by cultural differences or a lack of saving. People save even in the poorest countries. The value of such savings is estimated to be 40 times greater than all the foreign aid these countries have received since 1945.

101. The savings are, however, often held in a non-productive form: houses built on land the ownership of which is unclear as well as unincorporated, informal, even illegal businesses. This legal uncertainty means that the assets constitute “dead capital”. Because the rights of ownership over these assets are not sufficiently documented, they cannot be transformed into productive capital, for example that is the subject of a mortgage that could be used to invest in an enterprise.

102. Capital is an intangible concept and like other intangible concepts humans have had to invent systems to represent, measure and use them productively. The same applies to capital: the legal system that manages property rights is the system that gives life to capital and enables it to release its productive potential.

103. The advantages, as emphasised by economists, of a precise, stable legal system are therefore understood. The economic analysis of law proposes that legal rules be considered mechanisms of “implicit prices” used to regulate economic and social

¹²¹ Many historic works have analysed the development of *Lex Mercatoria* (Merchant Law) in these terms.

interactions. What is important is to ensure a certain stability in the distribution of rights in order to facilitate individual economic calculations and to secure transactions. From this point of view, even though it may not be possible to identify a system of law that is “intrinsically” efficient it does not necessarily follow that economic analyses advocate legal conservatism.

104. What is effective for a particular company, according to its current position (creditor or debtor, for example), its size or sector of activity, may not be so for others. Taken as a whole, a particular point of law is far more likely to benefit some of the economic stakeholders over others than to have economic benefits in the absolute: even though there are doubtless better balances than others in the general interest, it is difficult to identify them if we fail to acknowledge from the start that each legal choice makes some people happy and others unhappy.
105. It is therefore difficult to qualify an entire legal tradition as either good or bad for the economy, not only because there may be positive and negative aspects of all measurements but also for more fundamental reasons. On the one hand, there are no traditions that are static and exogenous; on the other hand, each legal system is a compromise between different versions of what is good for the economy, versions that do not simply oppose “entrepreneurs” and “lawmakers”. Even though this observation may not plead for the generalised use of “Doing Business” type indicators, nor should it be seen as a simple “everything is more complex”. On the contrary, it invites us to improve our understanding of law by creating new methods of analysis that are suited to the realities that the economic stakeholders often face, irrespective of the legal tradition in which they live. This is precisely the objective of the following chapters.

Chapter 3 – Inventory of legal indicators¹²²

List of abbreviations

BTI	Bertelsmann Transformation Index
CIRI HRD	Cingranelli-Richards Human Rights Data
CPIA	Country Policy and Institutional Assessment
DI	Democracy Index
DB	Doing Business
EIU	Economist Intelligence Unit
FSI	Financial Secrecy Index
FIW	Freedom in the World
FOP	Freedom of the Press
GB ROLD	Global Business Rule of Law Dashboard
GCI	Global Competitiveness Index
GII	Global Integrity Index
GRI	Global Rights Index
GWP	Gallup World Poll
IAB	Investing Across Borders
IEF	Index of Economic Freedom
MCC	Millennium Challenge Corporation
RCRI	Realization of Children's Rights Index
ROLI	Rule of Law Index (World Justice Project)
(S&P's) SCR	Standard & Poor's Sovereign Credit Rating
SGI	Sustainable Governance Indicators
(TI's) BPI	Bribe Payers Index (Transparency International)
(TI's) CPI	Corruption Perception Index (Transparency International)
USAID	United States Agency for International Development
WPFI	World Press Freedom Index
WGI	Worldwide Governance Indicator

¹²² This chapter was supervised scientifically by David Restrepo, Assistant University Lecturer at HEC and research associate at the Perelman Centre of the Free University of Brussels assisted by Julian McLachlan, research assistant at the Catholic University of Louvain.

Introduction

106. There has been sustained growth in the production and use of legal indicators since the start of the 2000s. The number of indicators has risen from six (6) before 2000 to more than twenty (20) now. Of these 20, six (6) legal specialist legal indicators have been created since 2009. Legal indicators are proliferating particularly in the sectors of human rights, employment law, corporate law, international investment law, justice management and the rule of law. The tendency towards quantitative and mathematical empiricism underpinning the production and use of such indicators is not an isolated fact of legal discipline. Instead it is part of a trend in social and decision-making sciences which aims at collecting empirical data and supplying it in ordered, figured form to public decision makers and private managers in order to encourage evidence-based decision-making.

107. The aim of this report is to draw up an inventory of existing legal indicators and their methodology. It offers a description and an analysis of these indicators as seen in terms of their practical usefulness as information tools on the quality and performance of States' legal systems. It thereby fills a scientific void on this subject as to date there exists no study in French or English that systematically describes the existence and operation of indicators in the field of law.

I. Definitions and preliminary remarks

108. In this study we define a legal indicator as a measuring instrument whose use, by means of a quantitative methodology, yields a figured result that can be used to establish the state or performance of a specific legal object in several State legal systems. By definition therefore it makes it possible to render the legal systems of different States comparable and establishes cross-border standards of performance.

109. Therefore this study does not cover indicators that only measure legal phenomena within a single State. For example we do not describe indicators developed in the context of justice management at the national level. We should also point out that the objective of the indicators studied is not necessarily to assess States' compliance with their obligations under international law. Each producer of an indicator sets its own evaluation criteria, sometimes on the basis of (national or international) legal categories, sometimes on the basis of social, political or economic categories. These criteria are then used to structure methodology, organise the data collected and present the results.

Practical aspects of legal indicators

110. Over the last ten years legal indicators have not only increased in number, they have also become more sophisticated, periodical and influential. They are more sophisticated, because they are now designed and implemented by scientifically

renowned professional, interdisciplinary teams. They are more periodical, because in most cases their results are updated annually and their methodological and conceptual assumptions are revised every two to five years to respond to suggestions and criticism or to incorporate the new data available. Unlike one-off quantitative studies, they therefore make it possible to audit legal systems periodically, measure the impact of reforms and make predictions of legal risks within given States (e.g. the risk of expropriation).

111. Lastly, legal indicators are also becoming more influential, because they have gradually been incorporated into the institutional processes of private and public organisations, either to produce new performance indicators or in decision-making processes, particularly in the fields of the granting of credit, development aid, legal reforms and foreign investment. We will now give a few examples that highlight current use of legal indicators in four distinct fields:

1. In 2013 the World Bank stated that its *Doing Business* indicators had resulted in 2,000 legal and regulatory reforms in 180 world economies¹²³.
2. The American agency the *Millennium Challenge Corporation's* process of allocating development aid is based on 19 performance indicators, 6 of which are legal indicators contained in this study¹²⁴. Legal indicators are also used when allocating development aid or credits at preferential rates by USAID¹²⁵, the World Bank¹²⁶ and regional agencies like the Inter-American, African and Asian Development Banks¹²⁷.
3. Standard & Poor's rating agency incorporated the results of the *Doing Business* and WGI ROL indicators on enforcing contracts and the rule of law respectively in drawing up the sovereign credit ratings of States.
4. In 2012 the Quebec Bar Association undertook a study entitled *Regard du barreau du Québec sur l'État de droit 2012*, in which it incorporated all the evaluation criteria of the *Rule of Law Index*¹²⁸. Later, the 2013 study by the

¹²³ The World Bank, *Doing Business 2013: Smarter Regulations for Small and Medium-size Enterprises* (World Bank, 2013, p. 10).

¹²⁴ Millennium Challenge Corporation, *Guide to the MCC Indicators and the Selection Process for Fiscal Year 2014* (Millennium Challenge Corporation, 2013, pp. 4-5).

¹²⁵ USAID, *Chapter 350: Grants to Foreign Governments* (USAID 2013, pp. 5,8); USAID, *Commercial Legal Systems*, available on line: http://www.usaid.gov/what-we-do/economic-growth-and-trade/trade-and-regulatory-reform/commercial_legal_systems (last consulted 26 March 2015).

¹²⁶ David Restrepo Amariles, "The mathematical turn: l'indicateur Rule of Law dans la politique de développement de la Banque mondiale", in *Gouverner par les standards et les indicateurs: The Hume aux Rankings*, B. Frydman, A. Van Waeyenberge (dir.), (Bruylant 2014, pp. 193-234).

¹²⁷ Vinod Thomas and Xubei Luo, *Multilateral Banks and the Development Process: Vital Links in the Results Chain* (Transaction Publishers, 2012).

¹²⁸ Quebec Bar Association, *Regard du Barreau du Québec sur l'État de droit 2012* (Barreau du Québec 2013, p. 7).

Canadian Bar Association *Access to Justice Metrics* proposed to implement reforms in the field of access to justice on the basis of the criteria and results published by the *Rule of Law Index* indicator¹²⁹.

112. From a more general perspective, legal indicators are important in the democratic cycle and public policy on law for five reasons:
1. They establish priorities and structure discussion about reforms, for example a new indicator can draw attention to problems that have been overlooked in classic public debate.
 2. They make it possible to implement and direct the mechanisms of public intervention and decision-making about law by identifying, for example, the most efficient and least costly mechanisms.
 3. They make it possible to establish correlations between legal changes and economic and social changes.
 4. They provide additional data to socio-economic indicators in the evaluation of societal problems.
 5. They make legal operators accountable by providing the various social and economic players with information.

Overview

113. It is possible to distinguish two generations in the development of legal indicators. The first generation consists of indicators produced before 2002. These are usually generic social indicators, most of which are political and economic in orientation, which include a certain number of legal sub-variables. They include the World Bank's Country Policy and Institutional Assessment (CPIA) indicators, *Freedom in the World* and *CIRI Human Rights Data*. From the methodological and conceptual point of view they tend to be relatively elementary. They are based mainly on the opinion of (internal or external) experts and neither their conception nor their production includes specialist legal knowledge. The second generation of legal indicators starts with the annual publication of the *World Governance Indicators* in 2002. Other indicators of this generation are the *Doing Business*, *Rule of Law Index* or *Global Rights Index* indicators. This generation is characterised by the fact that it mainly covers specialist indicators in the law or governance sectors produced by interdisciplinary teams (often made up of legal specialists and economists), who combine several methods for collecting (survey expertise, questionnaires, etc.) and consolidating (complex statistical and mathematical procedures) data.

114. The following table (Table 1) presents the elementary data from existing legal indicators on the basis of nine (9) criteria:

¹²⁹ The Canadian Bar Association, *Access to Justice Metrics: A Discussion Paper* (Canadian Bar Association 2013).

1. **Name of indicator:** Name of the legal indicator (LI) or sub-legal indicator (SLI) that is part of a generic social indicator (GI).
2. **Phenomenon measured:** Definition of the legal object measured by the legal indicator or sub-legal indicator.
3. **Institutions/individuals:** Name of the institution or group of researchers that produced the indicator.
4. **Conception of the indicator:** Professional affiliation of the members of the team who conceived the indicator.
5. **Age:** Date the indicator was created.
6. **Updating:** Frequency with which results are updated.
7. **Countries covered:** Number of countries measured by the indicator.
8. **Source indicators:** Names of the legal indicators used as sources to produce the indicator concerned that is part of this report. When the sources of the indicator in question are not given in this report (for example because they are non-legal indicators), the comment “indicators not-included” appears. When the indicator in question uses no other indicator as a source, the abbreviation n/a (not applicable) is used to indicate that the indicator only uses primary sources.
9. **Derived indicators:** Names of indicators that use the indicator in question as a source and the institutions that use the results of the indicator in their decision-making processes.

TABLE 1

OVERVIEW

Indicator	Phenomenon measured	Institution(s)/ Individuals	Conception	Age	Updating	Countries covered	Source indicators	Derived indicators
Rule of Law Indicator (SLI) of World Governance Indicators (GI)	Perceptions of the degree to which agents trust the rules of the society and act in conformity with them, particularly the following factors: (i) quality of the enforceability of contracts, (ii) quality of property rights, (iii) quality of police and courts, (iv) risk of criminality and violence	World Bank – International Bank for Reconstruction and Development	Economists	1996	Annual (since 2002)	215	GCI, IEF, BTI, CPIA, GII, FIW, DI, ROLI, CIRI HRD	MCC, GB ROLD, S&P's
Property and government rights subject to rules (SLI) of the Country Policy and Institutional Assessment (CPIA) – (GI)	Degree to which economic activity is facilitated by an effective legal system and a governance structure based on rules in which property rights and contractual rights are upheld and reliably applied	World Bank – International Development Association	Economists	1977	Annual	81	Reference indicators (<i>guideposts</i>): IEF (Property Rights), ABA ROL Indicators	WGI ROL
Doing Business (GI)	Ease of doing business measured using 7 legal criteria: (i) starting a business, (ii) transfer of ownership, (iii) getting credit, (iv) protecting minority investors, (v) paying taxes and dues, (vi) enforcing contracts, (vii) resolving insolvency; and 3 non-legal criteria: (viii) obtaining building permits, (ix) connection to electricity supply, (x) cross-border trade	World Bank – International Finance Corporation	Economists and legal experts	2004	Annual	189	n/a	GB ROLD, WGI ROL, GCI

Investing Across Borders (LI)	The laws, regulations and practices that affect direct foreign investment as measured by 4 criteria: (i) Investing across sectors, (ii) Starting a Foreign Business , (iii) Accessing Industrial Land, (iv) Arbitrating Commercial Disputes	World Bank – International Finance Corporation	n/d	2010	In 2012	87	n/a	-
Rule of Law Index (LI)	The degree to which countries abide by the rule of law in practice as measured by 9 criteria: (i) limited government powers, (ii) absence of corruption, (iii) order and security, (iv) fundamental rights, (v) transparent government, (vi) regulatory enforcement, (vii) access to civil justice, (viii) effective criminal justice, and (ix) informal justice	World Justice Project	Legal specialists and economists	2010	Annual (2012-2013 grouped)	99	n/a (only primary sources apart from criminal statistics)	GB ROLD
Global Rights Index (LI)	Fundamental worker's rights, particularly (i) freedom of association, (ii) the right to strike, and (iii) the right of collective negotiation	International Trade Union Confederation	Legal specialists	2014	n/a	139	n/a	-
Realization of Children's Rights Index (LI)	Children's Rights	Humanium	n/d	2011	n/d	196	n/d	-
Institutions (LI) of the Global Competitiveness Index (GI)	Legislative and institutional framework in which individuals, companies and governments interact to create wealth	World Economic Forum	Economists	2004	Annual	144	DB	WGI ROL, GB ROLD, TI's CPI, TI's BPI, World Trade Report, Financial Development Report
Freedom in the World (LI)	Political rights and civil liberties	Freedom House	n/d	1972	Annual	195	n/a	WGI ROL, MCC

Legal environment (SLI) of Freedom of the Press (GI)	Legislative and regulatory framework having an impact on the degree of media freedom (printed press, radio and TV, internet)	Freedom House	n/d	1980	Annual	197 (countries, territories)	n/a	MCC
World Press Freedom Index (LI)	Degree of freedom of information and the press (including the legislative framework, legal status of the media and journalists)	Reporters Without Borders	n/d	2002	Annual	180	n/a	-
Rule of Law (SLI) of the Bertelsmann Transformation Index (GI)	Separation of powers and repression of abuses of power	Bertelsmann Foundation	n/d	2003	Every two years	129	n/a	WGI ROL
Property Rights (SLI) of the Bertelsmann Transformation Index (GI)	Property Rights	Bertelsmann Foundation	n/d	2003	Every two years	129	n/a	WGI ROL
Democracy (LI) of Sustainable Governance Indicators (GI)	Democracy defined using four criteria: (i) electoral processes, (ii) access to information, (iii) civil rights and political freedoms, and (iv) rule of law	Bertelsmann Foundation	Economists, political scientists	2009	In 2011 and 2014	41	n/a	-
Property Rights (SLI) of the Index of Economic Freedom (GI)	Property Rights (conceived as a factor of the Rule of Law)	Heritage Foundation	Economists, political scientists	1995	Annual	178	n/a	WGI ROL, GB ROLD

Anticorruption & Rule of Law (SLI) of the Global Integrity Index (GI)	(i) Anticorruption legislative framework, (ii) judicial impartiality, (iii) professionalism in the application of the law	Global Integrity	Journalists, social science researchers	2004	Annual (except 2005) Every two years for 70 countries since 2009	100	n/a	WGI ROL, GB ROLD
Freedom of Speech (SLI) of the CIRI Human Rights Data (GI)	Degree to which freedom of speech and the press are affected by government censorship, including ownership of the media	David L. Cingranelli, David L. Richards, K. Chad Clay	Political scientists	1981	Annual (up to 2011)	202	n/a	WGI ROL
Independence of the Judiciary (SLI) of the CIRI Human Rights Data (GI)	Degree to which the power of the judiciary is independent of control by other entities, for example some other branch of government or the military						n/a	WGI ROL
Democracy Index (LI)	Democracy defined using five criteria: (i) electoral process and pluralism, (ii) civil liberties, (iii) operation of government, (iv) participation in politics, and (v) political culture	Economist Intelligence Unit	n/d	2006	Annual	167	Indicators not included	WGI ROL
Global Business Rule of Law Dashboard (LI)	Rule of Law environment of countries in which businesses operate	U.S. Chamber of Commerce and Pugatch Consilium	Social scientists	2013	Due in 2015	60	GCI, ROLI, IEF, GII, WGI ROL, DB	-
Political Score (SLI) of S&P's Sovereign Credit Rating (GI)	The way in which institutions and government policy affect the credit fundamentals of a sovereign State that has sustainable public finances by promoting balanced economic growth and by reacting	Standard & Poor's	n/d	n/d	n/d	129	DB, WGI ROL	-

	to economic or political impacts							
Financial Secrecy Index (LI)	Financial secrecy as measured using the following criteria: (i) Banking Secrecy, (ii) Trusts and Foundations Register, (iii) Recorded Company Ownership, (iv) Published Company Ownership, (v) Public Company Accounts, (vi) Country-By-Country Reporting, (vii) Fit for Information Exchange, (viii) Efficiency of Tax Administration*, (ix) Avoids Promoting Tax Evasion, (x) Harmful legal vehicles, (xi) Anti Money Laundering, (xii) Automatic Information Exchange, (xiii) Bilateral Treaties, (xiv) International Transparency Commitments, and (xv) International Judicial Cooperation *Only criterion (viii) (Efficiency of Tax Administration) is non-legal	Tax Justice Network	Economists, legal specialists, political scientists, accountants and financiers	2013	Every two years	82	n/a	The Commitment to Development Index, Basel Anti-Money Laundering Index

n/a: not applicable

n/d: data not available

Methodology

A. Overview of the methodology

115. The aim of this section is to identify the factors that characterise the methodology of legal indicators. We have identified seven (7) methodological factors in order of their practical utility, i.e. by what they contribute to the indicator as an instrument of information about the conditions, performance or quality of a State legal system.

1. Nature of the phenomenon measured

116. Regarding the nature of the phenomena measured by the existing legal indicators, we need to make a distinction between legal (i) and non-legal (ii) variables. This distinction enables us to identify the degree of conceptual accuracy of an indicator as well as its practical value for legal reforms or decision-making processes about the quality of the law in a given jurisdiction (“actionability”). (i) The legal variables are those which measure: (a) the substantive law as it exists in the formal sources of law, sometimes called “law in books” (for example, the formal existence or absence of a court specialising in commercial matters in a legal system); (b) the law as it is encountered in practice in a society, also referred to as “law in action” (for example, the more or less effective recourse to the commercial courts for the settlement of commercial disputes). (ii) Non-legal variables measure social and economic facts that may or may not be related to legal variables (for example, the levels of criminality or corruption in a society).

2. Type of result

117. The indicators measure legal phenomena at different stages of law defined as a social process and not simply as a set of rules¹³⁰. They can therefore focus on one or more of the following factors¹³¹:

- Input: The existence or objective quality of a system, rule or legal practice, and their contribution to a given legal, social or economic process.
- Process (in the strict sense of the term): The institutional or social process of creating, implementing and enforcing a system, rule or legal practice.
- Output: The quality of the resulting legal, economic or social process.
- Outcome: The perception of users of the system, rule or legal practice of its quality and relevance in achieving the desired objectives.
- Goal: Effectiveness of the system, rule or legal practice in achieving previously defined goals.

¹³⁰ Regarding the operationalisation of the concept of law as a process rather than a set of rules in order to make it measurable, see John H. Merryman: *Law and Development Memoirs II: SLADE*, 48 *Am. J. Comp. L.* 713 (2000), pp. 718-719.

¹³¹ These categories are used in the work of Mark G. Brown: *Keeping Score: Using the Right Metrics to Drive World-Class Performance* (CRC Press 1996, p. 95).

118. For example, a legal indicator designed to measure the legal stability of a country with the aim of facilitating foreign investment will give users completely different information according to whether it measures one or more of the following stages and phenomena: (i) the existence of collective redress in the commercial legislation or case-law of the country or more generally the legal and economic quality of its contract law (inputs); (ii) how commercial law handles collective redress/ or more generally the quality of the administration of justice in commercial cases (process); (iii) the quality, effectiveness and efficiency of judgements by commercial courts in cases of collective redress or questions of contract law in general and their impact on compliance with contractual obligations (outputs); (iv) the perception of company directors of the legal stability of a country as measured for example by their perception of the quality of the commercial rules and judges, or compliance with contractual obligations by the various players in the legal system (outcome); or (v) the number of foreign investors who set up or will set up in the country due to its legal stability (goal).

119. Nowadays there is a trend in management literature to consider outcomes (or results) as the most important components of a structure. As a result, most legal indicators chiefly measure socio-legal outcomes. For example, the WGI ROL measures the Rule of Law “with regard to a number of widely accepted outcomes that societies which respect the rule of law seek to achieve, as opposed to the institutional means, such as the legal and regulatory frameworks, to attain them”¹³². The *Doing Business* indicator, in contrast, sets up a more extensive measuring system. It assesses legal inputs (institutions and rules) as well as socio-economic outputs including economic efficiency.

3. Type of measurement

120. As law is a complex phenomenon that cannot be directly observed, legal indicators are based on indirect measurements. These measurements enable social science researchers to handle the problem of measuring social phenomena in terms of statistical estimates or forecasts¹³³. Indirect measurements are constructed on the basis of the collection and combination of observable empirical data the researchers believe will reflect the underlying interests of a non-observable legal phenomenon. In other words the researchers use mathematical and statistical procedures to produce an abstract, non-observable legal variable (e.g. the Rule of Law) out of observable empirical data, for example the perception of the quality of justice, the number of constitutional rules regarding justice, or how long legal proceedings last.

121. Nowadays legal indicators use two distinct types of measurement:

¹³² David M. Agrast, Juan C. Botero, Joel Martinez, Alejandro Ponce & Christine Pratt, *The Rule of Law Index 2012-2013* (The World Justice Project 2013, p. 185).

¹³³ David J. Bartholomew, *Mathematical and Statistical Approaches*, in *Encyclopedia of Social Measurement* vol. 2, Kimberly Kempf-Leonard (dir.) (Elsevier Academic Press 2005, pp. 633-640).

- (i) Measurements of perception: These indicators collect the subjective opinions of individuals, either experts or lay people, in order to measure the condition, performance or quality of legal objects. They therefore give pride of place to outcomes in the legal process.
- (ii) Factual measurements: These indicators are constructed on the basis of objective, directly observable facts such as whether there exist any anti-corruption laws, whether or not specialist commercial courts exist, the number of judges and prosecutors in a legal system, or the average cost of lawyer's fees. In contrast with indicators based on perception, factual indicators can be reproduced in new research and from this point of view they are more transparent and verifiable.

4. Scale of measurement

122. Indicators use different types of scales of measurement:

- Ordinal: the objects measured are ranked by their relative position and not by the magnitude of their difference. The typical example is the ranking by which a country is placed in a numbered scale of performance, from first to last.
- Interval: this type of scale expresses the degree of difference between two entities on a given scale, but omits any comparison in terms of ratio.
- Ratio: Like interval scales, ratio scales express the degree of difference between two entities on a given scale. In contrast to an interval scale, a ratio scale has a unique nil value that is not arbitrary, and deviations have a proportional value. Therefore a '0' indicates the complete absence of the object being measured.

123. In Table 2, for interval scales and ratio scales, the lowest point on the scale (the most negative) is always expressed first. For example, 1-5 means that '1' is the most negative score that can be awarded and '5' is the best; in contrast, 7-1 means that '1' is the best score possible.

5. Type of indicator

124. Seen from the point of view of the information they express, legal indicators can be divided into individual or aggregate indicators.

- (i) Individual indicator: The first measures an object that constitutes a statistical unit. For example, the number of commercial courts as measured by a cardinal indicator.
- (ii) Aggregate indicator: The result of an aggregation of individual indicators. Such aggregation is based on a conceptual and methodological model that reflects the multidimensional object measured in order to select, combine and weight the individual variables and account for their different dimensions or structures.

125. In this study, most of the indicators are aggregate indicators. In table 2 we give the levels of aggregation for which the results of the variables are made available (either solely at aggregate level or also at individual indicator level). The more numerous

the levels of disaggregation of the results available, the more the indicator in question is likely to be accurate and informative.

6. Methods and sources

126. The indicators use data from both primary and secondary sources.

- (i) Primary sources: Essentially methods of social science research, i.e. surveys of experts or the general population, focus groups, analysis of documents and interviews. We have also included internal and external expertise as a primary data source.
- (ii) Secondary sources: Data taken from other indicators, reports or institutions to produce the legal indicator. Where sources have not been taken from Table 1 in the category “source indicators”, they are specified in Table 2.

7. “Actionability”

127. In the view of Stephanie Trapnell, indicators that aim to identify and implement reforms must meet the criterion of “actionability”¹³⁴. Indicators therefore have to be accurate from a conceptual point of view, measure concrete objects that can be reformed, and avoid the confusion that can arise from measuring facts and the law in the same aggregate indicator. For example, an aggregate indicator that measures both the number of judges in criminal jurisdictions and the level of criminality is not actionable, because it is not possible to act directly on the level of criminality through legal reforms. In this study we give an opinion on the actionability of each indicator on the basis of: (i) its degree of conceptual clarity, (ii) the nature and accuracy of the identification of the object measured, and (iii) the type of indicator and level of disaggregation of the results published.

¹³⁴ Stephanie E. Trapnell, *Actionable Governance Indicators: Turning Measurement into Reform*, 3 HJRL 317 (2011), p. 321.

TABLE 2

METHODOLOGICAL OVERVIEW

Indicator	Phenomena measured	Type of result	Type of measurement	Scale de measurement	Type of indicator	Methods and sources	Actionability
Rule of Law Indicator (SLI) of the World Governance Indicator (GI)	Law in action Non-legal	Input Output Outcomes	Perception	Interval of -2.5 to 2.5 Ranking	Aggregate	Secondary sources	Non-actionable
Property and government rights subject to rules (SLI) of the Country Policy and Institutional Assessment (CPIA) (GI)	Law in books Law in action Non-legal	Input Process Output	Perception	Interval 1-6	Individual	<u>Primary sources</u> Internal expertise (<i>country experts</i>), Secondary sources	Actionable
Doing Business (GI)	Law in books Law in action Non-legal	Inputs Process Outputs Outcomes	Factual	Ranking	Aggregate	<u>Primary sources</u> Surveys (experts)	Actionable
Investing Across Borders (LI)	Law in books Law in action Non-legal	Inputs Outputs	Factual	Interval 0-100	Individuals	<u>Primary sources</u> Surveys (experts: law firms, accounting and audit firms, chambers of commerce, law professors)	Actionable
Rule of Law Index (LI)	Law in action Non-legal	Outcomes	Perception	Interval 0-1 Ranking	Aggregate	<u>Primary sources</u> Surveys (population, experts), focus groups <u>Secondary sources</u>	Actionable

						Center for Systemic Peace, Uppsala Conflict Data Program	
Global Rights Index (LI)	Law in books Non-legal	Inputs Outputs	Factual	Interval 1-5	Aggregate	<u>Primary sources</u> Survey Internal expertise	Actionable
Realization of Children's Rights Index (LI)	Law in action Non-legal	Output Outcomes	Factual Perception	Interval 0-10	Aggregate	n/d	Non-actionable
Institutions (LI) of the Global Competitiveness Index (GI)	Law in action Non-legal	Outcomes	Perception	Interval 1-7 (0-10 for protecting minority investors) Ranking	Aggregate	<u>Primary sources</u> Survey of company bosses (<i>business leaders</i>)	Actionable
Freedom in the World (LI)	Law in action Non-legal	Outputs	Factual	Interval 7-1, 1-40, 1-60 Free – Partially free – Not free (F/PF/NF)	Aggregate	<u>Primary sources</u> Internal expertise External expertise	Actionable
Legal environment (SLI) of Freedom of the Press (GI)	Law in books Law in action Non-legal	Inputs Outputs	Factual	Interval 30-0 For the GI: 100-0 F-PF-NF Ranking	Aggregate	<u>Primary sources</u> Internal expertise	Non-actionable
World Press Freedom Index (LI)	Law in action Law in books Non-legal	Outputs Outcomes	Factual Perception	Interval 100-0 Ranking	Aggregate	<u>Primary sources</u> Survey Internal expertise	Non-actionable
Rule of Law (SLI) of the Bertelsmann Transformation Index (GI)	Law in action Law in books	Outputs Outcomes	Factual Perception	Interval 1-10	Aggregate	<u>Primary sources</u> External expertise	Actionable
Property Rights (SLI) of the Bertelsmann Transformation Index (GI)	Law in action Law in books Non-legal	Outputs	Factual				

Democracy (LI) of the Sustainable Governance Indicators (GI)	Law in action Non-legal	Outputs	Factual	Interval 1-10	Aggregate	<u>Primary sources</u> Documentary analysis (sources from the OECD and the EU) Internal expertise	Actionable
Property Rights (SLI) of the Index of Economic Freedom (GI)	Law in action Law in books	Outputs	Factual	Interval 0-100	Individual	<u>Primary sources</u> Internal expertise	Actionable
Anticorruption & Rule of Law (SLI) du Global Integrity Index (GI)	Law in books Law in action	Inputs Process Outputs	Factual	Interval 0-100	Aggregate	<u>Primary sources</u> Internal expertise	Actionable
Freedom of Speech (SLI) of the CIRI Human Rights Data (GI)	Law in action	Outputs	Factual	Interval 0-2	Individual	<u>Primary sources</u> Documentary analysis (Reports on human rights by the US State Department)	Actionable
Independence of the Judiciary (SLI) of the CIRI Human Rights Data (GI)	Law in action	Outputs	Factual	Interval 0-2	Individual		Actionable
Democracy Index (LI)	Law in action Law in books Non-legal	Outcomes	Perception	Interval 0-2	Aggregate	<u>Primary sources</u> Internal expertise Public opinion surveys	Non-actionable
Global Business Rule of Law Dashboard (LI)	Law in action Law in books Non-legal	Inputs Process Outputs Outcomes	Perception Factual	Interval 0-100	Aggregate	Secondary sources	Non-actionable

Political Score (SLI) of S&P's Sovereign Credit Rating (GI)	Law in action Non-legal	Outcomes	Perception	Interval 6-1	Aggregate	Primary sources Internal expertise Secondary sources	Non-actionable
Financial Secrecy Index (LI)	Law in action Law in books Non-legal	Inputs Outputs Process	Factual	Interval 0-100% (for the secrecy score) 0-2000+ (for the final index) Ranking	Aggregate	Primary sources Surveys of Ministries of Finance and Financial Intelligence Units of the countries; documentary analysis (Public and official reports by the OECD, FATF, IMF and the US State Department; specialist fiscal databases)	Actionable

n/a: not applicable n/d: data not available

B. Methodological analysis

128. In this section we analyse the methodology of legal indicators by the three key stages of their construction: (a) data collection, (b) quantification, and (c) consolidation. We have assigned the indicators to six methodological categories according to their characteristics in the previous three stages: (1) purely composite indicators, (2) indicators from surveys of experts, (3) indicators from surveys of experts and the general population, (4) indicators from targeted surveys, (5) indicators from internal expertise, (6) indicators from documentary expertise¹³⁵.
129. For each of these categories we present a paradigm indicator (model indicator) in detail and we identify the indicators that are similar to it from a methodological point of view together with an examination of the differences from the model indicator for certain of them.

1. Purely composite indicators

Model indicator: Rule of Law Indicator of the World Governance Indicators

Similar indicator: Global Business Rule of Law Dashboard

Rule of Law Indicator of the World Governance Indicators

1.1. Data collection

130. The WGI ROL is a composite indicator that only has indirect contact with empirical data. The data collection stage therefore consists in collecting and classifying data derived from secondary sources. More precisely, the indicator is based on 9 sources described as representative and 13 non-representative sources from which 74 variables are derived. The sources use two research techniques: surveys and expert evaluation. The expert evaluations may in turn be differentiated depending upon whether the institution implementing the evaluation is a commercial data supplier, in the public sector, or an NGO.
131. The data itself mainly relates to outputs, i.e. socio-economic results believed to result from respect for the rule of law, and outcomes, the perception of the results by the agents, to the exclusion of inputs (i.e. law in books). Numerous variables are thus based on perception, particularly when the survey technique is used (for example, trust in the legal system or police forces). Other variables depend on raw facts of which the relevance for evaluating the rule of law is open to doubt (for example access to land and water for agriculture), or which result from the interaction between legal and non-legal aspects of a society (for example violent criminality or corruption). In particular, legal variables such as property rights, enforcement of contracts and the independence of the judiciary depend upon a combination of legal and non-legal factors (for example the measurement of property rights by the

¹³⁵ However, the Realisation of Children's Rights Index indicator has not been categorised when the information available was insufficient.

Heritage Foundation Index of Economic Freedom includes measurements of police activity and criminality levels).

1.2. Quantification

132. The composite character of the WGI ROL also facilitates the quantification stage. In fact an indicator no longer directly quantifies legal phenomena if it is based on data that has already been quantified. Each source has its own quantification method and new indicators can be created by simply organising and combining existing measurements.

133. In order to achieve this, the WGI ROL team use a statistical tool that makes it possible to combine values for variables taken from different sources into a single score, the Unobserved Components Model or UCM¹³⁶. This is based on the hypothesis that each variable provides an imperfect signal of the rule of law, which is difficult to observe directly. According to the authors of the indicator, this model precisely solves the problem of extracting signals which may be formulated as follows: how do you isolate an informative signal concerning an unobserved component of governance (here, the rule of law) that is common to each individual source?¹³⁷ The authors suppose that it is possible to write y_{jk} – the observed score of the rule of law of a country j based on relevant variables from source k – as a linear function of the unobserved rule of law g_j and an error term ε_{jk} :

$$\text{Equation 1: } y_{jk} = \alpha_k + \beta_k(g_j + \varepsilon_{jk})$$

where α_k and β_k are parameters dependent on the source k in question, and whose objective is to standardise the values of all the sources in a common scale in order to make them comparable. The error term is assumed to have a normal distribution, the mean of which is zero and the variance of which $\sigma_\varepsilon^2(k)$ is the same for all countries, but varies according to the source. For representative sources, α_k , β_k et $\sigma_\varepsilon^2(k)$ are obtained using the maximum likelihood estimation.

134. Melissa A. Thomas finds that adopting this model presupposes that each variable and “source variable” is a linear function of one and the same independent variable in the case of the rule of law¹³⁸. This contrasts with the approach of the WJP which attributes individual variables to several factors and sub-factors at the same time.

1.3. Consolidation

135. Each of the 22 sources used by the WGI ROL has not only its own quantification method, but also its own method for aggregating data for calculating its individual variables. Using these

¹³⁶ Kaufmann Daniel, Aart Kraay & Pablo Zoido-Lobaton, Governance Matters (The World Bank Policy Research Working Paper 2196, 1999, p. 5).

¹³⁷ Kaufmann Daniel, Aart Kraay & Massimo Mastruzzi, The Worldwide Governance Indicators: Methodology and Analytical Issues, 3 HJRL 220 (2011), p. 228.

¹³⁸ Melissa A. Thomas, What Do the World Governance Indicators Measure, 22 Eur. J. Dev. Res. 31 (2010), pp. 31-35.

individual variables, the WGI ROL indicator continues the aggregation process at a higher level.

136. In the first stage, if several variables from the same source are used, the arithmetical mean method is used to obtain a single score for the entire source, a score that, using Thomas's term, may be called the "source variable"¹³⁹. In this situation it is the source variable that is used rather than the individual variables of the source concerned. In a second stage the variables and the source variables concerning the same country are aggregated. This two-stage process is illustrated in figure 3, taken from Thomas's work.
137. The aggregation of variables and source variables is based on a statistical operation that uses a likelihood function which itself includes five stages. First an estimation g_j of the rule of law for the country j is constructed using the conditional distribution of g_j in the light of the data observed y_{jk} , and the data values of α_k , β_k and σ_k^2 (equation 2). The special feature of this first estimation is that it only uses data from sources described as "representative" by the authors. Secondly, in order to integrate the representative sources, the standard error of the estimations derived from equation 2 are calculated using equation 3. Thirdly, the regression of the non-representative sources on the estimations derived from equation 2 is performed in order to obtain estimations for α_k , β_k and σ_k^2 , and the standard error obtained using equation 3 is used to correct the measurement errors of these estimations. Fourthly, the weight w_k of each source k (whether representative or not) is calculated using equation 4, which is based on a comparison of the error terms of each source. The weight of a source is inversely proportional to the variance of the error of the source; in other words, the more accurate the signal supplied by the source regarding the rule of law, the more weight is assigned to the source. Fifth and last, equation 2 is re-applied using the newly-obtained weights in order to calculate the final estimations of the rule of law for a given country.

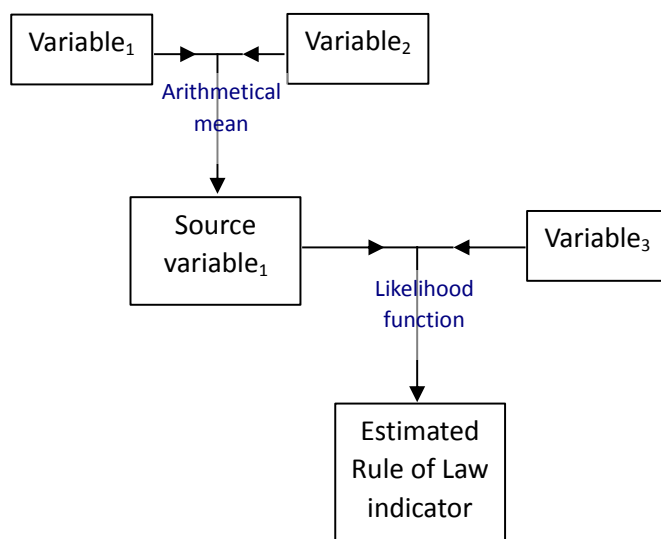
$$\text{Equation 2} \quad E[g_j | y_{j1}, \dots, y_{jK}] = \sum_{k=1}^K w_k \frac{y_{jk} - a_k}{b_k}$$

$$\text{Equation 3} \quad SD[g_j | y_{j1}, \dots, y_{jK}] = \frac{\sigma}{\bar{\sigma}} \left(1 + \sum_{k=1}^K \frac{\sigma_k^2}{\bar{\sigma}^2} \right)^{-1/2}$$

$$\text{Equation 4} \quad w_k = \frac{\sigma_k^{-2}}{1 + \sum_{k=1}^K \sigma_k^{-2}}$$

¹³⁹ Ibid., pp. 31-35.

Figure 1: Stages in the aggregation of the WGI ROL indicator ¹⁴⁰



2. Indicators from expert surveys

Model indicator: Doing Business

Similar indicator: Investing Across Borders

2.1. Doing Business

2.1.1. Data collection

138. Construction of the Doing Business indicator is based on two types of data each of which requires its own method of collection. On the one hand the indicator integrates data on the rules of law considered from a fairly theoretical viewpoint (law in books) for which a study of the legal and regulatory doctrine is undertaken by the Doing Business team and academic advisers. On the other hand, the indicator is based on the knowledge of experts the selection of which may sometimes seem “a little opaque” (expert-based knowledge), chosen using a questionnaire whose structure is based on a hypothetical case, a scenario assumed to be representative, to ensure the comparability of the results. Local experts whose profiles can vary without this always being very easy to assess (lawyers, consultants or judges) are identified and the Doing Business team discuss the questionnaire with them before using the questionnaire to interview them.

¹⁴⁰ Ibid., p. 35

2.1.2. Quantification

139. For the Doing Business indicator, the quantification stage is very simple. Most of the variables of the indicator are expressed in common units that can easily be counted such as the number of days, number of procedures or percentage of financial costs.
140. Firstly, as concerns substantive law, procedures are simply identified and counted. Then for economic outputs, data is obtained taking the mean of the local experts' responses in terms of cost and time. Finally, to digitise the variables making up an index (for example, the strength of legal rights index), a binary system is used: '1' if the expert confirms that the procedure exists or is favourable to the growth of business, otherwise '0'.

2.1.3. Consolidation

141. As regards the process of aggregating data, cardinal values (number of days, procedures, costs, etc.) for each individual variable are first ordered according to their respective centile in global distribution for the individual variable concerned. For example, three countries where the time needed to enforce a contract is 20, 21 and 4 days will be ranked 2nd, 3rd and 1st respectively. Cardinal values are therefore converted into ordinal values¹⁴¹.
142. It is the centiles obtained following this ranking that are aggregated using the arithmetical mean method in order to classify countries for each of the 10 topics, and the corresponding centiles. This operation is then repeated at the higher level: the arithmetical mean of the centiles obtained by a country for each topic is established to obtain the Ease of Doing Business index, i.e. the final Doing Business indicator.

2.2. Special features of the Investing Across Borders indicator

- (i) For certain questions model scenarios are used to ensure comparability but vary according to the variable measured and are not therefore valid across the board like the DB indicator. For example, for the extent of judicial assistance variable, two model situations are used: national and international commercial arbitration.
- (ii) Secondly, the quantification stage of the IAB indicator is less direct than for Doing Business. Only five individual variables are expressed in common units (number of days or procedures), the majority being given as indices. These indices are constructed not only using binary questions ("yes" and "no" become 1 and 0 respectively) but also questions concerning frequency, quality or rapidity, and which may therefore have intermediate values (halves, thirds or fifths). After possible "bonus" questions, the total score for an index (e.g. 31 out of 35) is expressed as a scale of 0 to 100.
- (iii) Lastly, it is in third stage that the divergence is most apparent since for the IAB indicator there is no aggregation to produce a final ranking or even aggregation to obtain a score for the topics.

¹⁴¹ The drawback is clearly the loss of useful information concerning the difference between cardinal values in the original distribution when ratings become rankings.

3. Indicator from surveys of experts and the general population

Model indicator: *Rule of Law Index*

Rule of Law Index indicator

3.1. Data collection

143. Of all the indicators analysed in this work, the Rule of Law Index created by the World Justice Project is the only one to combine two primary sources, namely surveys of experts and surveys of the general population. The raw data that constitutes the basic material of the indicator results from the General Population Poll (GPP) and Qualified Respondents Questionnaire (QRQ), both of which are created by the World Justice Project. The aim is to measure both the law in books as well as many outputs through perception-based and experience-based measurements. The inquiries are structured around cases that are assumed to be representative in order to ensure the results are comparable.
144. In practical terms, the GPP questionnaire totals 149 questions (of which 91 are based on perception and 58 on experience). The survey is translated into the local language and is conducted in the three largest cities of each country by a national survey agency. Survey methods may vary, i.e. over the phone, face to face or on the internet. The survey is conducted every three years and results in a sample of 1,000 people. The QRQ, which is intended for experts, covers four topics and is divided into two sections: one concerning hypothetical scenarios and the other containing questions based on experience or perception. It is available in English, French and Spanish and the survey is repeated annually. A minimum of three experts per category per country reply to the questionnaire.
145. On a subsidiary basis, third-party sources are used if they constitute more appropriate means for measuring a specific phenomenon, for example deaths resulting from bombings or armed combat.

3.2. Quantification

146. The quantification stage consists in giving each response a numerical variable ranging from 0 to 1 according to the degree of correlation with good performance in terms of the rule of law. The questions are either binary (yes/no) in which case the variable may only have the value 0 or 1; or multiple choice when they measure a probability, frequency or appropriateness; or lastly an evaluation on a scale of 1 to 10 (rating). For responses that are not expressed on a scale of 0 to 1, they are scaled down using the normalisation method called "min-max".

3.3. Consolidation

147. In order to aggregate the numerical variables obtained, the method of the arithmetic mean is used iteratively for each group level, keeping the variables from the GPP and those of the QRQ initially separate. Thus all the individual variables belonging to the same sub-factor are aggregated, then all the sub-factors relating to a factor are aggregated, and so on. This clearly implies that the individual variables do not all have the same weight in the final result, because the weight depends on the number of elements at each level of aggregation. An

additional constraint is inserted at the penultimate level of aggregation, i.e. at level 9 of the macro-variables which together determine final result for the rule of law. Each of these macro-variables is obtained by aggregating the data of the lower levels, but what is interesting is that the weights distributed are 50% for the QRQ variables and 50% for the GPP variables. The weight of data from third party sources and the way in which it is integrated is not reported.

4. Indicators from targeted surveys

Model indicators: Global Competitiveness Index

Similar indicators: Global Rights Index, World Press Freedom Index

4.1. Global Competitiveness Index

4.1.1. Data collection

148. The fundamental source of the Global Competitiveness Index is a survey, which has been conducted annually for over 40 years by the World Economic Forum, to which many executives throughout the world respond: the Executive Opinion Survey. This survey, the results of which are confidential, is translated into 30 languages and conducted in approximately 150 countries where the local institutions that are partners of the WEF identify and contact potential respondents (corporate directors and managers). The inquiry of the “institutions” pillar is mainly aimed at measuring socio-legal outputs. Of the 15,000 questionnaires filled in resulting from EOS 2013, 14,059 were used to create the indicator.

149. Alongside this primary source, the Global Competitiveness Index also uses data from third party sources if the survey does not cover or is unsuited to questions that are considered relevant: 39 individual variables thus result from third party sources. 6 of these are legal variables that come directly from raw individual variables (in cardinal form) of the Doing Business indicator.

4.1.2. Quantification

150. For the survey, quantification is performed directly by the respondents when most of the questions ask them to evaluate numerically the quality, performance or existence of socio-legal outputs, i.e. to give a rating on a scale of 1 to 7. For third party sources the phenomena measured are already quantified, the GCI team only has to use the numerical data as it stands or combine it to create a new variable.

4.1.3. Consolidation

151. The primary data¹⁴² is aggregated in two phases, each of which is subdivided into several

¹⁴² The weight of data from third party sources is not specified.

stages. In the initial phase the aggregation is performed in terms of a single question i . Firstly, the evaluations $q_{i,j,s,c}$ attributed by the respondents ($j = 1, \dots, N_{s,c}$ ¹⁴³) for this question i for a specific sector s in a country c , are aggregated using the arithmetic mean method. Each sector is given a score $q_{i,s,c}$ for the question i in a sector s . Then a sector-weighted average $q_{i,s}$ is calculated by attributing to each sector a weight $w_{s,c}$ proportional to its importance in the country's economy¹⁴⁴. The weighted average per sector obtained for a year (for example 2012) and that obtained for the previous year (2011) are then aggregated in order to make the estimations of the indicator more stable from one year to another. This moving technique consists in attributing a weight W_c^t to each of the weighted averages per sector (for example W_c^{2011} and W_c^{2012}). A weighted average over two years is therefore calculated with the weight thus defined (for example $q_{i,c}^{2011-2012}$), and this average represents the final score obtained by a country c for a question i .

152. Once the scores are obtained for each individual variable (i.e. for each question), the second aggregation phase begins at the level of the country c , a phase that takes place in four stages. Firstly, the individual variables are grouped into sub-indicators by calculating the arithmetic mean. Secondly, each sub-indicator is attributed a weight¹⁴⁵ and the sub-indicators are aggregated by weighted average to produce the intermediary categories. Thirdly, each of the twelve pillars is obtained from the intermediary categories of which it consists, which are aggregated according to the values attributed to them (also therefore by weighted average). Fourthly, in order to calculate the final score of the Global Competitiveness Index the weight of each pillar is determined by both its affiliation to one of the three "sub-indices" (basic requirements, efficiency enhancers, and innovation and sophistication factors¹⁴⁶) and by the "level of development" of the country in question. Once each country has been classified according to whether its economy is factor-driven, efficiency-driven or innovation-driven, the GCI attributes greater weight to the pillars judged more important for a country given its level of development.

4.2. Characteristics of the Global Rights Index

153. The Global Rights Index survey is conducted by the International Trade Union Confederation (ITUC). It adopts another point of view of labour relations: rather than the directors, the ITUC inquiry questions the workers. Moreover, they are measurements based on experience and not perception.

¹⁴³ Where $N_{s,c}$ is the number of responses in sector s of country c .

¹⁴⁴ Other than in two situations: (i) if the ratio of the weight of a sector compared to the percentage of questionnaires available for the sector is greater than five, then the weight attributed to the sector is limited to five times the percentage of questionnaires available for the sector to avoid attributing a very significant weight to a few responses relative to a very representative economic sector; (ii) if the sample for a country is too small or if the sectorial representation does not match the structure of the economy, then the weight attribution method is abandoned and a simple arithmetic mean is used (for example, this was the case for 8 countries in the 2012-2013 indicator).

¹⁴⁵ It is interesting to note that the WEF does not offer an explanation concerning the attribution of these weights.

¹⁴⁶ Basic requirements, efficiency enhancers, and innovation and sophistication factors

154. The questionnaire comprises 34 questions aimed at measuring violations of fundamental employment rights both in practice and *de facto*. The questionnaire is available in English, French and Spanish and is sent to the 325 workers' organisations affiliated to the ITUC, covering 161 countries and territories as well as 176 million workers. These organisations that then forward the questionnaire to their members¹⁴⁷. Five regional meetings are conducted with regional human rights and trade union coordinators where the questionnaire is distributed, explained and filled in. The ITUC also contacts the trade unions directly when it is notified of a violation in order to confirm the relevant facts. Violations are only recorded provided the trade unions can indicate the following information: the date, victim/trade union, a description of the event, and the complaints lodged at national and international level.

155. The second source of information used to create the GRI is a measurement of *de jure* violations. Legal specialists analyse the compliance by the national legislation with the fundamental employment rights defined by the International Labour Organisation Conventions.

156. To quantify the results of the survey and the doctrinal analysis, the information is encoded in 97 indicators relative to *de jure* and *de facto* violations, grouped into five categories: fundamental civil liberties, the right to establish or join a trade union, trade union activities, the right to collective bargaining, and the right to strike. Binary coding is used ("yes/no" becomes "1 / 0") and when a response requires grading, increasingly specific questions are used¹⁴⁸. It is important to note that, except in special cases, where a *de jure* violation is encoded for a given aspect, a *de facto* violation is automatically encoded for this same aspect.

157. Lastly, the 97 binary indicators are aggregated by addition – each one therefore obtains an equal weight. The resulting score may therefore theoretically vary from 0 to 97 (where 97 is the worst possible situation). The data reveals, however, that the scores vary from 0 to 43¹⁴⁹. It is therefore according to the following table that a rating is calculated for each country from 1 to 5, which represents the final result of the Global Rights Index. Moreover, a rating of 5+ is used when there is a complete breakdown of the rule of law in the country evaluated.

¹⁴⁷ International Trade Union Confederation, ITUC Global Rights Index 2014 (International Trade Union Confederation, 2014, p. 11).

¹⁴⁸ Ibid., p. 12

¹⁴⁹ Ibid., p. 13

Score	Rating	Explanation
0 – 8	1	Irregular violations
9 – 17	2	Repeated violations
18 – 26	3	Regular violations
27 – 35	4	Systematic violations
36	5	No guarantee of rights
	5	No guarantee of rights due to the breakdown of the rule of law

5. Internal expertise indicators

Model indicators: Democracy Index

Similar indicators: Freedom in the World, Bertelsmann Transformation Index, Sustainable Governance Indicators, Freedom of the Press, Country Policy and Institutional Assessment, Global Integrity Index, Standard and Poor's Sovereign Credit Rating, Index of Economic Freedom

5.1. Democracy Index

158. An indicator is considered to be an internal expertise indicator in this report when it is mainly based on evaluations by experts who are internal to the organisation that produces it. The lower cost of this method for collecting primary data explains why it is often used.

5.1.1. Data collection

159. The main source of this indicator consists of evaluations drawn up by the experts that make up the Economist Intelligence Unit team. The experts are asked to answer 60 questions on each country analysed and the EIU does not specify what the sources are. Even though these evaluations are not the sole source of the Democracy Index, this does not prevent them in any way from being representative of the “internal expertise indicators” category. The third party sources, which are public opinion surveys, are only used for a minority of questions, and only when they are available for the country in question. The survey in question is mainly the World Values Survey but others are sometimes used (Eurobarometer, Gallup Polls, Asian-/Latin American-/AfroBarometer). For 13 questions aimed at measuring the population's perception of a legal phenomenon, the experts' evaluation may therefore be replaced by data extracted from these surveys (where they exist).

5.1.2. Quantification

160. The EIU claims that the evaluation scales from 1 to 5 or 1 to 7 are too great when they violate the principle of reliability, whereby the measurements produced by a measuring procedure are the same each time, irrespective of the person taking them. The Democracy Index therefore adopts the principle of a binary system ('1' or '0' is for 'yes' or 'no'), which does not guarantee reliability but makes it more probable. In reality, there must be the possibility of a score of 0.5 to include the “grey areas” where a binary score is problematic. In the end this compromise between reliability and nuance results in only four questions being purely binary (questions 4, 5, 14 and 20), the remaining 56 use a tripartite scale.

5.1.3. Consolidation

161. In order to aggregate numerical evaluations the questions are grouped into five categories – but not all the categories have the same number of questions. For example, category V (Civil Liberties) contains 17 questions whereas category IV (Democratic Political Culture) contains only 8. This clearly has an impact on the weight of each question in the final result, because this is merely an arithmetic mean of the scores obtained for each of the five categories, irrespective of the number of questions in each one.
162. In practice, the evaluations for all the questions in a category are added together, the result is then reduced to a scale of 1 to 10. Moreover, adjustments are made if a country fails to obtain an evaluation of 1 for questions considered critical for democracy: free and fair elections, safety of voters, influence of foreign powers on the government, and the abilities of the public service. There is in fact a penalty of -1 or -0.5 (according to whether the evaluation is 0 or 0.5¹⁵⁰) imposed on the score of the category the question belongs to. The final indicator is obtained by an arithmetic mean of the scores of each category and is also expressed on a scale of 1 to 10. Lastly, this numerical value is converted into qualitative information according to the table below.

Indicator value	Type of regime
8 – 10	Full democracy
6 – 7,9	Flawed democracy
4 – 5,9	Hybrid regime
< 4	Authoritarian regime

5.2. Characteristics of Freedom in the World

- (i) Evaluation by experts attains the status of exclusive source. The methodological document is nevertheless more precise regarding the framework of the evaluation: 60 analysts, both internal and external, refer to public sources (such as press articles, academic analyses, NGO reports) as well as “individual professional contacts” to draw up a provisional report and suggest a score. 30 advisers then review and comment in detail on key countries or territories.
- (ii) The suggested scores are submitted to a peer review process. The review process is included in an annual meeting held for each region that is attended by the team members and a panel of expert advisers. The final scores therefore represent a consensus which is intended to ensure both chronological and geographical comparability.

¹⁵⁰ Except for the fourth, which only allows for a penalty of -1.

(iii) In the quantification stage the evaluation scale is no longer tripartite but enables scores of between 0 and 4 to be awarded for 100 questions. Nevertheless, like the Democracy Index, additional “discretionary” questions enable either a “bonus” of 1 to 4 points to be awarded or a penalty that varies according to the same scale.

(iv) For FIW a freedom status is awarded on the basis of the table below.

Score	Freedom status
1.0 – 2.5	Free
3.0 – 5.0	Partially free
5.5 – 7.0	Not free

5.3. Characteristics of the Bertelsmann Transformation Index

- (i)** The BTI is based on 236 experts from universities and research institutes, as well as civil society organisations (for country experts) who are in charge of the evaluation. For each country there is an internal and an external expert. One draws up the provisional report structured around 49 questions while the other reviews, comments and makes any necessary additions.
- (ii)** One difference compared to the other internal expertise indicators is that both experts express the qualitative evaluation in a numerical rating independently of the other. Moreover, like the FIW indicator, the individual scores are submitted for peer review in several stages: after intra-regional and then inter-regional calibration, these scores are submitted for the approval of the BTI committee.
- (iii)** 11 of the 49 questions use external quantitative indicators. They concern questions that measure economic or managerial rather than legal aspects.
- (iv)** The BTI also covers the Management Index, but this does not concern the legal phenomena and aggregation is taken no further which implies that the two indices remain very different.

6. Indicators from documented expertise

Model indicators: Financial Secrecy Index

Similar indicators: Cingranelli-Richards Human Rights Data

Financial Secrecy Index

163. At first glance the Financial Secrecy Index would appear to be categorised like an internal expertise indicator because it also depends greatly on contributions from experts. But in actual fact the experts play a very different role in producing this indicator. For internal expertise indicators, an evaluation is given from many varied sources, which cannot always be identified, and this evaluation therefore implies an intuitive aspect – and this is what constitutes the added value of internal expertise indicators. On the contrary, for the FSI the experts refer to official sources, or at least those that can be verified. Their most important task therefore consists in assembling a database that can be accessed by all users of the indicator. Their role is then limited to encoding the information according to very precise criteria. Even though possible subjectivity by the experts cannot be totally ruled out, the difference with other indicators is therefore that users may, if they so wish, trace the quantification process back to its source. We will now reconsider the various stages of production of the FSI in greater detail.

6.1. Data collection

164. The online database is assembled from three types of sources, with the access reference each time. Firstly there are the official and public reports of the OECD, the Global Forum with which it is associated¹⁵¹, FATF and IMF, as well as the American State Department¹⁵². Then there are databases and websites that specialise in tax matters: International Bureau of Fiscal Documentation, PwC, Worldwide Tax Summaries, Lowtax.net, etc. Lastly, there is the questionnaire (available on line) that is sent to the Ministry of Finance and Financial Intelligence Unit of each country analysed, which contains targeted questions on the fiscal and regulatory framework of the country. Of the 202 variables available in the database, 49 are used. It is important to note that an absence of data on a given question is expressed by a score that corresponds to total financial secrecy for the question concerned, the reason being that States have the opportunity to provide such data.

6.2. Quantification

165. Like many other indicators, the quantification operation consists in attributing a numerical value to each question. All the values that the numerical evaluations may have depend on the question. Certain questions are binary ('yes' and 'no' become '1' and '0'). Some aimed at measuring the degree of a country's compliance with a rule are expressed by a full figure

¹⁵¹ Global Forum on Transparency and Exchange of Information for Tax Purposes.

¹⁵² International Narcotics Control Strategy Report, which contains information on the fight against money laundering.

between 1 and 4 while others require a response on a scale of 0 to 2¹⁵³. Lastly, there are special cases where the grading is more pronounced – for example, the number of ratified Bilateral Tax Agreements is recorded and divided by 46¹⁵⁴, or the proportion of FATF criteria with which the country complies is calculated¹⁵⁵.

6.3. Consolidation

166. The first aggregation level consists in grouping all the questions covered by the same Key Financial Secrecy Indicators (KFSI), i.e. the same key macro-variable. The FSI indicator comprises 15 KFSIs and each KFSI contains a certain number of questions. For example, KFSI 1 (banking secrecy) contains 7 questions, whereas KFSI 6 (country by country reporting) contains only one. The weight of each of these questions in a KFSI is determined beforehand¹⁵⁶, and the weighted average of these questions results in the score for a KFSI, expressed on a scale of 0 to 1.
167. These KFSIs are then aggregated by arithmetic mean and the result is expressed as a percentage. It is this percentage that represents the secrecy score of a country, i.e. the extent of its financial secrecy where 0% is for the most complete transparency and 100% expresses complete opacity.
168. At a later date – and this is a characteristic of the FSI that distinguishes it from other indicators – each country is attributed a global scale weight. The purpose of this stage, in addition to the extent of a country's financial secrecy, is to take into consideration its contribution to the problems of illegal financial flows at international level. The countries that are attributed the greatest weights are those that play the most important roles on the financial service market intended for non-residents. In practical terms, the FSI team uses data that is available publicly on the international financial service trade of each country¹⁵⁷ in order to calculate the proportion that the trade represents compared to the worldwide total. The formula for the global scale weight of a country is therefore simply the volume of its exports of financial services divided by the total exports of financial services at global level (equation 5). It should be noted that the scale weight of a country has little meaning in itself; it is more a measurement of a country's potential to "contribute to the global problem of (financial) secrecy, if the secrecy policy is effectively adopted"¹⁵⁸.

¹⁵³ Particularly if it concerns a measurement of frequency or when the question applies to both instruments of national law and instruments of foreign law.

¹⁵⁴ See Key Financial Secrecy Indicator 13 (see below for an explanation of KFSIs).

¹⁵⁵ See Key Financial Secrecy Indicator 11.

¹⁵⁶ Tax Justice Network, Financial Secrecy Index 2013 – Methodology (Tax Justice Network, 2013, pp. 83-85 (Annexe C))

¹⁵⁷ The team mainly uses the IMF Balance of Payments Statistics and if any data is missing, the team extrapolates from stock measurements to generate flow estimations, following the IMF methodology (Ibid., p. 65).

¹⁵⁸ Author's translation, see Ibid., p. 69.

Equation 5

$$\text{Global Scale Weight}_i = \frac{\text{Export of financial services}}{\text{Total exports of financial services at global level}}$$

169. Lastly, the Financial Secrecy Index for a country i is obtained from the secrecy score and global scale weight. To obtain variations of the same scope of these measurements, a transformation is applied to each one before multiplying them (see equation 6).

Equation 6

$$\text{FSI}_i = (\text{Secrecy Score}_i)^3 \times \sqrt[3]{\text{Global Scale Weight}_i}$$

7. Final observations

170. This report shows the vitality of the legal indicator industry at transnational level and the tendencies in conceptual, methodological and strategic terms. At conceptual level, this report shows that the legal indicators tend to measure legal objects as socio-legal outcomes and often to focus on the perception of their performance. At methodological level, we are experiencing the increased use of methods for collecting empirical data on a large geographical scale and an annual update of results. Even though internal expertise indicators are still relevant, the use of surveys of the general population and experts is growing fast. Similarly, the complexity of statistical methods used by second generation indicators shows a significant methodological change in the legal measurement industry. Lastly, at strategic level, it is clear that a network of indicator producers is being gradually set up and that the success of new indicators is partly linked to their effective interaction with existing indicators and their institutionalisation by third parties.

171. Nowadays legal indicators offer measurements that are increasingly precise, relevant and necessary for public decision makers and private managers and they therefore contribute to the integration of managerial logic into law. This is now becoming essential in order to consider a large number of legal questions, particularly in the context of competition between legal systems that is inevitably becoming part of our globalised society.

172. These developments lead to the conclusion that the question that the legal specialists must tackle faced with the vitality of the indicators is no longer to determine whether or not a legal phenomenon is measurable (this report shows that they all are), but rather which phenomena it is relevant to measure, for what purpose and with what limitations.

Developments in social sciences show that legal measurements still have a way to go, particularly towards “big data” and evidence-based decision-making, but in the meantime legal indicators will doubtless continue to develop.

Chapter 4 – Developing the Legal Certainty Indicator (LCI)¹⁵⁹

173. The Legal Certainty Indicator is the result of permanent discussions between the research team and legal professionals. In the launch phase the indicator methodology was chosen jointly by the Civil Law Initiative and the monitoring committee chaired by J-L Dewost. Together the research team and the monitoring committee decided to create cases relating to 6 sectors that the practitioners and academics considered fundamental for evaluating the legal certainty of a system.

174. The creation phase of the cases was therefore the subject of attentive monitoring by the committee of professionals, in terms of both the wording and scoring of the questions. Once the cases were validated by the committee of professionals, they were submitted to the expertise of an international scientific committee in order to test the relevance of the questions in the 13 countries studied.

I. Discussions on the methodology

175. When the project was launched the monitoring committee chaired by J-L Dewost was the research team's preferred contact. The initial meetings focused on the appropriate methodology for creating a Legal Certainty Indicator. It was jointly decided to adopt a qualitative approach which would be more suitable for assessing the legal certainty of a law.

176. In this perspective the principle of the index is that well thought-out legal certainty is not synonymous with immobility or the equivalent of either total lack of legislative or regulatory constraint or even minimal constraint. On the contrary, it presupposes the accessibility of applicable law, its predictability, achieved through the ranking of the norms and the predefined roles of lawmakers and judges, reasonable stability over time and lastly, a balance between economic interests and the parties concerned.

A. General methodology

177. The research team adopted the "case method": this consists in defining a model legal case in which several sets of problems emerge relative to legal certainty and in questioning a specialist in order to observe how such a case is resolved by his/her national law.

¹⁵⁹ This chapter was supervised by Professors Bruno Deffains and Catherine Kessedjian assisted by Pierre Bentata and Romain Espinosa.

178. In order to ensure that this method was appropriate it was decided to first perform in-depth bibliographical research into the subject of legal certainty in the 4 languages of the project (German, English, Spanish and French). It was thus possible to identify the most problematic legal cases from the point of view of legal certainty.

B. Problems of legal certainty

179. On completion of this bibliographical research the research team proposed an approach to legal certainty covering mainly the issues of transparency, accessibility, stability and legal predictability, including also, in certain situations, issues of fairness (particularly in cases of employment law).

180. Based on this approach, it was decided to divide each case into two sections: the first dealing with the major problems defined earlier (“general questions”) and the second with their implementation in the case observed, as well as problems specific to the case (“specific questions”).

C. Choice of legal sectors

181. Once the methodology was accepted the team chose 6 legal sectors: contracts, property, liability, corporate law, employment law and dispute settlement. In particular, the discussions with the committee of professionals highlighted the importance of employment law mainly because it was an essential component in choices by investors and was often a source of uncertainty, for both the employer and the employee.

182. Moreover, the committee suggested a special methodology be adopted for dispute settlement as it is, by definition, too specific to be divided into two separate sections, i.e. general questions on the law in force and questions specific to the case concerned. The legal specialists of the research team accepted this suggestion.

183. Lastly, the team suggested two separate cases be created for each sector studied in order to cover all the questions relative to legal certainty for the various legal sectors.

II. Validation of the cases by the group of professionals

184. Each of the 12 cases created by the team was the subject of specific monitoring by the committee. Once the case was drawn up it was sent to all the committee members for their observations and recommendations.

A. Monitoring the drawing up of the cases

185. Each case was monitored by a committee member who is a specialist in the sector studied. In collaboration with the specialist, the research team defined precisely the topic and presentation of the case before drawing up all the questions. It was thus possible to maintain an identical structure for all the cases (other than for dispute settlement) while specifically studying the problems relevant to each sector.

186. At the meetings where the cases were presented, the discussions between the researchers and professionals concluded in how exactly each question should be worded, both in terms of its form and content. The purpose of this work was to formulate relevant questions that could be understood by all the specialists in the sector observed, irrespective of the legal system in their countries.

187. Several discussions were on how the questions were worded. The research team economists stressed the importance of avoiding conditional questions that are particularly difficult to process from a statistical point of view. Furthermore, they also suggested that as far as possible a number of identical questions be used for each case. During this stage the discussions therefore made it possible to reach a consensus, taking into consideration the statistical recommendations of the economists while maintaining the relevance of the handling of each case. Consequently, the number of questions may vary from one case to another, thereby changing the weight of each response in the same case. But this solution is the only satisfactory one in order to have a sufficient number of questions to cover every aspect of legal certainty relative to the various legal sectors considered by the index.

B. Choice of question wording: two examples

188. Concerning the accessibility of the rule, the research team had decided to pose a question on the nature of the rule, considering that accessibility is not the same depending on whether the rule is legislative or case-law in origin. The team therefore suggested the following wording:

Is the rule of legislative¹⁶⁰ or case-law origin?

- ☐ Legislative, available in a collection¹⁶¹
- ☐ Case-law, available in a collection¹⁶²
- ☐ Legislative, available in a collection, but the case-law, which is also present in a collection, is important in order to understand it
- ☐ Case-law, available in a collection, and the case-law, which is not present in a collection, is important in order to understand it
- ☐ Legislative, scattered throughout multiple texts, and the case-law is important in order to understand it
- ☐ Case-law, scattered throughout multiples sources

189. Given the somewhat unrealistic character of certain responses (“legislative, available in a collection”), that may influence the respondents, the monitoring committee suggested that the question be divided as follows:

- Is the rule legislative in origin (yes/no), then
- If the rule is of purely case-law origin, is it available in a collection? (yes/no)

190. The conditional wording (if “yes”) posed a problem, because a respondent who answered “yes” to the first question could not respond to the second, creating a different weighting between the various respondents. The team modified the question thus:

Is the rule of legislative or case-law origin?

- ☐ Legislative, available in a collection, interpreted by case-law also present in a collection
- ☐ Case-law, available in a collection
- ☐ Legislative, scattered throughout multiple sources, and the case-law is important in order to understand it
- ☐ Case-law, scattered throughout multiple sources

Similarly, in terms of stability of the law, the team asked the following questions:

¹⁶⁰ “Legislative origin” refers to both a law adopted by lawmakers and other regulatory bodies or authorities reporting to the executive power. In other words by this we mean that it is “written law”.

¹⁶¹ “Collection” refers to any official code or private compilation that regulates the texts and facilitates the understanding thereof.

¹⁶² In certain countries there exist ordered collections of case-law.

Is the rule controversial and are there plans to modify it?

- ☐ Not controversial and no plans to modify it
- ☐ Controversial and no plans to modify it
- ☐ Not controversial and plans to modify it
- ☐ Controversial and plans to modify it

Has the interpretation of the law changed in the past?

- ☐ No
- ☐ Yes, less than 5 years ago with prior notice of the change
- ☐ Yes, less than 5 years ago without prior notice

191. The monitoring committee expressed reservations on the subject of these two questions, considering that the question left great scope for the respondent's subjectivity and that the second did not enable legal certainty to be judged, because the fact of a rule changing does not, in itself, provide information on the legal certainty of a system. The committee members suggested the questions be reformulated in order to highlight the uncertain nature of a rule that may have to be changed too often. The team therefore decided to replace these two questions with the following:

Has the rule changed in the last 5 years?

- ☐ No
- ☐ Yes, once
- ☐ Yes, twice
- ☐ Yes, three times or more

This approach of discussing and rewording questions until a consensus was reached was applied to all the questions.

III. The choice of scoring

192. The scoring of cases was also discussed by the committee and the research team. As for the devising of the cases, the result is the product of many discussions.

A. Monitoring the scoring

193. The team initially presented its methodology for normalising the scores before the committee validated it following a discussion process that gave an indication of the scope of the challenge consisting in creating a qualitative indicator.

B. Purpose of the discussions: examples

194. Three questions illustrate the discussions between the committee and the research team, as well as the questions posed during this phase.

The first question had been the subject of a discussion on the origin of the rule (“Is the rule of legislative or case-law origin?”). The research team considered that the origin of the rule was not, as such, a source of more or less legal certainty, but that ease of access to this rule was the fundamental point. The team therefore suggested identical scoring be used for rules of legislative and case-law origin, only taking into consideration the fact of whether or not they were available in a collection:

Is the rule of legislative or case-law origin?

<input type="checkbox"/> Legislative, available in a collection, interpreted by the case-law that is also present in a collection	10
<input type="checkbox"/> Case-law, available in a collection	10
<input type="checkbox"/> Legislative, scattered throughout multiple sources, and the case-law is important in order to understand it	0
<input type="checkbox"/> Case-law, scattered throughout multiple sources	0

The professionals nevertheless explained that the presence of a rule in a collection was not equivalent to codification of the law and that therefore a rule of case-law origin, even though it may be present in a collection, could not be as easily accessible as a law of legislative origin present in a collection. The committee therefore suggested the scoring be modified as follows:

Is the rule of legislative or case-law origin ?

- | | |
|--|----|
| <input type="checkbox"/> Legislative, available in a collection, interpreted by the case-law also present in a collection | 10 |
| <input type="checkbox"/> Case-law, available in a collection | 5 |
| <input type="checkbox"/> Legislative, scattered throughout multiple sources, and the case-law is important in order to understand it | 0 |
| <input type="checkbox"/> Case-law, scattered throughout multiple sources | 0 |

195. The second question had been the subject of a discussion on checking compliance (“Is the rule checked to ensure it complies with the Constitution?”). The research team had considered that checking compliance before the law was introduced was safer than a control *ex post* or that a control could take place both before and after the law was introduced. The following scoring was therefore proposed:

Is the rule checked to ensure it complies with the Constitution?

- | | |
|---|----|
| <input type="checkbox"/> Yes, before the rule is included in the legal system | 10 |
| <input type="checkbox"/> Yes, after the rule comes into force | 5 |
| <input type="checkbox"/> Yes, both before and after the rule comes into force | 5 |
| <input type="checkbox"/> No | 0 |

Certain committee members approved of this scoring while others felt that the research team was influenced by the need for legal efficiency rather than certainty. Focusing solely on legal certainty, the professionals pointed out that double checking was safer. After discussion, it was decided to go along with the majority of professionals and to modify the scoring as follows:

Is the law checked to ensure it complies with the Constitution?

- | | |
|--|----|
| <input type="checkbox"/> Yes, before the law is included in the legal system | 5 |
| <input type="checkbox"/> Yes, after the law comes into force | 5 |
| <input type="checkbox"/> Yes, both before and after the law comes into force | 10 |
| <input type="checkbox"/> No | 0 |

196. Lastly, the third question was on scoring responses relative to public policy (“Does public policy play a part in the sectors concerned?”). The research team decided to award the best score to systems in which public policy did not play a part, because for investors this meant that the rules would never be questioned in the name of this principle which is often difficult to understand. The professionals nevertheless replied that public policy did not bring legal certainty into question and that therefore its intervention would not penalise a legal system. Faced with this difficulty it was decided not to score this question.

197. After validation by the monitoring committee, the team organised a so-called “crash test” phase during which the cases were sent to an international scientific committee whose members were selected jointly by the research team and the Civil Law Initiative.

198. The members of the scientific committee received all the cases as well as the scoring and had several weeks in which to discuss them with the research team. The response rate of the members of the international scientific committee was relatively high (65%).¹⁶³

199. On the whole the international scientific committee approved the methodology, question wording and response scoring. They nevertheless made three main recommendations:

- (i) All the members of the scientific committee responded that they agreed on the fact that it is impossible for a legal specialist, whether researcher or practitioner, to respond to all 12 cases for their country of origin. Because the reliability of the indicator depends on the relevance of the responses to each of the cases and for each country, the members of the scientific committee confirmed the relevance of the method proposed by the team, i.e. to use at least two respondents per country and per legal sector.

This first recommendation was taken into consideration by the research team which contacted over 300 specialists in order to comply, as far as possible, with the constraint of having at least two respondents per sector and per country.

- (ii) Certain members of the scientific committee questioned the choice of the legal sectors studied, suggesting that the criminal sector and the law on companies in difficulty be included.

¹⁶³ Professors Laurent Bieri (Lausanne University), Richard Brooks (Yale University), Yun-Chien Chang (Academia Sinica Taiwan), Dominique Demougin (Liverpool University), Kun Fan (CUHK), Michael Faure (Maastricht University), Claude Fluét (Quebec University in Montreal), Ejan Mackaay (Montreal University), Tadaki Matsukawa (Osaka University), Mavluda Sattorova (Liverpool University), Wei Shen (Koguan Law School, Shanghai) and Federica Cristani (Research Associate at Verona University) made their observations in writing or as part of direct discussions (meetings, phone calls).

In accordance with the discussions between the Foundation and the research team, the members of the scientific committee were reminded that the creation of the indicator constitutes a first stage that could be extended in the future to all sectors of the law.

- (iii) Certain members of the scientific committee also questioned the relevance of a qualitative indicator to evaluate the law. They nevertheless acknowledged that the construction of cases, as prepared by the team, based on precise questions, permitted actual problems of legal certainty to be targeted and to reinforce the relevance of the indicator.

IV. Conditions for constructing the LCI Index

A. Choice of sectors

200. The aim of the study is to evaluate legal certainty for a foreign investor wishing to start a business in the country observed. Initially, it was therefore necessary to define the problems common to all the legal systems. To achieve this we first listed all the scientific articles – in all four languages of the project, i.e. German, English, Spanish and French – relative to the concept of “legal certainty”. This enabled us to determine the main principles and topics to be tackled by the questionnaires. This preparatory work took the form of a glossary of legal certainty and a bibliography.¹⁶⁴ These two documents reveal major differences in the concerns of practitioners and academics in the various systems. The topic of legal certainty is in fact hardly discussed at all in German and Spanish literature and any references are more indirect or understood as part of a larger problem. In Anglo-American literature the topic is tackled more from the perspective of legal uncertainty or legal risk – which demonstrates an approach that is focused on the failures of the law in terms of predictability and stability.

201. The bibliographical study and drawing up of the glossary made it possible to identify accurately the main common problems of legal certainty and to define six key sectors of legal certainty for an investor: contract law, property law, liability law, corporate law, employment law and dispute settlement.

202. Two cases were identified for each sector. Each case concerns a problem that the researchers and practitioners considered of vital importance. The cases therefore cover, for each sector, all the questions needed to evaluate the legal certainty of a system.

¹⁶⁴ Detailed in Appendix I.

B. Choice of respondents

203. For each country we questioned at least one specialist for each legal sector studied. Each specialist therefore had to respond to two cases, except for the dispute settlement sector where the two cases required knowledge and skills that were too different to be answered by a single specialist.

204. The respondents were preferably chosen from lawyers and legal specialists in the sector concerned and who practise in the country for which they were to respond. We were therefore certain of the respondents' ability to envisage the proposed cases in practical, concrete terms.

205. For certain sectors and in certain countries it proved impossible, however, to find available practitioners. In this context, we called on academics who are specialists in the legal system observed and whose work focuses mainly on the sector in question.

C. Drawing up the questionnaires

206. For each sector we drew up two questionnaires that focussed on the two main problems of legal certainty. Each problem is presented in terms of a case study (1.3.1.). Except for the "dispute settlement" sector, all the cases have the same structure, consisting of a first sub-section that examines the general principles that apply to the case and a second sub-section that gives details of the specific problems of the case studied (1.3.2). Irrespective of the case studied, the same methodology was used concerning the wording of the questions and question type. This methodology is presented in section 1.3.3. Lastly, before being presented to the respondents, each case was validated by a scientific committee comprising experts on legal certainty (1.3.4)

1. Choice of cases

1.1. Contracts

207. For the large "contracts" topic field we created one case on price indexing (appendix IV) and one case of clauses limiting liability and penalty clauses (appendix V).

208. It was decided to choose contractual hypotheses between well-matched partners to avoid importing the problem of consumer contracts into the case. It also seemed closer to the concerns of a future investor to ensure free will was respected in a sector where it should reign supreme.

Case No. 1:

209. Price adjustment is one of the most open questions in comparative law and the most likely to create uncertainty for operators.

210. The price indexing case not only makes it possible to check whether a price indexing clause will be complied with in the envisaged legal system, but also, in the absence of such a clause, two other hypotheses. The first concerns the possible presence in the contract of a general revision clause (i.e. a clause relating to the general revision of the contract, not only the price, in the event of a change of circumstances). We need to determine whether the clause will be complied with and whether it will be applied to the price revision even though it is not necessarily intended for that purpose. The second concerns a judge's approach in the absence of any revision clause. Could a judge nevertheless order the parties to renegotiate the contract or otherwise amend the contract or take into consideration the change in price of raw materials to increase or decrease liability in the event of the contract being terminated?

Case No. 2:

211. Like Case No. 1, in contractual terms the questions addressed in Case No. 2 are recurrent for operators and are handled in various ways in comparative law.

212. The case concerning the clauses limiting liability and penalty clauses also ensure that free will is upheld. Furthermore it measures the predictability that companies must be able to make of the economic consequences of a contract being terminated. These clauses are particularly interesting to evaluate in that they are handled differently from one country to another.

1.2. Property

213. For the "Property" topic field we devised a case on land acquisition (appendix VII) and a case on the construction of immovable property (appendix IX).

Case No. 1:

214. The questions mentioned in this case are recurrent for investors and the handling of them differs from one system to another.

215. This case evaluates how easy it is to establish ownership rights over property. The questions focus mainly on the ownership of the land, proof of ownership and the fact of the right being legally binding. Moreover, the impact of the environmental constraints on legal certainty is also taken into account.

Case No. 2:

216. The questions focus mainly on the laws regulating the construction of a building.

217. This case checks the clarity and predictability of the responses to the problems of building construction, financing and defects. It also evaluates the timelines needed to obtain a building permit and the existence of the various compliance inspection mechanisms by the public authorities.

1.3. Liability

218. For the substantial “liability” topic field we devised cases on industrial risks (appendix XII) and a case on faulty products (appendix XIII).

Case No. 1:

219. The first liability case focuses on liability resulting from industrial risk, i.e. damage to the output of farming land due to toxic products being discharged into a river by a paper manufacturer.

220. The questions focus mainly on the guilty party’s means of defence and proof and also the chain of liability. This case evaluates the predictability of the outcome of the dispute in terms of industrial accidents and also the clarity of the clauses and means for waiving liability.

Case No. 2:

221. The second liability case focuses on liability due to faulty products, concerning serious malfunctions of a new model of electric kettle marketed by the company in question.

222. As in case No. 1, the questions focus on the predictability of the outcome of disputes in terms of product liability. This case shows how easily the liable party can predict the system to which it will be subject and the clarity of the means for waiving its liability.

1.4. Corporate

223. For the “Corporate” topic field we devised a case of a company takeover (appendix XIV) and a case of handling conflicting interests in the sale of a building (appendix XV).

Case No. 1:

224. This case focuses on the liability of the vendors and determining the price of the shares in a company when it is taken over.

225. The questions evaluate the clarity of the rules governing the takeover of a company both in terms of the liability of the parties and the guarantee of the selling price of the shares. This problem is recurrent in the literature on legal certainty and the way in which it is handled varies considerably from one system to another.

Case No. 2:

226. This case focuses on the sale of a building to a company controlled by the vendor. The questions focus on the minority shareholders who are disputing the sale claiming that the selling price is abnormally low.

227. This case observes the means available to minority shareholders of a company. The questions evaluate the scope of the minority shareholders' rights and the certainty of such rights in the various systems.

1.5. Employment

228. Employment law represents an essential component of legal certainty and undoubtedly influences the decisions of potential investors. For this topic field we devised the takeover or transfer of a company (appendix VI) and a case of the use of short-term contracts (appendix VII).

Case No. 1:

229. The first employment law case focuses on the takeover or transfer of a company. It concentrates on tackling the way in which the transferor and transferee may – or may not – negotiate the transferee keeping the staff on its payroll.

230. The questions assess not only the clarity but also the scope of the rights of each party (transferor, transferee, staff). These questions evaluate the means available to each party in order to measure the predictability of the outcome of the conflicts as well as the degree of protection granted to the successive employers and staff.

Case No. 2:

231. The second employment law case focuses on the use of casual labour where a company recruits staff on the basis of three-month employment contracts.

232. The questions reveal the degree of legal certainty for the staff and compare the obligations incumbent on both parties (employer and employee) if the contract terminates.

1.6. Dispute settlement

233. For the “dispute settlement” topic field we devised a case concerning national courts (appendix X) and a case concerning arbitration (appendix XI).

Case No. 1:

234. The first dispute settlement case focuses on dispute settlement before the State justice concerning a dispute over unfair competition.

Case No. 2:

235. The second dispute settlement case focuses on arbitration in a commercial dispute between two well-matched partners.

236. Concerning the arbitration case it was decided that a legal system that failed to respect the will of the parties to submit their disputes to arbitration provided less legal certainty than a country that did so. Moreover, it was decided to prefer *ad hoc* arbitration over institutional arbitration, particularly to avoid importing difficulties related to the competition between institutions. What is more, arbitration institutions are not necessarily representatives of a legal system.

8. Structure of the cases

237. Except for the “dispute settlement” sector all the legal topics have the same structure: the first section groups the “general questions” together, which are the same for all the cases, and the second section focuses on questions specific to the problem under discussion.

2.1. General questions

238. The “general questions” section is divided into sub-topics on access to legal information, access to justice, the predictability and stability of law. In virtually all cases it comprises 15 general questions that evaluate the characteristics that define the certainty of a legal system. It is for this reason that the 15 questions are scored identically in all the cases.

2.2. Specific questions

239. The specific section focuses on the points of law that present particular interest in the context of the case studied and that would appear essential for legal certainty. In this section the nature and number of questions vary according to the number and complexity of the points that need to be discussed and evaluated. For example, “Property” case No. 1 comprises 28 specific questions whereas “Liability” case No. 2

comprises only 11. In order to retain the greatest relevance, it was decided to discuss as many specific points as necessary, even when that implied a great variation in the total number of questions for each case.

2.2.1. Question types

240. From a methodological point of view there are 4 types of question: category, binary, quantified and catalogue. The first three types of question may be used in a questionnaire intended to draw up an index, i.e. to normalise responses in order to classify them and draw up a ranking. On the other hand, the “catalogue” questions, like the open questions used in the directive and semi-directive interviews, are not relevant because they do not allow any ranking and therefore any scoring. A catalogue question is formulated as follows: *“Does your legal system fall under the Common Law or the Civil Law?”*. It is understood that no response may be considered superior to another from a normative point of view. We therefore decided never to use catalogue questions. The three other types of question were used, with a preference for binary and category questions.

i) Quantified questions

241. Quantified questions focus on monetary values, durations or participation rates. They are formulated as follows: *“What are the legal costs of taking a case to court if the contractual clauses of this contract are not complied with?”*. For these questions the scoring may be continuous, semi-continuous or per segment. With continuous scoring the responses are noted according to their absolute value. In the previous example, if two respondents had announced 100 euros and 200 euros respectively, the first response would have had 10/100 points and the second 10/200 points (the responses being scored out of 10). With semi-continuous scoring, a threshold is defined above which all responses must have the same score. Lastly, with scoring per segment, intervals are defined and all the values present in the same interval are given the same number of points.

ii) Binary questions

242. The binary questions are yes/no type responses. For example, *“Do the parties have the possibility of using arbitration?”*. For these questions the scoring is very simple: one response is worth the maximum points (10) and the other zero.

iii) Category questions

243. Category questions offer several choices from a list on which all the options may be ranked on a normative scale, ranging from the best to the worst option. They are

formulated as follows: *“Has the norm in question been the subject of differing interpretations in the past? (1) No; (2) Yes, more than 10 years ago, (3) Yes, more than 5 but less than 10 years ago (4) Yes, less than 5 years ago.”* The scoring is then performed such that the best response is worth 10, the worst 0 and that the two intermediary scores are equidistant from the lowest and highest. In other words, in our example response (1) is worth 10, (2) is worth 20/3, (3) is worth 10/3 and (4) is worth 0.

244. Category questions were prioritised because they obtain a large quantity of information in only a few questions and therefore cover a wide range of problems with a questionnaire limited to approximately 25 questions. As an example, the category question brings the following two binary questions: *“Is the rule of legislative or case-law origin?”* and *“Is the rule available in a collection?”* together in a single question the possible responses to which are (1) Legislative, available in a collection, interpreted by the case-law which is also present in a collection, (2) Case-law, available in a collection, (3) Legislative, scattered throughout multiple sources, and the case-law is important in order to understand it; (4) Case-law, scattered throughout multiple sources.

2.2.2. Case validation

245. Once they had been devised the cases were submitted to a scientific committee¹⁶⁵ in a “crash test” phase. No member of the scientific committee challenged the questionnaire method based on case studies or the structure of the questionnaires. For the purposes of transparency the main observations of the scientific committee are summarised below.

- (i) The members of the scientific committee agree on the fact that it is impossible for legal specialists, whether researchers or practitioners, to respond to all 12 cases for their country. As the reliability of the indicators depends on the relevance of the responses to each case and for each country, the members of the scientific committee confirmed the relevance of the method proposed by the team, i.e. choosing at least one respondent (two or more being preferable) for each country and legal sector. This means that the responses will be given by specialists, who are the only guarantors of an accurate response.
- (ii) Certain members of the scientific committee questioned the choice of the legal sectors studied, particularly suggesting that the criminal sector be included. In accordance with the discussions between the Foundation and the research team, the members of the scientific committee were reminded that the creation of the Indicator constitutes an

¹⁶⁵ Professors Laurent Bieri (Lausanne University), Richard Brooks (Yale University), Yun-Chien Chang (Academia Sinica Taiwan), Dominique Demougin (Liverpool University), Kun Fan (CUHK), Michael Faure (Maastricht University), Claude Fluét (Quebec University in Montreal), Ejan Mackaay (Montreal University), Tadaki Matsukawa (Osaka University), Mavluda Sattorova (Liverpool University), Wei Shen (Koguan Law School, Shanghai) et Federica Cristani (Research Associate) (Verona University).

initial stage which will be enlarged to include all legal sectors at a later date. We therefore suggest that no changes be made to the policy adopted.

- (iii) The members of the scientific committee pointed out that constitutional control often functions in very different ways from one country to another. In order to take all of these characteristics into consideration and to avoid any problems of understanding, we added a footnote stipulating that a non-automatic control the implementation of which is always possible is considered to be a control.

2.3. Scoring criteria

2.3.1. Normalisation of scores

246. In order to avoid any risk of random scoring when a question offers more than two responses, it is necessary to “normalise” the scores, i.e. ensure that the difference between each score is always the same. If three responses are possible, the best being worth 10, the question is then how to score the worst and intermediary response. At first glance, two solutions would appear possible: score both responses at random (for example by giving 7 to one response and 3 to the other) or adopt a scientific scoring criterion for all questions offering more than two responses. In the first situation the random choice of the scores implies that each response will have a specific weight and the weight will depend on the random choice of the people responsible for scoring the responses. It would therefore be easy for anyone who is sceptical about the Legal Certainty Indicator to suggest a new ranking of legal systems by changing, even very slightly, the weight of certain responses.
247. To avoid this pitfall we decided to apply scoring based on a scientific, impartial criterion: only the ranking of the responses is predefined (the best response, the worst and the intermediary if a question proposes 3 responses). When the ranking is established the best response is automatically worth 10 and the worst 0. The intermediary response(s) are then calculated such that they all retain the same distance from the immediately superior and immediately inferior response. In this way the scoring can no longer be qualified as random because the relative weight of each response is defined according to a mathematical method applied identically to all the questions for all the cases.
248. The scoring method was therefore as follows: the best response always scores 10 and the worst 0. If there are 3 possible responses, the interval (0, 10) must be divided into 2 equal sections, which means that the intermediary score is worth 5 ($10/2$). If there are 4 possible responses, the interval (0, 10) must be divided into 3 equal sections, the second best response then being worth $2/3$ of 10, and the third $1/3$ of 10. Therefore, in the latter case, the 1st response (that which brings the most legal certainty) is worth 10 points, the 2nd response (the second best in terms of legal certainty) is worth $10 \cdot (2/3) = 20/3$ points, the 3rd response (the 3rd in order of legal certainty) is worth $10 \cdot (1/3) = 10/3$ points and

the 4th response (the worst in terms of legal certainty) is worth 0 points. This gives an equal difference between the responses.

Insert: Example of scoring

To the question on Access to Justice: “Is the rule available in a language other than the official language(s) of the country?”, there are 4 possible responses ranked from best to worst: 1) Yes, in more than 2 foreign languages, 2) Yes, in 2 foreign languages, 3) Yes, in one foreign language, 4) No.

Response 1) is automatically scored 10 and response 4) is scored 0. The score for response 2) must have the same difference with the score for 1) as the score for 3). The same applies to 3) which must be equidistant between 2) and 4). A single scoring is therefore possible: 2) is worth $20/3$ and 3) is worth $10/3$.

2.3.2. Aggregation methods

2.3.2.1. Score and rank

249. The method used to aggregate results inevitably poses problems because no method is definitively superior to the others. Moreover, the choice of method partly determines the final result. Several aggregation methods are possible for the Legal Certainty Indicator. Firstly, the results may be aggregated according to the score obtained in each of the topics studied. In this situation, as each topic is handled using two questionnaires the score attributed to the topic equals the mean of the scores for each questionnaire, and the final score is the mean of the scores in each of the topics. The advantage of this method lies in the fact that it reveals the differences between countries. By comparing the scores of two countries it is very easy to measure the distance that separates them. On the other hand, this method implicitly poses the hypothesis that each point has the same value, irrespective of the legal topic observed. Obtaining an excellent score in one legal sector and a very poor score in another is the equivalent of obtaining an average score in both sectors.

250. A second method consists in ranking countries according to their rank in each topic, from first to last. In this method the rank in one legal topic is the mean of the ranks achieved in each of the two questionnaires of the topic and the final rank is the mean of the ranks in each topic. The advantage of this method lies in the fact that it normalises

the results and therefore better situates each country according to its relative performances. On the other hand, this method does not accurately evaluate the distance that separates two countries that follow one another in the ranking. It is not therefore possible to determine whether the difference between the 12th and 13th is large or small and whether it is larger than that between the 2nd and 3rd.

251. We decided to adopt the first method, considering that a Legal Certainty Indicator must, above all, be used to measure differences between the various systems.

2.3.2.2. Arithmetic and geometric means

252. Irrespective of the method chosen, there are two ways of calculating the results: either by arithmetic mean or by geometric mean. The arithmetic mean is the sum of the ranks or scores obtained divided by the number of observations. In practical terms, it therefore gives as much importance to each rank or score irrespective of whether some are very high and others very low. On the contrary, the geometric mean – which is the n th root of the product of the scores or ranks – diminishes rapidly when a score or rank is low. Thus, using a geometric mean, there is a tendency to penalise countries in which one legal sector is weak (from a legal point of view) even though the other sectors may have obtained good results.

253. We decided to adopt the arithmetic mean. We also present, however, a general ranking using the geometric mean method.

2.3.3. Weighting of scores

254. Each case, except for the “dispute settlement” sector, contains general and specific questions. As explained above, the general questions are identical from one sector to another. These questions therefore have very important relative weight both in the score per sector and the final score. It is therefore appropriate to weight these general questions in order to limit their influence compared to the specific questions.

255. In order to do this, it is necessary to weight the most relevant weighting. To avoid any random choices we adopted a statistical method consisting in observing the variation in general ranking of countries according to the relative weighting given to the general questions. In this way we defined different intervals of weighting for which the ranking remained stable and we decided to retain the largest interval, considering that it therefore represented the weighting that was overall most stable. Once this interval was defined we chose the mean weighting of this interval. This method was used to define the most stable weighting scientifically, which was 25% for the general questions and 85% for the specific questions.

Insert: determining the weighting of the general questions

1. Mean without weighting

For each case k , there are general questions q_{gk} and specific questions q_{sk} .

Thus the unweighted mean of a case k for a country i is: $Q_{ki} = \frac{Q_{gki} + Q_{ski}}{2}$,

where $Q_{gki} = \frac{1}{n_{gk}} \sum q_{gki}$ and $Q_{ski} = \frac{1}{n_{sk}} \sum q_{ski}$

2. Mean with weighting

Using a coefficient α the weight (as a percentage) of general questions Q_{gki} is weighted such that:

$$Q_{ki} = [\alpha Q_{gki}/100 + (1 - \alpha)Q_{ski}/100] \text{ and } \alpha \in [0, 100]$$

For each country i , the general score for all the sectors is given by:

$$Q_{\alpha} = \frac{1}{k+1} (\sum Q_{\alpha k} + Q_d)$$

where $Q_{\alpha k}$ is the score obtained in sector k and Q_d is the score obtained in the “dispute settlement” case.

The general scores $Q_{\alpha i}$ are then ranked such that $Q_{\alpha 1} > Q_{\alpha 2} > \dots > Q_{\alpha 13}$.

The position of the country i in the previous ranking is then named $R_{\alpha i}$.

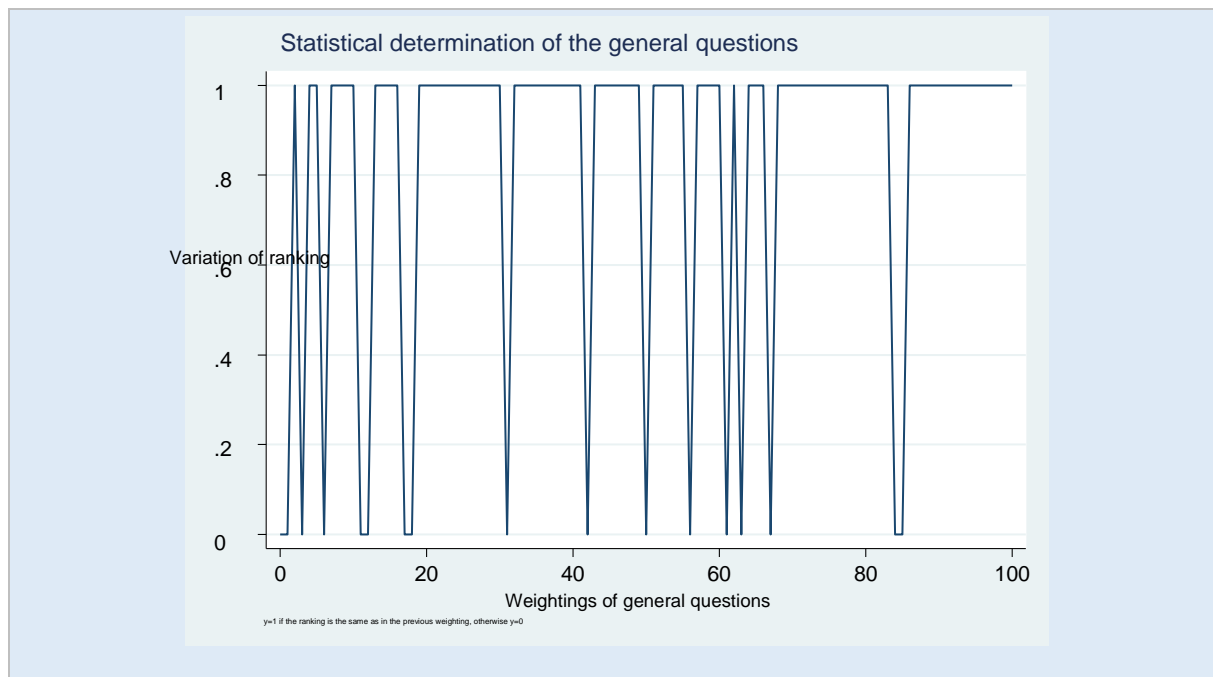
The final stage consists in determining the most stable interval of weighting, i.e. the largest interval of α for which the ranking does not change. To do this the scoring is as follows:

$$\begin{cases} C_{\alpha} = 1 \text{ si } R_{\alpha} \neq R_{\alpha-1} \\ C_{\alpha} = 0 \text{ si } R_{\alpha} = R_{\alpha-1} \end{cases}$$

Lastly, in interval $[0, 100]$ the largest possible interval $[\alpha_1, \alpha_2]$ is sought such that: $\forall \alpha \in [\alpha_1, \alpha_2], C_{\alpha} = 1$.

The results show that the largest interval for which the general ranking remains stable is given by $\alpha \in [19, 31]$.

We therefore choose the weighting $\alpha = 25$, i.e. a weighting of 25% for the general questions.



2.3.4. Weighting of sectors

256. Lastly, a third criterion of the aggregation is based on the choice of weightings of the different legal topics. The question of weighting is important for practitioners who assign great importance to a single legal sector and who want to compare countries based on this sector alone. However, the decision to weight each topic differently inevitably implies a degree of arbitrariness. All the topics are therefore given the same weight in determining the index.

257. For the purposes of clarity for practitioners and scientific transparency, we chose to aggregate the final indicator based on a non-weighted arithmetic mean. On the dedicated website users of the index may, however, apply a geometric mean and chose the weighting of each topic. Each user may therefore “customise” the indicator to his/her requirements.

Chapter 5 – Results and establishing the Legal Certainty Indicator (LCI)¹

258. The results of the study are first given without weighting (2.1.) then using the weighting method explained above (2.2.)

I. Raw results

259. In this unweighted ranking, the Common Law countries score very badly. This can be explained partly by the poor results they obtained in the general questions which severely penalise systems where the law is not in the form of Codes and where the Constitution is not expected to control conformity. This limit must be indicated, because it appears clearly that the wording of the general questions itself penalises countries whose legal system is too different from French law.

A. General ranking

260. The following ranking highlights the low scores of Common Law countries when answering general questions. In fact, the United Kingdom, the United States and Canada are the countries with the worst rankings. This type of grouping of countries that have major similarities in the very structure of their law leads us to suspect that the respondents from these countries had the same difficulties responding to certain questions. As we explained above, it is possible that the general questions are not entirely coherent with a Common Law system, particularly by virtue of the numerous references to Constitutional control or the notion of there being a “rule”. Therefore unweighted results should be approached carefully and are only given for information, to highlight the differences in results once weighting is taken into account.

¹ This chapter was supervised by Professor Bruno Deffains assisted by Pierre Bentata and Romain Espinosa

General ranking (arithmetical mean)

<i>Ranking</i>	<i>Country</i>	<i>score</i>
1	France	7.14
2	Norway	7.09
3	Morocco	7.00
4	Germany	6.98
5	Senegal	6.63
6	Argentina	6.40
7	China	6.32
8	Japan	6.04
9	Brazil	5.98
10	Italy	5.93
11	United Kingdom	5.89
12	United States	5.37
13	Canada	5.33

B. Ranking by sector

261. The following rankings give the results for each country for the six sectors surveyed. Overall, the results vary only slightly between Case 1 and Case 2 except in the “Dispute settlement” sector which is explained by the very different approaches of the two questionnaires. Moreover, this result confirms the validity of our choice to submit the two questionnaires to different specialists, contrary to the method adopted for the other sectors.

1. Contract

<i>Ranking</i>	<i>Country</i>	<i>Score</i>	<i>Case 1</i>	<i>Case 2</i>
1	Norway	7.80	7.79	7.81
2	France	7.34	7.64	7.03
3	Morocco	7.33	7.06	7.60
4	Senegal	7.01	6.27	7.76
5	Brazil	6.91	6.76	6.86
6	Germany	6.79	6.62	6.98
7	Italy	6.20	6.62	5.78
8	United States	6.01	5.88	6.14
9	Argentina	5.95	5.52	6.38
10	United Kingdom	5.61	5.39	5.83
11	Japan	5.36	4.41	6.32
12	China	5.35	5.29	5.41
13	Canada	3.64	3.43	3.84

2. Disputes

<i>Ranking</i>	<i>Country</i>	<i>Score</i>	<i>Case 1</i>	<i>Case 2</i>
1	Morocco	7.08	6.62	7.55
2	Germany	7.03	7.61	6.44
3	France	6.96	7.59	6.33
4	China	6.89	6.90	6.88
5	Norway	6.34	6.04	6.64
6	Italy	6.29	6.33	6.26
7	United Kingdom	6.29	5.69	6.89
8	Argentina	6.21	5.94	6.49
9	Senegal	6.17	6.15	6.19
10	United States	5.93	4.81	7.05
11	Brazil	5.86	5.88	5.83
12	Japan	5.66	4.81	6.5
13	Canada	5.24	4.61	5.89

3. Property

<i>Ranking</i>	<i>Country</i>	<i>Score</i>	<i>Case 1</i>	<i>Case 2</i>
1	Germany	8.55	8.62	8.49
2	Norway	8.17	8.16	8.18
3	Morocco	7.56	7.69	7.42
4	France	7.11	7.07	7.16
5	Brazil	6.71	6.91	6.51
6	Argentina	6.50	6.72	6.28
7	Senegal	6.28	6.12	6.44
8	United Kingdom	6.11	6.02	6.21
9	Japan	5.94	5.37	6.51
10	United States	5.79	6.12	5.45
11	Canada	5.38	6.07	4.70
12	China	5.24	4.96	5.53
13	Italy	4.55	5.24	3.86

4. Liability

<i>Ranking</i>	<i>Country</i>	<i>Score</i>	<i>Case 1</i>	<i>Case 2</i>
1	Germany	7.42	7.65	7.08
2	Japan	7.14	7.35	6.93
3	France	6.88	6.95	6.81
4	Argentina	6.87	7.34	6.41
5	Senegal	6.82	6.82	6.82
6	Canada	6.76	6.70	6.82
7	Italy	6.50	6.94	6.06
8	Morocco	6.35	6.80	5.91
9	United Kingdom	6.16	6.67	5.65
10	Norway	6.14	6.70	5.57
11	China	5.72	6.05	5.45
12	Brazil	5.34	6.82	3.86
13	United States	3.97	5.06	2.88

5. Corporate

<i>Ranking</i>	<i>Country</i>	<i>Score</i>	<i>Case 1</i>	<i>Case 2</i>
1	China	7.87	7.94	7.81
2	France	7.72	6.94	8.51
3	Senegal	7.21	6.61	7.81
4	Morocco	6.91	6.89	6.93
5	Argentina	6.44	5.78	7.10
6	Brazil	6.39	5.42	7.37
7	Norway	6.24	6.17	6.31
8	United States	5.88	6.50	5.26
9	Japan	5.77	4.44	7.10
10	Germany	5.72	5.53	5.92
11	United Kingdom	5.22	5.44	5.00
12	Italy	4.77	5.33	4.21

6. Employment

<i>Ranking</i>	<i>Country</i>	<i>Score</i>	<i>Case 1</i>	<i>Case 2</i>
1	Norway	7.88	7.88	7.88
2	Italy	7.29	7.16	7.43
3	France	6.84	6.51	7.18
4	China	6.83	6.74	6.92
5	Morocco	6.77	6.97	6.60
6	Germany	6.35	6.36	6.34
7	Japan	6.35	6.32	6.38
8	Senegal	6.27	6.06	6.47
9	United Kingdom	5.95	6.70	5.19
10	Canada	5.63	5.30	5.96
11	Brazil	4.69	4.70	4.68
12	United States	4.64	4.54	4.73

II. Weighted results

262. This section presents the rankings once the general questions have been weighted. The results are different from the previous section and seem more relevant in the light of the economic development and appeal of the country being studied.

A. General ranking

263. If we compare the following ranking and the unweighted ranking we find major differences. The United Kingdom, Canada and Germany are considerably better placed gaining 7, 4 and 1 places respectively. On the contrary, Senegal, Morocco, Argentina and Brazil respectively lose 2, 4, 5 and 4 places. Norway, which was ranked 4th goes to the top of the rankings. These changes would seem logical as they show that by assigning less weight to the structure of the law and more to the handling of disputes in practice, countries in which an activity holds a greater place in fact offer more certainty. This could be interpreted as a learning effect.

264. This new ranking seems coherent. Norway, Germany and France and the United Kingdom would appear to have the most reliable legal systems.

Furthermore, as we explained above, this new ranking would seem to penalise the Common Law countries less even though the ranking of the United States remains very poor, which is not entirely coherent with its level of appeal and the vitality of company creation in the country.

265. The detailed ranking gives scores obtained for each sector of the law surveyed. It would appear that with the exception of China, the scores are relatively uniform from one sector to the next. China's score in the corporate law sector is fairly surprising, in the region of 9 out of 10 when in the other sectors its average score is less than 6.50.

266. But the scores differ from one sector to another. For example, most countries obtain higher scores in contract law than liability law. This may mean that the cases are not of the same level of severity, which may be related to the fact that the problems presented by each case did not have the same degree of complexity.

General ranking

<i>Ranking</i>	<i>Country</i>	<i>Average</i>	<i>Contract</i>	<i>Disputes</i>	<i>Property</i>	<i>Liability</i>	<i>Corporate</i>	<i>Employment</i>
1	Norway	7.19	7.81	6.34	7.77	5.98	6.86	8.36
2	Germany	6.93	8.13	7.03	8.28	6.59	5.43	6.11
3	France	6.82	5.31	6.96	7.54	6.54	7.79	6.80
4	United Kingdom	6.56	8.03	6.29	5.98	5.91	5.89	7.26
5	China	6.41	6.23	6.89	5.29	4.85	8.79	6.39
6	Morocco	6.38	6.56	7.08	7.10	4.54	6.88	6.14
7	Senegal	6.35	7.49	6.17	5.99	5.86	7.24	5.32
8	Italy	6.19	5.52	6.29	5.09	5.57	6.99	7.69
9	Canada	6.13	6.56	5.24	5.46	6.89		6.47
10	Argentina	6.03	5.46	6.21	6.60	6.20	5.69	
11	Japan	5.97	5.95	5.66	5.82	6.47	5.55	6.39
12	United States	5.75	7.03	5.93	5.90	4.92	6.24	4.48
13	Brazil	5.63	5.47	5.86	7.03	4.12	6.37	4.96

267. Finally, the difference between the best score and the worst varies widely from one sector to the next. It is, in fact, very slight for dispute settlement (1.84 point separating the best score from the worst) and very great for corporate law and the laws on Employment (respectively 3.46 and 3.86). In the other sectors this difference is between 2.77 and 3.17. These differences may be due to the fact that certain sectors of law tend to become more uniform while others remain very specific to their national legal system.

B. Ranking by sector

268. The following rankings give the results for each country for the six sectors studied. Overall the results vary little between Case 1 and Case 2 except for the “Dispute settlement” sector which can be understood as being due to the very different approaches of the two questionnaires. In addition, this result bears out the validity of our decision to submit the two questionnaires to different specialists, unlike the method applied to the other sectors.

1. Contract

Ranking	Country	Score	Case 1	Case 2
1	Germany	8.13	7.77	8.49
2	United Kingdom	8.03	8.49	7.56
3	Norway	7.81	8.02	7.60
4	Senegal	7.49	6.26	8.73
5	United States	7.03	6.41	7.66
6	Canada	6.56	6.17	6.95
7	Morocco	6.56	8.48	4.64
8	China	6.23	7.34	5.13
9	Japan	5.95	6.49	5.40
10	Italy	5.52	6.37	4.66
11	Brazil	5.47	5.36	5.57
12	Argentina	5.46	3.95	6.96
13	France	5.32	5.59	5.05

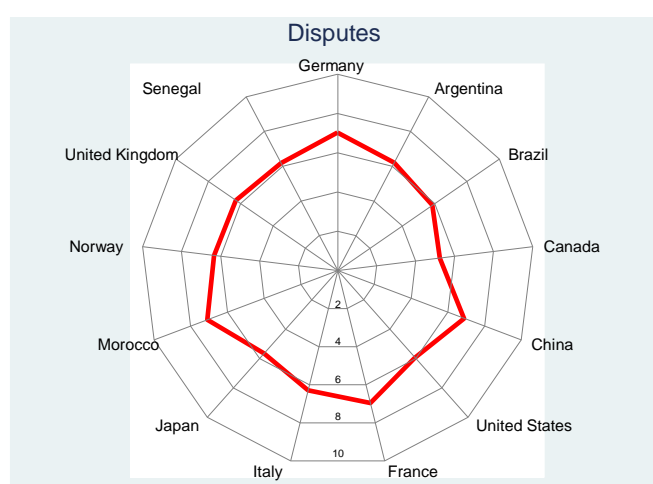
269. In the Contracts sector we find very disparate results from one country to the next. English-speaking countries overall score better than in the other cases. The United Kingdom, for example, comes 2nd and the United States 5th.



2. Disputes

Ranking	Country	Score	Case 1	Case 2
1	Morocco	7.08	6.62	7.55
2	Germany	7.03	7.61	6.44
3	France	6.96	7.59	6.33
4	China	6.89	6.90	6.88
5	Norway	6.34	6.04	6.64
6	Italy	6.29	6.33	6.26
7	United Kingdom	6.29	5.69	6.89
8	Argentina	6.21	5.94	6.49
9	Senegal	6.17	6.15	6.19
10	United States	5.93	4.81	7.05
11	Brazil	5.86	5.88	5.83
12	Japan	5.66	4.81	6.5
13	Canada	5.24	4.61	5.89

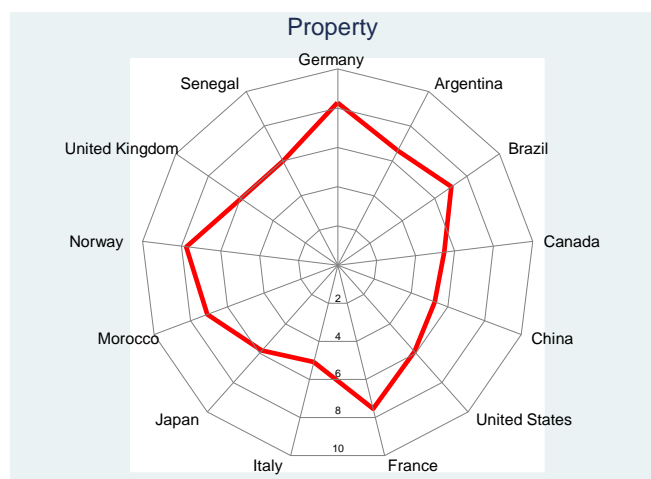
270. The three highest-ranking countries are Morocco, Germany and France. But it will be noted that the difference between the countries is relatively lower than in the other sectors.



3. Property

Ranking	Country	Score	Case 1	Case 2
1	Germany	8.28	8.52	8.04
2	Norway	7.77	8.00	7.54
3	France	7.54	7.15	7.93
4	Morocco	7.10	7.63	6.56
5	Brazil	7.03	7.09	6.96
6	Argentina	6.60	6.88	6.32
7	Senegal	5.99	6.14	5.84
8	United Kingdom	5.98	5.95	6.01
9	United States	5.90	6.22	5.57
10	Japan	5.82	5.22	6.42
11	Canada	5.46	6.16	4.77
12	China	5.29	4.89	5.69
13	Italy	5.09	5.43	4.75

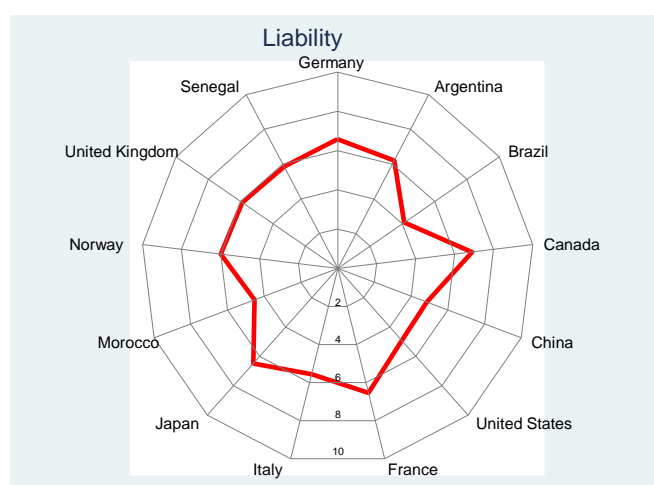
271. In this sector we would point out the low score of Italy which, with a score of 5.09, has more than three points less than Germany.



4. Liability

Ranking	Country	score	Case 1	Case 2
1	Canada	6.89	7.38	6.41
2	Germany	6.59	6.98	6.20
3	France	6.54	6.99	6.09
4	Japan	6.47	6.65	6.30
5	Argentina	6.20	6.48	5.92
6	Norway	5.98	6.72	5.24
7	United Kingdom	5.91	6.55	5.28
8	Senegal	5.86	5.95	5.77
9	Italy	5.57	6.16	4.97
10	United States	4.92	6.00	3.84
11	China	4.85	5.16	4.55
12	Morocco	4.54	5.29	3.78
13	Brazil	4.12	6.61	1.63

272. The results are overall lower than in the other sectors with the highest score at 6.89 and a minimum of 4.12. Moreover, 4 countries scored below average, namely the United States, China, Morocco and Brazil. Another point worth noting is the good score for Canada which has a poor ranking in other sectors.



5. Corporate

Ranking	Country	score	Case 1	Case 2
1	China	8.79	8.32	9.26
2	France	7.79	6.74	8.83
3	Senegal	7.24	6.55	7.93
4	Italy	6.99	5.94	8.03
5	Morocco	6.88	6.79	6.98
6	Norway	6.86	6.29	7.43
7	Brazil	6.37	5.18	7.56
8	United States	6.24	6.74	5.75
9	United Kingdom	5.89	5.46	6.32
10	Argentina	5.69	5.45	5.93
11	Japan	5.55	4.72	6.37
12	Germany	5.43	5.55	5.31

273. China scored highest in this sector, followed by France and Senegal. This ranking shows considerable disparity between the scores. We would point out the good score of the United States which achieves a better ranking here than in other sectors. Another point of note is the poor result achieved by Germany.



6. Employment

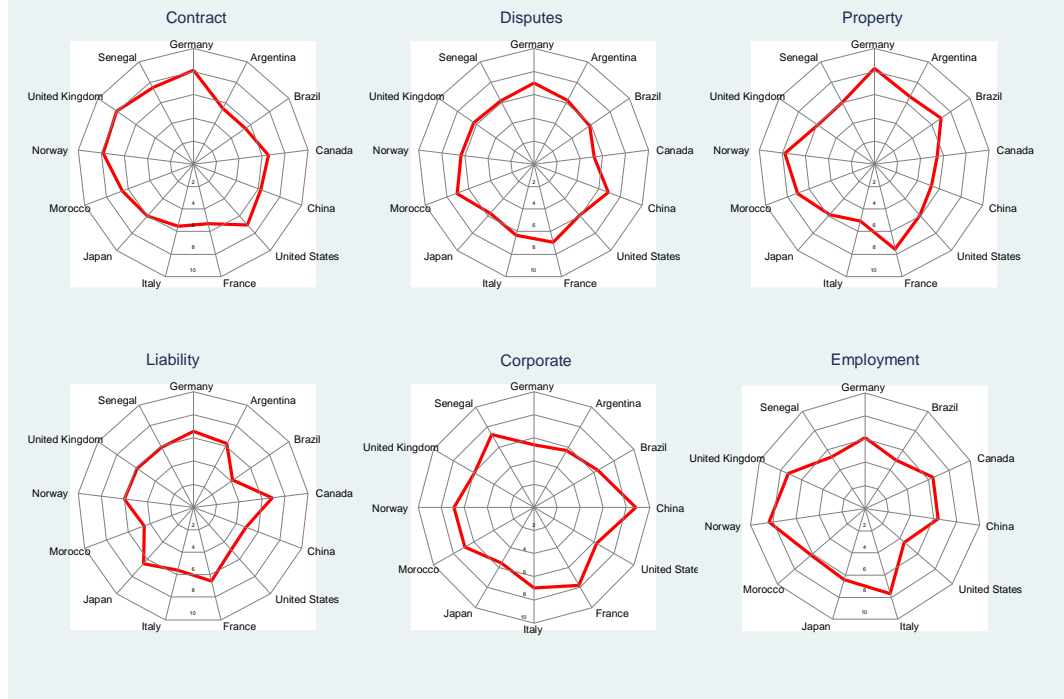
Ranking	Country	score	Case 1	Case 2
1	Norway	8.36	8.32	8.40
2	Italy	7.69	7.60	7.77
3	United Kingdom	7.26	7.89	6.63
4	France	6.80	6.46	7.15
5	Canada	6.47	6.47	6.47
6	Japan	6.39	6.84	5.94
7	China	6.39	6.09	6.69
8	Morocco	6.14	5.72	6.56
9	Germany	6.11	6.57	5.64
10	Senegal	5.32	4.48	6.15
11	Brazil	4.96	4.89	5.03
12	United States	4.48	3.93	5.04

274. In this sector Italy comes second behind Norway. This is Italy's best ranking.

As in the "Contract" sector, the United Kingdom comes third showing that different systems can provide a good level of legal certainty in employment law. Lastly, the distance between countries is particularly significant with Norway having nearly 4 points more than the United States.



Breakdown by sector of law



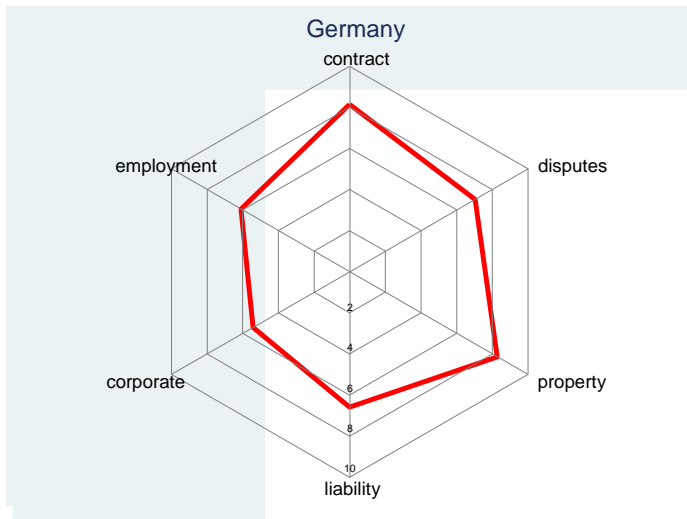
C. Results by country

275. In this final sub-section we will look at the results by sector for each country. By comparing the scores obtained in each sector we will establish a snapshot of legal certainty in each country observed.

1. Germany – General ranking 2nd

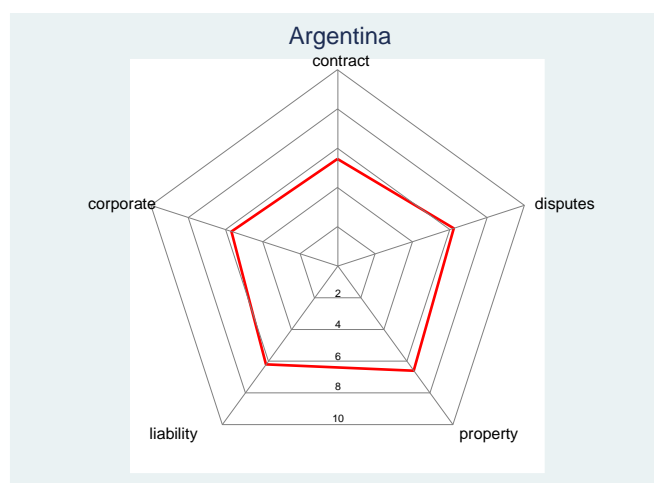
276. German law appears to score well in the Contracts and Property sectors. Germany holds first place in both these sectors.

On the other hand the ranking is lower in the corporate law and employment law sectors.



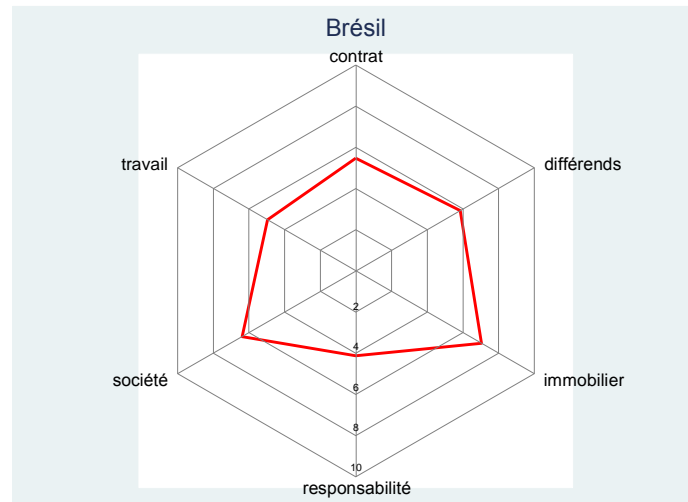
2. Argentina – General ranking 10th

277. Argentina's scores in the six sectors studied are all very close. Therefore all the sectors of the law appear to have similar degrees of legal certainty.



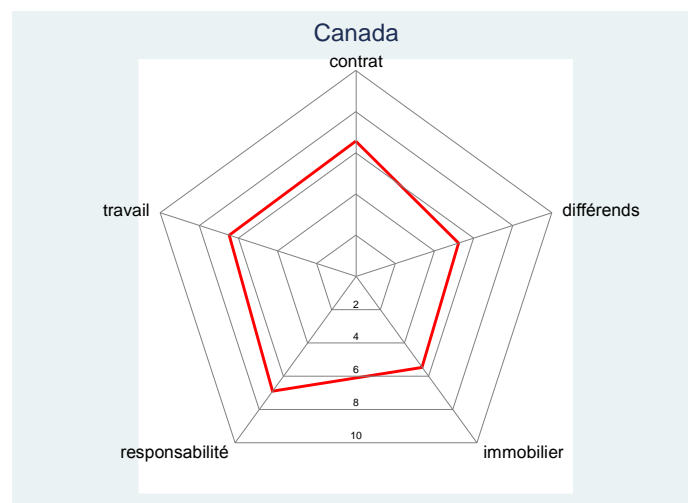
3. Brazil – General ranking 13th

278. The level of legal certainty in Brazilian law varies greatly from sector to sector. For example, corporate law and property law stand out more.



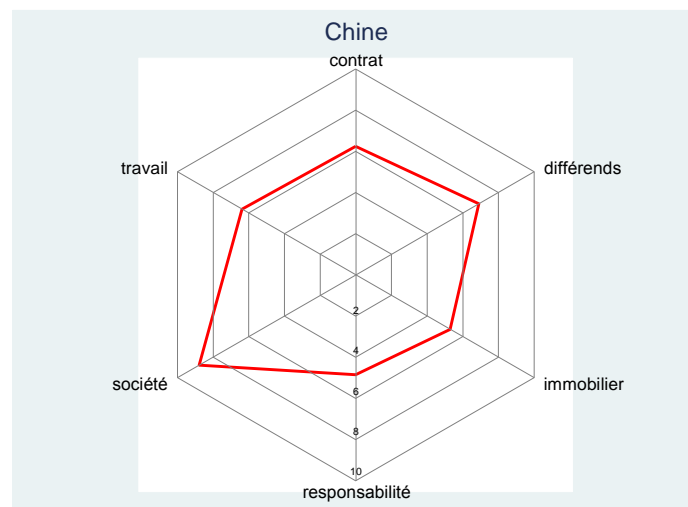
4. Canada – General ranking 9th

279. The degree of legal certainty varies between sectors. For example, property law and the dispute settlement appear to score badly. On the other hand, compared with all the other countries Canada has a good position in the sectors of contract law and the employment law. Lastly, liability law emerges as the best positioned as Canada comes 1st.



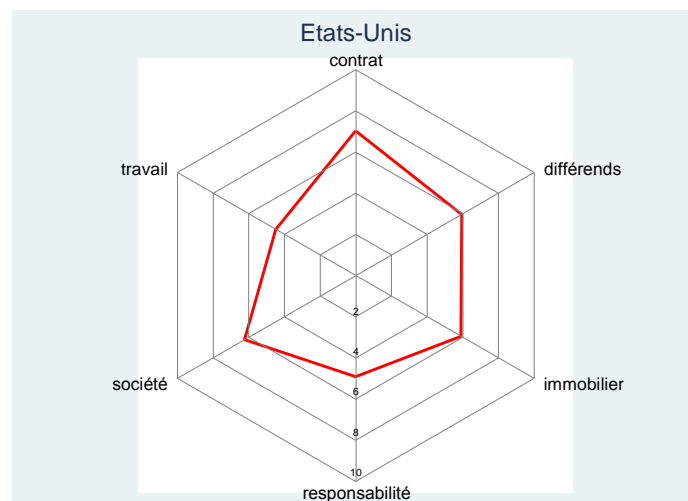
5. China – General ranking 5th

280. China is a special case. While five sectors of law obtained scores that were relatively close, reflecting a level of legal certainty that is fairly uniform, corporate law appears to perform particularly well. But we should stress that this result requires further analysis in that China's excellent score in this sector is particularly due to the nature of the second questionnaire which was based on binary responses for which China always obtained favourable responses. More precisely, liability law and property law are ranked lowest followed by employment law and contract law. In all these sectors China's ranking varies between 8th and 11th place.



6. United States – General ranking 12th

281. The United States is well placed as regards contract law and it is in this sector that the country gets the best ranking (5th). The United States' results in the sectors of corporate law, property law and the dispute settlement are very close to this.

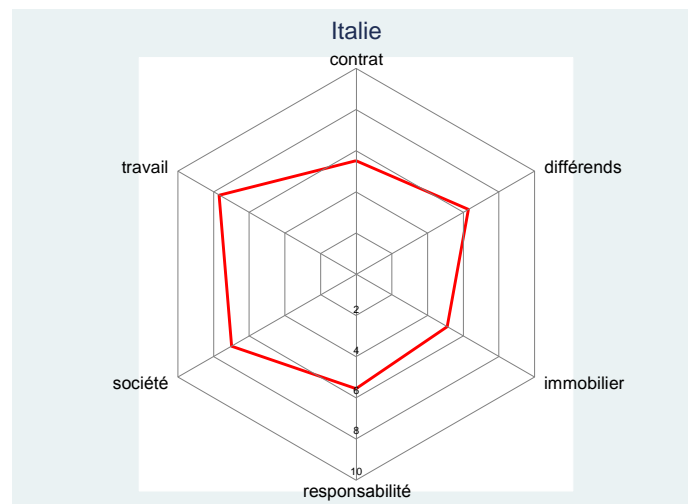


7. France – General ranking 3rd

282. France scored well in the sectors of corporate law and property law. The country comes in the first three in 4 out of the 6 sectors studied (disputes, property, liability and corporate). Contract law would appear to be the sector where results are the least good².

8. Italy – General ranking 8th

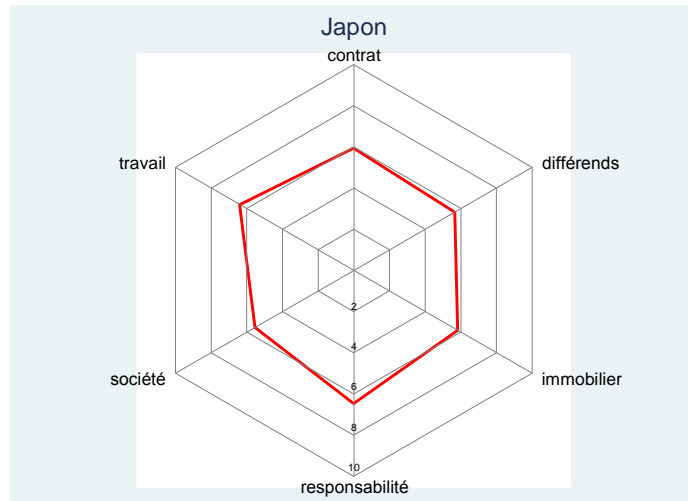
283. The results obtained for Italy vary greatly between sectors, leading us to believe that legal certainty differs by sector. We note that the sectors of contract law, the dispute settlement and property law score least well. In contrast, the sectors of corporate law and employment law obtained the best ranking. In these two sectors Italy comes respectively 4th and 2nd.



² The team would like to stress that both the questionnaires and the analysis of data were undertaken well before the Ministry started issuing statements about the draft Order reforming the law on contracts (March 2015).

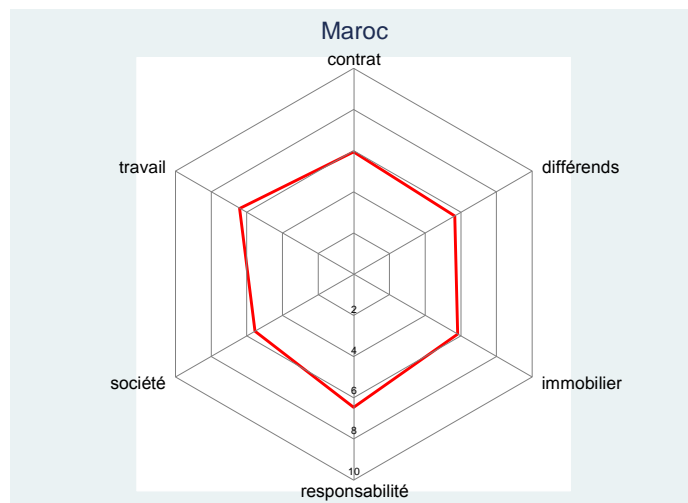
9. Japan – General ranking 11th

284. Japan's legal system offers the same degree of legal certainty across the board. The scores obtained are very close from one sector to another, varying between 5.55 for corporate law and 6.47 for liability law.



10. Morocco – General ranking 6th

285. Like Japan, Morocco presents a relatively uniform profile.

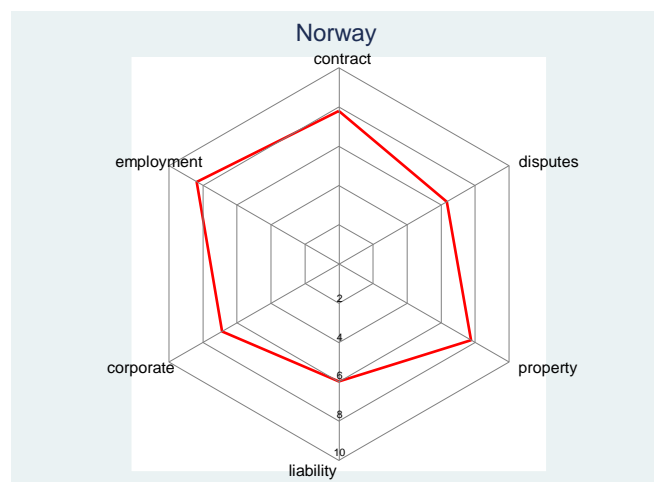


11. Norway – General ranking 1st

Norwegian law emerges in the best position in all sectors in terms of legal certainty.

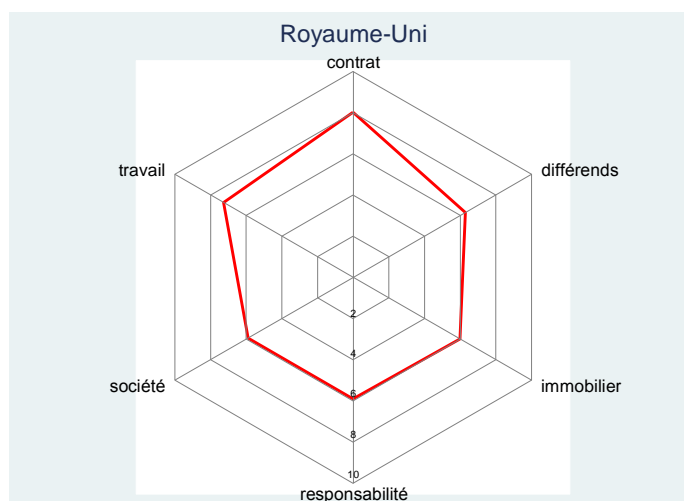
Despite this, not all the sectors offer the same degree of certainty. For example, liability law and the dispute settlement appear slightly less well placed.

In contrast, contract law and employment law appear very certain. In fact in employment law Norway would appear to give the best level of legal certainty (graded 1st).



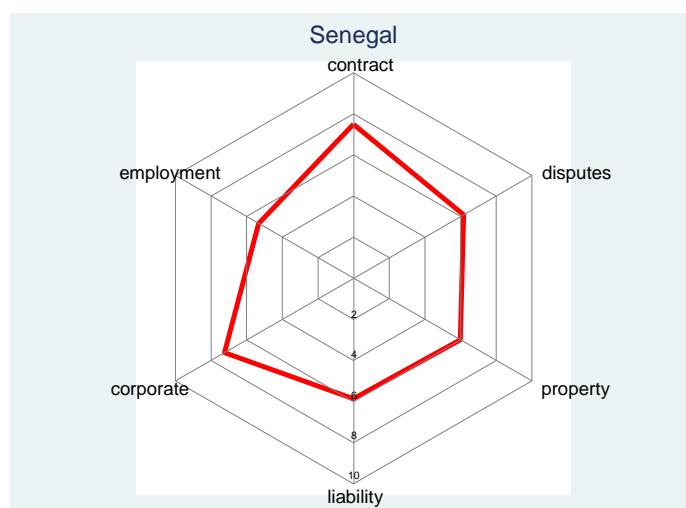
12. United Kingdom – General ranking 4th

286. The legal system in the United Kingdom means that degrees of legal certainty vary more greatly from one sector to the next. It is worth noting the good ranking in contract law.



13. Senegal – General ranking 7th

287. Senegal displays considerable disparity between sectors. Senegal appears to offer poorer legal certainty in the sectors of liability law and property law while corporate law and contract law appear fairly well positioned.



General Conclusion

1. Why do we need yet another index? Economic players are increasingly confronted with a complex legal reality distinguished by pluralism and a diversity of norms in most sectors of law. Our aim is not to add to the prevailing confusion in which public and private decision-makers all over the world are bombarded with legal information; our aim is to highlight a reality: no legal system can be presented as being intrinsically superior to any other in terms of legal certainty.
2. The recurrent arguments about the competition between or convergence of legal systems are meaningful but there are good reasons for thinking that in order for comparable degrees of economic development to be achieved, different legal systems have been used. It is this that our comparative empirical analysis seems to show in terms of legal certainty. There are differences between countries and sectors of law but none of them systematically comes down in favour of one legal tradition over another.
3. When we consider France in particular we see clearly that French law can be measured against other legal systems even though there is room for improvement on some points in terms of legal certainty. This conclusion appears at least as important as that which in the past led us to stress “legal formalism”. The fact that in France a company can be registered very quickly (usually within 24 hours) certainly allows it to take its place in certain international rankings but does not say much about the legal certainty which is, after all, at the heart of relations between economic players.
4. People have all too often tried to use empirical studies to highlight “absolute advantages” when in fact such advantages are at best relative, only applying to specific areas. At the end of the day we find that most countries included in this survey offer a satisfactory degree of legal certainty. If we may adopt a normative point of view for a moment, the most important thing is to acknowledge the importance of the process of ongoing improvement in legal certainty irrespective of the legal environment concerned.
5. Clearly as this is groundbreaking work on a subject that is particularly difficult to grasp empirically, it is obvious that conclusions in terms of general findings must not be allowed to blur the boundaries of the exercise. This work should be seen as a first stage which will encourage future developments, particularly in enlarging the lists of countries and legal sectors. We also need to improve the methodology used to draw up the questionnaires and process the data. This is yet another reason for strengthening cooperation between legal specialists and economists; this is vital if this project is to be brought to a satisfactory conclusion.

Annexes

Annexe I – List of reached persons

Allemagne

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Annexe II – Glossary

NB the translations are drawn from ECJ decisions

Introduction

The following glossary has been drawn up in accordance with the task entrusted to us, imagining ourselves to be in the position of a company seeking to invest in one of the countries concerned and wishing to analyse that country's legal system from the point of view of legal certainty. Most of the chosen areas of the law involve partners of equal strength. The only exception is labour law. Labour law highlights the fact that legal certainty is not in itself a rule of law. It concerns the relationship between a person and the regulatory framework within which that person acts. Also, when there is an imbalance between the two parties involved in a relationship (which is the case with the employment relationship, but also with any other contractual relationships in which there is a power relationship³), it is advisable to take into account, in constructing indices, the variety of potential infringements from a legal perspective. This poses an additional problem when constructing the index.

Accélération du temps juridique	Acceleration of judicial process
Accès à la justice	Access to justice
(Accès au droit codifié et accès au droit légiféré)	(Access to codified law and statute law)
Accessibilité de la norme (accès physique à la norme, aux décisions judiciaires, au statut conventionnel, aux éléments contractuels ; « accessibilité intellectuelle » : voir « simplicité du droit »)	Accessibility of legal norms (physical access to norms, judicial decisions, conventional norms, contractual matters; "intellectual accessibility": see "simplicity of the law")
Actions de groupe	Group actions
<i>Amicus curiae</i>	<i>Amicus curiae</i>
Atténuation de la prolifération des règles et de leurs sources	Attenuation of the proliferation of rules and their sources
Auteurs des normes (par ex. autorités administratives indépendantes)	Authors of norms (e.g. independent administrative authorities)
Adaptation (par rapport à stabilité)	Adaptability (compared to stability)
Ambiguïté (par opposition à clarté et	Ambiguity (as opposed to clarity and intelligibility for all)

³ P. Lokiec, *Contrat et pouvoir* (Contract and Power), LGDJ, 2003.

intelligibilité pour tous)	
Annonce du revirement de jurisprudence (ou prévisibilité des revirements de jurisprudence)	Announcement of changes in case law (or predictability of changes in case law)
Anticipation des changements (cela doit être lié à l'adaptation du droit, à la transparence, notamment)	Anticipation of changes (this must be associated, notably, with adaptation/adaptability of the law, transparency)
Application de la norme dans le temps (voir rétroactivité)	Application of the norm over time (see retroactivity)
Arbitrages du législateur entre les intérêts en présence ⁴	Balancing/Evaluation by the legislator of the respective interests involved ⁵
Arbitraire (application arbitraire de la norme)	Arbitrariness (arbitrary application of the norm)
Attente légitime (confiance légitime) (anticipations)	Legitimate expectation
Authentification des actes	Authentication of official documents
Autoréglementation (règles que les parties se donnent elles-mêmes. Exemple : les accords collectifs).	Self-regulation (rules the parties set themselves. E.g.: collective agreements).
Autorité de la chose jugée	Authority of <i>res judicata</i>

Bonnes pratiques / <i>Best practices</i> / <i>Benchmarking</i> / Méthode ouverte de coordination	Best practices / Benchmarking / Open method of coordination
Bonne administration de la justice (efficacité du système judiciaire)	Sound administration of justice (efficiency of the judicial system)
Bonne foi	Good faith
Brutalité du changement (progressivité du changement)	Abruptness of change (progressiveness of change)

Clarté (lisibilité)	Clarity (readability)
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⁴ Une question générale se pose que l'équipe n'a pas encore tranchée : l'évaluation doit-elle porter seulement sur les processus ou doit-elle aussi prendre en considération une part de substance ? Si l'on répond par l'affirmative à la deuxième partie de la question, la subjectivité de l'évaluation sera beaucoup plus grande.

⁵ A general question arises which the team has not yet resolved: should the assessment cover solely procedural aspects or also take into account part of substantive law? If the answer to the second part of the question is yes, the assessment will be far more subjective.

Codification (terme ambiguë car susceptible de plusieurs méthodes : la codification dite « à droit constant » en France n'a pas grand chose à voir avec la codification napoléonienne). (Codifier le droit c'est le rationaliser, l'ordonner, le hiérarchiser, le rendre accessible à tous ⁶ . Quid des <i>restatements</i> à l'américaine ?).	Codification (ambiguous term because of its susceptibility to several different methods: codification known as "constant law" in France has very little in common with the Napoleonic codification). (To codify law is to rationalise and set rules for it, establish its hierarchy and make it accessible to all ⁷ . Similar to American-style <i>restatements</i> ?).
Cohérence	Consistency
Cohérence intra-temporelle	Consistency (inter-temporal)
Commission d'évaluation des pratiques commerciales	Commission for the Evaluation of Business Practices
Commission paritaire d'interprétation ⁸	Joint Interpretation Committee ⁹
Communication des documents administratifs	Communication of administrative documents
Communiqué (comme outil au service de l'accès à la norme, aux décisions judiciaires) ¹⁰	Communiqué (a bulletin used as a tool for providing access to norms and judicial decisions) ¹¹
Compensation en raison du préjudice subi par une norme nouvelle	Compensation for damages suffered by reason of a new norm
Complexité (excessive) ¹²	Complexity (excessive) ¹³
Compréhension de la norme (à rapprocher d'accessibilité, de lisibilité, de clarté)	Comprehensibility of the norm (closely related to accessibility, legibility, and clarity)
Concept clandestin ¹⁴	Concept (clandestine) ¹⁵

⁶ Exemple particulier en droit du travail.

⁷ Particular example in labour law.

⁸ Il s'agit d'une commission qui s'occupe des problèmes d'interprétation des conventions collectives) / hiérarchie des normes / interprétation du droit / autorité *ab initio* / interprétation par rescrit/contrôle de conformité.

⁹ This is a commission which deals with problems of collective agreement interpretation/hierarchy of norms/interpretation of laws/*ab initio* authority/interpretation by ruling/control of compliance.

¹⁰ Exemple pris des communiqués de la chambre sociale de la Cour de cassation en France qui utilise abondamment cette pratique pour livrer son interprétation des arrêts qu'elle rend.

¹¹ Example taken from bulletins issued by the social affairs chamber of the Court of Cassation in France, which makes abundant use of this practice in its interpretations.

¹² La complexité en elle-même n'est pas un problème, si la norme est justifiée par des intérêts généraux et qu'elle est précise et intelligible.

¹³ Complexity in itself is not a problem, if the norm is justified by the general interest and is precise and intelligible.

¹⁴ Fait référence au fait que dans certains pays le concept n'est mentionné dans aucune législation, contrairement au droit brésilien par exemple.

Concurrence des droits (est parfois dite développer l'esprit de réforme)	Conflicting laws (sometimes said to encourage a spirit of reform)
Concurrence loyale (connaître le droit c'est assurer sur un marché donné une concurrence loyale entre les acteurs)	Competition (fair) (to understand the law is to vouchsafe a market in which there is fair competition between the actors involved)
Confiance légitime	Legitimate expectation
Confiance dans les institutions	Trust in the institutions
Consolidation des textes législatifs (renvoi à une forme de codification)	Consolidation of legislative texts (reference to a form of codification)
Consultations des parties prenantes (notamment consultation préalable en cas de réforme)	Consultation of stakeholders (particularly prior consultation in the event of reform)
Contrôle constitutionnel – question prioritaire de constitutionnalité	Constitutional control control of conformity with the constitution
Contrôle de conventionalité	Control of conformity/compatibility with (international?) agreements
Contrôle de l'accessibilité et de l'intelligibilité de la norme	Control of the accessibility and intelligibility of norms
Contrôle de l'application de la norme (hors contentieux)	Control of the application of norms (outside dispute context)
Conventions collectives en matière de droit du travail	Collective agreements in matters of labour law
Corruption (attention – terrain miné ! V. le dernier rapport de Transparency international sorti en juin 2013 ¹⁶ et le rapport de l'OCDE)	Corruption (beware – a minefield! See latest International Transparency report issued in June 2013 ¹⁷ and the OECD report)
Coût de transaction	Transaction cost
Crédibilité	Credibility

¹⁵ Refers to the fact that in some countries the concept is mentioned in no legislation, contrary to Brazilian law for example.

¹⁶ Le rapport de *Transparency International* est remis en cause dans la sphère économique, et d'un point de vue plus large, toutes les enquêtes qui se basent sur des sondages d'individus ou d'entreprise. http://extranet.isnie.org/uploads/isnie2013/kraay_murrell.pdf. C'est pour éviter ces critiques que nous avons décidé de ne pas mettre de données 'subjectives' dans notre indicateur.

¹⁷ The *International Transparency* report is open to question from an economic perspective, and more broadly, from the point of view of all the inquiries based on personal and business surveys. http://extranet.isnie.org/uploads/isnie2013/kraay_murrell.pdf. It is to avoid these criticisms that we have decided not to use "subjective data" in our indicator.

Développement (durable) ¹⁸	Development (sustainable) ¹⁹
Diversité	Diversity
Droits acquis	Acquired rights
Droit transitoire	Transitional legislation
Durée (concept de « droit durable » ou pérennité de la norme)	Durability/Duration (concept of “durable law” or long-standing norms)

Effectivité (application effective du droit – à rapprocher de justiciabilité des droits)	Effectiveness (effective application of the law – closely related to justiciability of rights)
Effet de seuil	Threshold effect
Efficacité	Efficaciousness
Effcience	Efficiency
Empilement	Piling up
Equilibre des règles	Balance of rules
Equité	Equity
Etat de droit (mal traduit par Rule of law)	Rule of law (mistranslation of the term ‘ <i>Etat de droit</i> ’)
Etude d’impact ²⁰	Impact study ²¹
Evaluation des lois	Evaluation of laws
Evolution de la jurisprudence	Development of case law
Evolution de la norme	Development of norms
Exécution des décisions de justice	Enforcement of judicial decisions
Exécution forcée	Enforcement

Fiabilité	Reliability
Fixité de la norme (concept généralement utilisé de manière négative, comme lorsque l’on parle de « norme figée »)	Fixity of norms (concept generally used in a negative manner, as when speaking about a “rigid norm”)

¹⁸ Notion ambiguë, mais qui fait partie de la mission qui nous a été confiée.

¹⁹ An ambiguous notion, but one which forms part of the task entrusted to us.

²⁰ Vaste sujet. Elles sont considérées comme permettant d’évaluer l’incidence économique, financière, sociale et environnementale des réformes envisagées. En pratique, au moins pour ce qui est des études conduites pour l’Union européenne, elles sont peu satisfaisantes.

²¹ A very broad subject. They are intended to make it possible to assess the economic, financial, social and environmental impact of envisaged reforms. In practice, at least as far as European Union studies are concerned, they are not very satisfactory.

Flexibilité / stabilité / adaptation (prise en compte des mutations politiques, économiques, sociales)	Flexibility / stability/ adaptation (taking into account political, economic and social change)
Flou	Vagueness
Flux de textes ²²	Flow of texts ²³
Force symbolique de la loi	Force (symbolic, of the law)
Force normative	Force (normative)
Formalisme	Formalism

Garantie (notamment garantie procédurale des droits)	Guarantee/safeguard (especially procedural safeguards)
Globalisation (par opposition à mondialisation)	Globalisation (as opposed to worldwide application)
Gouvernance	Governance

Harmonisation (par opposition à uniformité, standardisation)	Harmonisation (as opposed to uniformity, standardisation)
Hiérarchie (architecture complexe) ²⁴	Hierarchy (complex architecture) ²⁵
Histoire législative	History (legislative)

Imprévision	Unpredictability
Immutabilité/Intangibilité	Immutability/Intangibility
Incertitude	Uncertainty
Indépendance de la justice	Independence of justice
Inflation normative/ Emballlement normatif	Inflation (of norms/runaway norms)

²² L'idée est souvent émise dans les travaux sur la sécurité juridique que l'inflation des textes, les excès de normes temporaires, le « bavardage de la loi », sont des handicaps pour la sécurité juridique.

²³ The idea is often suggested in works on legal certainty that the multiplicity of texts, the excessive number of temporary norms, and "legal chit-chat", are legal certainty handicaps.

²⁴ Thème important développé dans le Rapport du CE 2006. Par exemple, p. 276 « circulaires, instructions qui, ne sont ni publiées ni opposables ».

²⁵ Important theme developed in the EC 2006 Report. For example, p. 276 "circulars, instructions which are neither published nor may be invoked in law".

Influence des droits étrangers, du droit européen (UE et CEDH), du droit international, des principes généraux du droit, des pratiques professionnelles, des usages, du droit « tendre » (soft law)	Influence of foreign laws, European law (EU and ECHR), international law, general principles of law, professional practices, usage/habitual practice, soft law
Information du sujet de droit (cela peut se recouper avec l'accessibilité au droit)	Information on the law (this may overlap with accessibility of the law)
Intégrité des institutions (voir corruption)	Integrity of institutions (see corruption)
Intelligibilité ²⁶	Intelligibility ²⁷
Intérêt général (motifs impérieux d'intérêt général).	Interest (general) (imperative grounds of general interest).
Internet (diffusion du droit par)	Internet (dissemination of the law by)
Interprétation (du droit, du contrat,...)/ rescrit ex ante – autorité qui permet de donner une interprétation ex ante qui s'impose	Interpretation (of the law, contract, ...)/ <i>ex ante</i> ruling – authority permitting an <i>ex ante</i> interpretation that may be required
Interprétation (encadrement de)	Interpretation (framework)

Justice sociale matérielle / Qualité de justice ²⁸	Justice (substantive social / quality of) ²⁹
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Langue (le droit du pays en cause est-il accessible dans une autre langue que la (les) langue(s) nationale(s) ? ³⁰	Language (is the law of the country concerned accessible in a language other than the national language/s?) ³¹
Légalité (des délits et des peines, contrôle de)	Legality (of offences and punishments, control of)
Lenteur/rapidité/précipitation	Slowness/rapidity/haste

²⁶ Une disposition législative incompréhensible et inexplicable est entachée d'incompétence négative – Cons. Constitutionnel décision 95-191, DC 10 juil. 1985.

²⁷ An incomprehensible and inexplicable legal provision is tainted with the lack of jurisdiction - Constitutional Council decision 95-191, CL 10 July 1985.

²⁸ Attention, voyez la question posée ci-dessus, note 2.

²⁹ Beware, see the question posed above, note 2.

³⁰ V. la traduction officielle en anglais du code des obligations suisse. Il y aussi des traductions quasi-officielles, notamment du Code civil, sur le site de Légifrance. Langues : allemand, arabe, anglais, espagnol, italien et chinois).

³¹ See the official English translation of the Swiss code of obligations. There are also semi-official translations, particularly of the Swiss Civil Code, on the Légifrance website. Languages: Arabic, Chinese, English, German, Italian and Spanish).

Lisibilité	Readability
Loi (claire et précise)	Law (clear and precise)
Loyauté	Loyalty

Modulation dans le temps des effets des lois et décisions (rétroactivité)	Variability over time of the effects of laws and decisions (retroactivity)
Mondialisation (par opposition à globalisation)	Worldwide application (as opposed to globalisation)
Motifs impérieux d'intérêt général	Reasons (imperative, of general interest)
Multiplication des normes (quantité) (intempérance normative)	Multiplication of norms (quantity) (normative intemperance)
Multiplication des sources (qualité)	Multiplication of sources (quality)
Mutabilité des normes	Mutability of norms

Négociation (droit du travail, par ex. négociations syndicales.)	Negotiation (labour law, e.g. trade union negotiations)
Neutralité (par rapport à la technique notamment)	Neutrality (in particular in relation to technicality)
Niveau de législation (central, local ou subsidiarité à l'européenne ou fédéralisme à l'américaine)	Legislation, level of (central, local, European-style subsidiarity or American-style federalism)
Non-rétroactivité des normes (v. aussi « rétroactivité »)	Non-retroactivity of norms (also see retroactivity)
Normalisation (ISO notamment – cela fait aussi référence au pluralisme juridique)	Standardisation (ISO in particular– this also refers to legal pluralism)
Normativité de la loi	Normativity of the law
Norme collective négociée en droit social	Norms (collectively negotiated in with the context of social welfare law)
Notariat ³²	Notarial profession ³³

³² V. en dernier lieu, A. (Teun) V.M. Struycken, « Notaires piliers de l'ordre juridique », in *De Rome à Lisbonne : Les juridictions de l'Union européenne à la croisée des chemins – Mélanges en l'honneur de Paolo Mengozzi*, Bruylant, 2013, p.475.

³³ See, ultimately, A. (Teun) V.M. Struycken, « Notaires piliers de l'ordre juridique » (Notaries, pillars of judicial order), in *De Rome à Lisbon: Les juridictions de l'Union européenne à la croisée des chemins – Mélanges en l'honneur de Paolo Mengozzi*, (From Rome to Lisbon: European Union jurisdictions at the crossroads - A compendium in honour of Paolo Mengozzi), Bruylant, 2013, p.475.

Obiter dictum comme signe avant-coureur des revirements de jurisprudence ³⁴	Obiter dictum as a precursory sign of changes in case law ³⁵
Opposabilité	Opposability
Opt-in/opt-out (actions de groupe)	Opt-in/opt-out (group actions)
Oralité (place de l'oral et de l'écrit dans les transactions commerciales et procédures)	Orality (place of oral and written contributions in commercial transactions and procedures)
Ordre/désordre	Order/disorder
Ordre public	Public policy

Pacta sunt servanda	Pacta sunt servanda
Pérennité/permanence (voir durée et immutabilité)	Perenniality/permanence (see durability/duration and immutability)
Pluralisme juridique (gouvernance)	Pluralism, legal (governance)
Portabilité des droits sociaux à l'issue de la relation de travail	Portability/Transferability of social rights on termination of the work relationship
Préjudice subi à cause d'une norme nouvelle	Injury suffered by the introduction of a new norm
Prévention (des conflits)	Prevention (of conflicts)
Prévisibilité (se rapproche de la gestion des risques)	Predictability (closely associated with risk management)
Principe général du droit	General principle of law
Procès juste et équitable	Trial, fair (and equitable)
« Prétéritions », comme signe avant-coureur des revirements de jurisprudence ?	"Preteritions", as a precursor of changes in case law?
Proportionnalité	Proportionality
Propriété (protection du droit de...)	Property (protection of the right right to)
Protection (des situations juridiques, des droits de l'homme, des salariés, ...)	Protection (of legal situations, human rights, employee rights, etc.)

³⁴ C'est aussi l'un des rôles des opinions dissidentes ou des opinions des avocats généraux dans le droit de l'Union européenne.

³⁵ This is also one of the roles of dissident opinion or the opinions of the Advocates-General in European Union law.

Protection du plus faible ³⁶	Protection of the weakest ³⁷
Publication	Publication
Publicité	Publicity

Radicalité (notamment de la réforme, du changement)	Radicality (especially of reform, change)
Rapidité	Rapidity
Réalisation (de la norme)	Realisation (of the norm)
Recours (justiciabilité des droits – critères définis par la CJUE pour les recours – pas trop coûteux, pas trop compliqués, dans des délais pas trop brefs)	Remedy (justiciability of laws - criteria defined by the CJEU for recourse - not too costly or too complicated, within time limits that are not too short)
Recours administratif contre les décisions de rescrit	Administrative action against rulings
Recours collectifs (limites aux)	Collective action (limits to)
Rédaction (place de l'oral et de l'écrit dans les transactions commerciales et procédures)	Drafting, legal (place of verbal and written contributions in commercial transactions and procedures)
Réduction de la sphère d'intervention du juge	Restriction of the sphere of judicial intervention
Référé (protection juridique provisoire)	Interim order (provisional legal protection)
Réforme (soudaineté, raisons, fréquence)	Reform (suddenness, reasons, frequency)
Registres publics	Public registers
Régulation (par opposition à règlementation ?)	Regulation (as opposed to the setting of rules?)
Réparation (droit à)	Reparation (right to)
Res judicata	Res judicata
Rescrit (social ...) (... d'application, ... d'interprétation)	Rulings (corporate, ., ... of application, ... interpretive)
Responsabilité de l'Etat, notamment lorsque la norme est contraire aux engagements internationaux	Responsibility of the State, especially when the norm is contrary to its international obligations

³⁶ V. l'introduction.

³⁷ See introduction.

Responsabilité sociale	Responsibility, social
Rétroactivité	Retroactivity
Reirement	Reversal, change
Risques ³⁸	Risks ³⁹

Sanction	Sanction
Sécurisation ⁴⁰	Safeguarding ⁴¹
Sécurité institutionnelle	Security, institutional
Sédimentation (on prend un texte et on légifère à nouveau sur le même sujet, sans évaluation), d'où superposition).	Sedimentation (one takes a text and legislates again on the same subject, without evaluation, hence superposition).
Séparation des pouvoirs	Separation of powers
Simplicité du droit ⁴²	Simplicity of the law ⁴³
Simplification ⁴⁴	Simplification ⁴⁵

³⁸ Le droit sert à gérer le risque juridique et le risque judiciaire. Comment évaluer cela sans passer par des questions de « ressenti » tant décrié ?

³⁹ The law serves to manage both legal and judicial risk. How can it be assessed without asking the much decried questions relating to "feeling"?

⁴⁰ Ce terme est aujourd'hui utilisé en lieu et place de celui de sécurité. La dernière loi en droit du travail s'appelle « Loi pour la sécurisation de l'emploi ». On parle aussi de sécurisation des parcours professionnels. Le glissement terminologique de « sécurité » à « sécurisation » est intéressant car il est symptomatique de la promotion de nouvelle technique qui procure la sécurité, c'est-à-dire la non immixtion du droit hétéronome par rapport aux prévisions des parties. Comment évaluer ?

⁴¹ Nowadays this term is used instead of security. The latest employment legislation refers to itself as a "Law for the Safeguarding of Employment". We also speak about safeguarding professional careers. The gradual terminological shift from "security" to "safeguarding" is interesting because it is symptomatic of the promotion of a new technical process whereby security of employment is obtained, that is to say the non-interference of heteronomous law in relation to the parties' forecasts. How should it be assessed?

⁴² Une vieille lune ?

⁴³ An out-of-date concept?

⁴⁴ Difficulté particulière sur la question de la simplification du droit – Certains disent que les règles doivent être simplifiées au point de pouvoir être appliquées sans l'aide d'un professionnel du droit. N'est-ce pas une vue de l'esprit ? N'est-ce pas contre intuitif car, de toute manière, il ne faut pas saper le travail des professionnels du droit. Les économistes voient souvent le débat de la simplification du droit comme un équilibre entre deux bénéfices : un droit simple réduit les coûts de 'transactions' (ex : les avocats sont avant tout un coût pour les agents économiques) ; un droit 'complexe' donne une solution optimale à des problèmes précis que des règles simples ne pourraient résoudre.

⁴⁵ Particular difficulty regarding the matter of simplification of the law - Some say that the rules must be simplified to the point where they can be applied without the assistance of a legal professional. Isn't this a pipe dream? Is it not counter-intuitive, in any case, because the work of legal professionals should not be undermined. Economists often see the argument for simplification of the law as balancing two beneficial outcomes: simplified law reduces the cost of "transactions" (e.g. lawyers are above all a cost for those engaged in business); "complex" law provides an optimum solution to specific problems that simple rules would be unable to resolve.

Sophistication (exagérée de la norme)	Sophistication (exaggeration of the norm)
Sources (multiplication, vitalité) (formelles, informelles)	Sources (multiplication, force) (formal, informal)
Stabilité (de la loi, contractuelle, des situations juridiques (mais adaptation nécessaire) ⁴⁶	Stability (of the law, contractual, of legal situations - but adaptation necessary) ⁴⁷
Standards juridiques	Standards (legal)

Technicité du droit	Technicality of the law
Titre (de propriété)	Title (of ownership)
Sécurisation foncière	Security of land tenure
Transparence (non seulement de la norme, mais des processus de création, de réforme, de l'accès aux recours etc...)	Transparency (not only of the norm, but also of the process for its creation, reform, access to legal remedies, etc.)

Ultra vires (compétence des autorités)	Ultra vires (jurisdiction of the authorities)
Usager égaré	User, lost

Valeurs (universelles ou non)	Values (universal or not)
Variation de la norme	Variation of the norm
Veille juridique (coût ?)	Legal research (cost?)

⁴⁶ Nous devrions mesurer l'équilibre entre ces deux pôles de préoccupation aussi légitime l'un que l'autre.

⁴⁷ We should measure the balance between these two matters of concern, each of which is as legitimate as the other.

Annexe III - Bibliographie générale

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Annexes IV-XV - Questionnaires

Annexe IV.

Contracts. Case no. 1: Price adjustment

Company A has entered into a supply contract with Company B for the monthly delivery of a certain quantity of products against payment of a price determined by the parties at the time of formation of the contract. The term of the contract was set at five years. During the fourth year, Company B refused to continue performing the contract on the ground of the disproportionate difference between the price provided for in the contract and the increase in its own production costs.

The two companies are of equal strength.

General Questions

1. Has the legal rule⁴⁸ which enables this question to be resolved been officially gazetted?

☐ Yes

☐ No

2. Is the rule statutory⁴⁹ or jurisprudential in origin?

☐ Statutory, available in a legal compilation⁵⁰, interpreted by jurisprudence which is also present in a legal compilation

☐ Jurisprudential, available in a legal compilation⁵¹

☐ Statutory, dispersed among multiple sources, and jurisprudence is important in understanding it

☐ Jurisprudential, dispersed among multiple sources

⁴⁸ The general term 'rule' is used to mean to any legal norm, irrespective of its source or the instrument in which it appears.

⁴⁹ By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'.

⁵⁰ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement, or any private compilation to which public authorities refer.

⁵¹ In certain countries, there are prescribed compilations of jurisprudence.

3. How do you access the rule? By using the internet⁵²

- ☐ The rule is easily accessible on the internet. Searching for it requires less than one hour
- ☐ The rule is accessible on the internet. Searching for it requires between one and two hours
- ☐ The rule is accessible on the internet. Searching for it requires more than two hours
- ☐ The rule is not accessible on the internet

4. Is the rule available in a language other than the official language(s) of the country?

- ☐ Yes, in one foreign language
- ☐ Yes, in two foreign languages
- ☐ Yes, in more than two foreign languages
- ☐ No

5. When it entered into force, this rule applied...

- ☐ ...to contracts concluded before this date, even those which have expired and which have been performed completely
- ☐ ...to contracts concluded before this date and still being performed
- ☐ ...only to contracts concluded after this date

6. In the event of an amendment, do the responsible authorities⁵³ carry out prior consultations?

- ☐ Yes
- ☐ No

7. Are there transitional provisions to facilitate implementation of the new rule⁵⁴?

- ☐ Yes
- ☐ No

8. Do the courts interpret the rule consistently?

- ☐ Yes, there is consensus
- ☐ No, but only on aspects which are incidental
- ☐ No, on essential aspects

⁵² Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

⁵³ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

⁵⁴ This question covers both transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed.

9. Has the rule been changed during the last five years?

- ☐ No
- ☐ Yes, once
- ☐ Yes, twice
- ☐ Yes, three times or more

10. Is the rule subject to checking for conformity with the Constitution⁵⁵?

- ☐ Yes, before the rule is introduced into the legal system
- ☐ Yes, after the rule starts to be applied
- ☐ Yes, both before and after the rule starts to be applied
- ☐ No

11. Is the rule subject to checking for conformity with international conventions?

- ☐ Yes, after the rule starts to be applied
- ☐ Yes, both before and after the rule starts to be applied
- ☐ No

12. Does public order (*ordre publique*) have a role to play in the subject-matter in question? (*no scoring*)

- ☐ Yes
- ☐ Yes, but rarely
- ☐ No

13. Is 'public order' defined by criteria which are easily recognisable by operators?

- ☐ Yes
- ☐ No

14. May an individual with full legal personality appeal against the way in which public order has been applied to him?

- ☐ Yes
- ☐ No

⁵⁵ The term 'Constitution' means any norm which is paramount in the relevant legal system, whether in writing or not.

Specific Questions

15. If the parties had taken the precaution to include in their contract an indexation clause, would the court seized be required to observe it?
- ☐ Yes
- ☐ No
16. If the parties had taken the precaution to include in their contract a revision clause in the event of economic hardship, would Company B be able to obtain, from the court seized...
- ☐ ...an order requiring Company A to pay damages if it refuses to renegotiate the contract
- ☐ ...a mandatory injunction requiring Company A to renegotiate the contract with Company B on pain of the periodic payment of a penalty
- ☐ ...a symbolic judgement in the event of refusal to renegotiate the contract
- ☐ ...nothing. The clause would not be applied in a case of price indexation
17. In the absence of a revision or indexation clause, Company B would be able obtain, from the court seized...
- ☐ ...revision of the contractual provisions
- ☐ ...compensation
- ☐ ...nothing, because the obligatory force of the contract is binding on the court
18. If the original terms of the contract are preserved and Company B decides nonetheless to terminate the contract, will the court take Company B's reasons into account when calculating the compensation awarded to the other party?
- ☐ Yes ☐ No

Annexe V.

Contracts. Case no. 2: Limitation of liability clauses and penalty clauses

Company A has entered into a contract for the installation of a computer system in Company B's premises and for maintenance of the system for a period of three years.

1. The contract includes a limitation of liability clause according to which the damages which Company A may be required to pay to Company B for breach of contract are limited to a fixed sum in full settlement equivalent to the annual price of maintenance, namely EUR 20,000. During the period of performance, Company B is unable to access the internet and its internal network for eight days¹. It assesses its commercial loss at EUR 550,000. Company B wonders whether it may disregard the disputed clause and obtain compensation for all of its commercial loss².
2. The contract also contains a clause excluding consequential damages, according to which the damages which Company A may be required to pay to Company B for breach of contract are limited to direct losses. In addition to its commercial loss of EUR 550,000, Company B has suffered a loss of income of EUR 700,000. Company A wonders if it may disregard the clause excluding damages and obtain compensation for its consequential loss.
3. After resolution of the first dispute, Company B faces cash flow problems, which oblige it to pay Company A with two months' delay. Company A claims the sum of EUR 100,000 as a 'penalty', relying on a contractual clause under the terms of which Company B is required to pay 'lump sum compensation' of EUR 50,000 per month of delay. Company B wants to know if it may not invoke the 'excessive' nature of this sum compared with the price of the maintenance, which amounts only to EUR 20,000 per year.

The two companies are of equal strength.

General Questions

1. Have the legal rules³ which enable these questions to be resolved been officially gazetted?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

¹ We shall assume that the liability of Company A has been established.

² For the purpose of this case, we shall assume that the commercial loss has been established.

³ The general term 'rule' is used to mean any legal norm, irrespective of its source or the instrument in which it appears.

2. Are the rules statutory⁴ or jurisprudential in origin?

	①	②	③
Statutory, available in a legal compilation, interpreted by jurisprudence which is also present in a legal compilation ⁵	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, available in a legal compilation ⁶	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Statutory, dispersed among multiple sources, and jurisprudence is important in understanding them	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, dispersed among multiple sources	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

3. How do you access the rules? By using the internet⁷

	①	②	③
The rules are easily accessible on the internet. Searching for them requires less than one hour	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires between one and two hours	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires more than two hours	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The rules are not accessible on the internet	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

4. Are the rules available in a language other than the official language(s) of the country?

	①	②	③
Yes, in one foreign language	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in more than two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

⁴ By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'.

⁵ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement or any private compilation to which public authorities refer.

⁶ In certain countries, there are prescribed compilations of jurisprudence.

⁷ Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

5. When they entered into force, the rules applied...

	①	②	③
...to contracts concluded before this date, even those which have expired and which have been performed completely	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
...to contracts concluded before this date and still being performed	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
...only to contracts concluded after this date	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

6. In the event of an amendment, do the responsible authorities⁸ carry out prior consultations?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

7. Do transitional provisions exist to facilitate implementation of the new rules?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

8. Do the courts interpret the rules consistently?

	①	②	③
Yes, there is consensus	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No, but only on aspects which are incidental	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No, on essential aspects	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

⁸ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

9. Has the rule been changed in the last five years⁹ ?

	①	②	③
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, once	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, twice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, three times or more	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

10. Are the rules subject to checking for conformity with the Constitution¹⁰ ?

	①	②	③
Yes, before the rules are introduced into the legal system	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

11. Are the rules subject to checking for conformity with international conventions?

	①	②	③
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

⁹ This question covers both transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed.

¹⁰ The term 'Constitution' means any norm which is paramount in the relevant legal system, whether in writing or not.

12. Does public order (*ordre publique*) have a role to play in the subject-matter in question? (*no scoring*)

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, but rarely	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

13. Is 'public order' defined by criteria which are easily recognisable by operators?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

14. May an individual with full legal personality appeal against the way in which public order has been applied to him?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Question Specific to limitation of liability clauses

15. May the courts overrule clauses (assuming them to be formally valid) that limit the liability of Company A?

- ☐ In the event of a discrepancy between the limitation and the loss suffered
- ☐ In the event of particularly serious misconduct by the obligor
- ☐ In the event of failure to observe an essential obligation of the contract
- ☐ On any grounds
- ☐ In no circumstances

Question Specific to clauses excluding consequential damages

16. May the courts overrule clauses (assuming them to be formally valid) that exclude consequential damages?

- ☐ On the grounds of the excessive nature of the consequential loss suffered
- ☐ In the event of particularly serious misconduct by the obligor
- ☐ In the event of failure to observe an essential obligation of the contract
- ☐ On any grounds
- ☐ In no circumstances

Question Specific to penalty clauses

17. May the courts overrule clauses (assuming them to be formally valid) that provide for a fixed sum penalty for each month of delay?

- ☐ On the grounds of the excessive amount provided for in the contract
- ☐ In the event of particularly serious misconduct by the obligor
- ☐ By reason of the creditor's difficult economic situation
- ☐ On any grounds
- ☐ In no circumstances

Annexe VI.

Employment Law. Case no. 1: Employment Law. The Purchase or Sale of an Undertaking

Company A, which develops computerised customer relationship management products for businesses, wants to acquire market share in your country. For this purpose, it decides to buy a business from Company B that is established in your country. To ensure the success of the project, Company A negotiates with Company B the continued employment of only those employees whom it considers best able to fulfil this objective.

1. An employee of the business that was sold, who had been notified of the termination of his contract by Company B before the sale, wishes to challenge the agreement reached between the two companies. (*Scenario 1*)
2. Company A learns that the head of the sales team, Mr. Y, who did not want to work for it, obtained a transfer to another of Company B's businesses. Can Company A prevent this step? (*Scenario 2*)

General Questions

1. What are the rules that enable the case to be resolved (multiple answers are possible)? (*no scoring*)

	①	②
Rules that apply to all contracts	<input type="checkbox"/>	<input type="checkbox"/>
Rules that apply to the termination of a contract of employment on the employer's initiative	<input type="checkbox"/>	<input type="checkbox"/>
Rules specific to the termination of fixed term contracts of employment	<input type="checkbox"/>	<input type="checkbox"/>
Other: specify	<input type="checkbox"/>	<input type="checkbox"/>

2. Have the legal rules⁴ which enable these question to be resolved been officially gazetted?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

3. Are the rules statutory² or jurisprudential in origin?

	①	②
Statutory, available in a legal compilation ³ , interpreted by jurisprudence which is also present in a legal compilation	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, available in a legal compilation ⁴	<input type="checkbox"/>	<input type="checkbox"/>
Statutory, dispersed among multiple sources, and jurisprudence is important in understanding them	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, dispersed among multiple sources	<input type="checkbox"/>	<input type="checkbox"/>

4. Are the rules occupational in origin⁵?

	①	②
Yes, and the law ⁶ is silent	<input type="checkbox"/>	<input type="checkbox"/>
Yes, and they take precedence over the law	<input type="checkbox"/>	<input type="checkbox"/>
Yes, and they clarify both the way a statute or regulation is implemented and its effects ⁷	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

⁴ The general term 'rule' is used to mean any legal norm, irrespective of its source or the instrument in which it appears.

² By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'.

³ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement or any private compilation to which public authorities refer.

⁴ In certain countries, there are prescribed compilations of jurisprudence.

⁵ By a 'rule occupational in origin', we mean a rule that originates from an agreement between the corporate stakeholders (at an inter-professional level, at the level of business sectors or at the level of the firm) [or, from one of the employer's usual practices.]

⁶ The general term 'legal rule' is used to mean to any legal norm, irrespective of its source or the instrument in which it appears.

⁷ In certain countries, there are prescribed compilations of jurisprudence.

5. How do you access the rules? By using the internet⁸

	①	②
The rules are easily accessible on the internet. Searching for them requires less than one hour	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires between one and two hours	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires more than two hours	<input type="checkbox"/>	<input type="checkbox"/>
The rules are not accessible on the internet	<input type="checkbox"/>	<input type="checkbox"/>

6. Are the rules available in a language other than the official language(s) of the country?

	①	②
Yes, in one foreign language	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in more than two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

7. Can you access an 'official' ⁹ explanation of the applicable solution?

	①	②
Yes, an explanation of the rule is easily accessible on an official website free of charge	<input type="checkbox"/>	<input type="checkbox"/>
Yes, an official explanation is issued by the authorities but not necessarily on a website	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

⁸ Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

⁹ The State provides citizens with an explanation of the rule, for information purposes, which makes it more easily understood.

8. When they entered into force, the rules applied...

	①	②
...to contracts concluded before this date, even those which have expired and which have been performed completely	<input type="checkbox"/>	<input type="checkbox"/>
...to contracts concluded before this date and still being performed	<input type="checkbox"/>	<input type="checkbox"/>
...only to contracts concluded after this date	<input type="checkbox"/>	<input type="checkbox"/>

9. In the event of an amendment, do the responsible authorities¹⁰ carry out prior consultations?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

10. Do transitional provisions exist to facilitate implementation of the new rules¹¹?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

11. Do the courts interpret the rules consistently?

	①	②
Yes, there is consensus	<input type="checkbox"/>	<input type="checkbox"/>
No, but only on aspects which are incidental	<input type="checkbox"/>	<input type="checkbox"/>
No, on essential aspects	<input type="checkbox"/>	<input type="checkbox"/>

¹⁰ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

¹¹ This question covers both transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed

12. Has the rule been changed in the last five years?

	①	②
No	<input type="checkbox"/>	<input type="checkbox"/>
Yes, once	<input type="checkbox"/>	<input type="checkbox"/>
Yes, twice	<input type="checkbox"/>	<input type="checkbox"/>
Yes, three times or more	<input type="checkbox"/>	<input type="checkbox"/>

13. Are the rules subject to checking for conformity with the Constitution¹²?

	①	②
Yes, before the rules are introduced into the legal system	<input type="checkbox"/>	<input type="checkbox"/>
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

¹² The term 'Constitution' means any norm which is paramount in the relevant legal system, whether in writing or not.

14. Are the rules subject to checking for conformity with international conventions?

	①	②
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

15. Does public order (*ordre publique*) have a role to play in the subject-matter in question?
(no scoring)

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
Yes, but rarely	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

16. Is 'public order' defined by criteria which are easily recognisable by operators?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

17. May an individual with full legal personality appeal against the way in which public order has been applied to him?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

Specific Questions

Scenario 1

18. Must the companies concerned involve the employees¹³?

Yes, and the ways in which they must be involved are clearly established ☐

Yes, and the ways in which they must be involved are not clearly defined ☐

No ☐

19. Is there a rule that requires purchasers to continue employing all the employees?

No, the choice of employees is at the purchaser's discretion ☐

No, and the purchaser must give reasons, in accordance with criteria established by a legal rule, for continuing to employ certain employees¹⁴ ☐

Yes, and its scope¹⁵ is clearly defined ☐

Yes, and its scope is not clearly defined ☐

20. Must employers follow a certain procedure if they terminate a contract of employment?

Yes, and the way that this procedure must be followed is clearly defined ☐

Yes, and the way this procedure must be followed is not clearly defined ☐

Yes, and the parties to the contract of employment may adapt it ☐

No ☐

¹³ For the purposes of this questionnaire, we are not interested in the way in which employees are represented.

¹⁴ The general term 'legal rule' is used to mean to any legal norm, irrespective of its source or the instrument in which it appears.

¹⁵ The term 'scope' refers to a substantive condition relating primarily to the ambit of the economic transaction in question.

21. May the employee refer the matter to a court before the termination of the contract of employment in order to avoid this termination?

Yes ☐

No ☐

22. In the event of unjustified termination, the court will order:

Reinstatement of the worker ☐

Compensation based on the loss suffered ☐

Fixed-rate compensation ☐

23. Whatever the court's decision (see question 22), may the purchaser renegotiate the price paid to the vendor?

Yes ☐

No ☐

24. What is the limitation period for a legal action challenging the termination of a contract of employment? (*no scoring*)

Number of months:

25. What is the limitation period for a legal action for payment or for restitution of salary¹⁶? (*no scoring*)

Number of months:

¹⁶ The definition of 'salary' includes not only wages *stricto sensu* but also overtime, paid holidays and all the other remuneration payable by the employer.

Scenario 2

26. May employees refuse to accept the agreement reached between the vendor and the purchaser?

Yes, the legal rule allows refusal at the discretion of the employee ☐

Yes, the legal rule allows refusal in certain clearly defined circumstances ☐

Yes, the legal rule allows refusal in circumstances that are not defined ☐

No ☐

Annexe VII.

Employment Law. Case no. 2: Fixed-term employment¹

Company B, which produces electronic components, unexpectedly experiences an increase in orders, which it thinks is temporary. In order to meet the orders, it recruits 10 employees, including Mr. X and Mr. Y, on contracts of employment with a term of three months. Since producing good quality work requires three days' training, the company hopes to ensure that the workers continue to work for it for the entire period.

1. At the end of two months, Mr. X wants to leave the company in order to work for another company. The employer wishes to prevent this and refers the matter to the court. (*Scenario 1*)
2. At the end of three months, the company realises that it needs to extend all the contracts of employment by three months. It renews them again but for only five employees. Mr. Y is one of those whose contract is not renewed. He takes legal proceedings to challenge this decision. (*Scenario 2*)

General Questions

1. What rules enable the case to be resolved (multiple answers are possible)? (*no scoring*)

	①	②
Rules that apply to all contracts	<input type="checkbox"/>	<input type="checkbox"/>
Rules that apply to the termination of a contract of employment on the employer's initiative	<input type="checkbox"/>	<input type="checkbox"/>
Rules specific to the termination of fixed term contracts of employment	<input type="checkbox"/>	<input type="checkbox"/>
Other: specify	<input type="checkbox"/>	<input type="checkbox"/>

¹ This case considers the position where casual labour is employed directly, without going through intermediaries such as temporary employment agencies.

2. Have the legal rules² which enable these questions to be resolved been officially gazetted?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

3. Are the rules statutory³ or jurisprudential in origin?

	①	②
Statutory, available in a legal compilation ⁴ , interpreted by jurisprudence which is also present in a legal compilation	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, available in a legal compilation ⁵	<input type="checkbox"/>	<input type="checkbox"/>
Statutory, dispersed among multiple sources, and jurisprudence is important in order to understand them	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, dispersed among multiple sources	<input type="checkbox"/>	<input type="checkbox"/>

4. Are the rules occupational in origin⁶ ?

	①	②
Yes, and the law ⁷ is silent	<input type="checkbox"/>	<input type="checkbox"/>
Yes, and they take precedence over the law	<input type="checkbox"/>	<input type="checkbox"/>
Yes, and they make clear the manner of implementing and the effects of a statute or regulation	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

² The general term 'rule' is used to mean any legal norm, irrespective of its source or the instrument in which it appears.

³ By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'.

⁴ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement or any private compilation to which public authorities refer.

⁵ In certain countries, there are prescribed compilations of jurisprudence.

⁶ By 'rule of occupational origin', we mean a rule that originates from an agreement between the corporate stakeholders (at an inter-professional level, at the level of business sectors or at the level of the company) [or, from one of the employer's usual practices.]

⁷ The general term 'legal rule' is used to mean to any legal norm, irrespective of its source or the instrument in which it appears

5. How do you access the rules? By using the internet⁸

	①	②
The rules are easily accessible on the internet. Searching for them requires less than one hour	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires between one and two hours	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires more than two hours	<input type="checkbox"/>	<input type="checkbox"/>
The rules are not accessible on the internet	<input type="checkbox"/>	<input type="checkbox"/>

6. Are the rules available in a language other than the official language(s) of the country?

	①	②
Yes, in one foreign language	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in more than two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

7. Is it possible to access an ‘official’⁹ explanation of the applicable solution?

	①	②
Yes, an explanation of the rule is easily accessible on an official website free of charge	<input type="checkbox"/>	<input type="checkbox"/>
Yes, an official explanation is issued by the authorities but not necessarily on a website	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

⁸ Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

⁹ The State provides citizens with an explanation of the rule, for information purposes, which makes it more easy to understand.

8. When they entered into force, the rules applied...

	①	②
...to contracts concluded before this date, even those which have expired and which have been performed completely	<input type="checkbox"/>	<input type="checkbox"/>
...to contracts concluded before this date and still being performed	<input type="checkbox"/>	<input type="checkbox"/>
...only to contracts concluded after this date	<input type="checkbox"/>	<input type="checkbox"/>

9. In the event of an amendment, do the responsible authorities¹⁰ carry out prior consultations?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

10. Do transitional provisions exist to facilitate implementation of the new rules¹¹ ?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

11. Do the courts interpret the rules consistently?

	①	②
Yes, there is consensus	<input type="checkbox"/>	<input type="checkbox"/>
No, but only on aspects which are incidental	<input type="checkbox"/>	<input type="checkbox"/>
No, on essential aspects	<input type="checkbox"/>	<input type="checkbox"/>

¹⁰ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

¹¹ This question covers both transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed.

12. Has the rule been changed during the last five years?

	①	②
No	<input type="checkbox"/>	<input type="checkbox"/>
Yes, once	<input type="checkbox"/>	<input type="checkbox"/>
Yes, twice	<input type="checkbox"/>	<input type="checkbox"/>
Yes, three times or more	<input type="checkbox"/>	<input type="checkbox"/>

13. Are the rules subject to checking for conformity with the Constitution¹²?

	①	②
Yes, before the rules are introduced into the legal system	<input type="checkbox"/>	<input type="checkbox"/>
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

14. Are the rules subject to checking for conformity with international conventions?

	①	②
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

15. Does public order (*ordre publique*) have a role to play in the subject-matter in question? (*no scoring*)

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
Yes, but rarely	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

¹² The term 'Constitution' means any norm which is paramount in the relevant legal system, whether in writing or not.

16. Is 'public order' defined by criteria which are easily recognisable by operators?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

17. May an individual with full legal personality appeal against the way in which public order has been applied to him?

	①	②
Yes	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>

Specific Questions

Frequently Asked Questions:

18. In what form must a fixed-term contract of employment be recorded?

- ☐ In writing, and the legal rule¹³ requires that certain clauses be included
- ☐ In writing, and the parties enjoy freedom of contract
- ☐ No particular form

19. Does the fixed-term contract contain a probationary period¹⁴?

- ☐ Yes, for both parties
- ☐ Yes, but only for termination on the employer's initiative
- ☐ Yes, but only for termination on the employee's initiative
- ☐ No

¹³ The general term 'legal rule' is used to mean to any legal norm, irrespective of its source or the instrument in which it appears.

¹⁴ The term 'probationary period' means the period, usually at the beginning of the contractual relationship, during which the contract may be terminated without notice or other formality.

20. Apart from this period, are there situations in which a party may terminate a fixed-term contract before its term?

- ☐ Yes, and the cases are specifically enumerated by the law
- ☐ Yes, and the parties have complete freedom
- ☐ No

21. Can the parties to a contract of employment include a termination clause?

- ☐ Yes, and it is for the benefit of both parties
- ☐ Yes, but only the employer may rely on it
- ☐ Yes, but only the employee may rely on it
- ☐ No

Scenario 1

22. In the event of termination of a fixed-term contract, must the employee observe a notice period provided by a legal rule¹⁵?

- ☐ Yes
- ☐ No

23. If a fixed-term contract is terminated prematurely on the initiative of the employee, may the employer obtain:

- ☐ Reinstatement of the worker
- ☐ Compensation based on the loss suffered
- ☐ Fixed-rate compensation
- ☐ Nothing

¹⁵ The general term 'legal rule' is used to mean to any legal norm, irrespective of its source or the instrument in which it appears.

24. May the employer make an urgent application to court?

☐ Yes

☐ No

Scenario 2

25. In the event of premature termination of a fixed-term contract, must the employer observe a notice period provided by a legal rule?

☐ Yes

☐ No

26. In the event of non compliance by the employer with the rules for the renewal of fixed-term contracts, may the employee obtain:

☐ The transformation of an indeterminate contract into a fixed-term contract

☐ Compensation based on the loss suffered

☐ Fixed-rate compensation

☐ Nothing

27. May the employee make an urgent application to court in order to prevent termination of the contract of employment or for it to be reinstated?

☐ Yes

☐ No

28. May the parties end the dispute by a compromise in settlement?

Yes ☐

No ☐

Annexe VIII.

Real estate. Case no. 1: Purchase of real estate

Company A wants to purchase an already-constructed building in order to install in it a factory for the manufacture of chemical products. It chooses a factory previously used for the manufacture of textiles. It has questions on the following subjects: 1) ownership of the land and the subsoil; 2) ownership of the buildings; 3) environmental constraints; 4) ownership of title; 5) proof of title; 6) enforceability of title.

General Questions

1. Have the legal rules³ which enable these questions to be resolved been officially gazetted⁴?

- ☐ Yes, for all the questions
- ☐ Yes, but only for questions ... (give the number of the questions)
- ☐ No, not for any of the questions asked

2. Are the rules statutory³ or jurisprudential in origin?

- ☐ Statutory, available in a legal compilation⁴, interpreted by jurisprudence which is also present in a legal compilation
- ☐ Jurisprudential, available in a legal compilation⁵
- ☐ Statutory, dispersed among multiple sources, and jurisprudence is important in understanding them
- ☐ Jurisprudential, dispersed among multiple sources

³ The general term 'rule' is used to mean to any legal norm, irrespective of its source or the instrument in which it appears.

⁴ The score for each question is reduced if the matter has not been officially gazetted. If five questions have been gazetted, the score is 50/6, if only four have, the score is 40/6 and so on.

³ By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'.

⁴ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement, or any private compilation to which public authorities refer.

⁵ In certain countries, there are prescribed compilations of jurisprudence.

3. How do you access the rules? By using the internet⁶

- ☐ The rules are easily accessible on the internet. Searching for them requires less than one hour
- ☐ The rules are accessible on the internet. Searching for them requires between one and two hours
- ☐ The rules are accessible on the internet. Searching for them requires more than two hours
- ☐ The rules are not accessible on the internet

4. Are the rules available in a language other than the official language(s) of the country?

- ☐ Yes, in one foreign language
- ☐ Yes, in two foreign languages
- ☐ Yes, in more than two foreign languages
- ☐ No

5. In the event of an amendment, do the responsible authorities⁷ conduct prior consultations?

- ☐ Yes
- ☐ No

6. Do transitional provisions exist to facilitate implementation of the new rule⁸?

- ☐ Yes
- ☐ No

7. Do the courts interpret the rules consistently?

⁶ Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

⁷ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

⁸ This question covers both the transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed.

- ☐ Yes, there is consensus
- ☐ No, but only on aspects which are incidental
- ☐ No, not on essential aspects

8. Has the rule changed during the last five years?

- ☐ No
- ☐ Yes, once
- ☐ Yes, twice
- ☐ Yes, three times or more

9. Are the rules subject to checking for conformity with the Constitution⁹?

- ☐ Yes, before the rules are introduced into the legal system
- ☐ Yes, after the rules start to be applied
- ☐ Yes, both before and after the rules start to be applied
- ☐ No

10. Are the rules subject to checking for conformity with international conventions?

- ☐ Yes, after the rules start to be applied
- ☐ Yes, both before and after the rules start to be applied
- ☐ No

11. Does public order (*ordre publique*) have a role to play in the field of real estate? (*no scoring*)

⁹ The term 'Constitution' means any norm which is paramount in the relevant legal system, whether in writing or not.

- ☐ Yes
- ☐ Yes, but rarely
- ☐ No

12. Is 'public order' defined by criteria which are easily recognisable by operators?

- ☐ Yes ☐ No

13. May an individual with full legal personality appeal against the way in which public order has been applied to him?

- ☐ Yes ☐ No

Specific Questions

14. Will the company become the owner of the land?

- ☐ Yes ☐ No

15. Will the company become the owner of the subsoil?¹⁰

- ☐ Yes
- ☐ No
- ☐ No, but these rights are clearly defined by law

16. Will the company become the owner of the buildings?

- ☐ Yes ☐ No

17. Is it easy to identify the contractual easements by which the company may find itself bound?

¹⁰ Ownership of the subsoil does not prevent the application of laws relating to or specifically concerning the presence of hydrocarbons or mineral resources lying under the land in question.

☐ Yes

☐ No

18. Is it easy to identify the statutory easements by which the company may find itself bound?

☐ Yes

☐ No

19. Is it easy to identify the easements in private law by which the company may find itself bound?¹¹

☐ Yes

☐ No

20. Will the company find itself bound by public easements?¹²

☐ Yes, they may be discovered by consulting a statute

☐ Yes, they may be discovered by consulting case law

☐ Yes, they may be discovered by consulting codified customary usage

☐ Yes, but they may be difficult to discover (e.g. unwritten customary usage)

☐ No

¹¹ Examples of 'easements in private law' include access to the public highway of land-locked property or other rights of way or rights relating to neighbouring property, in particular arising from the use of the land planned by Company A.

¹² Administrative limitations to ownership rights relate to:

- the use of (hydrocarbon) resources and the conservation of drinking water;
- health and public safety - areas subject to Natural Risk Prevention Plans (PPRNs or *Plans de Prévention des Risques Naturels*), Technological Risk Prevention Plans (PPRTs or *Plans de Prévention des Risques Technologiques*) and Installations Classified for Environmental Protection (ICPEs or *Installation Classée pour la Protection de l'Environnement*);
- for the conservation of heritage property (protected boundaries).

21. Will the company be faced with environmental constraints?

- ☐ Yes, clearly defined by law¹³
- ☐ Yes, but difficult for the company to discover
- ☐ No

22. Given the use to be made of the property, will the company have to ask for prior authorisation or may it proceed with a simple retrospective declaration?

- ☐ Yes, prior authorisation
- ☐ Yes, retrospective declaration
- ☐ No, neither authorisation nor declaration

23. In the event of authorisation, does the preparation of the file involve¹⁴:

- ☐ 1 step
- ☐ 2 to 5 steps
- ☐ More than 5 steps

24. In the event of authorisation or of retrospective declaration, is there a check of conformity by the competent authority?¹⁵

- ☐ Yes, within a time limit fixed by law
- ☐ Yes, this may be done at any time
- ☐ No

¹³ See note 1.

¹⁴ This question is dependent on the previous question: if the respondent ticked 'No, neither authorisation nor declaration' in reply to the previous question, he/she may not answer this question. In this situation, the respondent will receive a score 10 for this question even though he/she will not have replied.

¹⁵ The rationale behind questions 22 and 23 also applies here.

25. Is the check of conformity conducted after the company has been notified?

- ☐ Yes, within a time limit that is sufficient for compliance
- ☐ Yes, but within a very short time limit
- ☐ No, it is conducted without warning

Title of ownership

26. The document by which the company is going to purchase the property is:

- ☐ An unregistered private document
- ☐ A private document registered in an easily accessible public register
- ☐ An officially recorded unregistered document
- ☐ An officially recorded registered document

27. The right of ownership is evidenced:

- ☐ By a transcription of the document in the official register
- ☐ By the document, but there is no register
- ☐ By adverse possession

28. Do third parties have easy access to information about the owner of the right to ownership?

- ☐ Yes
- ☐ No

29. Do third parties have easy access to information about the extent of the right to ownership?

- ☐ Yes
- ☐ No

Land Registry

30. Is there official documentation that enables each building to be identified (a register of property)?¹⁶

☐ Yes ☐ No

31. If yes, does this documentation include plans enabling each building to be identified?

☐ Yes ☐ No

32. Is access to this system:

☐ Free of charge
☐ Restricted to certain individuals

33. Is there a register in which all the agreements concerning each building are entered?

☐ Yes ☐ No

34. If yes, what information is held in this register:¹⁷

☐ All contracts concerning the building?
☐ Contracts by which a right to ownership is transferred?
☐ Contracts by which a right to long-term occupation (more than 10 years) is transferred?
☐ Contracts which create an easement?
☐ Contracts which create a secured interest over the building (mortgage)?

35. Is there a legal obligation to enter agreements concerning the building in this register?

☐ Yes ☐ No

¹⁶ With regard to scoring: questions 30 and 31 are 'conditional' questions, since the answer to question 31 depends on the answer to question 30. As a result, it is not possible to score these two questions independently and the team have therefore decided to score them together, as a single question.

¹⁷ If all the replies are ticked, the score is 10; if only four are ticked, it is 40/5; if three, it is 30/5 ...and so on.

36. Who has access to the information held in this register?

- ☐ Any person interested
- ☐ Only persons who are authorised

37. Which persons supply the information held in this register?

- ☐ Only the lawyer who prepares the document
- ☐ The owner of the building
- ☐ Any person interested

Annexe IX.

Real estate. Case no. 2: Construction

Company A (the client or the prime contractor) wants to construct a building to house a food-processing factory on land it owns or over which it has user rights. It has questions on the following subjects: 1) the right to build; 2) the rules governing authorisations (particularly, procedures for the preparation of the file and time limits); 3) guarantees against defects; 4) the financing of the building.

General Questions

1. Have the legal rules⁵ which enable these questions to be resolved been officially gazetted⁶?

- ☐ Yes, for all the questions
- ☐ Yes, but only for questions ... (give the numbers of the questions)
- ☐ No, not for any of the questions asked

2. Are the rules statutory or jurisprudential⁷ in origin?

- ☐ Statutory, available in a legal compilation⁸, interpreted by jurisprudence which is also present in a legal compilation
- ☐ Jurisprudential, available in a legal compilation⁹
- ☐ Statutory, dispersed among multiple sources, and jurisprudence is important in understanding them
- ☐ Jurisprudential, dispersed among multiple sources

3. How do you access the rules? By using the internet¹⁰

⁵ The general term 'rule' is used to mean to any legal norm, irrespective of its source or the instrument in which it appears.

⁶ The score for each question is reduced if the matter has not been officially gazetted. If four questions have been gazetted, the score is 40/5, if only three have, the score is 30/5 and so on.

⁷ By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'.

⁸ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement or any private compilation to which public authorities refer.

⁹ In certain countries, there are prescribed compilations of jurisprudence.

- ☐ The rules are easily accessible on the internet. Searching for them requires less than one hour
- ☐ The rules are accessible on the internet. Searching for them requires between one and two hours
- ☐ The rules are accessible on the internet. Searching for them requires more than two hours
- ☐ The rules are not accessible on the internet

4. Are the rules available in a language other than the official language(s) of the country?

- ☐ Yes, in one foreign language
- ☐ Yes, in two foreign languages
- ☐ Yes, in more than two foreign languages
- ☐ No

5. In the event of an amendment, do the responsible authorities¹¹ conduct prior consultations?

- ☐ Yes
- ☐ No

6. Do transitional provisions exist to facilitate implementation of the new rules¹²?

- ☐ Yes
- ☐ No

¹⁰ Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

¹¹ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

¹² This question covers both the transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed.

7. Do the courts interpret the rules consistently?

- ☐ Yes, there is consensus
- ☐ No, but only on aspects which are incidental
- ☐ No, not on essential aspects

8. Has the rule been changed in the last five years?

- ☐ No
- ☐ Yes, once
- ☐ Yes, twice
- ☐ Yes, three times or more

9. Are the rules subject to checking for conformity with the Constitution¹³?

- ☐ Yes, before the rules are introduced into the legal system
- ☐ Yes, after the rules start to be applied
- ☐ Yes, both before and after the rules start to be applied
- ☐ No

10. Are the rules subject to checking for conformity with international conventions?

- ☐ Yes, after the rules start to be applied
- ☐ Yes, both before and after the rules start to be applied
- ☐ No

¹³ The term 'Constitution' means any paramount norm in the relevant legal system, whether in writing or not.

11. Does public order (*ordre publique*) have a role to play in the field of construction? (*no scoring*)

- ☐ Yes
- ☐ Yes, but rarely
- ☐ No

12. Is 'public order' defined by criteria which are easily recognisable by operators?

- ☐ Yes
- ☐ No

13. May an individual with full legal personality appeal against the way in which public order has been applied to him?

- ☐ Yes
- ☐ No

Specific Questions

14. May the company use the services of a *Société Civile de Construction* (a civil-law professional partnership for construction) or its equivalent? (*no scoring*)

- ☐ Yes
- ☐ No

15. Must the company ask for prior authorisation or will it make a simple retrospective declaration?

- ☐ Yes, prior authorisation
- ☐ Yes, retrospective declaration
- ☐ No, neither authorisation nor declaration

16. In the event of authorisation, does the preparation of the file involve¹⁴:

- ☐ 1 step
- ☐ 2 to 5 steps
- ☐ More than 5 steps

17. If the administrative authority does not respond, does silence signify acceptance?

- ☐ Yes
- ☐ No

18. In the event of authorisation or of retrospective declaration, does the competent authority¹⁵ check conformity?

- ☐ Yes, within a time limit fixed by law
- ☐ Yes, this may be done at any time
- ☐ Non

19. Is conformity checked after the company has been notified?

- ☐ Yes, within a time limit that is sufficient for it to conform
- ☐ Yes, but within a very short time limit
- ☐ No, it is checked without warning

¹⁴ This question is dependent on question 15. The maximum score would be given if the respondent does not tick any answer but answers 'No, neither authorisation nor declaration' to question 15.

¹⁵ The rationale behind questions 16 also applies here.

20. Does the fact that the building will be used for food processing entail additional checks?

- ☐ Yes, they are clearly defined by law
- ☐ Yes, but it is difficult to know what they are
- ☐ No

Guarantees against defects

21. Does the client have the benefit of a guarantee?

- ☐ Yes, a legal guarantee against all defects
- ☐ Yes, a legal guarantee but only for certain defects enumerated exhaustively by law
- ☐ No, it has to provide for a contractual guarantee

22. Can the parties choose arbitration to settle any disputes?

- ☐ Yes
- ☐ No

23. If the parties decide to go to court, are the courts used to dealing with construction disputes?

- ☐ Yes
- ☐ No

24. Do the domestic courts have a specialised division?

- ☐ Yes
- ☐ No

Financing

25. Can the company finance this construction on the local market? (*no scoring*)

☐ Yes ☐ No

26. Can the company use foreign capital? (*no scoring*)

☐ Yes ☐ No

27. Can the company use real-estate leasing? (*no scoring*)

☐ Yes ☐ No

Annexe X.

Settlement of Disputes. Case no. 1: In the national courts

Settlement of disputes relating to unfair competition in the national courts.

Company A signed a sales agreement with Company B allowing Company B to use Company A's sales network to offer its products and services to Company A's customers. Four years later, Company B terminated its contract with Company A and transferred all its customers, obtained through the use of Company A's network, to Company C, with which it has signed a new contract.

Access to the courts

1. May Company A apply for protective/provisional measures?

- ☐ Yes, the procedure is quick and easy
- ☐ Yes, but only if the need for urgency is demonstrated, easy procedure
- ☐ Yes, but the procedure is difficult
- ☐ No

2. May Company A sue on the merits?

- ☐ Yes
- ☐ No

3. Will the case be heard before a specialised court?

- ☐ Yes
- ☐ No

4. Are the parties in dispute able to use alternative ways to settle their differences?

- ☐ Yes, at any time in the proceedings
- ☐ Yes, before any hearing on the merits
- ☐ Yes, before taking the dispute to court
- ☐ No

5. Will Company A's costs be reimbursed if the court rules in its favour?

- ☐ Yes, all its costs
- ☐ Yes, but only the costs of access to court (excluding the cost of legal representation)
- ☐ Yes, but only within the limits of a fixed amount determined independently of the costs actually incurred
- ☐ No

6. Will Company A's legal costs be reimbursed if the court rules in its favour?

- ☐ Yes, all of them
- ☐ Yes, but only an amount determined by the court (equitably)
- ☐ No

7. Is the cost of legal professional services regulated¹⁶?

- ☐ Yes
- ☐ Yes, but the regulations apply only to ...
 - ☐ ... costs of counsel
 - ☐ ... costs of the process-server
 - ☐ ... the cost of expert opinions
- ☐ No

8. May Company A be awarded legal aid for the purpose of bringing a case to court?

- ☐ Yes
- ☐ Yes, provided the company's revenue is not above a certain income threshold
- ☐ No

Proceedings

9. Pre-trial investigation is conducted by (*no scoring*)

- ☐ The court¹⁷
- ☐ The parties, supervised by the court
- ☐ The parties

¹⁶ If the respondent ticks the three sub-responses of the reply 'Yes, but the regulations only apply to...' he gets a score of 30/4. If he only ticks two of them, he gets 20/4. If he only ticks one of them, he gets 10/4.

¹⁷ It is the equivalent of the French procedure for pre-trial preparation.

10. May the court decide on the types of evidence to be used?

- ☐ Yes, with no restriction
- ☐ Yes, except for public policy rules
- ☐ No, types of evidence are fixed by law

11. Is the adversarial principle followed:

- ☐ Yes, at all times in the proceedings
- ☐ Yes, but not at all times in the proceedings
- ☐ No

12. Are the proceedings confidential?

- ☐ Yes
- ☐ Yes, but the parties may waive confidentiality
- ☐ No, but the parties may provide for confidentiality
- ☐ No

13. Does the public have access to the exchanges of pleadings between the parties?

- ☐ Yes
- ☐ Yes, but the court may decide not to publish the confidential parts?
- ☐ No

14. Does the public have access to the documents exchanged between the parties?

- ☐ Yes
- ☐ Yes, but the court may decide to keep certain documents confidential?
- ☐ No

15. Are hearings public?

- ☐ Yes, with no restriction
- ☐ Yes, but exceptions are provided for by law
- ☐ No

16. Is there a maximum time limit within which the court must reach a decision on the dispute¹⁸?

- ☐ Yes, it is longer than...
- ☐ Yes, it is between... and...
- ☐ Yes, it is shorter than...
- ☐ No, there is no maximum time limit.

17. How long, on average, does the court take to reach a decision on a dispute? (*no scoring*)

- ☐ Less than 6 months
- ☐ Between 6 months and 1 year
- ☐ Between 1 and 3 years
- ☐ More than 3 years

18. For this type of litigation, is the impartiality of the court seized guaranteed?

- ☐ Yes
- ☐ No, the court's decision is influenced by
 - ☐ Pressure from government
 - ☐ Conflicts of interest due to connections between the judge and the dispute
 - ☐ The judge's lack of impartiality with regard to one of the parties
 - ☐ The judge combining his official function with private business interests
 - ☐ Inadequate protection of the judiciary
 - ☐ Others

Judgement

19. Must reasons be provided for judgements?

- ☐ Yes
- ☐ No

20. Must judgements include mandatory information?

- ☐ Yes, as provided by law
- ☐ Yes, but not clearly specified by the law
- ☐ No

¹⁸ Scoring will depend on the time limit announced by the respondent compared with the average time limit reported by all respondents.

Enforcement

21. Are judgements rendered by the court immediately enforceable?

- ☐ Yes, in all cases
- ☐ Yes, unless one of the parties makes an ordinary appeal¹⁹
- ☐ Yes, even when there is an appeal but the court has ordered provisional enforcement
- ☐ No

¹⁹ By 'ordinary appeal' we mean an appeal which enables a judgement on the merits to be reversed and which normally suspends enforcement of the judgement.

Annexe XI.

Settlement of Disputes. Case no. 2: Arbitration

The questionnaire is concerned with arbitration in commercial disputes between two partners of equal strength.

1. Does your legal system have a law governing arbitration?

☐ Yes

☐ No

2. If such a law exists, when was it enacted? (*no scoring*)

Arbitration Agreements

3. Does your legal system observe arbitration agreements?

☐ Yes

☐ Yes, except in exceptional circumstances described in law

☐ Yes, except in exceptional circumstances determined by the court

☐ No

4. Is it possible to extend an arbitration agreement to third parties who are not signatories?

☐ Yes, very easily

☐ Yes, the procedure is precisely governed by law

☐ Yes, on a case-by-case basis

☐ No

5. Can all matters be arbitrated?

☐ Yes

☐ No, but we know precisely which matters can be

☐ No, it is not clear

6. Despite the existence of an arbitration agreement, can the parties obtain protective/provisional measures from national courts?

- ☐ Yes, in accordance with criteria governed by law
- ☐ Yes, but only in urgent cases
- ☐ Yes, provided the dispute has not already been referred to the arbitration tribunal
- ☐ No

Composition of the arbitration tribunal

7. Are the parties free to choose their arbitrators without restriction?

- ☐ Yes
- ☐ No

8. Are there lists of arbitrators?

- ☐ Yes, but they are not binding
- ☐ Yes, binding
- ☐ Yes, but unofficial and not transparent
- ☐ No

9. Is it possible to replace an arbitrator who is or becomes unavailable?

- ☐ Yes, easily, a procedure is provided for by law
- ☐ Yes, but no precise procedure exists
- ☐ Yes, but it is difficult

10. Is it possible to challenge an arbitrator (for conflict of interests)?

- ☐ No
- ☐ Yes, in limited and well-defined cases
- ☐ Yes, but cases uncertain
- ☐ Yes, in a wide range of cases

Arbitration Procedure

11. Are the parties free to choose the procedure that they want?

- ☐ Yes, completely
- ☐ Yes, except for public policy rules (procedural guidelines)
- ☐ No, the procedure is laid down by law

12. Are the proceedings confidential?

- ☐ Yes
- ☐ Yes, but the parties may waive confidentiality
- ☐ No, but the parties may choose confidentiality
- ☐ No

13. Can the arbitration tribunal hear an *amicus curiae*

- ☐ Yes
- ☐ Yes, but under conditions strictly governed by law
- ☐ No, but the parties may provide for or request it
- ☐ No

14. Can the parties decide on the types of evidence which will be used?

- ☐ Yes, with no restriction
- ☐ Yes, except for public policy rules
- ☐ No, the types of evidence are determined by law

15. In the event of difficulties during the proceedings and assuming that the place of arbitration is in your country, can a national judge come to the aid of the arbitration proceedings¹?

- ☐ Yes, the procedure is easy and quick
- ☐ Yes, but the procedure is difficult and long
- ☐ No

¹ In certain countries this judge is called a '*Juge d'appui*' or 'Supporting Judge'

16. Are arbitration proceedings governed by time limits?

- ☐ Yes
- ☐ Yes, but they are rarely observed
- ☐ Yes, but extensions are possible, strictly governed
- ☐ No

17. Are arbitration tribunals free to conduct their deliberations as they wish?

- ☐ Yes
- ☐ Yes, except for public order rules
- ☐ No

18. Are there mandatory particulars for the award?

- ☐ Yes, as provided by law
- ☐ Yes, but not clearly specified by the law. You must refer to case law
- ☐ No

19. Are the classifications 'domestic award' and 'international award' clear?

- ☐ Yes
- ☐ No

20. Are domestic awards subject to remedy² before the national courts?

- ☐ Yes
- ☐ No

21. Are international awards subject to remedy³ before the national courts?

- ☐ Yes
- ☐ No

22. Can the enforcement of awards be deferred?

- ☐ Yes
- ☐ No

23. Can the courts review awards on their merits?

- ☐ Yes
- ☐ No

² By remedy we mean an application for annulment of the award, an appeal or any other remedy of the same type.

³ See the preceding note.

24. Do the parties have the right to waive remedies?

- ☐ Yes
- ☐ Yes, but only in certain ways specified by law
- ☐ No

25. In cases of remedies, does the law specify the instances of appeal?

- ☐ Yes
- ☐ No

26. How many instances of appeal are there?

- ☐ Fewer than 5
- ☐ Between 5 and 8
- ☐ More than 8
- ☐ Not determined

Enforcement

27. Is your country a party to the New York Arbitration Convention of 1958?

- ☐ Yes
- ☐ No

28. Is the internal law of your country more favourable to the enforcement of awards than the New York Convention?

- ☐ Yes
- ☐ No

29. Are the reasons for non-enforcement enumerated exhaustively by law⁴?

- ☐ Yes
- ☐ No

30. The number of reasons why an award is not enforceable is...

- ☐ Less than 5
- ☐ Between 5 and 8
- ☐ More than 8
- ☐ Not determined

⁴ Here, the term 'law' means either the New York Convention applicable directly, or the law incorporating the New York Convention, or the domestic law which is more favourable than the New York Convention.

31. Are there official statistics on the percentage of awards pronounced each year which raise difficulties of enforcement?

- ☐ Yes, official
- ☐ Yes, unofficial
- ☐ No

Annexe XII.

Civil liability. Case no. 1: Industrial hazards

Company A operates a paper factory, near a river that supplies water to neighbouring farmland. Farmer B cultivates the fields downstream from the factory and claims that his yield has declined significantly in recent years because of toxic effluent discharged into the river. He claims compensation from Company A and is ready to take his claim to court.

General Questions

1. What are the rules¹ of liability which Farmer B may invoke to support his claim²? (Several answers are possible)

- ☐ The rules of general law governing liability ①
- ☐ The rules of liability specific to the operation of an industrial site ②
- ☐ The rules of liability specific to environmental pollution ③
- ☐ Other ④ : _____ (please specify)

2. Have the legal rules³ enabling these questions to be resolved been officially gazetted?

	①	②	③	④
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

¹ The general term 'rule' is used to mean any legal norm, irrespective of its source or the instrument in which it appears.

² If only 1 answer is ticked, a score of 10 will be given, if 2 are ticked the score will be 5 and if there are more than 2, the score will be 0.

³ The general term 'rule' is used to mean to any legal norm, irrespective of its source or the instrument in which it appears.

3. Are the rules statutory⁴ or jurisprudential in origin?

	①	②	③	④
Statutory, available in a legal compilation ⁵ , interpreted by jurisprudence which is also present in a legal compilation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, available in a legal compilation ⁶	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Statutory, dispersed among multiple sources, and jurisprudence is important to understanding them	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, dispersed among multiple sources	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

4. How do you access the rules? By using the internet⁷

	①	②	③	④
The rules are easily accessible on the internet. Searching for them requires less than one hour	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires between one and two hours	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires more than two hours	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The rules are not accessible on the internet	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

⁴ By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'

⁵ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement, or any private compilation to which public authorities refer.

⁶ In certain countries, there are prescribed compilations of jurisprudence.

⁷ Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

5. Are the rules available in a language other than the official language(s) of the country?

	①	②	③	④
Yes, in one foreign language	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in more than two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

6. When they entered into force, the rules applied...

	①	②	③	④
...only to damage caused by events after this date	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
...to damage observed after this date, no matter what their causal event	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
...to all damage observed before and after this date	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

7. In the event of an amendment, do the responsible authorities⁸ carry out prior consultations?

	①	②	③	④
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

⁸ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

8. Do transitional provisions exist to facilitate implementation of the new rules⁹?

	①	②	③	④
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

9. Do the courts interpret the rules consistently?

	①	②	③	④
Yes, there is consensus	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No, but only on aspects which are incidental	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No, on essential aspects	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

10. Has the rule been changed during the last five years?

	①	②	③	④
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, once	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, twice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, three times or more	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

⁹ This question covers both the transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed.

11. Are the rules subject to checking for conformity with the Constitution¹⁰?

	①	②	③	④
Yes, before the rules are introduced into the legal system	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

12. Are the rules subject to checking for conformity with international conventions?

	①	②	③	④
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

13. Does public order (*ordre publique*) have a role to play in the subject-matter in question?
(no scoring)

- ☐ Yes
- ☐ Yes, but rarely
- ☐ No

14. Is 'public order' defined by criteria which are easily recognisable by operators?

- ☐ Yes ☐ No

¹⁰ The term 'Constitution' means any norm which is paramount in the relevant legal system, whether in writing or not.

15. May an individual with full legal personality appeal against the way in which public order has been applied to him?

☐ Yes ☐ No

Specific Questions

16. May Company A plead that its facility conforms to current regulations?

- ☐ Yes, conformity to current regulations will relieve Company A from liability
- ☐ Yes, but sometimes the judge refuses to grant an exemption, even though the regulations have been observed
- ☐ No

17. Is it easy to identify the types of evidence admissible in court?

☐ Yes ☐ No

18. If liability is established, may Company A take legal action against the former operator of the site, who sold it the site, to recover all or part of the compensation paid to Farmer B?

Yes, in all cases

- ☐ Yes, unless there is a clause in the contract of sale limiting liability
- ☐ Yes, the courts allow the operator, on a case-by-case basis, to take legal action against the former operator of the site
- ☐ No

19. Could Company A have limited the risk of liability by including a guarantee clause in the contract of sale concluded with the former operator of the site?

☐ Yes ☐ No

20. Does the lateness of the discovery of the pollution bar Company A from taking action for compensation against the former operator?

- ☐ Yes, a short limitation period is often an obstacle to such an action
- ☐ Yes, but long limitation periods rarely raise an obstacle
- ☐ No, because the limitation period begins to run from the time of discovery of the pollution

21. The causal link between the operation of the factory and the damage claimed by Farmer B is...

- ☐ ...assessed by the court in accordance with precise and invariable criteria
- ☐ ...assessed by the court in accordance with precise and invariable criteria, but a trend in case law is beginning to emerge
- ☐ ... assessed on a case-by-case basis but no one can predict in advance the solution adopted by the court

22. Does the court turn for advice to a court-appointed expert to assess the damage that can be compensated?

- ☐ Yes
- ☐ Yes, but at its own discretion
- ☐ No

23. May the company assess the amount of compensation that it will be ordered to pay?

- ☐ Yes, precisely
- ☐ Yes, but only by order of magnitude
- ☐ No

24. May proceedings be brought against Company A in a class action by several claimants that would enable it to make a final settlement of compensation for all victims?

- ☐ Yes, this possibility is clearly established in law
- ☐ Yes, the judge may occasionally agree to a class action or group litigation
- ☐ No

Annexe XIII.

Civil liability. Case no. 2: Defective Products

Company A specialises in the manufacture of electric household appliances for individuals. A year ago, it developed a new model of electric kettle, which it sells through a distribution network. A few weeks ago, Company A learned from one of its distributors that a significant number of customers have been complaining about serious malfunctions. Company A wants to know what system of liability will apply to it, assuming that the country in which its products are purchased is the country for which you are replying.

General Questions

1. What are the rules¹ of liability on which purchasers may rely in support of a claim for compensation? (Several answers are possible) (*no scoring*)

- ☐ The rules of general law governing liability ①
- ☐ Rules of liability specific to defective goods ②
- ☐ Other ③ : _____ (please specify)

2. Have the legal rules enabling these questions to be resolved been officially gazetted?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

¹ The general term 'rule' is used to mean any legal norm, irrespective of its source or the instrument in which it appears.

3. Are the rules statutory² or jurisprudential in origin?

	①	②	③
Statutory, available in a legal compilation ³ , interpreted by jurisprudence which is also present in a legal compilation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, available in a legal compilation ⁴	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Statutory, dispersed among multiple sources, and jurisprudence is important to understanding them	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Jurisprudential, dispersed among multiple sources	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

4. How do you access the rules? By using the internet⁵

	①	②	③
The rules are easily accessible on the internet. Searching for them requires less than one hour	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires between one and two hours	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The rules are accessible on the internet. Searching for them requires more than two hours	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The rules are not accessible on the internet	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

5. Are the rules available in a language other than the official language(s) of the country?

	①	②	③
Yes, in one foreign language	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, in more than two foreign languages	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

² By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'.

³ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement or any private compilation to which public authorities refer.

⁴ In certain countries, there are prescribed compilations of jurisprudence.

⁵ Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

6. When they entered into force, the rules applied...

	①	②	③
...only to goods sold after this date	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
...to damage occurring after this date, whatever the date on which the product was sold	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
...to damage occurring before or after this date, whatever the date on which the product was sold	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

7. In the event of an amendment, do the responsible authorities⁶ carry out prior consultations?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

8. Do transitional provisions exist to facilitate implementation of the new rules⁷?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

9. Do the courts interpret the rules consistently?

	①	②	③
Yes, there is consensus	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No, but only on aspects which are incidental	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No, on essential aspects	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

⁶ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

⁷ This question covers both the transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed.

10. Has the rule been changed during the last five years?

	①	②	③
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, once	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, twice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, three times or more	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

11. Are the rules subject to checking for conformity with the Constitution⁸?

	①	②	③
Yes, before the rules are introduced into the legal system	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

12. Are the rules subject to checking for conformity with international conventions?

	①	②	③
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, both before and after the rules start to be applied	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

⁸ The term 'Constitution' means any norm which is paramount in the relevant legal system, whether in writing or not.

13. Does public order (*ordre publique*) have a role to play in the subject-matter in question? (*no scoring*)

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Yes, but rarely	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

14. Is 'public order' defined by criteria which are easily recognisable by operators?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

15. May an individual with full legal personality appeal against the way in which public order has been applied to him?

	①	②	③
Yes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Specific Questions

16. May Company A plead that the product conforms to current regulations in the country of origin (Company A's country)?

- ☐ Yes, conformity to current regulations will relieve Company A from liability
- ☐ Yes, but sometimes the judge refuses to grant an exemption, even though the regulations have been observed
- ☐ No

17. May Company A plead the absence of any reprehensible behaviour, in particular the product's conformity to regulations in force in the country of purchase?

- ☐ Yes, conformity to current regulations will relieve Company A from liability
- ☐ Yes, but sometimes the court refuses to grant an exemption, even though the regulations in force have been observed
- ☐ No

18. Can Company A rely on the fact that, when the product was being developed, the design fault could not have been avoided, given the state of scientific and technical knowledge?

- ☐ Yes, this ground for exemption has been established in clear and precise terms
- ☐ Yes, the court sometimes takes this circumstance into account in order to exempt the manufacturer from liability
- ☐ No

19. Can Company A rely on the fact that the product defect has its origin in a design fault attributable to its supplier of heating resistors?

- ☐ Yes, this ground for exemption has been established in clear and precise terms
- ☐ Yes, the court sometimes takes this circumstance into account in order to exempt the manufacturer from liability
- ☐ No

20. Instead of claiming compensation from Company A, may purchasers rely on the liability of the seller or the distributor of a defective product, based on the same facts?

- ☐ Yes, the seller or the distributor may be held liable, but it will have recourse against the manufacturer, in accordance with clear and precise criteria
- ☐ Yes, but how the two liabilities are attributed is decided on a case-by-case basis
- ☐ No, actions can only be brought in respect of the manufacturer's liability

21. The existence of a product defect is ...

- ☐ ... assessed by the court in accordance with precise and invariable criteria
- ☐ ... assessed by the court in accordance with precise and invariable criteria, but a trend in case law is beginning to emerge
- ☐ ... assessed on a case-by-case basis, but no one can predict in advance the solution adopted by the court

22. The causal link between the product defect and the damage claimed by purchasers is ...

- ☐ ... assessed by the court in accordance with precise and invariable criteria
- ☐ ... assessed by the court in accordance with precise and invariable criteria, but a trend in case law is beginning to emerge
- ☐ ... assessed on a case-by-case basis, but no one can predict in advance the solution adopted by the court

23. What is the extent of the compensation that purchasers can claim? (*no scoring*)

- ☐ A sum less than their loss (because of a partial exemption or a cap on liability)⁹
- ☐ A sum equivalent to their loss
- ☐ A sum in excess of their loss (punitive damages)

24. Could Company A have limited the risk of liability by including a limitation of liability clause in the contracts concluded with the distributors?

- ☐ Yes, for distributors and purchasers
- ☐ Yes, only for distributors
- ☐ No

⁹ For the purposes of this case, we shall assume that the loss has been established.

25. May proceedings be brought against Company A in a class action by several purchasers that would enable it to make a final settlement of compensation for all victims?

- ☐ Yes, this possibility is clearly established in law
- ☐ Yes, the judge may occasionally agree to a class action or group litigation
- ☐ No

Annexe XIV.

Company Law. Case no. 1: Purchase of a company

Company A wants to acquire all the shares in Company B, which are held by two persons (the transferors). The price for 80% of the shares is fixed in the deed of transfer and is paid immediately. The price of the remaining 20% will be fixed and paid after taking into account the company's value one year later. The deed of transfer also contains a clause guaranteeing the liabilities in respect of 80% of the shares. We assume that a statutory auditor (or the equivalent) audits the accounts of the transferred company.

General Questions

1. Has the legal rule¹ which enables this question to be resolved been officially gazetted?

☐ Yes

☐ No

2. Is the rule statutory² or jurisprudential in origin?

☐ Statutory, available in a legal compilation³, interpreted by jurisprudence which is also present in a legal compilation

☐ Jurisprudential, available in a legal compilation⁴

☐ Statutory, dispersed among multiple sources, and jurisprudence is important in understanding it

☐ Jurisprudential, dispersed among multiple sources

3. How do you access to the rule? By using the internet⁵

☐ The rule is easily accessible on the internet. Searching for it requires less than one hour

☐ The rule is accessible on the internet. Searching for it requires between one and two hours

☐ The rule is accessible on the internet. Searching for it requires more than two hours

☐ The rule is not accessible on the internet

¹ The general term 'rule' is used to mean any legal norm, irrespective of its source or the instrument in which it appears.

² By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'.

³ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement, or any private compilation to which public authorities refer.

⁴ In certain countries, there are prescribed compilations of jurisprudence.

⁵ Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

4. Is the rule available in a language other than the official language(s) of the country?

- ☐ Yes, in one foreign language
- ☐ Yes, in two foreign languages
- ☐ Yes, in more than two foreign languages
- ☐ No

5. In the event of an amendment, do the responsible authorities⁶ carry out prior consultations?

- ☐ Yes
- ☐ No

6. Do transitional provisions exist to facilitate implementation of the new rule⁷?

- ☐ Yes
- ☐ No

7. Do the courts interpret the rule consistently?

- ☐ Yes, there is consensus
- ☐ No, but only on aspects which are incidental
- ☐ No, on essential aspects

8. Has the rule been changed in the last five years?

- ☐ No
- ☐ Yes, once
- ☐ Yes, twice
- ☐ Yes, three times or more

9. Is the rule subject to checking for conformity with the Constitution⁸?

- ☐ Yes, before the rule is introduced into the legal system
- ☐ Yes, after the rule starts to be applied
- ☐ Yes, both before and after the rule starts to be applied
- ☐ No

⁶ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

⁷ This question covers both the transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed.

⁸ The term 'Constitution' means any norm which is paramount in the relevant legal system, whether in writing or not.

10. Is the rule subject to checking for conformity with international conventions?

- ☐ Yes, after the rule starts to be applied
- ☐ Yes, both before and after the rule starts to be applied
- ☐ No

11. Does public order (*ordre publique*) have a role to play in the subject-matter in question? (*no scoring*)

- ☐ Yes
- ☐ Yes, but rarely
- ☐ No

12. Is 'public order' defined by criteria which are easily recognisable by operators?

- ☐ Yes
- ☐ No

13. May an individual with full legal personality appeal against the way in which public order has been applied to him?

- ☐ Yes
- ☐ No

14. Is a sale such as this is governed by

- ☐ Company Law?
- ☐ the Law of Contract?
- ☐ both

Specific Questions

Liability of the vendors

15. Are the vendors subject to joint and several liability?

- ☐ Yes
- ☐ No

16. Can the purchasers take action against the vendors: (*no scoring*)

- ☐ For fraud⁹?
- ☐ For wilful non-disclosure¹⁰?
- ☐ Under another legal principle?

17. What are the consequences of the purchaser's claim, if it is upheld?

- ☐ Annulment of the deed of transfer
- ☐ Only damages

Determining the price of the remaining 20%

18. Does the law lay down the method for calculating the price of the remaining 20%?

- ☐ Yes
- ☐ No

The Foundation has asked us to rephrase this question.

19. Can the price of the remaining 20% be determined based on expert advice?

- ☐ Yes, by an expert acting for the parties
- ☐ Yes, by an independent expert
- ☐ No

20. Is it possible to challenge in court the price determined by an expert acting for the parties?

- ☐ Yes, only for a gross error
- ☐ Yes, but for reasons which are difficult to determine in advance
- ☐ No

⁹ We define fraud as a deception concerning the (mostly accounting) facts, which, if the purchaser had been aware of them, would have prevented him from agreeing to the transaction or would have resulted in him agreeing at a lower price.

¹⁰ Wilful non-disclosure means the intentional failure by a transferor to disclose a fact which he should normally have disclosed.

Guarantee of the 80%

21. Can the statutory auditors be held liable?

- ☐ Yes, but only in criminal law
- ☐ Yes, but only in civil law
- ☐ In criminal and in civil law
- ☐ No

22. Can the former managers be held liable?

- ☐ Yes, only for misuse of company property (criminal)
- ☐ Yes, but only in civil law
- ☐ Yes, in both criminal and civil law
- ☐ No

23. Can the liability of former managers be excluded in the deed of transfer?

- ☐ Yes
- ☐ No

24. Is the guarantee of the liabilities regulated by law or left for the contracting parties to decide?

- ☐ The guarantee is regulated by law
- ☐ The guarantee is left for the contracting parties to decide

25. Does the transferor incur liability for declarations about the state of the company which very often precede guarantees of liabilities?

- ☐ Yes
- ☐ No

26. May the purchaser conduct an audit of the transferred company?

- ☐ Yes
- ☐ No

27. Will the interpretation of the guarantee depend on the existence of an audit?

☐ Yes

☐ No

28. Will the interpretation of the guarantee depend on any refusal by the transferor to allow an audit to be conducted?

☐ Yes

☐ No

29. Is there a register in which the official documents of the company are entered?

☐ Yes

☐ No

30. Is the guarantee of the liabilities transferable to another purchaser?

☐ Yes

☐ No

Position of the employees

31. Are the rights of the transferred company's employees clearly defined by statute or jurisprudence?

☐ Yes

☐ No

32. Are employees' representatives subject to an obligation of confidentiality concerning the information obtained?

☐ Yes

☐ No

Annexe XV.

Company Law. Case no. 2: Corporate Life - Conflict of Interests

The manager of Company A has sold to Company B, which he controls, a building belonging to Company A at a price which seems to be unusually low. The minority shareholders of Company A want to challenge this sale.

General Questions

1. Has the legal rule²⁵⁸ which enables this question to be resolved been officially gazetted?

- ☐ Yes ☐ No

2. Is the rule statutory²⁵⁹ or jurisprudential in origin?

- ☐ Statutory, available in a legal compilation²⁶⁰, interpreted by jurisprudence which is also present in a legal compilation
- ☐ Jurisprudential, available in a legal compilation²⁶¹
- ☐ Statutory, dispersed among multiple sources, and jurisprudence is important in understanding it
- ☐ Jurisprudential, dispersed among multiple sources

3. How do you access the rule? By using the internet²⁶²

- ☐ The rule is easily accessible on the internet. Searching for it requires less than one hour
- ☐ The rule is accessible on the internet. Searching for it requires between one and two hours
- ☐ The rule is accessible on the internet. Searching for it requires more than two hours
- ☐ The rule is not accessible on the internet

²⁵⁸ The general term 'rule' is used to mean any legal norm, irrespective of its source or the instrument in which it appears.

²⁵⁹ By 'statutory in origin' we mean both a rule adopted by the legislature and one adopted by other regulatory bodies or other authorities within the executive branch. In other words, what we mean is 'written law'.

²⁶⁰ By 'legal compilation' we mean any official code prepared by a public authority or with its endorsement, or any private compilation to which public authorities refer.

²⁶¹ In certain countries, there are prescribed compilations of jurisprudence.

²⁶² Assuming that the person carrying out the search is reasonably comfortable with computerised legal research.

4. Is the rule available in a language other than the official language(s) of the country?

- ☐ Yes, in one foreign language
- ☐ Yes, in two foreign languages
- ☐ Yes, in more than two foreign languages
- ☐ No

5. In the event of an amendment, do the responsible authorities²⁶³ carry out prior consultations?

- ☐ Yes
- ☐ No

6. Do transitional provisions exist to facilitate implementation of the new rule²⁶⁴?

- ☐ Yes
- ☐ No

7. Do the courts interpret the rule consistently?

- ☐ Yes, there is consensus
- ☐ No, but only on aspects which are incidental
- ☐ No, on essential aspects

8. Has the rule been changed during the last five years?

- ☐ No
- ☐ Yes, once
- ☐ Yes, twice
- ☐ Yes, three times or more

9. Is the rule subject to checking for conformity with the Constitution²⁶⁵?

- ☐ Yes, before the rule is introduced into the legal system
- ☐ Yes, after the rule starts to be applied
- ☐ Yes, both before and after the rule starts to be applied
- ☐ No

²⁶³ The term 'authorities' is deliberately general, whatever the source of the rule, statutory or jurisprudential.

²⁶⁴ This question covers both the transitional measures taken by the legislature and those adopted by the courts in cases where earlier case law has been reversed.

²⁶⁵ The term 'Constitution' means any norm which is paramount in the relevant legal system, whether in writing or not.

10. Is the rule subject to checking for conformity with international conventions?

- ☐ Yes, after the rule starts to be applied
- ☐ Yes, both before and after the rule starts to be applied
- ☐ No

11. Does public order (*ordre publique*) have a role to play in the subject-matter in question? (*no scoring*)

- ☐ Yes
- ☐ Yes, but rarely
- ☐ No

12. Is 'public order' defined by criteria which are easily recognisable by operators?

- ☐ Yes
- ☐ No

13. May an individual with full legal personality appeal against the way in which public order has been applied to him?

- ☐ Yes
- ☐ No

14. The rights of minority shareholders are governed

- ☐ by company law?
- ☐ by the general law?

15. May the company's articles of association govern the action of the minority shareholders, possibly against the law?

- ☐ Yes
- ☐ No

Specific Questions

16. May the minority shareholders bring legal actions:

- ☐ For damages?
- ☐ For annulment of the deed of transfer?
- ☐ None

17. May the minority shareholders obtain an expert opinion to check the correct price for the building before any litigation?

- ☐ Yes, subject to an informal condition precedent enabling the manager to provide documentary evidence to justify the sale
- ☐ Yes, without an informal condition precedent
- ☐ No

18. Should the manager have consulted the company's supervisory bodies before the transfer?

- ☐ Yes, by means of a clearly defined procedure
- ☐ Yes, but the procedure is not clearly defined
- ☐ No

19. Is the consultation procedure clearly defined by legal rules?

- ☐ Yes
- ☐ No

20. If the minority shareholders win their case, may they obtain:

- ☐ Annulment of the deed of transfer
- ☐ Damages for the minority shareholders
- ☐ Damages for the company
- ☐ Damages for the minority shareholders and for the company

21. What is the limitation period for legal action by the minority shareholders? (*no scoring*)

Number of months:

22. What is the limitation period for a legal action for payment or for restitution of salary²⁶⁶ ? (*no scoring*)

Number of months:

²⁶⁶ The definition of 'salary' includes not only wages *stricto sensu* but also overtime, paid holidays and all the other remuneration payable by the employer.