



Legal Mechanisms for Commercial Dispute Resolution in Afghanistan

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Introduction

Afghanistan's legal system is determined to be legal pluralism where three famous types of legal system have functioned it together. A huge part of Afghan legal system is derived of French model civil law system where the state legislature enacts laws in a codified manner. The second remarkable part of the Afghan legal system has been shaped by Islamic legal system based on Hanafi School of Thoughts, and the third and more reliable pillar of the Afghan pluralized legal system is Afghanistan's own traditional system shaped by customary law of Afghanistan. This diversity of legal sources, to the extent has made the legal system of Afghanistan to be complicated.

Likewise, in result of this diversity of law sources in shaping the system of legal pluralism, currently Afghanistan hosts various types of dispute resolution mechanisms which also adds to the complexity of the Afghan legal system, but on the other hand it has done a lot for commercial development and economic growth in Afghanistan. Dispute resolution mechanism is commonly divided into formal and informal systems or so-called State and non-state mechanisms where than, each of them is being divided into subtypes. For instance, formal dispute resolution mechanism includes only court system while the informal mechanism covers the arbitration, mediation, conciliation, Shuars and Jirgas. this small article specifically talks about legal mechanism for

commercial dispute resolution in Afghanistan, hence, we do not discuss other types of the disputes (e.g., civil, criminal.) and their resolution mechanism.

Commercial disputes in Afghanistan

Four decades ongoing war has destroyed Afghanistan's entire infrastructures; thus, it has many times been determined to be at the top of less developed countries which is still unable to even prepare its ordinary budget from its own internal financial incomes and sources. Still, a remarkable amount of Afghan yearly budget is depended on foreign financial aid of the international community.¹ Considering these financial uncertainties, the Afghan government has prioritized the Economic growth and commerce development as its top priorities. Following the commitment towards the economic growth and commerce development, the Afghan government has recently taken some very essential steps which consequently has made Afghanistan to keep continued economic growth and commercial development and be ranked in better places as per World's Bank's doing business reports.

According to the 2017/18 world bank report of doing business, Afghanistan has been ranked as top economic improver who even left India, China and Turkey behind.² It shows that Afghanistan's economy is developing rapidly, and internal and foreign investment have been significantly increasing. The growth of business increasingly requires merchants and companies to deal with other merchants and business companies inside and outside Afghanistan. This situation shapes the strong need for formal system of commercial laws to structure these new relationships and provide with dispute resolution mechanisms for commercial disputes.³

Currently, Afghanistan has various legal mechanisms for commercial dispute resolution which are established either by Afghan laws based on Afghanistan's own need or are established based on Afghanistan's commitment and obligation under international conventions. Commercial courts, domestic arbitration mechanism, mediation, Conciliation, Jirgas and Shuras are the mechanism which are existed from very early time

¹ STEPHANIE AHMAD ET AL., AN INTRODUCTION TO THE LAW OF AFGHANISTAN, (Stephanie Ahmad, et al 3d. ed. 2011).

² WORLD BANK, DOING BUSINESS (2018) INDEX. A WORLD BANK GROUP FLAGSHIP REPORT.

³ UNA AU ET AL., AN INTRODUCTION TO COMMERCIAL LAW OF AFGHANISTAN, (Will Havemann et al. 2d. ed. 2011).

as part of Afghanistan's legal or traditional systems, while some rules are promulgated to deal with the disputes contain foreign elements and are transitional or international issues. This short paper will just focus on commercial courts, arbitration, mediation and traditional mechanism which are more involved in commercial dispute resolution in Afghanistan.⁴

1. Commercial courts in Afghanistan

commercial courts in Afghanistan have been functioned as primary formal legal mechanisms for commercial dispute resolution which were first created by the Afghan constitution of 1964 within the structure of executive branch of the state. Following the concerning constitution, in 1967, the law on the commercial procedure code was enacted which set forth the legal framework for the courts to deal with commercial disputes.⁵

Current Afghan constitution of 2004 provides with an independent judiciary and says that the formation and authority of the courts will be regulated by separate statute.⁶ However, the concerning articles of the constitution clearly did not provide with the formation of commercial courts, but article 95 of the constitution has given the power of establishing new courts to the supreme court on need basis. Following article 95 of the constitution, in 2013, the law on the structure and authority of the courts provided with the creation of primary courts in each province.⁷ The law also states that the provinces which lacks the formation of commercial courts, commercial dispute can be brought to civil division of the city primary courts of the concerning provinces. Despite the clear provision of the law, still there is no commercial court in some provinces.

Under the 1964 Afghan constitution, commercial courts in Afghanistan had remarkable authority in the past. The commercial procedure code enacted under the 1964 constitution, explicitly granted the commercial court with the power to oversee settlement upon agreement of the parties, to make preliminary rulings; to

⁴ UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT, 2 (2010).

⁵ STEPHANIE AHMAD ET AL., AN INTRODUCTION TO THE LAW OF AFGHANISTAN, 166 (Stephanie Ahmad, et all 3d. ed

⁶ QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004] (AFG.).

⁷ QANUNI TASHKIL WA SALAHAT MAHAKIM AFGHANISTAN [THE LAW ON ORGANIZATION AND AUTHORITY OF THE COURTS OF AFGHANISTAN], [2013] (AFG).

initiate suits, motions, and pleadings; and to conduct trials, hear evidence, make decisions, and hear appeals.⁸

Likewise, commercial courts were also authorized to make arbitration ruling and awards.

Currently, commercial courts in Afghanistan do not have constitutional authority according to the current constitution of 2004. Since, the constitution has limited the commercial courts' power to serve as an independent forum of the business and commercial disputes. Article 95 of the constitution grants the supreme court of Afghanistan with the power to have control over all relevant regulation of the Afghan judiciary. Hence, currently, the Afghan supreme courts hold jurisdiction over commercial court and now, only the supreme court has the power to establish effective commercial courts in All provinces of Afghanistan.

As mentioned above, commercial courts have existed from very early time of the Afghan constitution of 1964, but they have not been so effective in terms of commercial dispute resolutions. The main underlying reasons behind the ineffectiveness are inaccessibility of the court, corruption, and lack of professionalism and expertise of the appointed judges.⁹ As mentioned earlier, currently, there are just 6 commercial courts in major cities of Afghanistan, however, the law says that every province should have a commercial court, so this limited numbers have made them inaccessible to majority of people. likewise, corruption, lack of professionalism and expertise of the appointed judges, and lengthy and costly court procedures are other reasons that have made Afghan commercial courts less trusted and ineffective. For instance, U.S. Stat Department's 2014 report on the investment climate in Afghanistan mentions that foreign investors in Afghanistan have not been generally benefited by from commercial courts' lengthy proceedings in Afghanistan, even the claim is true about the domestic investors who are also complaining of commercial courts in Afghanistan for the same problems mentioned above.¹⁰ Consequently, commercial disputes are mostly being resolved through other legal mechanisms. For instance, commercial arbitration, commercial mediation, conciliation, Shuras and Jirga are more trusted mechanisms for commercial dispute settlement in comparison with the commercial courts.

⁸ QANUNI AUSOOLE MAHAKIMATI TEJARATI AFGHANISTAN [AFGHANISTAN COMMERCIAL PROCEDURE CODE] ۱۳۴۳ [1965], (AFG.).

⁹ UNA AU ET AL., AN INTRODUCTION TO COMMERCIAL LAW OF AFGHANISTAN, (Will Havemann et al. 2d. ed. 2011).

¹⁰ U.S. DEPARTMENT OF STATES, REPORT ON INVESTMENT CLIMATE IN AFGHANISTAN, (2014).

However, commercial courts in Afghanistan have still remained one of the primary formal legal mechanisms for commercial dispute resolution in Afghanistan where a smaller number of commercial disputes are being referred to them for the settlement.¹¹

2. Commercial arbitration

After enacting Afghan Constitution of 1964, Afghanistan has signed many international conventions and treaties and promulgated various laws upon establishing commercial arbitration. For instance, despite the law on commercial procedure code which had a separate chapter for conducting commercial arbitration, Afghanistan also signed the Convention on the settlement of investment dispute in 1968 which committed Afghanistan to accept arbitration and mediation as legal mechanisms for the settlement of investment disputes arising among the states and nationals of the states.¹² In 2005, Afghanistan signed the New York Convention on the recognition and enforcement of foreign arbitral awards and following the New York Convention it also enacted its arbitration law, foreign investment law and mediation laws which contain arbitration provision for dispute settlement.¹³ But until 2015, practically, Afghanistan did not have any institutionalized commercial arbitration center to serve as an effective commercial dispute resolution mechanism.¹⁴ Recently, ministry of commerce with special help of private company established an ADR (Alternative Dispute Resolution) center and one arbitration center under the International Chamber of Commerce which conduct both commercial mediation and arbitration upon commercial dispute between merchants and business companies. Beneath, we discuss some of the legal documents which shaped the Afghan arbitration mechanism.¹⁵

¹¹ UNA AU ET AL., AN INTRODUCTION TO COMMERCIAL LAW OF AFGHANISTAN, 169 (Will Havemann et al. 2d. ed. 2011).

¹² EVAN BERQUIST ET. ALL., AN INTRODUCTION TO INTERNATIONAL LAW FOR AFGHANISTAN, 173 (Catherine Baylin et al. ed. May 2011),

¹³ EVAN BERQUIST ET. ALL., SUPRA NOTE AT 181.

¹⁴ NAJIBULLAH HAKIMI, DESIGNING AN EMERGENCY ARBITRATION MECHANISM FOR AFGHANISTAN: A COMPOSITE OF SUCCESSFUL MODELS FROM THE INTERNATIONAL COMMUNITY, SW. J. INT'L L. 269 (2016).

¹⁵ ABDUL HADI ZAMANI, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN AFGHANISTAN, 5 (2019).

2.1. CISID

in 1968, Afghanistan signed and ratified the international convention of settlement of investment disputes among states and national of other states. According to the concerning convention, alike other contracting states, Afghanistan has also agreed to settle investment disputes with nationals of other contracting states on voluntary basis through arbitration or conciliation processes and mechanisms.¹⁶

2.2. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

In 2005, Afghanistan signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The “New York Convention”). By entering New York Convention, Afghanistan agreed to provide legal ground for the recognition and enforcement of foreign arbitral awards of other contracting states in its own territory.¹⁷ Following the New York Convention and CISID, in 2005, Afghanistan ratified its Private Investment Law (PIL) which was enacted for purpose of supporting and protecting private investment in the country.¹⁸ The concerning law explicitly provides with the recognition of commercial arbitration as a mean of commercial dispute settlement. It also gives parties the choice to agree upon governing laws for their commercial transaction rather than the Afghan law, as well as to hold arbitration inside and beyond Afghanistan.¹⁹

2.3 Afghan Arbitration Law of 2007

Following the New York Convention, in 2007, Afghanistan ratified its new law on commercial arbitration in the light of UNCITRAL Model Law. However, he concerning law mostly deals with the domestic arbitration mechanism, for instance, they ways to conduct arbitration inside Afghanistan, choosing arbitrators, arbitration centers, arbitration board, and the procedure to make and render an arbitral award in Afghanistan.²⁰ But it also provides with recognition and enforcement of foreign arbitral awards in Afghan territory. It gives with the

¹⁶ EVAN BERQUIST ET. ALL., AN INTRODUCTION TO INTERNATIONAL LAW FOR AFGHANISTAN, 173 (Catherine Baylin et all ed. May 2011),

¹⁷ EVAN BERQUIST ET. ALL SUPRA NOTE AT 187.

¹⁸ AT 189.

¹⁹ NAJIBULLAH HAKIMI, DESIGNING AN EMERGENCY ARBITRATION MECHANISM FOR AFGHANISTAN: A COMPOSITE OF SUCCESSFUL MODELS FROM THE INTERNATIONAL COMMUNITY, SW. J. INT'L L. 269 (2016).

²⁰ QANUNI HAKAMYATI TEJARATI AFGHANISTAN [AFGHANISTAN COMMERCIAL ARBITRATION LAW] 1386 [2007] (AFG.).

provision upon signing written arbitration agreements or putting arbitration clauses in commercial contracts. furthermore, alike private investment law, arbitration law also gives the parties the choice to agree upon governing laws for their commercial transaction rather than the Afghan law, as well as to hold arbitration inside and beyond Afghanistan.²¹ Although the Afghan new arbitration law has been ratified in the light of UNCITRL Model Law based on Afghanistan's commitment and obligation under the New York Convention, and to the extent it seems to be in a substantial compliance with them, but still some uncertainties and controversies in the law have made the Afghan arbitration mechanism less trusted.²² Since, recognition and enforcement of foreign arbitral awards in Afghanistan is still uncertain which may create serious concerns towards promoting foreign investments and economic growth in Afghanistan. Likewise, the concerning legal problems may fail Afghanistan regarding its commitment to the New York Convention which may have negative consequences for Afghanistan as a contracting party to the Conventions.

2. Commercial Mediation law of Afghanistan

In 2005, Afghanistan also ratified its commercial mediation law which provides a framework for parties to informally settle disputes in a more formalized way. Informal mediation has been a common means of commercial dispute resolution in Afghanistan, but this law seeks to make such informal mechanisms more effective.²³ The law stipulates how parties to the dispute will appoint a mediator and how the mediation will be conducted. It also provides guidance to courts about how a settlement through mediation should be viewed and enforced.²⁴

The Law on Commercial Mediation defines mediation as a mechanism “whereby the disputant Parties request a third person or person (the “Mediator”) to help them in their effort to reach an friendly settlement of their dispute.²⁵ The Law provides with the framework by which parties can voluntarily seek to settle disputes

²¹ AFGHANISTAN COMMERCIAL ARBITRATION LAW, (2007).

²² ABDUL HADI ZAMANI, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN AFGHANISTAN, 7 (2019).

²³ QANUNI MIANJIGARI TEJARATI AFGHANISTAN [AFGHANISTAN COMMERCIAL MEDIATION LAW] 1384 [2005] (AFG.).

²⁴ UNA AU ET AL., AN INTRODUCTION TO COMMERCIAL LAW OF AFGHANISTAN, 169 (Will Havemann et al. 2d. ed. 2011).

²⁵ Afghanistan, COMMERCIAL MEDIATION LAW, (2005).

through outside assistance without concern that their discussions will be used against them should they ultimately end up in trial or arbitration.²⁶ Mediation is an important tool for helping parties overcome conflicts without resorting to litigation or arbitration.

Traditional-Based Dispute Resolution Mechanisms

Traditional justice system is not a perfect system of dispute resolution in Afghanistan and rather it is an array of ethnical mechanism for dispute resolution. This mechanism includes Shuras²⁷ which refers to the permanent and quasi-permanent local councils, and Jirga which is a Pashto term being used for ad hoc meetings and gathering to discuss important issues and settle disputes. Jirgas are very common among Pashto spoken areas of Afghanistan.²⁸ Both Shura and jirga are groups of people coming together to discuss the disputes within communities, be it a landmark dispute among tribes or a sample dispute among individuals regardless of types of disputes. Members of Shura and Jirga are mostly educated people, but it is not always the case and being educated is not a requirement, rather experience in dispute resolution and having positive influence over community are the characteristics which are vital to choose a person as Shura or Jirga member.

As mentioned earlier, Afghan traditional-based mechanism is not a perfect one, rather it tends to be a kind of restorative not retributive which mostly seeks to promote community or individual harmony through Islah (reconciliation).²⁹ The members for traditional mechanism are being appointed by the disputant, unless a dispute is referred to Islah (conciliation) by a court. Because, Afghan civil law recognizes the conciliation as an agreement between the disputant parties which takes place for purpose of resolving disputes. Similarly, Afghan civil procedure code authorizes the courts to submit the disputes to the community elders for resolution, conditionally, if the parties show interest in resolving their dispute through informal mechanism.

²⁷ The Term Shura is originally an Arabic term which is also used in Pashto and Dari Languages of the country. It has the same meaning as it has in Arabic.

²⁸ UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT, 2 (2010).

²⁹ JULIA PFEIFFER, TRADITIONAL DISPUTE RESOLUTION MECHANISMS IN AFGHANISTAN AND THEIR RELATIONSHIP TO THE NATIONAL JUSTICE SECTOR, 11 (2011).

traditional mechanism is not limited to only resolve civil disputes, rather it can resolve family, commercial, sometimes criminal and even political disputes as well. But they are mostly involved in resolving civil, family and commercial disputes among people.

The decisions taken by the Shuras and Jirgas are not absolute and final, as they do not have binding legal power and execution guarantee for their implementation. Hence, it can very easily be breached, unless the members of the mechanism receive some money³⁰ from the disputant sides as grantee to accept their decision. Only those decisions are binding and having legal power to be implemented that the courts officially refer to conciliation, since, such types of decisions are then officially being recorded in courts' registry books which ultimately own legal power to be implemented. Once, the Afghan government drafted a law on Jirga and Shura which provided with formation of the Shuras and Jirgas, they way to proceed a dispute and make decision upon, as well as the mechanism to formalize their decision for purpose of granting their decision the legal power to be implemented. But the concerning law was not approved by the parliament as well as was faced with the reaction of supreme court, since it was in obvious contradiction with provision of the Afghan constitution which provides that "Afghan Judiciary is an independent body of the state which has jurisdiction over all types of disputes, and no one can get a dispute out of its authority for the settlement."³¹ However, informally, it is still existed and is being used a legal mechanism for resolving civil, family, commercial, petty criminal s and in some cases political disputes.

³⁰ In tradition dispute resolution mechanism, the actors or member of the mechanism sometimes take some money form the disputant parties prior to make any decision. The purpose of taking money is a kind of grantee which makes the disputant parties committed to accept the decision taken by the Jirga or Shura. If they accept the decision, then they receive their money back, if they do not accept, then the money will not be refunded to them. The special term being used for such money is called "Machalgha". It's also a Pashto word which means Grantee.

³¹ QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004] (AFG.).

Conclusion

Afghanistan is currently in the stage of rebuilding its commercial and economic systems, and for doing so, it tends to expand its trade relations with global business community. One of the strategies to promote foreign trade and investment in Afghanistan, is to provide with well-developed commercial laws and disputes resolution mechanism which can guarantee the protection and support of foreign investors and their capital, so that they do not fear of losing their capital while investing in Afghanistan. Hence, Afghanistan struggles to provide the ground according to the wish of investors, be it a foreign investor or a national or domestic, and to a noticeable extent it has done to much in this regard.

First, it has established commercial courts as a primary and formal legal mechanism for the durable solution of the commercial disputes which can mostly be effective to the domestic commercial disputes, and to the extent can be effective for the disputes involving foreign investors. Particularly, in terms of enforcing foreign arbitral awards rendered by the foreigners and needs to be enforced against an Afghan investor. Similarly, Afghan legal system provides with the commercial arbitration and commercial mediation mechanisms, which are established to deal with both domestic and international commercial and investment disputes. Likewise, Afghanistan is a party to two important international conventions regarding commercial arbitration and investment dispute settlement which also provide with commercial dispute settlement mechanisms. And lastly, Afghanistan hosts a traditional legal mechanism for commercial dispute settlement for national investors. All aforementioned legal mechanisms for commercial dispute resolution have so far been significantly effective, and they had done a lot towards promoting investment, commercial development and economic growth in Afghanistan.