

Legal pluralism in Afghanistan

Afghanistan

A study of alternative dispute resolution mechanisms

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1. ABSTRACT

Presently, a formal and an informal dispute resolution system co-exist in Afghanistan for effective resolution of commercial disputes. This article commences by highlighting the centuries old traditional informal justice system of Jirga in Afghanistan followed by a brief overview of the prevalent formal justice system. Given the rich history of informal alternative dispute resolution mechanisms in Afghanistan, this article highlights the reasons and efforts made by Afghanistan to merge both systems together for effective and speedy justice.

2. KEYWORDS

2.1 Afghan legal system, alternative dispute resolution, traditional informal justice system, Jirga, Loya Jirga, Shura

2.2 **Özet:** Bugün itibariyle Afganistan'da ticari uyuşmazlıkların çözümü konusunda resmi ve resmi olmayan iki sistem birlikte yürürlükte bulunmaktadır. Bu makale öncelikle Afganistan'da yüzyıllardır varlığını sürdüren geleneksel uyuşmazlık çözümü yöntemi olan Jirga'yı açıklamakta, bilahare resmi yargılama sistemiyle ilgili özet bilgiler vermektedir. Afganistan'ın alternatif uyuşmazlık çözümü yöntemleri konusundaki zengin tarihi karşısında, makale Afganistan'ın, daha etkin ve hızlı bir yargı yaratmak amacıyla, bu iki uyuşmazlık çözümü yöntemini birleştirmek konusundaki çabalarını ve bunun nedenlerini açıklamaktadır.

2.3 **Anahtar kelimeler:** Afgan hukuk sistemi, alternative uyuşmazlık çözümü yöntemleri, geleneksel gayri resmi adalet sistemi, Jirga, Loya Jirga, şura.

3. ABBREVIATIONS

ACCI: Afghanistan Chamber of Commerce and Industries

ACDR: Center for Commercial Dispute Resolution

AMD: Arbitration and Mediation Department

ADR: Alternative Dispute Resolution

ICSID: International Centre for Settlement of Investment Disputes

ICSID Convention: Convention on the Settlement of Investment Disputes between States and Nationals of Other States

New York Convention: New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards

UNCITRAL Rules: United Nations Commission on International Trade Law Rules

4. INTRODUCTION¹

4.1 In recent times, the very name "Afghanistan", a country marred by years of war and the menace of terrorism, portrays a picture of anarchy and oppression where the need for an extensive legal system silhouettes itself. However, an examination of the Afghan legal system reveals centuries-old informal dispute resolution mechanisms where justice was served more efficaciously as compared to the present formal justice system.

¹ The author is grateful to Mr. Zahid Safi and Ms. Mariam Waqar, both associates at RIAA Barker Gillette for their helpful comments and assistance. They made useful suggestions and carefully read through a number of drafts, filling in the gaps and pointing out errors. The author alone is responsible for the views expressed, errors and omissions

Even recent studies suggest that an overwhelming majority of disputes are still resolved through the informal justice system in Afghanistan. The formal justice system referred to in this article refers to the state-administered justice system, whereas the informal justice system entails alternative dispute resolution ("ADR") mechanisms, including but not limited to the fundamentally-prevalent traditional Jirga system in Afghanistan.

4.2 Given the limited knowledge of Afghanistan's centuries old rich informal justice system, it is often assumed that to provide justice the entire legal system needs to be overhauled to pave the way for a new formal justice system, thereby, neglecting the important role of the informal justice system. Such an incorrect assumption, fails to account for the fact that Afghanistan has been dispensing speedy justice through its deep-rooted informal justice system comprising mainly of "Jirga"² and "Shura". Since time immemorial, the informal justice system can be solely attributed to for resolving a wide variety of frequently occurring disputes ranging from domestic to commercial disputes and ensuring peace between the warring tribes of Afghanistan. The informal justice system is a combination of tradition, culture and religious practices and is known to dispense speedy justice at a much lower cost when compared to the often expensive, time-consuming, inefficient and corrupt legal system of Afghanistan. However, there is a tendency by prominent administrators to exploit traditional mechanisms of dispute resolution to their own advantage by suppressing the weaker segment of the society such as women and minorities.

4.3 Due to the apparent weaknesses in the formal justice system highlighted above, the Government of Afghanistan has made a prudent effort to amalgamate the two justice systems. The effort of the Government of Afghanistan to link the formal and informal justice systems paved the way for the introduction of formal alternative dispute settlement mechanisms in Afghanistan. This article will briefly provide an overview of the formal and informal justice systems of Afghanistan and gradual attempts to formalise the country's informal justice system. Furthermore, the imminent need for promoting a strong linkage between the two parallel legal systems for amicable settlement of disputes will be highlighted.

5. TRADITIONAL INFORMAL JUSTICE SYSTEM OF AFGHANISTAN

5.1 History of the Jirga System

5.1.1 The history of the Jirga system is quite rich and can be traced back to the Aryan tribes³, who migrated from Central Asia to present day Afghanistan and then moved to India. The Aryans often used Jirga for resolving conflicts and disputes in accordance with the prevailing customs of the region or tribe. Syed Fida Yunas defines jirgah to mean "... an assembly of two or more persons to discuss and decide an issue which may range from a personal loan affair to a bloody inter-tribal feud. The size of a jirgah depends on the scope and importance of the issue. Qualifications of its members are social and religious status and proximity to the issue as well as confidence of involved parties"⁴. Historically, Jirga was often chaired by the King. Prominent Afghan rulers, such as Sultan Bahlol Lodhi (1451-1489), would constitute a Jirga of elders. The members of the Jirga, along with the Sultan, would sit in a circle to decide important issues. In addition, Sikander, another well-known ruler of India, deeply supported Afghan tribal independence and organised local Jargah. Another famous Afghan ruler of India, Sher Shah Suri, used to convene a Jargah of elders and would personally sit amongst them in the circle⁵.

² Commonly known as "jarga", "jirgah" or "jargah"; in Pashto: جرگه

³ Afghanistan was inhabited by the Aryan tribes until about 500 BC.

⁴ Dr. Sherzaman Taizi, "Jirga System in Tribal Life", Area Study Centre (Russia, China and Central Asia), p. 4

⁵ Dr. Sherzaman Taizi, "Jirga System in Tribal Life", Area Study Centre (Russia, China and Central Asia), p. 4.

5.1.2 Interestingly enough, the founder of Afghanistan was also elected by way of Jirga. In 1747, the Abdali tribe of Afghanistan organised a Loya Jargah (Grand Assembly) in Kandahar, the birthplace of modern day Afghanistan. This Jirga was organised for rather an unconventional purpose—choosing a leader who later became the founder of Afghanistan. After a lengthy discussion for nine days, Sabir Shah announced the decision of Jargah and held that Ahmad Shah Abdali was fit for this job⁶.

5.2 The Present Jirga System

5.2.1 The strong presence of the informal justice system in Afghanistan is not solely due to the decline and eventual demise of a central political authority in Afghanistan as a result both of more than two decades of civil war and the reign of the Taliban⁷. Besides the political instability, reliance on the informal justice system can be attributed to its centuries old presence thus often rendering it the only tried and tested dispute resolution mechanism among the locals. It should also be underlined that the reasons underlying the strong inclination towards an informal justice system in Afghanistan is not the same as the reasons leading to the gradually increasing use of ADR for resolving disputes in developed countries. There is a tendency to gravitate towards informal justice system in Afghanistan owing to, *inter alia*, cultural inclination, rampant corruption in the formal justice system, incompetency of legal professionals, and the high costs and rigidity of the legal system.

5.2.2 The traditional informal dispute resolution methods that are currently used to resolve civil and criminal disputes in Afghanistan differ from the state court system in two respects. First, in these methods, the governing law is Shari'a and custom, not the civil or commercial laws that are elements of the formal justice system of the country. Second, these systems are operationalised through traditional institutions, comprising of council structures. The most widely used names for such council structures are "Shura" (local councils) or "Jirga" (gathering of elders). The Pashto word *Jirga* and the notion of *Shura*⁸ are more and more used synonymously although they refer to historically different phenomena⁹. These councils generally consist of community elders and other respected individuals sitting together to reach equitable resolutions of disputes and to reconcile the disputants, their families and the community at large¹⁰.

5.2.3 Also, the traditionally used informal justice system is favoured in Afghanistan because it has certain advantages compared to the formal justice system. First, this system has been around for a much longer period of time compared to the formal justice system which, as noted above, is a relatively new phenomenon. Individuals and the society therefore find this traditional system more familiar. Second, in resolving disputes, the traditional justice system focuses on equity as opposed to the observation of a set of rather rigid rules of procedure and evidence. Third, it is less costly compared to the formal justice system. Fourth, it tends to reach solutions based on the consensus of the

⁶Ali Wardak, Jargah: A Traditional Mechanism of Conflict Resolution in Afghanistan, University of Glamorgan press, UK, September 10, 2004.

⁷ Martin Lau: Afghanistan's Legal System and its Compatibility with International Human Rights Standards, page 7, available at <http://www.refworld.org/pdfid/48a3f02c0.pdf> (last visited on 8.12.2014).

⁸ Which has its origin in the Arabic word for "consultation".

⁹ Linking formal and informal conflict resolution mechanisms in Afghanistan: A Survey of the people's perspective, August 2008, p. 8, <http://library.fes.de/pdf-files/bueros/kabul/05655.pdf> (last visited on 14.12.2014).

¹⁰ United States Institute of Peace, Peacebrief, Traditional Dispute Resolution and Stability in Afghanistan, February 16, 2010, <http://www.usip.org/sites/default/files/PB%2010%20Traditional%20Dispute%20Resolution%20and%20Stability%20in%20Afghanistan.pdf> (last visited on 14.12.2014).

disputing parties. Fifth, it is more accessible than state courts, especially in rural or far-flung areas. Finally, at least in some instances, it tends to be speedier than the state courts.

5.2.4 However, this traditional system also comes with some disadvantages. First, since there is no systematic approach governing jirgas or shuras, the settlement of disputes depends entirely on the morals and sense of ethics of those deciding the cases, which sometimes leads to unpredictability of the outcome. In this context, it would be apt to quote John Selden, a prominent seventeenth century jurist, who criticised equity by holding that, "*equity varies with the length of the Chancellor's foot*". Second, shuras or jirgas are also criticised for discriminating against vulnerable groups, such as women, since there is near to none female representation among those deciding matters referred to shuras or jirgas. Third, there is no mechanism to record the decision of such an informal dispute resolution mechanism, which may lead to problems at the enforcement stage. However, historically, the decisions of jirgas were always respected and in case of non-compliance, the entire tribe would act against the defaulter and in most cases expel the entire family. Finally, the appeal procedure, if any, is also not clearly laid out.

5.3 **Loya Jirga: The Grand Assembly of Afghanistan**

5.3.1 The phrase Loya Jirga¹¹ refers to a centuries-old institution similar to the Islamic "shura", or consultative assembly. Historically, it has been used to settle inter-tribal disputes, discuss social reforms and approve a new constitution¹². The mandate of the Loya Jirga is provided for in the Constitution of Afghanistan, 2004. The Loya Jirga is the highest manifestation of the will of the people of Afghanistan. The Loya Jirga consists of:

- (a) Members of the National Assembly, and
- (b) Presidents of the provincial as well as district assemblies.

5.3.2 Ministers, the Chief Justice and members of the Supreme Court as well as the Attorney General shall participate in the Loya Jirga sessions without voting rights¹³.

5.3.3 The Loya Jirga is convened in the following situations:

- (a) To decide on issues related to independence, national sovereignty, territorial integrity as well as supreme national interests;
- (b) To amend the provisions of the Constitution; and
- (c) To impeach the President in accordance with the provisions of Article 69 of the Constitution¹⁴.

5.3.4 After the collapse of the Taliban regime, a Loya Jirga was constituted towards the end of 2001 to confirm Hamid Karzai as a transitional leader. Subsequently, the second Loya Jirga since the ousting of the Taliban regime was convened around 2003 to approve the Constitution of Afghanistan, 2004. In 2009, Hamid Karzai, then Afghan President, announced in his inauguration speech the holding of

¹¹ In Pashto: جرگه لويه "grand assembly"

¹² http://news.bbc.co.uk/2/hi/south_asia/1782079.stm, (last visited on 8.12.2014)

¹³ Article 110 of the Constitution of Afghanistan, 2004

¹⁴ Article 111 of the Constitution of Afghanistan, 2004

a consultative grand council called Afghanistan's National Consultative Peace Jirga or, put shortly, Peace Jirga in 2010 for purposes of ending the ongoing Taliban insurgency.

5.3.5 Recently, the Loya Jirga approved the "U.S. Afghan Security Deal of 2013" for the presence of a limited number of US troops in Afghanistan beyond 2013. Thousands of tribal elders made their way to the capital to join the Loya Jirga. While the Loya Jirga's decision is not binding, Karzai said that he would follow their recommendation under one condition -- that U.S. forces do not conduct house raids¹⁵. Finally, the US Afghan Security Deal was signed by the newly-elected President Ashraf Ghani on September 30, 2014 upon recommendations of the Loya Jirga.

6. FORMALISATION OF ADR MECHANISMS IN AFGHANISTAN

Given the rich history of ADR in Afghanistan, it was relatively easy for the people of Afghanistan as well as jurists to accept and incorporate ADR mechanisms in the legislation. There is, however, much work to be done to bring such mechanisms in harmony. While the Constitution of Afghanistan, 2004 does not formally recognise the Jirga and Shura systems, it does encourage resolution of disputes through consultations. Let us now turn to the specific laws of Afghanistan, which contain ADR mechanisms.

6.1 Law on the Principles of the Commercial Courts, 1965 ("Commercial Courts Law")¹⁶

6.1.1 The Commercial Courts Law was passed under the 1964 Constitution and it gave the court the power, *inter alia*, to oversee settlement upon agreement of the parties, make preliminary rulings, initiate suits, motions and pleadings, conduct trials, assess evidence, make decisions, hear appeals and render arbitral awards.

6.1.2 Even at that time, commercial courts would encourage parties to resolve their disputes by resorting to arbitration at any stage of the dispute¹⁷. Parties were not required to have arbitration clauses in the contract or a separate agreement as long as they could mutually agree, during the court proceedings, to arbitrate their dispute. Parties were free to determine the number and appointment procedure of arbitrators. However, in limited circumstances, the court would intervene and appoint arbitrator(s). The limited power of the court to appoint arbitrator(s) was primarily aimed at saving parties' time.

6.1.3 With regard to the enforcement of the arbitral award, the Commercial Courts Law stipulates that after obtaining the arbitral award, the Court Secretary would take the award to the President and the members of the court and subsequently record it in the Claim Registry Book. If the court would find the decision to be in accordance with the provisions of the law, it would be considered as the final resolution of the dispute and the court would issue a ruling to this effect. Importantly, an appeal could not be filed against a binding award of the arbitrator¹⁸.

6.2 Private Investment Law, 2005

6.2.1 With the introduction of the Karzai regime, the government of Afghanistan enacted the Private Investment Law in 2005 primarily to promote the role of private investment, both domestic and

¹⁵ <http://edition.cnn.com/2013/11/24/world/asia/us-afghanistan-security-agreement/>, (last visited on 8.12.2014)

¹⁶ Please note that the provisions relating to arbitration were repealed to the extent that they were contrary to the Commercial Arbitration Law of 2007 explained in the later part of the article.

¹⁷ Article 209 of the Commercial Courts Law

¹⁸ Article 269 of the Commercial Courts Law

foreign, in the country's economy. The objective was to create a legal regime, together with an administrative structure, that would encourage, support and protect foreign and domestic private investors in order to promote economic development, expand the labour market, increase production and export earnings, promote technology transfer, improve national prosperity and advance the standard of living¹⁹.

6.2.2 In order to encourage investment, an entire chapter has been dedicated to an ADR mechanism, which guarantees full autonomy to investors (foreign and domestic) and Registered Enterprise to enter into contracts. Under this mechanism, an Investor or Approved Enterprise²⁰ may agree on arbitration or any other ADR mechanism. The seat of such arbitration opted by the parties may be outside of Afghanistan. The Private Investment Law also provides that parties can select the law, including the law of a country other than Afghanistan, that will apply to the resolution of the dispute²¹. Some of the salient features of the Private Investment Law in relation to arbitration are as follows:

6.2.3 **Enforcement of Foreign Arbitral Awards**

Once a foreign arbitral award is obtained, the major challenge that ensues is its enforcement in the relevant jurisdictions. This process is relatively straightforward under Afghan law because such arbitral awards are regarded final and binding unless the contract or agreement provides otherwise or the award is otherwise repugnant to the laws of Afghanistan. The court enforces these foreign awards upon application by any party to such arbitration.

6.2.4 **Disputes to which the Afghan State is a Party**

- (a) The Private Investment Law also deals with the resolution of disputes to which the State or any constituent subdivision, agency or instrumentality thereof is a party. If a dispute arises pursuant to a contract or other agreement entered into between an investor or a registered enterprise on one the hand and the State (or any constituent subdivision, agency or instrumentality thereof) on the other, with regard to an investment, or if an investor or registered enterprise has a claim under Chapter 7 (Expropriation) of the Private Investment Law, the dispute shall be resolved according to applicable Afghan law²², thus limiting the right of parties to resort to local arbitration under the relevant arbitration laws of Afghanistan.
- (b) In case of a dispute pertaining to a contract or other agreement entered into between a foreign investor or a registered enterprise with foreign equity ownership and the State or any constituent subdivision, agency or instrumentality thereof in regard to a foreign investment, or if a foreign investor or registered enterprise has a claim, the parties *shall* endeavour to settle such dispute amicably by mutual discussions. Failing such amicable settlement, and unless the parties to such dispute otherwise agree, the parties shall submit such dispute *either*:
 - (i) to the International Centre for Settlement of Investment Disputes ("ICSID") for settlement by arbitration pursuant to the Convention on the Settlement of

¹⁹ Article 2 of the Private Investment Law

²⁰ Approved Enterprise is defined to mean a business entity registered pursuant to the procedures set forth in Article 12 of the Private Investment Law.

²¹ Article 30(2) of the Private Investment Law

²² Article 30(4) of the Private Investment Law

Investment Disputes between States and Nationals of Other States ("ICSID Convention"), or

- (ii) if ICSID rules preclude the foreign investor from arbitrating before ICSID or if the foreign investor otherwise prefers, to arbitration in accordance with the United Nations Commission on International Trade Law Rules ("UNCITRAL Rules").
- (c) Therefore, The Private Investment Law envisages that the disputes to which the State is a party can arise either in conflict with foreign investors or Afghan investors. State disputes to which Afghan investors are a party must be resolved by resorting to the local Afghan arbitration. However, the State disputes to which foreign investors are a party may be resolved through foreign arbitration specified in the Private Investment Law.

6.2.5 Commercial Arbitration Law ("Arbitration Law")

- (a) The current Arbitration Law, which has melded international practices with local tradition²³, was published in the Official Gazette No. 913 dated 30 January 2007²⁴, which also repealed the Commercial Arbitration Law of 1995 and other statutory provisions addressing arbitration, which were in conflict with the Arbitration Law. The Arbitration Law was adopted in order to further formalise the process of arbitration in Afghanistan. The Law defines arbitration as "a binding proceeding whereby an Arbitrator or Arbitrators perform neutral services pursuant to a request by the parties or Court in order to resolve disputes under contracts for economic or commercial transactions"²⁵.
- (b) Most importantly, the Arbitration Law ratified, *inter alia*, the ICSID Convention and the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), resultantly recognizing rights of the parties, procedures, awards etc., under ICSID and the New York Convention. So far, the commercial courts of Afghanistan have enforced two foreign commercial arbitration awards under the Arbitration Law and interestingly both awards were enforced *in toto*²⁶. Let us now examine some of the most important aspects of the Arbitration Law.
- (c) **Agreement to Arbitrate**

The Arbitration Law expressly stipulates that the agreement to arbitrate should be in writing.²⁷ An agreement shall be in writing if it is:

- (i) Contained in a document signed by the parties;
- (ii) In an exchange of letters or other written communications (including, but not limited to, electronic mail) which presents a record of the Agreement; or

²³Afghanistan Legal Education Project ("ALEP") at Stanford Law School: An Introduction to the Commercial Law of Afghanistan, second edition, page 72, available at http://alep.stanford.edu/wp-content/uploads/2011/02/ALEP-Commercial-Law_Second-Edition_Final1.pdf (last visited on 8.12.2014).

²⁴ Before the 2007 Commercial Arbitration Law, the Commercial Arbitration Law of 1995 was in force.

²⁵ Article 2(2) of the Arbitration Law

²⁶ The number was confirmed from the Commercial Courts and no further details were shared.

²⁷ Previously, the Commercial Courts Law used to condition the validity of the agreement to arbitrate on the parties' mutual consensus.

- (iii) In an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another²⁸.

It should be underlined that, in the event that there is no prior arbitration clause or arbitration agreement, parties may nevertheless decide to refer a dispute to the Commercial Arbitration Office²⁹.

(d) **Appointment of Arbitrators**

Parties are free to determine the number of arbitrators, but if they do not, the number of arbitrators shall be one, unless one of the parties is a State, in which case the number of arbitrators shall be three³⁰. The arbitrators are required to possess:

- (i) certain qualifications prescribed under the Arbitration Law; and
- (ii) register with the Central Registry³¹. Previously, the Commercial Courts Law did not require any such registration of arbitrators.

Unfortunately, the relevant authority with which the arbitrators are required to register has not yet been determined. In fact, the Ministry of Commerce & Industries, the Ministry of Justice and the Supreme Court of Afghanistan have locked horns on the registration of arbitrators. Due to uncertainty surrounding the relevant authority for registration of arbitrators, mediation is currently being preferred over arbitration in Afghanistan.

6.3 **Setting Aside of an Arbitral Award**

6.3.1 An arbitral award may be set aside by a court where:

- (a) A party to the arbitration agreement lacked legal capacity;
- (b) The arbitration agreement has subjected the parties to a law that is not valid under the laws of Afghanistan (i.e., repugnant to the laws of Afghanistan);
- (c) The party making the application was not given proper notice of the appointment of an arbitrator or was otherwise unable to present his or her case as provided by the Arbitration Law;
- (d) An arbitrator was bribed, subjected to undue influence or had a material conflict of interest with respect to a party, witness or the subject matter of the arbitration, which was not disclosed to the parties in a timely fashion, as required under the Arbitration Law;
- (e) The award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration, but if the decisions on matters beyond the scope of the arbitration can be separated from those not beyond the scope of the arbitration, then only that part of the

²⁸ Article 13 of the Arbitration Law

²⁹ Article 16 of the Arbitration Law

³⁰ Article 17 of the Arbitration Law

³¹ Article 12 of the Arbitration Law

award which contains decisions on matters beyond the scope of the arbitration may be set aside;

- (f) The composition of the arbitral tribunal and the arbitral procedure was not in accordance with the agreement of the parties, unless the agreement of the parties was in conflict with a provision of the Arbitration Law from which the parties cannot deviate; or
- (g) The subject matter of the dispute is not capable of settlement by arbitration under the laws of Afghanistan or the award is in conflict with the public policy of Afghanistan³².

6.3.2 An application seeking the setting aside of an award may be submitted before the Commercial Court of Afghanistan within three months from the date on which the award was issued by the arbitral tribunal³³. The grounds for setting aside an arbitral award are wider under the Arbitration Law as opposed to an arbitral award under the Commercial Courts Law.

6.4 **Power to Grant Interim Relief**

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, take measures and issue any interim orders it deems necessary during the proceedings to protect the subject matter of the arbitration, including any measures for protecting the goods and commodities involved in the dispute, such as entrusting such items to third parties or selling perishable goods³⁴.

6.5 **Arbitration Award**

An award shall:

- 6.5.1 Be made in writing and be signed by the arbitrator or arbitrators (in arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated);
- 6.5.2 State the reasons upon which it is based, unless the parties have agreed that no reasons are to be given; and
- 6.5.3 Include the date and place of arbitration³⁵.

6.6 **Enforcement of Arbitral Awards**

An application has to be made to the court for the enforcement of an arbitral award. An arbitral award, irrespective of the country in which it was made, shall be enforceable³⁶.

6.7 **Appeal**

Similar to the Commercial Courts Law, the Arbitration Law does not provide for an appeal against the binding arbitral award *per se*. However, the Arbitration Law provides for rehearing by the arbitral tribunal. A court, when an award is set aside, may, where appropriate and so requested by a party, give the arbitral tribunal a reasonable

³² Article 53 of the Arbitration Law

³³ Article 54 of the Arbitration Law

³⁴ Article 29(1) of the Arbitration Law

³⁵ Article 47 of the Arbitration Law

³⁶ Article 56(1) of the Arbitration Law

opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for the setting aside of its award³⁷.

7. COMMERCIAL MEDIATION LAW, 2007

In addition to the Arbitration Law, Afghanistan also enacted the Commercial Mediation Law in 2007 ("Commercial Mediation Law") published in the Official Gazette No. 913, dated 30th January, 2007. Mediation is more commonly used due to its commonalities with the Jirga system by which the mediator, based on request and agreement of the parties, performs speedy, fair and impartial services to resolve commercial and economic disputes³⁸. So far in practice, mediation has proved to be a speedier and less costly alternative to court litigation or binding arbitration for dispute resolution. The Commercial Mediation Law, due to its very nature, is more flexible in terms of procedure. Confidentiality is ensured unless parties agree otherwise or where disclosure is required under the law, or for the purposes of enforcement of the settlement agreement signed by parties settling the dispute)³⁹.

7.1 Applicability of Commercial Mediation Law

The Commercial Mediation Law is yet another tool to resolve commercial disputes in Afghanistan, however, it depends on the parties to agree on applicability thereof to the mediation or otherwise. Even when the Commercial Mediation Law is admittedly applicable, parties are free to decide on the procedural framework within which mediation is to be conducted.

7.2 Limitation Period during Mediation Proceedings

The commencement of mediation proceedings stops the running of any statutory limitation period that applies to the claim that is the subject matter of the mediation. Where the mediation proceedings terminate without a settlement agreement, the limitation period resumes running from the date of termination of such proceedings⁴⁰.

7.3 Powers of Mediators and Enforcement of Mediation Decisions

Compared to an arbitrator, a mediator has significantly lesser powers with regard to making a binding decision resolving the dispute. Contrary to the arbitrator, whose award will be binding on the parties to the dispute, just like a court decision is, the mediator cannot issue such a decision. All that the mediator does at the end of the mediation proceedings is to propose a framework within which a settlement agreement may be reached by the parties, and encourage parties to do so. If the parties sign such an agreement to settle their dispute at the mediation proceedings, that settlement agreement shall be enforceable in the same manner as any other commercial agreement⁴¹ under provisions of the Civil Procedure Code of 1977 relating to the enforcement of contracts.

8. HINDRANCES IN ENFORCEMENT OF CONTRACTS THROUGH THE FORMAL JUSTICE SYSTEM

The formal justice system in Afghanistan faces a number of challenges, starting from the filing of claims to finding a lawyer. Once claims are filed, the next challenge is to ensure that the judges in this newly-introduced system understand the complexities of cross-border transactions. According to the "Doing Business 2015" data for

³⁷ Article 55 of the Arbitration Law

³⁸ Article 2(2) of the Commercial Mediation Law

³⁹ Article 21 of the Commercial Mediation Law

⁴⁰ Article 18 of the Commercial Mediation Law

⁴¹ Article 23 of the Commercial Mediation Law

Afghanistan, collated by the World Bank Group, contract enforcement in Afghanistan presently requires 46 procedures (average number of procedures to enforce a contract) and takes over 1642 days (the time to resolve a dispute, counted from the moment the plaintiff files the lawsuit in court, until payment)⁴². Roughly 25% of the claimed amount is spent on the settlement of the dispute through the formal justice system⁴³. These data underline the weaknesses in the formal justice system, which may well undermine the country's need for more investment. This has encouraged local parties to resort to the old informal justice system in Afghanistan and foreign investors to prefer foreign arbitration as the relevant dispute resolution mechanism.

9. RECENT INITIATIVES TO ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION

Since the fall of the Taliban regime, the developed world has invested heavily in Afghanistan's reconstruction efforts. In order to encourage investment, the Afghan Government has endeavoured to provide just and speedy mechanism for the resolution of disputes within Afghanistan by, *inter alia*, establishing Arbitration & Mediation Department and launching the Afghanistan Centre for Commercial Dispute Resolution.

9.1 Establishment of Arbitration & Mediation Department by the Afghanistan Chamber of Commerce and Industries

9.1.1 The Afghanistan Chamber of Commerce and Industries ("ACCI") took the initiative to develop a framework for the resolution of disputes in order to allow foreign investors to avoid going through the long and tedious court procedures in case of a dispute. The ACCI established an Arbitration and Mediation Department ("AMD") in 2008, which directly operates under the ACCI pursuant to its Rules of Procedure. The Rules of Procedure are created for the use of the AMD, however, there is no restriction against any private sector use of these Rules of Procedure⁴⁴.

9.1.2 It was initially intended that the AMD would settle commercial disputes through arbitration and mediation in accordance with the relevant Laws⁴⁵. However, due to the deadlock in the registration of arbitrators, presently it is predominantly mediation that is used for the settlement of commercial disputes. The ACCI has listed experts from various fields (medicine, transport, logistics, construction, agriculture etc.) who are deemed to be qualified to work in dispute resolution. Once a dispute is referred to the ACCI, the experts to handle the case are selected by the ACCI's director. This selection is made on a case-by-case basis.

9.1.3 According to the ACCI website, the AMD has conducted 58 mediations in the past three years of which settlement was reached in 30. With regard to the remaining 28 cases where settlement was not reached, parties opted to resolve disputes through the Commercial Court. These numbers indicate a settlement rate of 51.7% which, given the recentness of this mechanism and the continued lack of expertise, is significant. However, a lot more is required to be done to further improve the system and the settlement rate, which would indeed encourage parties, domestic as well as foreign, to rely on ADR mechanisms in Afghanistan.

⁴² <http://www.doingbusiness.org/data/exploreeconomies/afghanistan/#enforcing-contracts> (last visited on 8.12.2014)

⁴³ Cost in court fees and attorney fees, where the use of attorneys is mandatory or common, expressed as a percentage of the debt value.

⁴⁴ Article 2 of the Rules of Procedure

⁴⁵ Article 6 of the Rules of Procedure

9.1.4 A senior mediator at the AMD⁴⁶ confirmed that the disputes mostly referred to the AMD pertain to commercial contracts and recovery of payment. He further confirmed that among the most prominent cases, which the ACCI has settled through mediation in the past 3 years, are:

- (a) Supreme Petroleum vs. Jalal Mansor Limited; and
- (b) Helix Pharma vs. Bashir Amin Limited.

9.2 Launch of the Afghanistan Centre for Commercial Dispute Resolution

In addition, the Government of Afghanistan established the Centre for Commercial Dispute Resolution ("ACDR") on July 6th, 2014. Officially, however, the ACDR started its work in the first week of November 2014. The ACCI and Harakat (Afghanistan Investment Climate Facility Organisation, a non-profit organisation aimed at developing the business environment in Afghanistan) signed an official agreement in Kabul on 6 July 2014 to launch the ACDR Project⁴⁷. This Project aims to give the private sector access to speedy resolution of disputes at reasonable costs, by institutionalizing arbitration and mediation. This program includes transferring skills and know-how to judges, lawyers and other players involved in the Afghan dispute resolution practices. Furthermore, the project aims to activate an independent pilot mediation centre that provides professional mediation services to the private sector clients⁴⁸.

10. AFGHANISTAN ADR IN INTERNATIONAL CONTEXT

It will take time until the "new" Afghanistan, which has been emerging over the last decade, to develop a local dispute resolution system that may gain the confidence of foreign investors. At present, virtually all contracts signed between foreign investors and Afghan entities, both private and government, contain arbitration clauses governed by foreign institutions such as the ICC, ICSID or UNCITRAL. As explained above, the enforcement of foreign arbitration awards is far easier than the conduct of local arbitration or conceding to local courts jurisdiction. As a result of this, in practice, various government agencies, including ministries, also prefer foreign arbitration as opposed to local arbitration due to the inefficiencies in local arbitration.

11. CONCLUSION

11.1 The importance of ADR mechanisms ensuring speedy resolution of disputes is indisputable in all jurisdictions. In Afghanistan, where the enactment of modern laws is still at a nascent stage and the judiciary is on its way to being fully developed, this issue is of particular importance. Even after 15 years since the fall of the Taliban regime and the enactment of new laws from time to time, the informal dispute settlement mechanism is still very commonly used. While the significance of strengthening the formal justice system cannot be ignored, in our view, Afghanistan also needs to develop a strong ADR system, by including its related institutional and human resources aspects.

⁴⁶ The author met various mediators at ACCI's offices in Kabul.

⁴⁷ <http://www.harakat.af/news41f2014023501.html> (last visited on 8.12.2014)

⁴⁸ <http://www.harakat.af/news41f2014023501.html> (last visited on 8.12.2014)

At the inauguration of the Project, Naseem Akbar, the CEO of Harakat made the following remark regarding the important link between ADR and foreign investment:

"Our research indicates that absence of a standard and professional arbitration centre in Afghanistan has caused reduction of investments. Therefore, the ACCI and Harakat have been trying to establish such an arbitration centre for the last two years."

- 11.2 Given the long history of informal traditional dispute settlement mechanisms in the Afghan society, and the enactment of modern laws regulating not only substantive but also dispute resolution-related matters, Afghanistan will need to strike a balance between these two systems, as a way forward. Striking a balance between the two systems entails the difficult task of establishing links between the two, when future laws are drafted. In that process, attention should be paid to incorporating the advantages of these systems and avoiding their weaknesses.
- 11.3 In this regard, we suggest that disputes which are particularly important (in terms of the stakes at issue) be referred, in principle, to state courts, and other to the traditional dispute resolution mechanisms, such as *Jirga*. In such a system, there would be a record kept for the resolution of important disputes.
- 11.4 To the extent certain disputes will continue to be resolved through the informal traditional dispute resolution mechanisms, we consider it important to provide training for the individuals who will take part in such processes. Training individuals partaking in ADR mechanisms will allow better quality decisions, which will be more acceptable to the society at large, while maintaining the advantages of such mechanisms, such as their informal character, and speed.
- 11.5 It is clear that designing such a hybrid dispute resolution system cannot be achieved over night and on the contrary will require immense dedication and patience. However, the difficulties to be encountered in establishing a hybrid dispute resolution mechanism will be significantly outweighed by the benefits accruing from such a system.

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Bibliography

1. Afghanistan Legal Education Project ("ALEP") at Stanford Law School: An Introduction to the Commercial Law of Afghanistan, second edition, http://alep.stanford.edu/wp-content/uploads/2011/02/ALEP-Commercial-Law_Second-Edition_Final1.pdf (last visited on 8.12.2014)
2. Susan Blake, Julie Browne & Stuart Sime: A Practical Approach to Alternative Dispute Resolution, second edition, Oxford University Press, Great Britain, 2012
3. Martin Lau: Afghanistan's Legal System and its Compatibility with International Human Rights Standards, <http://www.refworld.org/pdfid/48a3f02c0.pdf> (last visited on 8.12.2014)
4. Ali Wardak, Jargah: A Traditional Mechanism of Conflict Resolution in Afghanistan, University of Glamorgan press, UK, September 10, 2004
5. Dr. Sherzaman Taizi, "Jirga System in Tribal Life", Area Study Centre (Russia, China and Central Asia), University of Peshawar (April 2007), <http://www.tribalanalysiscenter.com/PDF-TAC/Jirga%20System%20in%20Tribal%20Life.pdf> (last visited on 8.12.2014)
6. United States Institute of Peace, Peacebrief, Traditional Dispute Resolution and Stability in Afghanistan, February 16, 2010, <http://www.usip.org/sites/default/files/PB%2010%20Traditional%20Dispute%20Resolution%20and%20Stability%20in%20Afghanistan.pdf> (last visited on 8.12.2014)
7. Linking formal and informal conflict resolution mechanisms in Afghanistan: A Survey of the people's perspective, August 2008, p. 8, <http://library.fes.de/pdf-files/bueros/kabul/05655.pdf> (last visited on 8.12.2014)
8. <http://www.doingbusiness.org/data/exploreeconomies/afghanistan/#enforcing-contracts> (last visited on 8.12.2014)
9. <https://icsid.worldbank.org/ICSID/FrontServlet> (last visited on 8.12.2014)
10. <http://www.harakat.af/news41f2014023501.html> (last visited on 8.12.2014)
11. http://news.bbc.co.uk/2/hi/south_asia/1782079.stm (last visited on 8.12.2014)
12. <http://edition.cnn.com/2013/11/24/world/asia/us-afghanistan-security-agreement/> (last visited on 8.12.2014)