

By Zmarak Zhouand – published in IFLR 1000 in December 2011

Enforcing Contracts in Afghanistan and the Criminalization of Commercial Disputes

The ability to enforce contracts is a prerequisite for foreign investment particularly in a developing economy such as Afghanistan. In other words, a developing economy such as Afghanistan's can only succeed if investors can be confident that their contracts will be enforced.

The fundamentals of Afghan contract law are similar to those of more established civil law and common law jurisdictions. On the issue of contract disputes, foreign investors rely on alternative dispute resolution provisions that provide for, for example, a dispute to be resolved in the United States in accordance with specific arbitration centre rules. Since 2005 Afghan law has expressly recognised such provisions in contracts where a foreign investor is a party.

There are generally no issues where both parties agree to resolve their dispute in accordance with the dispute resolution provision. However, foreign investors have generally not been able to successfully invoke such provisions against counterparties that ignore the agreed dispute resolution provision and seek to enforce contractual rights through the Afghan courts or law enforcement agencies. This is because certain members of the legal profession, the judiciary and law enforcement agencies have maintained, incorrectly, that such provisions are not enforceable under Afghan law.

However, there are now encouraging signs that Afghan courts will, in accordance with Afghan law, recognise and enforce such provisions.

Commercial Code and Civil Code - Afghan contract law

Contract law in Afghanistan is governed by the Afghanistan Commercial Code 1955 (Commercial Code) and the Afghanistan Civil Code 1977 (Civil Code). Under these Codes, parties are generally free to enter into and perform a contract on any commercial subject matter provided the subject matter or performance is not contrary to law, public policy or *shariah*. Additionally, both foreign and local persons may enter into contracts and may agree to have foreign law govern their contract. With this in mind, under these Codes, a valid and enforceable contract will arise where there: (a) is an offer; (b) is an acceptance; (c) is a legal purpose/objective for the contract; (d) is a meeting of the minds; and (e) are competent contracting parties.

Contract enforcement under Afghan law

Foreign investors have historically avoided the Afghan courts, for a variety of reasons, and opted for international dispute resolution provisions in their contracts. As explained above, where the counterparty has ignored the dispute resolution provision and sought to enforce contractual rights through the Afghan courts or law enforcement agencies, foreign investors have not generally been able to successfully invoke the dispute resolution provision in the subject contract as a bar to, or a stay on, the action through the Afghan courts or law enforcement agencies. In the vast majority of instances, the foreign investor has capitulated under pressure and settled the dispute on terms favourable to the counterparty in the belief that legally or practically, it will not be able to enforce the agreed dispute resolution provision.

New York Convention, Investment Law and Arbitration Law

Since 2005, alternative dispute resolution provisions have clearly been enforceable under Afghan law.

In 2005, Afghanistan became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**New York Convention**). Under the New York Convention, Afghanistan has agreed to: (a) recognise and enforce awards made in another contracting state; and (b) apply the convention to commercial disputes.

Under the Private Investment Law 2005 (**Investment Law**) and the Commercial Arbitration Law 2007 (**Arbitration Law**): (a) parties can agree to have foreign law govern their contract and agree to have their

disputes resolved through arbitration or other mechanisms inside or outside Afghanistan; (b) the Afghan courts must enforce any resulting award or agreement; and (c) the Afghan courts may generally only intervene in instances where there are concerns about the impartiality of the arbitrator.

Enforcement by court

In response to a recent petition filed by a foreign investor in the Commercial Court, the Commercial Court acknowledged that under the Arbitration Law an alternative dispute resolution provision requiring a dispute to be mediated and arbitrated through an alternative dispute resolution centre in the United States is enforceable and confirmed its intention to issue a direction for the enforcement of such a provision in the subject case. The Commercial Court relied exclusively on the provisions of the Arbitration Law without referring to the New York Convention or the Investment Law.

Conclusion

Since 2005, Afghan law has expressly provided investors the right to resolve contract disputes through alternative dispute resolution inside or outside Afghanistan. For a variety of reasons foreign investors have generally found it very difficult to enforce such rights against unwilling counterparties that have sought to enforce their contractual rights through Afghan courts or law enforcement agencies.

The views expressed by the Commercial Court in the above case may signal a shift in the approach of the judiciary on this issue. The case is continuing and the views expressed are not part of judgment. Rather, in that case the Commercial Court formally acknowledged a legal principle and delivered a statement of its intention on how it will rule on the issue. Whilst it is possible for the Commercial Court to refuse to issue the direction in the subject case, the Commercial Court is not likely to retract the acknowledgement of legal principle. As such, it now appears that the Commercial Court will generally enforce alternative dispute resolution provisions in contracts involving foreign investors under the Arbitration Law. There would appear to be no reason why the same provisions would not be enforceable under the Investment Law or the New York Convention subject to their terms.

Way forward

For a confidential discussion, contact Zmarak Zhouand on +9379166999 or at z@lawyers.af

Firm Profile

(1) Afghanistan Lawyers International (“**ALI**” or “the **Firm**”) is an Afghan legal and government affairs advisory firm staffed by experienced lawyers with qualifications from Afghanistan, the United States and Australia. The Firm provides legal and regulatory advice and strategic government advisory services on complex and significant matters for the Afghanistan market.

(2) Personnel:

- The Firm’s partners and senior staff have extensive experience in advising on legal, taxation and government affairs matters in Afghanistan.
- Mr. Zmarak Zhouand – Partner – Mr. Zhouand is Afghan-Australian and was admitted as a barrister and solicitor in New South Wales, Australia, in 2001 and as an attorney and counselor at law in New York, USA, in 2014. Between 2001 and 2008, Mr. Zhouand worked with Henry Davis York and Gadens Lawyers, both leading Australian corporate law firms, where he represented “blue-chip” national and international clients across the corporate, commercial, banking and finance and litigation practice areas. Mr. Zhouand returned to Afghanistan in 2008

to work as Senior Legal Counsel with Roshan¹, where, until early 2011, he co-led Roshan's legal and government affairs team and was also in charge of the legal and regulatory function for Roshan's wholly owned subsidiary, M-Paisa. In the beginning of 2011, Mr. Zhouand re-entered private practice and founded ALI together with Prof. Mahjoor on October 5, 2013. Mr. Zhouand² regularly represents and advises foreign investors, development finance institutions, United States Government implementing partners and contractors, Government of Afghanistan agencies, foreign governments and non-governmental organizations on some of the largest and most complex Afghanistan related matters and transactions. He focuses on banking and finance, mergers and acquisitions, projects (telecommunications, mining and infrastructure, energy), litigation, regulatory and general commercial. Mr. Zhouand has been and continues to be consistently recognized as one of Afghanistan's leading corporate, finance and mining lawyers by a large number of publications and bodies including The Legal 500, Chambers and IFLR1000. He has a B.A (SCU) (1998) and a LL.B. (UNE) (2000) and is a member of the Chartered Institute of Arbitrators.

- Prof. Abdul Shukor Mahjoor – Partner – Prof. Mahjoor is an Afghan-American advocate registered with the Afghanistan Independent Bar Association. He has worked extensively in Afghanistan in the legal and government affairs environments over several years including having worked as a consultant with Mr. Zhouand. Prior to forming ALI with Mr. Zhouand, Prof. Mahjoor was, for a period of almost 3 years, Managing Partner of a specialist dispute resolution law firm in Kabul, Afghanistan. Prof. Mahjoor is Chancellor of, and Professor of Law at, Karwan University, Kabul, Afghanistan. In addition to lecturing at Karwan University, Professor Mahjoor is frequently called upon to train high-ranking Government of Afghanistan officials on legal and diplomatic matters. He is a regular speaker at conferences on issues relating to rule of law and economic development and often features on television programs where topical legal issues are discussed. Prof. Mahjoor is a dispute resolution specialist, and arguably one of Afghanistan's most effective dispute resolution lawyers. He frequently represents United States Government implementing partners and contractors, their foreign employees, and foreign legal and natural persons generally in relation to multi-million dollar disputes with Afghan counterparties, and in relation to Office of the Attorney-General investigations and commercial and criminal court proceedings up to and including the Supreme Court of Afghanistan. Prof. Mahjoor has a B.A. (Law) (Aazhar University), LL. M (Arab League University) and LL.M (University of Missouri).
- The Firm's practice is supported by a number of commercially experienced international and locally admitted lawyers.

(3) Sectors: Telecommunications, mining and infrastructure, oil and gas, information technology, banking and financial services, media, intellectual property, security, logistics, commercial aviation, contracting and non-governmental sectors.

(4) Services:

- (i) Corporate and investment: specific and integrated full legal services to organizations doing business, and overseas investors looking to do business, in Afghanistan.

¹ Roshan is Afghanistan's largest private company and taxpayer. Roshan's shareholders are the Aga Khan Fund for Economic Development, Monaco Telecom International (an affiliate of Cable & Wireless PLC) and Teliasonera B.V.

- (ii) Tax: the Firm specializes in the full range of tax issues such as tax exemptions, BRT, withholding taxes, corporate income tax, customs and tax dispute resolution.
- (iii) Projects: providing local counsel support for large and complex projects across a range of industries including mining and infrastructure, oil and gas and telecommunications.
- (iv) Donor funds/PPP: advisory and transactional support to participants engaged in donor funded projects including complex Public Private Partnerships (i.e. donors, public entities, private entities, prime grantees, and downstream grantees).
- (v) Commercial contracts: broad practice encompassing a range of commercial contracts and joint ventures, together with agency, distribution, franchising, sale of goods and services, procurement and other forms of transaction structures.
- (vi) Banking and finance: acting for financiers, borrowers and other intermediaries, strategic advice and practical structuring solutions, opinions, as well as documentation, for all types of transactions.
- (vii) Dispute resolution: negotiation, mediation, arbitration, specialist tribunals, primary and appellate courts.
- (viii) Government of Afghanistan advisory and lobbying services: including advising clients on devising engagement strategies with the Government of Afghanistan at the ministerial and deputy ministerial levels.
- (ix) Employment: including drafting standard employment agreements, human resources policies and procedures, advising on compliance and managing employee exits and disputes.