

## AFGHANISTAN LEGAL COUNTRY PROFILE

### LEGAL SYSTEM OVERVIEW

The legal system in Afghanistan is a mix of civil, customary (such as Pashtunwali) and Islamic Sharia law; the application of these depends on local acceptance of central legislation and state authority. The system is made up of the Constitution, state codes, state laws, decrees and regulations. The Constitution is supreme and all laws contrary to its provisions are invalid. Furthermore, the Constitution and statutory law is supreme over Sharia law in court proceedings. Thus, Sharia law is a subsidiary means of interpretation where the Constitution is silent and must operate within the framework of the Constitution and statutory law.<sup>1</sup> Nevertheless, judges are primarily trained and educated in Sharia law rather than statutory law, thus there is a greater application of the former, creating unpredictability in the hierarchy of Afghanistan's laws.<sup>2</sup>

The Afghan judiciary is highly susceptible to corruption and possesses a lack of checks and balances.<sup>3</sup> The judiciary comprises the Supreme Court, High Courts and Appeal Courts. The nine members of the Supreme Court are appointed by the President and approved by the House of the People. However, adequately trained statutory jurists are limited. The Judicial Anti-Corruption Centre was established in Afghanistan to enforce the law and prosecute corruption crime, it claims to be independent and free from any political interference. However, critics claim this centre is purely symbolic.<sup>4</sup>

The Civil Code of Afghanistan is the primary source of Afghan Contract Law. A contract is defined under Afghan law as a legal transaction with concurrence of the intention of the two contracting parties, and as a result obligation is incurred to one of the two parties.<sup>5</sup> Articles 705-729 of the Civil Code and Articles 619-623 of the Commercial Code provide implied terms which will be incorporated into contracts unless the contract explicitly specifies a different term will be used.<sup>6</sup> The main principle of Afghan contract law is autonomy of the parties to conclude contractual provisions on which they agree. In the case of one of the parties failing to fulfil their agreed obligations, the other can repudiate the contract, and where necessary, claim compensation for the losses.<sup>7</sup> The Commercial Code of Afghanistan 1995 governs commercial transactions which includes the purchase of moveable and personal property for sale or lease, employment for the purpose of contracting them to others, working for commission and brokerage, amongst others.

Afghanistan is signatory to a significant number of international treaties, including the Biological and Chemical Weapons Conventions, the Geneva Conventions and the United Nations Convention against Corruption. Afghanistan is also a member of the International Criminal Court, World Trade Organisation and the International Centre on the Settlement of Investment Disputes Convention which provides a mechanism for foreign investors to settle disputes. Afghanistan's approach to incorporating international law in compliance with

<sup>1</sup> [http://touchpointidg.com/wp-content/uploads/2015/01/2.4-Hierarchy-of-Laws\\_FEB\\_2014.pdf](http://touchpointidg.com/wp-content/uploads/2015/01/2.4-Hierarchy-of-Laws_FEB_2014.pdf); Constitution, Articles 130 and 12

<sup>2</sup> [http://touchpointidg.com/wp-content/uploads/2015/01/2.4-Hierarchy-of-Laws\\_FEB\\_2014.pdf](http://touchpointidg.com/wp-content/uploads/2015/01/2.4-Hierarchy-of-Laws_FEB_2014.pdf)

<sup>3</sup> <https://www.crisisgroup.org/asia/south-asia/afghanistan/reforming-afghanistan-s-broken-judiciary>

<sup>4</sup> <http://www.loc.gov/law/foreign-news/article/afghanistan-government-inaugurates-judicial-anti-corruptioncenter/>

<sup>5</sup> Civil Code, Title 2, Chapters 1 & 2.

<sup>6</sup> <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/12/Intro-to-Commercial-Law-of-Afg-2d-Ed.pdf>.

<sup>7</sup> Civil Code, Article 705, 739.

domestic provisions is unclear and in practice various ministries will revert to national law before applying international law.

## THE BUSINESS SECTOR

Afghanistan's economy is heavily dependent on agricultural exports and foreign aid and is likely to be so for the foreseeable future. Recent economic growth has primarily been in the informal sector, such as drug smuggling and hawala, leading to weak governance and challenges to state authority. Whilst Afghanistan is ranked 42 of 190 in the World Bank's Starting a Business index it also ranks 183 of 190 in the World Bank's Ease of Doing Business index.<sup>8</sup>

There are legal requirements for registering a business in Afghanistan have been greatly simplified<sup>9</sup> although sometimes means obtaining sector-specific licences. However, after registering there are additional governmental licences and approvals required and these are costly and time consuming, which increases complexity and creates opportunities for corruption. These include the need for visas and work permits for all expatriate individuals working in Afghanistan.<sup>10</sup> Despite this, there are benefits in doing business in Afghanistan. There is a low level of competition; UAE or Pakistan registered companies offer a low risk option for market entry; there is a very young, growing population and there are new commitments from the government to tackle corruption. There is also significant potential for the exploration of natural resources, as well as their transportation from neighbouring states. Problems prevail however from the downwards trending economy and negative trade balance, high levels of corruption, inefficient bureaucracy, weak infrastructure, an underdeveloped legal system unable to deal with complex commercial issues, and a lack of experience in dealing with and managing western companies.<sup>11</sup>

## SECURITY SITUATION

The conflict in Afghanistan sees no end in the immediate or near future, and the complex problems and lack of stable governance means that new conflicts are suspected to continually arise. Despite the Afghan National Security Forces (ANSF) numbering nearly 350,000 soldiers, police and air personnel, Afghanistan has heavily depended on US and NATO forces to provide security in and around Kabul and particularly in carrying out counter-terrorism operations. Roughly 17,500 NATO troops are currently deployed in Afghanistan as part of Resolute Support Mission.

The Taliban insurgency has seen a dramatic resurgence in recent years, with the group now possessing a presence in at least 160 of 407 of Afghanistan's districts, particularly in the Pashtun strongholds of Southern and Western Afghanistan.<sup>12</sup> The extent of Daesh's presence in Afghanistan is unclear, but is thought to have been significantly degraded following clashes

<sup>8</sup> <http://www.doingbusiness.org/rankings>

<sup>9</sup> [http://www.afghanembassy.com.pl/afg/images/pliki/How\\_to\\_Start\\_a\\_Business\\_in\\_Afghanistan.pdf](http://www.afghanembassy.com.pl/afg/images/pliki/How_to_Start_a_Business_in_Afghanistan.pdf)

<sup>10</sup> <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/12/Intro-to-Commercial-Law-of-Afg-2d-Ed.pdf>

<https://www.gov.uk/government/publications/exporting-to-afghanistan/doing-business-in-afghanistanafghanistan-trade-and-export-guide>

<sup>11</sup> <https://www.gov.uk/government/publications/exporting-to-afghanistan/doing-business-in-afghanistanafghanistan-trade-and-export-guide>

<sup>12</sup> <https://www.longwarjournal.org/archives/2017/09/lwj-map-assessment-taliban-controls-or-contests-45-of-afghan-districts.php>

with the Taliban and NATO counter-terror operations. Nevertheless, several major attacks have been claimed by Daesh. Terrorist attacks are frequent and widespread against the ANSF, domestic, international, political and civilian targets and humanitarian personnel. The risk of kidnap remains a constant threat: over 100 Westerners have been kidnapped in Afghanistan since 2001 and the motivation to undertake kidnapping is unlikely to cease.<sup>13</sup>

The security and defence industry continues to face a high demand for products and services, and provides many opportunities, with the industry making nearly \$100 billion since 2007. Nevertheless, owing to the factors above, the current Afghan security sector is not financially sustainable in the long term, whilst systemic corruption is reported within the Ministry of the Interior, which regulates the industry.<sup>14</sup>

## COUNTRY OVERVIEW

Afghanistan is a landlocked country located in Central Asia and South Asia, bordering Pakistan, Iran, Turkmenistan, Uzbekistan, Tajikistan and partially China. It is the 39<sup>th</sup> most populous country in the world with 34.1 million inhabitants, with Kabul being the most populous urban area and capital, with a population of 4.64 million. Dari and Pashto are the official languages, with Dari being the *lingua franca*, although over thirty minor languages are also spoken, notably Turkic languages. The main religion is Sunni Islam, which 84-89% of religious practitioners follow and a further 10-15% follow Shi'a Islam.

Afghanistan is deemed as 'very high risk' with regards to travel and commercial activity owing to a number of ongoing threats, notably insurgent activity, combat operations and kidnapping.<sup>15</sup> The Taliban have a presence in 45% of Afghanistan's Districts whilst Daesh Khorasan Province retains a small presence centred in Eastern Nangarhar Province.<sup>16</sup> Corruption is widespread in Afghanistan, existing at all levels of government and local entities, and the country is ranked at 169 of 176 in Transparency International's 2016 Corruption Index.<sup>17</sup> Afghanistan has taken anti-corruption measures, such as the Law on Supervision and Implementation of an Anti-Corruption Strategy 2008, however these have had little impact.<sup>18</sup>

Afghanistan's GDP has gradually fallen since 2012, now standing at \$19.47 billion, although the World Bank forecasts gradual growth in the near future.<sup>19</sup> The official currency of Afghanistan is the Afghani. The current unity government is headed by Ashraf Ghani and Chief Executive Abdullah Abdullah. The president is the head of State and government of the Islamic Republic of Afghanistan and exercises authority in the executive, legislative and judiciary, with further legislative power vested in the National Assembly.<sup>20</sup> The President and Vice-President are popularly elected: a system which resulted from the 2001 UN-sponsored Bonn Conference.

<sup>13</sup> <https://www.gov.uk/foreign-travel-advice/afghanistan/terrorism>

<sup>14</sup> [https://www.afghanistan-analysts.org/wpcontent/uploads/downloads/2012/09/13\\_Brooking\\_Private\\_Security\\_Companies.pdf](https://www.afghanistan-analysts.org/wpcontent/uploads/downloads/2012/09/13_Brooking_Private_Security_Companies.pdf)

<sup>15</sup> <https://www.clements.com/resources/risk-guide/asia-middle-east/afghanistan> ;

<https://globaledege.msu.edu/countries/afghanistan/risk>

<sup>16</sup> <https://www.longwarjournal.org/archives/2017/10/taliban-overruns-2-districts-in-southern-afghanistan.php>

<sup>17</sup> [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016#table](https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table)

<sup>18</sup> <http://www.loc.gov/law/foreign-news/article/afghanistan-government-inaugurates-judicial-anti-corruption-center/>

<sup>19</sup> <https://data.worldbank.org/country/afghanistan>; <http://www.worldbank.org/en/publication/global-economic-prospects#data>

<sup>20</sup> Constitution, Article 60, Article 6