

AFGHANISTAN LEGAL COUNTRY PROFILE

LEGAL SYSTEM OVERVIEW

The legal system in Afghanistan is a mix of civil, customary tribal law (primarily derived from the Pashtun community's code of 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. 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.¹

The Afghan judiciary comprises the Supreme Court, High Courts and Appeal Courts. The Afghan judiciary is highly susceptible to corruption and possesses a lack of checks and balances.² 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 which has led to the establishment of the Judicial Anti-Corruption Centre. 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 that the inauguration of the centre is purely symbolic, a way to show that there are anti-corruption operations in the country despite the lack of action from the government.³

The Civil Code of Afghanistan is the primary source of Afghan Contract Law. A contract is defined under Afghan law as an agreement of two wills for creation, amendment, transfer or elimination of right within the limits of the law, with mutual obligations of contracting parties as a result of the contract.⁴ 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.⁵

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.⁶ 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 others⁷.

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

¹ Judicial Systems in the Near and Middle East: Evolutionary Development and Islamic Revival, Herbert J. Liebesny, Middle East Journal, Vol. 37, No. 2 (Spring, 1983)

² <https://www.crisisgroup.org/asia/south-asia/afghanistan/reforming-afghanistan-s-broken-judiciary>

³ <http://www.loc.gov/law/foreign-news/article/afghanistan-government-inaugurates-judicial-anti-corruptioncenter/>

⁴ English version from Rasmi Djarida, The Civil Code of the Republic of Afghanistan, official journal from the Republic of Afghanistan, vol.19 (January 5, 1977) no. 497.

⁵ English version from Rasmi Djarida, The Civil Code of the Republic of Afghanistan, official journal from the Republic of Afghanistan, vol.19 (January 5, 1977) no. 705 - 729.

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

⁷ https://law.stanford.edu/wp-content/uploads/2017/10/ALEP-Commercial-Law-2d-Ed_English.pdf

which provides a mechanism for foreign investors to settle disputes Afghanistan's approach to incorporating international law in compliance with domestic provisions is unclear and in practice various ministries will revert to national law before applying international law.

BUSINESS OVERVIEW

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 authority⁸. Whilst Afghanistan is ranked 52 of 190 in the World Bank's Starting a Business index it also ranks 172 of 190 in the World Bank's Ease of Doing Business index.⁹

There are legal requirements for registering a business in Afghanistan that have been greatly simplified¹⁰ although sometimes entails 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.¹¹

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.¹²

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 37th most populous country in the world with 38.5 million inhabitants, with Kabul being the most populous urban area and capital, with a population of 4.114 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 having a 'high risk' political and economic situation, and is deemed 'very high risk' in terms of business climate, owing to an unpredictable legal system, lack of financial information and a number of ongoing threats, notably insurgent activity.¹³

Corruption is widespread in Afghanistan, existing at all levels of government and local entities, and the country is ranked at 173 of 180 in Transparency International's 2019 Corruption Index.¹⁴

⁸ https://www.unodc.org/pdf/Afgh_drugindustry_Nov06.pdf

⁹ <http://www.doingbusiness.org/rankings>

¹⁰ http://www.afghanembassy.com.pl/afg/images/pliki/How_to_Start_a_Business_in_Afghanistan.pdf

¹¹ <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>

¹² <https://www.gov.uk/government/publications/exporting-to-afghanistan/doing-business-in-afghanistanafghanistan-trade-and-export-guide>

¹³ <https://globaledge.msu.edu/countries/afghanistan/risk>

¹⁴ <https://www.transparency.org/cpi2019>

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.¹⁵

Afghanistan's GDP has gradually fallen since 2012, now standing at 19.363 billion, although the World Bank forecasts gradual growth in the near future.¹⁶ 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.¹⁷ The President and Vice-President are popularly elected: a system which resulted from the 2001 UN-sponsored Bonn Conference.



¹⁵ <http://www.loc.gov/law/foreign-news/article/afghanistan-government-inaugurates-judicial-anti-corruption-center/>

¹⁶ <https://data.worldbank.org/country/afghanistan>; <http://www.worldbank.org/en/publication/global-economic-prospects#data>

¹⁷ Constitution, Article 60, Article 6