

The Need, Development, and Benefits of Commercial Arbitration in Afghanistan



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Abstract

Aim: Commercial arbitration is considered to be one of the best and widely accepted mechanisms for resolving commercial disputes in the world today. However, on the one hand, as a member state of the international community, with regard to foreign investment and commercial development in Afghanistan, to what extent does Afghanistan need commercial arbitration in its jurisdiction? How much attention has been paid to the and finally, what are the benefits and advantages of this dispute resolution mechanism for the opposing sides of commercial disputes? All of these queries have been analytically discussed in this research. In this study, the efforts made in Afghanistan are evaluated. The basic purpose of the subject is to evaluate the need and development of commercial arbitration in Afghanistan and to reveal its benefits to foreign and domestic businessmen and companies so that businessmen and companies in Afghanistan can resolve their commercial disputes through a cheap, easy and efficient arbitration mechanism which ultimately paves the way for encouraging greater foreign investment and trade in Afghanistan.

Methods: In this research, the bibliographic approach has been used and the strategy of presenting the research information is descriptive and analytical.

Results: The findings of the research show that Afghanistan accepted commercial arbitration as a mechanism for resolving commercial disputes in its jurisdiction almost decades ago, and today it has created many laws for its more efficiency. In addition, it has also practically created arbitration centers and institutions for the resolution of commercial disputes and even created some educational programs for the training of professional arbitrators and expert in this field.

Recommendation: To a noticeable extent, Afghanistan has paid significant attention to the development of arbitration, it still needs to establish countrywide arbitration centers, enact new procedural laws to enforce arbitral awards and ultimately it needs to institutionalize the use of arbitration mechanism in its legal system.

Keywords: *Arbitration, disputes, arbitral award, commercial arbitration.*

Introduction

Conflict is an undeniable fact of human nature and life. From family life to commercial transactions, humans interact with their fellow human beings to secure and nurture their interests and meet their needs and sometimes disputes over securing their interests against others occur among them. Controversies and disputes arise. Even today, such conflicts are not only possible at the individual level, but also at the state level. Disputes and conflicts between people have specific factors that can usually be resolved by using different methods after diagnosing the causing factors (Al-zarraa, 2015). As far as commercial disputes between people are happening, the states and the international community have made many efforts to resolve such disputes and have created judicial and non-judicial mechanisms to resolve disputes in this regard. For instance, Afghanistan is one of those states which have both state and state mechanisms for resolving disputes. A non-judicial mechanism for resolving commercial disputes is commercial arbitration, which usually resolves disputes between businessmen and commercial companies. Commercial arbitration is justified by scholars on the basis of many logical and legally justified reasons, and it has found general popularity at the national and international levels as an effective mechanism for resolving disputes. The need for commercial arbitration in Afghanistan is justified on the basis of reasons. What Afghanistan has done so far to develop commercial arbitration and what the benefits of this accepted dispute mechanism for the conflict sides. Answering all these queries constitute the main themes of this research.

The Need, Development and Benefits of Commercial Arbitration to Resolve Commercial Disputes in Afghanistan

The diverse and multifaceted nature of Afghanistan's legal system has made Afghanistan, home to various dispute resolution mechanisms, which has further complicated the legal system of Afghanistan (Wardak, 2003). This situation, on the other hand, has proven to be beneficial in terms of the development and economic growth of commercial arbitration in Afghanistan. Initially, the conflict resolution mechanisms in Afghanistan were divided into two types (formal and informal) or the so-called governmental and non-governmental conflict resolution mechanisms, which are then divided into other sub-types. For example, formal or governmental dispute resolution mechanisms include only courts. While the illegal or non-governmental dispute resolution mechanisms include commercial arbitration, commercial arbitration, councils, conciliation or conciliation, and Jirga, of course, commercial arbitration is considered one of the mandatory mechanisms from this group today (Wardak, (2003).). From the above dispute resolution mechanisms, only commercial arbitration and the need for commercial arbitration in Afghanistan have been discussed in this chapter.

Need of Commercial Arbitration in Afghanistan

Four decades of continuous war have destroyed almost all of Afghanistan's infrastructures, which caused Afghanistan being ranked among the least developed countries. It is among countries which are not even able to meet their regular budget from their own internal fiscal revenues. From 2002 to 2021, a large part of Afghanistan's annual budget depends on foreign financial aid from the international community (Hakimi, 2016). Given this financial uncertainty, the previous National Unity Government made economic growth and commercial development one of its priorities. Following the promises of economic growth and trade development, the National Unity Government took some important steps in the past, as a result of which Afghanistan continued its

economic growth and commercial development at the level of Asia. Finally, it secured better rank in the report published by World Bank (Bank, 2018 Index).

According to the World Bank's 2018/2019 business and commercial reports, Afghanistan was economically ranked at the top of the Asian countries, leaving even China, India and Turkey behind in this regard. (Bank, 2018 Index). These events showed that the economy of Afghanistan was developing very rapidly, and domestic and foreign investment in Afghanistan was increasing on a very large scale. The development of business and commerce in the country requires that traders and trading companies have business deals and transactions with other traders and trading companies inside and outside the country (Momeni, 2018).

This scenario alongside other reasons, such as the ineffectiveness of commercial courts in Afghanistan, the development of Afghanistan's commercial relations and Afghanistan's commitments to some international documents related to commercial arbitration, require Afghanistan to have a formal mechanism resolving commercial disputes. This is the reason why there is a need to create a commercial arbitration mechanism to resolve commercial disputes outside the jurisdiction of the courts. Let's discuss each of the mentioned reasons briefly.

The Lack of Access to the Courts and its Ineffectiveness

Commercial courts are considered to be one of the first formal mechanisms for resolving commercial disputes in Afghanistan, which were established for the first time under the executive power of the state under the 1964 Constitution of Afghanistan. Following the Afghanistan constitution in 1947, the Commercial Courts Act of Afghanistan was also established, followed by the legal framework for resolving commercial disputes for commercial courts. (Hakimi, 2016).

The 2004 Constitution of Afghanistan also provides for an independent judiciary and it is clear that the formation and powers of the courts are regulated on the basis of a separate law (2003, Constitution of Afghanistan) Although this article of the Constitution does not say anything about the structure of commercial courts very clearly, but gives the Supreme Court the power and authority to create new courts based on the need. Afghanistan proposes the establishment of commercial courts in each province. This law clearly states that if there is no commercial court in any province, commercial disputes shall be referred to the civil court of the city courts of the same province for resolution (Law on Organization and Jurisdiction of Courts of Afghanistan, 2005).

In every province, there is a strong presence of commercial entities with legal authority in both urban and rural areas. Unfortunately, these commercial courts do not provide easy access to justice for the general public. Instead of facilitating public access to the courts, there is rampant administrative corruption within the court system, unlawful influence by powerful individuals on court arbitral awards, and the appointment of unqualified and inexperienced judges (Grono, 2011) The current situation in Afghanistan calls for an alternative mechanism to address the resolution of commercial disputes, where the authority of commercial entities is replaced by a more effective and timely mechanism to resolve commercial issues in a fair and less time-consuming manner.

Commercial Growth and Economic Development

In Afghanistan, the ongoing conflict has severely impacted the country's overall economy, leading to recession. However, Afghanistan still possesses potential economic opportunities, providing opportunities in various sectors for domestic and international investors. These sectors include

mining, construction, telecommunications, transportation, and agriculture (Momeni, 2018). The Afghan government has made efforts to stimulate and promote positive growth in the economic and trade sectors, aiming to create a favorable and conducive environment for business and investment. According to recent reports from the International Monetary Fund (IMF), Afghanistan's new government has taken significant steps to address economic and commercial challenges, focusing on improving economic and commercial infrastructure. To achieve sustainable economic growth and attract foreign investment, Afghanistan needs to establish an efficient, transparent, and low-cost mechanism to resolve commercial disputes. This mechanism should be quick, reliable, and cost-effective, addressing the pressing need for a viable alternative mechanism for commercial dispute resolution in Afghanistan.

Moreover, the lack of access to commercial and domestic markets remains a significant barrier for traders and companies (Al-zarraa, 2015). Therefore, the establishment of a robust and effective mechanism for resolving commercial disputes is essential for the promotion of trade and investment (Momeni, 2018). Currently, the commercial courts in Afghanistan suffer from limited accessibility, judicial corruption, undue influence in the judicial process, and lengthy and costly litigation, leading to a lack of trust among the public in the court system. Therefore, in order to address these challenges, there is a pressing need to introduce an alternative, accessible, and swift mechanism for dispute resolution that is cost-effective and time-efficient.

Afghanistan's Commitment to International Documents Related to the Acceptance of Commercial Arbitration in Afghanistan

The role of establishing a well-developed commercial arbitration in Afghanistan is crucial, and one of the main justifications is based on the international documents and conventions that Afghanistan has ratified. These documents and conventions bind Afghanistan to enact and enforce laws within its territory to regulate commercial activities and ensure compliance with legal requirements. In 1968, Afghanistan ratified UN Convention on the settlement of investment disputes. This convention, which is also ratified by other countries, allows Afghanistan to resolve disputes related to international sales contracts voluntarily and in accordance with the provisions of the convention (UN Convention, 1965).

Furthermore, Afghanistan in 2005 also ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Under this convention, Afghanistan commits itself to recognize and enforce arbitral awards in its territory based on the provisions of the convention, which provides a legal framework for the resolution and enforcement of commercial disputes (UN Convention 1958). Considering the aforementioned reasons and justifications, Afghanistan has established an official mechanism for the regulation of commercial activities within its jurisdiction.

Growth of Commercial Arbitration in Afghanistan

In Afghanistan, commercial governance and regulations have a long history of being shaped by various mechanisms. These mechanisms typically include specialized legal institutions, courts, (such as commercial courts), arbitration, and mediation. They are designed to provide a framework for resolving disputes and implementing changes in commercial practices.

Although these mechanisms vary in their application and scope, commercial governance in Afghanistan has its roots in the Commercial Code enacted in 1965, which established the principles of commercial courts (Commercial Code of Afghanistan, 1955). The code aimed to provide a legal

framework for commercial transactions and resolve disputes related to commercial and contractual matters. Under this system, if parties cannot resolve their disputes through negotiation, they can bring their case to a commercial court for resolution. Commercial governance mechanisms operate independently and are not necessarily part of the regular judicial system. Instead, they constitute an optional mechanism for the resolution of commercial disputes.

In 1343 AH (1964/1965 AD), Afghanistan enacted a fundamental law that obligated Afghanistan to adhere to international conventions and treaties concerning commercial governance. One of these conventions is the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention), which Afghanistan ratified in 1968. This convention obligates Afghanistan, as a party to the convention, to apply the rules of the convention to international sales contracts within its territory (Hakimi, 2016).

In 1384 AH (2005/2006 AD), Afghanistan incorporated the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) into its domestic law. The New York Convention provides a legal framework for the recognition and enforcement of arbitral awards, both domestic and international. By adopting this convention, Afghanistan recognized and regulated the enforcement of arbitral awards in its jurisdiction, in line with other countries (Zahid Safi, 2019). It should be noted that Afghanistan has enacted specific laws to regulate commercial governance, such as the Commercial Law, the Commercial Arbitration Law, the Bankruptcy Law, and various intellectual property laws. These laws provide explicit provisions for the resolution of commercial disputes through commercial governance mechanisms.

Despite the existence of various laws and mechanisms for the resolution of commercial disputes, Afghanistan faced significant challenges in establishing an effective mechanism for commercial dispute resolution until 2015. In 2016, the Ministry of Commerce established a collaborative mechanism with international partners to create an alternative dispute resolution system and established the Commercial Dispute Resolution Directorate to oversee its implementation and ensure the effectiveness of commercial dispute resolution.

Benefits of Commercial Arbitration in Afghanistan

Currently, in Afghanistan, the commercial dispute resolution centers at the national level, as well as in each province, provide accessible and efficient mechanisms for the resolution of commercial disputes. It has been recognized that commercial dispute resolution should be expedited and cost-effective, unlike traditional court proceedings, which can be time-consuming and costly. In this regard, commercial dispute resolution provides an opportunity for commercial entities and companies to resolve their disputes outside the formal judicial system, with the involvement of their chosen arbitrators. The commercial dispute resolution directorate works towards ensuring that commercial entities and companies have the opportunity to resolve their disputes through a legal and secure process. The main reason for the establishment of the commercial dispute resolution mechanism under the government's authority is to facilitate access to justice, provide alternative dispute resolution options, and expedite the process (Commercial Law of Afghanistan 2007). The government of Afghanistan has established a legal framework to support this mechanism and ensure its effectiveness.

According the Velocity and Effectively

The government of Afghanistan recognizes the need for an effective mechanism for resolving commercial disputes that is low-cost, accessible, and efficient, unlike traditional court proceedings. It has been observed that the traditional judicial system is time-consuming and costly for resolving commercial disputes. In 2007, a new law was enacted in Afghanistan, allowing businesses and companies in Afghanistan to choose direct or indirect arbitration for the resolution of their disputes.

Establishment of the Arbitration Center

In this regard, the government has established an arbitration tribunal to facilitate the resolution of disputes between commercial parties. Under this system, the resolution of disputes between commercial parties is facilitated by various institutional bodies, including the arbitration center and its administration. It is not mandatory for this mechanism to be limited to a specific country or jurisdiction but can be conducted in any country. Moreover, it is possible for parties to choose an arbitration center in their own country or in a foreign jurisdiction, such as the Dubai or United Arab Emirates, which can provide a secure, neutral, and effective forum for resolving disputes.

The law governing arbitration and the institutional bodies for arbitration, whether domestic or international, have been explicitly provided for in Afghanistan's commercial law. Article 12 of the Arbitration Law explicitly states: "The arbitration shall be domestic or international, depending on whether the parties are of national or foreign origin" (Commercial Law of Afghanistan 2007). The freedom and flexibility of the arbitration process and its enforcement are ensured to provide parties and businesses with the opportunity to resolve their disputes in a private and confidential manner, either by selecting a specific institutional body or government agency for their resolution or by referring their disputes to their own chosen arbitration center and tribunal.

Confidentiality in the Arbitration Process

Confidentiality is an important aspect of the arbitration process because it ensures that the dispute remains confidential. This is particularly significant for internal and international commercial disputes, especially those related to mining and military activities. It is crucial to maintain the confidentiality of trade secrets and sensitive information in such cases. The government of Afghanistan recognizes the sensitivity of confidential matters and has established provisions to safeguard and prevent their disclosure in the arbitration process. Article 10 of the Afghan Commercial Arbitration Law explicitly states: Clause 1: The arbitration award, arbitral awards, or any other documents issued or made during the arbitration process shall be treated as confidential, and the parties shall agree to keep them confidential (Commercial Law of Afghanistan 2007). Clause 2: The court shall take necessary measures to ensure the confidentiality of the arbitration proceedings and any documents related to the proceedings (Commercial Law of Afghanistan 2007).

The provisions of the Arbitration Law ensure the protection of confidentiality and prevent the disclosure of trade secrets and sensitive information. Even the arbitrators are prohibited from disclosing or using the confidential information they become aware of during the arbitration process. The law also anticipates the necessary measures to maintain the confidentiality and integrity of the proceedings and the information (such as the appointment of expert arbitrators).

Expert Arbitrators in Specialized Matters

In certain matters, arbitration may require the involvement of expert arbitrators who possess specialized knowledge and expertise in a particular field. Expert arbitrators can be appointed specifically for the resolution of complex and technical issues related to mining and military matters. The appointment of expert arbitrators is particularly relevant in cases where the resolution of disputes requires the application of specialized knowledge, expertise, and experience, especially in the field of mining and military activities.

The Afghan Commercial Arbitration Law also provides for the appointment of experts, ensuring their involvement in specialized arbitrations. Article 41 of the Arbitration Law explicitly states: (1) Clause: The authority to issue a board decision shall be entrusted to one or more specialists who have expertise in the subject matter of the board and are capable of preparing a comprehensive report for the purpose of decision-making. However, their arbitral awards must be consistent with the applicable laws and regulations. (2) Clause: The authority to issue a board decision requires that each member of the board provide relevant information, documents, evidence, opinions, and other necessary materials to the specialist for equal consideration and analysis. (3) Clause: The specialist is obliged to present their written or verbal report on the subject matter of the board, based on their expertise, to the board or as required by the board's necessity, and provide a clear explanation in their report.

(If there are other relevant laws and examples in other countries that govern the authority of specialists in logical and specialized matters, they should be considered. In any case, it is reasonable and logical for the specialist's opinion and expertise in their respective field to be taken into account in the decision-making process, and to be used in consultations and advice. However, the specialist's authority remains subject to doubt and can be contested based on their issues and the logic of their arguments, resulting in a dangerous precedent in the decision-making process (Commercial Law of Afghanistan 2007).

Use of the Preferred Language in Proceedings

The commercial authority shall use the preferred language of the parties involved, subject to the availability of an authorized interpreter for the preferred language of the parties or the official language of the country for the purpose of the commercial proceedings. The Afghan legal authority explicitly states in its law: “The board shall approve the use of the language(s) agreed upon by the parties in the proceedings. In case of disagreement, the language(s) used in the proceedings shall be determined. The language(s)/language used in the documents, statements, and issued arbitral awards, as well as the language(s) used in the board's deliberations or other communications, shall be in accordance with the agreed-upon language(s) of the parties” (Commercial Law of Afghanistan 2007).

The authority to issue board arbitral awards shall be based on the language(s) of the relevant documents and evidence, or the language(s) used in the board's deliberations, and shall not be decided based on the language spoken by the parties. This provision of the law ensures that the arbitral awards are made based on the language(s) used in the proceedings and the understanding of the parties (Commercial Law of Afghanistan 2007). The importance of language in the decision-making process is emphasized in the law, as it facilitates the interpretation of written statements, verbal statements, and issued arbitral awards. However, it should be noted that language

proficiency is not the sole criterion for understanding the subject matter, and the translation should be done with ease and accuracy for all languages involved.

Conclusion

The establishment of an effective mechanism for resolving commercial disputes in Afghanistan and other countries is vital for the development of trade and commerce. Due to various reasons and justifications, commercial courts in Afghanistan lack the necessary credibility and trust from Afghan traders and companies. Therefore, it is essential to address this issue in order to establish a reliable and trustworthy commercial jurisdiction in Afghanistan. This will enhance the confidence of traders and companies in seeking legal remedies and attract foreign investment to Afghanistan.

Similarly, compared to other legal and non-legal dispute resolution mechanisms, commercial arbitration has several advantages. In terms of cost-effectiveness, speed, effectiveness, confidentiality of proceedings, expert involvement in resolving commercial disputes and the choice of language relevant to the parties, commercial arbitration offers significant benefits. It provides a specialized forum for resolving commercial disputes and offers advantages both at the international level and within the country, thereby bringing positive and trusted changes to the commercial dispute resolution mechanism is undoubtedly vital towards encouraging foreign investment in Afghanistan.

Recommendations

In the legal framework of Afghanistan, there is a need to establish a mechanism that ensures the enforcement of commercial arbitral awards and provides centralized guidance for resolving commercial disputes. It should be ensured that the Afghan government is committed to the enforcement of commercial arbitral awards and takes adequate measures in this regard.

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