

## **Legal Situation in Afghanistan**

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### **Literature**

In expressing my legal views I have relied many authorities. As this report is not a legal treatise I have allowed myself to restrict quotations to my own books. There the reader will find further references to German and international authorities.

**Aden, Menno** Internationales Privates Wirtschaftsrecht (International Economic Law )  
München 2006

**and** Internationale Handelschiedsgerichtsbarkeit  
(International Commercial Arbitration)  
München 2003

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### **Abbreviations**

**AC** = Afghan Constitution  
**ACC** = Afghan Civil Code of 1977  
**ASL** = Anglo –Saxon legal system  
**BGB** = Bürgerliches Gesetzbuch, German Civil Code.  
**ComC** = Afghan Commercial Code  
**GS** = German or continental legal System  
**Could** = possible, but I have no strong opinion on this point.  
**HGB** = Handelsgesetzbuch, German Commercial Code  
**Laws** = the economic laws under review in this mission and dealt with in this report.  
**PEL** =Public Economic Law, Wirtschaftsverwaltungsrecht  
**WE** = Willenserklärung, declaration of intent: declaration, oral or written, by which a person, having the capacity of doing so, a) commits himself to be obligated under a contract or b) to dispose of a certain right, e.g. to give a proxy, to exercise the right of set - off etc.

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## **Part 1 Present Legal Situation in Afghanistan**

### **I. General Introduction**

#### **1. Brief Review of History**

The territory which is today named Afghanistan was known to the West as Baktria, the eastern most province of the empire of Alexander the Great. The Greek alphabet in now extinct regional languages and certain other cultural vestiges are still traceable. Afghanistan, under this name or nor, is arguably the region which has seen more foreign invaders and passers - through than any other region of he world. Over the centuries this territory has seen many tribes and peoples coming in and going out, leaving or not their imprints on the indigenous people and its culture.<sup>1</sup>

Afghanistan as we know it today is the product of the colonial rivalries between British India and Russia, from which it survived as a puffer- state between both.<sup>2</sup> This puffer - state situation has continued during most of the 20. century and the 1. and 2. World War, when A tended towards Germany and its Turkish ally. It almost naturally found its perpetuation in the US – Soviet antagonism of our times. The Taliban, now the foe of the West and the ruling government in Kabul, have been nurtured and supported by the US in their guerrilla war against the Soviet invaders during the 1980ies. But these now have turned against the US and are fighting them with weapons which in many instances were provided by the US themselves. It transpires from various conversations with A people of very different social status, that the Afghan history of the last 150 years, let alone of the last few decades, definitely did not endear Western powers to the A people as a whole. Many Afghans apparently are unconvinced of the sincerity of the US. In as far distinctions between Western countries are at ball made, Germany seems to get the best marks.

Culturally Afghanistan always tended towards Persia. The Dari language is in fact only another name for Farsi, the Persian language. Afghanistan has substantially contributed to the Persian and Islamic culture. As the Persian culture is second to none in terms of age and productivity, it would be a big mistake, to draw premature conclusions from the present state of Afghanistan, which indeed is a very poor one, on its future potential. I feel that this mistake is being made by many Westerners and Americans in particular.

#### **2. Economic situation**

The present state of mind in Afghanistan can be summed up in the following saying of one of my interlocutors: We have lost all hope! The USA and their allies are now here for years and things are worse than they were when the Russians ruled the place. Economic questions are not within my mandate. However, the law and economic laws in particular, are directly correlated to the present and foreseeable economic situation of the country, where such laws shall be implemented. The economic

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<sup>1</sup> For easy reference see: Encyclopaedia Britannica

<sup>2</sup> see: British – Afghan wars in the 1870 – ies, which in fact were lost by the British.

situation in Afghanistan is very poor. It is said that Afghanistan's economy is increasingly dependent on opium production, its \$3 billion or more annual production of opiates, which represent about half of Afghanistan's GDP, now furnish over 90% of the world's supply.<sup>3</sup> The apparent corruption of government by the dealers prevents the development of a strong central state operating under the rule of law. As a matter of fact everybody, Afghan people and among others World Bank officials, complain about corruption at all levels. Suffices it to walk around the capital of the Afghanistan, Kabul: in the very centre there are roads not deserving this name; hundreds even thousands of men of all ages loitering, the few working sites, e.g. to fill a big hole in one of the main roads, are grossly overcrowded by men who pretend to work. Water supply in Kabul is scarce, waste disposal a nightmare, housing obviously is poor. I have not been very far outside the capital, but the overall situation is ostensibly getting worse by the mile.

Nevertheless, since the intervention of the US and NATO in 2001 big progress is said to have been achieved. Word is, that some 18 billion USD have since been poured into Afghanistan.<sup>4</sup> World bank writes: *Economic growth, which has received far less international attention than has Afghanistan political process, has been dramatic.*<sup>5</sup> If this is true, the state of Afghanistan at the beginning of the process must have been really weird – what everybody indeed says it was. In fact there are some new and quite modern department stores in Kabul centre, new houses are under construction, even some very luxurious ones. I heard a businessman talking about plans on multi - storey apartment houses. Cars in Kabul are not new, but in a surprisingly good shape; their tyres, usually a good indicator for the technical state of a care, are generally good. Some shops seem to be thriving.<sup>6</sup>

## **II. Existing Laws**

### **1. Afghanistan Constitution (AC)**

Within the present mission only a general overview is possible on what the legal situation now is. The situation in Afghanistan in some ways is comparable to Bosnia – Herzegovina. There at least they have one common language and, generally speaking, the warring peoples are fairly close to modern European standards. In Afghanistan, however, the only thing the peoples of the country have in common seems to be Islam. This, outwardly at least, has a very strong hold on the people, even on the legislation. The AC constitution is full of references to the prescriptions of the Koran and Islamic religion. I was expressly advised by senior officials to take into account the Sharia when analysing the Laws. This I have tried to do.

Basis of Afghan law is the constitution from, AC, 1382 a. H (= 2004).<sup>7</sup> This begins with an invocation of Islam, but also with the proclamation of Afghanistan as a state adhering to the principles of the UN – Charta, see preamble of AC. Art. 2 para. I proclaims Islam as the religion of the state, para II says that followers of other

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<sup>3</sup> See: *Daily Outlook Afghanistan* ( engl. language newspaper in Afghanistan ) dd June 27th 2007

<sup>4</sup> I heard this figure several times, including from KFW .- Kabul.

<sup>5</sup> The World Bank, *The Investment Climate in Afghanistan*, December 2005

<sup>6</sup> Local people of course blame these house - owners as having earned phoney money. This may be true in many cases, but this is on the other hand also the universal suspicion and reproach of those who stay poor while others are getting wealthy.

<sup>7</sup> Art. 18 A C states that the calendar starts with Hedja. Friday is official holiday.

religions are free to exercise their faith, but only within the limits of the provisions of the law. Without going into constitutional details – here seems to lie a certain contradiction. It therefore remains to be seen in how far the Islamic character of the state compromises with the principle of non – discrimination, a principle which is again professed in Art. 22. Seen from outside and with the eyes of modern Europeans this principle is already impaired by the way the women are treated by law and custom. But: Westerners must refrain from being too reproachful, as their own accomplishments in this field are also of a fairly recent date.<sup>8</sup> It is remarkable, however, that art. 60 AC in referring to the State President says “ he or *she*” thereby implying that women indeed can become president. See also quota for women of 50% in nominations of the Upper House.

Important is art. 3: *No law can be contrary to the beliefs and provision of the sacred religion of Islam.* This must not, but can be interpreted as saying, that accepted religious rules take priority over secular laws. If so, this article would be a revocation of Art. 1 ACC of 1977, which expressly says: Whenever secular and religious laws are in contradiction, the secular law shall prevail. In this respect see art. 130 AC: *..the courts apply the provisions of this constitution and other laws.* Only if there is no secular law applicable the judge may resort to Islamic law. But as long there is a law, this must be applied, even if the judge thinks it is against Islamic law. This I infer from Art. 3, which reads: no *law* can be against religion. Thereby implying that a court verdict or an act of state, if based on a law, even if this law is against the religion, must stand.

Art. 10 is of high practical importance in saying that the State encourages market economy.

Art. 41 says, that individuals do not have the right to own immovable property in A. Some Westerners tend to see this as a contradiction to the principle of market economy. It should be noted, however, the same rule is true, albeit to differing degrees, in many countries, e.g. Switzerland, Austria, Poland, also Russia and China. Unclear is the word “individuals” - apparently leaving the door open for foreign legal entities/ companies to own immovable property in Afghanistan. Art. 21 Private Investment Law should however be interpreted as saying that companies can lease immovable property, but cannot own it. Here, by the way, is one example for what will be said later on: The Laws should be analysed in order to find out whether they are consistent with Afghanistan law and AC. E.g.: Art. 15 of the *Corporations and Limited liabilities law* is very (too?) liberal in recognizing foreign entities as legal entities under Afghanistan law. So it would be possible to neutralize art. 41 AC simply by putting up a group of individuals in say Bahamas, which then could buy land in Afghanistan.

Art. 43: Afghanistan binds itself to promote education. The unofficial figure of analphabetism is said to be around 50%, the rate of girls and women in this is disproportionately high, as is indirectly admitted in art. 44. I feel that in this area the real problems of the country lie, and here will be the solution to many of its woes.

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<sup>8</sup> The US – constitution allowed Negro slaves, although it expressly stated: “ all men are created equal.”

Art. 47 has some bearing on the new draft law on copyright by saying: rights of authors etc shall be guaranteed. This is fair enough. But it is puzzling that out of so many legal problems of similar importance this subject has been honoured to be explicitly mentioned in the constitution. I feel that this emphasise may be due to foreign, i. e US, influence.

Art. 51 says that a *person suffering undue harm by government* can claim a compensation from the state by going to court; see corresponding art. 34 German constitution. This may well remain an empty phrase without practical effect. Afghanistan lacks and for the foreseeable future will lack judicial protection against acts of state or its authorities (Verwaltungsgerichtsbarkeit).<sup>9</sup> If therefore responsible lawyers and judges give full effect to this clause, it could become the starting point for a totally new and modern understanding of human and other rights in Afghanistan. In Germany the corresponding has become very important.

The State President is also head of the government. He designates the ministers, Art. 71. The parliament has two houses, Art. 82. Elected deputies in the lower, and appointed persons in the upper house, the Senate. The senate takes part in the legislative process, art. 97.

Art. 79: When the parliament is in recess, the government can adopt legislation in emergency situation. The legislative decrees become laws after the president has signed them.

## **2. Legal Background<sup>10</sup>**

Since June 2002 Hamid Karzai is state president, who was and still is widely perceived as being the nominee of the United States. So it met with considerable interest that Karzai in June 2007 criticised NATO, in fact US – troops, of being too negligent with respect to Afghan civilian victims in their military actions. In the parliamentary elections held in October 2005, many hostile to the reconstruction of the state - especially under foreign tutelage – such as warlords, reputed drug lords, and even Taliban, formally legitimised themselves by joining the governance of the state through its legislative branch. Several were already involved with the Kabul executive and judiciary.

Under the Constitution, Arts. 95, 116-17, 120-25, 132-33, the judicial branch was given significant autonomy. Apparently only few members of the judiciary have legal training. Islam influence only lower level courts is said to be great.

A legal system worth the name must produce transparent and predictable results in legal disputes. Such a system apparently does not exist in Afghanistan. This problem has been acknowledged by the international community and international development programs have been initiated. But these mostly focus on criminal and

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<sup>9</sup> Which by the way is unknown to most countries including the US and seems to be typical for continental legal system, esp. Germany and France.

<sup>10</sup> Here I very often rely on the *Country Handbook on Afghanistan*.

administrative law. Private-sector disputes apparently are not within the immediate scope of such projects.

There is no official record of state laws. Private interviews intimate that nobody misses it. *We would not care any way* – I heard somebody as saying. Four (4) of the Laws are officially in force for a couple of months. Unanimous answer to pertaining question: *These laws have not yet been used anywhere in Afghanistan and are not known either!*

The Karzai government initially left the judiciary essentially where it was found, in the hands of religious elites and Islamists. The Karzai government's chief of staff has been quoted as saying: *There is a need for reform in the judiciary at all levels.* With this everybody concurs, who has only the slightest insight.

The Sharia is not codified set of rules. Some of these rule written and can be traced to the Koran itself, others have been handed down through the generations and are far from clear. I got very different answers from Arabian officials (in Algier, Kabul and elsewhere) on what Sharia really means. Some are apparently of the opinion that Sharia is equivalent to what we understand as "natürliches Recht" (natural law). So, a Supreme Court Judge explained to me that e.g. the rules of set-off (Aufrechnung), the seller's warranty (Gewährleistung beim Kauf) or more generally the law of contract - all is Sharia. A professor on the other told me that Sharia only refers to family law and pertaining subjects. The only thing obviously everybody can agree about is that Sharia prohibits interests taking and giving. Hence there is a fundamental lack of certainty in the source of law when it comes to this.

### **3. Afghanistan Compact**

The Afghanistan Compact, Annex II, addresses these rule of law issues as follows:

*By end-2010, the legal framework required under the constitution, including civil, criminal and commercial law, will be put in place, distributed to all judicial and legislative institutions and made available to the public. By end-2010, functioning institutions of justice will be fully operational in each province of Afghanistan, and the average time to resolve contract disputes will be reduced as much as possible.*

*A review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice will be initiated by end-2006 and fully implemented by end-2010; by end-2010, reforms will strengthen the professionalism, credibility and integrity of key institutions of the justice system.*

It seems improbable, that these objectives will be met. And almost everybody openly or tacitly agrees, that these dates cannot be met. Too much must be done, and the more is done, the pore the competent people realised how much more there is lacking. There is wide consensus, that a totally new generation of lawyers/judges is needed to approach A only to the lowest standards of Europe.

#### **4. Legal System as per the present Civil Code**

The ACC enacted in 1977. This Code is, drafted not along the lines of the US law, but fundamentally speaking along the lines of the continental, or even German legal system. Some key provisions are the following:

##### **a. Applicable Law – International Private Law, IPL**

The Law begins with rules on International Private Law; BGB has this at its end (= Einführungsgesetz, EG – BGB). Theoretically the Afghan approach is more convincing than the BGB approach. Modern laws however tend to regulate IPL in an extra law.<sup>11</sup> It may not now be of the highest priority for Afghanistan to modernize its IPL. This should however be considered in due course together with a revision of its law on international civil procedure (i.e. international jurisdiction, recognition and enforcement of foreign judgments). A modern country wishing to be partner in a global economy cannot do without firm rules on these subjects.

Articles. 27-28 provide that the law applicable to a contract shall be that of the place of residence of both parties, or in the case of different residences either the law agreed or intended, or the law of the place where the contract was completed shall apply, while the form of the contract is governed by the place it was completed.

##### **b. Family law.**

ACC follows the French Code Civil insofar as it starts with family law, including marriage, divorce etc). Here many typical Islamic rules seem to prevail. Under GS these subjects, as being of a rather special nature, are either dealt with in separate laws or put at the end of the code.

##### **c. Legal personality.**

Articles. 337-42 define a legal person as distinct from natural persons, natürliche Person, such as a company or commercial firm, or public institutions. Legal persons have legal capacity and rights determined by law, including to file or defend a claim in court.

The continental legal systems distinguish between private law and public law much more precisely than does the Anglo – Saxon system. So, also this Code makes a distinction between private and public legal entities.

Arts. 343: Foundations, which play a big role in tradition Islamic law are covered in a very detailed way. associations, and institutes may be established under the Civil Code in accordance with their charters. The association ( Verein) is not covered by the French Code, but is described here in Arts 403 ss. Thereby the basic form of all partnerships and commercial companies is given (organisation, set –up, directors etc). Here again we find influence from the German code, e.g. art. 471 non – commercial association (Idealverein).

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<sup>11</sup> e. g. IPR – Gesetz of Switzerland.

**d. Rights in property.**

Arts 472 ss describe what is translated into English as “goods” (looks like GS, see §§ 90 ss BGB Sachen).

**e. Contract Formation.**

Arts 497 ss deal with contracts. A contract is made by the meeting of minds of the parties under which one party is obligated by consent. The contract is formed through offer and acceptance, freely communicated in a way that clearly shows intention to contract, and may be implied or made by bid, delivery, silence, or mistake unless the other party is aware of the mistake.

Here ACC is clearly influenced by GS, more particularly by the concept of WE, Willenserklärung. Many of the elements are treated in the same systematic way as in BGB. The French Civil Code usually is much less clear in these and in ASL they are not covered at all. Arts. 505-14, 525-27, 529.

The offer remains open until withdrawn, superseded by another offer, expires, is rejected or counter-offered, or the offeror loses capacity. Arts. 515-20, 527. The Code provides protection to those lacking capacity, Arts. 542-50, or subject to coercion, mistake and fraud. Arts. 551-78. All this seems to be quite up to date.

**f. Interpretation.**

Rules of interpretation include deference to custom. Arts. 705-29. This would be the same under § 346 HGB ( Handelsbräuche). See also art. 2 of Afghan Commercial Code.

**g. Agency**

Agents may conclude contracts on behalf of disclosed or undisclosed principals. Arts. 534-41. This again follows the BGB – line, as this is poorly covered in the French Code and in ASL not at all. As this subject is of a high importance, the draftsmen of USAid obviously felt prompted to fill this gap by the draft Agency law, see below Part 2 VII. The draftsmen may not have noticed that Afghan law already covers this.

**h. Unforeseeable circumstances.**

In the event of exceptional and unforeseeable events or natural calamity a court may protect a party against grave losses. This provision may not be altered by agreement. Art. 696; cf. 830(1). This is an obvious German influence. Although originally not covered in BGB (but now: § 313 BGB) the pertaining jurisprudence was developed by former

German Supreme Court (Reichsgericht) based on old Roman doctrine of *clausula rebus sic stantibus* (= contractual obligation under the condition that overall circumstances will remain the same).

**i. Plurality of parties**

On the side of debtors as well as on the side of creditor more than one person can be involved ( Gesamtschuld/Gesamtgläubigerschaft) Arts. 859.

**j. Statute of Limitations.**

Contract claims generally, and claims based on written contract, may not be heard after 15 years, but claims such as for salaries, rents, and taxes may not be heard after 5 years, and for wages of workers, professional or broker fees, and restaurant or hotel charges after one year. Art. 965-90, 1494. *See also* Commercial Code Art. 108.

**k. Termination.**

A contract may be terminated by discharge. Arts. 949-59; A contract may be cancelled by the court, or rescinded by the parties. Arts. 739-50.

**l. Fulfilment of obligations**

Arts 897 ss, again a rather typical influence from BGB see §§ 362 ss BGB..

**k. Special Contracts.** Specific provision is made for:

**i. Transfer of ownership** in movable or immovable property entails a contract, Art. 2210, for which the law implies a warranty against defects of goods, Arts.1097-1107, 1136-51, and includes sales subject to inspection, testing and other options, instalment sales, conditional and revocable sales, sales in the form of lease, Arts. 1035-74, and sales of contested rights, Arts. 1159-62.

**ii. Contract for partnership**, which must be in writing and contain provisions for administration of the partnership, and cannot absolve the partners of responsibility for debt.

**iii. Contract for loan of money** or goods, Arts. 1288-94 and 1456-80, but “profit on a loan is not permitted unless provided by statute ,” Art. 1295. In this ACC most probably should be revised to make it consistent with Sharia –principles.

**iv. Contract for “peace”** (settlement), Arts. 1297-1320, prior to court judgment. It does not transpire from present draft/Mediation Law, see below Part 2 V, whether the drafters have been aware that ACC already contains much of what they intended to be enacted by Mediation Law.

**v. Contract for lease** of movable or immovable property, for which compensation may be received and must be specified in the contract along with the term of the lease, Arts. 1322 – 1455. Here again the concept of Sharia may lead to a thorough revision. Of the provisions.

**vi. Construction contracts**, which include a warranty against defects for 10 years, Arts. 1481- 1509;

**vii. Contract for public utilities**, to which government is a party and also fixes the rates, Arts. 1525-28. I feel that this type of contract, being partly at least of a public nature, should not be covered in ACC. It must also be analysed in how far this contract is consistent with the new law on public procurement.

**viii. Labor contracts** (excepting agricultural and domestic labor) which may be terminated on two months notice unless a term is set, and is subject to payment for the full fixed term in case of firing without cause after a three month trial period or constructive firing, may include a non-competition clause, Arts. 1529-53. These provisions must be analysed ; most probably they are out dated.

**ix. Agency / Mandate** contract, which may be general or limited, and includes power of attorney, Arts. 1554-1608. Similar to GS, where we make a distinction between agency = proxy (=Vollmacht, §§ 164 ss BGB) and agency = mandate(= Auftrag, §§ 662 ss BGB)

## **5. Afghan Commercial Code, ComC**

### **a. General**

The system of the ComC seems to follow the GS, i.e. general provisions first and then going in to specific subjects.

Arts 4 – 23: General: capacity to enter into a contract; partly overlapping with ACC.

Arts 24: Registration; To me it is not quite clear how the registration process under ComC relates to the one under the new Foreign Investment Law. The latter only seems to address companies, while in ComC all registration with relation to business activities are seem to be covered and referred to the courts ( as is done under GS).

Arts. 40 ss: Business Titles ( GS= Handelsfirma). This is a very important subject which partly can overlap with trade marks. It is not clear whether drafters of Trade Mark Law have been aware that this Chapter in ComC does exist.

Arts 50ss Illegal Competition. This subject again could overlap with Trade Mark Law, viz. Art.55 *If the marks or names....* It is not clear whether drafters of Trade Mark Law have been aware that this Chapter in ComC does exist.

Arts 63 ss Commercial Books: I feel that this Chapter needs a thorough revision; this should however be done with due regard to the present state of Afghanistan economy. Different rule may be necessary for SME and for big enterprises. All such rule should be compatible with the taxation law!

Art. 85 ss Business Agents, Brokerage: Given the present stat of the Afghan economy these provisions may serve present needs, but they need to be adapted to modern requirements.

Arts. 116 ss Chapter II Commercial Companies, Partnerships, Corporations. These are now covered in the Laws. See my comments there. e.g. : The Laws do not provide for a *Kommanditgesellschaft* as is provided for in Art. 447 ComC.

Arts.471 ss Chapter 3. Commercial Documents. I feel these provisions must be work on, especially in the light of the uniform conventions on letters of exchange and cheques with due regard to Sharia, e.g. Art. 518 providing for 6% interest should be reconsidered.

Arts. 608 ss Commercial Contracts. The system seems to follow , in part at least, German HGB or BGB, viz. Art. 612 = § 362 HGB; or Art. 618 = § 153 BGB.

Art: 619 = § 133, 157 BGB

Art. 624 = These provisions should systematically be transferred into the Code of Civil procedure, but may also stand as they are.

Art. 629 ss Subchapter C - Commercial price. I feel that these provisions should be revised in view of the fact that the subjects covered most belong to ACC, as they are of a general nature. ( Note: ACC came into force 20 years after the ComC!).

Arts. 665ss I feel that the greater portion of the ensuing provisions does not answer to modern needs. This may be particularly the case with the Commercial Mortgage, Art. 697 ss, Transportation, Art. 821ss, a subject in which new international instruments are now in usage, which should be taken up in the law.

Insurance should be covered in an extra law, which both would take up modern trends as well as need to accommodate the subject with Sharia.

#### **b. Special Contracts**

*Commercial Loans*, Articles 688-96, are defined as being spent for commercial matters, and entails payment of interest. Arts. 688, 692-93.

*Commercial Pledge*, Articles 697-710, should be for commercial purposes, and registered and certified by the Commercial Registration Office, Article 699. The creditor's priority in the pledged property is only recognized when he, or an agreed third party has possession. Article 701. A judicial sale of the pledged property requires notice. Arts. 706-07

*Current Account*, Articles 721-35, must be established by a commercial document, Article 733, which provides for offsetting entries that are cleared at the end of the year, unless otherwise agreed by contract or according to custom. The parties may also agree to convert the interest on balances to capital, and to determine the amount of interest and commissions. Arts. 724-27. Cases concerning the current account must be brought within 5 years. Art. 735.

*Deposit to Public Warehouses*, Articles 736-59, provides for contracts to store deposited or pledged goods in return for warehouse receipts, and pledge documents (warrant) in the specified form, which are maintained in warehouse files. Arts. 736-40. The receipt and warrant are transferable by endorsement, and the goods may be claimed by the bearer. Arts. 741-47. The bearer of the receipt may withdraw goods upon paying the amount due on a warrant and the bearer of the warrant may when the debt is due sell the goods ten days after protest, provided the warehouse fees and expenses have priority claim on the goods. Arts. 749-54. Limitations on bringing a claim under the receipt and warrant are the same as for a negotiable note. Arts. 538, 756. Regulations and conditions for establishing public warehouses for deposit of properties are to be set forth in special directives and rules. Article 759

*Commercial Agencies*, Articles 760-81, are contracts for agents who represent a principal in a commercial transaction for a fee. The agent may be personally

responsible for unauthorized transactions, and in case of misrepresentation or fraud, may also be subject to “punitive actions.” Arts. 772, 774.

*Commission Agents*, Articles 782-812, provides for firms that brokerage stocks or property in markets at fixed prices, Article 807, or other commercial transactions in which the brokers bind their principals, but bear the risk of any deviation from instructions. Arts. 786, 788-94.

*Freight Forwarding* (Transportation Commission Agency), Articles 813-820, provides an agency contract for transport services under which the agent has a lien in the goods, and can obtain payment only upon delivery of the goods. Arts. 815-16. A freight forwarder who issues a waybill containing the fixed price becomes a transporter. Art. 819. Claims must be brought against a freight forwarder within one year, except in case of misrepresentation. Art. 820.

*Transportation*, Articles 821-65, provides for contracts for goods and persons, whether undertaken as a business or as a single transaction. Claims must be brought within one year. Arts. 821-23. If the consignor does not issue shipping documents (bill of lading, customs documents) in the form specified, the transporter may issue a waybill in the same form. Arts. 824-29. Losses from delay, unforeseeable circumstances, damage or waste during transport are allocated between the parties according to the circumstances. Arts. 830-46. The transporter releases goods on presentation of the transportation documents, and payment or deposit thereof. Arts. 848-49. Passengers are entitled to refunds for canceled travel arrangements whether due to fault or unforeseeable circumstances. Art. 857-60.

### **c. Evaluation**

The Code served its purpose. As it has never been adapted or amended it stands today as it did 50 years ago. Within the time assigned to this project I cannot give a full appraisal whether and in how far the Laws are better than what is already in this ComC. To be sure, I feel that ComC partly at least is outdated. But as legal practitioners in Afghanistan are used to ComC, which is generally described as being quite practicable, I can on the other hand not see so striking improvements under the Laws as would justify to do away with the existing ComC now.

The emphasis is on *now!* It will be advisable to carefully analyse ComC and eventually to draft a new ComC.

It must not be discussed in detail, whether the ComC could be adapted without being superseded by totally new laws. It certainly could! Whether and to which extent this should or could be done, cannot be discussed now. I feel that too many changes would be necessary if one opted for an adaptation. My suggestion would be to draft a new Commercial Code consisting of

- a. general rules common to all commercial transactions and
- b. certain special contracts as a typical for today`s merchants, such as
  - Bank, guarantee, letters of credit, money instruments
  - Securities ( title retention, unregistered mortgages)
  - etc.

Given the present standard in Afghanistan ( legal education, court infra structure, lack of jurisprudence etc) I feel there is now not an urgent need to redraft ComC; there are other priorities.

## **6. Legal System**

### **a. Afghanistan Part of Continental Legal System**

Basically there are today two approaches in law :

- ASL, Anglo – Saxon way
- Continental or German System

By German system I mean the approach to legal questions and the systematisation of the law. This originally derives from the Roman legal tradition. The German system, which is most prominently reflected in the BGB, has been influenced by the French Civil Code, BGB has influenced the Swiss law and the law of other countries. Swiss law in its turn was a model to e.g. the Turkish Code under Ata Türk. The French influenced also the Egyptian Civil Code. The Afghan Civil was therefore influenced by the Egyptian and the Turkish code. Therefore it is safe to say that the Afghan Civil law system is part of the continental legal system as represented by the German and French codes. In my various conversations this was never questioned. Afghanistan lawyers are even proud of being part of this legal family.

BGB was also the model law in China, Japan and Korea. After the break up of the Soviet Union its system prevailed, almost with exclusivity, in the newly established states, including Russia itself. It therefore can be said that the continental legal system is the prevailing legal system in Eurasia. Afghanistan should therefore consider to stay within this system.

### **b. Main Traits of differing Systems**

It is not possible within the frame of the present mission to go into details and to give an expert advice on the pros/cons of either system. The differences can be very (!) roughly summed up as follows:

Anglo – Saxon: less system, more and longer special laws; this becomes clear when contracts under American law <sup>12</sup>contracts are compared. In continental Europe, even in England, there is a very wide consensus that the American legal and judicial system is problematic – to say the least. <sup>13</sup> Even Americans themselves admit to the many shortcomings and inequalities of their system. This system is difficult, time consuming and expensive and sometimes arbitrary. The cost burden of going to court in US is notoriously hefty. Often so much so, that most people simply cannot afford to go to court. Here arbitration serves as a certain outlet. This type of arbitration has a huge comparative advantage against normal courts proceedings. Procedures are less

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<sup>12</sup> Again: I know, that American Law strictly speaking does not exist in this field. International trade usually resorts to the law of New York.

<sup>13</sup> Aden, 148 ff with many references.

complicated, the defendant cannot ask for a jury, awards can be obtained without the help of a professional lawyer.

Continental: Systematic approach, less and shorter laws. This, however, requires a deeper legal education, which typically is more theoretical than in US.

### III. Judiciary

#### 1. Legal Infrastructure

Art. 116 AC proclaims the judiciary power as an independent organ of the state. The judicial organisation ( Gerichtsverfassung) is roughly as follows.

1. Level Courts in each province. As in some provinces there are too few commercial disputes these are treated by the civil court.

Commercial	Civil	Criminal
Commercial matters in general ; companies ; disputes between merchants ; HGB - System	Civil disputes other than Commercial. Two branches: Individual rights and rights implying public rights	Two branches. General & public offenses

These 3 courts form different bodies, they are organised as completely independent from each other.

2. Level Appellate Division sitting in branches for the three first level courts.

3. Level Supreme Court Sitting in branches as before.

The most important forum for contract and other business disputes, i.e the important court for the purpose of this mission, is the Commercial Court. The Commercial Court of Kabul with some 600 cases pending is the biggest one. In the provinces Commercial Court do not appear to be (very) active.

#### 2. Judges

##### a. General

There are presently some 1400 active Judges in Afghanistan. Art. 118 AC says, that judges should have higher education in *law or* in *Islamic law*. If indeed both qualifications are treated equally this poses a major problem. With all due respect to the Koran and Islamic tradition it must be said that the Sharia, whatever may be included in this, possibly cannot answer to questions modern.

There is a widespread perception that lawyers of all professions and legal practitioners both lack capacity and integrity. Legal expertise of many judges is said to be very poor. This is also the overall impression I gained. For this, a civil servant from a ministry may be cited as saying with respect to the new laws here under scrutiny: *will not even be read by the judges*.

It lies beyond the present mission to go into this in any detail here. It must however be repeated, what has been said so often: The reform of the country rests on the people who do it. If these are not trained, no law of whatever good quality will have any effect. If these people do not respect the law but take bribes in cash or decently dressed up as other goodies – the reform will equally fail. A thorough revision of the judiciary seems to be inevitable. This must include a review of how future lawyers are educated ( curricula of law students) practically trained.

There seems to be a widespread distrust of the judiciary. Everybody I talked to in Afghanistan complained about corrupt judges. The gossip about corrupt judges and civil servants in their respective host country rampant among the NGO`s all over. It seems to be a topic somehow symbolizing the justification for the NGO of being there. If one tries to go deeper into it, it invariably turns out, that such statements stem from a hearsay from a hearsay. Therefore, one should be cautious in this. For this reason I asked my interlocutors for concrete instances of corruption experienced. The answers were always very clear – and I was given off hand a series of examples, in which the respective person , in his words, *bribed himself through all levels*. When I said that and that judge only earns 100 USD/M – answer was, yes: But he earns 1000 – 1500/ USD/m under the table. Rumour has it, that not even Supreme Court Judges are aloof of this.

#### **b. Legal Education<sup>14</sup>**

There are 5 universities in Afghanistan with law faculties. These faculties are duplicate, one for the laic law, and one for Islamic law. Both branches have very little in common. Students of one seldom attend lessons of the other.

The **law faculty** again has two branches, the civil branch for future judges or advocates and the administrative branch for future civil servants.

In the civil branch students hear:

- private law ( droit civil).<sup>15</sup> Basis is the af Civil Code, which is said *very important*.
- Commercial law
- Criminal law
- Constitutional law
- Related topics.

In the administrative branch students hear pertaining law., which was not specified. It is guessed that there are some 250 law students/year in Kabul, who have some 30 professors, each earning about 200 USD/m.

The **Sharia faculty** concentrates on what is generally accepted as Sharia law, i.e. family, heritages, tutelage etc. Sharia has practically no provisions with respect to economic law, with the notorious exception the prohibition of interest. So Sharia students seems to not. Be qualified to serve as judges in other than family etc matter;

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<sup>14</sup> This passage based on information of Prof. Nadjib Djanbaz, Kabul .  
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<sup>15</sup> This conversation as conducted in French.

they should not, as was intimated, become judges at all, but it is the law now, that they can.

M.A.