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Real Estate

Afghanistan

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AFGHANISTAN

Law and Practice

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Contents

1. General	p.4	4. Planning and Zoning	p.11
1.1 Main Sources of Law	p.4	4.1 Legislative and Government Controls Applicable to Strategic Planning and Zoning	p.11
1.2 Main Market Trends and Deals	p.4	4.2 Legislative and Government Controls Applicable to Design, Appearance and Method of Construction	p.11
1.3 Impact of Disruptive Technologies	p.4	4.3 Regulatory Authorities	p.11
1.4 Proposals for Reform	p.4	4.4 Obtaining Entitlements to Develop a New Project	p.11
2. Sale and Purchase	p.5	4.5 Right of Appeal Against an Authority's Decision	p.11
2.1 Categories of Property Rights	p.5	4.6 Agreements with Local or Government Authorities	p.11
2.2 Laws Applicable to Transfer of Title	p.5	4.7 Enforcement of Restrictions on Development and Designated Use	p.11
2.3 Effecting Lawful and Proper Transfer of Title	p.5	5. Investment Vehicles	p.12
2.4 Real Estate Due Diligence	p.6	5.1 Types of Entities Available to Investors to Hold Real Estate Assets	p.12
2.5 Typical Representations and Warranties	p.6	5.2 Main Features of the Constitution of Each Type of Entity	p.12
2.6 Important Areas of Law for Investors	p.7	5.3 Minimum Capital Requirement	p.12
2.7 Soil Pollution or Environmental Contamination	p.7	5.4 Applicable Governance Requirements	p.12
2.8 Permitted Uses of Real Estate Under Zoning or Planning Law	p.7	5.5 Annual Entity Maintenance and Accounting Compliance	p.12
2.9 Condemnation, Expropriation or Compulsory Purchase	p.7	6. Commercial Leases	p.12
2.10 Taxes Applicable to a Transaction	p.8	6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time	p.12
2.11 Legal Restrictions on Foreign Investors	p.9	6.2 Types of Commercial Leases	p.12
3. Real Estate Finance	p.9	6.3 Regulation of Rents or Lease Terms	p.12
3.1 Financing Acquisitions of Commercial Real Estate	p.9	6.4 Typical Terms of a Lease	p.12
3.2 Typical Security Created by Commercial Investors	p.9	6.5 Rent Variation	p.13
3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders	p.9	6.6 Determination of New Rent	p.14
3.4 Taxes or Fees Relating to the Granting and Enforcement of Security	p.9	6.7 Payment of VAT	p.14
3.5 Legal Requirements Before an Entity Can Give Valid Security	p.9	6.8 Costs Payable by Tenant at Start of Lease	p.14
3.6 Formalities When a Borrower Is in Default	p.10	6.9 Payment of Maintenance and Repair of Communal Areas	p.14
3.7 Subordinating Existing Debt to Newly Created Debt	p.10	6.10 Payment of Utilities and Telecommunications	p.14
3.8 Lenders' Liability Under Environmental Laws	p.10		
3.9 Effects of Borrower Becoming Insolvent	p.10		
3.10 Consequences of LIBOR Index Expiry	p.10		

AFGHANISTAN CONTENTS

6.11 Insuring the Real Estate that is Subject to the Lease	p.14
6.12 Restrictions on Use of Real Estate	p.14
6.13 Tenant's Ability to Alter and Improve Real Estate	p.14
6.14 Specific Regulations	p.14
6.15 Effect of Tenant's Insolvency	p.14
6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations	p.14
6.17 Right to Occupy After Termination or Expiry of a Lease	p.15
6.18 Right to Assign Leasehold Interest	p.15
6.19 Right to Terminate Lease	p.15
6.20 Registration Requirements	p.15
6.21 Forced Eviction	p.15
6.22 Termination by Third Party	p.15

7. Construction	p.15
7.1 Common Structures Used to Price Construction Projects	p.15
7.2 Assigning Responsibility for the Design and Construction of a Project	p.15
7.3 Management of Construction Risk	p.15
7.4 Management of Schedule-Related Risk	p.16
7.5 Additional Forms of Security to Guarantee a Contractor's Performance	p.16
7.6 Liens or Encumbrances in the Event of Non-payment	p.16
7.7 Requirements Before Use or Inhabitation	p.16
8. Tax	p.16
8.1 VAT	p.16
8.2 Mitigation of Tax Liability	p.16
8.3 Municipal Taxes	p.16
8.4 Income Tax Withholding for Foreign Investors	p.16
8.5 Tax Benefits	p.16

1. General

1.1 Main Sources of Law

The Constitution of Afghanistan - 2004 is the main source of real estate in Afghanistan. Property rights are guaranteed and protected under the Constitution of Afghanistan. Privately owned property and government owned property are governed by different set of rules and regulations. In addition to the Constitution of Afghanistan, key laws and regulations that govern land and real estate in Afghanistan are:

- The Law on Managing Land Affairs, published in the Official Gazette No 1254, dated 15 April 2017, as amended on 17 October 2018 and published in the Official Gazette No 1317;
- Regulation on Managing the Affairs of Informal Urban Properties, published in the Official Gazette No 1285, dated 26 February 2018;
- The Law on Expropriation, published in the Official Gazette No 1258, dated 10 May 2017, as amended on 31 October 2018 and published in the Official Gazette No 1321 (“Law on Expropriation”);
- Regulations on Linear Land Expropriation Projects, published in the Official Gazette No 1283, dated 21 February 2018;
- The Civil Code, published in the Official Gazette No 353, dated 05 January 1977 (“Civil Code”);
- Presidential Decree No 305, published in the Official Gazette No 1321, dated 29 August 2018;
- Law on Municipalities, published in the Official Gazette No 1316, dated 15 October 2018;
- Law on Urban Development and Housing, published in the Official Gazette No 1278 dated 18 December 2017;
- Law on Granting State Properties, published in the Official Gazette No 1241, dated 28 December 2016;
- Law on the Sale of Immoveable Property to Foreign States and Political Missions and International Organizations, published in the Official Gazette No 947 dated 18 June 2008;
- Law on Mortgage of Immovable Property in Banking Transactions, published in the Official Gazette No 990 dated 2009.

1.2 Main Market Trends and Deals

The Afghanistan Independent Land Authority (ARAZI) merged with the Ministry of Urban Development and Housing (MoUDH) in December 2018, with a new title “Ministry of Urban Development and Land”. Similarly, the General Directorate of State Properties of the Ministry of Finance has been merged with the Ministry of Urban Development and Land. The said ministry has started to issue occupancy certificates to informal urban residential areas in eight cities and title issuances for land and property have become administrative.

The Ministry of Urban Development and Land took over from the courts and officially started issuing title deeds to properties in February 2020 in Herat province, and will gradually expand its services nationwide. The new regulation (Regulation on the Manner of Preparation of Registration and Issuance of Deed) provides that the Ministry of Urban Development and Housing must be the authority that registers and transfers both private and governmental real estate. However, this process has not started as expected and title deed transfer and sale of private property is still being performed by the relevant courts (“Wasayaq Courts”).

1.3 Impact of Disruptive Technologies

This is not applicable in this jurisdiction.

1.4 Proposals for Reform

One reform proposal is the requirement of a cadastral survey to identify and ensure tenure security. This new requirement is planned to be initiated in the first quarter of 2020 in Herat and Kabul provinces of Afghanistan.

Additionally, the National Spatial Strategy and Plan that has just been put in place by the Ministry of Urban Development and Land must be supported and put in practice within two years from now.

There is a dire need for all untitled real properties to be registered with the relevant authorities and obtain an official title deed. Most of the land in the urban areas is not registered with the government, or at least have no official title issued by the government. This results in land disputes that often results in killings.

Consolidation of all land related laws into one unified law that will make compliance easier. Currently, there are several pieces of legislation, regulations and on top of that there are several amendments that published in several separate pieces of legislations.

Most of the newly enacted laws such as the Land Management Law, and government institutions such as Ministry of Urban Development and Land mainly focus on the protection of government land rights. However, such laws fail to sufficiently address and protect private land rights, therefore, better laws should be enacted to protect private ownership of real property as well.

2. Sale and Purchase

2.1 Categories of Property Rights

There are different categories of property rights that can be acquired outlined in the Civil Code of Afghanistan. These are:

- Right of Ownership - ownership is a right on the basis of which a property comes under the will and dominance of both a natural and legal person and only the owner may, within the limits set by law, use and utilise it and take any possessory actions on it.
- Joint Ownership - if the ownership of a property is joint among two or more people, each of them will have the right to use it proportionate to their share and may take such action on it that does not cause harm to the other co-owner.
- Transfer of Ownership - the owner of the land has the right to irrevocably transfer his or her land on a permanent or a temporary basis.
- Easement Rights - easement is a right over a real estate for the benefit of the real estate of another person.
- Right of Water - the right of water is a turn of using water for the irrigation of crops or trees.
- Right of Way, water passage, and flood passage - if rights of way, passage and watercourse are old, they shall remain so, unless they are originally illegitimate; in this case, their age shall not be given credibility and they must be terminated if there is obvious harm.
- Right of Property Retention - except for the cases stated on possessory and official mortgages in law, such as a contract that creates subordinate real rights, and except provisions on the right to retain property as one of the means of guaranteeing the enforcement, the following shall have priority on rights of retention:
 - (a) right of property retention is a subordinate right over property for guaranteeing debt;
 - (b) the seller may argue on the basis of right of property retention when he or she refers to a buyer and against all creditors; and
 - (c) the lessee may retain the leased property, in case the lease is rescinded while he or she has paid the rent and the advance payment, until the payments are returned.
- Pre-emption Rights - pre-emption is the right of acquisition of ownership of all or part of a sold real estate in return for its price and the expenses made, even if by coercion.
- Providing Property or land as the security for a Mortgage - a possessory mortgage is a contract on the basis of which the mortgagor undertakes to assign possession of a property the mortgagee or another trustee person in exchange for a financial right whose full or partial payment shall have priority over rights of the first degree creditors and creditors of lower degrees.

- Lease Right - the right to use and occupy the property in a manner negotiated and contractually agreed between the lessor and lessee.

2.2 Laws Applicable to Transfer of Title

The Civil Code, The Law on Managing Land Affairs, Regulation on the Manner of Preparation for Registration and Issuance of Deed and the Regulation on Managing Affairs Related to Unofficial Urban Estates applies to all type of transfer of titles of real estate including residential, industrial, officers, retail and hotels.

2.3 Effecting Lawful and Proper Transfer of Title

Currently, as per the Land Management Law, Regulation on the Manner of Preparation for Registration and Issuance of Deed and Land Transfer Procedure, there are different procedures for the transfer of real estate. As of now, transfer of private real estate is effectuated once it has been registered with the land registration department of the relevant courts where the property is located.

The courts are responsible for maintaining the record of the land including the ownership documents. As per Afghan law, two kinds of deed transfer of real estate and land are available for property purchasers: *qabala qatayi* (perpetual ownership) and mortgage deed.

However, recently, with enactment of the Regulation on the Manner of Preparation for Registration and Issuance of Deed, the procedure has changed and the Ministry of Urban Development and Land is currently responsible for the registration and record keeping of private, state and public lands in Afghanistan. This regulation reflects the new procedure for transfer of title deed. The Ministry of Urban Development and Land has, however, not yet started to record and maintain the records of land ownership.

The Regulation on the Manner of Preparation for Registration and Issuance of Deed provides that the title deed will be transferred based on valid documents provided by the owner. Once it is proved that the person who provided the land documents is the lawful owner of the property and the value of the land is determined, based on market value, then the transfer of the deed will be completed through permanent transfer form. The permanent transfer form is yet to be developed and prepared by the Ministry of Urban Development and Land and made accessible to the beneficiaries of the title transfer.

Notably, each title shall have a specific security code. The Ministry of Urban Development and Land shall create a department of title deed preparation, a committee of title deed control and an electronic registration system of title deed in the capital and

provinces in order to make the process of title deed issuance transparent. However, these efforts might take longer time.

In order to ensure the validity of the ownership documents of the land, the titles of lands must be registered, and they cannot be transferred without the registration with the relevant registration authority.

In Afghanistan title insurance per se is only available for lenders in the form of a mortgage. Security for an ownership title can be insured by registration of the same with the court relevant to land. However, there is no title insurance available for general transactions or transfers of property in Afghanistan, as per the relevant laws.

2.4 Real Estate Due Diligence

There is no specific procedure for due diligence in Afghan laws. Inspection of the validity of the property documents is a tedious process considering the fact that most of the property in Afghanistan (particularly private) are untitled or unofficially titled. The general practice is that property purchasers conduct a title search of the property with relevant courts if the property is private and with the Ministry of Urban Development and Land if the property is state-owned.

Purchasers generally inspect the land registry records. As the land registry records are authoritative. A thorough inspection of these public records generally suffices to provide assurance to purchasers. The due diligence takes place as follows.

An application should be submitted to the relevant court where the property is located. If the property is registered with court archive, the court will issue a circular form to be verified by respective municipality, cadastre department of the Ministry of Urban Development and Land and the Revenue Department of the Ministry of Finance. Two witnesses must verify it. However, if it is being transferred through a customary/informal basis, then the procedure takes place through witnesses and neighbours' verification and the local councils.

Due diligence in relation to unofficial title deeds is hard as such title deeds are not officially registered with Afghan courts. The government is taking the initiative to provide official deeds to those who have unofficial deeds. However, this will not be an easy task for the Afghan Government.

The main trend in safe sale and purchase of the real estate is that sellers and, particularly, buyers tend to involve property dealers.

With the Ministry of Urban Development taking possession of the title deed transfer. The committee of property verification

must provide accurate information related to the authenticity of the title deed(s) to buyers.

2.5 Typical Representations and Warranties

Types of representations and warranties given in real estate transactions differ significantly depending on how the sale is organised and structured. The Civil Code outlines various representation and warranties for parties to any contract under general terms of contract.

The Civil Code provides that, whenever a time limit is fixed for acceptance, an offeror may not withdraw their offer before the end of the designated time period. The Civil Code stipulates observation of certain formalities for completion of a contract, presence of such formalities that include promise to confirm the contract shall also be considered as an essential part of the transaction.

In case there is defect and the purchaser has not been made aware of such defects prior to completion of purchase, the purchaser must have the option to terminate the contract. Laws of Afghanistan consider a contract valid regarding its contents, required by good faith and binding on all parties according to provisions of law, customs and justice.

If a contract is concluded under unjust conditions, a court may modify or remove the conditions as required. Notably, customs also play a major part in property transactions.

The law stipulates that only widespread, predominant customs will be considered valid.

Contracting parties may, while concluding, determine the amount of guarantee that has to be paid in case of non-fulfilment or delay, or they may agree on it afterwards.

Parties can agree on representation and warranties to the extent permitted by the law. Asset sales typically entail very limited representations and warranties, given that comprehensive details and information about any obstruction on the land, including granted easements, established security, and pre-emptive rights, are all noted in public records. However, if the deal is structured as a share sale, with the entity holding the asset changing hands rather than the underlying asset itself, extensive representations and warranties are generally demanded.

In a commercial transaction, sellers do not typically make available representations and warranties with respect to items that the buyer can verify themselves through due diligence, such as the state of the title or the physical condition of the asset.

Most often, sellers will represent proof of their authority to consummate the transaction, the existence and status of legal agreements affecting the property (such as leases and service contracts), the absence of defaults thereunder, the status of any litigation or claims affecting the property, and the absence of hazardous materials.

It is common practice to limit any recourse by the buyer against the seller for a breach of representations and warranties discovered after closing both by imposing a limit on the time in which the buyer may pursue the breach of contract and by capping the amount the buyer can recover. Where a buyer discovers a material breach of a seller's representation or warranty prior to closing, a buyer can terminate the purchase contract and potentially recover damages for the buyer's pursuit costs.

2.6 Important Areas of Law for Investors

In Afghanistan, the most important area of law for a real property purchaser to keep in mind is the property law, given that it determines the rights and obligations conferred to owners of property. The Civil Code is also important as it defines the rules and principles governing contracts related to real property (sale agreements, lease agreements, etc).

Foreign investors, before investing in Afghanistan, must consider Article 41 of the Constitution of Afghanistan which prevents foreigners purchasing real estate in Afghanistan.

For foreign individuals and companies, the only option available is to obtain land through a lease agreement. Afghan Law permits the government to lease out the lands to domestic and foreign persons by means of a lease agreement between the entity and the government.

2.7 Soil Pollution or Environmental Contamination

There is a legal obligation for owners of real property to comply with environmental laws and regulations. As such, a buyer of real property is, in principle, not responsible for any contamination that has taken place prior to their ownership of the real estate.

However, a case of contamination may carry with it the presumption that the current occupant is responsible for the contamination, and, in such an event, the occupant may need to counter that presumption by providing evidence that an earlier owner had caused the pollution.

Regulation on Decrease and Prevention of Air Pollution provides that owners of the property, developers of the properties (cities), and property owners shall at least provide 10% of the

land as green area. In practice, municipality offices require land-owners to provide 30% of the land as green area.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

As of now, there is neither a Zoning Law nor a Planning Law, and as a result, unplanned land development is one of the most challenging issues in land management for the country. However, the builders and constructors of real estate shall comply with master plan of the municipalities. If the constructor of the real estate does not comply with the master plan, such building may be subject to destruction by the municipal offices.

A master plan is defined as a technical document that provides for legal usage of lands and divides different areas of the country to different zones such as residential, agricultural, cultural, commercial, administrative, amusement, sports, transportation, airports and borders. The Municipality Law provides that any person who plan to construct real estate in Afghanistan must obtain a construction permit from the respective municipality. Such person is required to comply with the map and master plan but, in practice, there is considerable lack of compliance in relation to this requirement.

Additionally, any person who wishes to construct or alter any real estate (residential or commercial) shall obtain written approval of the relevant municipality. It is within the duties of the municipalities to observe the master plan when deciding to permit real estate development.

Investors can reach a specific development agreement with the Ministry of Urban Development and Land for state land, on a leasehold basis and for a specific time limit, depending on the amount of investment and the type of project.

2.9 Condemnation, Expropriation or Compulsory Purchase

The Constitution of Afghanistan is the main source that permits the government to expropriate private property for the public interest projects. A person whose land is expropriated must be given fair and just compensation either in form of cash or a parcel of government land depending on the type of land. The Expropriation Law lists a number of projects that are deemed to be of public interest and expropriation of which is allowed by the government. However, the Expropriation does not provide a definition of "public purpose".

Municipalities in coordination with the Ministry of Urban Development and Land are the authority that conduct expropriation of land according to the master plan for the public interest project. The municipalities are authorised to expropri-

ate private land for the following reasons as part of the government projects:

- building military camps or centres, security and defence installations;
- executing plans approved by competent authorities;
- extracting resources from mines and underground natural resources;
- establishing government industrial parks;
- constructing highways, roads, railway lines, and other connecting lines and other necessary installations;
- constructing oil and gas pipelines;
- building government airports and other related facilities;
- building networks and required facilities for communications and information technology, fibre optic, and government radio and televisions;
- building and installation of electricity network and its poles, heating system networks;
- construction of dams, water circulation reservoirs, canals, streams and irrigation canals as part of government projects;
- constructing water supply networks and canalisation, plants for collecting and storing garbage, and drainage of sewage;
- construction of facilities and installations related to health, education, research, sports, parks, kindergartens, orphanages and other social and cultural activities;
- construction of mosques and other religious institutions; and
- construction of settlements and residential cities.

The Expropriation Law requires a number of primary measures to be adopted by municipalities, which includes:

- if the public interest project is being implemented within the city's urban plan, the respective municipality is both the acquiring and requiring body. The respective municipality may be the implementing body or it may outsource it to the private sector;
- for out of city urban plans, the Ministry of Urban Development and Land is the acquiring body and the requiring body is usually another state institution.

Details of the processes of land expropriation are as follow:

- the municipalities develops the preliminary plans for the project including its estimate budget to be part of the finance year;
- the requiring body should conduct a social impact assessment and feasibility study and develop a detailed plan of the project and present it to the evaluation committee;
- if the plan is approved, the Ministry of Urban Development and Land will notify the affected people;

- the requiring body requests the Ministry of Urban Development and Land to conduct land clearance, land rights identification and valuation of the land and property;
- the valuation of land will be submitted to the Cabinet for approval;
- the Ministry of Finance will pay the compensation to affected persons based on the list of the affected people already identified by the Ministry of Urban Development and Land during the land rights identification process; and
- following the payment of compensation, the actual project begins.

In relation to expropriation of lands that contains constructions and buildings the Expropriation Law provides that the owner can demolish the buildings on the land that is subject to expropriation and get all the construction materials. However, this has to be done within three months.

If the owner did not take the initiative to demolish the building, then the expropriation authorities will destroy the buildings contained in the land and the owner will be deprived of construction materials. If the land contains planted trees, the owner can cut down the trees within the three months. After this, the expropriation body will cut down the trees and the owner will have no rights against it.

The authorities shall pay due technical consideration to the land that have building and constructions when evaluating and determining its price. The value of the constructions must be added to the land. If one portion of land has areas of differing values, then the price of each part must be determined separately.

In relation to expropriation of land in commercial areas, the law provides that the value of the real estate will be determined based on the value of adjacent commercial area and price will be paid to the owner based on the determined price of another similar expropriated land in the same project.

2.10 Taxes Applicable to a Transaction

According to Income Tax Law, income from sale and transfer of real property is subject to a flat tax of 1% of the total amount of the property being transferred. This applies to both natural and legal persons and there is no exemption from the application of this tax.

The Land Management Law provides that sale of governmental land is subject to a flat 2% duty of the total amount of the property being transferred, 1% goes to the Ministry of Urban Development and Land and 1% transfer tax must be paid by the seller in the case of selling property to the Ministry of Finance.

This applies to both natural and legal persons who buy governmental land.

The rate of applicable duty is as follows:

- if the value of the land is less than AFN1 million, a 3% duty will apply;
- if the value of the land exceeds AFN1 million, a 5% duty will apply; and
- the buyer is required to pay AFN300 for the official stamp paper.

2.11 Legal Restrictions on Foreign Investors

The Constitution of Afghanistan restricts foreign investors from ownership and purchase of real property in the country. The constitution provides that foreign natural and legal persons are not allowed to own land in Afghanistan and provides the option of acquiring land through a lease, for example, the acquisition of governmental land through a lease agreement for a period of one to 90 years from the Ministry of Finance.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

There is no different financing scheme for the acquisition of commercial real estate in Afghanistan. Acquisitions of commercial real estate are generally financed by loans and sale revenue generated from the project. Generally, there are two main sources of finance acquisition are:

- an internal source, such as government institutions, commercial banks and semi-governmental banks; and
- an external source, such as foreign governments, international organisations, international financial organisations (ie, the World Bank, the IMF, the Asian Development Bank (ADB), the Islamic Development Bank, etc) and private companies.

3.2 Typical Security Created by Commercial Investors

There is no specific form of security for commercial real estate investors for borrowing funds. Generally, securities such as a mortgage, share pledge, personal guarantee, assignment of receivables, etc, are used for real estate-related funding. The most common security that real estate investors use to secure loans from banks and other financial institutions is mortgage loans.

Two kinds of mortgages are stipulated in Afghan laws, an official mortgage and a possessory mortgage.

Official Mortgage

An official mortgage is properly registered with the relevant authority or court. The subject of an official mortgage is always an immovable property. There is no provision in Afghan laws relevant to adding and securing of subordinated debts.

Possessory Mortgage

Possessory mortgages are not registered with the courts and only the possession of the mortgaged property is acquired by the mortgager. Subject of a possessory mortgage can be both movable and immovable property. The mortgager and mortgagee may add and secure more debt in the same mortgage customary deed but, according to a circular issued by the Supreme Court of Afghanistan, the equivalency in the value of the mortgaged property should be considered in the mortgage agreement or the value of mortgaged property maybe more than the value of the loan/debt.

In the mortgage loan, the borrower must provide the lender with pre-emptive rights on the property as security for repayment. Upon default by the borrower, the lender's remedies include the ability to foreclose on the security instrument and either sell the property to a third party or obtain ownership and possession of the property directly. As additional security for a mortgage loan, the borrower is generally required to assign all property-related assets held by the borrower such as all leases and rents and property related contracts and agreements.

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

There are no restrictions on granting security over real estate to foreign lenders, nor are there any restriction on re-payments being made to a foreign lender under a security document or loan agreement in Afghan laws.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

The Court Fees Law, impose 0.50% registration fee for the registration of a securities with the court. The registration fee will be paid by the person who will benefit from the security, unless otherwise agreed by the parties in loan agreement.

3.5 Legal Requirements Before an Entity Can Give Valid Security

Pursuant to Afghan laws, there are certain requirements that must be complied with before an entity can give valid security over its real estate assets. Before an entity can give a valid security over its real estate assets, the entity must be duly formed, registered and licensed in Afghanistan.

3.6 Formalities When a Borrower Is in Default

When the borrower is in default and fails to repay the debt, the creditor has the right to request of the court the sale of the mortgaged property through auction with the market price to pay the debt. The price of mortgaged property should not be less than 75% of the value of comparable immovable property.

The creditor also has the option to request the Court to transfer the ownership of the mortgaged property to them in return for their credit, provided that the transfer of ownership is at a price that is determined by experts. Exercise of power of sale shall be performed in a commercially reasonable manner. In case of non-payment of the debt, the lender shall send a written notice to the mortgagor for non-payment of the debts or non-performance of liabilities, and request to remove such a default within 35 days, unless more is anticipated in the mortgage deed or loan agreement.

In case of mortgage on real property where the borrower is a natural or judicial person, the time period shall be not less than 60 days, or a longer time period if one is stated in the mortgage deed or loan agreement. If, despite notice and within the timeline, the borrower does not pay the debts or perform the liabilities, the lender can exercise the power of sale.

Pursuant to the Civil Code of Afghanistan, a creditor beneficiary of a mortgage must initiate an execution proceeding to liquidate the mortgage. Priority between claimants is listed as an obligatory rule of the applicable law. By law, a creditor beneficiary of a mortgage has priority over other creditors, with respect to mortgaged property.

In addition, the loan documents will govern enforcement of a lender's security interest in real property, subject to the requirements and limitations of Civil Code and Law on Mortgage of Immovable Property in Banking Transactions 2009, such as notice to a defaulting borrower and other interested parties, public notice requirements prior to a foreclosure sale and rights of redemption following a foreclosure sale. Upon foreclosure, lenders generally take title to the property free and clear of any properly noticed junior liens, but subject to any superior liens (eg, taxes).

3.7 Subordinating Existing Debt to Newly Created Debt

Contractual subordination is not expressly regulated under Afghan laws. The Law on Mortgage of Immovable Property only defines a subordinate agreement, where a lender with a priority right can modify or waive its right in favour of another mortgagee. A subordinate agreement must be in writing and registered in the relevant office

3.8 Lenders' Liability Under Environmental Laws

Under environmental laws, if the lender is not directly responsible for the pollution of the real estate, it will not be liable for it. Polluters must bear all expenses for the prevention, removal and clean-up of pollution. The law requires that, where environmental pollution is a possibility, the parties must take the necessary precautions in order to prevent pollution, and if pollution occurs they must take the required actions in order to stop the pollution or decrease the effects of the pollution.

The polluters have a strict liability due to environmental pollution, therefore, lenders holding or enforcing security over real estate should not be liable under environmental laws, as any pollution of the real estate is caused by the borrower. However, the environmental laws do not contain protections for secured lenders, and secured lenders are generally not protected from third-party claims based on personal injury or property damage caused by environmental contamination.

3.9 Effects of Borrower Becoming Insolvent

In principle, securities established in favour of a lender are not voided by a borrower's insolvency. There is no provision which nullifies the security interests created by a borrower in case the borrower becomes insolvent. Payments of claims are made to a person having priority rights where secured claims must be made in the first category should the borrower become insolvent.

There are two types of insolvency; voluntary and involuntary. In an involuntary insolvency case, the lenders can ask the court to declare bankruptcy of the borrower, bankruptcy rules which require that they be repaid first, in full, before other, unsecured creditors are paid.

As per the Insolvency Law, once an insolvency case is commenced, all legal proceedings and other actions by lenders of secured loans or by counterparties to ongoing contracts with the borrower must be suspended and shall not be recommenced without permission from the Commercial Court. The law explicitly prescribes priority rights to holders of secured loans. Once the liquidation plan is final, full payment of secured loans is on top of priority rights payments prior to any unsecured lenders.

3.10 Consequences of LIBOR Index Expiry

This is not applicable in this jurisdiction.

4. Planning and Zoning

4.1 Legislative and Government Controls Applicable to Strategic Planning and Zoning

Afghanistan does not have zoning and planning laws. However, the Law on Urban Development and Housing and the Law on Municipalities apply to urban development, keeping in view the social, economic, environmental and geographical conditions of the area in accordance with national and international standards, paving the way for building the cities and residential towns, and zoning. The Municipalities and Ministry of Urban Development and Land are the authorities that control strategic zoning and planning considering the master plan.

4.2 Legislative and Government Controls Applicable to Design, Appearance and Method of Construction

The Law on Municipalities, Regulation of Granting Permit of Control and Observing Construction Work for Constructive Affairs, Regulation of Classification of Granting Construction Permit and Regulation on Maps of Construction, within limitation of Urban Master Plan of Kabul, deals with design, appearance and method of construction.

Based on Municipalities Law, construction permits must be obtained from the relevant municipality office for a new construction, or major modification to an existing building. The construction permits and design documents should be in accordance with the Law on Municipality.

The Law on Municipalities define detailed technical requirements for design documents. A separate regulation will be enacted about construction permit documents. Additionally, various requirements and restrictions (eg, setback distances, ratio of footprint to a parcel area, construction coefficient) are also regulated under the Law on Municipality.

4.3 Regulatory Authorities

The Kabul Municipality and provincial municipalities and the Ministry of Urban Development and Land are responsible for regulating the development and designated use of individual parcels of real estate.

The Law on Municipalities, the Regulation of Granting Permit of Control and Observing Construction Work for Constructive Affairs, the Regulation of Classification of Granting Construction Permits, and the Regulation on Maps of Construction within Limitation of Urban Master Plan of Kabul, deal with the maps of residential, commercial, industrial, public interest, health, educational areas, etc.

4.4 Obtaining Entitlements to Develop a New Project

The procedure for obtaining entitlements to develop a new project or complete a major refurbishment provides that the owner must obtain a construction permit from the respective municipality, including the sketch, and they must comply with the requirements, whether commercial, semi-commercial, industrial or residential. The owners may also bring major alteration to an existing building by obtaining a modification permit from the relevant municipality office.

Third parties do not directly participate in the construction permit procedure. A third party may only complain if the construction is creating detriment to them. For instance, the law allow third parties to object to construction of a building if it vanishes light of their house and claim damages. The affected third parties may submit an official letter to the municipality for revocation of a construction permit, within the scope of the general right of petition.

4.5 Right of Appeal Against an Authority's Decision

There is no provision with respect to the right of appeal against municipality's decision to reject a construction permit. However, the Municipality Law provides that, if officers of a Municipality provide a construction permit in contradiction to a master plan, the officers will be subject to legal proceedings.

Additionally, the right of petition outlined in the Constitution of Afghanistan may apply if a person is affected by any government institution's decision or activity. Under the Constitution, all administrative decisions are subject to judicial review. Thus, an affected party may file an administrative lawsuit to declare the administrative act in violation to the laws and claim damages.

4.6 Agreements with Local or Government Authorities

Generally, it is not required by law to enter into agreements with local or governmental authorities to develop a project. However, in some projects, a number of government approvals are required, ie, national environmental protection approval.

4.7 Enforcement of Restrictions on Development and Designated Use

Restrictions on designated use are enforced by the police and other enforcing authorities. If the construction plan does not comply with the requirements outlined in the Municipal laws and regulations, the municipalities will not issue a construction permit. Moreover, if the planned activities do not comply with designated use, it is not possible to obtain an operation permit.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

In Afghanistan there are no specific types of entities available to investors to hold real estate assets. However, different types of legal entities in Afghanistan that investors can use to hold real estate assets, namely, limited liability companies (LLCs), partnerships and sole proprietorships.

5.2 Main Features of the Constitution of Each Type of Entity

It will be on real estate investors to choose the entity type suitable for their business. Limited liability is the most common business structure in Afghanistan and most businesses, including real estate investors, register their businesses as Limited Liability Company. Below are the types of entities investors commonly use to invest in Afghanistan.

Sole Proprietorship

As per the Companies Laws of Afghanistan this form of business owned by a single person. The single owner receives all the profits and is liable for all debts of the company. If the owner wishes to transfer his/her ownership interest but allows the business to continue, she can sell the entire business to another person. Foreign companies can also obtain a Sole Proprietorship license for a branch office operating in Afghanistan.

Limited Liability Company (LLC)

According to the LLC Law, LLC means a domestic limited liability company that is separate and distinct from its owners, incorporated in Afghanistan and organised under LLC Law with capital that is definite and divided into shares, and with liability of each Shareholder limited to the proportion of his or her share. It is worth noting that branches of foreign companies registered and licensed in Afghanistan do not constitute an LLC as the law only defines domestic companies as LLC. Therefore, if a foreign company intends to establish its company in Afghanistan, it can obtain an LLC licence for a branch office operating in Afghanistan.

Partnership

It is a business entity owned by two or more people to carry out a business for profit as co-owners. Both owners will be equally liable for the debts of the company.

5.3 Minimum Capital Requirement

The minimum authorised capital for forming an entity is sum of AFN500,000 which is USD6,666.

5.4 Applicable Governance Requirements

The Afghan law specifies the minimum number of directors. There should be at least one director of the company. However, the number of directors should be clearly stipulated in the Articles of incorporation of a company.

Requirements for Foreign Director

Every foreign individual (except for the president and vice president) who intends to work in Afghanistan is required to obtain a work permit from the Ministry of Labor and Social Affairs. The physical presence of the president, vice president and any other shareholder(s) of the company is mandatory at the time of incorporation of the company unless a notarised, legalised and consulsated power of attorney is given to another person to undertake the registration of the entity with the Afghanistan Central Business Registry.

5.5 Annual Entity Maintenance and Accounting Compliance

Maintenance and compliance cost vary depending on activities, nature and size of the entity.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

The type of arrangement that allows a person or company to occupy and use real estate for a limited period of time is lease and sub-lease according to the Civil Code of Afghanistan.

6.2 Types of Commercial Leases

There are no different types of commercial leases in Afghanistan. Leases are generally regulated under Civil Code of Afghanistan.

6.3 Regulation of Rents or Lease Terms

Generally, rents and lease terms of private properties are freely negotiated between the parties. However, the lease terms shall not be contrary to the laws of the country. Rents and lease terms of governmental properties is stipulated in Land Management Law and Government Land Lease Procedure.

6.4 Typical Terms of a Lease

The Ministry of Urban Development and Land determines the terms of the governmental land lease depending on the type of land, its location and the quantitative and qualitative characteristics of the proposed project to be undertaken therein. The amount of investment and business plan play a major role in the duration of the term of the lease on governmental lands. The governmental land may be leased by the ministry of Finance with consent of the Ministry Urban Development and Land to Afghan national and foreigners for investment purposes.

Typically, the rent will be paid in one instalment at the beginning of each financial year. However, based on agreements of the parties it may vary.

Length of Lease Term

The duration of a governmental land lease is stated in LMLA Law which asserts that agricultural land can be leased for a period of 50 of years while barren land can be leased out to domestic and foreign legal persons and entities for a period of up to 90 years.

However, generally as per the Civil Code, the length of lease term is not specified and the Civil Code provides that If length of lease is not explicitly provided in the lease agreement, lease shall be valid for a specific period of time considering the custom on the subject of lease. Therefore, except for governmental land the parties are free to set length of lease term.

Maintenance and Repair of the Real Estate Actually Occupied by the Tenant

Typically, maintenance and repair of real estate occupied by the tenant is on landlord, although, the Civil Code adds that a lessee must make minor repairs to the leased property, but the parties can agree otherwise.

If a landlord refuses to do the adjustment and repair, the lessee may either rescind the lease or personally adjust or repair it with the permission of the court and then refer to the lessor proportionally the amount of costs or deduct that amount from the rent. The lessee may, without the permission of the court, perform those urgent and simple repairs on the leased property that the lessor has not performed within a reasonable time after notification. The lessee shall deduct the costs of repairs from the rent according to the documents.

According to the Regulation on Leasing Government lands the lessee has the following duties:

- utilising the land in accordance with the environmental protection laws and regulations;
- safeguarding the soil of agricultural land;
- maintaining good relations with neighbours;
- keeping clean the irrigation network, canalisation equipment and installations related to the under-leased land;
- avoiding using the land in a manner contrary to the terms of the lease agreement;
- paying the rent to the lessor in accordance with the terms of the agreement;
- compensating any losses occurred to the land and installations;
- informing the Ministry of Finance in case of any kind of intervention by intruders;

- avoiding the use of irrigation water on the land under-lease for purposes other than those stipulated in the agreement;
- avoiding transfer and sub-letting the leased land;
- notifying the Ministry of Urban Development and Land in case of discovery of mines, historic artifacts and other cultural assets which appear to be government property;
- handing over the land along with the equipment and fixtures constructed thereon at the expiration of the term of the lease agreement;
- providing a copy of the bank receipt to the Ministry of Finance evidencing deposit of rent; and
- any other obligations provided for in this law.

The Civil Code does not specify the frequency of rent payment but rather it leaves it to the agreement of the parties. The Civil Code allows both Immediate payment of rent and payment of rent in different instalments. However, the Civil Code states that, if the rent rate is higher than the market price, the rent rate must be modified and reduced as per the market price. The market price is determined by the ruling of a competent court or competent authorities.

In relation to the rent of government land the LMLA Law outlines the following arrangements:

- the lessee of barren and arid lands shall deposit, in the government revenue account, the rent in advance of each year from the date of commencement of the lease agreement;
- the lessee of agricultural land shall deposit, in the government revenue account, the rent of leased land from the date of commencement of the lease agreement; and
- the lessee of barren and arid agricultural lands shall deposit, in the government revenue account, 50% of the rent on the date of commencement of the lease agreement and the remaining 50% at the end of the period of the contract.

6.5 Rent Variation

In relation to the private real property the payable rent will be determined by agreement of the parties and the parties may decide to increase or decrease the payable rent based on market value of the property, but the landlord cannot force the tenant to pay more rent as long as the lease agreement is valid.

The Government Land Lease Procedure states that payable rent of governmental land will not remain the same during the term of lease. Every five years, there will be an increase of up to 10%. In addition, the increase in rent varies depending on the location and commercial value of the property within urban areas and rural areas. It also varies on agriculture land from productivity perspective and connectivity perspective.

6.6 Determination of New Rent

Generally, commercial value, productivity and close proximity to the market, as well as demand, play a major role in the determination of rent.

Legally, the Ministry of Urban Development and Land may increase the rent of governmental land up to 10% every five years, specially on agricultural, barren and arid lands having due regard to the condition of the land, the project involved, the investment, suitability of the land for cultivation and other purposes and its location, and keeping in view the rule laid down in the Law

6.7 Payment of VAT

VAT is not payable on rent.

6.8 Costs Payable by Tenant at Start of Lease

There is no provision for paying any amount other than the advance rent amount as agreed by the parties. In private properties rented through a property dealer, each party is required to pay 0.5% of the total amount of rent. However, in practice, the property dealers charge much more than 0.5% and they charge each of the parties 1%.

6.9 Payment of Maintenance and Repair of Communal Areas

In Afghanistan maintenance and repairs is one of the obligations of the landlord not the tenant, therefore, maintenance of areas used by several tenants will be on the landlord. Minor repair and maintenance of common areas, and expenses arising out of the use of these areas are divided among the tenants proportionate to their usage of the real property as per the lease agreement.

6.10 Payment of Utilities and Telecommunications

Generally, payment of utilities and telecommunication are paid for according to the agreement of the tenants or according to check-meters. But mainly that is paid by the person who has taken the property on lease.

The lessor shall be liable for duties and taxes on the leased property, but the lessee shall be liable for costs of water, electricity and anything related to his or her utilisation, unless the contrary is agreed.

6.11 Insuring the Real Estate that is Subject to the Lease

The owner of the property pays the cost of insuring the property. It is not very common in Afghanistan to have insurance for real estate.

6.12 Restrictions on Use of Real Estate

Afghan laws are silent on restrictions imposed by the landlord on how the tenant use the real estate. The landlord can impose restrictions if it is agreed in the lease agreement. As per the Civil Code, the tenant shall use the leased property as per the agreement of the parties. The landlord may impose restrictions if it justifiable in the current custom.

6.13 Tenant's Ability to Alter and Improve Real Estate

Civil Code provides that the tenant shall not make alterations to the leased property that causes harm. If the tenant violates his obligations outlined in the agreement, then the tenant may be obligated to restore the property to its original condition and pay compensation. However, limits of the alterations must be highlighted in the lease agreement and mostly fundamental changes are not allowed by the landlord.

Below are few rights and obligations of the tenant in relation to repairs and modification:

- the tenant may claim from the lessor those costs of repairs that he has made on the property with the permission of lessor with the purpose of its improvement and preservation;
- the tenant obligated to return the leased property in the same condition as when it was delivered to him. If the leased property is delivered without a description of its attributes, it shall be assumed that the property has been delivered in good condition, unless evidence to the contrary is found; and
- if the tenant constructs building in the leased property or plants trees or makes other decorations therein that increase the value of the real estate, the lessor shall be obligated, at the end of the lease, to pay at least the costs or the price difference to the lessee, unless the contrary is agreed.

6.14 Specific Regulations

There are no specific laws which apply to leases of particular categories of real estate.

6.15 Effect of Tenant's Insolvency

A lease agreement may be terminated by the lessor if the tenant becomes insolvent.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

Generally, security is given to the landlord in cash in advance and it can be in other forms too. The court can oblige the tenant to pay compensation in case of failure to meet his or her obligations. However, failure to comply with this obligation can result in the termination of the contract.

6.17 Right to Occupy After Termination or Expiry of a Lease

If the tenant continues to occupy the real estate after the expiration of the lease agreement, he or she shall pay the amount of rent for the period of occupation of the real estate, but the landlord must agree to it. If the landlord wants to ensure that the tenant leaves the leased property on the agreed date, he or she should notify the tenant at least one month prior to expiry of the lease to evacuate the property.

On governmental agriculture land under LMLA both parties are required to notify each other in writing three months prior to the contract termination.

6.18 Right to Assign Leasehold Interest

In governmental land pursuant to the applicable laws of Afghanistan, a tenant is not allowed to assign its leasehold interest in the lease or sublease all or a portion of the leased premises to other. However, tenant of a private property is allowed to sublet the leased property. The landlord may limit the tenant from subletting. Generally, subleasing and assigning leasehold will be subject to the agreement of the parties.

6.19 Right to Terminate Lease

A lease agreement can be terminated in the following situations:

- winding up of the legal person or in case of insolvency of the tenant;
- termination of the business activities of the lessee by the government in compliance with legislative documents;
- violation by the tenant of the terms of and commitments made under the lease agreement, without any reasonable cause;
- death of the tenant or a declaration that he is not legally competent according to provisions of the law;
- unanticipated events which force the tenant to vacate the place or make the land under lease useless;
- any other grounds as provided for in the lease agreement;
- in case the land is not utilised within the deadline provided above;
- in case of deceit in establishing the contract;
- termination on mutual agreement of the parties; and
- in case of existence of over-pricing in the contract unless made voluntarily.

6.20 Registration Requirements

The governmental land must be registered with the Ministry of Urban development and Land. There is no fee for the registration. If the land or property belongs to a respective municipality, it is registered with it and maybe with the Ministry of Urban Development and Land.

If it is privately owned property then, the landlord must have valid ownership documents. However, Afghan law does not require the registration of private leased land, if parties to a lease agreement intends to register the lease agreement, they can register the same with the competent court. The parties are required to pay a 1% fee of the total amount of the lease to the court.

Also, since not all private land and property is officially registered, sometime, it takes place on a customary basis and with customary documents.

6.21 Forced Eviction

In case of any violation by the tenant of the terms and commitments made under the lease agreement the tenant can be forced to leave the leased real estate. There is no timeline mentioned for the process under the laws of Afghanistan.

6.22 Termination by Third Party

According to the Law on Expropriation, in case of expropriation of the property by the government for the purpose of a public interest project, a lease can be terminated. The expropriating body must give a three month notice to the tenant to leave the property.

In this case, the government pays rent for three months, provided that the expropriation is an urgent case. It can be the Ministry of Urban Development and Land or respective municipality, depending on the location of the project.

7. Construction

7.1 Common Structures Used to Price Construction Projects

Afghan laws impose no restrictions on how to price construction projects. It depends on the contractual agreement between the parties. It can be either a fixed price determined in advance or based on the actual cost of the project.

7.2 Assigning Responsibility for the Design and Construction of a Project

The construction company can take the responsibility of designing and construction both or the design may be carried out by the project company and the construction by the construction company. This matter is not discussed in the Afghan law and it depends on the agreement between the parties.

7.3 Management of Construction Risk

If a worker undertakes to provide all or part of the work materials, he or she will be responsible for its quality and must be

liable toward the employer if the quality of materials is not as prescribed by the agreement of the parties.

If some of materials become unusable due to negligence or professional incompetence of the worker, he or she shall be obliged to pay their replacement cost to employer. Also, if it becomes apparent that a worker or construction company performs contrary to the contract, the employer may warn worker that if he or she does not improve his or her performance within a specific period, the employer may rescind the contract or entrust it to another person on the account of the first worker.

Concerning limitations on liability, the construction engineer and workers must jointly be liable for general or partial destruction, breakage and subsidence of the constructed buildings or their other fixed attachments that they have constructed, even though destruction, breakage or subsidence has happened due to a defect of the land or if the employer has permitted construction of defective building, unless the contracting parties have intended to keep the building for less than ten years.

Also, it is worth noting that all the materials in the project contract should be approved by the Afghanistan National Standards Authority and taking into consideration the ISO standards, also the ANSA has laboratories for testing the materials.

7.4 Management of Schedule-Related Risk

Performance through compensation shall take place in accordance with the provisions of law. The owner is entitled to monetary compensation if the scheduled completion dates are not met. The compensation will be determined by the court after informing the person or construction company responsible of fulfilling the contract. The court can also impose fines on that person or entity, determining financial compensation by considering the damage caused to the party.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

In practice, parent guarantees, performance bonds, letters of credit are taken by the project contract performer from the bank. There is an escrow account where the project amount is kept as a surety and after completion of the project the amount is paid to the contractor.

7.6 Liens or Encumbrances in the Event of Non-payment

Owner can remove a lien by successfully challenging the validity of the lien, paying the debt or obtaining a lien release from the claimant. The Civil Code of Afghanistan provides that a discharge of a debt shall take place by cash payment, offsets of debts, acquittal, assignment and renewal.

7.7 Requirements Before Use or Inhabitation

There are no specific requirements that are certified by any government agency and that are issued when a project is finished and ready to be used for its intended purpose.

8. Tax

8.1 VAT

VAT is not applicable on the sale or purchase of real estate.

8.2 Mitigation of Tax Liability

There is no special method for to mitigate the transfer, registration, stamp, for tax liability on acquisitions of large real estate.

8.3 Municipal Taxes

Only the owner of the business premises is required to pay a cleaning duty to the municipality. The lessee who occupies the business premises is not liable for paying any such fee.

8.4 Income Tax Withholding for Foreign Investors

Foreign investors are subject to all applicable taxes in Afghanistan. There is a tax on rental income from real estate. The tenant may withhold the tax from the rent payment he or she makes to the landlord. The rate of the withholding tax on rental payment according to the income tax law is as follows:

- if the monthly rent is from AFN10,000 to AFN100,000, 10% tax should be paid; and
- if the monthly rent is more than AFN100,000, then 15% tax should be paid.

There is no exemption from the withholding on rent payment.

8.5 Tax Benefits

Interest paid on a loans or mortgage and the cost of repair of property can be deducted from the income tax. There are no other tax benefits from owning real estate in Afghanistan.

AFGHANISTAN LAW AND PRACTICE

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Shajjan & Associates is a full-service law firm based in Kabul, Afghanistan. It was founded in 2011 by Saeeq Shajjan and registered under the laws of Afghanistan. The firm's legal team is comprised of eight attorneys and three legal assistants. The attorneys hold licences conferred by the Afghanistan Independent Bar Association and one of the firm's attorneys is admitted at the Bars of District of Columbia, Maryland, New York, Pennsylvania, Texas and Virginia. The firm's practice area covers, but is not limited to, audit, aviation, banking, business

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