

BY HON. MICHAEL G. WILLIAMSON¹

Bringing the Rule of Law to a War-Torn Country

Law of Insolvency and Bankruptcy in Afghanistan of 2018

On Nov. 18, 2009, my longtime friend and colleague, Bankruptcy Judge Chuck Case, called me about a project he had been asked to do work on in Afghanistan. He called because he knew about my past work in the country. In 2007, USAID, working through a contractor, Booz Allen Hamilton, conducted a comprehensive review of Afghanistan's laws that govern commerce and serve as a basis for the country's ability to achieve and sustain market-based development.

There were 16 commercial areas that were the subject of this study. Eight commercial law specialists formed the assessment team, with each taking two commercial law areas. I was responsible for the areas of secured transactions and bankruptcy.

As a product of that work, USAID issued a comprehensive report in August 2007 that recommended how the environment for business investment and development could be improved. The report, entitled "Afghanistan's Agenda for Action: Developing the Trade and Business Environment, August 2007,"² was produced for USAID by Booz Allen Hamilton under the Business Climate Legal and Institutional Reform (BizCLIR) Project. It sets forth detailed recommendations for commercial law development in the areas covered by the study.

As reflected in the BizCLIR report, my conclusion (with respect to bankruptcy) was that while there were provisions of existing law in Afghanistan that dealt with insolvency and the winding up of business enterprises, they were generally unknown even among lenders. In practice, bankruptcy was nonexistent as a viable method of dealing with insolvency in Afghanistan. Thus, Afghanistan needed a new bankruptcy law. However, it was not a legislative priority in 2007 because work had not been completed on the new laws dealing with secured transactions and mortgages.



In 2007, during my assessment of Afghan commercial laws, this picture was taken on the way to a meeting of village elders who were assisting USAID in a project to recreate land titles destroyed by the Taliban.

I recommended that once these laws were passed, work should begin on a proposed new draft bankruptcy law. Once formulated in draft form, the proposed law would then be circulated "widely among the stakeholders

to include the lending and business communities through their respective representative organizations, the relevant governmental ministries, lawyers, and members of the judiciary."³

By mid-2009, the laws on mortgages and secured transactions had been enacted. USAID then moved forward with a project to draft and implement a new bankruptcy law. While the original commercial law assessment had been done under a USAID contract with Booz Allen, by 2010 Booz Allen had been replaced by Deloitte under a new Afghan project called the Economic Growth and Governance Initiative (EGGI).

As a result, having no "corporate memory" of the work done in 2007, Deloitte reached out to another bankruptcy judge with experience in international law development, Judge Chuck Case, for help in drafting a bankruptcy law for Afghanistan. As it turns out, Judge Case, with whom I had worked in Anapa, Russia, on a project to train commercial law judges, was familiar with my work in Afghanistan. On Oct. 18, 2009, Judge Case called me to discuss his concerns about the project.

Naturally, he had concerns about the security situation. We also discussed how a project might proceed in terms of staffing and the degree of in-country work that needed to be done. I assured Judge Case that the security was adequate and that I had never had any concerns while I was there in 2007.

We agreed that doing the project long distance as a "desk job" from an American law firm (as



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² For a copy of the report, visit yumpu.com/en/document/view/51111834/afghanistans-agenda-for-action-economic-growth-usaid (last visited June 26, 2018). As far as an English version of the law, while new laws are published in Dari within the country, English versions are not officially published but generally follow in collections by NGOs, universities or professionals that provide assistance to businesses who wish to do business in the country. Fortunately, one such business, Afghanistan Holding Group, has picked up the new insolvency law: <https://www.ahg.af/wp-content/uploads/2015/04/Draft-Insolvency-Law-English.pdf> (this translation references "Draft 30 January 2018," but that is the final version).

³ See BizCLIR Report at 63.

had been attempted in 2006) was a non-starter. This project was going to require a team approach with substantial in-country work. As I had learned from my mentor in the legal-reform area, Wade Channel, legal reform is a dynamic activity requiring “debate, negotiation ... outreach, revisions of drafts based on local political compromises and a host of other steps.”⁴

Judge Case then went back to Deloitte with a proposal for a two-person team, suggesting that I should be that second person since I was in the country and had met many stakeholders in the commercial arena in 2007. Thus, I was asked to join him on a trip to Kabul in April 2010 to begin work on a project to help the Afghanistan government prepare a modern insolvency law for the country. The project was undertaken through the USAID EGGI under the direction of Deloitte Consulting.

Working together, we reviewed previous assessments and reports that dealt with bankruptcy. The Deloitte staff arranged appointments with key stakeholders, as identified by both the local office and members of the team. The interviewees included representatives of key ministries, the Central Bank, other government offices, commercial banks, non-governmental organizations in the business sector, non-bank lenders and legal scholars.

Midway through the two-week mission, our team conducted a workshop where presentations were made to key stakeholders on the role of an effective bankruptcy law in a market economy. The meeting was sponsored by the Afghan Ministry of Commerce and Industries and organized by EGGI. Informal evening discussions with representatives from the Ministry of Justice and Afghan Ministry of Commerce were also conducted. These meetings were very useful in allowing members of the team to interact informally with policymakers and to make suggestions on the structure of and concepts underlying the proposed bankruptcy law.

Following that trip, I did the initial draft of an insolvency law. The new insolvency law was intended to replace the Law of Insolvency and Bankruptcy in Afghanistan, which had been enacted in 1942. However, many of the concepts and provisions contained in the 1942 law have been included in this new law.

In this respect, the new law updates and modernizes the 1942 law in keeping with international standards that have evolved in the insolvency law area since 1942. In particular, the new law generally follows the recommendations set forth in the *Legislative Guide on Insolvency Law* published by the United Nations Commission on International Trade Law. However, it is not simply an abbreviated version of the U.S. Bankruptcy Code.

The early drafts of the law dealt with insolvency as an administrative process because of early concerns about the lack of capacity within the judicial system and the general perception of corruption. Over the 10 years following my first trip, much had occurred in terms of enhanced capacity in the handling of commercial cases and addressing corruption issues. This is, in part, because of numerous new graduates



These pictures are of the initial press conference held by the Minister of Commerce and Industries in 2010 to announce the commencement of a project to develop a bankruptcy law.



from law school and the addition of a cadre of female judges who are often assigned to work on commercial cases.

In October 2010, I returned to Afghanistan to get feedback on the law from the various stakeholders. As part of that process, I participated in roundtable meetings with representatives from the business, banking, legal and governmental sectors in Mazar-e-Sharif, Herat and Kabul. After that trip, I incorporated the input that I had received and sent the law back for further distribution to the various stakeholders. I had expected to be working on getting the law passed in 2011, but the bankruptcy law project was interrupted when Deloitte’s contract with USAID unexpectedly ended.

In December 2011, I received a call from the U.S. Department of Commerce. They had taken over the commercial law development in Afghanistan and wanted to move forward with the insolvency law work. I returned to Afghanistan in July 2012 with Dave Curry, a retired Mayer Brown partner from Chicago who works throughout the Mideast on commercial law development.

The purpose of the July 2012 trip was to bring relatively new appointees at the Afghan Ministry of Commerce up to speed on the process that had been employed in preparing the current draft of the law, including the enormous amount of stakeholder input that had been incorporated into the current draft. During this trip, numerous other amendments were suggested, all of which were incorporated into a further draft.

In February 2013, Mr. Curry and I returned to Kabul to conduct a meeting of the proposed members of the Insolvency Resolution Commission, which had initially been proposed to serve as the administrative body to adjudicate bankruptcy cases. Representatives of the designated ministries — Commerce, Justice, Finance and Economy, together with

4 Wade Channell, “Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries,” Carnegie Paper No. 57, March 2005, at 9. Mr. Channell was the team leader on my first BizCLIR assessment in Azerbaijan in 2002. Later, he asked me to help him on a business courts project in Macedonia in 2004.

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general counsel of Da Afghanistan Bank — were in attendance. Also attending were five commercial judges, the head of the Afghan Lawyer’s Association and the deputy director of the Afghanistan Chamber of Commerce and Industry.

Following that meeting, various changes suggested by the parties participating in the meeting were incorporated into the draft law. Next, the updated law was provided to our contacts at the Afghan Ministry of Commerce in March 2013.

There was no activity with respect to the law until 2015. A three-day program was held in New Delhi from June 15-17 regarding the draft insolvency law. In attendance were relevant stakeholders on insolvency from the Ministry of Commerce and Industries, Ministry of Justice, the private sector and both houses of Parliament. During that program, Tom Jersild (a longtime company law expert that participated with me on the BizCLIR assessment in 2007) and I reviewed the law in its entirety, going over it line by line, responding to questions and noting numerous suggestions for improvements. Following the New Delhi trip, I incorporated those changes, and a new draft was sent to the Afghan Ministry of Commerce on July 1, 2015.

On Jan. 2, 2017, I received word from the U.S. Department of Commerce that the Afghan Minister of Justice wished to have the law introduced into Parliament in the spring of 2018. The minister had requested an in-person meeting to review the law in February, so I returned to Kabul for the eighth time.

A full-day meeting was held at the U.S. Embassy with the Afghan Minister of Justice, Abdul Baseer Anwar; his chief advisor, Mr. Mohammed Ashraf Rasooly; his advisor, Mr. Ubaidullah Ebadi; and two Taqneen (legislative) advisors from the Ministry of Justice. I was teamed with Department of Commerce Senior Commercial Law Advisor John Dickerson, who works in developing and transitioning countries through commercial legal reforms for the U.S. Department of Commerce through its Commercial Law Development Program (CLDP).

The U.S. Ambassador to Afghanistan, Hugo Llorens, welcomed all attendees and confirmed our country’s continued support for the bankruptcy law project. The law was reviewed comprehensively. Mostly minor changes were made, but it was finally determined that the bankruptcy law needed to be implemented in courts presided over by members of the Afghanistan Judiciary rather than through an administrative body.

Upon my return to Tampa, Fla., I redrafted the law to incorporate various changes made by the Minister of Justice. Principal among these changes was the removal of the Insolvency Resolution Commission as the adjudicatory body presiding over bankruptcy cases. The redrafted law contemplated a bankruptcy court with judges specializing in bankruptcy cases. The latest draft was then sent to the Afghanistan Ministry of Justice in March 2017.

During the balance of 2017, substantial work was done in reviewing and improving on various provisions through



Ambassador Hugo Llorens, Afghanistan Minister of Justice Abdul Baseer Anwar and me (l-r) in 2017 at the conclusion of the final in-country conference to review the law before submission to the cabinet and president for final review and passage.

Presidential Advisor Ajmal Almady, working with U.S. law firm DLA Piper. The principal changes included removal of the Insolvency Resolution Commission and adding the Civil Service Commission to maintain a list of receivers; providing for liability of directors who continue to trade after the debtor becomes insolvent, requiring insolvency as a requirement for a voluntary case; providing that utilities are ineligible to file a case; adding a provision requiring an “independent receiver auditor” to be appointed when necessary to review the conduct of the receiver; and expanding the persons qualified to be receivers, including “reputable insolvency practitioners” from several Common Law countries.

In March 2018, Mr. Dickerson at CLDP received word that the law had been passed and signed by President Ashraf Ghani. In summary, the law (as enacted) provides a relatively simple and efficient method of dealing with businesses that cannot pay their debts in a timely fashion. An insolvency case will be administered by a receiver subject to the direction and control of the commercial court. The law provides for either liquidation under a liquidation plan or continuation of the business under an agreement for settlement proposed by the receiver and approved by the creditors.

Creating a bankruptcy law is only the first step in creating a working bankruptcy system. The success of a bankruptcy regime is dependent not only on the framework of the bankruptcy law, but also upon the parties that perform the functions needed in order to implement the insolvency law. These include judges, attorneys and individuals to serve in the role of receivers. To this end, consideration has already begun on developing training programs for those who will be involved in bankruptcy cases.

At some point, work must also begin on developing the institutions that support a bankruptcy system. As an initial step, law professors interested in developing a bankruptcy curriculum should be identified. Bar associations will need to be engaged in order to develop continuing legal education programs in the bankruptcy area, as well as committees of attorneys who wish to develop a specialization in an insolvency practice. **abi**

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