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A birds-eye view of AIFC court practice and procedure



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In Kazakh mythology, the great phoenix Samruk laid a golden egg between the branches of a poplar tree and became a symbol of prosperity and happiness for the people of these lands. High above Astana's beautifully symmetric cityscape, this symbol has been immortalised atop the capital's viewing platform, the [Baiterek Tower](#).

Having identified some of the key features of the [AIFC](#) and [its court](#) in [my previous article](#), I intend to take up the birds-eye vantage point of the Samruk and consider some of the interesting facets of the new rules governing the AIFC court's proceedings. This is not intended to be a comprehensive review of the procedural rules, but merely an introductory insight into some of their distinctive or important features.

The court rules

Article 13(5) of the Constitutional Statute granted to the AIFC Management Council the power to make [regulations for the AIFC Court](#). The AIFC Court Regulations 2017 (Court Regulations) deal with the composition, appointment and removal of judges, jurisdiction, practice and procedure. Pursuant to Article 30, the Chief Justice of the court is exclusively empowered to make, amend, repeal or revoke the court rules, save for the fact that he may delegate this task to another judge of the court.

On 1 January 2018, the Court Rules 2018 (Court Rules) were signed by the Chief Justice, Lord Woolf. There are strong similarities between the Court Rules and the [Civil Procedure Rules](#) of England and Wales, which render English lawyers particularly well-placed to comment upon their likely interpretation and effect.

Lord Woolf and his team have clearly adopted some of the best features of his own reforms 20 years ago. Nonetheless, there are some interesting differences that may generate fruitful discussion for practitioners in the years to come.

Has the limitation period expired?

Before commencing proceedings, a claimant needs to consider limitation periods under the 2017 Regulations. Article 36 of the Court Regulations states that proceedings cannot be commenced more than six years after the date of the events that gave rise to

the proceedings. This limitation period is not unlike that imposed in English law for *contract and tort actions* (see sections 2 and 5 of *Limitation Act 1980* (LA 1980)).

However, it is interesting that there is no carefully-crafted exception to this rule equivalent to *section 14A of the LA 1980*, which permits an adjusted limitation period of three years from the “date of knowledge” required for bringing an action in negligence.

Which court?

Another question that the claimant will want to ask itself is in which court it should bring the claim, as the AIFC Court includes a Small Claims Court (SCC) for the efficient and cost-effective resolution of low-value claims.

Part 28 of the Court Rules provides for an SCC. Its jurisdiction extends to disputes in which:

- The amount of the claim or value of subject matter does not exceed USD 150,000.
- The amount of the claim or value of subject matter does not exceed USD 300,000 and all the parties elect in writing that it be heard by the SCC.
- The claim relates to the employment (or former employment) of a party and all parties elect for the matter to be heard by the SCC.
- In such other claims as ordered to be considered by the Chief Justice.

Part 28.29 to 28.35 of the Court Rules adopt the informal approach to SCC dispute resolution *envisaged by the CPR*. Strict rules of evidence are not applied, combined with a broad discretion in the hands of the judge to determine any given dispute.

The inclusion of an SCC under the umbrella of the AIFC Court is a positive contribution to securing timely and efficient decision-making within this new jurisdiction. It is not an option that was implemented in the *Qatar International Court* but has its equivalent in the Small Claims Tribunal in the *DIFC*.

Overriding objective and proportionality

The Court Rules adopt a concept that has been well-known by English practitioners since the Woolf reforms were introduced in 1999 – the *overriding objective*. Put at its most basic, it requires the court to deal with cases “justly”, which is defined by reference to items listed at Articles 1.6(1) to (5) of the Court Rules:

- Ensuring that the system of justice is fair and accessible.
- Ensuring that the parties are on an equal footing.
- Ensuring that cases are dealt with expeditiously and effectively.
- Dealing with cases in ways that are proportionate.
- Ensuring appropriate use of information technology.

Proportionality is assessed by reference to topics such as the importance and complexity of the case, as well as the amount of money involved in the dispute.

Article 1.8 stipulates that:

“The Court may waive any procedural requirement if it is satisfied that it is in accordance with the overriding objective to do so.”

This is an interesting statement. There is no express equivalent in CPR 1. It is tempting to suggest that this amounts to [CPR 1.2](#), which requires the court to seek to give effect to the overriding objective whenever exercising a power given to it under the rules or interpreting those rules. However, this provision is already replicated (in substance if not word for word) in Article 1.7(1) and (2) of the Court Rules.

Its closest cousin is [CPR 3.10](#), which permits an English court to issue an order remedying any error of procedure. However, Article 1.8 appears to be a novel provision, granting the court a discretion to waive strict procedural requirements where it can justify its actions pursuant to the overriding objective.

Interim remedies

The AIFC Court has been afforded broad interim remedies in Part 15, including interim injunctions, freezing orders and orders for the production of documents by a non-party. The real test of these interim remedies will be in their enforcement against entities whose assets and/or documents are in Kazakhstan (as opposed to against AIFC participants, as defined in the Constitutional Statute of 2015).

In theory, this is the great benefit of Article 13(8) of the Constitutional Statute mentioned in my previous article. It should be potent enough to apply to any judgment of the AIFC (final or interim) so that an order, for example, for non-party disclosure can be enforced, whether by the AIFC or in a Kazakh Court in the event of non-compliance. As always, the proof of the pudding will be in the eating. The two jurisdictions will need to build a rapport through tried and tested case law to ensure that the Court Rules are given full effect.

The Court Rules also explicitly grant the court the power to award security for costs, but an order for security cannot be made against the Astana Financial Services Authority (AFSA) or Registrar of Companies in proceedings initiated by them (*Article 15.27*). This is obviously an attempt by the AIFC to protect its primary regulatory authority from having legitimate regulatory actions stifled by demands for security.

Immediate judgment

The rules also provide for strike out and/or summary judgment of a claim. The Court Rules refer to summary judgment as “immediate judgment” (*Part 14*).

This is an important feature in the court’s case management powers. The rules for strike out and/or summary judgment borrow from the English procedural tradition. The latter, for example, refers to there being “no real prospect of succeeding or successfully defending a claim”. In the absence of further elaboration, it seems almost inevitable that the court will borrow from well-established English case law on the meaning and application of these terms of art.

Costs

The price of civil justice has been hotly debated in England and Wales over the past decade. It led to significant reforms by former Court of Appeal judge Sir Rupert Jackson, who will be sitting as a judge of the AIFC Court.

Part 26 of the Court Rules grants to the court a wide discretion to award costs. The general rule is equivalent to that adopted in the English courts, namely that “costs follow the event” or “loser pays”.

There are two bases of assessment, immediate or detailed. I understand that it is intended that the Registrar of the Court undertake detailed assessment as is the practice in the Qatar International Court.

What is particularly interesting is that despite being heavily based upon the CPR, the Court Rules do not incorporate the costs management additions to CPR 3 that were introduced following Rupert Jackson’s reforms in 2013. Given the extent to which the rules of procedure otherwise mirror the CPR, that will have been a very deliberate decision.

In the light of the relative infancy of the AIFC Court, it may have been thought that the strict (and strictly applied) rules on costs budgeting would not be appropriate at this early stage in the life of the court.

Appeal

The default timeframe for making an appeal from a lower court decision in the AIFC Court is 21 days. This may seem obvious to most English lawyers, but it is not a timeframe universally applied in international courts. For example, the Qatar International Court has a very generous 60-day period for lodging an appeal.

This 21-day rule, combined with the default paper-based applications for permission in the event that an oral request for permission made before the first instance tribunal has been rejected, ensures that the appeal process is stream-lined and efficient.

Enforcement

Enforcement was a key consideration of my previous article. Part 30 of the Court Rules sets out in detail the process for making applications for an “execution order”. What is particularly promising for judgment creditors is that the procedural rules envisage applications being made without notice and grant to enforcement judges of the AIFC Court the power to make execution orders without the need for a hearing.

Conclusion

The AIFC Court could become a key player in the dispute resolution market. It is designed well, presided over by a *highly qualified bench* and supported by what appear on their face to be robust rules of procedure. Lawyers with a current practising certificate have rights of audience and can register free of charge simply by sending an email to the court’s Registrar and CEO, *Mr Christopher Campbell-Holt*.

As this new jurisdiction develops, that English lawyers are engaged with the AIFC Court is both paramount and openly welcomed by its management. Through collaboration between the AIFC Court, Kazakh and English lawyers, there is real hope that the AIFC's dispute resolution offering could become a genuinely attractive option for parties in the very near future. It's website can be found at: <http://aifc-court.kz/>

<http://constructionblog.practicallaw.com/a-birds-eye-view-of-aifc-court-practice-and-procedure/>