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Ambitions for Astana



- by [Paul Fisher](#)
- Barrister

at [4 New Square](#)

There is a rising chorus of excitement among international practitioners in London. It centres upon the creation of the [Astana International Financial Centre](#) (AIFC) and [its court](#) (AIFC court) in the Kazakh capital, which became fully operational in January 2018.

In this post, I consider some of the key features of the new AIFC court and some questions that may arise in the near future about its operation. Given the fact that the legal architecture of the AIFC and its new court are purported to be based on the “Dubai model” of the [DIFC](#), with the assistance of advisers from the Emirate, it may be profitable to make comparisons with the [foundational Law No. 10 of 2004](#) (DIFC court law) and I do so where relevant. Further consideration will be given to the procedural code adopted for the AIFC court in a subsequent post.

What is the AIFC and its court?

An amendment taking effect in March 2017 to Article 2(3)(i) of the Constitution of Kazakhstan explicitly permitted the creation of a:

“... special legal order in the financial field... within the territory of Astana in accordance with the Constitutional law.”

The AIFC purports to establish a legal enclave within Kazakhstan in which to do business, offering a separate jurisdiction with preferential tax treatment, a simplified visa/ immigration regime and a common law framework for judicial decision-making. It is

the latter of these benefits that is exercising disputes and construction lawyers in London.

The AIFC and its court are not the first attempt by Nursultan Nazarbayev's government to attract direct foreign investment and encourage foreign enterprise within the borders of this former Soviet Republic. In fact, the law giving birth to the AIFC also puts to death its closest unhappy predecessor, the Almaty Regional Financial Centre (ARFC). The law creating the ARFC was declared null and void by the 2015 Constitutional Statute (AIFC law). However, it is fair to say that the ARFC was an altogether different creature from the AIFC, for whom the future seems more positive.

The AIFC's scope is ambitious. It describes itself as a:

"... financial hub for Central Asia, the Caucasus, EAEU, the Middle East, China, Mongolia and Europe."

It consists of five separate bodies, of which the AIFC court and *AIFC arbitration centre* are envisaged to be key features of the dispute resolution offering.

The AIFC court is to be headed by the newly-appointed Chief Justice Lord Woolf, whom those active in the Middle Eastern market will remember for his prior involvement in the Qatar International Court and any English lawyer for his overhaul of the English law of civil procedure in the late 1990s. The language of the AIFC court is English and its recently published rules have been developed based upon the *civil procedure rules of England and Wales*.

The court's jurisdiction

Article 13(4)(i)to(iii) of the AIFC law stipulates that the AIFC court has exclusive jurisdiction to hear and adjudicate upon:

- Disputes between AIFC participants, AIFC participants and AIFC bodies and an AIFC participant or an AIFC body and its expatriate employees.
- Disputes relating to activities conducted in the AIFC and governed by the "acting law" of the AIFC.
- Disputes transferred to the AIFC by agreement of the parties.

The last of these options is particularly interesting as it is understood that government contracts will begin identifying the exclusive jurisdiction of the AIFC court in their dispute resolution clauses. If that political will turns into a reality then there could well be a stable flow of construction and energy disputes before the AIFC court.

As long as the AIFC court is satisfied that the parties to the dispute fit into the three scenarios identified in Article 13(4) it is likely to accept jurisdiction, subject to two important exceptions: it does not have jurisdiction in respect of criminal or administrative proceedings.

Here lies a difficult dividing line for the AIFC court to determine in the future. In my experience both in England and Wales as well as, perhaps more importantly, the Middle East, what constitutes "administrative proceedings" is very much a moot point until properly settled by the court with jurisdiction. I would expect this to be a live issue for future disputes where the Kazakh government is involved as a party. In the event that a

critical mass of cases begins to form in Astana, it is conceivable that the AIFC courts will accept jurisdiction in respect of disputes where an enforcing Kazakh court is in disagreement.

English law enclave?

Many have suggested that the AIFC is based on English law principles, but that is not quite right. In accordance with article 13(6) of the AIFC law, when adjudicating on disputes, the AIFC court is bound by what is referred to as the “acting law” (on which see my comments below) but:

“... may also take into account final judgments of the AIFC Court in related matters and final judgments of the courts in other common law jurisdictions.”

So there are no hard and fast rules as to precedent to be gleaned from the AIFC law and, in disputes before the court, one can expect a dialogue with judges based on the jurisprudential logic of positions taken by any given common law jurisdiction. It is worth contrasting this position with article 30(2) of the DIFC court law, which did not specifically confine the parties to consideration of common law jurisdictions.

Article 13(2) of the AIFC law stipulates that the AIFC court is “independent in its activities and is not a part of the judicial system of the Republic of Kazakhstan”. That much is understood in theory.

However, the AIFC court is bound by the “acting law” of the AIFC (*article 13(6)*) and article 13 also states that:

- The judges of the AIFC court are appointed and approved by the President of Kazakhstan on the recommendation of the AIFC Governor.
- Decisions of the courts of the Republic of Kazakhstan are to be enforced in the AIFC in accordance with the legislation in the Republic of Kazakhstan.

The appointment process is similar to Part 3 of the DIFC law, whereby judges are appointed by the Ruler of the Emirate of Dubai (albeit that the strict rules for removal of a judge do not appear to have been replicated in the AIFC law and have, instead, been delegated to the AIFC management council for elaboration).

However, there are two facets of the AIFC law that serve to challenge assumptions about this supposed enclave, the “acting law” and the enforcement of judgments under Kazakh law.

“Acting law” of the AIFC

The reference to the acting law of the AIFC is intriguing. This is defined by article 4 of the AIFC law, which includes within its definition (*article 4(1)(iii)*):

“... the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts.”

The AIFC law appears to anticipate that the lacunae within its foundational laws will be filled by the laws of Kazakhstan. In itself that appears to be a sensible solution.

However, at present, it is difficult to anticipate the extent of any role that Kazakh law might play in guiding the court's decision making.

Enforcement of judgments

The Kazakh courts are to enforce judgments of the AIFC court, the decisions of which are final and binding at Court of Appeal stage (*article 13(7)*). Judgments of the AIFC court are to be given equal status to a Kazakh court judgment for enforcement purposes (*article 13(8)*). (As a point of practical necessity this will, of course, require translation into either of the two official languages of Kazakhstan – Kazakh or Russian). This is also significant in the light of the fact that the approach of the Kazakh courts to the enforcement of judgments from “foreign” jurisdictions has traditionally been conservative. Article 13(8) should give participants in the court some comfort when seeking to enforce against assets outside of the AIFC.

Article 13(9) of the AIFC law refers to enforcement “in accordance with the legislation in the Republic of Kazakhstan”. That sits somewhat unhappily with the desire to retain a separate jurisdiction. On its face, it could extend beyond mere reciprocity of enforcement as between two jurisdictions. It is also novel. There was no equivalent in the DIFC court law.

Though I am not a Kazakh lawyer, I am given to understand that Kazakhstan has a streamlined enforcement process, whereby private enforcement officers are tasked by the judgment creditor with the role of practically enforcing a substantive court judgment. There is no established practice whereby presiding “enforcement judges” regulate the practical enforcement actions of enforcement officers. This could be described as efficient for judgment creditors but lacks the judicial oversight for judgment debtors that would be evident in many common law jurisdictions. This may be an important consideration for parties when agreeing to refer disputes to the AIFC court.

However, that all depends upon the extent to which article 13(9) is interpreted as importing the law of enforcement in Kazakhstan wholesale into the judgments of the AIFC court. My inclination at present is that the AIFC judiciary, in tandem with the AIFC managing council, will be keen to assert their own influence on the enforcement process in accordance with common law principles, to which they are permitted to have regard, as well as the *raison d'être* of the court as a separate jurisdiction.

AIFC court's procedural rules

One of the critical interfaces between English and AIFC law will be procedural rather than substantive. The rules of the AIFC court closely mirror those of the English CPR (and no wonder, given that Lord Woolf has been appointed as its Chief Justice!). More on these in Part II...

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