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# Perspectives of the Court of the Astana International Financial Centre: Potential to Transform the Central Asian Legal Landscape

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## Abstract

The rise and proliferation of International Commercial Courts has become a perceptible trend across the European and Asian continents over the past two decades. One such dispute resolution hub exists within the Astana International Financial Centre, a special jurisdiction within the Republic of Kazakhstan that operates on the basis of common law principles. The Astana International Financial Centre and its Court were modelled on the international financial centres of Dubai and Qatar; however, there are substantial differences between the legal systems of the Gulf States and that of the Republic of Kazakhstan. As a result, the creation of a new court has led to considerable criticism within the local legal community, raising serious doubts as to whether the Kazakh state should be maintaining and financing a ‘caviar-court’ instead of using resources to reform and develop the national judicial system. Nevertheless, despite the scepticism surrounding the financial centre, there is potential for the Astana International Financial Centre and its Court to become a regional dispute resolution hub for post-Soviet countries and the Central Asian region, following the example of Singapore and Dubai.

## Introduction

Over the past fifteen years, many European and Asian countries have created international hubs for dispute resolution. Although the demand for specialised courts dealing exclusively with commercial disputes is high, International Commercial Courts (ICommCs) are not a new phenomenon, as one of the most reputable courts – the London Commercial Court (LCC) – has existed since 1895.<sup>1</sup> However, it is interesting to note that it is only recently that many different jurisdictions have begun to create similar courts or special commercial chambers. Evidently, this is not a single or unified trend; each region has distinct motivations driving the creation of an ICommC. A 2019 survey underscores the importance of such an institution, revealing that the world’s top ten economies share common traits such as robust regulatory quality and efficiency and specialised commercial courts.<sup>2</sup>

In order to meet contemporary challenges, the newly established ICommCs have blended characteristics of state courts and private alternative dispute resolution mechanisms or, as it has been described,

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<sup>1</sup>Marta Requejo Isidro, ‘International Commercial Courts in the Litigation Market’ (Max Planck Institute Luxembourg for Procedural Law Research Paper No 2019(2)) <[https://www.mpi.lu/fileadmin/mpi/medien/research/WPS/MPILux\\_Research\\_Paper\\_Series\\_2019\\_2\\_Requejo\\_International\\_Commercial\\_Courts.pdf](https://www.mpi.lu/fileadmin/mpi/medien/research/WPS/MPILux_Research_Paper_Series_2019_2_Requejo_International_Commercial_Courts.pdf)> accessed 10 Jan 2022.

<sup>2</sup>See Xandra Kramer & John Sorabji, ‘International Business Courts in Europe and Beyond: A Global Competition for Justice?’ [2019] Erasmus Law Review 1.

represent ‘a careful marriage between litigation and arbitration’.<sup>3</sup> They typically operate on the basis of the English common law system or similar international standards, use English as a primary or alternative language, and make extensive use of advanced technologies.<sup>4</sup> Notably, the Republic of Kazakhstan stands out as the sole post-Soviet country to have followed international trends by establishing a common law-based court within the Astana International Financial Centre (AIFC), which is regarded as a ‘legal enclave’ in the Central Asian region. Two neighbouring states, however, the Republic of Uzbekistan<sup>5</sup> and the Kyrgyz Republic,<sup>6</sup> are in the process of establishing similar international financial centres with common law jurisdiction. Evidently, one of the main purposes for the creation of such financial centres with ICommCs is to attract international investors to the national economy. Nevertheless, the creation of a common law jurisdiction within a civil law system has caused considerable legislative discrepancies within the Kazakhstani legal system, not to mention a backlash from the legal community.

This article analyses the recently established AIFC Court, its characteristics, and its potential impact on the Central Asian region. The second part of the article briefly reviews the types of newly emerging ICommCs worldwide and considers the peculiarities of the AIFC Court, its structure, and substantive law. The third part focuses on the existing criticisms of the new ICommC and the anticipated negative impact on Kazakhstan’s legal system. The fourth part analyses the potential benefits that the AIFC Court could bring to the justice system of the Republic of Kazakhstan, and the lessons that the neighbouring Central Asian states could learn from the creation of a similar court. The final part will summarise and conclude the article.

### AIFC Court: Following International Trends

The creation of the AIFC Court coincided with the emergence of similar ICommCs on the European and Asian continents. However, it is important to note that this was not the result of a single trend, but rather of a multitude of diverse political and economic factors driving the proliferation of ICommCs worldwide. Hence, it is crucial to consider the AIFC Court not in isolation, but from an international perspective within the context of the race for the best dispute resolution hubs.

### The Position of the AIFC Court on the World Map of ICommCs

Contrary to what their name might suggest, ICommCs are not ‘international’ in the sense of being established by international organisations or through international treaties.<sup>7</sup> ICommCs are created by sovereign states; the use of the term ‘international’ in their name signifies the subject matter of their jurisdiction, ie, commercial disputes that have an international component.<sup>8</sup>

<sup>3</sup>The term has been used several times in various articles by Singaporean researchers following the establishment of the Singapore International Commercial Court, which is intended to become the analogue of the London Commercial Court in the Pacific Asian region. See Steven Chong, ‘The Singapore International Commercial Court: A New Opening in a Forked Path’ (Speech at the British Maritime Association Lecture, London, 21 Oct 2015), as cited in Man Yip, ‘The Singapore International Commercial Court: The Future of Litigation?’ [2019] *Erasmus Law Review* 82, 88.

<sup>4</sup>Pamela K Bookman, ‘The Adjudication Business’ (2019) 45 *Yale Journal of International Law* 227.

<sup>5</sup>The creation of the Tashkent International Financial Centre is supported organisationally by TheCityUK, which is the industry-led body representing UK-based financial and related professional services in different countries. See The CityUK, ‘UK-Uzbekistan IFC Working Group Report: Recommendations on developing Tashkent International Financial Centre’ (July 2020) <[https://www.thecityuk.com/media/oqab4kg1/uk-uzbekistan-ifc-working-group-report-recommendations-on-developing-tashkent-international-financial-centre\\_english.pdf](https://www.thecityuk.com/media/oqab4kg1/uk-uzbekistan-ifc-working-group-report-recommendations-on-developing-tashkent-international-financial-centre_english.pdf)> accessed 30 May 2022.

<sup>6</sup>The Bishkek International Financial Centre was modelled on the AIFC, see ‘Кабмин намерен создать Международный финансовый центр «Бишкек» (Kabmin nameren sozdat’ Mezhdunarodnyy finansovyy tsentr «Bishkek») [The Government Intends to Create the Bishkek International Financial Centre]’ (Tazabek, 5 Nov 2021) <<https://www.tazabek.kg/news:1741668/>> accessed 14 Jan 2022.

<sup>7</sup>Manjiao Chi, ‘Regulation of Special Economic Zones Through Regional Trade Agreements: Confronting the Synergy Issue’ (2021) 24(2) *Journal of International Economic Law* 423, 426.

<sup>8</sup>Bookman (n 4) 229.

ICommCs can be divided into four categories. The first group includes the courts of London and New York, which are well established and considered the most reputable and sought-after commercial courts in the world.<sup>9</sup> The LCC, for example, hears almost a thousand high-profile cases a year.<sup>10</sup> Not only is the number of cases continuously increasing; the number of judgments has also risen over the last decade, from about 150 judgments in 2015 to 257 in 2023. In addition, almost 60% of the litigants were foreign parties from 75 different jurisdictions, which is a significantly higher number compared to any other state in the world.<sup>11</sup>

The significant influx of international litigants in commercial courts has changed the perception of the courts from mere dispute resolution mechanisms to commodities capable of attracting business to specific litigation forums.<sup>12</sup> Besides its direct effects on the dispute resolution market, the LCC has also indirectly influenced the rise of ICommCs in Europe: the current European trend of creating ICommCs, for example, has been attributed to the UK's decision to leave the European Union in 2016. Assuming that London would lose procedural privileges once it was no longer part of the EU,<sup>13</sup> European states such as Germany, Belgium, the Netherlands, and France created special chambers that deal exclusively with international commercial disputes.<sup>14</sup> Although Germany and France had already created special commercial chambers prior to the announcement of Brexit, the process itself provided an impetus to reassess their plans and develop new strategies.<sup>15</sup> Hence, European states did not necessarily see the ICommC as a tool to attract international investors, but rather as an opportunity to take London's place in the business litigation market in the wake of Brexit.<sup>16</sup>

In contrast to their European counterparts, Asian states seem to have taken a more comprehensive approach. For instance, Singapore recently created the Singapore International Commercial Court (SICC) as part of its strategy to become a regional economic and dispute resolution hub,<sup>17</sup> which is presumed to complement its existing and promising arbitration and mediation centres.<sup>18</sup>

At the same time, as China is aiming to consolidate and expand its influence through the Belt and Road Initiative, it has established the Chinese International Commercial Court (CICC). This move reflects China's intent to leverage its strategic position by developing a 'one stop shop' for international commercial disputes.<sup>19</sup> While the newly established court is presided over by local

<sup>9</sup>Despite the the United Kingdom's exit from the European Union, London remains one of the most attractive destinations for international litigants, according to a report prepared by Portland Communications that analysed the demand for different ICommCs around the globe. See Portland Communications, 'Commercial Courts Report 2023' (Portland Litigation and Disputes: Specialist advisory and strategic communications, 4 May 2023) <<https://portland-communications.com/wp-content/uploads/2023/05/Portland-Commercial-Courts-Report-2023-2.pdf>> accessed 10 May 2023.

<sup>10</sup>For an early account, see Burkhard Hess, 'The Justice Initiative Frankfurt am Main 2017' (Conflict of Laws, 31 Mar 2017) <<http://conflictflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>> accessed 13 Oct 2021.

<sup>11</sup>Portland Communications (n 9).

<sup>12</sup>Donald Earl Childress III, 'General Jurisdiction and the Transnational Law Market' (2013) 66 *Vanderbilt Law Review* En Banc 67, 74. See also Horst Eidenmüller, 'The Transnational Law Market, Regulatory Competition, and Transnational Corporation' (2011) 18 *Indiana Journal of Global Legal Studies* 707, 709.

<sup>13</sup>Marieke Witkamp, 'Internationalizing Domestic Courts in Europe: A Comparative Analysis on Procedure, Function, Organization', in Stavros Brekoulakis & Georgios Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (Cambridge University Press 2022).

<sup>14</sup>Sir William Blair, 'The New Litigation Landscape: International Commercial Courts and Procedural Innovations' (2019) 2 *International Journal of Procedural Law* 212, 215.

<sup>15</sup>Witkamp (n 13).

<sup>16</sup>See Kramer & Sorabji (n 2) 2. See also Giesela Rühl, 'Building Competence in Commercial Law in the Member States: Legal and Parliamentary Affairs' (European Parliament, Study for the JURI Committee, 14 Sep 2018) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2018\)604980](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)604980)> accessed 3 May 2023.

<sup>17</sup>Yip (n 3) 84.

<sup>18</sup>*ibid.*

<sup>19</sup>Julien Chaisse & Xu Qian, 'Conservative Innovation: The Ambiguities of the China International Commercial Court' (2021) 115 *AJIL Unbound* 17, 19.

judges only, it also has an international committee of experts to advise the court on matters of foreign laws and cases relevant to the disputes brought before it.<sup>20</sup>

Finally, there are states such as the United Arab Emirates (UAE), Qatar, and the Republic of Kazakhstan, which have established new forms of special economic zones (SEZs), calling them 'international financial centres'.<sup>21</sup> The Dubai International Financial Centre (DIFC) and the Qatar Financial Centre (QFC) were created in the early 2000s and became an inspiration for the subsequent zones created a decade later, such as the Abu Dhabi Global Market (ADGM) and the AIFC. The DIFC and the QFC are widely regarded as unique special or financial economic zones, which differ from the traditional trans-shipment and manufacturing zones and encompass areas that facilitate economic and financial services.<sup>22</sup> New financial hubs have similar and elaborate internal structures, which include several bodies, such as a Management Council, a President or Governor, a Financial Services Authority, an Administration, a Court, and an International Arbitration Centre.<sup>23</sup>

The AIFC Court is also one of the dispute resolution centres that exist within the new types of SEZs, which aim to resolve exclusively commercial disputes that fall within the jurisdiction of the Court. Notably, all of the aforementioned financial centres and their courts operate on the basis of common law,<sup>24</sup> which effectively makes these SEZs 'legal enclaves' or 'jurisdictions within a jurisdiction'.<sup>25</sup>

### *The Structure of the AIFC Court and its Jurisdiction*

As previously mentioned, the AIFC Court, as well as the AIFC itself, was established in a similar manner to the special economic zones of the Gulf region, most notably the DIFC. The initiative was proposed by the first President of the Republic of Kazakhstan in 2015 as part of his election campaign.<sup>26</sup> Later, the Kazakh government presented a national strategy ('Nation's Plan') called

<sup>20</sup>Zhang Yongjian, 'Towards a Fair, Efficient and Convenient Dispute Resolution Mechanism for B&R-related International Commercial Disputes: China's Practice and Innovation' (Speech at the Forum on the Belt and Road Legal Cooperation, Beijing, 2 Jul 2018) <<https://cicc.court.gov.cn/html/1/219/199/203/831.html>> accessed 5 Jun 2022.

<sup>21</sup>Teresa Cheng, 'Special Economic Zones: A Catalyst for International Trade and Investment in Unsettling Times?' (2019) 20 *The Journal of World Investment & Trade* 32, 63.

<sup>22</sup>Julien Chaisse & Georgios Dimitropoulos, 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law' (2021) 24 *Journal of International Economic Law* 229, 245.

<sup>23</sup>The DIFC is generally regarded as the first modern type of special economic zone in the financial sphere, which set the model for the internal structure of subsequent financial centres established in Qatar, Abu-Dhabi, and the Republic of Kazakhstan. See *The Law of the Dubai International Financial Centre (DIFC) No (9) of 2004* <[https://www.difc.ae/files/4414/5735/7076/Dubai\\_Law\\_No\\_9\\_of\\_2004\\_-\\_English.pdf](https://www.difc.ae/files/4414/5735/7076/Dubai_Law_No_9_of_2004_-_English.pdf)> accessed 23 Oct 2021; Federal Decree of the President of the United Arab Emirates No (15) of 2013 Concerning Establishing a Financial Free Zone in the Emirates of Abu Dhabi <[https://www.adgm.com/documents/legal-framework/federal-legislation/federal\\_decree\\_no\\_15\\_of\\_2013.pdf](https://www.adgm.com/documents/legal-framework/federal-legislation/federal_decree_no_15_of_2013.pdf)> accessed on 23 Oct 2021. See also Law No (7) of 2005 On the Promulgation of Law for the Qatar Financial Center <[https://qfca-en.thomsonreuters.com/sites/default/files/net\\_file\\_store/QFC\\_Law\\_7\\_of\\_2005-V1.pdf](https://qfca-en.thomsonreuters.com/sites/default/files/net_file_store/QFC_Law_7_of_2005-V1.pdf)> accessed 23 Oct 2021; Law No (4) of 2013 Concerning Abu Dhabi Global Market <[https://www.adgm.com/documents/legal-framework/abu-dhabi-legislation/abu\\_dhabi\\_law\\_no\\_4\\_of\\_2013.pdf](https://www.adgm.com/documents/legal-framework/abu-dhabi-legislation/abu_dhabi_law_no_4_of_2013.pdf)> accessed on 18 Dec 2021; Constitutional Statute of the Republic of Kazakhstan No 438-V Zrk on the Astana International Financial Centre (7 Dec 2015, amended 30 Dec 2019, entered into force 11 Jan 2020) <[https://online.zakon.kz/Document/?doc\\_id=39635390](https://online.zakon.kz/Document/?doc_id=39635390)> accessed on 5 Sep 2021 (hereinafter 'AIFC Constitutional Statute'). An English translation of the AIFC Constitutional Statute is available on the official web page of the AIFC, see <<https://aifc.kz/uploads/Expat/constitutional-statute-with-amendments-as-of-30-december-2019.pdf>> accessed 24 Oct 2021.

<sup>24</sup>See Ilias Bantekas, 'The Rise of Transnational Commercial Courts: The Astana International Financial Centre Court' (2020) 33 *Pace International Law Review* 1, 6. See also Andrew Dahdal & Francis Botchway, 'A Decade of Development: The Civil and Commercial Court of the Qatar Financial Centre' (2019) 34 *Arab Law Quarterly* 1, 4.

<sup>25</sup>Nicolas Zambrana-Tevar, 'The Court of the Astana International Financial Centre in the Wake of Its Persian Gulf Predecessors' [2019] *Erasmus Law Review* 122, 135.

<sup>26</sup>Irina Andreevna Baskakova (Ирина Андреевна Баскакова), 'Создание международного финансового центра «Астана» в рамках общего финансового рынка ЕАЭС (Sozdaniye mezhdunarodnogo finansovogo tsentra «Astana» v ramkakh obshchego finansovogo rynka YEAEU)' [Creation of the International Financial Centre 'Astana' within the Framework of the Common Financial Market of the EAEU] (2017) 4 *Вестник РГГУ. Серия «Политология. История. Международные отношения.»* (Vestnik RGGU. Seriya 'Politologiya. Istoriya. Mezhdunarodnyye otnosheniya.') [Bulletin of the Russian State University for the Humanities. Series 'Political Science. History. International Relations.'], 91, 110.

'100 Concrete Steps', whereby five steps were directly related to the creation of the AIFC and its Court, based on the example of the DIFC.<sup>27</sup> In accordance with the Nation's Plan, the legislative framework for the creation of the AIFC was established and in 2015 the *AIFC Constitutional Statute* was adopted, which is the most important piece of legislation regulating the financial centre. It provides that the AIFC has six main bodies in addition to the AIFC Court: the Management Council, which is the highest body; the Governor; the AIFC Authority; the Astana Financial Services Authority; and the International Arbitration Centre.<sup>28</sup> The AIFC Court, as well as its other bodies, are independent in their activities,<sup>29</sup> and the Court consists of two tiers: the Court of First Instance and the Court of Appeal. The Court of First Instance also includes the Small Claims Court (SCC), which has a special fast-track procedure for four types of disputes: where the amount in dispute is less than USD 150,000; where the claim is less than USD 300,000 and all the parties agree in writing to submit the claim to the SCC; where the claim relates to the employment or former employment of a party and all parties agree in writing to submit the claim to the SCC; and any other claim that the Chief Justice orders to be heard by the SCC.<sup>30</sup>

The AIFC Constitutional Statute provides for the exclusive jurisdiction of the AIFC Court over three types of disputes, specifically pertaining to civil and commercial matters arising out of transactions, contracts, arrangements, and incidences (notably, the Court cannot hear and adjudicate on criminal or administrative cases). The disputes that fall under the jurisdiction of the Court are divided into the following categories: firstly, disputes between AIFC participants, AIFC bodies, and their expatriate employees (AIFC participants are legal entities registered and recognised by the AIFC, and licensed to conduct specific types of activities);<sup>31</sup> secondly, disputes arising from activities conducted within the AIFC's territory and governed by its applicable law;<sup>32</sup> and finally the disputes transferred to the AIFC Court by agreement of the parties. Generally, there are twenty-nine types of regulated activities, including but not limited to dealing in investments as a principal, dealing in investments as an agent, managing investments, managing a collective investment scheme, and providing or arranging custody.<sup>33</sup> Moreover, the AIFC has contractual jurisdiction, which relates to disputes referred to the AIFC Court by the agreement of the parties. Accordingly, the term 'parties' relates to any party, even those not registered and those not conducting business in the AIFC. Parties may 'opt in' to the AIFC jurisdiction not only before the dispute arises but also after it has arisen.<sup>34</sup> And finally, the AIFC Court has an exclusive jurisdiction to interpret the AIFC Acts.<sup>35</sup> However,

<sup>27</sup>In general, steps twenty-four and seventy to seventy-three were set to establish the international financial centre in the capital of the Republic of Kazakhstan. One of the main benchmarks was to become one of the twenty most developed financial centres in the world. The plan also explicitly stated that the AIFC and its Court should operate on the principles of English common law, and that judges would be recruited from abroad. The English language is deemed to have official status within the AIFC. In addition, Islamic financing is highlighted as one of the important areas to be developed within the framework of the financial centre. See 'План нации – 100 конкретных шагов по реализации пяти институциональных реформ Главы государства Нурсултана Назарбаева (Plan natsii – 100 konkretnykh shagov po realizatsii pyati institutsional'nykh reform Glavy gosudarstva Nursultana Nazarbayeva) [The Nation's Plan – 100 Concrete Steps for the Implementation of the Head of State Nursultan Nazarbayev's Five Institutional Reforms]' (20 May 2015) <[https://online.zakon.kz/document/?doc\\_id=31977084](https://online.zakon.kz/document/?doc_id=31977084)> accessed 12 Sep 2021.

<sup>28</sup>AIFC Constitutional Statute, art 9.

<sup>29</sup>ibid art 9(2).

<sup>30</sup>AIFC Court Rules (1 Jan 2018) <<https://aifc.kz/files/legals/69/file/3.-legislation-aifc-court-rules-2018.pdf>> accessed 3 Oct 2021.

<sup>31</sup>AIFC Constitutional Statute, art 1.

<sup>32</sup>See the Resolution of the AIFC Management Council on the AIFC Court Regulations (5 Dec 2017) <<https://aifc.kz/files/legals/68/file/3.-legislation-aifc-court-regulations-2017.pdf>> accessed 24 Oct 2021 (hereinafter 'AIFC Court Regulations').

<sup>33</sup>AIFC Rules on AIFC General Rules No FR0001 (approved 17 Oct 2017, entered into force 1 Jan 2018, amended 9 Dec 2022, amendments effective as of 10 Dec 2022) <[https://aifc.kz/files/legals/65/file/gen-\\_v14\\_10.12.2022.pdf](https://aifc.kz/files/legals/65/file/gen-_v14_10.12.2022.pdf)> accessed 19 Dec 2023 (hereinafter 'AIFC General Rules').

<sup>34</sup>AIFC Court Regulations, art 26.

<sup>35</sup>AIFC Constitutional Statute, art 13(10).



the substantive law of the AIFC does not specify the procedure or instances in which the Court is to provide the official interpretation of the AIFC Acts.

Above that, the *AIFC Court Regulations* provide that the Court of First Instance has exclusive jurisdiction to hear and determine an appeal from a decision made by the AIFC bodies, organisation, or participants, where the appeal relates to: a question of law, an allegation of a miscarriage of justice, an issue of procedural fairness, or a matter provided for in or under AIFC law. Consequently, should there be an issue where the dispute falls within the jurisdiction of an AIFC Court, such a matter will be resolved by the Court itself, and its decision will be considered final.

### *Integration of Common Law Jurisdiction into a Civil Law System*

The creation of modern ICommCs has raised many questions, such as how the newly emerged common law jurisdictions – namely the DIFC, QFC, ADGM, and AIFC – fit into a civil law system. Many Kazakhstani scholars and legal practitioners have been sceptical or outright opposed to the initiative of creating a legal enclave within the state capital, Astana.<sup>36</sup> Critics have pointed out that there is a fundamental incompatibility between the civil law and the common law systems;<sup>37</sup> some have even suggested that the AIFC should be liquidated.<sup>38</sup>

When discussing legal frameworks, it is crucial to account for different international experiences. As noted above, ICommCs within the DIFC, the ADGM and the QFC operate under common law principles. This stands in contrast to the traditional civil law system in both the UAE and Qatar.<sup>39</sup> Similarly, the Republic of Kazakhstan has transitioned to a civil law jurisdiction since its time within the Soviet Union.<sup>40</sup> However, one of the main

<sup>36</sup>The main concerns of the local scholars were related to the incompatibility of the common and civil law systems, the fact that the Constitution of the Republic of Kazakhstan does not allow for the creation of a second legal system within the state, and that this could potentially pose a threat to the national security of the country. See Farkhad Karagusov (Фархад Карагусов), 'О попытке создать правовую основу для функционирования двух юрисдикций на территории Республики Казахстан (О попытке создать правовую основу для функционирования двух юрисдикций на территории Республики Казахстан)' [On the Attempt to Create a Legal Basis for the Functioning of Two Jurisdictions on the Territory of the Republic of Kazakhstan] (Online Zakon, 15 Feb 2016) <[https://online.zakon.kz/Document/?doc\\_id=39979088](https://online.zakon.kz/Document/?doc_id=39979088)> accessed May 2023. See also Maidan Suleimenov (Майдан Сулейменов), 'Система права и система законодательства Казахстана: выбор пути (Sistema prava i sistema zakonodatel'stva Kazakhstana: vybor puti)' [Kazakhstan's Legal and Legislative System: Choosing a Path] (Online Zakon, 15 Apr 2011) <[https://online.zakon.kz/Document/?doc\\_id=31102841](https://online.zakon.kz/Document/?doc_id=31102841)> accessed 22 Aug 2022. See also Arman Shaikenov (Арман Шайкенов) & Valikhan Shaikenov (Валихан Шайкенов), 'Конституционен ли МФЦА и помогут ли поправки в Конституцию? (Konstitutsionen li MFTSA i pomogut li popravki v Konstitutsiyu?) [Is the AIFC Constitutional and Will Constitutional Amendments Help?]' (Forbes Kazakhstan, 7 Mar 2017) <[https://forbes.kz/process/expertise/konstitutsionen\\_li\\_mftsa\\_i\\_pomogut\\_li\\_popravki\\_v\\_konstitutsiyu/](https://forbes.kz/process/expertise/konstitutsionen_li_mftsa_i_pomogut_li_popravki_v_konstitutsiyu/)> accessed on 13 May 2022.

<sup>37</sup>Maidan Suleimenov (Майдан Сулейменов), 'Перспективы внедрения судебного прецедента в правовую систему Казахстана (Perspektivy vnedreniya sudebnogo pretsedenta v pravovuyu sistemu Kazakhstana)' [Prospects for the Introduction of a Judicial Precedent into the Legal System of Kazakhstan] (2019) 55 Вестник Института законодательства и правовой информации Республики Казахстан (Vestnik Instituta zakonodatel'stva i pravovoy informatsii Respubliki Kazakhstan) [Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan] 49.

<sup>38</sup>Farhad Karagusov (Фархад Карагусов), 'Снова о Международном финансовом центре «Астана» (Snova o Mezhduнародном finansovom tsentre «Astana») [Once again on the Astana International Financial Centre] (Online Zakon, 9 Mar 2022) <[https://online.zakon.kz/Document/?doc\\_id=39068058](https://online.zakon.kz/Document/?doc_id=39068058)> accessed on 6 Jun 2022.

<sup>39</sup>Qatar and the UAE share a very similar historical trajectory, particularly in terms of the development of their legal systems. Both states have adopted a civil law system, strongly influenced by French and Egyptian civil law. At the same time, both Qatar and the UAE are Islamic states, and Sharia law applies to aspects of family, inheritance, and criminal law. See Zain Al Abdin Sharar, 'Does Qatar Need Reforming Its Arbitration Law and Adopting the UNCITRAL Model Law for Arbitration? A Comparative Analysis' (2011) 2 The Legal & Judicial Journal, Ministry of Justice, State of Qatar 1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2344139](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344139)> accessed 19 Apr 2022. See also 'Federal judiciary as per the UAE's Constitution' (UAE Government Website, 29 Mar 2022) <<https://u.ae/en/about-the-uae/the-uae-government/the-federal-judiciary>> accessed 15 Apr 2022.

<sup>40</sup>See Suleimenov, 'Sistema prava' (n 37).

differences between the Gulf States and the Republic of Kazakhstan is that the UAE and Qatar have been under the political and legal influence of the United Kingdom,<sup>41</sup> whereas the Republic of Kazakhstan was isolated from the rest of the world, having been part of the Soviet totalitarian regime for eighty years until its collapse. Post-independence, the sovereign Kazakhstani state made attempts to harmonise its legal system with other post-Soviet countries within the framework of the Eurasian Economic Union (EAEU), especially in the financial sphere.<sup>42</sup> The experiment of creating a legal enclave with common law jurisdiction is unprecedented in any of the post-Soviet countries. Moreover, despite the fact that the Gulf States and the Republic of Kazakhstan are considered to be civil law states, some scholars have suggested that this is not a relevant comparison due to the different state structures of the UAE and Qatar. As both states are monarchies, the establishment of a SEZ in the Gulf States is not subject to the same constitutional and legal issues as the establishment of a SEZ in the Republic of Kazakhstan.<sup>43</sup>

Despite claims of incompatibility between civil and common law systems, and the legislative discrepancies they entail, there are many examples of convergence between the two systems. Jurisdictions like Louisiana, Quebec, Puerto Rico, Ireland, and South Africa exhibit mixed legal systems incorporating case law and statutes.<sup>44</sup> In this regard, the experience of another unitary state is noteworthy, namely Israel, which is considered one of the classic examples of a mixed legal system, heavily influenced by Western legal principles and traditions.<sup>45</sup> Unlike most traditional mixed legal systems, the Israeli state was initially developed as a common law jurisdiction which later integrated civil law principles due to the influence of immigrants from continental Europe.<sup>46</sup> It is apparent, therefore, that the process of convergence of different legal systems is not limited to monarchies like the UAE and Qatar, but that it is also taking place within unitary republics such as Israel. Moreover, research suggests that most of the countries around the world have mixed legal systems,<sup>47</sup> and this is generally described as a process with many positive effects, such as the facilitation of international trade, overall economic development, further globalisation, the diffusion of culture, and a better understanding of legal traditions.<sup>48</sup>

<sup>41</sup>A Nizar Hamzeh, 'Qatar: The Duality of the Legal System' (1994) 30 *Middle Eastern Studies* 79.

<sup>42</sup>In 2020, the Eurasian Economic Commission prepared several initiatives to harmonise legislation within the EAEU – the union of five post-Soviet states, namely the Russian Federation, the Republic of Kazakhstan, the Republic of Belarus, the Kyrgyz Republic, and the Republic of Armenia. The Eurasian Economic Commission agreed to implement a number of important initiatives, including the signing of an agreement relating to a supranational body to regulate the common financial market of the EAEU, which was defined by the EAEU alongside a concept to form the common financial market. In addition, the plan included the standardisation of the licensing mechanism and the signing of the Standardised Licence Agreement to be developed by the Bank of Russia. The licence was to provide mutual access to the subsidiaries of the banks and insurance companies of the union members. Finally, a 'road map' was developed for the creation of a common exchange space for trading in the securities and financial instruments, which should link the exchange markets of the union states. For more information, see Eurasian Economic Commission, 'Eurasian Economic Commission Plan for harmonizing EAEU countries' legislation in the financial sector to be considered before year-end' (24 Jul 2020) <<http://www.eurasiancommission.org/en/nae/news/Pages/24.07.2020-2.aspx>> accessed 6 Jun 2022.

<sup>43</sup>Shaikenov & Shaikenov (n 36).

<sup>44</sup>Katja Funken, "'The Best of Both Worlds' – The Trend Towards Convergence of the Civil Law and the Common Law System' (Dec 2003) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=476461](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=476461)> accessed 14 May 2022.

<sup>45</sup>Nir Kedar, 'I'm in the East but My Law is from the West: The East-West Dilemma in the Israeli Mixed Legal System', in Vernon Valentine Palmer, Mohamed Y Mattar & Anna Koppel (eds), *Mixed Legal Systems, East and West* (Ashgate Publishing Company 2015).

<sup>46</sup>ibid.

<sup>47</sup>Vernon Palmer, 'Mixed Legal Systems – The Origin of the Species' (2013) 28 *The Tulane European and Civil Law Forum* 103, 104.

<sup>48</sup>John Henry Merryman, *The Civil Law Tradition: Europe, Latin America and East Asia* (The Michie Company 1994), as cited in Funken (n 44) 4.

## Analysis of the Criticisms of the AIFC Court

### Status of the AIFC Court

One of the main criticisms of the AIFC, and in particular its Court, relates to the place of the AIFC Court within the architecture of the judicial system of the Republic of Kazakhstan. As previously discussed, the AIFC Court, established in accordance with the AIFC Constitutional Statute, operates independently from state courts and is not formally part of Kazakhstan's judicial system.<sup>49</sup> This autonomy has raised concerns, given that Kazakhstan's *Constitution* prohibits to establish a special or emergency court under any name.<sup>50</sup> Indeed, some have described the AIFC Court as precisely such an 'emergency' or 'special' court,<sup>51</sup> which raises constitutional concerns. However, a closer examination reveals otherwise. Official interpretations (so-called Normative Resolutions) of the Kazakhstani Constitution, made by the now-abolished Constitutional Council, but still in force,<sup>52</sup> delineated 'special' and 'emergency' courts. According to their definition, 'emergency courts' historically emerged as special judicial or quasi-judicial bodies under the conditions of a totalitarian regime, typically linked to politically charged events, and include revolutionary tribunals as well as military revolutionary and military field courts.<sup>53</sup> 'Special courts', conversely, have one of the following characteristics: they are created and regulated by special regulatory acts and not by the Constitution or constitutional statutes; their administration is exempted from the general order of the legal proceedings, which creates conditions for the infringement of constitutional rights and the freedoms of the human being and the citizen; and finally, their creation violates the principle of the division of state power into legislative, executive, and judicial branches, which results in the dependence of special courts on the bodies of the executive branch. In this sense, the AIFC Court does not meet the definition of a 'special' or 'emergency' court, since it was established in accordance with the Constitution and the AIFC Constitutional Statute and is also regulated by the *Constitutional Statute of the Judicial System and the Status of the Judges of the Republic of Kazakhstan*.<sup>54</sup> Secondly, AIFC law does not infringe on the constitutional rights and freedoms of the citizens. It is also independent in its powers from the executive branch of the state.

As mentioned above, the AIFC is not an international court either, nor a supra-natural court, as it was not established by international agreements, but by a statute passed by Parliament in accordance with the Constitution. The AIFC Constitutional Statute explicitly states that the AIFC Court also operates independently from the national judicial system. Nevertheless, a review of the legislation shows that in order to harmonise the national judicial system and to avoid the problems of enforcement of the decisions of the AIFC Court, both domestically and abroad (which will be discussed later in this article), the AIFC Court should be integrated into the national judicial architecture.

But there is still a crucial question lingering about how the AIFC Court fits into the architecture of the national courts. In general, the justice system of the Republic of Kazakhstan consists of a

<sup>49</sup>The Constitution of the Republic of Kazakhstan (promulgated 30 Aug 1995, amended 10 Mar 2017), art 81.

<sup>50</sup>*ibid* art 75(4).

<sup>51</sup>Shaikenov & Shaikenov (n 36).

<sup>52</sup>The Constitution of the Republic of Kazakhstan, art 72(1)(4).

<sup>53</sup>Constitutional Council (Конституционный Совет), Постановление об официальном толковании пункта 4 статьи 75 Конституции Республики Казахстан N 1 от 14 апреля 2006 года (Postanovleniye ob ofitsial'nom tolkovanii punkta 4 stat'i 75 Konstitutsii Respubliki Kazakhstan N 1 ot 14 aprelya 2006 goda) [Resolution on the official interpretation of paragraph 4 of Article 75 of the Constitution of the Republic of Kazakhstan No 1 of 14 Apr 2006] <[https://adilet.zan.kz/rus/docs/S060000001\\_#z0](https://adilet.zan.kz/rus/docs/S060000001_#z0)> accessed 22 Sep 2022.

<sup>54</sup>Конституционный закон Республики Казахстан от 25 декабря 2000 года No 132-II о судебной системе и статусе судей Республики Казахстан (Konstitutsionnyy zakon Respubliki Kazakhstan ot 25 dekabrya 2000 goda No 132-II o sudebnoy sisteme i statuse sudey Respubliki Kazakhstan) [Constitutional Statute No 132-II of 25 Dec 2000 on the Judicial System and the Status of Judges of the Republic of Kazakhstan] <[https://online.zakon.kz/Document/?doc\\_id=1021164](https://online.zakon.kz/Document/?doc_id=1021164)> accessed on 3 Mar 2022 (hereinafter 'Constitutional Statutes on Judicial System').



three-tier system, with the Supreme Court as the highest judicial body, followed by the regional and their equivalent courts, and finally the district and their equivalent courts.<sup>55</sup> Regional and district courts are collectively known as local courts. In addition, other types of courts may be established in Kazakhstan, including ‘specialised courts’ in military, financial, economic, administrative, juvenile, and other spheres.<sup>56</sup> Specialised courts are established by the President of Kazakhstan and have the status of either a regional or a district court.<sup>57</sup> Potentially, the AIFC Court could be recognised as a local court, specifically as a specialised court in the financial sphere, as the Court’s jurisdiction is limited to the resolution of civil or commercial disputes arising from transactions, contracts, arrangements, or incidences.<sup>58</sup> If acknowledged as a local court, the AIFC Court would be subject to the jurisdiction of the Supreme Court of the Republic of Kazakhstan, which is the highest judicial body in civil, criminal, and other cases.<sup>59</sup> However, AIFC law provides that the decisions of the AIFC Court of Appeal stand as final, immune to appeal, and binding on all natural and legal persons.<sup>60</sup> Moreover, the genesis of the AIFC Court was to position it outside the jurisdiction of the Kazakhstani Supreme Court, assuring international investors exemption from the jurisdiction of the national courts. This could potentially lead to political and social tensions and will eventually require a legislative solution.

Another pressing matter revolves around the enforcement of AIFC Court decisions abroad. Legislative steps have been initiated for the decisions of the AIFC Court to be enforced within the Republic of Kazakhstan.<sup>61</sup> However, scholarly discussions have surfaced regarding the applicability of Kazakhstan’s international agreements governing the enforcement of decisions to the AIFC Court, considering that it is not part of the national court system.<sup>62</sup> Against this background, it is within the interests of the Republic of Kazakhstan to clearly identify the place of the AIFC Court within the justice system of the state.

One possible solution involves amending two legislations: the AIFC Constitutional Statute and the Constitutional Statutes on Judicial System. Specifically, addressing the provision that exempts the AIFC Court from the Kazakhstani court system could resolve the conflict of norms, stating that the AIFC Court is part of the Kazakhstani judicial system, albeit still operating outside the jurisdiction of the Supreme Court or any other local courts within the Republic of Kazakhstan. This adjustment would establish the AIFC Court’s autonomy from national courts while seamlessly integrating it into the judicial system.

### *The Applicable Law of the AIFC and its Court*

Despite the fact that the experience of the DIFC was primarily taken into account in the creation of the AIFC, a considerable amount of work had to be done in order to create a new regulatory framework adapted to Kazakhstan’s realities. The legal system of the AIFC is referred to by the term ‘acting law’,<sup>63</sup> which relates to the set of existing normative documents regulating the financial centre and its activities.

To establish a clear structure, the AIFC laws have a specific descending hierarchy, which is outlined by the AIFC Constitutional Statute. At the pinnacle stands the Constitution, possessing the highest legal authority. Following this, the hierarchy includes the AIFC

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid* art 3(3).

<sup>57</sup> *ibid* art 3-1.

<sup>58</sup> AIFC Court Regulations, art 2/26.

<sup>59</sup> AIFC Constitutional Statute, art 1.

<sup>60</sup> AIFC Court Regulations, art 13/7.

<sup>61</sup> AIFC Constitutional Statute, art 13(8).

<sup>62</sup> See Zambrana-Tevar (n 25).

<sup>63</sup> AIFC Constitutional Statute, art 4.

Constitutional Statute itself, subsequent internal acts of the AIFC adopted by the AIFC bodies, and finally, the laws of the Republic of Kazakhstan, which are applicable to matters not regulated by the preceding acts.<sup>64</sup>

However, there is an act called the *AIFC Regulations on AIFC Acts of 2017*<sup>65</sup> that also establishes a hierarchy of applicable law, although the hierarchy differs from that specified in the AIFC Constitutional Statute. Notably, while the AIFC Constitutional Statute stipulates that the ‘acting law’ of the AIFC is based on the Constitution of the Republic of Kazakhstan, the AIFC Regulations on AIFC Acts bind the ‘acting law’ only to a single paragraph of the Constitution regarding the establishment of the special legal regime in the city of Astana. Another difference is that the Regulations on AIFC Acts do not include Kazakhstani laws as part of the applicable law or within the hierarchy of AIFC law.

The narrowing of the scope of application of the Constitution by the internal AIFC law does not seem to be in line with its general concept that AIFC Acts shall not revise or amend the provisions of the legal acts that hold greater legal authority. This is evident from the fact that the AIFC Constitutional Statute itself stipulates that the AIFC Acts shall not be ‘inconsistent with this Constitutional Statute’.<sup>66</sup>

Apart from the laws mentioned above, two other sources contribute to AIFC law. The first comprises ratified international treaties, which hold precedence over the substantive law of the AIFC.<sup>67</sup> The second involves case law, since it has been established that the AIFC Court may take into account its own final judgments and ‘final judgements of the courts of other common law jurisdictions’.<sup>68</sup> However, the precedents are regarded as subsidiary; the law explicitly allows their consideration during adjudication, at the judges’ discretion.

There is, however, some ambiguity in the reference to ‘other common law jurisdictions’. While it is reasonable to assume that the AIFC Court will mainly reference English case law since the AIFC Acts are developed ‘on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres’,<sup>69</sup> the language in the AIFC Constitutional Statute evidently allows for the application of precedents from other common law jurisdictions. However, the applicable law of the AIFC does not specify the exact list of such jurisdictions, which raises questions about whether the decisions of the courts of a mixed common law jurisdiction such as Scotland, Quebec, or Louisiana<sup>70</sup> could be considered by the AIFC Court. Clarity on this matter falls within the purview of the Court, given its exclusive jurisdiction to interpret AIFC Acts.

Notwithstanding its relatively clear structure, the AIFC law remains a controversial subject, with many scholars struggling to identify its essence and its place within the national legal system.<sup>71</sup> Some researchers define AIFC law as English law<sup>72</sup> or identify the Acts of the AIFC as the primary

<sup>64</sup> *ibid* art 4(1).

<sup>65</sup> AIFC Regulations on AIFC Acts No 1 of 2017, art 8.

<sup>66</sup> AIFC Constitutional Statute, art 4(1)(2).

<sup>67</sup> *ibid* art 4(4).

<sup>68</sup> *ibid* art 13(6).

<sup>69</sup> *ibid* art 4(1)(2).

<sup>70</sup> Research on the list of mixed legal systems has been conducted by the University of Ottawa. The research includes the identification of eleven types of mixed legal systems and the classification of each state as belonging to a specific type of mixed legal system. For more information, see JuriGlobe – World Legal Systems Research Group, ‘Mixed Legal Systems’ <<http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php>> accessed 19 May 2022.

<sup>71</sup> See Karagusov, ‘Snova’ (n 38).

<sup>72</sup> See Maidan Suleimenov (Майдан Сулейменов) & Asel Duysenova (Асель Дуйсенова), ‘Смешанные юрисдикции и правовая система Республики Казахстан (публично-правовые и частноправовые аспекты) (Smeshannyye yurisdiksiii i pravovaya sistema Respubliki Kazakhstan (publichno-pravovyye i chastnopravovyye aspekty)) [Mixed Jurisdictions and the Legal System of the Republic of Kazakhstan (Public Law and Private Law Aspects)]’ (2021) 3 Вестник КарГУ (Vestnik KarGU) [Bulletin of the Karagandy State University] 118, 123.

law and the laws of England and Wales as the secondary law, whilst Kazakhstani laws are not applicable in the territory of the AIFC's jurisdiction.<sup>73</sup>

This statement, however, does not seem to be accurate. Despite the fact that the AIFC Acts are integrating common law principles within the financial centre's jurisdiction, it is incorrect to label them as laws of a foreign country, specifically England and Wales. We have established that the Constitution of the Republic of Kazakhstan and the AIFC Constitutional Statute stand as the primary legal sources within the AIFC. Above that, the Acts of the AIFC bodies that follow in the hierarchy of applicable law 'may be' based on the principles, legislation, precedents of the law of England and Wales, alongside standards of leading global financial centres. The term 'may be' signifies that the AIFC Acts do not directly adopt English and Welsh legislation, but instead use them as a model law for the AIFC when developing and adopting internal regulations, akin to the standards of leading global financial centres like the DIFC, the ADGM, and the QFC.

To date, more than four hundred distinct AIFC Acts have been adopted, including rules, regulations, notices, glossaries, and consultation papers, which cover and regulate a vast array of issues, ranging from corporate law to banking and Islamic financing.<sup>74</sup> Moreover, in matters not governed by the AIFC Constitutional Statute and the AIFC Acts, the legislative system of the Republic of Kazakhstan does in fact apply in the AIFC.<sup>75</sup> For instance, payment of taxes is carried out in accordance with the Kazakhstani tax legislation,<sup>76</sup> and an analysis of the AIFC employment regulation reveals that it is conducted in accordance with the Kazakhstani labour laws, including enrolment in pension schemes for Kazakhstani citizens.<sup>77</sup>

Regarding legal precedence, the hierarchy of the AIFC suggests that Kazakhstani law holds priority over case law, since the national legislation of the Republic of Kazakhstan holds a specific place in the hierarchy, mandating that the AIFC Court adheres to AIFC laws, while the precedents of the AIFC Court or any other common law court 'may be' taken into account when adjudicating disputes in the AIFC Court.

Therefore, the AIFC Acts cannot be solely considered as part of the legal jurisdiction of England and Wales. Furthermore, for the principles stemming from England and Wales to be applicable within the AIFC, they must be adopted by the AIFC bodies in the form of Acts.

However, the *AIFC Trust Regulations of 2019*<sup>78</sup> explicitly reference '[t]he common law of Trusts and principles of equity applicable in England and Wales', determining that they shall 'supplement these Regulations, except to the extent modified by these Regulations or any other AIFC Act or by the Court'. Notably, however, this provision in the AIFC Acts only assigns a 'supplementary' role to the law of trusts of England and Wales. Overall, an analysis of the functioning of the AIFC suggests that the AIFC could be considered as an area of mixed jurisdiction, based on statutory law and supplemented by case law. Furthermore, the substantive law should not be defined as law of England and Wales, but rather as a part of the legal system of the Republic of Kazakhstan. Similarly to the AIFC Court, the AIFC laws are enacted in accordance with the Constitution and the AIFC Constitutional Statute. The laws of the Republic of Kazakhstan apply to the relations not governed

<sup>73</sup>See Maidan Suleimenov (Майдан Сулейменов) & Asel Duysenova (Асель Дуйсенова), 'Государство Республики Казахстан как Смешанная Юрисдикция (Gosudarstvo Respubliki Kazakhstan kak Smeshannaya Yurisdiksiya) [The State of the Republic of Kazakhstan as a Mixed Jurisdiction]' in Svetlana Moroz (Светлана Мороз) et al (eds), 'Субъекты Гражданского Права и Реформа Систем Юридических Лиц (Sub'yekty Grazhdanskogo Prava i Reforma System Yuridicheskikh Lits) [Subjects of Civil Law and Reform of the Legal Entity System]' (Almaty 2021).

<sup>74</sup>The official texts of the AIFC Acts are published on the official page of the AIFC with classification by different spheres of social relations. See AIFC, 'Legal Framework' <<https://aifc.kz/en/legal-framework>> accessed 1 May 2023.

<sup>75</sup>AIFC Constitutional Statute, art 4(1)(3).

<sup>76</sup>ibid art 6(1).

<sup>77</sup>AIFC Employment Regulation No 4 (20 Dec 2017, amended 22 Feb 2019) <[https://aifc.kz/files/legals/219/file/4.-aifc-employment-regulations-2017\\_with-amendments-as-of-22-february-2019\\_new-design.pdf](https://aifc.kz/files/legals/219/file/4.-aifc-employment-regulations-2017_with-amendments-as-of-22-february-2019_new-design.pdf)> accessed 3 May 2023.

<sup>78</sup>AIFC Trust Regulations No 31 (6 Aug 2019), art 7 <<https://authority.aifc.kz/files/legals/20/file/9.-aifc-trust-regulations-no.-31-of-2019.pdf>> accessed 1 May 2023.

by the AIFC Acts. In addition, the AIFC Acts are adopted in accordance with the AIFC Constitutional Statute; they regulate only the specific scope of issues identified by the AIFC Constitutional Statute and their applicability is limited to the territory of the AIFC within the capital city of Astana.<sup>79</sup>

### Potential Benefits of the AIFC Court

Despite the inherent legal inconsistencies that the AIFC and its Court create within the national legal system of the Republic of Kazakhstan, there are still many advantages to creating a court that operates on the principles of the common law system. It has been noted that the blending of arbitration and litigation, internationalisation, and the increasing autonomy of the parties are values of modern ICommCs.<sup>80</sup> Moreover, the example of the LCC proves the lucrative benefits of a competitive ICommC.<sup>81</sup> Against this background, ICommCs can therefore constitute effective instruments to attract international investors by providing a venue for the resolution of high-value disputes.<sup>82</sup> This generally marks an interesting trend where states view the court system as a commodity, and dispute resolution as a service market. As a result, the ICommCs and their respective international chambers are seen as an independent business<sup>83</sup> generating a significant amount of profit.<sup>84</sup> This section, however, will examine the non-economic factors that could positively contribute to the development of the national justice system of the Republic of Kazakhstan and its neighbouring states.

### The Impact of the AIFC and its Court on the National Justice System of the Republic of Kazakhstan

The existence of the AIFC and its Court has triggered several interesting processes, including interaction with the national judicial system of the Republic of Kazakhstan, as well as influence on other Central Asian states. In general, the last six years have been marked by several important initiatives to develop the Kazakhstani justice system,<sup>85</sup> and many experts note positive trends.<sup>86</sup>

This is a particularly sensitive issue for international investors, who seek security and stability for their investments and business operations. As a result, one of the Central Asian states' key credentials in attracting foreign business is ensuring the security of investments. However, a 2022 report by the 'World Justice Project' (WJP), which assesses and ranks judicial and legal systems in what it calls

<sup>79</sup>The Constitution of the Republic of Kazakhstan, art 2(3-1).

<sup>80</sup>Үйп (n 3).

<sup>81</sup>Portland Communications (n 9).

<sup>82</sup>Requejo Isidro (n 1).

<sup>83</sup>Anselmo Reyes, 'The Business of International Dispute Resolution' (2017) 4 Journal of International and Comparative Law 69, 70.

<sup>84</sup>Deborah R Hensler & Damira Khatam, 'Re-Inventing Arbitration: How Expanding the Scope of Arbitration is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication' (2018) 18 Nevada Law Journal 381, 406.

<sup>85</sup>See Lyazzat Nazarkulova (Ляззат Назаркулова) & Almas Salpekov (Алмас Салпеков), 'Некоторые вопросы совершенствования судейских кадров в Республике Казахстан (Nekotoryye voprosy sovershenstvovaniya sudeyskikh kadrov v Respublike Kazakhstan) [Some Issues Regarding the Improvement of Judicial Personnel in the Republic of Kazakhstan]' (2020) 59 Вестник Института законодательства и правовой информации Республики Казахстан (Vestnik Instituta zakonodatel'stva i pravovoy informatsii Respubliki Kazakhstan) [Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan] 118. See also Gulnara Suleimenova (Гульнара Сулейменова), 'Основные этапы судебной реформы в Республике Казахстан (Osnovnyye etapy sudebnoy reformy v Respublike Kazakhstan) [The Main Stages of Judicial Reform in the Republic of Kazakhstan]' (Online Zakon, 29 Jan 2004) <[https://online.zakon.kz/Document/?doc\\_id=36866416](https://online.zakon.kz/Document/?doc_id=36866416)> accessed 4 Aug 2022.

<sup>86</sup>Tatyana Kiseleva (Татьяна Киселёва), 'Судебная реформа в РК: что хорошего уже сделано, а чего не хватает? — мнение адвокатов (Sudebnaya reforma v RK: chto khoroshego uzhe sdelano, a chego ne khvatayet? — mneniye advokatov) [Judicial Reform in the Republic of Kazakhstan: What Good Has Already Been Done, and What is Lacking? — The Opinion of Lawyers]' (365 Info.kz, 27 Sep 2021) <<https://365info.kz/2021/09/sudebnaya-reforma-v-rk-chto-horoshego-uzhe-sdelano-a-chego-ne-hvataet-mneniye-advokatov>> accessed 13 Mar 2022.

the ‘Rule of Law Index’, states that access to an impartial judicial system is a tangible problem for the region: the Republic of Kazakhstan is ranked 65<sup>th</sup> on the index, the second highest of all post-Soviet countries, after Georgia, which is ranked 49<sup>th</sup>.<sup>87</sup> Ukraine is ranked 76<sup>th</sup>, the Republic of Uzbekistan 78<sup>th</sup>, the Belarusian Republic 99<sup>th</sup>, the Kyrgyz Republic 100<sup>th</sup>, and the Russian Federation 107<sup>th</sup> out of 140 countries in the world. With most of the post-Soviet countries being in the second half of the index, it is clear that not only the Republic of Kazakhstan, but also all neighbouring jurisdictions are in need for judicial reform.

At the same time, most common law countries rank very high in the index: New Zealand is ranked 7<sup>th</sup>, the Republic of Ireland 10<sup>th</sup>, Canada 12<sup>th</sup>, Australia 13<sup>th</sup>, the United Kingdom 15<sup>th</sup>, Singapore 17<sup>th</sup>, Hong-Kong 22<sup>nd</sup>, and the United States 26<sup>th</sup>. However, the President of the Republic of Kazakhstan has announced a reform of the judicial system and continues to pursue the goal of improving the overall situation, and the fact that an institution such as the AIFC Court exists and is available to the international business provides additional protection for investor interests and gives the Republic of Kazakhstan an edge, especially when competing with other Central Asian and Eastern European neighbours.

Another positive trend emerges as the Supreme Court of the Republic of Kazakhstan displays a willingness to cooperate and integrate the experiences of the AIFC Court and its judges.<sup>88</sup> In 2017, prior to the official opening of the AIFC Court, a memorandum on mutual cooperation between the Supreme Court and the AIFC was signed.<sup>89</sup> Since then, numerous official meetings have been held between national judges and justices of the AIFC Court,<sup>90</sup> including lectures conducted by the AIFC Court to local judges.<sup>91</sup> This clearly demonstrates an understanding of the value of the AIFC Court from the perspective of the national justice system and what it could potentially bring to the Kazakh state.

In terms of the composition of the AIFC Court, it was initially established under the supervision and chairmanship of Lord Woolf,<sup>92</sup> the former Lord Chief Justice of England

<sup>87</sup>For more information, see World Justice Project, ‘Rule of Law Index 2022’ <<https://worldjusticeproject.org/rule-of-law-index/global/2022>> accessed 10 May 2023.

<sup>88</sup>Since 2017, the Supreme Court of the Republic of Kazakhstan has held several official meetings, signed the Memorandum of Mutual Cooperation, and also held several lectures with the judges of the AIFC Court, including the Chief Justice for the judges of the Republic of Kazakhstan. See Supreme Court of the Republic of Kazakhstan, ‘Жоғарғы Сотта АХҚО судьяларымен кездесу өтті’ (Joǵarǵı Sotta AXQO swdyalarımen kezdesw ötti) [A meeting was held with judges of the Supreme Court] <<https://sud.gov.kz/kaz/news/zhogargy-sotta-ahko-sudyalarymen-kezdeshu-otti>> accessed on 19 Dec 2023. ‘Ж.Асанов провел встречу с судьями Суда МФЦА (Z.Asanov provel vstrechu s sud'yami Suda MFTSA) [Zh. Asanov Held a Meeting with Judges of the AIFC Court]’ <<https://sud.gov.kz/rus/news/zhasanov-provel-vstrechu-s-sudyami-sudamfca>> accessed on 19 Dec 2023. ‘Судьи Верховного Суда встретились с председателями суда и Международного арбитражного Центра МФЦА (Sud'i Verkhovnogo Suda vstretilis' s predsedatelyami suda i Mezhdunarodnogo arbitrazhnogo Tsentra MFTSA) [Judges of the Supreme Court met with the chairmen of the court and the AIFC International Arbitration Center]’ <<https://sud.gov.kz/rus/news/sudi-verhovnogo-suda-vstretilis-s-predsedatelyami-suda-i-mezhdunarodnogo-arbitrazhnogo-centra>> accessed on 19 Dec 2023. ‘Между Верховным Судом, судом и Международным арбитражным центром МФЦА подписан Меморандум о сотрудничестве (Mezhdu Verkhovnym Sudom, sudom i Mezhdunarodnym arbitrazhnym tsentrom MFTSA podpisan Memorandum o sotrudnichestve) [A Memorandum of Cooperation was Signed Between the Supreme Court, the Court and the AIFC International Arbitration Center]’ <<https://sud.gov.kz/rus/news/mezhdu-verhovnym-sudom-sudom-i-mezhdunarodnym-arbitrazhnym-centrom-mfca-podpisan-memorandum-o>> accessed on 19 Dec 2023.

<sup>89</sup>ibid.

<sup>90</sup>ibid.

<sup>91</sup>Supreme Court of the Republic of Kazakhstan, ‘АХҚО сотының судьясы Руперт Джексон Қазақстан Жоғарғы Сотындағы әріптестерінің алдында дәріс оқыды (AXQO sotınıń swdyası Rwpert Djekson Qazaqstan Joǵarǵı Sotındaǵı әriptesterininiń aldında дәris oqıdı) [Rupert Jackson, Judge of the International Criminal Court, Gave a Lecture to his Colleagues at the Supreme Court of Kazakhstan]’ <<https://sud.gov.kz/kaz/news/ahko-sotyнын-sudyasy-rupert-dzhekson-kazakistan-zhogargy-sotyndagy-riptesterinin-aldynda-drıs>> accessed on 19 Dec 2023. See further ‘АХҚО сотының судьясы Қазақстан судьяларына дәріс оқыды (AXQO sotınıń swdyası Qazaqstan swdyalarına дәris oqıdı) [A Judge of the ICAO Court gave a Lecture to the Judges of Kazakhstan]’ <<https://sud.gov.kz/kaz/news/ahko-sotyнын-sudyasy-kazakistan-sudyalaryna-drıs-okydy>> accessed on 19 Dec 2023.

<sup>92</sup>For more information regarding the first Chief Justice of the AIFC Court, see AIFC, ‘Председатель Суда МФЦА (Predsedatel' Suda MFTSA) [Chairman of the AIFC Court]’ <<https://court.aifc.kz/ru/chief-justice/>> accessed 28 Nov 2021.



and Wales.<sup>93</sup> Following his resignation in 2020, Lord Mance, who is also regarded as one of the most eminent judges, was appointed Chief Justice of the AIFC Court.<sup>94</sup> Currently, the position is held by Lord Burnett of Maldon, who previously served as Lord Chief Justice of England and Wales from 2017 to 2023.<sup>95</sup> In addition, the remaining judges of the AIFC Court are highly respected experts in the field.<sup>96</sup> Against this background, the existence of such dispute resolution mechanisms is not only beneficial to the local legal system, but could also add value to the Republic of Kazakhstan as a safe place for investors to operate and do business.

Potentially, the role of English common law could increase further if the country's leadership continues to adopt international practices and expand their applicability. For example, it is interesting to note the dynamics of the interactions between the AIFC and the state authorities. As mentioned earlier, the national justice system is clearly interested in cooperating with the AIFC Court. Moreover, the Parliament of Kazakhstan has taken into account common law principles in regulating civil relations. To this end, the lower house of the parliament, the *Mäjilis*, has proposed several amendments to the Civil Code of the Republic in order to incorporate English law norms, including promissory estoppel, representation and warranties, and indemnity clauses into the civil law.<sup>97</sup> Evidently, common law principles have a direct influence and impact on the judicial and legal system of the Republic of Kazakhstan.

Moreover, the AIFC Court and the practice of English judges in administering justice stands as a potential blueprint for advancing other facets within Kazakhstan's legal system. Before Kazakhstan joined the Russian Empire and later became part of the Soviet Union, it had a significant customary legal system known as *adat*. Within this system, judges played a pivotal role in dispensing justice.<sup>98</sup> For instance, customary laws were constantly evolved and refined through the judicial activity of khans, sultans, and particularly the revered *biys*<sup>99</sup> – Kazakh judges that held immense significance in traditional Kazakh society, exercising crucial roles in administering justice for centuries.<sup>100</sup> The practice of the court of *biys* served as a formative source of law for many centuries, though it was not until the 19<sup>th</sup> century that this practice was formalised in writing, leaving room for varied interpretations in law enforcement practices.<sup>101</sup> Unfortunately, the court of *biys* ceased functioning when Kazakhstan became part of the Soviet Union.

<sup>93</sup>For more information, see World Justice Project, 'Rt. Hon. Harold Woolf' <[https://worldjusticeproject.org/about-us/who-we-are/honorary-chairs/harold\\_woolf](https://worldjusticeproject.org/about-us/who-we-are/honorary-chairs/harold_woolf)> accessed 10 May 2023.

<sup>94</sup>See AIFC, 'Состоялась церемония принесения присяги Председателем Суда МФЦА Лордом Мансом (Sostoyalas' tseremoniya prineseniya prisyagi Predsedatelem Suda MFTSA Lordom Mansom) [The Affirmation Ceremony for the Chief Justice of the AIFC Court, Lord Mance]' (8 Jul 2020) <<https://court.aifc.kz/news/the-affirmation-ceremony-for-chief-justice-of-aifc-court-lord-mance/>> accessed 3 Sep 2022.

<sup>95</sup>See AIFC, 'Who We Are' <<https://court.aifc.kz/en/who-we-are>> accessed 19 Dec 2023.

<sup>96</sup>*ibid.*

<sup>97</sup>The Government of the Republic of Kazakhstan announced its plans to introduce amendments to twenty-nine different legislative acts, including amendments to the Civil Code of the Republic of Kazakhstan. For more information, see Постановление Правительства о Плане законопроектных работ Правительства Республики Казахстан на 2022 год No 991 от 31 декабря 2021 года (Postanovleniye Pravitel'stva o Plane zakonproyektnykh rabot Pravitel'stva Respubliki Kazakhstan na 2022 god No 991 ot 31 dekabrya 2021 goda) [Decree of the Government on the Legislative Work Plan of the Government of the Republic of Kazakhstan for 2022 No 991 of Dec 2021] <<https://adilet.zan.kz/rus/docs/P2100000991>> accessed on 28 Jul 2022.

<sup>98</sup>Ayagoz Sultanova (Аягоз Султанова), 'Адат как способ взаимоотношений между кочевниками (Adat kak sposob vzaimootnosheniy mezhd kochevnikami) [Adat as a Means of Relations between Nomads]' (Научные статьи Казахстана (Nauchnyye stat'i Kazakhstana) [Scientific Articles of Kazakhstan], 2014) <<https://articlekz.com/article/8927>> accessed on 15 Aug 2022.

<sup>99</sup>*ibid.*

<sup>100</sup>Salyk Zimanov (Салык Зиманов), *Казахстанский суд биев – уникальная система правосудия (Kazakhstanskiy sud biyev – unikal'naya sistema pravosudiya)* [The Kazakh Court of Biys – A Unique Justice System] (Атамұра (Atamura) 2008) 34–36.

<sup>101</sup>Sultanova (n 98).

Recently, however, the government has taken the initiative to revive this traditional practice, and ‘*biy* councils’ have begun to operate again in various regions of the country as mediation centres for the resolution of civil disputes,<sup>102</sup> though many national legal scholars and practitioners are calling for a re-evaluation of the historical legacy of the traditional Kazakh legal system and a further expansion of the implementation of the council of *biys*.<sup>103</sup> In this regard, there is an opportunity to learn from the existing AIFC Court and the practice of English judges in administering justice, with the aim of using it in the reconstruction process of the traditional Kazakh court of *biys*.

### Important Precedents

Although it has generated considerable controversy within the Kazakhstani legal community, the work of the AIFC Court itself and its decisions have been largely ignored. However, in order to assess the impact of the AIFC Court, it is essential to analyse its decisions and the reputation that it has gained in relation to the AIFC and the Republic of Kazakhstan.

The AIFC Court was established in 2017,<sup>104</sup> but only began its work in 2018.<sup>105</sup> Within six years of operation, it had issued 101 decisions.<sup>106</sup> The first case was decided in 2019, which was the only dispute resolved that year. However, in 2020 the Court issued eleven decisions; fifteen and twenty-seven decisions in 2021 and 2022, respectively; and forty-six decisions in 2023.

A review of the Court’s decisions shows that twenty-six decisions concerned contractual disputes, and twenty-three concerned the enforcement of mediation and/or arbitral awards. Above that, fifteen decisions concerned labour issues, and seven mergers and amalgamations. Ten cases were discontinued, two of which were due to the Court’s lack of jurisdiction over the dispute, one case on anti-suit injunction and one claim seeking an order from the AIFC Court to enforce a foreign court’s judgment. The remaining cases were the appeal decisions of the disputes between the same parties.

Of the total of 101 decisions, four pitted state agencies against private parties in disputes whose outcomes may be of particular interest to international investors, since one of the main reasons for creating the AIFC within the common law court system in the first place was to attract international business to the region. However, as noted in the previous section, the justice systems of the Central Asian states, including the Republic of Kazakhstan, still lack the necessary credibility with the international community. Therefore, the decisions of the AIFC Court in disputes with government agencies can serve as a stepping stone in developing a good reputation for the AIFC as a safe environment for international investors.

<sup>102</sup>Currently, the ‘*biy* councils’ have started to operate in nine different regions of the Republic of Kazakhstan, including Mangistau, Atyrau, Semey, Shymkent, Turkestan, Taraz, Kyzylorda, Zhambyl, and Kokshetau. For more information on the ‘*biy* councils’, see Supreme Court of the Republic of Kazakhstan, ‘*Biy* Council’ <<https://sud.gov.kz/rus/tag/sovet-biev>> accessed 28 Aug 2022.

<sup>103</sup>Kanat Duyssembiev (Канат Дуйсембиев), ‘Совет биев, возврат к истокам (Sovet biyev, vozvrat k istokam) [Council of *Biys*, Returning to Basics]’ (Online Zakon, 3 Apr 2019) <[https://online.zakon.kz/Document/?doc\\_id=38861900](https://online.zakon.kz/Document/?doc_id=38861900)> accessed on 5 Sep 2022. See also Arina Gorbunova (Арина Горбунова), ‘Отчего плачут судьи и чего боятся инвесторы (Otchego plachut sud’i i chego boyatsya investory) [Why Judges Cry and What Investors Are Afraid of]’ (Forbes Kazakhstan, 13 Jul 2018) <[https://forbes.kz/process/expertise/otchego\\_plachut\\_sudi\\_i\\_chego\\_boyatsya\\_investoryi/](https://forbes.kz/process/expertise/otchego_plachut_sudi_i_chego_boyatsya_investoryi/)> accessed on 10 Aug 2022.

<sup>104</sup>Lord Woolf CH, *A Vision of the AIFC Court* (Christopher Campbell-Holt ed, AIFC Court 2019) 6.

<sup>105</sup>The AIFC Court and the IAC have dealt with more than nine hundred cases, the majority of which have been arbitration and mediation cases. In addition, 326 different lawyers from twenty-nine jurisdictions (twenty-seven countries) have joined the AIFC Court in order to represent their clients in cases before the AIFC Court. In addition, the AIFC Court and the IAC model are actively handling disputes concerning resolution clauses in more than 5,700 commercial contracts, with a value in excess of USD 2 billion, indicating the attractiveness of the AIFC Court in international business. For more information, see AIFC Court, ‘AIFC Court and IAC present their 2021 results and future plans’ (Press Release, 29 Dec 2021) <<https://court.aifc.kz/news/aifc-court-and-iac-present-their-2021-results-and-future-plans/>> accessed 15 Sep 2022.

<sup>106</sup>The complete list of cases starting from 2019 is available on the official website of the AIFC Court. See ‘Judgments & Orders’ <<https://court.aifc.kz/en/judgments>> accessed 19 Dec 2023.

Across these four cases, the AIFC Court consistently ruled in favour of the private businesses. For instance, in the Court's first case in 2021, the company Success K LLP brought a claim against the Ministry of Healthcare of the Republic of Kazakhstan to recognise and enforce the arbitration award of the International Arbitration Centre of the AIFC (IAC).<sup>107</sup> The defendant's argument rested on Kazakhstan's *Law on Arbitration*<sup>108</sup> and *Law on State Property*,<sup>109</sup> asserting that the arbitration clause was null and void without consent from the Ministry of Finance. The claim was dismissed on the grounds that the *AIFC Arbitration Regulations of 2017*<sup>110</sup> were applicable. After reviewing the dispute, the AIFC Court dismissed the Ministry of Healthcare's application to set aside and refuse recognition or enforcement of the award and granted recognition and enforcement of the original arbitral award for payment of approximately 75 million tenge (USD 172,000).

The second and third cases concerned disputes between the private company JSC Cengiz Insaat Sanayi ve Ticaret AS (JSC Cengiz) as claimant and the Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan (Ministry of Industry) as defendant. At first instance, the claimant sought payment from the defendant for construction work it had carried out.<sup>111</sup> After considering the case, the AIFC Court ordered the defendant to pay the claimant a total of 1,335,170,366 tenge (approximately USD 3,065,257). In the subsequent case, the same claimant, JSC Cengiz, sought enforcement of the arbitration award against the Ministry of Industry, which was granted by the Court for the amount of almost 460 million tenge (approximately USD 1 million), in addition to the arbitration cost of USD 20,000.<sup>112</sup>

Finally, the fourth case also concerned the enforcement of an arbitration award between Firm 800 Limited Liability Company as claimant and the Ministry of Healthcare of the Republic of Kazakhstan as defendant. The AIFC Court ordered the Ministry of Healthcare to pay debts totalling USD 27,747, including the costs of the arbitrator's fees of USD 1,000 and the legal costs of USD 1,800.<sup>113</sup>

As can be seen, the AIFC Court has ruled in favour of the private parties in all cases involving government agencies. The four cases seem to set precedents for international investors and present the AIFC Court as an impartial dispute resolution centre. The fact that the AIFC Court ordered the government agencies to pay a substantial amount of money shows that the AIFC Court is beyond the influence of state bodies. This sets the Court apart from the national judicial system, which, despite undergoing important reforms, still requires substantial transformations to drastically change its current state.<sup>114</sup>

<sup>107</sup>*Success K Limited Liability Partnership v Ministry of Healthcare of the Republic of Kazakhstan*, Case No AIFC-C/CFI/2021/0008 (24 Jan 2022).

<sup>108</sup>See Закон Республики Казахстан No 488-V от 8 апреля 2016 года «Об арбитраже» (Zakon Respubliki Kazakhstan No 488-V ot 8 aprelya 2016 goda «Ob arbitrazhe») [Law of the Republic of Kazakhstan No 488-V of 8 Apr 2016 'On Arbitration'] <[https://online.zakon.kz/Document/?doc\\_id=35110250](https://online.zakon.kz/Document/?doc_id=35110250)> accessed 14 May 2023.

<sup>109</sup>Закон Республики Казахстан No 413-IV от 1 марта 2011 года «О государственном имуществе» (Zakon Respubliki Kazakhstan No 413-IV ot 1 marta 2011 goda «O gosudarstvennom imushchestve») [Law of the Republic of Kazakhstan No 413-IV of 1 Mar 2011 'On State Property'] <[https://online.zakon.kz/Document/?doc\\_id=30947363](https://online.zakon.kz/Document/?doc_id=30947363)> accessed on 16 May 2023.

<sup>110</sup>Resolution of the AIFC Management Council on the AIFC Court Regulations (5 Dec 2017) <<https://aifc.kz/files/legals/73/file/aifc-arbitration-regulations-2017.pdf>> accessed 24 Oct 2021 (hereinafter 'AIFC Arbitration Regulations').

<sup>111</sup>*JSC Cengiz Insaat Sanayi ve Ticaret AS v The Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan*, Case No AIFC-C/CFI/2021/0005 (18 Oct 2021).

<sup>112</sup>*Cengiz Insaat Sanayi ve Ticaret AS v The Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan*, Case No AIFC-C/CFI/2021/0007 (30 Sep 2021).

<sup>113</sup>*Firm 800 Limited Liability Company v The Ministry of Healthcare of the Republic of Kazakhstan*, Case No AIFC-C/CFI/2022/0023 (7 Dec 2022).

<sup>114</sup>Research conducted by the Central Asian Bureau for Analytical Reporting suggests that by 2019, corruption in the Republic of Kazakhstan had decreased compared to the previous decade. For instance, the number of cases of abuse of power decreased from 443 in 2009 to 220 in 2019, the number of cases of forgery in office decreased from 542 cases to 111, and the number of cases of abuse of authority decreased from 116 to 52. However, acceptance of bribery increased from 315 cases in 2009 to 523 in 2019. Cases of bribery remained at the same level throughout the decade. For more information, see Askar Mukashev, 'How is the Fight Against Corruption in Kazakhstan Taking Place?' (Central Asian Bureau for Analytical Reporting, 28 May 2020) <<https://cabar.asia/en/how-is-the-fight-against-corruption-in-kazakhstan-taken-place?pdf=33753>> accessed 28 Oct 2022.

### *The Impact of the AIFC on Other Central Asian States*

In the six years of its existence, the AIFC has made a significant impact not only within the Republic of Kazakhstan, but also within the Central Asian region as a whole. For instance, the neighbouring Kyrgyz Republic announced the creation of a similar SEZ in the financial sphere, the Bishkek International Financial Centre (BIFC).<sup>115</sup> An analysis of the draft of the Constitutional Statute, published by the Ministry of the Economy of the Kyrgyz Republic on its official website, clearly indicates that the leadership of the Kyrgyz Republic has taken the AIFC Constitutional Statute as a model.<sup>116</sup> However, at this stage it is not clear whether the initiative will be implemented in the same way as it in the Republic of Kazakhstan, as the Kyrgyz government has not provided any information on the plans for its creation.<sup>117</sup>

The third Central Asian country in the process of establishing a financial centre is the Republic of Uzbekistan. At present, the Uzbekistani government is also actively discussing the creation of the Tashkent International Financial Centre (TIFC) with the government of the United Kingdom.<sup>118</sup> Similar to the approach taken by the Kyrgyz Republic, Uzbekistan has formally disclosed its study of the AIFC's experiences during the initial phase of analysing the prospective project.<sup>119</sup>

As can be seen, the experiences of the Republic of Kazakhstan have aroused considerable interest and clearly influenced its neighbours. Bearing in mind that all three republics are former socialist states with a civil law tradition, the fact that the AIFC has adopted a completely different legal framework, with its Court operating on the basis of the common law system, sets a compelling precedent. It is plausible that the future financial centres in Bishkek and Tashkent follow suit, establishing similar ICommCs built upon an English common law system.

<sup>115</sup>Djamiya Musuraliyeva (Джамиля Мусуралиева), 'Кабмин хочет создать Международный финансовый центр «Бишкек»' (Kabmin khochet sozdat' Mezhdunarodnyy finansovyy tsentr «Bishkek») [The Cabinet of Ministers wants to create the Bishkek International Financial Centre] (KaktusMedia, 5 Nov 2021) <[https://kaktus.media/doc/448893\\_kabmin\\_hochet\\_sozdat\\_mejdynarodnyy\\_f finansovyy\\_cent r\\_bishkek.html](https://kaktus.media/doc/448893_kabmin_hochet_sozdat_mejdynarodnyy_f finansovyy_cent r_bishkek.html)> accessed 15 Dec 2021.

<sup>116</sup>The Ministry of Economy and Finance of the Kyrgyz Republic submitted the draft of a normative legal act for public discussion. For more information, see 'Министерство экономики и финансов Кыргызской Республики выносит на общественное обсуждение проект НПА (Ministerstvo ekonomiki i finansov Kyrgyzskoy Respubliki vynosit na obshchestvennoye obsuzhdeniye proyekt NPA) [The Ministry of Economy and Finance of the Kyrgyz Republic submits a draft regulatory legal act for public discussion]' (Press Release, Government of the Kyrgyz Republic) <<https://www.gov.kg/ru/npa/s/3380>> accessed 17 Dec 2021.

<sup>117</sup>Despite the the Kyrgyz Republic's clear interest in establishing the BIFC, lack of funding could be one of the main obstacles to the project's realisation. For more information, see 'Что стало с законом по созданию Международного финансового центра «Бишкек»? — депутат (Chto stalo s zakonom po sozdaniyu Mezhdunarodnogo finansovogo tsentra «Bishkek»? – deputat) [What Happened to the Law on the Creation of the BIFC? – Deputy]' (Apparat Info, 7 Dec 2021) <[https://apparat.info/news/2021/12/07/10254500-cto\\_stalo\\_s\\_zakonom\\_po\\_sozdaniyu\\_mezhdu.html](https://apparat.info/news/2021/12/07/10254500-cto_stalo_s_zakonom_po_sozdaniyu_mezhdu.html)> accessed 10 Jan 2022.

<sup>118</sup>In comparison to the Kyrgyz Republic, the Republic of Uzbekistan seems to have more political will and financial resources to create an international financial centre in Tashkent, and the leadership of the state continues to discuss the implementation of the developed plans. However, it is not clear when the TIFC will become operational, as the leadership of the Republic of Uzbekistan has not yet announced any dates. For more information, see 'Начинается второй этап изучения концепции создания международного финансового центра в городе Ташкенте (TIFC) (Nachinayetsya vtoroy etap izucheniya kontseptsii sozdaniya mezhdunarodnogo finansovogo tsentra v gorode Tashkente (TIFC)) [The Second Stage of Studying the Concept of Creating an International Financial Centre in the City of Tashkent (TIFC) Begins]' (UZ Daily, 21 Dec 2020) <<https://www.uzdaily.uz/ru/post/57893>> accessed 30 Aug 2021.

<sup>119</sup>Currently, it is unclear whether the Republic of Uzbekistan will follow the example of the UAE, Qatar, and the Republic of Kazakhstan in creating an international financial centre in Tashkent, as Uzbekistan has not publish a draft of the legislation. Notably, Uzbekistan is also analysing the experiences of other cities, such as New York, London, Hong Kong, and Singapore. For more information, see 'При поддержке правительства Великобритании будет разработана концепция международного финансового центра ТИФЦ (Pri podderzhke pravitel'stva Velikobritanii budet razrabotana kontseptsiya mezhdunarodnogo finansovogo tsentra TIFC) [With the Support of the UK Government, the Concept of the TIFC International Financial Centre will be Developed]' (Investment Promotion Agency under the Ministry of Investments and Foreign Trade) <<https://invest.gov.uz/ru/mediacenter/news/with-the-support-of-the-uk-government-the-concept-of-the-international-financial-center-tifc-will-be-developed/>> accessed 14 Oct 2021.

Therefore, it is crucial for Kyrgyzstan and Uzbekistan to carefully analyse all of the existing issues related to the legal regulation of the AIFC before starting the operation of a financial centre with an ICommC. The fact that all three republics share the same historical and legal heritage is still reflected in the current stage of development of the countries. For example, the Constitutions and the legal regulations of the respective justice systems of the three republics are very similar,<sup>120</sup> which is especially true when comparing the Republic of Kazakhstan and the Kyrgyz Republic.<sup>121</sup> Therefore, before creating a common law court, it is important not only to analyse the previous legislative reforms carried out in the AIFC, but also to review all the legal discrepancies revealed after the regulation of the financial centre and its ICommC.

### Enforcement of Judgments

Dispute resolution is commonly acknowledged as a complicated, protracted, and costly undertaking. Even upon the conclusion of litigation itself, the ordeal persists. The victorious party encounters a final hurdle – the enforcement of the court’s decree – a process that can prove exceedingly challenging, particularly when enforcing judgments in foreign jurisdictions. This holds true for the Republic of Kazakhstan despite its participation in several international treaties, including the *Minsk Convention of 1993* on legal assistance and legal relations in civil, family, and criminal matters; the *Chisinau Convention of 2002* on legal assistance and legal relations in civil, family, and criminal matters; the *Kiev Convention of 1992* on settling disputes related to commercial activities; and the *Moscow Agreement of 1998* on the procedure for mutual enforcement of decisions of arbitration, commercial, and economic courts in the territories of the member states of the Commonwealth. Despite these affiliations, issues persist in enforcing foreign judgments in Kazakhstan,<sup>122</sup> especially when originating from a state lacking an international agreement with Kazakhstan.<sup>123</sup> Consequently, the local legal community has acknowledged the imperative need to reform the process for the enforcement of foreign decisions to enhance the nation’s overall investment climate.<sup>124</sup> This necessity extends beyond judicial decisions and encompasses arbitration awards as well.<sup>125</sup>

In this respect, the existence of the AIFC Court does not directly contribute to solving this problem, but it does provide an alternative forum with more efficient means of enforcing judgments. Accordingly, necessary amendments have been made to the national legislation of the Republic of Kazakhstan to ensure the enforcement of the AIFC Court’s decisions. Specifically, these amendments recognise AIFC Court as enforceable writs, encompassing orders securing or cancelling a

<sup>120</sup>Khaydarali Yunusov, ‘The Development of the Legal Systems of Central Asian States’ (2014) 2 *Studii Europene* 23. See also Leonid Golovko, ‘The Space for Legal Reform in Central Asia: Between Political Limits and Theoretical Deformations’ (2011) *OSCE Yearbook* 2010 105.

<sup>121</sup>Evgeniy Anichkin (Евгений Аничкин) & Tatyana Ryakhovskaya (Татьяна Ряховская), ‘Конституционное право Российской Федерации и стран Центральной Азии: уникальное и универсальное (Konstitutsionnoye pravo Rossiyskoy Federatsii i stran Tsentral’noy Azii: unikal’noye i universal’noye) [Constitutional Law of the Russian Federation and Central Asian Countries: The Unique and the Universal]’ (2019) 440 *Вестник Томского государственного университета (Vestnik Tomskogo gosudarstvennogo universiteta)* [Bulletin of Tomsk State University] 195, 200.

<sup>122</sup>Artem Timoshenko (Арте́м Тимоше́нко), ‘Признание и исполнение решений коммерческих арбитражей в Казахстане (Priznaniye i ispolneniye resheniy kommercheskikh arbitrazhey v Kazakhstane) [Recognition and Enforcement of Commercial Arbitration Awards in Kazakhstan]’ (*Arbitration Journal*, 30 Jan 2019) <<https://journal.arbitration.ru/ru/analytics/priznanie-i-ispolnenie-resheniy-kommercheskikh-arbitrazhey-v-kazakhstane/>> accessed 16 Oct 2021.

<sup>123</sup>Lyayla Tleulina (Ляйля Тлеулина), ‘Признание и исполнение решений коммерческих арбитражей и иностранных судов в Казахстане (Priznaniye i ispolneniye resheniy kommercheskikh arbitrazhey i inostrannykh sudov v Kazakhstane) [Recognition and Enforcement of Decisions of Commercial Arbitrations and Foreign Courts in Kazakhstan]’ (*Online Zakon*, 15 Jun 2015) <[https://online.zakon.kz/Document/?doc\\_id=32762407](https://online.zakon.kz/Document/?doc_id=32762407)> accessed 10 Nov 2021.

<sup>124</sup>*ibid.*

<sup>125</sup>Altynay Mukhametkaliyzy, ‘Hidden Impediments Await Foreign Parties Seeking to Enforce Arbitral Awards in Kazakhstan’ (*Kluwer Arbitration Blog*, 1 Apr 2020), <<http://arbitrationblog.kluwerarbitration.com/2020/04/01/hid-den-impediments-await-foreign-parties-seeking-to-enforce-arbitral-awards-in-kazakhstan/>> accessed on 3 Sep 2022.



claim's security.<sup>126</sup> However, according to the AIFC Constitutional Statute and the *Civil Procedure Code*,<sup>127</sup> the AIFC Court's decisions, as judicial acts, primarily pertain to the merits of the dispute. Consequently, only the merits of AIFC Court judgments are subject to enforcement within Kazakhstan. The assumption that the orders of the AIFC Court to secure a claim or to cancel the security of a claim are equivalent to a writ of enforcement hence goes beyond the provisions of the AIFC Constitutional Statute, which may lead to controversies regarding the enforcement of acts of the AIFC Court that are not decisions based on the merits of a case.<sup>128</sup>

Despite the aforementioned legal challenges, significant efforts have been made by the leadership of the Republic of Kazakhstan to create the legal basis for the AIFC and to develop a functioning ICommC within the financial centre. As a result, the AIFC Court's decision are currently enforced on the same grounds as the judicial acts of the national courts.<sup>129</sup> This is of crucial importance, as it is difficult to enforce decisions in favour of private parties against the sovereign states, which is also true for the Republic of Kazakhstan. The fact that the AIFC Court has already issued four decisions against government agencies only increases the value of such a dispute litigation forum for the international and local business community. Notably, the report of the AIFC Court issued in 2021 confirms that all decisions of the AIFC Court and the International Arbitration Centre have been fully enforced in the Republic of Kazakhstan.<sup>130</sup> In addition, the AIFC Court has an 'enforcement judge' appointed by its Chief Justice to monitor the enforcement of the court's decisions.<sup>131</sup> Although the precise scope of this judge's responsibilities remains somewhat unspecified in AIFC law,<sup>132</sup> the presence of an 'enforcement judge' stands to positively influence the actual implementation of enforcement orders by aiding litigating parties.

## Conclusion

Over the past decade, a peculiar trend has emerged across Europe and Asia: the emergence of different types of ICommCs. While European states are using their position in the post-Brexit era to try to compete with the LCC, China and Singapore have sought to create a one-stop shop in their respective regions and provide all the dispute resolution mechanisms. Conversely, the Gulf States and potentially a number of Central Asian countries alongside the Republic of Kazakhstan are

<sup>126</sup>Закон Республики Казахстан No 261-IV «Об исполнительном производстве и статусе судебных исполнителей» от 2 апреля 2010 года (Zakon Respubliki Kazakhstan No 261-IV «Ob ispolnitel'nom proizvodstve i statuse sudebnykh ispolniteley» ot 2 aprelya 2010 goda) [Law of the Republic of Kazakhstan No 261-IV 'On Enforcement Proceedings and the Status of Bailiffs' of 2 Apr 2010] <[https://online.zakon.kz/document/?doc\\_id=30617206](https://online.zakon.kz/document/?doc_id=30617206)> accessed 19 Dec 2023.

<sup>127</sup>Кодекс Республики Казахстан No 377-V «Гражданский процессуальный кодекс Республики Казахстан» от 31 октября 2015 года (Kodeks Respubliki Kazakhstan No 377-V «Grazhdanskiy protsessual'nyy kodeks Respubliki Kazakhstan» ot 31 oktyabrya 2015 goda) Code of the Republic of Kazakhstan No 377-V 'Civil Procedure Code of the Republic of Kazakhstan' of 31 Oct 2015 <<https://adilet.zan.kz/rus/docs/K1500000377>> accessed 7 Feb 2022.

<sup>128</sup>Symbat Ukin (Сымбат Укин) & Diana Baturbekova (Диана Батырбекова), 'Действие актов Центра Международного финансового центра «Астана» и особенности их исполнения во времени, пространстве и по кругу лиц (Deystviye aktov Tsentra Mezhdunarodnogo finansovogo tsentra «Astana» i osobennosti ikh proyavleniya vo vremeni, prostranstve i po krugu lits) [Action of Acts of the Centre of the International Financial Centre «Astana» and Features of their Execution in Time, Space and Scope]' (2018) 53 Вестник Института законодательства и правовой информации Республики Казахстан (Vestnik Instituta zakonodatel'stva i pravovoy informatsii Respubliki Kazakhstan) [Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan] 41, 48. See further AIFC Constitutional Statute, art 13(8).

<sup>129</sup>AIFC Constitutional Statute, art 13(8).

<sup>130</sup>AIFC Court, '2021 results and future plans' (n 105).

<sup>131</sup>AIFC Court Regulations, art 17.

<sup>132</sup>Svetlana Moroz (Светлана Мороз), 'Суд МФЦА: вопросы теории и практики (Sud MFTSA: voprosy teorii i praktiki) [AIFC Court: Theoretical and Practical Issues]' (2020) 59 Вестник Института законодательства и правовой информации Республики Казахстан (Vestnik Instituta zakonodatel'stva i pravovoy informatsii Respubliki Kazakhstan) [Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan] 111, 114.

focusing on creating SEZs for investors with a commercial court operating under English common law principles. At this stage, it is very difficult to assess how these new forms of ICommCs will interact with traditional judicial systems and how they will change the commercial dispute resolution landscape. Nevertheless, there is a growing perception that litigation is a form of commodity or service to some extent. Notably, the Republic of Kazakhstan is the first Central Asian country to align with these trends, yet the eligibility of the AIFC Court as a reputable destination for the international community remains to be proven. Internally, scepticism persists within Kazakhstan, with concerns over legislative discrepancies within the national systems caused by the AIFC Court.

Despite the backlash from the local legal community, however, the international experience of the Gulf State counterparts suggests that it is possible to successfully operate a common law court within a civil law jurisdiction. As international reports highlight deficiencies in Kazakhstan's national judicial system, lacking credibility and impartiality, it may be preferable to take advantage of the AIFC Court and seek to legally integrate the Court into the Kazakhstani judicial system. Accordingly, the existence of an alternative court operating on common law principles seems to be a worthwhile experiment, especially considering that its main purpose is to attract foreign investment into the national economy.