AIFC LAW CONFERENCE

3 July 2019, Nur-Sultan

ASTANA FINANCE DAYS

SPEECHES AND HIGHLIGHTS OF THE CONFERENCE

Dear reader,

It is a pleasure to share with you the book of speeches and highlights from the AIFC Law Conference, which was held on 3 July 2019 in Nur-Sultan.

We hope that you found the first book with speeches of our distinguished speakers from the Conference in 2018 interesting and insightful. This year, there are even more important updates on the AIFC law which were announced and discussed. A tremendous amount work has been done since the AIFC was officially launched in 2018 and impressive achievements were made within a short period of time.

Today, the AIFC is an innovative and efficient platform, which provides services under international standards, increasing trading volume and revenue. I'm very proud to say that the AIFC has reached 51st place out of 100 in the Global Financial Centres Index (GFCI), which is 37 positions higher than in March 2018. Our financial centre also holds 1st place in the Eastern Europe and Central Asia region.

This year's Conference provided information on the key benefits of the AIFC Jurisdiction from a practical perspective. Furthermore, our distinguished speakers discussed the legal profession, dispute resolution perspectives at the AIFC Court and International Arbitration Centre, as well as new opportunities made available at the AIFC.

We believe that you will find in this collection the essential information for running your business within the AIFC or simply keep it as a reference to understand the uniqueness of the AIFC Jurisdiction, its benefits and opportunities.

Kairat Kelimbetov
Governor of the AIFC

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AIFC LAW CONFERENCE

The AIFC Law Conference was held on 3 July 2019 in Nur-Sultan under umbrella of Astana Finance Days.

The conference was dedicated to the AIFC Jurisdiction and its further steps to development. Representatives of leading international law firms such as Baker & McKenzie, White & Case, Norton Rose Fulbright, Curtis Mallet-Prevost, embassies, universities, professors and lawyers gathered here, in Nur-Sultan.

The guests had a privilege to hear some insightful presentations and discussions from the reputable international speakers, amongst which are highly acclaimed authors, well-respected international chief justices, judges and legal experts such as the Rt Hon The Lord Woolf CH (Chief Justice of the AIFC Court), Barbara Dohmann QC (Chairman of the AIFC International Arbitration Centre) and Michael Blair QC (Chairman of the AIFC Legal Advisory Council).

THE OBJECTIVE

The speakers discussed important updates on the AIFC Law and explained the features of the legal profession in the AIFC. They also considered the practical aspects of the application of the AIFC Law and the possibility of implementation of maritime and transport initiatives within the AIFC.

Special attention was given to the AIFC Court, which operates on the principles of the law of England and Wales. The discussion covered the AIFC Court as a convergence of the common law and civil law. The speakers emphasized the importance of an alternative dispute resolution at the IAC – a tool to the promotion of business relations in Eurasia and beyond.

DECLARATION ON THE AIFC LAW CONFERENCE

During the Conference, the Declaration on the AIFC Law Conference 2019 was adopted by acclamation. It was presented by one of the distinguished guests of the Conference, Mr Michael Blair QC, the Chairman of the AIFC Legal Advisory Council and Leading Counsel at 3 Verulam Buildings Barristers (United Kingdom).

AIFC Astana International Financial Centre

AIFC LAW CONFERENCE

AIFC LAW: FURTHER STEPS TO DEVELOPMENT

3 July 2019

NAZARBAYEV CENTRE, NUR-SULTAN

FOUNDATION OF THE FIRST PRESIDENT OF THE REPUBLIC OF KAZAKHSTAN - ELBASY

Declaration on the AIFC Law Conference

The AIFC Law Conference was convened in Nur-Sultan, Kazakhstan on 3 July 2019 hosted jointly by the AIFC Authority and the Foundation of the First President of the Republic of Kazakhstan – Elbasy and attended by more than 200 participants from around the world.

The participants, through this conference, learned more about the AIFC legal regime, its practical aspects and opportunities for businesses related to the unique legal framework and other features of the AIFC jurisdiction. The AIFC greatly contributed to the enhancement of the rule of law in the region of Central Asia, the Caucasus, Eurasian Economic Union, the Middle East, West China, Mongolia, Europe and Belt and Road countries through introducing its own free-standing legal regime based on the principles of the law of England and Wales and standards of leading global financial centres.

Focused on the theme "AIFC Law: Further Steps to Development", and in a friendly, pragmatic and constructive way the participants carried out mutual

exchange and in-depth discussions in several legal areas, including further development of the AIFC Law; ensuring the core principles of rule of law are maintained through quality legal services; ensuring independent financial regulation; and potential development of maritime, aviation in the AIFC jurisdiction.

With the objective of strengthening exchange and enlarging cooperation on the further development of the AIFC jurisdiction among the international and local business community, the participants expressed the following views:

1. The AIFC legal regime contributes to supporting the core principles of the rule of law.
2. The participants support the Acting Law of the AIFC based on the principles, norms and precedents of the law of England and Wales and standards of leading global financial centres, promoting a special legal environment familiar to investors around the world.
3. The participants will use all reasonable endeavours to choose the Acting Law of the AIFC as the governing law in their contracts and in settlement of disputes.
4. The AIFC encourages an independent, strong, diverse and effective legal profession.

5. The AIFC stimulates new initiatives in the legal field, which would beneficially impact for all AIFC participants' activities.

Based on the achievements of the AIFC Law Conference, the participants actively consider, through the appropriate channels, to establish a network and deepen international communication and cooperation to further develop the AIFC jurisdiction and strengthen the sharing of best practices, experience and outcomes in the relevant fields of law.

This declaration is adopted by acclamation on 3 July 2019 in Nur-Sultan, Kazakhstan in the official language of the AIFC, the English language.

SIMON FT COX

Member of the AIFC Legal Advisory Council, Senior Consultant at Norton Rose Fulbright

Moderator of the Panel Session

Ladies and gentlemen, good morning. For all of us on this panel, it is a great honour to be participating at this auspicious event. Our brief is to touch on the ways in which the laws and regulations on which us and more particularly the excellent domestic team here have been building the rules and regulations and the way in which those can be implemented and put to use to create the vibrant centre, which AIFC is designed to perform. We have all been watching for some years, from the very early stages: the development of the centre and the extraordinary parallel growth of the rules and regulations, to a very voluminous rule book now, but at the same time the construction of the extraordinary physical infrastructure of the centre and all that is happening there. Clearly, the next stage is to build on the regulatory regime, to utilize that infrastructure to create the vibrant centre which is the object for everybody.

I am going to do a few brief introductory comments and then hand over to my distinguished colleagues, who will be going into greater detail on all these points.

Among the benefits which will contribute to the development of the Centre are the following:

- The establishment and evolution of a regulatory structure to facilitate the authorisation and operation of financial service businesses operating in and from the AIFC.
- The use of AIFC Law as the governing law through choice or through mandatory provision for contracts, whether or not the parties or the subject matter have any connection with the AIFC or, indeed, with Kazakhstan.
- The selection of the AIFC Court and the International Arbitration Centre as the forum for dispute resolution for domestic and international disputes. And the extremely impressive opening of the Court yesterday, and the very encouraging and positive comments by his excellency, the President, showed the support which the state has for the development of this enterprise.
- The use of AIFC entities as operating entities in the AIFC but also potentially as holding companies and as part of structuring, and both Paul and I will be talking about that in more detail in a second.
- The development of the AIX, a critical part of this, I think for many people the most obvious and perhaps the easiest way to fill all the offices and develop the financial centre will be through the increase in listings and active trading, and all that is involved in that. Clearly, there are some major companies listed already and the privatisation of so many excellent Kazakh businesses hopefully will be a fundamental part of the development of the centre going forward.
- In addition, the development of the fund's sector and investment, management, generally, the development of Islamic finance, insurance, FinTech and all the other areas of business for which the laws and regulations have been developed. All provide the basis for the growth in jobs and the financial community here going forward.

I am going to touch very briefly on two issues where we believe that

there is real scope for continuing the development of the AIFC on a fast track basis. The first, is the use of AIFC corporations as holding companies or as part of group structures, and Paul is going to deal with more detail on this, but I am going to touch on a few points which have come out of some of the questions which have arisen in recent discussions.

I should say very carefully that I am not a tax expert. The Tax Law is complicated, it is evolving and the relationship between the tax arrangements in the AIFC and the mainland/greater Kazakh tax regime and the corporate regime is something which I am attempting to discuss with great caution. Clearly, nothing that I or the other panel member should say in relation to tax or structuring in any way should prevent people from taking specific advice in relation to specific circumstances. My understanding and most of you will know much more about this than I do, that a 'TOO' operating in Kazakhstan cannot offer its shares to the public. And to convert to a GSC 'OAO' is a complicated process which can take up to six months. So, a possible structure which depends of course on the circumstances would be to create a corporation, a company, in the AIFC and contribute the assets or the business operating in Kazakhstan as share capital to the new company, and Paul will talk about the mechanics of transfer of assets in a minute.

There will be AIFC in its simplest case AIFC corporation sitting on top of a wholly-owned subsidiary carrying on an ordinary tax-paying business in Kazakhstan. In those circumstances, it is my understanding that there will be no tax on the AIFC corporation on dividends paid up from the subsidiary. There would be no tax on the business if it is a regulated activity; if it is not a regulated activity there is potentially tax on other income generated. And shareholders in that company would have the benefit both of there being no Kazakh tax on dividends they receive from the company but also no tax on capital gains that they derived through trading in those shares.

There is a supplemental matter, a listing may also be used to achieve many advantages, I will come on to that briefly in a second. But this is a real practical use of the structure to create companies which have international acceptability and English law-based corporate structure, with which international investors will be comfortable as a way of structuring and holding companies operating in Kazakhstan. Likewise, the creation of separate finance companies through the AIFC could be very efficient.

Again, easily formed companies, for example issuing bonds, which would have to be listed, subject to eligibility, in order to get the tax breaks for the investors in holding the debt securities, but money could be borrowed through the issue of bonds by the finance co and then down to the operating company, there is then no withholding tax on interest which is paid up from the operating company to the finance company. Yet, the finance company does not have a spread, a difference between the interest it pays and the interest it receives, there would be no element of tax. Potentially if there is a spread then it may be taxable, but as Paul will address in a second. This may be a circumstance where people may voluntarily wish to take on regulation authorisation to get the taxation benefits in addition to all the other benefits which would result from that.

And finally, as part of my introductory comments, I want to talk about the AIX. This is arguably the wrong forum for that, at the LAC we have not been reviewing the stock exchange rules and regulations in detail, but it is clearly a fundamental part of the AIFC as a centre. It is designed to enable people to list shares here, shares of AIFC corporations, mainland Kazakh corporations, and of course international corporations on a sole, or duel, or multiple listing bases. It is intended to provide a structure which gives transparency, provides the highest quality of investor

protection, and provides a regime for the effective operation and listing of companies on the AIX, subject to eligibility. For example, normally a three-year trading record, unless a concession is available. If the shares are traded on the stock exchange, and in the case of debt securities if they are also traded on the stock exchange, the same reliefs are available for Kazakh taxation in relation to both dividends and capital gains, a very positive advantage. But in addition, it creates a currency, a form of consideration, have listed securities for acquisitions for growth and development of Kazakh businesses.

This is a framework which will enable privatisations and the raising of capital for the existing shareholders, and for the secondary market and primary market, to raise money for companies to grow and develop. And hopefully, that will be a major source of activity for the Exchange and the Centre going forward, because it will require, obviously, huge numbers of bankers, brokers, accountants, even lawyers, and other service providers, to assist in the growth and development of the Astana International Exchange.

I am now going to hand over to Michael Blair QC. Michael, as well-known to all of you, is the Chairman of the AIFC Legal Advisory Council of which the three of us are members. He rules our committee with a rod of iron, so it is rather nice to be in a moderation position with Michael as a speaker. I will hand over to Michael, he will be able to explain what he is talking about as he is a very distinguished and a very supportive practitioner.

MICHAEL BLAIR QC

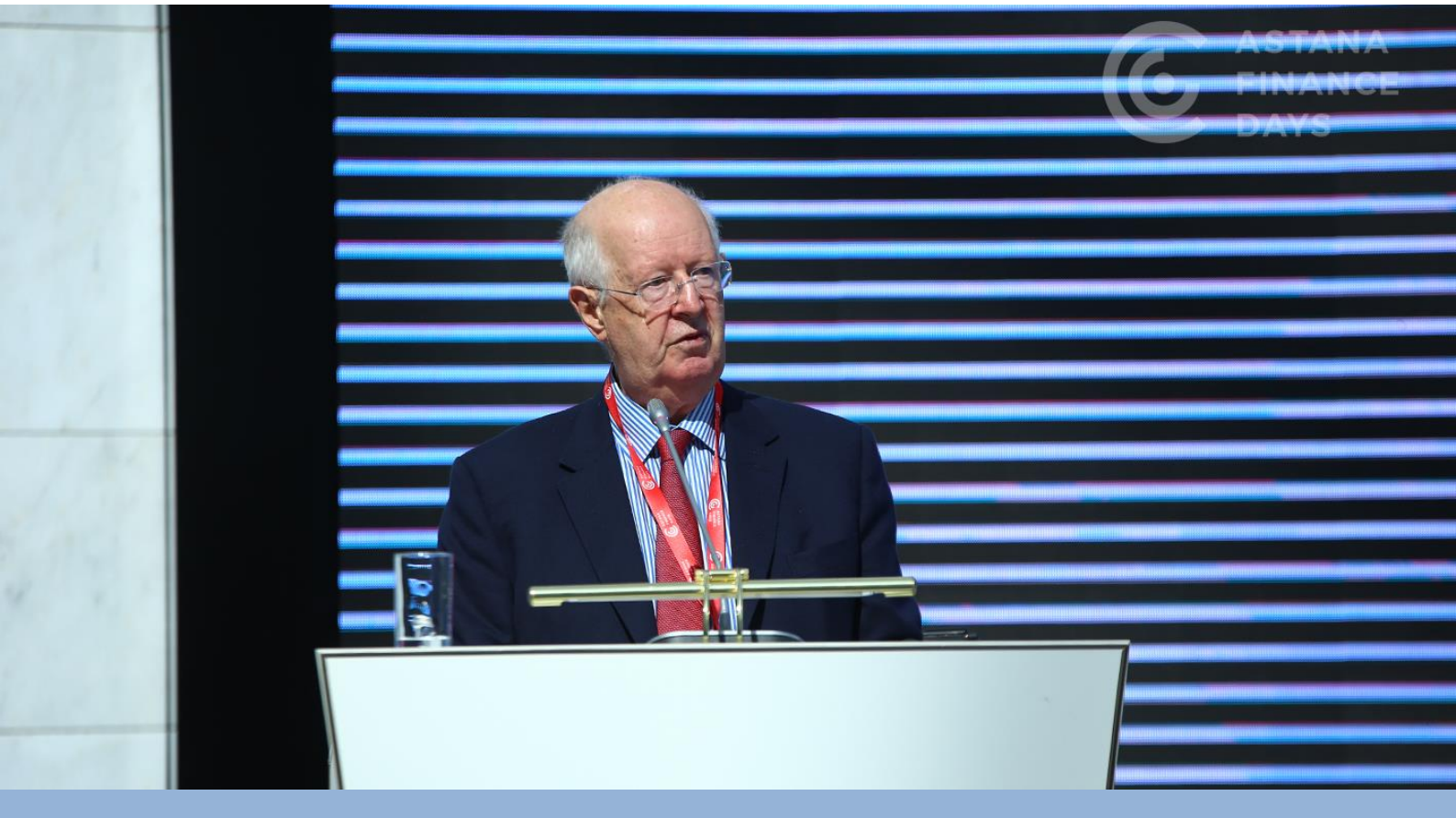
Chairman of AIFC Legal Advisory Council,
Leading Counsel at 3 Verulam Buildings Barristers

"AIFC in Operation: One Year On"

My subject is the benefits of the AIFC in operation one year on. Last year I had the honour of speaking at the Inaugural Law Conference in this very hall on the AIFC Jurisdiction and the General Legal Framework of the AIFC, and a quick overview may be useful now as a precursor to the updating that we are all going to provide.

The story begins with the changes to the basic law of the Republic of Kazakhstan, which enabled the finalisation of the Constitutional Statute in December 2015, as subsequently amended. That envisaged the creation of the Centre as we all know and set out some key elements of the approach.

First, and relevant for today, is the requirement for a special legal framework based on the principles, legislation and precedents of the Law of England and Wales and the standards of leading global financial centres. It is absolutely key to everything today. The Constitutional Statute has since been supplemented with other Constitutional Decrees and laws, but it is still essentially in place as the fundamental basis for this entire initiative. It sets out some central concepts which together helped to fashion the jurisdiction of the AIFC.



The first of these is the centre participant. This means a person who has received permission of some kind from authorities in the Centre to become as it were a member of the Centre: he thereby joins the club. This creates a jurisdictional nexus based on personal membership.

That is not, however, enough to create the necessary base for jurisdiction; geography is needed as well, just as that is the case for any jurisdiction anywhere in the world. So, the second concept set out in the Statute of 2015 was the territory of the Centre. Originally quite small, it is now 1600 hectares here in Nur-Sultan. So those key concepts of the territory and the centre participant, provide the mixture for a structure based on the deliberate mixture based on people and based on place.

Well, what are the benefits of this? Two particular ones that I would like to stress are these.

1

The first is internal cooperative overlap. That means that in the 1600 hectares, there is no exclusivity. Not everybody has to be a centre participant: other people can proceed quite happily about their business without joining the AIFC if they do not wish to. So, there are banks in the Centre that do not belong to the jurisdiction of the Centre: they are still operating under the law of Greater Kazakhstan. That is internal cooperative overlap. And restaurants, clothing stores, hotels, food supermarkets and so on can rub shoulders here in the Centre with the centre participants without actually joining with them in any legal sense. That is the big advantage of the AIFC approach. Some other Centres have been set up on a more exclusive basis without this open cooperation that I have described and there is a big advantage in doing it this way round. The key phrase to remember as describing this non-exclusive approach is: “no centre participation means no compulsory involvement”.

2

The second benefit, I would say reaching out, is greater external reach. The effect of this double approach of people and place produces a result that has been strongly welcomed and, I think, is an advance on the exclusive jurisdiction of financial centres elsewhere. The status of centre participant derives essentially from Kazakhstani law, as elaborated in AIFC regulations: so, a centre participant based in, or otherwise legally operating in, the Centre, is able to use that status so as to carry on regulated activities elsewhere in the Republic without having to comply with regulatory requirements that exist elsewhere. His status as a centre

participant enables him to carry on those activities in or from the Centre. So, a contract entered into between a Centre participant and a non-participant in, say, Almaty under the AIFC law will be as valid as if both of them had been in the Centre itself. So, the key again is, “no centre participation, no compulsory involvement.” The non-participant, of course, can say that he does not wish to contract on the basis of AIFC law in which case there is not any of that extra external reach. It depends on the willingness to comply with the new legal system that has been elaborated here.

So, the border between the AIFC and the rest of the Republic is a truly permeable one with the advantages that I have described. Of course, this means that there has to be an approach within Kazakhstan with an element of opting in and in consequence a system of what the lawyers call choice of law. While this means that in theory jurisdictional disputes are possible, the legal structure worked on here has produced the result that there is really no tension at the moment, that I can observe, and there is a great deal of goodwill as between the authorities of Greater Kazakhstan and the authorities here in the Centre. So, at least in the first year, I am not aware of any legal issues about constitutional structure that have arisen.

I move on to the General Legal Framework. As mentioned last year, this was brought into being for the AIFC under the supervision of the Legal Advisory Council, which I have the honour still to chair. It is, broadly speaking, a codified restatement for the AIFC of the commercial aspects of the common law and statutory legislation of England and Wales. As already mentioned, it involves basing this legal system on the principles legislation and precedents of the law of England and Wales, as well as the standards of leading financial centres.

This was a deliberate choice of the first President of the Republic of Kazakhstan. So, we have a commercial code of a kind in the General Legal Framework which functions separately from but alongside, for the AIFC, the civil procedure and Court based elements of commercial law in London. As to the substantive General Legal Framework, I split it into two parts. The general side provides a commercial code of general law to enable persons in the Centre to run their affairs in accordance with a legal construct expressly created to enable them to do so. There is also a more specific side, which means laws specifically required for the operation of the financial markets within the Centre.

On the general side, two of the most important components are a code for corporations and other legal bodies of various kinds such as partnerships, principally in the Companies Regulations. And the second one is a law of contract principally in the Contract Regulations. You are going to hear more about both of those major general elements of the framework in a moment or two. Other important sets of regulations of a general kind cover employment law, obligations, (which lawyers call torts), personal property, damages, remedies, data protection, insolvency etc. These demonstrate the benefits of a code drawn from English law but stated and codified with clarity. The various regulations in the code will be able to develop through experience with the assistance of the top-quality judiciary in the AIFC Court, which is very familiar with the underlying base but is also attuned to the special features of the AIFC. This General side should be all that is needed for those who wish to operate in the AIFC as AIFC participants, for general purposes, such as the hotel, or the coffee shop, or anybody else not in the financial sphere.

I turn to the specific side, relating to the financial sphere. This is needed only for those who wish to participate here in the AIFC in the specific context of financial services. The principal set of regulations here is the Financial Services Framework Regulations often called FSFR, or the framework regulations, which provide the legal basis for the regulation and supervision of financial services. The Astana Financial Services Authority, AFSA, is a creature in a sense of those regulations as well as the Constitutional Statute and that gives it the power to regulate. I leave the detail of that to AFSA who are able to speak in various venues this week and we will have one member, at least, of the AFSA Board later this afternoon to listen to today.

The same is true of the Astana International Exchange. It derives its authority to act as a market institution in the AIFC by a decision made by AFSA under the Financial Services Framework Regulations. There are some specific parts of the General Legal Framework as well, providing further support for the smooth functioning of financial markets. These include the security regulations, governing the process for taking and enforcing security interests in property, netting regulations and payment system finality regulations, which uphold the integrity of financial markets, particularly in the context of insolvency.

The final set of observations, if I may, is about recent developments.

What is new since 2018 July? Last year the Governor, with advice from the Legal Advisory Council, had been able to put in place all that was needed for the start-up of the Centre exactly a year ago today. One or two legal bricks were still missing from the wall but none that were crucial for a good start. Since then, the Governor has been able to put in place most of the remainder, such as new regulations on insolvency, which I hope will not actually be needed in the financial sector at least, because AFSA takes a lot of care to ensure that people regulated by it do not become insolvent in the Centre, if at all possible.

There are also new regulations on security in the context of shares and other financial instruments, which is relevant for the increased activity of the Exchange here in the Centre. There has been some useful consolidation of the Companies Regulations and more developmental work on foundations to provide a new form of legal entity for financial assets in the family and other related purposes. And a new law of trusts will emerge shortly, which I hope will be useful for financial vehicles and for other aspects of the management of the family property.

There has been some litigation in the AIFC Court this year, but I leave it to the speakers from the Court to tell us about that later on.

My concluding remark, therefore, is, I hope, obvious from the above. In summary we have here a new and actively managed International Financial Centre already reckoned, as has been mentioned, to be ranked 51st out of over a hundred global financial centres and described by the rating evaluators as ‘growing in an unprecedentedly fast way’. I hope that my colleagues on this panel will be able to help you further with their chosen topics on legal persons and on contract law. Thank you very much.

PAUL PULLINGER

Ozara Services Ltd

“Practical Aspects of AIFC Legal Entities Framework”

Over Over the last 3 years we have been helping set up the regulator here and become registered as a participant to help other companies take advantage of the rules, the laws, and the jurisdiction which the AIFC provides here, in Kazakhstan, but actually broadly around the world for people to invest into Central Asia.

Firstly, I want to set a perspective about how I think about the AIFC here and generally about regulations, laws and jurisdictions. Many people see regulations and laws as a set of bars which form a prison, which they can’t escape from. I prefer to see the rules and regulations as a set of bars which form a children's climbing frame, which you can climb up on and see, get a different perspective and look to grow your business. So, I'm coming from the perspective that the rules and regulations here are a way of growing and making your business dynamic and creative. So, let’s change in the perspective of what we are doing.

AIFC is a fourth-generation centre. It has learnt from all the other centres which have been recently established: Qatar, Dubai, Abu Dhabi. And what does that mean? Well, there are some really practical things, and Michael has already touched on it. It was established under the Constitution, and it's under a separate limb in the Constitution, which means that if the law is silent in the AIFC law, then you take the Kazakh law. It is very simple, very straightforward. It is practical. And It's one of the questions we get asked most, if something says it does not happen here on the AIFC, what really does happen? And we get asked a lot of questions about the differences and is there a conflict, and very rarely is there a conflict between the two halves of the Constitution, and therefore the law of Kazakhstan.

So, how can companies take advantage? And how can companies use their AIFC to grow? And how can you help your clients achieve that? I think when you look at the strategy of the government here, which is to move away from the extraction business, move away from government-driven business into a more private sector economy. We need to be able to look at not only the large-scale IPOs, which are very public, which is going to happen and will be listed on the AIX. But also, you need to be looking at the smaller, medium, and private sized enterprises, where a small company becoming a participant in the growth kernel of an economy. And if you look at economies like Germany, that are based on small-medium sized enterprises, which are strong, robust, and the framework of AIFC encourages that for Kazakh companies.

So how do I view it? It is about becoming a participant. A participant, as Michael has already said, as well as Simon, can take benefits of the dividend as exempt from tax.. And then as they grow, they need capital. And they need to be able to raise funds. International sources of funds, the inbound flow of FDI into Kazakhstan is really important, and the Centre provides the opportunity for external companies, which many of you will be in touch with, answering the question, how do I invest in Kazakhstan? How do I invest across Central Asia? And can I use the financial centre to make those investments? We probably get asked three times a week by different investment funds, how do I create a fund? Or, how do I access directly to Kazakh companies?

So, how do we think about helping companies? Well, we like using the “acid test”. The acid test was established in the gold mining sector, obviously very important here in Kazakhstan as well. In the Klondike

Gold Rush in America, because obviously, miners will be digging up rock rushing off to turn ore into hard cash for themselves. And often, it wasn't real gold. So, the acid test was about putting your raw material into acid, everything would disappear apart from the gold, and therefore you get the value of the gold. So, it is very straightforward. How does it make me more money? And does it enable me to conduct my business in an easier and more straightforward fashion? Two very simple questions of our AIFC acid test.

The first one, can it make me more money? Every business person wants to make more money. Let's be very practical about that. So the answer is, whether you're small, and it's about retention of dividends, which you can reinvest in yourself, whether it's access to capital, and that you want to be able to source more capital for more rapid growth, whether you want to either privately list on the AIX or publicly list on the AIX, it is about raising money from shareholders. It is a straightforward thing about how do I make more money? Simple, simple question. Is it easier to conduct business? Well, if you're a real follower of news, you will have seen the announcement in the last couple of days, that Uzbekistan has also made the announcement that they are going to have English law to conduct their business. Just over the border. Okay, that's good news, isn't it? It's a recognised global standard. And I really appreciate all the hard work that the legal teams and the Court put in place to enable that to happen. Everybody was talking to us about that. How do we make it happen? And how does it relate to Kazakh law?

It is easier to conduct business, it is easier to source things. So, you can see what the acid test is that we use to assess how can we help companies. It is not straightforward.

But most importantly, it is not just a lawyer activity. It's a multidisciplinary team and to help companies truly take advantage, then you need your legal team to know are you being lawful, you need your business strategy team to understand how you're going to drive and grow your business, you need your accountants because now you get into the stage of finances, as well for a holding company. And this is something Simon and I were touching on with each other over the last few days, is how does a holding company which is currently based in Kazakhstan, or how does a group company based in Kazakhstan, take advantage of the situation? And can it actually structure itself in a better fashion, to be able to gain advantages of the exemptions? It is about understanding the P&L and the balance sheet. Is the company highly profitable? And therefore, you are really addressing how do I manage dividend distribution. Or is it about raising capital for growth, and in infrastructure projects, and you've got a 25-year road plan ahead? And I thought most of the effort is really thinking around the balance sheet, not on the P&L initially.

So, you need to be able to think about your accounting, your numbers, to take advantage of, are you looking at something that says its dividends? Are you looking at something which is exempt from profit? Or are you looking at, large amount of cash management, that you need to spin off the finance area of the firm, to be able to separate the financing organisation? You have the holding company, associated firms, and of course, as you know, under AFSA rules, those related companies, connected companies and associated companies all have slightly different meanings about what you can do under the AFSA rules and regulations Can you set up the credit provider for yourself to provide credits and become a source of money for your subsidiary companies, which are based in your holding companies. And therefore, you can enable the direct flow of funds from the holding management company, down to the operating companies. That is a real practical use of the laws and regulations where you combine being a participant, you combine being regulated, to be able to gain the tax exemptions of both and be able to distribute money most effectively, in terms of being a credit provider to your own firms.

If you have a look at the aircraft business in the airline business. Look at Hitachi. Look at Boeing. Look at their Airbus. Look at the computing sector, IBM, Oracle. They all have their own finance departments. And they all have their own financing firms. And It's because there is money

to be made from money, to be brutally honest, there is money to be made from money. And they set up their own credit providing business to be able to do that. So, in Abu Dhabi, the airlines base there with their credit providers to lease to their own companies. And there are many other holding companies, which you are in daily contact with, which, with the right level of analysis, can take advantage of being, potentially, having their own treasury finance firm, to be operators, a credit provider, not only to attract foreign direct investment into their group, but also be able to use that foreign direct investment as cash for their operational businesses.

The final thing I'd like to touch on that is when you're looking at the AIFC, and the global businesses, there are many businesses here which conduct in US dollars. And as you know, if you have been reading the press recently, in Russia, there is already a gold company, which is looking at moving away from using USD to be able to buy and sell gold and offering their clients to be able to trade in any currency they like, for buying or selling gold. That is going to become increasingly important. And one of them, as people move away from USD, and as President Trump continues to use the dollar, as a kind of a weaponized currency to drive the behaviours which he wants. And that means that foreign currency and foreign currency contracts are becoming more important around the world, and especially in Central and Eastern Asia. By being based in the AIFC, your clients can operate in any currency to currency fashion, without the need for Tenge and without the need for USD, and that makes a big, and will make a big advantage over the next few years.

So, how do I see it going forward? Practically, I see it as a growth engine for the Kazakh economy. I say it is a growth engine for Central Asia and AIFC is the driver of that growth.

FRANCIS FITZHERBERT-BROCKHOLES

Member of the AIFC Legal Advisory Council,
Partner of Counsel at White & Case

"Practical Aspects and benefits of the AIFC Contract Legal Framework"

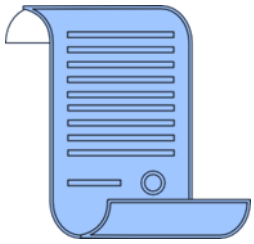
When I was studying law and had a question on the law of contracts my favourite textbook was Anson's Law of Contract; it has continued to be a key reference book for me, and I have turned to it many times during the course of my career. It is organised in a very logical fashion dealing first with formation of contracts and then with form and consideration, terms, matters defeating contractual liability, limits of liability, performance and discharge and then remedies for breach. That is indeed very similar to the structure of the AIFC Contract Regulations, which came into force in December 2017 and was one of the first pieces of legislation considered by the AIFC Legal Advisory Council, of which Michael is our most able Chairman and I am a humble foot soldier.

But where did the Regulations come from? One of the earliest decisions of the Legal Advisory Council, in May 2017, was to approve the General Legal Framework of the AIFC in accordance with recommendations given in a report by Hogan Lovells International. That report recommended that the AIFC should use the Contract Law of the Dubai International Financial Centre as the basis for the AIFC Contract Regulations. The DIFC Contract Law provides a clear codified set of rules, derived in large part from English common law and, indeed, looks remarkably like the AIFC Contract Regulations. Why reinvent the wheel when one has a perfectly usable circular object currently in use and ready to go? So that's what we did.

Maybe over time the Contract Regulations will develop and be modified but I suspect that this will happen more through the development of a body of precedents, as the common law has done. Indeed, this concept of precedent is enshrined in Paragraph 6 of Article 13 of the AIFC Constitutional Statute which provides that in adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account *final judgments of the AIFC Court* in related matters and *final judgments of the courts of other common law jurisdictions.* Note, "other" common law jurisdictions.

But starting with the clean slate that we have in the Contract Regulations, what do these provide? First, they cover contracts generally. What is a contract?

- It is an agreement which is legally binding;
- may be in any particular form; and
- may exclude the application of the Regulations, or modify them, and will also include any customary terms of international trade which are reasonable.



So far, so good. So how does a contract come about? By acceptance of an offer. Does it also require consideration, as in the traditional common law sense of that word? No, a "contract is concluded … by the mere agreement of the parties, without any further requirements." [Regulation 35] so that gets rid of quite a bit of common law baggage and other things, such as promissory estoppel. That contract will then "be interpreted according to the common intention of the parties." [Regulation 49]

That common intention may be derived from express or implied terms with the implied terms arising from:

- the nature and purpose of the contract;
- practices established between the parties and usages;
- good faith and fair dealing; and
- reasonableness. [Regulation 57]

So there's quite a lot to think about here, particularly implied terms arising from concepts of good faith and reasonableness, and no doubt the AIFC Court will in due course address them and establish its own precedents.

The Regulations [77-91] next go on to consider performance and breach and, in particular:

- the effect of partial performance;
- payment arrangements; and
- non-performance, with there being a set of rules for determining:
- the effect of non-performance and termination rights;
- the ability to cure a breach;
- the effect of force majeure;
- the consequences of an anticipatory breach;
- rights of restitution; and
- rights of set-off.

Finally, insofar as I am talking about them today, the Regulations [109-123] set out clearly the position regarding damages, namely:

- the right to damages on non-performance;
- calculation of damages;
- the obligation to mitigate damage;
- the right to interest;
- avoidance of penalties; and
- limitation periods.

Let's take these principles and apply them to the facts of several old English cases, favourites from the days of law school but set in modern Kazakhstan and see how they would be resolved under the Contract Regulations.

This is the first one[1]:

A manufacturer of medical products, Mr Omarov, advertises on his website that he has developed a miracle cure that will prevent influenza during the cold winters in Nur-Sultan and promises that if you take the medicine in accordance with the instructions you will be blessed with the

[1] Based on Carlill v. Carbolic Smoke Ball Company [1893] 1 Q.B. 256

healthiest winter ever. So confident is he of the efficacy of his product that he agrees to pay KZT1 million to anybody who nevertheless catches the flu and that he has put KZT100 million in a bank account to secure his promise. Mrs Issaeva buys the medicine in a shop and then takes it in accordance with the instructions, but that winter has the worst bout of 'flu ever. She is in bed sick for two weeks. When she gets better, she claims the reward. Mr Omarov claims that this was only an advertisement, mere puff, and that nobody should seriously have thought that he would have to pay. Anyway, he says, I never had a contract with her, her contract was with the shop.

How would the AIFC Court decide this? Well I think it is pretty clear that it would say there had been an offer which had been accepted and that therefore a binding contract had arisen [Regulation 14]. But, says Mr Omarov, I might have made an offer, but I was never told that it had been accepted. Unfortunately for him Regulation 19(3) provides that:

"If, by virtue of the offer … the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed."

So, Mrs Issaeva accepted the offer by taking the medicine and is entitled to her KZT1 million reward! Now of which leading English case does this remind us? By the way, the same result would probably arise under the Kazakhstan Civil Code but that is not a certain result.[2]

Here's another case[3]:

Mr Dostoevsky, a well-known lawyer in Nur-Sultan has a very busy office and one day his only photocopier breaks down. The whole office grinds to a halt and Astana Office Equipment Carriers are called in by the office manager to collect the photocopier, take it to be mended and then bring it back the same day to the office. The circumstances of the break down are never explained to the carrier, nor is the nature of the work done in the office. On his way back with the mended photocopier the driver gets diverted to attend to the urgent needs of another client and just loses track of the time. In the end the mended machine is not delivered until the next morning and a furious Mr Dostoevsky claims that he has lost a whole day's work on several important deals because of the carrier's negligence. He says that he is entitled to be paid the equivalent of all the profit his office would have made that day had the photocopier been returned on time. The carrier said that he would have expected that the office would have had a second photocopier and how was he to know that the office was at a standstill without it. He also said that he had no real idea what lawyers did and that he thought they only fought long and time-wasteful court cases.

What did the AIFC Court say when faced with a lawsuit from Mr Dostoevsky? Well, the carrier had promised to bring back the photocopier on the same day, and didn't, so it had failed to perform the contract and as a result Mr Dostoevsky was entitled to damages [Regulation 109], measured as the amount of harm he has suffered [Regulation 112(1)] but only to the extent that the carrier foresaw or could reasonably have foreseen at the time he was contracted to do the work [Regulation 113]. The court agreed but also said that, if he was indeed so busy, Mr Dostoevsky should have sent out the office manager to rent a small photocopier or used a photocopying shop to help him cope and that by not doing so he had not taken reasonable steps to reduce the harm he had suffered and that damages would be reduced accordingly [Regulation 117]. This is the case of Hadley v. Baxendale from 1854. How would this have been handled under the Kazakhstan

[2] If we assume that the website is a purchase place and the name and quantity of the goods are specified, then according to Articles 407 and 447 of the Civil Code such an offer can be considered as a formal offer and the fact of purchase of the medicine by Mrs. Issaeva would be an acceptance of the offer. If the court finds that the promise to pay KZT1 million was a term of the offer, and not just a promise which does not entail any liability, then the court will order Mr Omarov to pay Mrs. Issaeva that KZT1 million.

[3] Based on Hadley v. Baxendale [1854] 9 Exch. 341.

Civil Code? Here there is a major difference, because under paragraph 4 of Article 9 of the Civil Code damages are calculated on an indemnity basis, subject only to an obligation on the damaged party to mitigate. This is found in Article 364, so if Mr Dostoevsky had tried to mitigate but had been unsuccessful in finding help, then under the Civil Code he would have collected all his lost profit.

Finally, we'll look at one last case[4]:

Mr Tschaikovsky, the well-known composer and opera impresario, hired the famous mezzo soprano, Yelizaveta Lavrovskaya, whose best singing days were, to be frank behind her, to sing the part of Tatyana in three performances of his opera Onegin at the Nur-Sultan Opera House. He agrees to pay her KZT 100,000 for each of the three performances and specifies in the contract (which is governed by AIFC law) that should she fail to make any of the performances she will not get paid anything and, in addition, will pay him compensation of KZT 2 million. After the first performance the singer playing Prince Gremin, her stage husband, causes her great offence by publicly criticising her singing and suggesting that she was too old for the part of a young maiden. She refuses to attend the second and third performances. Tschaikovsky sues her for KZT2 million in the AIFC court. What was the judgment?

Well, the first thing the court established was that Ms Lavrovskaya was definitely in breach of her contract with Tchaikovsky and that he was therefore entitled to damages, subject to his obligation to mitigate and the question of foreseeability discussed above. But what about the agreed damages of KZT 2 million? In relation to these, Ms Lavrovskaya was able to establish that the behaviour of Prince Gremin had so shocked the people of Nur-Sultan that virtually nobody had booked tickets for the second and third performances and that anyway her understudy had sung the role of Tatyana beautifully, so the court concluded that in those circumstances Regulation 122(2) should be invoked because KZT 2 million was grossly excessive in the circumstances in relation to the harm resulting from the breach. It was also payable in the event of any non-performance, irrespective of the actual damage. That is also the result which would have prevailed under English law; KZT 2 million was clearly a penalty and was not a genuine pre-estimate of the impresario's loss. Under Kazakhstan's Civil Code a similar result would probably also have been achieved.[5]

[4] Based on Kemble v. Farren [1829] 6 Bing. 141

[5] Under Article 293 the parties may agree to provide for a fixed sum payable on breach but under Article 297 the fixed amount is reduced if found to be excessive.

So, I think that, as a result of this test drive, the Contract Regulations have fared pretty well. There may be some instances where they differ from the position at common law in England, but on the whole, I would say that they do succeed in their purpose of codifying English contract law. Thank you.

MR. CHRISTOPHER CAMPBELL-HOLT

Registrar and Chief Executive
AIFC Court and International Arbitration Centre

"Rights of Audience in the AIFC Court"

I have been asked to talk about the rights of practitioners or lawyers at the AIFC Court. We call this rights of audience. In our *AIFC Court Regulations 2017,* we provided for specific rights of the Court to decide for itself how and on what terms lawyers would be able to represent clients in the Court. We have created a code of conduct for lawyers. I will say a few words about that in a moment.

When you look at some courts around the world, particularly some other international financial centre courts, I think it is fair to say that they can have quite a restrictive mechanism in place, or code in place, to restrict the rights of audience to a limited number of lawyers.

What we wanted to do at the AIFC Court was to launch a system which will be truly wide and open for maximum access to justice to lawyers from all over the world, not just international lawyers, but specifically to enable Kazakhstani lawyers to represent their clients on an equal footing in the AIFC Court to international lawyers.

We have developed a system which we believe provides registration of lawyers in the quickest possible way. It is free of charge with no cost whatsoever to the lawyer wishing to register for rights of audience at the AIFC Court. Rights of audience are also granted for an unlimited duration.

Rights of audience may be obtained in two ways. First, they may be obtained via our eJustice system, which enables the entire electronic filing of all papers related to any claim filed at the AIFC Court and at the International Arbitration Centre. It provides access to justice 24/7. Filing for rights of audience at the AIFC Court via the eJustice system is a very simple process.

We have an excellent team of Kazakh nationals, whom we have trained, in London and elsewhere, to ensure that all people in Kazakhstan who wish to register for rights of audience can have immediate assistance.

Secondly, lawyers may apply for rights of audience via email.

The lawyer may simply write a letter to me, the Registrar of the AIFC Court, requesting an official grant of rights of audience before the AIFC Court. It does not have to be a case in particular question at that time, it can happen at any time. And we urge and have been urging and promoting for the last two years, lawyers to do so. All that is required from an internationally qualified lawyer is a valid practising certificate from whichever regulatory body the lawyer is a party to. So, for example, a New York qualified lawyer will need to provide evidence of a practising certificate that is currently valid. In addition, they will need to provide a letter of good standing from their regulatory bar board. And we have already registered very many lawyers through the system successfully specifically from the US and the UK.

As we are aware, there is no professional lawyer qualification as it currently stands in Kazakhstan for commercial lawyers. And most commercial lawyers that I have spoken to, and indeed our judges and arbitrators and arbitration Chairman have spoken to, over the last year and a half, have explained that they have rights of audience in the local Kazakhstan courts without having that professional qualification. All they might have in some instances would be an undergraduate law degree.

So, we have developed a system, which enables Kazakhstani lawyers who are currently practising as commercial lawyers or otherwise, to register for rights of audience at our Court. To apply, such lawyers need to provide a scanned copy of an undergraduate law degree from anywhere around the world, and a letter of reference either from a judge in front of whom they have represented a client in a court in Kazakhstan or elsewhere, or from a client to the like effect. We have registered a significant number of Kazakhstani lawyers already, and we want to encourage more and more lawyers to do so.

I have said that the process for registering as lawyers is very quick, is free and is for an unlimited time. But there is one key condition and that is that the lawyer who registers for rights of audience at the AIFC Court must comply with our code of conduct, which is available in English and will soon be available in Russian via our AIFC Court website.

I am going to summarise as quickly as I can the key elements of our code of conduct because I think it will be of a particular use and interest

to anyone wishing to register or to advise others to register as lawyers in the AIFC Court. We started with an overriding governing principle that, firstly, as I have just said, there must be an observance of the code of conduct. And this applies not just when a lawyer is perhaps acting as an advocate in front of a judge in the Court, but it applies from the very beginning of the initiation of the claim. So, it starts from bringing a claim to the Court through to its final resolution. There are a series of duties which our code of conduct requires all lawyers to comply with.

Now, why have we done this? We have done this because we realise that it is critical for our AIFC Court, in the same way as the Arbitration Centre, to have international standard credibility and integrity. If the Court can develop and enforce a particular conduct, a particular standard of behaviour, it will help our international standing, locally, and regionally, as well, for that credibility and integrity. It will, we hope, as has been proven in courts all around the world for many years, also assist with the quickest and most cost-effective resolution of the dispute.

The first duty I want to touch upon, if I may, are the duties owed to the Court. A lawyer shall deal with the Court and its staff honestly, cooperatively and with civility. Lawyers shall ensure that they are familiar with the rules of the Court, and in particular, the overriding objective. Now I am going to highlight, if you will forgive me, the overriding objective. Any common lawyer in the room, particularly the English lawyers, will be very familiar with this because of course, it has come from Lord Woolf, our Chief Justice, many years ago, and it is something which we were really keen, not just for the Court but also for the Arbitration Centre, to include in our Rules.

In terms of being familiar and complying with our overriding objective, lawyers at the AIFC Court are expected to assist the Court to deal with cases justly. Dealing with a case justly includes ensuring that the system of justice is accessible and fair, ensuring that the parties are on an equal footing, ensuring that the case is dealt with expeditiously or quickly and effectively using no more resources than are absolutely necessary, dealing with the case in ways which are proportionate to the amount of money involved in the importance of the case, to the complexity of the issues and the financial position of each party.

Lastly, making appropriate use of information technology and we, as the AIFC Court and the Arbitration Centre, are doing everything we can to assist lawyers to utilise the very latest up-to-date most digital technology.

The lawyers also have a duty to the Court to never knowingly or

recklessly make any incorrect or misleading statements of fact or law to the Court, and they are under a duty to correct any material incorrect or misleading statement of fact or law at the earliest possible opportunity.

Lawyers owe duties to their clients, in addition to the Court. Thus, lawyers shall advance, defend and protect the interests of their clients before the Court without regard to any consequences to themselves, or any other person. They have to be independent and fairly represent, in an honest way, their clients. Lawyers shall at any time of their engagement enter into a clear and transparent fee agreement with their client and ensure that sufficient records are kept of work done to enable the Court to properly assess any legal costs and expenses claimed during or at the conclusion of proceedings. And lawyers shall keep information communicated to them by their client confidential unless such disclosure is authorised by the client, ordered by the Court or required by law. The duty continues even after the lawyer has ceased to act for the client.

There are other duties, but I will very quickly highlight duties to other lawyers. Lawyers shall deal with each other honestly, cooperatively and with civility.

Now, what are the consequences for a lawyer acting to represent the clients in the AIFC Court if that lawyer does not act in accordance with the Code of Conduct? There are specific sanctions since there is no point in having a code if there is no logical result at the end of it to keep everyone to account to ensure our longevity, integrity, credibility and compliance with best international standards in the Court from the lawyer’s perspective.

Firstly, any complaints by any person or body that our lawyer has acted in breach of our Code of Conduct for Rights of Audience shall be made to the Court acting through the Registrar, me, or any other officer of the Court as the Chief Justice of the Court, Lord Woolf, may appoint for that purpose. The Registrar shall file a copy of the complaint to the lawyer, require from the lawyer a written response to the complaint, make any further investigation he deems appropriate, and accordingly issue a reasoned written decision on the complaint.

The Registrar should be responsible for drawing up and issuing the decision which should be final and not subject to appeal. Lawyers may be suspended from practice as well. We hope that this will never be necessary in practice because we want to encourage as many lawyers as possible to represent clients in our Court.

What are we doing in the meantime to assist lawyers, particularly from this country, Kazakhstan, and from the Eurasia region to be on a level playing field in terms of complying with the Code of Conduct? Well, firstly, it is critically important to make everyone familiar with our Code. We are promoting the code now and we will be doing a lot more promotion on this in the foreseeable future, and we are providing various training programmes to assist lawyer development in Kazakhstan.

I am very proud and privileged to say that in June, we launched our education month at the AIFC Court and the International Arbitration Centre, during which period, we touched upon, not exclusively, but we touched upon some key areas that we believe will be of immediate assistance to lawyers in the Kazakhstan community and throughout Eurasia.

We partnered with a dear friend of ours, Dr Mark Moore, from Cambridge University. He is the director of the Masters in Corporate Law Degree. He taught an international commercial law course for two days in Nur-Sultan and two days in Almaty to Kazakh lawyers, professors from the academic institutions here and students. We also partnered with two leading barristers from London, Charles Banner QC, and Tatiana Nesterchuk from Fountain Court Chambers, to deliver two days of common law advocacy training in Nur-Sultan, and then also to the Almaty City Bar in Almaty.

We had enormously positive feedback on our education programme, and we will be rolling this out again in the future because we really can see that there is a significant need for this in Kazakhstan. We really want to assist lawyers to do the best they can for their clients in the most appropriate and sophisticated international way.

That is all from me, thank you very much!

CHRIS KENNY

Chairman of the AIFC Advisory Panel on Legal Regulatory Matters,
Chief Executive and Secretary of MDDUS

“Vision on the regulation of the legal profession in the AIFC”

On behalf of the Advisory Panel on Legal and Regulatory Matters, let me begin by thanking the AIFC for inviting the five of us to take part in this fascinating initiative and also for the invitation to participate in today's conference.

None of us has direct experience of having worked in Kazakhstan. I can claim that, a quarter of a century ago, I worked on economic reform in the Former Soviet Union in the UK Treasury. I certainly did not envisage then that I would find myself doing business in such a new, vibrant capital 25 years later – or even that an institution such as the AIFC could exist. We have all become increasingly fascinated by this extraordinary endeavour and we are flattered to have been asked to play part in one aspect of its further evolution.

I was asked initially to talk about "A vision of legal regulation for the AIFC". That sounds as if we are being parachuted in with a preconceived picture of what was needed. Let me assure you that this is not the case. Neither I nor any of my colleagues on the panel start with assumptions about what kind of legal services regulation is needed for the AIFC – or even whether any kind of regime is essential at all. So what I want to do today is to talk about the panel and about our remit, rather than our endpoint.

But I will also be asking for your help. I was taught by one of my former mentors always to be very suspicious of management consultants. He was the first person to tell me the old joke that, "A management consultant is a man who steals your watch to tell you the time." Well, if your watch goes missing this week, we may be the suspects!

I'm not going to apologise too much for that – there is a danger that we will get our recommendations wrong if we do not know the time in the AIFC. So, we are determined to consult in-depth and learn from the expertise you have from working in the unique setting of the AIFC. We want to understand the context, what works well and less well from your perspective – and what both excites and worries you about how the situation might develop in future.

Let me take you through the relevant parts of our remit one by one to show where we need your input:

First, the panel has been asked to

> "Assess the rationale and evidence base for any specific regulation of legal services providers registered with the AIFC, in order to assist the AIFC to meet its stated objectives"

This seems to us to be the most fundamental part of our remit. We are being asked fundamentally *whether* there is a case for regulation of legal services that is specific to the AIFC. We are not starting from the position that the answer is regulation, irrespective of what the question is.

You may feel a degree of cynicism about that question when you look at the membership of the Panel. After all, we comprise two senior staff from the Legal Services Board, the overarching regulator in the UK, a former deputy chair of the Bar Standards Board, the editor of the leading academic work on legal regulation and the mainstay behind the international legal regulators conference.

But before leaping to that view, take a look at our record. I have spent

nearly as long arguing with regulators – first as Director of Life Insurance and Pensions for the Association of British insurers and now directly litigating against the General Medical Council and General Dental Council in my current role as chief executive of a major clinical indemnifier - as I have spent as a regulator. Crispin Passmore spent most of his time as my deputy and then as number two at the Solicitors Regulation Authority radically slimming down the SRA rulebook. Patricia Robertson introduced similar de-regulatory initiatives at the Bar Standards Board and she and Iain Miller, have spent as much of their time as practitioners arguing against regulators – not least the SRA - as for them. And Alison Hook may well bring international regulators together, but does so as much to berate them into deregulation, drawing on her past experience with the Law Society, rather than urging them to do more.

I rehearse that not simply to claim that we are sinners who have repented but to impress on you that the question about whether to regulate or is not a genuine and crucial one. We will want to establish

1. First, the current and potential future interplay between the emerging domestic regulatory regime for legal services in Kazakhstan, regulation of AIFC participating firms in their home jurisdictions and the needs of the AIFC itself. We are particularly mindful of the words of the President in the Management Council yesterday when he spoke of the AIFC as an exemplar for Greater Kazakhstan and we have benefitted from a thorough briefing from the Minister of Justice and his colleagues;

2. Second, are there potential harms which a regulatory regime that is bespoke to the needs of the AIFC can help avoid? If those risks exist, are they present today or are they rather more nebulous threats for the future?

3. Third, could the cure be worse than the disease? Over prescriptive regulation imposes direct cost – but I believe that the cost of lost competition and innovation can be both greater in scale and much more harmful in effect.

4. Fourth, what is the cost of inaction? Many clients may big and ugly enough to take care of themselves, but not all. And might perceptions of gaps in control, for example around money laundering prevention, detract from the AIFC's efforts to head to the top 30 international financial centres from its current place at 51?

The second part of our remit is quite subtle:

> "Identifying (if specific legal service regulation is thought not to be justified at present), the triggers, or tests, which might lead to a change in this assessment in future"

There is not much hard data about the AIFC's operation in its early days. So, informing our views, we will be as, if not more dependent on judgement, foresight and experience. That brings is a risk of over-reaction and over-prescription.

But there is an equal and opposite risk of being unable to react promptly if questions and challenges, requiring a regulatory response, do arise. So, if the conclusion is that now is not the right moment to introduce a regulatory regime, we should still seek to have a possible solution ready that could be deployed in future, rather than having to identify one in an emergency.

This is, of course, is closely related to the third leg of our task:

> "Identifying (if regulation is currently advisable), the most appropriate scope, extent and structure for this to take, given the AIFC's mission, membership and wider legal environment"

This strikes us as important for at least three reasons. First, it is definitely an "if" clause, rather than an "as" one. Second, it very clearly sets any recommendations we make in the context of the wider mission of the AIFC, rather than encouraging us to look for the perfect vision of legal services regulation. For the avoidance of doubt, I should just get on the record now that we do not believe that the UK version as currently constituted in the 2007 Legal Services Act is that vision – we can learn from its failings as well as its undoubted successes. And, third, it also places the work clearly in the "wider legal environment" and current domestic reforms in Kazakhstan and more widely.

The fourth and fifth legs of our terms of reference are intimately linked. The fourth asks us to:

> "Identify what regulatory institutions and architecture are required to deliver any agreed approach, particularly in the context of other AIFC institutions and what the most appropriate operating model for models might be"

whilst the fifth asks us to:

> "Identify what strategic next steps should be taken by the AIFC in this area and how"

The focus on other players and institutions seems to us extremely relevant. Michael Blair rightly talked about "internal cooperative overlap" as a working principle for business in the AIFC. But that does not translate well to regulation. Duplication, and confusion - whether between regulators and courts, overlapping regulators in the same jurisdiction, representative bodies and regulators - can cause great reputational damage to all who get caught up in it.

The Clementi report on legal services regulation in England and Wales famously included an almost incomprehensible "wiring diagram," showing who did what in regulation. In my view, that led to a world where regulation was both expensive *and* ineffective. And in England and Wales, we are still working through an only half improved system. We hope to help the AIFC avoid that misdesign from the start. Legal services regulation should only be concerned with the behaviour of lawyers and law firms. It should not overlap with the role of the Court nor move into the proper territory of AFSA.

In short, to brutally oversimplify,

- First, we will seek to determine whether any action is needed at all – and I underline again that we start with a completely open mind on this;

- Second, if we do think something may be needed, we will consider whether that need is immediate or should be subject to further triggers

- Third, if it is immediate, we will seek to make the response absolutely proportionate and related to the specific context of the AIFC, rather than being academic in nature To echo Paul Pullinger's words early, regulatory rules are absolutely meant to be

a climbing frame to get the AIFC and its participating firms to new heights, safely, not the bars of a prison.

- And fourth, we will aim to ensure that any solution complements, rather than complicates, the unique institutional architecture of the AIFC.

I hope that this gives you a degree of reassurance both about the task that we have been given and the way we are setting about to achieve it. To help further, let me pick out the sixth leg of our task which is:

> "To engage and achieve strategic involvement with any regulated firms/persons and other stakeholders"

Thank you.

DAVID GALLO

Expert to the AIFC Authority,
Ex-Director of the DIFC Academy of Law

“Preparing Lawyers for International Commercial Law Practice at the AIFC”

Good morning. Thank you for your time and attention. I am David Gallo, and I wanted to talk to you for about the next 10 minutes about our thoughts around how to adequately prepare lawyers for an international commercial law practice because there will be some very big things that go on here some very complex things. And we're especially enthusiastic to have the opportunity for legal professionals to develop along with the legal system in order to operate effectively in this grand scheme of things.

There are a couple of themes that I'd like to focus on. One is preparing lawyers for international commercial law practice. But a related theme to that is, are continuing to think about the linkage between the vision behind the AIFC and the operating model to make that real, and the importance of legal education to drive the success of the venture.

So, a big theme here is the importance of knowledge-based legal system development at the AIFC as a key success factor. So, a couple of big topics, there's a lot to cover in under 10 minutes. But we'll get there, I promise.

One is the intersection of law and business. Right? The AIFC is a commercial platform, it's all about business. It's attracting multinational companies to come here and get set up, send people here, financial services companies to come here, invest money, take a risk, and inject capital into some major infrastructure development projects to really drive the growth engine behind the economic vision.

But we need to talk about the current situation, where are we in the scheme of the development of the AIFC? We're going to summarise just very briefly what everyone already knows, but by way of review, what are those key components of the economic vision? And what are some of the challenges around delivering that vision? And then I think most importantly, we'll talk about how education will typically address those challenges in a positive way.

When we talk about the business of education, we think about how do we come up with a structure to provide systematic legal education to supplement the already phenomenal skills that legal practitioners will bring to the AIFC equation. And whenever you're thinking about creating a structure, you need to think about classical business modelling theories. What are the needs of this environment? What are the education needs? Who are our stakeholders? And what are their expectations?

We're going to talk a little bit about that because that becomes the basis for certain market findings that will really inform the structure of an education model within the AIFC. And then that naturally leads to value. An education model needs to deliver value. Legal Education is a competitive saturated field, and globally, there are some phenomenal legal education providers. So, the question is, how do we come up with something that's customised that's appropriate, that's relevant, and maybe fills gaps in traditional legal education, to make sure that the practitioners here have the skills, the confidence and the knowledge base to perform in a way that will really drive the success of the AIFC?

Okay, so we talked about the things that are pretty obvious, but just

quickly, you know, sort of by way of review, what was what is the government vision? What is the AIFC Executive remit? And especially, everyone in this room and all personnel and stakeholders associated with the AIFC, what are the things that everybody is thinking about in terms of the big picture? Well, this is a global stage. This isn't just Nur-Sultan, this isn't just Kazakhstan. It's not just Eurasia. This is a global stage and the vision is fairly grandiose.

That is to come up with an economic Business Centre, a centre of commercial excellence, and along with that, you need to have a centre of legal excellence, as the foundation to drive the economic vision. Its commercial hub, clearly, this is business, this isn't Criminal law, this isn't Family Law. These are commercial transactions, and commercial professionals will be those who drive both the legal and the business infrastructure of the AIFC. It's all about economic growth, it's about not growth for growth's sake, but investing capital and infrastructure projects that will create higher standards of living for people who live here, make it an attractive place for people to come and live and learn and work.

So, economic growth really matters. It's really the foundation behind what this is all about. Diversify industries, we've all heard the mantra, you have phenomenal natural resources here, oil-based and so forth. The idea is to diversify away from extraction and distribution into various other manufacturing as well as service-based industries. It's about foreign direct investments about attracting companies to come here and invest. It's about public, private partnerships. There will be some unique experiments in collaborations between and among governments and private enterprise and other organisations to make it real to make it work. It's about major projects, projects that could take two, three or four years to deliver, projects that are incredibly sophisticated and incredibly complex, from a legal standpoint.

Economic metrics, you know, we're a room full of lawyers and legal professionals. But I think we should always keep our eye on what the economists are thinking at the government level and at the international level, about the goals and objectives. So, when you think about growth, you think about the gross domestic product, you think about output, you think about diversifying manufacturing, and services so that more and more of that GDP comes from the services sectors, not just manufacturing. It is about new jobs. It's about increasing employment levels. When you have a tightening labour market, so more and more

demand for good labour means higher salaries, higher salaries, means more disposable income, that disposable income gets invested back into the economy in the form of consumer expenditures.

So, the ship rises with the tide. Things like a balance of trade, budgets, surpluses, and so forth. These are all things that are outputs of the grand experiment, the grand economic development vision, and now there's a new legal system, that's the foundation. On the right side, that’s maybe an appropriate segue to talk about what are the challenges for education? And what are some of the challenges to really drive success?

First of all, its jurisdiction awareness. The ongoing marketing and business development activities will continue. But education needs to play a significant part in educating the public and educating potential participants about why they should form their business organisations here. It's about knowledge of the laws and the rules. Obviously, it's common law, its English language, it is based on the statutory scheme of England and Wales. But what's interesting here is you have two different legal systems that exist in contiguous space, right, you have the national Kazakh legal system based on civil law, a long tradition of excellence and effectiveness. And in the very same city, you have a common law, legal jurisdiction, in the English language and so forth.

So interestingly, the transactions the project financings, the project development, again, these are going to be complex, sometimes multi-party and sometimes there will be multiple legal systems and laws and rules that will come into play, that will need to be managed by legal professionals.

A very quick anecdote. I moved to Dubai about 10 years ago with a large multinational company. It was very clear in Dubai, that large corporate clients had legal needs that were governed by in that case, DIFC Financial Services laws. And in other cases, they were operating units that the company had, that was governed by the Federal UAE law. So, if you're a client or a potential client, a multinational company, you need to have legal support and competencies that are effective, and in some cases may cut across jurisdictions.

Think about the environment that we're going to be operating in when you have civil law and a common law environment with an international global overlay. We will all live in a comparative law environment, we will all live in a conflict of laws environment, in some cases, we will live and operate in an international law environment. We were talking yesterday about certain statutory schemes that will be relevant for practitioners here. Things like Anti-Money Laundering, Foreign Corrupt Practices Act, Data Protection and Privacy, some of these big themes will play into providing competent legal services here.
Practice standards.

Chris focused on the fact that when you have a new jurisdiction, and it requires legal professionals to competently operate within that system, for the benefit and protection of clients and society, and for the global brand of the AIFC is very important that there is some baseline of practice standards around what will be required to operate. And that's where legal education can come into play. The skewed playing field, what does that mean? We're talking about here is that if we look at Dubai as a model from 14 years ago, I think what happened is the English and American and other common law practitioners were first responders. And here, at the AIFC there's a unique opportunity to really include the local and regional legal practitioners in the AIFC work to give them equal access to transactional work, equal access to client development, and so forth.

So, let's move on to the big takeaways from all of that.

It's sort of a logical set of deductions that the legal system is the foundation for growth because you have to have predictable, fair, well-known laws to govern complex commercial contracts. And you need to have a fair and efficient and consistent dispute resolution process, as Christopher described, relative to the courts. You need knowledgeable professionals in order to transact these major deals and to resolve disputes. And education and knowledge are really key success factors in that entire game.

Now, this I won't go through in any level of detail, but you step back and say okay, so what, now what, what does all this mean? Again, when you're trying to build an education model that's going to be meaningful and relevant and valuable and may be differentiated from the traditional legal education that most people have brought to the equation.

You're going to want to look at who are the stakeholders and what are their needs, what are their expectations. What about the external environment, anytime you build a business model, in this case, it's the business of education, it's a service but it also needs to be a sustainable model. You need to look at what is the competitive landscape, what is it that we can do that is different and better, and what others might be able to do. Well, that analysis will lead you to certain findings and conclusions and that information will really drive the content of what we can put together.

Value Proposition we talked about differentiation that really matters. Well, the big takeaway from all of that is that, let's think about what those findings are in terms of the stakeholders who will be affected by all this.

On the government side that one’s pretty obvious. You need legal infrastructure as a foundation for economic development we've already talked about that.

Let's think about lawyers let's think about law firms. Well, traditionally, the value proposition for international law firms was, they were knowledgeable, they're quick and efficient, and they are priced right, they're priced right enough to win business. But what happened over time, in the private legal sector was it got to a point where pretty much every international firm had that same value proposition.

So, there is a risk in the legal profession of the commoditisation of their legal services where the only thing ultimately that started to differentiate among firms was price, who could dive lowest in price. Well, that's not really the best way to, you know, operate a sustainable industry or a business so lawyers and law firms have a vested interest in diversifying their competencies. Maybe expanding their hiring practices to include Civil law and Common Law Lawyers, and maybe practitioners and big firms would see the benefit of cross-training, getting some legal system, academic knowledge and experience in the other system, where they may not have the background so cross-training can be very important.

When you think back to law firms, you have enterprise clients I told you about my own anecdotal experience in Dubai with a multinational. Big companies have legal needs in multiple jurisdictions. If you're a law firm, you really care about your enterprise relationships with major companies, and you want to make sure that you have the legal services that are appropriate to support your client, whether they be in civil or common law jurisdictions, or whether it's in the AIFC or outside the AIFC.

To wrap it all up, let's kind of come back to, who are we talking about here. How do we deliver valuable legal education here? Well, the most relevant and quality-oriented way to get into the market is to collaborate with those organisations and institutions who already have knowledge, they already do this very well. So, you look for win-win collaboration opportunities so you can quickly get to market with high-quality products and services, those players are universities.

There could be opportunities to get additional qualifications here whether it's in to become a solicitor under the laws of England and

Wales or a US qualified lawyer, there can be specialised training that can be made available right here to truly supplement the backgrounds and experiences of local nationals and international lawyers. Support Services groups and likely will be here. These are the publishers, the technology enablers and so forth. They would make great collaboration partners. Obviously, the law firms and the barristers who are here, both the internationals who are coming in, as well as local are a phenomenal source of knowledge and wisdom, and we would hope to conscript them into our learning and development activities and lecturers' writers and instructors. Finally, companies themselves will be building their own in-House Counsel teams, and they really represent a wealth of knowledge, they're both great targets for education, as well as great sources of delivering education in certain circumstances

In terms of what we have in mind, we're thinking about some sort of Academy of Law that would encompass the kinds of things that a law school might encompass but customised for this environment. So, think about the things the Law Society does, its legal education, its publications, its pro bono services, and its creating networking opportunities for the professional community of legal practitioners. So, we're thinking about an academy of law, and we are in the process of going through these various steps that ultimately, hope, will result in the launch of a meaningful educational backbone for the AIFC. Thank you very much.

JUSTICE ANDREW SPINK QC

AIFC Court

"The AIFC Court: The Convergence of the Common Law and Civil Law"

Good morning, everybody! In this short presentation, I propose to consider at a relatively straightforward and introductory level, the main features of the civil and common law systems, their differences, and some of their perceived advantages and disadvantages.

I am very conscious of the fact that sitting in the audience are some, far more experienced practitioners in both systems than myself, and what I may say, will come as no surprise to a number of you. But I hope, nonetheless, that drawing the threads together in the way that I propose to do will be of some interest.

There are important differences between the way in which the substantive law in the common law and civil law systems is made and recorded, and between the procedures that are used in those two systems. I am going to try to outline some of those and seek to explain, without in any way trespassing on my colleagues, Sir Jack Beatson's talk, something about the way in which those two systems will operate alongside each other in the AIFC Court itself.

First of all, substantive law. We all talk about the common law, but what is it? And what are its perceived advantages, if any, over the civil law system? Recently, the Chancellor of the High Court in England and Wales, Sir Geoffrey Vos, said, in a lecture in London, the common law is a system of basic legal principles established over centuries, and developed and matured by cases, raising new factual situations to which established principles and precedents can be applied. This, as he said, gives rise to certainty and predictability.

The common law, as we can see, has developed organically in England and in Wales, entirely separately from any parliamentary legislative process, which may be running alongside it through centuries of judges having a central role in developing the rules that govern the behaviour of its citizens, and amongst other things, the mercantile and property rights and obligations that operate between them. To take a simple but classic example, in England and Wales, the elements required to prove the crime of murder, are contained in case law instead of being defined in statute. These principles have been established not only in England and Wales but in other countries where the common law has formed part of the foundations of the local legal system. Accordingly, the common law legal principles which we operate stem from the thinking of judges in many nations.

Does this mean that the common law is judge-made law? Well, the answer is both yes and no, perhaps to that question. As Sir Geoffrey said in his recent lecture, the common law develops incrementally, and that has been a successful modus operandi for hundreds of years. It is an important mantra that the court should limit itself to deciding the case. We should, in my view, be cautious of grand statements as to how we might like the law to be. So, in the case not covered by statute or legislation enacted by Parliament, the result will be determined by legal principles that have been developed over time by judges. In this long-term sense, the common law is judge-made law. But it is important to understand that judges in a common law system do not just make the law up as they see fit to deal with the case in front of them. They apply the law that has been established in earlier cases, and then gradually and incrementally developed and matured, to use Sir Geoffrey's words, to meet new factual situations.

It is often said that a common law system creates greater certainty and predictability of outcome than a civil law system based on more abstract codified legal principles. If that is correct, why is it so? The fact that in a common-law jurisdiction like England, a judge is bound to follow rulings of law in earlier cases, provided those rulings are properly applicable to the facts of the case in front of him or her, and that, of course, is a matter for the judge to determine as well, is the first important contributing factor to the certainty and predictability of the common law.

This principle of binding legal precedent is part of the bedrock of the common law. In the AIFC, interestingly, the position on precedent is slightly different, although it may be doubtful that in practice there will be much difference in the outcome. As is made clear by the Constitutional Statute, the AIFC Court is bound by the Acting Law of the AIFC which consists of the AIFC Acts, the Constitutional Statute, and the Acting Law of the Republic of Kazakhstan. However, the AIFC Court may also take into account judgments of the AIFC Court itself in related matters, and of the courts of other common law jurisdictions.

This combination, on the one hand, of a codified law, which is a civil law approach, and on the other hand, a modified form of precedents, whereby the Court may take into account decisions of its own Court and of common law jurisdictions elsewhere, demonstrates, I would suggest an element of practical convergence between the civil and the common law approach in the AIFC Court.

The other contributing factor to the certainty and predictability of the common law is the breadth and depth of reported common law cases. They cover a multitude of real factual situations, which means that there is in effect a vast pool of legal resource out there, in the form of example, cases on different permutations of fact, and that helps to identify what the result ought to be in any particular case. And there is less reliance on pure theory and logic than there might be in certain situations under a civil law system. And experience suggests that this element of certainty and predictability in the common law is an attractive feature, maybe one of the reasons why England has been such an attractive centre for dispute resolution on the part of international litigants and those seeking arbitration resolutions for so long.

The second perceived advantage of the common law is its flexibility. If a case has slightly different facts, or if there are peculiarities that can distinguish the current case, from those gone before, it is open to judges to decide the case on the facts in front of them. And that results in a dynamic and evolving process. And many people think that that flexibility is an important element of a legal system in our modern global community, where ways of carrying on the business can change so quickly. And in order, for example, to respond to such developments as FinTech, artificial intelligence, and digital ledger technology, the common law is, in fact, very well placed to do that. And it is a tribute to the adaptability and flexibility of the common law that it has been chosen, I would suggest, as an important element in the law to be applied by the AIFC Court.

Under a civil law system, which those of you who are Kazakh lawyers will understand far better than I, the principal approach is to have a set of enacted rules, we usually call codes because they codify the law. They enshrine the basic rights and laws and duties into statute. And there is a somewhat more limited scope for judge-made law. This, of course, can make it much more straightforward to learn and discover what the law is. In the common law world, a significant problem for students and practitioners is the sheer volume of legal material that the common law system produces. It is particularly relevant in a dispute resolution centre in an international financial centre such as this. That is why, one may feel, that the AIFC approach has been to introduce a codification of basic legal rights to sit alongside the underlying common law basis for those principles in terms of access to an understanding of

what the law will be in the AIFC Court. That is an important factor, which of course is not present in the courts of England and Wales.

I will conclude my presentation briefly by talking about some of the procedural differences between the common law and the civil law approach. In the common law approach, of course, the underpinning aspect is the adversarial system. The parties under that system, and in line with procedural rules designed to facilitate the fair resolution of disputes in an adversarial context, take a position and argue that position before a neutral judge whose role at that stage in the process is to act more like a referee, and the judge will remain neutral until giving his or her decision. And of course, the judge is bound by the principles of precedent. This gives the parties in an adversarial system, to a considerable extent, a strong influence on the way in which the pre-trial procedures will be organised, and what will happen at trial. In terms of the presentation of the evidence, the experience that advocates and judges have gained in cross-examination of witnesses, and in pre-trial procedures, in relation to disclosure of documents.

Experience has tended to demonstrate that that can be a very useful way of determining the facts in a particular case. The judges of this Court, I think, entirely have all practised as advocates in the courts of England and Wales before becoming judges and that is a characteristic of the way in which our courts operate in England and Wales. What it means is that the central legal characters in the trial process, the judge and the advocates, have between them a considerable amount of experience of what does and does not work and what is and is not appropriate in terms of the way in which court procedures should operate. And I think that is generally perceived to be an advantage in terms of the way in which the trial process works.

Under the inquisitorial system, which is used in many civil law systems, a very different approach is taken. Judges tend much more to take the initiative in questioning witnesses, in ordering investigations, and in seeking evidence, and may be less likely to be bound by decisions in other cases. The court and the parties are seen perhaps to be working together to find the correct resolution. But the parties have only a very limited say in what issues are presented to the court.

In our common law jurisdiction, and also in the AIFC, the adversarial approach is mediated, helped and assisted by the Civil Procedure Rules, which have been adopted in a briefer and rather more accessible form in the AIFC Court Rules in order to enable the Court to deal with cases justly and at a proportionate cost. This is a good example, I would suggest, of judges in common law courts being given the power to be more interventionist than was traditionally the case previously. And for that, we owe our Chief Justice, Lord Woolf, a great tribute for introducing that approach into England and Wales.

Time does not permit me to look in any depth or really at all at the fascinating interplay between the common law and the civil law approaches in the field of arbitration. Where this critical dispute forum has fused together, many of the approaches, the best approaches in both the common law and the civil law world to produce a system of dispute resolution that is tailored to the international business market in a most flexible way. I will leave it to my colleagues who are going to speak after lunch to develop that theme. But it is a very interesting, further example of the convergence of the two systems to produce a system that works for the user.

Thank you very much!

JUSTICE THE RT. HON. SIR JACK BEATSON FBA

AIFC Court

“The Commercial Law Jurisdiction of the AIFC Court”

I am going to deal briefly, because you have heard a lot about it, with the sources of the jurisdiction of the Court, and the sources of the substantive law. And then I want to explore what is meant by saying that the AIFC Court will provide a common law system to resolve civil and commercial disputes based on the principles and legislation of the law of England and Wales.

The three main sources of jurisdiction are the Constitution of Kazakhstan, the AIFC Constitutional Statute, and the AIFC Court Rules. I am going to, in what I say, just focus on the Constitutional Statute. I think it gives us all we need for an overview. In broad terms, Article 13, gives the Court jurisdiction in two kinds of disputes: the first is disputes between the specified entities and bodies within the AIFC – AIFC participants, AIFC bodies, disputes between participants and bodies and their employees; and then, in the words of the Statute, activities conducted in the AIFC and governed by the Acting Law of the AIFC, the jurisdiction is said to be exclusive.

The great thing about being a judge in a future court is I can say I am not going to go into too much detail lest I be thought to pre-empt what a decision will be in some future case. But that is very important. And it is also important that the Constitutional Statute and the AIFC Regulations on AIFC Acts provide the Court has exclusive jurisdiction to interpret AIFC Acts.

The second category, which in practice, I think is going to be very important too, if the AIFC and the AIFC Court is going to fulfil its broader hopes and aims that it has within the whole region is disputes which the parties agree should be determined by the Court. The agreement may be in the contract governing the party's substantive relationship, whether it is a sale, investment and management, whatever, or it might be an ad hoc agreement made at a different time.

The Statute says that the jurisdiction in relation to transferred disputes is largely based on English law and will be interpreted using common law principles of interpretation and the procedure in the AIFC Court Rules which is based, as Justice Andrew QC said previously, on these English Civil Procedure Rules, but what is important is that the source of the law is not English law. The source of the law is not English law as such, but it is the AIFC Act in question and the decisions of the AIFC Court, which will build up within this hybrid jurisdiction a system of precedent.

Two examples to illustrate this. The first concerns the grounds of appeal to the AIFC Court from regulatory decisions of the AFSA and other AIFC Bodies. Those grounds are modelled closely on the principles of common law judicial review and are concerned with legality, rationality, proportionality, and procedural fairness of a decision rather than the merits, which is a matter remitted to the regulator.

The second example is that the AIFC Contract Regulations 2017 reflect the common law rules on formation of contracts. For example, that writings are only required for specified types of contracts and what is required for a term to be implied by custom, that no form is required, except where a party insists on it during negotiation - all of those are modelled on what happens in English law without the benefit, well, sometimes with a bit of benefit from statute, but generally without. The position is similar to the interpretation and construction of contracts, regulations 49 to 51 provide the meaning of the words, is determined

objectively in their context, in the light of the circumstances, the matrix of fact.

The AIFC Contract Regulations 2017 may in some respects differ from or be ahead of English common law. An example of a difference would be that it appears from Regulation 35, which provides that the contract is concluded, modified or terminated by the mere agreement of the parties, that there is no requirement of consideration or an exchange for that to be a binding contract. An example of being “ahead” is Regulation 31, adopted in December 2017, which provides that a “no oral variation clause”, stating that the contract cannot be amended, save in writing, signed on behalf of the parties, is binding. That, Regulation 31, pre-empted, I do not think the Supreme Court of the United Kingdom were aware of it, at least they do not say they were, but it pre-empted the decision in May 2018, in which the majority largely adopted a similar rule.

The AIFC Regulations do not make provisions for a matter, which is settled in English law, for example, that evidence of prior negotiations and subsequent conduct is generally inadmissible in construing a

contract. What will happen if that question arises in a dispute before the AIFC Court? Well, again, without wanting to go into too much detail, I think that the Court will have regard to the English decisions. But the Court may also have regard to the criticism of those decisions by commentators and scholars, to the position in some other common law countries and to the position under international codes, such as the UNIDROIT Principles of International Commercial Contracts.

The second reason that it is an oversimplification, to say that it is applying English law is that, as commonly happens in English commercial litigation, the Court considering the case here, the AIFC Court, may not apply the law of that jurisdiction, i.e. the AIFC Law. It will apply the law of the jurisdiction chosen by the parties, or the jurisdiction, which is the most closely related to the facts and the persons concerned in the matter before it. And it is clear from the AIFC Law that the parties are, as they are in England and other common law countries, subject to statutory control and the regulatory regime, free to choose the law which is to govern their relationship.

You see that from the AIFC Regulations on AIFC Acts Part 5 and you also see it from the Contract Regulations and you also see it from the AIFC Court's functions in relation to arbitration. I do not want to tread on anything that will be said this afternoon. But in relation to arbitration, what I will say because it ties in to this point, is at the root of the system in the Arbitration Regulations, as I understand them, is respect by the Court for the party's choice of arbitration, and that is shown by a light touch system of supervision guided by a general principle of non-intervention. And it is for those reasons, and in that sense that the principles and approach of the law of England and Wales will be applied, but it will be AIFC law, which is applied by the Court.

JUSTICE THE RT. HON. SIR RUPERT JACKSON

AIFC Court

“Judicial Mediation”

Some disputes can be cracked by simple negotiation between the parties or their lawyers. Some disputes need the help of a mediator. Sometimes, the parties want a full-on court action or arbitration. Very often, what the parties want is a combination of different methods. They may want to begin by litigating or arbitrating and then move to negotiation or to mediation after there has been an exchange of evidence. Sometimes they want the Court or tribunal to decide a preliminary issue. And then after that they will negotiate or mediate.

I have quite often as a Judge decided some point of principle, or the interpretation of a contractual clause as a preliminary issue, knowing full well, that the parties will then go on to settle. Sometimes, at a case management conference, I discuss with counsel, what issue or question it would be helpful for me to decide as a preliminary issue, to clear the way so that the parties can reach their own solution.

As I said in opening, the key to effective dispute resolution is flexibility. Now, just one tool, which may sometimes be helpful in dispute resolution, is judicial mediation. I have prepared a paper on judicial mediation as shown below:

JUDICIAL MEDIATION

LECTURE BY SIR RUPERT JACKSON IN ASTANA IN JUNE 2019

1. INTRODUCTION

1.1 Judicial mediation is one of the services offered by the AIFC Court. The purpose of this lecture is to explain in more detail (a) the service which is offered and (b) the background to judicial mediation.

1.2 Definitions. In this lecture I use the following abbreviations:
"ADR" means alternative dispute resolution.
"CEDR" means Centre for Effective Dispute Resolution.
"ENE" means early neutral evaluation.
"He" means he or she. (If I keep saying "he or she" that disrupts the text.)
"TCC" means the Technology and Construction Court in London.

2. MEDIATION

2.1 The process. Mediation is a procedure whereby a trusted neutral person explores the positions of both parties, seeking out common ground and helping them to reach a consensual settlement if that is possible. The basic format developed by CEDR is, in brief outline, as follows:
(i) The parties prepare position papers. These are not formal pleadings.
(ii) Joint session of both parties, in which the mediator and then both parties make opening statements. This is often an occasion for grandstanding by the parties or their lawyers.
(iii) Private meetings with the parties. The mediator shuttles between their private rooms. Initially he concentrates on developing a rapport and gaining an understanding of their concerns and interests. These go well beyond the parties' pleaded cases. The mediator conveys messages or information between the parties, in so far as it is helpful to do so and the parties permit. Gradually the mediator explores a broad foundation for settlement. He then transmits offers and counter-offers between the parties, gently cautioning them against making offers or responses which are likely to be inflammatory. He seeks to break through any deadlocks which appear.
(iv) The mediator then helps the parties to draw up detailed settlement terms. He facilitates the signing of the settlement, when all parties and their lawyers have properly considered the document and are content with it.
(v) The mediator makes no decision. If the parties settle, the settlement agreement can be enforced as a contract.

(vi) There is absolute confidentiality. If the case does not settle, no-one may rely on what was said in the mediation.

2.2 Woolf Reports. In 1995 and 1996 Lord Woolf (then a member of the Judicial Committee of the House of Lords, now Chief Justice of the AIFC Court) published two highly influential reports. Amongst much else these reports emphasised the value of mediation as a means of early and inexpensive dispute resolution.

2.3 Growth of mediation in the late 1990s. Following the Woolf Reports the use of mediation progressively increased. Judges encouraged the use of mediation in appropriate cases, but they did not (and still do not) compel it.

2.4 Research project in 2006-2008. In 2006, as judge in charge of the TCC, I set up a research project in conjunction with King's College, London. This involved a survey of all cases which concluded in the period 1st June 2006 – 31st May 2008. At the end of each case the solicitors were asked to complete form 1, if the case had settled, or to complete form 2, if the case had proceeded to trial and judgment. King's College then analysed the results in some detail.[1] In a nutshell, the survey showed that in most cases mediation brought forward a settlement which would have happened anyway, but at a later date. Thus, mediation achieved a substantial saving of costs. In a smaller number of cases, mediation precipitated a settlement which probably could not have been achieved by bilateral negotiation. In a small number of cases the mediation did not result in settlement, but quite often it generated other benefits such as narrowing of the issues.

2.5 Review of Litigation Costs Final Report. Chapter 36 of the Review of Civil Litigation Costs Final Report (January 2010) concluded that parties were making insufficient use of mediation as an alternative to formal litigation and that the advantages of ADR were insufficiently appreciated. The last paragraph of the chapter made two recommendations: "I recommend that: (i) There should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR. (ii) An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation."

2.6 Jackson ADR Handbook. In order to implement the second recommendation, the Judicial College, the Civil Justice Council and the Civil Mediation Council collaborated in producing a handbook on mediation, entitled *The Jackson ADR Handbook*. This is now in its second edition.[2] It provides much valuable guidance for judges, practitioners and court users about ADR, in particular mediation.

3. JUDICIAL MEDIATION

3.1 Family litigation. In the Family Division of the High Court in London there is an established practice, which is like an evaluative mediation. It is called a Family Dispute Resolution Hearing ("FDR"). It is conducted like a normal court hearing, but the entire procedure is without prejudice and the judge does not resolve factual disputes. The FDR takes place either in the judge's chambers or in the solicitors' office. The judge hears submissions and then tells the parties what order he would make if he were deciding the case. The parties

[1] For a summary, see chapter 34 of the Review of Civil Litigation Costs Preliminary Report (May 2009).
[2] Written by S Blake, J Browne and S. Sime; Oxford University Press, 2016

then go out and negotiate. They usually reach a settlement, but if they are unable to reach agreement another judge will hear the case and give a binding judgment.

3.2 Technology and Construction Court. In 1996 the TCC introduced a procedure for judicial mediation entitled 'Court Settlement Process'. The details are set out in the TCC Guide.[3] In summary, the judge may on the application of the parties make a Court Settlement Order. There is then a preliminary meeting to establish the procedures to be followed. At the main settlement conference, the judge acts effectively as a mediator. If this does not result in settlement the judge may, upon the application of a party, set out his views on the dispute. If that does not result in a settlement, another judge takes over the management and trial of the litigation.

3.3 Early neutral evaluation. ENE is another form of judicial ADR which is well established in the Commercial Court and the TCC in London. The judge hears brief argument and then states his views on the issues in dispute, together with reasons. This process is much cheaper than having a full trial and usually results in a settlement. If it does not, then a different judge will take over the management and trial of the litigation.

3.4 The AIFC Court. Having regard to the experience of judicial mediation in England and Wales, the AIFC Court now offers ENE and judicial mediation as alternatives to formal litigation. In the course of ongoing litigation, if both parties so request, the judge may:
(a) undertake an ENE, or
(b) assume the role of mediator and attempt to secure a settlement of the litigation, proceeding in accordance with the Mediation Rules set out in Part III of the Rules on Arbitration and Mediation at the International Arbitration Centre, Astana.
If the ENE or mediation fails to result in settlement, then another judge will take over the management and trial of the litigation.

Rupert Jackson June 2019

[3] Second edition, October 2005; third revision, March 2014

For reasons previously explained, I should go through this paper with some brevity. Paragraph 2.1., describes what mediation is. You will know what mediation involves. I set out these six steps there, in a clear and helpful way. I will read it out. Some 25 years ago, Lord Woolf was charged with reviewing the rules and procedures in England and Wales. He produced two very influential reports about how our procedural rules should be amended. One of his many recommendations was that parties should make much greater use of mediation.

About 20 years ago, I was the Judge in charge of the Technology and Construction Court in London. I took the opportunity in conjunction with a university, King's College London, to carry out a research project whereby over a two-year period, solicitors filled in questionnaires at the end of a case, form one if the case had settled, form two if it went to judgement. Now, the full findings of this research project are available on the internet. But in a nutshell, what it showed was that there are two or three key points in litigation when a case is more likely to settle. And this study also looked at the effect of mediation. It found that in a large number of cases, mediation accelerated a settlement which was going to happen anyway. It brought it forwards and, in the process, saved the parties a great deal of time and cost.

The study also showed that there was a small number of cases where mediation brought about a settlement, which was otherwise unachievable by negotiation. You can see further details of that research in my paper. Then I refer to a subsequent report on civil litigation and recommendations to increase the use of mediation.

I now turn to judicial mediation. The courts in England and Wales are starting to make use of different forms of mediation by judges. Paragraph 3.1 of my paper describes a procedure in family litigation, whereby a Family Division Judge sitting in his chambers or in a solicitor's office, has a brief argument from the lawyers and then indicates how he would decide the case. That helps the parties to settle, as they usually do. But if that fails, another judge goes on to deal with the full dispute about finances - who gets the house, who gets the dog, and so on.

Then paragraph 3.2 of my paper talks about Employment Tribunals. Employment Judges have now been trained to serve as mediators, and they will either conduct a full adversarial hearing, or they will conduct a mediation, either a facilitative one, whereby the mediator does not express any view, or an adjudicative one and evaluative one, in which the Employment Tribunal Judge will in the course of the mediation, express his own view, that usually leads to a settlement. If it does not, another judge takes over. The Technology and Construction Court has a

similar procedure for judicial mediation, which I set out in paragraph 3.3 of my paper. Another variant of judicial mediation is early neutral evaluation. The judge sits in court, he hears brief submissions from the lawyers on both sides, and then indicates how he or she would decide the case on the basis of the brief arguments heard. The parties usually can then negotiate a settlement. If they cannot, a different judge will go on to hear the full case.

I have described in my paper the various forms of judicial mediation which have evolved over the years in England and Wales. The AIFC Court is a flexible institution, and it offers full-on litigation, or, if you want, the judges will act as mediators. Very often, of course, action will begin in court, but when it reaches a certain stage, and each side knows what the other side's evidence is, and what the experts say, they may want to mediate. Well, if you want that, that is the service, which the Court will offer, and the judge will then assume the role of mediator.

Although if the mediation fails, a different judge would have to carry on the litigation. So, as I said at the start of this talk, flexibility is the key to effective dispute resolution. Now here in the AIFC Court and IAC, you have the full panoply of flexibility available to you, you can arbitrate, you can litigate, you can mediate, you could begin by arbitrating and then turn to mediation. You could begin by litigating and then turn to mediation. Every dispute is different. The needs of the parties in each dispute are different. What this Court and arbitration centre are committed to doing is to resolve the disputes which you bring before them in the most appropriate method which fits the needs of the parties in that particular case. Thank you very much!

BARBARA DOHMANN QC

Chairman of the IAC

Good afternoon! Thank you very much for being here for the panel of the International Arbitration Centre here in Nur-Sultan. It was in 2013 here in Astana, as it was then called, Nur-Sultan, where President Xi of China announced the revival of the Silk Road. This new Silk Road comprises the Belt and Road, the Silk Road Economic bridge to which Kazakhstan is a Centre, and the Eurasian Land bridge, the 21st century Maritime Silk Road and others. There were Silk Roads since before 200 B.C.

There has been arbitration, as this great American jurist Randy Holland explained on this panel a year ago, going back to 300 B.C., at least during the times of Alexander The Great. Arbitration has always been and today is more than ever, the preferred method of dispute resolution for the commercial world and the trading world.

We have on this panel international arbitrators, all of them, who are based respectively in Frankfurt, in Berlin and Milan, in my case, in London. They will speak to you on the background of the trade routes that interest us in part in Kazakhstan and then beyond and that will be Dr. Grigolli from Milan. We will then have Dr. Patricia Nacimiento speaking about third party funding which is a very important development which we intend to introduce, because there has to be access to justice that includes access to arbitration for those who may not be able to have this access without funding. Then, Thomas Kruemmel will speak about why it is that our rules

at this Centre here are more flexible and more advanced than anywhere in the world. At the end of all of that, I will add something about mediation and arbitration, the confluence of common law and civil law systems and any law systems that the parties will have chosen and the exact flexibility that we propose for our participants in our Centre.

We will be speaking about rules next. This is a particular topic with which we have not as yet had to grapple, because so far, in general commercial arbitration that exists throughout the West, funders have to be disclosed and, overall, the tribunal tries to keep them out of things as much as possible. ICSID is a very special area of human endeavor since a state is involved as you have said, and transparency is even more necessary than anywhere else. Our rules, as we will hear from Thomas in a moment, and I will come back to this, are genuinely the most flexible. If we recognize the emergency of any particular issue or problem, then we will be in a position to address it. We will consult with each other, of course, and with the court, and we will then add a new rule that is considered to be appropriate to ensure that there is fair dealing for all the parties, that both parties can be clear that nothing is hidden and there isn't anybody siting at the table where you do not know who they are. Please, Thomas!

We are frequently asked, and by 'we' I mean among others, in particular, our Registrar Chris Campbell-Holt and I, why on Earth should people come here when there are well-established, experienced centres surrounding Kazakhstan and various corners of the world? You have seen several examples as to why it is that there should be an obvious choice for our Arbitration Centre here. The rules really are, even more than Thomas had time to explain, at the absolute avant garde of what has been done worldwide in administered arbitration rules. We are able to adjust them at any time to anything else.

I want to make it clear. Firstly, so far as the representation is concerned of parties at an arbitration, absolutely anybody who is properly authorized by a party to that arbitration can represent that party. That can be a lawyer, not a lawyer, it doesn't matter. They just need to be properly authorized. Of course, it is true, that from the point of view of the tribunal, it is best assisted if people are experienced in representing parties and experienced in the legal system that the parties have chosen to apply to their dispute, or that the tribunal chooses, that those be lawyers, because they are experienced in these matters and that helps. But there is no restriction, I want to make it clear, as to who can appear.

Equally, there is no restriction as to any particular legal system that would be applied. There is no default position that is automatic. The parties will either have chosen the applicable law or, as Thomas has explained, the tribunal will find the law that is most applicable to that particular dispute.

I want to mention something that has been mentioned in passing so far, except, of course, by Sir Rupert Jackson - not at all in passing, namely mediation. Mediation is part of our rulebook. Here is our rulebook. These are our arbitration and mediation rules. Mediation is a very essential part of what we have to offer. As Sir Rupert has explained, you can interrupt your court proceedings, you can interrupt your arbitration proceedings and say ‘Oh, we seem to have come to a certain point. We might as well mediate and we might be able not to have to go back to court or back to arbitration’. In China, as some of you may know very well, there is arb-med that is a very much developed system whereby the very arbitrators who hear a case can turn into mediators. We have not at the moment chosen that route. Our proposal remains that if people are in an arbitration but want to mediate, then somebody can come in, chosen by the Registrar, unless chosen by the parties, and that person will then be the mediator. If the mediation succeeds, there will be a mediation agreement enforceable like a contract. If the mediation doesn’t succeed, at least not immediately, you can go back into the arbitration, and you can always settle the case later. That happens quite a lot.

I recommend to you our rules, our system and our Centre. Thank you!.

DR. STEPHAN GRIGOLLI

Member of the IAC Panel of Arbitrators and Mediators

“IAC Arbitration - A Tool to Promote Business Relations in Eurasia and Beyond”

We are here in Kazakhstan, the largest economy in Central Asia with vast natural resources and growing international trade. For this reason alone, the AIFC and its five main bodies including the AIFC Court and the IAC are important institutions which have chosen to create an attractive environment for investment in the financial services industry. The development of the securities market, the insurance market, banking services, and Islamic financing market in Kazakhstan, as well as the development of financial and professional services based on best international practices, but specifically and especially referring to the legal system to offer rules to resolve disputes relating to this significant and dynamic economy.

And the next minutes, I would like to explain how these legal institutions and of course, mainly the IAC, can be an important tool to promote business relations in Eurasia and beyond from different points of view.

First, the general status quo regarding bilateral treaties concerning trade and economic cooperation and investments. Second, the foreign investors perspective. Third, the Kazakh business perspective and forth, a global perspective.

The general status quo, of course, there are many bilateral treaties

regarding trade and economic cooperation and investments matters between Kazakhstan and other countries. Since I am half Italian and half German, I would just like to mention three examples – Italy, Germany and the EU, which are the major trade and investment partners in Kazakhstan. For example, in Germany, with Kazakhstan, they have a treaty on the Promotion and Protection of Financial Investments of 1995. There are more than 1500 economic entities with German capital registered in Kazakhstan. There are more than 900 German companies, which operate actively in the country. And the trade turnover in 2018 has been about 5.1 billion. Italy - there are also many bilateral treaties, among others, the Treaty on the Promotion and Protection of Financial Investments from 1996, and the Treaty of Strategic Partnership of 2009. The trade turnover in 2017 has been 9.6 billion. And in 2018, over 10 billion, so the double turnover, as Kazakhstan has with Germany.

Italy is among Kazakhstan trade partners and occupies the third place after China and Russia and the first place among the European countries that trade with Kazakhstan. And at last, the EU - there is an Enhanced Partnership and Cooperation Agreement of 2015, which will, of course, contribute to further development of cooperation between Kazakhstan and the EU. All these treaties were signed to make business between foreign and Kazakh investors easier and provide additional security. However, in problematic cases, foreign investors have to rely on the judgment of Kazakh courts, and especially newer potential business partners who do not have much experience with Central Asian countries might, therefore, feel uneasy and be more conservative regarding investments.

Furthermore, there is a widespread absence of bilateral instruments allowing the recognition and enforcement of foreign state court judgments in Kazakhstan or Kazakh judgments in courts outside of the ambit of the former USSR. Therefore, the introduction of a reliable and efficient dispute resolution mechanism would be a perfect way to motivate foreign investors to make further investments in Kazakhstan. OECD studies have shown that a well-functioning judicial system plays a crucial role in determining economic performance.

On the one hand, it would help to make dispute resolution in Kazakhstan easier and faster, which saves plenty of time, money and of course, human resources. On the other hand, it makes Kazakhstan look like a safer business opportunity from the outside. This could create a snowball effect, foreign investors can operate in a much more efficient way, which contributes to the overall country. This can be used as an advertisement to bring in new investors who are attracted by countries with a stable economy and judicial security. So now we have mainly two dispute

resolution mechanisms, the AIFC Court and the IAC. About the Court, we have already got a lot of information from our previous sessions and you know that the Court decisions are to be enforced in Kazakhstan like decisions of the national courts of Kazakhstan.

Whether the Rules of the IAC make them a particularly attractive choice for commercial parties that desire a swift resolution of disputes and parties with interest in Kazakhstan? There is no doubt that these Rules in their current form reflect many of the more recent developments in other institutional arbitration rules. It is particularly worth noting that these Rules make it easier for awards to be enforced in Kazakhstan and of course, whilst Kazakhstan is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention on International Commercial Arbitration of 1961, neither conventions have been ratified which has resulted in some comments that foreign arbitral awards are only enforceable in Kazakhstan on a reciprocal basis. This risk is not present where enforcement is made through the Court.

The Kazakh business perspective. The classical arbitration institutions are mostly situated in Europe and the Far East as to say in Paris, Stockholm, London, Singapore, Hong Kong. With the establishment of Central Asia, as a new business hub, it is time to offer investors an alternative. My distinguished colleague, Thomas Kruemmel, will explain soon how IAC Arbitration Rules provide more flexible, versatile and efficient causes of action than other administered arbitration proceedings, and indeed proceedings in the state courts. With a strategic and unique geographical location, Kazakhstan can be used as a mediating point for business from economically important regions, such as Europe, Russia, and China, and at the same time provide a harbour for neighbouring Central Asian countries who wish to expand their business and international connections.

Nur-Sultan is one of the key links of the new transcontinental routes of the Belt-and-Road global initiative. While every country can profit from a new arbitration centre in Central Asia, Kazakhstan can again use this as an advertisement and focus foreign eyes on itself. It would encourage its investors to become more interested in the nation and explore its often-overlooked benefits and possibilities. Parties without any relation to Kazakhstan can still profit from IAC arbitration. When operating in the wider Eurasian region, it is highly beneficial to have an arbitration institution in the closed surroundings without having to turn to the far-away business and arbitration centres.

Arbitration in an emerging economy can offer an interesting alternative

with new possibilities. Since those new arbitration institutions are facing long-established concurrence, they have to adapt and show competitiveness, which in return could mean higher effectiveness, higher speed and lower expenses for the end-user.

Another advantage is the possible role of Kazakhstan as a mediator between the economic powerhouses of Eurasia. While investors might be pretty cautious about arbitrating in the lion’s den, Kazakhstan can constitute a neutral ground where every party can rest assured about the impartiality of the arbitrators, instead of them being under a country's direct control. Kazakhstan has always had very close ties to Russia and has established strong bonds with both the EU and China in recent years. Therefore, it offers a multicultural adapted platform to further these dispute resolutions between parties from vastly different cultures. Thank you very much!

DR. PATRICIA NACIMIENTO

Member of the IAC Panel of Arbitrators and Mediators

"Arbitration and Third-Party Litigation Funding"

I will be speaking about a topic that is not just Kazakh-related, but it is a topic that we all have to deal within international arbitration - it is third party funders. It is a phenomenon that we have to deal with that we are experiencing all over. And I just want to illustrate it by one picture, and I hope you can see the picture.

I have taken it from the ICSID website, this is how a typical hearing room looks like. You have all the people sitting around the table. You have the arbitrators, the parties, the secretaries, you have translators, court reporters, and whoever has a seat at the table will be properly recorded within the transcript, everyone will know who is there. And it is also perfectly understood that there will be no one lurking in the shadows, or no one being in the room without having been asked to identify himself. And why is this relevant? Because everyone that you see on this picture is subject to certain rules, whether it is the arbitration as such, and then obviously, it is subject to very specific arbitration rules and a certain procedure, which is at the core of any arbitration proceeding. And then obviously, for each of the persons, you will have, also, certain rules applying. For example, ethical rules, both for the arbitrators and counsel.

Let us now imagine that you have people sitting at the table, and you do not know these people, you are not even aware that they are there. And this is a situation that we have, a lot of the time, with third party funders. The discussion is not advanced enough at this stage and at this point we

sort of have a situation of ‘the Wild West’, because it is a phenomenon that came in, it is an industry, it is a fair business opportunity. Why not? But as any business opportunity, it needs to have its place. And if there is no discussion that others in the room need to be subject to certain rules, need to be identified and need to be part of the whole picture.

I would say there is no doubt that the same applies to the funder, or even more so. It is not acceptable that you have people in the room. They are sitting at the table, but no one knows that they are there. No one knows what they are doing. What is their interest? What exactly is their role in the proceedings? What are the potential issues, a number of issues and of course, you can say, third party funders, that is access to justice and this provides for many parties the opportunity to initiate arbitration at all, an opportunity that normally they would not have without funding, and which is fair enough, and which is a business that has its reason to be, from that angle.

On the other side, you also have to see what it means. And I think the first rule is so who is the actual party to the dispute. And these are the most important people on the table, the parties to the dispute. And of course, you have to know who you are litigating against. I would say that is a matter, of course, and this is something that needs to be addressed very quickly and very formally. Why? Also, because you have a number connected issues like conflict of interest. That is a major issue in arbitration, and in particular, in investment arbitration, you absolutely need to know about the conflict of interest, the situation needs to be transparent, and it needs to be addressed. And, in particular, in investment arbitration, we should not forget that investment arbitration is not just a mechanism offered to everyone. It is the state agreeing to arbitration under the very specific circumstances and it's only in the protection of the investment and the investor. It is not the mechanism open to everyone. And it is very important that it is about the protected interests of the protected party. And not someone who might be remote and does not have the same interest and who might change the landscape of the dispute.

The next issue is confidentiality and then obviously, the use of confidential information obtained in arbitration. How do you deal with this? We have certain funders, there are some players and you see them all over in several cases. Of course, over time, they will gather certain information, what are the rules applicable to how they can use this information? Who is to prevent the funder to fund both parties in a dispute that simply gamble on it, there are no rules for this, and of course, if any of the arbitrators or counsel would behave like this, clearly, that is a major issue and to a certain extent, even a criminal offence. But for a funder,

there are no rules at this stage.

The other issue is direct financial interest, it is only financial at that stage. And obviously, in arbitration, you have much, much more than just the financial interest. A lot of disputes never reach a decision. They are settled before because there is more than a financial interest normally in a business relationship. What about the controlling influence of the funder, funders usually take a very close look at the dispute, and then they take the chances. For them, it is a business and they bet their money on where they can win, which means that in normal circumstances, they have a controlling influence on the arbitration itself.

So, who is actually conducting the arbitration? And the same applies then if you look at other players in arbitration, so you have the attorneys, they are clearly subject to certain rules, not least ethical rules. What about the funder? They can just play their sides as they want. The same applies for arbitrators, they are subject to very critical and severe rules. Again, this does not really happen with funders, or we just do not know what is happening. That is the general situation and there is not a lot of case law. And we can see that actually, it is a development that just occurred. And it has been growing over the last years. And if you look at the major funders, how the business has been growing, and obviously it is an interesting option for many parties.

There is not a lot of case law yet and the case law generally goes into the direction that, yes, the funder should be disclosed. But many times, you will not even know that there is a funder. There is also the problem of actually identifying and regulating the role of the funder, and you can see some uncertainties in how the tribunal deals with this. There is one case where actually the party was ordered to disclose the funder. And if you look also what is generally happening - we see that this problem has been identified, it has been identified as an issue that needs to be addressed and resolved. If you look, for example, to the ICSID Rules, here, we see that this is on the agenda and it goes into the direction that clearly the funder, if the funder is part of the proceedings, there needs to be some regulation around it. We see the same in the UNCITRAL Working Group III Report. And just to give you an example, also the Hong Kong Code of Practice for Third-Party Funding in Arbitration goes into the same direction.

Clearly, then, the rule must be if you want to have a place at the table, you need to play by certain rules. And right now, the situation is that those rules yet have to be defined.

Thank you!

MR. THOMAS KRUEMMEL

Member of the IAC Panel of Arbitrators and Mediators

"IAC Arbitration - A Modern Key to Efficient International Dispute Resolution"

Good afternoon, ladies and gentlemen, whenever and wherever we talk to colleagues and clients about the IAC we describe it as a new opportunity to resolve disputes in a civilised manner, allowing parties not to perturb the business relations while litigating.

One of the obvious first questions always and inevitably is: *why should I choose the IAC when there are already fine and well-proven administered arbitration institutions available?*

There are a number of good answers to that question, one of them being that in the IAC Arbitration and Mediation Rules 2018, they will find the most modern, flexible and efficient procedure available in the market to date. And with your kind indulgence, I shall show you a few examples to prove that thesis.

In doing so, I shall, by way of comparison, refer to the rules of three major administered arbitration systems, namely, the 2017 Rules of the International Chamber of Commerce, the 2014 Rules of the London Court of International Arbitration, and the 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules.

Now, if I were to sum things up, in a shortlist, the major advantages of the IAC Arbitration and Mediation Rules 2018, I would sum it up in these

points you see here: the rules allow efficient and flexible case management and conduct of the procedure.

There is provision for time-saving and up to date communication between the tribunal and the parties. The tribunal has a rather strong role in proceedings as its master. There is a wide range of guidance and direction tools for the tribunal to ensure procedural discipline and to rule out misuse. There are high standards of transparency, fairness and efficiency. And also, the IAC Rules provide many useful features not yet available in any other leading administered arbitration rules, such as the IAC, the LCIA, and the Hong Kong IAC.

Now, the overriding objective - we have heard about that very important principle this morning. The overriding objective of the IAC Rules or of proceedings under the IAC Rules, is defined to be the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense and the Rules bear reference to all of these points in a particular manner.

Now, when you start proceedings, you file a request for arbitration. And Article 4.2 of our Rules states that a request for arbitration must be filed with the Registrar in electronic format, in accordance with any relevant practice direction. Must be filed in electronic format. If you compare that to the ICC Rules, you have to file on paper mandatorily. The LCIA Rules provide optional electronic filing, but you do not have to file electronically. And the 2018 Hong Kong Rules provide no mandatory form of filing. The advantage of all that is that we provide the speediest and most modern form of communication as a mandatory standard. There can be no discussion of whether you file your request on paper or electronically, you just send it in a modern way of communication.

Article 4.6 of the IAC Rules states that the Claimant must send a copy of the request for arbitration and all the accompanying documents to the respondents directly and just notify the Registrar of the date on which that was done and the method of delivery. That is very practical and speedy.

The ICC provides, as you know, mandatory service by the Secretariat. I think it is safe to say that the loss of time caused as the result is between one and three weeks, depending on the amount of business they have to deal with. The LCIA Rules and the Hong Kong Rules have similar provisions to those in the IAC Rules. The advantage of it is that we have the most direct possible notification of the respondent, therefore saving time for the actual proceedings.

Of course, in arbitration proceedings, there is always a case management conference. Article 12.4 of the IAC Rules fleshes this out in

a very practical, also very detailed manner. The tribunal shall convene a case management conference with a party as soon as practicable in person or by any other suitable means, obviously, phone conference or whatever you can think about, or a video conference and schedule the procedures that will be most appropriate and efficient for the case. That is very detailed and down to earth.

The ICC Rules provide for a mandatory case management conference without describing the way that this has to be done and the timetable must be established. The LCIA Rules encourage the tribunal to hold a case management conference. The Hong Kong Rules require the tribunal to adopt suitable procedures and set up a timetable. In other words, the IAC Arbitral Tribunal must define initially and in the manner which is fully transparent to the parties, the procedures for the case, so that the parties may rely on suitability and efficiency of the management of their case by the tribunal.

Next, treatment of evidence. Article 14.3 of the IAC Rules provides that the tribunal determines the relevance, the materiality and the admissibility of all evidence. And it goes on saying that the tribunal is not required to apply the rules of evidence of any applicable law in making such determination. The ICC Rules do not contain any provisions like that. The London Rules leave it to the tribunal to decide whether to apply strict rules of evidence. And the Hong Kong Rules do the same. In our case, the treatment of evidence remains a matter for the tribunal only. And any dilatory action by parties is ruled out, which is a great practical feature.

Now very important, the applicable law. Obviously, the tribunal decides, and we have heard about the applicable law quite a lot this morning and connection with the Court. The tribunal decides the merits of the dispute on the basis of the law in the arbitration agreement. In the absence of such agreement, and that is the important point, the tribunal shall apply the law that it considers most appropriate with regards to the circumstances of the case and the overriding objective. And none of the other rules that I compare with here contains that qualification, which is very important.

The ICC Rules prescribe that in the absence of agreement the tribunal determines the rules of law, which it deems appropriate, and the London and Hong Kong Rules do the same. Which means, in essence, that if you choose arbitration under the IAC Rules, the tribunal, when determining the law applicable to the case, is under the express obligation to take into account the circumstances of the individual case and the principles of fairness, impartiality, speed and efficiency.

Now, two things that may be invented or just taken advantage of, to slow down proceedings if a party wants to block things. If a party fails to appear at a meeting or hearing without showing sufficient cause for such failure, the Tribunal under Article 19.3 of the IAC Rules may proceed with the arbitration and may make an award based on the submissions and evidence before it. And that is something unique to our Rules. It does not appear in the ICC Rules. It does not appear in London, it does not appear in Hong Kong. The obvious advantage of that being that any wilful dilatory action by a party cannot stop or slow down our proceedings in the interests of speed and efficiency.

The same applies to the situation when a witness fails to appear for an oral examination. The tribunal may place such weight on the written evidence as it thinks fit, having regard to the circumstances of the case and of course, the overriding objective. Only the London Rules have a similar qualification. The Rules provide that the Tribunal may place such weight on the written testimony or exclude all or any part thereof as it considers appropriate in the circumstances that they do not have any reference to the overriding objective. The failure of the witness cannot stall or slow down proceedings unless the circumstances of the case and the overriding objective make examining the witness appear necessary.

What about sanctions for default? If a party fails to comply with any provision or requirement under the Rules or any procedural order given by the Tribunal, the Tribunal may draw such inferences as it considers appropriate and that clearly confirms the role of the Tribunal as the master of proceedings. You cannot, put it bluntly, mess with the Tribunal in arbitral proceedings. There is a very long and exhaustive list of additional powers of the Tribunal.

I shall spare you the torture of reading them out to you slowly and commenting on each and every one. Suffice it to say, that this list of 14 individual additional powers is the most wide-ranging, detailed list of such powers in the four sets of Rules I made comparative analysis of. The ICC Rules do not have any express list of additional powers partly because some of them are enshrined in other articles. The London Rules provide a list, albeit not containing all the powers listed here, which are most of them, and the Hong Kong Rules do not have any such provision. The advantage being that the Tribunal has, at its disposal, a wide-ranging, detailed and transparently defined set of instruments to ensure smooth and fair efficient proceedings.

One more interesting feature regarding the award is that the IAC Rules do not require the AIFC Court to review an arbitral award before it is signed and handed down by the arbitrators. The ICC Rules provide that

as you probably know, before signing any award, the Tribunal must submit it in draft form at the Court, which may lay down certain modifications, whilst London and Hong Kong remain silent on that count. It effectively means that the role of the AIFC Court, as concerns the arbitral award, is limited to challenging an arbitral award, the arbitrator, one of the arbitrators or the ruling on costs. And that is fleshed out in Article 27 of the AIFC Court Rules.

In other words, the rather strong role of the Tribunal is underlined, and the time-efficient decision of disputes is made possible. I just wanted to draw your attention to the fact that we have a very fine set of early determination rules. And an equally fine set of rules on the expedited procedure, with the latter being far above the threshold as defined by the Rules with which we make comparisons.

We also have an expedited procedure in the IAC Rules, if the amount of dispute does not exceed the aggregate equivalent of 5 million US dollars, which is a higher amount than those prescribed in the rules of other arbitration institutions.

Thank you!

PAUL ASTON

Partner at HFW

"The Aspects of Development of Maritime Law in Singapore and How AIFC Can Benefit from Transport and Logistics"

First, it is a pleasure to be in Nur Sultan and to see my friends from the AIFC and observe all the great work that you are doing. This is my second trip and last time it was colder. It is always wonderful to be in this dynamic city and at the AIFC.

I have been involved in arbitration now for nearly 38 years, I have sat behind junior counsel, senior counsel, some judges and some who became judges and are now retired arbitrators. I arbitrate myself, I advocate myself and I am a mediator as well.

There are some unsatisfactory developments in international arbitration and we have to make sure that does not happen here in Astana and I am going to talk about that a bit.

First, however, I deal with the question which has been put to me by my friends here at the AIFC and that is: "Do we require sector-focused arbitration offering?" My opinion is that you do not. To ring fence projects or disputes into maritime or transport is unhelpful in my view. Put simply it all morphs into one

Let me give you some examples: almost everything you now see in this room has come here either on a train or by ship and if not the raw materials that made them probably did. That is true for coal, iron or petrochemicals and all the rest of it. Maritime and transportation projects involve huge mega-projects: port terminals, buildings of shore and land tanks, dredging of huge areas of land, reclamation, construction of massive floating structures, railways and terminals, offshore resource development. I can give you many examples. A good one is in Singapore, where they are now expanding the port and that is a multi billion dollar project over 30 years.. That is maritime, but it moves across all the sectors.

Often what starts out as a commodity contract or a maritime contract or construction contract, actually becomes a dispute about a letter of credit, or a guarantee. Issues of misrepresentation, repudiation, mistake, estoppel, implied terms, bad faith and even fraud arise. These are common law principles and they are well-established in English commercial and maritime law. In fact, if you look through the seminal cases on major legal concepts, such as repudiation and frustration, by the way of example, you will note that they often arise out of maritime case law.

The answer, in my opinion, is that you need to have a good international arbitration centre or international court (but let’s stick to arbitration just for now) with excellent and experienced arbitrators. You also need to have the excellent Rules that you have here at the Astana International Arbitration Centre, which I have considered. They have everything that arbitrators need to enable them to run and handle the arbitration robustly.

So, looking at it from a user’s perspective, what has gone wrong with international arbitration? Indeed let’s not kid ourselves, things have gone wrong. Queen Mary University has had many studies and surveys about dissatisfaction with Intentional Arbitration.

First, due-process paranoia. Arbitrators are concerned about having misconduct claims brought against them. They want to be re-appointed. That is not the case for every arbitrator, but for quite a few. There are concerns about partiality, there are concerns about ethics. Arbitrators acting for the same parties 5 or 6 times in the same year. Not all the

institutions take on board the IBA Rules on Ethics. The main culprits are the sector focused arbitration regimes. Costs and delays are also identified as concerns.

Secondly high costs and delay particularly in construction arbitration disputes. Thirdly an unwillingness of advocates and lawyers to recommend and experiment with ADR.

I have looked at it from the view of an arbitrator and I have looked at it from the point of a user. I conclude that arbitration institutions and arbitrators get an unfair press sometimes because unfortunately, and I am going to make a few enemies now, the abusers are in fact the users: the lawyers, the parties, in-house counsel. Why do I say this? Well when people draft their dispute resolution clauses, they think: "let's have this nice, clubby, conservative, confidential arbitration. We can still carry on business with "X" whilst we are arbitrating". If we choose court, issuing a writ is like stabbing "X" with a sword and it is warfare thereafter.

However, as soon as a dispute arises, more often than not, the guy who has been chased for money becomes unresponsive. In-house counsels tell their lawyers "take every point, delay, do not settle." People get passionate and suddenly long term planning expectations about a good way to resolve disputes, undergo a schizophrenic change and such people transform into "win at all costs and never concede". Reason gets jettisoned and emotion takes over. It is a feature of all conflict resolution that there are two primary factors at play. Emotion and reason and you can only deal with reason when you have dealt with and understood emotion.

The great thing about the AIFC is that you have wonderful rules, you have a wonderful panel of experienced arbitrators and judges. We have heard them today saying they are going to utilise your Rules to make the unresponsive respondent comply with his consensual agreement to arbitrate. Your Rules and Regulations both in the Court and in the Arbitration start off laying out the overriding objectives. Any of you who are familiar with Lord Woolf's reforms 20 years ago will know what that means. It is so pleasing to see them enunciated in the Arbitration Rules as well. The Rules give the arbitrators adequate powers and I know that the AIFC Court is going to support the arbitrators.

In Singapore, and also in London, arbitrators are backed up by the courts, the judges have the arbitrators' backs. I say to arbitrators: "so what if someone challenges your decision by applying to the Court?" If a party makes an application to dismiss your award on grounds of misconduct the chances are it will be public in court and you will be exonerated and that will be a good thing. That is good publicity. So back yourselves and stop worrying about your next appointment.

Now, 10 years ago, you as a user you had a choice; you went to the domestic court or international arbitration. Nowadays, you have another choice because we have international commercial courts. It might surprise some of you to know, that there are now about 21 international commercial and financial courts in the world. We have had the ones in the Middle East since 2004 (commencing with DIFC) and they serve a very specific purpose in ringfencing and having a parallel system to Sharia law.

The Singapore International Commercial Court started in 2016, it is a division of the High Court, it has had 40 published judgements already. I sat in on a User's session on feedback of the new revised Rules. I can tell you the news Rules are very fit for purpose and creative.

It is not in the interest of arbitrators to force parties to mediate and I am not going to blame the arbitrators for that. What is positive about your rules, and I hope is symbolic, is that immediately after the arbitration Rules, there are the mediation Rules, which suggests that you are mediation-friendly, which is absolutely excellent. We now have a choice!

I believe international commercial courts have emerged because international arbitration has been found wanting and the users have been abusing it. Now, I believe the rise of the international commercial courts is going to make international arbitration regimes pull up their socks and be a real choice. Of course, your arbitration and your court here are not tainted, they have no track record. But from what I have heard, you have

all the tools, you have the right judges, the right panel to be able to robustly, properly, fairly, in the pursuit of the overriding objective handle your court cases, arbitrations and mediations.

Is your Court going to be in competition with your arbitration centre? Are they compatible or are they in competition? I suggest that they are compatible, it gives the user (me) more choices. But be very careful, highest standards can only be achieved if the arbitration centre and the court checks and balances one another.

Why do I say that international commercial courts are on the rise and will provide stiff competition for international arbitration? Well I can answer that by saying what do I want as a User?

1. First, rights of audience. I am self-interested, I have rights of audience before most international commercial courts. Now I think Astana, like Singapore, has reached a very sensible landing. You have a very fair and open system of registration.

2. Secondly, I need to know what the language is. All the international commercial courts adopt the English language, most of them have rules and regulations that are based on the Woolf reforms which are very recognisable to an English lawyer and many of them like yours are also recognisable to civil lawyers from civil law jurisdictions.

3. Thirdly, I want excellence of my judges and you get those in international commercial courts. There is no home turf advantage. I have had to arbitrate and litigate in several countries in Asia. In one jurisdiction where the arbitration Rules said I could represent my client my opponent's lawyer threatened to be put me in jail because I did not have a work permit. I could not get a work permit as you need to reside and pay tax in that country. In their opinion unless I was called to the bar of that country I could not represent my client, even with locally qualified lawyer, in arbitration. Of course whilst they maintained this venal stance they were representing their clients in Singapore and other jurisdictions. This lack of recipocracy should not be tolerated by AIFC or other international arbitral institutions.

The international commercial courts are giving clients the opportunity to be represented by their lawyers of choice and to have the law of their choice as the substantive law. Good intentional arbitration bodies like

your own are giving people that opportunity.

So, in my view, to have a new Court and new arbitration centre untainted, well-established with the remarkable people you have, it is going to be a success and it is going to provide people like me (the user) with more choice. I wish to use the Centre. Will you succeed? Well why won't you. You are in an excellent country; I could go on about the geographic and geopolitical reasons and why is now Kazakhstan's time but the others have already said that. You have got excellent judges, excellent facilities and another point- an excellent Registry. A Registry that makes the arbitration system work is absolutely crucial. And you have a great Registry. So really, there is only one group that can mess it up and that is us- the Users, and we're not going to do that or be allowed to do that for the reasons I have said.

Thank you very much!

GERARD FORLIN QC

Barrister at Cornerstone Barristers

“Is Aviation Different?”

I have never been to Kazakhstan, but I will be back as Arnold Schwarzenegger says. I just want to talk about aviation today and the topic is: is aviation different? I think it is, but I will come to that in a moment.

I just want to share with you how fantastic it was. I tried bottle of very nice Australian red but it broke when I put it down on the seat and it started to leak and it went on a white jacket. The crew took away that white jacket and by the time it came back, they scrubbed it so much those stains had almost gone. And I just want to share that with you and it was an extraordinary experience and I am going to tell everyone about it everywhere I go.

Secondly, I have a little home in France and I know that Astana's sister city is where my house in France is Nice. So I thought that is quite auspicious. Unlike Paul, by 4 years, I have been doing aviation work for 34 years. It is such a wide and diverse industry, just in my time, I have acted for manufacturers, airlines, pilots, airports. I have acted for companies and I have acted for, virtually, everyone. And at the moment, I am doing two major aviation cases: one I am acting for 10 out of the 11 dead in relation to an air crash that took place near Brighton in 2015 when a hawker jet came down during a display and killed 11 men in different cars on the road as they were driving to their work. There weren't anywhere near the air show. So acting for the Plaintiff, the Claimant and the inquest. And the reason I mentioned that, is that aviation is such a vast topic and people do not always realise it. It is not just about airlines; it is about, for example, the train that brings people to the airport, the roads that bring them, the taxis that bring them. All these kinds of things can lead to litigation.

Why AIFC? And why now?

I just want to tell you very briefly what aviation is: the best definition that I have ever seen for aviation is: an industry that deals with travel in and above the earth's atmosphere and deals with all the productions of the vehicles that are used in such travel. If you think about that, that is a massive definition. More interestingly perhaps, the industry is worth, at the moment 750 billion USD a year. Why can't the AIFC and Kazakhstan get some of that? I am going to pose that question. And it is split, roughly, 45% civilian aircraft – Boeing, Airbus, BA systems, which is heavily involved with your national carrier. And 55% military, and that is again a different topic. I am very briefly going to talk about the dichotomy, that Paul has just mentioned, between courts and arbitration. But I am not going to go through all the advantages and disadvantages of each one.

I just want to zoom into one thing that is very important for aviation, more than perhaps other industry, reputation means everything. If you have a clash on a carrier, people remember that. If there is a manufacturing issue, we can think of a few at the moment, people remember that. Once the genie is out of the bottle, you cannot put that genie back in. And zoning down a little more, the real issue in aviation, is there are very few experts that are any good, most of the world's expert in aviation, from food poisoning to defective manufacturing to why planes crash, pilots' negligence, there are very very few. Everyone wants them, everyone tries to retain the same experts in a crash. They just sit there and wait for the phones ring, and they have to take the first phone call unless there is some conflict issue. I was looking at your fantastic rules and I wish Lord Woolf is still here, but you are perfectly positioned to deal with this kind

of cases. Clause 12.47 of the *AIFC Court Rules 2018* governs Group Litigation Orders ("GLO") so that deals with, for example, mass torts issues;

> "The Court may make a Group Litigation Order ('GLO') where there are or are likely to be a number of claims giving rise to common or related issues of fact or the law (the 'GLO issues')"

And most importantly perhaps I'd say if you turn to Part 19 you have an excellent session on Experts. In your *AIFC Court Rules 2018*, clause 19.2 which deals with only having one expert and I think that is a big advantage of the AIFC because of the reasons I have explained. Usually, in any field, there are only 2 or 3 really top experts in the world, you've actually got in your rules the opportunity to deal with only one expert which I think is a big advantage and I have not always seen in every similar court.

> "A reference to a 'single joint expert' in this Part is a reference to an expert who has been instructed to prepare a report for the Court on behalf of two or more of the parties (including the claimant) to the proceedings."

The other thing I want to deal with is aviation is driven by intentional convention, if you have damages it is driven by Montreal Protocol; if you have issues on board a plane it is governed by the Tokyo Convention, so that means the pilot or the flag-carrier is in control, the law of the country of the plane is in control. You have all kind of issues of refusing to board, people that are delayed, all those kinds of things are ruled by an international convention. And again, the AIFC is perfectly placed to deal with those matters, cargo etc. And kinds of cases that I have seen that the AIFC would be perfect for airport construction matters, maintenance matters, defective aircraft matters, aircraft damage claims and just remember as I just said, it is a vast and connected field. It is not just about planes flying in the air, it's about airports, building roads to airports. They are all interconnected. And to just look at the thing: shipping or aviation is a silo way, in my humble opinion, misses the point.

So why the AIFC?

I have only been in your country for 32 hours and I absolutely love it. Firstly, can I just say the people are just unbelievably friendly and incredibly helpful and that is not the same in everywhere I go, I can assure you that and I have worked in nearly 70 countries? You are 7 hours flying time from about 3 quarters of the world's population, that is a huge

advantage. You are the 9th largest landmass country of the world, you are the geographical crossroads: Russia, China, Turkey, Europe, Asia, absolutely amazing. You have been incredibly well-revealed, last year at the World Bank, that gave you a glowing report in 2018 about the work that you are doing, about the development of this country: democracy, the rise of the middle classes, You are ranked 1st by the World Bank last year in the report.

Who is buying aircraft?

They are not mainly buying them in Europe. They are buying them in the Middle East, in India and in Asia. And you are now in that position, and in a few years if not now, you will be the guys buying most of the aircraft. You can look at your rules and always look to see what other people are doing, how you can improve yourself? How can the AIFC get better? I just want to give one particular mention, something that you can look at, I am on the Legal and Arbitration Panel, of 14 people, for the Royal Aeronautical Society in London, which is the oldest aviation society in the world and they have their own rules which allow people, when they are entering into a contract, to have the Royal Aeronautical Society input into that. Have a look into those rules, you might want to see if there is any interest in it. You might not. But have a look at them, be aware and judge positionally or geographically what is going on, so that you rise quickly, from position 51 into what is your ambition to be in the top 10 or 20 in a few years' time. But that takes work and everything I have seen in less than 30 hours in Kazakhstan and in Astana, it gives me absolutely no doubt that you will be able to achieve that I think even ahead of your time.

I just want to say to the AIFC, to the government and to the fantastic hospitality and I have to pick out Dastan because he has been my real link so far. Thank you very much to Sheikh for taking up the role as moderator at very last minute and I think is doing a fantastic job and I would like to thank him personally for that. But carry on, fantastic. Thank you very much!

GREGORY TANZER

Member of the Board of Directors of Astana Financial Services Authority (AFSA)

“Future Perspectives of Financial Regulation in the AIFC”

I would like to express my very deep appreciation, as indeed many others had, to the organizer of this conference. It is a great honour and privilege to be in the President’s House and that is an enormous privilege and that indicates the importance which the government placed in the AIFC. And I really thank you, Marat Aitenov and your team, for organizing this conference in this place.

I thought I will start my presentation by allowing you some facts which come from the experience to date that the Astana Financial Services Authority (“AFSA”) has in improving Registrations within the AIFC, and I thought it will be useful to give you an idea because I am going to focus my remarks on new opportunities for lawyers with respect to financial services.

This slide represents the authorised firms or firms in the course of authorisation within the AIFC. These are the firms which have been authorised by the AFSA to operate in the field of financial services. On the far left-hand side, there are two bars for Market Institutions and for Broker-Dealers, these are the parts of the machinery which comes to the operation of the capital markets. Next across from that, we have two bars for Fund Managers and Funds and you can also see that there is a significant interest in the field of asset management in the provision of asset management services and the opportunities that it might provide. Next to that we have two much shorter bars, but bars that are very important to the AIFC, which is related to the Islamic Finance- Islamic Banks and Islamic Funds.

It is safe to say that you may look at those bars as meaning two things: one is you might think well if there are not many people here maybe there is not much of an opportunity; I am a glass half full person actually and I think that represents a great opportunity for people interested in Islamic Finance in the AIFC. Then the next two bars are Traditional Banks and Insurance, again two areas where these are traditional types of financial services and they can be contrasted with the very last bar which is on the far right, which is Fintech. This is the area where innovation flourishes and you can see that there is a lot of interest here in provision of FinTech through the AIFC. I am going to focus my comment on three of these areas: capital markets, asset management and FinTech.

I will start with capital markets, there have been fantastic achievements in the field of capital markets within the first 12 months of the operation of the AIFC and I give credit to all of the market institutions that are involved: The AIFC Authority, the AFSA on which I am privileged to service and direct and indeed the AIX. There has been an IPO of Kazatomprom, the world's largest producer of natural uranium- 451million USD was successfully placed on the London Stock Exchange and on the AIX. And indeed, there was significant retail investor take-up of that IPO on the AIX. A fantastic achievement.

There has been a dual listing of Polymetal International PLC, which is a top-20 global gold producer and top-5 global silver producer with assets both in Russian and Kazakhstan. And there has been a significant volume of bonds issued. What you see in that is great progress with significant listings. There is a long way to go, we need to have many more listings on the market to make it a much more viable and active market, but it is a great start. And I am confident about that because of the following:

We have a good ecosystem for advancing what is in the pipeline and what we expected to come into the pipeline by the way of capital market issues within a short period of time. The Belt and Road Initiatives, to the extent that they involve Kazakhstan, will also be a great mover in that sort of area. The capital market activity is a great field of activity and a great field of opportunity particularly because of the advanced legal framework that we have here.

With respect to asset management, there is a nice link between capital market activities and asset management because of course fund management activity goes hand in hand with raising funds for productive uses. We have got, not a huge number of assets managers but a good range of asset managers and representative officers of asset management companies already here, and I expect that to grow. Particularly as the opportunities for developing fund products that cover critical Kazakh type assets or cover critical Kazakh-type industries like mining industries.

Another key point that I want to point out is one that, as a lawyer, that we would not normally consider when thinking about asset management activities: the Foundations framework, Trust Regime and Self-Managed Funds Regime. We have taken the opportunity as part of the establishment of the AIFC Legal Framework, to develop an entirely new and fit for purpose funds and foundations regime. The significance of that is that for people in this country and people in this region who had not have the opportunity to use trusts and foundations as part of their personal wealth management, that opportunity now exists and I think that is a great opportunity for people practising in the legal profession in this area because of course lawyers are very often called into entrusted positions and they are often called in to advice on these types of structures. On the asset management side, there is the major fund management type activity that you would think of which is associated with the capital markets and then there are, at a more micro level, there are opportunities for family-type asset management in this country and related regions.

Now with respect to FinTech, 17 firms have been accepted to the sandbox built-for- purpose regulatory regime. It is striking that most of those firms are not from Kazakhstan- there are a good number of firms from Kazakhstan-three; but a good number of firms from other parts of the world which have chosen to come and get authorised under the AFSA/AIFC sandbox regime and I think that is very significant: USA, Hong Kong, UK, UAE, Latvia and Singapore. The types of services that they offer include digital and mobile banking, crowdfunding, payment

services and the issuance of digital currencies. For those that are interested in digital currencies, we also have a built-for-purpose digital currency trading regime.

My last point is about crowdfunding, and this is where we link together innovative practice, small-to-medium enterprises ("SMEs") and the real economy, which brings us back to the opportunities within the region. We have a built-for-purpose crowdfunding regime which covers both crowdfunding loans and crowdfunding equity. This is what we expect to be a significant engine of opportunities for raising finance for SMEs both within Kazakhstan and within the region. And of course, it can reach well beyond that as well and the offerings do need to be limited to this region. Crowdfunding is a key innovation; it provides great opportunities for a lower cost but lower risks style of fundraising and investment in this kind of start-up SME. And I think it will be a particularly exciting and useful opportunity for the legal profession to examine not just with respect to Kazakhstan but with respect to the great Central Asian region as a whole.

Рахмет! *(Thank you!)*