

THE LAW OF THE AIFC

by

Michael Blair QC

Chairman of the AIFC Legal Advisory Council

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This book has been authored by Mr Michael Blair QC, the Chairman of the AIFC Legal Advisory Council, Leading Counsel at 3 Verulam Buildings Barristers in London. The book consists of 4 parts and describes a brief history of the formation of the AIFC legal regime, the reasons, and features of the choice of English common law as the basis for the AIFC Law, as well as its advantages and application in practice.

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*I dedicate this book to the 25th Anniversary of the
Constitution of the Republic of Kazakhstan, the
supreme governing law, which provides a firm
constitutional foundation for the functioning and
further development of the AIFC.*

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PREFACE

As the Chairman of the Legal Advisory Council of the Astana International Financial Centre, I am honoured to have been invited to write this book entitled “The Law of the AIFC”, and I express my gratitude to the AIFC Management for this opportunity. It is indeed a great privilege to represent the Astana International Financial Centre and to describe the role of the Constitution in the development of this unique financial centre in the entire region. I am also most grateful to my colleagues from the Advisory Council and the AIFC staff for all their dedicated work done since the early stages of the development of the financial centre.

In the early years of the AIFC’s life there has been an impressive amount of effort on the part of the AIFC (both management and staff) to bring about the establishment of the unique jurisdiction in the newly emerged financial centre and, of course, to further its development. More than 70 acts of the financial centre have been adopted so

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far in the context of the “General Legal Framework” which I describe below. These cover the majority of relationships between registered or recognised companies in the AIFC and other relevant persons. They include corporate, contract, employment, and other matters. Most importantly, they are based on the principles, legislation, and precedents of the law of England and Wales and the standards of leading global financial centres. So, these acts are tailored in English specifically for doing business in the AIFC in a language and legal structure both of which are familiar to global market players.

The market itself shows the growing demand for the AIFC Jurisdiction, as the number of participants has grown considerably since the official opening of the AIFC in July 2018. The AIFC Law is increasingly being selected as the governing law for contractual agreements and the AIFC Court and International Arbitration Centre are also being chosen as places for dispute resolution in those and other commercial contracts.

Furthermore, I would like to pay tribute to the active and continuous support from the Government of Kazakhstan. This has provided an additional impetus for the further development of the AIFC Jurisdiction, not only for Kazakhstani national undertakings but for private enterprises as well. Mr President’s recent instructions to the national undertakings on actively using the AIFC as a primary platform in attracting foreign direct and portfolio investments allow us to look into the future with confidence.

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Given the growing interest in the AIFC and its special legal regime among foreign investors as well as local entrepreneurs and practising lawyers, it is important that more should be known about the Law of the AIFC. I very much hope that you will find this book useful in your endeavours.



Michael Blair QC

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

FOREWORD

Dear reader, you are holding the first and, therefore, unique book that reveals the features of the acting law of the Astana International Financial Centre (AIFC). The special legal environment of the AIFC, the positive aspects of which are now familiar and attractive to investors from all over the world, opens great opportunities and prospects for the domestic legal services market. Mr. Blair, whom I know very well, plunges the reader into the history of the formation of the financial centre's own law and reveals the advantages and features of its application not only for foreign investors, but also for Kazakhstani entrepreneurs.

The very idea of establishing the AIFC, which was designed to turn the capital of Kazakhstan into a regional financial hub, was proposed by HE Nursultan Nazarbayev, the First President of the Republic of Kazakhstan – the

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‘Elbasy’¹, in 2015 as one of the responses to new global challenges. Since 1 January 2018, the financial centre started its work.

To accomplish the tasks set and attract international participants, unprecedented conditions have been created in the AIFC that have no analogues in the post-Soviet space.

Amendments were made to the Constitution of Kazakhstan regarding the establishment of a special legal regime in the financial sphere in the capital of the Republic. This strategic decision of the ‘Elbasy’ gave the constitutional basis for the functioning of the AIFC.

The legal status of the Centre is also enshrined in the Constitutional Statute *On the Astana International Financial Centre*, according to which the Acting law of the AIFC is based on the Constitution of Kazakhstan and includes, among other things, AIFC acts, which in turn are based on the principles and precedents of the law of England and Wales as well as the standards of the global leading financial centres.

Due to its geographical location, the Republic of Kazakhstan lying on the new “Silk Road”, and the creation of a unique legal platform of the AIFC, which is influenced by both continental European and English common law, the AIFC today is becoming a “bridge” between Europe and Asia not only in logistics, but also in the legal sense.

¹ Head of the Nation.

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Kazakhstan, as we can see, approached the implementation of common law in a pinpointed way, exclusively within a special territory, without erasing the current traditional system of law.

With regard to the AIFC, the acting law of Kazakhstan does not come into conflict with the norms of case law but supplements it in places that it has not settled. Such a ‘duet’, in practice, shows how the norms of case law can be effectively applied and, in certain cases, demonstrate their advantage over the current law. Using various sources of law allows achievement of an optimal level of interpenetration of the two legal systems, which minimizes the possibility of their conflict.

It is worth noting that observing the transformations taking place in our country and seeing the successful example of the AIFC, neighbouring countries are also considering the implementation of English law and the creation of such an institution in their countries. In 2019, Mr Blair and I spoke at one of the panel sessions of the IX St. Petersburg International Legal Forum, which was entitled “Case Law: Pro et Contra”, in a talk show format with the involvement of a wide audience. After all the speeches and discussions, more than half of the participants voted ‘For’ the expediency of the convergence of the systems of European-continental and case law. This illustrates that this tendency is growing in the legal community where everyone will benefit from the mutual enrichment of legal ideologies: the state, investors, and society.

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I am most grateful to Mr Blair and his team from the AIFC Legal Advisory Council for their invaluable contribution to the development of the AIFC law, and therefore, to the development of legal thought in the Republic. This book reflects the tremendous work done to ensure the most comfortable legal environment and the Rule of Law in the financial centre. I am quite sure that the publication of this book will arouse interest among Kazakhstani and foreign lawyers and become a practical guide for everyone who is interested in the activities in the AIFC.



Igor Rogov

Deputy Executive Director of the
Foundation of Nursultan Nazarbayev,
Member of the European Commission for
Democracy through Law
(the Venice Commission),
Member of the Academic Council of the
AIFC Academy of Law

FOREWORD

On behalf of Astana International Financial Centre (the AIFC), I would like to welcome you to this book, authored by my colleague, Mr Michael Blair QC, the Chairman of the AIFC Legal Advisory Council and Leading Counsel at 3 Verulam Buildings Barristers in London. You have a great opportunity to dive into details of the AIFC legal environment, which is based on the best of the English commercial law and international standards, to see its structure and benefits for you from the inside. The author describes them in detail and, therefore, opens a ‘door’ to the key features of the special legal regime in the financial centre.

Kazakhstan, which sets itself an ambitious goal to diversify the economy and increase its self-sufficiency, is actively involved in the race for investment against the backdrop of the corona crisis. One of the country's advantages, therefore, is the AIFC - a unique financial centre for the EAEU and Central Asia, which is designed

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to support the inflow of investment and development of the domestic financial market.

In December 2015, the Constitutional Statute “On Astana International Financial Centre” was adopted, for ensuring the successful launch and operation of the AIFC. Thanks to this document, investors can obtain a special status that allows preferential conditions for entry into the country, and a special tax regime, as well as a special currency regulation regime.

The AIFC Law may be applied and used not only by the AIFC participants but also upon agreement of parties, irrespective of whether they have a connection to AIFC or not. The unique legal system of AIFC accommodates the AIFC Court and the International Arbitration Centre (IAC), which operate in accordance with the best international standards for resolving civil and commercial disputes in the AIFC. Judgements of the AIFC Court are enforced in Kazakhstan as well as in foreign countries following international agreements, which is, of course, a great achievement and a right path to becoming the regional centre for resolving commercial disputes.

In the light of the new global challenges, the AIFC is now becoming one of the key development institutions in Kazakhstan.

At the final session of the State Emergency Commission on 11 May 2020, the President of Kazakhstan, His Excellency Kassym-Jomart Tokayev, noted that it is highly essential to “intensify the use of AIFC

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potential to attract investments and develop the stock market”. Also, the emphasis was made on the need to ensure access of Kazakh entrepreneurs to take advantage of the AIFC Court and the IAC in resolving business disputes.

On 2 July 2020 at the expanded meeting of the AIFC Management Council chaired by the Head of the State, the Development Strategy of AIFC until 2025 was approved, where we identified the main priorities for our work which are aimed at promoting the economic growth of Kazakhstan and the region as a whole.

Besides, on 1 September 2020, the President of Kazakhstan called for heavy involvement in the AIFC as a key tool for the attraction of direct and portfolio investments. It is also worth noting that the AIFC was created not only for foreign investors but also for local entrepreneurs, as opportunities of the centre are available to all without exceptions. Hence, the AIFC is becoming a unique meeting place for capital and projects in Kazakhstan and the region, and it has demonstrated its effectiveness and benefits as a platform for attracting investment.

Guided by constitutional values, we are confident that we will be able to become a “bridge” for a more powerful flow of capital into the country as well. Most importantly, this aim is ensured by the unique legal regime.

All of these are brilliantly described by Mr Blair QC, who is not only the author of this book, but also one of the

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authors of the AIFC Law since early 2017. The AIFC Legal Advisory Council, led by Mr Blair QC, made a tremendous contribution in development of the AIFC Law, which has been building “brick on a brick” with the inclusion of the best international practices. We very much value every input of the Advisory Council’s members and are most grateful for its Chairman, Mr Blair QC, for this work and personal desire to explain how the AIFC Law works.

I trust you find this wonderful book useful. Enjoy the reading!



Dr Kairat Kelimbetov

Governor of the AIFC

INTRODUCTION

The AIFC is the area within the City of Nur-Sultan determined by the President of the Republic of Kazakhstan as the area where the special legal regime, established by the Constitution of Kazakhstan and governed by the Constitutional Statute ‘On the Astana International Financial Centre’ of 2015, is operative.

This special legal regime is a free-standing commercial law system, designed to enable an independent international financial centre to operate. The powers to create this commercial law system are derived from the Constitution of the Republic of Kazakhstan, and the Constitutional Statute mentioned above. This legal ground for establishing such a financial centre in the region was driven by the inspiration of the First President of Kazakhstan, which was later reflected in his Plan of the Nation ‘100 Steps’.

The AIFC is indeed new, and separate, but still essentially Kazakhstani in nature. The Constitutional

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Statute created this segment of the State and the introduction of the amendments to the Constitution established a solid foundation and a constitutional ground for the functioning and further development of the AIFC. This was a first precedent in the entire region, which ensures the creation of a special legal regime in the financial sphere based on the principles, legislation, and precedents of the law of England and Wales as well as the standards of leading global financial centres. That is a historical event and a strategic decision for the success of the AIFC, which provides a unique platform and opportunities with a suitable and flexible legal environment today.

Since the AIFC officially opened in the summer of 2018, it announced itself to the world as a new platform of opportunities, for doing business, and a safe harbour for foreign investors in the region. Earlier the same year, the set of Regulations and Rules based on English common law were introduced, which set up the reliable and fundamental ground for the AIFC goals and ensure the effective functioning of the financial centre. These AIFC Acts were codifications, that is they contain a simplified version of the English common law, rather than referring directly to that law as some other financial centres do. Under Article 4.3 of the Constitutional Statute on AIFC, the AIFC bodies have the power to adopt acts that regulate civil relationships, civil procedural relationships, and financial relationships, as well as administrative and procurement procedures in the AIFC. It is important to

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bear in mind that the matters not governed by the Constitutional Statute and the AIFC Acts are subjects for regulation by Kazakhstani national legislation, such as the criminal law, environmental protection law, and others.

Given this unique nature of the special legal regime, created on common law lines in the heart of the country with its civil law jurisdiction, it is essential to understand its structure, operation, and interaction with the mainland jurisdiction. As the Chairman of the Legal Advisory Council, which has been given an important role in building the AIFC General Legal Framework, it is my duty and privilege to describe to the reader what the AIFC Law is, in plain language, but with detailed explanations where appropriate. Therefore, I hope, this book, entitled the '*Law of the AIFC*', lives up to that aim.

I have divided this work into four main parts. In the first part, I have outlined the historical background of the establishment of the AIFC Law, the Constitutional basis for its operation, and the process of setting up the special legal regime. Part 1 thus describes the emergence of the AIFC directly from the Constitution of Kazakhstan and Constitutional Statute as an important institution for the future of the Republic.

Then, in Part 2, I have set out the contribution of all involved in establishing the new legal regime, principally by adapting to the AIFC the English common law principles, legislation and precedents just mentioned. This Part contains some observations on the inclusion within a

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civil law country of a special legal regime based on the common law.

Then, Part 2 also highlights the rationale, process, and importance of the AIFC Legal Advisory Council in helping to make a set of ‘codified’ commercial codes – the General Legal Framework as the governing law of the AIFC.

Part 3 then offers in chapter 3.1 an overall picture of the structure of the AIFC, including its institutions and governance. Part 3 also discusses in chapter 3.2 the structure of the AIFC in legal conceptual terms. This is followed by a discussion in chapter 3 on the uniqueness of the AIFC jurisdiction. Here I explain the key features of the General Legal Framework (chapter 3.3) and Financial Services Framework (chapter 3.4) as core blocks of the AIFC Law. I also offer my own views on how common law and the doctrine of judicial precedent can operate in, benefit, and fit in with national law in emerging markets such as Kazakhstan and countries in the region.

In addition to those four chapters in this Part, chapter 3.5 deals with the AIFC Court and the International Arbitration Centre (IAC). This has been contributed, very kindly, by Mr Christopher Campbell-Holt, the Registrar and Chief Executive of the AIFC Court and IAC. I am most grateful for his contribution since he is an acknowledged expert on the important dispute resolution arrangements in the financial centre and can deal with that topic in a more authoritative way than I could.

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Lastly, the book ends with a description in Part 4 of the additional benefits in the AIFC for a legal person and for a natural person whether it, he or she is an AIFC Participant or not. And it briefly highlights the activities on raising awareness of the AIFC Jurisdiction.



“Astana International Financial Centre is a new page in the history of independent Kazakhstan. Its launch is a very significant step towards sustainable development of the economy.”

N. Nazarbayev

PART 1: AN AMBITIOUS NEW PROJECT IN THE HEART OF EURASIA

1.1. The Inspiration of the First President of Kazakhstan

Kazakhstan, a country located at the heart of the Great Silk Road, is on its way to accelerating its integration with global markets. It has already demonstrated its competitiveness and attractiveness on the regional and global stages alike. Today, the country plays a strategic role in recreating a trade corridor connecting East and West through China's Belt and Road initiative. Therefore, the city of Nur-Sultan with its strategic location has a tremendous opportunity to become a central delivery unit for Belt and Road infrastructure financing.

An important component of country-wide economic and institutional reforms, aimed to catalyse Kazakhstan's economic progress and inclusive growth, is a new institution with an attractive environment for foreign investors. This role is now being carried out by the new financial centre in the Heart of Eurasia, the Astana

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International Financial Centre (AIFC), in the development of which I am honoured to be playing a minor role.

The historical record shows clearly what Nursultan Nazarbayev, the First President of the Republic, wanted for his country in starting the process for the creation of the AIFC. He suggested the idea of launching the AIFC “as a response to a new global challenge. Large-scale institutional and structural reforms are being implemented in Kazakhstan. They aim to make the country more competitive and elevate it to a place among the top 30 developed countries in the world”.² As part of the May 2015 ‘Plan of the Nation’, he announced the intention to establish the AIFC: it was in the list of ‘100 Steps’ that formed part of that Plan. It is clear from the history that the establishment of the AIFC is one of the major projects in the Plan of the Nation, in that the AIFC covers 5 of the “100 Steps”. These contain different directions to ensure a legal ground on the highest level, an attractive environment, and a sustainable function for the proposed new financial centre in the future.³ For instance, the two key steps among those five states as follows:

“70. Establishing the *Astana International Financial Centre (AIFC)* with giving special

² Annual Report on the Activities of Astana International Financial Centre (AIFC 2019) 3
<<https://aifc.kz/uploads/Annual%20reports/AIFC%20Annual%20report%20short%20ENG.pdf>>.

³ Steps 24, 70, 71, 72, and 73 of the Plan of the Nation.

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status to it and based on the infrastructure of Astana EXPO 2017. Giving it *a special status consolidating legally within the Constitution*. The establishment of the centre as a *Financial Hub* for the CIS countries, as well as the entire region of West and Central Asia. An *independent commercial law system*, which will function on *English law principles* and with a judicial corps consisting of foreign experts will be established. The goal is for Kazakhstan's financial hub to join the top 20 financial centres of the world.”, and

“72. Making English the official language of the financial centre. Its *independent legislation* must be developed and applied in the English language.”⁴

The three other key steps relating to the AIFC were concerned with:

- (a) establishing an international arbitration centre in the AIFC, modelled on the Dubai experience (24th step);
- (b) development of new types of financial services as well as the introduction of a liberal tax regime and the concept of ‘Investment Residence’ (71st step); and
- (c) ensuring international transport accessibility for the AIFC and establishing regular air transport routes

⁴ *Plan of the Nation – 100 Steps* the Program of the President of Kazakhstan dated 20 May 2015.

between the AIFC and other leading financial hubs (73rd step).⁵

This set of steps reveals that the First President had four aims relating to the AIFC project, which can be derived either from what was stated or else from the specific way in which the project was formulated in legislation in 2015.⁶

First, he wanted a Financial Centre that adopted and upheld the best international standards of financial regulation. A new venture of this kind can succeed only if it aspires to the highest quality available worldwide.

Secondly, he wanted a Centre that was infused with the spirit of the common law. The common law has done so much for the western world in providing a workable and just legal atmosphere, especially with commerce, finance, and international trade. In particular, he admired and wished to rely on the common law of England and Wales, because of its reputation as a system of law that is transparent, incorruptible, just, and procedurally fair.

Thirdly, he wished the designers of the Centre to be familiar with and to draw inspiration from the international financial centres that have arisen during this

⁵ *Plan of the Nation – 100 Steps* the Program of the President of Kazakhstan dated 20 May 2015.

⁶ In particular, in the Constitutional Statute *On Astana International Financial Centre*, approved on 7 December 2015. The text is available in Annex 2 to this book.

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century in the Middle East,⁷ and also those older markets further East in Hong Kong, Singapore and elsewhere.

Fourthly and lastly, the First President clearly appears to have wanted a Financial Centre which would have effects for the benefit of Kazakhstan as a whole. What was designed in 2015, as I will show below, was not just a kind of international “free-port” planted in the Republic and operating on its own there for international customers etc. On the contrary, the clear intent was to create a “centre of excellence” that would have positive effects, as it developed, for the benefit of the Republic, its economy, and its citizens.

The result of these four aims is stated succinctly in the 2015 Legislation. The Constitutional Statute “On Astana International Financial Centre” describes the purpose of the AIFC as “to establish a leading international financial centre for financial services”⁸ and five objectives beneath that are set out. Broadly,⁹ they are (a) attracting inward investment in the financial services sphere; (b) developing a securities market and integrating it with international

⁷ In Dubai (2002), Qatar (2004) and Abu Dhabi (2013).

⁸ The Constitutional Statute at Article 2.1.

⁹ Article 2.2 reads in full as follows: 2.2. The objectives of the AIFC are as follows: (1) attracting investment into the economy of the Republic of Kazakhstan by creating an attractive environment for investment in the financial services sphere; (2) developing a securities market in the Republic of Kazakhstan and integrating it with international capital markets; (3) developing insurance markets, banking services, Islamic finance, financial technologies, electronic commerce and innovative projects in the Republic of Kazakhstan; developing financial and professional services based on international best practice; (5) achieving international recognition as a financial centre.

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capital markets; (c) developing insurance and banking services, Islamic finance, and innovative projects including “fintech” and “e-commerce”; (d) developing financial and professional services, and (e) securing international recognition.

The activities of the centre are by law to be based on the principles of efficiency, transparency, integrity, professionalism and application of international standards and international best practice.¹⁰ Finally, the Constitutional Statute emphasises the important concept of the independence of the AIFC and its Participants, which regulation of the AIFC must respect.¹¹

It also follows from the first three of these four Presidential aims that the official language of the AIFC was required, by article 15 of the Constitutional Statute, to be the English language. The international standards of financial regulation tend to be written in English and the emphasis on English law made the choice of English as the official language a practical necessity. Further, the other centres that were to be relevant as precedents are ones where the English language predominates.

¹⁰ See Article 2.3.

¹¹ Article 2.4.

1.2. The Constitution of Kazakhstan and the Constitutional Statute which Embody that Inspiration

As mentioned, the key piece of legislation passed in Kazakhstan was the Constitutional Statute of December 2015.¹² This was passed by the Parliament of the Republic and signed by the President, so as to become the Constitutional Statute, on 7 December 2015. Its enactment took place within the framework of the implementation of the Plan of the Nation “100 Steps” of May 2015. On 9 March 2017, the Constitutional Council of the Republic of Kazakhstan formally reached a conclusion, in the context of a Law passed by the Parliament on 6 March 2017,¹³ that there was no doubt

¹² It has since been amended twice in 2017, in March and again in December, in some minor respects, and so as to create the office of Governor of the AIFC (new Article 10-1 inserted in December 2017). Recent amendments in December 2019 introduced a new concept of ‘Investment Residency’ (new Article 5-1 was inserted).

¹³ The Law was entitled “On amendments and Additions to the Constitution of the Republic of Kazakhstan”, adopted by the Parliament on 13 March 2017.

about the constitutional propriety of the proposal for the AIFC. The amendment to the Constitution itself that was required by the AIFC project was thus itself verified as fully in compliance with the Constitution of Kazakhstan established in 1995.

As enshrined by the Constitution, it is the constitutional intent that economic development for the benefit of all the nation would be supported by the government.¹⁴ This explains the reason why the amendment to the Constitution was introduced¹⁵; it was necessary, first, to give full effect to the fundamental principle of supremacy of the system of existing law in Kazakhstan; and, secondly, to ensure the effective functioning of the newly established AIFC. The Constitution, as the supreme document of the nation, provides a solid foundation for the successful development of the Country, acting as the will of the people,¹⁶ and the AIFC is a legitimate part of the arrangements in place for that development.

The amendment was needed to establish a foundation and a constitutional ground for the functioning and further development of the AIFC. This was a strategic decision and a result of the farsighted policy of the First President of the Republic of Kazakhstan to establish a financial hub in the heart of Eurasia. It is also worth noting that this significant step to ensure such a legal

¹⁴ Article 1(2) of the Constitution of the Republic of Kazakhstan 1995.

¹⁵ With effect from 14 March 2017.

¹⁶ Article 2 (3.1) of the Constitution.

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environment is an innovative and historical event in the region, which gives certainty and clear vision for the future of the AIFC future from the political perspective. In a sense, therefore, it can fairly be said that the AIFC is ‘a special legal child of the Constitution of Kazakhstan’.

As a result, the system of law in the AIFC depends, according to the Constitutional Statute, upon its not being inconsistent with the Constitutional Statute itself. This means that the AIFC legal system is not a sovereign system as such but is valid only in so far it does not exceed the bounds for its lawful existence set by the Constitutional Statute, and also as long as no amendments are made to the Constitutional Statute, which would have the effect of narrowing or abolishing any of the present provisions defining the permissible extent of AIFC law. This is of course right and proper in a Centre inside a sovereign state. That said, the AIFC was established and has continued to operate with the benefit of significant goodwill on the part of the most influential circles in the Republic. This makes it extremely unlikely that anything would be done to impose new limits on the powers and constitutional position of the AIFC. As has been stated by Mr Kairat Mami, the Chairman of the Constitutional Council of the Republic of Kazakhstan:

“the law of the AIFC ... complements measures to modernise the national legal system of Kazakhstan and helps to increase

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the effectiveness of activities of legal structures. Eventually, such a tandem will have a positive impact on the strengthening of the Rule of Law in the country and the development of a financial system.”¹⁷

I will elaborate further and in greater detail on the unique nature of the AIFC legal regime, as empowered by the Constitution and Constitutional Statute, in Part 3 below (*the AIFC Jurisdiction in Full Operation*).

¹⁷ Foreword to the AIFC publication on “The AIFC General Legal Framework” (September 2018).

1.3. The Process of Building the International Financial Centre

Since the Constitutional Statute was adopted in late 2015, providing a legal basis for setting up the financial centre, the next steps, between 2016 and 2018, were preparatory initiatives taken under the management of Dr Kairat Kelimbetov, Governor of the AIFC. During these decisive years, the structure of the AIFC was determined, highly qualified personnel, fully familiar with the English common law and best international standards, were selected and the AIFC bodies and organisations were formed.

The implementation of defined goals, principles, and objectives of the financial centre in the Constitutional Statute started from the strategic and decisive activities, where the Government of Kazakhstan was also heavily involved. Dr Kairat Kelimbetov, who had previously been Governor of the National Bank of Kazakhstan, was appointed by the President of Kazakhstan to take office as

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the Governor of the AIFC¹⁸ and to spearhead the development. Thereafter, on 25 December 2015, the AIFC Authority was created by the National Bank of Kazakhstan, initially in the form of a joint-stock company under the Law of Kazakhstan *On Joint-Stock Companies 2003*. However, recent amendments to the Constitutional Statute in December 2019 have redefined its form as a ‘non-profit organisation’.

Each of the Governor and the AIFC Authority is now what is known in the Constitutional Statute as an “AIFC Body”. These two AIFC Bodies have played a crucial role in governing and forming the AIFC legal environment that we have today. It is perhaps apposite to note that my own involvement in the AIFC, as well as that of the rest of the AIFC Legal Advisory Council team, came about through the activities of one of these two AIFC Bodies.

On 31 December 2015, the highest governing body of the AIFC, the Management Council of the AIFC, was formed.¹⁹ Chaired by the President of Kazakhstan and composed of well-known experts in the world, the Management Council has (a) defined the structure of the AIFC bodies; (b) approved the Charter of the Astana Financial Services Authority (AFSA), and (c) given instructions to establish AFSA as another AIFC Body.²⁰

¹⁸ Order of the President dated 24 December 2015.

¹⁹ Decree of the President dated 31 December 2015.

²⁰ Minutes of the Meeting of the Management Council dated 26 May 2016.

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On the same day, the President of Kazakhstan defined the territory of the AIFC within the City of Nur-Sultan,²¹ on the left bank of the Essil river running through the City. The geography thus delineated plays an essential role in the functioning of the financial centre and creates a major part of the necessary base for its jurisdiction, just as in the case of any jurisdiction anywhere else in the world.

Within this short period, the inspiration of the First President was becoming a reality and the first significant steps were taken to establish a suitable environment and a favourable regime. However, this was only the half way point of setting up a fully operating financial centre that would meet the high demands of the market players. It is vital for investors and other users, especially for foreigners, to have a special legal regime that would be suitable for and familiar to them. In this regard, the Constitutional Statute clearly states that the core legal framework of the Centre the AIFC Acts “may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres”.²² The requirement for a special legal framework based on the English common law as well as the best experiences of other leading international financial centres is absolutely key to everything relating to the AIFC 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

²¹ Decree of the President No 161 dated 31 December 2015.

²² Article 4(1).

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initiative. It sets out some central concepts which together helped to fashion the jurisdiction of the AIFC. You will find them in detail in Part 3 (*The AIFC Jurisdiction in Full Operation*) below.

To help ensure the introduction of the best global practice and the implementation of the relevant law of England and Wales, another advisory body was created in February 2017, known as the AIFC Legal Advisory Council (the LAC).²³ It consists of several lawyers drawn from the legal professions in England and Wales with relevant experience in the United Kingdom, or in Kazakhstan, or both. It was a great honour to me personally to have been invited to join the LAC as its Chairman, and thus to be able to contribute to the development of the law of the AIFC law in that capacity. Here, a new chapter in my life has started and I am most grateful to the AIFC management for this opportunity.

From early 2017, the LAC has been contributing to the elaboration of the bespoke legal system which I consider to be a primary pillar of the AIFC. I am going to describe it in greater detail in Part 2 (*Establishing a New Model of Law in a Civil Law Regime*) below.

Another advisory body that I would like to mention is the Advisory Panel on Legal Regulatory Matters (Advisory Panel). It was established in 2019 with the primary

²³ The AIFC Legal Advisory Council was established by the Order of the Governor of the AIFC *On the Legal Advisory Council of the AIFC* No 4 dated 28 February 2017.

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objective to determine and evaluate the future regulatory approach to and philosophy on the establishment of a regulatory regime for legal services and legal services providers in the AIFC. Chaired by Mr Chris Kenny who, along with the other members, was a leading regulatory expert involved in equivalent regulatory reforms in the United Kingdom, the Advisory Panel is mandated to propose the path for the regulation of the legal market in the AIFC. This approach is necessary given the increasing number of legal services providers in the AIFC.

In May 2020, a further advisory body in the legal field was set up. This is the “AIFC Advisory Council on the Development of LegalTech” which has been established to develop legal technology in the AIFC, to improve the efficiency and quality of legal services and make them more accessible. The Council itself is chaired by Mr Mark Beer OBE and comprises international experts in the field of law and legal technology from the UK, USA, Switzerland, the Netherlands, and Singapore. I feel sure that the AIFC will benefit from assembling this group of experts with similar interests to work together toward the same goals.

I must not dive into too much detail in describing the history of the establishment of the AIFC and other bodies. However, I have set out below at the end of this Part a brief timescale showing the key dates and the main events between 2015 and 2020 which directly or indirectly affected the development of the Law of the AIFC.

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Today, in Nur-Sultan, we are able to witness the growth of a dynamically developing financial centre with substantial achievements and with new ambitious projects in the pipeline. After starting life in various buildings in Nur-Sultan in 2015 onwards, the AIFC finally moved between 2018 and 2019 into the magnificent premises designed for it in the former EXPO 2017 Centre. All of the AIFC Bodies are now accommodated there in one wing of the pavilions that were established for the 2017 Exposition.

The staff required for all the AIFC Bodies and their organisations has been found from the public service of the Republic of Kazakhstan and some international and local recruitment. For instance, Mr John Leahy, an Australian barrister with more than 40 years of experience as a legislative draftsman, has been helping the AIFC Authority to develop AIFC Acts remotely from Canberra, Australia. The services of this highly qualified expert in common law from the other side of the world, thanks to new technology, has been of inestimable value.

In all my dealings with staff in all parts of the AIFC, including AFSA, I have found them to be positively motivated, hard-working and keen to learn from any source how to do their best, especially from the overseas contingent which they invariably welcome in an open and friendly way. Although, as stated above, English is the official language of the AIFC and is required by the Constitutional Statute “to be used in all areas regulated by the AIFC”, one hears Russian and Kazakh spoke in the

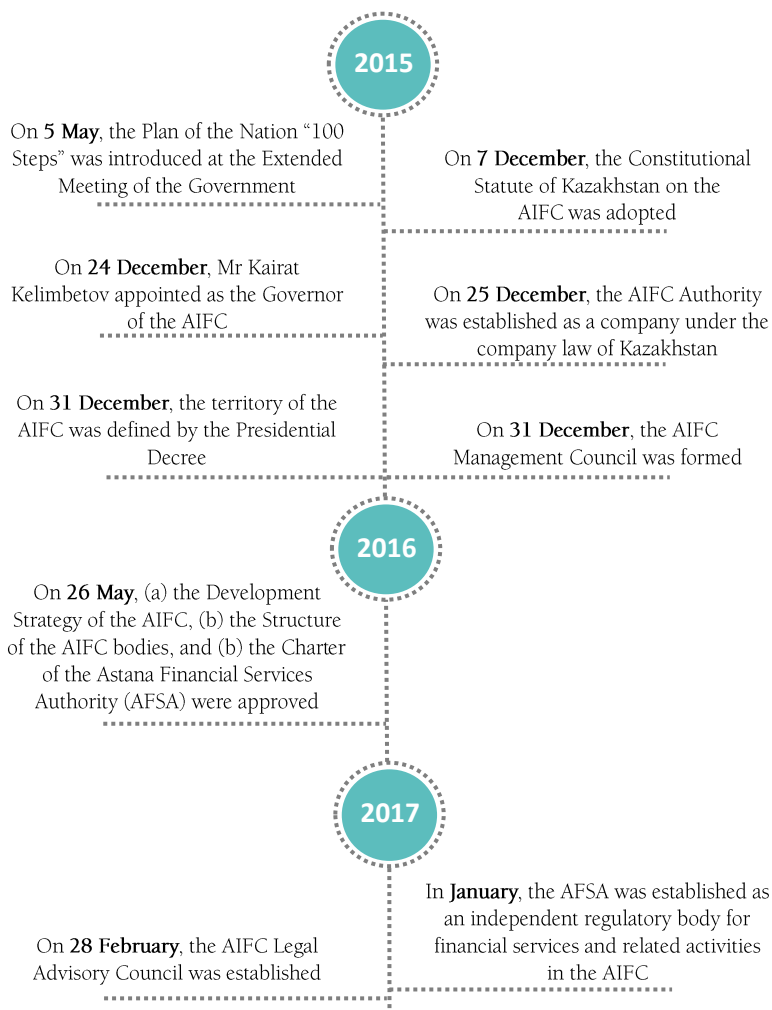
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corridors in the AIFC premises, and in the canteens and areas for receptions as well.



ANNEX TO PART 1

THE TIMESCALE OF MAJOR EVENTS:



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On **9 October**, (a) the Structure of the AIFC bodies and (b) the Charter of AFSA were amended, where the powers of the Governor were extended

On **5 December**, (a) the *AIFC Court Regulations 2017* and (b) the *AIFC Arbitration Regulations 2017* were adopted by the Resolution of the Management Council. As a result, the AIFC Court and International Arbitration Centre were established

On **22 December**, the Constitutional Statute on the AIFC was amended with further improvements of the AIFC activities and where the Governor of the AIFC was defined as an AIFC Body

On **5 May**, the 1st Meeting of AIFC Legal Advisory Council was held at the Embassy of Kazakhstan in London. Here, the Model for the AIFC General Legal Framework was approved

On **20 December**, the following AIFC Acts were adopted by the Governor:

- *AIFC Regulations on AIFC Acts*
- *AIFC Companies Regulations*
- *AIFC Contract Regulations*
- *AIFC Implied Terms in Contracts and Unfair Terms Regulations*
- *AIFC Employment Regulations*
- *AIFC General Partnership Regulations*
- *AIFC Limited Partnership Regulations*
- *AIFC Limited Liability Partnership Regulations*
- *AIFC Non-profit Incorporated Organisations Regulations*
- *AIFC Security Regulations*
- *AIFC Netting Regulations*
- *AIFC Payment System Settlement Finality Regulations*
- *AIFC Data Protection Regulations*
- *AIFC Insolvency Regulations*
- *AIFC Personal Property Regulations*
- *AIFC Regulations on Obligations*
- *AIFC Regulations on Damages and Remedies*
- *AIFC Financial Services and Framework Regulations*

On **28 December**, the boundary of the AIFC territory was expanded to 1 632 ha

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On **29 December**, the following AIFC Acts were adopted by the AFSA:

- *AIFC Companies Rules*
- *AIFC General Partnership Rules*
- *AIFC Limited Partnership Rules*
- *AIFC Limited Liability Partnership Rules*
- *AIFC Non-profit Incorporated Organisations Rules*
- *AIFC Insolvency Rules*

2018

In **July**, the official opening of the AIFC was held

On **22 January**, the AIFC Data Protection Rules were adopted by the AIFC Authority

On **8 October**, the AIFC Security Rules were adopted by the AIFC Authority

2019

On **26 March**, the AIFC Foundations Regulations were adopted by the Governor

On **26 April**, the AIFC Advisory Panel on Legal Regulatory Matters was established

On **13 June**, the AIFC Common Reporting Standard Regulations were adopted by the Governor

On **6 August**, the AIFC Trust Regulations were adopted by the Governor

On **7 October**, the Academic Council of the AIFC Academy of Law was established

On **9 October**, the AIFC Academy of Law was established within the AIFC Authority as a Project Management Office

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On **30 December**, the Constitutional Statute on the AIFC was amended with further improvements of the AIFC activities including the new concepts of 'Investment Resident' and 'Investment Residency Programs'

2020

On **2 July**, the AIFC Development Strategy until 2025 was approved by the Management Council

On **13 May**, AIFC Advisory Council on the Development of LegalTech was established

PART 2:
ESTABLISHING A COMMON LAW
MODEL INSIDE A CIVIL LAW
REGIME

2.1. Contribution to Establishing the New
Legal Regime by adaptation to the AIFC of
the Commercial Law of England and
Wales and Best International Practice

In Chapter 2.1, I will deal with three topics, which overlap to some degree, as follows –

- a. The First President’s decision in 2015 to choose a basis of English law and procedure for the new AIFC.
- b. The reasons that seem to me to have been relevant in the making of that choice, and
- c. The advantages that such a choice confer on the AIFC in practice.

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In the light of those topics, I will then add some observations about the underlying, and fundamental, policy issues that any legal system has to resolve in its own way, including some questions that are raised from time to time about the relationship of the new Common Law regime with the Civil Law tradition in Kazakhstan as a whole.

In Chapter 2.2 below, I will set out some details about the membership of the AIFC Legal Advisory Council (the LAC), which was formed in early 2017. When the members of the LAC were invited to join it, our task was to contribute to building a unique legal regime within the civil law jurisdiction, and based on the Constitutional Statute as the source of the power to act.

(a) The initial decision to choose English law for the AIFC.

By the time we were appointed in 2017, the President and other leaders of the Republic of Kazakhstan had already decided to form this unique regime with some English common law elements. This decision was first introduced in the Plan of the Nation in 2015, which referred to this project in five of the “100 Steps”, as set out above in Part 1.1.

That choice was then fundamentally settled in 2015 in the Constitutional Statute, which stated that:

“AIFC Acts, ... may be based on the principles, legislation and precedents

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of the law of England and Wales and the standards of leading global financial centres”.²⁴

In consequence, the acceptance of the English precedent was a deliberate policy orientation of the First President and the Parliament of Kazakhstan.

However, it is important to mention four²⁵ other key overarching “design features” that were inherent in the language of Article 4.1 of the Constitutional Statute, as just quoted.

- a. The *first* of these is the fact that the Law of the AIFC is to be in “AIFC Acts” which are to be based on the English precedent. The Constitutional Statute does not call for a wholesale application of any element of English law but mandates a process for the new, written law. Thus, AIFC law is required to be purpose-made specifically for the AIFC, with its content inspired by the qualities of English law as described in Article 4.1 (principles, legislation and precedents);

²⁴ Article 4(1) of the Constitutional Statute on AIFC.

²⁵ Later in this book I will need to mention some other “design features” inherent in the Constitutional Statute, that affect the shape and content of the law of the AIFC. Two of them, for example, are the fact that an “AIFC participant” has to be a legal person, such as a company, rather than an individual, and the fact that the territory of the AIFC consists of a large part of Nur-Sultan where there are and will continue to be many commercial enterprises that do not have any relationship with the AIFC. These are not, of course, relevant to the topic now under discussion which is about the use of English law in the AIFC.

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- b. The *second* of these is that the focus is not exclusively on the English legal system as the template for AIFC law-making. The language speaks of a power to base the AIFC law on the English precedent, and not on a duty: (“may” is used, rather than “shall” or “must”). Further, the Constitutional Statute also mentions the “standards of leading global financial centres” as another recommended source of AIFC law.
- c. The *third* is that the Constitutional Statute makes it plain that the AIFC legal system is to be subordinate, subject always to the over-riding force of the Constitutional Statute itself²⁶. It follows that AIFC lawmakers have to avoid the risk of any conflict between the law they make and the over-riding and empowering Constitutional Statute. This subordinate status was further emphasised by another provision in the Constitutional Statute, which provided that part of the “Acting Law of the AIFC” is, after the Constitutional Statute itself and AIFC Acts, “3) the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts.” This means for instance that if matters are not dealt with in substance by AIFC Law, then the underlying law of the Republic is not displaced. An obvious example of this is

²⁶ Under Article 4.1, AIFC Acts are law only if they are not inconsistent with the Constitutional Statute itself.

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criminal law since the AIFC has no power to write laws that create criminal responsibility.

- d. The *fourth* design feature relates to the hierarchy within AIFC Law. The Constitutional Statute defined the top level of this hierarchy at Article 4.1, as follows: “The Acting Law of the AIFC is based on the Constitution of the Republic of Kazakhstan and consists of 1) this Constitutional Statute; and 2) AIFC Acts, which are not inconsistent with this Constitutional Statute and which may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres, adopted by the AIFC Bodies in the exercise of the powers given by this Constitutional Statute; and 3) the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts.” (*my underlining*). Some of the consequences of that triple hierarchy have been described at (c) above. But the Constitutional Statute left to “AIFC Acts” (the middle of the three layers defined in Article 4.1) the task of determining the internal hierarchy within that middle layer itself. It, therefore, was for the LAC an early task, in introducing the new regime, to define a model for the future framework of that middle layer. Essentially, the main distinction that evolved was between “Regulations”, which cover specific topics, and

“Rules” which fill in some of the details required to make the Regulations workable in practice. Settling this topic and advising the Governor on it was the first and primary task for the LAC at its first meeting. In consequence, section 8 of the *AIFC Regulations on AIFC Acts 2017* entitled “Hierarchy of Acting Law of AIFC” provides for “the following descending levels: (a) paragraph 3-1 of article 2 of the Constitution of the Republic of Kazakhstan; and (b) the Constitutional Statute; and (c) the Management Council Resolution on AIFC Bodies; and (d) Regulations; and (e) Rules; and (f) other Acts of relevant AIFC Bodies adopted to regulate specific issues.” The section goes on to provide for the risk of inconsistency between AIFC Acts at different levels in the hierarchy, and also if the inconsistency arises within the same level²⁷, because a general model has to comprise the fundamental laws required for a functioning legal system of the AIFC.

It follows from all this that our role on the LAC was in 2017, and still continues to be, to bring to the financial centre, by way of new text, the best of the ‘modern’ English commercial law, suitably combined with the best practice

²⁷ These provisions are set out in section 8 (2) and (3) as follows: “(2) If AIFC Acts of different levels are inconsistent, the AIFC Act of the higher level prevails over the AIFC Act of the lower level to the extent of the inconsistency. (3) If AIFC Acts of the same level are inconsistent, the later adopted AIFC Act prevails over the earlier adopted AIFC Act to the extent of the inconsistency.” There are other provisions to aid in the application of subsection (3) above, with a view to narrowing the impact of potential inconsistency.

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and worthwhile innovations to be found in other global financial centres.

(b) Reasons underlying that choice.

Why, one may ask, does the Constitutional Statute point in the direction of English law as a model? My answer is that there are five reasons which seem to me to have been influential in the making of this choice. In doing so, I seek to indicate reasons for that tendency, more by way of evidencing the strong demand of businesses for the benefits of the law of England and Wales, rather than by way of seeking actively to promote it.

First, *Language*. It was an early decision relating to the establishment of the AIFC that the Centre would use the English language as its language of choice. Step 72 of the Plan of the Nation clearly shows this as mentioned in Part 1.1. Later, this choice was reflected in Articles 15-19 of the Constitutional Statute.²⁸ This no doubt derived from the fact that the English language has become, in my lifetime, the language of international commerce and communications in the same way as the French language performed that function two hundred years ago.

²⁸ Of these 5, the most relevant ones for present purposes are Articles 15 and 16, which read “Article 15. Language of the AIFC. The official language of the AIFC is the English language, which is to be used in all areas regulated by the AIFC in the territory of the AIFC.” And “Article 16. Language of AIFC Acts. AIFC Acts are to be drafted and adopted in the English language. AIFC Acts may be translated into the Kazakh or Russian language. The official translation of AIFC Acts is to be produced by the AIFC.”

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And, if the proceedings of the Centre are to be conducted in English, in terms of laws, rules, decisions and correspondence, then a natural follow-on decision from that would be that the law, as expressed in English, should actually be based on English law as well.

Second, *the Competition*. The architects of the new centre in Kazakhstan were seeking to establish it in a global market for international financial services that seemed already to have a large number of players. And there was already a marked preference among other international financial centres for English law or a derivative of it as the underlying source of law. In March 2015, when the first idea for the AIFC began in what is now Nur-Sultan, the latest independent survey, the Global Financial Centres Index (number 17) (GFCI) contained details of 82 centres with some others not yet fully assessed. The dominance of centres with a common law background was then very marked, and that trend has continued since 2015. As of today, there are now, in the September 2020 Edition, some 111 global centres from New York at no. 1 to Wuhan at no. 111.²⁹ Of the top 6, I would say that 4 have a common law base (New York, London, Hong Kong and Singapore). Of the top 20, 11³⁰ seem to be based on the common law compared with 5

²⁹ The Global Financial Centres Index 28 (September 2020) 4.

³⁰ New York, London, Hong Kong, Singapore, 5 others in the USA, Edinburgh, and Dubai. In March 2020, there was one fewer common law jurisdiction.

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operating in a civil law jurisdiction,³¹ and 4 based on a third source of law.³²

The law of England, as a ‘commercially minded system’,³³ forms a very suitable base in the arbitral field, with 40% of all global corporate arbitrations selecting that law for the purpose of regulating their relationships, including arbitration if necessary. Besides, in terms of choice of forum, no less than 75% of cases in the UK Commercial Court in 2018 were international in nature,³⁴ which shows that there is a strong preference among global commercial players to select a forum which functions in a way that is respected by both sides to a commercial relationship or dispute. English law is the basis of the legal systems for some 27% of the world’s 320 jurisdictions.³⁵ Even more, the statistics relating to choice of law in practice clearly illustrate that English law, or a variant of it, New York law, is the predominant choice in the commercial world as a whole.

The relatively recently established and rapidly developing international financial centres, such as Dubai,³⁶ Abu Dhabi,³⁷ and Qatar,³⁸ have also chosen to choose the

³¹ Zurich, Luxembourg, Geneva, Frankfurt, and Paris.

³² Three in China and one in Japan.

³³ The Law Society of England and Wales Report ‘England and Wales: A World Jurisdiction of Choice’ (2019) 8.

³⁴ *Ibid* 4.

³⁵ ‘Legal Excellence, Internationally Renowned’ UK Legal Services Report (TheCityUK, December 2019) 7.

³⁶ Currently ranking at number 17 in the world.

³⁷ Currently ranking at number 33.

³⁸ Currently ranking at number 56.

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English language and a legal system based on English law. So, it makes sense to compete in a way that draws from the experience of success elsewhere, in a way which is also familiar to the majority of users of the major centres.

Third, *User Familiarity*. This is related to the second point. If the new centres want to encourage participants to use their services, and, most importantly, to establish branches or subsidiaries in the centres to do business there, then the bigger international players are more likely to establish a presence there if the overall legal landscape is reasonably familiar.

Fourth, *Quality of Service and Justice*. It must have been seen as an advantage to bring into the new centres, alongside and together with the law itself, common law practitioners as part of the community of lawyers servicing the centre and clients of the centre. This makes sense not only with a view to applying and administering the law in the non-contentious aspect (negotiation of contracts, and advice on business matters generally) but in the contentious aspect as well. I do not propose to enter into a detailed comparative study of the merits of the common law and civil law trial machinery, though I touch on the topic below. As already mentioned, on the contentious side of justice, the Commercial Court in London with its reputation for integrity and expertise is a big draw for international commerce. The choice made for the new centres in the Middle East enabled experienced incoming advocates with common law experience to use the courts in those centres, the courts in which are served by judges

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from various common law jurisdictions. It no doubt was thought advantageous in Kazakhstan to provide for something similar.

Fifth, *Intrinsic Suitability of the common law for Commerce and Finance*. English commercial law is widely respected across the world. The law underlying international trade, although partly codified, has a good deal of common law input. Besides, the substantive law in England and the common law world contains some concepts of particular value for new commercial and financial centres: trust law, fiduciary obligations of all kinds, restitution and a streamlined and flexible insolvency regime are good examples.

(c) The advantages that such a choice confer on the AIFC in practice.

My third topic offers some views on the advantages for the AIFC that are already flowing and may be expected to continue to flow, from the choice of English law as the base for the Law of the AIFC.

I start with a recent quotation from the Governor of the AIFC in an interview he gave in November 2019. Dr Kairat Kelimbetov, the Governor of the AIFC, noted in that context that this approach of using English law as the conceptual base for AIFC law, “works in most of the business space and those business transactions that

connect us to the outside world.”³⁹ He also noted that English law allows introducing the most innovative technologies, new developments, and the ‘fourth industrial revolution’.⁴⁰

Today a substantial majority of the larger financial centres in the world established their jurisdictions based on the principles of English law, simply because it is familiar and popular among the global business sectors. What however are the real benefits of such a choice? Based on some material already mentioned above, three key advantages of the English common law today can be highlighted. These are *flexibility*, *predictability*, and *stability* of the law, which, in the view of a recent report by the (English) Law Society make the English law “the ideal law for businesses across the globe, regardless of language or legal history”.⁴¹ I will also add some remarks about those three qualities of the law itself, and then mention two more advantages derived from the application of the law in practice.

First, *Flexibility*. When, in the context of the law of contract, it is said that English law is *flexible*, this means, for example, that contract law has almost absolute freedom regarding the content of contractual relationships. Some of the reasons for its attractiveness include: (a) ‘parties are

³⁹ From the interview with Dr Kairat Kelimbetov on 20 November 2019 <<https://www.kommersant.ru/doc/4164095>>.

⁴⁰ Ibid.

⁴¹ The Law Society of England and Wales Report ‘England and Wales: A World Jurisdiction of Choice’ (2019) 8.

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bound by the terms of their agreement’, (b) ‘businesses and individuals can tailor bespoke agreements to fit their specific needs’, and (c) ‘parties can agree on the proportion of benefits which may accrue to either party’.⁴² The system is also flexible in its application particularly between businesses and requires no formality such as a written agreement or notarisisation. The Rt. Hon. Sir Jack Beatson FBA, one of the Justices of the AIFC Court, describes the flexibility of the common law system:

‘It is the flexibility of the system which keeps it relevant and up to date and able to meet the challenges of an ever-changing commercial world.’⁴³

This extensive contractual freedom is, indeed, an encouragement to global market players, including businesses based in non-common law jurisdictions, to choose English law for their contractual arrangements, and this preference can be expected to be relevant also to a centre such as the AIFC which has based its law upon English law.

⁴² The Law Society of England and Wales Report ‘England and Wales: A World Jurisdiction of Choice’ (2019) 8.

⁴³ From the lecture of The Rt. Hon. Sir Jack Beatson FBA titled ‘The AIFC Court and the Common Law Method of Resolving Commercial Disputes and Issues arising from Regulatory Decisions’ Lecture delivered on Tuesday 24 April 2018 at the Supreme Court of Kazakhstan.

Secondly, *predictability*, which can be also stated as *transparency*. English law allows a comprehensive approach to assessing commercial and other risks; and it also gives to enterprises a high degree of confidence about the likely outcome of any particular issue, whether in actual practice or at the prior stage of scenario planning. Here a key role is played by the doctrine of judicial precedent⁴⁴ which underlies English common law. The court's decisions, available to the public, 'bind future decisions of the same type of court on similar points of law. It also binds all of its direct, lower courts until there is another authoritative statement of the law, by the legislature or a higher court.'⁴⁵ Hence, it is relatively easy for a potential litigant to predict the outcome before he or she steps further and incurs the cost of litigation, which gives certainty and confidence.

Thirdly, *stability*. English law, which has developed from a combination of statute and common law, has been formed by laying brick on brick through almost a thousand years of history.⁴⁶ It contains the distilled wisdom over centuries of judges applying fairness with consistency. And changes that are brought about through evolution, including by Parliamentary legislators, tend to

⁴⁴ I will discuss the issues about precedent further on in this chapter.

⁴⁵ The Law Society of England and Wales Report 'England and Wales: A World Jurisdiction of Choice' (2019) 10.

⁴⁶ The last successful invasion of England by a foreign power (as opposed to internal "regime change" involving some crossing of the border/s) was in 1066.

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respect and reinforce the essentially stable nature of the underlying common law concepts.

I now turn to the two additional benefits to be derived from the way English law is typically applied in practice. One of these key advantages is the *high reputation of the English judiciary*. Over the years the judges certainly have helped to cement English law and to provide a solid framework of predictability for the financial services sector and other commercial sectors. The English Commercial Court in London is a popular destination for dispute resolution involving parties which often had no prior connection with England.

In the common law tradition judges are appointed after significant practical experience as lawyers and, therefore, their background 'helps them to understand the differences between acceptable and unacceptable business practices.'⁴⁷ Hence, under that tradition, there is a relatively high degree of certainty and confidence among litigating international parties that any disputes will be decided only on their intrinsic merits, by judges with mature experience in the field and, of course, without regard to nationality, politics, religion, or race. And practice shows that this 'is a vital factor in inspiring business confidence and underpinning international trade and investment.'⁴⁸

⁴⁷ From the lecture of The Rt. Hon. Sir Jack Beatson FBA titled 'The AIFC Court and the Common Law Method of Resolving Commercial Disputes and Issues arising from Regulatory Decisions' Lecture delivered on Tuesday 24 April 2018 at the Supreme Court of Kazakhstan.

⁴⁸ Ibid.

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The second key advantage is the *adversarial system* which prevails in courts with a common law background, as opposed to the more inquisitorial approach that typifies most civil law systems. Where litigation appears necessary to resolve differences of view on rights and duties, major players in the worlds of international trade, commerce and finance appear to have a preference for litigation in a common-law forum, not least because the parties can have more control over the way in which the litigation proceeds than in a more inquisitorial system. Asked whether they would wish to be able to call their own witnesses and cross-examine those of the other side, or to leave to the tribunal the forensic task of obtaining and testing the weight of evidence, most of these players appear to prefer the adversarial approach.

The relevance of the best practice of other international financial centres.

Hitherto, in this chapter, I have been concerned with the English law element. However, as mentioned, the Constitutional Statute is also favourable towards bringing into the AIFC the standards of leading global financial centres.⁴⁹ The LAC, therefore, felt it incumbent on them to include, alongside the restatement of essential English common law, specific elements of improvements brought

⁴⁹ The Constitutional Statute gives a clear pointer for that: at Article 4.1 “AIFC Acts, ... may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres”.

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about in the standards in financial centres most relevant to the AIFC. Further, although I have not been closely involved in the drafting of the rules and regulations elaborated by the Astana Financial Services Authority (AFSA) for the purposes of financial services regulation, I am aware from the elements of those rules and regulations which came before the LAC that AFSA was very alert to the need to select the best possible precedents from the world as a whole for the provisions they put in place.

Some observations about the underlying, and fundamental, policy issues in any legal system

I move now to some observations about an underlying, and fundamental, policy issue that any legal system has to resolve in its own way, and will then address some questions that are raised from time to time, in relation to that policy issue, about the relationship of the new Common Law regime in the AIFC with the Civil Law tradition in Kazakhstan as a whole.

The issue, in short, is about Clear Predictability as against Fair Flexibility. The issue revolves around two pairs of tensions which are inherent in the construction and operation of any legal system. They are relevant in particular for a high-level comparative look at the common law systems of law and at the civil systems of law.

All legal systems have to confront two pairs of imperatives:

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1. First, the law must be predictable, but it must also be fair, and
2. Secondly, the law must be clear, but it must also be flexible.

The legal order in any state has to ensure that the judiciary in deciding cases are indeed applying the law, and not just imposing their views of morality or justice. Predictability, and consistency across a national territory (often with wide geographic space), require no less. In a traditional common law world, where the judges made the law, this discipline was achieved by requiring the lower levels of judges to abide by what their more senior colleagues had already decided. In a civil law system, the requirement to abide by the legislature's Codes produces a similar result. That said, the relevance in each system of previous decision making was essentially different.

English historical evolution.

The task of living somewhere between the two ends of these dilemmas (predictable/fair, and clear/flexible) has been part of the historical evolution of English law over the centuries. The same applies to many other common law countries, although the English common law is the oldest of them.

For instance, in the process of developing the advanced English common law, two streams of judicial authority emerged, each with their courts. The first stream

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was the common law courts, known as the Court of the King's Bench and the Court of Common Pleas. These administered the common law as it was at the time. The second stream was the Courts of Chancery, which were administering the initially separate wing of judge-made law, based on principles of flexibility and fairness. This wing was known as "Equity", and the Chancery Courts were also called the Courts of Equity.

This double system had grown organically and soon began to produce an element of tension. Each wing had its own adherents. The strict common lawyers criticised the lack of certainty in Chancery, saying that the law of equity varied with the length of the foot of the principal judge in the Chancery Court from time to time. The lawyers practising in Equity, on the other hand, criticised the strict and inflexible approach of the common law courts as producing injustice which their own law of Equity was able to avoid.

The controversy was eventually put to rest through judicial machinery, including a preference for the equitable approach in the 1600s, decisions of the equivalent of the present Supreme Court in the 1700s, and finally through effective Parliamentary action in the 1800s. The result in the 1870s was the abolition of all the old courts of common law and equity in favour of a new, unitary, system which was enabled and required to administer both systems side by side. This has ever since been regarded in England as an acceptable compromise, combining clarity with flexibility. One of the reasons for

the popularity of English law, and its derivatives elsewhere, may be that the UK position appears to be as close as is possible to an optimal balance between certainty and fairness.

The two great legal inventions of the English Courts, that is *the law of negligence* as part of the law of obligations, and the *law of trusts* as a key part of the property and commercial law, are good examples of this process and its result.

That said, it is crucial to bear in mind that the days of universal judge-made law in England are now long past. Parliament has introduced much by way of domestic legislation, and that pace of reform and development has increased notably in my lifetime. A good example of the value of Parliamentary improvement of the common law is in the common law tort of negligence. Initially, and until 1945, there was a strict common law rule that applied when an accident between, say, two horse-drawn carriages could be said to have been the fault of either or both of the drivers. The court's task was to apply the so-called "last opportunity" rule, that is that the damages caused to both vehicles (and to bystanders etc) had to be paid for in full by whichever of the two drivers was thought to be the last person who could have taken action to avoid the collision. By 1945 this rule had become discredited, and Parliament introduced in that year a new principle, namely that each of the persons who had contributed to an accident was obliged to pay only the appropriate share of the cost. If one

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driver was 80% to blame, the judgment against him at the suit of the other driver would be not for 100%, but 80%.

Further legislative change has more recently come not from the UK Parliament, but mainland Europe. The UK has, until very recently, been a member of the European Economic Community (later called the European Union). In the 47 years of the UK's membership of that Community/Union, and thus of close legal contact with the rest of Europe, a substantial body of legislation made in Brussels has had to be transposed into the UK domestic law (or has had "direct effect" in the UK by virtue of the original Act of Parliament of 1972). Both of these legislative trends have had the result that the proportion of judge-made law in the UK has been progressively reduced.

A look at the doctrine of precedent.

An important aspect of the two tensions just mentioned relates to the value of "precedent" in the two systems. Civil jurisdictions tend to take a written Code as the juridical base for the law. Many Codes are based on old Roman law, though others take as a basis the French Codes produced by or under the authority of the Emperor Napoleon over two hundred years ago. As I understand it, in a civil law system, the extent to which a prior judicial decision is relevant in later proceedings is relatively limited. Advocates in civil law proceedings may and do mention in their submissions earlier decisions in similar

cases, but there is no room for the submission that the second court is bound to adopt the same approach as the first. The second court is free to reach its own view as to the meaning and application of the Code in the circumstances of the second case. In England and Wales, on the other hand, previous decisions of higher courts are binding unless the judge in the case in hand can “distinguish” the earlier authority.

The net effect of the two systems, therefore, seems to me to be that each attains the necessary degree of predictability and certainty, but in a subtly different way. The judge in a current case is bound either (i) by the language of the Code, or (ii) by the force of previous judicial authority. And each of the two systems has a measure of flexibility, in that the judge in a current case can, *where appropriate*, reach his view (i) as to the true meaning of the relevant provision of the Code, or (ii) by treating his own case as legally different from the one that would otherwise have been binding upon him. Each of these decisions can be corrected by a higher court if the analysis can be shown to be faulty or inadequate.

My experience of the two systems of law, the civil system and the common law system, therefore, is that in general terms each of them works based on a judicious blend of certainty and flexibility. And I tend to disagree with the proponents of one or the other system who are sometimes prone to criticise the other system based on an incomplete understanding of the merits of the one they dislike. For example, I do not share the concerns which I

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sometimes hear from lawyers who grew up in the civil law world that the common law system leaves too much to the discretion of the judiciary.

Some commentators have suggested from time to time that this project of translation of English Law into a new financial centre is potentially challenging for a former Soviet Union state such as Kazakhstan with its long-established attachment to the civil law approach. My view, on the other hand, is that innovation has worked smoothly so far. As there has, as yet, been relatively little experience of internal precedent in the AIFC Courts, the apparent concerns about undue judicial discretion remain unsubstantiated.

Even so, it may help if I summarise, for the benefit of readers drawn from a civil law system, how the doctrine of precedent in a common law system such as England (and indeed in the UK as a whole) works.

a. Judges at first instance are bound by Appellate decisions in previous cases unless they can distinguish them.

b. Appellate Judges are bound by their predecessors' decisions as well unless they can distinguish them, or they are indistinct through conflict or lack of clarity.

c. But the Supreme Court (as it is now called), which was bound in the same way from earliest times until 1966,

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is now free to depart from its own previous decisions and has done so in several cases since then.⁵⁰

d. This system applies to the common law so far as left untouched by Parliament; and also, to cases about interpreting Parliamentary legislation as well.

e. The judicial approach to parliamentary law is to ascertain the legislative intent and to apply it: but a previous appellate decision on the meaning of the words in the Act binds, just like any other appellate decision.

The net effect of this is to limit substantially the ability of common law judges to apply their personal views as to morality or fairness at large.

Let me now look in another way at the balance between predictability and fairness. This is the need for the law to evolve as society and technology both develop. Old-fashioned law has to move forward to reflect the needs of modern life. In the civil law system, the primary means for evolution is an amendment to the Code itself or subordinate legislation derived from the Code. In the common law system, Parliament is the primary source for the new law and will be prepared to make changes if the Executive puts forward sensible proposals. A recent example of that would be new controls against discrimination on the grounds of age.

⁵⁰ The present Supreme Court in the United Kingdom is at present in something of an activist and evolutionary phase.

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Secondly, the UK Parliament can take action on its initiative, where there is enough pressure from back-bench Parliamentarians to deliver change. Recent examples have included the law on abortion and the law on divorce, with other proposals on, for example, “mercy killing” (assisting the terminally ill to carry out a settled intention to end their own life) still work in progress. The Courts can deliver or at least commence some progress to a limited degree, e.g. by reinterpreting the intention of the legislation to fit modern times or, more frequently, by applying the old law but indicating that it needs to be reviewed. Where the law in question derives from a European legislative act, the courts were able to ask the Court of Justice for the European Union (the CJEU) for guidance on the true meaning of the European Act and then seek to understand and apply the answer that comes back from that Court in Luxembourg.⁵¹

What then if the common law appears to be out of step with modern times? For updating of this kind, the system described above is the normal way (with the Supreme Court in the lead). Parliament can also take the modernising steps itself by reversing an old judicial decision⁵² or restating the common law with amendments so that it becomes statutory law after that. For

⁵¹ Provided of course that the Court of Justice of the European Union (CJEU) still has any jurisdiction in relation to matters arising in the UK. That jurisdiction will fall away at some time as part of the UK's withdrawal from the Union.

⁵² E.g. by the Law Reform (Contributory Negligence) Act 1945 discussed above.

Parliamentary law, the judges have much less scope to modernise, and their obedience to Parliament, ever since 1689, prevents them from doing anything more than purposive and modern interpretation. However, the current mix of certainty and flexibility is one that seems to fit with the British way of life and pragmatic approach to problem-solving, and no-one at present is seeking to change any of the fundamentals of this process.

Selection of the primary model

The first meeting of the LAC was held at the building of the Embassy of Kazakhstan in London on 5th May 2017, where we made our first decision to approve the Model for the AIFC General Legal Framework, on the advice of Hogan Lovells.⁵³ This advice was based on a comparative analysis of the laws of three common-law based jurisdictions, the Dubai International Financial Centre (the DIFC), the Abu Dhabi Global Market (ADGM), and the United Kingdom itself. The advice sought to identify the most suitable benchmark for the development of the AIFC Acts. Having carried out a comparative analysis of the laws of these jurisdictions, the Hogan Lovells report recommended selecting the DIFC precedent, since its legislation was generally less complex but not materially less comprehensive than the general laws of the ADGM and the United Kingdom. It was also to be noted that as a

⁵³ Hogan Lovells International LLP suggested the Model for General Legal Framework in a comparative analysis on 27 February 2017.

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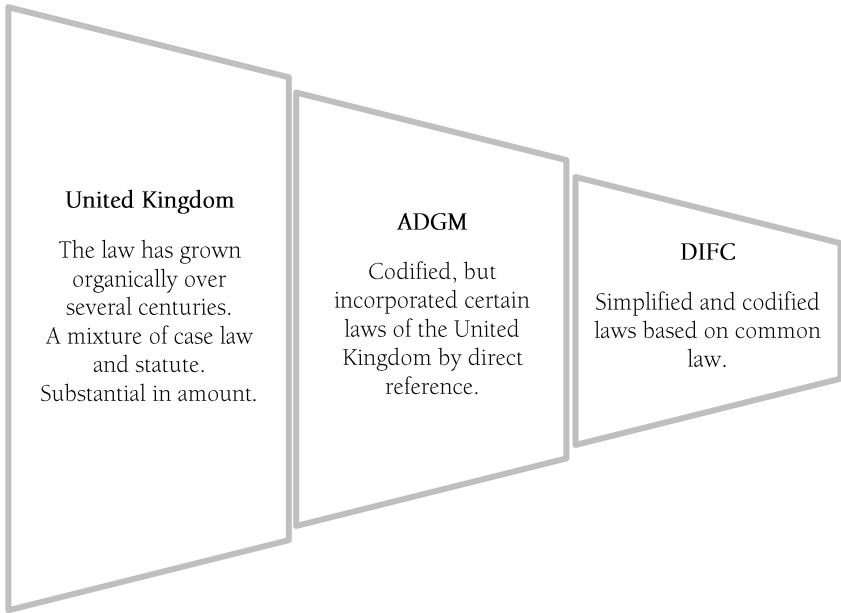
free-standing financial centre within a ‘mother nation’, the DIFC had an impressive ‘track record’. Nevertheless, the Report concluded that there were specific aspects of ADGM law and the United Kingdom law that could usefully complement the DIFC model. In general, the LAC agreed, on the basis of the Report, that this was a sensible starting point for the AIFC to develop its legal framework.

Below, I have illustrated these three jurisdictions and differences between them in a cone, where the UK laws are at the wider end, the ADGM is in the middle, and the DIFC at the narrow end. English law is wider and broader than the other two because it has been around for a long time and still has a substantial element based on common law precedent. By contrast, the DIFC model is at the narrow end, because it proceeds entirely by way of reducing English law for commercial purposes into a series of DIFC Laws so that practitioners and judges there can depend on the DIFC Laws for all that they need.

Finally, The ADGM comes in the middle. It is narrower than the UK model because there is an element of codification of English law into ADGM laws, but it is wider than DIFC law because ADGM has retained English law as the base to be ascertained if the codified legislation does not provide a clear answer. This means that in the ADGM it is always possible for the courts to apply English law as the residual substratum, rather than having to find other ways to arrive at an appropriate answer; but this benefit has to be paid for in that it is less easy, as a result, for non-English practitioners and judges to ascertain the

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relevant law than in a place like DIFC, and now AIFC,⁵⁴ where the written law is all that needs to be looked at.



Picture 1. Illustrates the key features of the laws of the United Kingdom, ADGM, and DIFC

So, a perfectly fair question arose before the LAC in 2017. Is there any need to reinvent the wheel when there appears to be a perfectly usable circular object currently in

⁵⁴ I should add that the ADGM approach was, in any event, not possible in the AIFC, in view of the language of the Constitutional Statute referred to above. No legal system can have two bases for selection of fundamental law.

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use and ready to go? You can tell from the way that I put that issue what the LAC answer, as subsequently accepted by the AIFC as a whole, actually was.

In the result, therefore, the DIFC model was selected as suitable for most of the AIFC General Legal Framework Acts, while the room was also left for a selection of even better individual options from the ADGM, the United Kingdom, and indeed other financial centres such as Australia. The LAC concluded that (i) specially adapted legislation based on the principles of the law of England and Wales and the high standards of these leading financial centres would provide a concise and up-to-date set of laws that would be highly suitable for use by an international financial centre such as the AIFC; and (ii) the general laws proposed would fit well with the financial services regulatory system that was being prepared in parallel by the AIFC.

At present, the AIFC has developed its tailor-made legislation in the English language, designed for the convenience of doing business in the AIFC. The AIFC Acts were a codified absorption of the best of the common law jurisdiction and laws of top international financial centres. They cover a variety of fields, for example, corporate law, contracts, banking, insurance, Islamic finance, employment, and others. Activities not covered are left to the application of the underlying acting law of the Republic of Kazakhstan. Nevertheless, the coverage of activities by the AIFC Acts is being constantly extended to respond to the needs of the market and based on best

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practices of international financial centres. I will deal with the broad content of the Acting Law of the AIFC in the following Part 3.

2.2. The AIFC Legal Advisory Council

The LAC, as I mentioned earlier, was established at the beginning of 2017 to ensure the setting up of the legal and regulatory framework of the AIFC via the introduction of the best global practices and the implementation of the relevant law of England and Wales. The LAC was formed by an Order of the Governor of the AIFC on 28 February 2017 and its Statute was also adopted as the main document for its operation.⁵⁵

Accordingly, I set out here a summary⁵⁶ of the scope of the LAC's activities drawn from its Statute:

a. Identifying an approach in designing the legal and regulatory framework of the AIFC based on English common law and international standards (Dubai, Qatar, Abu Dhabi, Singapore, UK or other).

⁵⁵ Order of the Governor of the AIFC "On the Legal Advisory Council of the AIFC" No 4 dated 28 February 2017.

⁵⁶ Annex 2 below contains the full text.

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b. Determining the scope, content, hierarchy and architecture of the AIFC primary and (if necessary) subsidiary legislation based on English common law and international standards.

c. Identifying the strategy for the development and stages of the drafting of the AIFC legislation, including the AIFC Acts necessary for launching the AIFC and for its further development.

d. Approval of draft AIFC Acts, before their final adoption by relevant bodies of the AIFC.

e. Ensuring a consistent approach to the drafting of the AIFC Acts.

f. Advising on other matters regarding drafting and development of the applicable law of the AIFC, and

g. Advising on other relevant matters.⁵⁷

As I see the LAC's role in the AIFC life, it is similar to that of the Parliament of Kazakhstan, albeit on a very much smaller scale. The Parliament carefully reviews the laws proposed by the Government before they are signed by the President and thus become law. In the much smaller AIFC, the AIFC Authority or another AIFC Body such as AFSA makes proposals for new AIFC Acts, and the LAC reviews the proposals before they are submitted to the Governor

⁵⁷ Section 5 of the Statute of the Legal Advisory Council of the AIFC, adopted by the Order of the Governor of the AIFC "On the Legal Advisory Council of the AIFC" No 4 dated 28 February 2017.

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and become law. That said, the LAC's functions are more restricted than that of the Parliament. It has no power to initiate the law, since, as is clearly stated in its terms of reference, it is purely an advisory body. Our task is carefully to review draft AIFC Acts that are submitted to us, through the 'prism' of the common law approach, before finalisation by the Governor of the AIFC or another relevant AIFC body.

Use of such an advisory body, composed of experienced international commercial practitioners, was in my view a valuable innovation on the part of the AIFC Authority. I do not know of any other international centre that has proceeded in this way.

As the Chairman of this unique advisory body, it is my pleasure and honour to introduce its Members, who are highly qualified English lawyers from well-known international law firms. They are all in private practice and with extensive experience in advising their clients on English commercial law. Furthermore, and most importantly, they have had extensive experience of international finance and in international financial centres.

Myself as Chairman. As I mentioned previously, I was honoured to be invited in early 2017 to preside over the LAC. I imagine that I was chosen to do this because I had previously been closely involved in the establishment and reform of two recent financial regulatory systems, in the United Kingdom and the Dubai International Financial Centre (the DIFC).

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In the United Kingdom, I was the most senior lawyer inside financial regulation on the securities side from 1987 to 2000 and had helped to deliver two major changes to the original system, which dated from 1986. The reforms took place in the early 1990s and then, even more radically, in the late 1990s. I retired as General Counsel to the UK Financial Services Authority in 2000 and returned to independent practice at the English Bar.

Secondly, in Dubai, in the United Arab Emirates, I was invited in 2001 to join the inaugural board established to create what became the Dubai Financial Services Authority (the DFSA). I then served on the Board of the DFSA itself from 2004 until 2013. The new initiative in Kazakhstan is, therefore, a third opportunity to help in the creation of something new and important in the financial services regulatory field. That is a real privilege for which I am grateful to all concerned.

The Kazakhstan Constitutional Council published in August 2020 a book as part of the celebrations to mark the 25th Anniversary of the Republic of Kazakhstan. This book “Kazakhstan Way: Constitutionalism, Man, Peace and Prosperity”⁵⁸ contained a chapter under my name on the Astana International Financial Centre, and I was also a speaker at the August 2020 conference “Constitutional

⁵⁸ The volume with the title “Kazakhstan Way: Constitutionalism, Person, Peace and Prosperity” is available on the website of the Constitutional Council of Kazakhstan <<http://ksrk.gov.kz/sites/default/files/books/2020-09/%D1%82%D1%80%D0%B5%D0%BD%D0%B4%20%D0%BD%D0%B0%20%D0%B0%D0%BD%D0%B3%D0%BB%20%D0%BF%D0%BE%D1%81%D0%BB.pdf>>.

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Values as the Legal Basis for Consolidating Society to Overcome Global Challenges” organised by the Constitutional Council to acknowledge that anniversary.

Now let me highlight here some details about the rest of the membership of the LAC.



Mr Christopher Campbell-Holt
Registrar and Chief Executive of AIFC Court and International
Arbitration Centre

Christopher represents the AIFC Court and International Arbitration Centre as he is responsible for their day-to-day management, administration, and case management. He previously worked at the international law firm Norton Rose Fulbright in London, and at a regional law firm in the Middle East that was strategically partnered with the US international law firm, Covington & Burling LLP.

He practised broad international commercial law and dispute resolution. He also assisted with the development of

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another international financial centre commercial court and dispute resolution centre and was the Registrar of that court.



Mr Simon FT Cox

Senior Consultant at Norton Rose Fulbright in London

Simon has extensive experience of working on the UK and international securities (including IPOs and other equity and debt security issues), mergers and acquisitions and investment fund projects. Much of his work involves frontier markets and working on securities and M&A projects for natural resources projects.

He has worked on a wide range of Kazakh projects over many years. He regularly speaks at conferences on corporate finance and CIS-focussed issues and contributes a chapter on London listing of overseas companies, investment entities, debt and specialist securities and mineral companies in the annual Practitioners Guide to the Financial Services Authority Listing Regulations.

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Mr Francis Fitzherbert-Brockholes
Partner of Counsel at White & Case in London

Francis started his career with White & Case over 40 years ago and currently he is a Partner of Counsel based in the Firm's London office. He has qualified both as an English barrister and as a member of the New York Bar and has mostly represented banks and other private and public entities and sovereign governments in various financial transactions, with particular emphasis on their activities in the international capital markets.

During his career, Francis has received many honours, including that for 'Legal Innovation in Financial Services' in the 2009 Financial Times Innovative Lawyers Awards. Francis has also been recognised as a “Super Lawyer” by Thomson Reuters and a “Senior Statesman” by Chambers as well as being included in the Legal 500 Hall of Fame. In recognition of his skills and expertise, Chambers invited Francis to be the Contributing Editor of their first global practice guide to the debt and equity capital markets which was published in 2019.

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Mr Andrew Oldland QC
Senior Partner at Michelmores in London

Andrew is Senior Partner at Michelmores LLP in London and the first barrister to hold this role within a Top 100 law firm. Andrew is also Head of the Financial Services team and Head of the Regulatory team of the firm. He has extensive experience in financial regulation and financial crime, including anti-corruption and anti-money laundering.

Andrew is a highly experienced advocate in the UK and can provide continuity of representation from initial advice through to the conclusion of any court or tribunal proceedings. was previously standing counsel to HM Revenue and Customs and a member of the 'A' list of counsel for the Serious Fraud Office.

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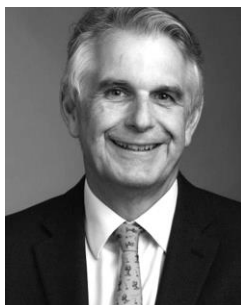


Mr Roy Pearce
Partner at Baker McKenzie in London

Roy is a Partner at Baker McKenzie in London and a member of the firm's Capital Markets Group. He joined one of the top law firms in 1996 and had an opportunity to work in the firm's Almaty and Moscow offices. Currently, he advises investment banks and issuers on debt and equity capital markets transactions and debt restructurings, with a focus on securities offerings from emerging markets.

He has also advised on a number of cross-border mergers and acquisitions, joint ventures and investments, principally in the mining, petroleum, and power industries. He speaks English, French, Polish, and Russian languages.

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Mr Andrew Roberts

Former partner at Herbert Smith Freehills in London

Andrew specialises in the debt capital markets. He works with issuers and underwriters on offerings of a wide range of debt and equity-linked securities. With substantial international experience, he has worked with clients in most major financial centres and many emerging markets. He also specialises in Islamic finance.

His practice spans the full spectrum of debt capital markets products, including investment-grade bonds, MTNs and ECP, sovereign and quasi-sovereign issues, emerging market issues, regulatory capital, liability management, equity-linked bonds, structured bonds, high-yield bonds and Sukuk.

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Mr Michael Thomas

Partner at Hogan Lovells International in London

The core of Michael's practice is the provision of financial services regulatory advice. He advises firms on how financial services regulation will apply to them from their initial set-up to their on-going business and concerning key events such as corporate transactions or outsourcing arrangements. In addition to regulatory advice, Michael advises financial institutions on commercial transactions, such as major outsourcing arrangements and distribution deals.

His financial services team at Hogan Lovells came second at the Lawyer Awards 2015 in the category of Corporate Team of the Year, for their work in the launch of LME Clear, the new clearinghouse for The London Metal Exchange.

Each Member has been contributing to the development of the AIFC Law since the day of establishment of the LAC or from the date of appointment

if later.⁵⁹ Their extensive experience in commercial law and financial services regulation are invaluable assets to the AIFC. I would like to also mention here Mr David Simpson, a barrister in my own chambers, 3 Verulam Buildings (London), and Mr Philip Barden, a partner at Devonshires Solicitors (London). They were members in 2017 and made a great contribution in developing the AIFC Acts at the early stage.

The LAC's initial tasks were to approve a suitable Model for the AIFC General Legal Framework, as mentioned above, and to oversee the preparation of the various elements of the AIFC General Legal Framework, looking at the topic in a strategic way as well as at the drafting detail. I will return to the General Legal Framework in Chapter 3.3 below.

The AIFC General Legal Framework was intended to sit alongside another framework for the purposes of more detailed, bespoke sets of financial regulations and rules, which were later adopted under that framework by the Astana Financial Services Authority (AFSA). This second framework was the Financial Services Framework Regulations, to which I will return in Chapter 3.4 below.

After the LAC had approved (a) the Model, (b) the scope, content, and hierarchy of AIFC Acts, as well as (c) the strategy and stages for the drafting of AIFC Acts, we

⁵⁹ Mr Andrew Roberts joined the AIFC Legal Advisory Council in 2018. He was included as a Member by the Order of the Governor of the AIFC No 1173 dated 16 January 2018.

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were ready to move on to the individual items that together would make up the General Legal Framework. These items included key Acts that would be essential for the launch of the AIFC and Acts that would be required for further development of the AIFC. This, of course, does not mean that we drafted the Acts, though, as it happens three of us who were members of the LAC at the time were also the three draftsmen of the Financial Services Framework Regulations. The LAC's function was, rather, to review each draft AIFC Act that was submitted to us, carefully and thoroughly, viewing the proposals through the prism of English commercial law as well as that of best practice in other leading financial centres.

During the LAC meetings held throughout the years, we have reviewed the submitted drafts and given our advice and recommendations for their further adoption to the Governor or other AIFC bodies, primarily the AIFC Authority and AFSA. Throughout 2017, the LAC approved about 30 new drafts of AIFC General Legal Framework Acts that were later signed into law by relevant AIFC bodies. It was crucial for us in doing that to assess carefully whether these Acts were able to meet the highest international standards and to fulfil the AIFC's own expectations. 10 meetings of the LAC were held within the first year of its operation and a tremendous amount of work was done by the LAC members and the AIFC Authority legal staff.

A particularly important role has been played by former First Deputy Chief Executive Officer of the AIFC

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Authority, Mr Marat Aitenov, who had been a Member of the LAC from the outset and was the main point of contact between the AIFC management and the LAC. He has worked imaginatively and tirelessly in support of our efforts. I would also like to thank the two successive Secretaries of the LAC, Mr Yerkin Budenov and Mr Asset Sydykov, for their invaluable assistance and dedication.

Although we meet at the LAC Meetings in person (or video-link) mostly in London or voting for submitted materials via absentee meetings, we also normally hold our meetings in Nur-Sultan each summer during the Astana Finance Days.⁶⁰ As a part of the AIFC Family, this travel is to see the development of the AIFC with our own eyes, to feel and ‘taste’ that product, in which we contributed. What we saw each year is impressive. However, the only exception is the year 2020 due to the outbreak of the pandemic (COVID-19), which forced us to switch our meetings to an online format, thanks to new technology.

Following the successful launch of the AIFC in July 2018, the LAC’s task has moved on to the development of the framework’s content to ensure that it remains up to date and can cope with the expansion of the business of the AIFC. We have been reviewing the existing AIFC legislation on an ongoing basis to ensure clarity and consistency. We have given preliminary approval to a large number of AIFC Acts based on drafts prepared by one or

⁶⁰ From May 2017 to June 2020, 26 LAC Meetings were held, including 3 in Nur-Sultan (in August 2017, July 2018, and July 2019).

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more of the AIFC bodies. We also have been advising the AIFC on implementation of a variety of concepts in new areas of law and new projects which will be important for the future development of the AIFC as a whole. One recent example of this has been the emerging proposals for regulation of the legal profession and legal practitioners in the AIFC.



PART 3: THE AIFC JURISDICTION IN FULL OPERATION

3.1. The Structure of the AIFC: Institutions and Governance

The Constitutional Statute establishes and gives powers and functions to the various bodies which together form the structure of the AIFC. I deal with governance hereafter but start with the “AIFC Bodies” at the working level. There are four of these, each of which appears in four key Articles⁶¹ in the Constitutional Statute.

Operational AIFC Bodies.

The first working-level body is the *AIFC Authority*, which is established under Article 11 and constitutes the central capability of the AIFC. It provides the leadership and organisation required for the running of the Centre as a whole. Its specific functions⁶² are, first, support for the

⁶¹ Articles 11, 12, 13 and 14.

⁶² Set out in Article 11.

activities of other AIFC Bodies and their organisations, and, secondly, representation of their interests. More specific functions appear in article 11.4 of the Constitutional Statute, including relationships with relevant international bodies, the central finance function, and powers to regulate activities in the Centre which are not “financial services or related activities”.⁶³ The AIFC Authority is thus the provider of the dedicated premises allocated to the financial centre and its various bodies. It also has legislative capacity; it possesses the power to propose what might be called “primary legislation” on matters within its powers and has a direct power to adopt secondary legislation as well.

The second body at working level is the *Astana Financial Services Authority* (AFSA), established under Article 12, whose function⁶⁴ is to take responsibility for the regulation of “financial services and related activities” in the AIFC. It has, like the AIFC Authority, legislative capacity, in that it has the power to propose what might be called primary legislation and power itself to adopt secondary legislation. The AFSA is also a prudential and conduct of business regulator which provides both a wholesale and retail framework under which financial services can be provided.

The third and fourth bodies are the dispute resolution bodies established by the Constitutional Statute. The main

⁶³ This is because “Financial services and related activities” fall within the purview of the AFSA (see below).

⁶⁴ As set out in Article 12.1 of the Constitutional Statute.

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one is the *AIFC Court*, mentioned in Article 13 of the Constitutional Statute, and an institution required to be independent in its activities and to be separate from the main judicial system of the Republic. The secondary one is the so-called *International Arbitration Centre*, mentioned in Article 14 of the Constitutional Statute, whose function is to hear and resolve disputes submitted to it by agreement of the parties. Mr Christopher Campbell-Holt, the Registrar and Chief Executive of the AIFC Court and International Arbitration Centre, has kindly agreed to write a ‘guest chapter’ on these bodies, which appears at chapter 3.5 below. I am most grateful for his contribution to this book.

There are also a few other working-level institutions within the AIFC, but without the status of “AIFC Bodies” as defined in the Constitutional Statute.⁶⁵ I specifically mention here the *Astana International Exchange (AIX)*, because it receives a passing mention in the Constitutional Statute,⁶⁶ albeit not listed as an AIFC Body in Article 9. Within a comparatively short period,⁶⁷ the AIX has become one of the key players in the AIFC as well as of the greater Kazakhstan’s economy.

Besides, several institutions were established to support the day-to-day activities and to implement new

⁶⁵ The list of the AIFC Bodies is at Article 9 of the Constitutional Statute.

⁶⁶ See Articles 1.2 and 3.2, where it is referred to as “the Stock Exchange”.

⁶⁷ The First President of Kazakhstan launched the first trading session on the AIX in November 2018, though it was established in November 2017.

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projects in the AIFC. They are Business Connect,⁶⁸ Green Finance Centre,⁶⁹ FinTech Hub,⁷⁰ Expat Centre,⁷¹ Bureau for Continuing Professional Development,⁷² and finally, the Academy of Law. I would like to mention the latter institution here as it strongly linked with the development of the AIFC Law.

The Academy of Law was established as an educational platform with the aim of familiarising the legal community as well as other people with the AIFC legal regime and international commercial practices. The Academy set the strategy to prepare professionals for international commercial law practice via cooperation with international education institutions. Its core activities are as follows:

⁶⁸ The Business Connect aims to spur direct investment, complementing the work of 'Kazakh Invest' JSC. It is also the first contact point for AIFC Participants as well as entities are looking to set up a company in the AIFC.

⁶⁹ The Green Finance Centre promotes the AIFC as a hub for green financing in the region, offering strategic solutions to governments, financial institutions, and enterprises, and facilitating the issuance of green bonds.

⁷⁰ The FinTech Hub aims to develop a vibrant multi-stakeholder fintech ecosystem, bringing together financial institutions, technology partners, fintech companies, and investors to establish a global FinTech hub and a fintech innovation centre in the region.

⁷¹ The Expat Centre was established as a 'one stop shop' for over 500 government services specifically for expats and their families, where assistance with visa-related services, tax payments, police registration, consultations on healthcare, and other services can be obtained.

⁷² The BCPD is a centre for professional development in AIFC, which seeks to develop a highly qualified workforce in the region by offering opportunities for continuing professional development in accounting, finance, risk management, human resources, corporate governance, and other subjects.

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1) to train and prepare specialists for the AIFC market;

2) to publish informative materials on AIFC Law to raise its awareness;

3) to host educational and other events; and

4) to maintain the AIFC Pro Bono platform for providing free legal advice by law firms to any interested parties at no cost.⁷³

Headed by Mr David Gallo, the Academy of Law is a promising and key institution in promotion and development of the AIFC Law in Kazakhstan and beyond, which is highly essential for the financial centre that is intended to become a financial hub of the region.

The above-mentioned AIFC bodies and institutions compose the block of the ‘Operational AIFC Bodies’. However, I need for completeness to add here the advisory bodies. Among them are the AIFC Legal Advisory Council, the Advisory Panel on Legal Regulatory Matters, and the Advisory Council on the Development of LegalTech, which have been helping the AIFC to build its unique legal regime. I have already mentioned these three bodies in Part 1.

Governance of the AIFC.

I turn to the strategic decision-making bodies for the AIFC, which are two. First, there is a *Management Council*,

⁷³ Annual Report on AIFC Legal Matters (AIFC Academy of Law 2019) 32.

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whose functions are set out in Article 10 of the Constitutional Statute. The Management Council is chaired by the President of the Republic and has broad legislative capacity and strategic powers as well as functions to foster favourable conditions for the development of the AIFC. Secondly, there is the *Governor of the AIFC*, who is also mentioned in the Constitutional Statute, at Article 10.1. The Governor's functions are further laid down by the Management Council itself,⁷⁴ and in practice he exercises the legislative and oversight functions on its behalf on a day-to-day basis. His appointment is the preserve of the President of the Republic and I pay tribute to the Governor, Dr Kairat Kelimbetov, for the energy and vision which he has brought to his carrying out of these highly important functions.

⁷⁴ The Governor's powers are defined in the "Structure of the Bodies of the AIFC" that was adopted by the Management Council's Resolution on 26 May 2016, and which were further expanded by its Resolution on 9 October 2017.

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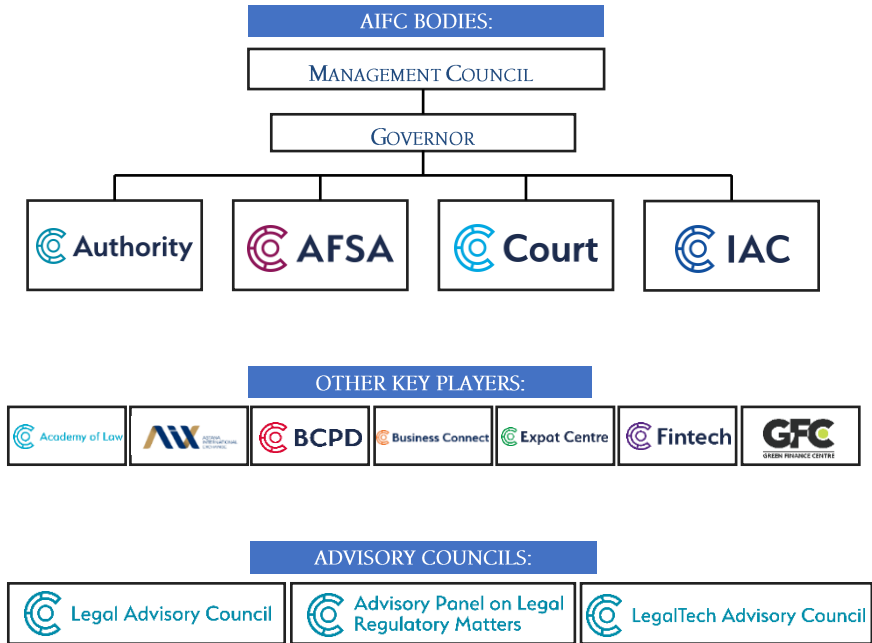


Table. The Structure of the AIFC Ecosystem

3.2. The Structure of the AIFC in Legal Conceptual Terms

Chapter 3.1 above has covered the central Articles of the Constitutional Statute of December 2015 which relate to the institutional structure of the AIFC. These Articles, (Articles 9 to 14) established the institutions required for the direction and operation of the AIFC, through a series of “AIFC Bodies”. However, the Statute also, importantly, set out some of the central legal concepts, which together help to fashion the jurisdiction of the AIFC. The three key ones are:

- a. The Acting Law of the AIFC;
- b. The AIFC Participant (or Centre Participant); and
- c. The Territory of the AIFC.

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The Acting Law of the AIFC.

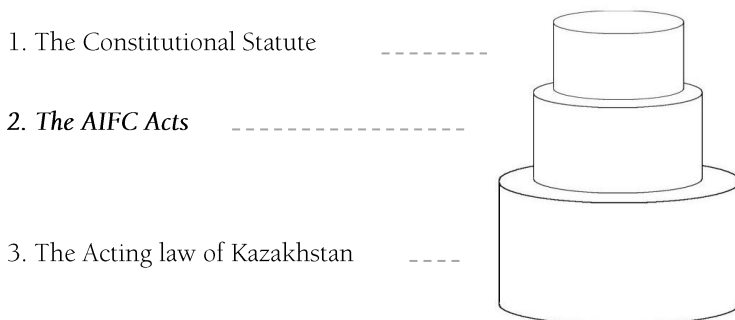
The first of these is the “Acting Law of the AIFC”, which Article 4 of the Constitutional Statute states,⁷⁵ most fundamentally, to be “based on the Constitution of the Republic of Kazakhstan”. Article 4 then goes on to delineate the make-up of the Acting Law of the AIFC, by describing what is best thought of as three “layers” of law.⁷⁶ The top layer, unsurprisingly, is the Constitutional Statute itself. The bottom layer (if I may jump to that first) is also Kazakhstan law: Article 4.1(3) states that this (bottom) layer is “the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts.” That reference to AIFC Acts means the middle layer, which, broadly, is legislation created in the AIFC itself.

To illustrate the hierarchy of the Acting Law of the AIFC, it is useful to think of that Acting Law as a three-layered cake with the AIFC Acts in the middle.

⁷⁵ In Article 4.1.

⁷⁶ Images used in describing this concept include that of a sandwich or burger (with the top and bottom as Kazakhstani and the filling as AIFC Acts), or a three-layered cake (with an AIFC Acts middle layer).

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Picture. The diagram to show the Hierarchy of the Acting Law of the AIFC

Using this conceptual approach, it needs to be noted that the top layer applies at all times. This is exactly what one would expect of a body of law governing the institution itself: its constitutional status and structure are fixed. On the other hand, the bottom layer, in the provision just cited, is at once both applied and dis-applied. Article 4.1(3) of the Constitutional Statute has the effect that Kazakhstan legislation applies as part of the Acting Law of the AIFC whenever the middle layer does not displace that general law. But it also means that Kazakhstan law does not apply at all in the Centre if there has been a valid process of creation of law in the middle layer to displace the general law.

Let me give some examples of how this three-layered structure works. First, since criminal law is not within the

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competence of any AIFC Body,⁷⁷ it follows that, as part of the bottom layer of the Acting Law of the AIFC, Kazakhstan's criminal law and criminal procedure always apply in the AIFC. Another example would be the Republic's tax law, though the Constitutional Statute makes provision for a beneficial (50 year) tax regime for some activities in the AIFC.⁷⁸ A third would be the law relating to activities in the AIFC's territory which are not regulated by the AIFC Bodies: hotels, restaurants, sports, and recreation would be good examples of areas where the middle layer is not used, and thus the bottom layer (the general law of Kazakhstan) applies in full.

Examples of places where the middle layer is effective to dis-apply the general law of Kazakhstan may also be useful. Most obviously, the Kazakhstan legislation on financial services will give way to the AIFC system. So too will the Kazakhstan law on companies and other forms of a legal entity, as long as the AIFC law on that does apply on the facts of the case.⁷⁹

In this regard, a clear boundary between the application of AIFC Acts and the legislation of Kazakhstan is prescribed further in legislation created in the middle

⁷⁷ The reason why this is so appears in Article 4.3 of the Constitutional Statute; AIFC law deals with (civil) relationships and not with public order and the protection of the public from crime. Article 13.4 also excludes criminal law from the jurisdiction of the AIFC Court.

⁷⁸ See Article 6.

⁷⁹ The *AIFC Companies Regulations 2017* apply only to companies created under the law of the AIFC: so, Kazakhstan companies can still be created in the centre where the law chosen for incorporation is Kazakhstan law.

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layer (that is at the level of AIFC Acts). This is achieved under the *AIFC Regulations on AIFC Acts*. These Regulations describe their objectives as including: “(a) defining the system of Acting Law of the AIFC and AIFC Acts; and (b) providing certainty about the rights, liabilities and obligations of Persons in relation to civil and commercial matters arising in the AIFC; and (c) allowing Persons, in certain circumstances, to adopt the law of another jurisdiction in relation to civil and commercial matters arising within the AIFC.”⁸⁰

Section 40 of those regulations takes careful steps to ensure that the bottom layer of the cake illustrated above does not apply in cases where it is actually not needed.

Section 40(1) reads “Because, by virtue of article 4 of the Constitutional Statute, AIFC legislation can apply in the AIFC despite any Acting Law of Kazakhstan on civil or commercial matters, the rights and liabilities between Persons in any civil or commercial matter are to be decided according to the relevant law for the time being in force in the Jurisdiction chosen in accordance with subsection (2).”

Section 40(2) then goes on to establish a hierarchy, under which the law of Kazakhstan, as the so-called “bottom layer of the cake”, appears in the fifth place, and applies only if all the previous four chosen laws are not applied in preference to the fifth. It reads as follows:

⁸⁰ Section 7 of the AIFC Regulations on AIFC Acts 2017.

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“(2) The Jurisdiction chosen is to be the Jurisdiction first ascertained under the following paragraphs:

(a) so far as there is a regulatory content, the AIFC Acts or any other law in force in the AIFC; failing which,

(b) the law of any jurisdiction other than the AIFC expressly applying under any AIFC Act; failing which,

(c) the laws of a Jurisdiction as agreed between all the relevant Persons concerned in the matter; failing which,

(d) the laws of any Jurisdiction that appears to the Court or Arbitrator to be the Jurisdiction most closely related to the facts of and the persons concerned in the matter; failing which,

(e) the Acting Law of Kazakhstan.”

It will be helpful to add a few more remarks about some of the four choices of law available under section 40 above. First, the wide language of subsection (2)(a) should be noted. It uses the phrase “so far as there is a regulatory content”. I regard this as a clear indication that the residual layer of Kazakhstan law should not be regarded as applicable inappropriately. The phrase appears to me to be designed to defeat an argument, that might otherwise

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be advanced, that the Acting Law of Kazakhstan has to apply where it actually ought not to. The argument would be that, for example, an item of middle layer (AIFC) legislation did not displace the relevant item of Kazakhstan law because its legal approach was not identical to that adopted by the Kazakhstan law.

Let us suppose, to take a purely theoretical example, that there is in issue an AIFC Act about proof of the validity of documents. Let us assume that the AIFC Act states that a document of a specific type will be regarded as valid if signed by the maker in the presence of a witness who also signs the document as a witness. Let us also suppose that the equivalent legislation in the Republic of Kazakhstan requires such a document to be notarised. The argument that in my view should be defeated would be that the absence of any requirement for notarisation in the AIFC Act means that the law of Kazakhstan was not validly displaced by the middle layer of the cake and therefore applies so that the document is invalid for lack of a notarial act. In my view, though there is no binding authority on this as yet, the words in section 40(2)(a) “so far as there is a regulatory content” would have the effect of repelling that argument. The AIFC Act had in its “content” “regulated” the matter of validity of the document, and the AIFC Act could, therefore, lawfully be different from the law of Kazakhstan without producing the result that the law of Kazakhstan was reimported.

Section 40(2)(b) allows for the possibility that an AIFC Act might have the result that a specific topic arising

in the AIFC had to be decided according to the law applying to that topic in, say, England and Wales. This might be by way of express legislation, though I am not myself aware that there has as yet been any such choice by an AIFC legislator.⁸¹ It might also come about through the rules of private international law, such as the referral of internal company constitutional issues to the law of the place of incorporation of the company. If for example, a partnership governed by a foreign law were to own a building in the AIFC and were to be dissolved, then the eventual destination of the remaining assets would need to be decided according to the law applicable to the constitution of the partnership.

Section 40(2)(c) makes it perfectly clear, in my view, that parties to any “matter” can choose “foreign” law to apply to their matter without any risk of an accidental and unwanted reapplication of the law of Kazakhstan. And section 40(2)(d) does much the same for cases where the choice of law falls to the Court or an arbitrator.

It is now necessary to look at section 40 in the opposite direction, that is by considering cases where the acting law of Kazakhstan does indeed turn out to be the relevant law to be applied. This is most obviously the case where there is and can be no AIFC legislation in the field,

⁸¹ The legislation for the Court and that for the International Arbitration Centre enable each of those bodies to apply law other than AIFC Law, but in my view do not depend upon the provision made generically by section 40(2)(b) of the AIFC Regulations on AIFC Acts. They seem to me to be cases where section 40(2)(c) and (d) of those Regulations apply. See section 29 of the AIFC Court Regulations and section 38(4) of the Arbitration Regulations.

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for example where there is in issue a possible criminal offence in the AIFC: here there can be no displacement of the criminal law of the Republic of Kazakhstan.

More nuanced, however, would be a case where there is some AIFC legislation, but it is too far removed from the facts of the case to have any displacing effect. An example would be where, say, AIFC law in the financial regulatory field is dealing with the raising of standards with careful and prudent management of money belonging to others. And let us suppose that an employee in an AIFC Participant's financial services business is careless, or even fraudulent, concerning the customer's assets. It is to be expected that the result of section 40 would be to leave AFSA free to deal with the regulatory issues arising out of the careless behaviour. As to the question of possible dishonesty by the employee, however, an issue might arise as to whether this meant that only the criminal law of Kazakhstan would be relevant. That would certainly be the case if the employee had assaulted the customer. However, financial dishonesty is arguably different. If, as is the case, the AFSA system of financial regulation is designed to restrain financial fraud, the answer, in my view, would be that "so far as there is a regulatory content", the AFSA regime would not be displaced. By seeking to deal with financial dishonesty by regulatory means, AFSA can be sure that the AIFC Act would retain its place under Article 40(2)(a).

That said, it might turn out that there were discussions between the AFSA enforcement authorities

and the Kazakhstan criminal authorities as to whether there should be a prosecution of the employee in respect of the fraud. The management of the borderline between regulatory powers and the powers of the criminal justice system is a feature of all developed financial centres. In this case, though again there appears so far to be no authority, the choice of the route between the regulatory one and the prosecution one would appear to be regulated by decision making in the ambit of section 40(2)(b).

There is a further case where the law of Kazakhstan might well come to be applied, even where there was in place an apparent competitor in the AIFC legal world. Because of the language⁸² used in Article 4.1.2 of the Constitutional Statute itself for defining AIFC Acts, there may be some AIFC legislation that does not achieve the displacement of the bottom layer. This would be the case where the purported AIFC legislative provision was inconsistent with the top layer (the Constitutional Statute itself); or where the purported AIFC legislation had not been adopted by an AIFC body in the due exercise of its powers. In such a case a challenge to the purported AIFC legislation would succeed in restoring Kazakhstan law,

⁸² Article 4.1 (2) of the Constitutional Statute defines “AIFC Acts” as acts “which are not inconsistent with this Constitutional Statute and which may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading centres, adopted by the AIFC Bodies in the exercise of the powers given by this Constitutional Statute.” I should add that while the first and last parts of this definition are strict (inconsistency; and “*intra vires*”), the middle one (English law and international standards) is best described as “soft law”; no challenge to validity could be based on these expressions of desirable content.

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whether the case was brought in the AIFC Court (see below) or in the courts of Kazakhstan. It must, however, be expected that, with the high quality of legal advice available to the AIFC, neither of these risks of the legislative mishap will ever arise.

The diagram at page 82 above uses a “cake” with three-tiers, or layers, to illustrate, in conceptual terms, the structure of the Acting Law of the AIFC. In actual practice, however, in the commercial world of the AIFC, and in terms of commercial law, a different diagram of the Acting Law of the AIFC may actually be more appropriate.

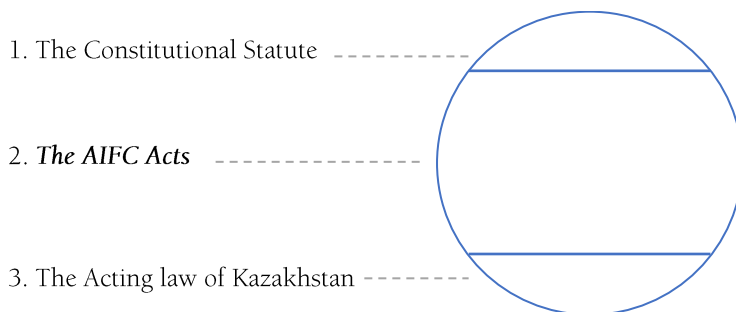


Diagram to show the Acting Law of the AIFC in the commercial context.

As appears from this different image, there is, in the commercial context, more substance in the middle tier or layer (AIFC Acts) than in the upper and lower tiers. This

is true in terms of both content and relevance. It will only be rarely that an issue arising out of the top and bottom tiers will arise. In a lecture⁸³ delivered on 29 October 2020, the new Chief Justice of the AIFC Court, Lord Mance, indicated that the substance of the cases coming before the Court related to the middle tier only, and that this was only to be expected in a regime based on a codification of commercial law. He added that the number of occasions when a genuine point on the law of the Republic of Kazakhstan was relevant was very small indeed. So, for practical purposes, the sphere in this second diagram, matching as it does one of the iconic buildings in the AIFC's home territory, may be more helpful than the image of a layered cake.

Finally, it is important to emphasise that the system of law in the AIFC is in no sense sovereign. It is essentially a subsidiary system, bounded by the Constitutional Statute of 2015. Not only does the validity of that system depend upon its not being inconsistent with the Constitutional Statute itself. The Statute also has the effect that the AIFC legal system is dependent for its future existence on continued acceptability of it to the sovereign legislature of the Republic. The AIFC legal system can continue to exist as long as no amendments are made to the Constitutional Statute, which would have the effect of narrowing or abolishing any of the present provisions of AIFC law. This is of course right and proper in a Centre

⁸³ The Right Honourable Lord Mance: AIFC Court Jurisdiction webinar: 29 October 2020; see court.aifc.kz/events.

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inside a sovereign state, but the goodwill towards the AIFC which is clearly noticeable in greater Kazakhstan makes it extremely unlikely that anything would be done to impose new limits on the powers and constitutional position of the AIFC.

Having just mentioned support for the AIFC from the central government in the Republic of Kazakhstan, I should mention some examples. The three I have chosen, all fairly recent (that is in the summer of 2020), are:

- (a) Use of the AIFC by public enterprises. Direct instructions were recently given to public authorities in Kazakhstan by Mr Kassym-Jomart Tokayev, the President of Kazakhstan, in a meeting of the State Commission on 11 May 2020. In that address, the President stated, in context of the challenges presented by the global pandemic (COVID-19): “Access should also be provided to Kazakhstani entrepreneurs to take advantages of the English law and arbitration in the AIFC in resolving business disputes.” This shows a high-level encouragement in Kazakhstan to obtain in the AIFC the benefits of the principles of contract law and dispute resolution law based on English principles.
- (b) Regulatory cooperation. Secondly, on 20 May 2020, the National Bank of the Republic of Kazakhstan (NBK), the Agency for Regulation and Development of the Financial Market of the

Republic of Kazakhstan (ARDFM) and the Astana Financial Services Authority (AFSA) have signed a tripartite agreement to strengthen cooperation on supervision of financial markets, maintenance of financial stability and protection of consumers of financial services. There is thus now in place a comprehensive framework within Kazakhstan as a whole for cooperation and exchange of information concerning authorisation, ongoing supervision, insolvency, financial recovery, anti-money laundering, unfair practices in the financial market and other breaches of the law. The Agreement formalises the previously informal arrangements for cooperation and information sharing and underscores the shared commitment to maintaining the highest standards of supervision and the joint promotion of a stable financial services sector in the country.

- (c) Transfer of proceedings to the AIFC. On 1 June 2020, Mr Zhakip Asanov, the President of the Supreme Court of Kazakhstan, announced that hearings of some commercial cases can be transferred to the AIFC Court or International Arbitration Centre. The President highlighted the benefits of this initiative to be derived from resolving disputes in the AIFC jurisdiction, including the value of English law as the most effective global jurisdiction in the world for

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investor protection, and the experience and expertise of judges drawn from the English judiciary. The Code of Civil Procedure of Kazakhstan has been amended in June 2020 to enable this initiative to bear fruit, and no fees are to be charged in respect of a transfer until the end of 2021. This welcome initiative should help materially with the development of the AIFC Jurisdiction as a centre for dispute resolution in the region and with the economic development of greater Kazakhstan.

The Centre Participant.

The second key concept is that of the “AIFC Participant” or “Centre Participant”.⁸⁴ This means a person who has received a permission of some kind from authorities in the Centre to become as it were a “member” of the Centre. This creates a jurisdictional nexus based on personal membership. That is not, however, enough of its own to create the necessary base for jurisdiction. Geography also has to be brought to bear, as is the case for any concept of jurisdiction, outside the world of religion at least. The concept of the Centre Participant interlocks with the third concept, and I will, therefore, deal with them together below.

⁸⁴ See Article 1.5, Article 2.3 and Article 3 of the Constitutional Statute.

The Territory of the Centre.

The third concept created by the Constitutional Statute was the territory⁸⁵ of the Centre. Originally quite small, that territory has since been enlarged at the end of 2017, by Presidential Decree, to cover over 1600 hectares and now extends to a large part of Nur-Sultan.

These two constitutional concepts together provide the AIFC with a structure built on a deliberate mixture of jurisdiction based on people and jurisdiction based on place. The Centre Participant concept provides jurisdiction based on people. The concept of the Territory of the AIFC provides the jurisdiction based on place. In my experience, this is an unusual structure, but one that has considerable benefits for the AIFC. It is one on which the draftsmen and designers of the Constitutional Statute should be congratulated.

The AIFC is a mixture of jurisdiction based on the concept of an “enclave” and also based on the concept of a “club”. An “enclave”, for this purpose, is a part of one country or territory that is carved out as different from the rest. The DIFC in the Emirate of Dubai, itself in the UAE, is a classic example. The “club” concept, by contrast, is personal. It is derived from members’ societies, like golf or tennis clubs: the main thing that binds the club together is

⁸⁵ See Article 1.1 of the Constitutional Statute. The Centre means “the area within the City of [Nur-Sultan] determined by the President of the Republic of Kazakhstan as the area where the special legal regime in the financial sphere established by this Constitutional Statute applies.”

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the common agreement of the members to be members and to abide by the club rules.

I should mention briefly the legal analysis which underlies the ability of a bank or other financial institution to operate in the territory of the AIFC without becoming a Centre Participant. Normally, across the world, the imposition of a regulatory regime, especially in the financial sector, makes it an offence (whether civil or criminal) to carry on the relevant services in the relevant territory without obtaining prior authorisation to do so. The authorisation may take the form of a permission, or a licence, or some other method of approval. Because the AIFC is a “club” rather than an enclave, this normal approach is not appropriate for the AIFC. If AIFC law had followed those precedents, then all the banks and other financial institutions already established in a large part of Nur-Sultan would have had either to join the AIFC as Centre Participants, or else to have moved their premises to a place outside the territory of the AIFC. In the result, however, this effect was avoided, and the ability of financial institutions to operate in the territory of the AIFC with the benefit of an authorisation from the mainland Kazakhstan authorities was preserved. This was done by means of Section 24 of the *AIFC Financial Services Framework Regulations*, which reads “The General Prohibition. A Centre Participant must not carry on a Regulated Activity, Market Activity or Ancillary Service unless it is licensed to do so by the AFSA.” It does not say “A person must not ...”, but “A Centre Participant must

not ...”. It goes without saying, however, that the jurisdiction of the mainland regulators (such as the Agency for Regulation and Development of the Financial Market of Kazakhstan) to supervise financial services firms is not cut down by the Acting Law of the AIFC unless the firm in question is a Centre Participant. So, a firm wishing to act as a bank or as another financial services enterprise in the territory of the AIFC without becoming a Centre Participant will need to act in compliance with the general Kazakhstan law about financial services regulation, and to obtain any necessary licences from the Republic’s regulators accordingly.

What then are the benefits of this arrangement? The first benefit is *internal cooperative overlap*. In the 1600 hectares in Nur-Sultan, there is no “exclusivity”. The centre is not the exclusive preserve of the Centre Participants: others can remain there too or come in afresh to be there too. And these others, in governing their affairs, remain subject to the general law of the Republic of Kazakhstan. Restaurants, clothing stores, hotels and food supermarkets can “rub shoulders” in the Centre with the Centre Participants. It is only the Centre Participants who are bound by the legal system of the Centre. Even banks and other financial institutions can stay in the centre without joining the centre’s legal arrangements, but of course, if they do not join, they have to comply with the general requirements in the Republic concerning financial regulation in particular.

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This is a substantial advantage of the AIFC approach. Some other centres have been set up on an “exclusive” basis, and this has immediately put pressure on the territorial limits, or the “border” between the Centre and the “mother state”. Arrangements have had to be made there to permit coffee shops and shirt makers, for example, to have a Centre status of some kind if they wish to trade in the Centre. In the AIFC this issue simply does not arise; the coffee shop and shirt maker continue to operate under the general law of Kazakhstan. Participants can mix easily with others in the Centre who are not part of it. The key phrase to remember as describing this non-exclusive approach is “No Centre Participation, no compulsory involvement”.

The second benefit is “*greater external reach*”. The effect of the double approach (people and place) produces a result which has been strongly welcomed, and which appears to represent an advance on the “exclusive” generation of financial centres elsewhere. The status of “Centre Participant” derives essentially from the law of Kazakhstan, in the top “layer”, as elaborated in regulations made in the AIFC itself, in the middle “layer”.

The key, once again, is “No Centre Participation, no compulsory involvement”. The non-participant can, of course, say that he does not wish to contract on a basis of AIFC law; no one can compel him to do so. But if he does agree to that, then that contract is likely to be valid in the eyes of AIFC law even if the non-participant counterparty has never set foot in the Centre.

The result, therefore, is that the border between the AIFC and the rest of the Republic is a truly “permeable” one, with advantages for both sides as a result. As an example, a resident of Shymkent may wish to have the services of an AIFC Centre Participant to buy shares for him or to manage his investment portfolio. All he has to do is to be willing to reach an agreement with the Centre Participant in a contract governed by the AIFC law of contract and having effect in the AIFC territory.⁸⁶ Equally, an industrial enterprise in Pavlodar, anxious to become a quoted company on the AIX (the AIFC stock exchange), can make arrangements with a Centre Participant to prepare the shares for listing, and manage the launch. The Pavlodar company whose shares are to be quoted might eventually wish to become a Centre Participant in some way, either by incorporation, or as a branch, but this is not required. Both the early stages and the later stages can be dealt with across the “permeable border”.

Of course, this involves an approach with an element of “opting-in, and potentially a choice of regulatory

⁸⁶ An AIFC Participant is required to be established physically and to open its office within the AIFC boundary, from where it will conduct its regulated activities. It follows, in my view, that a contract of an AIFC Participant to supply services for its clients would be considered as concluded in the AIFC. This is also the case when, let us say, a director of a company that is an AIFC Participant, reaches an agreement and signs a contract elsewhere, say in Almaty or even in London. The place of the contract would then generally be the AIFC territory, because that director represents the company, and signs as an agent for an identified principal. Unless the parties agree on a different approach, therefore, the fact that the contracting party is an AIFC Participant and located in the AIFC is likely to mean that the activity is conducted in the AIFC.

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jurisdiction. While this means that, in theory, jurisdictional disputes are possible, the legal structure has done its best to reduce the risk to zero or very near. And my observation is that there is a great deal of goodwill in place as between the jurisdictions of “greater” Kazakhstan and of the centre itself. The permeable border, which has over the period 2017-2020 caused some serious constitutional problems in the UK in the Brexit context, appears not to exist here in Kazakhstan.

Before leaving the topic of “greater internal reach”, I should add a few remarks about the legal analysis underpinning that topic. I deal with this first in relation to activities in the territory of the centre, and, secondly, concerning the people who can “use” the Centre. The heading of Article 3 of the Constitutional Statute mentions both of these, as the heading is “Activities conducted in the AIFC and by AIFC Participants”.

As to activities in the territory, the central concept, to be found in Article 3(1), is “activities that may be conducted in the AIFC” (*my underlining*). Article 3(1) thus enables AIFC Bodies to adopt Acts which define the permissible activities to be conducted inside the Centre. So that power is aimed at defining, loosely speaking, financial services etc as the business which is to be carried on and regulated in the Centre. The main list of these activities, guided by Article 2 of the Constitutional Statute, is in Schedule 1 to the AIFC General Rules made by AFSA under its powers conferred by Section 17 of the *Financial Services Framework Regulations*.

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As to the people who can use the centre, the focus switches to Article 4 of the Constitutional Statute. It empowers, at Article 4(3), AIFC Bodies, to “regulate relationships” between various persons (*my underlining*). By a “relationship” the Constitutional Statute means, to take two examples, the relationship between two (or more) contracting parties bound by a particular contract, and the relationship between an authorised Centre Participant and its regulator, AFSA. In conferring these powers, Article 4(3) goes into some detail as to the persons whose relationships can be governed by AIFC Acts. It imposes limits on these powers of the AIFC Bodies, by defining the “relationships” concerned. The main relationships are defined as those (a) between AIFC Participants, (b) between AIFC Bodies, and (c) between a person in (a) and a person in (b). Employees of either of these persons are also included.

This approach in Article 4(3) appears, at first sight, to adopt a rather narrow approach about the people who can be permitted to carry out activities in the Centre. The three classes of relationships just mentioned ((a), (b) and (c) above) are all “internal” to the AIFC itself. There is no mention there of a person elsewhere in Kazakhstan, or indeed of a person in a foreign country.

However, that first sight impression is an unnecessarily narrow approach to the Constitutional Statute and indeed is dispelled by another provision in Article 4 itself. A later sentence in Article 4(3) reads as follows: “In cases expressly provided for by this

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Constitutional Statute, the AIFC Bodies may adopt Acts governing relationships that are not covered by the first part of this paragraph”. This broadening provision thus expands the power to cover other relationships “expressly provided for” elsewhere in the Constitutional Statute.

Examples of such express provision are to be found in particular in Article 2 of the Constitutional Statute, which describes the objectives of the AIFC as including, for instance, developing a securities market (to be integrated with international capital markets and developing insurance markets, banking services etc). It would not be practicable to achieve those aims, and, in particular, international integration, if the only persons who could be the subject of AIFC Acts would be persons internal to the AIFC population and territory. Further, the Constitutional Statute plainly intends this broadening provision to have a wide meaning. That approach is helpfully underlined elsewhere in the Constitutional Statute, in Article 13 (4). This provision, in essence, gives the AIFC Court exclusive jurisdiction in relation to -

“(1) disputes between AIFC Participants, AIFC Participants and AIFC Bodies and an AIFC Participant or AIFC Body and its expatriate employees;

(2) disputes relating to activities conducted in the AIFC and governed by the Acting Law of the AIFC;

(3) disputes transferred to the AIFC Court by agreement of the parties.” *(my underlining)*

The existence of paragraph (2) in Article 13.4 shows, beyond any doubt, that the Constitutional Statute intended that the Acting Law of the AIFC could cover activities conducted in the AIFC which involve a wider class of persons than the narrow internal list of persons covered in paragraph (1). For example, the relationship between the share-purchaser in Shymkent (discussed earlier in this chapter) and the AIFC Participant who acts as his dealer or fund manager, is a relationship envisaged by the Constitutional Statute. In consequence, in my view, all relationships covered by the aims of the Centre, set out in Article 2 and as expanded by AFSA under Article 12.3, can be the subject of AIFC Acts, as long as an AIFC Participant is on one side of the relationship. The non-AIFC Participant persons who form part of those relationships can be persons elsewhere in the Republic of Kazakhstan, and persons outside Kazakhstan altogether.

That said, I should make it clear that this widened scope of AIFC Acts still has to observe the critical requirement, in Article 3(1) of the Constitutional Statute, that the activities are carried on in the AIFC. An AIFC Participant who set up a branch in, say, Almaty, could not carry on regulated business under AIFC Law and regulatory jurisdiction from that branch.⁸⁷ It would not be possible to show that such activities were being carried on “in the AIFC”. In practice, therefore, AIFC Participants who are acting through relationships with persons in

⁸⁷ A branch of an AIFC Participant must be set up and carry on its activities in accordance with the law of the country in which it is established.

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greater Kazakhstan have to make sure that their activities can still properly be described as “carried on in the AIFC”. This is essential in order to ensure that the regulatory jurisdiction is that of AFSA rather than of the relevant authority in greater Kazakhstan. In practice the process of, as it were, branding the activities as covered by AIFC regulation can be done by booking relevant transactions (that is transactions to be governed by AIFC regulation) in the AIFC and making sure that promotional activity is initiated in and carried out from the AIFC premises in question.

I have already described the most unusual way in which legal authority to govern and regulate within the AIFC is based on a blend between personal jurisdiction and jurisdiction based on a territorial space. This blend is not unusual in the special field of juridical capacity but is extremely rare in the much broader field of a legal system’s essential structure. Because of its importance in conceptual terms, I offer some more supporting comment here about the important nexus between “Centre Participant” and “Territory of the Centre” for the purposes of fixing the boundaries of the AIFC legal jurisdiction.

Courts are familiar with this nexus in terms of their jurisdiction. They have a territorial base and are also open to additional jurisdiction based on contractual or voluntary submission to jurisdiction, at least in civil and commercial matters. Arbitrations have “seats” and depend, even more than do courts, on a personal, contractual, agreement between the parties. However, the blend

between “territory” and “person” is unusual in relation to the creation of an international financial centre, and in the associated commercial legal system which is required to support it.

This blend of jurisdiction leads directly to a crucially important aspect of the AIFC model. The interlock between AIFC law and the national law of Kazakhstan, as the “mother state”, is directly, and unusually, affected by this blend between “territory” and “people”. The solution to this is beneficial to the AIFC, and, in my view, also to the Republic of Kazakhstan as a whole.

Many of the other financial centres around the world, and especially in the Middle East, are “enclave” models. They have a strict border around the relevant territory, whether it is of a few hundreds of hectares or something larger. Within this territory, every person located inside the boundary who carries on financial services is prohibited from doing so unless it, he or she has a licence from the regulator. This is very different from the AIFC. Here, non-Participants in the Centre, as already explained, can carry on trading, even in financial services, under the general law of the Republic. In the AIFC territory, both legal systems operate side by side, depending on who has or has not become a Centre Participant. Nowhere else, with the possible exception of Qatar, does this kind of co-existence of legal systems exist.

This is self-evidently a flexible system, which seems very useful to all concerned. And the risk of jurisdictional

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clashes between the two legal, regulatory, and judicial systems has been greatly reduced by the clarity of the AIFC legal structure, including its ground-breaking Constitutional Statute.

Further, in these other centres, the erection of the strict territorial border means that the question where the activity is being performed becomes a key one in one particular and important aspect. The position about two types of the three types of financial activities that are carried on in such centres is clear. Firms licensed in the centre can do regulated business (i) with other firms so licensed, and (ii) with persons “abroad”, that is, outside the “mother” state as a whole. But the legality of the third type of business, that is regulated business (iii) between a centre licensee and a person resident elsewhere in the “mother state”, is rather less clear.

It is no secret that there are or else have in the past been issues about the “enclave” structure in one or more of these other centres, because of an unresolved point about “which law applies to what?” When a firm licensed in the centre wishes to do business with a counterparty in the “mother state”, there has been a question whether it can do so under the banner of the centre licence, or whether it needs to have an additional licence in the “mother state” to deal with that person.

By contrast, however, as already described, in the case of the AIFC, an AIFC Participant can generally offer and sell services from its premises in the AIFC to clients located

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in broader Kazakhstan or elsewhere. In relation to broader Kazakhstan, the extent to which the general laws of Kazakhstan would apply to such activity would depend on whether such activities are described as and are in fact subject to regulation under AIFC Law. In my view, the words ‘in the AIFC’⁸⁸ need to be considered as a legal and regulatory construct, not solely as a geographic one. That is, it can properly be read as meaning ‘conducted under and in accordance with (valid) AIFC Law’, and not as having the literal, stricter, meaning limiting the activities to those having effects only within the geographical boundary of the AIFC.

This is consistent with the AIFC's aim to be a financial hub with financial services and products bought and sold throughout Eurasia and indeed the wider world. This is also the case even where the counterparty is not itself also governed by AIFC law. If it is willing to deal with the Centre Participant under the Centre Participant's law (that is AIFC law) that should be enough.

I am aware that some lawyers with expertise in Kazakhstan and AIFC law are uncertain as to whether an AIFC Participant's services in Kazakhstan outside the AIFC are still potentially open to challenge on jurisdictional grounds. I can see that, since the AIFC was established

⁸⁸ For instance, Article 13(3) of the Constitutional Statute gives the power to the AFSA “to develop draft AIFC Acts relating to the regulation of financial services and related activities in the AIFC” and “to adopt Acts, in the form of regulatory provisions, on matters related to the regulation of financial services and related activities in the AIFC”. It seems to have been the intent that ‘in the AIFC’ should have a broader meaning than ‘in the territory of the AIFC’.

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quite recently, it has come into being later in time than some Kazakhstani laws which may include certain restrictions imposed upon local persons.⁸⁹ The newly established financial centre, with its own independent legal and regulatory regimes, is legally innovative and may still be unfamiliar, particularly bearing in mind the need to look at the issues in a multilingual way.⁹⁰

I am not an expert on Kazakhstani law, and have to form my views based on the language of the Constitutional Statute and the AIFC Acts themselves. As already stated, I believe that the Constitutional Statute was intended to have a rather wider interpretation than that adopted by some of the more cautious readers mentioned above.

Fortunately, however, work is under way between the authorities in the AIFC and in greater Kazakhstan which should lead before too long to a resolution of these doubts. AFSA is now engaged in joint discussions on inter-jurisdictional matters with the National Bank of Kazakhstan and the Agency for Regulation and Development of the Financial Market of Kazakhstan. They are working closely together to harmonise both regulatory regimes, and my understanding is that the signed trilateral

⁸⁹ Certain restrictions are related to avoid being involved with the foreign jurisdiction or to foreign entities that provide services for Kazakhstani natural or legal persons. In this regard, the existing legislation does not contain certain exemptions regarding the AIFC, but the Constitutional Statute on AIFC is also a Kazakhstani law and it is on a higher position in hierarchy than the Codes of Laws of Kazakhstan, except the Constitution and other Constitutional Statutes (only those adopted after 7 December 2015).

⁹⁰ Kazakhstani laws are adopted in the Kazakh and Russian languages, while AIFC laws are all in English.

agreement of May 2020, which I mentioned earlier, has been a good starting point for this.

Whether or not such activities also fall within the legal and regulatory regimes of other sovereign states (or indeed the Republic of Kazakhstan) and require dual regulation, will be an important consideration for Centre Participants. It will depend critically on the precise nature of the activity being carried out. If I may revert for a moment to my examples of the Shymkent investor and the Pavlodar company seeking a listing, this could make things clearer. If in those contexts it were the case that the activities which each of them was conducting in greater Kazakhstan required to be regulated by a Kazakhstan regulator, then issues of potentially overlapping regulatory jurisdiction would arise. However, if, as in my examples above, each of these persons was in essence a customer of the AIFC Participant, the risk of problems arising would be much less.

The AIFC seems to be unique in this way. There is no financial centre of which I am aware that has been set up as an internal territory, with its commercial legal system, but based on a flexible and “permeable” border permitting business to be carried on under its own rules with counterparties in the “mother state”.

So, the AIFC Participants, as members of a ‘club’, have the privilege of benefitting from at least four very positive advantages, such as (a) a bespoke legal regime, based on the English common law and best practices of other

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international financial centres, (b) a modern system of governance focused on international best practice, (c) dispute resolution mechanisms with English judges and, indeed, (d) tax advantages, all of which are available for AIFC Participants as members of the club providing certain types of activities.

3.3. The AIFC General Legal Framework

I turn from the structural side of the AIFC to the side relating to content, again staying in the legal sphere. One of the main activities for the AIFC in its first few years of establishment and operation was the creation of a General Legal Framework (GLF). There follows, below, an illustration of the set of Regulations and Rules which comprise the GLF. Although they relate to the general law, rather than to financial services law as such, their purpose as part of the Law of the AIFC is to assist in the establishment and operation of the financial centre. The infrastructure required to enable a financial centre to operate and to grow demanded no less.

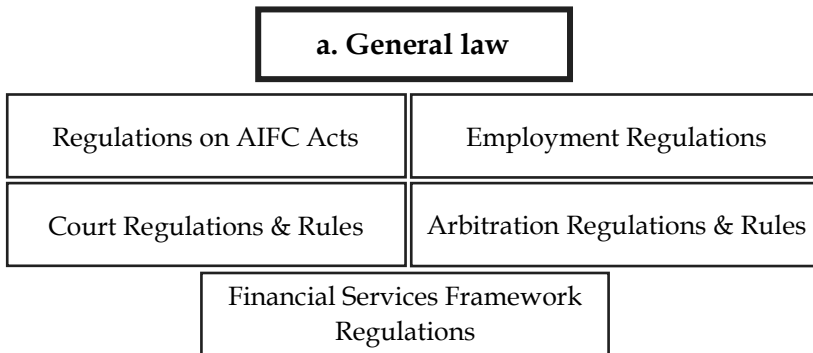
It is useful to divide the legal infrastructure provided by the General Legal Framework into three parts, that is -

- a. A system of general commercial law to enable financial services to be carried on.

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- b. Enablement of a system of financial regulation to supervise and regulate those carrying on those financial services; and
- c. Other basic requirements, including, in particular, a dispute resolution system, involving at least a Court structure, to deal with disputes and differences that inevitably arise in the conduct of financial services.

The table below sets out in diagrammatic form the shape of the General Legal Framework. The total number of Acts is rather larger than the Table might suggest, since rules made under regulations are taken into the relevant box and not set out separately. The total number of AIFC Acts in the General Legal Framework exceeds 40.



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b. General Commercial

i. SUBSTANCE		
Contract Regulations	The Implied Terms in Contracts and Unfair Terms Regulations	Regulations on Obligations
Regulations on Damages and Remedies	Data Protection Regulations & Rules	Security Regulations & Rules
Insolvency Regulations & Rules	Personal Property Regulations	Preferential Creditor Rules
ii. STRUCTURES		
Companies Regulations & Rules	Special Purpose Company Rules	General Partnership Regulations & Rules
Limited Liability Partnership Regulations & Rules		Non-Profit Incorporated Organisations Regulations & Rules

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c. Law in support of financial services

i. OPERATIONS		
Payment System Settlement Finality Regulations	Netting Regulations	
Dematerialised Investment Rules	Common Reporting Standard Regulations & Rules	
ii. VEHICLES		
Limited Partnership Regulations & Rules	Foundations Regulations	Trust Regulations

The Table with AIFC General Legal Framework Acts

As can be seen, the biggest number of topics appears under the general heading of General Commercial law, including both substantive commercial law, such as contract law, and law about commercial structures (corporate or other). The next largest class of items in the General Legal Framework is legislation specifically to enable financial services firms to operate in their special field and to enable their regulation (by AFSA). A third, smaller, but highly important class of legislation in the

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General Legal Framework is the General Class, covering legislative structure, financial regulation, dispute resolution and employment law.

a. General commercial law.

I start with the first of these three, that is, the AIFC's general commercial law. This part of the GLF is a codified restatement for the AIFC of the commercial aspects of the common law and statutory legislation of England and Wales. As mentioned above, basing this legal system "on the principles, legislation and precedents of the law of England and Wales, and the standards of leading global financial centres" was a deliberate choice of the First President of the Republic of Kazakhstan.

The code is provided in a large number⁹¹ of free-standing sets of Regulations, on Companies, Contract, Obligations, Insolvency etc. About half of the total deal with the types of legal entity which are permitted in the AIFC.⁹²

The result is a bespoke codified commercial law in simple language. Each of the various sets of Regulations,

⁹¹ The total is over 40, including some Regulations that have only recently been made, and the various sets of Rules that deal with secondary matters in relation to some of the sets of Regulations.

⁹² These are Companies, General Partnerships, Limited Liability Partnerships, Non-Profit Incorporated Organisations, and Limited Partnerships. There is also a selection of entities that are more in the nature of vehicles rather than active participants: these include the Special Purpose Company, and (to be found in the Companies Regulations) the Investment Company.

reflect, broadly speaking,⁹³ English Law on the subject, but with some special features adopted carefully from other jurisdictions.⁹⁴ And it has been necessary to ensure that the imported law in the commercial framework can work alongside Kazakhstan law so far as it needs to do so. The process of creating this commercial law for the AIFC involved input by the Legal Advisory Council of the AIFC, mentioned above.

There would have been another way of importing a code of commercial law, which, deliberately and wisely, was not chosen for the AIFC. This would have been, as at least one other international financial centre has decided, to state that, so far as written laws and regulations in the centre do not deal with a matter, then the law of England and Wales as it is from time to time is to apply. This was not an option in the AIFC, because, as already shown, the underlying base law in the AIFC (the “bottom layer” mentioned above) is the Acting Law of Kazakhstan. And the path chosen by that provision seems better for the AIFC in any event, for two reasons. First, it makes the law of the AIFC much easier to understand and apply, especially in a jurisdiction which expects to encourage local lawyers to practise in the AIFC, rather than simply expecting foreign lawyers schooled in English common

⁹³ This is not the case, however, with the Employment Regulations, dealt with later in this chapter, which reflect the economy and culture of Kazakhstan as a whole.

⁹⁴ An early decision by the Legal Advisory Council was to recommend many of the “codes” of English law rewritten in Dubai as the base for drafting the AIFC Code.

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law to fulfil the need. Secondly, the necessary process of judicial development (and indeed of legislative improvement) can be handled more transparently and efficiently⁹⁵ if the levers of change are in the AIFC rather than somewhere in London.

All this means that the Judges in the AIFC Court will be able to take into account developments in common law jurisdictions elsewhere so far as relevant to the case being tried. But the central task of the judiciary in the AIFC will be the interpretation of the commercial “Code” provided here. The “Code” develops organically, and not by reference to an outside legal system. Further, the task, for the judiciary, does not include any duty to ascertain and apply what the law is in any parent legal system: instead, it includes the consideration of relevant developments in relevant foreign legal systems as part of the function of applying the AIFC code itself.

In the AIFC, therefore, the intention of the Constitutional Statute and the draftsmen of the commercial “Code” was to enable the law in the Centre to stand on its own feet, as a transplanted but autonomous entity, to a greater extent than in the alternative model. AIFC law speaks for itself and will develop organically with experience rather than by having to apply directly any of the results that belong elsewhere. My own

⁹⁵ It will be recalled that, under the Constitutional Statute, Article 2.3, two of the five “principles” which are the base of the AIFC activities are “efficiency” and “transparency”.

preference is for the greater internal consistency, and I would say autonomy, of the approach here in the AIFC.

A few high-level comments follow on some of these acts, which can be identified as key acts and comprise the GLF, aimed to ensure AIFC participants with a safe and secure platform to conduct their business in the AIFC.

Contract Regulations.

The regulation of contractual relationships is one of the core items of law in the AIFC. Not only is there a codification of the general law of contract in England and Wales with some minor changes. But there is also a restatement of some of the newer rules in England and Wales to improve the extent to which contractual agreements are required to be structured to be fair to those with less bargaining power, especially consumers.

The Contract Regulations essentially represent a codification of the key principles of English contract law. These Regulations will provide the legal underpinning for the majority of the commercial and financial transactions that will be governed by the AIFC law.

The Implied Terms in Contracts and Unfair Terms Regulations provide certain safeguards for parties to contracts and specific protections for the benefit of customers who would otherwise be at risk of being made subject to unfair terms resulting from their lack of bargaining or negotiating power.

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The Regulations on Obligations are effectively a codified distillation of the key principles of the English common law of tort and specify the basis on which a party may owe non-contractual obligations to another party, and how they might be liable to that other party in the event of a breach of those obligations. This includes the concepts of negligence, misrepresentation, and deceit, together with a range of other economic torts, such as unlawfully interfering in a contract. These Regulations also set out defences to claims for breach of obligation.

The Regulations on Damages and Remedies set out the basis on which remedies may be awarded in respect of breach of obligations, whether arising in contract or other ways.

One further point is relevant to the AIFC Contract Regulations. They establish general principles regulating commercial dealings during day-to-day activities in the AIFC. Their provisions regulate rights and obligations between parties that have a link with the AIFC: AIFC participants and AIFC Bodies: “These Regulations govern contracts made between AIFC Participants, AIFC Bodies and AIFC Participants, and AIFC Bodies, unless otherwise expressly provided in a contract.”⁹⁶ However, it also needs to be stressed that section 7(2) of the AIFC Contract Regulations 2017 enables the reach of the Regulations to be extended to cover contracts entered into by persons other than AIFC Participants and AIFC Bodies. Such other

⁹⁶ Section 7(1) of the AIFC Contract Regulations 2017.

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parties can, as it were, “opt into” the AIFC Contract Regulations by a deliberate act of agreement. Section 7(2) achieves this effect by referring to other parties if they specify the AIFC Law in their contracts. The text is as follows:

“If a party to a contract is not an AIFC Participant or AIFC Body, these Regulations do not apply to the contract **unless expressly provided in the contract.**”.

This is a key provision, which provides for non-AIFC participants or any other individuals to apply the Acting Law of the AIFC in their contracts as governing law. And section 7(2) appears to apply to a contract between two outsiders just as much as it does to the case where one contracting party is an AIFC Participant and the other is an outsider. That said, as already stated in Chapter 3.2 above, no outsider can be compelled to contract into AIFC Law: the effect of section 7(2) is limited to cases where AIFC law is expressly chosen, and where it is chosen in the contract itself, and not in some other unrelated document.

This is exactly in line with one of the direct instructions recently given to public authorities in Kazakhstan by Mr Kassym-Jomart Tokayev, the President of Kazakhstan. In a meeting of the State Commission on ensuring the state of emergency on 11 May 2020, the

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President addressed the challenges that had emerged because of the global pandemic (COVID-19), and stated: “Access should also be provided to Kazakhstani entrepreneurs to take advantages of the English law and arbitration in the AIFC in resolving business disputes.”⁹⁷ This high-level encouragement in Kazakhstan to obtain in the AIFC the benefits of the principles of the English law contract law must be very strongly welcomed. Those who respond to the encouragement should find advantage in the flexibility of the AIFC contract law (such as no required forms; liquidated damages; deliberately open terms; negotiated options; etc).

Corporate relationships and structures.

The General Legal Framework contains a range of Regulations and Rules,⁹⁸ adopted by relevant AIFC Bodies. These acts compose one of the core principles of being an AIFC participant as they determine the organisational forms, procedures and requirements for the establishment and registration of legal entities in the AIFC, as well as

⁹⁷ Mr President gave instructions during the meeting of the State Commission on ensuring the state of emergency on 11 May 2020 to use the benefits of the AIFC Jurisdiction, including the English law in the AIFC. That is, to the Acting Law of the AIFC, in particular, to the AIFC Acts, that based on the English law.

⁹⁸ They are: AIFC Companies Regulations & Rules; AIFC General Partnership Regulations & Rules; AIFC Limited Partnership Regulations & Rules; AIFC Limited Liability Partnership Regulations & Rules; AIFC Non-profit Incorporated Organisations Regulations & Rules; and others.

licensing procedure and requirements to AIFC participants.⁹⁹

Whilst most centre participants are likely to be established as companies, there are regulations for alternative structures, which are likely to be of use in connection with professional service providers, fund structures and non-profit organisations. Having these alternative regimes set out from the outset will provide flexibility to enable firms to find the most suitable basis for operating within the AIFC and managing their corporate liability for such operations.

b. Financial Services and Regulation.

The second limb of the General Legal Framework concerns the key function of the AIFC which is to foster and supervise a financial services sector. The principal Regulations for this purpose are the Financial Services Framework Regulations (FSFR),¹⁰⁰ which takes the form of an overarching piece of “framework” legislation. Chapter 3.4 below will discuss the structure for financial services regulation in more detail when it will also be possible to

⁹⁹ Article 3(1) of the Constitutional Statute on AIFC defines this as follows: “The requirements and procedures for legal entities to be recognised as AIFC Participants, the type of activities that may be conducted in the territory of the AIFC, Licensing procedures and requirements for AIFC Participants, as well as procedures and requirements for the establishment and registration of legal entities in the territory of the AIFC and their organisational forms, are to be determined by AIFC Acts.”

¹⁰⁰ The FSFR were made under the general power to establish the AIFC legal framework under Article 4.3 of the Constitutional Statute.

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include material about the detailed rules for financial regulation adopted by AFSA under the FSFR.

In addition to the FSFR themselves, there are some parts of the General Legal Framework itself which are relevant to financial markets. They provide further support for the smooth functioning of financial markets and mirror those to be found in other financial centres. For instance, they are designed in part to prevent things from going wrong (Netting, and Settlement Finality, being good examples), and in part to address what happens when things do go wrong. An example is where a company becomes insolvent and the Insolvency Regulations are required to function, setting out the insolvency regime, the powers of the insolvency practitioners and the process for winding up companies or putting them into administration. The Security Regulations are another example of both preventing difficulty (if the creditor has security) and resolving difficulties (eg if the security is inadequate). They establish the regime for the granting and taking of security interests, the processes for perfecting security interests and the order of priority between security interests.

The Netting Regulations provide a basis for the netting of obligations under financial transactions and the protection of netting agreements in the event of an insolvency. Finally, the Payment System Settlement Finality Regulations establish a regime for the protection of the finality of payments made via certain payment systems in the event of an insolvency of a participant in

one of those payment systems. These last two are concerned with upholding the integrity of financial markets when faced with insolvency of one or more market participants.

These protective rules are essential for a properly functioning financial system, as they provide clarity and comfort as to the rules that would diminish the risk of loss and would apply in the event of default of one of the participants in the system. Such rules are needed to preserve the orderly operation of the system notwithstanding such risks, as they protect certain transactions and provide a regime that seeks to minimise the detrimental impact of risk.

c. Other general provisions, especially dispute resolution in the AIFC.

The last part of the General Legal Framework is more general and is largely about dispute resolution. The AIFC Court and the International Arbitration Centre are established at Articles 13 and 14 of the Constitutional Statute. Each of them has its own set of Regulations and Rules, which derive their authority, not from Article 4 of the Constitutional Statute, which is about the commercial Code, but from the specific legislative powers in Articles 13(5) and 14(2).

I include the Regulations and Rules for the AIFC Court and the IAC as part of the General Legal Framework,

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even though their elaboration was handled differently from the rest of the GLF itself. As stated, the Court Regulations were made, for good constitutional reasons relating to the independence of the judiciary, by the Management Council. Although the Legal Advisory Council was asked for and offered comments about those Regulations, the other material relating to the Court and the IAC was very largely developed inside those Bodies themselves. An account of the process of establishing the AIFC Court and its role in developing an investment hub in Eurasia is given in a book written by the first Chief Justice of the AIFC Court, Lord Woolf. He presented the book as “A vision of the AIFC Court”¹⁰¹ at a special launch at the AIFC Court on 9 September 2019, and it was also presented at the AIFC on 17 September 2019, in the context of the Constitutional Council of Kazakhstan, by him and a Member of the Constitutional Council, with the title “The AIFC Court: Present and Future”.

I leave it to Mr Christopher Campbell-Holt to deal with the AIFC Court and International Arbitration Centre in chapter 3.5 which he has kindly contributed to this work.

Finally, in the context of general infrastructure, the AIFC Employment Regulations deal with the relationship between employers and their employees in the various types of AIFC entities (AIFC bodies, AIFC bodies’

¹⁰¹ The book can be downloaded via the following link:
<<https://court.aifc.kz/uploads/02-1%20AIFC%20Court%20Book%202019%20ENG.pdf>>

organisations, and AIFC Participants). The Regulations cover employees in those AIFC entities, whether the employee is an expatriate employee or one of Kazakhstan nationality. In so doing they rely on the wide wording of Article 4.3 of the Constitutional Statute, even though there are indications elsewhere that might have been taken to suggest that the intention was to cover expatriate employees only.¹⁰²

¹⁰² See, for example, the Constitutional Statute at Article 13.4 (1), and the AIFC Court Regulations at Article 26(1)(a).

3.4. The AIFC Financial Services Framework at a Glance¹⁰³

As I mentioned above, the key and governing act under the Financial Services Framework is the FSFR which provide a legal basis for the regulation and supervision of financial services. This is similar to the UK Financial Services and Markets Act 2000.¹⁰⁴ However, the FSFR is a great deal simpler and is intended to be easily understood and applied.

The FSFR are genuinely “framework” in character. They contain little that is able to operate directly in the marketplace, but, instead, confer powers to bring about those results. Essentially, AFSA¹⁰⁵ is enabled to regulate through these Regulations. AFSA has written a large

¹⁰³ I am most grateful to the Legal Team of AFSA for comments provided on this chapter.

¹⁰⁴ The Financial Services and Markets Act 2000 (FSMA) is an Act of the Parliament of the United Kingdom, that created a regulatory framework for the supervision and management of the UK's banking and financial services industries.

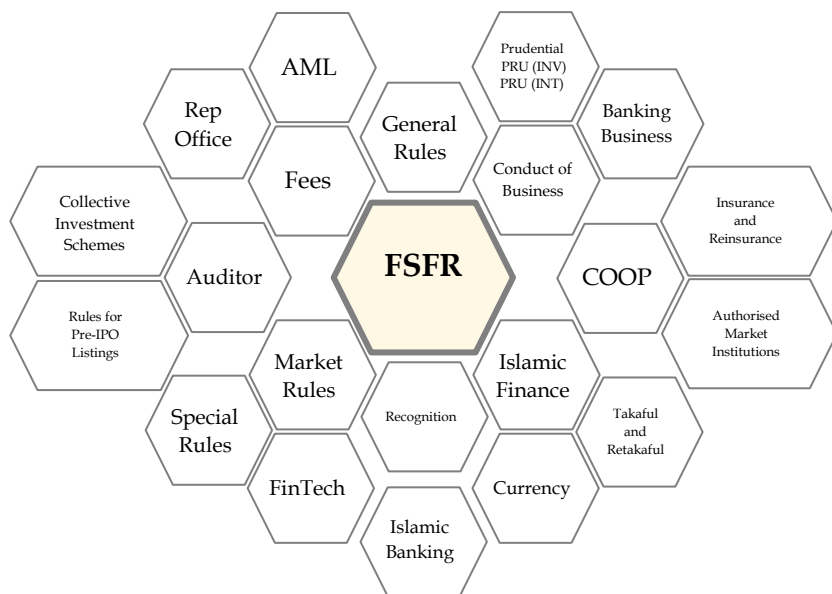
¹⁰⁵ AFSA was established under Article 12 of the Constitutional Statute.

number of sets of regulatory rules under the powers given in the FSFR. Further, the Astana International Exchange (AIX) derives its authority to act as a market institution in the AIFC by a decision made by AFSA under section 36 of the FSFR.¹⁰⁶ The AIX I understand has now been able to list and admit to trading all three of the main types of investment traded on exchanges, that is, shares (securities), bonds, and exchange-traded funds.

A large variety of fields of law is covered by AFSA in making the Rules designed specifically for the regulation of financial services (and related services) in the AIFC. The illustration below shows the structure of the Financial Services Framework with the FSFR in the centre as the heart of financial services regulation, and with the supplementary Rules appearing around it. These Rules, like the FSFR itself, are based on best international practice with an emphasis on simplicity and comprehensibility.

¹⁰⁶ The AIX is also mentioned, as “the Stock Exchange” in Article 1.2 and Article 3.2 of the Constitutional Statute.

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The table with Financial Services Framework Acts

These bespoke legal acts were tailored and designed specifically for conducting financial and relevant non-financial activities within the AIFC Jurisdiction. Broadly speaking, the structure deals with three types of activity that fall to be regulated and supervised by AFSA. These are “Regulated Services” themselves, followed by “Ancillary Services” and “Market Activities”.

In considering the structure for regulation, it is important to bear in mind that the Constitutional Statute sets out the areas of economic activity which are considered to be of importance to the AIFC. These

include, under Article 2.2 (2), (3), and (4): “2) developing a securities market in the Republic of Kazakhstan and integrating it with international capital markets; 3) developing insurance markets, banking services, Islamic finance, financial technologies, electronic commerce and innovative projects in the Republic of Kazakhstan; 4) developing financial and professional services based on international best practice”. The early steps in the AIFC have focussed on most of these, with a particular emphasis on Capital Markets, Asset Management, Financial Technology, Islamic Finance, Private Banking, and Green Finance.¹⁰⁷ The professional practices prioritised include legal services, auditing, accountancy services, consulting, and credit rating services (Ancillary Services).

At this stage, therefore, there is a rather less well-developed regime for some of the specific directions pointed to by the Constitutional Statute, such as banking services and insurance markets. The same is true of Islamic finance, although the Islamic sides of both banking and Insurance have taken on some prominence.

Conducting activities in the AIFC.

The *AIFC General Rules 2017* set out the current list of regulated and market activities as well as ancillary services

¹⁰⁷ These are defined as the core pillars for the development of the AIFC in the “Strategy for the Development of the AIFC”, adopted by the Resolution of the Management Council on 26 May 2016. They are also featured in the Annual Report of the AIFC for 2019.

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to be provided within the AIFC.¹⁰⁸ That list over time has gradually been expanded as more regulated activities have come into focus in the AIFC. So, this is a good starting point for entities to have an eye on to know whether a particular activity requires to be authorised under the FSFR by a regulator or not.

However, it needs to be noted that there is a ‘general prohibition’ against carrying on these listed activities in the capacity of a Centre Participant unless the person in question is appropriately permitted to do so under a license granted by the AFSA: “A Centre Participant must not carry on a Regulated Activity, Market Activity or Ancillary Service unless it is licensed to do so by the AFSA.”¹⁰⁹ If a Centre Participant¹¹⁰ is carrying on any regulated activity within the financial centre without the appropriate authorisation from AFSA, it will ‘fall out’ of the general provision. So, it is essential to be authorised and to understand when this is needed. That involves looking at the activities that are being or are proposed to be conducted.

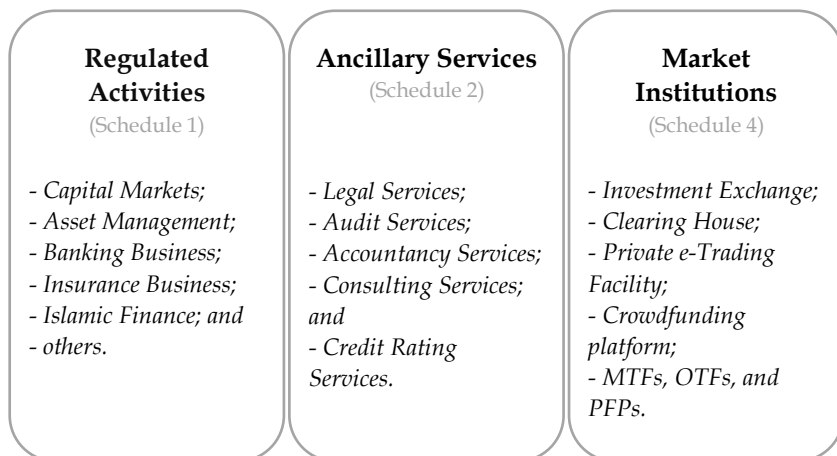
¹⁰⁸ Schedule 1 specifies more than 25 regulated activities; in Schedule 2 ancillary services, such as providing legal, audit, accountancy, consulting, and credit rating services are listed; whereas Schedule 4 specifies the list of market activities within the AIFC.

¹⁰⁹ Section 24 of the AIFC Financial Services Framework Regulations 2017.

¹¹⁰ A person who is not a Centre Participant is not caught by this provision. The reasons for this have been fully explained in Chapter 3.2 above.

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Below, I have grouped and summarised the activities specified in schedules to the AIFC General Rules, which comprise the three main groups.



One of the key things to be mentioned here is that AFSA has the function, under the Constitutional Statute and the FSFR, of deciding which services and activities fall within the regulatory ambit of the AIFC. Under section 6(2) of the FSFR: “The AFSA may issue Rules and guidance as to the circumstances in which activities capable of having an effect in the AIFC are or are not to be regarded as conducted in the AIFC.” Accordingly, the decision whether a particular Centre Participant that is considering carrying on certain activities falls within the scope of the AIFC Acts and has to be regulated is a matter for AFSA

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alone. By contrast, the position in the United Kingdom is that the decision where the jurisdictional border is to lie is a matter for Parliament, acting on a proposal from the UK Treasury, which is the equivalent of a Ministry of Finance. The UK Financial Conduct Authority has the power to issue guidance¹¹¹ about the jurisdictional border, but only by way of explaining where the border has been placed by the Treasury and Parliament. In the AIFC, both these functions fall to the AFSA.

¹¹¹ A manual called the PERG (the Perimeter Guidance Manual) sets out in guidance the perimeter as fixed by the Treasury Order and offers views, again in the guidance, as to how the Financial Conduct Authority interprets the law setting out what needs to be regulated or not.

3.5. AIFC Court and International Arbitration Centre

by Christopher Campbell-Holt

At the heart of the AIFC is a legal system that has been created to apply common law and international best practices to attract investment by enabling effective commercial practices and providing robust protection of investor rights. The AIFC Court and International Arbitration Centre (“the IAC”) are the ultimate safeguards to protect investor rights at the AIFC and they provide justice that accords with the rule of law.

The rule of law is a concept whose precise meaning is difficult to define. It has been defined in a book by the same name by one of the UK’s most distinguished judges, the late Lord Bingham. He noted that the rule of law takes its identity from its context, so it is important to ascertain its meaning from the context in which it is being considered. The rule of law has many requirements. In particular it requires that every individual is entitled to

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have access to a court or dispute resolution forum for the determination of his or her rights and to be treated equally and fairly in the same way as anyone else subject to the court's or dispute resolution forum's jurisdiction. Every party in a dispute deserves to have his or her case determined in accordance with the law of the land. This includes having fair consideration of the dispute by independent and incorruptible judges, arbitrators, or other types of dispute resolution professionals, who conduct the case and give a decision with reasonable expedition. Citizens who live in a country which adheres to the rule of law can be confident that their disputes will be resolved in a just manner and that justice will not only be done but it will also be seen to be done.

The reason why the AIFC Court and IAC were established is relevant to the consideration of what the rule of law requires. The AIFC required a special court and arbitration centre to be created because it appreciated that its prospect of success as a commercial centre would be greatly increased if investors involved with the AIFC, many of whom are expected to come from outside Kazakhstan, are satisfied that the AIFC is a safe environment in which to invest. International investors look to invest in jurisdictions which recognise and apply the rule of law. Any commercial decision outside of an investor's home jurisdiction involves risk. Investors know that from time to time disputes in business will arise and they may well require the assistance of a court or arbitration centre to resolve them. When this happens,

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they want to have the protection the rule of law provides. Risk is significantly reduced if there exists a court and arbitration centre which complies with the requirements of the rule of law.

In recent times courts and arbitration centres similar to what has been established in the AIFC have been established in other countries where new commercial centres have been created to attract investment, including in Singapore, Hong Kong, Qatar, Dubai and Abu Dhabi. Other countries inherited common law systems including commercial law from the UK, including Australia, Canada, India, Malaysia, and New Zealand. Like the AIFC, these jurisdictions have systems of justice which are substantially based on the common law system of justice designed to operate in accord with the rule of law. The models of commercial dispute resolution institutions in these jurisdictions were considered when deciding upon the model which should be adopted at the AIFC.

The AIFC Court and IAC were still in their early years of operation as they approached the end of their third year of operation. As at early October 2020, the AIFC Court had given seven judgments and orders and additional cases were ongoing. All resolved cases had been enforced in Kazakhstan to one hundred percent satisfaction. Two hundred and thirty-eight arbitration and mediation cases had been successfully resolved at the IAC. The cases at the IAC were predominantly mediation cases, reflecting the appetite for commercial parties in disputes in Kazakhstan to resolve their disputes amicably via mediation without

needing to pursue more formal arbitration or litigation. The case parties came from Kazakhstan, the UK, Russia, China, Uzbekistan, Poland, and Azerbaijan. The law applied in the cases was predominantly the law of the AIFC, Kazakhstan, and Russia. The nature of the disputes covered all areas of commercial practice including finance, sales, property, land, and general contract matters. Two hundred lawyers from twenty-four jurisdictions around the world had registered with the AIFC Court for rights of audience. The AIFC Court and IAC had been included in the dispute resolution clauses of thousands of business contracts of businesses in Kazakhstan and elsewhere.

The AIFC Court and IAC are playing a central role in establishing Kazakhstan as a successful commercial centre with all of the facilities and international standards that investors expect such institutions to have. The establishment of the AIFC Court and IAC will significantly increase the attractiveness and investment in the AIFC, Kazakhstan and the wider Central Asia region where at present there are no comparable commercial dispute resolution institutions.

The Establishment of the AIFC Court and IAC

From February 2017, Lord Woolf CH, the former Lord Chief Justice of England and Wales, and I, were engaged by the AIFC to advise on the establishment of the AIFC Court and IAC. From 1 January 2018, the AIFC Court and IAC had been established as separate

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independent legal entities and were operational. This achievement could not have happened without the close support of the AIFC Governor and the Government of the Republic of Kazakhstan. The AIFC Court and IAC were established following the approval of the *AIFC Court Regulations 2017* and *AIFC Arbitration Regulations 2017* by the AIFC Management Council, which comprises the President and Prime Minister of the Republic of Kazakhstan as well as other ministers of the Government of the Republic of Kazakhstan and international advisors.

Before this could happen, the Parliament of the Republic of Kazakhstan enacted the AIFC Constitutional Statute 2015 which provided for the establishment of the AIFC. More specifically, the AIFC Constitutional Statute 2015 provided for the establishment of the AIFC Court in Article 13 which provides that the AIFC Court shall be “independent in its activities and is not part of the judicial system of the Republic of Kazakhstan”, and Regulation 11 of the *AIFC Court Regulations 2017* provides for the judges of the AIFC Court to have “complete independence” and “act independently and impartially” when performing their judicial functions. Article 14 of the AIFC Constitutional Statute provided for the establishment of the IAC, and the *AIFC Arbitration Regulations 2017* and IAC Arbitration and Mediation Rules 2018 provide requirements of independence and impartiality for arbitrators.

In March 2017 the Constitution of the Republic of Kazakhstan was amended to enable there to be a legal

regime for a financial centre, the AIFC, in Nur-Sultan, or Astana as it was known then, in the Republic of Kazakhstan.

Judges, arbitrators, mediators, and other dispute resolution professionals

The AIFC Court has as its Chief Justice, Lord Mance, the former Deputy President of the UK Supreme Court which is the highest court of appeal in the UK, and nine judges. The judges are amongst the most experienced and distinguished judges from the common law world. The IAC has as its Chairman, Barbara Dohmann QC, a highly experienced and respected arbitrator, mediator, and litigator. The IAC has a Panel of outstanding arbitrators and mediators comprising highly experienced and multi-lingual professionals from all around the world.

The judges, arbitrators, mediators, and other dispute resolution professionals at the AIFC Court and IAC have global reputations for absolute independence, impartiality, integrity and incorruptibility. They are committed to the rule of law and uphold the same judicial standards and legal principles that have been developed and applied over many years by commercial dispute resolution centres in the UK and elsewhere. In particular, they all have considerable experience and interactions over many years with commercial entities and individuals who they represented as lawyers. That background gives them experience and understanding of the commercial world

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and they understand the need for commercial law to reflect the needs of the business community. They will ensure that the AIFC Court and IAC meet the expectations of the international business community by ensuring provision of predictable legal protection in a timely manner. Parties to disputes at the AIFC Court and IAC can be confident that their disputes will be decided only on their merits without regard to nationality, politics, religion, or race.

Services

The AIFC Court provides litigation proceedings with application of the most modern procedural rules modelled on the rules of other common law courts including the courts of England and Wales. It also provides Judicial Mediation, that is mediation of a dispute pre-litigation by a judge of the AIFC Court. That judge would not then consider the case as a judge of the AIFC Court if the case progressed to litigation at the AIFC Court. The judges of the AIFC Court also have considerable experience of commercial arbitration and the AIFC Court provides limited supervision of IAC arbitration cases guided by the principle of non-intervention.

The IAC provides four main dispute resolution services: 1. Arbitration – exclusive administration of arbitrations governed by the IAC Arbitration and Mediation Rules, subject to the agreement of the parties to a case; administered arbitrations governed by UNCITRAL

Arbitration Rules and ad hoc arbitration rules subject to the agreement of the parties to a case; 2. Mediation – mediations governed by the *IAC Arbitration and Mediation Rules* and ad hoc mediation rules subject to the agreement of the parties to a case, as well as other forms of alternative dispute resolution subject to the agreement of the parties to a case; 3. Appointments – an appointment authority, assisting with the appointment of arbitrators and mediators to arbitrations and mediations conducted at the IAC or elsewhere; and 4. Fundholding – fundholding, holding and disbursing advances in relation to costs associated with use of the IAC’s services and facilities.

Jurisdiction, levels, precedent, and rights of audience

The AIFC Court has the sole power to determine the proper scope of its jurisdiction within the limits of its competence given by the AIFC law. It does not have jurisdiction to hear administrative¹¹² or criminal cases but it does have jurisdiction to: 1. Interpret AIFC Regulations; and 2. Adjudicate any disputes: a) between AIFC registered companies (“AIFC Participants”), AIFC bodies

¹¹² The term “administrative” is used to refer to matters such as road traffic offences or immigration issues which are dealt with by the RK Administrative Court. It is not intended to limit the review by the AIFC Court of an AIFC Body such as AFSA, the AIFC regulator. It differs from its meaning in English law. See AIFC Court Regulations 2017, Article 26(5), which provides that: “The [AIFC] Court of First Instance has jurisdiction to hear and determine an appeal from the decision of an AIFC Body ... where the appeal relates to: (a) a question of law; (b) an allegation of a miscarriage of justice; (c) an issue of procedural fairness; or (d) a matter provided for in or under AIFC law.”

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and or their foreign (i.e. non-Kazakh nationals) employees; b) relating to operations carried out in the AIFC and regulated by the AIFC Acting Law; and c) transferred to the Court by agreement of the parties (i.e. “opt-in” jurisdiction for parties who do not otherwise have any connection to the AIFC). Parties may file applications to the AIFC Court applying any law, whether it is common law or civil law, AIFC law or otherwise, provided all of the parties to the case agree and the AIFC Court decides that it is appropriate for it to have jurisdiction.

Similar to other international arbitration centres, the IAC considers disputes where the governing law of the dispute is AIFC law or any other law as agreed by the parties to the dispute. The *AIFC Arbitration Regulations* provide the AIFC as the seat in an arbitration at the IAC where the seat has not been agreed by the parties. But parties can agree to have an alternative jurisdiction as the seat in their arbitration proceedings at the IAC if they agree to do so. We provided this flexibility at the IAC to give case parties maximum choice and flexibility and to enable dispute resolution on legal and procedural terms that most appropriately fits the needs of the parties and justice in each individual case.

The AIFC Court has three different levels: 1. The Small Claims Court as a division of the AIFC Court of First Instance, with specialist judges and procedures for cost-effective and timely resolution of disputes valued up to USD 150,000; 2. The AIFC Court of First Instance is the first court where disputes are heard applying the AIFC

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Court's Rules. It also considers appeals from the AIFC Small Claims Court; and 3. The AIFC Court of Appeal will hear appeals from the AIFC Court of First Instance. Its decisions are final and not subject to appeal. To appeal to the AIFC Court of Appeal will require litigants to have been given permission to appeal by the AIFC Court of First Instance, or, if that permission is refused, to obtain permission from the Court of Appeal itself. The AIFC Court has already successfully resolved numerous small claims and first instance claims and a permission to appeal application.

The AIFC Court may consider final judgments of the AIFC Court in related matters and final judgments of the courts of other jurisdictions when deciding cases. While there is no automatic binding precedent of previous AIFC Court decisions on future AIFC Court decisions, it is expected that the flexibility inherent in the procedures and the approach that is expected to be adopted at the AIFC Court will enable the AIFC common law system to develop principle incrementally and keep up to date without producing uncertainty.

Within the framework of AIFC statute or written AIFC law, the AIFC law will be developed by the judges of the AIFC Court through their decisions in cases at the AIFC Court with application of legal principles to new circumstances in a way that will be sensitive to the particular commercial context of the case in dispute. AIFC Court decisions will also continue to be made accessible and transparent via the AIFC Court website and in law

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reports, textbooks, and media which will analyse the effect of the decisions with a view to identifying the principles that underlie them. This will assist parties and their lawyers to understand their legal positions under the AIFC law and to be able to make a reasonable prediction of the outcome of any disputes that will be considered by the AIFC Court.

The AIFC Court has extremely wide rights of audience. All lawyers have rights of audience provided the lawyer has a practicing certificate from anywhere in the world, or in the case of Kazakhstan lawyers, qualified by a law degree and some court experience. There is this special rights of audience provision for Kazakhstani lawyers to create a level playing field. In Kazakhstan there is no centrally administered regulatory body to regulate the training and practices of Kazakhstani lawyers and without this special rights of audience provision they would not be able to represent parties in cases at the AIFC Court. By comparison, the IAC Platform is accessible to all lawyers and professionals to represent parties in cases at the IAC.

Rules

The procedural rules of the AIFC Court and IAC were drafted by leading dispute resolution professionals including Lord Woolf, Barbara Dohmann QC, Tom Montagu-Smith QC, and myself. When creating a new judicial system, it is all too easy to overcomplicate matters

by underestimating the importance of a court and arbitration centre having the appropriate powers and avoiding unnecessary complexities which can delay or restrict justice. With this in mind we drafted practical procedural rules for the AIFC Court and IAC that will foster predictability and enable cases to be dealt with in a way that is proportionate to their complexity. The procedural rules include all of the modern innovations of other international dispute resolution institutions and are sensitive to the unique needs of commercial court and dispute resolution institution users but in as short a number of rules as possible to avoid unnecessary complexity.

The procedural rules of the AIFC Court and IAC clearly set out their approach. The *AIFC Court Rules 2018* provide at Rule 1 that the AIFC Court has the overriding objective to deal with cases justly. Dealing with cases justly includes, so far as practicable: ensuring that the system of justice is accessible and fair; ensuring the parties are on an equal footing; ensuring that litigation takes place expeditiously and effectively, using no more resources than is necessary; dealing with cases in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, facts and arguments, and the financial position of each party; and making appropriate use of IT. The *IAC Arbitration and Mediation Rules 2018* provide at Rule 2.1 that the overriding objective of the IAC is to obtain the fair

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resolution of disputes by an impartial tribunal without unnecessary delay or expense.

There are other more specific rules in the AIFC Court and IAC Rules, but they do no more than amplify or illustrate the overriding objectives. They give the judges of the AIFC Court and the arbitrators and mediators of the IAC the wide discretion and flexibility they need to do justice in cases.

Enforcement of AIFC Court and IAC decisions and awards

Enforcement of AIFC Court decisions and IAC arbitration awards is critically important. If this cannot happen, the successful party in a dispute resolution will be left with a sense of injustice. It is this fear of injustice that deters investors who could profitably trade with a particular country from doing so, to the economic disadvantage of the country with which they could have otherwise traded.

Enforcement of AIFC Court decisions within Kazakhstan is carried out in the same manner as the enforcement of decisions of other courts in the Kazakhstan legal system. Translations of the AIFC Court's decisions into the Russian and Kazakh languages will be authorised by the Court in accordance with the AIFC Acting Law and provided to the Kazakhstan authorities for enforcement purposes. In practice, enforcement of AIFC Court decisions in Kazakhstan is ensured by the implementation

of step by step procedures of the AIFC Court and the enforcement authorities in Kazakhstan. The procedures are implemented with the closest supervision of the AIFC Court Registry and the enforcement agents, and the result at October 2020 has been that all AIFC Court decisions have been enforced within Kazakhstan to one hundred percent satisfaction.

Enforcement of AIFC Court decisions in other countries outside of Kazakhstan will happen with the support of the Kazakhstan authorities in accordance with international agreements that provide for mutual recognition and enforcement of court decisions. The AIFC Court is also a member of the Standing International Forum for Commercial Courts and works in close cooperation with the many jurisdictions that are represented by the membership of that organisation including on enforcement of court decisions.

IAC arbitration awards are enforced in Kazakhstan as Orders of the AIFC Court. The procedure to convert an IAC arbitration award into an Order of the AIFC Court for enforcement purposes is simple and expedient. IAC arbitration awards have been recognised by the AIFC Court and judgments and execution orders of the AIFC Court have been given within a matter of hours of such applications being filed at the AIFC Court Registry. Kazakhstan acceded to the New York Convention 1958 and enforcement of IAC arbitration awards in countries outside of Kazakhstan shall happen in accordance with that Convention.

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Premises and IT

The AIFC Court and IAC have international standard physical premises at the EXPO-2017 site in Nur-Sultan, Kazakhstan, with advanced meeting and conference rooms, hearing rooms, and office facilities for all lawyers, judges, arbitrators, and mediators.

The AIFC Court and IAC also have innovative modern digital technology to assist with timely and cost-effective case management and overall dispute resolution. e-Justice was launched at the AIFC Court and IAC in February 2019. It provides immediate electronic access to all documents in a given case to the parties, judges, arbitrators and mediators working on that case from its initiation to its final disposition. Access is 24/7. Video technology is used for oral hearings when a judge, arbitrator or mediator decides that an in-person hearing is not necessary or appropriate.

Education

The judges', arbitrators' and mediators' experience has been shared in Kazakhstan, promoting the education and training of students and lawyers with lectures and mock trials. This has significantly improved the understanding in the Kazakhstan community on the AIFC law and the AIFC Court and IAC procedures and practices to ensure there is access to justice that is as wide as possible.

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The successful establishment and operation of the AIFC Court and IAC has ensured that the AIFC has a dispute resolution system that applies the strictest standards of the rule of law. With proven case resolution numbers, enforcement of decisions, inclusion in the dispute resolution clauses of business contracts, and significant outreach, promotions and training programmes, both institutions are quickly becoming the number one choice for commercial dispute resolution for investors engaging in commercial and financial activities in Central Asia. This will be a powerful signal to the international commercial world that Kazakhstan has a modern business environment that is committed to the strict adherence to the rule of law.



PART 4: LOOKING TO THE FUTURE WITH CONFIDENCE

4.1. Early Signs of Success.

My final Part is dedicated to the question of how far the decision to proceed with the AIFC initiative has proved to be a success. The AIFC in Nur-Sultan now offers, within what is an essentially civil law country, a financial centre equipped with common law-based legislation and with a Court system staffed by former English judges applying the law as so imported. As explained above, this common law jurisdiction generally operates within the legal boundaries of the AIFC and in relation to one or more AIFC Participants, but a certain amount of legal coexistence is, even so, required.

The AIFC that officially emerged on the world map in mid-2018, only two and a half years ago, is considered as a very young financial centre. Experience shows that, usually, it takes 5-10 years to establish a new venture as a financial centre, at least in the region, and sometimes even longer is required. Hence, the AIFC may be considered to be only at the start of its journey. Nevertheless, it has

worked in my view very well so far. The codified common law, specially written for the Centre, has been widely welcomed, and the judicial system, though not yet much tested in practice,¹¹³ is seen as very suitable for the imaginative venture which has been pioneered in Kazakhstan. Commentators conclude that this common law, precedent-based, “transplant” is working alongside, and is fitting in well with, the rest of the legal system in the country of Kazakhstan as a whole. There is, in the AIFC, a harmonious and well-designed internal legal system in the geographical area of the Centre where English law is welcomed and respected.

At the last count, there were over 500 Centre Participants,¹¹⁴ which represents, in my view, a relatively fast take-up of the opportunity to operate in the AIFC. Some of the Participants are internationally prominent names which will bring reputational gains to the Centre now and over time. As mentioned above, the AIX is now functioning as an international exchange, with securities, bonds, and exchange-traded funds on offer. The Centre is attracting a good deal of interest from law firms in Kazakhstan as well as from foreign jurisdictions, such as Germany, UAE, Hong Kong, Malaysia, the United Kingdom, and others.¹¹⁵

¹¹³ As at early October 2020 over 250 arbitration and mediation cases have been completed in the International Arbitration Centre, and 7 judgments and orders have been made following a judicial decision in the Court.

¹¹⁴ On 2 July 2020, the AFSA registered the Centre's 500th participant.

¹¹⁵ As of August 2020, there were 43 law firms registered in the AIFC.

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The Dawn of Global Recognition.

It is not usually easy to measure, on an objective basis, the comparative success of a commercial venture. However, there is, in this case, a respected external comparator, known as the GFCI index of global centres, which is published every six months with an updated set of rankings. This ranking explores financial centres around the world by analysing areas such as the competitiveness of the business environment, human capital, infrastructure, financial sector development, reputation, as well as the level of diversity, speciality, and accessibility. On this basis, like two of the other three broadly comparable Centres (in Abu Dhabi, Dubai, and Qatar), the AIFC seems to be making very good progress. For example, the GFCI indexes, in March and September 2019, show upward movement, and relatively high standing already, for three of the four centres. The AIFC in Kazakhstan, in particular, has risen from 88th place in March 2018 to 61st in September 2018 and to 51st in March and September 2019. Even more, it was ranked as the top financial centre in Eastern Europe & Central Asia.¹¹⁶ This illustrates a good pace for the young financial centre. The authors of the report, on the GFCI website, state that it is unusual for a recently launched centre to perform so well so soon. As the authors of the report mentioned the AIFC is a centre that started to perform strongly since its official launch in the middle of 2018,

¹¹⁶ Global Financial Centres Index 26 (September 2019) 26.

which is unusual for young financial centres.¹¹⁷ Besides, there was a message that the AIFC is “within the top 15 financial centres likely to become more significant over the next 2-3 years”, which appears to reflect the AIFC’s aim to be the financial hub for the region.

However, in 2020, the AIFC lost some ground in comparability terms in the 27th and 28th editions of the GFCI index in March 2020, falling by 21 and then two further places.¹¹⁸ This, of course, did not have any direct effect on the Centre’s activities, attractiveness, and legal regime. Nevertheless, the AIFC aims to continue developing its favourable environment for investors and businesses, to emerge among the top 50 financial centres in the world.¹¹⁹ In March 2020, a comment appeared in the GFCI index that the AIFC “may rise rapidly as people become more familiar with the new name and residence of the Astana International Financial Centre”.¹²⁰ Hence, it is to be hoped that the AIFC may benefit from a further advance in the Index, to reflect the continued international and regional progress which it has shown.

Apart from the GFCI indices, I should mention another arrangement for cooperation among financial centres of the world. The World Alliance of International

¹¹⁷ Ibid.

¹¹⁸ The AIFC took 72nd position amongst 108 international financial centres and 74th position among 111 in September 2020, according to the Global Financial Centres Index 27 (March 2020) 5.

¹¹⁹ In new AIFC Development Strategy until 2025, there is an aim to enter the top 50 in the GFCI Business environment component by 2025.

¹²⁰ Global Financial Centres Index 27 (March 2020) 3.

Financial Centres (WAIFC) was formed in 2018 by its founding members of which the AIFC is one of eleven.¹²¹ The WAIFC is a non-profit association, which represents leading international financial centres and facilitates cooperation and the exchange of best practices.¹²² Later on, six more financial centres have joined the WAIFC, that is Doha, Hong Kong, Mauritius, Stuttgart, Tokyo, and London, which is represented by “TheCityUK”.¹²³ Besides, the DIFC in Dubai also joined this alliance but with observer status. I believe that being a founding member of the new alliance and among the world’s leading financial centres is another opportunity for the AIFC. This will allow it to share and gain experience not only in finance but also in improving the existing legal framework and developing new niches in the rapidly changing markets which are relevant to the AIFC.

On the Path of Belt and Road Initiative.

Another key milestone for the AIFC is that it is strategically located on the path of the Belt and Road Initiative (BRI), for the implementation of which China has huge plans and ambitions. The AIFC plays here an important role. The entire Republic of Kazakhstan plans

¹²¹ The World Alliance of International Financial Centres was announced in Paris in July 2018 as a new strategic initiative and formed by the founding members from Abu Dhabi, Brussels, Busan, Casablanca, Frankfurt, Luxembourg, Moscow, Muscat, Nur-Sultan, Paris, and Toronto.

¹²² The WAIFC website <<https://waifc.finance/>>.

¹²³ The Industry-led body, founded in London in 2010, with the aim of representing UK-based financial and related professional services.

to benefit from being, as it were, the “Buckle” on the Belt of this very substantial project, since it expects to be a key recipient of transport-related BRI projects. Within Kazakhstan, the AIFC is in a position to offer its services, platform, and, most importantly, its flexible and competitive jurisdiction in the context of the BRI. As a result, therefore, the AIFC in its new strategy of July 2020 has defined the establishment of the “Belt and Road” market as one of the essential and key directions for development from now until 2025.¹²⁴ The AIFC thus aims to function as an important “Hub” in the region for the BRI projects at different levels.

Apart from offering its advantageous jurisdiction and platform (its special legal and regulatory regime, tax incentives, favourable business environment, high-tech stock exchange infrastructure, etc.), the AIFC has been developing a variety of initiatives to support the emergence of the centre as the leading hub for the BRI.¹²⁵ The management of the AIFC is charged to ensure that “the AIFC will facilitate the development of new sources and financing instruments for BRI projects by attracting institutional and private investors and developing legal, regulatory and operational frameworks.”¹²⁶

¹²⁴ The New AIFC Development Strategy until 2025 was adopted during the meeting of AIFC Management Council, chaired by the President of Kazakhstan, on 2 July 2020.

¹²⁵ Annual Report on the Activities of the AIFC (2019) 76.

¹²⁶ *Ibid.*

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Furthermore, the AIX has introduced a special market segment for BRI financing, known as the Belt and Road Market. This initiative is aimed at developing an attractive alternative environment for financing different investment projects in the BRI context in a wide variety of industry sectors: energy and natural resources, manufacturing, agriculture, high-technology, culture, telecommunication, etc.¹²⁷

All told, therefore, the BRI is one of the key projects for the AIFC. The AIFC aims to become a platform of choice for the implementation of BRI projects in the entire region and this should lead to real success for the Centre. The AIFC in this respect confidently expects to play here a crucial role as an attractive and flexible jurisdiction that is based on English common law and unique in the Central Asian region and amongst CIS countries.

¹²⁷ Annual Report on the Activities of the AIFC (2019) 76.

4.2. Additional benefits for doing business under AIFC Law.

In previous Parts, I have mentioned the AIFC's unique legal regime, which includes relevant and up to date English common law principles and precedents as well as the best practice of leading global financial centres, and its structure and advantageous position in the region. I have also briefly described the AIFC Law and key benefits offered to AIFC Participants in corporate, contractual, and other relationships. It therefore only remains to cover here some additional benefits and to include some remarks on the application of the AIFC Law in practice.

Liberal Tax Regime.

I start by briefly describing the simplified tax environment that was established for the AIFC market, though I need to make it plain that I am not a tax expert. As mentioned previously in Part 3, the Tax Code of the

Republic of Kazakhstan is applicable in the AIFC by the virtue of the third layer of the “cake”, since the second layer (AIFC Acts) does not regulate any tax matters. In addition, however, the Constitutional Statute on the AIFC, as the first layer, provides certain valuable tax exemptions for 50 years, that is until the end of the year 2065.¹²⁸ These exemptions create a favourable and liberal tax regime for the AIFC participants, as indeed is stipulated in the 71st Step of the Plan of the Nation “100 Steps”.

So, what type of tax exemptions can be obtained and in what circumstances? This can be divided into main four parts.

Firstly, corporate income (and value-added tax). These are covered by article 6 of the Constitutional Statute which provides that AIFC Participants are exempt from corporate income tax and value-added tax (VAT) received from providing certain financial and non-financial services in the territory of the AIFC. Those services, in the financial services sphere, are (a) Islamic banking, (b) reinsurance and insurance brokerage, (c) investment management services for assets of investment funds, accounting and safekeeping services for investment funds, as well as services related to issuing, offering, trading, purchase and redemption of securities of investment funds, and (d) brokerage, dealer or underwriting as financial services.¹²⁹ Besides, the exception for corporate income tax is

¹²⁸ Article 6 of the Constitutional Statute on the AIFC.

¹²⁹ Article 6(3) of the Constitution Statute on AIFC: for the provision on VAT, see also Article 6 paragraph 8-2

extended to other services, described as (a) legal, (b) audit, (c) accounting, and (d) consulting.¹³⁰ These four classes of services are known in the AIFC as “ancillary services”. It must be stressed, however, that, as a result of Article 6(4), ancillary services providers are exempted from corporate income tax only for “services provided to AIFC Bodies as well as to AIFC Participants that provide financial services”.

In addition to the financial and ancillary services mentioned in the Constitutional Statute, the Statute enables additional financial services to be exempted from corporate income tax. This power, under paragraph 3(5) of Article 6, has been exercised by the AIFC jointly with the Ministry of Finance and the Ministry of National Economy. They have adopted a list of financial services provided by the AIFC Participants, income from which is exempt from corporate income tax and VAT.¹³¹ The list contains 33 additional financial services, which takes the scope of the tax exemption considerably wider than the services specified directly in article 6(3) of the Constitutional Statute. For instance, financial services such as managing investments, providing custody, acting as a trustee of a fund, operating a loan crowdfunding

¹³⁰ Article 6(4) of the Constitution Statute on AIFC.

¹³¹ Joint Order of the Governor of the AIFC No 126 dated 26 May 2020, Minister of Finance of the Republic of Kazakhstan No 547 dated 29 May 2020, and Minister of National Economy of the Republic of Kazakhstan No 118 dated 12 June 2020 “On approving the List of financial services provided by participants of the Astana International Financial Centre, the income from which is exempt from payment of corporate income tax, value-added tax”.

platform, and others are listed in the Joint Order. This expansion of the regime for favourable tax treatment represents a substantial effort by the Kazakhstani state authorities to assist the AIFC by allowing AIFC Participants to be exempted from taxes, concerning all these additional financial services, from June 2020 onwards.

Secondly, foreign nationals who are employed by an AIFC Participant, which provides regulated services stipulated in Articles 6(3) and 6(4), or by an AIFC body, are exempt from personal income tax.¹³² This exemption lasts until the end of the year 2065.

Thirdly, AIFC Participants that provide the financial and ancillary services stipulated in (and under) articles 6(3) and 6(4) are exempt from property tax and land tax for facilities located in the territory of the AIFC.¹³³ However, I need to clarify here that this provision does not apply to the entire territory of the AIFC with a total area of 1,632 hectares. It applies only to the AIFC's 25 ha central territory.¹³⁴ To be precise, this is the area where the Expo site is located.

Lastly, under Article 6(7) of the Constitutional Statute, some of the tax exemptions are available to non-

¹³² Article 6(6) of the Constitutional Statute on AIFC.

¹³³ Article 6(8) of the Constitutional Statute on AIFC.

¹³⁴ By virtue of article 6(8) of the Constitutional Statute on AIFC, section 2 of the Boundary of the AIFC, approved by the Decree of the President of Kazakhstan No 161 dated 31 December 2015 further stipulates that the property and land taxes exemptions are applicable only within the small area of the AIFC territory, that is the Expo site.

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AIFC Participants. The purpose of this provision is to encourage investment in securities listed on AIX, and investment in the capital of AIFC Participants. So, any natural or legal person is exempt from individual and corporate income tax on income received from the following activities:

- “1) profits from the sale of securities listed, on the day of their sale, on the official list of the Stock Exchange;
- 2) profits from the sale of shares or stakes in the capital of AIFC Participants that are legal persons registered under the Acting Law of the AIFC;
- 3) dividends and interest from securities listed, on the day of their accrual, on the official list of the Stock Exchange;
- 4) dividends from shares or stakes in the capital of AIFC Participants that are legal persons registered under the Acting Law of the AIFC.

These four exemptions are available to corporate bodies and individuals investing in one way or another in the AIFC.

Article 6(7) also contains a fifth provision, added in December 2019, for individuals earning profits or income

outside the Republic of Kazakhstan. The individuals have to be “AIFC investment residents, and recognised residents of the Republic of Kazakhstan for the purposes of the Tax Code”.¹³⁵

This last provision in Article 6, paragraph 7(5) therefore opens up, with effect from December 2019, a further way in which persons other than an AIFC Participant or an AIFC body can benefit from some of the tax exemptions. This is achieved through the status of an Investment Tax Resident, to which I now turn.

Investment Tax Residency Programme

In line with the liberal tax regime mentioned above, the Government of Kazakhstan introduced late in 2019 the new concept of ‘Investment Tax Residency’ to fulfil requirements that were set out in the 71st Step of the Plan of the “100 Steps”. The purpose was to assist the further development of the AIFC activities and to make the AIFC an even more attractive environment.¹³⁶ An investment residency programme is a common practice in the modern world, and the investment residency market is, I understand, currently experiencing a period of significant growth. The main idea of an investment tax residency programme is to attract individuals with money to invest in the jurisdiction to become resident in that jurisdiction,

¹³⁵ Article 6 paragraph 7(5) of the Constitutional Statute on AIFC.

¹³⁶ New article 5-1 was inserted into the Constitutional Statute on AIFC in December 2019.

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together with a right to receive a multiple-entry visa for a period of up to 5 years and an exemption from paying personal income tax on worldwide income.

An AIFC investment resident is a foreign national¹³⁷ who has invested following the AIFC Investment Tax Residency programme and who meets a requirement which is designed to ensure that the investment resident is indeed a foreign national.¹³⁸ That requirement is that the investor must not have been tax resident in Kazakhstan nor a citizen of Kazakhstan during the 20 years before he or she initially applies to participate in the programme.¹³⁹

Let me briefly explain the process of becoming an investment resident.

Firstly, due diligence procedures will be conducted in relation to the potential foreign investor, including anti-money laundering checks and compliance with the requirements prescribed by the Constitutional Statute (non-Kazakhstani citizenship during the previous 20 years and non-Kazakhstani residence for tax purposes during those 20 years).

Once all the screening procedures are completed, an investor can invest a minimum of 60,000 USD in the AIFC platform, buying securities, units in investment funds and stake capital in one or more of the AIFC Participants. At

¹³⁷ Or a stateless person.

¹³⁸ Or a stateless person.

¹³⁹ Article 5-1 of the Constitutional Statute on AIFC.

that point, the investor can become an Investment Resident of the AIFC.

An Investment Resident can expect to obtain a right to an entry visa for up to 5 years. The AIFC will apply for this visa on his behalf, and the decision to issue or refuse a visa is made by the Ministry of Internal Affairs based on the results of its review of the documents and approval from the national security authority.

The next step for an Investment Resident is to secure the right to receive an exemption from personal income tax on income from sources outside of Kazakhstan. An Investment Resident may apply to the tax authorities to obtain this right after 90 days of residence in Kazakhstan.

In this case, income generated within Kazakhstan will be taxed under the Tax Code, whereas income with a foreign origin is exempted. This approach could therefore well be useful for investors who want to optimise their tax expenditures.

Selection of the AIFC Law and Jurisdiction by non-AIFC Participants

Since the AIFC positions itself as a platform with its unique legal regime to contribute to investment into Kazakhstan, it may be said that the financial centre is targeted at foreign investors. Its favourable legal regime is specifically tailored for foreign market players, for example by use of the English language which is likely to be more

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familiar for them in particular.¹⁴⁰ However, the AIFC itself and its jurisdiction are much more than just a tool for the attraction of foreign investment. The AIFC is becoming, by degrees, but unmistakably, ever closer to mainland Kazakhstan, its economy, and its people.

The strong influence in this direction can be derived from the highest political quarters in the Republic. As already mentioned in Part 3, the President of Kazakhstan has given direct instructions to public enterprises to encourage active use of the AIFC Jurisdiction to attract direct and portfolio investments into the Centre. Kazakhstani entrepreneurs were encouraged “to take advantages of the English law and arbitration in the AIFC in resolving business disputes”. The encouragement relates both to the choice of law and the choice of jurisdiction, though, of course, many contractual agreements choose to have both of these together.

Choice of Law

As of today, there appears to be nothing in the AIFC Law that could prevent the use of it by non-AIFC participants, e.g. ordinary Kazakhstani companies, as long as there are no restrictions in the mainland jurisdiction itself.

¹⁴⁰ In making that point, I am of course also aware of the value of the English language internally in the AIFC, for AIFC Participants and their employees, particularly if they too do not have Kazakh or Russian as a maternal language.

To test this, it is helpful to have a look at relationships between Kazakhstani enterprises with no link with the AIFC in terms of participation. Can two companies that are based in, say, Almaty agree between themselves that their contractual relationship on a particular venture is to be governed by AIFC law? In my view, as a matter of AIFC Law, the parties can indeed validly select AIFC Law as the governing law in their commercial contracts. Section 7(2) of the *AIFC Regulations on AIFC Acts 2017* achieves this effect by referring to other parties who specify the AIFC Law in their contracts: “If a party to a contract is not an AIFC Participant or AIFC Body, these Regulations do not apply to the contract unless expressly provided in the contract.” This key provision in AIFC Law thus enables companies which are not AIFC participants, or any other persons including individuals, to apply the Acting Law of the AIFC in their contracts as the governing law.¹⁴¹

That said, however, the question arises whether there is any restriction in the mainland jurisdiction, to which I referred in opening this analysis, which might operate to nullify what seems to be the natural construction of Article 7(2).

¹⁴¹ I can see that there is a potential argument in favour of a narrower construction of Article 7(2), namely that it could be intended to enable non-AIFC Participants to join in a contract where at least one other party is such a Participant. I do not adopt that construction myself, since the draftsman could very easily have made that limitation express, if it had been intended. Further, it seems unlikely that the encouragement from the President of the Republic would have been made in the form in which it was made if it had been the case that Article 7(2) would have prevented the encouragement from delivering any results.

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I am not qualified to comment on the law of the Republic of Kazakhstan, and I must, therefore, proceed with care. I can say, however, that I have heard, and indeed read, that some writers about this topic have been troubled that there might be such an impediment in the Kazakhstan Civil Code.¹⁴² These commentators state that the Code might be construed to limit the freedom of persons in Kazakhstan to choose a foreign law by contract. This would be done by limiting that freedom to cases where (a) there is already, in the factual matrix surrounding the parties' venture, a foreign element, and (b) the law chosen corresponds with that foreign element. If (a) and (b) above were not satisfied in the view of a Court in Kazakhstan, the contract would fall to be dealt with by ignoring the choice of law.

From the point of view of the AIFC, and indeed of the AIFC Court and IAC, it would be something of a setback if this view were to become authoritative. Even now, the existence of this view may be impeding the development of all three of those institutions. I hope, therefore, that the suggestion can speedily be dispelled in an authoritative way, or else be removed by an appropriate amendment to the Code. After all, the AIFC and its jurisdiction are not in any real sense external to Kazakhstan as a whole. They are part of an important Kazakhstani initiative to develop the financial capability of the country as a whole. Further, as

¹⁴² Saniya Perzadayeva, 'Choice of law in contracts: English law benefits' (2019), <<https://www.linkedin.com/pulse/choice-law-contracts-english-benefits-saniya-perzadayeva/>>.

already mentioned in Part 3, the Acting Law of the AIFC contains the Kazakhstani Constitutional Statute on the AIFC as the top layer of the cake and the Acting Law of Kazakhstan as the bottom layer as well, so far as not displaced by the middle layer of the law of the AIFC. To a common lawyer like me, therefore, the two systems of law in Kazakhstan both appear to be domestic systems, rather like English Law and Scots Law in the United Kingdom.

Assuming that I am right about the breadth of Article 7(2), why would two or more non-AIFC Participants wish to select AIFC Law as the choice of law for their commercial contracts? What are the benefits that a legal or natural person would obtain by such a selection?

One answer to this is that the legal or natural person may desire more than just the law, and may wish to have all the privileges given an AIFC Participant?

If, for instance, the person wishes to carry on regulated activities in the AIFC such as fund management, other financial services, banking, etc, in a way that secures significant tax advantages, then the Regulations about those activities require a person to obtain a licence from the regulator, the AFSA.

Secondly, even if there is no intention to carry on regulated activities, the AIFC law may of itself be of value. Persons thinking of choosing AIFC law may well be advised that this would make them eligible to benefit from key principles of English contractual law, which may be absent in the Kazakhstani Civil Code and, in most cases,

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other civil law jurisdictions. These English Law principles, embodying valuable freedom to contract,¹⁴³ include deliberately open terms and negotiable options and choices as to what the contract provides. They play a key role in contractual relationships between the parties, giving considerable flexibility for the parties in entering into contractual obligations. For example, as mentioned earlier, in the AIFC Contract law there are no requirements for a contract to be concluded in or evidenced by writing. So, no forms are required. It may be proved by any means, including witnesses, and contracts can be concluded via email or using e-signatures. This can be particularly important for those concluding contracts and running the business during the current “lockdown” measures, which have disrupted the world in many different ways and have affected the ongoing activities of businesses.

None of this, however, means that AIFC law will always be able, once chosen, to operate to the exclusion of Kazakhstani law. Entities choosing and applying the AIFC Law cannot wholly disregard the legislation in the Republic. This is because the Acting Law of Kazakhstan is a part of Acting Law of the AIFC. The third layer of the “cake” applies in so far as it is not disapplied by the broad language of the second layer. So, even where a contract applies the AIFC Law as the governing law of the contract, the parties would still fall under certain Kazakhstani laws,

¹⁴³ Saniya Perzadayeva, ‘Choice of law in contracts: English law benefits’ (2019), <<https://www.linkedin.com/pulse/choice-law-contracts-english-benefits-saniya-perzadayeva/>>.

such as on tax, criminal law, banking (eg if the bank for the contract was not an AIFC Participant), and others.

Choice of Jurisdiction

Secondly, and in some ways most importantly of all, a choice of AIFC law brings with it the benefits, should they be required, of AIFC Dispute Resolution. Parties who choose AIFC Law as the governing law of a contract are likely also to choose litigation before the AIFC Court, or arbitration or mediation before the AIFC's International Arbitration Centre (IAC), as the means for dispute resolution in their contracts.¹⁴⁴ That said, of course, I should not be taken to imply that those avenues (the AIFC Court and the IAC) are available only where AIFC law is chosen. Both are of course willing to apply other chosen laws in dealing with disputes that arise, even though the primary expertise of the Judges and some of the IAC appointees is English law. Much more detail is provided on this topic in chapter 3.5 above, written by the Registrar and Chief Executive of the AIFC Court and the IAC.

¹⁴⁴ I assume that the potential impediment in the Kazakhstani Civil Code (as discussed at page 175 above) would apply, if it has force, to cut down the ability of Kazakhstani contracting parties to select both AIFC law and AIFC jurisdiction at the same time. This seems another reason for finding a solution to the concern I have described.

Transfer of Incorporation.

I would like also to mention here the AIFC arrangements to enable a ‘Transfer of Incorporation’ or “re-domiciliation” of a company from another jurisdiction into the AIFC. This facility is relevant, in particular, because of a successful transfer in December 2019. Kazakhstan Energy Reinsurance Company Ltd. (KERC), an affiliated company of the national oil operator “KazMunayGas JSC”, used the arrangements to transfer its place of incorporation to the AIFC jurisdiction from Bermuda.¹⁴⁵

This procedure is an alternative solution for establishing a presence in the AIFC and has one particularly beneficial feature. The re-domiciliation of a company to the AIFC jurisdiction can be achieved without liquidation of that company in its original jurisdiction. Under the AIFC Law, a company may continue to be the same legal person, and to have all the property, rights and privileges, and to be subject to all the liabilities, restrictions and debts that it had before the transfer. So, it remains a party to any agreements entered into and legal proceedings commenced before its registration in the AIFC.¹⁴⁶ It is important to note that the ability of a company to be transferred to the AIFC is dependent on the law of its (prior) incorporation containing provisions to allow it to transfer out. While more than 50 jurisdictions in the world allow a company to be

¹⁴⁵ KERK had been operating in Bermuda since 2004.

¹⁴⁶ Section 155 of the *AIFC Companies Regulations 2017*.

transferred to another jurisdiction, Kazakhstan is not one of them; so entities cannot be transferred from Kazakhstan into the AIFC.

Nonetheless, this is beneficial for Kazakhstani national companies' affiliated entities registered abroad, as the KERC case itself has demonstrated. It seems, therefore, that transfer of incorporation into the AIFC may be a useful method for the relocation of Kazakhstani capital and assets from foreign jurisdictions to the AIFC.

The Future of Regulation of the Legal Profession

I should also mention another future advantage to be derived from being an AIFC “club” member, even though the initiative has not yet been fully implemented. This is the proposed regime for the future regulation of the legal profession in the AIFC, which could become another key component for the Centre's attraction for market players. As I mentioned in Part 1, the AIFC Advisory Panel on Legal Regulatory Matters was established to ensure the introduction of best global practices for the regulation of the legal profession in the financial centre.

Since the primary mission of the AIFC is to establish and maintain a well-functioning ecosystem to attract foreign investment and stimulate the economy of mainland Kazakhstan, the Centre needs to regulate professional services based on international best practice. Therefore, the establishment of a regulatory regime that

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specifically deals with the AIFC legal market is essential, and the Advisory Panel members and the AIFC Authority Legal Team are currently addressing that need.

At present, matters relating to the legal profession fall under the Kazakhstani legislation. Until AIFC Acts displace the mainland regulation, this is the result to be derived from Article 4(1) of the Constitutional Statute on the AIFC. Therefore, the Centre needs to close the legislative gap by developing appropriate regulations inside the AIFC, whilst at the same time avoiding over-regulation which may deter legal services providers from practising law in the AIFC.

The Advisory Panel, in cooperation with the LAC and the able assistance of colleagues within the AIFC, has developed a conceptual approach on how legal regulation should operate within the AIFC and moved from there to the preparation of detailed regulations to establish the future regulatory regime on legal services. This regime will be charged with ensuring that the legal services market in the AIFC is fair, efficient, transparent, and orderly, providing non-discriminatory conditions and treatment of participants thereby fostering and maintaining confidence in an open legal market in the AIFC.

This conceptual approach to the development of the new regulatory framework concludes that the most effective approach would be a simple, user-friendly, regulatory framework with a set of codes and related rules to establish clear standards and avoid setting up regulatory

burdens beyond required standards. In this way, the future regulatory regime will be modelled on best practices from developed legal markets while taking into account the unique context of the still-developing AIFC legal market.

Establishing this regulatory framework would cover key standards for legal services, control of quality, a code of ethics, and further provision of legal education and training for the conduct of legal services providers within the AIFC. This would also ensure high, professional standards of competence, skill, and integrity in the delivery of legal services in the financial centre. Hence, the framework would allow for the building of a strong, independent, and effective legal services market, which should have a positive effect on the quality of legal services provided in the AIFC.

This is important both for international firms and for those within greater Kazakhstan. The former group is likely to feel greater confidence in a regime designed to meet the specific needs of the unique operating environment of the AIFC. The latter group, more used to operating in the different civil law context of greater Kazakhstan, needs clarity to understand the extent to which their processes need to develop to make them most effective in the AIFC context. Taken with the very welcome activities of the AIFC “Academy of Law”, which I discuss later, the new regulatory framework will provide not just greater certainty and protection for all involved in

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the AIFC, but an incentive for greater competition and for ever-increasing standards of professional practice.

4.3. Ways of Raising Awareness of AIFC Law.

It is commonly accepted that the establishment of and respect for the Rule of Law in a specific jurisdiction are important prerequisites in the context of making investment decisions concerning that jurisdiction. As can be seen from previous chapters, the work is done by the Kazakhstani Government, the AIFC staff, and expert consultants, who together have established in the Heart of Eurasia a favourable environment for businesses and a 'Gateway' to the region for investors. The unique legal regime has been successfully established, and the AIFC extends a welcome to anyone seeking to participate in its dynamically developing platform.

However, any jurisdiction, especially one as young as the AIFC, needs to promote its offered platform and to raise awareness of the advantages of its legal regime. Therefore, AIFC management pays special attention to these activities, both abroad and in Kazakhstan itself. The

new Development Strategy of the AIFC until 2025 clearly emphasises that the Centre is to continue to work on promotion and confidence-building in its jurisdiction, including cooperation and establishment of business relations with leading international arbitration centres, legal institutions, and courts, both in local and in other jurisdictions.¹⁴⁷ In this regard, the AIFC bodies and their organisations are actively involved in the promotion and raising awareness of the opportunities provided by the AIFC.

Here, the Academy of Law plays a significant role in the promotion and provision of education on the AIFC Law. Additionally, as the new Strategy states, the Academy of Law is charged to create a unique model of legal education that features the integration of business, law, ethics, and cross-jurisdictional practice skills.¹⁴⁸ It is designed to contribute to the enhancement of human capital by conducting education and training courses, workshops, seminars and online webinars, inviting professors and professionals to deliver valuable speeches for the audience. Among the audiences so far, there have been practising and in-house lawyers, entrepreneurs, representatives of central and regional public authorities, students, and other individuals interested in the AIFC Jurisdiction.

¹⁴⁷ AIFC Development Strategy until 2025 (July 2020) 18.

¹⁴⁸ *Ibid.*

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These activities have stimulated interest in the opportunities presented by the Centre. In addition to the regular seminars and webinars, the AIFC Academy of Law hosts an annual major legal event, the AIFC Law Conference, under the umbrella of an annual showcase, the Astana Finance Days. Since the official presentation of the AIFC in summer 2018, the conference has gathered in one platform numerous leading judicial officials, senior legal practitioners, business community representatives and other members of the legal profession to discuss pertinent legal issues related to the AIFC Law. Among the speakers, there were highly acclaimed authors, well-respected international chief justices and judges and legal professionals. Even Lord Woolf himself, one of the most distinguished judges in British legal history, has delivered speeches at the Conference in 2018 and 2019.

The Legal Advisory Council, as one of the architects of the AIFC General Legal Framework, was also heavily involved in these events. The Members and I, as Chairman, have had the privilege of visiting Nur-Sultan for this purpose during the beautiful sunny days of 2017, 2018, and 2019 and of speaking on behalf of the LAC. The summer of 2020 was however exceptional since we had to participate remotely because of the global pandemic. I am most grateful for the members of the LAC for their involvement and contribution, which, I believe, helped to make the events successful.

In conclusion, I am happy to say with confidence that the AIFC is on course for the success it seeks. It has been

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well designed for its demanding responsibilities; it has ambitious projects and is well served by able executives and professionals at the helm. Most important of all, it is fortunate to enjoy generous and continuous support from the Government of Kazakhstan. All this enables the AIFC to look into the future with confidence.



CONCLUSION

The AIFC in Nur-Sultan now offers, within what is an essentially civil law country, a financial centre equipped with common law-based legislation and with a Court system staffed by English judges applying the law as so imported. As explained above, this common law jurisdiction generally operates within the legal boundaries of the AIFC and in relation to one or more AIFC Participants, but a certain amount of legal coexistence is, even so, required.

It has been working, in my view, very well so far, albeit there were initially some sceptical views from others. The codified common law, specially written for the Centre, has been widely welcomed, and the judicial system, though not yet much tested in practice, is seen as very suitable for the imaginative venture which has been pioneered in Kazakhstan.

The amendments made in 2017 to the 1995 Constitution of the Republic of Kazakhstan, the supreme

document of Kazakhstan, verified that the AIFC was fully in accord with the spirit and the letter of the Republic's Constitution. With the Constitutional Statute on AIFC it is established on a secure constitutional foundation which will assist it with its current operations and with further development. The AIFC is the first international financial centre to be established in Central Asia, and thus forms a possible precedent for similar developments elsewhere.

With confidence based on this, the AIFC adopted its new Strategy of Development until 2025 with new ambitious projects as the market and rapidly changing world require. Among these new initiatives, the Centre has also turned its attention to developing two new areas of law. I expect them to become important new niches of development in the AIFC in the near future. These are, first, the regulation of the legal profession, and, secondly, the development of LegalTech.

In conclusion, I would like to stress that the established special legal regime is becoming a major player and key instrument for the economic growth of Kazakhstan via attraction of investments. This was also emphasised by the President of Kazakhstan HE Kassym-Zhomart to ensure access of Kazakh entrepreneurs to take advantage of the AIFC jurisdiction and to involve the AIFC as a key tool for the attraction of direct and portfolio investments.

Therefore, the AIFC was created not only for foreign investors but also for local entrepreneurs, since the

CONCLUSION

opportunities of the centre are available to all without exceptions. Hence, our priority is to ensure the welfare of the Nation of Kazakhstan.



ANNEX 1

HIGHLIGHTS IN PICTURES

Here I would like to illustrate some key events, highlights, and moments at works in the AIFC in pictures.



HE Nursultan Nazarbayev, the First President of Kazakhstan, held the Extended Meeting of the Government where he introduced the Plan of the Nation “100 Steps”
Nur-Sultan, 5 May 2015



The First Meeting of the AIFC Management Council
Nur-Sultan, 26 May 2016

THE LAW OF THE AIFC



The First Inaugural Meeting of the AIFC Legal Advisory Council with
HE Erlan Idrissov, Ambassador of the Republic of Kazakhstan to the United
Kingdom, and Dr Kairat Kelimbetov, the Governor of the AIFC
London, 5 May 2017



5th Meeting of the AIFC Legal Advisory Council, where we gathered in the
capital of Kazakhstan for the first time
Nur-Sultan, 23 August 2017

HIGHLIGHTS IN PICTURES



The Official Affirmation Ceremony of the Lord Woolf as Chief Justice of the AIFC Court and other Justices of the AIFC Court with the participation of HE Nursultan Nazarbayev, the First President of the Republic of Kazakhstan
Nur-Sultan, 6 December 2017



14th Meeting of the AIFC Legal Advisory Council
Nur-Sultan, 3 July 2018

THE LAW OF THE AIFC



The AIFC Legal Advisory Council Members and Mr John Leahy
at the AIFC Law Conference
Nur-Sultan, 4 July 2018



The official opening ceremony of the AIFC by HE Nursultan Nazarbayev,
the First President of the Republic of Kazakhstan
Nur-Sultan, 5 July 2018

HIGHLIGHTS IN PICTURES



The official launching of the first trading session on Astana International Exchange
Nur-Sultan, 14 November 2018



The First Inaugural Meeting of the AIFC Advisory Panel on Legal Regulatory Matters with Mr Igor Rogov, Deputy Executive Director of the Foundation of Nursultan Nazarbayev and Member of European Commission for Democracy through Law (the Venice Commission).
Nur-Sultan, 1 July 2019

THE LAW OF THE AIFC



20th Meeting of the AIFC Legal Advisory Council
Nur-Sultan, 1 July 2019

ANNEX 2

THE CONSTITUTIONAL STATUTE AND AIFC ACTS

1. The Constitutional Statute of the Republic of Kazakhstan On Astana International Financial Centre dated 7 December 2015.



(up to date text can be downloaded via provided QR code or the following link: <https://aifc.kz/legal-framework/constitutional-statute-of-the-republic-of-kazakhstan/>)

THE LAW OF THE AIFC

2. AIFC General Legal Framework and Financial Services Framework Acts.



(up to date texts can be downloaded via provided QR code or the following link: <https://aifc.kz/legal-framework/national-legislation-rus/>)

ANNEX 3

3. The Statute of the AIFC Legal Advisory Council, approved by the Order of the Governor of the AIFC No 4 dated 28 February 2017.



(up to date text can be downloaded via provided QR code or the following link: <https://aifc.kz/advisory-bodies-on-legal-matters/lac/>)

