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THE RISE OF TRANSNATIONAL COMMERCIAL COURTS: THE ASTANA INTERNATIONAL FINANCIAL CENTRE COURT

Ilias Bantekas*

ABSTRACT

The proliferation of international commercial courts aims to boost income from legal services and serve as a catalyst for newly found rules of law and thus attract investor confidence. The latter is the underlying purpose for the creation of the Astana International Financial Centre (AIFC) and its Court. The Court's legal framework is set out in the tradition of its competitors in the Gulf and similarly employs an impressive lineup of former senior judges from the United Kingdom. It is a unique experiment because it strives to create a balance between maintaining a judicial institution of the highest caliber while at the same time being subject to several limitations that jeopardize its independence. As companies in the AIFC continue to grow in size and assets, the AIFC Court will inevitably become one of the key dispute resolution institutions in Asia over the next decade.

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I. INTRODUCTION

The provision of efficient legal services has emerged as an industry in and of itself throughout the last decade.¹ Industrialized and newly-wealthy countries have realized that speedy and effective dispute resolution mechanisms anchored within national legal systems have the potential to attract interested fee-paying end-users while benefiting the local legal profession and peripheral services, such as translators, clerks, legal executives, administrators, and others.² When a professional activity becomes an industry it also feeds into the local economy.³ Legal fees generate taxes⁴ and end-users must use hotels, restaurants, public and private transport, and airlines. Additionally, if they have enjoyed their experience, end-users will most likely return as tourists. The legal services sector in the UK is estimated to contribute three percent of the country's GDP,⁵ and a large part of that is due to the London Commercial Courts,⁶ which largely attract international end-users.⁷ Therefore, it is no wonder that English courts have the most cost-effective court fees among all of their global competitors.⁸

¹ *Everyone's a Law Company*, PRACTICE, July–Aug. 2019, <https://thepractice.law.harvard.edu/article/everyones-a-law-company/>.

² See Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 107, 109, 125, 132–33 (2015).

³ See Horst Eidenmuller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J. GLOB. LEGAL STUD. 707, 713 (2011).

⁴ Robert W. Wood, *IRS Form 1099 Rules for Settlements and Legal Fees*, BUS. L. TODAY (Jan. 28, 2020), <https://businesslawtoday.org/2020/01/irs-form-1099-rules-settlements-legal-fees/>.

⁵ See THECITYUK, LEGAL EXCELLENCE, INTERNATIONALLY RENOWNED (2017), which demonstrates that the legal sector alone was found to generate 311,000 jobs in the U.K.

⁶ See *Commercial Court*, GOV.UK, <https://www.gov.uk/courts-tribunals/commercial-court> (last visited Sept. 23, 2020), for a discussion regarding the London Commercial Courts, which is a subdivision of the Queen's Bench Division of the High Court of Justice and is comprised of several specialist chambers, including insurance, construction, contract and business, financial, commercial and others.

⁷ In 2017–18, 70% of the Commercial Court's work was intentional in nature. See JUDICIARY OF ENG. & WALES, THE COMMERCIAL COURT REPORT 2017–2018 7, 9 (2019).

⁸ The courts of England and Wales do not charge a daily hearing fee and are thus the cheapest forum to settle disputes compared to both other courts, and in relation to arbitration. See Queen Mary Univ. of London Sch. of Int'l Arb., Ctr. for Com. L. Stud., *Competitiveness of fees charged for Commercial*

This “legal services tourism” (LST) is wholly different from the notion of forum shopping. The latter assumes that a person, natural or legal, manipulates his or her personal circumstances, chief residence, incorporation, seat, or other, with the purpose of sustaining a civil suit in the courts of a country that would ordinarily deny jurisdiction.⁹ LST concerns a much broader and comprehensive commercial undertaking—the courts and legal services are just part of a larger undertaking whereby end-users move part or all of their business activities to a tailor-made financial center or financial economic zone¹⁰ operating within a state. These zones offer competitive corporate tax rates, hassle-free administrative services—including the elimination of red tape and bureaucracy—as well as the promise of a global hub for business.¹¹ One main attraction of such financial zones is an established court composed of largely international, highly experienced judges, with use of the English language,¹² and operational transnational laws¹³ and principles that are no different from London and New York.¹⁴ Hence, these hybrid transnational commercial courts operate as independent judicial entities wholly outside the procedural and substantive laws of the country hosting them and thus provide an additional layer of guarantees for investors that are otherwise suspicious of the

Court Services: An overview of selected jurisdictions 3 (2013).

⁹ See Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QUINNIPIAC L. REV. 25, 25–26 (2005), who addresses why forum shopping should be considered wrong as a general rule.

¹⁰ The impact of special economic zones on the rule of law in the target country has received little attention, but see MADELEINE MARTINEK, EXPERIMENTAL LEGISLATION IN CHINA BETWEEN EFFICIENCY AND LEGALITY: THE DELEGATED LEGISLATIVE POWER OF THE SHENZHEN SPECIAL ECONOMIC ZONE 321–22 (2018), for a discussion of the improvement of the legal design of experimental regulations in special economic zones which is done by striking a balance between the pursuit of rapid socioeconomic progress on the one hand, and the increasing need and will to govern by the rule of law on the other.

¹¹ *Id.* at 322.

¹² Christoph A. Kern, *English as a Court Language in Continental Courts*, 5 ERASMUS L. REV. 187, 188–89, 193, 209 (2012).

¹³ See Legal High Comm. for Fin. Mkts. of Paris, *Recommendations for the Creation of Special Tribunals for International Business Disputes* 4, 13 (2017), https://publications.banque-france.fr/sites/default/files/rapport_07_a.pdf, for a study regarding whether there was a need for Paris to establish an English-speaking chamber.

¹⁴ *Id.* at 12–13.

independence of ordinary local courts and institutions.¹⁵ Such hybrid courts must also compete with the institution of arbitration, which the parties have recourse to, as well as the jurisdiction of other courts, which investors in a financial zone may simply choose through choice of forum clauses in their contracts.¹⁶ At the same time, it should not be forgotten that certain long-entrenched institutions attract end-users for particular disputes, but not for others.¹⁷ For example, one of the perceived advantages of New York City arbitration is that even mistakes of fact and law do not warrant vacatur of an otherwise rational award.¹⁸

In the last two decades, three broad types of hybrid transnational commercial courts (HTCC) have been established.¹⁹ The first is grounded in and is an integral part of quasi-independent financial centers, like the Qatar International Court and Dispute Resolution Centre (QICDRC), which is an entity of the Qatar Financial Center (QFC), formerly known as the Commercial and Civil Court of the Qatar Financial Center.²⁰ The QICDRC's jurisdiction is grounded in the governing law of the QFC.²¹ The same is true of the Dubai International Financial

¹⁵ Eidenmuller, *supra* note 3, at 715.

¹⁶ *Id.* at 722–23.

¹⁷ See *id.*, for an explanation that end users may choose to resolve disputes at these institutions for reasons such as “the quality of the judges and courts,” a neutral venue, and the institutions’ levels of professionalism.

¹⁸ See Hackett v. Milbank, 86 N.Y.2d 146, 155 (1995), which demonstrates that few, if any, stay claims will ever be successful in this jurisdiction.

¹⁹ Stephan Wilske, *International Commercial Courts and Arbitration—Alternatives, Substitutes or Trojan Horse?*, 11 CONTEMP. ASIA ARB. J. 153, 156 (2018).

²⁰ *History—Origins of the Court*, QATAR INT’L CT. & DISP. RESOL. CTR., <https://www.qicdrc.gov.qa/history-origins-court> (last visited Sept. 25, 2020).

²¹ “The QFC was established by Law No. 7/2005 (the ‘QFC law’).” Zain Al Abdin Sharar & Michael Earley, *The Qatar International Court: Judicial Update*, MENA BUS. L. REV. 46, 47 (2018). “The QFC consists of the QFC Authority, the QFC Regulatory Authority, the Regulatory Tribunal, and the Civil and Commercial Court.” *Id.* Article 34 of the Court’s Regulations and Procedural Rules grants the court wide enforcement powers. *Id.* More specifically, Article 34(3)(2) authorizes the Court to make “any order that it considers necessary in the interests of justice.” *Id.* “In addition, Schedule 6(16) of the QFC Law allows the QIC to use the provisions of the [Qatari] Civil and Commercial Procedures Law (Qatar Law No. 13/1990) where the QFC Law and Regulations are silent on a concerned matter.” *Id.*

Center (DIFC) Courts, whose jurisdiction emanates from DIFC-related disputes.²² In fact, the DIFC has generated so much case law that it has succeeded to establish itself as a distinct and highly original legal system far beyond the otherwise forward-looking legal system of Dubai and the Emirates.²³ The subject matter of this article, the Court of the Astana Financial Services Centre, is part of this paradigm, as this Court's creators aimed to emulate the DIFC court model.²⁴ An additional element that renders these courts attractive is the autonomy of parties to choose the governing law of their choice.²⁵ For example, the QICDRC is meant to apply QFC law and regulations as well as the law set out by the parties in their contractual relationships,²⁶ albeit in practice the Court relies predominantly on common law principles and case law. This is not only because these principles and cases are more familiar to the majority of the judges, but also because English law is the predominant law in a majority of transnational commercial agreements.²⁷ By way of illustration, in *Leonardo S.p.A v. Doha Bank Assurance Company*, the Court was faced with demand guarantees under the Uniform Rules for Demand Guarantees, which were adopted by the International Chamber of Commerce in 1991.²⁸ Even so, the Court

²² See Jayanth K. Krishnan & Priya Purohit, *A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution*, 25 AM. REV. INT'L ARB. 497, 497–98 (2014).

²³ Jayanth K. Krishnan, *The Story of the Dubai International Financial Center Courts: A Retrospective* 5 (Ind. Univ. Maurer Sch. of Law, Research Paper No. 404, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3280883.

²⁴ Nicolás Zambrana-Tévar, *The Court of the Astana International Financial Center in the Wake of Its Predecessors*, 12 ERASMUS L. REV. 121, 122 (2019).

²⁵ *Id.* at 128.

²⁶ See QATAR FIN. CTR. LAW NO. 7 OF 2005 [QFC LAW NO. 7] (including amendments made by Law No. 14 of 2009), https://qfcra-en.thomsonreuters.com/sites/default/files/net_file_store/QFC_Law-V3-Oct09.doc.pdf. This is also spelled out in Article 11 of the Court's Regulations and Procedural Rules, whereas Article 4 enunciates the principle of the “overriding objective” of the Court, which is to “deal with all cases justly.” THE QATAR FIN. CTR. CIV. AND COM. CT. REGULS. AND PROCEDURAL RULES arts. 4, 11, https://www.qicdrc.gov.qa/sites/default/files/s3/wysiwyg/qfc_civil_and_commercial_court_regulations_date_of_issuance_15_december_2010_0.pdf.

²⁷ See generally *Why English Law Governs Most International Commercial Contracts*, QLTSCHOOL (Sept. 12, 2016), <https://www.qlts.com/blog/why-english-law-governs-most-international-commercial-contracts> (discussing why English law is preferred).

²⁸ *Leonardo S.p.A v. Doha Bank Assurance Co.*, Case No. 12 of 2019,

went on to examine the nature of such guarantees by reference to English case law.²⁹

The second type of HTCC is composed of expert judicial chambers, in addition to the existing judicial architecture of the states in which they are situated.³⁰ The jurisdiction of these chambers is triggered by a choice of forum clause in the parties' agreement.³¹ The primary consideration of such courts is to offer English-language dispute resolution in relation to complex transnational commercial disputes through speedy procedures and unlimited party autonomy, while still grounded in a stable, respectable, and well-performing legal system.³² This is the case with the Singapore International Commercial Court (SICC), whose rationale is, no doubt, rather different from the HTCC encountered in the previous paragraph.³³ The SICC is part of the Singapore Supreme Court and constitutes a division of the High Court.³⁴ In accordance with section 18(d) of the Supreme Court of Judicature Act, the SICC has conferred jurisdiction over disputes of an international and commercial nature submitted to it expressly by the parties and it may also hear cases transferred to it by the High Court.³⁵ Hence, the SICC seeks to emulate the success of the London Commercial Court,³⁶ and to a great degree,

Judgment, Civ. and Com. Ct. of the Qatar Fin. Ctr. App. Div., ¶ 44 (2020), https://www.qicdrc.gov.qa/sites/default/files/s3/judgments/english/case_no_12_of_2019_judgment_16_march_2020.pdf.

²⁹ *Id.* ¶ 42.

³⁰ See Wilske, *supra* note 19, at 157–59.

³¹ See Man Yip, *The Singapore International Commercial Court: The Future of Litigation?*, 12 ERASMUS L. REV. 81, 85 (2019); Hague Convention on Private International Law, Convention on Choice of Court Agreements art. 3, June 30, 2005, 44 I.L.M. 1294; see also *Vinmar Overseas (Sing.) Pte Ltd. v. PTT Int'l Trading Pte Ltd.*, Civil Appeal No. 159 of 2017, Judgment, Sing. Ct. App. (SGCA) ¶ 122 (2018), [https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/final-version-for-release-\(v1\)-pdf-1.pdf](https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/final-version-for-release-(v1)-pdf-1.pdf), for an example of how the Singapore Court of Appeals ruled on choice of court agreements and the element of party autonomy.

³² Yeshnah D. Rampall & Ronan Feehily, *The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium*, 23 HARV. NEG. L. REV. 345, 348 (2018).

³³ Yip, *supra* note 31, at 86.

³⁴ *Id.* at 84.

³⁵ Supreme Ct. of Judicature Act, 2007, ch. 322, § 18(d) (Sing.).

³⁶ See Man Yip, *The Resolution of Disputes before the Singapore International Commercial Court*, 65 INT'L & COMPAR. L. Q. 439, 445 (2016).

it has succeeded.³⁷ The Netherlands Commercial Court (NCC) and The Netherlands Commercial Court of Appeal (NCCA),³⁸ which falls within this type of HTCC, is a specialist chamber of the Amsterdam District Court and the Amsterdam Court of Appeal.³⁹ Equally, the China International Commercial Court (CICC), which was set up by the Chinese Supreme Court, has a similar remit.⁴⁰ In fact, the CICC's jurisdiction is the result of an interpretation issued by the Supreme Court and, as a result, it is subject to the Chinese Civil Procedure Law.⁴¹ Such specialist chambers have not necessarily been welcomed by national parliaments, as the political tensions underlying the proposed Brussels International Business Court (BIBC)⁴² and a similar

³⁷ See SING. INT'L COM. CT., REPORT OF THE SINGAPORE INTERNATIONAL COMMERCIAL COURT COMMITTEE ¶ 6 (2013) ("The SIAC is the fourth most preferred arbitral institution (after the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the International Centre for Dispute Resolution (ICDR)) . . .").

³⁸ NETH. COM. CT., <https://netherlands-commercial-court.com/#> (last visited Nov. 5, 2020).

³⁹ Neth. Com. Ct., *Rules of Proc. for the Int'l Com. Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal)*, DE RECHTSPRAAK, art. 1.1, § 1.1.1 (2018), <https://www.rechtspraak.nl/SiteCollectionDocuments/ncc-procesreglement-en.pdf>; *Jurisdiction of the Netherlands Commercial Court*, NETH. COM. CT., <https://netherlands-commercial-court.com/jurisdiction-netherlands.html> (last visited Oct. 14, 2020); see also Georgia Antonopoulou & Xandra Kramer, *The Netherlands Commercial Court holds its first hearing!*, CONFLICT LAWS.NET (Feb. 18, 2019), <https://conflictoflaws.net/2019/the-netherlands-commercial-court-holds-its-first-hearing/> (delivering the court's first judgment concerning an application for court permission to privately sell pledged shares).

⁴⁰ See *A Brief Introduction of China International Commercial Court*, CHINA INT'L COM. CT., <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (last updated June 28, 2018).

⁴¹ Lance Ang, *International Commercial Courts and the Interplay Between Realism and Institutionalism: A Look at China and Singapore*, HARV. INT'L L. J.: ESSAYS, ONLINE SCHOLARSHIP (Mar. 2020), <https://harvardilj.org/2020/03/international-commercial-courts-and-the-interplay-between-realism-and-institutionalism-a-look-at-china-and-singapore/>; see also China Guiding Cases Project, *Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*, STAN. L. SCH. (July 1, 2018), <https://cgc.law.stanford.edu/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts/>, for a list of five types of cases the CICC has jurisdiction over per Article 2 of the CICC Provisions.

⁴² See Erik Peetermans & Philippe Lambrecht, *The Brussels International Business Court: Initial Overview and Analysis*, 12 ERASMUS L. REV. 42, 43–44, 44 n.21, 48 & n.81 (2019), for a discussion of the bills establishing the Brussels International Business Court including, Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives) 54,

English-speaking chamber in Germany exemplify.⁴³

The third type, which is not a distinct mechanism, but rather merges elements of all the aforementioned structures, concerns the function of several HTCC to assist arbitral proceedings.⁴⁴ In this sense, chambers serve as flexible and highly expert ‘competent courts’ in the sense of article 6 of the UNCITRAL Model Law on International Commercial Arbitration.⁴⁵ Examples of these types of HTCC include the Amsterdam International Commercial Court,⁴⁶ the QICDRC,⁴⁷ and the AIFC Court,⁴⁸ among others.

It is within this context that the Astana International Financial Centre (AIFC) and its Court are examined.⁴⁹ The AIFC and the Court are the result of a troubled past during which the newly founded Republic of Kazakhstan tried to grapple with the

3072/007, at 59, and Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives) 54, 3072/010, at 4, which indicate that the absence of an English-speaking chamber in any existing Belgian court is due to the Belgian legislature’s reluctance in that creating one will only increase the number of disputes and how the Court outsources for “specialist” judges who must speak English and have expertise in international trade law. *See also* 2020 CONST. art. 151 (Belg.) (indicating that the High Council of Justice for all of Belgium is composed of a Dutch-speaking college and a French-speaking college).

⁴³ Jenny Gesley, *Germany: Regional Court of Frankfurt Establishes English-Speaking Chamber for Commercial Matters*, LIBR. CONG. (Dec. 6, 2017), <https://www.loc.gov/law/foreign-news/article/germany-regional-court-of-frankfurt-establishes-english-speaking-chamber-for-commercial-matters/>; *see also* Gesetzentwurf [Cabinet draft], Deutscher Bundersrat: Drucksachen [BR] 53/18 (Ger.) (establishing an English-speaking chamber for international commercial matters in Germany).

⁴⁴ *See History—Origins of the Court*, *supra* note 20 (listing the variety of disputes heard in the QICDRC).

⁴⁵ *See* ILIAS BANTEKAS ET AL., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 96–103 (2020).

⁴⁶ *See, e.g.*, Art. 4:1020–73 RV (Neth.).

⁴⁷ *See* Qatar Int’l Ct. and Disp. Resol. Ctr., *Law No. 2 of 2017 Promulgating the Civ. and Com. Arbitration Law*, art. 1 (Qatar), https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/107697/132714/F-1501879919/law_no_02_2017_promulgating_the_civil_and_comm.pdf [hereinafter *QFC Law No. 2*].

⁴⁸ *See* Astana Int’l Fin. Ctr., *AIFC Arbitration Regulations* ¶ 14 (2017) (Kaz.), <https://aifc.kz/files/legals/73/file/aifc-arbitration-regulations-2017.pdf> [hereinafter *AIFC Arb. Regul. 2017*].

⁴⁹ *Id.*

legal implications of its vast oil and gas deposits.⁵⁰ Despite its wealth and its liberal attitude towards trade and investment, at least in contrast to most of its Central Asian neighbors, Kazakhstan's laws have always been in a constant state of flux and rushed amendments.⁵¹ In addition, foreign investors have never really seen the country's legal regime as stable or arbitration-friendly.⁵² Kazakhstan's court system is notoriously biased in favor of government entities, and its inward investment in fields other than energy have been weak.⁵³ Because of this, it is not surprising that foreign investors and those engaging in trans-border commerce have sought to make use of arbitration to resolve disputes, whether with government entities or other private entities.

The AIFC is a relative newcomer to the various hybrid commercial courts mainly in the Gulf.⁵⁴ The AIFC itself was not only set up to emulate those financial centers but also, and more importantly, to alleviate Kazakhstan's poor investment image abroad.⁵⁵ It is not enough to set up one semi-autonomous financial center, even with a court comprising eminent international judges, in an attempt to fix Kazakhstan's tarnished image. The very fact that the Kazakhstani capital was moved from Almaty

⁵⁰ See ILIAS BANTEKAS ET AL., OIL AND GAS LAW IN KAZAKHSTAN: NATIONAL AND INTERNATIONAL PERSPECTIVES 229–31 (2004).

⁵¹ See, e.g., POVERTY REDUCTION AND ECONOMIC MANAGEMENT UNIT: EUROPE AND CENTRAL ASIA REGION, REPUBLIC OF KAZAKHSTAN TAX STRATEGY PAPER REPORT NO. 36494-KZ VOLUME 1: A STRATEGIC PLAN FOR INCREASING THE NEUTRALITY OF THE TAX SYSTEM IN NON-EXTRACTIVE SECTORS 1, 39 (2008) (criticizing “the arbitrary and unpredictable methods of raising revenues”).

⁵² See U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2018 Country Reports on Human Rights Practices: Kazakhstan 8–10 (2018).

⁵³ See Paul Stronski, *Kazakhstan at Twenty-Five: Stable but Tense*, CARNEGIE ENDOWMENT INT'L PEACE (Feb. 4, 2016), <https://carnegieendowment.org/2016/02/04/kazakhstan-at-twenty-five-stable-but-tense-pub-62642>.

⁵⁴ See Barclay Ballard, *Kazakhstan's capital seeks new role amid shifting global markets*, WORLD FIN. (Nov. 4, 2019), <https://www.worldfinance.com/markets/kazakhstans-capital-seeks-new-role-amidst-shifting-global-markets>.

⁵⁵ See *The Strategy for development of the Republic of Kazakhstan*, OFF. SITE PRESIDENT REPUBLIC KAZ., https://www.akorda.kz/en/official_documents/strategies_and_programs (last visited Oct. 16, 2020) (noting that the Kazakhstan 2030 Vision considered economic development through a financial system as one of its seven priorities and the AIFC is a direct implementation of this vision); Ailuna R. Utegenova, *Kazakhstan's 2030 Development Strategy: Significance and Results*, 2010 OSCE Y.B. 133, 136–37 (2011).

to the steppes of Astana, which then assumed the name of the Kazakhstani President (for life), Nursultan Nazarbayev, who hails from Astana,⁵⁶ is evidence of authoritarianism of the highest caliber. The Gulf states, on the other hand, already enjoyed high volumes of commerce, trade, and successful attempts at high technology before setting up financial centers to attract more financial service providers.⁵⁷ The rule of law in the Gulf is strong despite the absence of democratic structures (at least in the Western sense).⁵⁸ Additionally, public institutions and the standard of living in the Gulf far overshadow the standard of living in Kazakhstan, even though the latter is vastly oil-rich, has a relatively small population, and fertile land.⁵⁹ It is, therefore, important to see the AIFC as part of a larger project, which includes several special economic zones and the creation of the Astana International Exchange (AIX).⁶⁰ “The Shanghai Stock Exchange, the US Nasdaq, the Beijing-sponsored Silk Road Fund and Goldman Sachs all joined the AIFC Authority as shareholders and strategic partners in the exchange.”⁶¹ The Kazakhstani government is committed to using the AIX to complete its ambitious privatization process by listing minority stakes in

⁵⁶ Ballard, *supra* note 54.

⁵⁷ See Kristian Coates Ulrichsen, *The Gulf States and the Rebalancing of Regional and Global Power*, 3–5 (Jan. 8, 2014) (working paper) (on file with the Rice University James A. Baker III Institute for Public Policy).

⁵⁸ See Mark Fathi Massoud, *International Arbitration and Judicial Politics in Authoritarian States*, 39 LAW & SOC. INQUIRY 1, 11–12 (2014).

⁵⁹ See MARTHA BRILL OLCOTT, *KAZAKHSTAN: UNFULFILLED PROMISE?* 3–10 (2d ed. 2010); Nadim Kawach, *High living standards in UAE*, GULF NEWS (June 22, 2002), <https://gulfnews.com/uae/high-living-standards-in-uae-1.391517>; Nazym Shedenova & Aigul Beimisheva, *Social and Economic Status of Urban and Rural Households in Kazakhstan*, 82 *PROCEDIA SOC. & BEHAV. SCI.* 585, 585–87 (2013).

⁶⁰ See *Overview: Astana International Exchange (AIX)*, ASTANA INT’L EXCH., <https://www.aix.kz/about-aix/overview/> (last visited Sept. 8, 2020). AIX is an entity situated with the AIFC and it is regulated by the Astana Financial Services Authority, which is an AIFC body. See *id.*; *Rules and Regulations*, ASTANA INT’L EXCH., <https://www.aix.kz/rules-regulations-2/rules-regulations/> (last visited Nov. 7, 2020) (“Pursuant to Part 3, Chapter 2 of the AIFC Framework Regulations, AFSA has granted AIX a license to carry on one or more Market Activities as an Authorised Market Institution.”).

⁶¹ Jacopo Dettoni, *AIFC sets sights on central Asian financial hub status*, FDI INTEL. (Aug. 15, 2019), <https://www.fdiintelligence.com/article/75360>. For a complete list of AIX’s trading partners, see *Trading Members*, ASTANA INT’L EXCH., <https://www.aix.kz/aix-membership/aix-members/trading-members/>.

some of the most prominent state enterprises.⁶²

The AIFC Court is a welcome contribution to Kazakhstan's judiciary, but it must feed the latter with its exemplary work, practices, and development of the law—both substantive and procedural. If the AIFC Court remains a stand-alone island in an ocean of ill-equipped, non-independent,⁶³ largely biased national courts, and avoids externalizing its concern over the deterioration of the rule of law, its status and legitimacy will be compromised. Moreover, the AIFC Court will have to prove and justify why foreign investors should endow it with jurisdiction over and above arbitral tribunals⁶⁴ seated outside Kazakhstan, even in respect of entities incorporated or listed in the AIFC. At the time of writing this article, the AIFC Court had issued only a single order.⁶⁵ At the same time, it has not attracted much analysis from dispute resolution scholars,⁶⁶ but this may be attributable to so-called “tribunal fatigue,” the proliferation of international courts and tribunals, and perhaps the fact that few are optimistic that it will actually convince end-users of its value.⁶⁷ This author is hopeful that the AIFC and the AIFC

⁶² Dettoni, *supra* note 61.

⁶³ See Klaus Schwab & Xavier Sala-i-Martin, *The Global Competitiveness Report*, WORLD ECON. F. (2017–2018), <http://www3.weforum.org/docs/GCR20172018/05FullReport/TheGlobalCompetitivenessReport2017%E2%80%932018.pdf>, for a survey on perceptions of judicial independence conducted in 2017, where Kazakhstan scored a 3.7 out of a possible 7, which shows some, but very few, signs of progress. See also Alexei Trochev, *Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts*, 50 CORNELL INT'L L. J. 107 (2017), for a more critical view of the perceptions of judicial independence.

⁶⁴ See Queen Mary Univ. of London Sch. of Int'l Arb., Ctr. for Com. L. Stud. & White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration 2* (2018) (finding in one of the largest surveys of corporate preferences that in respect to dispute resolutions, a staggering “97% of respondents indicate[d] international arbitration is their preferred method of dispute resolution . . .”).

⁶⁵ See *Aurora AG Ltd. v. Star Asian Mining Co.*, Case No. AIFC-C/SCC/2019/0001, Judgment, Small Claims Ct. of the AIFC, 2 (Apr. 25, 2019), https://court.aifc.kz/uploads/Case%20No.%201%20of%202019%20-%20Aurora%20AG%20Limited%20v%20Star%20Asian%20Mining%20Company%20LLP_eng.pdf, for an exemplification of a decision under the small claims' procedures.

⁶⁶ See Zambrana-Tévar, *supra* note 24, at 134.

⁶⁷ See Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC'Y INT'L L. PROC.

Court will realize the importance of this project for Kazakhstan and will zealously guard its independence and legitimacy and will contribute to the overall rule of law in Kazakhstan.

II. THE PLACE OF THE AIFC COURT IN THE AIFC ARCHITECTURE

The AIFC Court is an entity—specifically a ‘body’—within the general structure of AIFC.⁶⁸ It is the existence of the AIFC and its designated goals and activities that necessitate the creation of the Court.⁶⁹ In the mold of the DIFC and the QFC, the AIFC was conceived as a special economic zone⁷⁰ meant to serve as a conduit for the investment in Kazakhstan of financial, economic, and insurance service providers.⁷¹ “At the end of 2019, the gross inflow of FDI to Kazakhstan amounted to \$ 24.1 billion[,]”⁷² which is significant in its attempt to diversify the economy. The AIFC Constitutional Statute and succeeding acts and regulations provide significant benefits to foreign financial investors.⁷³ However, similar to the Gulf special economic zone courts, it was recognized that, in the absence of a highly regarded court with special jurisdiction, the AIFC did not offer substantial guarantees to investors.⁷⁴ The creation of the AIFC through constitutional law underpins its importance and distinguishes it from the other special economic zones operating in the

160, 160 (2000).

⁶⁸ CONSTITUTIONAL STATUTE NO. 438-V ZRK OF 7 [AIFC CONST. STATUTE] art. 9(1), at 8 (Kaz.), <https://aifc.kz/files/legals/7/file/constitutional-statute-with-amendments-as-of-30-december-2019.pdf>.

⁶⁹ *Id.* art. 2, at 3.

⁷⁰ By 2020 there were thirteen special economic zones in Kazakhstan. See *Special Economic Zone*, KAZAKH INV. NAT’L CO. (2020), <https://invest.gov.kz/doing-business-here/fez-and/>. These are regulated by the Law of the Republic of Kazakhstan No. 242-V art. 1 (Kaz.). See Ministry of Justice of the Republic of Kazakhstan, *On Judicial System and Status of Judges in the Republic of Kazakhstan*, art. 38–1 (Apr. 3, 2019), <http://adilet.zan.kz/eng/docs/Z1900000242>.

⁷¹ AIFC CONST. STATUTE, *supra* note 68, art. 2, at 3.

⁷² Alzhanova Raushan, *Volume of foreign investment gross inflow in Kazakhstan reached \$ 350 bln*, KAZINFORM INT’L NEWS AGENCY (Apr. 8, 2020, 10:20 AM), https://www.inform.kz/en/volume-of-foreign-investment-gross-inflow-in-kazakhstan-reached-350-bln_a3635217.

⁷³ *Towards Best Practice Guidelines for the Development of Economic Zones*, MENA-OCED INV. PROGRAMME 1, 8 (Nov. 23, 2009), <https://www.oecd.org/mena/competitiveness/44866585.pdf>.

⁷⁴ *Id.* at 8–9.

country. It is also part of the constitutional reforms which have taken place with a view to better separation of powers in accordance with the requirements of the Council of Europe and the Venice Commission.⁷⁵

The AIFC Constitutional Statute distinguishes between AIFC bodies and AIFC participants.⁷⁶ The former consists of the public entities that comprise the AIFC itself, each of which possesses a distinct legal personality and powers.⁷⁷ The AIFC bodies are the Management Council, the AIFC Governor, the AIFC Authority, the Astana Financial Services Authority, the AIFC Court, and the International Arbitration Centre.⁷⁸ AIFC participants comprise legal entities registered under the AIFC Acting Law, as well as legal entities recognized by AIFC.⁷⁹

III. JURISDICTION OF THE AIFC COURT

Article 13(4) of the AIFC Constitutional Statute sets out the jurisdiction of the AIFC Court.⁸⁰ While excluding authority over criminal and administrative proceedings, its jurisdiction encompasses: “(1) disputes between AIFC Participants [*inter se*], 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; [and] (3) disputes transferred to the AIFC Court by agreement of the parties.”⁸¹ Section 26(1) of the 2017 AIFC

⁷⁵ See Eur. Consult. Ass., *Kazakhstan Opinion on the Amendments to the Constitution*, 110th Plen. Sess., Doc. No. 882 (2017), where the Venice Commission remarked the progress that had been made; particularly, in regard to the devolution of power from the President, adding in paragraph 19 that, “[t]he draft propose[d] to abolish the right of the President to issue decrees having the force a law, which will certainly strengthen the legislative power.” “However, the possibility to establish priorities in the adoption of different pieces of legislation might somewhat reduce the positive impact of this important change.” *Id.*

⁷⁶ AIFC CONST. STATUTE, *supra* note 68, art. 1(5), (9), at 3, 8.

⁷⁷ *Id.* art. 9, at 8.

⁷⁸ *Id.*

⁷⁹ *Id.* art. 1(5), at 3.

⁸⁰ *Id.* art. 13(4), at 10.

⁸¹ *Id.* art. 13(4)(1)–(3), at 10. Curiously, this wording was slightly altered in Art 26(1)(b) of the AIFC Court Regulations. See Astana Int'l Fin. Ctr., *AIFC Court Regulations: Resolution of the AIFC Management Council*, pt. 5, § 26(1), at 16 (2017) (Kaz.), <https://aifc.kz/files/legals/68/file/3.-legislation-aifc-court->

Court Regulations includes an additional strand of jurisdiction in subsection (d), namely, “the interpretation of AIFC Acts.”⁸²

Unlike the QFC Court, which has authority over regulatory issues, which, in turn, may be viewed as administrative matters, the AIFC Court does not have such jurisdiction.⁸³ Even so, in a dispute between an AIFC participant and an AIFC body, it is more than likely that the Court will have to pass judgment on regulatory or administrative issues, particularly where a participant claims that a body has acted *ultra vires* or in violation of the AIFC Acts. If such claims were to be viewed by the Court or the AIFC Bodies as “administrative” matters or proceedings and, hence, beyond the jurisdiction of the Court, it is unlikely that foreign investors would make much use of the Court.⁸⁴ Section 26(2) of the AIFC Court Regulations emphasizes that the term “disputes” “applies to civil or commercial disputes arising from transactions, contracts, arrangements or incidences.”⁸⁵ This, no doubt, excludes the range of administrative contracts and transactions entered into between private investors (AIFC participants) and AIFC bodies.⁸⁶ As a result, it is wholly unlikely that AIFC participants will not subject such matters to commercial or investment arbitration. One must look to the

regulations-2017.pdf [hereinafter *AIFC Ct. Regul. 2017*]. In particular, “activities” is replaced by “operations,” whereas “governed” is replaced by “regulated.” *Id.* pt. 5, § 26(1), at 16. Moreover, “Acting Law of the AIFC” is replaced by “the law of the AIFC.” *Id.* It is not clear if this is merely a drafting oversight or a conscious choice with clear implications.

⁸² *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(1)(d), at 16.

⁸³ Qatar Fin. Ctr. Regul. Auth., *Introducing the Qatar Financial Centre Regulatory Authority* 2–3 (2020).

⁸⁴ At the time of writing, Kazakhstan was in the process of finalizing an administrative code, replacing all other discrete acts. See Eur. Consult. Ass., *Kazakhstan Opinion on the Amendments to the Constitution*, 116th Plen. Sess., Doc. No. 931 (2018) [hereinafter *Kaz. Op. on Amend. to Const.*]. Article 30 of this code defines an administrative body as “a public body, a local authority, as well as other organisations which are authorised under the laws of the Republic of Kazakhstan to perform activities in the sphere of state governance of aimed at ensuring the interests of state and public (public functions).” *Id.* pt. IV, § f, ¶ 35, at 9.

⁸⁵ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(2), at 16.

⁸⁶ See *Kaz. Op. on Amend. to Const.*, *supra* note 84, pt. V, ¶¶ 51–52, at 11 (emphasizing that the draft administrative code was unclear about the jurisdiction of administrative courts, which might limit the discretion of the AIFC Court and certainly renders its authority in these matters unclear).

various entities established by AIFC bodies to ascertain whether disputes arising from those bodies fall within the jurisdiction of the AIFC Court. The AIX Business Rules, for example, specify that the “[r]ules shall be governed by and construed in accordance with the laws, acts and regulations of the AIFC and each Member irrevocably submits to the exclusive jurisdiction of the AIFC Court and its legal jurisdiction.”⁸⁷ Subsequently, all members waive the right to challenge the jurisdiction of the AIFC Court.⁸⁸

Paragraph five of Section 26 of the AIFC Court Regulations make a slight exception to the “administrative process” exception.⁸⁹ It stipulates that:

The [AIFC] Court of First Instance has jurisdiction to hear and determine an appeal from the decision of an AIFC Body, Organisation, or Participant, as provided for in the AIFC Constitutional Statute, AIFC Regulations, AIFC Court Rules, or other AIFC Rules 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.⁹⁰

Section 26(1) makes it clear that, with respect to the first two categories of disputes (a and b), the AIFC Court possesses exclusive jurisdiction.⁹¹ Although the chapeau (i.e. paragraph 1) implies that exclusive jurisdiction applies also with respect to disputes transferred to the Court by agreement of the parties and the interpretation of AIFC Acts, it goes on to state in paragraph three of Section 26 that, “[t]he reference to ‘transferred to the Court by agreement of the parties’ in this Article applies to all parties, including parties not registered in the AIFC, such that all parties may ‘opt in’ to the jurisdiction of the Court by agreeing to give the Court jurisdiction pre or post-dispute.”⁹²

⁸⁷ Astana Int’l Exch. [AIX], *AIX Business Rules* art 1.19.1 (emphasis omitted).

⁸⁸ *Id.* art. 1.19.2.

⁸⁹ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(5), at 16.

⁹⁰ *Id.*

⁹¹ *Id.* pt. 5, § 26(1), at 16.

⁹² *Id.* pt. 5, § 26(3), at 16.

The jurisdiction contemplated in paragraph three is of some significance because assuming the AIFC bodies do not exercise authoritarian rule against the interests of investors, the bulk of disputes should be of a private nature between investors, their contractors, and sub-contractors.⁹³ If the AIFC and its Court want to imitate the work and attractiveness of entities such as the London Commercial Court or the DIFC, it must first attract a critical mass of investors to the AIFC,⁹⁴ which, in turn, will generate a healthy string of cases not only between registered participants but also non-registered parties. This, of course, implies that registered and non-registered parties will perceive the AIFC Court as a better alternative to international commercial arbitration, which is unlikely at this point.

Paragraph eight of Section 26 of the AIFC Court Regulations provides an additional dimension to the Court's jurisdiction.⁹⁵ It states that "[t]he Court shall have jurisdiction in relation to any matter in respect of which jurisdiction is conferred on it by the AIFC Constitutional Statute or AIFC Regulations, including with regards to the Court's authority to perform functions to facilitate effective arbitration."⁹⁶

The only possible meaning underlying this provision must be its reference to future forms of jurisdiction as and when the AIFC Constitutional Statute or Regulations are amended. As to the last part of Section 26(8), the Court is clearly referenced as the "competent court" of AIFC arbitrations in the sense of Article 6 of the UNCITRAL Model Law on International Commercial Arbitration.⁹⁷ This eventuality is analyzed in more detail in a

⁹³ See *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(3), at 16.

⁹⁴ By July 2019, there were 200 investors registered in the AIFC, including the China Construction Bank, which is the second largest asset globally. See *200 companies registered in AIFC jurisdiction*, ASTANA INT'L FIN. CTR. (July 2, 2019), <https://aifc.kz/press-relizy/200-companies-registered-in-aifc-jurisdiction/>.

⁹⁵ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(8), at 17.

⁹⁶ *Id.*

⁹⁷ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*, ch. 1, art. 6, at 4 (Vienna: United Nations, 2008), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [hereinafter *UNCITRAL Model Law*].

subsequent section.

An issue that typically goes unnoticed in the statutes and operations of specialized courts, such as the AIFC Court, is their precise place within the complex web of private international law, particularly where choice of forum is concerned.⁹⁸ This issue is irrelevant in the sphere of arbitration because arbitration very much excludes the application of private international law unless the law of the seat deems otherwise.⁹⁹ As a matter of international law, it is unclear whether specialized hybrid courts are part of the ordinary judicial machinery of the state in which they are situated. If not, their status is similar to arbitral tribunals, but their judgments will not be considered awards under the terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁰⁰ Such a state of affairs would place specialized courts at a disadvantage, not only because it would disengage them from the global web of civil and commercial courts and their ability to communicate through the language of private international law, but it would also forbid the parties from recognizing and enforcing judgments through existing bilateral and multilateral channels because of a lack of reciprocity. As a result, it is the position of this author that specialized courts—including the AIFC Court—are subject to the entire gamut of private international law similar to Kazakhstani courts.

These considerations have unfortunately not been addressed except for a partial explanation in a subsequent section within the AIFC Court Regulations. Paragraph ten of Section 26 of the AIFC Court Regulations only refers to a jurisdictional delimitation between the AIFC Court and the ordinary courts of Kazakhstan, but again there is no clear rule as to how such

⁹⁸ See Gordon Blanke, *Dubai courts v DIFC courts: just a jurisdictional stand-off or an outright declaration of war?*, THOMSON REUTERS (June 12, 2017), <http://arbitrationblog.practicallaw.com/dubai-courts-v-difc-courts-just-a-jurisdictional-stand-off-or-an-outright-declaration-of-war/>.

⁹⁹ See *id.*

¹⁰⁰ See United Nations Commission on International Trade Law, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. 5, at 9 (New York: United Nations, 1958) 4739 U.N.T.S. 330 [hereinafter *The New York Convention*].

delimitation is to be performed.¹⁰¹ It states that “[t]he Court shall consider the express accord of the parties to a case that the Court shall have jurisdiction and if the Court considers it desirable or appropriate, it may decline jurisdiction or may refer any proceedings to another Court within the Republic of Kazakhstan.”¹⁰²

This provision is confusing, to say the least, and contravenes the express authority of the Court to entertain disputes referred to it by registered and non-registered AIFC participants.¹⁰³ How then should the Court consider it “desirable” or “appropriate” to decline jurisdiction and refer the parties to litigation before the Kazakhstani courts? Several issues arise from this provision. First, there is no apparent rule justifying referrals to Kazakhstani courts in the event that the AIFC Court determines that it does not possess appropriate jurisdiction, especially if neither of the parties are Kazakh.¹⁰⁴ Second, it suggests, or is otherwise not mindful, that the AIFC Court has no authority to apply the ordinary Kazakhstani private international law rules in order to determine the most appropriate jurisdiction for the dispute in question.¹⁰⁵ Third, it undermines party autonomy, which, by the mutual choice of the AIFC Court, expressly and unequivocally rejected the jurisdiction of Kazakhstani courts in the first place.¹⁰⁶ If foreign investors in the AIFC risk their disputes being referred to the Kazakhstani courts, which is the *raison d’être* for the creation of the AIFC and its Court, then it will soon become redundant.

The Appeals Chamber of the AIFC Court possesses jurisdiction, as already mentioned with respect to Section 26(1)(d) of the AIFC Court Regulations, to interpret AIFC Acts.¹⁰⁷ Such referrals effectively confer the status of “constitutional court” on the AIFC Court in the same manner as the referral process to the

¹⁰¹ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(10), at 17.

¹⁰² *Id.*

¹⁰³ *Id.* pt. 5, § 26(3), at 16.

¹⁰⁴ *Id.* pt. 5, § 26, at 16–17.

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(1)(d), at 16.

Court of Justice of the European Union (CJEU).¹⁰⁸ Referrals may only be made by: “(a) the Court of First Instance concerning any matter before it; (b) any of the AIFC Bodies; or (c) any of the AIFC Participants with leave of the Court of Appeal.”¹⁰⁹

This jurisdiction, which feels natural to the Court, provides an important function.¹¹⁰ This “constitutional” role is not unusual in closed systems such as the EU, QFC, and AIFC, but the use of such authority across the various courts is hardly uniform.¹¹¹ Some courts, such as the CJEU, are ambitious, far-reaching, and not afraid to challenge their creators.¹¹² In contrast, it is doubtful that specialized courts, such as the AIFC Court, are prepared to challenge the boundaries of their mandate.

Finally, the jurisdiction of the AIFC Court encompasses a small claims dimension. Paragraph seven of Article 26 states that:

The Small Claims Court shall have a special fast track procedure for claims below a specified value and Small Claims Court jurisdiction shall be defined in the AIFC Court Rules. Appeals of decisions of the Small Claims Court may be brought to the Court of First Instance, subject to the permission of the Court as set out in the AIFC Court Rules. No appeal lies to the Court of Appeal from any judgment given of the Court of First Instance on an appeal from the Small Claims Court.¹¹³

¹⁰⁸ See Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Oct. 26, 2012, 2012 O.J. (C326); *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(1), at 16.

¹⁰⁹ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(12)(a)–(c), at 17.

¹¹⁰ See *id.* pt. 9, § 38, at 23; see also LORD WOOLF, A VISION OF THE AIFC COURT 28–29, 32–33 (Christopher Campbell-Holt ed., 2019) (providing information related to the AIFC Court’s jurisdiction and stating that the “natural capacity of AIFC Court judges [is] to apply and interpret the AIFC law”).

¹¹¹ Gerald Lebovits & Delphine Miller, *Litigating in the Qatar International Court*, 28 N.Y. STATE BAR ASS’N INT’L L. PRACTICUM 54, 54–56 (2015); Gráinne de Búrca, *Internalization of International Law by the CJEU and the US Supreme Court*, 13 INT’L J. CONST. L. 987, 987–89 (2015).

¹¹² de Búrca, *supra* note 111, at 987–89.

¹¹³ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 5, § 26(7), at 17.

A small claims jurisdiction exists in all specialized hybrid tribunals, which is pretty consistent with the statutes of all of the AIFC Court's competitors.¹¹⁴

IV. APPLICABLE LAW

The authority of the AIFC and its Court should be derived from the Kazakhstani Constitution, whether directly or implicitly. Article 75(4) thereof clarifies that the Constitution shall establish all courts and tribunals, and that “[t]he establishment of special and emergency courts under any name is not allowed.”¹¹⁵ A 2017 amendment to the Constitution did in fact allow the legal regime of the AIFC to exist but did not specifically refer to the AIFC Court.¹¹⁶ As a result, several experts have expressed concern as to whether the AIFC Court conforms with the Kazakhstani Constitution.¹¹⁷ Article 13(2) of the AIFC Constitutional Statute exacerbates this state of affairs by declaring that “[t]he AIFC Court is independent in its activities and is not a part of the judicial system of the Republic of Kazakhstan.”¹¹⁸ Apart from the issue of constitutionality, which seems to have been brushed under the carpet, it is not at all clear that the AIFC Constitutional Statute is competent to make this sharp distinction between ordinary Kazakhstani courts and the AIFC Court. This is so on account of several inter-connected considerations. First, it may conflict with bilateral and multilateral treaties to which Kazakhstan is a party, relating to the status and powers of national courts.¹¹⁹ There would be nothing in those treaties

¹¹⁴ In fact, small claims judgments have seen a boost in DIFC and are considered by many as the cornerstone of access to justice. See *Press Release: Commercial claims on the rise at DIFC Courts*, DUBAI INT'L FIN. CTR., (Feb. 19, 2018, 4:49 AM), <https://www.difc.ae/newsroom/news/commercial-claims-rise-difc-courts/>.

¹¹⁵ THE CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN, Aug. 30, 1995, art. 75(4).

¹¹⁶ *Id.* art. 2(3-1).

¹¹⁷ Zambrana-Tévar, *supra* note 24, at 123 & n.33.

¹¹⁸ AIFC CONST. STATUTE, *supra* note 68, art. 13(2), at 10.

¹¹⁹ See Maulenov K. Syrbaevich, *Bilateral Investment Treaties of the Republic of Kazakhstan with Foreign States*, 39 INST. LEGIS. REPUBLIC KAZ. 81, 81–87 (2015); see also *International Investment Agreements Navigator: Kazakhstan*, U.N. INV. POL'Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/107/kazakhstan> (last visited Oct. 20, 2020), for a list of BITs to which Kazakhstan is a party.

that allows member states to exclude application to one or more judicial institutions, or conversely to unilaterally include an extraordinary judicial body outside of the ordinary justice system.¹²⁰ Second, the AIFC Court would possess the authority to make judgments and decisions only within the confines of the AIFC, but these would have no force in Kazakhstan.¹²¹ In addition, the AIFC Court would have no authority similar to ordinary Kazakhstani courts in making domestic or worldwide injunctions and orders—including for reasons already stated. Third, all these considerations make it unclear whether the rules of private international law applicable to ordinary Kazakhstani courts also apply to the AIFC Court. We have already stated that they do, but the AIFC Court, or other AIFC body, may rely on Article 13(2) of the AIFC Constitutional Statute and declare that it, in fact, does not.

In practice, and given Kazakhstan's political climate, it would be unrealistic for the Court or other AIFC Body to either declare the AIFC Court unconstitutional—or that there is some serious inconsistency between AIFC Acts and Kazakhstani law—in such a manner that excludes the AIFC Court from Kazakhstan's extensive treaty relations as they apply to its judicial system. Claims of this nature that challenge the very legitimacy, lawfulness, and existence of an extraordinary court are not unusual, and the courts in question have no problem providing extensive—and convincing—arguments in their favor.¹²² In any event, the AIFC Court will take for granted that all AIFC Acts are consistent and in conformity with the Kazakhstani Constitution.

Surprisingly, one finds a hierarchy of sources for the AIFC, and implicitly for the Court, in Part 2, Section 8 of the AIFC Regulations on AIFC Acts of 2017. This regulation states as follows:

¹²⁰ See Syrbaevich, *supra* note 119.

¹²¹ CIVIL PROCEDURE CODE OF THE REPUBLIC OF KAZAKHSTAN NO. 377-V ZRK [KAZ. CODE OF CIV. PROC.] art. 7.

¹²² See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

- (1) Correlation of legal force of Acting Law of the AIFC is construed in accordance with 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.¹²³

This is a descending order, and the remainder of this provision sets out a methodology for resolving conflicts between higher and lower levels, as well as between equal levels.¹²⁴ It should have been stated from the outset that the “Acting Law of the AIFC” encompasses the entire legal framework of the AIFC.

Paragraph five of Article 13 of the AIFC Constitutional Statute makes a remarkable statement about the actual law or “legal system” that is meant to be applied as the default law—i.e. if the parties have not already chosen a “law” or “legal system” in their contract.¹²⁵ This article states that “[t]he activities of the AIFC Court are governed by the resolution of the Council *On the Court of Astana International Financial Centre*, which is based on the principles and legislation of the law of England and Wales and the standards of leading global financial centres.”¹²⁶

Although some word selection is unfortunate,¹²⁷ the meaning is abundantly clear. The entirety of this section (on applicable law) is found, in principle, in this provision.¹²⁸ Given that the AIFC and its Court aspire to emulate the Gulf financial

¹²³ AIFC, *AIFC Reguls. on AIFC Acts No. 1 of 2017*, pt. 2, ch. 1, § 8(1)(a)–(f), at 5 (Kaz.), https://aifc.kz/files/legals/207/file/1.-aifc-regulations-on-aifc-acts-2017_new-design.pdf [hereinafter *AIFC Regul. on AIFC Acts*].

¹²⁴ *Id.* pt. 2, ch. 1, § 8(2), at 5.

¹²⁵ AIFC CONST. STATUTE, *supra* note 68, art. 13(5), at 10.

¹²⁶ *Id.*

¹²⁷ While “activities” refers to the external/outer workings of the Court, this confusingly encompasses administrative matters and its relation to the state, whereas a better formulation would be: “the (default) law applicable to legal proceedings before the Court . . .”

¹²⁸ AIFC CONST. STATUTE, *supra* note 68, art. 13(5), at 10.

centers,¹²⁹ as well as the underlying notion that these are driven by the common law, as applied by a selection of top judges, such as an applicable law makes eminent sense. In the opinion of this author, the entire rationale for Article 13(5) of the AIFC Constitutional Statute is, at worst, misconceived, and, at best, misunderstood or overplayed. For one thing, the law of England and Wales is not synonymous with the broader notion of the (transnational) common law applied by institutions such as the London Commercial Court, the DIFC, the QFC Court,¹³⁰ and others. In fact, these courts will apply English law and transnationalized common law only where the parties' choice of law so dictates, or where it is appropriate.¹³¹ Neither Dubai nor Qatar has substituted the substantive law of their specialized financial centers with the law of another nation.¹³² The success of the Gulf specialized courts lies in the fact that, by allowing unlimited party autonomy over the choice of governing law, English law has become predominant in the majority of agreements.¹³³ It is a natural extension for such courts to thereafter apply English law to the cases before them. We have already referred to *Leonardo S.p.A.*, where the QFC Court, in dealing with demand guarantees under the Uniform Rules for Demand Guarantees—an ICC instrument—went on to examine the nature of such guarantees by reference to English case law.¹³⁴

A contentious issue here concerns the scope of Article 13(5). The law of England and Wales encompasses not only statutes and the common law, but also obligations incumbent on the United Kingdom by virtue of international treaties and

¹²⁹ Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225, 276–77 (2020).

¹³⁰ See QFC LAW NO. 7, *supra* note 26, art. 7–8.

¹³¹ See *Why English Law Governs Most International Commercial Contracts*, *supra* note 27.

¹³² See Camille Paldi, *Proposal for the Dubai World Islamic Finance Arbitration Tribunal (DWIFAC) and Jurisprudence Office (DWIFACJO) as the Dispute Resolution Mechanism and Center for the Islamic Finance Industry*, 2 J. ISLAMIC BANKING & FIN. 15, 16–17 (2014).

¹³³ See *Why English Law Governs Most International Commercial Contracts*, *supra* note 27.

¹³⁴ *Leonardo S.p.A.*, Case No. 12 of 2019, Judgment ¶ 44.

customary international law.¹³⁵ These international treaties cannot artificially be divorced from “English law” because constitutional statutes such as the Human Rights Act permeate every aspect of English law.¹³⁶ When the AIFC Court comes to apply English law it should do so in its entirety, as that is how it would have been applied by the courts of England and Wales. Any other result would be inconsistent with the parties’ legitimate expectations. Moreover, the wording of Article 13(5) suggests wholesale “legal transplantation,” which has not only failed as a model of law reform but has universally been condemned by the scholarly community.¹³⁷ No doubt, it would be disastrous for the reputation of AIFC if the parties or the Court were to identify gross inconsistencies between English law and AIFC Acts, or the Kazakhstani Constitution itself! Article 13(6) of the AIFC Constitutional Statute makes much more sense. It states that, “[i]n adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account final judgments of the AIFC Court in related matters and final judgments of the courts of other common law jurisdictions.”¹³⁸

Another serious issue to consider is the extent to which the AIFC Court is bound by the customary law and international treaties to which Kazakhstan is a party. Some treaties—such as those concerning human rights—are territorial, including effective control over foreign territory, and, hence, apply in respect of any action in the incumbent state’s territory, irrespective of the constitutional status of the person or entity in question.¹³⁹ We have already stated that the separation of the AIFC Court from the ordinary Kazakhstani judiciary through the constitution has no retrospective effect on subsequent treaties but it may affect its rights and duties if Kazakhstan were to carve out a special

¹³⁵ See Tawhida Ahmed & Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT’L. L. 771, 776 (2006).

¹³⁶ Human Rights Act, 1998 c. 42 (Eng.).

¹³⁷ Jaakko Husa, *Developing Legal System, Legal Transplants, and Path Dependents: Reflections on the Rule of Law*, 6 CHINESE J. COMPAR. L. 129, 137 (2018); Toby S. Goldbach, *Why Legal Transplants?*, 15 ANN. REV. L. & SOC. SCI. 583, 584 (2019).

¹³⁸ AIFC CONST. STATUTE, *supra* note 68, art. 13(6), at 10.

¹³⁹ See U.N. Hum. Rts. Off. of the High Comm’r, *The United Nations Human Rights Treaty System*, Fact Sheet No. 30/Rev. 17 (2012).

regime in those treaties (whether negative or positive) for the AIFC Court. Although this matter is not made explicit in the AIFC Constitutional Statute, it is spelled out elsewhere. For example, Part 5, Section 45(1) of the AIFC Arbitration Regulations makes it clear that AIFC awards and judgments are tantamount to Kazakhstani awards and judgments for the purposes of enforcement in other jurisdictions.¹⁴⁰ It should therefore be taken for granted that the AIFC Court is a Kazakhstani court for the purposes of Kazakhstan's treaty, and customary, obligations.¹⁴¹

A. Party Autonomy in the Choice of Governing Law

The attractiveness of special regimes such as the AIFC lies not only in the business and financial benefits and incentives provided to foreign investors, but also on account of the attendant legal certainty and the rule of law. Given that arbitration is a readily available choice that is susceptible to global enforcement, a specialized court such as the AIFC Court and its Gulf competitors must be able to offer something more, or at least something of an equivalent value. In the case at hand, this might be the possibility of enforcing AIFC judgments against entities in Kazakhstan, which is otherwise difficult through any other foreign award because of the alleged obstinacy of Kazakhstani courts.¹⁴² Such an incentive should not be underestimated. No doubt, the processes, and procedures before the AIFC Court must be as flexible and party-oriented as in international commercial arbitration.

¹⁴⁰ *AIFC Regul. on AIFC Acts*, *supra* note 123, pt. 5, ch. 2, § 45(1), at 17.

¹⁴¹ Even so, it is unlikely that it will be allowed to enforce foreign judgments or awards against the Kazakhstani state. See, for example, Republic of Kazakhstan v. Ascom Group, S.A., No. 133/19, Judgment, Luxembourg Superior Court of Justice (Dec. 19, 2019), <https://jusmundi.com/en/document/pdf/Decision/IDS-379-19122019-11223/en/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-judgment-of-the-luxembourg-court-of-appeal-unofficial-english-translation-thursday-19th-december-2019>, where the court recognized and enforced an award in the hundreds of millions of dollars range, which the Kazakhstani government unsuccessfully tried to prove was awarded based on fraudulent grounds.

¹⁴² See *Dispute Resolution Around the World: Kazakhstan*, BAKER MCKENZIE 1, 11 (2009), https://www.bakermckenzie.com/-/media/files/in-sight/publications/2016/10/dratw/dratw_kazakhstan_2009.pdf?la=en.

In this respect, the ability of the parties to choose the law of their choice is of immense importance. This right is aptly recognized in Section 43 of the AIFC Regulations on AIFC Acts, which provides that “[a]n express choice of a governing law in a contract is effective against all Persons affected by the choice.”¹⁴³ In the absence of a choice of law clause, the contract is to be governed by the Acting Law of the AIFC,¹⁴⁴ which is effectively the law of England and Wales, as this is supplemented by the various other sources analyzed in previous sections. This is a somewhat unsatisfactory situation. While it provides a degree of legal certainty to the parties, this situation is, nonetheless, rather antithetical to the general rule, whereby in the absence of a choice of governing law this is either selected by reference to private international law rules (in litigation),¹⁴⁵ or by reference to the law that is closest to the parties’ contract (arbitration).¹⁴⁶ It may well be that the drafters of this provision desired to avoid complex conflicts of law determinations that protract and complicate proceedings, in which case this is a welcome compromise. However, Article 43 is incomplete and poses a serious danger to the parties. In particular, it is unclear if the notion of “governing” law follows the Rome Convention paradigm,¹⁴⁷ or if, instead, it is predicated on the much broader party autonomy paradigm set out in international arbitration, whereby it is not restricted

¹⁴³ *AIFC Regul. on AIFC Acts*, *supra* note 123, pt. 5, ch. 2, § 43, at 20.

¹⁴⁴ *Id.* pt. 5, ch. 2, § 44, at 20.

¹⁴⁵ C.M.V. CLARKSON & JONATHAN HILL, *THE CONFLICT OF LAWS* 218–20 (4th ed. 2011). The 1980 Rome Convention on the Law Applicable to Contractual Obligations was consolidated several times. See generally 2008 O.J. (L 177) 6 [hereinafter Rome I], for the current version of the law applicable to contractual obligations.

¹⁴⁶ *UNCITRAL Model Law*, *supra* note 97, ch. VI, art. 28(2), at 17; see *2017 Arbitration Rules*, INT’L CHAMBER COM. (2017), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_21 (providing in Article 21(1) that in the absence of an express choice of substantive law, “the arbitral tribunal shall apply the rules of law which it determines to be appropriate”); see also ILIAS BANTEKAS, *AN INTRODUCTION TO INTERNATIONAL ARBITRATION* 38–40 (2015) (explaining that Article 4(1) of Rome 1 indicates that absent a choice of law clause, disputes are governed pursuant to the law of a party’s residence).

¹⁴⁷ H. Matthew Horlacher, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 *CORNELL INT’L L. J.* 178, 178–80 (1994). The conflict rules of the *forum* will set out particular criteria which link the contract in question to a system of law – these criteria are known as “connecting factors.” See Rome I, *supra* note 145, art. 4(1).

to the “legal system” of a country.

Unlike the Rome I Article 1(1) restrictions on the conflict of laws rules—i.e., the meaning of “law” as it concerns governing law over a dispute—which limit the governing law of a particular legal system, “such as that of France, the situation is different in respect of arbitral proceedings.”¹⁴⁸ Under Rome I:

‘African customary law,’ the UNIDROIT Principles of International Commercial Contracts or ‘Islamic law’ are not considered national legal systems as such, the justification being that they are indeterminate and vague and hence give rise to uncertainty.¹⁴⁹ It is thought that trying to determine what Islamic law is in a particular case, as opposed to Saudi law which despite its sharia foundation is considered predictable, would give rise to several confusing and conflicting versions and interpretations.¹⁵⁰

These perceptions on the meaning of ‘law’ and ‘legal systems’ may be problematic in litigation,¹⁵¹ but not for arbitration because it is not only assumed that the parties are well aware of the implications of their choice of law (and their ability to choose the law of their choice) but also because the appointment of arbitrators is based on their expertise of the parties’ chosen law. Unlike litigation, in international arbitration the parties are free to designate any ‘law’ as their governing law, irrespective if

¹⁴⁸ BANTEKAS, *supra* note 146, at 44; see Emmanuel Gaillard, *The Role of the Arbitrator in Determining the Applicable Law*, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 185, 197–98 (Lawrence W. Newman & Richard D. Hill eds., 2014).

¹⁴⁹ BANTEKAS, *supra* note 146, at 44; *Beximco Pharm. Ltd. v. Shamil Bank of Bahrain E.C.*, [2004] EWCA 19.

¹⁵⁰ BANTEKAS, *supra* note 146, at 44. “This is because in strict legal terms there is no single or unified Islamic law.” *Id.* at 44 n.18. “The four key sources of Sunni Islamic law on the basis of their hierarchy are as follows: 1) Qur’an; 2) the *sunnah* (representing the sayings and actions of the Prophet); 3) *qiyas* (human reasoning by analogy, but only if adopted by a large enough majority of Muslim scholars); and 4) *ijma*, which represents the actual consensus of the Muslim scholarly community.” *Id.* “The four different schools of Sunni Islam, with the exception of the Qur’an, cannot always agree on the veracity of all the other sources and in any event ascribe varying interpretations to these and disputed sources.” *Id.* “All this justifies the argument as to the non-existence of a single, coherent, verifiable Islamic law.” *Id.*

¹⁵¹ And, of course, these limitations are imposed by conflict of law rules as discussed previously.

this is classified as a legal system or not under the Rome Convention (or other conflict of law rules). In fact, it is not uncommon for parties to designate as their governing law the *lex mercatoria*, equitable principles (*ex aequo et bono*), Islamic law, public international law and others, such as EU law,¹⁵² that are not ordinarily considered legal systems.¹⁵³

In the particular context of the AIFC Court, I would like to think that in the pursuit of commercial justice, experienced foreign judges will conclude that party autonomy is not limited by the private international law paradigm.¹⁵⁴ Rather, the parties may choose any law or principles, other than the law of a legal system, as long as it does not offend Kazakhstani public policy or the AIFC Acting Law.¹⁵⁵ It is crucial that the Court clarifies this position in its first judgments so as to alleviate any concerns that prospective parties may have.

V. PARTY AUTONOMY IN RESPECT OF THE PROCEEDINGS

One of the key features of broad party autonomy is the ability of the parties to agree on the procedural rules applicable to the proceedings, subject, however, to the right to a fair trial. This principle is applicable regardless of the nature of the proceedings.¹⁵⁶ Procedural party autonomy is the cornerstone of arbitration.¹⁵⁷ The voluntary character of arbitration would be

¹⁵² For an example of a case where the parties designated European Union law as their governing law, see Gaillard, *supra* note 148, at 201 & n.33.

¹⁵³ BANTEKAS, *supra* note 146, at 44–45; *see also* In re Arb. between Raisler Corporation & N.Y.C. Housing Auth., 32 N.Y.2d 274, 283 (1973) (holding that “an arbitrator may decide the issues as equity and justice require, unbound by the rigors of law”). Given that the parties had not authorized the arbitrator to act as *amiable compositeur* or decide the case *ex aequo et bono*, this case may be a bit of a stretch.

¹⁵⁴ This conclusion is further enhanced by Section 29(1)(c) of the AIFC Court Regulations, which reads that the law to be applied by the Court shall be “such law as appears to the Court to be the most appropriate in the facts and circumstances of the dispute.” *See AIFC Ct. Regul. 2017, supra* note 81, pt. 8, § 29(1)(c), at 21.

¹⁵⁵ *Id.* pt. 8, § 29(1)(b), at 21.

¹⁵⁶ *See* Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT’L & COMPAR. L. Q. 991, 991–93, 1001 (2020).

¹⁵⁷ Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?*, 9 AFE BABALOLA UNIV. J. SUST. DEV. L. & POL’Y 222, 224 (2015).

seriously undermined if the parties were unable to dictate how arbitral proceedings are to be held and conducted. Control over the process is hardly an end to itself. Its purpose is to mitigate the adverse qualities of litigation or alternative dispute resolutions and, hence, to ultimately satisfy the parties' business demands in a particular case.¹⁵⁸ By way of illustration, if the dispute concerns a sensitive or pressing issue, the parties may well urge the tribunal to resolve the dispute as timely as possible,¹⁵⁹ perhaps through fast-track proceedings. Equally, if the parties feel that a hearing would spiral costs and provide little clarity to the dispute, they can decide to dispense with an oral hearing altogether, agreeing solely to a documents-based process.¹⁶⁰

The prevalence of party autonomy in the conduct of arbitral proceedings is manifest in both the New York Convention and the Model Law, as well as customary international law; the latter as evidenced by the consistent laws and judicial practice of states, as well as the proliferation of institutional rules to this effect.¹⁶¹ Article 19(1) of the Model Law provides that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings[.]"¹⁶² whereas Article V(1)(d) of the New York Convention stipulates that a foreign award may be refused enforcement and recognition if "the arbitral procedure was not in accordance with the agreement of the parties"¹⁶³ The parties are free to choose any model they desire or no model whatsoever, or, alternatively, leave this task to the tribunal.¹⁶⁴

The AIFC Court, as well as its other foreign counterparts, was meant to function as a conventional court, albeit with all the benefits and privileges typically associated with specialized

¹⁵⁸ See Fagbemi, *supra* note 157, at 223–24.

¹⁵⁹ *Id.* at 230.

¹⁶⁰ *See id.*

¹⁶¹ Advocate Rajveer, *Parties' autonomy in international commercial arbitration*, 9 INT'L J. SCI. & ENG'G RSCH. 1204, 1204 (2018).

¹⁶² UNCITRAL Model Law, *supra* note 97, ch. V, art. 19(1), at 14.

¹⁶³ *The New York Convention*, *supra* note 100, art. V(1)(d), at 10.

¹⁶⁴ *See, e.g.*, THE LONDON COURT OF INTERNATIONAL ARBITRATION, THE LCIA ARBITRATION RULES art. 22.1(vi) (2014), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2022.

hybrid tribunals.¹⁶⁵ Hence, there is nothing in the AIFC Laws, including the AIFC Court Rules, suggesting that party autonomy may, or can, supersede the prevailing rules of civil procedure. Even so, although this has not yet been tested, a minor window of opportunity does exist. Section 29(1)(c) of the AIFC Court Regulations allows the Court to apply “such [procedural] law as appears to the Court to be most appropriate in the facts and circumstances of the dispute.”¹⁶⁶ Although such a determination will ultimately be made by the Court, the parties may offer their views to which the Court can be receptive.¹⁶⁷ In this manner, the AIFC Court may circumvent non-mandatory procedural rules, seemingly on its own initiative and in the best interest of proceedings, even if triggered by the parties. This line of thinking is further enhanced by Sections 30(1) and (2) of the AIFC Court Regulations, which confer on the Chief Justice a wide margin of discretion, even above arbitrators—the latter being limited by the parties’ agreement.¹⁶⁸ This reads:

(1) AIFC Court Rules and Practice Directions may provide for the practice and procedure to be followed in the Court. They may be made, amended, repealed, or revoked, by the Chief Justice of the Court only, except that he may nominate a Judge of the Court to exercise his functions under this Article.

(2) AIFC Court Rules may provide for any matter of practice or procedure to be made and/or governed by Practice Directions.¹⁶⁹

The Court Rules and Practice Directions thus have the potential of conferring significant discretionary powers on judges in applying and shaping rules of procedure and evidence. The range of experienced judges appointed to the AIFC Court essentially ensures that the judges will be prepared to work with the parties in shaping their rules in such a manner that promotes the parties’ mutual interests and the interests of procedural justice.¹⁷⁰

¹⁶⁵ Zambrana-Tévar, *supra* at note 24, at 123.

¹⁶⁶ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 8, § 29(1)(c), at 21.

¹⁶⁷ See AIFC CONST. STATUTE, *supra* note 68, art. 13(6), at 10.

¹⁶⁸ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 9, § 30(1)–(2), at 22.

¹⁶⁹ *Id.*

¹⁷⁰ See *id.* pt. 2, § 12, at 6–8.

This is very evident in the AIFC Court Rules.¹⁷¹ In theory, the entire process is subject to the so-called “overriding principles,” as these are set out in Article 1.7 of the AIFC Court Rules, which are based on the notions of justice, fairness, and proportionality, and which the Court is obliged to enforce in its administration of justice.¹⁷² Part 16 of the AIFC Court Rules sets out an extensive outline for case progression conferences in which the parties are expected to take on an active role by agreeing on appropriate case management directions.¹⁷³

VI. THE STRUCTURE OF THE AIFC COURT AND ITS POWERS

The AIFC Court consists of only two instances, namely first and appellate levels.¹⁷⁴ Decisions of the appellate chamber are binding and not subject to further judicial scrutiny¹⁷⁵ and as a result, produce *res judicata*. There is a further specialist division in the form of a small claims court.¹⁷⁶ The AIFC Court is headed by the Chief Justice and consists of other judges, all of which are “appointed and removed by the President of the Republic of Kazakhstan on the recommendation of the Governor of the AIFC.”¹⁷⁷ Although Article 13(2) of the AIFC Constitutional Statute emphasizes that the Court is an independent body, the appointment and removal of its judges by the President seriously undermines claims of independence.¹⁷⁸

¹⁷¹ At the time of writing, the Chief Justice had already issued AIFC Court Rules, effective as of January 1, 2018. See Astana Int'l Fin. Ctr. Ct. Rules pt. 1, §§ 1.6–1.8, at 1 (2018) (Kaz.), <https://aifc.kz/files/legals/69/file/3.-legislation-aifc-court-rules-2018.pdf> [hereinafter AIFC Ct. Rules 2018]. In accordance with Art 1.5 of the AIFC Court Rules, Practice Directions “may modify or disapply any provision of [the] Rules.” *Id.* pt. 1, § 1.5, at 1.

¹⁷² *Id.* §§ 1.6–1.7, at 1.

¹⁷³ *Id.* § 16, at 45–47.

¹⁷⁴ AIFC CONST. STATUTE, *supra* note 68, art. 13(3), at 10.

¹⁷⁵ *Id.* art. 13(7), at 10.

¹⁷⁶ See AIFC Ct. Rules 2018, *supra* note 171, pt. 1, § 1.3(1), at 1; *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 2, § 9, at 6.

¹⁷⁷ See AIFC CONST. STATUTE, *supra* note 68, art. 13(3-1), at 10.

¹⁷⁸ *Id.* art. 13(2), (3-1); see also G.A. Res. 40/32, Basic Principles on the Independence of the Judiciary (Nov. 29, 1985) (“The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”); Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L. J. 909, 912 (2007) (discussing that judicial accountability and

The powers of the Court are set out in the AIFC Court's extensive Rules, which, as already stated, were drafted by the Court's Chief Justice.¹⁷⁹ Significant effort has been placed in these Rules to balance the public nature of the Court with the need to make it as amenable as possible to the degree of party autonomy typically associated with international arbitration.¹⁸⁰ This balancing test seems to have been undertaken in a very masterful way. It is beyond the scope of this relatively narrow paper to undertake a thorough analysis of the Court's extensive Rules, so we will instead attempt a brief insight into some key or innovative features, namely, the availability of Group Litigation Orders (GLOs) in the event of several claims giving rise to common or related issues of fact or law ("GLO issues").¹⁸¹

Another unique feature of the AIFC Court Rules is the possibility of a so-called "immediate judgment" under circumstances specified in Part 14 of the AIFC Court Rules.¹⁸² Part 15 of the Court Rules consists of an exceptionally detailed section on interim remedies and the condition for granting these to a claimant.¹⁸³ This may appeal to investors and their counsel who fear that foreign awards against Kazakhstani entities would not be followed up by worldwide injunction orders by the courts of the seat.¹⁸⁴ Part 16 of the Court Rules sets out the contours of party-led case progression conferences, which, as already stated, requires the parties to agree on how their case will progress.¹⁸⁵ This effectively enhances party autonomy to a significant

independence "should run to the public[.]" so that there is "a legitimate interest in ensuring that the judiciary has been responsible . . . and . . . public laws are functioning as intended").

¹⁷⁹ AIFC Ct. Rules 2018, *supra* note 171, pt. 1, § 1.2, at 1.

¹⁸⁰ *See id.* pt. 27, at 76–83.

¹⁸¹ *Id.* pt. 12, § 12.47, at 33.

¹⁸² *Id.* pt. 14, at 37–38.

¹⁸³ *Id.* pt. 15, at 40–45.

¹⁸⁴ *See Ras Al Khaimah Inv. Auth. v. Bestfort Dev. LLP* [2017] EWCA 1014 (finding a freezing order to be the appropriate means to prevent the defendant from dissipating assets prior to a final judgment); Case C-18/18, *Glawischnig-Piesczek v. Facebook Ir. Ltd.*, ECLI:EU:C:2019:821, ¶ 55 (Oct. 3, 2019) (holding that the EU Directive on Electronic Commerce does not prevent national courts from ordering a host provider like Facebook to take down online content worldwide where the content is declared unlawful pursuant to domestic laws).

¹⁸⁵ AIFC Ct. Rules 2018, *supra* note 171, pt. 16, §§ 16.1–16.11, at 45–46.

degree.¹⁸⁶ Part 20 of the Court Rules establishes a process in which parties making a settlement offer are not required to show these offers or payments to the Court until the question of costs is to be decided (offers to settle and payments into court).¹⁸⁷ Part 23 introduces an Abridged Procedure for claims, which includes situations where the claimant seeks the Court's decision on a question unlikely to involve a substantial dispute of fact or where a Rule or Practice Direction in relation to a specified type of proceeding requires or permits the use of the Abridged Procedure.¹⁸⁸

VII. ENFORCEMENT OF AIFC COURT JUDGMENTS

The AIFC Constitutional Statute is at pains to emphasize the sharp distinction between the AIFC Court and the ordinary Kazakhstani judicial system. However, at the same time, such a distinction must have some limits, lest it creates more problems than it purports to resolve. With respect to the mutual enforcement of judgments between the AIFC Court and regular Kazakhstani courts, Article 13, Sections (8) and (9) of the AIFC Constitutional Statute state:

8. Decisions of the AIFC Court are to be enforced in the Republic of Kazakhstan in the same way, and on the same terms, as judicial acts of the courts of the Republic of Kazakhstan. To enforce a decision of the AIFC Court, a translation of the decision into the Kazakh or Russian language, in accordance with the procedure determined by AIFC Acts, is required.

9. Decisions of the courts of the Republic of Kazakhstan are to be enforced in the territory of the AIFC in accordance with legislation of the Republic of Kazakhstan.¹⁸⁹

This is not only sensible but fully warranted. Any other outcome whereby the AIFC Court was fully insulated from the Kazakhstani judicial system would have required extensive legislation

¹⁸⁶ See *Case Management*, Gov.UK (Jan. 30, 2017), <https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/case-management>, for an example of the case management practice in England.

¹⁸⁷ AIFC Ct. Rules 2018, *supra* note 171, pt. 20, at 63.

¹⁸⁸ *Id.* pt. 23, at 66–69.

¹⁸⁹ AIFC CONST. STATUTE, *supra* note 68, art. 13(8), (9), at 10.

and re-negotiation of the country's bilateral or multilateral treaties pertinent to its courts.¹⁹⁰ From the perspective of foreign investors, this must surely be the key highlight of the AIFC Court. Although foreign arbitration would have been more favorable, as stated above, the enforcement of foreign awards will always be a problem in Kazakhstan.¹⁹¹ The need for arbitration is redundant since a judgment of AIFC can be enforced *ipso facto*, without further restrictions or scrutiny in Kazakhstan, especially if the AIFC Court is viewed to be just as good and independent as foreign-seated arbitral panels. Although Article 13(8) and (9) refer to "decisions,"¹⁹² this must be an oversight in translation, and must also encompass judgments on the merits.

Section 27 of the AIFC Court Regulations provides the Court with extensive powers of interim and injunctive relief at all stages of the proceedings.¹⁹³ On the basis of Article 13(8) and (9) of the AIFC Constitutional Statute, such orders and decisions may be enforced in the Republic of Kazakhstan through ordinary Kazakhstani courts.¹⁹⁴ What is unclear, although largely implicit, is whether the AIFC Court is endowed with the power to issue worldwide injunction orders or whether, in the event of a conflicting order or judgment issued by regular Kazakhstani courts, it possesses the authority to dismiss the same.

As for the second issue concerning conflicting judgments and decisions, the inherent powers of courts and tribunals¹⁹⁵ clearly dictates that the AIFC Court, either on its own motion or at the request of any party, may assess the constitutionality or

¹⁹⁰ Zambrana-Tévar, *supra* note 24, at 128–29.

¹⁹¹ Altynay Mukhametkalikyzy, *Hidden Impediments Await Foreign Parties Seeking to Enforce Arbitral Awards in Kazakhstan*, KLUWER ARB. BLOG (Apr. 1, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/04/01/hidden-impediments-await-foreign-parties-seeking-to-enforce-arbitral-awards-in-kazakhstan/>?

¹⁹² AIFC CONST. STATUTE, *supra* note 68, art. 13(8)–(9), at 10; *see also AIFC Ct. Regul. 2017*, *supra* note 81, pt. 9, § 40(2), at 24 ("Judgments, orders and directions of the Court, and awards issued in arbitrations seated in the AIFC which have been ratified by the Court, may be enforced in the AIFC and the Republic of Kazakhstan in accordance with the AIFC Constitutional Statute.").

¹⁹³ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 6, § 27, at 18.

¹⁹⁴ AIFC CONST. STATUTE, *supra* note 68, art. 13(8)–(9), at 10.

¹⁹⁵ BANTEKAS, *supra* note 146, at 107–13.

another defect of a judgment, including also “in the interests of justice.”¹⁹⁶ It is unfortunate that such authority is not spelled out clearly in any AIFC Acts because the scope of abuse is significant and may dispel the benefits of enforcement of AIFC judgments in the Kazakhstani legal order; especially, if a conflicting judgment of the Kazakhstani courts serves to nullify a judgment or order of the AIFC Court. Therefore, it should not be taken for granted that any judgment or order of the regular Kazakhstani courts will not be enforced in the AIFC if it is in conflict with AIFC Acts, judgments, or orders of the AIFC Court, or if it fetters the powers of the AIFC Court.

As to the second issue, there is no mention of extra-territorial powers being conferred on the AIFC Court and hence any order of this nature will have to be referred to the Kazakhstani courts through the pertinent channels. This eventuality, however, allows the Kazakhstani courts to deny the transmittal of the order on subjective grounds. Moreover, although the AIFC Court may transmit such an order for further execution, it is not clear that its content will not be discussed anew by the Kazakhstani courts.¹⁹⁷

VIII. CONSISTENCY WITH AGREEMENTS TO ARBITRATE AND ARBITRAL PROCEEDINGS

Unlike other specialized hybrid commercial tribunals, the AIFC features an arbitral institution, fully equipped with its own arbitration rules.¹⁹⁸ Other financial centers, such as the QFC, do not have a distinct arbitral chamber,¹⁹⁹ chiefly because this would defeat the very purpose of the QFC Court. Of course, the QFC Court has an active role in arbitrations by acting as the “competent court,” where appropriate, or in enforcing foreign awards in the QFC framework.²⁰⁰

Article 14 of the AIFC Constitutional Statute sets up the

¹⁹⁶ *AIFC Ct. Regul. 2017*, *supra* note 81, pt. 6, §§ 27, 27(2)(j), at 18–19.

¹⁹⁷ *Id.* pt. 5, § 26(10), at 17.

¹⁹⁸ *AIFC Arb. Regul. 2017*, *supra* note 48.

¹⁹⁹ *See About Us*, QATAR INT'L CT. & DISP. RESOL. CTR., <https://www.qicdrc.gov.qa/about-us> (last visited Nov. 10, 2020).

²⁰⁰ *QFC Law No. 2*, *supra* note 47, art. 35.

AIFC International Arbitration Centre (IAC) in the form of an AIFC body,²⁰¹ and delineates its relationship with the Kazakhstani legal order.²⁰² In accordance with paragraphs three and four of Article 14, AIFC IAC awards are enforced as domestic awards in the Kazakhstani legal order and the same is equally true of awards seated in Kazakhstan.²⁰³ The AIFC Court, as already stated, has been designated as the competent court in relation to arbitrations taking place under the AIFC IAC in accordance with Section 14 of the AIFC Arbitration Regulations.²⁰⁴ The Regulations are predicated on the UNCITRAL Model Law on International Commercial Arbitration (with some exceptions),²⁰⁵ a rather sensible decision. The AIFC Court possesses a significant supervisory role over arbitral proceedings, including ordering interim measures,²⁰⁶ and the appointment of arbitrators in the event of an impasse.²⁰⁷ However, there are some instances where significant departure from a merely supervisory authority is stipulated. For example, Section 18 of the AIFC Arbitration Regulations states that while arbitral proceedings are confidential, the AIFC Court may rule otherwise through the issuance of an order.²⁰⁸

Section 27 of the AIFC Arbitration Regulations is especially confusing. Unlike the UNCITRAL Model Law or transnational arbitral practice whereby the parties are free to approach both

²⁰¹ AIFC CONST. STATUTE, *supra*, note 68, art. 14, at 11.

²⁰² *Id.* In 2019, Kazakhstan amended its 2016 Law on Arbitration with the aim of internationalizing its arbitration industry. See Cameron Ford, *Kazakhstan Internationalises Arbitration Law*, KLUWER ARB. BLOG (Aug. 19, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/08/19/kazakhstan-internationalises-arbitration-law/>. The new law is known as the Law of the Republic of Kazakhstan No. 217-VI “On Amendments to Certain Legislative Acts of the Republic of Kazakhstan Concerning Strengthening the Protection of Property Rights, Arbitration, Optimizing the Judicial Caseload, and Further Humanizing the Criminal Law.” *Id.* It has been welcomed by the international legal community. See *id.*

²⁰³ AIFC CONST. STATUTE, *supra* note 68, art. 14(3)–(4), at 11.

²⁰⁴ AIFC Arb. Regul. 2017, *supra* note 48, pt. 2, ch. 1, § 14, at 2–3.

²⁰⁵ See UNCITRAL Model Law, *supra* note 97.

²⁰⁶ AIFC Arb. Regul. 2017, *supra* note 48, ch. 2, § 17, at 3; see also *Interex & Co. v. Prom Region KZ LLP*, Case No. AIFC-C/CFI/2020/0001, Judgment ¶ 2 (AIFC Ct. of First Instance May 11, 2020), where the court exercised its authority of interim measures to enforce an arbitral award.

²⁰⁷ AIFC Arb. Regul. 2017, *supra* note 48, ch. 3, § 20, at 4–5.

²⁰⁸ *Id.* ch. 2, § 18, at 3–4.

the tribunal and the courts of the seat with all requests concerning the imposition and enforcement of interim measures, this is not the case in the AIFC Court.²⁰⁹ The bigger part of the provision suggests that all relevant requests fall under the authority of the tribunal.²¹⁰ Then, paragraph two goes on to say that:

With the written permission of the arbitral tribunal a party in whose favour an interim measure has been granted may request from the AIFC Court of First Instance an order enforcing the arbitral tribunal's order or any part of it. Any request for permission or enforcement made under this Article shall be simultaneously copied to all other parties. Unless the arbitral tribunal at any time directs otherwise, the party making a request to the AIFC Court of First Instance under this Article shall be entitled to recover in the arbitration any legal costs and AIFC Court of First Instance fees reasonably incurred.²¹¹

It is certainly a novelty that the parties must seek permission from the tribunal before approaching the courts of the seat—in this case, the AIFC Court—with a request to enforce the order, given that the tribunal cannot on its own achieve such an outcome.²¹² So, what if the tribunal does not provide written consent? This does not make much sense and provides a serious impediment to the parties. Paragraph 3(b) of Section 27 confers significant power on the AIFC Court in that the latter is permitted to refuse recognition of an interim measure ordered by a court outside the AIFC if it is found to be *ultra vires*.²¹³ This is a powerful tool in the armory of the AIFC Court and may appease investors that Kazakhstani courts are not going to interfere in arbitral proceedings in the AIFC. Paragraph five of Section 27 conforms to the UNCITRAL Model Law by stating that “[t]he AIFC Court shall have the same power of issuing an interim measure in relation to arbitration proceedings, where their seat is in the AIFC, as it has in relation to proceedings in

²⁰⁹ *AIFC Arb. Regul. 2017*, *supra* note 48, ch. 4, § 27, at 7–9; *UNCITRAL Model Law*, *supra* note 97, ch. IV.A, § 1, art. 17(1), at 9.

²¹⁰ *AIFC Arb. Regul. 2017*, *supra* note 48, ch. 4, § 27(1), at 7–8.

²¹¹ *Id.* ch. 4, § 27(2), at 8.

²¹² *Id.*

²¹³ *Id.* ch. 4, § 27(3)(b), at 8.

the AIFC Court.”²¹⁴

It is not at all clear if paragraph two is incompatible with the express and unequivocal terms of paragraph five of Section 27, or if it constitutes a very exceptional deviation from the general rule enunciated in paragraph five.²¹⁵

Finally, Section 45 of the AIFC Arbitration Rules makes it crystal clear that all awards issued by the AIFC tribunal, as well as awards issued elsewhere, are to be enforced in the AIFC Court in accordance with the bilateral and multilateral treaties to which Kazakhstan is a party.²¹⁶ Hence, for the purposes of enforcement of awards and judgments, the AIFC is not an exceptional territory for which Kazakhstan would have been obliged to make a unilateral declaration. Moreover, AIFC awards are Kazakhstani awards for the purposes of the New York Convention.²¹⁷

IX. CONCLUSION

This paper has taken a critical stance on the AIFC Court, pointing out both shortcomings and various positive features that make the Court stand out from ordinary Kazakhstani courts. None of this criticism was meant as an attack against this institution; quite the contrary. The AIFC Court is a beacon of the rule of law in Kazakhstan and a first attempt at creating an impartial judicial institution that is independent of bias and the intervention of government;²¹⁸ or at least, so it is hoped.

²¹⁴ *AIFC Arb. Regul. 2017*, *supra* note 48, ch. 4, § 27(5), at 9; *UNCITRAL Model Law*, *supra* note 97, ch. IV.A, § 1, art. 17(1), at 9.

²¹⁵ *AIFC Arb. Regul. 2017*, *supra* note 48, ch. 4, § 27(2), (5), at 9; *see also* KAZ. CODE OF CIV. PROC., *supra* note 121, art. 492 (determining the criteria under which award creditors may apply for interim measures against assets owned by a sovereign state).

²¹⁶ *AIFC Arb. Regul. 2017*, *supra* note 48, ch. 7, pt. 3, § 45, at 16.

²¹⁷ Philip Kim, *Why arbitrate at the Astana International Financial Centre?*, KLUWER ARB. BLOG (Sept. 19, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/09/19/why-arbitrate-at-the-astana-international-financial-centre/>.

²¹⁸ Arif Durrani & Gabe Kirchheimer, *Why Invest in Kazakhstan?*, BLOOMBERG (Nov. 20, 2018), https://sponsored.bloomberg.com/news/sponsors/aifc/why-invest-in-kazakhstan/?adv=19268&prx_t=hSIEAAAAAFE-ANA.

Unfortunately, this is not enough since the very need to establish the AIFC and the AIFC Court necessarily stems from the fact that Kazakhstan is not perceived as providing the legal and political stability for trade and investment.²¹⁹ The AIFC is designed as an “island of difference” from the ordinary Kazakhstani investment and trade landscape, even if it is focused on specific investments in theory.²²⁰ This is not the case with the AIFC’s Gulf counterparts, where healthy and diversified economies already existed, and political and legal stability were never issues of concern.²²¹ What this means is that Kazakhstan should make every effort to feed the work of the AIFC Court into its judicial and legal system. If this does not occur, then the AIFC will be an illegitimate institution that sustains a regime that is averse to overall change.

No doubt, with the proliferation of international courts and tribunals, the AIFC Court will endeavor to make its mark. Recent history has shown that the stature, authority, and overall gravitas of individual judges make or break the reputation and credibility of an international court.²²² Conformity only helps an institution hide in obscurity, which is exactly what the AIFC Court and AIFC do not want.²²³ These institutions are desirous of visibility, the boosting of investor confidence, and the perception that justice is not only served but served at the highest possible level.

²¹⁹ See Durrani & Kirchheimer, *supra* note 218.

²²⁰ Joanna Lillis, *Kazakhstan: Will Astana’s financial gamble pay off?*, EURASIANET (Aug. 7, 2018), <https://eurasianet.org/kazakhstan-will-astanas-financial-gamble-pay-off>.

²²¹ Zambrana-Tévar, *supra* note 24, at 122.

²²² The AIFC Court employs judges with international reputation and experience, including its first chief justice, Lord Woolf. See *Justices*, AIFC, <https://court.aifc.kz/who-we-are/justices/> (last visited Nov. 5, 2020). The current line-up is equally impressive, led by Lord Mance. *Id.*

²²³ See Reuters Staff, *Seeking Belt buckle role, Kazakhstan launches China-backed financial hub*, REUTERS (July 5, 2018, 7:19 AM), <https://www.reuters.com/article/us-kazakhstan-aifc/seeking-belt-buckle-role-kazakhstan-launches-china-backed-financial-hub-idUSKBN1JV1CG>, for a discussion regarding the AIFC’s hope that outside companies will utilize its dispute resolution services and that the AIFC Court’s desire to become an “intermediary between larger nations and a gateway for foreign investment” while, unlike other courts of a similar nature, not requiring its members to be present in the Kazakhstani capital.

We are still in the AIFC's infancy and, hopefully, all of these goals will end up being materialized. Given the growth of the Kazakhstani economy and the companies listed in the AIFC, it is a matter of time before they realize that speedy dispute resolution is better served in the AIFC Court as opposed to international commercial arbitration; particularly, if the Kazakhstani government is seen honoring international awards against its public entities both abroad, but more importantly, at home.