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On the Court and Arbitration at the Astana International Financial Center: A Practical Perspective on What They Can Offer to Kazakhstani businesses

In early July this year we witnessed the opening of the Astana International Financial Center (**AIFC**). We have seen a large number of reports in the media on the Court and Arbitration at the AIFC, but little has been said specifically on what exactly they can offer to Kazakhstani businesses.

We observe increasing interest from clients on the Court and Arbitration at the AIFC. In this connection, in this article the author has attempted to analyse on the basis of available documents issued by the AIFC the key benefits and potential downsides of the AIFC Court and Arbitration from the perspective of Kazakhstani businesses.

The author notes that the views expressed below are based on the author's understanding of relevant rules and regulations which have been published so far. So, further comment from the AIFC Court and Arbitration may be helpful to shed further light on specific features of both.

1. AIFC Court:

1.1. Who may submit to the AIFC Court?

According to Art. 13(4) of the Republic of Kazakhstan (**RoK**) Constitutional Law "On the Astana International Financial Center" dated 7 December 2015, the Court does not have jurisdiction in relation to any disputes that are of a criminal or administrative nature. The Court has jurisdiction in relation to:

- (1) Disputes arising between the AIFC's participants, bodies, and/or their foreign employees;
- (2) Disputes relating to operations carried out in the AIFC and regulated by the law of the AIFC[1]
- (3) *Disputes transferred to the Court by agreement of the parties*

Therefore, in order to submit to the AIFC Court, it is not necessary for a Kazakh company to have registration/accreditation with the AIFC. It would be sufficient for two or more (Kazakh and/or foreign) parties/companies to agree to resolve the dispute at the AIFC Court.

The parties may also agree on the choice of applicable law. For example, they can agree that their dispute will be resolved according to Kazakh law. Thus, it is not at all necessary that a dispute is resolved under English law or under the law of the AIFC.

1.2. Advantages of the AIFC Court:

Perhaps the main advantage of the AIFC Court is its independence from the judicial and political system of Kazakhstan. This is so important these days in the existing Kazakh legal environment.

Second, in light of high qualifications of foreign judges appointed to the AIFC Court and that there are no time restrictions to

hearing cases the AIFC Court is capable of considering very complex categories of cases and devote them as much time as necessary. Unlike the AIFC Court, Kazakh state courts (Kazakh courts) are bound to observe very strict statutory deadlines for considering cases, and such deadlines are not always enough for the court to fully delve into a case. Kazakh judges are overloaded, and this may considerably affect the quality of judicial acts.

Third, Kazakh parties may find it attractive that AIFC Court Rules set out an extended limitation period for filing claims. Kazakh law sets out a three-year limitation period, which commences at the time of violation of a right (for example, the moment a contract is breached). The three-year limitation period is frequently not enough. This is specifically relevant to complex construction projects. At the AIFC Court a proceeding cannot be commenced more than six years after the date of the events that gave rise to the proceedings.

Perhaps the fourth advantage of the AIFC Court is that, as we understand, the AIFC Court appoints a so-called “Enforcement Judge”, a judge appointed to oversee enforcement of judicial acts. The Enforcement Judge may issue orders to facilitate enforcement the AIFC Court judgments. Such feature of the AIFC Court will probably have a positive effect on the prospects of enforcement of the AIFC Court judgments. However, a specific scope of powers of the Enforcement Judge is not entirely clear.

It remains unclear as to how judgments of the AIFC Court will be enforced, as we have not been able to find any specific rules governing enforcement procedures. The RoK Constitutional Law “On the Astana International Financial Center” dated 7 December 2015 provides that judgments of the AIFC Court in the RoK shall be carried out “in the same order and under the same conditions” as the enforcement of Kazakh court judgments. Following this rationale, the RoK Law “On Enforcement Proceedings and the Status of Bailiffs” should apply to the enforcement of the AIFC Court judgments. Thus, it seems that the AIFC Court judgment could be passed for enforcement to any private enforcement officer in Kazakhstan.

However, it is not clear how judgments of the AIFC Court, for example, issued under foreign law, will be enforced by local bailiffs, if the court’s judgment (in terms of actions which the bailiff should take to enforce it) is incompatible with powers of the bailiff under Kazakh enforcement law. It is not entirely clear how the Enforcement Judge would be integrated into existing Kazakh enforcement system. We would hope that the AIFC Court’s autonomy would also apply to enforcement of its judgments

Fifth, the AIFC Court Rules provide parties with serious procedural advantages compared to existing practices in Kazakh courts in relation to, for example, interim relief, collection of evidence, etc. Interim relief can be requested, both before and after commencing a lawsuit, unlike Kazakh civil procedure rules, where claimant can seek interim relief only if proceedings are commenced.

AIFC Court rules also envisage so-called “discovery” procedure, where a party to the proceedings may request disclosure by the counter party of certain “category of documents”, including documents directed against the counter party’s interests, that “are reasonably believed to exist”. This procedural option provides a serious advantage for the claimant to prove relevant circumstances. This is particularly useful where the respondent fails to disclose/produce requested documents (a relatively common practice in Kazakh courts).

In Kazakh courts a claimant finds it difficult to obtain an order requesting the respondent to disclose certain documents, as this would depend on the position of a judge, whether the claimant can prove the existence of a specific document which has been requested, title of the document, and that the document is in the respondent’s possession, etc. This seriously complicates the possibility of collecting relevant evidence.

AIFC Court rules pay greater attention to witness statements, unlike the practice of Kazakh courts, where little attention is given to witness statements in commercial disputes. Kazakh courts are usually very skeptical hearing witnesses in commercial disputes, and the procedure of cross-examining a witness is not properly regulated by law, judges are mostly unfamiliar with it, and there are no established practices of cross examining a witness.

Sixth, the AIFC Court rules are generally more balanced in terms of interests of a claimant and a respondent, unlike Kazakh civil procedure rules where, depending on the the stage of court proceedings a party may have serious procedural advantages over the other. For example, Kazakh courts at the request of a claimant may quickly issue a freezing order on the respondent's assets. The claimant does not even need to have a valid claim to request a freezing order. Courts in most cases issue freezing orders at the request of the claimant. The appeal of a freezing order does not suspend the legal effect of the order.

In practice, obtaining a freezing order against a respondent on the basis of a claim which is barely grounded is often used as a way to put pressure on the respondent, because such freezing order is difficult to remove. Kazakh civil procedure rules set out that the court, when issuing interim relief, may require security of the respondent's damages which may have been caused by the interim relief. However, this rule does not work in practice.

Unlike Kazakh rules of civil procedure, at the time of issuing interim relief (e.g. freezing of bank accounts and other property of the respondent, etc.) the AIFC Court will take account of the respondent's interests. The AIFC Court, before issuing the order, will require that the claimant provide proof that he/she has sufficient assets to cover possible losses of the respondent. If such proof is not provided, it will cancel interim measures. Therefore, submission to the AIFC Court would provide greater protection from possible attacks by way of obtaining ungrounded interim relief.

Kazakh civil procedure rules permit the respondent to request cancellation of interim relief in certain cases. In practice, however, Kazakh courts very rarely cancel interim relief at the respondent's request. As a result, it is relatively common where after the Kazakh court issues a freezing order such order stays until the court proceedings are finished, i.e. until completion of appeal, i.e. almost 6-8 months after the order is placed. This is a serious business risk.

In contrast, the AIFC Court rules provide that, if the AIFC Court issues interim relief (for example, seizure of property), the court shall indicate the date of the next hearing at which the respondent can file his/her objections to such interim relief. Thus, there is no need to wait for 6-8 months until the interim relief is removed.

One of the most important advantages of the AIFC Court is the size of the court's fee. Practice direction No. 1 of the AIFC Court provides that for money and property claims where the value of the claim is between 1 and 500,000 US dollars, the fee (similar to state duty in Kazakh courts) will be 5%, but not less than 1,200 US Dollars. Where the value of the claim is between 500,000 US Dollars and 1,000,000 US Dollars, the court's fee will be 20,000 US Dollars plus 0.8% of the amount exceeding 500,000 US Dollars.

For example, if the amount of the claim is 800,000 US Dollars, the amount of the court's fee will be 20,000 + 2,400 US Dollars, i.e. 22,400 US Dollars or 2.8% of the value of the claim. This is comparable to the size of the state duty in Kazakh courts, which is a flat 3% fee, regardless of the value of the claim.

However, as the value of the claim increases, the fee of the AIFC Court would reduce considerably. For example, if the value of the claim is 20,000,000 US Dollars, the AIFC Court's fee would be 68,000 US Dollars (or 0.34% of the claim value). By way of comparison, in order to file a claim with Kazakh District Court for 20,000,000 US Dollars, the state duty would be 600,000 US Dollars.

In addition, the AIFC Court rules provides for a small claims procedure, which envisages expedited and simplified process for the review of claims. Small claims procedure applies to claims which value does not exceed 150,000 US Dollars or 300,000 US Dollars, if the parties ask the court to consider the dispute in a small claims procedure. The court's fee for small claims procedure is 1% of the value of the claim, but not less than 100 US Dollars.

1.3. Potential Disadvantages of the AIFC Court

First, despite the fact that parties are free to choose any applicable law to resolve their dispute, and the parties do not need to

have registration / accreditation with the AIFC to apply to the AIFC Court, the language of court proceedings at the AIFC Court is English. Thus, legal fees of lawyers who can represent clients at the AIFC Court will be significantly higher than those accepted in relation to domestic disputes. Besides, parties are likely to incur significant expenses on interpreters.

Also, as the AIFC Court rules are based on the principles of English law, it is likely that Kazakh lawyers, at least for some time, will not have sufficient experience to represent clients at the AIFC Court (as far as we understand, the AIFC Court rules do not restrict Kazakh lawyers / law firms to represent clients at the AIFC Court). This may for some time cause the need to attract foreign lawyers from England or other common law countries, and the fees of such foreign lawyers would be significantly higher

In addition to the court's fees and lawyers' fees, parties will pay the AIFC Court a fee of 800 US Dollars for each full day or 400 US Dollars for half a day of court hearings.

Second, the flip side of the AIFC Court's ability to handle complex disputes and devote them sufficient time is possible length of proceedings. The AIFC Court Rules do not set out time limits for consideration of disputes. So far, there is no practice of cases considered by the AIFC Court. Thus, at this stage it is difficult to predict how long the proceedings at the AIFC Court could take. We could guess that proceedings at the AIFC Court will take considerably longer than in Kazakh courts.

However, considering that obtaining an enforceable judicial act from a Kazakh court may take 6-8 months (if judgment of a District Court is appealed to Appellate Court), duration of proceedings at the AIFC Court should not be significantly different, except in complex cases.

Judgments of the AIFC Court enter into effect immediately after they are issued. It is possible to appeal judgments, if the AIFC Court of Appeals permits an appeal (if serious violations are found). Thus, one could guess that in the vast majority of cases judgments of the AIFC Court will not be appealed.

One of the main advantages of English courts is that they are empowered to hold a party in contempt of court and impose criminal or civil liability (unlimited fine). The AIFC Court does not have the power to consider criminal or administrative cases. The AIFC Court rules provide that in case of contempt of court, the court may impose fines or refer the matter to criminal courts of Kazakhstan.

The procedure of interaction of the AIFC Court and criminal courts of Kazakhstan raises many questions. For example, if the AIFC Court makes a finding that a party acted in contempt of court, it is not clear if Kazakh court would assume that such contempt of court took place or whether it would establish the facts anew? Many questions arise as to how the AIFC Court and criminal prosecution bodies would interact, because before the Kazakh court issues a verdict in a criminal case, criminal prosecution bodies would have to conduct investigation and have the findings approved by a prosecutor.

We are used to low predictability of judgments issued by Kazakh courts in relation to civil cases, because there is no precedent system in Kazakhstan. It is not uncommon where Kazakh courts issue different judgments on similar set of facts.

English courts are famous for predictability of jurisprudence which has developed over years. The AIFC Court will apply the legislation of the AIFC, the previous judicial acts of the AIFC Court (precedents) and in part not regulated by them - the RoK legislation.

However, lack of the AIFC Court's judicial practice may for some period of time raise questions over predictability of judgments of the AIFC Court. The AIFC Court rules provide that the Court may apply judgments issued in other common law jurisdictions (for example, England, the United States, Australia, etc.). However, laws in these common law jurisdictions may seriously differ. Thus, one could guess that for some period of time, until the AIFC Court's judicial practice is developed, uncertainty over the AIFC Court's possible judgments may not be uncommon.

2. Arbitration at the AIFC

2.1. Why it will be more popular than the AIFC Court?

International Arbitration Court at the AIFC, like other arbitration courts, allows parties to agree that their dispute would be resolved by arbitrators which the parties may elect (from the list of arbitrators approved by the AIFC Court). Parties are free to choose language of proceedings (for example, it could be Kazakh or Russian). The parties may agree that hearings would take place at a certain place (for example, not necessarily in Astana). Arbitration has other advantages and disadvantages, and discussion of arbitration as a means to resolve disputes goes beyond the scope of this article.

The AIFC Arbitration rules are simple compared the AIFC Court rules. The main advantage of arbitration at the AIFC is that it is exempt from the RoK Law "On Arbitration". Thus, all risks underlying this law and uncertainties which have been discussed in the jurisprudence (for example, risks relating to validity of arbitration clauses, scope of arbitrability of disputes, e.g. arbitrability of corporate disputes and many other issues) would not apply to the AIFC arbitration.

Arbitral awards, although binding once declared, cannot be enforced immediately. In order for them to be enforced, state court must issue a ruling to recognise and enforce an arbitral award. In order to turn the arbitral award into a document which a bailiff may enforce arbitral award must pass through Kazakh court for the court to decide whether or not to recognise and enforce the arbitral award.

There are cases set out by law where a Kazakh court may refuse to recognise and enforce an arbitral award. This is the key risk of the arbitration system in Kazakhstan. In practice, in large or political disputes Kazakh courts may refuse to recognise and enforce arbitral awards on questionable grounds.

Meanwhile, arbitral awards of the AIFC Arbitration would be recognised and enforced by the AIFC Court by effectively converting the arbitral award into an AIFC Court judgment. We would expect that the AIFC Court will take arbitration friendly approach which means that the likelihood of successful recognition and enforcement of the AIFC arbitral awards will be high.

2.2. Fees

Registration fee for filing a claim to arbitration court at the AIFC is 1,000 US Dollars.

A fee of 150 US Dollars per hour will also be charged for administering the dispute by the arbitration court at the AIFC.

The hourly fee of an arbitrator will not exceed 635 US Dollars, and this rate could be reduced by agreement with an arbitrator. Unless parties agree otherwise, dispute will be resolved by a tribunal composed of three arbitrators.

The losing party (or both parties, in certain cases) will have to reimburse arbitrators' expenses (costs of travel, accommodation, etc.), as well as costs of arbitration (translators' fees and other expenses).

3. Conclusion:

The AIFC Court is effectively an "enclave" in the existing judicial system of Kazakhstan. Undoubtedly, submission to the AIFC Court or arbitration has serious advantages not only for foreign, but also for Kazakh parties, as the AIFC Court or arbitration will ensure independent, fair and high-quality justice, which is so important in Kazakhstan today.

It is arguable as to whether the cost of litigation at the AIFC Court will or will not be higher that litigation in Kazakh courts, as the AIFC Court's filing fee is significantly lower than the state duty payable to Kazakh courts in relation to large disputes, while the rest of expenses would be higher.

There may be issues with predictability of the AIFC legislation and the judicial practice of the AIFC Court. However, parties are free to select applicable law and reduce risks of possible uncertainty of the AIFC legislation which may exist for some time as relevant judicial practice evolves.

Questions may arise with respect to the procedure of enforcement of the AIFC Court's judgments in Kazakhstan and interaction between the AIFC Court and existing enforcement system. However, we hope that the AIFC Court's successful enforcement track record will be good in light of strong political support of the AIFC.

We hope that the AIFC Court will become successful very quickly, and that it will create serious competition to the courts of Kazakhstan.

[1] AIFC law refers to rules and regulations adopted by the AIFC based on principles of English law. The AIFC legislation regulates various spheres, including commercial, corporate, labor law, bankruptcy and other relations.

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