

THE ASTANA INTERNATIONAL FINANCIAL CENTRE COURT

TALK BY SIR RUPERT JACKSON TO THE 2018 HONG KONG INTERNATIONAL COMMERCIAL LAW CONFERENCE

1. BACKGROUND

In 2013 Xi Jinping announced China's Belt and Road Initiative ('BRI') in a lecture at Nazarbayev University in Kazakhstan. The BRI aims to promote infrastructure development, trade and comity across more than 70 countries from the Baltic Sea to the Pacific Ocean.¹ China has already invested tens of billions of US\$ in that project. Estimates differ as to the actual sums invested to date and as to likely future investments. This initiative may be seen as part of a wider phenomenon. Economic power and geopolitical influence are shifting from America to China.

Because of its location, stretching from Mongolia to the Caspian Sea, Kazakhstan is at the heart of the BRI. China's new Silk Road, like the Silk Road² of the Han and later dynasties, runs across the steppes of Kazakhstan. A new 'port' has been built at Korgos on the border of China and Kazakhstan for 'dry' handling of goods shipped by land.³ This is a hub which switches containers carried by train from the narrow gauge of China's railways to the standard gauge. From there goods are transported across Kazakhstan to Russia and Europe.

The AIFC will have five main functions. These are capital market development; asset management; private banking; Islamic finance; and 'FinTech' (i.e. promoting start-ups, especially those developing new technologies or protecting the environment).

2. THE AIFC COURT AND ARBITRATION CENTRE

A court and arbitration centre, in which experienced judges and arbitrators will apply the common law, are an integral element of the AIFC. Overseas investors and users of the AIFC Court and IAC are familiar with the common law. They will have confidence in both institutions. They both formally came into being on 1st January 2018. While the experience of other international financial centres suggests it is unlikely that cases will be filed at the court and arbitration centre in their first year of operation, the court and arbitration centre are attracting much interest within Kazakhstan and overseas at an early stage.

The court⁴ comprises a Court of First Instance ('CFI') and a Court of Appeal. Within the CFI there is a separate Small Claims Court. The Small Claims Court will deal with claims up to US\$150,000 or (where both parties agree) up to US\$300,000. Appeals from the Small Claims Court go to the CFI. Appeals from the CFI go to the Court of Appeal, which comprises up to three of the justices, excluding (obviously) the judge under appeal from the CFI.

Lord Woolf is Chief Justice of the AIFC Court. The justices of that court comprise retired English judges and senior English counsel. The court was established this year. It is therefore much younger than the other international courts under discussion at this conference.

¹ See 'Xi v Marshall', *The Economist*, 10th March, 2018, p 77.

² The name 'Silk Road' was first given to that ancient trade route in the nineteenth century: see Peter Frankopan, *The Silk Roads: a New History of the World*, Bloomsbury, 2015.

³ Described in the Sunday Times, 17th December 2017.

⁴ For further information about the AIFC Court, see <http://aifc-court.kz/>.

Constitutional Statute no.438-V ZRK of 22nd December 2017 governs the AIFC. Article 13 provides:

“Article 13. AIFC Court

1. The judicial settlement of disputes specified by paragraph 4 of this article is to be undertaken exclusively by the AIFC Court. The purpose of the Court is to protect the rights, freedoms and legal interests of the parties and to ensure that the Acting Law of the AIFC is implemented.
2. The AIFC Court is independent in its activities and is not a part of the judicial system of the Republic of Kazakhstan.
3. The AIFC Court consists of two instances: the court of first instance and the court of appeal.
3-1. The Chief Justice and other judges of the AIFC Court are appointed and removed by the President of the Republic of Kazakhstan on the recommendation of the Governor of the AIFC.
4. The AIFC Court has exclusive jurisdiction in relation to the hearing and adjudication of the following disputes, but does not have jurisdiction in criminal and administrative proceedings: 1) disputes between AIFC Participants, AIFC Participants and AIFC Bodies and an AIFC Participant or AIFC Body and its expatriate Employees; 2) disputes relating to activities conducted in the AIFC and governed by the Acting Law of the AIFC; 3) disputes transferred to the AIFC Court by agreement of the parties.
5. The 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. The Resolution of the Council *On the Court of Astana International Financial Centre* determines the composition of the AIFC Court, the procedure for the appointment and removal of court officials, qualification requirements for judges and court officials, and other matters related to the functioning of the AIFC Court.
6. In adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account final judgments of the AIFC Court in related matters and final judgments of the courts of other common law jurisdictions.
7. Decisions of AIFC Court of Appeal are final and not subject to appeal, and are binding on all natural and legal persons.
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 decisions 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 AIFC in accordance with legislation of the Republic of Kazakhstan.
10. The AIFC Court has exclusive jurisdiction to interpret AIFC Acts.”

The AIFC Court Regulations⁵ supplement article 13 of the Constitutional Statute. Regulation 26 (1) to (5) provide:

“26. Jurisdiction of the Court

⁵ Resolution of the AIFC Management Council dated 5th December 2017

(1) The Court has exclusive jurisdiction, as provided by Article 13 of the AIFC Constitutional Statute, in relation to:

- (a) any disputes arising between the AIFC's Participants, Bodies, and/or their foreign employees;
- (b) any disputes relating to operations carried out in the AIFC and regulated by the law of the AIFC;
- (c) any disputes transferred to the Court by agreement of the parties; and
- (d) the interpretation of AIFC Acts.

(2) The reference to "disputes" between the parties mentioned in this Article applies to civil or commercial disputes arising from transactions, contracts, arrangements or incidences.

(3) The 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.

(4) The Court does not have jurisdiction in relation to any disputes that are of a criminal or administrative nature.

(5) The 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. Decisions of the Court of First Instance referred to in this Article 26(5) are final and shall not be subject to further appeal."

Regulation 29 of the AIFC Court Regulations provides:

"29. Applicable law in the Court

(1) The law to be applied by the Court is as set out in Article 4 and Article 13(6) of the AIFC Constitutional Statute. Accordingly, in exercising its powers and functions, the Court shall apply:

- (a) the AIFC Constitutional Statute, AIFC Regulations including the AIFC Court Regulations, and AIFC Court Rules;
- (b) such law as is agreed by the parties, although it will not do so if such law is inconsistent with the public order or public policy of the Republic of Kazakhstan; or
- (c) such law as appears to the Court to be the most appropriate in the facts and circumstances of the dispute.

(2) The Court, as provided by Article 13(6) of the AIFC Constitutional Statute, in determining a matter or proceeding, shall be guided by decisions of the Court and decisions made in other common law jurisdictions."

The Rules of the AIFC Court are based upon the Civil Procedure Rules of England and Wales, but in much abbreviated form. They are 94 pages, when printed on A4 sheets. Readers may note that this is somewhat shorter than the White Book.

One major function of the court will be to support the arbitration regime in the same way that the Commercial Court provides support for arbitrations in London.

The International Arbitration Centre ('IAC')⁶ in the AIFC will administer arbitrations in broadly the same way as the London Court of International Arbitration administers arbitrations. The AIFC's Arbitration Regulations dated 5th December 2017 govern the IAC. Paragraph 49 of the Arbitration Regulations sets out the functions of the IAC as follows:

"49. Functions

The International Arbitration Centre shall provide the following services:

- (1) Exclusive administration of arbitrations governed by the International Arbitration Centre Arbitration Rules, subject to the agreement of the parties to a case, and such rules to include procedures for expedited arbitrations, the appointment of emergency arbitrators, and resolution of investment treaty disputes;
- (2) Administered arbitrations governed by UNCITRAL Arbitration Rules and ad hoc arbitration rules subject to the agreement of the parties to a case;
- (3) Mediations governed by the International Arbitration Centre Mediation Rules and ad hoc mediation rules subject to the agreement of the parties to a case;
- (4) Other forms of alternative dispute resolution subject to the agreement of the parties to a case;
- (5) Fundholding, to hold and disburse advances in relation to costs associated with use of the International Arbitration Centre's services and facilities;
- (6) An appointment authority, to assist with the appointment of arbitrators and mediators to arbitrations and mediations conducted at the International Arbitration Centre or elsewhere; and
- (7) State of the art administrative facilities, including conference, meeting, and hearing rooms, at its premises, to be known as "The International Arbitration Centre Chambers".

The IAC's Arbitration and Mediation Rules are available via the IAC website. The Chairman of the AIFC is Barbara Dohmann QC. The IAC's panel of arbitrators comprises 23 members, and 11 of these members are also available to serve as mediators. All members of the panel have wide experience. They are drawn from the UK, Hong Kong, USA, Japan, India, Russia, Ireland, Italy, France and Germany.

3. OBSERVATIONS

The AIFC Court is the first common law court to be set up in Central Asia or in a former Soviet state. The establishment of this court is an important step in the promotion of the rule of law world-wide. It is fair to say that this project is arousing considerable interest. Many parties are now writing into their contracts clauses referring future disputes to the AIFC Court and/or the AIFC International Arbitration Centre. Standard form provisions for this purpose are available. Parties proposing to include such clauses can, if they wish, discuss the matter with Mr Christopher Campbell-Holt, who is the Registrar and Chief Executive of both the court and the arbitration centre.

Many commercial parties doing business in Kazakhstan may prefer to have their litigation dealt with in a more thorough manner than is possible under Kazakhstan civil procedure (which requires all civil

⁶ For further information about the IAC, see <http://aifc-iac.kz/>.

cases to be completed in three months). Also, they may prefer to have their disputes dealt with by judges or arbitrators with particular specialist experience.

Both the AIFC Court and the International Arbitration Centre will have first class accommodation and state-of-the-art IT facilities. Completion of the construction and fitting out works is anticipated in the near future. Hearings can be held either in Astana or elsewhere. Where appropriate, hearings can proceed by video link.

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