

Astana joins Dubai: Can International Finance Centre courts Replace the English High Court?

Philip Gardner (Associate) of Peters & Peters discusses the new Astana International Finance Centre Court and Arbitration Centre, and whether it and similar ventures can replace the English Court as the jurisdictions of choice for heavyweight commercial litigation.

Introduction

The English legal system is historically one of the UK's great exports, with the English common law forming the basis of the legal systems for approximately a quarter of the world. In addition to evolving in various ways in different jurisdictions, English law remains the law of choice in much of international commerce and in particular in shipping, financial services and resource extraction.

It is, therefore, unsurprising that the new Astana International Finance Centre (AIFC) Court and International Arbitration Centre (IAC) will lean heavily on the English legal tradition, as confirmed by the signing of a Memorandum of Understanding between the AIFC, IAC and the Law Society of England and Wales in March of this year.

The AIFC is an initiative of the President of Kazakhstan designed to improve inward investment to the country and help to make it a regional hub for finance, business and dispute resolution. With support from strategic partners – NASDAQ and the Shanghai Stock Exchange – the AIFC has already attracted a significant number of international companies, including many from China and the Middle East to base themselves there. Fundamental to the success of the AIFC will be the Court and IAC that are associated with it, which will provide some judicial certainty in a region that has often lacked it.

The Court and IAC have appointed what the Governor of the AIFC refers to as an 'All-Star legal team'. The Court is made up of nine retired members of the English judiciary including former Master of the Rolls and Lord Chief Justice Lord Woolf and Sir Rupert Jackson LJ who led the highly influential and most recent review of civil litigation in England and Wales. Not to be outshone, the IAC has appointed the leading commercial silk Barbara Dohmann QC as chair. The rules of the Court are based on the Civil Procedure Rules and registry staff of both the Court and the IAC are in part drawn from or have received training in the English legal community.

Indeed, the only non-English flavour to the AIFC legal organs is the relaxed rules of rights of audience and representation, with admission being free, not subject to a time limit and open to lawyers admitted in any jurisdiction (or indeed law graduates with letters of recommendation from a court).

The Court itself is made up of a court of first instance and appeals chamber (along with a small-claims track for those claims under \$150,000). The Court is independent from the Kazakh judiciary, though its decisions will be enforced domestically through an accelerated partnership with the Kazakh state.

Considering the large number of Kazakh-related disputes that have come before foreign – and not least the English – courts in recent years, it is unsurprising that the Kazakh government wishes to persuade more of those disputes to remain within Kazakhstan. The huge natural resources of Kazakhstan and its strategic position in terms of China's 'Belt and Road' initiative both strengthen the potential for the AIFC to become a local hub for international litigation and arbitration that needs a reliable, familiar and enforceable process.

Can the AIFC match the DIFC?

The most successful model for the AIFC to follow is clearly the DIFC based in the United Arab Emirates. Active for over a decade, the DIFC is now a base for many multinational companies, and the DIFC Court broke its own records again in 2018 by hearing 670 cases with a total value in excess of £2 billion. DIFC jurisdiction clauses (typically applying English law) are common-place in the Middle East, and that model is clearly one that the AIFC hopes to emulate.

Despite the clear government backing and potential for growth in the regional economy, the AIFC will be hard-pressed to keep up with the DIFC.

The DIFC's success – and particularly that of its judicial organs – is largely based on the dynamism and development of the Gulf economy. The concentration of shipping and natural resources industries along with the sophistication of Gulf-based financial services provides a common-law disposed clientele. Further, many international – and particularly UK – law firms already have a large presence in the UAE and wider Gulf region, and so the DIFC presents an obvious forum for their clients.

There is no doubt that the AIFC will have to work hard to compete with such in-built advantages, though the buy-in of major Chinese and Russian corporations is certain to provide a big boost to the Kazakh efforts.

Why is the English Court still dominant?

Notwithstanding the success of the DIFC and the increasing high-profile nature of its court – for example in the now infamous *Akhmedova -v- Akhmedov* family litigation – the reality is that the High Court in London remains the jurisdiction of choice for heavy-weight international commercial litigation.

Nonetheless, practitioners are forced to consider whether this will remain so, in light of the new Netherlands Commercial Court (offering English language proceedings), the expansion of the International Chamber of the French Court of Appeal and IFC challenges from around the world.

The continued dominance of London may seem superficially surprising when one views the state-of-the-art facilities that many competitors (including the DIFC and

AIFC) benefit from, the well-publicised challenges in UK judicial recruitment and the practical challenges to enforcement presented by Brexit, including asset flight.

In reality, however, many of the issues that do exist with the English Court (no uniform e-filing, delays in hearings/appeals due to judicial shortages) require only limited changes – predominantly through an attainable increase in resourcing – and certainly not root and branch reform. The announcement by the Ministry of Justice this week of an increase to salaries for High Court judges is a welcome step.

The benefits of English litigation – as recognised by the hundreds of corporate and HNWI disputes which are brought there by choice (at least by one party) – are manifold and lie overwhelmingly in the quality of legal professional (judiciary, advocates and solicitors) and the respect and thus enforcement potential that such quality engenders around the world.

The English Court also provides greater certainty as to outcome. Not only will the process be fair and enforceable but the doctrine of precedent (much more loosely followed in IFC courts) and the sheer range of disputes that it confronts regularly (far wider than the relatively narrow areas of the IFCs) makes it possible for experienced legal advisors to offer clients a realistic assessment of the English Court’s likely view.

This strength of quality gives rise to robust judgments, which can be enforced swiftly in many jurisdictions (or against the large proportion of foreign-held UK assets).

While it is important that the English Court be alive to the challenges of other litigation centres, it seems likely that it will retain its preeminent position for the foreseeable future.

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