

The AIFC Court and the Common Law Method of Resolving Commercial Disputes and Issues arising from Regulatory Decisions

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1. Introduction

(1) It is a huge honour and a great pleasure to be asked to speak here at the Republic of Kazakhstan's Supreme Court in the presence of Chief Justice Assanov, other judges of the Supreme Court, and regional judges joining us by videolink.

(2) My topic is the nature of the common law method and how it will work in the context of an international financial centre such as the AIFC. I was asked to speak on this because, as is well known, the law to be applied in the AIFC Court, is to be based on English law principles and legislation and the standards of leading global financial centres. As Lord Woolf, the Chief Justice of the AIFC Court, has said, it is significant and a sign of confidence that Kazakhstan has chosen to use English common law rather than Kazakhstani law in its new financial centre. He considers this will be mutually beneficial to both systems. This talk is the first in a series designed to introduce those in the Kazakhstan legal and business community unfamiliar with the common law to it. My purpose is to indicate what contribution English common law with its developed and sophisticated body of commercial law can make to the AIFC within the legislative structure laid down by the AIFC Constitutional Statute 2015 (the "Constitutional Statute") approved by the Kazakhstan Parliament.^[1] To do this, it will be necessary for the judges of the AIFC Court to gain understanding about the commercial and business contexts in which users of the AIFC Court operate and the approach of the Kazakhstan legal and business community to the questions that will come before it.

(3) I shall first briefly summarise the legal framework within which the AIFC Court will work. I will then suggest that there will be at least seven features of the common law method which will make a substantial contribution to dispute resolution in the AIFC. These features involve two elements. The first concerns the nature of the substantive and procedural common law. The second concerns the judges who created so much of the common law over the centuries. The seven features about which I will briefly introduce are:

- A proven track record and proven foundational principles relevant to commercial and regulatory law which have been attractive to the international business community for over 100 years;
- An independent judiciary committed to the rule of law who are appointed as judges after significant practical experience as lawyers;
- The decisions of common law judges are sources of law which are binding precedents for decision-making in later cases on the same question so that parties and their advisers know where they stand and have a basis for predicting the outcome of any disputes when they arise;
- Flexibility which enables a common law system to develop principle incrementally and keep up to date without producing uncertainty;
- Procedural rules which also foster predictability and enable cases to be dealt with in a way that is proportionate to their complexity;
- A developed body of principles and decisions on the supervision by judicial review of decisions of commercial regulatory bodies, and
- Considerable experience of commercial arbitration and respect for the parties' choice of arbitration shown by a "light touch" system of supervision guided by a general principle of non-intervention.

2. The Legal Framework

(4) The starting point is the Constitutional Statute, to which I have referred. Article 13 provides for the establishment of the AIFC Court. Article 13(2) provides that the court "is independent in its activities and is not part of the judicial system of the Republic of

Kazakhstan".^[2] The court is to serve the AIFC by dealing with all disputes which arise out the AIFC or its operation; that is disputes between AIFC participants, and between participants and AIFC bodies and the foreign employees of participants. But the court will also have jurisdiction over disputes concerning other markets where all parties agree to this.

(5) The AIFC Court Regulations ("the Court Regulations") make provision for "the complete independence" of the AIFC Court's judges when performing their judicial functions. They also require them to act impartially when doing so.^[3]

(6) Article 13(5) of the Constitutional Statute provides that the law to be applied is to be "based on the principles and legislation of the law of England and Wales and the standards of leading global financial centres". Regulation 29(3) of the Court Regulations provides that the Court will be guided by its own decisions on relevant matters and by final decisions in other common law jurisdictions. It thus has similar features to other institutions of what can be described as a transnational system of dispute resolution such as the Dubai International Financial Centre Courts and the Singapore International Commercial Court. Such courts also form part of a complementary partnership between dispute resolution based on litigation and that based on arbitration.

(7) As to enforcement, it is important to note that Article 13(8) of the Constitutional Statute states that the 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" (emphasis added).

3. The 7 features resulting from the AIFC being based on and guided by principles of English common law and legislation

(8) A proven track record and proven foundational principles relevant to commercial and regulatory law: A 2017 report stated that 27% of the world's 320 legal jurisdictions use English common law.^[4] The confidence for over 100 years by the international business community in English common law and its judges is also demonstrated by the number of companies and individuals with no or little connection to England who choose to litigate or arbitrate in London. So, in 2015 70% of the London Commercial Court's work had no relation to England except for the choice of law and choice of jurisdiction clause in the contract.^[5] In the year ending in July 2017, 71% of claims in London's Admiralty and Commercial Courts were international in nature with 49% of all claims in these courts involved international parties on both sides. ^[6] A 2015 survey showed that four of the top 7 preferred seats of arbitration were common law jurisdictions, and that English law is the choice for about 40% of all global corporate arbitrations.^[7] A 2015 survey showed that four of the top 7 preferred seats of arbitration were common law jurisdictions: Why is this?

(9) The first reason is that the principles of English common law balance the tension between the needs of certainty and flexibility in a way which has proved practical and attractive to its international users. I mention three principles that are relevant to the likely workload of the AIFC Court. First, the common law respects the parties' freedom of contract and the bargain they have made, and so in general respects their autonomy to agree the terms of the contractual relationship as they choose. The second is that commercial contracts are construed so as to give effect to the intentions of the parties objectively determined. Provided you contract in reasonably clear and intelligible terms, what you agree is what you get. The objective standard protects those who rely in good faith on the apparent position and thus it promotes certainty and finality of transactions. The third principle is that the courts will not imply terms into contracts or rectify their terms unless stringent conditions are met. Other than the relatively rarely applied rule against penalties, English law does not seek to strike down or amend the parties' agreement. There is no overriding duty of good faith

(10) **The United Kingdom has a strong independent judiciary committed to the rule of law:** A strong and incorruptible judiciary ensures fair and predictable dispute resolution. International parties litigating in a jurisdiction with such a judiciary can be confident that their disputes will be decided only on their intrinsic merits, without regard to nationality, politics, religion or race. That is a vital factor in inspiring business confidence and underpinning international trade and investment. The judges of the AIFC

Court are all the product of such a system, and will bring its values to their work. In the context of the AIFC itself, the commitment to judicial independence and to the rule of law is seen from the provisions in the AIFC's Constitutional Statute and Regulations to which I have referred.^[8]

(11) **Common law judges are appointed after significant practical experience as lawyers:** They have therefore had significant interactions over many years with the commercial entities and individuals who they represented or who were their adversaries. That background gives them experience and understanding of the pressures of commercial life. They understand the need for commercial and financial law to reflect the needs of the business community. Their background also helps them to understand the differences between acceptable and unacceptable business practices. It has also been an important factor in the adaptability of English common law to fast-changing practical and commercial realities.^[9] In the context of the AIFC Court, the judges' background means they will appreciate their need to learn about the commercial contexts in which those using the Court operate.

(12) **The decisions of common law judges are sources of law:** The hallmark of a common law system is the importance accorded to the decisions of judges and, in particular appellate judges, as sources of law. So, within a framework set by the legislature when it enacts statutes, the law is made by decisions of judges. The common law is thus that part of the law which it is within the province of the courts themselves to establish. It is unwritten in the sense that it is not in a statute, but it is made accessible and transparent in law reports and in textbooks which analyse the effect of the decisions with a view to identifying the principles which underlie them.

(13) **Decisions are binding precedents:** The system is built on and depends on individual decisions being binding precedents for future courts at the same level to follow so that "like cases are treated alike". The principles in a particular area are built up by a gradual development from case to case. Two features of precedent are crucial to promoting the certainty that the common law seeks. The first is its strength. The second is its maturity. Because English law has been determining international commercial disputes since the early 19th century it has built up a large and formidable body of precedent in many specialist areas such as shipping, commodities, insurance, construction and banking. This assists parties and their advisers to know where they stand and to be able to make a reasonable prediction of the outcome of any disputes when they arise. By contrast, civilian systems are essentially codified legislative systems and owe their inspiration to the principles of the Napoleonic codes. In such systems judicial decisions are not primary sources of law but only a gloss on the law in the legislative code.

(14) **This is not to downplay the importance of legislation:** Of course, much English commercial law is contained in legislation. Some is from statutes now updated but originating in the nineteenth century which reflected market practice and previous decisions on topics such as sale of goods, bills of exchange, and marine insurance. Many are modern, such as the statutes dealing with company law, banking and the financial markets. But much law is also contained in the decisions of the courts; either "pure" common law where there is no statute involved (a rarity in the modern world), or where the decision interprets the statute or is made against a statutory background which while not directly applicable is relevant to the determination of the underlying principles and the result in the case. While the core of pure common law doctrine continues to shrink, the common law technique will continue as the courts consider and apply the statutory provisions. In the case of the AIFC, its legal framework consists of regulations and rules made in accordance with its Constitutional Statute.^[10]

(15) The judges' duty to apply statutory and common law, the fact that the principles governing the underlying contractual or other dispute are ascertainable, and the importance of the doctrine of precedent are strong factors in the degree to which English Commercial Law is certain and predictable. Certainty is particularly important where a transaction or course of dealing may affect third parties, for example involving documentary letters of credit, bills of lading, bearer bonds or long chains of contracts of sale.^[11] In such cases there can be difficult choices between the claim of a person who

has been wrongfully deprived of property, often fraudulently, and the claim of a third party who has acquired the property in good faith in the market place.

(16) **A common law system has flexibility which enables it to develop principle and keep up to date without producing uncertainty:** The common law does this by applying old principles to new circumstances, and by very gradually moving from the particular to the more general in a way which is sensitive to the particular commercial context. Lord Goff, a distinguished English appeal judge and scholar, stated that the dominant element in the development of English law should be and is “professional reaction to individual fact situations rather than theoretical development of legal principles”.^[12] Lord Goff described the process of legal development within a common law system as a movement from the identification of specific heads of recovery in particular cases to the identification and closer definition of the limits to a generalised right of recovery; a search for principle.

(17) This “bottom-up” approach of gradually generalising from the specific is part of the way that judges have exercised their responsibility over the centuries to keep the common law abreast of current social and market conditions and expectations, and the challenge of new technology. ^[13] Lord Goff saw the developing state of the law as a mosaic that is kaleidoscopic in the sense that it is in a constant state of change in minute particulars. Such development typically takes place in the decisions of appellate rather than first instance courts, and the reference to **minute particulars** indicates that it is very gradual and dependent on the particular context of the case which is being decided. Because common law change is incremental and gradual, it is also possible to step back if a particular development turns out to be a step too far.^[14]

(18) Some of the most dramatic examples of such development of the law have happened in areas which are not of relevance to the work the AIFC Court will be doing. But there are also examples of development which are of great importance to private and commercial law. In 1932 the House of Lords took the specific cases in which a person had been held liable in damages for a civil wrong (a tort) and stated they were based on a single general principle of liability focussed on the blameworthiness of the defendant’s conduct which foreseeably caused the harm to those closely and directly affected by the conduct.^[15] In 1991 the final court of appeal rationalised a large number of cases which had appeared to be based on narrow fact-based grounds and recognised the principle of unjust enrichment as the unifying principle underlying liabilities to make restitution of benefits gained by the defendant at the plaintiff’s expense.^[16] In 2011, a majority of the Supreme Court reversed the long-standing rule that expert witnesses were immune from liability for professional negligence.^[17]

(19) It is the flexibility of the system which keeps it relevant and up to date and able to meet the challenges of an ever-changing commercial world. In recent years English law has been a leader in addressing the problems of globalised financial markets after the global financial crisis in 2008, as seen in the “Waterfall” and other litigation about *Lehman Brothers*.^[18] The court has recently had to revisit and determine the duty of banks in identifying fraud in the internal corporate structure of their clients.^[19] Last month, Lady Justice Gloster, the Vice-President of the English Court of Appeal, stated that at present the common law is leading the way in Fintech, Digital Ledger Technology and Artificial Intelligence.^[20]

(20) **Predictability by the application of known and suitable procedures:** The English Civil Procedure Rules are designed to be practical and to deliver the speedy and efficient resolution of business and financial disputes in ways which are proportionate to the nature and complexity of the case. They are sensitive to the unique needs of commercial court users and are generally accepted as being the most effective set of rules to apply in trying complex commercial cases.

(21) I anticipate that the AIFC Court Rules, which are closely modelled on the English Civil Procedure Rules, will provide similar benefits. For example, there is a special fast track procedure for small claims.^[21] The common law principle that the costs are generally to be borne by the loser applies in the AIFC Court, although there is power for it to make a different order.^[22]

(22) **A developed body of principles and many decisions on the supervision by judicial review of decisions of regulatory bodies:** I have stated that the AIFC court is to have exclusive jurisdiction over disputes between AIFC participants and AIFC bodies. The exact boundaries of that jurisdiction will need to be determined. In this context, however, the experience of the English common law in the exercise of the judicial review jurisdiction over the decisions of regulatory bodies, including those in the financial, banking and commodity markets will, in my view be very helpful. The role of the court has been to ensure that regulatory bodies operate within the area that has been allocated to them by the legislature. The court is concerned with the legality of their decisions, including their rationality and procedural fairness but not with their substantive merits.

(23) While the courts have the final word on questions of law, in considering the other questions, they will not interfere if the matter is one for the judgment of the regulator and not for the judgment of the court. They take into account the expertise of the decision-maker, and whether the decision requires the evaluation of complex economic or scientific evidence. The threshold for a finding of "irrationality" is high. English Courts exercising the supervisory jurisdiction do not substitute their own judgment for that of the regulator who was tasked with making the decision.

(24) **English law has considerable experience of commercial arbitration and respect for the parties' choice of arbitration:** Chief Justice James Allsop of the Federal Court of Australia has said that "co-operation and partnership between courts and arbitral structures is essential for a jurisdiction to serve international commerce, and for judicial and arbitral institutions to complement each other and to grow and succeed". He also said that how well any particular jurisdiction deals with international commercial arbitration and so serves the international commercial community is dependent upon the quality and qualities of its commercial courts" which, "as supervising seat courts and as enforcing courts, are a critical integer in the successful operation of the international commercial arbitral legal order".^[23]

(25) The legislative framework provided by the English Arbitration Act 1996 and the decisions of courts on it show respect for the parties' choice of arbitration. English Courts provide support for the process during the arbitration if one party tries to frustrate the arbitration agreement and there is a general principle of non-intervention in arbitral proceedings. The volume of commercial litigation and arbitration in the Commercial Court in London means that English common law has considerable experience of supervising the awards made in commercial arbitrations. Last year, in an important speech in Beijing, Lord Thomas, then Lord Chief Justice of England and Wales said that when considering a dispute about an arbitration agreement or the arbitration process, courts are required "to ensure that the choice of arbitration and party autonomy are fully respected and not nullified".^[24]

(26) These then are the features of the English common law system which will, in my judgment, make the AIFC Court an effective and independent institution in which its users can have confidence. Confidence by the business community and the international investors in the AIFC in the AIFC Court and the fairness of its processes will play a vital role in ensuring the success of the AIFC.

(27) Thank you.

[1] No. 438-V ZRK of 7 December 2015, amended on 22 December 2017. It came into force on 9 January 2018.

[2] As the Constitutional Statute was approved by the Kazakhstan Parliament, the AIFC Court was established "by law" within Article 75(3) of the Constitution of Kazakhstan, and is thus a "court of the republic" authorised by that provision. Cf. Article 75(4) proscribing the establishment of "special and extraordinary courts".

[3] Reg. 11.

[4] The CityUK, UK Legal Services Report 2017, p. 7. CityUK represents the legal interests of London's financial and related professional services sector. The report states that American common law is used by around 20% of jurisdictions, and that English law is by some distance the most widely-used foreign law in Asia.

[5] Justice James Allsop, Chief Justice of the Federal Court of Australia, "National Courts and Arbitration: Collaboration or Competition" Chartered Arbitrators Centenary Conference 2 July 2015 p. 6.

[6] The CityUK, UK Legal Services Report 2017.

- [7] The CityUK, UK Legal Services Report 2017; J Makin, global co-head of Mining, Freshfields Bruckhaus, Deringer, presentation on 17 October 2016: <http://www.brickcourt.co.uk/application-forms/Brexit17.10.16papersfinal.pdf>.
- [8] Art. 13(2) of the Constitutional Statute and Reg 11 of the Regulations: see paras. (4) and (5).
- [9] Lord Neuberger, Address to International Council of Advocates and Barristers (Edinburgh, 16 April 2016)
- [10] There are at present some 30 AIFC General Legal Framework Acts. The topics dealt with by Regulations or Rules include Contract, Companies, Arbitration, Implied Terms, Security, Netting, Payment System Settlement, Data Protection, Partnership, Insolvency, Obligations, Damages and Remedies.
- [11] For examples, see the Court of Appeal's decision in *Secure Capital SA v Credit Suisse* [2017] EWCA Civ. 1486; 2 Lloyd's Rep. 599 (holder of bearer bonds is their absolute owner for all purposes and the only person who can sue on them) and *Hamzeh Malas v British Imex* [1958] 2 QB 127, 129 (obligation of the bank which opened a confirmed letter of credit to pay the vendor of goods is an absolute obligation regardless of any dispute between the parties to the sale).
- [12] "The Search for Principle" (1983) 59 Proc Brit. Academy 169, 186 (Maccabean Lecture). See also, Justice Oliver Wendell Holmes of the United States Supreme Court: "The life of the law has not been logic; it has been experience..." (The Common Law (1881) p. 1) and: "general propositions do not decide cases" (*Lochner v. New York*, 198 US 45 (1905)).
- [13] See also *Spectrum Plus Ltd* [2005] 2 AC 680, per Lord Nicholls at [32], "Judges have a legitimate law-making function ... For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations.". For the view that the courts should be very cautious before doing this, especially on questions of public law, see Lord Sumption, *The Limits of Law*, (27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013).
- [14] On liability in tort for economic loss, see the retreat from the general principle stated in *Anns v Merton LBC* [1978] AC 728 that culminated in *Murphy v. Brentwood DC.* [1991] 1 A.C. 398 See JW Davies in Birks ed, *English Private Law* (1st ed.) vol. II §14.32 describing the tort of negligence now as "not a federation united by a single principle but a confederation of islands of liability each with its own semi-independent regime".
- [15] *Donoghue v Stevenson* [1932] AC 562
- [16] *Lipkin Gorman v Karpnale Ltd.* [1991] 2 AC 548.
- [17] *Jones v Kaney* [2011] UKSC 13. One of the dissenters, Baroness Hale, considered that such a change should be made by legislation.
- [18] *Re Lehman Brothers International* [2012] UKSC 6; [2015] EWHC 2269 (Ch); [2017] EWCA Civ. 1462.
- [19] *Singularis v Daiwa Capital Markets* [2017] EWHC 257 (Ch), affirmed [2018] EWCA Civ. 84. A bank is put on notice when the evidence of fraud is obvious, and it cannot defend a claim in negligence and breach of contract brought by the customer on the ground of illegality within the customer's corporate structure.
- [20] "Brexit - One Year to Go: What to expect", keynote speech, 5 March 2018 (Holman Fenwick Willan LLP).
- [21] Part 28 (compulsory for claims of up to US\$ 150,000; and available where the parties agree for claims of up to US\$ 300,000). Article 26 of the AIFC Court Regulations requires such a procedure.
- [22] Part 26.5.
- [23] "National Courts and Arbitration: Collaboration or Competition" Chartered Arbitrators Centenary Conference 2 July 2015 pp. 1-2.
- [24] Lord Thomas CJ, *Commercial Dispute Resolution: Courts and Arbitration* 6 April 2017, National Judges college, Beijing, <https://www.judiciary.gov.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf>