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The International Financial Centre “Astana” as an Example of the Common Law Implant in the Constitutional Scheme of the Republic of Kazakhstan⁴

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Abstract

The existence of the Court of the International Financial Centre “Astana” is a challenge to both legal theory and practice. This challenge concerns the status of the judges of this court, who apply the precedents of the English courts in their case law. This unique practice of letting the territory of a sovereign country enforce the principles coming from a completely different system of law is described by legal academics and commentators in various ways: as a reception, acculturation, transformation, implementation, migration of the law, continuity and replicability of the law. In this context, we analyse the very nature of the financial centre “Astana” and particularly one of its most prominent institutions, namely the Court of the International Financial Centre “Astana” presenting it as a process of its integration into the framework of the Kazakh constitution of the autonomous legal system within the economic zone whose boundaries are determined by the constitution and the constitutional law governing the roles played by the international financial centre.

Keywords: international financial centre, legal system, English common law, The Court of the International Financial Centre “Astana”, the position of the judges, applicable law, the constitutional statute, legal competencies of the court.

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Międzynarodowe Centrum Finansowe „Astana” jako przykład implantu systemu prawa common law w systemie konstytucyjnym Republiki Kazachstanu⁵

Streszczenie

Istnienie Sądu Międzynarodowego Centrum Finansowego „Astana” stanowi wyzwanie zarówno dla teorii, jak i praktyki prawa. Wyzwanie to dotyczy statusu sędziów tego sądu, którzy w swoim orzecznictwie stosują precedensy sądów angielskich. Ta wyjątkowa praktyka, pozwalająca na terytorium suwerennego kraju wykorzystywać zasady pochodzące z zupełnie innego systemu prawa jest opisywana przez przedstawicieli doktryny na różne sposoby: jako przykład recepcji, akulturacji, transformacji, implementacji czy migracji prawa oraz instrument ciągłości i replikowalności prawa. W tym kontekście analizujemy samą naturę Międzynarodowego Centrum Finansowego „Astana”, a w szczególności jednej z jego najważniejszych instytucji, jaką jest Sąd Międzynarodowego Centrum Finansowego Astana. Przedstawiamy go jako instrument procesu integracji w ramach kazachskiej konstytucji autonomicznego systemu prawnego w strefie ekonomicznej, której granice określają konstytucja i ustawy konstytucyjne regulujące Międzynarodowe Centrum Finansowe „Astana”.

Słowa kluczowe: Międzynarodowe Centrum Finansowe, system prawny, angielskie prawo zwyczajowe, Sąd Międzynarodowego Centrum Finansowego Astana, status sędziów, prawo właściwe, ustawa konstytucyjna, kompetencje sądu.

⁵ Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

Introduction

The second half of the 20th and the beginning of the 21st century have become a playground of reciprocal interactions and mutual impacts of various legal systems of the world. These phenomena have resulted from the processes of globalisation, including the sphere of the state and law. They are, however, no entirely new developments since similar interactions had been taking place from the end of the 18th century and continued through the whole 19th century and onwards.

In those times, the USA, a country with traditions of common law based on the system of precedents, adopted the world's first constitution, which is still in force. This constitution became a source of inspiration for many legal systems of the world. It was also a result of the ideas of Enlightenment. The thoughts of philosophers from the world of the continental, German, and French legal traditions inspired it. French philosophers like Montesquieu and Rousseau were a source of inspiration for the Fathers of the US Constitution.⁶ Mostly, the Montesquieu's concept concerning the separation of powers is inspired by the English parliamentary system (even if Montesquieu's analysis of this system was based on several misunderstandings – it is, however, quite common that such misunderstandings or myths are the driving force behind intellectual development) impacted the American constitutional thought.⁷

It is a common experience of the reciprocal influence among different legal systems, notably between the common law and the continental legal tradition. In the existing continental legal systems, there are increasingly more legal implants like trusts, franchising, leasing etc., which earlier did not appear in the framework of these systems. For example, there are current considerations in the Kazakh legal system regarding whether the concept of damage should be independent of the concepts existing in the common law to make the system of contract law more effective.⁸

The judicial system also experiences a process of transsystemic exchange and reciprocal inspirations. The growing relevance of facts in modelling the legal argumentation, the role of lawyers, and the more contradictory framing of the

⁶ P.M. Spurlin, *The French Enlightenment in America: Essays on the Times of the Founding Fathers*, Georgia 2021, p. 86.

⁷ A.M. Cohler, *Montesquieu's Comparative Politics and the Spirit of American Constitutionalism*, University Kansas 1988. Available from: <http://www.jstor.org/stable/10.2307/j.ctv1p2gm5j> (accessed: 4.10.2024).

⁸ M. Sulejmenov, *Anglijskoe pravo i pravovaya sistema Kazahstana*, "Pravo i gosudarstvo" 2016, 3(72), pp. 37–45.

procedure could be used as an example for such kinds of implants or at least for a type of convergence. On the other hand, the signs of more vivid judicial activism and more purpose-oriented interpretation of law have also reached the common law jurisdictions.⁹ A departure from the textual-centred interpretation of legal texts can also be seen in the Eastern European and Central-Asian countries under the influence of the Western jurisdictions of the civil law tradition.¹⁰

While analysing the process of the mutual impact and convergence of the different legal traditions, the case of the Republic of Kazakhstan could be especially interesting. Kazakhstan, bearing a part of the heritage of the Russian Empire and, later on, of the Soviet Union, belongs to the continental legal tradition, carrying its own specificities.

This article centres around a few examples of the impact of common law on Kazakhstan’s legal system. We have chosen to discuss and present a particular case of the emergence of a genuine common law-based jurisdiction of the English kind within the legal landscape of the Republic of Kazakhstan. It is the International Financial Centre “Astana” with its own Court.

The legal framework of the International Financial Centre “Astana”

The International Financial Centre “Astana” was created to attract foreign investments to Kazakhstan by creating an investment-friendly environment, possibly reducing bureaucratic obstacles and creating a tax policy supporting businesses from all over the world.¹¹ The idea has proven successful since the Global Financial Centres Index 34 (for the day 28.09.2023) ranked the International Financial Centre “Astana” 1st among similar financial centres in Eastern Europe and Central Asia. The Astana Centre was also named 1st by the Global Green Finance Centre 12 as of 26.10.2023 in the respective region.¹²

Institutions of this kind are a tool to overcome various fears of foreign – primarily Western – investors when investing in a country unknown to them, whose legal systems they do not trust, and which are not familiar to them or their legal

⁹ S.A. Lindquist, F.B. Cross, *Measuring Judicial Activism*, Oxford 2009, p. 30.

¹⁰ A. Mazmanyan, *Judicialization of Politics: The Post-Soviet Way*, *International Journal of Constitutional Law* 2015, 13, p. 215.

¹¹ S. Valiyeva, *On The Court And International Arbitration At The Astana International Financial Centre For Foreign Investors In The Oil And Gas Industry*, 2024; N. Zambrana-Tévar, *The Court of the Astana International Financial Centre in the Wake of Its Predecessors*, *Erasmus Law Review* 2019, 12, p. 122.

¹² *Mezhdunarodnyj finansovyj centr “Astana” (MFC)*, <https://aifc.kz/ru/about-us>.

practices.¹³ Post-Soviet countries face various difficulties when it comes to the functioning of their justice systems, which are expected to comply with all required standards of the culture of judicial independence. There is an ongoing reform process, but for Western investors, it is still an unknown and challenging legal environment. An important factor is language, which is also an essential barrier for full accessibility of the justice system. The idea of the Centre should facilitate access to the market of Kazakhstan with more convenience thanks to a more understandable and easily accessible legal environment.¹⁴

The legal nature of the International Financial Centre Astana, including its Court, is more than complex. This complexity is due to the whole array of global financial challenges requiring unorthodox approaches to channel them at a place in which competitiveness must be increased.

The Centre is governed by constitutional law and is fixed constitutionally within the Kazakh legal system. It is primarily regulated by the Constitutional Law of the Republic of Kazakhstan of 7 October 2015 on the International Financial Centre "Astana".¹⁵ The constitutional laws (constitutional statutes) need to be adopted in accordance with the Kazakh Constitution, and only if the Constitution provides competence for such legislation. In the year 2015, when the Centre was organised, such a norm of competence was not provided for by the Constitution. In this context, the norm is the process of "constitutionalising", which means a method of integration of constitutional norms into the whole system of law, governing various areas of life.¹⁶ This gap has been remedied by the revision of the Constitution of 10 March 2017 in Article 4 no. 3-1, reading as follows: "In the area of the city Astana there may be set a separated legal regime in the domain of finance in accordance with the constitutional law".¹⁷

Looking at the Constitution of Kazakhstan and this constitutional law, one may notice the active role of the government in the process of setting a special territorial zone governed by a particular legal system.

¹³ M. Kenzhallyev, *Perspectives of the Court of the Astana International Financial Centre: Potential to Transform the Central Asian Legal Landscape*, Cambridge 2022.

¹⁴ K. Proskurina, *Astana International Financial Centre: Features of the Tax Regime and Legal Regulation of Cryptocurrency Turnover, Investments and Public Finance*, Białystok 2022, p. 179. Available from: <https://repozytorium.uwb.edu.pl/jspui/handle/11320/14066> (accessed: 3.10.2024).

¹⁵ *Konstitucionnyj zakon Respubliki Kazahstan ot 7 dekabrya 2015 goda "O Mezhdunarodnom finansovom centre "Astana"*. Available from: <https://adilet.zan.kz/rus/docs/Z1500000438>; A. Baimoldayeva, M. Zia-Ud-Din, *The Establishment of the Court of Astana International Financial Centre (AIFC) in the Wake of Its Precursors*, "Journal of Legal Studies" 2022, 29(43), p. 19.

¹⁶ A. Rahmetulin, Y. Abdrasulov, A. Abdrasulova, *Impact of constitutionalization on the legal culture, national norms, and international relations in Kazakhstan*, "Journal of Law and Sustainable Development" 2023, 11(11), p. 13–29.

¹⁷ K. Proskurina, *op. cit.*, p. 180.

The government takes part in organising and financing numerous authorities of the Centre, including the Governing Council, headed by the President of the Kazakh Republic, the Governor of the Centre, appointed by the President of the Republic, Authority of the Centre, Committee of the Centre which regulates the financial services of the International Centre of Arbitration,¹⁸ the Court of the Centre.¹⁹

Foreign participants of the Centre benefit from numerous privileges, e.g. concerning the visa procedures (they are entitled to receive a special 5-year visa under an accelerated procedure) and are also released from the duty to apply for work permission. They are also released from duties arising from the laws of Kazakhstan concerning foreign currencies.²⁰

The most distinguishing feature of the Centre is that it has its own autonomous legal system, and the English law of precedents is in force.²¹ The authorities of the Centre are, with a few exceptions, independent from the government authorities and institutions. They do not need to apply the legislation of Kazakhstan while making their own decisions, even though prominent officials of the Republic took part in the process of establishment of the Centre. The official language of the Centre is English, used in all relationships governed by the Centre on its territory.²² The Centre has its own budget, composed of the resources coming from various sources, including the relevant portion of the budgetary resources of the Republic. These resources are supervised according to Article 9 No. 4 of the Constitution by the competent governmental authority.

The constitutional background for the Court of the Centre

A special role in the system of the Centre, especially for its functioning, is given to the Centre's Court. The process of constitutionalisation functions in the sense of application of constitutional norms to organise a judicial system of the country, which provides, according to the Constitution, that the courts of the Republic are

¹⁸ International Arbitration Centre is a distinctive unit, which differs from the Court of the Centre: S. Valiyeva, *op. cit.*

¹⁹ M. Kenzhallyev, *op. cit.*

²⁰ *Kratkij obzor osnovnykh aspektov prava i deyatel'nosti Mezhdunarodnogo finansovogo centra "Astana"*. Available from: https://docs.yandex.ru/docs/view?tm=1716095194&tld=ru&lang=ru&name=AE_MΦIA_2020_1.pdf&text=.x; A. Bazarbayev, *The Court of Astana International Financial Centre and Public – Legal Regulation Matters*, "Biulletin of Institute of Legislation and Legal Information of the RK" 2024, 1, p. 236.

²¹ Konstitucionnyj zakon Respubliki Kazahstan ot 7 dekabrya 2015 goda, *O Mezhdunarodnom finansovom centre "Astana"*. Available from: <https://adilet.zan.kz/rus/docs/Z1500000438>.

²² A. Bazarbayev, p. 232.

the Supreme Court, regional courts, and other courts created by law. This general constitutional rule is then implemented by the Constitutional Law, which regulates in Article 13 the status and competencies of the Court. Further, the implementation of the constitutional rules contains the statute of the Court, adopted by the Authority of the Centre.

The legitimacy of the Authority headed by the President of the Republic arises from Article 13 No. 5 of the Constitutional Law, which stipulates that the Court of the Centre, in its activity, follows the regulations of the Council on the Court of the International Financial Centre “Astana” which shall be based on the procedural principles and rules of England and Wales²³ and/or standards of the leading global financial centres.²⁴

Even though the Court of the Centre was established based on Article 18 of the Constitution and the respective Constitutional Law and over-governing acts being in conformity with the Constitution, it is not a part of the Kazakh judicial system. It is a unique situation for the Kazakh legal system that in the centralised legal system with a unitary territory and unitary law, there is a special area created with the active involvement of the government, granted an autonomous status and a mixed legal system.²⁵ The Court applies first the Constitutional Law, then its own case law and the case law of common law jurisdictions²⁶, then – the law which, according to the judges deciding a given case, is the closest connected with the subject matter of the affair, and further – the law agreed by the parties which does not infringe the public order and the governmental policies of Kazakhstan.²⁷

The co-existence of the different legal systems in the territory of a single country is not unique from a comparative perspective.²⁸ Such a practice may also be observed in cases of other international financial centres, particularly those not located in the core of the Western world; they too receive a special, autonomous status and may apply a law which makes them attractive to investors. One such example is e.g. the courts of the Dubai International Financial Centres, which also apply

²³ S. Valiyeva, *op. cit.*, p. 128.

²⁴ *Kratkij obzor osnovnykh aspektov prava i deyatel'nosti Mezhdunarodnogo finansovogo centra "Astana"*. Available from: https://docs.yandex.ru/docs/view?tm=1716095194&tld=ru&lang=ru&name=AE_MΦIIA_2020_1.pdf&text=; N. Zambrana-Tévar, *op. cit.*, p. 128. On the various types of the international financial centres on the globe see: M. Kenzhallyev, *op. cit.*

²⁵ M. Kenzhallyev, *op. cit.*

²⁶ S. Valiyeva, *op. cit.*

²⁷ Reglament Suda MFCA. Prinyat Postanovleniem Soveta po upravleniyu MFCA ot 5 dekabrya 2017 goda, <https://aifc.kz/files/legals/68/file/3.-legislation-aifc-court-regulations-2017.pdf>; A. Baimoldayeva, M. Zia-Ud-Din, *op. cit.*, p. 28.

²⁸ M. Kenzhallyev, *op. cit.*

common law in their judicial practice.²⁹ Such practice among countries that do not belong to the common law world stems from the fact that the most important financial centres of the world – like New York, London, Hong Kong, and Singapore – are part of the common law system, and this common law background can be seen as an important factor of competitiveness.³⁰

On the question of the nature of the application of common law by the Court of the Centre

Such an autonomous structure with its own jurisdiction and the common law environment is a new solution in Kazakhstan. It should therefore come as no surprise that the question on the application of the English common law by the Court of the Centre is a matter of a heated academic debate.³¹ Some legal academics and commentators see the application of English law by the authorities of the Centre as an example of the reception of English law by the whole Kazakh legal system. This position is supposed to be supported by the enforceability of the judgments of the Centre’s Court in the whole of Kazakhstan and the equal status of these judgments with the judgement of regular courts,³² which follows from the Constitutional Law on the Centre.³³

This view cannot be upheld because it is necessary to distinguish between the effects of the judgments which are not necessarily confined to the small territory of the Centre and produce their result also beyond its boundaries and the territorial jurisdiction of the Court, which covers the territory of the Centre with its ordinary status in Kazakhstan. The territorial jurisdiction of the Centre is confined to the zone of the permanent placement of the Centre, assigned to the Centre by the government and one where all commercial transactions happen. The parties to all these transactions and other legal relationships concerning the activity of the Centre and its authorities could be the citizens of Kazakhstan, irrespective of their place of residence or foreigners. All of them could be targeted and affected by the acts

²⁹ On the Dubai International Financial Centre as a source of inspiration for the Astana Centre: S. Valiyeva, *op. cit.*; K. Proskurina, *op. cit.*, p. 185; N. Zambrana-Tévar, *The Court of the Astana International Financial Centre in the Wake of Its Predecessors*, “Erasmus Law Review” 2019, 12, p. 123, see as well : A. Baimoldayeva, M. Zia-Ud-Din, *op. cit.*, p. 20.

³⁰ D. Horigan, *Consensual Jurisdiction of the DIFC Courts*, “Proceedings of 20th International Business Research Conference”, Dubai 2013, p. 2.

³¹ M. Kenzhallyev, *op. cit.*

³² N. Zambrana-Tévar, *op. cit.*, p. 122.

³³ D.S. Batyrbekova, *Dejstvuyushchee pravo mezhdunarodnogo finansovogo centra “Astana” i ego vzaimodejstvie s dejstvuyushchim pravom respubliky Kazakhstan*, “Pravo i gosudarstvo” 2021, 4(93), pp. 6–24.

of the Centre, in their quality as participants of the Centre or accredited participants of the market.³⁴ For example, numerous companies run their businesses in the Centre as so-called “recognised companies”, although they are registered formally in other jurisdictions, including Kazakh. The only requirement of the Centre’s system for the registered companies is the mandatory registration of the company’s legal address in the territory of the Centre and the actual presence of at least one representative of it.³⁵

The argument that the enforceability of judgments is a symptom of the incorporation of common law into the general Kazakh legal system is not convincing. It is also the case that the arbitration awards, based on various sources of law, are enforceable, but this is not evidence for the reception of a respective legal system.³⁶ It is rather an emergence of a parallel legal system established in the interest of a country in a designated territory, with little control of the government, which could be qualified as a case of mixed jurisdiction. It is possibly a better kind of legal particularism producing vivid competition among the legal systems, and the participants of the legal relationships have more freedom in choosing one or the other legal system in the territory of one or more countries. The case of the European Union shows that according to the European freedoms, the EU citizens and entities are free to start their activity in the selected Member State of the Union and enjoy the characteristics of competition under the chosen system.³⁷

There are several facts which indicate that Kazakhstan sees the emergence of a particular and mixed legal system.³⁸ The law of the Centre is composed of the norms of the Kazakh national law and common law, as well as of the orders of the Centre’s authorities established with the participation of the government authorities.³⁹ Relationships which are not governed by the acts of the Centre are subject to the regular Kazakh law.⁴⁰ Despite this, the mixed nature of the Centre’s law can be seen

³⁴ A. Bazarbayev, *op. cit.*, p. 233; A. Baimoldayeva, M. Zia-Ud-Din, *op. cit.*, p. 22.

³⁵ AIFC companies’ regulations AIFC regulations no. 2 of 2017 (with amendments as of 25 November 2021, which commence on 1 January 2022). Available from: <https://aifc.kz/files/legals/424/file/2.-aifc-companies-regulations-no.-2-of-2017.pdf>; <https://afsa.aifc.kz/en/recognised-company>; on the jurisdiction of the centre see: N. Zambrana-Iévar, *op. cit.*, p. 124.

³⁶ Zakon Respubliki Kazahstan ot 8 aprelya 2016 goda № 488-V ZRK “Ob Arbitrazhe”. Available from: <https://adilet.zan.kz/rus/docs/Z1600000488>.

³⁷ A. Latyev, *Skromnoe obayanie partikulyarizma*, 2013. Available from: https://zakon.ru/blog/2013/8/4/skromnoe_obayanie_partikulyarizma (accessed: 4.10.2024).

³⁸ The concept of the mixed jurisdictions understood as a system combining the common law and the continental legal tradition is discussed in deep in W. Palmer (ed.), *Mixed Jurisdictions Worldwide* (2nd ed.), Cambridge 2012.

³⁹ A. Baimoldayeva, M. Zia-Ud-Din, *op. cit.*, p. 27.

⁴⁰ See, however, the slightly different position of M. Kenzhallyev, *op. cit.* The author indicates that there is a difference between the Constitutional Statute and AIFC Regulations on AIFC Acts of 2017 in determining the hierarchy of sources named in the Constitutional Statute. But the Centre is not exempted

in the case of licensing granted to the Centre’s participants. They need to receive a commercial license issued by the Centre for one year with the possibility of prolongation, but they also need to get a Kazakh license for special kinds of activities if the Centre itself does not require a special license in such cases.⁴¹

The legal positioning of the Centre’s Court and the legal status of its judges

The Constitutional Law and the rules of the Centre govern the essential issues of the Court’s activity, its competencies, appointment, and dismissal of judges, structures, and financing of the Court, procedure, and the enforcement of its judgements.⁴² The Court of the Centre consists of the Court of the First Instance and the Court of Appeal. The Court of the First Instance also includes a special section: the Small Claims Court.⁴³

Firstly,⁴⁴ the Court decides cases resulting from disputes among the participants of the Centre, its authorities, and foreign employees.⁴⁵ Secondly, the Court decides the outcome of disputes resulting from every operation proceeded by the Centre, governed by the legal sources it issues. Thirdly, the Court decides cases concerning whether the parties have contractually accepted the jurisdiction of the Court. In the latter case, it is unnecessary to establish the Court’s authority that the parties to the dispute are registered or accredited at the Centre.⁴⁶ The parties of the dispute need in the last case to agree that the Court will exercise jurisdiction over their dispute.⁴⁷ The Court suggests a standard formulation of such an agreement, stating that the exclusive jurisdiction of the Court should cover all disputes, of either contractual or extracontractual nature, resulting from the contractual relationship or related to it, including all questions concerning its existence, validity, and extinction. Beyond this, the contractual terms should indicate that the chosen language for the whole procedure is English.⁴⁸ The parties shall also agree on the applicable

from the constitutional order of Kazakhstan and therefore remains the Kazakh law further a “background law” and the Constitution and the Constitutional Statutes remain their authority.

⁴¹ *Kratkij obzor osnovnyh aspektov...*; M. Kenzhallyev, *op. cit.*

⁴² *Pravila Suda Mezhdunarodnogo finansovogo Centra “Astana”*. Available from: <https://aifc.kz/files/legals/69/file/3.-legislation-aifc-court-rules-2018.pdf>.

⁴³ S. Valiyeva, *op. cit.*

⁴⁴ On the jurisdiction of the Court see M. Kenzhallyev, *op. cit.*

⁴⁵ Domestic employees do not belong to the jurisdiction of the centre: N. Zambrana-Tévar, *op. cit.*, p. 125.

⁴⁶ S. Valiyeva, *op. cit.*

⁴⁷ *Ibidem.*

⁴⁸ Model Clauses, <https://court.aifc.kz/en/model-clauses>.

law.⁴⁹ Fourthly, only the Court is competent to interpret the acts of the Centre. However, the Court has no jurisdiction to handle criminal or administrative cases.

Looking at the composition and the structure of the Centre's Court, it becomes apparent how it differs from the regime of the selection and appointment of the judges of the national Kazakh judicial system, governed by the Constitutional Law on the courts and the status of the judges of the Republic of Kazakhstan,⁵⁰ even though the President of the Republic is in all cases involved in the process of appointment of the judges, receiving of the judicial oaths, dismissal of judges, determining the financing of the judiciary from the budget of the Republic etc.

The number of judges in the Centre is not predetermined. The internal rules of the Centre instruct that there shall be enough judges for an efficient decision-making process. The internal rules of the Court require the appointment of at least four judges for the first instance and for the Court of Appeal accompanying the President of the Court. The rules require the appointment of at least three judges entitled only to decide cases in the Small Claims Court. The Rules of the Court admit also the appointment of temporary judges with all powers of regular judges.

The judges of the Court are appointed for a five-year term with the possibility of extension. The judges may serve up to their age of 80-ties unless specific circumstances occur. This limitation does not include the First President of the Court.

The President of the Court and the judges of the two instances (there are currently 11) are appointed and dismissed by the President of the Republic following a recommendation of the chief executive officer of the Centre. After the appointment of the President of the Court, they are obliged to take an oath in the presence of the President of the Republic. The judges make their oaths in the presence of the President of the Court.

All judges who currently serve at the court are highly experienced in the application of common law in deciding cases.⁵¹ On 3 November 2023, the President of the Republic appointed Lord Burnett of Maldon, the former Lord Chief Justice of England and Wales, as the President of the Court. Other judges of the Court also belong to the group of the most prominent jurists in the common law world with international standing. Among them is Sir Rupert Jackson, former justice of the Court of Appeal of England and many other lawyers of the highest professional standing. There is no requirement for the judges of the Court to have Kazakh citizenship and residence in this country. The judges may combine their service

⁴⁹ S. Valiyeva, *op. cit.*

⁵⁰ Konstitucionnyj zakon RK ot 25 dekabrya 2000 goda "O sudah i statute sudej RK". Available from: <https://adilet.zan.kz/rus/docs/Z000000132>.

⁵¹ This is not a novelty; the quality of the judges appointed has been high since the beginning of the institution: N. Zambrana-Tévar, *op. cit.*

to the Court of the Centre with other professional activity unless they do not have a negative impact on the fulfilment of the duties to the Court. This leniency distinguishes, in essence, the position of the Centre's judges from the general state judiciary of Kazakhstan, who must be Kazakh citizens and may not be involved in other activity except for scientific, academic or artistic work.

There is also a certain degree of ambiguity in the status of the judges of the Centre, and it concerns the question of whether the judges of the Centre are protected by the immunities and other measures safeguarding the independence of the judiciary provided under the Constitutional Law on the judiciary system and status of the judges of the Republic of Kazakhstan. This uncertainty concerning the status of the judges in the Centre in relation to the general judiciary raises a question of whether a judge of the regular judiciary appointed to the judicial position at the Centre will benefit from their period of judicial activity, including the time of service at the Court of the Centre e.g. from the perspective of the age of retirement and whether they will benefit from all judicial guarantees provided by the mentioned Law on the system of the judiciary.⁵² It is also a question of whether the Court of the Centre could be regarded – from the perspective of the national judicial system – as an international court, with all diplomatic issues, regarding the status of the judges, whether they could be treated as judges of an international court, including the possibility to hold a diplomatic status. It will be, however, difficult to consider the Court as an international one, since the organisation of the Court, the appointment of the judges, and the financing is exclusively on the part of the Republic of Kazakhstan.⁵³ The legal sources for the Court are entirely adopted within the framework of the Kazakh legislation.⁵⁴

The Court of the Centre has its own back office supporting the material and organisational functioning of the Court. All financial matters related to the functioning of the Court fall within the competence of the administration of the Centre under the framework of separate budgets for both instances of the Court.⁵⁵

One may question whether the Court of the Centre should be seen as a part of the constitutional justice system or if it is more of a kind of arbitration tribunal with a type of governmental support and recognition. In this paper, we have shown

⁵² S.K. Ukin, D.S. Batyrbekova, E.B. Titova, *Nekotorye voprosy pravovogo statusa sudej Mezhdunarodnogo finansovogo centra "Astana"*, "Vestnik Yuzhno-Ural'skogo gosudarstvennogo universiteta. Seriya: Pravo" 2019, 19(1), pp. 87–93.

⁵³ K. Proskurina, *op. cit.*, p. 185.

⁵⁴ M. Kenzhallyev, *op. cit.*

⁵⁵ Postanovlenie Soveta po upravleniyu Mezhdunarodnym finansovym centrom «Astana» ot 26 maya 2016 goda «Struktura organov Mezhdunarodnogo finansovogo centra "Astana"». Available from: <https://aifc.kz/files/legals/410/file3/2.-b-c-bc-0-30-2-a-87ab.-0-1.7.2021-4-o-a09b0.pdf>.

that the International Financial Centre “Astana” is much more than a private institution following the framework of the private autonomy of common law, and it is much more than a permanent institution of arbitration. The Centre has been organised as a territory with its own legal system and jurisdiction. The English common law is applicable within the jurisdiction of the Centre (combined with the other sources of law) as its own law – not foreign law. The way how the judges of the Court are appointed and the involvement of the Kazakh President and the government in this process is proof that the Court is a part of the justice system of the country (however distinct from the general judiciary of Kazakhstan) embodied in its constitutional framework.⁵⁶ However, there are certain features of the Court more typical of arbitration, the most important being the possibility for the positive choice of the jurisdiction of the Court, resembling the prevalent arbitration clause (under the general judiciary mechanism, parties may agree on the jurisdiction of the state court as well).⁵⁷ Therefore, it is a kind of mixed institution, which is a part of the system of justice combined with a high level of autonomy (it must be stressed again that the International Arbitration Centre is a distinct entity within the Centre). From the New York Convention perspective, it is not regarded as an arbitration tribunal.⁵⁸

Procedural aspects of the Court’s activity

The procedural rules for the Court are adopted in the Rules and Principles of the Court.⁵⁹ Firstly, the rules governing the timespan of the procedure in the Court differ essentially from those applicable to the general judiciary. According to point 1.6 of the Court’s Rules, which is a rule setting a standard of due process, the timeline results from the requirement of efficient administration of judicial procedure, including appropriate and not extensive use of resources (not more than necessary). For example, the time for submission of a petition to the respondent is set for a maximum of four months from the date of delivery to the Court (in the case of a foreign submission, this period is extended to six months). In regular courts, the law determines the general maximum three-month period for deciding the case from the date of submission of the petition to the court. Such provision has

⁵⁶ M. Kenzhallyev, *op. cit.*

⁵⁷ It must be stressed that the jurisdiction of the Court may be established in the cases in which parties have not decided to make a choice of this court by contractual agreement. More specifically on this topic see: A. Baimoldayeva, M. Zia-Ud-Din, *op. cit.*, p. 24.

⁵⁸ *Ibidem*, p. 30.

⁵⁹ The procedural rules are rooted in the tradition of English law. N. Zambrana-Tévar, *op. cit.*, p. 127.

an important effect on disciplining the judges in the acceleration of the procedure, but it also burdens the judge who may lack time and be unable to analyse the case in a sufficiently detailed manner. The judges of regular courts suffer from an overload of cases which they must decide within a week.

Secondly, there is also an important difference concerning the limitation period for the claims. In Kazakh's standard private law, there is a prescription period of three years. The Rules of the Court of the Centre determine a six-year limitation period. It clearly favours creditors in enforcing their claims at the Court of the Centre.

Thirdly, the procedure at the Court of the Centre provides much more efficient interim measures than in the general judicial system. These differences result from the bigger range of methods available to secure a claim under the system of the Centre and the specific duties of the respondent and the claimant. Point 15.8 of the Rules of the Court protects not only the claimant but also the respondent, setting that every interim measure decision should also contain an order imposing on the claimant a duty to reimburse all the costs borne by the respondent, which finally must be paid according to the Court by the claimant.⁶⁰ The rules of Kazakh's regular procedure also provide a right to secure compensation for the respondent's expenses, but a comparable convenient procedural enforcement scheme is missing.⁶¹

The Kazakh Court decides in the matter of the interim measures issued by the Court of the Centre, and the judicial executors fulfil the orders of the courts on the interim measures (Article 13 No. 8 of the Constitutional Law on the Centre, Article 158 of the Code of the Civil Procedure and Article 5 of the Law on the Execution Procedure and the Status of the Judicial Executors).⁶²

Fourthly, another feature distinguishes the procedure at the Court of the Centre from the civil-procedural rules applicable to the regular judiciary. The Rules of the Court of the Centre determine the competence of the Court to ask a party to deliver documents to another party which it has in its possession or control (this procedure resembles the common law deposition procedure).⁶³ In traditional Kazakh procedural law there are some rules entitling the claimant to demand from the respondent the submission of certain documents. Still, there are numerous restraints – the claimant needs to list the required documents and prove they need to obtain them. The procedural rules of the Centre in this respect are more objective and regulated

⁶⁰ Pravila Suda Mezhdunarodnogo...

⁶¹ *Kratkij obzor osnovnyh aspektov...*

⁶² Zakon Respubliki Kazahstan ot 2 aprelya 2010 goda № 261-IV "Ob ispolnitel'nom proizvodstve i statuse sudebnyh ispolnitelej". Available from: <https://adilet.zan.kz/rus/docs/Z100000261>; Grazhdanskij processual'nyj kodeks RK ot 31 oktyabrya 2015 goda. Available from: <https://adilet.zan.kz/rus/docs/K1500000377>.

⁶³ On the notion of deposition see: J.A. Pike, J.W. Willis, *The New Federal Deposition-Discovery Procedure: I*, "Columbia Law Review" 1938, 38(7), pp. 1179–1198.

in a more detailed way in the Rules of the Court. They also contain essential sanctions for a party infringing upon the duty to submit the required documents.

Fifthly, there are far-reaching differences concerning the oral evidence since the Court of the Centre applies the common-law practice concerning the hearing of testimonies (cross and direct examination). In the Kazakh judicial practice, there needs to be more confidence in the testimony of the witnesses if the case concerns proprietary and economic questions. A formal scheme for questioning the witnesses needs to be provided (as in other continental jurisdictions, there are no specific rules for direct and cross-examining witnesses). The practice of the Court of the Centre complies with the common law practice of examining the witnesses and witness experts, being a much more efficient way to determine the truth than in the case in continental-like jurisdictions.⁶⁴

Further particularities in the art of dealing with the Court at the Centre concern the fees. In the regular Kazakh procedure, the fee is usually 3% regardless of the claim's value. In the procedure at the Court, there is a degression of the fee if the claim's value increases. In a case where the claims have substantial value, the fee in the regular Kazakh court may even be ten times higher than at the Court of the Centre.⁶⁵

The judgments of the Court of the Centre are enforceable in other countries, among them in the countries of Central Asia, where the Minsk and Kyiv conventions are applicable, but also other countries which have signed agreements with Kazakhstan on the enforcement of judicial decisions.⁶⁶ There is also a possibility of enforcement in some other countries based on the principle of reciprocity.⁶⁷

Conclusions

Establishing the Centre and its Court was an important milestone in developing the Kazakh law and state. It supports the economic growth of the country and attracts foreign investments.⁶⁸ It is also a positive practice of bringing the common law experience to the Kazakh legal environment, enriching the latter.

⁶⁴ A.I. Loboda, *Vse, chto vy hoteli znat' o perekrestnom doprose, no boyalis' sprosit': ustnye pokazaniya eksperta po voprosam prava v anglijskom sude ili pered arbitrami*, "Tretejskij sud" 2022, 2(3), pp. 85–105.

⁶⁵ B. Tukulov, *O sude i arbitrazhe pri Mezhdunarodnom finansovom centre g. Astana: chto oni dayut kazahstanskomu biznesu?* Available from: https://forbes.kz/life/observation/o_sude_i_arbitraze_pri_mftsa_chno_oni_dayut_kazahstanskomu_biznesu (accessed: 4.10.2024).

⁶⁶ M. Kenzhallyev, *op. cit.*, discusses this question more in deep, indicating some legal questions concerning the enforceability of the Court's judgement.

⁶⁷ AIFC rules on Enforcement. Available from: <https://court.aifc.kz/en/enforcement>.

⁶⁸ A. Bazarbayev, *op. cit.*, p. 235; M. Kenzhallyev, *op. cit.*

The efficiency of the activity of the Court could be seen in the quantity of the cases decided by the Court. So far, the Court has decided more than 118 cases. The first case was decided on 25 April 2019 (Aurora AG Limited Company v. Star Asian Mining Company). The plaintiff demanded the payment of the equivalent of 110 000 USD, so the case was handled by the Small Claims Court. The highest number of cases was decided in the year 2023. There were 50 cases concerning various matters, mostly related to non-performance of contracts.

The functioning of the Centre is an example of a legal exclave of mixed jurisdiction with the essential common law component within the area of a continental legal system in transition from the post-Soviet past to the free-market society with numerous specific features, characteristic of the countries of Central Asia. This system has been incorporated into the constitutional framework of Kazakhstan and the Court of the Centre plays a pivotal role in securing the proper cohabitation of these complex legal schemes.

We have already stated that the fact of creation of a common law area in Kazakhstan does not mean that Kazakhstan has become a mixed jurisdiction since the Centre is only a small exclave of common law (and legal norms applicable to it).⁶⁹ It is, however, to be expected that the existence and practice of the Centre and the activity of the Court may have an important impact on the development of the legal culture in the Republic. It could be a source of fruitful experiences for the general Kazakh judiciary to make the system more efficient. The Centre may play a role in encouraging the academic world for more research in the field of common law. Finally, the success of the Centre may cause interesting legal transplants to the Kazakh legal system. From this perspective, it could be seen as a source of an inspiring legal experiment.⁷⁰

It has also a practical advantage. Investors do not need to fear overcoming the shortcomings of the local general judicial system or cultural difficulties in adapting to an unknown legal system and culture. For this reason, the model of the Centre could be a fruitful source of inspiration for countries being in a comparable geopolitical, cultural, linguistic, and legal situation to the Republic of Kazakhstan.

⁶⁹ M. Kenzhallyev, *op. cit.*

⁷⁰ On this positive impact of the Centre on the Kazakh's general law see: M. Kenzhallyev, *op. cit.*

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