

A COMMON LAW JUDICIARY IN THE POST-SOVIET SPACE: THE AIFC COURT AS A FORUM FOR INTERNATIONAL COMMERCIAL ADJUDICATION

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This contribution aims to explore the role of the Astana International Financial Centre's common-law judiciary in the development of commercial laws within the former Soviet republics and beyond. The globalization of access to the high-caliber international commercial courts, operating under common law and striving to offer the world's finest dispute settlement services, has made the creation of strong financial markets possible in emerging economies. Despite the challenges caused by the COVID-19 pandemic, active utilization of technological advances has facilitated these courts' continuous operations. Unlike arbitral tribunals, such forums also focus on the development of a substantive international commercial law. Along with accommodating convenient procedures, the increasing pace of global commerce is requiring new approaches to dispute settlement that may produce sound legislation. The legal reforms granting jurisdiction to international commercial courts to consider disputes on par with private arbitral tribunals, and universal recognition of the resulting judgments, are therefore timely.

I. INTRODUCTION

In 2017, Kazakhstan hosted an international exhibition, Astana EXPO-2017.¹ Based on EXPO-2017 international exhibition's infrastructure and state-of-the-art facilities, the Republic of Kazakhstan (the RK) was the first among the post-Soviet countries to create an offshore financial center² (the OFC) or financial free zone³ in its territory, operating within a special legal regime. Astana International Financial Center (the AIFC) is expected to

¹ The theme chosen for the exhibition was "Future Energy," focusing on ensuring sustainable access to energy while simultaneously reducing CO2 emissions. See *Expo 2017 Astana Future Energy*, QAZEXPO CONGRESS, <https://qazexpocongress.kz/en/event/expo-2017-astana/> [<https://perma.cc/7A9R-SEUS>] (last visited Nov. 2, 2022).

² See Nicolas Zambrana-Tevar, *The Court of the Astana International Financial Center in the Wake of Its Predecessors*, 12 ERASMUS L. REV. 122, 122 (2019) (citing International Monetary Fund (IMF) referring to the OFC as "any financial center where offshore activity takes place.").

³ *Id.* ("[A] financial free zone . . . is an entity with only a very small or nominal territory and whose goal is mainly the provision of offshore corporate and financial services.").

create an attractive investor-friendly climate⁴ for various financial activities.⁵ The AIFC is intended to be an international financial hub for Central Asia, the Commonwealth of Independent States (CIS),⁶ the Eurasian Economic Union

⁴ Among the countries of the former Soviet Union, the Republic of Kazakhstan (the RK) is second only to the Russian Federation (the RF) in terms of the amount of attracted foreign direct investment (FDI). *Country Comparison: Stock of Direct Foreign Investment – At Home*, THE CIA WORLD FACTBOOK, <https://web.archive.org/web/20201224025625/https://www.cia.gov/library/publications/the-world-factbook/rankorder/2198rank.html> [<https://perma.cc/27F2-J5PV>] (last visited Nov. 2, 2022). As of December 31, 2017, the cumulative value of all FDIs in Kazakhstan was 156,200,000,000 USD (in Russia, it was 479,700,000,000 USD). *Id.* Kazakhstan ranked thirty-sixth worldwide, while Russia ranked nineteenth by the amount of received FDI. *Id.* Although unprecedented sanctions against Russia following its invasion of Ukraine have significantly deteriorated Russia’s investment climate, their direct effect on Kazakhstan remains to be seen. Roza Nurgozhayeva, *Where Does Kazakhstan Stand on Russia’s Invasion of Ukraine?*, JURIST (Mar. 22, 2022, 10:16 AM), <https://www.jurist.org/commentary/2022/03/roza-nurgozhayeva-russia-ukraine-invasion-kazakhstan/> [<https://perma.cc/C63L-AG2U>]. To date, however, the spillover effect from the sanctions has pulled down Kazakhstan’s national currency and led to significant losses borne by some publicly traded Kazakhstan companies. *Id.* Despite that, some experts think the current crisis offers new opportunities for the country. *Id.* Because of Russia’s isolation, Kazakhstan may become the region’s most attractive and stable destination for international investments. *Id.*

⁵ HORACE YEUNG, ZHANYL BEKMURZAYEVA, FLORA HUANG & DINA SULEIMENOVA, INSTITUTIONAL DEVELOPMENT AND THE ASTANA INTERNATIONAL FINANCIAL CENTRE 18 (2018).

⁶ “The Commonwealth of Independent States (CIS) is a regional intergovernmental organization focused on cooperation on political, economic, environmental, humanitarian, cultural and other issues between a number of former Soviet Republics. On December 8, 1991 in Minsk the Agreement on the Establishment of the Commonwealth of Independent States was signed by the heads of Belarus, Russia and Ukraine.” *Commonwealth of Independent States*, MINISTRY FOREIGN AFF. THE REP. BELR., <https://mfa.gov.by/en/multilateral/organization/list/c2bd4cebdff6bd9f9.html> (last visited Nov. 2, 2022). Along with Russia and Kazakhstan, the CIS Member States are Azerbaijan, Belarus, Kyrgyzstan, Armenia, Moldova, Tajikistan, and Uzbekistan.

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(EAEU),⁷ the Caucasus, Western China, and beyond.⁸ One key feature of the AIFC is that it functions within an autonomous common law regime

⁷ “The Eurasian Economic Union [EAEU] is an international organization for regional economic integration. It has international legal personality and is established by the Treaty on the Eurasian Economic Union. The EAEU provides for free movement of goods, services, capital and labor, pursues coordinated, harmonized and single policy in the sectors determined by the Treaty and international agreements within the Union. The Member-States of the [EAEU] are the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation.” EURASIAN ECON. UNION, <http://www.eaeunion.org/?lang=en#about> [<https://perma.cc/4H7Z-MWGX>] (last visited Nov. 2, 2022). Apart from economic integration, the CIS Member States also formed a military alliance, known as the Collective Security Treaty Organization (the CSTO). *From the Treaty to the Organization*, COLLECTIVE SEC. TREATY ORG., <https://en.odkb-csto.org/25years/> [<https://perma.cc/BYP8-7EM2>] (last visited Nov. 2, 2022). On May 15, 1992, heads of six post-Soviet states signed the Collective Security Treaty that laid the foundation for establishing the CSTO. *Id.* Along with Russia and Kazakhstan, its current Member States are Armenia, Belarus, Kyrgyzstan, and Tajikistan. *Id.*

⁸ The AIFC is strategically located in Kazakhstan, an area occupying 2,724,900 square kilometers (1,052,090 square miles), and is the ninth largest country and largest landlocked country in the world. *The 30 Largest Countries in the World by Total Area*, STATISTA (Mar. 29, 2022), <https://www.statista.com/statistics/262955/largest-countries-in-the-world/> [<https://perma.cc/7KMD-KUBL>]. The country is oil-rich and also possesses significant gas and mining resources. It is for that major reason that many foreign corporations and international firms have established their businesses there. The country is active in the international arena and contributes to regional economic integration. Kazakhstan was a non-permanent member of the United Nations Security Council in 2018. *Current Members*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/content/current-members> [<https://perma.cc/7KGV-KZF3>] (last visited Nov. 2, 2022); *Sweden, Bolivia, Ethiopia and Kazakhstan Elected to Security Council*, U.N. (June 28, 2016), <https://news.un.org/en/story/2016/06/533342-sweden-bolivia-ethiopia-and-kazakhstan-elected-security-council>. [<https://perma.cc/32AB-RC5D>] It is a member of the WTO and the World Bank. *Members & Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [<https://perma.cc/3RC5-Y5RE>] (last visited Nov. 2, 2022); *Member Countries*, THE WORLD BANK (Nov. 20, 2020), <https://www.worldbank.org/en/about/leadership/members> [<https://perma.cc/A3CN-6XG7>]. Kazakhstan was also chair of the Organization for Security and Co-Operation in Europe (OSCE) in 2010 and the Organization of Islamic Conference (OIC) in 2011-2012. *Kazakhstan Takes Over OSCE Chair, Seeks to Strengthen Organization and Advance Dialogue on Future European Security Architecture*, ORG. FOR SEC. & CO-OPERATION IN EUR. (Jan. 1, 2010), <https://www.osce.org/cio/51810> [<https://perma.cc/88ZE-H4PW>]; Richard Weitz, *Kazakhstan Promotes Central Asian Interests Within OIC*, EURASIA DAILY MONITOR (Feb. 15, 2013, 11:17 PM), <https://jamestown.org/program/kazakhstan-promotes-central-asian-interests-within-oic/> [<https://perma.cc/VL4D-5LAT>].

governing the legal relationships between market participants.⁹ This characteristic aligns well with the notion that strong legal institutions are central for financial development, and common law is capable of providing greater shareholder protections.¹⁰

One of the core institutional structures of that common law-based framework is its independent financial regulator—the Astana Financial Services Authority (the AFSA).¹¹ Another AIFC institution is the Astana International Arbitration Center (the IAC) that serves as an alternative dispute resolution venue. The establishment of the AIFC common law court (the AIFC Court) has become a cornerstone to building the AIFC’s separate and independent legal regime. The AIFC Court has exclusive competence to adjudicate all disputes between the AIFC participants and may also hear disputes, whether international or domestic, between non-AIFC participants as long as all disputing parties agree to that forum.¹²

The globalization of access to the high-caliber common law judiciary has made the creation of strong financial markets possible in developing civil law countries. As independent institutions of justice, international commercial courts such as the AIFC Court, operating under common law and in accordance with best practices and international standards, have also been at the forefront of innovation. International commercial courts’ preference for digital technologies position them to withstand global disruptions such as pandemics and international lockdowns.¹³ Despite the difficulties facing civil court proceedings worldwide due to the COVID-19 pandemic, active utilization of technological advances along with procedural flexibility have facilitated and permitted continuous dispute resolution operations of international commercial courts, including the AIFC Court. This feat is especially impressive considering that in other courts, case progression has been substantially delayed or even suspended, to the frustration of litigants.

Moving toward online proceedings can also enable traditional dispute resolution centers to better serve other parts of the globe by minimizing the

⁹ YEUNG ET AL., *supra* note 5, at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² See Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre at art. 13.4, KAZ. PRAVDA [KAZ. PRAV.] Dec. 9, 2015, *translated in the AIFC Database*, <https://aifc.kz/files/legals/7/file/constitutional-statute-on-the-aifc-with-amendments-as-of-30-december-2022.pdf> [<https://perma.cc/PP4L-GUP3>] (last visited Nov. 5, 2022).

¹³ Pamela K. Bookman & Matthew S. Erie, *Experimenting with International Commercial Dispute Resolution*, 115 AM. J. INT’L L. UNBOUND 5, 7–8 (2021).

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need for litigants to travel.¹⁴ However, providing hearings and case management resources within the appropriate time zone may become more crucial, which could eventually decentralize and further regionalize international commercial dispute resolution (e.g., traditional North American hubs serving Latin America, while traditional European hubs serving Africa in the same time zones).¹⁵ Such a paradigm should also provide international commercial courts with their respective share of cases arising from the regions located in the relevant time zones. In addition, settling disputes in international commercial courts having jurisdiction over local and potentially regional cases would provide more comfort to litigants due to the judges' familiarity with the domestic laws and traditions of the country or region where the business is based or has substantial presence.

International commercial courts have the potential to complement and eventually substitute the jurisdiction of the domestic public judiciary in the resolution of complex investment disputes. Moreover, such courts seem intended to fill the gaps between services offered by local public courts and private arbitration institutions. The increasing pace of global commerce requires new approaches to dispute settlement that, along with satisfying the investors' need for the rule of law and impartiality, would also provide expedient and efficient procedures. Granting jurisdiction to international commercial courts, such as the AIFC Court, to consider disputes on par with private arbitral tribunals and universal recognition of the resulting judgments alongside the arbitral awards requires a combination of legal reforms and state actions. If properly implemented, such reforms and actions would not only provide more flexibility to investors to choose between litigation and arbitration, but they would also reframe regional and global corporate governance practices and securities markets.

Given the difficulties that international policymakers, judges, and counsel may face due to varying interpretations of provisions of regional and global recognition conventions, this Article's key findings reveal the reforms required to clarify the jurisdiction of international commercial courts operating within the separate legal regimes. These findings will allow readers to identify the transnational law issues and related aspects of post-Soviet commercial legislation. In this regard, the previous works have viewed the corporate and securities law reforms in the post-Soviet space through the lens of the legal

¹⁴ Anthea Roberts, *Introduction to the Symposium on Global Labs of International Commercial Dispute Resolution*, 115 AM. J. INT'L L. UNBOUND 1, 4 (2021).

¹⁵ *Id.*

institutions existing in the 1990s.¹⁶ These authors have continued to consider the lack of a strong judiciary and efficient enforcement mechanisms to be the primary reasons why these reforms failed. They believed that successful privatization and sound financial markets required the establishment of effective legal institutions in the first place. All subsequent attempts to reform commercial legislation in the CIS have stumbled over the problem of access to a fair and competent judiciary. Consequently, there is a legal vacuum that corporate and securities scholarship has not sufficiently filled since the 1990s-early 2000s.

The “new legal hubs”¹⁷ located in the OFCs have the potential to fill the institutional vacuum created in jurisdictions with undeveloped capital markets. This work is the first-ever scholarship discussing the corporate and securities laws development amid the implementation of common law institutions in the former Soviet Union. It suggests the reforms required to extend the jurisdiction of world-class commercial judicial institutions—such as the AIFC Court—to the broader area of the CIS and internationally. It further expands on the prior research about the changing face of international commercial dispute resolution around the world.¹⁸ With the emergence of new legal hubs across the globe, the role of the traditional centers for international commercial dispute settlement has substantially diminished over the past decade. The legal hubs located in the Middle East and Asia, as well as new international commercial benches in continental Europe, present an alternative to the monopoly of London and New York in the “adjudication business.”¹⁹ The inauguration of the AIFC Court in Kazakhstan is another such initiative to draw in local disputes arising in the post-Soviet space from London or New York. The discussion adds to the existing literature covering other international commercial court structures that have been installed in Dubai,

¹⁶ See Bernard S. Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, 1733 (2000) (discussing that home-court bias and judicial corruption result in shareholders’ losing suits against major companies and concluding that the strong controlling institutions are central to successful mass privatization of state-owned enterprises); see generally J. Robert Brown, Jr. & Kostyantyn Shkurupiy, *Corporate Governance in the Former Soviet Union: The Failure of the Self-Enforcing Model*, 7 COLUM. J.E. EUR. L. 629 (2000) (discussing the failure of a shareholder-centered model without an effective enforcement mechanism); see also Greg Lumelsky, *Does Russia Need a Securities Law?*, 18 NW. J. INT’L L. & BUS. 111 (1997) (arguing the relevance of a U.S.-style securities law in absence of robust judicial as well as administrative, civil, and criminal enforcement).

¹⁷ See Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT’L L. 225, 225 (2020).

¹⁸ See Roberts, *supra* note 14, at 1.

¹⁹ See Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT’L LAW 227, 246 (2020).

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Abu Dhabi, Qatar, China, Singapore, France, Germany, and the Netherlands or comparing the prospects of such judicial institutions in Australia and the United States.²⁰ Along with that, it analyzes how the international commercial courts established within the OFCs, such as the ones in the Middle East and Kazakhstan, fit in the global judgments' recognition framework²¹ and international arbitration system.

This Article proceeds as follows. Part II explores the evolution of corporate and securities law in Kazakhstan and Russia following the fall of the Soviet Union.²² Mass privatization of state-owned enterprises in the 1990s set the stage for corporate law development, while U.S.-style disclosure approach to securities regulation was designed to protect investors against fraud and to remedy information asymmetries.²³ Part III demonstrates that self-dealing by managers, or “[T]ransactions between insiders and the company, in which the insiders profit at the company’s expense,”²⁴ was one of the major reasons for mass privatization’s failure to revive these centrally-planned economies. Meanwhile, the lack of adequate and truthful company disclosures undermined the capital markets development. Weak courts and underdeveloped enforcement institutions further exacerbated these problems.

²⁰ See, e.g., Jayanth K. Krishnan & Priya Purohit, *A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution*, 25 AM. REV. INT’L ARB. 497 (2015); Zain Al Abdin Sharar & Mohammed Al Khulaifi, *The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis*, 46 HONG KONG L.J. 529 (2016); Michael Strong & Robert Himber,

The Legal Autonomy of the Dubai International Financial Centre: A Scalable Strategy for Global Free-Market Reforms, 29 INST. ECON. AFF. 36, 37 (2009); Bookman, *supra* note 19, at 228; Julien Chaisse & Xu Qian, *Conservative Innovation: The Ambiguities of the China International Commercial Court*, 115 AM. J. INT’L L. UNBOUND 17 (2021); Man Yip, *The Singapore International Commercial Court: The Future of Litigation?*, 12 ERASMUS L. REV. 82 (2019); Giesela Rühl, *The Resolution of International Commercial Disputes—What Role (if any) for Continental Europe?*, 115 AM. J. INT’L L. UNBOUND 11 (2021); S.I. Strong, *International Commercial Courts in the United States and Australia: Possible, Probable, Preferable?*, 115 AM. J. INT’L L. UNBOUND 28 (2021).

²¹ See generally David P. Stewart, *The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters*, 113 AM. J. INT’L L. 772 (2019).

²² While this Article discusses the modern history and development of corporate law and securities regulation of Russia and Kazakhstan, a similar analysis could be applied in relation to the other former Soviet republics that joined the CIS, EAEU, or both. Consequently, there might be some additional jurisdiction-specific features pertaining to a given post-Soviet republic as the body of the related commercial and corporate law literature is fairly limited.

²³ See Lumelsky, *supra* note 16.

²⁴ Black et al., *supra* note 16, at 1733.

Part IV reports on the establishment of the AIFC that introduced a common law framework for the first time in the post-Soviet region. It describes the AIFC as a financial free zone with a special legal regime based on English common law principles and standards of the leading international financial centers. The discussion demonstrates that the AIFC's institutional structures are separate and independent from the local judicial and legal systems. Part V investigates the growing role of international courts—such as the AIFC Court—in domestic commercial adjudications. It illustrates that these judicial bodies operate in accordance with best practices and international standards, providing for an effective alternative to dysfunctional domestic justice. A potential amendment to the regional recognition convention, granting jurisdiction to the AIFC Court to hear civil and commercial cases involving litigants from the CIS, would provide the latter with access to world-class justice. Part VI examines international commercial litigation as a judicial alternative to the existing arbitration system. A global reform explicitly granting jurisdiction to, and recognizing the resulting judgment of, international commercial courts established within the OFCs would prevent any confusion with regard to their status as official institutions of justice by having the imprimatur from the respective hosting states. Part VII concludes.

II. THE EVOLUTION OF CORPORATE AND SECURITIES LEGISLATION IN THE POST-SOVIET REPUBLICS

Rapid transition from a command economy to a market economy and mass privatization of state-owned enterprises in the 1990s—known as “shock therapy”—set the stage for the corporate and securities law development in the former Soviet Union republics. Since the beginning of the “first wave” privatization program in the 1990s, the majority of large enterprises in Kazakhstan have remained in the hands of the state.²⁵ The continued dominance of the government led Kazakhstan to follow a “state-led liberalized market economy” model.²⁶ In this model, the market provides the management mechanisms for the growing private sector, but in sectors of strategic interest the state maintains ownership and control.²⁷ Unlike Russia, Kazakhstan pursued rapid but also carefully designed financial-sector reforms and a general liberalization of its economy.²⁸ This has ensured more efficient use of

²⁵ YEUNG ET AL., *supra* note 5, at 5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 6.

its mineral resources and improved economic outcomes.²⁹ Other post-Soviet republics have implemented similar economic reforms, with some variations, but state actors continued to play key roles in their markets.

This Part analyzes the development of corporate and securities laws in Russia and Kazakhstan amid mass privatization of state-owned enterprises in the 1990s. The designers of a “self-enforcing” model have introduced it into corporate legislation³⁰ to protect shareholders against managerial misconduct and to minimize reliance on corrupt courts and law-enforcement authorities. In its turn, U.S.-style disclosure approach built into the domestic securities regulation had to address the information asymmetries problem and to protect investors against fraud.

A. *Corporate and Securities Laws*

In the late 1980s, some underlying premises for the development of corporate³¹ and securities³² laws had begun to manifest themselves with the disintegration of the Soviet Union. The major development of corporate and securities legislation in Kazakhstan and Russia took place in the 1990s-early 2000s when the first wave privatization program started to roll-out. Geographic proximity,³³ along with current close economic ties and the Soviet

²⁹ *Id.*

³⁰ See Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996).

³¹ *E.g.*, Federal’nyi Zakon RF ob Aktsionernykh Obshchestvakh [Federal Law of the Russian Federation on Joint-Stock Companies], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 29, 1995, translated in THE WTO’S Database, https://www.wto.org/english/thewto_e/acc_e/rus_e/wtaccrus58_leg_394.pdf [<https://perma.cc/N7SJ-54Q3>] (last visited Nov. 3, 2022); Zakon RK ob Aktsionernykh Obshchestvakh [Law of the Republic of Kazakhstan on Joint-Stock Companies], KAZAKHSTANSKAIA PRAVDA [KAZ. PRAV.] May. 16, 2003, translated in ADILET Database, http://adilet.zan.kz/eng/docs/Z030000415_ [<https://perma.cc/BE9L-MWL9>] (last visited Nov. 3, 2022) [hereinafter the JSC Laws].

³² *E.g.*, Federal’nyi Zakon RF o Rynke Tsennykh Bumag [Federal Law of the Russian Federation on the Securities Market] ROSSIISKAIA GAZETA [ROS. GAZ.] Apr. 22, 1996, translated in ASSOCIATION OF EURASIAN CENTRAL SECURITIES DEPOSITORIES’ Database, https://aecsd.org/upload/files/Legal%20Framework/39_FZ.pdf (last visited Aug. 25, 2023); Zakon RK o Rynke Tsennykh Bumag [Law of the Republic of Kazakhstan on the Securities Market], KAZAKHSTANSKAIA PRAVDA [KAZ. PRAV.] July 10, 2003, translated in ADILET Database, http://adilet.zan.kz/eng/docs/Z030000461_ [<https://perma.cc/3QKR-G2J9>] (last visited Jan. 24, 2022) [hereinafter the Securities Laws].

³³ Russia and Kazakhstan, for example, share the longest continuous international border in the world. See *Length of Longest International Land Borders Worldwide*, STATISTA, <https://www.statista.com/statistics/1103985/border-length-between-countries/> [<https://perma.cc/X7F7-PSBS>] (last visited Nov. 3, 2022).

past, have brought about common trends in the legal development of former Soviet states. The development of model civil legislation in the early 1990s has been a cornerstone of the formation of the post-Soviet Union republics' legal systems.³⁴ That legislation has recognized corporate law as a branch of civil commercial legislation establishing the types of corporate legal entities and focusing on regulation of their activities.³⁵

B. *Corporate Governance*

In the 2000s, the policy of information openness earlier introduced in the JSC Laws began to shape the development of corporate governance structures.³⁶ Corporate mechanisms and procedures have since become more transparent and the accountability of managers for their actions, practices, and decisions made on behalf of companies has increased.³⁷ Such procedures have generated, to some degree, awareness among managers of the importance of business reputation to maintain the enterprises' financial health. Companies need more resources to face new challenges of a competitive market economy and to continue to meet their financial obligations.

It has become clear that adequate disclosure and better reputation will also lead to attraction of more financing and investment.³⁸ The government has not stood aside either as it introduced the required legislative mechanisms; For instance, the Securities Laws have been reformed to prohibit deletions of stock ownership records and to provide procedural safeguards such as a requirement to maintain independent share registers.³⁹

C. *Securities Market Regulation*

In addition, for the first time in the history of the former Soviet republics, a set of comprehensive reforms has been introduced to recreate a

³⁴ MAIDAN SULEIMENOV, ZNACHENIE MODEL'NOGO GRAZHDANSKOGO KODEKSA DLIA STRAN SNG [THE SIGNIFICANCE OF THE MODEL CIVIL CODE FOR THE CIS COUNTRIES], https://online.zakon.kz/Document/?doc_id=33945897#pos=6;-106 [<https://perma.cc/8HUB-6AY4>] (last visited Nov. 3, 2022). A draft model civil code of the CIS was prepared based on the draft civil codes of four countries: Russia, Kazakhstan, Ukraine, and Belarus. *Id.* The fact that there is now a significant similarity between the CIS civil codes is, undoubtedly, thanks to the model civil code. *Id.*

³⁵ See generally Farkhad Karagussov, *Development of Company Law in Kazakhstan*, 24 JURIDICA INT'L 84 (2016).

³⁶ A. MOLOTNIKOV, SLIYANIYA I POGLOSHENIYA. ROSSIYSKIY OPYT 15 [MERGERS AND ACQUISITIONS. RUSSIAN EXPERIENCE] (2d ed. 2007).

³⁷ See generally *id.*

³⁸ Lumelsky, *supra* note 16, at 119.

³⁹ *Id.* at 117.

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traditional stock market regulatory system. That system has envisaged three tiers of regulation: company law reflecting the bottom tier, securities law representing the second tier, and listing regulations, creating the highest regulatory tier.⁴⁰ In this structure, the specialized public agencies along with the exchanges themselves, have been tasked with regulatory supervision of the securities markets.⁴¹

1. COMPANY LAW. THE “SELF-ENFORCING” MODEL

The leading framework introduced by the architects of Russian company law—Bernard Black and Reinier Kraakman—has called for a “self-enforcing” approach⁴² to corporate law. That approach provides shareholders with statutory mechanisms to protect themselves against managerial misconduct while minimizing reliance on corrupt courts and law-enforcement authorities. Among the key requirements of the self-enforcing model are two-tier shareholder- and board-level approvals for self-interested transactions.⁴³ Other provisions include a mandatory cumulative voting rule for election of directors to ensure board representation of minority shareholders.⁴⁴ In such model, enforcement rests with shareholders who are purported to act as corporate monitors of managerial behavior.⁴⁵ The self-enforcing model has been incorporated into JSC laws of many former Soviet republics, including the theoretical structure of capital markets and commercial legislation in Russia, Kazakhstan, Armenia, Belarus, and Ukraine.⁴⁶

2. SECURITIES LAW. DISCLOSURE REQUIREMENTS

Along with introducing the shareholder-centered norms to the JSC Laws, the mandatory disclosure and reporting requirements have been implemented into the Securities Laws taking into account the U.S. experience and its securities legislation, most notably the Securities Act of 1933 and the Securities Exchange Act of 1934. Such reforms have envisaged information disclosures through periodic reporting, requiring disclosures at the public offering stage, and revealing the occurrence of “essential events and acts

⁴⁰ Iain MacNeil & Alex Lau, *International Corporate Regulation: Listing Rules and Overseas Companies*, 50 INT’L & COMP. L.Q. 787, 787 (2001).

⁴¹ YEUNG ET AL., *supra* note 5, at 9.

⁴² See Black & Kraakman, *supra* note 30.

⁴³ See *id.* Russia’s and Kazakhstan’s courts may attempt to refer to the U.S. jurisprudence while interpreting provisions of the JSCs Laws on related matters.

⁴⁴ RF JSC Law at art. 66.4 (Rus.).

⁴⁵ Brown & Shkurupiy, *supra* note 16.

⁴⁶ Black et al., *supra* note 16, at 1734 n.3.

bearing on the issuer's economic and financial activity."⁴⁷ Share issues have been subject to registration with domestic financial regulators.⁴⁸

Truthful disclosure, reporting, and registration requirements have been designed to protect investors against fraud and to remedy information asymmetries.⁴⁹ Introducing the new Western-style disclosures to the Securities Laws has assured that prices for shares of publicly traded companies are formed by the market based on, among other things, such disclosures.⁵⁰ The other goal has been to provide comfort that efficient statutory corporate governance structures are in place to protect public shareholders.⁵¹

3. PUBLIC AND PRIVATE ENFORCEMENT

Even though preventing conflicts of interest and imposing truthful disclosure requirements have been an overarching strategy for the development of the JSC and Securities Laws, robust enforcement mechanisms are no less important for the growth of securities markets. Such mechanisms may take the form of public enforcement, in which the financial regulator bears the responsibility to collect information and conduct investigation, or private enforcement, in which the injured party possesses a legal right to sue for compensation of damages in a court.⁵²

Acknowledging the role of public financial regulators in enforcing the disclosure provisions of the JSC and Securities Laws or conducting securities fraud investigations, this Article focuses on private enforcement mechanisms that have become available to foreign investors with the emergence of new international commercial courts. By enforcing civil remedies sought to compensate minority shareholders' damages suffered from illegitimate actions of local elites or manipulations by corrupt managers, international commercial courts may indirectly facilitate the public financial regulators' goal in ensuring truthful and timely disclosures by issuers. Thus, the efficient enforcement mechanisms will not only bolster the development of the JSC and Securities Laws, but also stimulate the growth of capital markets.

⁴⁷ Lumelsky, *supra* note 16, at 136; *see also* the Securities Law Art. 23 (Russ.). This Law, however, has not required distribution of prospectus to potential investors. Instead, the issuers have provided investors with information contained in the prospectus through periodicals. Lumelsky, *supra* note 16, at 136–37.

⁴⁸ *E.g.*, the Securities Law Art. 19 (Russ.) provides that the Russian Central Bank is responsible for registration of securities issue.

⁴⁹ Lumelsky, *supra* note 16 at 132–33.

⁵⁰ YEUNG ET AL., *supra* note 5, at 10.

⁵¹ *Id.*

⁵² *Id.*

III. THE DEFICIENCY OF THE CORPORATE AND SECURITIES
REGULATION IN THE FORMER SOVIET UNION

Despite the abovementioned corporate and securities law reforms, introducing the self-enforcing model, and truthful disclosure requirements to the JSC and Securities Laws has not yet been sufficient to control managerial misconduct. This Part demonstrates that self-dealing by managers was one of the major reasons for mass privatization's failure to revive the post-Soviet centrally-planned economies in the 1990s. Although mass privatization stimulated the development of market relationships in the corporate sector, it also provided virtually unrestricted control to corporate insiders that enabled them to engage in large-scale self-dealing that the government failed to control.

Meanwhile, the lack of adequate and truthful company disclosures undermined the development of capital markets. Weak courts and underdeveloped enforcement institutions exacerbated these problems further. Shareholders could not protect their interests without reliable support from controlling public institutions. Thus, the most important lesson learned from the 1990s is that it is impossible to conduct successful privatization of state-owned enterprises without establishing strong judicial institutions and enforcement mechanisms.⁵³ If privatization happens first, massive looting will take place before such controlling infrastructure develops.⁵⁴

A. *Failure of the "Self-Enforcing" Model*

The self-enforcing model, thus, was no match for the system run by corrupt managers. Black and Kraakman later recognized that they also undervalued the need for credible courts and prosecutors to remedy gross violations of the JSC Law.⁵⁵ By that time, however, most valuable and important companies were privatized at bargain prices by a few insiders or their affiliates, later known as Russian oligarchs. In many instances, the critical elements of the self-enforcing model, including cumulative voting rules, different levels of board and shareholder approval, and independent directors were ignored. At the very best, these procedures became mere formalities that provided a cover of "legitimacy" for skimming corporate assets through self-interested transactions.

⁵³ Black et al., *supra* note 16, at 1731.

⁵⁴ *Id.* at 1735.

⁵⁵ *Id.* at 1756.

Sometimes, managers would go further to reduce outside shareholders' influence.⁵⁶ They might, for example, exclude shareholders from meetings, fail to reflect their interests properly (or at all) on the share registry, or use other strategies to impede shareholders' voting.⁵⁷ Thus, the shareholder-centered approach implemented in the JSC Laws ignored the historical and cultural influences of different parts of the Soviet Union.⁵⁸ Enterprises were still managed by the same directors from the Soviet era, this time, however, without any limits on self-dealing behavior.⁵⁹ Though board supervision provided outside shareholders with some information, shareholders lacked leverage over self-dealing by the "red directors" and could not influence corporate policies.⁶⁰ As a result of managerial hostility and information asymmetry, the value of most corporate securities was negatively affected and simply became illiquid.⁶¹

B. *Too Broad Disclosure Requirements*

The disclosure requirements imposed by the Securities Laws are hardly more effective than the self-enforcing provisions of the JSC Laws. The former may be viewed as too broad and burdensome, in many instances, failing to address facts meaningful to the ordinary investor.⁶² That ambiguity allows dishonest issuers to manipulate information about the most important facts concerning a company. Shareholders, however, rarely employ litigation as a disclosure-enforcing tool and prefer avoiding courts that might take unpredictable decisions. Other non-shareholder investors, such as lenders, may also be reluctant to go to court to avoid any negative political consequences associated with bringing suits against state-owned enterprises.

While introducing amendments to the Securities Laws might further clarify the scope of disclosure requirements, local courts may fail to correctly apply and interpret complex statutory provisions on, for instance, materiality of misrepresentations or omissions in disclosed information. Therefore, any private or public enforcement attempts to seek compensation or penalize misconduct can be futile without competent judicial support. The problem is also exacerbated by the fact that a gap created between the Securities Laws and their practical application has not been sufficiently filled by the financial

⁵⁶ Brown & Shkurupiy, *supra* note 16, at 634.

⁵⁷ *Id.*

⁵⁸ *Id.* at 631.

⁵⁹ *Id.*

⁶⁰ *Id.* at 639.

⁶¹ Lumelsky, *supra* note 16, at 121.

⁶² *Id.*

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regulators. These institutions have failed to create reliable disclosure mechanisms in their respective securities markets.

The financial regulators alone have not been in the best position to effectively enforce disclosure provisions of the Securities Laws without strong judicial support. Thus, competent courts are critical elements of an efficient disclosure system made to provide shareholders with truthful and relevant information. Inefficient courts, on the contrary, are disruptive not only to a particular investor, but to economic growth as a whole.⁶³ Problems with courts are particularly salient in emerging and formerly socialist economies.⁶⁴ Corruption, uncertainty, and inefficiency prevailing in local courts hinder capital markets development and economic growth.

C. *Enforcement Problem*

Robust enforcement mechanisms have always been indispensable for effective corporate governance and strong securities markets in the United States. Such mechanisms formed the backbone of the U.S. disclosure approach introduced by the securities legislation enacted in 1933 and 1934.⁶⁵ By that time, federal judges had accumulated extensive experience adjudicating fraud cases, disputes between corporations and shareholders, and other contractual legal matters.⁶⁶ Unfortunately, that has not always been the case for courts in Kazakhstan and Russia. Even though their national courts have had jurisdiction to consider commercial or securities disputes and fraud issues, the judges lack sufficient experience and expertise to resolve such matters.⁶⁷

Incoherent application of commercial law terminology, principles and concepts is not uncommon. In many instances, judges rely on interpretations of commercial and securities laws by the respective state authorities that may depart from commonly established and well-recognized commercial law principles applied in Western jurisdictions. Further, various procedural requirements and the court's power to stay proceedings continue to compromise enforceability of contracts and other commercial arrangements.

Enforcement by administrative authorities is also not very effective.⁶⁸ While the relevant subdivisions responsible for control over securities markets possess commercial expertise, they lack adequate enforcement resources.⁶⁹ In

⁶³ See Jens Dammann & Henry Hansmann, *A Global Market for Judicial Service* 6–67 (Yale Law Sch., Law & Econs. Rsch. Paper No. 347, 2007).

⁶⁴ *Id.* at 11.

⁶⁵ Lumelsky, *supra* note 16, at 123.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 126.

⁶⁹ *Id.*

Russia, that problem was aggravated when one such subdivision lost its operational independence and was placed under control of its Central Bank.⁷⁰ Finally, the enforcement and prosecution powers of these administrative bodies are quite weak relative to the U.S. Securities and Exchange Commission's authorities.⁷¹ Judicial and administrative enforcement of corporate and securities laws is neither stable nor predictable. At this stage, it is not always clear how relevant legislative provisions or commercial arrangements would be interpreted and enforced by local courts or state authorities. Such unpredictability deters outside shareholders from investing in the securities markets of the former Soviet states and facilitates corruption.

D. Corruption

Establishment of effective enforcement institutions is a long process that may take decades.⁷² To be effective, state enforcement authorities and judicial bodies need to gain experience in securities and fraud matters. Moreover, these institutions need to recover from corruption and the remnants of the command economy. There is no shortcut to solving these problems without reformatting the existing corrupt infrastructure. Previous efforts at corporate and securities law reform in Kazakhstan and Russia have not realistically accounted for the scale of the corruption problem. Both countries have the world's lowest Corruption Perception Index scores.⁷³ A wide sense of discontent over endemic corruption and social injustice sparked a recent wave of protests across many post-Soviet states, including Kazakhstan and

⁷⁰ In Russia, the Federal Financial Market Service was disbanded in 2014. See Press Service, *On Abolition of Bank of Russia Financial Markets Service*, BANK RUSS. (Feb. 28, 2014), http://www.cbr.ru/eng/press/pr/?file=11032014_124740eng_sfr.htm [<https://perma.cc/FBB9-4ZXZ>]. Its functions were diluted within the Russian Central Bank's subdivisions. *Id.* In Kazakhstan, the Committee for Control and Supervision of Financial Market and Financial Organizations operated under the National Bank but emerged as a separate agency in 2020. See *About the Agency*, AGENCY REPUBLIC KAZ. FOR REGUL. & DEV. FIN. MKT., <https://www.gov.kz/memleket/entities/ardfm/about?lang=en> (last visited Mar. 25, 2023).

⁷¹ Lumelsky, *supra* note 16, at 126.

⁷² Black et al., *supra* note 16, at 1753.

⁷³ For instance, Russia's CPI rank in 2021 was 136 out of 180 countries, and fell to 137 in 2019; Kazakhstan's CPI rank improved to 102 in 2021 from 113 in 2019. See *Corruption Perceptions Index*, TRANSPARENCY INT'L, <https://www.transparency.org/en/cpi/2021> [<https://perma.cc/ZND8-93GT>] (last visited Nov. 3, 2022) (click on relevant country in order to view current and historic data).

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Russia.⁷⁴ Thus, corruption risks pose a serious threat to political stability and investment regime.

The scale and scope of the corruption problem create serious impediments to corporate governance and securities market development in the post-Soviet space. Although countries like Kazakhstan have been keen to attract foreign investments and to integrate into global financial markets, the combination of weak courts and corrupt law-enforcement authorities have undermined the goals of corporate and securities law reforms while exposing failures. Strong enforcement institutions are critical elements of market discipline,⁷⁵ helping to ensure that corporations maximize returns to shareholders, among other things. It is for that major reason that Kazakhstan has established a parallel common law system to isolate the administration of justice from the influences of local corrupt institutions.

IV. THE AIFC – A NEW PLATFORM FOR THE CAPITAL MARKETS? DEVELOPMENT IN THE EURASIAN ECONOMIC UNION AND AN INTERNATIONAL FINANCIAL HUB

The corporate and securities sector around the world is undergoing significant changes characterized by the globalization of financial markets. The AIFC is a new financial free zone established to bring investments much in the same way as the financial centers in the Persian Gulf countries. Right from its launch on January 1, 2018, the AIFC set an objective to become an international financial hub for Central Asia, the Caucasus, the EAEU, Mongolia and West China.⁷⁶ In addition, businesses from the United States, Europe, and the Middle East would likely play major roles in the AIFC

⁷⁴ On January 23, 2021, a week after the poisoned anti-corruption campaigner Alexei Navalny was taken into custody upon his return to Moscow, Russia witnessed its largest nationwide protest in recent history. Anastasia Edel, *The Berlin Patient: Russia is no Stranger to Protests, but Navalny's are Different*, FOREIGN POL'Y (Apr. 25, 2021, 7:00 AM), <https://foreignpolicy.com/2021/04/25/navalny-protest-dissent-russia-putin/> [<https://perma.cc/76BP-DEWG>]. Less than a year after the Russian protests, the turmoil in Kazakhstan incited by rage and frustration over soaring fuel prices eventually erupted into violent clashes over the country's future direction, prompting in early January 2022, a Russian-led military intervention using the CSTO forces. See Dan Bilefsky, *Revolt in Kazakhstan: What's Happening, and Why It Matters*, N.Y. TIMES (Jan. 7, 2022), <https://www.nytimes.com/2022/01/05/world/asia/kazakhstan-protests.html> [<https://perma.cc/4LZL-WWUK>].

⁷⁵ See generally DONALD M. DEPAMPHILIS, *MERGERS, ACQUISITIONS, AND OTHER RESTRUCTURING ACTIVITIES* (8th ed., 2015).

⁷⁶ *Welcome to AIFC*, AIFC, <https://aifc.kz/> [<https://perma.cc/VX5Z-Y76R>] (last visited Nov. 5, 2022).

investor base development.⁷⁷ With its strategic location in Kazakhstan, the AIFC may provide a convenient platform to raise capital from the fast-growing markets of China and South Asia. In return for investments, Kazakhstan—and eventually other former Soviet republics—may offer access to their vast natural resources.

AIFC occupies an area within Kazakhstan's capital city of Astana. It enjoys a special legal regime consisting of the RK Constitutional Statute on the Astana International Financial Center⁷⁸ as well as jurisdiction based on English common law principles and standards of leading global financial centers. Kazakhstan laws also apply to the extent they do not conflict with the AIFC applicable legal framework.⁷⁹ Justice is administered by the AIFC Court. In resolving disputes, the AIFC Court is bound by the acting laws of the AIFC, including the AIFC Constitutional Statute and acts of the AIFC bodies.⁸⁰

The United Arab Emirates (the UAE), Qatar in the Middle East, and now Kazakhstan have set up financial centers and financial free zones, equipped with a full menu of dispute settlement options to secure foreign investments and to guarantee their protection to the global financial community.⁸¹ This menu often includes an international commercial court as the centerpiece, but the financial free zones also offer a set of other options, such as arbitration and mediation.⁸² This Part explores these financial free zones, their offshore legal systems and judicial structures. It attempts to explain why the international financial centers, despite being hosted in civil law jurisdictions, choose common law for their offshore legal regimes. One of these regimes' key features is that they are bolstered by a set of separate and independent judicial bodies consisting of English judges, providing for the fair and efficient settlement of international commercial disputes. Two different legal systems—one functioning onshore in the mainland and one offshore in the international financial center—reduce the market inertia by allowing the established businesses to operate under the existing rules while at the same time providing the new companies with a more efficient parallel regulation.

⁷⁷ *See Id.*

⁷⁸ *Konstitucionnii Zakon RK o Mezhdunarodnom Finansovom Tsentre Astana* [Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre], KAZ. PRAVDA [KAZ. PRAV.] Dec. 9, 2015, *translated in* the AIFC Database, <https://aifc.kz/files/legals/7/file/constitutional-statute-on-the-aifc-with-amendments-as-of-30-december-2022.pdf> [<https://perma.cc/PP4L-GUP3>] (last visited Nov. 5, 2022) [hereinafter AIFC Constitutional Statute].

⁷⁹ *Id.* at art. 4.1 (Kaz.).

⁸⁰ *See id.* at arts. 4.1, 13.6 (Kaz.).

⁸¹ Bookman, *supra* note 19, at 240.

⁸² Bookman & Erie, *supra* note 13, at 5.

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A. *Regulatory Dualism as a Development Strategy in the Emerging Economies*

In essence, the separate legal regimes created in the international financial centers and geared toward capital markets development are embodiments of regulatory dualism.⁸³ The idea of regulatory dualism as a development program facilitating economic growth and promoting capital markets in the emerging economies is not new. Regulatory dualism helps to reduce political resistance to change by allowing the established businesses to operate under the existing rules while also creating a more efficient parallel regulation for new companies.⁸⁴ Such parallel regulation is more efficient because managers themselves are interested in corporate governance policies that investing shareholders require to ensure long-term growth of their companies.⁸⁵ This also relieves the tension between the new companies' desire for future financial growth and the existing balance of capital and power.⁸⁶

The development of capital markets may in some sense jeopardize well-established companies and their shareholders who own a controlling stake.⁸⁷ The result is that all wealth and corporate control, and eventually also political power, can be transferred away from the controlling shareholders toward public investors.⁸⁸ Furthermore, effective protection of shareholders helps to finance the prospective rivals, as new businesses typically require more outside capital than already-established firms.⁸⁹ Such concerns provide the owners and managers of established companies with a powerful stimulus to prevent new competitors from expanding.⁹⁰ This opposition to expansion-fostering reforms historically entailed radical revolutionary changes that led to redistribution of wealth and power.⁹¹ The excessive resistance against change may cause an economic crisis which would be as harmful to the new

⁸³ See generally Ronald J. Gilson, et al., *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475 (2011).

⁸⁴ See *Id.*

⁸⁵ See MARIA HELENA SANTANA ET AL., *NOVO MERCADO AND ITS FOLLOWERS: CASE STUDIES IN CORPORATE GOVERNANCE REFORM* 9 (2008), <https://documents1.worldbank.org/curated/en/109341468136179593/pdf/426760NWP0Focu1Box0327331B01PUBLIC1.pdf> [<https://perma.cc/T9NL-X68A>].

⁸⁶ Gilson et al., *supra* note 83, at 475.

⁸⁷ *Id.* at 477.

⁸⁸ *Id.* at 477–78.

⁸⁹ *Id.* at 478.

⁹⁰ *Id.*

⁹¹ *Id.* at 477.

companies as to the established ones.⁹² Countries striving to develop their capital markets frequently call upon regulatory dualism to stop this process by mitigating such resistance while also protecting the interests of the elite. Even though the existing elites may eventually lose their financial and political power, they can still retain their wealth.⁹³

1. *BRAZILIAN CAPITAL MARKETS EXPERIMENT OR THE NOVO MERCADO*

There is good precedent that shows the positive impact that regulatory dualism may have on the capital markets' development. A particular case showing its effective application is Brazil's "New Market" or *Novo Mercado*. The underlying logic that guided the establishment of *Novo Mercado* in December 2000 was that a decrease in investor-risk expectations would positively affect share prices and liquidity.⁹⁴ Unlike the AIFC's Astana International Exchange (the AIX) operating independently from its onshore equivalent, the Kazakhstan Stock Exchange (the KASE), *Novo Mercado* is a premium listing segment within the San Paulo Stock Exchange (The B3 - Brasil Bolsa Balcão S.A.) that enables firms to pledge themselves voluntarily to essential protections of minority shareholders without compromising the position of existing elite-controlled firms through the imposition of comprehensive corporate governance reforms.⁹⁵ Companies listed in the *Novo Mercado* have implemented voluntary U.S.-style corporate governance policies, including rules extending shareholder rights and mandating detailed transparency beyond those prescribed by Brazilian legislation.⁹⁶

As domestic and international investors have pointed out, one of the main problems in Brazil has been the prevalence of non-voting preferred shares that permitted holders of voting shares to control companies by owning only seventeen percent of the total stock.⁹⁷ Such ownership structure resulted in a significant imbalance between the interests of preferential and controlling stockholders.⁹⁸ Apart from an apparent imbalance of power between the two types of shareholders, the existing regime has not treated all shareholders equally when fundamental changes in the companies' ownership structure take place.⁹⁹ For instance, the change of control provisions in the Brazilian

⁹² *Id.* at 479.

⁹³ *Id.*

⁹⁴ SANTANA ET AL., *supra* note 85, at 1.

⁹⁵ *See generally* Gilson et al., *supra* note 83.

⁹⁶ SANTANA ET AL., *supra* note 85, at 2.

⁹⁷ *Id.* at 9.

⁹⁸ *Id.*

⁹⁹ *Id.*

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corporate legislation have not entitled minority shareholders to a tender offer to sell their stock with the sale of the controlling blocks.¹⁰⁰ The controlling blocks were regularly sold with exceedingly high premiums payable to the controlling shareholders only.¹⁰¹ The remaining shareholders had no choice but to sell their stock on the market at significantly lower prices.¹⁰² The *Novo Mercado*, on the other hand, gave rise to the enhanced standards of corporate governance by requiring listed companies to issue common voting shares only, providing minority shareholders one hundred percent tag-along rights to sell their stake on the same terms and conditions applicable to majority shareholders, and setting up internal compliance and audit structures, among other things.¹⁰³

The *Novo Mercado*'s price and liquidity of shares have been positively affected by the degree of protection afforded to shareholders and the accuracy of information disclosed by the companies.¹⁰⁴ Brazil's capital markets expanded remarkably following the launch of the *Novo Mercado*.¹⁰⁵ In 2007, Brazil ranked third worldwide after China and the United States as the most dynamic IPO market, with a ten percent share of these offerings globally.¹⁰⁶ That same year, the *Novo Mercado* went public and became the largest of all emerging market exchanges in terms of market capitalization.¹⁰⁷ In mid-2008, the capitalization of Brazil's equity market already corresponded to its GDP with one hundred listings in the *Novo Mercado* alone.¹⁰⁸

2. THE NOVO MERCADO'S ENFORCEMENT REGIME

Despite the initial success of the *Novo Mercado*, both its old and new regulatory regimes have been subject to the jurisdiction of the same national judiciary.¹⁰⁹ As problems with weak courts are endemic in developing countries, the question of how two different regulatory regimes could co-exist relying on the same enforcement and judiciary mechanisms has remained open.¹¹⁰ In Kazakhstan, the UAE, and other countries that have established the

¹⁰⁰ *Id.* at 9–10.

¹⁰¹ SANTANA ET AL., *supra* note 85, at 10.

¹⁰² *Id.*

¹⁰³ *Listing Segments*, B3, http://www.b3.com.br/en_us/products-and-services/solutions-for-issuers/listing-segments/novo-mercado/ [<https://perma.cc/4KDD-VL2K>] (last visited Nov. 5, 2022).

¹⁰⁴ See SANTANA ET AL., *supra* note 85, at 11.

¹⁰⁵ Gilson et al., *supra* note 83, at 500.

¹⁰⁶ *Id.*

¹⁰⁷ SANTANA ET AL., *supra* note 85, at 1–2.

¹⁰⁸ Gilson et al., *supra* note 83, at 500.

¹⁰⁹ *Id.* at 492.

¹¹⁰ *Id.*

OFCs, a set of separate and independent judicial institutions has been installed to address that problem. Although Kazakhstan has one of the best minority shareholder protection regimes in the world provided by its domestic JSC Law,¹¹¹ additional measures have been required to assure enforcement of that regime. Previous privatization experience from the 1990s has shown that the legal rules alone are not sufficient to protect minority shareholders against self-dealing by managers with acquiescence of corrupt public courts. In the long run, a robust enforcement mechanism is also required to guarantee protection of investments in line with the requirements of the written law.

Unlike the states that have established international commercial judiciaries, Brazil has attempted to improve the existing dispute resolution mechanism. By establishing a mandatory and institutionalized arbitration under the San Paulo Stock Exchange, the *Novo Mercado* has aimed to eliminate the enforcement difficulties attributed to the weak national judiciary in settlement of complex commercial disputes.¹¹² However, the traditional disadvantages associated with private arbitration compared to courtroom proceedings can be seen here as well.¹¹³ Domestic public courts do not provide sufficient protection either because they may be susceptible to external pressures from local elites.¹¹⁴

Granting jurisdiction to international commercial courts to consider commercial and securities disputes between market participants on the stock exchange markets, such as the *Novo Mercado*, has the potential to make international litigation more attractive in the eyes of potential investors than private arbitration. International commercial courts operating independently from the local judicial system, while addressing some of the arbitration's shortcomings, may also serve as a barrier to the local elite's interference. These courts will be considered a success if they encourage more investment by attracting certain constituents and extending their jurisdiction.¹¹⁵

¹¹¹ According to the World's Bank Doing Business Report, Kazakhstan ranked 7 (Russia ranked 72) out of 190 countries in the Protecting Minority Investors in 2021. *Doing Business* 2020, WORLD BANK GROUP, https://archive.doingbusiness.org/en/data/exploreconomies/kazakhstan#DB_pi [<https://perma.cc/QM5P-PQ3E>] (last visited Nov. 5, 2022). A higher ranking means the regulatory framework is more favorable to doing business in terms of the minority shareholder protections. *Id.* Among the indicators are extent of disclosure, director liability, shareholder rights, ownership, control, and ease of shareholder suits. *Id.*

¹¹² Gilson et al., *supra* note 83, at 492–93.

¹¹³ *Id.*

¹¹⁴ *Id.* at 514.

¹¹⁵ Bookman, *supra* note 19, at 231–32.

B. *The AIFC Institutions*

Development of an efficient judiciary may take decades.¹¹⁶ As a shortcut to achieving court efficiency, jurisdictions across the world are setting up international commercial dispute settlement forums: English-speaking offshore or domestic courts focusing on international commercial litigation.¹¹⁷ Over the past sixteen years, Dubai, Qatar, Singapore, Abu Dhabi, and China have all formed commercial courts specializing in international disputes.¹¹⁸

One of the most recent developments is Kazakhstan's AIFC Court that was officially opened in 2018, although the formal prerequisites for its establishment were enacted by the AIFC Constitutional Statute in 2015.¹¹⁹ The AIFC offers a menu of dispute settlement mechanisms, including litigation and arbitration, to position itself as an international go-to forum for both public and private parties. Its independent judicial arm—the AIFC Court—functions separately from Kazakhstan's judicial system. The Court consists of nine English justices,¹²⁰ including the Chief Justice Lord Mance who superseded Lord Woolf, former Lord Chief Justice of England and Wales. As an alternative to court litigation, the IAC provides arbitration services to resolve disputes within the AIFC financial free zone. The IAC is chaired by Barbara Dohmann QC¹²¹ who has been one of the UK's leading international arbitrators.

The AIFC's financial regulator—the AFSA—is tasked with supervising the securities market and regulating the AIX, a high-technology stock exchange operating in the AIFC.¹²² The AIX founding shareholders are the Shanghai Stock Exchange and NASDAQ¹²³—the latter of which provided the AIX with a trading platform. Kazakhstan possesses vast oil, gas, and other mineral resources¹²⁴ and the AIX is a platform capable of attracting foreign investments into the natural resources sector of its national economy.

¹¹⁶ Black et al., *supra* note 16, at 1753.

¹¹⁷ Bookman, *supra* note 19, at 228.

¹¹⁸ *Id.*

¹¹⁹ See generally AIFC Constitutional Statute.

¹²⁰ *Justices, THE AIFC COURT*, <https://court.aifc.kz/who-we-are/justices/> [<https://perma.cc/T5UK-EM9A>] (last visited Nov. 5, 2022).

¹²¹ *IAC Chairman Signs Multiple Memoranda of Understanding with International Arbitration and Mediation Partners in Asia*, IAC (Oct. 29, 2019), <https://iac.aifc.kz/who-we-are/chairman-iac/> [<https://perma.cc/XU7S-FL4H>].

¹²² See generally AIFC Constitutional Statute at arts. 14.1, 14.3 (Kaz.).

¹²³ *AIX Shareholders, AIX*, <https://aix.kz/about-aix/overview/> [<https://perma.cc/L7LG-M2R7>] (last visited Nov. 5, 2022).

¹²⁴ The energy sector has traditionally been the main driving force behind the economic growth in Kazakhstan.

It appears that the support provided by the Shanghai Stock Exchange and NASDAQ will facilitate public offerings of domestic enterprises, thus attracting new investments to the country and region. Chinese investors have already started investing in the development of infrastructure projects in Kazakhstan via the AIX Belt and Road Market.¹²⁵ The NASDAQ, on the other hand, may bring the North American businesses through its “groundbreaking technology, which will allow for standardized and unified operations, coupled with robust flexibility to boost [the AIX] competitive proposition in a rapidly evolving international marketplace.”¹²⁶

For decades, the former Soviet republics have been closed and have had very limited access to international capital markets. Providing access to inexpensive capital and bridging the financial gap in the region creates new business opportunities for the largest and technologically-advanced stock

In 2020, Kazakhstan was the world’s ninth-largest exporter of crude oil and 12th of natural gas.

Kazakhstan Oil and Gas Market Size & Share Analysis – Growth, Trends & Forecasts (2023-2028), MORDOR INTELLIGENCE, <https://www.mordorintelligence.com/industry-reports/kazakhstan-oil-and-gas-market>

(last visited Aug. 25, 2023). In 2020, the three major trading partners of Kazakhstan were Italy, China, and the Netherlands, which accounted for more than 40% of Kazakhstan’s exports. Crude oil, refined copper, radioactive chemicals, natural gas, and ferroalloys were the leading exports. *Kazakhstan (KAZ) Exports, Imports, and Trade Partners*, OBSERVATORY ECON. COMPLEXITY, <https://oec.world/en/profile/country/kaz> [<https://perma.cc/UU8E-5HUB>] (last visited Nov. 5, 2022). The Netherlands, the United States, Switzerland, China, and France have been among the top 5 investor jurisdictions. Baurzhan Sartbayev, *Kazakhstan Aims to Become a Destination for Global Investment*, FOREIGN POL’Y, <https://foreignpolicy.com/sponsored/kazakhstan-aims-to-become-a-destination-for-global-investment/> [<https://perma.cc/NRH8-FDQD>] (last visited Nov. 5, 2022).

¹²⁵ *The First RMB-Denominated Bond in Kazakhstan Listed on the AIX Belt and Road Market*, AIX NEWS (Mar. 20, 2020), <https://aix.kz/the-first-rmb-denominated-bond-in-kazakhstan-listed-on-aix-belt-and-road-market/> [<https://perma.cc/Y36C-ULXF>]. Chinese Yuan or Ren Min Bi is the lawful currency of the People’s Republic of China.

¹²⁶ *Astana International Financial Centre JSC and NASDAQ Sign Technology Deal for New AIFC Exchange*, NASDAQ (May 29, 2017), <http://ir.nasdaq.com/news-releases/news-release-details/astana-international-financial-centre-jsc-and-nasdaq-sign>.

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exchanges, such as the Shanghai Stock Exchange and NASDAQ.¹²⁷ Financial incentives of the stock exchanges can be scaled as the AIX gives access to raise capital in Central Asia and the EAEU. Synergetic cooperation of the AIFC with the Shanghai Stock Exchange and NASDAQ provides the AIX an innovative platform for financial services, while also expanding the global presence of the former.

C. *The AIFC and Predecessor Financial Centers*

As part of the RK Presidential Program consisting of “100 concrete steps,”¹²⁸ the AIFC aims to strengthen the securities market and establish an attractive environment for investment in financial services, including Islamic finance. The Program alludes to the Dubai International Financial Center (the DIFC), created in 2004 when prominent British law firms drafted underlying DIFC legislation modeled on the London Commercial Court’s rules.¹²⁹ The DIFC is an example of how common law may effectively function within the civil law tradition. While the London Commercial Court has acted as a catalyst, the DIFC courts set a trend for the development of new international commercial judiciaries across the world.¹³⁰ Dubai has created a new precedent that any state may set up world-class legal institutions to support development.¹³¹ Inspired by the DIFC’s success, similar financial centers have also emerged in the Middle East, including the Qatar Financial Center (QFC) in 2005 and the Abu Dhabi Global Market (ADGM) in 2015.¹³² These

¹²⁷ These exchanges are large profit-generating corporations rendering services by offering technological solutions to their clients. The NASDAQ, for instance, charges companies for listing stock on its exchange and transactions made on its servers. *Who Owns NASDAQ? Does It Collect Fees from Stock Transactions?*, STACK EXCH., <https://money.stackexchange.com/questions/14501/who-owns-nasdaq-does-it-collect-fees-from-stock-transactions> [<https://perma.cc/56HD-X9Y9>] (last visited Nov. 5, 2022). It may also provide certain other financial or IPO-related services by contracting with third parties. *Id.*

¹²⁸ *National Plan - 100 Steps to Implement Five Institutional Reforms is Published*, STRATEGY 2050 (May 20, 2015, 11:45 AM), <https://strategy2050.kz/en/news/21667/> [<https://perma.cc/4C92-8KWJ>].

¹²⁹ Bookman, *supra* note 19, at 243.

¹³⁰ *Id.* at 272.

¹³¹ YEUNG ET AL., *supra* note 5, at 17 (citing Michael Strong & Robert Himber, *The Legal Autonomy of the Dubai International Financial Centre: A Scalable Strategy for Global Free-Market Reforms*, 29 ECON. AFF. 36 (2009)).

¹³² *Galadari Insights: Exploring Common Law Litigation in the Middle East: Comparing DIFC, ADGM, and QFC*, GALADARI, <https://www.galadarilaw.com/news/galadari-insights-exploring-common-law-litigation-in-the-middle-east-comparing-difc-adgm-and-qfc/> (last visited Aug. 25, 2023).

financial centers have already proved to be the premier destinations to conduct business while also providing familiar judicial and alternative dispute resolution mechanisms guaranteeing investment protection. Dubai and Qatar claim that their mission is to establish the best dispute settlement mechanisms in the world.¹³³

The AIFC's legal system and that of the other financial centers is two-tier. The first tier includes laws and regulations made by the legislative and regulatory authorities of the host country; the second tier consists of laws and regulations adopted by the respective financial centers themselves. The first-tier domestic legislation creates the financial centers, defines their purpose, and approves structure and management.¹³⁴ It establishes administrative bodies, such as boards of directors and management councils, as well as institutional entities including financial authorities, courts, and arbitration centers.¹³⁵ Such courts and arbitration centers are autonomous from the administrative bodies with the chief justice and the head of the arbitration center playing central roles.¹³⁶ Finally, the AIFC as well as the other financial centers have registrars performing case management functions.¹³⁷

The DIFC has also set the course for the development of the AIFC's and other financial centers' court systems. In all cases, there is a first instance court and a court of appeals.¹³⁸ The latter may review judgements made by the former and interpret provisions of laws produced within the financial center.¹³⁹ Generally, the appellate court has discretionary jurisdiction and its decisions are final.¹⁴⁰ In addition, small claims tribunals are created to support the first instance and appellate courts with an intention to consider matters under a certain monetary value ranging from 100,000 USD to 150,000 USD.¹⁴¹ These tribunals resolve matters in an expeditious manner. For instance, ninety percent of cases considered by the DIFC's small claims tribunals are resolved in about three weeks.¹⁴²

¹³³ Bookman, *supra* note 19, at 264.

¹³⁴ Zambrana-Tevar, *supra* note 2, at 122.

¹³⁵ *Id.* at 123.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Krishnan & Purohit, *supra* note 20, **Error! Bookmark not defined.** at 502.

¹⁴⁰ *Id.* at 6.

¹⁴¹ Zambrana-Tevar, *supra* note 2, at 123.

¹⁴² Krishnan & Purohit, *supra* note 20 **Error! Bookmark not defined.**, at 503.

D. *Common Law as a Common Trend in the International Financial Centers*

There is a consensus among scholars that the legal environment matters for the growth and scale of a country's securities market.¹⁴³ The explanation is that the strong legal environment, with good laws and robust enforcement, prevents opportunistic entrepreneurs from expropriating financiers' investments.¹⁴⁴ In such an environment, investors are willing to exchange funds for shares, thus expanding the scope of a given country's securities market.¹⁴⁵ The "Law and Finance" scholarship also suggests that common law systems provide better shareholder protection than those of civil law systems.¹⁴⁶ Because civil law countries provide less protection to shareholders, they have "smaller and narrower capital markets."¹⁴⁷

The traditional common law jurisdictions, such as the United Kingdom and the United States, host the leading global financial centers. For a long time, London and New York have also been preferred international dispute resolution forums, owing largely to the efficiency and commercial expertise of their common law judiciary. Established in 1895, the London Commercial Court (the LCC) has been known for its judges' business expertise, impartiality, adherence to the rule of law, flexible procedural requirements, broad jurisdiction, and openness to foreign litigants.¹⁴⁸ The attractiveness of London's judiciary and English law is also attributable to the popularity of the English language.¹⁴⁹ English, the "global language of business," is one of the world's most spoken languages.¹⁵⁰ English law, at the same time, has been the most preferred governing law for business contracts in the European Union, thanks to its conduciveness to the enforcement of contracts.¹⁵¹ Taken together, these features have attracted a significant amount

¹⁴³ YEUNG ET AL., *supra* note 5, at 8 (citing Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997)).

¹⁴⁴ YEUNG ET AL., *supra* note 5, at 8.

¹⁴⁵ *Id.*

¹⁴⁶ YEUNG ET AL., *supra* note 5, at 8–9 (citing John Armour et al., *Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis*, 6 J. EMP. L. STUD. 343 (2009)).

¹⁴⁷ YEUNG ET AL., *supra* note 5, at 8.

¹⁴⁸ Bookman, *supra* note 19, at 233–34.

¹⁴⁹ *Id.* at 235.

¹⁵⁰ Tsedal Neeley, *Global Business Speaks English*, HARV. BUS. REV. (May 2012), <https://hbr.org/2012/05/global-business-speaks-english> [<https://perma.cc/J5M5-33QA>].

¹⁵¹ Bookman, *supra* note 19, at 235.

of international cases.¹⁵² In 2015 alone, sixty-three percent of the lawsuits considered by the LCC involved foreign litigants.¹⁵³

Although English law dominates in the Eurozone, parties in the Americas prefer New York law as the governing law of commercial contracts.¹⁵⁴ The widespread use of the English language in business further contributes to the promotion of New York law and New York courts. Like English law, New York law is widely recognized and often chosen to govern contracts even where a particular commercial arrangement has little or nothing to do with New York.¹⁵⁵ Like their English counterparts, the New York state courts have long been extremely responsive to the enforcement of contracts.¹⁵⁶ “In 1993, almost one hundred years after the [creation] of the [LCC], New York [introduced] its own Commercial Division.”¹⁵⁷ Factors like these explain why New York is designated as a dispute resolution venue in the growing number of international transactions. According to one of the contract surveys filed with the SEC, New York was selected as the forum in thirty-four percent of the domestic and forty-five percent of the international contracts examined.¹⁵⁸

The values of English and New York laws “resonates in the [application] of common-law” principles and precedents.¹⁵⁹ The stability and predictability of English and New York laws, coupled with commercial sophistication and expertise of judges, create favorable and familiar environments for investors. It should, thus, come as no surprise that the other international financial centers, though hosted in civil law jurisdictions, choose common law that has already proved its capability to create a robust legal framework for foreign businesses. Just like “historic treaty port [courts] in Asia” incorporated foreign, mostly common law principles, and were “established by foreigners for foreigners,” new international financial centers adhere to the common law tradition but “are [founded] by locals for foreigners” with the same goal of guaranteeing investment protection.¹⁶⁰

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 236.

¹⁵⁵ Bookman, *supra* note 19, at 236.

¹⁵⁶ See Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2087 (2009).

¹⁵⁷ Bookman, *supra* note 19, at 237.

¹⁵⁸ Julian Nyarko, *We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial*

Contracts, 58 INT'L REV. L. & ECON. 6, 7 (2019).

¹⁵⁹ Bookman, *supra* note 19, at 236.

¹⁶⁰ See *id.*, at 273.

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Among the key advantages of the common law system are its courts that adjudicate based on broader principles rather than a specified set of predefined regulations.¹⁶¹ These courts resolve matters in an efficient manner. Common law judges may themselves set investor-friendly rules and standards providing for more procedural flexibility in resolving disputes to ensure shareholders' protection against unlawful expropriations by local elites or corrupt managers. Along with provision of competent and predictable judiciary services, English common law-based courts are also committed to deter parties from unnecessary court proceedings motivating them to resolve disputes amicably. In Dubai, "the [DIFC] courts [of various instances] have [already considered] approximately [six hundred] cases"; at that, ninety-five percent of disputes under the first instance court's jurisdiction are resolved before trial.¹⁶² These courts have already left their predecessor LCC, having a sixty percent settlement rate, far behind.¹⁶³ For the DIFC cases, the higher settlement rate means the "court is doing its job" and building "certainty and trust."¹⁶⁴

While English common law dominates the legal system in the discussed international financial centers, the latter are not bound to operate solely based on such norms and principles. For instance, the AIFC Court may consider "final judgements of the courts of other common law jurisdictions."¹⁶⁵ Local laws may also apply to matters not otherwise governed by the AIFC Constitutional Statute and the acts of the AIFC bodies. If courts in Dubai, Qatar, or Kazakhstan interpret cases under contracts governed by English law—while also considering other relevant judgments from different common law jurisdictions or even foreign laws—that could have a big impact on the development trajectory of English law itself. Effectively, each financial center is crafting its own legal system comprising a unique blend of common law principles and precedents, local laws and traditions, as well as standards and regulations created by the centers themselves. In the future, these legal systems will likely shift their focus from governing procedural matters to the development of substantive commercial law.¹⁶⁶

¹⁶¹ John C. Coffee Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641, 702 (1999).

¹⁶² Krishnan & Purohit, *supra* note 20, at 5–6.

¹⁶³ *The Commercial Court Report 2018–2019*, JUDICIARY OF ENGLAND & WALES, 10 (2020), https://www.judiciary.uk/wp-content/uploads/2022/07/6.6318_Commercial-Courts-Annual-Report_WEB1.pdf [<https://perma.cc/8QCB-SVZL>] (last visited Nov. 5, 2022).

¹⁶⁴ See generally JAYANTH K. KRISHNAN, THE STORY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS: A RETROSPECTIVE 68 (2018).

¹⁶⁵ AIFC Constitutional Statute at art. 13.6 (Kaz.).

¹⁶⁶ Bookman, *supra* note 19, at 274–75.

E. *New Investment Platform*

AIFC is creating an investor-friendly environment through developing the AIX, among other things, and ensuring its integration with international capital markets. Kazakhstan's national companies have already pursued new international fundraising opportunities offered by the AIFC¹⁶⁷ and the government's "second wave" privatization program.¹⁶⁸

The AIFC is expected to boost capital markets, insurance, private banking, and Islamic finance not only in Kazakhstan, but also within the broader area of the EAEU.¹⁶⁹ While Kazakhstan's national companies are already scheduled for sale, other companies of EAEU Member States could as well make their offerings on the AIX.¹⁷⁰ Such offerings might turn the AIX into the EAEU's common financial platform. Kazakhstan and other EAEU Member States have already initiated the creation of the common market

¹⁶⁷ Ariel Cohen, *Kazatomprom IPO With Astana International Financial Center (AIX) Shows Global Appetite For Uranium*, FORBES (Nov. 27, 2018, 9:35 AM), <https://www.forbes.com/sites/arielcohen/2018/11/27/kazatomprom-ipo-with-astana-international-financial-center-aix-shows-global-appetite-for-uranium/?sh=12bb11b9519d> [https://perma.cc/6PMW-E3BD]. On Nov. 14, 2018, Kazatomprom, the uranium mining company controlled by Kazakhstan's Samruk-Kazyna Sovereign Wealth Fund (Samruk-Kazyna), launched the first ever IPO on the AIX. *Id.* In addition, Kazatomprom made a simultaneous offering on the London Stock Exchange. *Id.* Despite a very weak demand for materials involved in the nuclear fuel production, purchase requests for Kazatomprom came from all over the world. *Id.* In 2021, Kazatomprom provided 41% of global primary uranium supply as the world's largest producer of natural uranium. *About us*, KAZATOMPROM, https://www.kazatomprom.kz/en/page/o_nas [https://perma.cc/92UJ-WLJN] (last visited Nov. 5, 2022).

¹⁶⁸ *Second Wave of Privatisation: Three Most Profitable Companies Unveiled*, THE ASTANA TIMES: BRINGING KAZAKHSTAN TO THE WORLD (Feb. 23, 2018), <https://astanatimes.com/2018/02/second-wave-of-privatisation-three-most-profitable-companies-unveiled/> [https://perma.cc/Z6PQ-XVDD]. "Samruk-Kazyna plans to . . . offer [for sale through an] . . . Initial Public Offering (IPO) [at least six of its most valuable national enterprises]: Kazatomprom [JSC (the national atomic company)], Air Astana [JSC (the national air carrier)], Samruk-Energy [JSC (the largest power holding company in Kazakhstan)], KazMunayGas [JSC (the national oil and gas company)], Kazpost [JSC (the national postal operator)], and Kazakhstan Temir Zholy [JSC (the national railway company).]" *Id.*

¹⁶⁹ *Welcome to AIFC*, AIFC, <https://aifc.kz/> [https://perma.cc/VX5Z-Y76R] (last visited Aug. 25, 2023).

¹⁷⁰ *See AIX Official List*, AIX, <https://aix.kz/listings/listed-companies-2-2/> (last visited Aug. 25, 2023).

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providing for free movement of capital, goods, and services.¹⁷¹ The EAEU Member States have also reached an agreement to coordinate economic policy in the financial sector by way of “exchange of information” and “harmoni[zation] [of securities] legislation” with international rules and standards.¹⁷²

The AIFC positions itself “as a regional cent[er] for business and finance.”¹⁷³ Despite being a new institution, it has already received international recognition and achieved good rankings.¹⁷⁴ In addition to the comprehensive legal system, a preferential visa and tax regime has been introduced to attract professionals and businesses from all over the world.¹⁷⁵

Going forward, Kazakhstan plans to benefit from China’s Belt and Road Initiative (the BRI).¹⁷⁶ The right institutional environment is, therefore, crucial to take advantage of the economic opportunities offered by the BRI. The AIFC provides an institutional setting that may create the proper conditions for investors from countries lying along the Chinese BRI project.

¹⁷¹ *Single Markets of Services and Labor Resources to Have Multiplicative Effect on Union States’ Business Development*, EURASIAN ECON. COMM’N (Nov. 25, 2020), <http://www.eurasiancommission.org/en/nae/news/Pages/25-11-2020-02.aspx> [<https://perma.cc/6HKH-CDE6>].

¹⁷² See Treaty on the Eurasian Economic Union art. 70, paras. 2.1, 2.3, May 29, 2014, 3042 U.N.T.S. 3, https://docs.eaeunion.org/docs/en-us/0003610/itia_05062014 [<https://perma.cc/K974-GJ93>].

¹⁷³ There are more than 2,000 companies currently registered in the AIFC. *Welcome to AIFC*, *supra* note 76.

¹⁷⁴ The AIFC is ranked seventy-fifth according to the Global Financial Centres Index (GFCI). *GCFI 30 Rank*, LONG FINANCE, <https://www.longfinance.net/programmes/financial-centre-futures/global-financial-centres-index/gfci-30-explore-data/gfci-30-rank/> [<https://perma.cc/DB36-2TX3>] (last visited Nov. 5, 2022). The GFCI is a ranking of the competitiveness of financial centers based on over 29,000 financial center assessments from an online questionnaire together with over one hundred indices from organizations such as the World Bank, the Organisation for Economic Co-operation and Development (OECD), and the Economist Intelligence Unit. *Id.*

¹⁷⁵ AIFC Constitutional Statute at arts. 6–7 (Kaz.). For example, the visa-free entry to Kazakhstan is provided to “[residents] of the [OECD countries, the UAE], Malaysia, . . . Singapore[,] . . . Monaco,” and some other countries “for a period of up to [thirty] calendar days.” *Id.* at art. 7.5. Until 2066, there is a fifty-year exemption from income, property and land taxes for qualified services and activities performed by the AIFC participating entities. *Id.* at arts. 6.2, 6.8.

¹⁷⁶ The BRI is the Chinese government’s global strategy to develop infrastructure, introduced in 2013, and involves nearly seventy countries and international organizations in Asia, Europe, and Africa. Caroline Freund & Michele Ruta, *Belt & Road Initiative*, THE WORLD BANK GROUP (Mar. 29, 2018), <https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative> [<https://perma.cc/5ZEK-HFAT>].

Further, the Chinese and Kazakh parties intend to turn the AIFC into the BRI's regional financial services hub.¹⁷⁷ "The first RMB-denominated bond[s],"¹⁷⁸ in fact, "ha[ve] been listed on the AIX [Belt and Road Market] and the *Hong Kong Exchange* . . . to support [the] local infrastructure projects and [BRI] projects in Kazakhstan."¹⁷⁹

V. THE AIFC COURT AS A NEW FORUM FOR RESOLUTION OF CIVIL AND COMMERCIAL DISPUTES IN THE COMMONWEALTH OF INDEPENDENT STATES AND BEYOND

Countries around the world differ substantially in the performance of their court systems.¹⁸⁰ "In some jurisdictions, [cases are settled by] courts quickly, [reasonably], and economically."¹⁸¹ "In others, [courts] are slow, inefficient, [unfair], incompetent, or [dishonest]."¹⁸²

"A [logical solution] is that countries with [poorly] [performing] [justice systems] should reform their courts."¹⁸³ However, such "reform is both [complicated] and slow[.]" especially when judicial independence and credibility are at stake.¹⁸⁴ Some scholars have suggested the idea of "globalizing commercial litigation" when "litigants from [afflicted nations could resolve] their [disputes] in other [countries with stronger court] systems."¹⁸⁵ Or, alternatively, "extraterritorial courts" for corporate law could be established in host countries, allowing such courts (e.g., Delaware courts) to "hold hearings and trials out of state [.]"¹⁸⁶

¹⁷⁷ Ren Jun & Zhang Jiye, *Kazakhstan's Financial Center Gearing up to Become BRI Regional Hub*, XINHUA (Sept. 24, 2019), <https://obortunity.org/2019/09/25/kazakhstan-financial-center-gearing-up-to-become-bri-regional-hub/>.

¹⁷⁸ *The First RMB-Denominated Bond in Kazakhstan Listed on the AIX Belt and Road Market*, AIX NEWS (Mar. 20, 2020), [https://aix.kz/the-first-rmb-denominated-bond-in-kazakhstan-listed-on-aix-belt-and-road-market/](https://aix.kz/the-first-rmb-denominated-bond-in-kazakhstan-listed-on-aix-belt-and-road-market/https://aix.kz/the-first-rmb-denominated-bond-in-kazakhstan-listed-on-aix-belt-and-road-market/) [<https://perma.cc/Y36C-ULXF>]. Chinese Yuan or Ren Min Bi is the lawful currency of the People's Republic of China.

¹⁷⁹ *Id.*

¹⁸⁰ Dammann & Hansmann, *supra* note 63, at 3.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 3 (2008) (JOHN M. OLIN CTR. STUD. L., ECON., & PUB. POL'Y, Research Paper No. 357, 2008).

¹⁸⁶ Jens Dammann & Henry Hansmann, *Extraterritorial Courts for Corporate Law 2*, 5 (Eur. Corp. Governance Inst., Working Paper No. 43/2005, 2005).

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The states that have established the OFCs pursue another solution by offering investors separate legal regimes where robust judicial systems operate independently from the national judiciaries. Effectively, courts in such judicial systems are deemed extraterritorial. However, unlike the idea of importing extraterritorial courts with the whole body of their respective state laws (that might be as comprehensive and specific as Delaware corporate legislation), the extraterritorial commercial courts functioning within the OFCs have a head start owing to the formation of an adapted common law regime to operate from—guaranteed by domestic legislation of the hosting nation. The latter solution provides access to world-class justice within domestic boundaries with due regard to local rules and legal traditions. On the face of it, such judicial systems create a more reliable regime for settling disputes than local courts could offer—particularly for foreign investors. In time, this approach may also stimulate the development of domestic courts and establish investors' trust in the national judiciary. Successful realization of the abovementioned investment projects depends to a large extent on the quality of judicial services guaranteeing protections against expropriations of capital.

The AIFC, DIFC or any other courts established within the OFCs or financial free zones are offshore courts; as such, they function separately from onshore or national “courts of their host country[—]Kazakhstan[,] the UAE[,] [or any other beneficiary state], respectively.”¹⁸⁷ These precedents have shown that strong and efficient offshore commercial courts may be established in countries with otherwise dysfunctional onshore judicial systems. The rapid expansion “of [offshore commercial] courts is a [product] of particular . . . political [processes and] economi[c] . . . factors.”¹⁸⁸ Along with corporate and financial services development, the OFCs have bolstered the economy of their hosting states to become less dependent on oil and gas as well as other natural resources. The effective offshore commercial judiciary has become one of the major drivers of the hosting states economic growth.¹⁸⁹ Other countries might also take advantage of adjudication by such judiciary to support the development of their national economies, should they recognize jurisdiction of the offshore commercial courts. It is possible that at the initial stage the recognition of these courts' jurisdiction would depend on geographical preferences as well as political and economic considerations (i.e., it may make more sense for the EAEU and CIS countries to recognize an AIFC Court resembling the arrangement between the Persian Gulf countries acknowledging the DIFC courts' jurisdiction).

¹⁸⁷ Zambrana-Tevar, *supra* note 2, at 122.

¹⁸⁸ See Bookman, *supra* note 19, at 230.

¹⁸⁹ See Dammann & Hansmann, *supra* note 63, at 11.

An amendment to the regional recognition convention granting jurisdiction to the AIFC Court to hear civil and commercial cases would provide access to world-recognized justice to litigants not only from (or doing business in) Kazakhstan, but also to litigants or businesses from other CIS Member States. This Part investigates the growing role of the offshore judicial institutions—such as the AIFC Court—in global adjudication and the development of international commercial law.

A. *New International Commercial Judiciaries*

Following the Brexit vote and the U.S. Supreme Court's application of “‘litigation isolationism’ . . . doctrine[] that [excludes] transnational cases [from consideration by] U.S. courts,” London and New York have lost their positions of dominance in the international litigation market.¹⁹⁰ Ultimately, this may force litigants to seek alternative destinations for dispute settlement.¹⁹¹ The emergence of new English-speaking commercial courts around the globe offers a sufficient selection of venues for litigants to choose from that typically do not require any connection between the case and the forum state. As leading providers of arbitration services, these forums also aim “to accommodate [substantive court] litigation, not [merely] to [recognize and] enforce arbitration clauses and awards.”¹⁹² Such international arbitration centers, as those in Asia and the Middle East, strive to become world leaders in global commercial adjudication. One of their primary objectives is appointment as preferred forums for any disputes that arise out of international commercial arrangements and to provide a suitable venue for non-contractual matters.¹⁹³

Among the leaders in the international litigation market, Singapore offers a paradigmatic example of the modern venues rendering premium dispute resolution services in one location. This city-state seems set to become a preferred destination for all types of commercial disputes.¹⁹⁴ The Singapore International Arbitration Centre (the SIAC), now ranks in the top five for

¹⁹⁰ Bookman, *supra* note 19, at 274; *see also* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV 1081, 1087 (2015).

¹⁹¹ *See* Bookman, *supra* note 19, at 231.

¹⁹² *Id.* at 246.

¹⁹³ *Id.* at 229.

¹⁹⁴ *See The Singapore Dispute Resolution Institutions—What and Why (Part 2 of 4)*, SING. MGMT. UNIV.: SIDRA ACADEMY (Mar. 12, 2017), <https://sidra.smu.edu.sg/singapore-dispute-resolution-institutions-what-and-why-part-2-4> [<https://perma.cc/4CBT-D73U>].

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international arbitration worldwide.¹⁹⁵ Singapore also established the Singapore International Commercial Court (the SICC) in 2015 “[as] a division of . . . the [Singapore] High Court”¹⁹⁶ to strengthen its status “as the leading [international commercial dispute resolution] hub in [the region.]”¹⁹⁷ Singapore’s legal model is centered on the idea of the co-existence of arbitration and litigation in international commercial adjudication.¹⁹⁸

The establishment of the SICC has been an important step for Singapore to enhance and complement its dispute settlement capabilities¹⁹⁹ amid its state-of-the-art arbitration and mediation centers and a very friendly law toward arbitration agreements.²⁰⁰ For this purpose, the SICC “designated” “international judges,”²⁰¹ admitted foreign counsel to its bar, allowed confidential hearings, and restricted the possibilities for appellate review.²⁰² Through such measures, Singapore intends to bolster the SICC’s global legitimacy and ability to consider international cases.²⁰³ The SICC rules also offer broad discretion to permit joinder of parties who have not formally agreed to the SICC jurisdiction if the claims “are appropriate to be heard in the Court.”²⁰⁴ Such permissive joinder rules have been introduced as a solution

¹⁹⁵ See Paul Friedland & Stavros Brekoulakis, *2018 International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARRY UNIV. LONDON, <https://arbitration.qmul.ac.uk/research/2018/> [<https://perma.cc/9LXL-RCFY>] (last visited Aug. 25, 2023). **Error! Hyperlink reference not valid.**

¹⁹⁶ *SICC – A Prime Destination for International Commercial Dispute Resolution*, SICC, <https://www.sicc.gov.sg/> (last visited Aug. 25, 2023).

¹⁹⁷ *Establishment of the SICC*, SICC, <https://www.sicc.gov.sg/who-we-are/establishment-of-the-sicc> [<https://perma.cc/WYH5-PQLP>] (last visited Nov. 6, 2022).

¹⁹⁸ See Yip, *supra* note 20, at 82–83.

¹⁹⁹ See Bookman, *supra* note 19, at 247.

²⁰⁰ See generally Rachel Chiu Li Hsien, *Clothing the Bare: The Enforcement of Arbitration Clauses in Singapore*, N.Y.U. L. REV. (Mar. 2, 2018), <https://blogs.law.nyu.edu/transnational/2018/03/clothing-the-bare-the-enforcement-of-arbitration-clauses-in-singapore/> [<https://perma.cc/3BC8-2A7H>] (discussing Singapore’s dispute resolution offerings).

²⁰¹ *Judges*, SICC, <https://www.sicc.gov.sg/who-we-are/judges> [<https://perma.cc/PJ53-3ESL>] (last updated Nov. 1, 2022). Along with twenty-eight Singapore Court Justices, the SICC bench comprises eighteen International Judges. *Id.*

²⁰² See Yip, *supra* note 20, at 84–90.

²⁰³ See Lance Ang, *International Commercial Courts and the Interplay Between Realism and Institutionalism—A Look at China and Singapore*, HARV. INT’L L. J., <https://journals.law.harvard.edu/ilj/2020/03/international-commercial-courts-and-the-interplay-between-realism-and-institutionalism-a-look-at-china-and-singapore/> [<https://perma.cc/9ZXS-N7UL>] (last visited Nov. 6, 2022).

²⁰⁴ Supreme Court of Judicature Act of 1969, rev. ed. 2014, ch. 322 sec. 80, O. 110 r. 9 (Sing.) [hereinafter Singapore Rules of Court], <https://sso.agc.gov.sg/Act/SCJA1969> [<https://perma.cc/797U-QYDL>] (last visited Jan. 24, 2022).

to the long-standing problem in arbitration of joining non-parties to the arbitration agreement.²⁰⁵

Singapore, China, the UAE, Qatar, and Kazakhstan have focused on developing litigation and arbitration as complimentary modes of dispute resolution. These jurisdictions have demonstrated their willingness to position themselves as legal hubs offering the one-stop-shop for litigation and arbitration as well as other alternative dispute resolution (ADR) services. Such services are not only more competitive but also more supportive of each other. Court systems create a critical infrastructure required to service arbitration by upholding arbitration agreements and enforcing arbitral awards, or otherwise facilitating arbitration proceedings in gathering evidence or nominating arbitrators where it is not possible for parties to agree.²⁰⁶ Likewise, litigation has evolved as a result of the influence of arbitration by allowing the parties to use English-language proceedings and offering English-speaking judges and expert panels.²⁰⁷

B. *Categories of International Commercial Courts*

In the past fifteen years, an increasing number of countries have drawn on the London and, to a certain extent, the New York models to create courts specializing in international commercial disputes and having exclusive jurisdiction over “international” and “commercial” cases.²⁰⁸ These countries have established chambers or divisions of the existing domestic courts that exclusively focus on international commercial disputes or have opened new separate commercial courts enjoying a special legal regime. The disputes span a wide range of corporate and commercial issues, including construction, project finance, data security, employment, insolvency, securities regulation, and enforcement of international arbitration agreements and awards.²⁰⁹

There are a multitude of driving forces for countries to establish international commercial courts, chambers, or divisions.²¹⁰ They may seek to promote local and regional investment, aspire to become international litigation centers, consolidate geopolitical power and influence, or set

²⁰⁵ See Drossos Stamboulakis & Blake Crook, *Joinder of Non-Consenting Parties: The Singapore International Commercial Court Approach Meets Transnational Recognition and Enforcement*, 12 ERASMUS L. REV. 98, 105 (2019).

²⁰⁶ See Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1125 (2019).

²⁰⁷ See Bookman, *supra* note 19, at 276.

²⁰⁸ *Id.* at 233–34.

²⁰⁹ See Bookman & Erie, *supra* note 13, at 5.

²¹⁰ See Bookman, *supra* note 19, at 261.

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some combination of these or other objectives.²¹¹ The two broad categories of international commercial judiciary that have emerged as a reflection of states' intention to attract financing or become international legal hubs are "investment-seeking courts"²¹² and "aspiring litigation destinations."²¹³ Given the size of the Chinese economy, a recent initiative—China's new international commercial court (the CICC)—may also be placed into a separate category of courts having "unique potential for global influence."²¹⁴

While the first two court categories have been created to encourage investments (e.g., Dubai and Qatar) or are set to become new benchmarks for commercial dispute settlement in the respective region (e.g., Singapore in Asia and the specialized commercial court chambers in Europe), the court in China is intended to act as a one-stop-shop for all international commercial disputes arising out of Chinese BRI's investments.²¹⁵ Investment-seeking courts and the CICC appear to be mainly concerned with the need to provide stable legal mechanisms to safeguard regional and global investment.²¹⁶ Aspiring litigation destinations, on the other hand, seem to contend for the adjudication market, or, in other words, for cases.²¹⁷ The UK's decision to leave the European Union also triggered recent efforts in continental Europe to improve its international commercial dispute resolution framework.²¹⁸

Kazakhstan's AIFC Court possesses, to some extent, the features of all of the abovementioned court categories. Its primary goal is to attract investments to the country and the region, guaranteeing protection through a familiar and reliable judicial system. The AIFC Court has the required prerequisites to become a standard and preferred forum for commercial adjudication in Central Asia, the EAEU, and the CIS. As a country, Kazakhstan plays a crucial role for the success of China's BRI thanks to its transit potential required for the Western China-Western Europe Transport

²¹¹ *Id.*

²¹² *Id.* at 239.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See WORLD BANK GROUP, *supra* note 176 (The goal of the BRI is "to improve connectivity and cooperation on a transcontinental scale. . . . [Seventy-one] economies[,] geographically [situated across the] BRI transport[ation] [network, attracted] [thirty-five percent] of global foreign direct investment [in 2017] and accounted for [forty percent] of . . . merchandise exports [around the world.]").

²¹⁶ See Bookman, *supra* note 19, at 265.

²¹⁷ *Id.*

²¹⁸ See Ruehl, *supra* note 20, at 11.

Corridor.²¹⁹ This, combined with China's intentions to turn the AIFC into the BRI's regional financial hub, means it is likely that the AIFC Court might be designated as a go-to forum for commercial disputes arising from Chinese investments into the BRI infrastructure projects developed in Kazakhstan and other CIS countries. Or China, using its superior financial bargaining power, may push for designation of the CICC as a forum for resolution of disputes arising out of any BRI projects irrespective of their geographic implementation. However, if consent to the jurisdiction of the CICC becomes a prerequisite for Chinese investment through the BRI, the CICC might rapidly gain popularity, though not necessarily legitimacy.²²⁰ The CICC is obviously an ongoing project subject to reforms and increased internationalization that may impact and define the CICC's and the BRI's international legitimacy and credibility in the long run.²²¹

C. Independence of the AIFC Court

The AIFC Court is independent in the exercise of its powers as provided by the AIFC Constitutional Statute and the applicable legislation of the AIFC.²²² It has received all necessary political and legislative support from the government. The AIFC Court has been endorsed by the RK President, the Supreme Court, and the Parliament of Kazakhstan through Presidential edicts, constitutional statutes, laws, regulations, and memorandums of understanding. As an institution established to bring justice based on English common law principles, it has been designed to help improve business climate and to prevent corruption in the administration of justice. The state founded the AIFC, recruited foreign judges, arbitrators, lawyers, and personnel to work within this parallel structure with a clear goal of promoting Kazakhstan as a leading location in the region to conduct business, and to ensure that a credible and fair legal and judicial system exists to promote confidence among foreign investors.

²¹⁹ The Western Europe-Western China Highway is a transcontinental expressway linking China's Yellow Sea coastal city of Lianyungang with Russian port city of St. Petersburg located on the Baltic Sea. Wang Yutong, *Riding the Western Europe-Western China Highway: A Connection Between Europe and Asia*, CGTN (Apr. 19, 2019, 3:52 PM), <https://news.cgtn.com/news/3d3d514e7749544f33457a6333566d54/index.html> [<https://perma.cc/W7RY-P65C>]. There has been a commercial road starting from China since the second century AD, going all the way west to Central Asia, West Asia, and eventually to Europe. It became known as the "Silk Road" because the key transaction item on this route was silk. Nicknamed as the "New Silk Highway," the new Western Europe-Western China motorway stretches 8,445 km. See Ruehl, *supra* note 20, at 11.

²²⁰ See Bookman, *supra* note 19, at 280.

²²¹ See Ang, *supra* note 203.

²²² See AIFC Constitutional Statute at art. 9.2 (Kaz.).

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Along with building up a regional reputation, one of the underlying motives behind creating the AIFC Court has been to prevent local conflicts from fleeing to London or New York.²²³ Dubai has already managed to draw in some of the regional disputes from London. In 2016 alone, the number of contracts drafted in English throughout the Middle East and North Africa that designated the DIFC as the dispute resolution forum rose to forty-two percent, while the share of London decreased from fifty-two percent in 2015 to twenty-five percent in 2016.²²⁴ To that end, the AIFC Court is fully able to repeat what the DIFC courts have already done by seizing on the opportunity to attract cases that would have otherwise gone abroad.

The AIFC Court is separate and independent from the legal and judicial system of Kazakhstan. Its court regulations explicitly prohibit the RK Government from interfering with the Chief Justice or other judges in the exercise of their judicial authority.²²⁵ The judgments of the AIFC Court's appellate instance are final and binding and may not be reviewed by local courts.²²⁶ As a general rule, all hearings are held in public.²²⁷ The judges, officers, and employees of the AIFC Court are immune from liability for any acts or omissions in the performance of their functions or exercise of the powers unless it is shown that the acts or omissions "have been done in bad faith."²²⁸

Another way to test the independence of the AIFC Court is to analyze the mechanisms of appointment, removal, and remuneration of judges.²²⁹ The Chief Justice of the Court and the other judges are appointed by the RK President based on the nomination by the Governor of the AIFC.²³⁰ The appointment of other judges has to be made in consultation with the Chief Justice.²³¹ The judges may be removed or suspended from judicial office in a similar manner in case of ill-health, criminal offense punishable with

²²³ See Bookman, *supra* note 19, at 274.

²²⁴ See Marta Requejo Isidro, *International Commercial Courts in the Litigation Market*, 9 INT'L J. PROC. L. 4, 12 (2019) (citing data from the Singapore Academy of Law for disputes in Asia).

²²⁵ See *AIFC Court Regulations*, ASTANA INT'L FIN. CTR. reg. 11 (Dec. 5, 2017), <https://aifc.kz/files/legals/68/file/3.-legislation-aifc-court-regulations-2017.pdf> [<https://perma.cc/Q3ZR-SMNQ>] (Kaz.).

²²⁶ See AIFC Constitutional Statute at art. 13.7 (Kaz.).

²²⁷ See *AIFC Court Rules*, ASTANA INT'L FIN. CTR. Part 22.2 (2018), <https://aifc.kz/files/legals/69/file/3.-legislation-aifc-court-rules-2018.pdf> [<https://perma.cc/55GK-REXF>] (Kaz.).

²²⁸ *AIFC Court Regulations*, *supra* note 225, at reg. 22 (Kaz.).

²²⁹ See Zambrana-Tevar, *supra* note 2, at 134.

²³⁰ See *AIFC Court Regulations*, *supra* note 225, at reg. 12 (Kaz.).

²³¹ See *id.*

imprisonment, or misconduct incompatible with performance of judicial duties.²³² The AIFC regulations somehow guarantee independence in this removal process as the Chief Justice is authorized to establish a procedure of investigation to determine allegations of such misconduct.²³³

The AIFC Court has its own budget allocated by the RK Government for maintaining and financing the Court's activities.²³⁴ The amount of remuneration of the Chief Justice and the other judges is determined by the Governor of the AIFC.²³⁵ However, the remuneration of judges cannot be reduced during their tenure at the AIFC Court.²³⁶ This way judges are guaranteed some financial independence from the hosting state that could otherwise put economic pressure on the Court while considering the issue of remuneration. Additionally, in countries with high exchange rate fluctuations, such as Kazakhstan, compensating foreign judges in a hard currency is an employment benefit.²³⁷

The Chief Justice is responsible for preparing the Court's budget and the annual financial accounts.²³⁸ Such financial accounts must be prepared in consultation with the Governor of the AIFC, and comply with internationally accepted accounting principles.²³⁹ The Court's budget is subject to final approval by the offshore AIFC authorities.²⁴⁰ By externalizing the budgetary approval process offshore, the AIFC has created an additional safeguard against possible pressures from the onshore finance and economy ministries.

D. *Jurisdiction of the AIFC Court*

The AIFC Court may consider disputes under a choice of forum clause.²⁴¹ Its general jurisdiction covers any civil, and commercial matters.²⁴² In addition, the AIFC Court's jurisdiction depends on whether the parties have been formed within or authorized by the financial center, and whether the conflict emerges from activities performed within the AIFC and governed by AIFC law.²⁴³

²³² See *id.* at reg. 14 (Kaz.).

²³³ See Zambrana-Tevar, *supra* note 2, at 134.

²³⁴ See *AIFC Court Regulations*, *supra* note 225, at reg. 19 (Kaz.).

²³⁵ See *id.* at reg. 16 (Kaz.).

²³⁶ See *id.*

²³⁷ See Zambrana-Tevar, *supra* note 2, at 134.

²³⁸ See *AIFC Court Regulations*, *supra* note 225, at reg. 19 (Kaz.).

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See Zambrana-Tevar, *supra* note 2, at 124.

²⁴² See *AIFC Court Regulations*, *supra* note 225, at reg. 26 (Kaz.).

²⁴³ See Zambrana-Tevar, *supra* note 2, at 124.

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Granting “exclusive jurisdiction” may reinforce the notion that Kazakhstan’s domestic courts cannot interfere with disputes where both parties are the AIFC Center Participants; in cases where the dispute relates to operations performed in the AIFC that are governed by AIFC law; or, finally, where the parties have chosen the AIFC Court by means of a choice of forum clause in their underlying contract or by a separate agreement after the dispute arises.²⁴⁴

While the AIFC rules primarily consider legal persons as parties to civil disputes resolved by the AIFC Court, individuals, including employees in labor disputes, can also be parties to civil and commercial proceedings in their capacity as the AIFC Participant’s corporate officers, individual registered auditors, individual attorneys or individual entrepreneurs.²⁴⁵ The choice of forum clause is also a common ground for jurisdiction, irrespective of whether the parties to the agreement are the AIFC Participants or are otherwise authorized to operate in the Center.²⁴⁶

It follows that litigants from the CIS Member States, Central Asia, the EAEU, or China (potentially on disputes related to the implementation of the BRI projects), may submit to the jurisdiction of the AIFC Court provided there is a valid choice of court agreement in their original contract or an arrangement to settle in the AIFC Court after the dispute has arisen. However, there may be two potential problems with that approach. First, the national courts of the abovementioned states may disregard such forum submission based on their own domestic law grounds. Such courts may take jurisdiction and review a case on merits. Second, even if the AIFC Court resolves the matter and no other national court intervenes in the dispute, there is a risk that the resulting judgement will not be recognized in the states where the enforcement is to be subsequently sought. Thus, a supranational compact of which Kazakhstan, Russia, any other CIS or EAEU Member State, and potentially China, are participants, providing for settlement in the AIFC Court upon parties’ submission to the Court’s jurisdiction, could solve the abovementioned jurisdictional problem.

For example, Kazakhstan, Russia, and the CIS or EAEU Member States could sign a treaty providing that litigants from these countries may submit their private disputes for resolution by the AIFC Court. The development of capital markets might be one of the key incentives for these countries to enter such treaty and to provide their respective businesses with protections guaranteed by a reliable and efficient common law framework from which the AIFC Court operates. China may be interested in signing a

²⁴⁴ *See id.* at 125.

²⁴⁵ *See id.* at 126.

²⁴⁶ *See id.* at 127.

similar arrangement with Kazakhstan to promulgate the BRI further and to ensure enhanced judicial assistance, mutual recognition, and enforcement of judgements.

1. ENFORCEMENT OF THE AIFC COURT'S JUDGEMENTS IN KAZAKHSTAN

The AIFC Court's judgments are enforced in Kazakhstan "in the same way and on the same terms" as decisions of its national courts.²⁴⁷ Parties must first apply to the AIFC Court for an "execution order" and then translate the judgment into either Russian or Kazakh.²⁴⁸ The AIFC Court has already reached a Memorandum of Understanding (MoU) with the Republican Chamber of Private Bailiffs responsible for executing domestic court decisions.²⁴⁹ Therefore, along with public bailiffs, the judgment of the AIFC Court may also be forwarded to any onshore private bailiff in Kazakhstan for enforcement.²⁵⁰ A recent legislative reform has clearly included the AIFC Court's decisions and rulings in the list of documents subject to mandatory enforcement by public and private bailiffs in compliance with domestic law.²⁵¹

2. ENFORCEMENT OF THE AIFC COURT'S JUDGEMENTS ABROAD

The judicial systems of Kazakhstan and other post-Soviet republics in general, and many of its judges in particular, lack sufficient experience in considering matters arising from high-level commercial transactions. Since the body of the relevant precedents is fairly scarce, the investors are faced with a challenging task of predicting enforceability of their contractual rights and obligations by local courts. The AIFC Court is mandated to provide a platform to bridge this gap by giving legal certainty and establishing a judicial system familiar to investors. With regard to enforcement abroad, it is important that the AIFC Court is clearly separated from Kazakhstan's domestic judicial

²⁴⁷ See AIFC Constitutional Statute art. 13.8 (Kaz.).

²⁴⁸ See *id.* See also *AIFC Court Rules*, *supra* note 227, at art. 30.2 (Kaz.).

²⁴⁹ See Zambrana-Tevar, *supra* note 2, at 129.

²⁵⁰ See *Zakon RK ob Ispolnitel'nom Proizvodstve i Statuse Sudebnykh Ispolnitelei* [Law of the Republic of Kazakhstan on Enforcement Proceedings and the Status of Enforcement Agents] art. 162 (Kaz.), EGEMEN KAZAKHSTAN [EGEMEN KAZ.] Apr. 20, 2010, *translated in* Law of the Republic of Kazakhstan on Enforcement Proceedings and the Status of Enforcement Agents, ADILET Database [hereinafter the Law on Enforcement Proceedings], <http://adilet.zan.kz/eng/docs/Z100000261> [<https://perma.cc/LY4T-BXAV>] (last visited Nov. 6, 2022).

²⁵¹ *Id.* at art. 9 (Kaz.); see also Zambrana-Tevar, *supra* note 2, at 129 (citing a lecture given at KIMEP University by Sir Jack Beatson, Justice of the AIFC Court, in Almaty on Apr. 19, 2019).

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system.²⁵² This is a major jurisdictional distinction that differentiates the AIFC Court from its Middle Eastern analogues in Dubai, Abu Dhabi, or Qatar.²⁵³ The AIFC Court has been created to complement the jurisdiction of local civil law courts.²⁵⁴ Its goal is to address the legal challenges associated with resolution of complex and sophisticated investment commercial projects.²⁵⁵

The AIFC designers chose not to follow the example of Dubai where the DIFC courts are considered part of the domestic judicial system.²⁵⁶ They have applied years of work experience within the English common law system to establish a completely independent framework while maintaining close cooperation with local courts.²⁵⁷ Effectively, such absolute independence from Kazakhstan's judicial system probably means that the AIFC Court would not have to follow local civil procedure requirements²⁵⁸ nor be obliged to comply with regulations applicable to local courts. From the one side, the approach taken in the AIFC keeps adjudication free from influences and pressures of domestic judicial system. From the other side, however, this could potentially mean that the parties to the AIFC Court proceedings cannot take advantage of the recognition treaties of which Kazakhstan is already a party.²⁵⁹

Because the DIFC courts are part of the Dubai local court system, their decisions and orders benefit from the UAE's recognition conventions. The UAE has concluded several multilateral treaties, including the 1996 GCC

²⁵² Zambrana-Tevar, *supra* note 2, at 130.

²⁵³ *Id.*

²⁵⁴ LORD WOOLF, A VISION OF THE AIFC COURT 8 (Christopher Campbell-Holt ed., 2019).

²⁵⁵ *Id.*

²⁵⁶ Zambrana-Tevar, *supra* note 2, at 131.

²⁵⁷ Vladimir Yaduta, *Christopher Campbell-Holt: "We are Ready and Able to Deliver Justice,"* RAPSIS RUSS. LEGAL INFO. AGENCY (Dec. 2, 2019, 12:00 PM), www.rapsinews.com/publications/20191202/305123463.html [<https://perma.cc/5B7T-XZ3C>].

²⁵⁸ See generally GRAZHDANSKII PROTSESSUAL'NYI KODEKS RESPUBLIKI KAZAKHSTAN [GPK RK] [Civil Procedural Code] (Kaz.), *translated in* CIVIL PROCEDURE CODE OF THE REPUBLIC OF KAZAKHSTAN, ADILET Database, <http://adilet.zan.kz/eng/docs/K1500000377> [<https://perma.cc/9TMK-MSTJ>] (last visited Nov. 6, 2022).

²⁵⁹ Kazakhstan is a party to twenty-six legal assistance treaties on civil matters. Along with the multilateral treaties, Kazakhstan entered into bilateral recognition agreements with Georgia (civil and criminal matters), Lithuania (civil, family, and criminal matters), Turkey (civil matters), Vietnam (civil matters), India (civil matters), North Korea (civil and criminal matters), Mongolia (civil and criminal matters), Pakistan (civil, family, and criminal matters), the UAE (civil and commercial matters) and a few other countries. VERKHOVNYI SUD RESPUBLIKI KAZAKHSTAN [VERKH. SUD RK] [Supreme Court of the Republic of Kazakhstan], <https://sud.gov.kz/rus/content/pravovaya-pomoshch-pograzhdanskim-delam> (last updated on June 27, 2023).

Convention,²⁶⁰ the 1983 Riyadh Convention,²⁶¹ and bilateral agreements with Tunisia, France, Egypt, China, and Kazakhstan.²⁶² In 2008, the DIFC signed an agreement with the London Court of International Arbitration (the LCIA) to establish the DIFC-LCIA Centre, thus providing investors with the benefits of reputable international arbitration institution, while keeping the place of arbitration within Dubai.²⁶³ Further, a new mechanism has been introduced to allow the parties who have submitted to the jurisdiction of the DIFC courts to use the DIFC-LCIA platform for enforcement of the DIFC courts' judgements.²⁶⁴ This way, the parties to the DIFC litigation may convert the DIFC judgement into a DIFC-LCIA arbitral award to allow for wider international recognition under the terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).²⁶⁵ A similar mechanism allowing litigants to the AIFC Court proceedings to use the AIFC's own arbitral tribunal—the IAC—as a platform to enforce the judgements of the former could be developed. As is the case with the DIFC litigation, the AIFC Court judgment could be transformed into an IAC arbitral award to ensure global recognition pursuant to the New York Convention.

The last scenario, however, may cause certain doubts since (a) such confirmatory awards fall outside the scope of arbitration as defined by the New York Convention, because arbitrators would not be resolving disputes on their merits; (b) an “*exequatur on an exequatur*” may fail to be admissible; and (c) these confirmatory awards would bypass foreign state courts which would otherwise have competence and discretion over the recognition and enforcement of the DIFC or AIFC courts' judgements.²⁶⁶ Despite that, using the New York Convention to enforce decisions of international commercial courts may rebut an argument that litigation is fundamentally distinct from

²⁶⁰ The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications, Dec. 15, 1995, Gulf Cooperation Council [GCC], JURIS ARB. L., http://arbitrationlaw.com/files/free_pdfs/GCC%20Convention.pdf [<https://perma.cc/EF5A-RAK5>] (last visited Jan. 24, 2022).

²⁶¹ The Riyadh Arab Agreement for Judicial Cooperation, Apr. 6, 1983, League of Arab States [LAS], REF WORLD, <https://www.refworld.org/docid/3ae6b38d8.html> [<https://perma.cc/X4RE-NT9K>] (last visited Nov. 6, 2022).

²⁶² Zambrana-Tevar, *supra* note 2, at 131.

²⁶³ Krishnan & Purohit, *supra* note 20, at 514.

²⁶⁴ *Id.* at 515.

²⁶⁵ *Id.* at 528.

²⁶⁶ Zambrana-Tevar, *supra* note 2, at 131 (citing Hamad Ibrahim Ahmed Ali Alustath, Choice of Law in Respect of Contracts in the United Arab Emirates and the European Union; and Related Aspects of Private International Law in Relation to the Dubai International Financial Center (Nov. 2015) (unpublished Ph.D. dissertation, University of Essex) (on file with the University of Essex Library system)).

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arbitration as a dispute resolution method. While there are significant differences between these two methods of dispute resolution, the international commercial courts show that litigation and arbitration may have converging procedural mechanisms.²⁶⁷

The DIFC's regulations on recognition and enforcement have been examined more in practice²⁶⁸ than those of the AIFC. A number of MoUs or memoranda of guidance (MoGs) have been signed between the DIFC courts and foreign judicial institutions.²⁶⁹ While MoGs have been concluded with the leading foreign courts for the most part, there are also MoGs made with the onshore Dubai courts, other UAE government bodies, and special economic zones.²⁷⁰

Signing MoGs with foreign courts or other governmental bodies and institutions provides an easier alternative to entering into international recognition treaties between sovereign states, which usually entails onerous ratification procedures. However, these MoGs or MoUs may remain a dead letter in some cases, and enforceable in others. For example, the MoG between the Supreme Court of the RK and the DIFC courts stipulates that "it has no binding legal effect" and that "[i]t does not constitute a treaty or act."²⁷¹

E. *The AIFC Court and the 2002 Chisinau Convention on Legal Assistance and Legal Relations on Civil, Family and Criminal Matters Between the CIS Member States*

In addition to the bilateral recognition treaties, Kazakhstan also ratified the 2002 Chisinau Convention on Legal Assistance and Legal Relations on Civil, Family, and Criminal Matters (the Chisinau Convention)

²⁶⁷ Bookman, *supra* note 19, at 275.

²⁶⁸ Zambrana-Tevar, *supra* note 2, at 130.

²⁶⁹ *Id.*

²⁷⁰ *Protocols and Memoranda, DIFC COURTS*, <https://www.difccourts.ae/about/protocols-memoranda> [<https://perma.cc/959B-BQJ3>] (last visited Nov. 6, 2022).

²⁷¹ Zambrana-Tevar, *supra* note 2, at 130.

between the CIS Member States.²⁷² The Convention, among other things, provides equal access to domestic judicial services for litigants from the CIS countries.²⁷³ Further, court judgements obtained in one CIS Member State are recognized and enforced in all others.²⁷⁴ However, the judgements have to be issued by the respective *domestic* courts to be enforceable in another CIS jurisdiction under the Chisinau Convention.²⁷⁵

Since the AIFC Court is not part of Kazakhstan's judicial system, some may advance an argument that it lacks jurisdiction to consider disputes between litigants from the CIS Member States under the Chisinau Convention. Consequently, should a judgment be obtained from the AIFC Court, it is unlikely to be given direct effect in or by courts in other CIS Member States since the AIFC Court is not likely to be recognized as a domestic court of Kazakhstan per the Chisinau Convention.

Thus, the focus here is on the mechanism, in which cases involving individuals or legal entities from Russia, Kazakhstan, or any other CIS Member State could effectively be tried in the AIFC Court. That mechanism will give litigants from the abovementioned jurisdictions access to high-quality common law judiciary applying well-proven commercial law principles. If properly implemented, this mechanism will boost investors' confidence in the region by offering working instruments to control self-dealing by managers and to enforce company disclosure requirements. The investors will be more likely to acquire shares in local companies that will

²⁷² Even though the Chisinau Convention has replaced the 1993 Minsk Convention on Legal Assistance and Legal Relations on Civil, Family, and Criminal Matters (the Minsk Convention), for some countries, such as Russia, the former has not yet become effective. As such, the Minsk Convention is still in force between Russia and other CIS Member States, including Kazakhstan. *See* the Minsk Convention on Legal Assistance and Legal Relations on Civil, Family, and Criminal Cases, Jan. 22, 1993, Commonwealth of Independent States [CIS], *translated in* Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, U.N. REFUGEE AGENCY [UNHCR], <https://www.unhcr.org/protection/migration/4de4edc69/convention-legal-aid-legal-relations-civil-family-criminal-cases-adopted.html> [<https://perma.cc/U67A-YWR4>] (last visited Nov. 6, 2022); Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, Oct. 7, 2002, Commonwealth of Independent States [CIS], *available at* ADILET Database, <https://adilet.zan.kz/rus/docs/Z040000531> [<https://perma.cc/3XZH-5GRC>] (last visited Nov. 6, 2022); *see also* Yelena Burova, *CIS Regional Conventions on Cross-Border Litigation and its Application by Russian Courts*, CIS ARB. FORUM (Dec. 9, 2016), <http://www.cisarbitration.com/2016/12/09/cis-regional-conventions-on-cross-border-litigation-and-its-application-by-russian-courts/> [<https://perma.cc/Y2SM-WG9H>].

²⁷³ Chisinau Convention, *supra* note 272, at art. 1.2.

²⁷⁴ *Id.* at art. 54.1.

²⁷⁵ *See id.* at arts. 1.2, 54.1.

eventually lead to the growth of capital markets. The familiar and reliable English common law-based judiciary should provide sufficient guarantees to the investors against managerial misconduct and the risk of asset-stripping.

Another critical factor is to ensure that the AIFC Court's judgements are recognized in the respective jurisdiction where enforcement is to be sought. Clearly, such mechanism would require either a new treaty, or amendment to the existing one, setting forth jurisdictional matters and enforcement procedures. As the Chisinau Convention recognizes only *domestic* courts of the CIS Member States as dispute resolution venues,²⁷⁶ the scope of the Convention should be extended to grant the AIFC Court jurisdiction to consider civil and commercial disputes involving the CIS litigants. This can be achieved via introducing an amendment to the Chisinau Convention clarifying its applicability to the states with non-unified systems of law that have two or more territorial units with different legal systems—the mechanism used in the international conventions on the recognition of foreign courts and judgments in civil or commercial matters, as discussed in more detail in Part VI. That approach would allow Kazakhstan, a country that has two different legal systems functioning onshore in the mainland and offshore in the AIFC, to secure the recognition of the AIFC Court's jurisdiction and enforcement of its judgements in other CIS countries.

With that approach, litigating parties from Kazakhstan, Russia, or other CIS Member States would be able to submit to jurisdiction of the AIFC Court provided there is a valid choice of forum clause in the underlying commercial contract, or a separate agreement made after the dispute has arisen. The resulting judgement issued by the AIFC Court would then be enforced in another CIS jurisdiction along with judgements of the other courts recognized as domestic under the Chisinau Convention.

F. *The AIFC Court and the SIFoCC (Standing International Forum of Commercial Courts) Memorandums of Understanding*

As is the case with the other OFCs, new arrangements will likely be made by the AIFC Court in the future with courts of other jurisdictions for mutual recognition and enforcement purposes.²⁷⁷ The AIFC Court has already become a member of the SIFoCC formed in 2017 to promote recognition and enforcement of foreign judgements through non-binding MoUs.²⁷⁸ Although MoUs may be an effective practical tool, there are only a handful of Western

²⁷⁶ See *id.* at arts. 1.2, 54.1.

²⁷⁷ Zambrana-Tevar, *supra* note 2, at 129.

²⁷⁸ *Id.*

countries, international financial centers, and U.S. states that actually have become the SIFoCC members.²⁷⁹ The SIFoCC may provide a viable mechanism for recognition and enforcement of not only the AIFC Court's judgements, but also judgements of other foreign commercial courts. If Russian commercial courts or the respective courts of other CIS Member States join the SIFoCC, they will also enjoy mutual recognition and enforcement benefits. That platform might efficiently be used until the respective amendments to the Chisinau Convention are negotiated and agreed upon by and between the CIS Member States.

VI. AN ALTERNATIVE TO ALTERNATIVE DISPUTE RESOLUTION: A WORLDWIDE JUDICIAL ALTERNATIVE TO THE INTERNATIONAL ARBITRATION SYSTEM

This Part examines international commercial litigation as a judicial alternative to the existing arbitration system implemented globally by the vast majority of states under the New York Convention. It discusses the advantages and disadvantages of international arbitration, its lack of capacity to encompass public courts' jurisdiction on commercial legal matters, as well as the solutions offered by international commercial courts to address the shortcomings of arbitration and the inefficiencies of public domestic judiciary. Overall, while private arbitration continues to play a vital and increasing role in settling commercial disputes, it will not serve as a fully functional replacement for weak public courts.²⁸⁰ In contrast, courts specializing in international commercial disputes, including those established within the financial free zones, such as the AIFC, have the potential to complement and eventually substitute the jurisdiction of domestic public judiciary in resolution of complex investment disputes.

Courts established within the financial free zones—such as the DIFC, QFC, ADGM or AIFC courts—may serve as good examples of setting up a competent commercial judiciary effectively operating in parallel to the onshore judicial and arbitration institutions. These courts may complement and substitute the commercial jurisdiction of domestic courts by providing legal certainty and a judicial system familiar to investors. Countries like the

²⁷⁹ Along with some Western jurisdictions, members of the SIFoCC are courts of the AIFC, QFC, DIFC, ADGM, Singapore, Delaware, New York, Pennsylvania, and others. *See generally* STANDING INT'L FORUM OF COMMERCIAL COURTS, MULTILATERAL MEMORANDUM ON ENFORCEMENT OF COMMERCIAL JUDGMENTS FOR MONEY (2019), **Error!** **Hyperlink** **reference** **not** **valid.** <http://www.sifocc.org/app/uploads/2019/11/Multilateral-Memorandum-on-Enforcement-Nov-2019.pdf> [<https://perma.cc/WHZ5-E9MX>].

²⁸⁰ Dammann & Hansmann, *supra* note 63, at 8.

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UAE, Qatar, and Kazakhstan have established the OFCs with courts experienced in commercial dispute settlement to stimulate investments and capital through their special economic zones.²⁸¹ Such courts received all necessary political and legislative support from the host nations; their judges are supervised by the respective foreign bar authorities that subject them to very demanding statutory requirements. The judges, sitting on these courts' benches, already have an international reputation for integrity and independence that should satisfy the investors' need for the rule of law and impartiality.²⁸²

In the future, international commercial courts might make litigation even more appealing to investors than private arbitration. But for the time being, most parties find it more practical to resort to arbitration to avoid biased adjudication or to avail themselves of the mandatory enforcement regime supported by the New York Convention. What may remain unchanged, however, is a complementary connection of international commercial courts with arbitration: together they may offer one-stop-shop dispute resolution services in one location.²⁸³

A. *Advantages of International Arbitration*

There are many reasons for international litigants to prefer and widely accept arbitration as a method of dispute resolution. Factors such as the forum's neutrality and confidentiality of the proceedings are indicative of the parties' preference to refer disputes to the private arbitration tribunals rather than the state judicial institutions. The neutrality factor presumes that the parties view arbitration as a preferred dispute settlement mechanism relative to the court litigation in home jurisdiction of one of the parties.²⁸⁴ Arbitration proceedings also provide sufficient confidentiality safeguards as such proceedings are not open to the general public, and the resulting awards do not have to be published.

The preference for arbitration over court litigation becomes more apparent whenever an issue of enforceability comes to light.²⁸⁵ The enforceability of arbitral awards is primarily a function of the current state of international law: more than 140 countries are signatories to the New York Convention.²⁸⁶ Be it *ad hoc* or institutional arbitration, awards obtained

²⁸¹ Bookman, *supra* note 19, at 231.

²⁸² See generally *supra* note 390.

²⁸³ *Id.* at 275.

²⁸⁴ Dammann & Hansmann, *supra* note 63, at 23.

²⁸⁵ Krishnan & Purohit, *supra* note 20, at 514.

²⁸⁶ Dammann & Hansmann, *supra* note 63, at 24.

through such structures can effectively be enforced under this Convention.²⁸⁷ Enforcement of foreign court judgments, by contrast, may be performed under the 2005 Hague Convention on Choice of Court Agreements (the Hague Court Convention)²⁸⁸ of which only thirty-six countries are parties, the majority being the European Union members.²⁸⁹ The Hague Court Convention entered into force on October 1, 2015²⁹⁰ and is still open for signature or accession by all countries.²⁹¹ In addition, foreign court judgments may potentially be enforced pursuant to another 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Hague Judgments Convention).²⁹² It is broader in scope than the Hague Court Convention that is limited to recognition of judgments resulting from proceedings based on choice of court agreements. The Hague Judgments Convention's objective, as such, is to fill a significant jurisdictional vacuum that exists in private international law by developing a regime for foreign court judgments that complements the Hague Court Convention and, in some ways, the New York Convention.²⁹³

The Hague Judgments Convention is also open for signature or accession by any state.²⁹⁴ Currently, there are thirty-three Contracting Parties, including the European Union, but the Convention has not yet come into force.²⁹⁵ Kazakhstan and other CIS countries could also become members to the Hague Court Convention and Hague Judgments Convention to guarantee global recognition and enforcement of judgments on commercial matters. As

²⁸⁷ Krishnan & Purohit, *supra* note 20, at 514.

²⁸⁸ *Hague Convention on Choice of Court Agreements*, HAGUE CONF. PRIV. INT'L L. art. 8 (June 30, 2005), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> [<https://perma.cc/5ZXG-WZAJ>] (last visited Nov. 7, 2022) [hereinafter *Hague Court Convention*].

²⁸⁹ The European Union is also a Contracting Party to the Hague Court Convention as a Regional Economic Integration Organisation. *Status Table*, HAGUE CONF. PRIV. INT'L L. (Mar. 3, 2021), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> [<https://perma.cc/5EAB-4T7T>].

²⁹⁰ *Id.*

²⁹¹ *Hague Court Convention*, *supra* note 288, art. 27.

²⁹² *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, HAGUE CONF. PRIV. INT'L L. art. 1 (July 2, 2019), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> [<https://perma.cc/CU9R-7FES>] (last visited Nov. 7, 2022) [hereinafter *The Hague Judgments Convention*].

²⁹³ Stewart, *supra* note 21, at 772.

²⁹⁴ *The Hague Judgments Convention*, *supra* note 292, at art. 24.

²⁹⁵ *Status Table*, HAGUE CONF. ON PRIV. INT'L L. (Aug. 29, 2022), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> [<https://perma.cc/MYJ9-QBNB>].

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a growing number of states join and implement the Hague Court Convention and Hague Judgments Convention, the stability and predictability of cross-border commercial transactions will be substantially improved, thereby promoting trade, investment, and global economic growth.²⁹⁶

Unlike the Chisinau Convention, the Hague Court Convention and Hague Judgments Convention contain several provisions clarifying their applicability to the countries with non-unified systems of law that have two or more territorial units with different legal systems.²⁹⁷ At the time of joining, such states have the option to declare that the Conventions either extend “to all its territorial units or only to one or more of them.”²⁹⁸ If no such declaration is made, the Conventions apply to all territorial units of the country by default.²⁹⁹ Therefore, countries with dual legal systems, such as Kazakhstan or the UAE, may expressly declare that the Hague Court Convention and Hague Judgments Convention extend to all their territorial units or, conversely, not make any declarations at all if they ever decide to become members to these Conventions. In this case, not only would foreign judgments be enforced within their entire territory, including in the DIFC or AIFC offshore zones, but also decisions of the DIFC or AIFC courts might be mutually respected in other countries participating in the Hague Court Convention and Hague Judgments Convention.

One more reform explicitly granting jurisdiction to, and recognizing the resulting judgment of, international commercial courts would clarify the scope and applicability of both the Hague Court Convention and Hague Judgments Convention to judicial institutions established within the OFCs. Such reform would prevent any confusion with regard to the status of the international commercial courts as official institutions of justice having the imprimatur from their respective hosting states, even when such courts do not form part of the domestic judicial system (as is the case with the AIFC Court). It will also create a distinction between the international commercial courts’ decisions and the awards issued by private arbitral tribunals, and will ensure universal recognition of the courts’ judgments alongside the arbitral awards. Otherwise, litigants may have to resort to a less preferred process of converting the international commercial courts’ judgments into the arbitral awards to

²⁹⁶ Stewart, *supra* note 21, at 772.

²⁹⁷ See the *Hague Court Convention*, *supra* note 288, at arts. 25, 28; see also the *Hague Judgments Convention*, *supra* note 292, at arts. 22, 25.

²⁹⁸ See the *Hague Court Convention*, *supra* note 288, at art. 28; see also the *Hague Judgments Convention*, *supra* note 292, at art. 25.

²⁹⁹ See the *Hague Court Convention*, *supra* note 288, at art. 28; see also the *Hague Judgments Convention*, *supra* note 292, at art. 25.

allow for a global recognition pursuant to the New York Convention, as described in Part V.

In customary practice, the recognition and enforcement of foreign court judgments have been regulated solely by each state's domestic law and procedure, resulting in variations in national approaches to issues such as jurisdiction, applicable law, and the sum and type of damages.³⁰⁰ Since there are no agreed-upon international norms, decisions made by one country's courts run the risk of being rejected by the courts of another.³⁰¹ Although foreign court judgments may also be recognized based on principles of comity or reciprocity, it is not always clear which judgments would be given effect and whether such foreign sovereign acts would sufficiently be respected by the domestic courts of other jurisdictions. Thus, enforcement of arbitral awards is much easier and more predictable than is the case with judicial decisions in those countries that have signed the New York Convention but have not yet joined the Hague Court Convention or the Hague Judgments Convention.

B. *Disadvantages of International Arbitration*

Despite the abovementioned advantages, in-house counsel repeatedly question resorting to arbitration as the primary tool for settlement of commercial disputes.³⁰² Several empirical studies have undermined the presumption that parties to international commercial contracts prefer arbitration.³⁰³ With the emergence of new international commercial courts that perception is even further weakened.³⁰⁴ The widely known advantages of arbitration may well be offset by certain disadvantages, placing significant

³⁰⁰ Stewart, *supra* note 21, at 772–773.

³⁰¹ *Id.*

³⁰² Krishnan & Purohit, *supra* note 20, at 521.

³⁰³ See, e.g., Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers:*

An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts, 41 U. MICH. J. L.

REFORM 871, 876 (2008); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007); John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT'L L. 323 (2019); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses*, 25 OHIO ST. J. DISP. RESOL. 433 (2010); Christopher Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. INT'L COMP. L. 449 (2008).

³⁰⁴ See, e.g., Dorothee Ruckteschler & Tanja Stooss, *International Commercial Courts: A Superior Alternative to Arbitration?*, 36 J. INT'L ARB. 431 (2019).

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limits on its employment as an exclusive dispute settlement tool.³⁰⁵ Over the time, these disadvantages may create a level playing field for international commercial courts to catch up and compete with arbitration.

Arbitration proceedings are not always conducted in a time- and cost-efficient manner. Delays are common, whether caused by the arbitrators or by the disputing parties themselves.³⁰⁶ Sometimes, it may take several months to simply decide where to meet; and when the arbitration begins, the proceedings can be as complicated and challenging as the court proceedings.³⁰⁷ Additionally, commercial arbitrators are usually professionals with other sources of permanent employment. Thus, compared to arbitration, where arbitrators tend to be more overwhelmed and less available to the parties, international commercial courts provide (at least for now) timely access to their judges.³⁰⁸ While parties cannot appoint the respective judges, they are aware that the judges will be chosen from a list of experts maintained by the international commercial court, and available on its website.³⁰⁹ As arbitrators are generally appointed (directly or indirectly) and compensated by the parties, the former may have an incentive to accept compromised decisions that do not substantially harm the interests of either party.³¹⁰ While such compromised decisions increase arbitrators' chances of being reelected in prospective disputes, the result is a lack of confidence that contractual obligations are interpreted and enforced in accordance with the parties' original intentions.³¹¹

Arbitrators are often compensated on an hourly basis for their services. From an economic perspective, such arrangements do not incentivize the latter to save on cost and time.³¹² Clients may end up paying very high bills for their services, which makes the arbitration an expensive mechanism of dispute settlement. International commercial courts' fees, on the other hand, are typically fixed because the relevant court rules contain the exact amounts

³⁰⁵ Dammann & Hansmann, *supra* note 63, at 24.

³⁰⁶ Krishnan & Purohit, *supra* note 20, at 522.

³⁰⁷ *Id.*

³⁰⁸ See Janet Walker, *Specialized International Courts: Keeping Arbitration on Top of Its Game*, 85 ARB. 2 (2019).

³⁰⁹ Bookman, *supra* note 19, at 276.

³¹⁰ Dammann & Hansmann, *supra* note 63, at 24–25.

³¹¹ *Id.*

³¹² *Id.*

for each stage of hearings.³¹³ For a limited period of time, the AIFC Court has waived all of its fees to the extent the dispute relates to operations performed in the AIFC, between the AIFC participants, or where the parties have designated the AIFC Court as a forum.³¹⁴ The payment structures implemented by international commercial courts are thus more predictable and transparent, helping the litigants avoid paying potentially high legal bills.

Since arbitral awards generally do not have a binding precedential effect, the parties may have trouble predicting possible dispute outcomes. In an attempt to ensure confidentiality, such awards are not typically published, and therefore cannot be studied by the parties³¹⁵ who face identical or similar facts or legal issues. Unlike arbitral tribunals, international commercial courts have already produced judgments that may have a significant law-making capacity to establish binding precedents for future decisions. By default, international court hearings are open to the public, and decisions are usually published.³¹⁶

Finally, in line with the parties' ability to appoint their own arbitrators and to limit time and costs, arbitral awards cannot be appealed.³¹⁷ International commercial courts are more flexible, allowing the parties to customize their proceedings to provide an option to subject their dispute to appellate review or waive it altogether along with the standard rules of evidence.³¹⁸

³¹³ Singapore International Commercial Court Rules 2021, O. 26 r. 4 (Sing.), <https://sso.agc.gov.sg/SL/SCJA1969-S924-2021/Uncommenced/20211203094428?DocDate=20211202&ValidDt=20220401&Provs=PO26-#PO26-pr4> (last visited Aug. 25, 2023). The SICC court and hearing fees payable for all proceedings range approximately from US \$1800 to \$18,000 depending on nature of hearing and number of judges involved.

³¹⁴ *Fees*, THE AIFC COURT, <https://court.aifc.kz/fees/> [<https://perma.cc/PC6P-CUA9>] (last visited Nov. 7, 2022). Until end-November 2022, all applications, management procedures, and hearing sessions at the AIFC Court are free. All parties to a contract, which is agreed before end-November 2022, and refers to the AIFC Court as a venue, will also be qualified to receive free administration of any dispute resolution at the AIFC Court under that contract even after end-November 2022.

³¹⁵ Dammann & Hansmann, *supra* note 63, at 24–25.

³¹⁶ Hiro Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 NEV. L.J. 541 (2018).

³¹⁷ Dammann & Hansmann, *supra* note 63, at 24–25.

³¹⁸ *See Judgments*, SING. INT'L COM. CT., <https://www.sicc.gov.sg/hearings-judgments/judgments> [<https://perma.cc/3VF9-MKN8>] (last visited Nov. 7, 2022); *Laws and Regulations Administered by the DIFC Authority*, DUBAI INT'L FIN. CTR., <https://www.difc.ae/business/laws-regulations/legal-database/> [<https://perma.cc/F55T-KGTY>] (last visited Nov. 7, 2022); *Laws & Rules*, THE AIFC COURT, <https://court.aifc.kz/legislation/aifc-court/> [<https://perma.cc/6HZD-ZDHR>] (last visited Nov. 7, 2022).

C. *Can Arbitration Substitute Inefficient Local Courts?*

While private arbitration continues to play a vital and increasing role in settling disputes, it will not serve as a fully functional replacement for weak public courts.³¹⁹ Arbitration may be a preferred method of dispute resolution for international rather than domestic arrangements in that it ensures the forum's neutrality and enforceability of awards in the majority of jurisdictions.³²⁰ Public courts, however, have been durable institutions with reputations built over a prolonged period of time.³²¹ Establishing a comparable reputation has always been a challenging task for private arbitral tribunals.³²² International commercial courts seem intended to fill the gap between services offered by local public courts and arbitration institutions. These courts will also need time to establish their reputation, but they may already build upon the legacy of public courts as stable judicial entities. Their judges, just as any other public courts' judges, are also closely monitored, and may be prosecuted by the state authorities for corruption. It is difficult to control corruption and impose criminal sanctions on private arbitrators, especially if they are foreign nationals (as is normally the case with international arbitration).

On top of that, the arbitration services are substantially different from those provided by courts.³²³ Most criminal law cases, for instance, are *a priori* not arbitrable as the parties cannot enter into an arbitration agreement on such cases as a matter of public policy. Where arbitration derives from the common will of the parties, the criminal justice system, on the contrary, reflects the sovereign right of a state to impose compulsory laws, and restrict autonomy of the parties.³²⁴ Arbitrators also lack coercive powers compared to criminal law judges who have robust penal authorities.³²⁵

International commercial courts have the required capacity to combine powers vested in public adjudication system with arbitration services. In this respect, the AIFC Court has jurisdiction over civil and financial matters

³¹⁹ Dammann & Hansmann, *supra* note 63, at 22.

³²⁰ *Id.* at 23.

³²¹ *Id.* at 27.

³²² *Id.*

³²³ *Id.* at 24.

³²⁴ Juan P. Morillo, Gabriel F. Soledad & Alexander G. Leventhal, *Arbitration Advocacy and Criminal Matters: The Arbitration Advocate as Master of Strategy*, GLOB. ARB. REV. (Oct. 1, 2019), <https://globalarbitrationreview.com/chapter/1208876/arbitration-advocacy-and-criminal-matters-the-arbitration-advocate-as-master-of-strategy#footnote-033> [https://perma.cc/R48Z-LHAK].

³²⁵ *Id.*

as well as civil and administrative procedures,³²⁶ but lacks, for instance, jurisdiction in criminal matters.³²⁷ Unlike the case with private arbitral tribunals, however, the AIFC Court has the capacity to extend its jurisdiction to review criminal cases. The current lack of criminal jurisdiction may significantly limit the utility of the AIFC Court.³²⁸ Many complaints come from investors in connection with tax reporting requirements where relatively small accounting discrepancies may lead to serious charges of tax fraud that may put bona fide managers at risk of imprisonment.³²⁹ At the same time, the local courts lack sufficient expertise to interpret complex statutory provisions, including materiality of misrepresentations or omissions in disclosed information. Should the AIFC Court have criminal jurisdiction, cases involving corrupt managers accused of market manipulation, use of insider information, or self-dealing, could be considered by the AIFC Court whose judges already have the required experience and expertise in commercial fraud, and financial services matters.³³⁰

Creation of international commercial courts, however, might reflect alarming tendencies demonstrating states' intent to go further and reaffirm sovereignty in an area that has recently been occupied by private arbitration.³³¹ The increasing number of international commercial courts around the globe represents state attempts to substitute arbitration with these courts that might be more responsive to state interests, in particular owing to their dependency upon funding from hosting countries.³³² Proponents of international commercial courts, however, emphasize the potential of such courts to develop transnational commercial law compared to arbitration, which is not capable of

³²⁶ AIFC Constitutional Statute at art. 4.3 (Kaz.).

³²⁷ *Id.* at art. 13.4.

³²⁸ Zambrana-Tevar, *supra* note 2, at 124.

³²⁹ *Id.*

³³⁰ See *Justices*, THE AIFC COURT, <https://court.aifc.kz/who-we-are/justices/> [<https://perma.cc/6ZC8-GUDL>] (last visited Nov. 7, 2022). *E.g.*, from 1989 to 1994, Justice Beatson served as the Law Commissioner for England and Wales, where he worked on law reform in areas such as contract and commercial law, damages, financial services, and civil evidence. Justice Montagu-Smith QC is an international commercial law specialist with expertise in commercial fraud, arbitration, insurance and reinsurance, professional negligence, and construction.

³³¹ Bookman, *supra* note 19, at 281.

³³² See Erie, *supra* note 17, at 58.

declaring and establishing substantive law.³³³ Thus, if international commercial courts focus on their own capability to develop substantive laws, they should be cautious not to exhibit bias in favor of state parties and their interests.³³⁴

Since arbitration does not require a connection of the case with the forum state, it relies heavily on the parties' consent as a basis for jurisdiction. Compared with arbitration, courts have the power to join and consolidate parties, claims, or proceedings, as well as the ability to exert jurisdiction, even without the parties' consent.³³⁵ Such capabilities would allow new international commercial courts to examine the extraterritorial limits to which their jurisdictions may effectively extend,³³⁶ including pursuant to the recognition conventions and other arrangements, such as the MoUs. The SICC, for instance, has so far mainly relied on referrals from national Singapore courts.³³⁷ Similarly, the CICC is not limited to a jurisdiction based on consent and also reviews matters referred by the China's Supreme People's Court (the SPC).³³⁸

The lack of predictability, nonavailability of appellate review, and limited consent-based jurisdiction associated with arbitration may eventually shift the balance toward courtroom proceedings, provided however the neutrality and enforceability concerns associated with the latter are also removed or their negative effects mitigated. The rise of international commercial courts while addressing many such concerns has also brought many of the common assumptions concerning the global adjudication market, the relationship between arbitration and litigation, and the discrepancies between the two, into question.³³⁹

³³³ Bookman, *supra* note 19, at 282; SINGAPORE INTERNATIONAL COMMERCIAL COURT COMMITTEE, REPORT OF THE SINGAPORE INTERNATIONAL COMMERCIAL COURT COMMITTEE § 13 (2013) [hereinafter The SICC Committee Report], https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-_90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf [<https://perma.cc/YAY5-EBJS>].

³³⁴ Bookman, *supra* note 19, at 282.

³³⁵ Pamela K. Bookman, *Arbitral Courts*, 61 VA. J. INT'L L. 161, 163 (2021).

³³⁶ See Dammann & Hansmann, *supra* note 186, at 2.

³³⁷ Burkhard Hess & Timon Boerner, *Chambers for International Commercial Disputes in Germany: The State of Affairs*, 12 ERASMUS L. REV. 33, 33 (2019) (stating that the SICC has considered only one case where it was designated as the forum of choice).

³³⁸ Bookman, *supra* note 19, at 280.

³³⁹ Bookman, *supra* note 19, at 283.

D. *International Commercial Courts' Remedies for the Shortcomings of Arbitration and Problems of the Local Judiciary's Inefficacy*

International commercial courts provide an interesting perspective on the common assumption that parties prefer to choose arbitration.³⁴⁰ The increased supply of international courts implies that there is a potential market for these institutions, undermining the assumption that arbitration has substituted litigation in international commercial contracts as the dispute settlement mechanism of choice.³⁴¹

International commercial courts are innovative, cost-efficient, and receptive to traditional court criticism.³⁴² They often borrow procedural devices, such as party-driven design and confidentiality, that have previously been considered features of arbitration that distinguish the latter from court litigation.³⁴³ Their benches include highly qualified foreign lawyers, and other professionals as judges; the international commercial courts integrate ADR, and permit parties to opt-out of standard domestic law proceedings, leading to courts providing more of a combination of litigation, and arbitration services.³⁴⁴

Perhaps the most appealing aspect is the expediency of the international commercial courts' procedures compared to those offered by ordinary domestic courts and arbitration.³⁴⁵ For example, the DIFC courts clearly may, and do, grant summary judgments on a regular basis.³⁴⁶ Since its launch in 2015, the SICC in Singapore has already made sixty-two decisions.³⁴⁷ These judgments have been rendered promptly within three months or less of the hearing.³⁴⁸ The AIFC Court rendered its first several decisions in a similar time-efficient manner without compromising the quality

³⁴⁰ *Id.* at 232.

³⁴¹ *Id.*

³⁴² *Id.* at 229.

³⁴³ *Id.* at 232.

³⁴⁴ *Id.* at 229.

³⁴⁵ Krishnan & Purohit, *supra* note 20, at 522.

³⁴⁶ Krishnan & Purohit, *supra* note 20, at 522.

³⁴⁷ *See Judgments, supra* note 318.

³⁴⁸ *Id.*

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of the adjudication process.³⁴⁹ It introduced the eJustice system,³⁵⁰ to allow parties to use the most up-to-date digital technologies and to get commercial disputes resolved remotely without charge.³⁵¹

All of these institutional innovations and procedural changes have taken place in a world seriously affected by the COVID-19 pandemic.³⁵² Considering the novel recognition of doing at least some parts of transnational processing of cases and hearings online, there is an increasing perception that, even after the pandemic passes, the area would never return to where it was before.³⁵³ Despite the challenges posed by the COVID-19 pandemic, using the eJustice platform by the AIFC Court and IAC has ensured continuous dispute settlement operations and services without jeopardizing public health and safety.³⁵⁴ Disputes have been settled without the parties needing to leave the comfort and safety of their homes.³⁵⁵ As compared to 2019, when the AIFC Court and IAC considered only five cases, 2020 saw a dramatic increase in the number of cases that were resolved.³⁵⁶ In 2020, the AIFC Court and IAC

³⁴⁹ See *Judgments & Orders*, THE AIFC COURT, <https://court.aifc.kz/judgments/> [<https://perma.cc/LT6J-ZS4Z>] (last visited Nov. 7, 2022).

³⁵⁰ eJustice is an online platform which allows parties to file cases remotely from anywhere around the globe without physical attendance at the AIFC Court and IAC in Astana. *AIFC Court and IAC “eJustice” Launch*, THE AIFC COURT (Feb. 26, 2019), <https://court.aifc.kz/news/aifc-court-and-iac-ejustice-launch/> [<https://perma.cc/X8LW-N46X>]. The AIFC Court and IAC eJustice system is a one-stop 24/7 online service that performs the end-to-end electronic management of legal paperwork, administration functions, and court proceedings. The eJustice system is developed on CrimsonLogic’s Chrysalis platform, which provides for high customizability and adaptability while also swiftly meeting the AIFC’s judiciary workflows. Automatic notifications and calendar updates to judges and lawyers are among the system’s advantages, resulting in greater timeliness, better resource utilization, and simpler assistance for the AIFC’s litigation and case management operations. *CrimsonLogic Extends Partnership with the AIFC Court and International Arbitration Centre to Launch eJustice System*, CRIMSON LOGIC (Feb. 26, 2019), <https://www.globalpsa.com/wp-content/uploads/nr190226.pdf> [<https://perma.cc/29RB-7WUB>].

³⁵¹ Yerbolat Uatkhonov, *AIFC Court, IAC Consider Five Cases in 2019*, THE ASTANA TIMES (Jan. 5, 2020), <https://astanatimes.com/2020/01/aifc-court-iac-consider-five-cases-in-2019/> [<https://perma.cc/S428-8AMR>].

³⁵² Roberts, *supra* note 14, at 3.

³⁵³ *Id.*

³⁵⁴ *AIFC Court and IAC Measures and Service Continuity During COVID-19*, THE AIFC COURT (Apr. 3, 2020), <https://aifc.kz/press-relizy/covid-19-online-dispute-resolution/> [<https://perma.cc/3CVU-HJ6Z>].

³⁵⁵ *Id.*

³⁵⁶ Uatkhonov, *supra* note 351; see also *AIFC Court and IAC Present Their Results in 2020*, THE AIFC COURT (Dec. 28, 2020), <https://iac.aifc.kz/en/news/aifc-court-and-iac-present> [<https://perma.cc/EME8-C32C>].

considered 291 cases on which the AIFC Court issued nine judgments and IAC settled the remaining 282 arbitration cases.³⁵⁷ The vast majority of arbitration matters were resolved using mediation proceedings.³⁵⁸ The IAC's effectiveness in settling disputes by way of mediation eliminated the need for further arbitration or litigation of such cases.³⁵⁹ Thanks to the existing direct arrangements with domestic enforcement authorities, all required enforcement measures available in Kazakhstan have also been implemented expeditiously.³⁶⁰ Thus, the international commercial courts resolve disputes quickly and efficiently without the hassles of long and tedious procedures typically associated with traditional litigation.³⁶¹

Such courts may gradually become a preferred option for commercial dispute resolution in addition to arbitration. The boundaries between litigation and arbitration that have long existed in international commercial dispute resolution are disappearing.³⁶² The procedures assumed previously to belong to one or the other, such as confidentiality, discovery, English language adjudication with expert judges, or even appeal,³⁶³ have already been used in both. Many international commercial courts also attempt to recreate the most attractive features of arbitration while trying to address some of its limitations.³⁶⁴ Because of their adaptable procedures, foreign judges, and other characteristics that resemble arbitration, international commercial courts are sometimes referred to as "arbitral courts."³⁶⁵ Some of them, such as the SICC, do little to disguise their willingness to compete with arbitration by offering substitute services, taking on certain international arbitration advantages, and overcoming some of its shortcomings.³⁶⁶ For instance, the SICC aspires to develop a "freestanding body of international commercial law"—an important

³⁵⁷ *AIFC Court and IAC Present Their Results in 2020*, THE AIFC COURT (Dec. 28, 2020), <https://iac.aifc.kz/en/news/aifc-court-and-iac-present> [<https://perma.cc/EME8-C32C>]. The cases involved litigants from eleven countries including Kazakhstan, Russia, China, Uzbekistan, and the United Kingdom. The laws applicable to these disputes were the laws of the AIFC, Kazakhstan, and Russia. *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ Uat Khanov, *supra* note 351.

³⁶¹ Krishnan & Purohit, *supra* note 20, at 522.

³⁶² Bookman, *supra* note 19, at 276.

³⁶³ Aragaki, *supra* note 316, at 559.

³⁶⁴ Bookman, *supra* note 19, at 276.

³⁶⁵ Bookman, *supra* note 335; *see also* Bookman & Erie, *supra* note 13, at 5.

³⁶⁶ Ashvin S. Thevar, *The SICC: Competitor, Companion or Captain?*, LAW GAZETTE, <https://v1.lawgazette.com.sg/2015-07/1339.htm> [<https://perma.cc/4CAC-FGVS>] (last visited Nov. 7, 2022) There is significant overlap in the subject-matter jurisdiction of the SICC with its arbitration counterpart – SIAC. The jurisdiction over “international” and “commercial” disputes creates competition for cases between these two institutions.

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task that arbitration has failed to accomplish to date.³⁶⁷ Arbitration's failure to create a substantive commercial law can be explained by the lack of publicity surrounding the proceedings and arbitral awards. In contrast, international commercial courts may be in a position to generate a comprehensive core of precedents in international commercial law, provided that their proceedings and resulting judgments will be public.

Interpretations of common law principles and precedents by international commercial courts may facilitate the development of such principles and precedents.³⁶⁸ Some argue that such interpretations may even add to the "continuum of precedential decisions."³⁶⁹ The systemization and coherent application of international commercial principles and precedents would contribute to the legal regime's clarity and assist parties in estimating the risks and calculating possible outcomes of litigation. That may be possible if the international commercial courts' decisions are made public. When parties know that the rules are binding and courts consider matters fairly, expeditiously, and conclusively, they may be less prone to breach their contractual obligations.³⁷⁰ In case they are not able to abide to the terms of the contract, they may prefer settlement over the challenges of litigation, including the risk of losing and being faced with compensating both sides' legal expenses.³⁷¹ If the parties choose to litigate, however, the international commercial courts, such as the DIFC and AIFC courts, or the SICC, resolve matters efficiently, and the trial is much cheaper than arbitration.³⁷²

The courts mentioned here tend to approach confidentiality and publicity in various ways.³⁷³ The DIFC, QFC, AIFC, and ADGM, for example, all have court hearings open to the public, and the DIFC publishes videos of

³⁶⁷ The SICC Committee Report, *supra* note 333.

³⁶⁸ Bookman, *supra* note 19, at 278.

³⁶⁹ Walker, *supra* note 308, at 18.

³⁷⁰ Krishnan & Purohit, *supra* note 20, at 523.

³⁷¹ *Id.*

³⁷² See Krishnan & Purohit, *supra* note 20, at 527 (citing correspondence with Mark Beer dated Aug. 18, 2014, and noting that based on Beer's review of various arbitration centers' websites and discussions with lawyers specializing in international arbitration, on a US \$6.5 million dispute, the claimant using the DIFC courts typically pays roughly US \$27,255 in court fees, compared to: (a) the SIAC where the charges would be approximately US \$245,000, (b) the LCIA fees of approximately US \$326,000 (keep in mind, however, that the LCIA operates on an hourly basis, so its rates might vary considerably depending on the intricacy of the case), and (c) the International Chamber of Commerce [the ICC], where the costs might be as high as US \$435,000. For the applicable fees of the SICC and AIFC Court, see also the SICC Rules 2021, *supra* note 313; *AIFC Court Practice Direction No. 1: Fees*, *supra* note 314.

³⁷³ Bookman, *supra* note 19, at 278.

the proceedings on its website.³⁷⁴ The SICC allows parties to opt-in for confidential proceedings.³⁷⁵ These courts may, however, need to find the right balance between keeping sensitive proceedings confidential, and making the adjudication public to build awareness about their activities and to ensure the decisions' credibility.

1. *POTENTIAL BIAS OF INTERNATIONAL COMMERCIAL JUDICIARY IN EUROPE AND ASIA*

In the aftermath of the Brexit vote, several states in Europe also established their own court chambers or separate courts specializing in cross-border commercial matters³⁷⁶ to reduce dependency on and “to challenge the hegemony of English courts in international commercial litigation.”³⁷⁷ As it is likely that the United Kingdom will no longer benefit from the many European recognition regulations and conventions on judicial assistance in civil matters, English judgments will not be directly enforced in the European Union.³⁷⁸ That alone may create demand in the European Union for efficient commercial adjudication of the same high standard offered by the LCC. A newly established commercial chambers, divisions or courts in Paris, Frankfurt, Amsterdam, and Brussels have been set up to address that concern and recapture the atmosphere of commercial dispute resolution available in London.³⁷⁹ They have allowed parties to submit documents and conduct proceedings in English, hired English-speaking judges with background in common law, and allowed foreign lawyers to appear before their respective bars. A proposal has been made to integrate these efforts further, and to create

³⁷⁴ See Walker, *supra* note 308, at 19. The default rule of the AIFC Court Regulations requires that all proceedings must be held in public. There are a few exceptions to that rule providing for private hearings including, among others, matters of national security, personal financial matters, and the interests of justice; see also *AIFC Court Regulations*, *supra* note 225, at reg. 32 (Kaz.).

³⁷⁵ See Bookman, *supra* note 335.

³⁷⁶ GIESELA RUEHL, BUILDING COMPETENCE IN COMMERCIAL LAW IN THE MEMBER STATES 38 (2018), [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU\(2018\)604980_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf) [<https://perma.cc/SM2G-2JSE>] [hereinafter EU COMMERCIAL COMPETENCE DIRECTORATE].

³⁷⁷ Giesela Ruehl, *Doors Open for First Hearing of International Chamber at Paris Court of Appeal*,

CONFLICT OF LAWS (June 5, 2018),

<http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/> [<https://perma.cc/VCP8-WV4B>].

³⁷⁸ EU COMMERCIAL COMPETENCE DIRECTORATE, *supra* note 376, at 7.

³⁷⁹ See *id.* at 43.

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a European Commercial Court (the ECC).³⁸⁰ Although the ECC has yet to be formed and currently encounters some legal and political barriers that seem to be insuperable now,³⁸¹ it could be better positioned to compete with London than a set of separate specialized commercial courts scattered over the European continent.³⁸² A court like this could send a strong message to the rest of the world that Europe is a good place for international commercial litigation.³⁸³

In Asia, along with the SICC, China has also presented a platform to meet the dispute resolution needs potentially arising out of business transactions between parties from the BRI-participating economies. In June 2018, China's SPC established two international commercial courts, one in Xi'an and another in Shenzhen, collectively known as the Chinese International Commercial Court or the CICC.³⁸⁴ The CICC is a significant step toward China's ambition to enhance national dispute resolution capabilities, strengthen judiciary, and establish a BRI *lex mercatoria*.³⁸⁵ The CICC intends to become a one-stop shop for international commercial dispute settlement by offering a platform on which mediation, arbitration, and litigation services are effectively integrated.³⁸⁶ It comprises innovative procedural rules that attempt to combine ADR techniques into the traditional litigation process performed before the CICC.³⁸⁷

Unlike the case with the other international commercial courts in Asia or the Middle East, foreign judges do not directly sit on the CICC's bench. Instead, the CICC judges are English-speaking justices of the SPC with

³⁸⁰ *Id.*

³⁸¹ See Rafal Manko, *Expedited Settlement of Commercial Disputes*, EUR. PARL. (Nov. 20, 2019), <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-expedited-settlement-of-commercial-disputes> [<https://perma.cc/KP9D-YDN5>] (announcing that while the Commission could study the possibility, it will not work on establishing the ECC).

³⁸² EU COMMERCIAL COMPETENCE DIRECTORATE, *supra* note 376.

³⁸³ Ruehl, *supra* note 20, at 15.

³⁸⁴ *A Brief Introduction of China International Commercial Court*, CICC (June 28, 2018), <http://cicc.court.gov.cn/html/1/219/193/195/index.html>; see also Yip, *supra* note 20, at 84.

³⁸⁵ Weixia Gu, *China's Law and Development: A Case Study of the China International Commercial Court*, 62 HARV. INT'L L.J. 67, 70 (2021).

³⁸⁶ *Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-Stop" Diversified International Commercial Dispute Resolution Mechanism*, CHINA INT'L COM. CT. (Dec. 5, 2018), <http://cicc.court.gov.cn/html/1/219/208/210/1144.html> [<https://perma.cc/Y8J5-7878>].

³⁸⁷ Gu, *supra* note 385, at 73.

backgrounds in civil, and international commercial law.³⁸⁸ The SPC, however, has established an International Commercial Expert Committee, consisting of Chinese and non-Chinese legal experts, to lead the CICC's mediation services, provide advisory opinions on issues relating to international commercial disputes, advise on the revision of the CICC's rules, and consult on judicial interpretations and policies.³⁸⁹

Along with the national judges, the international commercial courts' benches and expert committees are typically comprised of the judges and international business law specialists from all over the world.³⁹⁰ Many of them are well-known and highly regarded for their profound knowledge as well as analytical and coherently formulated opinions.³⁹¹ An important question that remains is whether the international commercial courts, especially those staffed with local judges, stay neutral in cases involving major local stakeholders. These courts may have ample political and economic resources to function independently on a permanent basis, which seems to be the case to date in many of them. However, the international commercial courts have been established by and their judges are paid by the state. Most of these courts are part of domestic judicial systems or operate as the specialized international commercial divisions or benches under the respective national supreme courts. Some panels are comprised exclusively of national judges. For instance, with the exception of the Brussels experiment, all European international chambers hire local English-speaking judges who, despite being subject-matter experts, may however be inclined to favor domestic litigants, a widespread critique of national judges.³⁹²

It may be that those European international commercial chambers rely on their democratic legitimacy and do not see the need for, nor have the political capital for, hiring foreign judges.³⁹³ As a result, the international

³⁸⁸ *Judges*, CHINA INT'L COM. CT., <http://cicc.court.gov.cn/html/1/219/193/196/index.html> [https://perma.cc/76A5-N7SV] (last visited Jan. 24, 2022).

³⁸⁹ *The Supreme People's Court Established the International Commercial Expert Committee*, CHINA INT'L COM. CT. (June 28, 2018), <http://cicc.court.gov.cn/html/1/219/208/209/981.html> [https://perma.cc/3Y26-LCAY]. There are fourteen Chinese professional judges in the CICC.

³⁹⁰ *Judges*, SICC, *supra* note 201; There are thirteen justices in the DIFC courts, including eight foreign and five local judges. *Judges*, DIFC COURTS, <https://www.difccourts.ae/about/court-structure/judges> [https://perma.cc/H3VM-DSUD] (last visited Nov. 7, 2022). All nine justices of the AIFC Court are foreign judges. *Justices*, THE AIFC COURT, <https://court.aifc.kz/who-we-are/justices/> [https://perma.cc/3XM3-R3S4] (last visited Nov. 7, 2022).

³⁹¹ Krishnan & Purohit, *supra* note 20, at 523.

³⁹² Bookman, *supra* note 19, at 268–269.

³⁹³ *Id.* at 269.

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chambers in Europe are deemed international to the extent that they try international cases.³⁹⁴ On the other hand, there are jurisdictions that resort primarily to the diverse composition of their international commercial judiciaries to prove such panels' reliability, independence, and fairness.³⁹⁵ The courts in the DIFC, AIFC, QFC, ADGM, and the SICC have counted on the professionalism and strong reputation of their judges to assure impartial and competent review of the complex commercial cases in a way that avoids potential local bias. Thus, as cases become more complicated, with potential involvement of local stakeholders, the neutrality of both national and foreign judges of international commercial courts will be tested in the future.

In this respect, the DIFC courts have made decisions in favor of the state on matters involving the DIFC authority, but they have also taken actions against quasi-government companies and other stakeholders.³⁹⁶ In November 2019, the DIFC Court of First Instance made one of its landmark judgments refusing to recognize and enforce a decision of the onshore Dubai Cassation Court concerning the validity of an arbitration clause providing for the DIFC-LCIA arbitration.³⁹⁷ The DIFC Court held that the Cassation Decision contravened the New York Convention and, accordingly, could not be recognized under common law on public policy grounds.³⁹⁸ The judgement of the DIFC Court was not appealed, and served as a signal to demonstrate the Court's independent jurisdiction and commitment to impartial review of matters involving local stakeholders.

2. THE EXISTING IMBALANCE IN ENFORCEMENT OF COURT DECISIONS AND ARBITRAL AWARDS

There is no doubt that arbitration continues to dominate as a preferred method for international dispute settlement thanks to the forum's neutrality,

³⁹⁴ Ruehl, *supra* note 20, at 15.

³⁹⁵ Bookman, *supra* note 19, at 268.

³⁹⁶ Erie, *supra* note 17, at 38.

³⁹⁷ *YYY Limited v ZZZ Limited*, No. ARB-005-2017, Judgement (The Dubai International Financial Center Courts Nov. 2019), <https://www.difccourts.ae/2019/11/17/yyy-limited-v-zzz-limited-2017-difc-arb-005/> [<https://perma.cc/677T-TXHW>]. ZZZ (as Hotel Operator) and YYY (as Hotel Owner) signed a thirty-year hotel management agreement (the HMA). *Id.* The HMA contained an arbitration clause providing for a DIFC-LCIA arbitration. *Id.* English law has been selected as the governing law of the contract. *Id.* In its judgment, the DIFC Court of First Instance held that the Dubai Cassation Court erroneously applied the UAE law instead of English law being the HMA's governing law. *Id.* By doing so, the Cassation Court breached the requirements of the New York Convention to apply English law as the law to which the parties have subjected the arbitration agreement. *Id.*

³⁹⁸ *Id.*

and the widespread enforcement guaranteed by the New York Convention. The emergence of international commercial courts and the OFCs, however, may make court litigation seem more appealing than private arbitration in both domestic and cross-border matters. International commercial courts position themselves as independent from local courts. The forum's neutrality is achieved by the diverse composition of the respective benches consisting of judges from different jurisdictions.

Regionally, the international commercial courts' decisions may be honored pursuant to the judgments' recognition conventions concluded between the countries that have integrated geographically. The DIFC courts' judgements, for instance, are respected under multilateral recognition conventions between the Persian Gulf countries just as any other decisions of the UAE's national courts.³⁹⁹ By contrast, enforceability of the AIFC Court judgments within the CIS remains questionable, at least until the respective amendments to the Chisinau Convention recognizing the AIFC Court's jurisdiction are introduced. Mandatory enforcement of decisions issued by the AIFC Court may be determinative for the development of corporate law, corporate governance, and the growth of securities market in the former Soviet republics.

Globally, however, the international commercial courts' judgements do not enjoy the same recognition benefits as awards made by arbitration institutions. That imbalance may be rectified once Kazakhstan and other post-Soviet republics, countries in the Middle East, China, or other nations pursuing economic growth through capital markets' development, join and ratify the Hague Court Convention and Hague Judgments Convention. A further reform, clarifying the scope of both Conventions as applying to the international commercial courts established within the OFCs, would extend jurisdiction of such courts, and would guarantee global recognition and enforcement of their judgements on commercial matters. Whenever that happens, court decisions issued by the judicial institutions, including the international commercial courts, would be recognized and enforced universally, just as the arbitral awards are acknowledged worldwide under the New York Convention.

VII. CONCLUSION

An effective judiciary and reliable enforcement mechanisms might be the key to reformatting the corporate law and governance systems, and may facilitate the growth of securities markets in the former Soviet republics and beyond. The previous corporate and securities law reforms proved incapable of creating sound financial markets in the post-Soviet space without strong

³⁹⁹ See the 1996 GCC Convention, *supra* note 260.

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judiciary and robust enforcement mechanisms. The emergence of international commercial courts all over the world, operating within the separate legal regimes, has provided an efficient alternative to weak domestic justice. Such courts have become increasingly popular among the nations that are willing to attract foreign investors but whose domestic legal and judicial structures are either flawed or insufficient to appeal to potential investors. By all means, these nations have established a compatible framework for the development of corporate governance structures and securities markets with the reliable enforcement system. The establishment of the common-law courts offering world-class commercial adjudication services has become a cornerstone to the building of the international financial centers' independent legal regimes.

The inauguration of the AIFC Court in Kazakhstan gives a new perspective to the development of international commercial judiciary in the post-Soviet region, contributing to the existing scholarship discussing similar initiatives in the Middle East, continental Europe, and Asia. Such initiatives in the judicial area have proved their viability and effectiveness throughout the COVID-19 crisis thanks to innovative and cost-efficient services supported by the most up-to-date digital technologies. Although the same technological advances may enable London or New York to serve international litigants remotely, rendering case management and hearing services by judges and professionals familiar with the region and within the relevant time zones may become of essence. Providing other developing countries access to such international common-law based systems and judiciaries would bolster corporate governance and securities market reforms both regionally and globally.

