

Institutional Development and the Astana International Financial Center in Kazakhstan

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Abstract: This article investigates the most recent instance of the transplantation of English corporate and financial law into a different legal environment. The Astana International Financial Center (AIFC) in Kazakhstan was launched in 2018. The AIFC has largely built on the institutional model pioneered by the Dubai International Financial Center. This key institutional innovation is the transplanting and operation of laws based on the English common law, independent of their national legal systems (civil law systems, heavily influenced by Islamic tradition, and, in the case of Kazakhstan, also Soviet socialist principles). This article seeks to contribute to the understanding of the system of Kazakhstan, a strategically located but well under-investigated country, and a potentially viable institutional model for other aspiring financial centers. To the best knowledge of the authors, this work is the first ever English academic literature on the development of the AIFC.

Keywords: Kazakhstan, Astana International Financial Center, Institutions, Company and Financial Laws, English/Common Law, Legal Transplant

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I. INTRODUCTION

Kazakhstan, formerly part of the Soviet Union, declared independence on 16 December 1991. It is the largest and, thanks to its natural resources, wealthiest country in Central Asia. The Governor of the Astana International Financial Center (AIFC), formerly chief of the National Bank of Kazakhstan, Kairat Kelimbetov referred to Kazakhstan now as “another Singapore in Central Asia, the most competitive economy among all post-Soviet nations”.¹ Traditionally, the political and economic center of the country has been in Almaty. In 1997 Kazakhstan's President Nursultan Nazarbayev moved the capital from Almaty in the southeast of the country to the newly-named Astana (previously called Akmola; now Nur-Sultan), which was then “an empty patch of land by the Ishim River best known as a former gulag prison camp for the wives of Soviet traitors”.² Despite unfortunately being given the label of “the world's weirdest capital city”³, Nur-Sultan is definitely up-and-coming, especially with the development of the AIFC. The AIFC is envisaged to be a financial hub for Central Asia and beyond. It operates within a special legal regime different from the one pre-existing in Kazakhstan, regulating the legal relationships between AIFC participants and third parties and is aimed at the development of the financial market.

This article seeks to explore how different institutional arrangements, believed to be modelled on a Dubai experience, will serve to support the development of the AIFC. This key institutional innovation is the transplanting and operation of laws based on the English common law, independent of their national legal systems (civil law systems, heavily influenced by Islamic tradition, and, in the case of Kazakhstan, also Soviet socialist principles). This choice apparently sits well with the belief under the law and finance scholarship that legal institution is essential in financial development. However, this article argues that, with its pre-existing national shareholder protection regime highly praised by the World Bank's Doing Business Report (ranked the first out of 190 countries), the transplantation may not have necessarily led to better law. Also, this article notes that attention should be particularly put on enforcement, amidst the concern of “transplant effect”. Two possible types of transplantation can perhaps be distinguished, a mild and gradual form which entails predominantly black letter laws and a more radical and acute form like Dubai and the AIFC, which entails the borrowing of effectively an entire legal system (we sometimes call it the Dubai model/experience in this article).⁴ The latter is what the AIFC has adopted, and the concern of such an extensive scale of legal transplantation is inevitably prevalent.

¹ Vladislav Inozemtsev, *Why Kazakhstan Holds the Keys to the Global Economy*, INDEPENDENT, 9 November 9. 2015, <https://www.independent.co.uk/voices/why-kazakhstan-holds-the-keys-to-the-global-economy-a6727391.html>.

² Daisy Carrington, *Astana: The World's Weirdest Capital City*, CNN, July 13, 2012, <https://edition.cnn.com/2012/07/13/world/asia/eye-on-kazakhstan-astana/index.html>. It is worth noting that in honor of their long standing president who has stepped down recently, Astana was renamed to Nur-Sultan in March 2019. It is at present uncertain if the AIFC is to be renamed to Nur-Sultan International Financial Center in the future. But retaining the name of AIFC can still make sense as Astana means “capital city” in local language.

³ Ibid.

⁴ For example, the Cadbury Report was the first time ever that the need for flexibility and experimentation in corporate governance was considered by coming up with the approach of “comply or explain”. This approach has had a profound impact on worldwide corporate governance, not just on common law systems. See Financial Reporting Council, *COMPLY OR EXPLAIN: 20TH ANNIVERSARY OF THE UK CORPORATE GOVERNANCE CODE* (2012), <https://www.frc.org.uk/getattachment/06870154-78a0-44f5-a1c5->

The first part, after this introduction, will consider the economic, financial and political motivations of establishing the AIFC. Then, it will discuss the development thus far of the AIFC. The third part, the key part of this article, will seek to enquire whether the AIFC possesses a notable institutional advantage as opposed the rest of Kazakhstan, by considering the general trajectory of legal development in corporate and financial law, as well as certain specific mechanisms of shareholder protection. To do this, there are two dimensions of comparison. The first dimension will involve comparing the AIFC rules and regulations with their UK counterparts to reveal the degree of legal transplantation. The second dimension will involve comparing the AIFC rules and regulations with their domestic counterparts to explore a potential regulatory gap between the two systems. In particular, the article seeks to ascertain if there is a wholesale or partial legal transplantation. If it is the former, the AIFC should in principle provide comparable protection of investor rights as witnessed in the UK; if it is the latter, how the UK regime complements the domestic regime can be an issue. The fourth part, before a final conclusion is made, will ask if the AIFC is going to be a success by drawing on some prior experiences elsewhere in the world, notably Dubai. To the best knowledge of the authors, this work is the first ever English academic literature on the AIFC. Overall, this work seeks to contribute to the understanding of the system of Kazakhstan, a strategically located but well under-investigated country, and a potentially viable institutional model for other aspiring financial centers.

II. A NEW FINANCIAL CENTER IN KAZAKHSTAN? SOME ECONOMIC, FINANCIAL AND POLITICAL BACKGROUND

Kazakhstan is the largest country in Central Asia and the ninth largest in the world. The country’s mineral resources and arable lands have long been the major pillars of its economy. Kazakhstan also has a strategic location. Despite being a landlocked country, it links the large and fast-growing markets of China and South Asia and those of Russia and Western Europe by road, rail, and a port on the Caspian Sea. According to the World Bank, Kazakhstan moved from lower-middle-income to upper-middle-income status in 2006.⁵ The country is currently Central Asia's largest economy. For a comparison with its neighboring countries, see Table 1. Its per-capita Gross Domestic Product (GDP) of US\$9,331 in 2018 was only below that of Russia, comparable to China, but by far higher than the remaining Central Asian Countries.

Table 1 – Economic Indicators of Kazakhstan and Surround Countries in 2018

| Country | GDP (US\$ bn) | GDP per Capita (US\$) |
|-------------------|---------------|-----------------------|
| China | 13,608.15 | 9,770.8 |
| Russia | 1,657.55 | 11,288.9 |
| Kazakhstan | 170.54 | 9,331.0 |
| Uzbekistan | 50.50 | 1,532.4 |
| Azerbaijan | 46.94 | 4,721.2 |
| Turkmenistan | 40.76 | 6,966.6 |
| Kyrgyzstan | 8.09 | 1,281.4 |
| Tajikistan | 7.52 | 826.6 |

48b42f860049/FRC-Essays_Comply-or-Explain.pdf. This is consistent to the prediction of Hansmann and Kraakman, who once famously said that convergence in most aspects of the law and practice of corporate governance over time towards the Anglo-American model might well be witnessed. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

⁵ World Bank, KAZAKHSTAN (2019), <http://www.worldbank.org/en/country/kazakhstan/overview>.

The energy sector has been the main driver of economic growth. It is estimated that oil and gas contributes around 30% of GDP, 70% of exports and 20% of budget revenues.⁶ As of 2016, Italy, China and Russia were the three largest trading partners of Kazakhstan (accounting for over 40% of the Kazakh exports).⁷ The top exports were crude petroleum, refined copper, radioactive chemicals, petroleum gas and ferroalloys. According to the National Bank of Kazakhstan, in 2016, the gross inflow of the foreign direct investments (FDI) in Kazakhstan reached new heights, growing 40% compared to 2015 and surpassing the previous record from 2008.⁸ The main recipients of FDI were the mining industry, geological exploration and processing. The top four investors include the Netherlands, the US, Switzerland and France.

In order to realize the country's growth potential, ongoing structural and institutional reforms are underway, including the "100 Concrete Steps" program and the privatization agenda aiming to reduce the role of the state in the economy and facilitate the development of a vibrant, modern and innovative tradable non-oil sector.⁹ In March 2015, President Nazarbayev unveiled a comprehensive national plan to put forward five key institutional reforms, known as the "100 Concrete Steps".¹⁰ Step 70 outlines the commitment to establishing the AIFC. The AIFC is intended to serve as a financial hub for the Central Asian region. It will enjoy a special status recognized by law, including notably an independent legal system based on English law principles.

Indeed, Almaty is a pre-existing national financial center in Kazakhstan. The city had been the country's capital until 1997 when President Nazarbayev decided a relocation to Astana. The Kazakhstan Stock Exchange (KASE), founded on 17 November 1993, is based in Almaty. As of the beginning 2017, it had a market capitalization of US\$42 billion and 98 listed companies. Although relatively small¹¹, the KASE is much larger than Central Asia's other exchanges. In comparison to the KASE's market capitalization, the Tashkent Stock Exchange, for example, had a total market cap of US\$2.1 billion, and the Kyrgyz Stock Exchange of US\$255m.¹² The KASE has an important role in the (partial) privatization of the country's state

⁶ Department of International Trade UK, *DOING BUSINESS IN KAZAKHSTAN: KAZAKHSTAN TRADE AND EXPORT GUIDE* (2016), <https://www.gov.uk/government/publications/exporting-to-kazakhstan/exporting-to-kazakhstan>.

⁷ Observatory of Economic Complexity, *KAZAKHSTAN* (2017), <https://atlas.media.mit.edu/en/profile/country/kaz/>.

⁸ Zhazira Dyussebekova, *Kazakhstan Attracts Record Amount of Foreign Investment in 2016*, *ASTANA TIMES*, April 18, 2017, <https://astanatimes.com/2017/04/kazakhstan-attracts-record-amount-of-foreign-investment-in-2016/>.

⁹ World Bank, *KAZAKHSTAN'S ECONOMY IS RISING – IT IS STILL ALL ABOUT OIL* (2017), <http://www.worldbank.org/en/country/kazakhstan/publication/economic-update-fall-2017>.

¹⁰ They are i) creation of a modern and professional civil service; ii) ensuring the rule of law; iii) industrialization and economic growth; iv) unified nation for the future; and v) transparency and accountability of the state. For the full version of the "100 Concrete Steps" in English, see Consulate General of the Republic of Kazakhstan in Sydney, *THE 100 CONCRETE STEPS SET OUT BY PRESIDENT NURSULTAN NAZARBAYEV TO IMPLEMENT THE FIVE INSTITUTIONAL REFORMS* (2017), <http://mfa.gov.kz/en/sydney/content-view/100-konkretnyh-sagov-sovremennoe-gosudarstvo-dla-vseh>.

¹¹ At the same time, as a comparison, the Moscow Stock Exchange had a market cap of US\$643 billion and 245 companies. Data from the World Federation of Exchanges.

¹² *Uzbekistan's Financial Markets Development Concept Proposed for Public Consultation*, *TASHKENT TIMES*, July 24, 2017, <http://tashkenttimes.uz/finances/1206-uzbekistan-s-financial-markets-development-concept-proposed-for-public-consultation>; and CEIC, *KYRGYZSTAN MARKET CAPITALIZATION*:

sector through the “People’s Initial Public Offerings” campaign.¹³ Kazakhstan has launched a series of initial public offerings since 2012 in order to improve liquidity in its stock market and allow some of its people to own shares in its major companies. KazTransOil was the first state company to float its shares in November 2012. Subsequently, the campaign was planned to expand to a number of other state companies.¹⁴

According to Charman, despite the privatization program, the majority of large enterprises have remained in the state hands.¹⁵ The continuing dominance of the state took Kazakhstan to a “state-led liberalized market economy” model. In this model, the market would provide the coordination mechanisms for the growing private sector, but the state sector would retain ownership and control in sectors of strategic interests. Soon after independence, the governments of Central Asia recognized that the transition to market economy would require the supportive development of their bank and financial system, which involves considerable institutional and capacity building virtually from scratch.¹⁶ As mentioned, the KASE was established in 1993 to provide an additional source of finance for the economy. In 1994, Kazakhstan had 184 banks, six of which were state-owned.¹⁷ In 2000, only 48 Kazakh banks remained. As of 2017, Kazakhstan has 34 commercial banks.¹⁸ The five largest banks held assets worth approximately US\$45.6 billion, or about 58.5% of the banking sector’s total assets.¹⁹ According to the Economist’s Intelligence Unit, the Kazakh banking sector has struggled to overcome the legacy of the global financial crisis in 2008. This has led to four of the largest financial institutions defaulting on their debt and has prompted government bail-outs to prevent systemic collapse.²⁰ According to the investigation by Claessens and colleagues of seven former CIS countries²¹, in Kazakhstan (also true for the Kyrgyz Republic), the plan was to develop the privatization program and the stock market in parallel.²² To that end, during privatization the stock market was built around public offerings of companies whose majority ownership was sold to strategic investors. The government then floated a small percentage of the listed shares on the market, creating broader ownership. The benefits of well-developed stock markets, especially to transition economies like Kazakhstan, are neatly summarized by Claessens and colleagues.²³

KYRGYZ STOCK EXCHANGE (2018), <https://www.ceicdata.com/en/kyrgyzstan/kyrgyz-stock-exchange-market-capitalization/market-capitalization-kyrgyz-stock-exchange>.

¹³ Dmitry Solovyov, *Kazakhstan to Offer KMG EP Stake in “People’s IPO”*, REUTERS, March 1, 2011, <https://uk.reuters.com/article/us-kazakhstan-ipo/kazakhstan-to-offer-kmg-ep-stake-in-peoples-ipo-idUKTRE72019020110301>.

¹⁴ The list included KEGOC, Air Astana, KazMorTransFlot, Samruk-Energo, KazTransGas, Kazakhstan Temir Zholy, KazTemirTrans, KazAtomProm, KazMunayGas, etc.

¹⁵ Ken Charman, *Kazakhstan: a State-led Liberalized Market Economy?*, in VARIETIES OF CAPITALISM IN POST-COMMUNIST COUNTRIES 165 (David Lane & Martin Myant eds., 2007).

¹⁶ Tunc Uyanik & Carlo Segni, *Evolution of the Banking Sector in Central Asia*, in FINANCIAL TRANSITION IN EUROPE AND CENTRAL ASIA: CHALLENGES OF THE NEW DECADE 97 (Lajos Bokros et al. eds., 2001).

¹⁷ *Id.*

¹⁸ International Trade Administration US, KAZAKHSTAN COUNTRY COMMERCIAL GUIDE (2017), <https://www.export.gov/article?id=Kazakhstan-Market-Overview>.

¹⁹ The five banks are HalykBank, KazKommertsBank, Tsesna Bank, Sberbank-Kazakhstan and ATF Bank.

²⁰ *Kazakhstan Financial Services*, ECONOMIST’S INTELLIGENCE UNIT, July 7, 2017, <http://www.eiu.com/industry/article/785686862/kazakhstan-banking-sector-risk/2017-07-07>.

²¹ These included Armenia, Azerbaijan, Kazakhstan, the Kyrgyz Republic, Russia, Ukraine, and Uzbekistan.

²² Stijn Claessens et al., *Stock Markets in Transition Economies*, in FINANCIAL TRANSITION IN EUROPE AND CENTRAL ASIA: CHALLENGES OF THE NEW DECADE 109 (Lajos Bokros et al. eds., 2001).

²³ *Id.*

They enhance economic performance by enabling growing companies to raise capital at lower costs...companies in countries with developed equity markets are less dependent on bank financing, which can reduce the risk of a credit crunch [and create] a less risky financial structure...stock markets can increase the efficiency of corporations' investment and management by enhancing their governance. Overall, a mix of bank-intermediated funds and stock markets can enhance growth.

Many observers tend to attribute the country's impressive growth performance to the favorable prices of Kazakhstan's abundant mineral resources.²⁴ However, in the view of Akimov and Dollery, it would be wrong to believe that it constitutes the whole story.²⁵ In contrast to other resource-rich economies such as Russia, Kazakhstan undertook aggressive and carefully designed reforms in the financial sector as well as a general liberalization of its economy. This has ensured the more efficient use of its mineral resources and better economic performance.

Looking forward, Kazakhstan is set to benefit from China's Belt and Road Initiative (BRI). When the Chinese President Xi Jinping visited Central Asia and Southeast Asia in Autumn 2013, he raised the initiative of jointly building the Silk Road Economic Belt and the 21st Century Maritime Silk Road (and hence the initial name, One Belt One Road, in short OBOR). According to the State Council of China, BRI can help promote the economic prosperity of the countries along the routes and regional economic cooperation, strengthen exchanges and mutual learning between different civilizations, and promote world peace and development.²⁶ Under BRI, the economic relations between Kazakhstan and China have been closer than ever. Following the visit of the Chinese Premier Li Keqiang in December 2014, a new package of economic deals totaling US\$14 billion was unveiled.²⁷ Joint projects on key sectors, such as mining, oil and gas, construction, chemical and light industry, and transport have been launched. One example is the oil and gas development project in Aktyubinsk region of Kazakhstan. Oil pipelines have been built to allow direct oil exports to China, including the pipeline running from Kazakhstan's Caspian shore to Xinjiang of China. Major participants in the project include the China National Petroleum Corporation and the Kazakh oil company KazMunayGas. Another example is the China-Kazakhstan Khorgos Frontier International Cooperation Center, which is the first trans-border international free trade zone in the world.²⁸ Ensuring that Kazakhstan has the right institutional setting to capture all these opportunities arising from BRI will be influential in determining the country's future economic growth. It is widely believed that the AIFC seeks to attract more foreign investment for the country from its prime position in BRI, with the backing of China.²⁹

²⁴ Alexandr Akimov & Brian Dollery, *Financial System Reform in Kazakhstan from 1993 to 2006 and its Socioeconomic Effects*, 44 EMERGING MARKETS FIN. & TRADE 81 (2008).

²⁵ *Id.*

²⁶ National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, ACTION PLAN ON THE BELT AND ROAD INITIATIVE (2015), http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.

²⁷ Hong Kong Trade and Development Council, KAZAKHSTAN: MARKET PROFILE (2019), <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/Kazakhstan-Market-Profile/obor/en/1/1X000000/1X0A374B.htm>.

²⁸ *China-Kazakhstan Zone Creates Jobs, Stimulates Trade*, CHINA DAILY, July 3, 2017, http://europe.chinadaily.com.cn/business/2017-07/03/content_29968418.htm.

²⁹ Olzhas Auyezov, *Seeking Belt Buckle Role, Kazakhstan Launches China-backed Financial Hub*, REUTERS, July 5, 2018.

III. ASTANA INTERNATIONAL FINANCIAL CENTER

The AIFC began operation in January 2018, but an official international launch took place later on 5 July in the same year.³⁰ It is a good example of a combination of both the country's institutional and structural reform, and China's increasing involvement in the country's economy under BRI. As discussed, the AIFC is part of President Nazarbayev's "100 Concrete Steps" to implement five institutional reform goals. In December 2015, President Nazarbayev signed the Constitutional Statute "On the AIFC" 2015 (amended on 22 December 2017) which provides a legal framework for its establishment and operation. According to this legal framework, the governing law of the AIFC is based on the Constitution of the Republic of Kazakhstan and will have a special legal regime, consisting of its own laws and its own independent judicial system and jurisdiction which will be based on English common law, and standards of leading international financial centers.³¹ The current laws of Kazakhstan apply to the extent that they do not conflict with the laws adopted by the AIFC. It is believed that the AIFC legal system has similarities with the principles and standards of the Dubai International Financial Center in Dubai, the UAE.³²

The core businesses within the AIFC are expected to include capital market, asset management, private banking, Islamic finance and financial technology. To attract companies and talents from across the world, other than a robust legal framework, there is a preferential tax regime and a simplified visa regime.³³ For example, there will be a 50 year waiver for corporate tax, individual income tax, property tax and land tax, till the end of year 2066. Citizens of countries of the OECD, Malaysia, the UAE, Singapore and Monaco, as well as a few other countries enjoy visa-free entry to Kazakhstan for a period of 30 days. The core administrative and regulatory structures of the AIFC include the Management Council, the AIFC Authority, Astana Financial Services Authority, the AIFC Court, and the International Arbitration Center.³⁴

The AIFC has been actively seeking foreign expertise in ensuring that the implementation of its legal and regulatory framework is in line with the best international practices and standards. Its Legal Advisory Council is composed of leading lawyers in the field to perform a consultative and advisory role. The Council is chaired by Michael Blair QC, who is a specialist on financial services and financial services regulation, and used to serve as General Counsel to the Board of the (then) Financial Services Authority in the UK from 1998-2000, and as head of the legal function in its predecessor body, the Securities and Investments Board, from 1987-97. The other nine members sitting on the Council are all senior lawyers from international leading law firms, predominantly based in London. This does not come as a surprise as the AIFC Court has adopted an English common law system. When adjudicating disputes, the AIFC Court will apply the procedures provided in the AIFC Court Regulations 2017 and AIFC

³⁰ Kazakhstan's President Nursultan Nazarbayev attended the grand international opening of the AIFC on 5 July 2018. *Id.*

³¹ Article 4(1) of the Constitution of the AIFC.

³² Philip Kim, *The Astana International Financial Centre: AIFC Court and International Arbitration Centre Legal Systems to be Based on English Common Law*, KLUWER ARBITRATION BLOG (August 6, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/08/06/astana-international-financial-centre-aifc-court-international-arbitration-centre-legal-systems-based-english-common-law/>.

³³ Articles 6 and 7 of the Constitution of the AIFC.

³⁴ For a description of their respective roles and functions, refer to website of the AIFC, <https://aifc.kz/>.

Court Rules 2018, and will take into account “judgements of the courts of other common law jurisdictions”.³⁵

The AIFC has not been shy in drawing on experience and expertise around the world. NASDAQ has been selected to provide certain market technology to the AIFC Exchange.³⁶ It has been predicted that the London Stock Exchange would have a prominent role in supporting the AIFC to develop a strong foundation of corporate governance and an even stronger regulator.³⁷ A tripartite agreement has been signed among the AIFC, the City of London and the London Stock Exchange to train personnel at the AIFC Exchange.³⁸ The US and the UK have long been regarded as the preferred host countries for the professional development programs of the AIFC.³⁹ As indicated by Sayasat Nurbek, former Managing Director of the AIFC, whilst it is inevitable to rely on foreign personnel initially, they have the tasks to train local specialists in the long run.⁴⁰

The AIFC has also worked closely with various parties in China. It is envisaged that the Chinese and Kazakh sides are determined to develop the AIFC into the regional financial services hub of BRI.⁴¹ The AIFC and the Shanghai Stock Exchange signed a Memorandum of Understanding and Cooperation in 2016.⁴² The Chinese side became a strategic partner of the AIFC and pledged to provide support to the AIFC to establish a stock exchange. The cooperation between the two sides deepened in June 2017 when the Shanghai bourse signed an agreement to become a primary shareholder of the stock exchange within the AIFC. It was reported that the Shanghai bourse took a 25% stake in their Kazakh counterpart.⁴³ Furthermore, a Memorandum of Understanding and Cooperation was signed between the AIFC and China’s Tsinghua University. It is envisaged that they will engage in cooperative educational and research activities for the mutual benefit of both institutions, including training programs and joint research programs for the AIFC’s employees.⁴⁴ Also, Hangzhou Electronic Commerce

³⁵ Article 13(6) of the Constitution of the AIFC.

³⁶ NASDAQ, ASTANA INTERNATIONAL FINANCIAL CENTER JSC AND NASDAQ SIGN TECHNOLOGY DEAL FOR NEW AIFC EXCHANGE (2017), <http://ir.nasdaq.com/releasedetail.cfm?releaseid=1028105>.

³⁷ Law Society of England and Wales, THE NEW ASTANA INTERNATIONAL FINANCIAL CENTRE (2016), <https://communities.lawsociety.org.uk/kazakhstan/the-new-astana-international-financial-centre/5054192.article>.

³⁸ *Kazakh-British Investment Forum Participants Sign Agreements, Enhance Cooperation*, ASTANA TIMES, November 10, 2017, <https://astanatimes.com/2017/11/kazakh-british-investment-forum-participants-sign-agreements-enhance-cooperation>.

³⁹ AIFC, AIFC LAUNCHED THE PROFESSIONAL DEVELOPMENT PROGRAM IN THE US (2016), <http://www.aifc.kz/en/news/24.html>.

⁴⁰ *Id.*

⁴¹ AIFC, ASTANA INTERNATIONAL FINANCIAL CENTRE AND SHANGHAI STOCK EXCHANGE SIGNED SHAREHOLDERS’ AGREEMENT (2017), <http://www.aifc.kz/en/news/80.html>.

⁴² AIFC, THE ASTANA INTERNATIONAL FINANCIAL CENTRE AND SHANGHAI STOCK EXCHANGE SIGNED A MEMORANDUM OF UNDERSTANDING AND COOPERATION (2016), <http://www.aifc.kz/en/news/19.html>.

⁴³ *Shanghai Stock Exchange to Become Shareholder of New AIFC Stock Exchange*, KAZAKHSTAN NEWS GAZETTE, June 22, 2017.

⁴⁴ AIFC, ASTANA INTERNATIONAL FINANCIAL CENTRE AND TSINGHUA UNIVERSITY SIGNED A MEMORANDUM OF UNDERSTANDING AND COOPERATION (2017), <http://www.aifc.kz/en/news/68.html>.

Industry Park in China signed a Letter of Intent and agreed to explore the possibility of creating a joint park for the development of the e-commerce industry in the territory of the AIFC.⁴⁵

IV. THE IMPORTANCE OF INSTITUTIONAL AND CAPACITY BUILDING

Institutional economics, which has existed for nearly a century, is a branch of scholarship which explores the role of institutions in economic activities and growth. Different types of institutions have been reviewed by scholars, including but not limited to finance, law, politics, trade, culture, technology, education, colonial origin, etc.⁴⁶ For the relationship between law, finance and growth, the explanation can be that law helps deepening the financial markets, thereby facilitating economic growth.⁴⁷ Claessens and colleagues have explained the advantages of equity finance and its role in economic growth.⁴⁸ The “Law and Finance” scholarship seeks to explore the correlations between law and financial development.⁴⁹ La Porta and colleagues examined legal rules covering the protection of corporate shareholders and creditors, the origin of these rules and the quality of their enforcement in 49 countries.⁵⁰ They alleged that the legal environment, including both legal rules and their enforcement, matters for the size and extent of a country’s capital market. It is because a good legal environment protects the potential financiers against expropriation by entrepreneurs. Investors are willing to surrender funds in exchange for securities and therefore expand the scope of capital markets. Based on their findings, they claimed that civil law countries with weaker investor protection, have smaller and narrower capital markets.⁵¹ By building on La Porta and colleagues’ research design, John Armour and colleagues, despite finding no evidence of a positive impact of legal changes on stock market development, agreed that common law systems are more protective of shareholder interests than civil law ones.⁵²

In the view of Posner, common law is conceived of as regulation by judges because common law doctrines are made by judges.⁵³ The flexibility of common law courts to use broad standards rather than specific rules in rendering their decisions means that judges are more readily to “catch” wrongdoings and thereby discourage it.⁵⁴ In contrast, Roe rightly indicates that the distinction between common law and civil law systems is often exaggerated.⁵⁵ Modern securities regulation revolves around a regulatory agency operating through a comprehensive regulatory code. This is not an intrinsic common law institutional advantage.

⁴⁵ AIFC, ASTANA INTERNATIONAL FINANCIAL CENTRE AND HANGZHOU ELECTRONIC COMMERCE INDUSTRY PARK HAVE NEGOTIATED THE DEVELOPMENT OF ELECTRONIC COMMERCE IN THE REPUBLIC OF KAZAKHSTAN (2017), <http://www.aifc.kz/en/news/123.html>.

⁴⁶ For a comprehensive review of the scholarship in this area, see Flora Huang & Horace Yeung, INSTITUTIONS AND ECONOMIC GROWTH IN ASIA 7-36 (2018).

⁴⁷ See for example, Ross Levine, *Law, Finance, and Economic Growth*, 8 J. FIN. INTERMEDIATION 8 (1999)

⁴⁸ Claessens et al, *supra* note 22.

⁴⁹ Mathias Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 52 MCGILL L.J. 55, 57 (2007).

⁵⁰ Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997).

⁵¹ *Id.*

⁵² John Armour et al., *Shareholder Protection and Stock Market Development: an Empirical Test of the Legal Origins Hypothesis*, 6 J. EMPIRICAL LEGAL STUD. 343 (2009).

⁵³ Richard Posner, *Regulation (Agencies) versus Litigation (Courts) an Analytical Framework*, in REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11 (Daniel Kessler ed., 2010).

⁵⁴ John Coffee, *The Future as History: the Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641 (1999).

⁵⁵ Mark Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006).

A. *Is the AIFC Possessing Better Institutions?*

The role of legal institutions in fostering a good business environment is underlined by the World Bank's Doing Business project.⁵⁶ This project provides objective measures of business regulations and their enforcement across 190 economies and selected cities at the subnational and regional level. The first Doing Business report, published in 2003, covered 5 indicator sets and 133 economies. The most recent report in 2018 covers 11 indicator sets and 190 economies. Amongst which, the Protecting Minority Investors indicator is perhaps the most relevant in light of the law-finance nexus. The minority investor protection index measures the extent of protection from conflicts of interest and shareholders' rights in corporate governance.⁵⁷ The higher the index indicates a better protection of investors' interests. The maximum score is 100. OECD high income countries on average get a score of 64.21 in 2018. Quite contrary to common perception, it is worth highlighting that Kazakhstan occupies the top position among 190 economies in protecting minority investors with a score of 85. This raises the doubt of whether it makes sense to have a separate set of laws for the AIFC, and whether it makes sense to follow "the laws, the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centers" when the UK and the US, the two leading global financial centers are ranked 15th (with a score of 75) and 50th (with a score of 64.67) in the World Bank index respectively. The following sections will try to discuss, compare and contrast the national laws and the AIFC laws so as to further verify the institutional advantages of the AIFC.

B. *Trajectory of Legal Development*

As shown above, the quality of the legal regime to protect minority investors in Kazakhstan is well recognized and is placed the first in the world according to the World Bank. The primary legislation to provide this protection is the Kazakh Company Law⁵⁸. Karagussov has outlined its development since 1990.⁵⁹ Before 1990, there was virtually no corporate law, although the Civil Code of the Russian Soviet Federative Socialist Republic of 1922 and the Civil Code of the Kazakh Soviet Socialist Republic of 1963 had provided a limited degree of regulation in this regard. Starting on 31 May 1991, the Basics of Civil Legislation of the Union of Soviet Socialist Republics defined the notion of a commercial organization, distinguished economic partnerships from other forms of association, and made provision for regulation of the legal status of different types of economic partnerships and companies. Shortly after that, the Law of the Kazakh Soviet Socialist Republic on Economic Partnerships and Joint-Stock Companies was adopted, making a very important starting point for formal corporate regulation in Kazakhstan. A turning point then came in 1998 when the regulation of partnerships and companies was separated with the introduction of the Law on Joint-Stock Companies. In May 2003, the most significant changes to the status of joint-stock companies were witnessed. The current Kazakh Company Law was adopted, repealing the previous law of 1998. The law has since been amended regularly over time.

⁵⁶ World Bank, DOING BUSINESS 2019 (2018), <http://www.doingbusiness.org>.

⁵⁷ Important parameters include the extent of disclosure, director liability, shareholder rights and suits, etc.

⁵⁸ The current law is Law No. 415 II of 13 May 2003 of the Republic of Kazakhstan on Joint Stock Companies ("Kazakh Company Law" hereinafter). The English version of the law is available via the Legal Information System of the Ministry of Justice Kazakhstan, http://adilet.zan.kz/eng/docs/Z030000415_.

⁵⁹ Farkhad Karagussov, *Development of Company Law in Kazakhstan*, 24 JURIDICA INT'L 84-95 (2016).

According to Ussen and Sadyrbayeva, significant changes were brought about by the 2003 legislation compared to its predecessor.⁶⁰ Firstly, the 2003 law eliminated the distinction of closed and open joint stock companies, meaning all companies may now make a public offering of their shares. Meanwhile, there is a unified and increased minimum capital requirement, a ten-fold increase from the former threshold for open companies and 500 times more than that for closed companies.⁶¹ This change was predicted to cause a substantial reduction in the number of joint stock companies.⁶² The 2003 law specified the minimum number of directors, which is three.⁶³ Amongst them, not less than one third of company's board of directors' members must be independent directors. Under prior law, a joint stock company had to form an audit commission to monitor performance of the company. The establishment of an internal audit function is now optional.⁶⁴ To foster more corporate transparency, there are now reporting requirements for major transactions and related-party transaction.⁶⁵ According to the World Bank, since the introduction of the 2003 law, it has been reviewed and amended regularly to strengthen investor protections by, for example, introducing greater requirements for immediate disclosure of related-party transactions to the public, increasing shareholder rights and role in major corporate decisions, clarifying ownership and control structures and requiring greater corporate transparency.⁶⁶

In relation to securities law, similarly, early regulation was achieved by the Civil Codes of 1922 and 1963. With the first domestic stock exchange established in 1993, arguably there had not been a strong demand for securities regulation before then. Suleimenov and Karagoussov have given an overview of the legal development in this area.⁶⁷ In preparation of the establishment of KASE, the *Law on Securities Circulation and the Stock Exchange*, issued on 11 June 1991, was introduced to regulate the following matters: the issuing of securities, the registration of such issues, licensing intermediary activities in the securities market, and the formation and operation of the stock exchange. Subsequently, on 20 March 1994, the President of the Republic of Kazakhstan issued an *Edict on Measures to Form the Securities Market*, which symbolized a new stage of state regulation of the securities market and securities legislation. With this Edict, the *Statute on the National Securities Commission* was approved; a public regulator was installed. A more systematic approach in regulating the market came in 1997 when the Law on Securities Market of 5 March 1997 was enacted. The current Kazakh

⁶⁰ Zhaniya Ussen & Saltanat Sadyrbayeva, *Securities Market Reform in Kazakhstan: an Outline of Major Legal Developments and Consequences*, 2 KAZ. BUS. L. MONITOR 1 (2003).

⁶¹ Article 10 of the Kazakh Company Law. ("The minimum size of the authorized capital of a company shall be 50,000 monthly calculation indices as established by the law of the Republic of Kazakhstan concerning the Republican Budget for the relevant financial year.") The monthly calculation index (MCI) is a unit for calculation of benefits and other social payments, as well as for the penalties, taxes and other charges in accordance with the Republic of Kazakhstan legislation. As of 2018, each index unit is set at KZT2,405 (around US\$7.3).

⁶² Ussen & Sadyrbayeva, *supra* note 60. A more appropriate business form for smaller businesses is Limited Liability Partnership, which is regulated by Law No. 220-I of 22 April 1998 of the Republic of Kazakhstan on Limited and Additional Liability Partnership. There is a low minimum capital requirement of KZT173,100 (further reduced to KZT100 for small businesses).

⁶³ Article 54(5) of the Kazakh Company Law.

⁶⁴ Article 61(1) of the Kazakh Company Law.

⁶⁵ Articles 68 & 71 of the Kazakh Company Law.

⁶⁶ World Bank, *DOING BUSINESS REFORMS* (2018), <http://www.doingbusiness.org/data/exploretopics/protecting-minority-investors/reforms>.

⁶⁷ Maidan Suleimenov & Farkhad Karagoussov, *The Legal Basis for the Securities Market in the Republic of Kazakhstan*, 24 REV. CENT. & E. EUR. L. 451 (1998).

securities law was adopted in 2003, repealing the previous law of 1997.⁶⁸ Similarly, the law has since been amended over time to meet the ever-evolving demands in the financial market.

Another important aspect of the regulation is corporate governance. Codes of conduct and codes of best practices as well as self-regulation are now considered as complementary to statutory regulation. A Code on Corporate Governance was adopted by the Council of Issuers and the Council of the Association of Financiers (Financial Institutions' Association) in 2005 and amended in 2007. There have been no updates since then. The Code is voluntary and applies to Kazakhstan listed companies, which are recommended to incorporate the provisions of the Code in their own codes and bylaws. According to the investigation by the European Bank for Reconstruction and Development (EBRD), while the majority of companies formally incorporate the Code in their corporate documents, in practice the implementation of the Code's principles remains weak.⁶⁹

As discussed, the regulatory framework of the AIFC has its own regulatory framework and is independent of all the regulatory instruments above. The AIFC Companies Regulations were issued on 20 December 2017, comprising 250 articles. In contrast, the current Kazakh Company Law has 91 articles only. On the face of it, the former is far more comprehensive than the latter. The AIFC Market Rules ("MAR" hereinafter), issued on 17 October 2017, comprises six broad rules (with numerous sub-rules) covering six key areas, including offer of securities, governance of reporting entities, financial reports, sponsors and compliance advisers, market abuse, and market disclosure. In contrast, the Kazakh securities law is organized quite differently comprising 114 articles. It is worth noting that the MAR has included its own corporate governance code. Seven general corporate governance principles are contained in MAR 2.2.2 to 2.2.8, with more elaborated standards contained in Schedule 3 of the MAR. For this, a "comply or explain" approach, as introduced firstly by the UK, is adopted. In making a corporate governance statement in its annual report, the listed company must describe it has applied the standards set out in MAR Schedule 3, or alternatively explain reasons for not following them.⁷⁰ It is in a sharp contrast to the voluntary approach under the national code, as explained before.

Considering that it is virtually impossible to compare all these laws in every single aspect using the limited space of this work, the following section will endeavor to examine some selected features of the laws with particular respect to key mechanisms of shareholder protection, which is, as discussed, widely regarded as the essential foundation of a successful financial market.

C. Selected Mechanisms of Shareholder Protection Compared

One core strategy of company law in controlling the agency problem within a company, is to ensure that the directors of a company will perform their duties honestly and diligently. Director duties are provided in Article 62 of the Kazakh Company Law.⁷¹ There is a list of

⁶⁸ The current law is Law No. 461 of 2 July 2003 of the Republic of Kazakhstan on the Securities Market ("Kazakh Securities Law" hereinafter). The English version of the law is available via the Legal Information System of the Ministry of Justice Kazakhstan, http://adilet.zan.kz/eng/docs/Z030000461_.

⁶⁹ European Bank for Reconstruction and Development, CORPORATE GOVERNANCE IN TRANSITION ECONOMIES: KAZAKHSTAN COUNTRY REPORT (2017), <http://www.ebrd.com/documents/legal-reform/kazakhstan.pdf>.

⁷⁰ MAR 2.2.9.

⁷¹ This article has been amended three times since 2003 by Laws of the Republic of Kazakhstan No. 230 dated 19.02.2007; No. 406-IV dated 10.02.2011; and No. 551-IV dated 01.02.2012.

seven duties. According to Dragneva, the law of Kazakhstan managed to contain in the legislation some general standards for the discharge of director duties.⁷² The first principle is that, a director is asked to “perform their duties conscientiously and use the methods which best reflect the interests of the company and its shareholders”. There are also specific duties in relation to the use the company's assets, integrity of the accounting and financial reporting, company disclosure, and confidentiality of the information about the company's activity. The 2011 amendments to the Kazakh company law added two more duties, making it seven in total, in relation to legal compliance and fair treatment of shareholders together with the need to exercise objective independent judgment on corporate issues. However, despite a list of seven duties, the concept of fiduciary duties is still not a single integral set of norms of Kazakhstani legislation.⁷³ For example, the company law lacks some important aspects of the duty of loyalty; does not establish the duty of care; and does not impose the burden of proof on the directors and officers. In addition, it should be understood that the notion of fiduciary duties is perhaps the most complicated mechanism for application in corporate governance. The most important condition for its effective use is the availability of competent and influential court that has sterling knowledge of the doctrine of fiduciary duties. In Kazakhstan, this condition is absent.⁷⁴ It is also necessary to remember that the concept of fiduciary duties is based on the perception of the company's managers as agents, and the shareholders as the owners or principals. Such interpretation is again alien to Kazakhstani corporate law.⁷⁵

In contrast, the AIFC company law is almost an exact reproduction of the Companies Act (CA) 2006 in the UK, covering seven duties.⁷⁶ As a result, an enlightened shareholder value approach is effectively adopted. A director is asked to promote the success of the company for the benefit of its shareholders as a whole and, in doing so, must have regard, among other matters, to the interest of various stakeholders.⁷⁷ However, considering that the CA 2006 has over 1,000 sections, there is a question of whether the AIFC company law, with just over 200 articles, has the same degree of coverage. For example, the enlightened shareholder value approach has a disclosure-based enforcement mechanism. In the UK, the directors of a company must prepare a strategic report for each financial year of the company. The purpose of the strategic report is to inform members of the company and help them assess how the directors have performed their duty under Section 172 (duty to promote the success of the company).⁷⁸ However, the same requirement of a strategic report is not seen in the AIFC company law, meaning that an enlightened shareholder value approach is there but may not be enforceable. Another breakthrough of the CA 2006 is arguably the codification of the duty of care and skills. Traditionally, a subjective standard of care has been imposed by the common law in the English case of *Re City Equitable Fire Insurance*.⁷⁹ The advantage of a subjective test is flexibility, but at the same time, there is no minimum objective standard required of the directors. One legislative aim is to introduce a dual test of an objective and subjective standard.⁸⁰ According to the AIFC company law, it is required that a director of a company must exercise reasonable care, skill and diligence with (i) the knowledge, skill and experience

⁷² Rilka Dragneva, *Legal Regulation of Shareholder Rights in the CIS*, in INVESTOR PROTECTION IN THE CIS 45, 81 (Rilka Dragneva ed., 2007).

⁷³ Dentons, KAZAKHSTAN BUSINESS UPDATES (2015), <https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2015/december/7/kazakhstan-business-updates>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Articles 77-83 of the AIFC Companies Regulations; see also CA 2006 ss 171-177.

⁷⁷ Article 78 of the AIFC Companies Regulations; see also CA 2006 s 172.

⁷⁸ CA 2006 s 414C.

⁷⁹ [1925] Ch 407.

⁸⁰ CA 2006 s 174.

which may reasonably be expected of a director having the same responsibilities (objective standard); and (ii) any additional knowledge, skill and experience which the director in fact has (subjective standard).⁸¹

As for corporate transparency, listed companies are generally required to disclose their financial and operating conditions to the public. This form of information disclosure is generally in the format of annual reports and accounts as well as interim reports. Under Article 4-1 of the Kazakh Company Law, the corporate website of a public company in the public domain should contain the following documents: 1) the charter of the public company; 2) the code of corporate governance; 3) the annual financial statements, confirmed by audit reports; 4) other internal documents, regulating corporate governance issues, including those regulating the activities of the board of directors and its committees, the activities of the corporate secretary, as well as the issues for auditing the public company. The AIFC company law is not too different in this regard.⁸² Meanwhile, certain transactions undertaken or proposed to be undertaken by a company must be disclosed to shareholders or the prior approval of shareholders should be sought. This is an example of how mandatory disclosure can work alongside other legal strategies, in this instance, the decision rights of a shareholder. Such transactions can fall into two categories: major transactions and connected transactions. A major transaction is defined by Article 68 of the Kazakh Company Law. The defining line is normally 25% of the value of the total assets or allotted securities. If the transaction exceeds this amount, then it will be regarded as a major transaction. The company is obliged to publish information on the transaction in Kazakh and Russian in the mass media within three working days after the decision to conclude a major transaction by the company was taken.⁸³ However, this is a need to disclose only, but not requiring shareholder approval unless the transaction will affect 50% of the value of total assets of the company.⁸⁴ If a shareholder disagrees with it, they have the right to demand redemption of their shares by the company.⁸⁵ In contrast, under MAR 2.3.8, a major transaction (again the line is 25% of the value of the company) will require shareholder approval. As for a connected transaction or related party transaction⁸⁶, it will require shareholder approval, both under the Kazakh Company Law and the MAR.⁸⁷

Shareholder decision-making power can be reflected in their approval or disapproval of major and connected transactions. Another aspect of this will be their ability to appoint directors to represent their interests. It is worth noting that Kazakhstan has provided for mandatory cumulative voting, a type of voting system that helps strengthen the ability of minority shareholders to elect a director, for all companies regardless of their size.⁸⁸ In France, the UK and the US, companies may adopt a cumulative voting rule, but public companies rarely do so.⁸⁹ Under the AIFC company law, it is provided that directors (except the founding ones) are elected by the shareholders by ordinary resolution, or as otherwise provided by the Articles of Association, for the term that the shareholders decide, without explicitly endorsing or prohibiting cumulative voting.⁹⁰

⁸¹ Article 80 of the AIFC Companies Regulations.

⁸² Part 10 of the AIFC Companies Regulations.

⁸³ Article 70 of the Kazakh Company Law.

⁸⁴ Article 36 of the Kazakh Company Law.

⁸⁵ Article 70 of the Kazakh Company Law.

⁸⁶ Article 71 of the Kazakh Company Law; MAR 2.5.2.

⁸⁷ Article 73 of the Kazakh Company Law; MAR 2.5.3.

⁸⁸ Article 54 of the Kazakh Company Law.

⁸⁹ John Armour et al., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 80 (2017).

⁹⁰ Article 75 of the AIFC Companies Regulations.

Other than exercising their decision rights (which is normally meaningless to minority shareholder under the basic one-share-one-vote principle), an invaluable tool for shareholders will be their rights to sue. Article 63 of the Kazakh Company Law provides for the liabilities of the directors of the company if shareholders suffer damages, caused by their actions or inaction to the company and its shareholders. The shareholder (shareholders), owning (in the aggregate) five or more percent of the voting shares of the company may apply to the chairman of the board of directors with the request to initiate a legal action against the wrongdoing officers. Meanwhile, it can be assumed that the AIFC company law will have adopted a UK model. As an exception to the rule in *Foss v Harbottle*⁹¹, a shareholder can bring legal proceedings on behalf of the company against any director in respect of misfeasance committed against the company.⁹² This is called a derivative action. However, as opposed to a derivative claim, the AIFC company law indeed permits a shareholder (or any other parties who suffer loss as a result) to sue a wrongdoing director directly.⁹³ This is indeed fairly absurd under the ordinary principle of privity of contract, as there should not be a direct legal relationship between the shareholders (and other parties) and the directors. The danger is that, first, this exposes corporate officers to all sorts of liabilities and litigation risks.⁹⁴ Second, the application of common law can be confusing.⁹⁵ The notable absence of a derivative action is a rare exception of the AIFC's rather wholesale adoption of the UK model. However, the AIFC company law does include an unfair prejudice remedy as seen in the UK.⁹⁶ If a company's affairs are being or have been conducted in a way that is unfairly prejudicial to the interests of its shareholders, the court may grant a range of possible relief to the shareholders. Also, like the UK, a just and equitable winding up order is available under the AIFC company law.⁹⁷

D. Enforcement of Transplanted Law

Legal transplant was a term coined by Alan Watson to indicate “the moving of a rule or a system of law from one country to another”.⁹⁸ On a general theoretical level, Watson believed that legal transplants between different societies are feasible on the proposition that “there is no exact, fixed, close, complete, or necessary correlation between social, economic, or political circumstances and a system of rules of private law”.⁹⁹ Systems related to one another through legal transplants might in their similarities and differences indicate the impetus to growth.¹⁰⁰ Today, legal transplants are often mentioned in the broader process of diffusion and infusion

⁹¹ (1843) 2 Hare 461.

⁹² CA 2006 s 260.

⁹³ Article 174 of the AIFC Companies Regulations.

⁹⁴ *Foss v Harbottle*, which set out the proper claimant principle, has an important practical rationale. It can eliminate wasteful litigation when a wrong can be put right by only one claim initiated by the company, as opposed to a multiplicity of claims initiated by numerous other parties.

⁹⁵ A key doubt is, whether certain classic company law cases such as *Foss v Harbottle* will still have their place in the AIFC jurisprudence.

⁹⁶ Article 175 of the AIFC Companies Regulations; CA 2006 s 994.

⁹⁷ Article 176 of the AIFC Companies Regulations; UK's Insolvency Act 1986 s 122(1)(g).

⁹⁸ Alan Watson, LEGAL TRANSPLANTS AN APPROACH TO COMPARATIVE LAW 21 (1993).

⁹⁹ Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79, 80-83 (1976). Watson believed that “there is no exact, fixed, close, complete, or necessary correlation between social, economic, or political circumstances and a system of rules of private law.” See also Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 313-4 (1978).

¹⁰⁰ Watson, *supra* note 98, at 107.

of law.¹⁰¹ In Twining's view, instead of direct one-way transfer, reciprocal influences between legal orders at different levels are more welcome.¹⁰² However, a transfer of legal rules cannot be divorced from their original environment. Legrand and Teubner address that persistence such as legal culture, legal mentalities and the deep structures of law will constrain and probably overcome the competitive forces pushing for a global convergence.¹⁰³ The success of legal transplants largely depends on the circumstances in which law was imported and the similarities of their legal cultures.¹⁰⁴ As a result, the notion of "transplant effect" is proposed by Pistor and others.¹⁰⁵ Conceiving the formal legal order that evolved in some Western countries is a much more important determinant of legality and economic development than the mere supply of a particular legal code.

Even if a legal action can be initiated, the quality of the judiciary is important in ensuring that there is effective enforcement. In the World Justice Project's Rule of Law Index, Kazakhstan is ranked 50th out of 113 countries in civil justice, which measures whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system.¹⁰⁶ The top three countries are the Netherlands, Denmark and Germany. The UK is in the 14th position. Pressure to improve the judicial system in Kazakhstan has been constantly recognized.¹⁰⁷ Experts from the UK have been notably involved in the legal structures of the AIFC thus far. For example, Lord Woolf CH is the Chief Justice of the AIFC Court. Lord Woolf CH, formerly Lord Chief Justice in the UK, was also the first President of the Qatar Financial Center Civil and Commercial Court (which arguably has also drawn on the Dubai model). The other eight Justices in the AIFC Court have an English law background. Furthermore, the demand for an English legal education/training has been witnessed locally. For example, in early 2016, the AIFC approached the Law Society of England and Wales through the Embassy of Kazakhstan in the UK to discuss a potential judicial training program

¹⁰¹ For diffusion of law, see William Twining, *Diffusion of Law: A Global Perspective*, 49 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (2004). For infusion of law, see Esin Örüçü, *A General View of "Legal Families" and of "Mixing Systems"*, in COMPARATIVE LAW: A HANDBOOK 169 (Esin Örüçü & David Nelken, eds., 2007).

¹⁰² Twining, *supra* note 101, at 20.

¹⁰³ Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262 (1995); and Pierre Legrand, *European Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52 (1996). For a summary of Legrand's ideas, see Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 15 (1998).

¹⁰⁴ Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 13 (1974); see also Pierre Legrand, *The Impossibility of "Legal Transplants"*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); and Watson, *supra* note 98, at 27.

¹⁰⁵ Daniel Berkowitz et al., *Economic Development, Legality and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003); and Katharina Pistor et al., *Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries*, 18 WORLD BANK RES. OBSERVER 89 (2003).

¹⁰⁶ World Justice Project, RULE OF LAW INDEX 2017-2018 (2018), https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition_0.pdf. The Index measures whether civil justice systems are accessible; affordable; and free of discrimination, corruption, and improper influence by public officials.

¹⁰⁷ Kyle Davis, *Purging the System: Recent Judicial Reforms in Kazakhstan*, 8 U.C. DAVIS J. INT'L L. & POL'Y 255 (2002). Also, it is an important theme of the "100 Concrete Steps". For example, Step 16 outlines the transition in Kazakhstan from the five-level justice system (first, appeal, cassation, supervising and re-supervising) to a three-level (first, appeal and cassation) system. The aim is to strengthen foreign and domestic investors' trust in Kazakhstan's court system. Malika Rustem, *Kazakhstan Unveils 100 Concrete Steps to Implement Institutional Reforms*, ASTANA TIMES, May 28, 2015, <https://astanatimes.com/2015/05/kazakhstan-unveils-100-concrete-steps-to-implement-institutional-reforms/>.

for judges and senior court staff from Kazakhstan.¹⁰⁸ The Law Society staff subsequently designed a bespoke judicial training program, which was funded by their national Bolashak Scholarship Fund in Kazakhstan. This training was delivered from April to September 2017 in the UK. On the face of it, the AIFC Court will provide a more trustworthy system to resolve civil and commercial disputes than the Kazakh courts, especially for foreign investors.¹⁰⁹

Further, the International Arbitration Center of the AIFC will provide an alternative dispute resolution platform for them. Similarly, the Center has drawn on the reputation of leading UK lawyers. For example, the Chairman of the International Arbitration Center is Barbara Dohmann QC who has been one of the UK's leading commercial barristers and an international arbitrator for many years. Meanwhile, the importance of arbitration has been recognized nationally. On 8 April 2016, the new Arbitration Law was enacted in Kazakhstan. This law was adopted in response to the request of President Nazarbayev, who noted that "comprehensive development of arbitration is necessary for effective investment activity" and in this connection instructed that a uniform law on arbitration be developed.¹¹⁰ Before that, domestic and international arbitrations were regulated by two different laws.¹¹¹ According to the EBRD, the new Arbitration Law is a step forward in the regulation of arbitration in Kazakhstan, but at the same time raises concerns among investors because it allows a party to unilaterally withdraw from an arbitration agreement; prohibits foreign investors from choosing foreign law to govern a contract with a state-owned company; and introduces a licensing system for arbitration agreements with state bodies or state-owned companies.¹¹² On the other hand, the AIFC Arbitration Regulations 2017 include procedures for expedited arbitrations, the appointment of emergency arbitrators, and resolution of investment treaty disputes.

Generally speaking, company and financial law is an area of private law that will rarely attract criminal liabilities which justify public enforcement. An exception will be white-collar crimes like insider trading.¹¹³ Furthermore, in the case of weak economic incentive for private parties to sue and limited access to information, regulators may be compelled to step in the shoes of

¹⁰⁸ Law Society of England and Wales, FINAL EVALUATION REPORT, PRESENTED IN ASTANA, OF THE LAW SOCIETY'S KAZAKH JUDICIAL TRAINING PROGRAMME (2018), <https://communities.lawsociety.org.uk/capacity-building-of-foreign-law-societies/final-evaluation-report-presented-in-astana-of-the-law-societys-kazakh-judicial-training-programme-/5064501.article>.

¹⁰⁹ For a vision of what the AIFC Court intends to achieve, refer to Lord Woolf CH and Christopher Campbell-Holt, A VISION OF THE AIFC COURT (2019); see also Sir Jack Beatson FBA, THE AIFC COURT AND THE COMMON LAW METHOD OF RESOLVING COMMERCIAL DISPUTES AND ISSUES ARISING FROM REGULATORY DECISIONS (2018), <https://aifc-court.kz/lecture-the-aifc-court-and-the-common-law-method-of-resolving-commercial-disputes-and-issues-arising-from-regulatory-decisions>. It is worth noting that the very first case of the AIFC Court took place in 2019. See *Aurora AG Limited v Star Asian Mining Company LLP* (Case No. 1 of 2019). As of November 2019, it remains the only case ever decided there.

¹¹⁰ Aigoul Kenjebayeva & Nurzhan Albanov, *A New Law "On Arbitration": Key Issues Undermining the Investment Attractiveness of Kazakhstan*, EXPERT GUIDES (2016), <https://www.expertguides.com/articles/a-new-law-on-arbitration-key-issues-undermining-the-investment-attractiveness-of-kazakhstan/arruxdra>.

¹¹¹ Law No 23-III of 28 December 2004 on International Arbitration; and Law No 22-III of 28 December 2004 on Arbitral Tribunals, which was for domestic arbitration.

¹¹² European Bank for Reconstruction and Development, STRATEGY FOR KAZAKHSTAN (2017), <http://www.ebrd.com/documents/strategy-and-policy-coordination/strategy-in-kazakhstan.pdf>.

¹¹³ Article 56 of the Kazakh Securities Law and MAR 5.3. A person found guilty of unlawful use of insider information can be subject to a penalty in the amount of up to 500 MCI. If the same actions caused major damage (major damage is equal to or more than 10,000 MCI), the responsible natural persons can be subject to criminal liability and imprisonment. See Article 230 of the Criminal Code of Kazakhstan. Kazakhstan's criminal legislation, including the Criminal Code, applies to all AIFC participants. So, the penalty should be the same under either regime.

private individuals who are reluctant to seek recourse through the court systems. The National Bank of Kazakhstan is the main regulatory body for the securities market. The National Bank also regulates the financial sector, including banks and insurance companies, and is generally responsible for monetary policy. Its enforcement actions are published online.¹¹⁴ The Kazakh government efforts in regulating the Kazakh capital market have been fully noted by the EBRD.¹¹⁵ On the other hand, the AIFC has its own independent regulator, the Astana Financial Services Authority. But it is still early to make an assessment of its enforcement capacity.¹¹⁶

V. WILL THE AIFC BE A SUCCESS?

As of the beginning of 2019, around half a year since its global launch, the Astana International Exchange has witnessed 14 listings (including equity and debt).¹¹⁷ Kazatomprom, the state-owned uranium production company of Kazakhstan, has been described as “making history” by becoming the first initial public offering of a large Kazakh company in more than a decade.¹¹⁸ Furthermore, 86 companies are registered with the AIFC to operate in and take advantage of their unique institutional structures.¹¹⁹

From an institutional perspective, the AIFC is not the first ever separate and distinct regulatory system within a single country. For the case of Hong Kong, Huang and Yeung argue that the “One Country Two Systems” ideology has enabled Hong Kong to maintain a common law system and a separate corporate and financial law regime, both independent of China, and this institutional advantage has been the foundation of the city’s success.¹²⁰ For example, at the time of reunification on 1 July 1997, China did not even have a proper set of securities law yet.¹²¹ It is in a sharp contrast with Hong Kong who has formally regulated its market since 1974.¹²² More precisely, the institutional concept of the AIFC is indeed modelled on the experience in Dubai.¹²³ The Dubai International Financial Center (DIFC) is a geographic and legal jurisdiction within the emirate of Dubai (part of the federation of the UAE). In 2004 the UAE constitution was amended to allow an emirate to establish a “financial free zone”, a separate legal, geographic and judicial jurisdiction. Federal Law No. 8 of the UAE allows a

¹¹⁴ See the relevant section of the website of the National Bank, <https://nationalbank.kz/?docid=3235&switch=english>.

¹¹⁵ European Bank for Reconstruction and Development, COMMERCIAL LAWS OF KAZAKHSTAN (2014), <http://www.ebrd.com/documents/legal-reform/kazakhstan-country-law-assessment.pdf>.

¹¹⁶ The authors of this article have asked three members of the AIFC Legal Advisory Council during a panel discussion in the AIFC Finance Days on 1-4 July 2019 regarding the transparency of enforcement data, both public and private. They were unable to give a direct answer but at the same time said that, “It may take some time for a new financial center to mature.”

¹¹⁷ Data from the website of the Astana International Exchange, <https://www.aix.kz/listings/listed-companies/>.

¹¹⁸ Ariel Cohen, *Kazatomprom IPO with Astana International Financial Center (AIX) Shows Global Appetite for Uranium*, FORBES, November 27, 2018, <https://www.forbes.com/sites/arielcohen/2018/11/27/kazatomprom-ipo-with-astana-international-financial-center-aix-shows-global-appetite-for-uranium/>.

¹¹⁹ Data from the website of the Astana Financial Services Authority, <http://afsa.kz/public-register>.

¹²⁰ Horace Yeung & Flora Huang, “One Country Two Systems” as Bedrock of Hong Kong’s Continued Success: Fiction or Reality?, 38 B.C. INT’L & COMP. L. REV. 191 (2015). In a meeting with Sayasat Nurbek, former Managing Director of the AIFC, in September 2017, he told the authors of this article that Hong Kong is a model that the AIFC has drawn upon.

¹²¹ China’s first securities law was adopted at the Sixth Session of the Standing Committee of the Ninth National People’s Congress on 29 December 1998.

¹²² The Securities Ordinance and the Protection of Investors Ordinance became effective in this same year. See Securities and Futures Commission, SECURITIES REGULATION IN HONG KONG 11 (2002).

¹²³ See for example, Step 24 of the “100 Concrete Steps” which expressly states this.

free zone to be established by Federal Decree, with Federal Decree No. 35 later specifically establishing the DIFC. All activity within the DIFC is governed by the laws of the DIFC, with the exception that federal criminal law applies within the center. The DIFC has adopted a full set of laws largely based on that of the UK.¹²⁴ Similar to the AIFC, the DIFC has a separate court system, the DIFC Courts, and an independent regulator, the Dubai Financial Services Authority to deal with all matters in the DIFC. The members of the DIFC Courts are generally non-resident senior members of the judiciary from the UK and other British common law jurisdictions.¹²⁵

The DIFC is referred to by the Financial Times as the region's leading hub for financial firms.¹²⁶ In 2016, more than a decade since its establishment, there were 1,648 active registered firms operating in the DIFC, employing a strong workforce of over 20,000 people and generating US\$115 million profits for the government-owned free zone. In the view of Strong and Himer, the DIFC has established a new precedent, that any countries may install world-class legal institutions to help development.¹²⁷ Meanwhile, there are still certain hindrances, such as the financial dependence of the DIFC courts and the extent of application of a-national Shari'a principles, especially with respect to Islamic banking and finance.¹²⁸ These two hindrances are indeed shared by the AIFC when Kazakhstan itself is an Islamic country and the AIFC is determined to develop Islamic finance. More recently, it is reported that friction has arisen on potential conflicts of jurisdiction between the domestic Dubai courts and the DIFC Courts, thereby denting the confidence in the Dubai model.¹²⁹ Despite this, the apparent initial success of the DIFC has led to a nearby imitator. The Qatar Financial Center was established in 2005 to assist in diversifying Qatar's economy to become less reliant on oil and gas. Needless to say, it is a separate jurisdiction based on an English system like the DIFC. A newer imitator was the Abu Dhabi Global Market, again based on the Dubai model, which opened for business in late October 2015. According to Wilson, competition can be helpful to financial development in the region.¹³⁰ It has been predicted that the top regional financial center for managing Middle Eastern investments is essentially a two-horse race between Dubai and Qatar.¹³¹ This largely shows that the institutional innovation pioneered by the two early adopters has worked, and the AIFC has every reason to be hopeful about its future.

VI. CONCLUSION

As the economic leader in the Central Asian region, Kazakhstan is well placed to develop a world class regional financial center. The decision to establish the AIFC, despite a pre-existing

¹²⁴ International Monetary Fund, UNITED ARAB EMIRATES-DUBAI INTERNATIONAL FINANCIAL CENTRE (2007), <https://www.imf.org/external/pubs/ft/scr/2007/cr07365.pdf>.

¹²⁵ *Id.*

¹²⁶ Simeon Kerr, *Dubai International Financial Centre Grows 14% in 2016*, FINANCIAL TIMES, February 20, 2017, <https://www.ft.com/content/5c836cf2-54be-31cc-b743-821158cad970>.

¹²⁷ Michael Strong & Robert Himer, *The Legal Autonomy of the Dubai International Financial Centre*, 29 ECON. AFF. 36 (2009)

¹²⁸ Alejandro Carballo, *The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage within the UAE?*, 21 ARAB L.Q. 91 (2007).

¹²⁹ Simeon Kerr, *Legal Wrangles Dent Dubai's Image as Region's Financial Centre*, FINANCIAL TIMES, October 13, 2017, <https://www.ft.com/content/8d4f047e-87df-11e7-8bb1-5ba57d47eff7>.

¹³⁰ Rodney Wilson, *The Development of Islamic Finance in the Gulf Cooperation Council States*, in THE TRANSFORMATION OF THE GULF 146, 160 (David Held & Kristian Ulrichsen eds., 2012).

¹³¹ Melissa Hancock, *Pace of Regional Rivalry Quickens*, FINANCIAL TIMES, October 19, 2012, <https://www.ft.com/content/bb9e38e6-187b-11e2-8705-00144feabdc0>.

commercial and financial center in Almaty, clearly confirms the commitment of the country to do so. Kazakhstan has drawn on the Dubai experience to make sure that the AIFC will fly high. However, if one believes in the relationship between institutions and financial development, an obvious question will be what makes the AIFC different from other parts of Kazakhstan, let us say, Almaty. As shown in this article, the AIFC has a mostly verbatim reproduction (with some exceptions such as the unavailability of derivative actions) of various UK legislations in its rulebooks and they have English judges to reside in their AIFC Court. All these are primarily intended to reconstruct a familiar business and legal environment that foreign investors can trust so that they are comfortable enough to take their money and business to Kazakhstan. One determining factor will be whether there is a credible degree of shareholder protection. As discussed, Kazakhstan is currently recognized by the World Bank as having the best minority shareholder protection regime in world. Arguably, there is not much more to learn from the UK system in terms of written rules. In other words, quite surprisingly, the AIFC does not indeed have a particularly impressive set of company and financial law rules when compared to the rest of Kazakhstan. Also, the adapted legal transplantation in the AIFC as opposed to a wholesale transplantation from the UK means that it remains to be seen how certain laws are to be interpreted, applied and enforced.¹³² Further, a robust legal system should comprise both legal rules and enforcement.¹³³ The AIFC Court is expected to mirror their Dubai counterpart, which is “renowned for their investor-friendly approach”.¹³⁴ It is the whole regulatory package that will presumably make the AIFC work in the future. This is perhaps an important point that other aspiring financial centers should bear in mind, should they want to adopt the Dubai/Qatar/Abu Dhabi/Astana model.

¹³² Such as Article 174 of the AIFC Companies Regulations.

¹³³ John Coffee, *Law and the Market: the Impact of Enforcement*, 156 U. PA. L. REV. 229 (2007).

¹³⁴ Kerr, *supra* note 129.