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AIFC Law and Sources of Law in the Republic of Kazakhstan

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Abstract: The paper discusses the impact of the current law of the Astana International Financial Center on the development of the system of sources of law in the Republic of Kazakhstan. It is noted that over the five years of the functioning of the AIFC jurisdiction, the legal system of Kazakhstan has included elements atypical for the existing system of sources of national law, allowing the use of foreign judicial practice, international standards and ways of interpreting legal norms in a foreign language. The lack of a doctrinal understanding of this process, and sometimes ignoring the trends in the development of the new AIFC jurisdiction in the legal community, leads to the formation of parallel law and order in terms of sectoral regulation, contradictions between which will only increase over time. The author proposes to investigate and analyze the differences between the sources of AIFC Law in the context of sources of national law, and on the basis of this to harmonize existing approaches.

Keywords: Astana International Financial Center, sources of law, current AIFC law, English common law, financial relations, legal doctrine, implementation.

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Түйіндеме: Мақалада «Астана» Халықаралық қаржы орталығының қолданыстағы құқығының Қазақстан Республикасындағы құқықтың қайнар көздері жүйесін дамытуға әсері туралы мәселе қаралады. АХҚО юрисдикциясы жұмыс істеген бес жыл ішінде Қазақстанның құқықтық жүйесінің құрамына шетелдік сот практикасын, халықаралық стандарттарды және құқықтық нормаларды түсіндіру тәсілдерін шет тілінде қолдануға мүмкіндік беретін ұлттық құқықтың қайнар көздерінің қалыптасқан жүйесі үшін типтік емес элементтер енгізілгені атап өтілді. Бұл процесті доктриналық түсінудің болмауы, кейде АХҚО құқығының қоғамдастықтағы жаңа юрисдикциясының даму тенденцияларын елемей салалық реттеу бойынша параллельді құқықтық тәртіптердің қалыптасуына әкеледі, олардың арасындағы қайшылықтар уақыт өте келе арта түседі. Автор АХҚО құқығының қайнар көздерінің айырмашылықтарын ұлттық құқықтың қайнар көздерінің контекстінде зерттеуді және талдауды, соның негізінде қолданыстағы тәсілдерді үйлестіруді ұсынады.

Негізгі сөздер: «Астана» Халықаралық қаржы орталығы, құқықтың қайнар көздері, АХҚО қолданыстағы құқығы, ағылшын жалпы құқығы, қаржылық қатынастар, құқықтық доктрина, имплементация.

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Аннотация. В статье рассматривается вопрос о влиянии действующего права Международного финансового центра «Астана» на развитие системы источников права в Республике Казахстан. Отмечается, что за пять лет функционирования юрисдикции МФЦА в состав правовой системы Казахстана оказались включены нетипичные для сложившейся системы источников национального права элементы, допускающие применение на иностранном языке зарубежной судебной практики, международных стандартов и способов толкования правовых норм. Отсутствие доктринального осмысления данного процесса, а иногда игнорирование тенденций развития новой юрисдикции МФЦА в юридическом сообществе приводит к формированию параллельных по отраслевому регулированию правовых порядков, противоречия между которыми со временем будут только возрастать. Автор предлагает исследовать и проанализировать различия источников права МФЦА в контексте источников национального права, а на основе этого гармонизировать существующие подходы.

Ключевые слова: международный финансовый центр «Астана», источники права, действующее право МФЦА, английское общее право, финансовые отношения, правовая доктрина, имплементация.

Introduction

In the Republic of Kazakhstan for the period from 2018 to 2023 the legal framework for the operation of the Astana International Financial Center (hereinafter – the Astana IFC) was formed as a special legal regime for conducting business based on international standards and principles of English common law. In addition a special legal regime has been established at the constitutional level in the Astana IFC, within which conditions have been created for the establishment and development of a system of precedent norms in the activities of the Astana IFC Court and there is a possibility of developing this area in the activities of the Astana IFC Arbitration. During this period the new jurisdiction of the AIFC is characterized by an increase in the number of registered legal entities – their number already exceeds 2,200 and the number of countries of nationality of the founders of these companies is 78 (among them the most common are China, Russia, the United States and the United Kingdom).

Materials and Methods

The paper uses the works of scientists devoted to AIFC Law and jurisdictions of the international financial centers, as well as other scientific literature on the problems of theory law and comparative law. The paper uses research methods

characteristic of analytical jurisprudence, as well as special legal methods (formal legal method of interpretation of regulatory prescriptions).

Main Provisions

In 2017 an addition was made to Article 2 of the Constitution of the Republic of Kazakhstan on the possibility of establishing a special legal regime in the financial sector in Astana in accordance with the constitutional law [1]. On December 7, 2015, the Constitutional Law "On the Astana International Financial Center" entered into force, the norms of which in several languages became the basis the formation of the jurisdiction of the AIFC as indicated on the official website of the Center [2]. The adoption of this law was preceded by the publication of the Joint Action Plan of the National Bank of the Republic of Kazakhstan and the Government of the Republic of Kazakhstan on the formation of the Astana IFC as well as the publication of Decree of the President of the Republic of Kazakhstan No. 24 dated May 19, 2015 to implement measures to update national legislation and create favorable conditions for the activities of the AIFC.

The legislator has fixed at the constitutional level the possibility of creating and using legal acts of the AIFC based on the principles, norms and precedents of the law of England and Wales as well as the possibility for the AIFC Court to use its own previous similar court decisions as well as decisions of courts of other jurisdictions of common law countries in dispute resolution.

It should be noted that the AIFC Management Council [3] headed by the President of the Republic of Kazakhstan has the right to include the principles, norms and precedents of the law of England and Wales into the current AIFC Law, which carries out its functions through the issuance of relevant resolutions [4, p. 31]. It follows from this that the legal norms, principles and precedents of England and Wales penetrate into the substance of the AIFC's current law system exclusively through acts adopted by the bodies of the Astana IFC, within the powers granted to them by the Law on the Astana IFC [4, p. 31].

The most significant innovation in the regulation of relations on the territory of the AIFC is the creation of an autonomous judicial system for the resolution of financial and investment disputes. The experience of creating special arbitration courts on the territory of international financial centers is known in international practice but in the case of the AIFC a constitutional basis is provided for the formation of such specialized courts of the Center. By its legal nature the AIFC Court is a court with special jurisdiction limited to financial transactions and other disputes within the competence of the Center's bodies [5].

Discussion

In the scientific literature the analysis of the processes of formation and functioning of the AIFC as a special jurisdiction is presented rather modestly. The first publications on this topic began to appear in 2016 especially on the pages of a special issue of the journal "Law and the State" dedicated to English Law (S.F. Udartsev, N.S. Yeshniyazov, M.M. Daulenov, M.N. Abilova) and in the works of A.B. Didikin [6]. Later attempts to analyze the special legal regime of the AIFC in

Astana and the current law of the AIFC were made in the papers by D.S. Batyrbekova and S.K. Ukin [7] as well as through the prism of the theory of judicial precedent and constitutional law – I.I. Rogov [8], M. Gabdualiev [9], M. Seidimbek [10], A. Nurmagambetova, S. Nurmagambetova [11]. The appearance of books and papers by the "founding fathers" of the AIFC, Lord Harry Kenneth Woolf and the Chairman of the AIFC Legal Advisory Council, Michael Blair, devoted to the Court and jurisdiction of the AIFC in 2019-2020 [13, 14] somewhat revived the search for doctrinal grounds for the development of this new jurisdiction.

The territorial jurisdiction of the AIFC is determined by its borders within the territory of Astana especially part of the territory of the International Exhibition Expo-2017. Despite geographical restrictions the jurisdiction itself is extraterritorial that is companies are required to be physically present in Astana only at the level of legally designed office premises but business processes themselves can take place in the world at the discretion of company managers. The experience of other international financial centers (in particular London, Dubai, Qatar and Hong Kong) was used as the basis for the formation of the AIFC's legal model where the internal law of the Center is also applied using English in document management, regulating financial and other relations between residents of the Center and the external socio-economic environment.

Article 1 of the Constitutional Law, which defines the key concepts, states that the special legal regime of the Astana IFC is based on the operation of the legal acts of the Center as the main regulators of the relationship between the participants of the Center, investors, Administration and public authorities. Along with this a special judicial body and a technological stock exchange have been established on the territory of the Center and uniform rules for financial activities based on international standards are being formulated.

The global goal of the Center's existence related to attracting investments into the economy of the Republic of Kazakhstan is realized by achieving other important tasks, in particular the development of the securities market and its integration with international capital markets, the development of the insurance, banking and Islamic finance markets, as well as the financial and professional services market. At the same time the Center and its participants are independent in all matters of their activities from national authorities and supervisory authorities.

Research Results

The most important innovation of the special legal regime of the Center is the possibility of making decisions and legal acts that can be based in accordance with Article 4 of the Constitutional Law on the principles, norms and precedents of the law of England and Wales and (or) standards of world financial centers. It follows that since 2018 two interrelated elements have developed in the legal system of the Republic of Kazakhstan – national jurisdiction and the jurisdiction of the AIFC [15]. Does this mean that English Common Law has been introduced into the legal system of the state? What happens to the system of sources of law as the AIFC develops?

Firstly, it should be noted the flexibility of regulation for the legal acts of the AIFC. Along with the effect of legal norms in the original language many AIFC acts allow references to the practice of other international financial centers and business practices and may also create a "regulatory sandbox" mode in terms of the possibility of testing new financial technologies. It follows from this that even if any issue is settled by the norm of the AIFC act, which has a higher legal force than the norm of the national law, the ways of applying this norm may vary.

Secondly, there is a noticeable language barrier in the AIFC jurisdiction since the texts of the legal acts of the AIFC, according to the Constitutional Law, are not subject to official translation into the qazak or russian languages. This means that only the text of the AIFC act in English is official and who exactly will be able to act as its translator leaves questions.

Thus in a formal legal sense the jurisdiction of the AIFC is determined by the legal acts of the AIFC on the basis of the Constitutional Law and memoranda on interaction with national authorities.

However from the point of view of legal doctrine a combination of institutions of English Common Law and National Law of the Republic of Kazakhstan can be seen in the structure of the jurisdiction of the AIFC.

For example from the sources of English law adapted to the regulation of financial relations in the AIFC one can find "statutory law" (the principles and norms of English law in the original language are adopted in the legal acts of the AIFC), legal doctrine as a source of law (it is formed through the publication of the works of the judges of the AIFC Court (Lord H. Woolf, etc.) for the interpretation of acts of the AIFC and the adoption of judicial decisions), as well as judicial precedents (the AIFC Court, decisions of courts of the common law system), according to paragraph 2 of Part 1 of Article 4 of the Constitutional Law on the AIFC. Despite the fact that among these three sources of English law only the first one has been fully developed so far the expansion of the judicial practice of the AIFC Court (40 court decisions as of 2023) contributes to the development of the doctrine of judicial precedent and interpretation of legal acts of the AIFC.

The sources of the current AIFC Law on the part of National Law should include the Constitution of the Republic of Kazakhstan (enshrining the special legal regime of the AIFC), the Constitutional Law on the AIFC (defining the scope of regulation of legal acts of the AIFC), memoranda and international agreements between the AIFC and foreign financial institutions as well as between public authorities. Thus, the dynamics of changes in national legislation also affects the modification of the current AIFC Law.

Based on these provisions it would be incorrect to believe that the current AIFC Law "copies" or "transfers" English Common Law as a legal order. The legal acts of the AIFC are based only on the principles and standards of English Common Law, formalizing them for internal legal relations in the jurisdiction of the Center. Mainly such relations are the organizational and legal forms of legal entities (whose activities, however, are not based on English law but on the internal legal acts of the

Center applied in the English version), methods of transactions and placement of securities, regulation of labor relations in the jurisdiction of the Center, etc. Otherwise the intersection between the two jurisdictions in the Republic of Kazakhstan is observed, for example, when the state approves the register of separate accounting of income and expenses of residents of the Astana IFC since a tax-free regime for residents is established inside the Astana IFC. The national legal regulation remains outside the jurisdiction of the Center.

One of the aspects of this provision is the approval by the Management Council of the Center of the procedure for the development and adoption of legal acts of the Center, which allows for some autonomy of the jurisdiction of the Center from national law. At the same time the legal acts of the Center regulate limited types of legal relations (civil law relations; civil procedure relations; financial relations; administrative procedures). The law provides for a special management system for the AIFC. It consists of the Management Council of the Center, the administration of the Center the Committee of the Center for the Regulation of Financial Services and the Court of the Center.

An important innovation of the Center's jurisdiction provided for by the Constitutional Law is its functioning based on the use of the English language. English is the official language of the Center, in which documents are drawn up, responses to requests are formulated, mediation and legal proceedings are carried out. The Center can translate documents into Qazak and Russian languages as well as provide interpreters in mediation and legal proceedings.

A significant innovation in the regulation of relations on the territory of the AIFC is the creation of an autonomous judicial system for resolving financial and investment disputes. The experience of creating special arbitration courts on the territory of international financial centers is known in international practice but in the case of the AIFC a constitutional basis is provided for the formation of such specialized courts of the Center. By its legal nature the AIFC Court is a court with special jurisdiction limited to financial transactions and other disputes within the competence of the Center's bodies.

The autonomy of the Court of the Center consists in the fact that it is not part of the judicial system of the Republic of Kazakhstan and operates on the basis of two instances – the Court of first instance and the Court of Appeal. At the same time the Court's jurisdiction does not extend to criminal and administrative proceedings and concerns only specific financial disputes of the following types:

- consideration and resolution of disputes arising between the participants of the Center, the bodies of the Center and (or) their foreign employees (labor and civil law disputes);
- consideration and resolution of disputes concerning any transaction carried out in the Center and subject to the law of the Center (currency and financial transactions, stock trading, securities transactions);
- consideration and resolution of disputes submitted to the court of the Center by agreement of the parties.

Conclusion

When resolving disputes the Court of the Center may be guided not only by the legal acts of the Center but also by precedents that have entered into force – decisions of courts of other common law jurisdictions as well as the precedents of the Court of the Center itself on specific disputes. As noted by M.M. Daulenov and M.N. Abilova the precedents of English law can "penetrate" into the substance of the internal law of the Center through special decisions of its bodies as well as through the work of the Court, which may in some cases violate the principle of "legal certainty" [4, p. 31]. It is difficult to agree with this given that the stability of the legal system of the Astana MFC will be ensured not by the arbitrary application of decisions of foreign courts of the Anglo-Saxon legal family, but according to a pre-established procedure for amending the legal acts of the Center. The judicial discretion of the judges of the Court of the Center will also be limited by the jurisdiction of the Center and the nature of the financial disputes under consideration.

Thus the development of the current AIFC law has an impact on the system of sources of national law in the Republic of Kazakhstan. This process requires a doctrinal understanding and sound proposals for the harmonization of legal regulation models in each jurisdiction.

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