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“The Rise of Distinct Common Law Commercial Zones in Islamic Countries”

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The Rise of Distinct Common Law Commercial Zones in Islamic Countries

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This paper investigates four instances of the transplantation of English commercial law (broadly defined) into a different legal environment. The financial centres in Dubai (UAE), Abu Dhabi (UAE), Doha (Qatar) and Nur-Sultan, formerly Astana (Kazakhstan) adopted a legal regime based on English Common Law, despite their national civil law and Islamic traditions. This choice seeks to create an attractive business environment through optimal protection of market participants' rights. The paper employs a comparative perspective to explore tensions arising from the interaction of different legal traditions and how the Common Law may provide the institutional conditions for the centres' success. This research is the first study which appraises comprehensively, through a comparative perspective, the unique institutional and regulatory model adopted and practised by the four zones: the Dubai International Financial Centre (DIFC), Abu Dhabi Global Market (ADGM), Qatar Financial Centre (QFC), and Astana International Financial Centre (AIFC). The key institutional innovation of these financial zones is their transplanting and operation of laws based on the English common law, independent of their national legal systems (civil law systems, influenced by Islamic tradition, and, in the case of Kazakhstan, also Soviet socialist principles). The four zones are in different stages of their development. The DIFC was established in 2004, as the pioneer in introducing this ground-breaking institutional model. The QFC quickly followed suit in 2005. The ADGM and AIFC, launched in 2013 and 2018 respectively, are a comparatively late adopter. A comparative law approach is employed by this article. There are three dimensions of comparison: (1) comparing the centres' rules and regulations with their UK counterparts to reveal the degree of legal transplantation; (2) comparing the centres' rules and regulations with their domestic counterparts to explore a potential regulatory gap between the two systems; and (3) comparing the four different regimes to reveal their potentially different experience, particularly in relation to institutional quality and enforcement, in transplanting commercial laws, especially corporate and financial laws from the UK.

Keywords: Common Law, Financial Development, Dubai, Abu Dhabi, Qatar, Nur-Sultan (Astana)

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This paper seeks to explore the institutional development of four financial centres in the Middle East and Central Asia, which all have transplanted English law into their legal framework as the strategy to attract businesses and investors. These four financial centres are, in the order of the time of establishment, the Dubai International Financial Centre (DIFC), Qatar Financial Centre (QFC), Abu Dhabi Global Market (ADGM), and Astana International Financial Centre (AIFC).

Legal Bases of the Establishment of the Zones

The DIFC is a geographic and legal jurisdiction within in the emirate of Dubai, part of the federation of the United Arab Emirates (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.¹ Federal Law No. 8 of 2004 of the UAE allows a free zone to be established by Federal Decree. The zone shall be subject to all Federal laws, with the exception of Federal civil and commercial laws.² This on the one hand empowered the DIFC to create its own legal and regulatory framework for all civil and commercial matters. On the other hand, it confirmed the application of Federal criminal laws in the zone, including the Federal laws on anti-money laundering.³ Federal Decree No. 35 of 2004 officially created the DIFC as a Financial Free Zone in Dubai with accompanying cabinet resolution setting out the geographic boundaries of the DIFC. Furthermore, the Dubai Law No. 9 of 2004 acknowledged and confirmed the creation of the DIFC by recognising its financial and administrative independence, and creating essential bodies, which include the DIFC Authority⁴, Dubai Financial Services Authority⁵ (DFSA), and DIFC Courts⁶.

The DIFC Authority is responsible to oversee the strategic development, operational management and planning of Dubai International Financial Centre. It is also responsible for the development and administration of laws and regulations other than those related to the financial services firms. The DFSA is an independent regulator of financial and related services conducted in or from the Centre. The DFSA also supervises regulated companies and monitors their compliance with the applicable laws and regulations. The DIFC Courts are the designated legal fora for resolving all civil and commercial laws disputes.

¹ Article 121 of the UAE Constitution, which deals with the division of powers between Federal and Emirati authorities.

² Article 3(2), Federal Law No. 8 of the UAE.

³ Article 3(1), Federal Law No. 8 of the UAE.

⁴ Article 6, Dubai Law No. 9 of 2004.

⁵ Article 7, Dubai Law No. 9 of 2004.

⁶ Article 8, Dubai Law No. 9 of 2004.

As for the QFC, the Qatari Law No. 7 of 2005, became effective on 1 May 2005. Although the country's first constitution had been issued in 2004, it did not actually come into effect until after the establishment of the QFC.⁷ However, the 2005 Law did make brief reference to its predecessor, the Amended Provisional Constitution 1972. The 2005 Law sets out the structure of the QFC and establishes the independent bodies necessary for its operation. These include the QFC Authority, the QFC Regulatory Authority, the Civil and Commercial Court (first instance and appellate divisions), and the QFC Regulatory Tribunal. The functions of the first three bodies are broadly similar to their Dubai counterparts and require no additional explanation. But it is worth noting that the QFC Regulatory Tribunal is established as a specialist appeals body to hear complaints raised by individuals and corporate bodies against decisions of the QFC Authority, Regulatory Authority and other QFC Institutions.⁸ The Appellate Circuit of the Civil and Commercial Court shall have the jurisdiction to hear appeals against decisions of the First Instance Circuit, as well as appeals against decisions of the Regulatory Tribunal.⁹ Except criminal law, the QFC laws and regulations shall apply to the contracts, transactions and arrangements conducted by the entities established in, or operating from the QFC.¹⁰

As for the ADGM, since Abu Dhabi is an Emirate within the UAE, Federal Law No. 8 of 2004 applies which allows establishing a financial free zone in any Emirate of the UAE, by Federal Decree. As noted before, it exempts financial free zones and financial activities from all Federal civil and commercial laws, when the UAE criminal law still applies. The Federal Decree No. 15 of 2013 and its associated cabinet resolution formally established the ADGM as a financial free zone on Maryah Island in the Emirate of Abu Dhabi. Meanwhile, like its Dubai counterpart, ADGM requires an Emirati legislation to set out the governance, legislative, and regulatory framework. The relevant legislation is the Abu Dhabi Law No. 4 of 2013. The key bodies within ADGM are the Registration Authority, Financial Services Regulatory Authority, and ADGM Courts.

Lastly for the AIFC, in December 2015, President Nazarbayev of Kazakhstan signed the Constitution of the AIFC which provides a legal framework for its establishment and operation. The Constitution of Kazakhstan was amended to allow a 'special legal order in financial field' be established within the territory of Astana.¹¹ According to this legal

⁷ Al Jazeera, 'Qatar to Adopt First Constitution' (8 June 2005). Before that, a provisional constitution was enacted in 1970, subsequently amended in 1972.

⁸ Article 8(2), Qatari Law No. 7 of 2005.

⁹ Article 8(3), Qatari Law No. 7 of 2005.

¹⁰ Article 18, Qatari Law No. 7 of 2005.

¹¹ Article 2 of the Constitution of the Republic of Kazakhstan. 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 Centre in the future. But retaining the name of AIFC can still make sense as Astana means 'capital city' in local language.

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 centres.¹² The current laws of Kazakhstan apply to the extent that they do not conflict with the laws adopted by the AIFC. 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 Astana International Arbitration Centre.¹³

In a nutshell, the following table summarises the national legal bases enabling the establishment of the four financial centres. As it can be seen, the process normally requires additions/changes to different levels of the law, from constitutional level to dedicated statute(s) in creating the zone.

DIFC	QFC	ADGM	AFIC
<ul style="list-style-type: none"> - UAE Constitution (art. 121) - Federal Law No. 8 of 2004 - Federal Decree No. 35 of 2004 - Dubai Law No. 9 of 2004 	<ul style="list-style-type: none"> - Amended Provisional Constitution of 1972 (arts. 23, 34 & 51) - Qatari Law No. 7 of 2005 	<ul style="list-style-type: none"> - UAE Constitution (art. 121) - Federal Law No. 8 of 2004 - Federal Decree No. 35 of 2004 - Abu Dhabi Law No. 4 of 2013 	<ul style="list-style-type: none"> - Constitution of the Republic of Kazakhstan (art. 2) - Constitution Statute No 438-V ZRK of 7 December 2015

A Snapshot of their National Legal System – How are the zones different?

Naturally if the countries have a reliable national legal system in regulating civil and commercial matters, it will not justify the need to have a separate system in place. This part will therefore seek to present a quick overview of their national systems, before examining in more details the legal framework in the zones.

A common feature between all four zones is that they all have a national civil law system. In the cases of the DIFC and ADGM, the UAE adopts a dual legal system of civil and Sharia laws. The UAE's Constitution provides that Islam is the official religion of the Federation

¹² Article 4(1) of the Constitution of the AIFC, official known as the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre (Constitution Statute. No 438-V ZRK of 7 December 2015).

¹³ Article 9 of the Constitution of the AIFC.

and the Islamic Sharia is a main source of its legislation.¹⁴ However, most codified legislations in the UAE are indeed a mixture between Islamic laws and other civil laws such as the Egyptian and French civil laws.¹⁵ The Sharia law courts work alongside the civil and criminal courts. The former have the exclusive jurisdiction to hear family disputes. Religious principles like prohibition of *Riba*, *Gharar* and *Maysir* in financial transactions can have a direct impact on the operations of businesses.¹⁶ The legal structure in the UAE runs in two systems: the Federal Judiciary presided by the Federal Supreme Court as the highest judicial authority in the UAE and the local judicial authorities in each Emirate.¹⁷

In the view of Hamzeh, a unique legal system prevails in Qatar amongst the Arab Gulf states such as the UAE.¹⁸ On the one hand, like the UAE, dualism of civil and Sharia laws exists in the Qatari system. On the other hand, the dualism there is ‘visible’, as opposed to the UAE, as well as other states in the Gulf. In a typical Gulf state, the basis of Islamic legitimacy and the Sharia law apply to all people, Muslims or not. However, in Qatar, the economic activities and civil matters of non-Muslims are regulated by a special court, the *Adlia* court (civil court). In other words, a separate jurisdiction has effectively long existed before the QFC. Meanwhile, Muslims will still settle their disputes through the Sharia court (Islamic court).

In relation to Kazakhstan, there can be a doubt of whether it is an Islamic state (from a legal perspective). According to Article 1 of the Kazakhstani Constitution, ‘The Republic of Kazakhstan proclaims itself a democratic, secular, legal and social state.’ However, in reality around 70 percent of the population is Muslim, broadly the level as seen in the UAE and Qatar.¹⁹ In the view of Cornell and colleagues, Islam in Kazakhstan has remained largely the domain of individual belief, and not translated into politics.²⁰ According to a 2013 global Pew survey of Muslims’ attitudes, Kazakhstan has among the lowest levels of support of any Muslim country for Sharia law: only 10 percent of Kazakhs support it. The CIA World Factbook describes its legal system as a ‘civil law system influenced by Roman-Germanic law and by the theory and practice of the Russian Federation’.²¹ In contrast, Stalbovskiy and colleagues believe that the legal system of Kazakhstan is influenced by the traditions of both

¹⁴ Article 7 of the UAE Constitution.

¹⁵ <https://www.government.ae/en/about-the-uae/the-uae-government/the-federal-judiciary>

¹⁶ The meanings of the three words are: *Riba* (interest), *Gharar* (uncertainty) and *Maysir* (gambling). https://mpr.aub.uni-muenchen.de/67711/1/MPRA_paper_67711.pdf.

¹⁷ Articles 99, 104 & 105 of the UAE Constitution.

¹⁸ <http://ddc.aub.edu.lb/projects/pspa/qatar.html>

¹⁹ CIA World Factbook.

²⁰ <https://silkroadstudies.org/resources/pdf/SilkRoadPapers/2018-04-Kazakhstan-Secularism.pdf>

²¹ CIA World Factbook

Islamic law and Roman law.²² In addition to the three-tier court system (district and city, appeal and supreme courts), the EBRD observes that specialised courts have been established, such as economic and administrative courts, and a specialised financial court.²³ The Special Financial Court of the City of Almaty, for example, can determine matters involving ‘participants’ in the Almaty Regional Financial Centre, namely businesses having a permanent presence in Almaty and being licenced accordingly. This was arguably an early experiment of the AIFC and its court.

In addition to a separate court system, the zones have their own rules and regulations in various civil and commercial areas, there is a need to look at their national counterparts to justify why a dedicated separate set of rules is required in the zones to facilitate business. Considering that it is virtually impossible to examine all civil and commercial laws of the UAE, Qatar and Kazakhstan using the limited space here, a convenient way to do so will be by referring to the World Bank’s Doing Business Report.²⁴ 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 2019 covers 11 indicator sets and 190 economies. Economies are ranked on their ease of doing business, from 1–190th. A high ease of doing business ranking means the regulatory environment is more conducive to the starting and operation of a local company.

According to the World Bank ranking, the UAE, Qatar and Kazakhstan are ranked 11th, 83rd and 28th respectively. As a comparison, the US and UK, where the two leading financial centres in the world, New York and London, are located, are ranked 8th and 9th respectively. On the face of it, there is still room for the three countries to learn from the Anglo-American system. However, if one truly believes in the robustness of the ranking, the regulatory gap is not really vast, except for Qatar. Further, these countries are indeed world leading in certain important aspects of doing business. For example, the UAE is ranked the first and second in getting electricity and paying taxes respectively.²⁵ Kazakhstan is ranked the first and fourth in protecting minority investors and enforcing contracts respectively.²⁶

²² <https://www.nyulawglobal.org/globalex/Kazakhstan1.html>

²³ Commercial laws of Kazakhstan An assessment by the EBRD.

²⁴ Doing Business Website

²⁵ ‘Getting Electricity’ measures all procedures required for a business to obtain a permanent electricity connection and supply for a standardised warehouse; ‘Paying Taxes’ measures the taxes and mandatory contributions that a medium- size company must pay in a given year as well as measures of the administrative burden of paying taxes and contributions and complying with postfiling procedures.

²⁶ ‘Protecting Minority Investors’ measures the protection of minority investors from conflicts of interest through various indicators, based on the strength of securities regulations, company laws, civil procedure codes and court rules of evidence; ‘Enforcing Contracts’ measures the time and cost for resolving a commercial dispute through a local first-instance court and the quality of judicial processes index.

In a nutshell, for a summary of the key features of their national legal systems and business environment, please refer to the table below. The availability of *Adlia* route in Qatar and a specialist financial law court in Almaty, Kazakhstan apparently provided the early foundation and recognition for the need of non-religious and specialisation of civil and commercial regulation.

	UAE	Qatar	Kazakhstan
Legal System	Mix of Civil and Islamic	Mix of Civil and Islamic	Civil (without notable Islamic influence, despite the religion is practised by the majority of population)
Court System	Federal and Emirati; Sharia, civil and criminal courts	Sharia and <i>Adlia</i> (civil) courts.	Three-tier court (district and city, appeal and supreme); Special Financial Court of Almaty
Quality of Business Regulation (ranking by World Bank, out of 190 economies)	11th	83rd	28th

Substantive Regulations – a General Perspective

As explained before, in addition to dedicated administrative and regulatory authorities, the core feature of the four zones is their independent set of civil and commercial regulations and common law court systems. This section will focus on the former, before moving on to look at the court systems.

The DIFC has 27 main regulations, covering various important areas of civil and commercial law, independent of their national framework.²⁷ Although it is understood that the four zones seek to mirror or (adaptively) transplant from an English system, it is worth noting that English contract law is largely common law based yet the DIFC has a comprehensive code

²⁷ These include, for example, Arbitration Law DIFC Law No 1 of 2008, Companies Law No. 5 of 2018, Contract Law DIFC Law No. 6 of 2004, Employment Law, DIFC Law No.2 of 2019, Insolvency Law, DIFC Law No.1 of 2019, Law of Security DIFC Law No. 8 of 2005, Real Property Law No. 10 of 2018, Trust Law, DIFC Law No. 4. of 2018, etc.

on contract law.²⁸ In contrast, the QFC has 29 main regulations. Two notable regulations that are on the list of QFC but not that of the DIFC are Immigration Regulations and Tax Regulations. More is to be discussed below on these two aspects of regulation in light of the incentives given to the participants and businesses in the zones. As for the ADGM, it claims to be the first jurisdiction in the Middle East to ‘directly apply common law’.²⁹ Consistent to this approach, the ADGM has a notably shorter list of regulations (comprising 17). A notable regulation is the Application of English Law Regulations, which on the one hand stipulates that, ‘The common law of England (including the principles and rules of equity), as it stands from time to time, shall apply and have legal force in, and form part of the law’ of the ADGM.³⁰ On the other hand, certain Acts in the England ‘shall apply and have legal force in, and form part of the law of’ the ADGM, and as a result, the ADGM does not need to reproduce (no matter adaptively or wholesale) and re-enact that specific area of the law.³¹ The Schedule of Applicable Statutes is contained in the Regulations, and there are 47 English statutes such as the Bills of Exchange Act 1882, Partnership Act 1890, Sale of Goods Act 1979, Trustee Act 2000 and so on. Some of these 47 statutes apply in full whilst the rest require modifications as stated in the Schedule. The list of 17 main ADGM regulations still contains some regulations in key areas like company law, data protection, insolvency, real property and so on, where the English counterparts do not apply directly.³² Meanwhile, the AIFC has 20 main regulations. It largely resembles the lists of the DIFC and QFC, and at the same time streamlines them a bit by omitting items like Hotel Operating Regulations (DIFC), Single Family Office Regulations (DIFC), and also no immigration and tax rules as in the QFC.

In addition to a dedicated legal framework, there are also some incentives (both financial and non-financial) to attract businesses and participants to the zones, especially in relation to taxation and immigration policy. Normally, these can be in the form of a preferential tax regime and/or a simplified visa regime. In the DIFC, a 50-year guarantee of zero taxes on corporate profits their employees’ income is provided.³³ However, it is only attractive to certain companies when compared to the rest of Dubai and the UAE where presently corporate income tax is only chargeable for oil companies and foreign banks, and there is no

²⁸ Contract Law DIFC Law No. 6 of 2004. For a discussion of the need of codification of English contract law, see Aubrey Diamon, ‘Codification of the Law of Contract’ (1968) 31 *Modern Law Review* 361; and Andrew Tettenborn, ‘Codifying Contracts—An Idea Whose Time has Come?’ (2014) 67 *Current Legal Problems* 273.

²⁹ <https://www.adgm.com/about-adgm/overview>

³⁰ Section 1(1) Application of English Law Regulations 2015.

³¹ Section 2(1) Application of English Law Regulations 2015.

³² Companies Regulations 2015, Data Protection Regulations 2015, Insolvency Regulations 2015, and Real Property Regulations 2015; and their English counterparts are apparently the Companies Act 2006, Data Protection Act 2018, Insolvency Act 1979, and Law of Property Act 1925.

³³ Article 14 of Dubai Law No. 9 of 2004.

personal income tax.³⁴ The same analysis can also be applied for the ADGM which operates a zero taxation regime for 50 years in relation to profits and income tax.³⁵ As a side note, it is worth highlighting that in general the UAE is regarded as a tax haven by the European Union.³⁶ Similarly, in the AIFC, there is a 50 year waiver for corporate tax, individual income tax, property tax and land tax, till the end of year 2066.³⁷ As a comparison, the normal corporate tax and personal income tax rates in Kazakhstan are 20 percent and 10 percent respectively.³⁸ Amongst the four zones, the QFC is perhaps the only one which levies taxes on corporate profits. The same standard rate of corporation tax of 10 percent is applied nationally, both within and outside of the QFC, for a corporate entity that is wholly or partially foreign owned.³⁹ There is no personal income tax in Qatar.

As for non-financial incentives, for the AIFC, 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.⁴⁰ The QFC is certainly the only zone which goes far enough to have dedicated Immigration Regulations. In the rest of Qatar, foreign companies registered with the Ministry of Economy and Commerce must obtain special approval from the Ministry of Labour to hire foreign workers. In contrast, companies registered with the QFC are exempt from this requirement. In the view of Jankovic, the QFC regime will benefit from having a dedicated Immigration Office⁴¹ at the QFC site, along with simplified procedures for visa applications.⁴² As for the DIFC and ADGM, the national visa and immigration policies and procedures are applicable. So, there is no obvious advantage in this regard.

In addition to an independent legal system, which is essentially English, tax incentives and seemingly more friendly immigration policies, other selling points of the zones include fewer restrictions on foreign ownership and capital flow. One of the key advantages of establishment in one of the UAE free zones is the right to 100 percent foreign ownership.⁴³ Tight foreign ownership restriction used to be in place in the UAE. Normally, any company established in the UAE must have a UAE national shareholder holding at least 51 percent of

³⁴ <https://www.government.ae/en/information-and-services/finance-and-investment/taxation>

³⁵ Article 18 of Abu Dhabi Law No. 4 of 2013.

³⁶ <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>

³⁷ Article 6 of the Constitution of the AIFC

³⁸ http://egov.kz/cms/en/articles/tax_payment/2Ftax_rate2014.

³⁹ Article 9 of the QFC Tax Regulations. <https://www.mof.gov.qa/en/Pages/Corporate-Income-Tax.aspx>. No corporate income tax is levied on a corporate entity that is wholly owned by Qatari nationals and GCC nationals. Like the UAE, a rate of 35 percent is to levy on oil and gas companies.

⁴⁰ Article 7 of the Constitution of the AIFC

⁴¹ Articles 6 & 7 of the QFC Immigration Regulations.

⁴² Vladimir Jankovic, 'Qatar Jurisdictions from an Immigration Perspective' (5 June 2018) Lexology.

⁴³ <https://www.difc.ae/business/starting-business/>

the capital.⁴⁴ However, the new Foreign Direct Investment Law⁴⁵ issued in 2018 permits up to 100 percent foreign ownership in 13 sectors of business. As observed by Low and colleagues, these 13 sectors are innovative in nature, such as production of new types of energy, including greener options, biotechnology, e-commerce and transportation of pharmaceuticals.⁴⁶ Further, the UAE has no foreign exchange controls, and no restrictions or levies on the repatriation of capital and profits by foreign investors outside the county.⁴⁷ There is no special advantage to operate in either the DIFC or ADGM in this regard.

Quite like the UAE, the Qatari Foreign Investment Law⁴⁸ only allowed foreign investors to invest in all sectors up to a maximum of 49 percent in the equity of Qatari companies. In 2018, the Ministry of Economy and Commerce announced a draft law that will allow foreign investors to own 100 percent of equity.⁴⁹ Under this draft law, the current restriction on foreign ownership will be removed, except for listed companies and financial institutions. This new Foreign Investment Law was approved in January 2019, repealing the former law of 2000.⁵⁰ Within the QFC, it is made clear that any restrictions, contained in the laws, such as the Foreign Investment Law of 2000, shall not apply.⁵¹ Furthermore, although the QFC takes pride in allowing ‘100 percent foreign ownership, 100 percent repatriation of profits’, the latter is not really a concern in Qatar when the country.⁵² Qatar does not generally have any foreign exchange controls or restrictions on the remittance of funds.⁵³ As a result, foreign investors are free to transfer profits and capital into and out of the country.

As for Kazakhstan, Deloitte observes that the Kazakhstani Constitution affords foreign companies and individuals the same rights and obligations as Kazakhstan nationals.⁵⁴ Foreigners may invest in almost all sectors of the economy, but restrictions do exist for

⁴⁴ Article 10 of the UAE Commercial Companies Law (Federal Law No. 2 of 2015). Companies in the DIFC and ADGM are incorporated under the zones’ respective companies regulations as opposed to the UAE company law, thus the restriction does not apply and the zones’ respective companies regulations do not contain such restriction. Indeed, Article 5 of the UAE Commercial Companies Law stipulates that the law as a whole does not apply to companies established in the financial free zones.

⁴⁵ Decree Law No. 19 of 2018

⁴⁶ <https://www.clydeco.com/insight/article/ground-breaking-uae-business-reforms-announced>

⁴⁷ https://www.bakermckenzie.com/-/media/files/insight/publications/2017/05/doingbusinessuae/bk_uae_dbi_2017.pdf?la=en.p.4

⁴⁸ Law No. 13 of 2000.

⁴⁹ <https://www.ey.com/gl/en/services/tax/international-tax/alert--qatar-announces-draft-law-to-allow-100-percent-foreign-investment-in-all-sectors>

⁵⁰ Law No. 1 of 2019. <https://www.gulf-times.com/story/618609/Law-regulating-investment-of-non-Qatari-capital-to>

⁵¹ Article 2 of the QFC Companies Regulations.

⁵² <http://www.qfc.qa/Admin/Resources/Resources/Holding%20Companies%20Factsheet.pdf>

⁵³ <https://www.lw.com/thoughtLeadership/doing-business-in-qatar>

⁵⁴ https://www2.deloitte.com/content/dam/Deloitte/kz/Documents/about-deloitte-kz/Doing%20Business%20in%20KZ_2016.pdf

specific industries.⁵⁵ Ownership restrictions include telecommunications lines operators (up to 49 percent), media companies (up to 20 percent), and airlines (up to 49 percent). It seems there is no obvious advantage in operating in the AIFC in this regard, as firstly the restriction applies to few specialised industries only; and secondly for these industries it is dubious if the restriction can really be bypassed.⁵⁶ Furthermore, national reforms introduced since 1992 have largely liberalised foreign trade, and eased capital transfer and exchange controls.⁵⁷ Again, the AIFC offers no special treatment in this regard.

In a nutshell, it can be seen that a dedicated regulatory framework (including written rules, regulators, and court system) is the major benefit offered by the zones. On the other hand, in relation to other aspects, the zones are operating a seemingly more liberal regime. However, this competitive advantage has gradually faded out when more and more national reforms have been introduced to create a nationwide business environment which is more (foreign) investors friendly. For example, the zones arguably were capable of providing a legitimate way to bypass foreign ownership restrictions in companies (especially in the cases of the UAE and Qatar). However, recently such restrictions have indeed been largely relaxed in the two countries. Also, as explained above, some of the zones’ benefits (as advertised by them) are indeed nationwide, not only available to participants and businesses in the zones, such as a zero or low tax rate (except for the AIFC). For a quick summary of benefits offered by the zones, see the Table below.

	DIFC	ADGM	QFC	AIFC
Written Rules	A dedicated set, largely based on English law, separate from the National framework	A dedicated set, largely based on English law, separate from the National framework, in conjunction with directly applicable English statutes	A dedicated set, largely based on English law, separate from the National framework	A dedicated set, largely based on English law, separate from the National framework
Selected Strengths (as	“100% Ownership” “No Restriction On Capital Repatriation”	“100% Ownership”	“Up to 100% foreign ownership”	“Special tax regime”

⁵⁵ Ibid.

⁵⁶ For example, the National Security Law of Kazakhstan limits telecommunication opportunities by not allowing foreign individuals or companies to manage or operate trunk communication lines, or own more than 49 percent of shares in long-distance or international communications operators owning land communication lines. The National Security Law is a branch of public law and clearly applies to the AIFC.

⁵⁷ https://www.bakermckenzie.com/-/media/files/insight/publications/2018/09/guide_dbkazakhstan2018_sep2018.pdf

advertised by them)	“Tax Efficiencies”	“0% corporate and income tax” “No restrictions on repatriations of profits”	“100% repatriation of profits” “10% corporate tax on locally-sourced profits”	“Simplified VISA regime”
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Sources:

<https://www.difc.ae/business/starting-business/>

<https://www.adgm.com/setting-up>

<http://www.qfc.qa/en/About/Pages/QFC.aspx>

<https://aifc.kz/advantages>

Substantive Regulations – a Specific Perspective through the Lens of Company Law

Considering that each zone has its own comprehensive set of civil and commercial laws, it is almost impossible to examine every single one of these laws, given the limited space of this paper. This section will therefore use company law as an example, to demonstrate the potential differences between the zone’s, national and English approaches in various aspects of regulation. Company law is important because it performs two important functions.⁵⁸ First, it establishes the structure of corporate form as well as ancillary housekeeping rules to necessary to support this structure; second, it attempts to control conflicts of interest among corporate constituencies, including but not limited to shareholders, directors, creditors, employees, consumers, members of the general public and so on.

In the case of the UAE, there are a few types of business associations available.⁵⁹ The common types are Limited Liability Company, Private Joint Stock Company, and Public Joint Stock Company. Only the first type cannot offer shares to the public, and thus is ‘private’ in a UK sense.⁶⁰ There is no minimum capital requirement for Limited Liability Company, but there is a restriction of number of shareholders to 50.⁶¹ Both Private Joint Stock Company and Public Joint Stock Company have high minimum capital requirements of AED 5 million (over GBP 1 million), and AED 30 million (over GBP 6 million)

⁵⁸ The Anatomy of Corporate Law, p.29.

⁵⁹ Article 9 of the UAE Commercial Companies Law.

⁶⁰ Despite its name containing the word ‘Private’, the Emirates Securities and Commodities Authority Board of Directors Decree No 10 of 2014 Concerning the Regulation of Listing and Trading of Shares of Private Joint Stock, provides the conditions under which Private Joint Stock Companies would be able to list their shares on the stock market. http://afриди-angell.com/items/limg/c_2911CM_7United%20Arab%20Emirates.pdf, p. 307

⁶¹ Article 71 of the UAE Commercial Companies Law.

respectively.⁶² The UAE Commercial Companies Law does not apply to companies established in the financial free zones (i.e. the DIFC and the ADGM).⁶³ Therefore, the business forms available there may be somewhat different. In the DIFC, there are two major types of companies, private and public. Private companies are prohibited from making a public offer of shares, and can have no more than 50 shareholders.⁶⁴ Private companies have no minimum capital requirement, whereas, a public company shall have a minimum capital of USD 100,000, clearly a much lower amount than its national counterpart. Similarly, in the ADGM, private companies cannot make a public offer and do not have a minimum capital requirement.⁶⁵ Public companies there have an even lower, when compared to the DIFC, required minimum capital amount of USD 50,000.⁶⁶ In addition, there may be two more advantages to establish in the zones, first, as explained above, the zones allow full foreign ownership in companies although the benefit arguably has had diminished importance following the introduction of the new national Foreign Direct Investment Law. Furthermore, both the DIFC and ADGM have explicitly introduced the partnership forms, as available in the UK, in their zones, when their national existence (bar LLP) is apparently integrated into the company law.⁶⁷

In Qatar, similarly the regulation of both partnerships and companies is dealt with together under the Qatari Commercial Companies Law.⁶⁸ According to the Ministry of Commerce and Industry, General Partnership Company and Simple Partnership Company are available.⁶⁹ The former is akin to a general partnership⁷⁰ in the UK, in which the partners assume joint responsibility for the partnership's obligations. The latter is akin to a limited partnership⁷¹ in the UK, in which there are 'sleeping' partners who have contributed capital, but shall be liable only to the extent of their capital contribution. Limited Liability

⁶² Articles 193 & 256 of the UAE Commercial Companies Law.

⁶³ Article 5 of the UAE Commercial Companies Law.

⁶⁴ Articles 27 & 42 of the DIFC Companies Law.

⁶⁵ Article 693 of ADGM Companies Regulations 2015.

⁶⁶ Article 701 of ADGM Companies Regulations 2015.

⁶⁷ For the DIFC, see General Partnership Law - DIFC Law No.11 of 2004, Limited Partnership Law - DIFC Law No. 4 of 2006, Limited Liability Partnership Law - DIFC Law No. 5 of 2004,; the corresponding UK statutes seem to be, Partnership Act 1890, Limited Partnership Act 1907, and Limited Liability Partnership Act 2000. It is worth noting that the ADGM has its own Limited Liability Partnership Regulations to govern the use of the Limited Liability Partnerships. For general and limited partnerships, it applies the UK statutes through the force of the Application of English Law Regulations 2015. The concept of Joint Liability Company, as in Article 39 of the UAE Commercial Companies Law, seems to correspond to general partnership, but it requires incorporation and registration (Article 43); whereas the UK counterpart does not. Similarly, the concept of Simple Commandite Company may correspond to limited partnership.

⁶⁸ Law No. 11 of 2015.

⁶⁹ <https://www.moci.gov.qa/en/our-services/investor/companies-type/>

⁷⁰ Partnership Act 1890

⁷¹ Limited Partnership Act 1907

Partnership is available in the QFC, but not nationwide.⁷² In Qatar, public shareholding companies required special approval from the Ministry, and requires a minimum capital amount of QAR 10 million (more than GBP 2 million).⁷³ Private companies exist in the form of private shareholding companies and limited liability companies. The former cannot offer its shares for public subscription and the company's capital shall not be less than QAR 2 million (over GBP 400,000).⁷⁴ Further, there is no restriction on the maximum number of shareholders. The latter has no minimum capital requirement, but the number of shareholders cannot exceed 50 (quite like its UAE counterpart). As for the QFC, it has ditched the distinction between private and public companies. They are collectively known as Limited Liability Companies.⁷⁵ There is no minimum capital requirement, and they can be listed on a stock exchange. Also, in addition to Limited Liability Partnership as already mentioned, both general partnerships and limited partnerships are available in the QFC.⁷⁶

As for Kazakhstan, the main business forms there are limited liability partnerships and joint stock companies. For the former, the initial capital may not be less than 100 times the monthly calculation index⁷⁷, that is, roughly over GBP 500.⁷⁸ For the latter, the minimum authorised capital of the company is 50,000 times monthly calculation index, that is, roughly over GBP 250,000 and is therefore only suitable for larger businesses.⁷⁹ A public company is a type of joint stock companies which may make a public offering of its shares in the securities market.⁸⁰ Furthermore, general partnerships and limited partnerships are available, but not to foreigners.⁸¹ The availability of business forms is broadly similar in the AIFC.⁸² One notable difference is, the minimum capital amount (for public companies only) is denominated in US dollars (USD 100,000).

⁷² The QFC Limited Liability Partnerships Regulations 2005.

⁷³ Articles 65 & 66 of the Qatari Commercial Companies Law.

⁷⁴ Article 205 of the Qatari Commercial Companies Law.

⁷⁵ Part 3 of the QFC Companies Regulations 2005.

⁷⁶ QFC Partnership Regulations 2007. Unlike the UK, there is not a dedicated legislation for limited partnerships. But note there was once a plan to repeal and replace the Limited Partnership Act 1907 in the UK in 2008. In that year, the Department for Business, Enterprise and Regulatory Reform published a Consultation Document containing a draft Legislative Reform Order to repeal and replace the Act. The draft Legislative Reform Order proposed the 1907 to be merged into the Partnership Act 1890. Elspeth Berry, 'Death by a thousand cuts or storm in a teacup? The reform of limited partnership law' [2011] JBL 578, 579 & 581.

⁷⁷ As of 2019, each unit is equivalent to KZT 2,525. https://egov.kz/cms/en/articles/article_mci_2012.

⁷⁸ Article 23 of the Law of the Republic of Kazakhstan No. 220-1 dated 22 April, 1998 about limited and additional liability partnerships, as amended. For small businesses, there can be no minimum capital amount.

⁷⁹ Article 10 of the Law of the Republic of Kazakhstan dated 13 May, 2003 No.415 on Joint Stock Companies.

⁸⁰ Article 4 of the Law of the Republic of Kazakhstan dated 13 May, 2003 No.415 on Joint Stock Companies

⁸¹ Article 58 of the Civil Code of the Republic of Kazakhstan.

⁸² AIFC Companies Regulations; AIFC General Partnership Regulations; AIFC Limited Partnership Regulations; AIFC Limited Liability Partnership Regulations.

It can be seen that for the four zones, the availability of business forms is not very different from that of the UK. The three forms of partnership are available. This is important when the partnership forms may not exist or may not be well developed in the national frameworks. Needless to say, the corporate form is available too. One observation is, the zones generally impose a lower bar in terms of capital requirement for public companies than the national requirement, and even that of the UK (for the ADGM and QFC).⁸³ Further, it can be said that the QFC has not quite followed the UK model in a sense that, there is no distinction of public and private companies. Also, general partnerships and limited partnerships are governed by one single regulation (something proposed but finally not going ahead in the UK). Indeed, there is evidence that the zones are evolving rapidly and getting ahead of the UK. For example, all zones have dedicated treatment on cell companies.⁸⁴

	DIFC	ADGM	QFC	AIFC
National Framework	Different types of business associations as provided in Article 9 of the UAE Commercial Companies Law, covering also General Partnerships and Limited Partnerships		Different types of business associations as provided in Article 4 of the Qatari Commercial Companies Law, covering also General Partnerships and Limited Partners	Three forms of partnerships and joint stock companies, as provided by the Civil Code, the Laws on limited and additional liability partnerships, and on Joint Stock Companies
Within the Zone	Akin to the UK, with dedicated regulations for each of the three forms of partnerships, and a comprehensive set of company regulations,	Akin to the UK, with three forms of partnerships available, as provided by the ADGM regulation and relevant UK statutes; and	Three forms of partnerships, regulated by Partnership Regulations 2007, and the Limited Liability Partnerships Regulations	Akin to the UK, with dedicated regulations for each of the three forms of partnerships; company law has special parts for companies like

⁸³ In the UK the amount is GBP 50,000. CA 2006 s 763.

⁸⁴ DIFC Investment Cell Company Regulations; Protected Cell Company Regulations; ADGM Companies Regulation 2015 Part 36; QFC Companies Regulations 2005 Part 4; AIFC Companies Rules Part 8. A protected cell company is regarded as a standard limited company in the UK that has been separated into legally distinct portions i.e. cells. Such arrangements are often used in relation to captive insurance. See HMRC International Manual INTM236500.

	dealing with specific forms of companies like investment companies and cell companies.	company law has a specific part to deal with cell companies.	2005; company law has special parts for companies like cell companies, and International Business Companies (but note the part on the latter contains nothing at the moment)	investment companies and cell companies.
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In addition to fulfilling the function of providing the business forms, as explained above, company law also has the functions of controlling the conflicts of interests between various constituencies with a company. There are three generic agency problems that can arise in companies.⁸⁵ The first type involves the classic agency problem identified by Adam Smith. The problem lies in assuring that the managers are responsive to the shareholders' interest rather than pursuing their own personal interests. The second agency problem involves the conflict between majority and minority shareholders. The former generally have a tendency to expropriate the latter. The third problem lies in assuring that corporate insiders does not behave opportunistically toward outsiders such as creditors, workers and consumers. There can be different legal strategies to mitigate these three agency problems.⁸⁶ The rules strategy, for example, requires or prohibits specific behaviours.⁸⁷ Here we will use director duties as an illustration to see how the zones have introduced regulation in the same manner or differently.

In the DIFC, the set of director duties is provided in Articles 69 to 75 of the DIFC Companies Law, mirroring (almost verbatim) the seven duties as provided in the Companies Act 2006 of the UK.⁸⁸ Similarly the same seven duties are found in the ADGM Companies Regulation and the AIFC Companies Regulations.⁸⁹ In contrast, the QFC has a unique approach. The set of only five duties is provided in Article 55 of the QFC Companies Regulations. The first

⁸⁵ Anatomy of Corporate Law, pp 29-30.

⁸⁶ Ibid. 31-32

⁸⁷ Ibid. 32.

⁸⁸ Sections 171-177 of CA 2006.

⁸⁹ Sections 161-167 of the ADGM Companies Regulations 2015; sections 77-83 of the AIFC Companies Regulations 2017.

sets out a general standard of duty of honesty and good faith; the second largely corresponds to the exercise of independent judgment as in Section 173 of the UK Companies Act; the third mirrors the duty of care, skills and diligence as in Section 174 of the UK Act by providing a dual subjective and objective test;⁹⁰ the fourth corresponds to the corporate opportunity doctrine as set out in Section 175 of the UK Act; the fifth is the duty of not accepting third party benefits (essentially Section 176 of the UK Act). In other words, Sections 171 and 172 of the UK Act have not been adopted by the QFC. This clearly sets the QFC apart from the other three zones in a sense that the QFC has undertaken a more selective approach in transplanting English law. At the same time, it may make logical sense considering that the ‘proper purpose rule’ remains far from crystal clear despite a Supreme Court attempt to provide an authoritative interpretation.⁹¹ Secondly, the enlightened shareholder value approach is quite controversial and has been considered and rejected by even other common law jurisdictions.⁹²

Next, it is important to compare the zones’ rules in this regard relative to their national framework to reveal the possible differences. In the UAE, the duties of directors as provided in the law are quite brief.⁹³ Despite the fact that these might be supplemented by the Civil Code and the Penal Code, Boahene points out that the common law system in the DIFC (therefore the same applies to ADGM) will assist in defining the scope of the directors’ duties.⁹⁴ As for Qatar, Slawotsky and Truby believe that the Qatari company law provides two independent duties for directors: duties of loyalty and due care.⁹⁵ In relation to the former, the law prohibits directors from engaging in conduct that raises questions regarding loyalty such as participating in competing businesses, engaging in self-interested transactions, obtaining cash loans from the company, or exploiting insider information.⁹⁶ As for the latter, the law provides both that the directors are jointly responsible for managerial mistakes.⁹⁷ Slawotsky and Truby criticises that the duty of care

⁹⁰ This duty, like its UK counterpart, contains wordings like ‘reasonably prudent person’ and ‘a director in his position and any additional knowledge, skill and experience which he has’.

⁹¹ See *Eclairs Group Limited v JKK Oil & Gas plc* [2015] UKSC 71.

⁹² For the case of Australia, see e.g. Keay, ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s ‘Enlightened Shareholder Value Approach’’. For Hong Kong, see Ernest Lim, *A Case for Shareholders’ Fiduciary Duties in Common Law Asia*, p.186.

⁹³ Article 22 the UAE Commercial Companies Law. The full section reads, ‘A person authorized to manage the company shall preserve its rights and extend such care as a diligent person. Such person shall do all such acts in agreement with the objective of the company and the powers granted to such person by virtue of an authorization issued by the company in this respect.’

⁹⁴ <https://www.incegd.com/en/knowledge-bank/directors-duties-and-liabilities-comparison-of-the-position-under-the-uae-commercial-companies-law-and-the-difc-regime>

⁹⁵ The Director Duty of Care in Qatar

⁹⁶ Articles 108-111 of the Qatari Commercial Companies Law.

⁹⁷ Article 113 of the Qatari Commercial Companies Law.

in Qatar is rather ‘open-ended and undefined’.⁹⁸ In Kazakhstan, director duties are provided in Article 62 of the Kazakh Company Law.⁹⁹ There is a list of seven duties. According to Dragneva, the law of Kazakhstan managed to contain in the legislation some general standards for the discharge of director duties.¹⁰⁰ However, as criticised by Dentons, despite a list of seven duties, the concept of fiduciary duties is still not a single integral set of norms of Kazakhstan legislation.¹⁰¹ In particular, 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 a nutshell, it can be seen that by mirroring the English statute and adopting a common law regime, it is fair to say that the zones are capable of providing a more comprehensive, much tested, set of director duties. Also, it is noted that Qatar has selectively adopted the English position on director duties, as opposed to a rather wholesale approach adopted by the other three zones. For a quick summary of discussion, see the table below:

	DIFC	ADGM	QFC	AIFC
National Framework	Article 22 the UAE Commercial Companies Law; a single general standard		Duties of loyalty and due care, covered by Articles 108-111 & 113 of the Qatari Commercial Companies Law	A list of seven duties, provided by Article 62 of the Kazakh Company Law
Within the Zone	Verbatim adoption of the UK position	Verbatim adoption of the UK position	Selective adoption of the UK position	Verbatim adoption of the UK position

⁹⁸ The Director Duty of Care in Qatar p.371.

⁹⁹ 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.

¹⁰⁰ R Dragneva, Legal regulation of shareholder rights in the CIS, p 81.

¹⁰¹ <https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2015/december/7/kazakhstan-business-updates> p.36