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ARTICLE

Transplanting English Law in Special Economic Zones in Asia: Law As Commodity

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Abstract

English law has become a commodity for developing, resource-rich economies desirous of diversifying their economies. A small number of special economic zones, chiefly in the Gulf, but also elsewhere, have set up entire legal systems predicated to a large or smaller degree on English law. This transplantation is based on three distinct models, namely: (a) wholesale incorporation of statutes; (b) general reference to English law as residual law and; (c) implicitly, on the basis of the common law origin of judges appointed to the courts of special economic zones. The expectation in all these models is that the specialised courts and other stakeholders (eg, legal professionals) will apply English statutory and common law in conformity with other laws applicable in the special economic zones. Ultimately, the practice of the courts and other participants will give rise to a sui generis common law jurisdiction that is in dialogue with the courts and institutions of England and Wales. The article argues that this has already been achieved in the majority of the special economic zones examined here.

Introduction

Special economic zones (SEZ) typically operate in countries that already offer significant competitive advantages to foreign investors and transnational service providers, including preferential tax rates,[1] as well as in developing countries eager to attract foreign investors. In 2019 UNCTAD published an important study on the regulation and performance of SEZ around the world but did not specifically elaborate on the transplantation of foreign laws in the SEZ.[2] The prospect of a SEZ may seem moot for entities such as Kazakhstan, Abu Dhabi, Qatar and Dubai, although perhaps not so for others, such as China, Russia and Jamaica. Nonetheless, even for resource-rich countries that endeavour to diversify their economies and limit their dependence on natural resources, there is a realisation that fruitful diversification can chiefly be achieved by attracting high end technological and financial services. While low taxation is a significant incentive that already exists in the Gulf Cooperation Council (GCC) and other states, including Kazakhstan, these countries continue to

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[1]The impact of special economic zones on the rule of law in the target country has received little attention, but see Madeleine Martinek, *Experimental Legislation in China between Efficiency and Legality: The Delegated Legislative Power of the Shenzhen Special Economic Zones* (Springer 2018) 321–322, for a discussion of the improvement of the legal design of experimental regulations in special economic zones which is done by striking a balance between the pursuit of rapid socio-economic progress on the one hand, and the increasing need and will to govern by the rule of law on the other.

[2]See UNCTAD, *World Investment Report 2019* (United Nations 2019) 161 ff <https://unctad.org/system/files/official-document/wir2019_en.pdf> accessed 5 Jul 2022.

place limitations on capital ownership;[3] their legal systems are viewed as being complex and their courts have been known to issue erratic judgments.[4] It is precisely with a view to countering these deficiencies that developing countries across the globe are setting up SEZ. One of the main features of SEZ, for the purposes of this article, is their dislocation from the ordinary legal system of the countries in which they operate. Some of the functions of SEZ are explained by reference to the notion of 'charter cities',[5] but while some elements of this notion are found in SEZ (namely legislative autonomy from the mother state), many others are missing. Some, but not all,[6] SEZ operate like mini states, although technically they are corporate entities under the law of the mother state,[7] and adopt a wide range of laws that allow them to function distinct from most of the laws of their mother state. No doubt, this is not a simple exercise and that is precisely why the SEZ examined in this article typically borrow elements from other more established legal systems. While cherry-picking of this nature is cost efficient and ensures that best practices and principles working well elsewhere will attract interested end-users (particularly those already using these laws and principles), there are at least two major concerns.

The first has to do with the fact that wholesale legal transplants have generally failed to sow seeds in the grand experiment of the IMF/IBRD in the aftermath of decolonisation. It may be remembered that when newly independent states first experienced liquidity problems they turned to international financial institutions (IFIs) such as the IMF for liquidity assistance. One of the conditions imposed by the IMF at the time – the present time is not substantially different it has to be said – was the wholesale adoption of foreign, mostly European laws, particularly on mining, banking, finance procurement and others. In most cases, foreign laws were adopted verbatim, with no regard to local context or exigencies.[8] Not surprisingly, these laws were short-lived and proved detrimental to the law and economy of the adopting states.[9]

This brings us to the second major concern. In applying the transplant metaphor to agriculture, no one would sensibly argue that a rose can grow in the desert unless it is provided the same soil, nutrients, water and climate, artificial or otherwise, as that in which it thrives. In just the same way, the wholesale transplant of parts or elements of a legal system may indeed flourish only if the essential underpinnings of that foreign legal system are also set up to support it. This is exactly what the newly decolonised states were not equipped with. Transplanting a law along with its necessary institutions is by no means an easy enterprise.[10] It requires: (a) full compatibility with the overall legal system of the transplanting state; (b) constant adjustment which balances between the exigences of

[3]By way of illustration, QFC-regulated entities are not susceptible to the regulation of the Qatar Central Bank. Secondly, QFC entities may have 100 per cent foreign ownership, which is not the case under the Qatari Law No 13 of 2000, establishing the Foreign Capital Investment Law. See Ilias Bantekas & Ahmed Al-Ahmed, *Contract Law of Qatar* (Cambridge University Press, forthcoming 2023) ch 14.

[4]See eg, *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Case No 503/2003, Judgment (15 May 2004) (henceforth, '*Bechtel*').

[5]See Lan Cao, 'Charter Cities' (2018–2019) 27 William and Mary Bill of Rights Journal 717.

[6]The Jamaica Special Economic Zone Authority does not operate as a fully functioning legal system that is independent from the ordinary laws of Jamaica. The Special Economic Zones Act 2016 simply regulates activities within the SEZ as well as its governance but does not create a special court nor does it exclude ordinary Jamaican law on issues not covered by the SEZ Act. Available at: Jamaica Special Economic Zone Authority, 'Special Economic Zones Act' <https://www.jseza.com/legislation-and-guidelines/special-economic-zones-act/> accessed 6 Jul 2022.

[7]UAE Federal Law No 8 of 2004 Regarding the Financial Free Zones. Article 2 stipulates that a financial free zone shall have a body corporate and that no other entity shall be responsible for obligations arising out of its conduct.

[8]Ruth Hall, 'Land Grabbing in Southern Africa: The Many Faces of the Investor Rush' (2011) 38 Review of African Political Economy 193.

[9]See Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 111.

[10]See Jaakko Husa, 'Developing Legal Systems, Legal Transplants and Path Dependents. Reflections on the Rule of Law' (2018) 6 The Chinese Journal of Comparative Law 129; Toby S Goldbach, 'Why Legal Transplants?' (2019) 15 Annual Review of Law and Social Science 583.

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the transplanting state and the ongoing developments in the transplant state; (c) a bureaucratic institutions experienced in the application of the transplanted law, including courts, skilled civil service, highly trained judges, legislators monitoring its applications, lawyers able to apply it for the benefit of their clients and clients interested in using it.[11] All these gatekeepers and enforcers of the transplanted law ultimately ensure that it is a *living instrument*[12] as applied to its local context.[13] That local context may well determine in the passage of time that divergences from the practice of the transplant state are not only necessary but logical. As the transplanted law (whether in the form of statute or common law) begins to grow and attract an army of end users it may even compete against its prototype by offering more incentives and flexibility. This may be achieved through its application and refinement by the courts, or subsequent amendments, as opposed to the prototype that is saddled with a long line of inflexible precedent from which the transplant (ie, English) courts cannot easily escape.

This article explores the transplantation *only* of English law in four distinct SEZ, namely the Qatar Financial Center (QFC), the Abu Dhabi Global Markets (ADGM), the Dubai International Financial Center (DIFC)[14] and the Astana International Financial Center (AIFC). What is common among these is that they have incorporated/transplanted English law in their legal systems in distinct ways and have in addition set up dedicated courts to deal with disputes arising from entities registered in the respective SEZ. Given that these courts also serve as competent courts for the purposes of commercial arbitration[15] necessarily means that their authority to construe English law encompasses a wider scope of cases than merely disputes under the laws of the SEZ. The application and construction of relevant statutes and common law by specialised courts ensures that the preservation of both the transnational character of the SEZ as well as the adaptation of English law not only to the local but the transnational context underpinning the SEZ.[16] What these four SEZ, with varying degrees of success so far, have managed to achieve is a synergy of the three elements necessary in any successful legal transplant, as identified above. This is also the measure of their success and the premise of this article that wholesale transplants are indeed possible and beneficial where the necessary and underlying elements and institutions of a law are equally transplanted and adapted.[17]

[11]In the political science literature this is typically known as institutional or policy transfer, as well as policy convergence, which emphasise the distinction between *formal* and *informal* institutions in the process of transplants. Legislation and politics count as formal institutions, whereas culture is informal. See David Dolowitz & David Marsh, 'Who Learns What from Whom: A Review of the Policy Transfer Literature' (1996) 44 Political Studies 343.

[12]I am using this notion as applied by the European Court of Human Rights (chiefly) as an interpretative tool by which to adapt the ECHR to present-day conditions. This doctrine was first developed in *Tyrer v UK* [1978] 2 EHRR 1. See George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', in Andreas Føllesdal, Birgit Peters & Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 106.

[13]Even the scholarship supporting the 'one size fits all' model, ultimately does so on the basis that there is no longer such a thing as a purely domestic transplant. Michaels, for example, argues that in the process of law reform one is not looking for a 'best law' approach, but rather law that is just 'good enough law'. He further contends that legal transplants no longer happen in isolation but rather on a global scale, so that context-specific rules are no longer necessarily local. Ralf Michaels, 'One Size Can Fit All – Some Heretical Thoughts on the Mass Production of Legal Transplants', in Günter Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013).

[14]There is no distinct subsection dedicated to the DIFC because it is extensively explored in the literature. See Rupert Reed & Tom Montagu-Smith (eds), *DIFC Courts Practice* (Edward Elgar 2020).

[15]See eg, Law No 2 of 2017 Promulgating the Civil and Commercial Arbitration Law (Qatar), art 1.

[16]In a comprehensive study carried out on 68 judgments issued by the QFC Court between 2009 and 2018, it was found that 166 sources of law were cited by the Court. Of these, 114 were Qatari (chiefly legislation), 57 from England and Wales (both common law and legislation), 2 from the DIFC Court, and 1 was an Australian judgment. The common law background of many of the judges, indeed the most senior ones, is no doubt a major factor in the prevalence of common law over other legal traditions (save for Qatari law). See Andrew M Dahdal & Francis Botchway, 'A Decade of Development: The Civil and Commercial Court of the Qatar Financial Center' (2019) 34 Arab Law Quarterly 1, 13.

[17]This avoids the risks associated with what Ferreri and Di Matteo call 'superficial' transplants, chiefly in the form of legal concepts (such as good faith). They opine that these are doomed to failure where the transference is without proper

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It should be pointed out that not all SEZ endorse, let alone, impose or enforce English or common law, other than through freedom of choice of law clauses in contracts. The SEZ analysed in this article constitute the exception, as the vast majority of SEZ rely on domestic laws and institutions. Moreover, one should not conflate the existence of international commercial courts with the operation of a SEZ.[18] Only the SEZ analysed here are equipped with their own specialist courts. The jurisdiction of those other international commercial courts not grounded in a SEZ is triggered by a choice of forum clause in the parties' agreement.[19] Their primary consideration is to offer English-language dispute resolution in relation to complex transnational commercial disputes through speedy procedures and unlimited party autonomy, while still grounded in a stable, respectable, and well-performing legal system.[20] This is the case with the Singapore International Commercial Court (SICC), which is part of the Singapore Supreme Court and constitutes a division of the High Court.[21] In accordance with Section 18D of the *Supreme Court of Judicature Act*, the SICC has been conferred jurisdiction over disputes of an international and commercial nature submitted to it expressly by the parties and may also hear cases transferred to it by the High Court.[22] Equally, the Netherlands Commercial Court (NCC) and the Netherlands Commercial Court of Appeal (NCCA)[23] is a specialist chamber of the Amsterdam District Court and the Amsterdam Court of Appeal.[24] This is also the case with the China International Commercial Court (CICC), which was set up by the Chinese Supreme Court under a similar remit.[25] In fact, the CICC's jurisdiction is the result of an interpretation issued by the Supreme Court and, accordingly, subject to the *Chinese Civil Procedure Law*;[26] although it is true that the Shenzhen tribunal of the CICC is in fact the judicial arm of a SEZ.[27] Even though it is not

definitional and interpretive criteria to provide the means to guide courts and regulatory agencies in their interpretation and application. See Silvia Ferreri & Larry Di Matteo, 'Terminology Matters: Dangers of Superficial Transplantation' (2019) 37 Boston University International Law Journal 35.

[18]See generally Georgios Dimitropoulos & Stavis Brekoulakis (eds), *International Commercial Courts: The Future of Transnational Adjudication* (Cambridge University Press 2021).

[19]See Man Yip, 'The Singapore International Commercial Court: The Future of Litigation?' (2019) 12 Erasmus Law Review 81, 85; see also *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65 para 122, for an example of how the Singapore Court of Appeals ruled on choice of court agreements and the element of party autonomy; Hague Convention on Private International Law, Convention on Choice of Court Agreements (2005) 44 ILM 1294, art 3.

[20]Yeshnah D Rampall & Ronán Feehily, 'The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium' (2018) 23 Harvard Negotiation Law Review 345, 348.

[21]Yip (n 19) 84.

[22]Supreme Court of Judicature Act (Cap 322, rev ed 2020), s 18D; see Man Yip, 'The Resolution of Disputes before the Singapore International Commercial Court' (2016) 65 International and Comparative Law Quarterly 439, 445.

[23]Netherlands Commercial Court, 'Home Page' <https://www.rechtspraak.nl/english/ncc/Pages/default.aspx> accessed 6 Jul 2022.

[24]Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal) 2018, de Rechtspraak, art 1.1(1.1.1) <https://www.rechtspraak.nl/SiteCollectionDocuments/ncc-procesreglement-en.pdf> accessed 6 Jul 2022; Netherlands Commercial Court, 'Jurisdiction and NCC Agreement' <https://www.rechtspraak.nl/English/NCC/Pages/jurisdiction-and-agreement.aspx> accessed 6 Jul 2022; see also Georgia Antonopoulou & Xandra Kramer, 'The Netherlands Commercial Court Holds its First Hearing!' (Conflict of Laws.Net, 18 Feb 2019) <https://conflictoflaws.net/2019/the-netherlands-commercial-court-holds-its-first-hearing/> accessed 6 Jul 2022 (delivering the court's first judgment concerning an application for court permission to privately sell pledged shares).

[25]See China International Commercial Court, 'A Brief Introduction of China International Commercial Court' <http://cicc.court.gov.cn/html/1/219/193/195/index.html> accessed 6 Jul 2022.

[26]Lance Ang, 'International Commercial Courts and the Interplay Between Realism and Institutionalism: A Look at China and Singapore' (Harvard International Law Journal, Mar 2020) <https://harvardilj.org/2020/03/international-commercial-courts-and-the-interplay-between-realism-and-institutionalism-a-look-at-china-and-singapore/> accessed 6 Jul 2022; see also China International Commercial Court (n 25) for a list of five types of cases the CICC has jurisdiction over per Article 2 of the CICC Provisions.

[27]See Julien Chaisse & Jiaxing Hu (eds), *International Economic Law and the Challenges of the Free Zones* (Wolters Kluwer 2019); Sheng Zhang, 'China's International Commercial Court: Background, Obstacles and the Road Ahead' (2020) 11 Journal of International Dispute Settlement 150.

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the purpose of this article to examine the courts of SEZ, the author must necessarily rely on the judgments and practice of these courts in order to demonstrate how English law is domesticated and transplanted therein.[28] Given the wide discretion and authority of SEZ courts on this matter, such an approach makes ample sense.

The article progresses as follows. It first explores the three models of English law transplants identified by this author, followed by an exploration of the common features underpinning these models. The article thereafter examines each model on the basis of three distinct case studies, namely the AIFC, the ADGM and the QFC.

The Three Models of Transplants

The scholarship concerning the 'working' of legal transplants (eg, is it that they 'fit' well culturally or that they have the desired social effect?) is significant, as is also true with its counterpart dealing with the so-called 'best' design of legal transplants.[29] It is beyond the scope of this article to elaborate these theories and apply them to the present context. For one thing, as the process of transplantation is still under way it is premature to assess whether they fit well or have the desired social effect. Furthermore, there is no indication that the architects of any of the sophisticated SEZ analysed in this article predicated the incorporation of English law therein on one or another theoretical model. The presumption from the outset was that only English law could serve as a globally trustworthy platform for a newly founded jurisdiction.

Three models of transplants are identified in this article. Although this distinction serves our methodology and allows us to ascertain subtleties in legislative approach, the reader will no doubt notice several overlaps between these. The model first declares the general application of English law without any limitation, albeit only where the parties have not subscribed to the substantive law of the SEZ. It is assumed under this model that the eminence and authority of the specialised court will over time rationalise the application of English law and provide some degree of local context. However, prima facie this model is no different from an ordinary choice of law clause in a transnational contract, save for the fact that domestic law may prevent parties from that state choosing a foreign governing law.[30] The AIFC, described below in a distinct sub-section reflects this first model of transplant. This was also the model preferred for the Dubai International Financial Center (DIFC). While the DIFC founding law[31] is silent on the application of English or common law, Article 8(2)(5) of the 2004 *Law on the Application of Civil and Commercial Laws* in the DIFC[32] ranks 'the laws of England and Wales' fifth in descending order, at the apex of which are DIFC laws. This has not prevented DIFC Courts from an extensive case law that relies predominantly, but not exclusively, on the common law. In order to apply common law, the DIFC courts first examine the origins of a DIFC legal principle and its compatibility with comparable common law. In one case, the claimant argued that the DIFC courts should have followed long-standing common law principles whereby before granting a foreclosure order the court should grant a *nisi* order, which

[28]Indeed, there is an emerging literature on these courts. See Pamela K Bookman, 'Arbitral Courts' (2021) 61 Virginia Journal of International Law 161; Pamela K Bookman, 'The Adjudication Business' (2020) 45 Yale Journal of International Law 227; Pamela K Bookman, 'Global Labs of International Commercial Dispute Resolution' (2021) 115 American Journal of International Law Unbound 1; Matthew S Erie, 'The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution' (2020) 60 Virginia Journal of International Law 225.

[29]See Goldbach, 'Why Legal Transplants?' (n 10); Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 1 International Review of Law and Economics 3; Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, 'The Transplant Effect' (2003) 51 The American Journal of Comparative Law 163.

[30]It should be noted that not even the regime of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, OJ L 266 (9 Oct 1980) allows parties to circumvent 'public policy' and 'overriding mandatory provisions' through choice of law clauses.

[31]Law No 9 of 2004 in respect of the Dubai International Financial Center.

[32]Law on the Application of Civil and Commercial Laws in the DIFC, 2004, DIFC Law No 3, of 2004.

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should be transformed to an absolute order where the mortgage is not repaid in the intervening period. The DIFC Court rejected the application of common law in that case by finding that the DIFC real estate law was predicated on so-called 'Torrens title', which itself was based on Australian land law.[33]

This is the type of legal development that the much younger AIFC aspires to emulate, albeit the relative absence of a common law culture among the majority of existing AIFC participants, as well as the absence of key legislation predicated on common law, or transnational model laws, may hinder this aspiration. The AIFC Court may, however, opt to develop the 'living law' theory effectively adopted by the DIFC and the QFC, explored briefly below in this section.

The second model is a more sophisticated version of the first one. It is exemplified by the ADGM's 2015 Application of English Law Regulations, which seek to apply most areas (chiefly private) in the legal order of the ADGM, albeit subject to meticulous monitoring and adaptation, as well as in accordance with sensible rules concerning adaptation of English law in the ADGM context. This model is predicated on selective, yet largely wholesale legal transplantation, subject to an adaptation, but not a filtering, mechanism. This model effectively relies on its stakeholders (courts, clients, lawyers, non-legal professionals, SEZ participants)[34] to be apprised not only of legal developments in English law, but also anticipate the impact in the SEZ of imminent changes to English law, as well as construe English law in accordance with ADGM laws and local context.

The third model is very much emblematic of the QFC, although in large part it is also emulated by the DIFC. Although touted as a common law jurisdiction, there is no reference to the common law, let along English law in the founding or other laws of the QFC. The QFC has adopted sophisticated laws on a broad range of issues, some of which are predicated almost verbatim on model laws crafted by inter-governmental organizations such as UNIDROIT or UNCITRAL. Despite the absence of statutory authority to import English law this is effectively transplanted through: (a) the appointment of senior common law judges to the SEZ specialised courts;[35] (b) contracts concluded by end-users to or from the SEZ are in their majority predicated on English law;[36] (c) English-language, foreign, law firms typically dominate the transnational legal landscape in the mother country of the SEZ. These elements have culminated in the introduction of English law (both statutory and common law), but also elements of the civil law tradition (although to a much lesser degree), in court proceedings and by implication the construction of SEZ laws. No doubt, there are several commonalities between this third model and the first one in terms of the consistent application of the common law by the SEZ courts and the participants; this is in fact the point of convergence of these two models. The application of common law and elements from other legal traditions, absent express authority, evinces a necessity for legal pluralism, not in the abstract but in the sense of 'living law' that possesses a real value for the relevant stakeholders.[37]

It is common in the first and third models, but not the second one (ie the ADGM typology) that SEZ courts are not bound by the rule of precedent which their UK counterparts are subject to,[38] and

[33] *Al Rihab Real Estate Co LLC v Emirates NBD Bank*, [2020] DIFC CA 006, paras 164 ff.

[34] See Andrew L Friedman & Samantha Miles, *Stakeholders: Theory and Practice* (Oxford University Press 2006).

[35] Of course, this is also true of the specialised courts encompassed under the other models, as well as those international commercial courts that operate as distinct chambers of ordinary courts, such as the one in Singapore: Singapore International Commercial Court, 'Judges' <https://www.sicc.gov.sg/about-the-sicc/judges> accessed 6 Jul 2022.

[36] See Ilias Bantekas, 'The Globalisation of English Contract Law: Three Salient Illustrations' (2021) 137 Law Quarterly Review 130.

[37] My use of 'living law' here is not meant to indicate that English law is informal generally, but that it is not strictly formal in the legal system of the QFC. See David Nelken, 'Eugen Ehrlich, Living Law and Plural Legalities' (2008) 9 Theoretical Inquiries in Law 443, 446. In the subsequent section the reader will encounter references to informal law accepted by the laws and courts of SEZ.

[38] Apart from the application of the *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77 by the Supreme Court to declare not being bound the jurisprudence of the House of Lords in cases such as *Austin v Southwark London Borough Council* [2010] 4 All ER 16, there exists vertical precedent at all other levels, both horizontal and vertical.

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hence are free to shape common law according to their exigencies and even construe common law principles liberally.[39] While this allows for greater flexibility and judicial dialogue,[40] it has the potential to break from the original common law line of precedent and create a distinct legal tradition with common law influences, in the sense of best practices. Be that as it may, two observations are pertinent. Firstly, evidence suggests that SEZ courts falling in transplant typologies 1 and 3 can and do converse with (as well as influence) each other and equally communicate with the courts and institutions of other common law jurisdictions.[41] This is also the case with common law courts across the globe which engage in global dialogue in a conscious attempt to forge uniformity not only with the common law but also other legal traditions.[42] Secondly, although there is no formal rule to that effect, common law SEZ courts operate an internal line of precedent, both vertical and horizontal in nature.[43]

Common Features Underpinning the Three Models

There are several features that are common to all three models and which effectively dictate their success as legal transplants. The first is that although independent, to varying degrees, from the legal system of the mother state, they are very much embedded in such legal systems, chiefly, but not exclusively, the constitution of the mother state. The application of common law in isolation of the laws and institutions of the mother state entails the absence of institutional communication and judicial dialogue and is devoid of local context. The local context of SEZ is not distinct from the context of the mother state as that would mean that the English social, legal and political context are also transplanted in the SEZ. This is, however, antithetical to the notion of successful transplants. Such embeddedness is evident in all three models, even the ADGM whose legal system is built around English statutes and allows an interaction not only between mother state and SEZ laws but also between the courts of the SEZ and mother state courts. A fruitful dialogue between the two sets of courts is important because: (a) it prevents friction and competition for resources; (b) it induces consistency and avoids conflicting judgments; (c) avoids judicial elitism and; (d) produces necessary knowledge exchange that enhances the transnational legal expertise of the mother state courts.[44]

[39]In *Al Tamimi v Qatar Financial Centre Authority; Al Tamimi v Employment Standards Office* [2018] QIC (A) 3 paras 58, 67, the key issue was whether a decision of the QFC Employment Standards Office (an Ombudsman type of entity) was capable of generating *res judicata*. Although the QFC Appeals Court relied on Lord Sumption in *Virgin Atlantic Airways Limited v Zodiac Seats UK Ltd* [2013] UKSC 46, it relied on none of the varieties cited there to determine *res judicata*. Instead, it noted that the 'governing principle' of that judgment was aimed at preventing abuse of process and reflected 'fundamental litigation principles and international best practice', found in all legal traditions.

[40]Meaning is conditioned by the interlocutors through the course of their dialogue. Thus, we cannot talk about *meaning* outside the parameters of a particular conversation and its distinct interlocutors. When a conversation commences it is governed by so-called conversational rules, which are co-operative in nature. The philosopher Paul Grice identified numerous conversational maxims, such as avoidance of information overflow, relevance, brevity, avoidance of ambiguity and obscurity of expression; see Talbot J Taylor & Deborah Cameron, *Analysing Conversation: Rules and Units in the Structure* (Pergamon Press 1987) 83.

[41]In *QFC Regulatory Authority v First Abu Dhabi Bank PJSC* [2019] QIC(A) 3, for example, the Appeals Chamber of the QFC Court referred to judgments of the DIFC Court with approval, emphasising the similarities between both legal systems; see equally the influential judgment by Thorley IJ of the Singapore International Commercial Court in *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 3, concerning its regulation and status of cryptoassets and smart contracts.

[42]See Brian Flanagan & Sinéad Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 International and Comparative Law Quarterly 1, 18–22. Flanagan and Ahern suggest that guidance and uniformity in judicial interpretation is the key reason why common law judges refer to foreign court decisions.

[43]See eg, *Lahkhan v Lamia*, [2021] DIFC CA 001 paras 38, 41 ff.

[44]A major contention underpinning international criminal tribunals was that they were set up to operate in isolation and (sometimes) in conflict with territorial courts. In addition, while they had ample resources for a relatively small case load, over-burdened territorial courts operated on shoestring budgets. Finally, the dialogue between international tribunals and territorial courts was imbalanced because the latter were supposed to be 'educated' by the former, but not the other way round. See Kenneth Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009)

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The second common feature is pedantic but true; namely language. The concept of language for the purpose of arbitral or other judicial proceedings refers to a medium of communication whose oral and written components correspond.[45] This is not true of all mediums of communication or of things we call 'languages'.[46] English is not only the language of the common law, but also the language of SEZ laws and regulations – although SEZ laws are also translated in Arabic – as well as the language of court proceedings and judgments,[47] which naturally means that the legal and associated professions are fluent in English. With few exceptions, the parties' contracts are equally drafted in English. All this ensures that the meanings attributed to legal terms in the common law are not replaced by equivalents in the SEZ and its mother state and that the infusion of English case law and statute in the SEZ is a natural, rather than an artificial, process.

A third feature of common law-based SEZ concerns their aims and aspirations. By way of deduction, Russian and Chinese SEZ aspire to attract investors from manufacturing sectors but have no desire to create distinct legal systems. Russian and Chinese SEZ laws simply set out the incentives and obligations of potential participants, but in all other respects federal or state laws apply without distinction[48] and participants must seek further protection by applicable bilateral investment treaties (BITs). The common law is meaningless in this process and would require an institutional mechanism that neither Russia or China see any benefit in maintaining and financing. On the other hand, GCC states and Kazakhstan, at the very least, envision their SEZ as attracting high end portfolio investment, which is typically regulated by industry practices (self-regulation), model rules, or/and the common law. Adherence to living law is crucial for SEZ aspiring to attract portfolio investment.[49] The political economy of the SEZ analysed in this article is a significant factor in their choice of law. GCC states and Kazakhstan account for most of the globe's upstream carbon-based energy.[50] A big part of the contractual framework of such energy production is governed by English and transnational law.[51] In addition, these states own some of the largest sovereign wealth funds (in terms of dispensable assets), all of which engage in outward investment, both portfolio and otherwise.[52] Moreover, Gulf countries have generated a considerable volume of trade and commerce, as well as mega-construction projects,[53] in addition to being the leaders in the emerging field of

20 European Journal of International Law 331. Anderson questions to what degree the proliferation of international criminal tribunals supplanted or crowed other aspects and institutions of international law. See also David Wippman, 'The Costs of International Justice' (2006) 100 American Journal of International Law 861.

[45]See generally Bruce Fraser, 'The Role of Language in Arbitration', in James L Stern & Barbara D Dennis, *Decisional Thinking of Arbitrators and Judges* (Bureau of National Affairs 1981) 19.

[46]'Legal language' is an excellent example. See Mark Van Hoecke, *Law as Communication* (Hart 2002). Van Hoecke argues that all legal relations are to be understood in terms of dialogue, conversation and communicative processes, rather than as traditional command-obedience structures. This is so, he argues, because legal systems are open systems, thus allowing for this type of interaction between their various participants.

[47]See Christoph A Kern, 'English as a Court Language in Continental Courts' (2013) 5 Erasmus Law Review 187.

[48]See Federal Law No 116-FZ of Jul 22, 2005, on Special Economic Zones in the Russian Federation, art 1.

[49]There is a large line of literature (notably by Djankov et al) that claims a 'common law advantage' which apparently has been a determinant for SEZs like the ones identified in the paper. See Simeon Djankov et al, 'The Regulation of Entry' (2002) 117 The Quarterly Journal of Economics 1.

[50]See Rania Al-Gamal, 'Qatar Petroleum Signs Deal for Mega-LNG Expansion' (Reuters, 8 Feb 2021) <https://www.reuters.com/article/qatar-petroleum-lng-int-idUSKBN2A81ST> accessed 6 Jul 2022.

[51]See Ruchdi Maalouf, 'International LNG Contracts' (Oil, Gas and Energy Law: Global Energy Law and Regulation Portal, 2018) <https://www.ogel.org/article.asp?key=3767> accessed 6 Jul 2022.

[52]Qatar's investment vehicle, for example, is the Qatar Investment Authority (QIA). Although financial data is missing from its website, its estimated assets are 450 billion USD, which ranks it 11th among all sovereign wealth funds according to the Sovereign Wealth Fund Institute. See SWFI, 'Qatar Investment Authority (QIA)' <https://www.swfinstitute.org/profile/598cdaa60124e9fd2d05bc5a> accessed 6 Jul 2022.

[53]It is estimated that construction contracts in the Gulf in 2021 and 2022 are set to be worth 115 billion USD and 112 billion USD respectively: 'Gulf construction sector tipped to rebound following Covid impact' (Arabian Business, 25 Sep 2021) <https://www.arabianbusiness.com/industries-construction/468768-gulf-construction-sector-tipped-to-rebound-following-covid-impact> accessed 6 Jul 2022.

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Islamic finance. These activities are very much governed by transnational law, which itself is largely predicated on common law principles,[54] and which in turn has allowed some SEZ courts to claim as their 'own'.[55]

It is not always clear to legal scholars why English law was preferred over US law and whether this choice was dictated by some kind of presumed proximity with Islamic law, if any.[56] While culture, particularly legal colonial culture in the GCC, may have played a role, it is probably one dimension of culture that was overwhelming. This has to do with the proliferation of English legal culture in the Middle East, whether by the use of English law in transnational contracts or the importation of UK-educated lawyers.[57] Even US law firms utilise and retain this model in their GCC transactions, rather than exhort their clients towards US contract or commercial law. This shows that while language (English) is important, the key criterion for the special economic zones analysed in this article is English legal culture with its particular norms and institutions. With the introduction of English law in the legal systems of these special economic zones one also becomes witness to the migration of legal services professionals from England. While foreign lawyers are not licensed to argue before local courts, they may validly offer all other legal services, whether as in-house or law firm counsel, without further bar/professional requirements. These professionals, whether court registrars, judges, solicitors, barristers (without however a right of audience), paralegals and clerks rightly presume that they are paid handsomely not in order to learn new laws, but rather to apply what they are already good at, in more or less the same way, albeit in a new jurisdiction. As they do so, incoming generations of legal professionals, whether trained in the common law or other legal traditions, must follow suit. As the entire system operates on common law and English law foundations, as adapted to local exigencies and in accordance with the zones' laws and regulations, the courts and other institutions of each zone must and do converse with the courts (and institutions) of England in order to ensure coherence and uniformity.[58]

Legal education in the GCC is undergoing rapid changes. While local public law schools are climbing global rankings, the bulk of their programs is offered in Arabic. However, in the last decade it became evident that law graduates trained exclusively in Arabic were ill-equipped for transnational legal careers. This is because the majority of the teaching staff were Egyptians who in turn relied on Egyptian law and practice,[59] which is largely out of tune with the realities of modern

[54]See Ilias Bantekas, 'Transnational Islamic Finance Disputes: Towards a Convergence with English Contract Law and International Arbitration' (2021) 12 Journal of International Dispute Settlement 1. In *The Investment Dar Co KSSC v Blom Development Bank SAL* [2009] All ER (D) 145, the English High Court was able to override the designation of English law as the governing law of a *Wakala* agreement, on the ground that it was not Sharia-compliant with the underlying investment, which the parties had expressly agreed should be so compliant. In similar manner, the English High Court in *Sanghi Polyesters Ltd India v The International Investor KCFC (Kuwait)* [2000] 1 Lloyd's Rep 480, had no trouble finding in the event of a conflict between English and Islamic law that the more pressing law to the issue at hand (in the present instance an Islamic finance transaction) would prevail.

[55]This is true for the DIFC, which is the leader among its rivals in the Gulf. See Reed & Montagu-Smith (n 14).

[56]See Bantekas, 'Transnational Islamic Finance Disputes' (n 54): Bantekas argued that not only classic Islamic (commercial) law is consistent with English law, but this is also the case with contemporary applications, including its dispute resolution dimension.

[57]We have made only very sparse mention to Islamic law in this article. Although this body of law plays some (but not a great) part in the laws of GCC states, but chiefly in the fields of family and criminal law, we only find remnants of its influences in contemporary private laws. See Nicholas P Kourides, 'The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts' (1970) 9 Columbia Journal of Transnational Law 384.

[58]See Ilias Bantekas, 'Transplanting the UNIDROIT Contract Principles into the Qatar Financial Center: A Fresh Paradigm for Wholesale Legal Transplants?' (2021) 26 Uniform Law Review 1. Bantekas demonstrates that even where a transnational instrument, such as the UNIDROIT Principles of International Commercial Contracts, is transplanted in a jurisdiction, the infusion of English legal culture tends to submerge and unify it therein.

[59]There is a sound reason behind this. Abd el-Razzak el-Sanhuri, an Egyptian private law scholar, reformed and re-wrote the 1948 Egyptian Civil Code, which was the basis for all subsequent MENA and GCC civil codes. Egyptian legal education (and by extension Egyptian judgments) naturally became the epicenter in the Arab-speaking world. Sanhuri's students later

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financial and commercial transactions.[60] As a result, most law schools began to hire native English academics with a view to offer advanced courses in Anglo-American commercial law, as well as public international law. This influx of English-speaking legal academics introduced their students to a new type of critical, contextual and in-depth scholarship that did not exist in the past. Many law schools in the GCC are now associated with US or UK law schools and hence the quality of legal education has surpassed that of the prior legal metropolis, namely Egypt. Although some GCC nationals still choose to study law in Egypt, graduates of GCC law schools are all bilingual (Arabic and English). This tension between Egyptian and transnational law is apparent to those working and operating in the professional legal market. In practice, English and US law firms, with a small amount of GCC firms, dominate the lion's share of the high-end market. They naturally steer their contracts, clients and dispute resolution towards English law and generally avoid local courts and arguments based on Egyptian law and jurisprudence. On the other hand, locally based lawyers trained in the Egyptian tradition typically rely on the case law of the Egyptian Court of Cassation and Court of Appeals, not only because this is their competitive advantage but also because the vast majority of judges in GCC courts are also trained in this tradition. This dichotomy explains why the law of SEZ in the GCC, although not perhaps so in the AIFC, expresses a desire to break from Egyptian legal influences.

The Mechanics of Transplanting English Law in the Legal Systems of the Various Zones

The following subsections explain in what manner English law, including common law, has been transplanted in the legal systems of the AIFC, the ADGM and the QFC. In doing so, the subsections rely on both the statutory basis of such incorporation, as well as the necessary adaptation by the courts of the various zones.

English Law in the Astana International Financial Center

The AIFC is a relative newcomer to the global SEZ landscape and its aim from the outset was to emulate its counterparts in the GCC.[61] It is perhaps apt to commence this section with Article 75(4) of the *Constitution of the Republic of Kazakhstan*, which stipulates that '[t]he establishment of special and emergency courts under any name is not allowed.'[62] A 2017 amendment to the Constitution did in fact allow the legal regime of the AIFC to exist but did not specifically refer to the AIFC Court.[63] Article 13(2) of the AIFC Constitutional Statute exacerbates this state of affairs by declaring that '[t]he AIFC Court is independent in its activities and is not a part of the judicial system of the Republic of Kazakhstan.'[64] As far as the subject matter of this article is concerned, Part

drafted other MENA and GCC civil codes on the basis of his philosophy and ideals. See Nabil Saleh, 'Civil Laws of Arab Countries: The Sanhuri Codes' (1993) 8 Arab Law Quarterly 165.

[60]It is clear that reliance on the case law of Egypt for any progressive legal system is far from an ideal choice, not only because of the difference in culture (broadly understood) but also because of the erratic nature of the Egyptian higher courts. By way of illustration, the Cairo Court of Appeal ruled in 1997 that an arbitral tribunal was allowed to apply interest above the maximum rate set by statute because the parties had come to a mutual agreement and thus the award did not contravene Egyptian public policy: Case No 41/114, Judgment (2 Oct 1997). In 2020, however, the Egyptian Court of Cassation in *Legal Representative of Interfood Co v The Legal Representative of RCMA Asia Pte Ltd Singapore*, Ruling 282/89 (9 Jan 2020), overturned the long-standing practice of the Court of Appeal.

[61]See Ilias Bantekas, 'The Rise of International Commercial Courts: The Astana International Financial Center Court' (2020) 33 Pace International Law Review 1.

[62]The Constitution of the Republic of Kazakhstan (promulgated 30 Aug 1995, amended 10 Mar 2017), art 75(4).

[63]ibid art 2(3–1): 'Within the city of Nur-Sultan, a special legal regime can be established in the financial sphere in accordance with the constitutional law.'

[64]AIFC Constitutional Statute No 438-V Zrk of 7 Dec 2015 (amended 30 Dec 2019, amendments came into effect 11 Jan 2020), art 13(2) <https://aifc.kz/files/legals/7/file/constitutional-statute-with-amendments-as-of-30-december-2019.pdf> accessed 6 Jul 2022 (hereinafter 'AIFC Constitutional Statute').

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2, Section 8 of the AIFC Regulations on AIFC Acts of 2017 provides a hierarchy of the sources available to the AIFC Court, as follows:

Correlation of legal force of Acting Law of the AIFC is construed in accordance with the following descending levels:

1) paragraph 3–1 of article 2 of the Constitution of the Republic of Kazakhstan; and
2) the Constitutional Statute; and
3) the Management Council Resolution on AIFC Bodies; and
4) Regulations; and
5) Rules; and
6) other Acts of relevant AIFC Bodies adopted to regulate specific issues.[65]

This is a descending order, and the remainder of this provision sets out a methodology for resolving conflicts between higher and lower levels, as well as between equal levels.[66]

Article 13(5) of the AIFC Constitutional Statute goes on to identify the actual law or 'legal system' that is meant to be applied as the default law – ie, if the parties have not already chosen a 'law' or 'legal system' in their contract.[67] This provision states that '[t]he activities of the AIFC Court are governed by the resolution of the Council On the Court of Astana International Financial Centre, which is based on the principles and legislation of the law of England and Wales and the standards of leading global financial centers.'[68] Although English law is the law applicable to a dispute *only* as a matter of default, the AIFC Court hails itself as a common law court.[69] This self-identification is justified neither in the substantive laws of the AIFC, nor its practice, or indeed the practice of its end-users. Unlike other SEZ whereby the laws and jurisdiction of their courts endure even where a party is not registered in the SEZ, this is not the case with the AIFC.[70] The case law of the AIFC Court up to the time of writing has not shown any great inclination to apply English law, although it is true that the cases so far have tended to be rather insignificant.[71] This is perhaps sensible, yet unless the AIFC Court advances the application of English law itself it is unlikely that transnational entities will prefer to resolve disputes there. While there might well be some degree of attraction stemming from the laws and regulations of the AIFC, these cannot of their own accord have an international appeal.

In the theoretical scenario that two AIFC-registered entities do not choose any legal system to govern their contract, the application of English law is not necessarily the most sensible solution, even as default rules. Although it is expected that the parties are diligent about such matters, it may well be the case that both parties earnestly believed that AIFC law was applicable and not a default law that is alien to their contract, their legal underpinnings and their interests. In such cases, the AIFC Court must confer with the parties as to whether there is consensus among them about the application of AIFC laws, failing which it can then enforce English law. In this manner, however, English law becomes peripheral and the immersion of AIFC in the English legal tradition becomes distant. It is not clear if this was the role envisaged by the creators of AIFC, but

[65]AIFC Regulations on AIFC Acts No 1 of 2017, art 8(1)(a)–(f) <https://aifc.kz/files/legals/207/file/1.-aifc-regulations-on-aifc-acts-2017_new-design.pdf> accessed 6 Jul 2022 (hereinafter 'AIFC Regulation on AIFC Acts').

[66]ibid art 8(2).

[67]AIFC Constitutional Statute, art 13(5).

[68]ibid.

[69]Astana International Financial Centre, 'Home Page' <https://court.aifc.kz> accessed 6 Jul 2022, which says: 'Welcome to the AIFC Court. An independent common law court …'.

[70]See *Modtech Group Teknoloji Systemleri Ltd v Mosston Engineering Ltd and Others*, Case No AIFC-C/CFI/2020/10 (22 Feb 2021) para 33, where the AIFC Court declined jurisdiction because one of the parties was not an AIFC-registered company.

[71]In *Star Asian Mining LLP v Aurora AG Ltd*, Case No AIFC-C/SCC/2020/03 (6 Aug 2020) para 15, the Court did not specify the governing law of the contract; yet went on construe the notion of withholding performance on the basis of ordinary Kazakhstani law.

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despite the fact that English law seems to be an insignificant element of the AIFC architecture, its transplantation in the AIFC is by no means easier under the existing authority. Were the AIFC Court to encounter a case in which it is called to apply English law by default – even if it has little or nothing to do with the contract under consideration – the Court would have to assess which part or principles to apply. The wording of Article 13(5) suggests wholesale 'legal transplantation', which may, however, turn out to be in conflict with existing AIFC laws.[72] Moreover, one of the parties may counter that relevant human rights are at play, such as the right to property under the terms of the UK *Human Rights Act*. An AIFC Court staffed with senior UK judges would be hard pressed to refuse application of case law and statutes of this nature and a declaration that particular rights are antithetical to the Kazakhstani Constitution would be awkward. This would be embarrassing and injurious to the reputation of the AIFC and the Court. The limitations of this first model are many and obvious but certainly not insurmountable.

English Law in the Architecture of the Qatar Financial Center

The Qatar Financial Center (QFC) is paradigmatic of the third model.[73] It was set up under *Law No 7 of 2005* (hereinafter 'QFC Law'), which is both its founding law and its Basic Law (effectively its internal constitution). The aim of the QFC was to attract foreign investment in the financial, banking, asset management and insurance sectors, chiefly through favourable incentives. This was expanded to encompass non-regulated activities that fall outside the broader financial sector. These include holding companies, special purpose companies, trusts, single family offices, professional, corporate and business services, as well as company headquarters. Even though the QFC legal system is distinct from the ordinary Qatari legal system and a variety of regulations regulate all matters related to the QFC, several ordinary Qatari laws are applicable, particularly *Law No 11 of 2004 establishing the Penal Code*[74] and *Law No 4 of 2010 Combatting Money Laundering*.

Just like the AIFC, the QFC, but particularly its Court, hails itself as a common law jurisdiction.[75] But this is where their similarities end. The QFC legal architecture makes no reference to English or common law, not even as a matter of default law. Yet, English law is predominant in the QFC legal order. The first point of departure is the creation of an institutional climate rendering the QFC a global focal point where QFC entities can use the QFC and its legal system as a launchpad for international transactions. This has the effect of internationalising the QFC as opposed to internalising it. By extension, it is not a far leap for Article 18(3) of the QFC Law to extend QFC laws to all transactions, irrespective of the incorporation of the parties, as follows:

> The QFC Laws and Regulations shall apply to the contracts, transactions and arrangements conducted by the entities established in, or operating from the QFC, with parties or entities located in the QFC or in the State but outside the QFC, unless the parties agree otherwise.

[72]No doubt, it would be disastrous for the reputation of AIFC if the parties or the Court were to identify gross inconsistencies between English law and AIFC Acts or the Kazakhstani Constitution itself! Article 13(6) of the AIFC Constitutional Statute makes much more sense. It states that: 'In adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account final judgments of the AIFC Court in related matters and final judgments of the courts of other common law jurisdictions.'

[73]The academic literature on the QFC is feeble and most of it focuses on the QFC Court. See Zain Al Abdin Sharar & Mohammed Al Khulaifi, 'The Courts in Qatar Financial Center and Dubai International Financial Center: A Comparative Analysis' (2016) 46 Hong Kong Law Journal 529; Dahdal & Botchway (n 16).

[74]However, in accordance with Art 18(1) of the QFC Law, where the conduct of an entity is consistent with the laws and regulations of the QFC, such conduct shall not constitute a criminal offence under the law of the QFC or the laws of the State of Qatar.

[75]The QFC website prides itself in being a 'legal system based on English common law': Qatar Financial Centre, 'Laws & Regulations' <https://www.qfc.qa/en/laws-and-regulations> accessed 6 Jul 2022. Even though most scholarly and professional commentaries emphasise this common law dimension, no direct reference to the common law is made in QFC laws and regulations, but it is certainly part of the QFC Court's consistent practice.

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This is a deceptively simple conflict of laws provision with significant implications for parties that fail to adequately think about the governing clause of their contract. Several judgments of the QFC Court serve to illustrate the point.[76] The QFC Court has also gone as far as rule that where an arbitration takes place in Qatar and neither party is incorporated in the QFC, the parties may nonetheless designate the QFC Court as their competent court,[77] as stipulated under Article 1 of the *Qatari Arbitration Law*.[78]

The conscious institutional transnationalisation, both internal and external, of the QFC is consistent with the QFC's laws and regulations. Many of these are modelled on transnational model laws, as is the case with Regulation No. 4 (2005), known as the 'QFC Contract Regulations', which is predicated almost verbatim on the UNIDROIT Principles on International Commercial Contracts (PICC).[79] To date, the QFC Court has not relied on any commentary to the PICC to construe the Contract Regulations. Instead, it has relied on English contract law (both common law and statute), which in theory the PICC was meant to specifically exclude (with some exceptions) from its expression of general principles. English law enters this equation effectively as a set of construction tools for these transnational statutes. In this manner the Court's construction is not arbitrary, but very much consistent with the institutional outlook of the QFC and the parties' transactions. In this process, the Court is not averse to any foreign law, custom or principle that advances the transnational outlook of the QFC. By way of illustration, although the QFC Court is not expressly directed to exclude judgments by the ordinary Qatari courts, it is not uncommon to refer to the case law of the higher Qatari courts, where this is appropriate.[80] However, the QFC Court, in construing contractual or other legal terms regularly imports common law and English statutory law as authority.[81] This is the case also where the contracts under dispute were not predicated on English law.[82] In this manner, English law serves not only as a tool of construction but also as the ultimate authority by which all legal principles are assessed (a form of internal constitutional validity), which is now common knowledge to all end users.[83] By way of illustration, in *Leonardo Spa v Doha Bank Assurance Co LLC*,[84] the QFC Court had to deal with demand guarantees under the Uniform Rules for

[76]See QFC Law, art 8(3)(c) (outlining the jurisdiction of the QFC Court, including the entities that are encompassed under its authority); equally, QFC Court Regulations and Procedural Rules, art 9 (which is based on Article 8(3)(c) of the QFC Law). Jurisdictional dilemmas may arise where a party to a contractual dispute is not a QFC-registered entity. In *Daman Health Insurance Qatar Ltd v Al Bawakir Co Ltd* [2017] QIC (F) 2, the claimant was a QFC-registered company, whereas the respondent was not. Their insurance agreement was governed by QFC laws and as a result the QFC Court ruled that in the absence of a choice of court agreement, it was compelled to exercise jurisdiction. Iterated in *Badri and Salim Elmeouchi LLP v Data Managers International Ltd* [2020] QIC (F) 1 paras 15–16.

[77]*C v D* [2021] QIC (F) 8.

[78]Law No 2 of 2017, Promulgating the Civil and Commercial Arbitration Law.

[79]See, in particular, Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford University Press 2015); Michael J Bonell (ed), *The UNIDROIT Principles in Practice* (Brill 2006).

[80]Several QFC Court judgments refer in substance or in passing to judgments of Qatari courts in order to aid their interpretation of provisions in the QFC Contract Regulations. See *Nasco Qatar LLC v Misr Insurance (Qatar Branch)* [2020] QIC (F) 17 para 32.

[81]In *Qatar Financial Centre Authority v Silver Leaf Capital Partners LLC*, Case No.0001/2009 (unreported), Judgment of 1 Jun 2009 (QFC Court), the Court emphasised that it gave effect to Qatari and English (contract) law principles, while taking into account international best practices.

[82]Even where the governing law of a contract is not English law, the QFC Court still relies on English contract law to flesh out general principles. In *Obayashi Qatar LLC v Qatar First Bank LLC* [2020] QIC (F) 5 para 90, Qatari law was the contract's governing law. Yet, the Court relied predominantly on the English law of demand guarantees, as well as the fraud exception therein, as a condition freeing the debtor from its obligation.

[83]In *Chedid and Associates Qatar LLC v Said Bou Sayad*, QFC Case 02/2013, Supplementary Judgment (16 Sep 2014), [2014] QIC (F) 3 para 3, the QFC Court made an important statement on the persuasive value of the common law on QFC law. It held that the reasoning in non-QFC judgments, such as from common law courts, which concern principles, expressions or concepts similar to those in QFC laws have persuasive value in interpreting and applying QFC laws, including the QFC Contract Regulations.

[84]QFC Case 3/2019, unreported, Judgment of 5 Sep 2019, para 42 ff.

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Demand Guarantees, which were adopted by the International Chamber of Commerce (ICC) in 1991. The Court went on to examine the nature of such guarantees by reference to English case law and not the various ICC commentaries.

Another illustration where the QFC Court draws from the common law in order to construe a principle that is absent from the QFC Contract Regulations is available in *Nasco Qatar LLC v Misr Insurance (Qatar Branch)*. In that case, a broker had set up a single account with the insurer on the basis of which all referral fees would be paid as agreed in the claimant's bank account. The respondent claimed that the limitation period prescribed in Article 108 of the Contract Regulations commenced from the date of the last payment for each referral, with each referral constituting a distinct contract subject to distinct limitation periods. The QFC Court disagreed. While agreeing that the Contract Regulations did not expressly provide for running accounts in the context of limitation, nor indeed in most statutes such as the English Limitation Act, it relied on the practice of English courts which in fact had expressly made such distinction. In particular, the QFC Court referred to English authority, according to which where a customer has a current account with a bank, a cause of action does not accrue to the customer until a demand for payment is made on the bank.[85] Exceptionally, it may accrue earlier if in the meantime the business relationship comes to an end.[86]

English law is also present even in legislation that is seemingly wholly unrelated. We have already stated that the QFC Contract Regulations (effectively the QFC Contracts Code) was modelled after the UNIDROIT PICC. Even so, there are some elements of the common law that are poignant in the Regulations. This is true for example with respect to good faith and misrepresentation. Unlike good faith in the *Qatari Civil Code* (hereinafter 'Qatari CC'), whose observance is binding upon conclusion of the contract,[87] there is no similar provision in the Regulations. It must therefore be assumed that good faith is not obligatory upon conclusion of the contract under the Regulations, particularly since Article 13(2) of the Regulations makes it clear that a party negotiating or ceasing negotiations in bad faith incurs liability for any losses caused to the other party. No doubt, the drafters of the Regulation felt that since English contract law was predominant in the region, as a result the absence of good faith during the lifetime of the contract would have been an attraction for potential end users of the Contract Regulations. Misrepresentation is equally derived directly from the common law tradition.[88] In fact, misrepresentation during negotiations is not counted as a ground for a valid defect of consent in the civil law tradition and is not counted as such in the Qatari CC.[89]

The Abu Dhabi Global Markets: A Wholesale, yet Regulated, Approach to English Transplants

The ADGM's founding law, *Law No. 4 of 2013*, under which the Abu Dhabi Global Markets (ADGL) was established as a SEZ, was predicated on Article 121 of the *Constitution of the United Arab Emirates*. Driven by its predecessors in the GCC, the ADGM, another SEZ with its

[85]*Nasco Qatar v Misr Insurance* (n 80) para 28, citing with approval *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110, and cited with approval by Lord Reid in *Arab Bank Ltd v Barclays Bank* [1954] AC 495, 531.

[86]ibid, citing with approval, *In re Russian and Commercial Bank* (1955) 1 Ch 148, 157 (Wynn-Parry, J).

[87]Qatari Civil Code, art 172(1). See Nudrat Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah' (2004) 20 Arbitration International 97. In fact, evidence suggests that Islamic law requires good faith during negotiations too. This is generally derived from a number of *hadith*, namely: 'a person does not believe until he prefers for his brother what he prefers for himself', which is construed as requiring fair dealing and diligent examination of terms and conditions of a sale. It is equally forbidden to conceal or misrepresent the qualities of a good. See Muslim bin Hajjah, 'Ṣahīh Muslim, Book of Faith' No 459; equally, Al-Bukhari 3/67, cited in Mahmoud Fayyad, 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law: A Comparative Analysis' (2014) 28 Arab Law Quarterly 205, concerning the narration of a negotiation for the purchase of a camel.

[88]Under the leading case of *Smith v Hughes* (1871) LR 6 QB 597, it was famously held that there exists no general duty to disclose information and in principle mere silence is not a ground for avoiding a contract. The English Misrepresentation Act 1967 identifies three types of misrepresentation, namely: fraudulent, negligent and innocent.

[89]See QFC Contract Regulations, art 35.

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own distinct court, came to the realisation that an attractive legal system was an indispensable ingredient for high end transnational end users. As a result, its Board of Directors adopted in 2015 the Application of English Law Regulations. Article 1(1) of the Regulations renders English common law (including the principles and rules of equity) as 'part of the law of the ADGM', subject to the following qualifications: (a) so far as context allows; (b) subject to modifications as context requires;[90] (c) subject to any amendment made by ADGM legislation and; (d) any amendments to English law shall only have force in the ADGM upon express ratification by the ADGM legislature.[91] In the event of a conflict between ADGM law and English law, the former prevails.[92] Interestingly, Article 3(1) of the 2015 Regulations stipulates that in the event of variance between an equitable and common law principle concerning the same subject matter, the equitable principle shall prevail. At the end of the Regulations there is a Schedule with all the English statutes that are in force in the ADGM. The list is in historical ascending order, starting with the *1677 Statute of Frauds*. Next to each statute there is an indication as to whether the entire statute is in force or parts of it. Although the emphasis is on legislation, it is clear from the references in the 2015 Regulations that common law has binding force in the ADGM. The 2015 Regulations are supplemented from time to time in line with developments in English law or adaptation by the ADGM legislature.[93]

In order to safeguard and monitor the application of English law in the local context, the ADGM has devised a consultative mechanism with the professional legal community in the ADGM and beyond, as well as with all interested stakeholders. In fact, the ADGM frequently invites consultations wherever changes to English law occur or are imminent with a view to affecting meaningful changes, if any, to its own legal system.[94] As far as this author is aware, this fruitful exchange is popular and meaningful to the ADGM and its direct stakeholders.

Just like other SEZ courts, the ADGM Board of Directors effectively entrusted the embeddedness of English law through the work of the ADGM Court. In practice, the Court sees no conflict between English statutory law and ADGM law[95] and construes the former on the basis of the common law. This is fortunate, because a painstaking compatibility test in every case would have done little to alleviate legal certainty concerns. The Court regularly refers to English statutes while noting the corresponding provisions in the pertinent ADGM laws.[96] In this manner the Court effectively

[90]See the power of the ADGM Board in this regard in Article 5 (aptly titled 'Power to remove difficulties') of the ADGM Application of English Law Regulations.

[91]Equally, if legislation is amended on abolished in England, this will continue to have force in ADGM. See ADGM Application of English Law Regulations, arts 1(3) and (4).

[92]ibid art 1(2).

[93]See Application of English Law (Amendment) Regulations 2016 and Application of English Law (Amendment) Regulations 2020, which made slight modifications to the language used in the 2015 Regulations or otherwise exclude certain sections of English statutes.

[94]See Mohammad Tbaishat, 'Abu Dhabi Global Market Opens Consultation to Update English Law Regulations' (Pinsent Masons, 5 Nov 2020) <https://www.pinsentmasons.com/out-law/news/abu-dhabi-global-market-opens-consultation-update-english-law-regulations> accessed 6 Jul 2022. See equally ADGM, 'Proposed Amendments to the ADGM Arbitration Regulations 2015' (Consultation Paper No 8 of 2000, 25 Nov 2020) <https://www.adgm.com/documents/legal-framework/public-consultations/2020/consultation-paper-no-8/consultation-paper-no-8-of-2020--adgm-arbitration-regulations.pdf> accessed 6 Jul 2022, which asked participants to comment on the adaptation in the ADGM of the common law position on the arbitration agreement.

[95]This is rare but when it does occur the Court hardly emphasises it. See *NMC Healthcare Ltd and associated companies* [2020] ADGMCFI 0008, para 22, where the Court, while noting that the English liquidation and administration of insolvent companies' regime was similar to its ADGM counterpart, the English regime did not include an equivalent to priority funding. Even so, the Court did not give priority to ADGM law, but instead relied on the statement of Nicholls LJ in *Re Atlantic Computer Systems PLC* [1992] Ch 505 about the fundamental nature of administration.

[96]*Akfar Capital Ltd v Saifallah Mohamed Amin Mahmoud Fikry* [2017] ADGMCFI 1 paras 28 and 29 (referring to rule 25.1 of the English Civil Procedure Rules (CPR) as corresponding to rule 71(1) of the ADGM Court Procedure Rules), citing with approval *The National Crime Agency v N & RBS plc* [2017] EWCA Civ 253, *Rolls Royce plc v Unite the Union* [2009]

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introduces common law in the ADGM legal order, not in the abstract sense of the 2015 Regulations, but as a matter of precedent.[97]

While SEZ courts do not generally discuss their relationship with the courts in the mother state, nor indeed do they touch upon general matters of public policy – unless specifically a claim to that effect arises – the ADGM Court has been diplomatic about this issue. In one case, a party sought to enforce an arbitral award through the 1958 New York Convention in the ADGM. As it turned out, the party against whom enforcement was sought did not have assets in the ADGM; it only had attachable assets in the UAE. Even though the ADGM Court acknowledged the likelihood that such an application may not have been made in order to enforce against assets in the ADGM, but as a device to have an order of the Court (rather than the award itself) enforced elsewhere in the UAE, the judge went on to say that:

> I would need little persuasion that it is desirable and, in a general sense, in the public interest that the different Courts of the UAE work together harmoniously and that there be an orderly distribution of jurisdiction between the Courts of Abu Dhabi and more generally of the UAE. There is, I think, more room for debate whether questions of this kind engage considerations of public interest within the meaning of the New York Convention and with regard to the recognition and enforcement of New York Convention awards.[98]

In this manner, the Court did not have to pronounce whether bypassing the UAE courts, which have not hesitated in the past to strike down foreign awards on abstract and arbitrary grounds of public policy,[99] was an issue of public policy. By making this a New York Convention issue the Court avoided the thorny question of diluting English law by reference to UAE public policy. In the process, it also avoided touching on the question as to the existence of an ADGM public policy that is distinct from a UAE public policy. It is inevitable that such a distinction in fact exists given that the two legal systems (ie, ADGM and the UAE) are grounded on wholly distinct laws and principles, including the means and methods for the operation and interpretation.

It was not a far leap for the ADGM Court to adjust the limitations in Article 1 of the 2015 Regulations and construe English law (and ADGM law) as possessing at times an extra-territorial character in the territory of the UAE. In the case at hand, it was contended that the power of the Court under Rule 253 of the ADGM Court Procedure Rules 2016, which is based on Rule 71 of the English CPR 71, did not permit an order of attendance against a director of a judgment debtor company who is outside the jurisdiction. This argument was further enhanced by a judgment of the House of Lords to this effect.[100] The ADGM Court masterfully decided to give effect to local context by emphasising that the English CRP upon which *Masri* was predicated served the purposes of a

EWCA Civ 387 para 120 (Aikens LJ) and *Governor & Company of the Bank of Scotland v A Ltd and Ors* [2001] EWCA Civ 1081 para 46, (Lord Woolf CJ).

[97]In *Akfar Capital Ltd v Saifallah Mohamed Amin Mahmoud Fikry and Sylvain Vieujot* [2018] ADGMCFI 2 paras 28–29 and 62, the ADGM Court relied on *Brookes v HSBC Bank plc* [2011] EWCA Civ 354 para 6 (Moore-Bick LJ), in order to press the long-standing rule that a claimant who discontinues is generally liable for costs. It equally relied on *In Ghafoor v Cliff* [2006] EWHC 825 (Ch) para 72 (Richards J), according to which in order for the courts to exercise their discretion on costs on the standard or the indemnity basis, there must be something in the conduct of the proceedings or the circumstance of the case which takes the case out of the norm in a way that justifies an order for indemnity costs; see equally on mitigation of losses through reasonable care, *Rosewood Hotel Abu Dhabi LLC v Skelmore Hospitality Group Ltd* [2019] ADGMCFI 0009 para 92, citing with approval *Reichman v Beveridge* [2006] EWCA Civ 1659.

[98]*A4 v B4* [2019] ADGMCFI 0007 para 21.

[99]Particularly *Bechtel* (n 4). This same result was later reaffirmed by the Court in Case No 322/2004, Judgment (11 Apr 2005). Not surprisingly, the UAE Federal Arbitration Law No 6 of 2018 dispensed with the peculiarity and negative impact of the *Bechtel* decision.

[100]*Masri v Consolidated Contractors International Co SAL and others* [2009] UKHL 43.

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different era (the 19th century) and hence was not appropriate for the proper construction of Rule 253 of the ADGM Court Procedure Rules. It went on to say that:

> [T]his Court is tasked with interpreting Rule 253, and must do so with regard to the "legislative grasp or intendment" behind this Rule as intended by those drafting this legislation in 2015, and not by those drafting CPR 71 in the late nineteenth century.[101]

This is clearly the role intended for the ADGM Court under Article 1 of the 2015 Regulations.[102] At the same time, its contextual and contemporary construction of English law, even by distinguishing *Masri*, renders it in a transnational judicial dialogue[103] with English and common law courts.

There is equally some evidence to suggest that the ADGM Court will view Islamic finance disputes through the lens of English law as a matter of contract.[104] In one case involving a *Murabaha* agreement, which was one among several forms of security on the purchase of real estate, the Court did not go into the mechanics of the *Murabaha* agreement, but instead relied on English property law, which is part of the law of the ADGM.[105] This is consistent with the approach of English courts. In *The Investment Dar Co KSSC v Blom Development Bank S.A.L*, the English High Court was able to override the designation of English law as the governing law of a *Wakala* agreement, on the ground that it was not Sharia-compliant with the underlying investment, which the parties had expressly agreed should be so compliant.[106] A similar result, through a similarly sensible conflict process, was reached in *Sanghi Polyesters Ltd India v The International Investor KCFC (Kuwait)*. There, the parties had agreed to English law as the governing law of their agreement to the degree that this was compatible with Islamic law.[107] The Court had no trouble finding in the event of a conflict between English and Islamic law that the more pressing law to the issue at hand (in the present instance an Islamic finance transaction) would prevail.

Conclusion

This article identified three types or models whereby English law has been transplanted in the legal systems of several special economic zones. The first is achieved by planting the mere seed of English law, with the expectation that its direct stakeholders will make it flourish. The second is predicated on the wholesale introduction of English statutes, and by implication corresponding common law, further enhanced by institutions capable of adapting and applying this body of law. In the third model there is no express legislative provision for the introduction of English law. Even so, the adoption of laws with a transnational character and the conscious appointment of prominent common law judges to enforce said laws is taken as implicit authority to construe said law, to some degree at least, on English law, including also common law. The other dimension of this study is that the case studies explored concerned only developed, or sophisticated, special economic zones, with an emphasis on the attraction of high-end financial services, such as insurance,

[101] *Rosewood Hotel Abu Dhabi LLC v Skelmore Hospitality Group Ltd* [2020] ADGMCFI 0002 para 22.

[102] ibid para 28. The Court held that: 'if the view as now taken should be incorrect, in so far as may be necessary the Court further holds that a purposive construction of Rule 253 clearly warrants a departure from the common law approach adopted in England and Wales, and justifies giving this provision extraterritorial effect, at the least within the UAE.'

[103] We have alluded to this earlier in the paper in more general terms. For an excellent discussion, see Philip M Moremen, 'National Court Decisions as State Practice: A Transnational Judicial Dialogue?' (2006) 32 North Carolina Journal of International Law & Commercial Regulation 259.

[104] See, however, Dubai Cassation Court Judgment 898–927/2019, which concluded that for a *murabaha* contract to be Sharia-compliant, it has to satisfy the criteria of the Maliki school and that a certificate of compliance from an Islamic bank or financial institution is insufficient.

[105] *Abu Dhabi Commercial Bank PJSC v KBBOBRS Investments Holdings Limited & Anor* [2021] ADGMCFI 0002 paras 3, 19, 54.

[106] *The Investment Dar Co KSSC v Blom Development Bank SAL* [2009] All ER (D) 145.

[107] *Sanghi Polyesters Ltd India v The International Investor KCFC (Kuwait)* [2000] 1 Lloyd's Rep 480.

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investment banking and others. This is in stark contrast to special economic zones in developing economies striving to attract manufacturing or natural resources exploitation. No doubt, the aspiration is that since English law has allowed London to attract and retain high-end financial services, while at the same time enhancing its legal services sector, the use of English law is a powerful tool that could be transplanted with similar success in other regulatory environments seeking to diversify their economies.[108]

[108]See Steven L Schwarcz, 'Sovereign Debt Restructuring and English Governing Law' (2017) 12 Brooklyn Journal of Corporate Finance and Commercial Law 1 (demonstrating that in instruments regulating sovereign debt restructures the parties, as chiefly imposed by creditors and international financial institutions, govern the entire agreement on the basis of English law, although it is unclear if this also encompasses English public law, as opposed to merely private law).

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