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Common Law Zones: An Illustrated Review

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Abstract

Governments across the globe have created special jurisdictions offering common law rules and practices imported from abroad, the better to attract foreign investment and stimulate local economic growth. Four such common law zones have launched in recent years: the United Arab Emirates' Dubai International Financial Centre, in 2004; the Abu Dhabi Global Market, also in the UAE, in 2015; Kazakhstan's Astana International Financial Centre, in 2018; and the first Honduran ZEDE, in 2020. Each of these common law zones has faced the challenge of transplanting foreign rules and practices into a jurisdiction set apart from that of its host government, which instead follows some mix of Napoleonic Civil Code, Sharia, and/or Soviet legal traditions. The first three zones have answered that challenge by importing the common law of England (and sometimes also Wales) and entrusting its interpretation to courts that, while set apart from the local legal system, remain under the control of government officials. The ZEDE system takes a different approach. It requires each ZEDE operator to come up with its own detailed governance plan, subject to independent review, and carefully insulates ZEDE Courts from Honduran politics. The first such plan to win approval, that of the Próspera ZEDE on the island of Roatán, collects rules from various private sources in a Common Law Code and subjects most disputes to interpretation by private arbitration services. This report from the field thus finds two species of common law zone, a burgeoning genus of special jurisdiction. The first species draws its law from foreign sovereigns and leaves its courts exposed to political interference. The more recently evolved species of common law zone, as evidenced by the Próspera, enjoys greater freedom to choose and interpret its own governing rules. In theory, that should give ZEDEs an advantage over competing zones in providing the rule of law. In practice, the contest between common law zones has only just begun.

Keywords: Special jurisdiction, special economic zone, SEZ, private adjudication, common law.

Resumen

Los gobiernos de todo el mundo han creado jurisdicciones especiales que ofrecen reglas y prácticas de derecho consuetudinario importadas del extranjero. Ésta ha sido una excelente estrategia para atraer

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inversión extranjera y estimular el crecimiento económico local. En los últimos años, se han creado cuatro de estas zonas de derecho consuetudinario: el Centro Financiero Internacional de Dubai de los Emiratos Árabes Unidos, en 2004; el mercado global de Abu Dhabi, también en los Emiratos Árabes Unidos, en 2015; El Centro Financiero Internacional Astana de Kazajstán, en 2018; y la primera ZEDE hondureña, en 2020. Cada una de estas zonas de derecho consuetudinario ha enfrentado el desafío de trasplantar reglas y prácticas extranjeras a una jurisdicción distinta a la de su gobierno anfitrión, que en cambio sigue una combinación de Código Civil Napoleónico, Sharia y / o tradiciones legales soviéticas. Las primeras tres zonas han respondido a ese desafío importando el derecho consuetudinario de Inglaterra (y a veces también Gales) y han confiando su interpretación a tribunales que, aunque separados del sistema legal local, permanecen bajo el control de funcionarios gubernamentales. El sistema ZEDE adopta un enfoque diferente. Requiere que cada operador de ZEDE elabore su propio plan de gobernanza detallado, sujeto a revisión independiente, y aísla cuidadosamente a los tribunales de ZEDE de la política hondureña. El primer plan de este tipo que obtuvo la aprobación, el de la ZEDE Próspera en la isla de Roatán, recoge normas de diversas fuentes privadas en un Código de Derecho Común y somete la mayoría de las controversias a interpretación por parte de servicios de arbitraje privados. Este informe de campo encuentra así dos especies de zona de derecho común, un género floreciente de jurisdicción especial. La primera especie extrae su derecho de soberanos extranjeros y deja sus tribunales expuestos a interferencias políticas. La especie de zona de derecho común de evolución más reciente, como lo demuestra la Próspera, goza de mayor libertad para elegir e interpretar sus propias reglas de gobierno. En teoría, eso debería dar a las ZEDE una ventaja sobre las zonas competidoras en la provisión del estado de derecho. En la práctica, la contienda entre zonas de derecho consuetudinario apenas ha comenzado.

Palabras clave: Jurisdicción especial, zona económica especial, ZEE, adjudicación privada, derecho consuetudinario.

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1. INTRODUCTION: THE RISE OF COMMON LAW ZONEs

Recent decades have witnessed a surge in special economic zones (SEZs), created by countries across the globe to attract foreign investment and drive local development (Bell, 2018, pp. 19-27). By definition, each zone offers rules different from those prevailing elsewhere in the host country (Farole, 2011, p. 23). Most do little more than lighten the burdens of custom duties and other trade-related taxes. Increasingly, however, special jurisdictions go beyond mere economic concerns to market entire legal systems, complete with their own rules and courts, designed to compete in the international market for capital and talent. The proven success and widespread use of the common law has made it a popular resource for special jurisdictions seeking rules and practices from abroad. This paper reviews the efforts of four such *common law zones*, as it labels them.

The recent surge in common law zones began in 2004, in the United Arab Emirates (UAE), with the launch of the Dubai International Financial Center (DIFC, 2020a). The success of DIFC inspired another UAE common law zone in 2015, the Abu Dhabi Global Market (ADGM, 2020). Kazakhstan's Astana International Financial Centre followed in 2018 (AIFC, 2020). The DIFC, ADGM, and AIFC share strategies when it comes to importing common law rules and practices. The spring of 2020 brought a fresh approach to the challenge with the launch of the first zone in the Honduran Zona de Empleo y Desarrollo Económico (*Zone of Employment and Economic Development*) system (ZEDE, 2020; Honduras Próspera, 2020).

The DIFC, ADGM, and AIFC invoked the common law of England (and sometimes also Wales) when building the foundations of their zones' rules and set up nominally independent courts to interpret those rules. However, as the analysis below indicates, the judges in those courts appear to remain subject to the influence of local politicians. The ZEDE system, in contrast, requires each private zone promoter to come up with its own detailed

governance plan, subject to independent review, and shelters the judges of ZEDE Courts from the interference by Honduran politicians.

This survey of common law zones, a new and rapidly expanding genus of special jurisdiction, thus finds two major species. The first three zones closely resemble the SEZs from which they evolved. The most recent, the Honduran ZEDE system, takes a new approach to the problem of importing the common law.

In fairness, it bears noting that the DIFC, ADGM, and AIFC are hardly perfect counterparts to ZEDEs. The non-Honduran zones do not face the huge task before each ZEDE: Provide the functional equivalent of a super-municipality complete with a resident population, comprehensive legal system, social benefit programs, and the other trappings of government. Regardless of these differences, however, all four of the special jurisdictions aspire to provide independent and competent common law-based judicial systems. That provides a basis for cross-zone comparisons.

The investigation begins with an overview of each common law zone, from oldest to newest. Section 2 covers the two UAE zones, the DIFC and ADGM, both of which rely on the same national legislation. Section 3 covers Kazakhstan's AIFC; section 4, the Honduran ZEDE system. Each of these overviews offers a brief background, a description of how the zone imports the common law, and an illustrated guide to the zone's functional features. The last of these provides a basis for comparing the independence of the adjudicative bodies in these special jurisdictions, an exercise taken up in the concluding section. This structural analysis gives reason to predict that the design of Próspera ZEDE's legal system will promote the common law's core values of judicial independence, individual rights, and the rule of law better than that of the DIFC, ADGM, or AIFC. Will that theoretical advantage bear out in practice? To answer that question will require continued study of common law zones in their natural habitat, so to speak.

It bears noting that this paper does not discuss the various sovereigns that offer common law legal systems by default, a list that includes Great Britain and the many countries influenced by England's legal tradition, including 53 other Commonwealth nations and the United States (Commonwealth, 2020). Those perhaps represent common law zones of a sort, but not the sort of interest here. The focus instead falls on special jurisdictions that aim to transplant the common law to new foreign environments.

Despite its claim to "follow the English Common Law," the Qatar Financial Center falls outside the scope of this study because its publicly available laws and regulations do not make evident how it fulfills that claim, if at all (Qatar Financial Center, 2020). The Center explains that it has not yet issued regulations for its civil and commercial courts (*ibid.*). Perhaps it plans to import the common law later.

2. UAE FINANCIAL FREE ZONES

The United Arab Emirates (UAE) governs a federation of seven emirates, each a royalty governed by its own supreme leader, typically titled Ruler or Sheikh. In 2004, the UAE amended its constitution to clear the way for a new kind of special jurisdiction—Financial Free Zones (UAE Constitutional Amendment No (1) of 2004). It thereafter passed a federal law allowing each of its member emirates to create such zones (UAE Federal Law No. (8) of 2004).

With regard to banking, the exchange of stocks, insurance, and other financial services, each zone has considerable independence. The federal law says of each zone, "It and no one else shall be responsible for the obligations arising out of the conduct of its activities." (*id.* Art. 2). Laws criminalizing money laundering and certain other obligations remain in place, however, and Financial Free Zones can self-legislate only in civil and commercial matters (*id.* Art. 3(2)). In contrast to Honduran ZEDEs, these limitations leave the UAE

zones far short of semi-autonomous municipalities. Like the AIFC that followed them, the UAE Financial Free Zones focus on economic transactions.

The UAE currently hosts two Financial Free Zones, the DIFC in Dubai and the ADGM in Abu Dhabi. The next two subsections describe each in turn. Figure 1, below, illustrates the functional relations between the UAE and its two zones, and the major structures of the two zones themselves. This picture of the governance of the Financial Fee Zones offers scant evidence of the decentralized and independent decision-making typical of common law systems.

To summarize: A Ruler, acting through the institutional framework of his emirate, effectively controls each zone. The Emirate of Dubai appoints and removes all important officers of the DIFC and legislates for the zone. The Emirate of Abu Dhabi exercises control as completely, but by delegating power to an Executive Council, which legislates for the zone and appoints its officials while serving at the discretion of the Ruler. Further details follow below in subsections examining the DIFC and ADGM, each in turn

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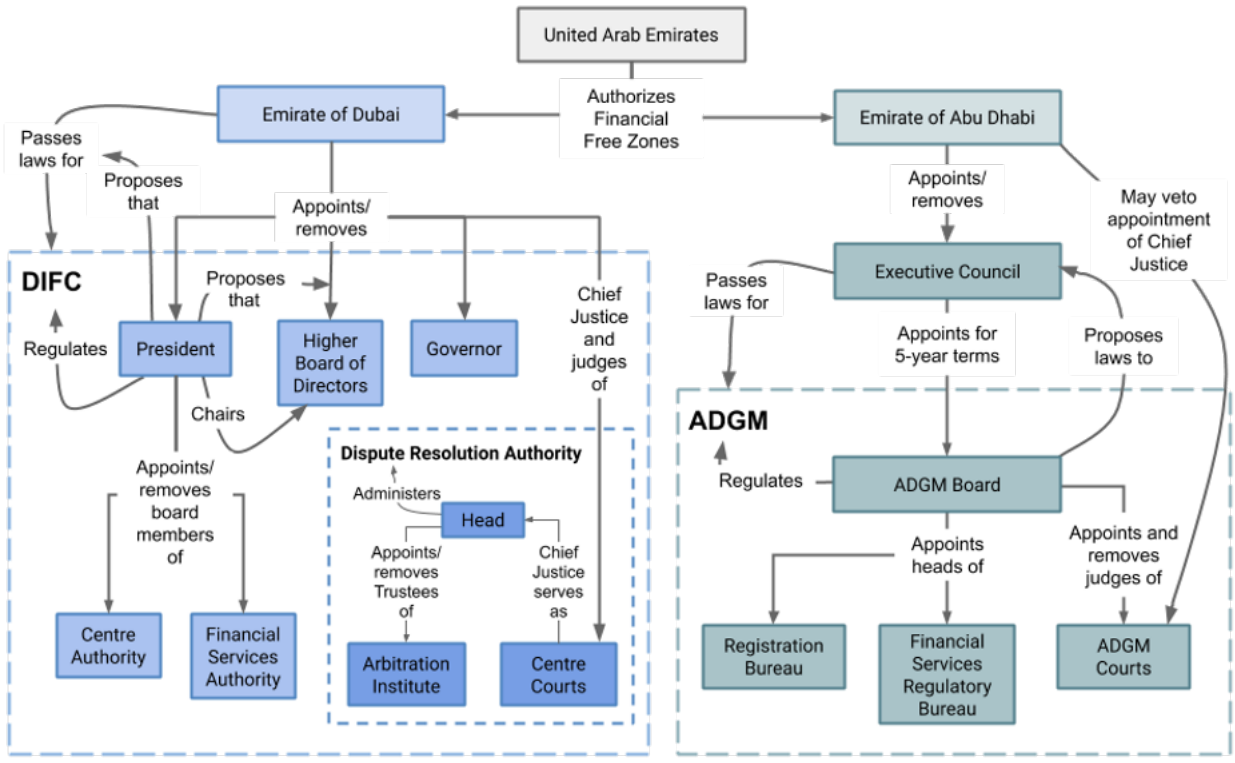

Figure 1: UAE Financial Free Zones' Governing Structures (author's own elaboration)

2.1. Dubai International Financial Centre

In 2004, within months of amending its constitution and passing legislation to enable Financial Free Zones, the UAE decreed the establishment of the first, the Dubai International Financial Centre (DIFC) (UAE Federal Decree No. (35) of 2004). Dubai's Sheikh Mohammed Bin Rashid Al Maktoum (Ruler), thereafter issued the Law of the DIFC, defining the zone's governance (Law of the DIFC). The DIFC has by most accounts proven a success (DFIC, 2019a, 2019b). Subsection 2.1.1. explains how it imported the common law to the UAE, a jurisdiction otherwise shaped by a mixture of Civil Code and Sharia Law influences. Subsection 2.1.2. offers a structural analysis of the zone.

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2.1.1. How the DIFC Imports the Common Law

The UAE statute creating Financial Free Zones merely removes them from the reach of federal civil and commercial laws; it does not specify what should fill that gap (UAE Federal Law No. (8) of 2004, Art. 3(2)). For the most part, the DIFC has filled it with its own local laws and regulations, which run at some length and in great detail (DFIC, 2020b). Some of these borrow heavily from statutes of the United Kingdom, though legislation from the United States also shows an influence (Horigan, 2009, p. 10). As a general matter and by design, those control most transactions in the zone.

More specifically, the DIFC recognizes a hierarchy of rules. At the top come the DIFC's own enactments (DIFC Law No. 3 of 2004, Art. 8(2)(a)). If those leave a particular issue unresolved, the search moves down the list to inquire whether the concerned parties agreed to have another law control their transaction (id., Art. 8(2)(c)). Failing that, the DIFC adjudicatory body considering the question may itself determine the law "most closely related to the facts of and the persons concerned in the matter …." (Id., Art. 8(2)(d)). Only if that effort also fails does DIFC law, as something of a last resort, fall back on "the laws of England and Wales." (Id., Art. 8(2)(e)). In contrast to the ADGM's enabling law, the DIFC Law does not expressly state whether this reference automatically tracks changes to its foreign referent, or whether it instead stays fixed as of the date of the DIFC law's enactment. The DIFC also built the common law into its legal system by hiring experienced judges to run its courts (Krishnan & Purohit, 2014, pp. 523-54), a measure likely to have more practical effect than any merely written provision.

2.1.2. Structural Analysis the DIFC

Dubai's Ruler, Sheikh Mohammed bin Rashid Al Maktoum, acts as the supreme legislator of the DIFC under Article (2) of the DIFC Law, which defines "Centre Law" as "any laws issued by the Ruler in relation to the Centre." Article (3)2 of the Law of the DIFC gives the Ruler

power to appoint the President of the DIFC. As the title suggests, the President exercises many powers in the DIFC. Unlike some presidents, though, the DIFC's President serves not a voting public or shareholder board but a single ruler: the Ruler. The President's powers within the DIFC include:

- Submitting draft Centre Laws to the Ruler for issuance (id., Art. (5)2)
- Issuing Centre Regulations (id., Art. (5)3);
- Appointing or removing the chairs or members of the Centre Bodies (id., Art. (5)4, (5)5).

The President also holds the purse for all Centre Bodies via the power granted in Article (5)8 to approve (and thus presumably disapprove) their budgets. Their funds come straight from the Government, however, which de facto controls their disbursement through the Department of Finance. The President is not given the power to appoint or remove the head of the Dispute Resolution Authority. In addition to the President, the DIFC's Centre Bodies have an especially powerful influence on the zone's operations. The Law of the DIFC establishes three such bodies:

- The Dubai International Financial Centre Authority (Centre Authority);
- The Dubai Financial Services Authority (Financial Services Authority); and
- The Dispute Resolution Authority (DRA) (id., Art. (3)3).

The DRA includes two sub-institutions of note, the Centre Courts and the Arbitration Institute (id., Art. (8)1st1). (Though sources closer to the ground report that there has been significant functional restructuring of the DIFC court system, the account here applies the applicable law as described by DFIC bodies (DIFC-LCIA Arbitration Center, 2021). In practice, the DIFC-LCIA Arbitration Centre, formed as a joint venture between the Arbitration Institute and the London Court of International Arbitration, has taken a prominent role in local dispute resolution (id.)

The DIFC also includes a Higher Board of Directors, chaired by the President, the members of which the Ruler chooses (id., Art. (3)5). Members of the Higher Board must include the Governor, the chairs of the boards of the Centre Authority and the Financial Services Authority, and the head of DRA (ibid.). The Higher Board evidently serves as something like a board of advisors to the President, who in turn proposes zone legislation to the Ruler and appointments to the Higher Board.

The DIFC has a Governor appointed or removed by the Ruler upon proposal of the President (id., Art. (5)^{bis}1). The Governor serves as the managing director of the DIFC, a position that regardless of its practical importance does not have much to teach about how the DIFC's legal system operates. The discussion thus returns to the three Centre Bodies.

The DIFC's founding law insists that the Centre Authority must perform its functions free from interference by other Centre Bodies (id., Art. (6)2). Toward that end, the Authority has its own budget, which it receives straight from the Government of Dubai (which is to say, given the monarchical form of government, the Ruler) (id., Art. (6)3). While guaranteeing the independence of the Centre Authority from other Bodies, this does not appear to prevent the President from controlling the Centre Authority's budget via the approval power set forth in Article (5)8. Similarly, Article (3)6 provides that the President "shall be responsible for supervising the Centre's Bodies and coordinating between them … without affecting the independence of the Centre's Bodies." This must speak to their independence from one another, as it can hardly speak to their independence from the President, to whom the Authority's board of directors must answer (id., Art. (6)4). That makes sense, given the President's power to appoint or remove the chair or members of the Centre Authority's board, as well as to specify their duties and remuneration (id., Art. (5)4). Combined, these powers give the President considerable influence over the Centre Authority.

The DIFC's founding law gives the Financial Services Authority a similar treatment, insisting that other Bodies must not interfere with its operations, funding it directly from

Government coffers, and placing it under the President's direct supervision (id., Art. (7)3-4). As with the Centre Authority, the President controls who sits on the board of directors of the Financial Services Authority, their duties, and their pay.

The founding law starts out treating the DIFC's Dispute Resolution Authority the same way, espousing its independence from other Centre Bodies and promising it Government funding (id., Art. (8)1st3-4). Unlike the Centre Authority and the Financial Services Authority, though, the Dispute Resolution Authority is not placed under the control of the President. Instead, the Ruler retains direct control of the Dispute Resolution Authority.

The Law of the DIFC creates this governance structure in a roundabout way. First, it designates the Chief Justice of the Centre Courts as the Head of the Dispute Resolution Authority (id., Art. (8)1st5). These courts have exclusive jurisdiction "to interpret the Centre's Laws and the Centre's Regulations," per Article (8)2nd7. Some sections later, the Law of the DIFC provides that the Ruler appoints the Chief Justice (*id.*, Art. (8)2nd3). Still later, it provides that the Ruler appoints all the judges of the Centre's Courts (*id.*, Art. (8)2nd5.e). Add it all up and the Ruler appoints the DRA Head and Centre Court Chief Justice, in one and the same person, and appoints all Centre Court judges.

In contrast to the ZEDE Courts, which have jurisdiction over crimes occurring in their zones, and like their counterparts in the ADGM and AIFC, Centre Courts are forbidden to hear such cases. "The Courts of the Emirate shall have jurisdiction on crimes committed within the Centre," the DIFC's founding law emphasizes (id., Art. (8)2nd6). True to their name, and consistent with their statutory subordination to UAE money laundering laws, Financial Free Zones do not offer a special jurisdiction with regard to criminal matters. The Centre Courts' jurisdiction over foreign and domestic awards has become a bone of contention with onshore Dubai Courts, leading the Ruler to decree the creation of a Joint Judicial Committee to resolve the conflict (Walker & Thadani, 2018, p. 28).

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The Dispute Resolution Authority also hosts an Arbitration Institute, set up to provide private dispute resolution services for-hire to local and international customers (Law of the DIFC, Art. 8[3rd]). The Arbitration Institute falls under the direct control of the Head of the Dispute Resolution Authority (and Chief Justice of the Centre Courts), who holds the power to appoint and remove members of the Institute's Board of Trustees (id., Art. 8[3rd]4). This Board runs the Arbitration Institute (id., Art. 8[3rd]5).

The Ruler, acting through the Emirate of Dubai, controls the Dispute Resolution Authority and Centre Courts from one step away, via the power to appoint or remove the Head/Chief Justice. The Emirate controls the Arbitration Institute from two steps away, acting through the Head/Chief Justice's direct control over the composition of the Institute's Board. This structure does not dilute the sovereign's authority so much as delegate it. It offers the Ruler the potential of exercising detailed control over the operations of the DRA and Centre Courts via the power to terminate the Head/Chief Justice and judges. Figure 2, below, highlights the government's control over all important personnel of the DRA.

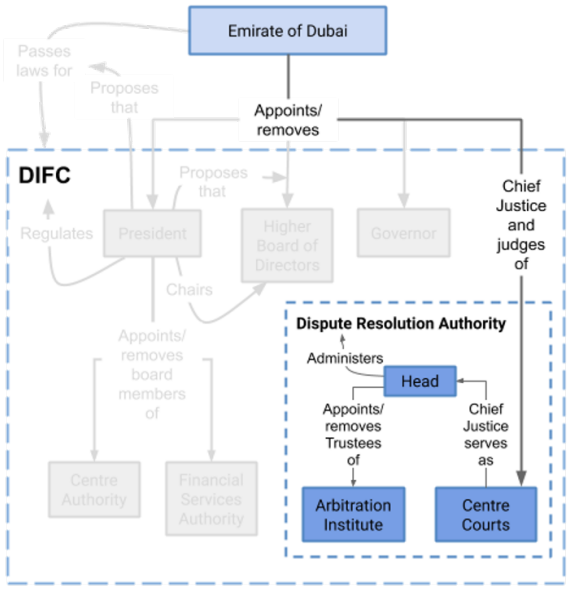

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Figure 2: The DIFC Judicial System, Highlighted (author's own elaboration)

The same theme recurs throughout the design of governance of the DIFC. Though the Law of the DIFC proclaims that Centre Bodies shall not interfere with each others' operations, it says nothing against the Ruler influencing or indeed directly commanding the President, Head of the DRA, Chief Justice, and inferior judges of the DIFC. Against all, he wields the power of termination. The Ruler exercises the same power over the members of the boards of Centre Bodies, acting through the President, and over the trustees of the Arbitration Institute, acting through the Head of the DRA.

Does the DIFC design subjects its courts to undue risk of political influence? Suppose the valued friend of a hypothetical Ruler faced a large claim in the Centre Court, the resolution of which turned on a hotly contested point of law. Suppose further that the Ruler let the Chief Justice know that termination would follow if his friend lost. Would any institution or law stand in the way of this attempt to interfere with the court's deliberations? It seems not (Krishnan & Purohit, 2014, p. 531).

None of this is to say that the present Ruler *would* do such a thing, of course; it speaks only to what under DIFC law a hypothetical Ruler *could* do. In this respect, the DIFC resembles the AIFC and the ADGM, while differing sharply from the ZEDE system or a traditional common law legal system. It bears noting, however, that the DIFC has built an innate defense of judicial independence into its court system by hiring judges of high repute with experience in the common law tradition. Regardless of ideology, a rational politician would have to realize that brute interference with zone courts would likely break the very mechanism that gives them value. The increasingly competitive market for hosting international financial transactions incentivizes the DIFC and other common law zones to respect the rule of law or lose business. Further comparative analysis follows in the concluding section.

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2.1.3. Abu Dhabi Global Market

In 2013, through Federal Decree No. (15), the UAE authorized the creation of its second Financial Free Zone: The Abu Dhabi Global Market (ADGM) (UAE Federal Decree No. (15) of 2013). Soon thereafter, Abu Dhabi defined the governing structure of the zone in Law No. (4) of 2013 Concerning Abu Dhabi Global Market (ADGM Founding Law). The zone opened in 2015 with a focus on private banking, wealth management, asset management, derivatives and commodities trading, and similar transactions. Physically, it occupies 114 hectare (282 acre) Al Maryah Island; functionally, the ADGM "enables registered financial and non-financial institutions, companies and entities to operate, innovate and succeed within an international regulatory framework based on common law." (ADGM, n.d.).

2.1.4. How the ADGM Imports the Common Law

Like the DIFC, the ADGM builds the common law into its legal system (Reynolds, 2017; Russell & Bognar, 2017) Specifically, ADGM regulations provide 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 the ADGM (ADGM Application of English Law Regulations of 2015, § 1(1)). Unlike the DFIC and AIFC, the ADGM focuses exclusively on English law, eschewing that of Wales. The ADGM also stands apart from its counterpart common law zones in that it gives expressly gives immediate effect to changes wrought by English courts, a relationship of dependency that commentators euphemise as "evergreen" (Reynolds, 2017) or "ambulatory" (Russell & Bognar, 2017).

The ADGM also incorporates by reference a great many English statutes, such as the Statute of Frauds and Partnership Act, that modify the common law (id., § 2(1)). In contrast to its treatment of English common law, however, the ADGM takes care to not give changes

to foreign legislation local effect automatically. The ADGM's regulations for application of English law to the zone provide that, notwithstanding any amendment [to] the law of England made pursuant to an Act or any legislative instrument adopted thereunder at any time after the date of enactment of these Regulations, [the] amendment shall not apply and have legal force in, or form part of the law of, the Abu Dhabi Global Market, unless and until an Abu Dhabi Global Market enactment expressly provides.... (id., § 1(1)(d)). In other words, no changes to English legislation have local effect unless and until approved by specific ADGM enactment.

2.1.5. Structural Analysis of the ADGM

A Board of Directors governs the ADGM. Who appoints its members? According to Article (4) of the ADGM Founding Law, "their appointment and remuneration shall be determined by a resolution issued by the chairman of the Executive Council." The Founding Law here refers to the Executive Council of the Emirate (id., § 1). And who appoints its members? Such appointments give every appearance of falling within the exclusive province of the Ruler (Wikipedia, 2020). It could hardly be otherwise, given the monarchical basis of Abu Dhabi's government.

The Founding Law states that Board Directors will serve 5 year terms renewable "unless the chairman of the Executive Council decides otherwise." (ADGM Founding Law, Art. 4). That chairman at present is the Crown Prince of the Emirate of Abu Dhabi, Sheikh Mohammed bin Zayed bin Sultan Al Nahyan (Abu Dhabi Executive Affairs Authority. 2013). The exact scope of the chairman's discretion remains unclear in the English translation. At any rate, that appears to be the most that any of the zones here under review does toward providing job security to judges.

Article 10 of the ADGM Founding Law creates three zone Authorities, each with its own legal personality and budget:

- The Global Market's Registration Bureau;
- The Financial Services Regulations Bureau; and
- The Global Market's Courts (ADGM Courts).

The Registration Bureau provides administrative support to the zone in a variety of ways, including registering properties and establishments, preparing reports, and proposing regulations to the Board (ADGM Founding Law, Art. 11). The Regulations Bureau oversees financial services in the zone, a power that includes licensing and monitoring them, reporting to the Board, and proposing regulations (id., Art. 12). Those Authorities matter less for present purposes than the ADGM Courts, however, to which consideration now turns.

The ADGM's Chief Justice and other judges are appointed and removed under Articles 6(3) and 13(2) of the ADGM Founding Law. Article (6) provides:

> The Board of Directors shall be the supreme authority in the Global Market.… It may exercise all the competencies and authorities necessary to do so, without affecting the independence of all the Global Market Authorities. It shall, in particular carry out the following:... 3. Appoint, remove and replace … the Chief Justice and judges of the Global Market's Court, and to specify their duties, the terms of their service and their remuneration pursuant to this law and the Global Market's Regulation.

Article (13) of the ADGM Founding Law puts a special limitation on the Board's power to appoint the Chief Justice, though: "2. The Global Market's Courts shall have a Chief Justice appointed by a Board of Directors resolution which shall become effective upon the expiry of

15 days of notifying the Chairman of the [Abu Dhabi] Judicial Department of such resolution and receiving no objections thereto." Because Sheikh Mansour Bin Zayed Al Nahyan serves as the Chairman of the Abu Dhabi Judicial Department (Abu Dhabi Judicial Department, 2020), this provision in effect gives the Emirate of Abu Dhabi 15 days to veto the prospective appointment by the Board of Directors of any judge to the ADGM Court.

The ADGM Founding Law imposes no similar review on appointments by the Board of Directors of officials to the other two zone Authorities, the Registration Bureau and the Financial Services Regulations Bureau. The Ruler evidently wants to subject any prospective Chief Justice of the ADGM Court to extra scrutiny. Well it might; the Chief Justice controls the appointment of lesser judges under Art. 13(3) of the Founding Law, which provides: "The judges of the Global Market Courts shall be appointed by resolutions issued by the Board of Directors based on the proposal of the Chief Justice of the Global Market Courts."

Figure 3, below, highlights the relationships through which the Emirate of Abu Dhabi controls ADGM's judicial processes. In contrast to the Emirate of Dubai's direct power to shape appointments to DIFC Courts, the Emirate of Abu Dhabi shapes ADGM judicial appointments by determining the composition of Abu Dhabi's Executive Council, which in turn determines the composition of the ADGM's Board of Directors, which itself appoints (subject to an Emirate veto of Chief Justice candidates) and removes the judges of the ADGM Courts. On a purely structural basis, this gives the ADGM Courts more protection against political influence than enjoyed by DIFC Courts.

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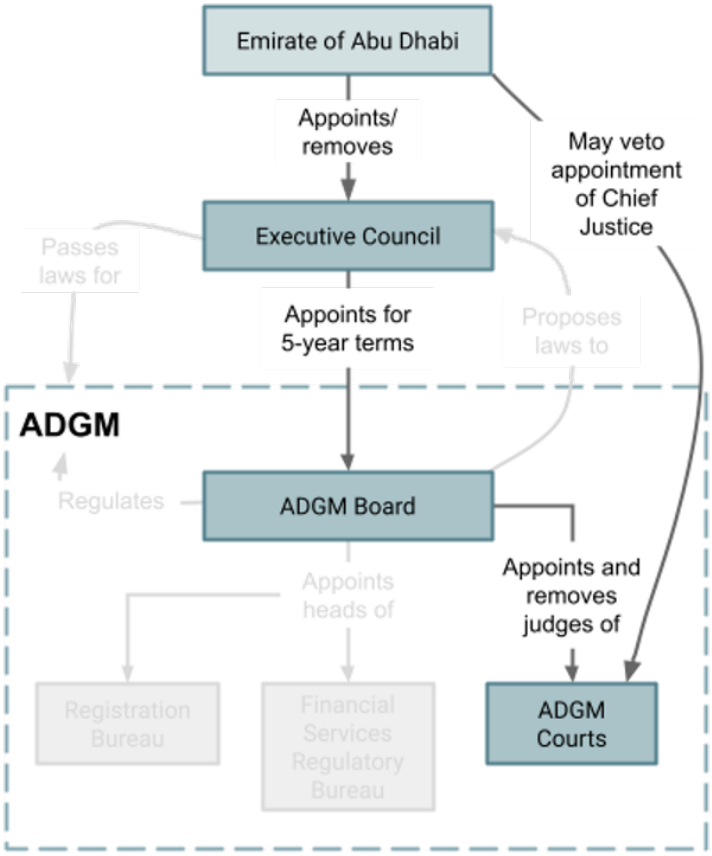

Figure 3: The ADGM Judicial System, Highlighted (author's own elaboration)

Further details of the appointment and removal of judges in ADGM Courts appear in regulations issued by the Board of Directors (ADGM Court Regulations). These regulations clarify the meaning of the ADGM Founding Law's requirement that the Board make appointments "*based on* the proposal of the Chief Justice" (Art. 13(3), emphasis added)--a condition that admits to various interpretations. The regulations evidently read it to mean that the Chief Justice must nominate judges to fill vacancies, unless he thinks they may remain unfilled, which nominations the Board must approve (*id.*, §§ 195(6), (7), & (11)). The

Board may at most "request the Chief Justice to consider a person" for a judicial appointment (*id.,* § 195(9)).

The ADGM Court Regulations go beyond the Founding Law to grant the Chief Justice the power to remove lower judges. They provide that such judges "shall hold [] office during good behaviour, subject to a power of removal by the Board on the recommendation of the Chief Justice." (*Id.,* § 196(2)). The regulations moreover continue by giving the Chief Justice exclusive authority to initiate the removal of lower judges for bad behavior, saying, "It is for the Chief Justice alone to recommend to the Board the exercise of the power of removal" in such cases (*id.,* § 196(3)).

Note that this power granted to the Chief Justice in ADGM Court Regulations operates not in lieu of the Board's power to remove judges but in addition to it. The ADGM Founding Law, which predominates over the regulations, provides in Article 6: "The Board of Directors shall be the supreme authority in the Global Market.… It shall, in particular carry out the following:… Appoint, remove and replace … the Chief Justice and judges of the Global Market's Court…." No mere regulation could strip the Board of its power and indeed duty under the Founding Law to remove wayward ADGM judges. The ADGM Court Regulations merely create a way--a limited way, since only the Chief Justice may exercise it--to initiate the removal of a judge for bad behavior.

3. ASTANA INTERNATIONAL FINANCIAL CENTRE, KAZAKHSTAN

On July 5, 2018, the Republic of Kazakhstan launched the Astana International Financial Centre (AIFC), promising low taxes, streamlined treatment of foreign commerce, and a bespoke legal system combining advanced financial regulations with independent resolution of disputes (Business Standard, 2018). Though physically located in the capital city, Nur-Sultan, deep in the heart of the steppe that sweeps through the east and north of Kazakhstan,

the AIFC makes its judicial services available across the globe through electronic means. The AIFC offers a special jurisdiction with its own common law-based court system and other selling points reminiscent of those offered by the UAE Financial Free Zones and Honduran ZEDEs. This section offers an overview of the AIFC. Subsection 1 explains how the zone mandates but does not command adoption of the common law. Subsection 2 offers a structural analysis of the AIFC, with particular focus on judicial independence.

The AIFC exhibits a number of notable features. Transactions in the zone may be denominated and executed in a currency of the parties' choosing, winning broad exemptions from Kazakhstan currency regulations and controls (Constitutional Statute of the AIFC, 2019, Art. 5). AIFC bodies and participants enjoy wide-reaching exemptions from corporate income taxes on financial transactions and services conducted in the zone until the year 2066 (*id.,* Arts. 6.2-6.4). During that same period, foreign nationals working for AIFC bodies or participants owe no personal income taxes (*id.*, Art. 6.6), and AIFC bodies and participants owe no property or land taxes for facilities located in the zone (*id.*, Art. 6.8). Foreigners seeking to conduct business in the AIFC enjoy privileged treatment of entry and work permits (*id.*, Arts. 7-8). English serves as the official language of the AIFC (*id.*, Arts. 15-20).

The global pandemic has not left Kazakhstan unscathed, alas, leaving the fate of the fledgling zone uncertain as of this writing. At the most recent AIFC Management Council meeting, in early July of 2020, Kazakhstan's President Kassym-Jomart Tokayev (who by Presidential Decree chairs the Council) reportedly said that the funding of the AIFC should be directed to help the country's economy recover from its current woes, and while noting that the AIFC was not designed with that mission in mind, "it is high time to change the situation" (Beer, 2020). What the President and Chair's new policy will mean for the finances and independence of the AIFC remains as yet unclear.

3.1. How the AIFC Imports the Common Law

Though inspired by the DIFC and ADGM, the AIFC does less than its UAE predecessors to mandate the importation of the common law to the zone. The Constitutional Statute of the AIFC responsible for its creation provides that its internal regulations, "may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres" (Constitutional Statute of the AIFC, 2019, Art 4.1(2)); further, that the AIFC Court shall be governed by rules "based on the principles and legislation of the law of England and Wales and the standards of leading global financial centres." (*Id.*, Art. 13.5). Notably, the enabling statute invokes not just the common law of England and Wales but their legislation, too.

This call to place the zone under rules based on foreign sources would seem to speak with great authority. The Constitutional Statute for the AIFC follows only Kazakhstan's Constitution and international treaty obligations in terms of its rank in the applicable legal hierarchy, placing it above any mere presidential decree, AIFC act, or other Kazakhstan law (Constitutional Statute of the AIFC, 2019, Articles 4 & 10.3(3); Decree of the President, 2015, Art. 1.2). That would mark a notable change in a jurisdiction formerly inspired by Soviet socialist and Islamic legal traditions (Yeung, et. al., 2020, p. 67). On closer examination, however, the Statute merely encourages the AIFC to take the common law and other foreign laws into account.

That the enabling statute for the AIFC merely invites the importation of the common law, rather than requiring it, shows clearly in the contrasting verb phrases of Article 13(6): "In adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account final judgements of the AIFC Court in related matters and final judgements of the courts of other common law jurisdictions." (Constitutional Statute of the AIFC, 2019, Art. 13(6)). In other words, whereas the AIFC legal system *must obey* the Constitutional Statute and higher authorities in Kazakhstan's legal system, they *may take account of* common law precedents. The AIFC's noncommittal approach to the common law

also shows in Article 13.6's evident refusal to recognize the concept of binding precedents, a characteristic feature of common law legal systems and one that distinguishes them from their civil law counterparts.

Further references to the common law appear in the AIFC Court Regulations issued by the AIFC Management Council, the body authorized to run the zone. These require that judicial appointees to AIFC Courts have "significant knowledge of the common law and experience as a lawyer or judge in a common law system …." (AIFC Court Regulations, 2017, Articles 12(6)(b) & 12(7)(b)). The Regulations also require that AIFC Courts "be guided by decisions of the Court and decisions made in other common law jurisdictions." (*Id.*, Art. 29(2)). Consistent with the rest of the AIFC's approach to the common law--making it a matter of choice rather than mandate--the Regulations allow AIFC courts to "provide common law courses and accreditation for lawyers and judges" (*id.*, Art. 49(1)(f)). In these ways, the AIFC makes the common law more of an aspirational ideal than a functioning institution.

3.2. Structural Analysis of the AIFC

How does the AIFC work? Its moving parts, functionally speaking, include the:

- AIFC Management Council;
- Governor of the AIFC;
- AIFC Authority;
- Astana Financial Services Authority (AFSA);
- AIFC Court; and
- International Arbitration Centre

A survey of each of these bodies' powers and limitations follows. Figure 4, below, portrays the relationships between the various institutions involved with or in the AIFC.

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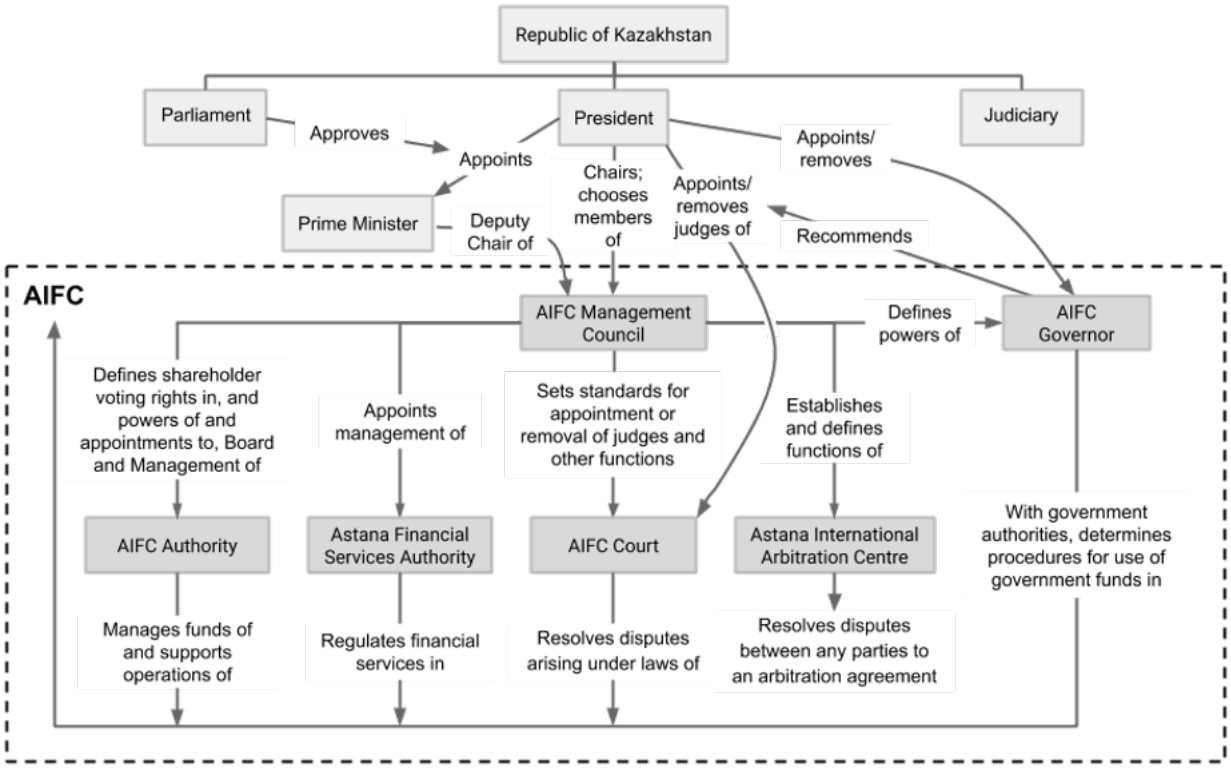

Figure 4: AIFC Governing Structures (author's own elaboration)

3.2.1. AIFC Management Council

The Management Council sets general policy for the AIFC, defines subordinate bodies, makes select staffing decisions, and issues AIFC Acts in the form of binding resolutions (Constitutional Statute of the AIFC, Art. 10.2-.3). The scope of these Acts extends to relationships between AIFC participants and employees in civil, financial, and administrative matters (id., Art. 4.3). AIFC Acts "may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres," a common law-friendly approach that the AIFC shares with Honduran ZEDEs and UAE Financial Free Zones (id., Art. 4.1(2)).

The President of Kazakhstan exercises considerable control over the AIFC Management Council. The President chairs the Council (*id.*, Art. 10.1), or if absent from the Council, may have the Prime Minister (whom the President appoints) serve as Deputy Chair (Decree of the President, 2015). The President must also approve the rules regulating Council operations and its members (Constitutional Statute of the AIFC, Art. 10.4). That statute does not give any other person or institution a say in Council membership, making the fact that its "composition" is "to be approved by the President" (*ibid.)* effectively a grant of unilateral power to determine its membership.

3.2.2. AIFC Governor

The AIFC statutory framework leaves the Management Council with wide discretion to determine the powers of the AIFC Governor (*id.*, Art. 10-1.2). It specifies, however, that "procedures for exercising control to ensure the targeted and efficient use of the funds of the republican budget allocated to the AIFC" shall be jointly determined by Kazakhstan officials and the Governor (*id.*, Art. 9.4). Exactly how that joint responsibility gets handled remains unclear. The Governor also enjoys a statutory power to recommend the appointment or removal of judges by the President (*id.*, Art. 13.3-1). That does little to guarantee the independence of the AIFC judiciary, however, because the President has unfettered control over the appointment and removal of the Governor (*id.*, Art. 10-1.1).

3.2.3. AIFC Authority

The AIFC Authority is "a non-profit organisation established by the National Bank of the Republic of Kazakhstan" with a mandate to manage funds received from the government, fee paying participants, and other sources in support of AIFC functions (*id.*, Art. 11.1-.2). It also fulfills a number of advisory, reporting, budgeting, outreach, and administrative functions (*id.,* Art. 11.4).

A Board of Directors oversees the AIFC Authority; a Management Board handles day-to-day operations (*id.,* Art. 11.2-1). The AIFC Management Council appoints the members of those bodies, sets the terms of their employment, and determines their powers, as well as the powers exercised by shareholders of the AIFC Authority in their general meetings (*ibid.*). By separate decree, the President has defined the AIFC Authority as the "working body of the Council," formed as a company of shareholders Decree of the President, 2015, Art. 1.3).

3.2.4. Astana Financial Services Authority

The Astana Financial Services Authority (AFSA) touts itself as "an independent regulator of financial services and related activities" in the AIFC (AFSA, 2020b). Its budget comes "from funds of the republican [i.e., national state] budget, in the form of targeted transfers through the AIFC Authority in accordance with the budget legislation of the Republic of Kazakhstan, as well as fees and payments contributed by AIFC Participants." (Constitutional Statute of the AIFC, Art. 12.1). The AFSA thus appears independent of the AIFC Authority but not of the Republic of Kazakhstan in terms of funding, whereas the Council appoints the AFSA's management (*id.*, Art. 10.3(5)). It remains uncertain whether such regulators, who rely on the national government for financial support and on the AIFC Council (over which the President exercises considerable control) for their continued employment, will find it easy to exercise independent judgment.

3.2.5. AIFC Court

The AIFC Court has exclusive jurisdiction over disputes between AIFC participants, bodies, and their expatriate employees, disputes relating to activities in the AIFC governed by its law, and disputes transferred to the Court by the consent of the parties (*id.*, Art. 13.4). It has no jurisdiction over criminal or administrative proceedings, however (*ibid.*). (How that limitation of the AIFC Court's jurisdiction jibes with the statute's simultaneous grant to

AIFC Acts of authority over "administrative procedures" in *id.* Art. 4(3-4) remains unclear.) In addition to a court of first instance, the system includes an appellate court, from which no further appeals are allowed, and a Small Claims Court with expedited procedures for claims up to the value of US $150,000 (AIFC, 2020a). The AIFC Court's electronic filing system "enables parties to file cases electronically from anywhere around the world without their having to be physically present in Nur-Sultan." (*Ibid.*). Like other AIFC bodies, the Court's activities are governed by the AIFC Management Council, "based on the principles and legislation of the law of England and Wales and the standards of leading global financial centres." (Constitutional Statute of the AIFC, Art. 13.5).

The AIFC Court declares itself "an independent common law court operating to the highest international standards" (AIFC, 2020c). Indeed, it by law is "not a part of the judicial system of the Republic of Kazakhstan." (Constitutional Statute of the AIFC, Art. 13.2). And the Management Council's regulations proclaim, "Neither the Government of the Republic of Kazakhstan, the AIFC Authority, or any other person or entity, shall interfere with the judicial duties or decisions" of the Court (AIFC Court Regulations, 2017, Art. 11(2)).

The judges of the AIFC Court enjoy nothing like tenure, however. They "are appointed and removed by the President of the Republic of Kazakhstan on the recommendation of the Governor of the AIFC." (Constitutional Statute of the AIFC, Art. 13.3-1). As discussed above, the President has exclusive authority to appoint or remove the Governor. In effect, therefore, judges of the AIFC serve at the discretion of the President, who of course is not bound by the stance taken by the AIFC Court Regulations against interference.

3.2.6. AIFC International Arbitration Centre

Though established within the institutional framework of the AIFC, and presumably marketed to its bodies, participants, and employees, the International Arbitration Centre aims to serve anyone who appears before it "on the basis of an arbitration agreement between

the parties." (*Id.*, Art. 14.1). Like the AIFC Court, the International Arbitration Centre provides its services electronically, across the globe, via the AIFC "eJustice" system (AIFC, 2019). The relevant law emphasizes that awards of the body merit the same respect as awards issued by other arbitration bodies in Kazakhstan, once they have been translated from the English used in the AIFC into the Kazkh or Russian more common elsewhere in the country (Constitutional Statute of the AIFC, Art. 14.3). It says nothing specific about who manages the AIFC International Arbitration Centre or its internal structure, presumably leaving such matters at the discretion of the Management Council, which establishes the Centre (*id.*, Art. 14.2) and determines its structure (*id.*, Art. 10.3(4)).

3.2.7. Summary of AIFC Judicial Independence

The AIFC's governing structure gives the President almost unchecked power to appoint or remove judges of the AIFC Court, albeit upon recommendation of the AIFC Governor. That is not likely to serve as much of a check on the President, given that the President has unchecked power to appoint or remove the Governor. The President alone controls who sits on the AIFC Management Council, too, which controls all other aspects of the zone's Court and International Arbitration Center. Figure 5, below, highlights these governing structures, which have the combined effect of giving the President considerable control over the AIFC legal system.

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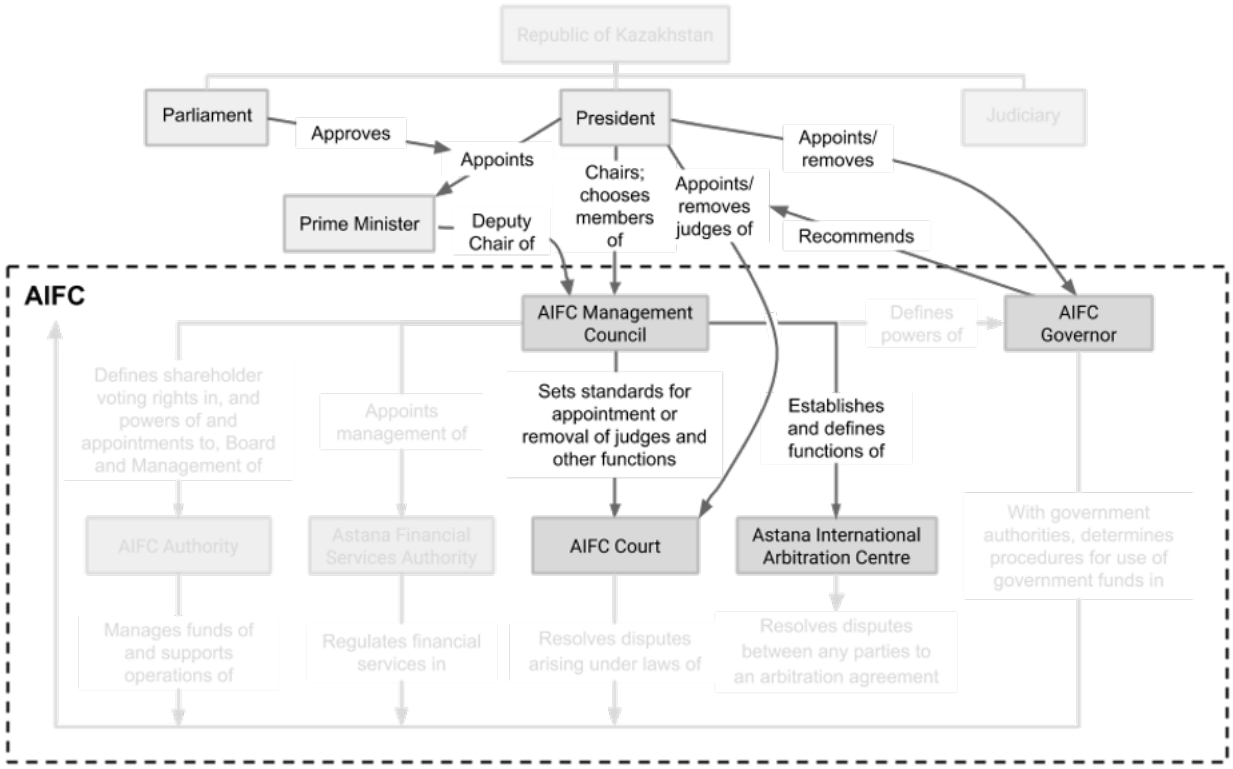

Figure 5: The AIFC Judicial System, Highlighted (author's own elaboration)

Suppose that a party somehow affiliated with the President--a cousin, say--were to come before the AIFC Court with a very high stakes case. Suppose further that the hypothetical President let the judges know they would be fired if they decided against his friend. What result? One might of course cite in opposition to the President's interference many fine words, quoted from policy statements and regulations of the AIFC. But none of those would legally bind the President in this scenario.

This critique has nothing to do with the current President of the Republic of Kazakhstan, who doubtless embodies the virtues typical of a public servant and national leader. A structural analysis of special jurisdiction takes no notice of individual personalities.

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Just as bridge engineers plan for worst-case storms, those who design legal systems must plan for worst-case politicians. At present, the AIFC design leaves the judges of its courts as exposed to political influence. On that count, it does about as well as the DIFC, a bit worse than the ADGM, and much worse than the ZEDE system. Further comparative analysis follows below, in the concluding section.

4. HONDURAN ZEDES

In September 2013, the Republic of Honduras passed legislation authorizing a new kind of special jurisdiction in that country: Zones of Economic Development and Employment, called *ZEDEs* (ZEDE Organic Law). The enabling legislation gives each ZEDE wide ranging autonomy to pass its own laws and resolve disputes via private dispute resolution. Indeed, the ZEDE system puts the onus on each ZEDE's developer to enact local legislation, subject to CAMP veto and adjudication by ZEDE Courts. The ZEDE Organic Law thus leaves many details of zone governance unspecified, subject to later determination. The first subsection reviews how the ZEDE system encourages rather than mandates importation of the common law, and how the only ZEDE to date, Próspera, has responded to that invitation. The second subsection describes the particular features of the ZEDE system, illustrated below in Figure 6.

4.1. How the ZEDEs Import the Common Law

The enabling legislation calls on the Honduran Judicial Council and the ZEDE Committee for the Adoption of Best Practices (called *CAMP* from its Spanish name, *Comité para la Adopción de Mejores Prácticas*) to cooperate in building the common law (among other options) into a system of ZEDE Courts. These "autonomous and independent courts with exclusive competence in all instances on matters that are not subject to binding arbitration"

have exclusive jurisdiction over a select few classes of disputes (ZEDE Organic Law, Art. 14). The legislation directs ZEDEs to generally rely on binding arbitration except for "penal matters, those concerning children, and those concerning adolescents" (*id.*, Art. 20)--cases that *must* go to ZEDE Courts. And through them comes the only mandate, such as it mostly is *not*, that Honduran lawmakers issued on behalf of importing the common law.

Article 14 of the enabling legislation says ZEDE Courts "shall be created by the Judiciary through the Judicial Council at the proposal of the Committee for the Adoption of Best Practices and shall operate under the common law or Anglo-Saxon tradition, or any other in accordance with Article 329 of the Constitution of the Republic." (*Id.* Art. 14). Strictly speaking, that "or any other" clause leaves ZEDEs open to legal traditions other than those that originated with the Anglo Saxons and that have come to us today under the banner of the common law. This shows a spirit quite different from that evinced in the DIFC and ADGM, both of which tied themselves more directly to the laws of England. It more resembles the AIFC's ambivalent approach to the common law. Honduran lawmakers evidently wanted to leave those creating ZEDEs with as much freedom to choose their own laws as permissible under its constitution and international law. Perhaps, too, lawmakers wanted to avoid the unseemly appearance of putting their territory under the laws of a specific foreign sovereign. On that count, the Hondurans can boast of preserving its national dignity better than did the UAE or Kazakhstan.

The "or any other" clause in the ZEDE Organic Law does not, however, mean anything goes; ZEDE courts must operate "in accordance with Article 329 of the Constitution of the Republic." (*Ibid.*). And what does that mean? Judging from the constitutional text, it means that legal traditions or systems from elsewhere must do at least as well protecting human rights as Honduran law and win prior approval of the National Congress (Constitution of the Republic of Honduras, 2013, Art. 329). In other words, ZEDE Courts operate under general common law principles by default, but may apply to operate under another system.

The only other reference in the ZEDE Organic Law to the common law appears in Article 17, which provides that ZEDE Courts "must be composed of legal professionals of high standing and proven track record of domestic or foreign jurisdictions, always having to prove extensive knowledge and experience in the application of Common Law or Anglo-Saxon or other legal traditions in accordance with Article 14 of this Law." In sum, therefore, the ZEDE Organic Law does nothing more to mandate the common law than to make its general principles the default for ZEDE Courts. Given that those courts have exclusive jurisdiction only over a select few kinds of cases, moreover, a ZEDE might in theory govern itself with very little reference to the common law. The common law will likely prevail in practice, though, as evidenced by the governance system approved for the first ZEDE, Próspera.

Próspera ZEDE launched in spring 2020 on the Caribbean island of Roatán (Gómez, 2020). To date, it remains the only ZEDE with a governance system approved by CAMP and in operation (Próspera ZEDE, n.d.; Próspera Arbitration Center, 2020). Though Ciudad Morazán ZEDE won CAMP approval of its Charter and Bylaws, it does not appear to have submitted internal legislation or dispute resolution mechanisms for review (Ciudad Morazán, 2020). The proposed Mariposa ZEDE remains for now even less developed (Mariposa, 2020). Próspera has had a strong start. Its President, Erik Brimen, reports that it closed its series A round of funding "oversubscribed by a wide margin" and has begun developing land on Roatán acquired for the project (Charter Cities Institute, 2020). From that base, if events do not veer too far from plans, the ZEDE's jurisdiction will expand to other areas of Honduras (Próspera ZEDE).

What does Próspera demonstrate about internal governance in the ZEDE system? The popularity of the common law. Though Próspera's legal system borrows from many sources, at its core runs the *Roatán Common Law Code*, a name it earned thanks to the many *Restatements of the Common Law* incorporated into it by reference (Próspera ZEDE, 2018). In notable contrast to the court opinions and statutes borrowed from foreign sovereigns by

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the DIFC, ADGM, and AIFC, Próspera's *Roatán Common Law Code* thus borrows only from private, non-governmental sources for its laws of contracts, property, and other matters.

4.2. Structural Analysis of the ZEDE System

Figure 6, below, offers an overview illustration of the governing structure of the Honduran ZEDEs worth several thousand words. The accompanying text will thus forego lengthy descriptions in favor of establishing exactly whence comes the legal authority for each particular feature under consideration. Consistent with the prevailing theme, this survey will focus on the legal system--*systems,* actually--of the ZEDEs.

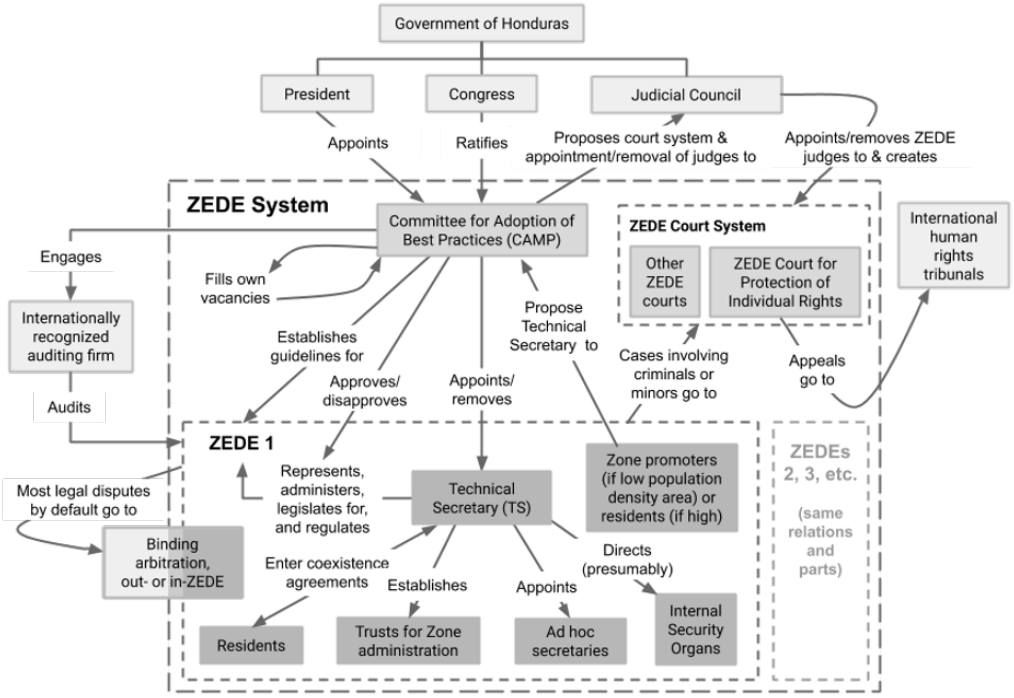

Figure 6: Honduran ZEDEs' Governing Structure (author's own elaboration)

4.2.1. ZEDE Courts

The ZEDE Organic Law calls for "autonomous and independent courts" to decide questions arising under the zones' legal systems (ZEDE Organic Law, Art. 3). As noted above, it calls for the Judicial Council to create a ZEDE Court following a proposal by CAMP, which is to ensure that the Court will "operate under the common law or Anglo-Saxon tradition" by default (*id.* Art. 14). Its judges must "prove extensive knowledge and experience in the application of common law," per Art. 17. CAMP determines the "structure, powers and jurisdiction of the courts ... and the duration in office and the requirements for the appointment of judges" (*ibid*). Article 11(6) directs CAMP to propose ZEDE judges to the Judicial Council. Article 15 gives the Council the power to appoint judges from the CAMP's list of candidates.

Those provisions give CAMP and the Judicial Council shared authority to appoint and regulate judges of the ZEDE Court. What about their removal? The ZEDE Organic Law strongly suggests that the Judicial Council has the sole authority to exercise that power upon a recommendation of removal from CAMP, too. Article 11(6) calls on CAMP "to recommend removal when appropriate" and the Judicial Council's power to appoint arguably includes the power to revoke an appointment.

Query whether the Judicial Council could legally remove a ZEDE judge without the CAMP's recommendation or whether the President or another Honduran government body shares the Council's removal power. With regard to both questions: likely not. Opening ZEDE judges to removal by unilateral act of the Judicial Council, without CAMP recommendation, or by anybody other than the Judicial Council, would gut the autonomy and independence of ZEDE Courts and violate one of the common law's most characteristic and deep-seated traditions. Article 19 reinforces that reading, saying the ZEDE courts, "must exercise their functions independently, free from any interference" and calling for "penalties for those who

interfere or seek to interfere with the exercise of the judicial function." It thus seems most likely that ZEDE judges can be appointed or removed only by the Judicial Council upon CAMP's request.

Despite their all-encompassing name, the ZEDE Courts in fact have original and exclusive jurisdiction under only a portion of cases arising under the ZEDE Organic Law. Parties within a zone's jurisdiction "may contractually agree to the submission to arbitral or judicial jurisdiction different from" the ZEDE Courts (*id.*, Art 14). The ZEDE Organic Law furthermore directs that zones "should make use of binding arbitration for all matters involving contracts or property." (*Id.* Art 20). Clauses calling for such arbitration will presumably appear in the "agreements of coexistence … consistent with universal moral principles" that zones must enter into with "people who wish to live or reside freely within" them (*id.*, Art 10(1)).

Cases subject to mandatory arbitration may be heard by ZEDE Courts only if the parties "previously signed an agreement in which they waived arbitration and established their decision to present their case to" those courts (*ibid.*). The ZEDE Organic Law expressly exempts from mandatory arbitration only cases involving penal matters or minors (*ibid.*). Those cases evidently represent the only ones over which the ZEDE Courts exercise original and exclusive jurisdiction.

The ZEDE Organic Law requires the zones' judicial system to include a Court for Protection of Individual Rights (*id.*, Art. 16). Appeals from that body do not go to a higher ZEDE or Honduran court, but to unspecified international tribunals. Lawmakers perhaps had in mind the Inter-American Court of Human Rights, to which Honduras and other members of the Organization of American States have agreed to submit human rights claims (though it is not clear how an individual litigant could win standing in the IACHR, given limits on that body's jurisdiction) (Inter-American Court of Human Rights (2020). Regardless of the proper administration of such appeals, it bears noting that neither ZEDE courts nor

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Honduran ones have the final say about alleged violations of individual rights in the zones. That represents a singularly powerful safeguard of the rule of law, unique not only among common law zones but among common law jurisdictions, generally.

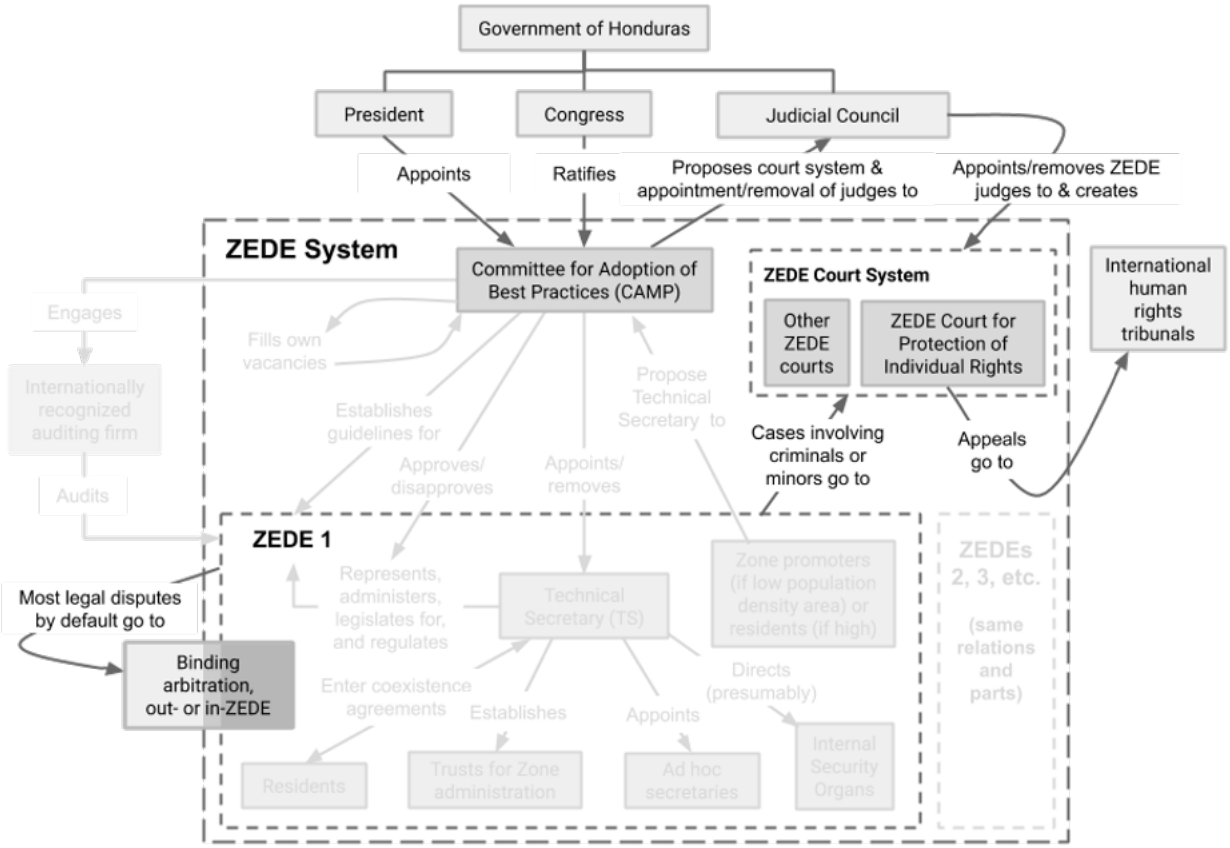

Figure 7: ZEDE System Judicial Features, Highlighted (author's own elaboration)

Figure 7, above, highlights the features of the ZEDE judicial system. The number of independent parties given a say in the appointment and removal of judges to the ZEDE system proves especially notable when contrasted to the judicial systems of the DIFC, ADGM, and AIFC. So does the distribution of judicial powers across the ZEDE Courts created by

CAMP and the Judicial Council, the private arbitration services of the various ZEDEs, and entirely independent international human rights tribunals.

Suppose for instance that a child of the President were embroiled in a legal dispute subject to the jurisdiction of ZEDE law. If the case involved anything but suspected criminals or minors, it would go before the private dispute resolution service set up by the ZEDE in question. The President would of course have no power to terminate those arbitrators or otherwise legally interfere with how they resolve the dispute. If the case involved crimes or children, it would go to the ZEDE Court, the judges of which the President again would have no power to terminate or otherwise legally threaten.

4.2.2. The CAMP

The well-connected position it occupies at the center of Figure 6 demonstrates that the CAMP plays an important role in ZEDE governance. The ZEDE legislation gives the President the power to appoint the first twelve CAMP members, subject to ratification by the Congress, thereafter leaving the Committee to control its own membership and operations (ZEDE Organic Law, Art. 11(10)). Relevant to the CAMP's power to implement the common law, it provides candidates to the Judicial Counsel to serve as judges or magistrates in ZEDE Courts (*id.*, Art 11(6)). As noted above in § 4.2, the enabling statute gives ZEDE Courts exclusive jurisdiction over select cases and encourages them to operate under common law principles.

The CAMP has a much more direct yet complicated relationship with the other major player in the ZEDE system, the Technical Secretary. Article 11(2)-(3) of the ZEDE Organic Law gives the CAMP power to approve or disapprove the conduct, appointment, or regulations of a Technical secretary. Beyond that, the CAMP can only "establish general guidelines for domestic policy and transparency of" the zones. It thus has no power to direct the specific operations of a particular ZEDE or its Technical Secretary. Note in particular that the CAMP has no power to choose a Technical Secretary. Article 11(3) gives a zone's

residents (if it is in a high population area) or developers (if in a low population area) the exclusive right to propose their own Technical Secretary. The CAMP can only approve or disapprove their nomination to the post.

These provisions make the relationship between the CAMP and the Technical Secretary nothing like those of a principal to an agent or an employer to an employee. The law instead puts CAMP in the place of a government oversight board, and the Technical Secretary as the head of one of the private entities it oversees. In that model, the Technical Secretary may well aim to keep the CAMP happy, but ultimately works for a ZEDE. True, Article 12 makes a Technical Secretary "responsible for his actions before" the CAMP. But that means only that the Technical Secretary must answer to the CAMP—not that it employs him. And that same Article also calls the Technical Secretary the zone's "highest level executive officer and its legal representative," again making clear that he works for his (or as it may turn out in the actual event, *her*) ZEDE rather than for the CAMP.

4.2.3. The Technical Secretary as Alcalde

Article 3 specifies that a ZEDE has "the functions, powers and duties that the Constitution and laws confer upon municipalities." Because a ZEDE is modeled on a municipality in Honduran law, it makes sense to analogize the Technical Secretary to an alcalde (Spanish for "mayor") who serves the ZEDE, rather than as an agent of the CAMP or, through it, an agent of the national government. If a ZEDE resembles a municipality, in other words, the Technical Secretary resembles an alcalde.

CAMP represents the interests of the national government. According to Art. 11(10), its members are "appointed by the President of the Republic . . . [and] ratified by Congress." In that, the CAMP resembles one of the 18 departmental governors that, in the Honduran system of government, represent the executive branch in specified regions of the country. (U.S. Federal Research Division, 1995, pp. 168-69). A department governor has

comparatively little authority over alcaldes in the Honduran system, who thanks to the 1990 Law of Municipalities instead enjoy considerable autonomy from the national government (*ibid*). The same hands-off relationship should thus prevail between the CAMP and any Technical Secretary that it oversees.

That model reveals the deep structure of the ZEDE Organic Law: It aims to create something like a new kind of municipality in the governing system of Honduras. In both variations on the theme, the national government appoints a regional representative—governors for departments and the CAMP for ZEDEs. Operating largely free of national control of matters within their purview, alcaldes run their municipalities in much the same way that Technical Secretaries run their zones.

The parallel between a municipality and a ZEDE recurs in how locals—residents in the case of a densely populated zone and developers in the case of sparsely populated one—get to choose their own leaders (ZEDE Organic Law, Arts. 11(3)(a), (b)). This suggests that Technical Secretaries will exercise at least as much autonomy from the national government's direction, whether exercised directly or via the CAMP, as the autonomy enjoyed by the alcades chosen by municipalities to manage local affairs. Given the vastly greater range of powers that TSs enjoy, they might justly lay claim to even more autonomy than alcaldes.

The ZEDE system thus somewhat replicates the structure of its parent government, that of the Republic of Honduras. Consider the parallels between the relationship of the national government, departmental governors, alcaldes, and municipalities on the one hand, and the national government, CAMP, Technical Secretaries, and ZEDEs on the other. The most notable difference between the two systems reflects their deeper unity: Whereas voters in a conventional municipality elect a new alcalde every four years, a Technical Secretary serves for a seven-year term (*id.*, Art. 12). By way of counterbalance, however, the CAMP acts as an independent check on a Technical Secretary's exercise of authority, standing ready

to protect locals by disapproving the conduct, regulations, or appointment of a wayward Technical Secretary. Taken together, these measures show that Honduras carefully crafted ZEDEs to function analogously to municipalities making allowance for the CAMP's supervisory powers over Technical Secretaries.

5. SUMMARY AND CONCLUSION

This illustrated review of common law zones concludes with a summary of the findings. Two species of the genus have emerged: 1) government-run zones of limited scope that import the common law of a foreign sovereign to courts exposed to political interference; and 2) zones run as public-private projects with broad responsibilities and that rely on non-governmental sources for their laws and that shelter judges from political interference. The first three common law zones to arise, the DIFC, ADGM, and AIFC, represent the first species. The ZEDE system, at least as exemplified in Próspera, represents the second.

Table 1, below, summarizes across the separate sections to show the source that each zone draws on for its common law and how it uses the referenced authority:

Zone	Source	Use
DIFC	Common Law of England and Wales	Given local effect; fixed?
ADGM	Common Law of England	Given local effect; evergreen
AIFC	Common Law of England and Wales	Invoked as model; evergreen?
ZEDE	Restatements of the Common Law	Given local effect; fixed

Table 1: Sources Used by Common Law Zones (author's own elaboration)

The distinction between the two species stands out clearly in Table 1, as does the overwhelming popularity of England and Wales among those zones willing to tie their fates to foreign sovereigns. That dependence on England and Wales doubtless reflects the

dominance of London bankers and lawyers among those who helped Dubai, Abu Dhabi, and Kazakhstan set up their common law zones. In some cases, a zone's enthusiasm for foreign law reaches beyond court decisions to embrace great tranches of statutory law, as in the ADGM's embrace of several English statutes. (ADGM Application of English Law Regulations of 2015, § 2(1)). Próspera ZEDE's use of the Restatements gives its common law a distinctly American flavor.

Table 1 also tracks how each zone uses the kind of common law that it references. In most cases, foreign law has a direct effect. Uniquely, the AIFC limits itself to invoking merely the principles of the common law, a vague and thus non binding commitment. Table 1 also shows that the ADGM alone ties its laws to those of a foreign state on a so-called evergreen basis, a somewhat original arrangement in international law. Because it cites only published Restatements for its common law, Próspera ZEDE definitely does not walk in lockstep with foreign authorities. The DIFC does not expressly state its position, weakly suggesting that the DIFC Law embraces only the common law as it stood upon the law's enactment. The AIFC likewise does not speak to the matter, but its loose invocation of principles rather than precedents suggests it would smile on authorities keeping up-to-date with foreign developments.

Table 2, below, addresses another issue of autonomy: whether courts in a common law zone can, like courts in common law jurisdictions proper, perform their duties without suffering interference by political authorities. There being no way to measure such things directly, the analysis instead relies on hypotheticals designed to test each zone's institutional protections of judicial independence. The first species of common law zone does not fare well on that measure. In the DIFC and AIFC, the local sovereign has executive authority to summarily terminate judges; in the ADGM, that power is tempered only by delegation to a Council staffed at the Emirates discretion. In no such zone can judges count on

institutionalized checks and balances to protect them against the consequences of issuing politically unpopular decisions.

Zone	Most Direct Route for Political Influence
DIFC	Executive power to terminate judges
ADGM	Executive power to terminate Council members, who may terminate judges
AIFC	Executive power to terminate judges
ZEDE	Legislative amendment via supermajority?

Table 2: Most Direct Means for Politicians to Influence Zone Judges

With regard to the second species of common law zone, the Honduran ZEDE, Table 2 wavers. It is not as easy to trace the most direct route for Honduran politicians to influence ZEDE because no route can get them there easily. The CAMP, an unelected and self-sustaining body, stands between the rest of the Honduran government and ZEDE Court. Although the Judicial Council must also agree, no judicial appointment to or removal from the ZEDE Court can happen without the CAMP's approval. A politician intent on interfering with a ZEDE Court could hope for little more than influencing the Judicial Council to disapprove of a judge. Alas for Honduras, it is not difficult to imagine a politician successfully swaying the deliberations of the Judicial Council. (Bowen 839-40). But that would have little effect if CAMP, sequestered beyond political influence, disagreed with the Judicial Council about the merits of a ZEDE judge. As for the deliberations of the private adjudication services that will in practice handle the bulk of legal disputes in the ZEDE system, those operate entirely free of political machinations.

The susceptibility of Honduran judges to political pressure suggests that litigation targeting the foundations of the ZEDE system or the scope of the ZEDE Organic Law might provide the most direct route to undermining the autonomy of the zone's courts. Not even the plainest language can resist a judge determined to destroy a constitutional or statutory limitation on government power. At the same time, though, Honduran politicians can only

go so far toward subverting the rule of law before they risk frightening away foreign investment, a prospect that must give even the most corrupt of them pause.

Perhaps the least indirect route to interference with the ZEDE judicial system would have politicians amend the responsible statute. Because the Honduran Constitution makes express provision for ZEDEs, however, the ZEDE Organic Law has more than the usual legislative stability. As it notes, "In accordance with the provisions of Article 329 of the Constitution, this Act may only be modified, amended, interpreted or repealed by two-thirds (2/3) in favor of the members of Congress." (ZEDE Organic Law, Art. 45). At that price, it is hard to see how corruption could pay.

As a theoretical ideal, a common law court functions independent of any political influence, deciding each case based solely on its facts and the applicable law. To the extent that a given court in practice fails to meet that standard, it cannot claim to render justice impartially, which amounts to saying that it cannot render justice at all. A court subject to outside interference, such as political pressure to decide an important case in a convenient way, does not bring peace to the contesting parties but rather submits both to the force of another's will. That might sadly describe how actual governments function, but it cannot describe the rule of law. A court that presumes to administer the common law requires the backing of institutions capable of guaranteeing judicial independence from political influences. Of the four judicial systems under consideration here, all but the ZEDEs show structural weaknesses on that count.

Even the most calculating politicians might respect the independence of a special jurisdiction's courts, reasoning that they gain more by maintaining the good standing of the courts than by meddling with its decisions. And, of course, many politicians will honor courts' independence, regardless of what Machiavelli might counsel, because they also honor justice. But good legal system design calls for anticipating worst-case politicians for the same reason that good bridge design anticipates 100 year storms. On the basis of theory alone, the legal

system of the ZEDEs looks most likely to shelter judges from political forces, allowing them to bring peace to contesting parties. Whether the same will hold true in practice remains for now an open question, and one that only further research of common law zones can answer.

Disclosure

As discussed in *Your Next Government? From the Nation State to Stateless Nations* (Cambridge University Press 2018), the author advised special jurisdiction projects in Honduras and created Ulex, the open source common law-based legal system. The audiobook version of *Your Next Government?* (2020) notes that the Próspera ZEDE's Roatán Common Law Code implements Ulex. The author helped design and install the Roatán Common Law Code and other aspects of the Próspera governance system as part of a team of coders, enjoys friendly relations with parties responsible for the ZEDE program's success, and holds a small equity interest in Próspera by way of gift and investment.

Disclaimer

Opinions expressed herein represent those of the author only, who bears sole responsibility for their publication, and do not represent the opinions of any employer, client, or associate.

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