

# The Decree 19 Judicial Tribunal and its Consequences: Redefining the Scope of the DIFC Courts' Jurisdiction

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Those decisions left intact, for now, the DIFC Courts' status as a conduit for the enforcement of foreign arbitral awards and foreign judgments in Dubai. They did, however, effectively stop domestic arbitral award creditors pursuing the same route, at least until challenges to the validity of those awards have been conclusively determined in the Dubai Courts.

## **The reaction of the Dubai Court of First Instance to the Decree 19 Tribunal decision in *Meydan***

The Dubai Courts may have started reacting to the Decree 19 Tribunal and its decisions. On 15 February, the Dubai Court of First Instance issued an unusually detailed judgment annulling the DIFC Courts' decisions, at both first instance and on appeal, in *Meydan Group LLC v. Banyan Tree Corporate Pte Ltd* (ARB 003/2013 & CA 005/2014). *Meydan* essentially established the precedent for the DIFC Courts being used to recognise and enforce domestic arbitral awards so that the resulting DIFC Court orders can be taken to the Dubai Courts, and other courts, for execution.

The procedural history of *Meydan* is relatively straightforward. Banyan Tree obtained a DIAC arbitration award against *Meydan* and sought its recognition and enforcement in the DIFC Courts in 2013. At both first instance and on appeal, the DIFC Courts found they had jurisdiction to hear the claim and proceeded to recognise and enforce the award. The outcome of these DIFC Court proceedings was widely commented on because neither *Meydan* nor *Banyan Tree* had offices, assets or activities within the DIFC. The underlying contract, a hotel management agreement, was governed by Dubai law rather than DIFC law and the seat of the arbitration was Dubai rather than the DIFC, meaning that the supervisory courts were the Dubai Courts and not the DIFC Courts.

*Meydan* applied to the Dubai Courts to seek the nullification of the DIFC Court orders. The Dubai Court of First Instance considered the actions of the DIFC Courts and nullified the decisions of both the DIFC Court of First Instance and the DIFC Court of Appeal citing their alleged lack of jurisdiction. In doing so, the Dubai Courts considered a matter for which the Decree 19 Tribunal was established, although the latter body has no power under Decree 19 to nullify court orders. It is also worth noting that an earlier jurisdiction challenge by *Meydan* in the Union Supreme Court failed.

The DIFC Courts' jurisdiction is set out in the Judicial Authority Law (Dubai Law 12 of 2004 as amended by Dubai Law 16 of 2011, the JAL). Article 5 of the JAL gives the DIFC Courts exclusive jurisdiction in cases involving the DIFC, its bodies and establishments; cases involving contractual disputes performed or executed in the DIFC; incidents in the DIFC; or where contracting parties have opted into its jurisdiction in writing. In its annulment judgment, the Dubai Court of First Instance noted this limited jurisdiction of the DIFC Courts and explained that the Dubai Courts' jurisdiction prevailed in all other circumstances. The Dubai Courts were described as the normal, default courts of the emirate, while the DIFC Courts had only

exceptional jurisdiction. Any decisions of the DIFC Courts falling outside this exceptional jurisdiction must therefore fall within the jurisdiction of the Dubai Courts. As none of the jurisdictional gateways set out above were available in *Meydan*, the Dubai Court of First Instance felt entitled to nullify the DIFC Court orders issued in that case.

### **Analysis of the Dubai Court of First Instance judgment in Meydan**

A number of observers consider the judgment of the Dubai Court of First Instance to have been wrongly decided. Perhaps most importantly, the judgment does not adequately acknowledge the statutory provisions that underpin the DIFC Courts' judgments in *Meydan*. Specifically, it fails to address the key provision in the JAL providing that the DIFC Courts have jurisdiction over any "*claim or action over which the [DIFC] Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations*" (Article 5(A)(1)(e)). One of the DIFC's laws, the Court Law (DIFC Law 10 of 2004) expressly permits the DIFC Courts to ratify any recognised judgments and awards (Article 24). Neither the JAL nor the Court Law apply a DIFC location or asset test to the exercise of this jurisdiction.

The Dubai Court of First Instance judgment is also inconsistent with the Decree 19 Tribunal's judgment in *Daman Real Estate Capital Partners Limited v Oger Dubai LLC* (Cassation 1/2016). In the latter judgment, the Decree 19 Tribunal expressly stated that both sets of courts had jurisdiction to enforce domestic awards. In *Daman*, the arbitration award debtor had sought to have a DIAC award annulled by the Dubai Courts while the DIFC Courts had in parallel considered and then recognised and enforced the same award. The Decree 19 Tribunal determined that in the interests of due process, and in order to avoid the risk of conflicting judgments, only one of the two sets of courts should hear both the enforcement claim and the annulment application. It added that on the basis of the "general principles embodied in the laws of the civil procedure", the appropriate forum for the matter was the Dubai Courts, though no further reasoning was provided.

In contrast, in *Meydan*, the Dubai Court of First Instance dismissed any jurisdiction of the DIFC Courts to enforce any domestic award at all. It cited the Protocol of Jurisdiction signed by the Dubai Courts and DIFC Courts in support of its annulment decision, ignoring the specific recognition and enforcement powers of the DIFC Courts set out in the JAL, a Dubai statute, and in the Court Law, a DIFC statute.

Furthermore, the Decree 19 Tribunal does not have jurisdiction to annul any judgments. It is therefore surprising that the Dubai Court of First Instance considered that it had the power to declare the DIFC Courts' judgments in *Meydan* null and void ab initio when the body established to resolve jurisdictional conflicts between the two sets of courts, the Decree 19 Tribunal, does not have the power to do so. For this reason alone, it seems unlikely that the judgment of the Dubai Court of First Instance in *Meydan* would survive an appeal.

### **Amendments to the Decree 19 Tribunal's procedures**

The Decree 19 Tribunal is expressly empowered by Decree 19 to propose the rules necessary to prevent conflicts between the Dubai Courts and DIFC Courts (Article 2(3)) and to set out rules for the Decree 19 Tribunal's procedures. While some of its rules and procedures are already publicly known, adding greater clarity to them would allow the Decree 19 Tribunal to operate more efficiently, leading to more predictable decision-making and reducing unnecessary delays and costs. As more decisions and rules are issued by the Decree 19 Tribunal, they can be expected to serve as precedents and guidance for affected parties. This should help deter or dismiss applications that are weak and motivated purely by short-term tactical considerations.

The Decree already places some welcome requirements on the Decree 19 Tribunal, including to issue a final decision no later than 30 days from the date of submission of any application. However, it is silent on key procedural matters such as how an application is communicated to a respondent, in what form a respondent is required to respond, and by when it must do so.

The Decree is also silent on the language of proceedings before the Decree 19 Tribunal; whether the Decree has retrospective effect; and oversight of the Tribunal. We understand a practice direction setting out rules and procedures (beyond those set out in the Decree itself) is being considered. If and when it emerges, it should make the operations of the Decree 19 Tribunal more transparent and effective. Many practitioners will be keen to avoid the Tribunal becoming a general appeal court for parties that have exhausted their options in the DIFC Courts or Dubai Courts, so this issue may also be addressed in any such practice direction.

A preliminary or summary judgment procedure may also prove useful to filter out spurious applications. This could involve a single judge of the Tribunal carrying out a paper review of an application at a permission stage, followed by a summary decision-making by three judges. Arguably the full Tribunal would only need to meet to consider the most complex or controversial applications.

The decisions of the Decree 19 Tribunal are published in both Arabic and English, with the former version being authoritative. The early judgments have been terse and set out limited reasoning or analysis in relation to their conclusions. Sections of the English-version judgments are unclear, which is surprising in view of the fact that they were signed off by experienced DIFC Court judges with international backgrounds. Parties and practitioners are likely to expect the Tribunal to enhance not only its rules and procedures but also the substance of its judgments in order to provide greater predictability of its approach to conflicts of jurisdiction.