The enforcement of foreign arbitral award merged with foreign judgement under the United Arab Emirate Civil Procedure Law

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Abstract: The argument of this paper is based on the fact that since the methods of enforcement of foreign arbitral awards are different from their counterparts which are provided for foreign judgements. The question arises as to whether foreign arbitral award merged into judgement will be enforced by methods of enforcement pertaining to foreign awards or those pertaining to foreign judgments in UAE.

Keywords: arbitral award; merger; foreign judgement; legal theory; law; justice; UAE.


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1 Introduction

This paper focuses on the enforcement of foreign award merged with foreign judgement. It is generally recognised that the enforcement of foreign arbitral awards is more easy, straightforward, uncomplicated and inexpensive process than the enforcement of foreign judgements.1 This is because:

The network of international and regional treaties providing for the recognition and enforcement of international awards is more widespread and better
developed than corresponding provisions for the recognition and enforcement of foreign judgements.\textsuperscript{2}

Once an arbitral award is made, the winning party will seek to enforce such an award in the state where the assets of the losing party are located. This enforcement will be under either the international conventions, such as the New York Convention of 1958, or the local regimes, which are provided for this purpose in the country where the enforcement is sought, such as Articles 235 and 236 of UAE Civil Procedural Law.

The argument of this paper is based on the fact that since the methods of enforcement of foreign arbitral awards are different from their counterparts which are provided for foreign judgements.\textsuperscript{3} The question arises as to whether foreign arbitral award merged into judgement will be enforced by methods of enforcement pertaining to foreign awards or those pertaining to foreign judgements? To answer this question, this paper is divided into the following sections:

- How does the merger of an arbitral award operate?
- Why does an arbitral award merge into a judgement?
- When does an arbitral award merge into a judgement?
- How will a foreign arbitral award merged into a foreign judgement be recognised and enforced abroad?

2 How does the merger of an arbitral award operate?

The doctrine of merger operates to absorb an arbitral award within the judgement.\textsuperscript{4} Thus, the winning party, in some jurisdictions, cannot rely on an arbitral award for enforcement but on the judgement. As far as the recognition and enforcement of a foreign judgement based on a foreign award are concerned, the scenario in which an award merges into a judgement is a matter for the Lex fori of the court asked to enforce.\textsuperscript{5}

In the UAE, a local award can be enforced under Article 213 of Civil Procedure Law, under which an award, made by the tribunal pursuant to an arbitral agreement, may, by leave of the court, be enforced in the same manner as a judgement or order of the court to the same effect. Where leave is so given, judgement may be entered in terms of the award. In most countries, a local award may be enforced by similar or analogous procedures, varying from a mere deposit of the award with the court which gives it executory effect, to a formal order giving the award executory effect or entering a judgement in terms of the award.\textsuperscript{6} If enforcement measures of this kind are taken in a foreign country, it is the award or the foreign judgement which is to be enforced in UAE.\textsuperscript{7}

3 Why does an arbitral award merge into a judgement?

The winning party may seek to confirm an arbitral award by a local judgement for the following reasons\textsuperscript{8}:

1 To obtain enforcement in the place where the arbitral award is made. The winning party in some jurisdictions, such as in UAE, is requested to bring an action on the
award. In other jurisdictions, the winning party needs to confirm the award into a judgement in order to obtain enforcement.

2 A winning party may seek to confirm an award for more finality, since the losing party is capable of challenging an award in the rendering place. As such, in some jurisdictions, judicial confirmation is almost immune from an action to set aside. Also, in some jurisdictions, the time for setting aside starts running once the motion to execute or enter an execution order has been filed. So, by merging an award into a judgement, an award becomes immune from challenge.

3 To enforce the arbitral award abroad. According to some convention-regimes, such as the New York Convention of 1958, an award will not be enforced if it is not binding on the parties. The Geneva Convention of 1927 also requires that an award is final in the country where an award is made. Thus, in order to comply with such conditions, the winning party seeks, in advance, to confirm an award in the country where it was made before seeking to enforce it abroad.

4 To avoid delay in enforcement: the need to confirm an award in the rendering place makes the losing party interpose its motion to set aside the award. By doing so, the winning party avoids inconvenient litigation in the country of the arbitral award and so avoids delay in enforcement in the forum place. According to Article VI of the New York Convention, for instance, an enforcing court may adjourn enforcement if the party against whom enforcement is sought furnishes the court with evidence that an application to set aside an award has been made in the rendering place.

5 To avoid misapplication of the foreign law by the enforcing court. An award can be set aside according to the applicable law. The enforcing court will examine this matter according to this law. Since the parties agree to apply the law of the country where the arbitration took place, confirming an award by the court of this law is evidence of how the rendering place law can be applied by the rendering place court to the given facts.

4 When does an arbitral award merge into a judgement?

There are many actions that the winning party may take to enforce the arbitral award. He may seek to apply for summary procedures by leave of enforcement, by registration, by deposit to an award, or by obtaining judgements from the court of rendering place. The question arises as to whether any of these actions merge an award to be absorbed within the action concerned. It is submitted that there is a difference in character between an execution order and judgement on award. An execution order on an award has a territorial effect within the State in which it was issued, and it does not absorb the arbitral award, whereas a judgement on an award absorbs it within the judgement. In *Northern Sales co. v Reliable Extraction Indus. Pvt*[^9], the High Court of Bombay declared:

> The wording of the order leaves no manner of doubt that it was merely an enforcement order and not a judgement in terms of the award. The leave was granted by the Master in chambers merely for enforcement of the award in the same manner as the judgement and cannot be considered as a judgement in terms of the award.
Moreover, in *Stolp & Co v Browne & co*\(^{11}\), the defendants contended that:

The document produced as a judgement is not in reality a judgement of the court at all, but that the effect of the certificate attached to the award is merely an order upon which execution could issue in Holland, and is not such a judgement as could be sued on in Canada.

Thus, an execution order on the arbitral award is not considered for the purpose of a merger, while judgement on an award is considered for this purpose. For the purpose of recognition and enforcement, it is the judgement and not the execution order that is considered.

### 5 How will a foreign arbitral award merged into a foreign judgement be recognised and enforced abroad?

The enforcement of a foreign arbitral award merged into foreign judgement abroad is described by Berg as:

> If in the country of origin a leave for enforcement is issued by the court of the award, the leave may constitute a court judgement in that country. Such judgement may furthermore have the effect of absorbing the award into the judgement in that country. If in this case the enforcement is sought in another contracting State, the question arises whether the award is to be enforced as a foreign award under the convention or as a foreign judgement on another basis. In other words, does the merger of the award into the judgement in the country of origin have an extraterritorial effect?\(^{12}\)

It is also addressed in *Dicey and Morris* as:

> In England a local award may be enforced under section 66 of the arbitration act 1996, under which leave of the court may be obtained to enforce the award in the same manner as a judgment, and also, if the claimant applies, to enter judgment in terms of the award. In most countries a local award may be enforced by a similar or analogous procedure, varying from mere deposit of the award with the court which gives it executory effect, to a formal order giving the award executory effect or entering judgment in terms of the award. If enforcement measures of this kind are taken in the foreign country is it the award or the foreign judgements which are to be enforced in England or do the claimant have an option?\(^{13}\)

It can be submitted that there are three possible answers to the above question, namely merger, non-merger, and the option between merger and non-merger.

#### 5.1 An award merged into a judgement in the country of origin has an extraterritorial effect (merger doctrine)

In this regard, a foreign arbitral award after its merger into a foreign judgement will not be enforced as an award but as a foreign judgement.\(^{14}\) The question arises as to whether or not the winning party can rely on the award after it has merged into a judgement. Dicey and Morris address this matter saying:

> A doubt, however, arises whether an award can be enforced as such after entry of judgement on it in the foreign country. The mere fact that the claimant has taken enforcement proceedings involving entry of judgement abroad should as
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This adoption addresses two questions; namely, can an award that has been nullified elsewhere be enforced in UAE; and can a nullified UAE award be enforced in another jurisdiction? In deciding whether to do so in the light of this adoption, an UAE court cannot enforce an award that has been annulled abroad. This is because the foreign award, according to the merger doctrine, is merged into the judgement.

However, article V of the New York Convention gives the UAE court the option to enforce an award even when the grounds of refusal are met. Thus, the UAE court has the discretionary power to enforce an award that has been annulled elsewhere or not. However, the UAE court is unlikely to enforce an award annulled in the country where it was made because article 235 of UAE Civil procedural Law requires that foreign award should be enforceable in the state where it was made.

Regarding the second question, this is an issue primarily for the law and the court of the country enforcing the award (forum place). UAE law does not place any limitations on such enforcement (except reciprocal arrangements). Therefore, the merger of an award into the judgement under UAE law will leave a nullified award invalid for enforcement abroad.

5.2 An award merged into a judgement in the country of origin has no extraterritorial effect (non-merger)

This opinion is based on the fact that the purposes of any action made by the court of the place of origin about an arbitral award are to enforce such an award in its territory. It does not extend to have any effect on the territory of another state as a judgement. Thus, seeking the enforcement of an arbitral award abroad will not be affected by the judgement of the court. Its enforcement abroad will be as a foreign arbitral award and not as a foreign judgement. This doctrine is adopted in some jurisdictions with respect to foreign arbitral award including Germany, France, Netherlands, Canada, and India.

This doctrine is supported by many commentators, such as Berg, who notes that:

[T]he merger of the award into the judgement in the country of origin does not have extra-territorial effect. The leave for enforcement means that a court authorises the enforcement of the arbitral award within its jurisdiction. The fact is that the country of origin is a technical aspect for the purpose of enforcement within that country. The award can therefore be deemed to remain a cause of action for enforcement in other countries.

Dicey and Morris criticised the position of the English court in adopting the merger doctrine, by saying that:

This anomalous result could only apply to enforcement at common law, since (it is suggested) the provisions in section 101 of the Arbitration Act 1996 that convention awards ‘shall’ be recognised as binding on the parties would apply even if judgement on the award had been entered abroad.

Mustill and Boyd also criticised the English court position, arguing that:
This rule is, however, anomalous and it leads to the rather odd result that two regimes of enforcement with somewhat different requirements may be in existence simultaneously when judgement has been entered abroad on a ‘convention award’ or a ‘foreign award’-one to enforce the judgement and the other to enforce the award.20

Furthermore, Davidson concluded his comments on Atlantic Emperor case by saying:

Thus the situation might easily arise where a UK court is obliged by the 1968 Brussels convention (and the 1982 act) to recognise or enforce a judgement of a court of a member State, and obliged at the same time to enforce an entirely inconsistent arbitral award by the 1958 New York convention (and the 1975 act). How might this situation be solved?21

In the Atlantic Emperor case, the advocate general suggested that:

The merger of the awards must be regarded as limited to the territory of the court which delivered the judgement and only the award must be taken into account for the purpose of recognition and enforcement in other States. In any event, it is clear that the solution of limiting recognition only to the judgement in which the award is merged must be rejected.22

There are some other reasons for not adopting the merger doctrine with respect to foreign arbitral awards. On the one hand, in the case of the merger doctrine, the enforcing court may face different situations, such as whether or not to enforce the enforceable arbitral award accompanied by an unenforceable judgement, an unenforceable award accompanied by an enforceable judgement, an unenforceable award accompanied by an unenforceable judgement, or an enforceable award accompanied by an enforceable judgement. How can the enforcing court deal with all these situations?23 On the other hand, the enforcement of a foreign award merged into a foreign judgement makes the conventions provided to deal with the recognition and enforcement of foreign arbitral awards meaningless.24

5.3 The option between merger and non-merger of a foreign arbitral award

This solution is based on the fact that the winning party has the choice to rely on a foreign judgement or on a foreign arbitral award. The choice will be based on which one is in the best interests of the winning party.

This solution was suggested by the Advocate General in the Atlantic Emperor case, when he commented:

[T]he prevailing trend in legal literature and case law is to grant the beneficiary of a merged arbitral award an option between the possibility of enforcing the award itself under the New York convention or of enforcing the judgement under bilateral convention or domestic law.25

Furthermore, this solution complies with the doctrine of the more favourable-right-provision provided by article VII of the New York Convention. In this regard, the enforcement of a foreign judgement will prevail if it is the more favourable method than the enforcement of a foreign award.26
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6 Conclusion

The paper does not answer the questions relating to the enforcement or refusal of an arbitral award. It deals with the enforcement of an arbitral award merged into a judgement in the State of origin. The argument in this paper is based on the fact whether or not the enforcement of such an award will be as a foreign award or as a foreign judgement.

As far as the arbitral award merged into a foreign judgement in UAE is concerned, its enforcement will be according to the regimes enacted to deal with foreign judgements. The UAE courts have also adopted the merger doctrine with respect to a foreign award merged into a foreign judgement.

Note

7 ibid.
16 Articles 235 and 236 of UAE Civil Procedural Law.