

**THE IDEA OF A-NATIONAL ARBITRAL AWARD AND AN AUTONOMOUS ARBITRAL ORDER – A
CRITICAL ANALYSIS**

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I. INTRODUCTION

It is highly desirable that the fate of an award passed in international arbitration is governed by internationally accepted norms and not by parochial laws. The New York Convention of 1958 [**“the Convention”**] was framed with this object as it created a regime under which enforcement of foreign awards could be refused only on internationally accepted grounds as enumerated in the Convention. The limitation of the Convention is that it applies at the stage of enforcement only and hence cannot protect arbitral awards from the idiosyncrasies of the laws of the seat of arbitration.

Consequently, there has been an attempt to make the seat completely inconsequential. This has happened in two ways. One of them delinks an arbitral award from the seat and grounds it in the legal order of the place of enforcement. This approach is fraught with the problem of retrospective validity i.e., the award remains in a legal vacuum till the time it is enforced. Furthermore, like the Seat Theory, it regards a municipal system of law – a legal order of some State, as the source of validity of an award passed in international arbitration. Consequently, it also ends up subjecting an international phenomenon to a national legal order. The argument here being that the foundation of an international phenomenon ought to be international.

This has given birth to the idea of grounding international arbitration in a non-national legal order, consequently rendering the arbitral award passed in such an arbitration ‘a-national’ i.e. an award whose legal validity does not stem from any national legal order. Two questions of fundamental importance arise here. Firstly, whether such an award is enforceable under the New York Convention, which governs the enforcement of foreign awards globally and secondly, whether such an idea would make international arbitration a more preferable option to decide cross border disputes. This paper endeavors to answer these questions.

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The paper is divided into 5 parts. Part I is introduction. Part II deals with the idea of delinking arbitration from the legal order of the seat and Part III deals with the theory of transnational arbitral legal order. Part IV discusses the possibility of enforcing ‘a-national arbitral awards’ under the Convention. The paper ends with Part V i.e., the conclusion.

II. DELINKING INTERNATIONAL ARBITRATION FROM THE SEAT OF ARBITRATION

France has been at the forefront of detaching international arbitration from the legal order of the seat of arbitration. Accordingly, this paper analyses the progression of this approach in France.

The French saga of delinking arbitration from the legal order of the seat begins with the *Norsolor*¹ case. This case had “created a great stir”,² however, for the reason that the arbitrators decided the dispute on the basis of *lex mercatoria*.³ The dispute concerned termination of an agency agreement between a Turkish company called Pabalk and a French company Ugilor, which later became Norsolor. The agency agreement provided for ICC arbitration and Vienna was fixed as the seat of arbitration. As the parties had not selected the substantive law of the contract, according to Rule 13 of the erstwhile ICC Rules, it was incumbent upon the arbitrators to make the selection by applying the conflict of law rules they would deem fit.

In view of the international nature of the contract, the tribunal selected *lex mercatoria* as the governing law of the contract, without applying the conflict of law rules. The tribunal held that Norsolor had misused its superior position and did not act in good faith, which is one of the core principles of *lex mercatoria*. Consequently, it passed an award against the French company, ordering it to pay compensation to Pabalk.

Norsolor applied for setting aside the award in Vienna, which was dismissed by the Commercial Court of First Instance there.⁴ At the same time, the Court of First Instance in Paris allowed Pabalk’s application for enforcement of the award.⁵ Norsolor applied to the Court of Appeal in Vienna for setting aside of the award, and also approached the Court of Appeal in Paris for

¹ *Pabalk Ticaret Ltd Sirketi v Norsolor SA* decided 19 Nov. 1982 Paris Court of Appeal (1983) Rev Arb 472, Y B Comm Arb XI (ICCA and Kluwer 1986) 484.

² Emmanuel Gaillard, ‘Enforcement of Awards Set Aside in the Country of Origin: The French Experience’ in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of the Application of the New York Convention* (ICCA and Kluwer Law International 1999) 505, 508.

³ *Id.*

⁴ Y B Comm Arb XI (ICCA and Kluwer Law International 1986) 486.

⁵ *Id* at 484.

setting aside the order of enforcement granted by the Court of First Instance. The Court of Appeal in Paris postponed the matter in view of the proceedings before the Court of Appeal in Vienna, which indicates acknowledgement of a link between the legal order of the seat and an arbitral award passed there.

Accordingly, when the Court of Appeal in Vienna vacated the award partially, its French counterpart refused to enforce that part. The word on which the Paris Court of Appeal relied upon to do so was “*cassee*” which it said is a synonym of “*annullee*”.⁶ Accordingly, it stated that the annulled part of the award becomes unenforceable from the very moment it is annulled “in accordance with Art. V (1) (e) of the New York Convention”.⁷ Thereafter, it retracted the order of enforcement granted by the Court of First Instance to the extent the latter had allowed enforcement of the annulled part and refused to stall enforcement of the part which had not been annulled.⁸ However, the French Supreme Court rejected this approach and held that the French courts have an obligation to explore the possibility of enforcement under some other law in view of Article VII (1) of the Convention.⁹ Thus the French Apex Court acknowledged that international arbitration is free from the legal order of the seat of arbitration.

This position is clearly and firmly established by the French courts i.e. the Cour de cassation (The Supreme Court) and the Cour d’appel de Paris through the famous *Hilmarton*¹⁰ case wherein they upheld the idea of an international award not anchored to the legal order of the seat of arbitration.¹¹ *Hilmarton* carries a lot more weight than *Norsolor* because in *Norsolor* the award was upheld by the Apex Court at the seat before the Cour de Cassation ruled in favour of enforcing the same in France. On the other hand, in *Hilmarton* the award had been squarely annulled by all the relevant courts at the seat, including the Apex Court. Despite that, in France, all courts right from the lowest rung to the top agreed to enforce it.

The case involved a consultancy agreement between an English company Hilmarton and a French company Omnium de Traitement et de Valorisation S.A. [“**OTV**”]. As per the contract,

⁶ *Id* 488.

⁷ *Id*.

⁸ *Id* 487.

⁹ *Id* 489. Also see Emmanuel Gaillard (n 2) 509.

¹⁰ *Omnium de Traitement et de Valorisation-OTV v Hilmarton* Y B Comm Arb XXI (ICCA and Kluwer Law International 1996) 524.

¹¹ Emmanuel Gaillard (n 2) 510.

the English company was to help OTV in procuring a construction contract in Algeria. A dispute arose about the commission, and the matter was referred to arbitration under the ICC Rules in Geneva.

The sole arbitrator rendered an award against Hilmarton on the basis that the agreement involved “traffic in influence”,¹² which in his opinion was against the Algerian law as well as the public policy of Switzerland, the seat of arbitration. Hilmarton applied for setting aside of the award in Switzerland and OTV applied for its enforcement in France. The award was set aside by the Geneva Court of Appeal¹³ and the decision was also affirmed by the Swiss Supreme Court.¹⁴ Nevertheless, permission to enforce the award was granted in France by the Court of First Instance as well as the Court of Appeal.

The decision to enforce the award was affirmed by the Cour de Cassation, stating that the relevant award was “an international award which was not integrated into the Swiss legal order, such that its existence continued in spite of it being set aside and that its recognition in France was not contrary to international public policy”.¹⁵

Hilmarton clearly detached arbitration from the legal order of the seat and thus made Article V (1) (e) of the Convention superfluous. This position was further strengthened by the Paris Court of Appeal’s decision in *Chromalloy*,¹⁶ wherein an award passed in favour of an American company and against the Egyptian government was enforced despite its annulment by a competent court at the seat in Egypt. After *Hilmarton*, van den Berg had said that “if an award is set aside in the country of origin, a party can still try its luck in France”.¹⁷ *Chromalloy* made it clear that it is not anymore a matter of luck but a firmly established rule. It is remarkable here that *Chromalloy* had sought enforcement in the US as well and the US joined France in enforcing awards set aside at the seat¹⁸ and thus recognizing that an arbitral award is not bound to the legal order of the seat of arbitration.

¹² Y B Comm Arb XXI (ICCA and Kluwer Law International 1996) 525.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Emmanuel Gaillard (n 2) 510.

¹⁶ ‘France No. 26, The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc., Cour d’Appel [Court of Appeal], Paris, Not Indicated, 14 January 1997’ Y B Comm Arb XIX (ICCA and Kluwer Law International 1997) 691.

¹⁷ Y B Comm Arb XIX (ICCA and Kluwer Law International 1994) 592.

¹⁸ Eric Schwartz, ‘A Comment on Chromalloy, Hilmarton, à l’américaine’ (1997) 14 JOIA 126.

The problem with this approach is that it delinks arbitration from the legal order of the seat but grounds it in the legal order of the place of enforcement. The shortcoming is that, till the time the award is enforced, it exists in a legal vacuum. From the perspective of legal theory, this is not tenable. Furthermore, this does not make international arbitration international, because ultimately it draws its validity from a national legal order. Moreover, this approach is arbitrary in the selection of the law governing arbitration, since the seat is at least selected by the parties but the place of enforcement could be any place where the award creditor has assets. Thus this approach goes against party autonomy, which is cardinal to arbitration.

III. THE THEORY OF ARBITRAL LEGAL ORDER

The theory of arbitral legal order postulates that international arbitration does not have any connection not just with the legal order of the seat of arbitration but with any national legal order. It rather belongs to an “international legal order, called sometimes *lex mercatoria*, sometimes transnational law, more recently arbitral legal order”.¹⁹ It was the French jurist Berthold Goldman who had famously stated that an arbitrator in international arbitration does not have any forum and if he has any it is the whole world.²⁰ Gaillard developed this idea further,²¹ and it has been endorsed of late by the French courts including the *Cour de Cassation*.²²

This idea has gained much traction with the passage of time. Thus, the Supreme Court of Canada has held that “arbitration is an institution without a forum and without a geographic basis”.²³ Stephen Schill describes international arbitration as a stable institution of transnational governance”.²⁴ According to Lew, international arbitration in modern times exists in a “non–

¹⁹ Pierre Mayer, ‘The French Approach as a Starting Point for General Reflections on the Recognition of Foreign Award Judgments’ in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity* (ICCA and Kluwer Law International 2017) 706.

²⁰ See Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martin Nijhoff 2010) para 1.

²¹ *Id.*

²² ‘*Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*, Cour de cassation (1ère Ch. civile), Not Indicated, 29 June 2007’ (2007) Rev Arb 507; Philippe Pinsolle, ‘The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali’ (2008) 24 Arbitration International 277, 282.

²³ *Dell Computer Corporation v Union des Consommateurs and Olivier Dumoulin* [2007] 2 RCS 801,803.

²⁴ Stephen W Schill, ‘Developing a Framework for the Legitimacy of International Arbitration’ in Albert Jan Van den Berg (ed), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Vol 18 (ICCA & Kluwer Law International 2015) 789, 794.

national or transnational”²⁵ space. The proposition here is that international arbitration exists in a legal order which is distinct from national legal orders and is transnational in nature.²⁶

There are scholars who have turned to natural law to evince the existence of a transnational arbitral order. Gaillard thus observes:

*“The existence of an arbitral legal order can readily be acknowledged if one accepts to reason from a natural law perspective. Higher values that supposedly result from the nature of things or of society-which at times consolidate solutions found in positive law by justifying them and, at other times, question those solutions to induce their evolution-can easily be perceived as a justification for the existence of a legal order that is superior to legal systems whose only merit is to have been generated by sovereign States.”*²⁷

Natural law consists of those transcendental values which are intrinsic to “the nature of man or of society”.²⁸ The argument is that international arbitration is a natural option for the settlement of certain types of disputes and it is very reasonable to have a distinct legal order to deal with this distinct phenomenon. Thus, Thomas Clay says that it seems that natural law “has found a new expression in the idea of an arbitral legal order”.²⁹ Natural law is instinctively universal and so is international economic law. It is in the very nature of international economic law to desire a unifying transnational legal order. The fragmented municipal legal orders are against its very nature. According to Bruno Oppetit, international commercial law:

*“for its part, clearly manifests a desire for unity and universality, based on the common needs and interests of the international economic community. As such it does not accord with a fragmentation of the international legal framework and encourages the use of unifying legal notions, such as lex mercatoria, general principles of law, or truly international public policy.”*³⁰

²⁵ D M Lew, ‘Achieving the Dream: Autonomous Arbitration’ (2006) 22 *Arbitration International* 179, 181.

²⁶ See Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010).

²⁷ Emmanuel Gaillard, (n 26) para 46.

²⁸ *Id* at para 47.

²⁹ Thomas Clay, *L’arbitri* (Daloz 2001) 222 translated into English in Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) para 48.

³⁰ Bruno Oppetit, *Philosophie du Droit* (Daloz 1999) 119, translated into English in Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) para 48.

In the naturalist vision of international arbitration, certain norms like autonomy of the parties, general principles of law and international public policy are the higher norms to which the other laws dealing with arbitration must conform. If the latter are not in consonance with these higher norms, then the arbitrator shall disregard them.³¹ On the other hand, according to Gaillard, the source of transnational arbitral legal order lies in the “normative activity of States”.³² He opines that in the field of arbitration, certain principles are now accepted by most of the States. It is these universally accepted principles which constitute the transnational arbitral legal order and an award passed in international arbitration is grounded in this order.

ENDORSEMENT OF THE VIEW BY THE FRENCH COURTS

In the year 2007, in *Putrabali v Rena Holding*, the French Supreme Court once again allowed the enforcement of an award annulled at the seat.³³ *Putrabali* is hugely important because this time the Court developed a completely new theory to justify the enforcement of annulled awards. Although *Hilmarton* and *Chromalloy* had firmly established the French approach of enforcing awards annulled at the seat, the premise on which they rested was problematic as the arbitral award remained in a legal vacuum until its enforcement. The *Putrabali* decision addressed that issue by proposing the existence of an autonomous arbitral legal order and rooting an award passed in international arbitration in the said legal order right from the moment it is delivered by the arbitral tribunal.

Putrabali involved a contract for supply of white pepper by an Indonesian company named Putrabali, to a French company Société Est Epices, which later became Rena Holding. The goods sank during the voyage and the French buyer refused to make the payment. Importantly, the shipping documents had been transmitted to the buyer before the goods sank.

The matter was referred to arbitration with the seat as London which culminated in an award passed in favour of the seller. Since the parties had agreed to two-tier arbitration, an award was passed in favour of the French buyer in the second round. The Indonesian company made an appeal to the English High Court against the second award. The High Court found the award

³¹ Emmanuel Gaillard, (n 26) para 49.

³² *Id* at para 50.

³³ *PT Putrabali* (n 22) 507.

faulty and remitted the matter to arbitration. This time, an award was passed in favour of the Indonesian company, requiring the French buyer to make the payment.

In the meantime, the French company applied in France for enforcement of the award passed in the second round. The Court of First Instance granted the permission to enforce the same and the decision was affirmed by the Court of Appeal in Paris, stating that there is no reason not to enforce the award in France as none of the grounds enumerated under Article 1502 were applicable in this case. It reiterated the French position that annulment of an award at the seat is no ground for refusing enforcement in France.

Putrabali made an appeal to the Cour de Cassation. It is remarkable here that Putrabali did not dispute the possibility of enforcement of an award annulled at the seat, in France. The crux of its challenge was that Rena Holding should not have tried to enforce the first award in view of the agreed procedure between them. In doing so, it breached that trust. As Pinsolle points out, the Cour de Cassation could have simply rejected the challenge of Putrabali on the basis that the enforcement is valid as per French law by relying upon Article VII of the Convention, which it did, but it also went further and discussed the theoretical basis for allowing the enforcement of annulled awards.³⁴

The Cour de Cassation held that “an international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought”.³⁵ Decisions of international justice emanate from a transnational legal order, and not from any national legal order.³⁶ The task of the legal order of the place of enforcement is merely to see whether to incorporate the decision in its legal order.³⁷ According to the *Putrabali* decision, there exists a distinct arbitral legal order and the validity of an award passed in international arbitration stems from this order. Since this award is not rooted in any national legal order, the award becomes an ‘a-national award’.

IV. THE NEW YORK CONVENTION AND THE IDEA OF A-NATIONAL AWARDS

³⁴ Philippe Pinsolle, (n 22) 280.

³⁵ Y B Comm Arb XXXII (ICCA and Kluwer Law International 2007) 299, 302.

³⁶ Pinsolle (n 22) 285.

³⁷ *Id* at 289.

An ‘a-national award’ does not draw its legal force from any particular national legal order. This makes it truly international. Furthermore, no national court has the power to set it aside, and thus it is immune from the idiosyncrasies of the laws of the seat. Of course it can be refused enforcement but only if the enforcement would be against the global standards provided in the Convention. The important question which arises is, does the Convention recognise such an award? The Convention applies to foreign arbitral awards and defines the same as an award passed in a country other than the place where enforcement is sought. This does not accommodate the idea of ‘a-national awards’, because in the case of an ‘a-national award’, the place where it is passed is irrelevant.

The said territoriality principle was objected by some delegates particularly from France and Germany during the making of the Convention.³⁸ Their argument was that in some conditions, an award passed within their territory could be considered as a foreign award and the Convention should apply to such awards as well. On their insistence, another criterion was added which provided that the Convention would also apply to awards not considered domestic by the State where enforcement is sought.³⁹ This was in view of the autonomy of the parties to choose the law governing their arbitration. The problem with this view is that even though autonomy is cardinal to arbitration but the legal force of an award cannot stem from the autonomy of the parties alone because the very idea of autonomy can exist only if provided by some legal system.⁴⁰

The Convention permits the parties to select a governing law other than that of the seat. According to Article V(1)(e), a foreign award can be refused enforcement if “the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”. The words “under the law of which” imply that the law governing arbitration could be of a place other than the seat of arbitration. Could that law also be ‘a-national’?

It can be argued that there is no point in allowing the parties to subject arbitration to the municipal law of a place other than the State where arbitration is conducted. If that choice is so attractive, the parties will choose that place as the seat, instead of complicating things without

³⁸ Albert Jan van den Berg, *The New York Convention of 1958*, (T.M.C. Asser 1981) 23.

³⁹ *Id.*

⁴⁰ Francis Mann, ‘Lex Facit Arbitrum’ (1986) 2 *Arbitration International* 241, 245.

any rhyme or reason. Therefore, permitting them to select a law other than that of the seat as the governing law, should be interpreted to allow parties to subject arbitration to a non-national system of law. But the provision contemplates a competent authority to suspend or set aside an award which is not possible in the case of an ‘a-national legal order’. Hence the above mentioned reference under Article V(1)(e) of the Convention cannot be to a non-national legal order. Moreover, the idea of ‘a-national awards’ is not in consonance with the intention of the makers of the Convention. This is clear from the travaux préparatoires of the Convention.

The Convention came into existence on 10 June 1958. Its genesis cannot be said to be confined to merely the time when it was being drafted and deliberated upon. On the other hand, its “roots can be traced back to the very beginning of the 20th century”.⁴¹ The seeds of the Convention were sown then. This was the time when arbitration was seen with suspicion or unfavorably by national courts generally.⁴² Nevertheless, the international business community pitched for developing a legal framework for international arbitration. The ICC which was established in 1919 took the lead in this respect and submitted a proposal to the League of Nations, which finally took the form of the Geneva Protocol on Arbitration Clauses (1923)⁴³ (“the Protocol”).

The Protocol is considered a landmark in the field of international arbitration.⁴⁴ There also exists a view that “the Protocol was not a major contribution to the development of the law of arbitration”.⁴⁵ According to Gary Born, such “suggestions are inaccurate”.⁴⁶ In his opinion, some aspects of the Protocol “had a profound and decisive effect on the future of international arbitration law and on the language of the New York Convention, the UNCITRAL Model Law and other leading legislation and international instruments in the field”.⁴⁷

⁴¹ Christoph Liebscher, ‘Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Preliminary Remarks’ in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards-Commentary* (CH Beck 2012) 9.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 1.18.

⁴⁵ Hamid G. Gharavi, *The International Effectiveness of the Annulment of An Arbitral Award* (Kluwer Law International 2002) para 117. Though in the same paragraph he acknowledges that “It would, however, be unfair to minimize the achievements of the Protocol as it constituted the first step towards an international arbitration legislation”.

⁴⁶ Gary Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021) 63 see at foot note 461.

⁴⁷ *Id.*

The Protocol though a milestone in the journey of international commercial arbitration was not equipped to enforce foreign arbitral awards.⁴⁸ The States party to it were obliged to enforce awards passed in their territory only and that too in accordance with the local laws.⁴⁹ This meant that a substantive review of an award was also possible at the stage of enforcement if the laws of the place of enforcement permitted the same. These limitations paved the way for the creation of the Geneva Convention of 1927.

The most significant aspect of the Geneva Convention was that it introduced for the first time the concept of a foreign award in a multilateral treaty.⁵⁰ The obligation of the contracting States was to enforce awards passed in any other contracting State. However, it suffered from the problem of double execution, i.e., the award was required first to be approved by a court in its country of origin before it could be enforced in any other contracting State. Thus, it was required to be approved twice.⁵¹ This proved practically quite cumbersome.⁵² Moreover, the procedure for the conduct of the arbitration proceedings used to be the law of the place of arbitration, and it was required that the award conforms to that law.⁵³

The international business community, forced by the above-mentioned shortcomings, geared its efforts towards the creation of a truly international legal framework to regulate international commercial arbitration.⁵⁴ Once again the ICC was at the forefront and worked towards the creation of uniform standards to govern international arbitration.⁵⁵ The main problem which it found with the Geneva Convention was its overdependence on the laws of the place of arbitration. In 1953, the ICC submitted a draft proposal to the United Nations Economic and Social Council (ECOSOC), in which it proposed the radical idea of autonomous arbitration, i.e., detaching it from national laws.⁵⁶ This did not find favour with most of the States.⁵⁷

⁴⁸ Christoph Liebscher (n 41) 9.

⁴⁹ According to Article III of the Protocol, "Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory".

⁵⁰ Christoph Liebscher (n 41) 11.

⁵¹ Nigel Blackaby (n 44) para 11.87.

⁵² Albert van den Berg (n 38) 7.

⁵³ Christoph Liebscher (n 32) 11.

⁵⁴ Albert van den Berg (n 38) 7; Christoph Liebscher (n 41) 12; Gary Born (n 46) 99.

⁵⁵ Albert van den Berg, (n 38) 8.

⁵⁶ Gary Born (n 46) 99.

⁵⁷ Christoph Liebscher (n 41) 12.

Consequently, the ECOSOC formed an ad hoc committee and forwarded the ICC Draft Convention to it.⁵⁸ The ad hoc committee created a draft considerably different from the one sent to it. The ECOSOC forwarded this draft to many stakeholders.⁵⁹ In order to deliberate further, it conducted a conference at the United Nations headquarters in New York between 20 May and 10 June 1958.⁶⁰ It is these deliberations which finally brought into existence the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, popularly known as the New York Convention of 1958.

The Convention removed the requirement of seeking “a declaration”⁶¹ from a competent court at the seat of arbitration that the award is enforceable in their jurisdiction. It also provided for the presumptive validity of an arbitral award, which shifted the onus on the party resisting enforcement to prove the existence of any of the conditions for refusing enforcement.⁶² However, it did not accept the idea of an international award i.e., an award detached from the national laws as proposed by the ICC, and replaced that with the idea of a foreign award as proposed by the ad hoc committee formed by the ECOSOC.⁶³ Thus, it rejected the notion of a-national awards. Van den Berg believes that the Convention does not apply to a-national awards but he admits that there is some confusion in this respect.⁶⁴

V. CONCLUSION

The quest to free arbitration from the peculiarities of national laws is understandable, but the endeavor to achieve that goal by detaching arbitration from the national legal order and making awards a-national is fraught with problems. First, the Convention does not accept the idea of a-national awards as it was rejected during its making. Second, arbitration needs assistance of national courts not only at the time of enforcement of an award but even before it commences and also during the conduct of the proceedings. This support may be required even to bring an arbitration tribunal into existence and at times for “the ‘freezing’ of a bank account or for the

⁵⁸ *Id.*

⁵⁹ Albert van den Berg (n 38) 8.

⁶⁰ *Id.*

⁶¹ Nigel Blackaby (n 44) para 1.210.

⁶² See Article V of the New York Convention; Albert van den Berg (n 38) 9.

⁶³ Albert van den Berg (n 38) 35.

⁶⁴ *Id.* at 34, “Although the extensive debates at the New York Convention are not entirely clear on this point, it can be assumed that the idea was also rejected by the majority of the delegates.”

detention of goods”.⁶⁵ A national court would not be ready to provide the said support, if arbitration is not rooted in its legal order.

Thirdly, an ‘a-national award’ cannot be annulled by any national courts, which will make it a fearsome instrument. Even an apparently flawed award will have to be opposed at every place where enforcement is sought. Consequently, making potential parties disinterested in opting for international arbitration as a mechanism to resolve their cross-border disputes. Thus, the idea of ‘a-national awards’, which at first glance appears to facilitate the growth of international arbitration, actually makes it a less preferable option.

⁶⁵ Nigel Blackaby (n 44) para 3.77.