THE 'TRANSPLANT EFFECT' IN HARMONIZATION

TT ARVIND*

Abstract This article examines the problem of divergent judicial interpretation of harmonized documents. Drawing on the experience of harmonization of the law of arbitration, it points out that divergent interpretation runs much deeper than is commonly assumed, and shows strong similarities to the 'transplant effect' discussed in the literature on legal transplants. The article examines why the transplant effect shows up in harmonization, and considers its importance for the eventual success or failure of harmonization projects.

I. INTRODUCTION

How serious a problem is it if harmonized documents are interpreted in different ways by different national courts? The typical response of scholars would be, not very. Even coordinate courts within the same country, it is argued, often interpret the same law differently, and divergent views across jurisdictions do not represent anything fundamentally different.[1]

This article demonstrates that this view is both incorrect and unwarranted. It is incorrect because the divergences that one actually sees in the interpretation of harmonized laws are, in point of fact, far more serious than what would be expected or acceptable within a single jurisdiction. Worse, they frequently relate to points that go to the core of the principles on which the harmonization project was built, a point of particular concern in the contemporary context, where harmonization is as much about 'improving' laws as it is about drawing them together. And, in addition, the argument is unwarranted because the possibility of deep-running divergences is predicted by the experience of legal transplants.

Harmonization is not the only way in which laws move to new jurisdictions. Legal principles, statutes and even entire codes can also move from their home jurisdiction to others as a result of the latter choosing to use them as the base for a new law or legal rule. Legal transplants or transpositions[2] of this type are very common in actual practice. The process of transplanting a law is

* York Law School, University of York. I would like to thank Stefan Enchelmaier, Jenny Steele, Lindsay Stirton and two anonymous referees for their comments on earlier drafts of this article. Email: tta500@york.ac.uk

[1] See, eg R Goode, H Kronke and E McKendrick, *Transnational Commercial Law* (OUP, Oxford, 2007) 723–724.

[2] E Örücü, 'Law as Transposition' (2002) 51 ICLQ 205.

[*ICLQ* vol 59, January 2010 pp 65–88] doi:10.1017/S0020589309990017

not, however, always straightforward. Much as winemakers claim that a grape variety transplanted outside its native *terroir* produces a different wine notwithstanding that it remains the same plant, a transplanted law often functions in a different way in its new home. This will obviously happen if the transplanted law is deliberately modified to meet local needs, but transformations may occur even if the text of the rule remains the same or is intended to remain mostly the same. The case law and academic scholarship associated with the original law may, for example, be accepted in part and rejected in part, or even ignored altogether, producing a law that is in some ways different, notwithstanding its common origin.[3] Or, alternatively, the transplanted law may diverge simply because it comes to be used and applied in different ways. These transformations are sometimes called the 'transplant effect'.[4] The key distinguishing feature of the transplant effect—and the one that indicates that it is truly the transplant effect that is in play in a given situation—is that the changes that occur in the transplanted law are deeper and more systematic than the general drift that one might expect as a necessary consequence of the fact that there is no longer a common superior court to keep the law unified. And, in general, the factors that lie behind the transplant effect tend to arise from the transplantation itself.

In this article, I use the example of arbitration—one of the oldest, most ambitious and most successful harmonization projects in terms of its breadth and the number of countries to which it has spread—to demonstrate that harmonization exhibits a very similar pattern. Harmonization efforts sometimes succeed in drawing the laws of disparate jurisdictions much closer together, but in other instances ostensibly harmonized laws exhibit fundamental differences across jurisdictions in a manner that shows so many of the features of the transplant effect that it can, for all practical purposes, be considered a manifestation of the same phenomenon. As I demonstrate, this effect, whilst not inevitable, is a product of the very nature of the harmonization process as it is presently structured, implying that radical changes are required to the way harmonization works if it is to have a realistic chance of being as successful as its proponents hope.

II. THE AIMS BEHIND HARMONIZATION IN ARBITRATION

The harmonization of arbitration law was, from the outset, as much a law reform project as it was a project to unify the law. Since early modern times, the law of arbitration had come to be significantly influenced by a theoretical view that arbitration was, in effect, an exercise of the judicial function by people who were not judges. As such, the ability to arbitrate should be seen as

[3] cf A Watson, 'Legal Transplants and European Private Law' (2002) 4 Electronic J of Comp L 4, <http://www.ejcl.org/44/art44-2.html> accessed 1 November 2008.

[4] D Berkowitz, K Pistor and J-F Richard, 'The Transplant Effect' (2003) 51 Am J Comp L 163.

a significant concession, and arbitration itself should be closely regulated and supervised by the court, to ensure that it adheres to the high standards set by the judicial process.[5] The mere agreement of the parties could not, in the words of an 18th-century English judge, 'oust' the jurisdiction of the courts.[6] Similarly, French courts took the view that article 14 of the Code Civil gave every French citizen a privilege of access to the national courts, whose renunciation could not be presumed.[7]

The effect of this approach varied greatly across jurisdictions. In England and other common law jurisdictions, it resulted in a strict requirement that arbitrators follow the law in deciding a dispute, with courts having the power to review awards if they disagreed with the arbitrator's interpretation or application of the law. On the continent, arbitrators were not bound to apply the law, but could act as *amiables compositeurs*, deciding cases in accordance with principles they believed to be just rather than according to the rules of any particular national law.[8] Despite this apparent freedom, arbitration was tightly regulated in many continental jurisdictions. In France, for example, attitudes to arbitration had soured during the 19th century as a reaction to its abuse during the early period of the French Revolution.[9] As a result, French courts had held, using the presence of the guarantee in article 12 together with a narrow reading of article 1006 of the Code of Civil Procedure, that agreements to arbitrate future disputes were unenforceable.[10] In addition, French courts in many circumstances had total discretion to refuse to enforce arbitral awards, which was almost as broad as the discretion to reject the report of a rapporteur.[11]

The high level of judicial control of arbitration hampered the use of arbitration in the resolution of cross-border commercial disputes.[12] The harmonization process was in origin an attempt to address this issue by reforming the law of arbitration through action at a transnational level. The two key aims of its proponents were to reduce judicial intervention in the arbitral process, and to increase the power of arbitrators and parties to organize and conduct the arbitral proceedings as they desired. The process began shortly before the First

[5] Two of the most complete statements of this theory are Lainé, 'De l'exécution en France des sentences arbitrale étrangères' (1899) 26 Clunet 641 and FA Mann, 'Lex Facit Arbitrum' in P Sanders (ed), *International commercial arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff, Dordrecht, 1967) 157.

[6] *Kill v Hollister*, 1 Wils. 129, 95 ER 532.

[7] League of Nations Economic Committee (Sub-committee on Arbitration Clauses) 'Report on the Session held in London, July 1922' (1922) 3 Official Journal of the League of Nations 1410, 1412.

[8] ibid 1412.

[9] For a detailed discussion, see JJ Clère, 'L'Arbitrage révolutionnaire: Apogée et déclin d'une institution (1709–1806)' 1981 Revue de l'Arbitrage 3.

[10] *Compagnie l'Alliance v. Prunier*, Dalloz 1843.I.343

[11] League of Nations (1922) (n 7) 1412.

[12] The League of Nations' Sub-committee on Arbitration Clauses, for example, observed that arbitration was hardly used in France. Their report makes it clear that they believed this was mostly due to the unsatisfactory state of French law. League of Nations (1922) (n 7) 1411, 1413.

World War, when the predecessor of the International Chamber of Commerce began a project to draft an international agreement on the recognition and enforcement of agreements to arbitrate, which finally reached fruition in 1923 as the Geneva Protocol on Arbitral Clauses. Many of its sponsors were French, who were motivated in no small part by a desire to force a change in the general rule of French law that agreements to arbitrate future disputes were unenforceable. The final Protocol, therefore, owed a lot to legal doctrines formulated by French scholars in response to the strict position taken by French law.[13] It required countries to give effect to all arbitral agreements relating to international disputes (defined as being between persons subject to the jurisdiction of two States) by staying or refusing to hear proceedings brought in contravention of an agreement to arbitrate,[14] and provided that the arbitral procedure in the resultant proceedings would be governed solely by the will of the parties and the law of the forum.[15] Cumulatively, these provisions significantly restricted the power of courts to refuse to give effect to an agreement to arbitrate and their power to apply their law to questions concerning foreign arbitral proceedings, which had until then been the two powers most frequently invoked by courts to support their intervention in arbitral proceedings. In addition, by its emphasis on the will of the parties, the Protocol brought to the fore the notion of the freedom of parties to organize the arbitral proceedings in the manner they deemed best.

The Geneva Protocol was followed in 1927 by the Geneva Convention on the Execution of Foreign Arbitral Awards, which made the awards of foreign arbitral tribunals in international commercial disputes internationally enforceable. This instrument tackled the third major ground for judicial intervention in arbitration—it drastically curtailed the discretionary power to refuse enforcement of foreign awards which national courts had enjoyed under the conflicts rules that it replaced. The Convention provided only eight grounds on which the enforcement of a foreign arbitral award could be refused.[16] These related principally to the validity of the arbitral clause,[17] the conformity of the arbitral procedure to the parties' agreement[18] and certain basic (and clearly specified) general principles,[19] the finality of the award,[20] and the public policy of the enforcing State.[21] In particular, the Convention left no room for the review of foreign awards on substantive grounds apart from the ground of public policy which was intended to have a narrow sense. The Convention did not permit the review of foreign awards on the ground of an error of law as English law did, nor did it permit the wide-ranging review that French law once had.

[13] Arthur von Mehren, 'International Commercial Arbitration: The Contribution of the French Jurisprudence' (1986) 46 Louisiana L Rev 1045.
[14] Art 1.
[15] Art 2.
[16] Arts 1, 2.
[17] Art 1(a).
[18] Art 1(c).
[19] Arts 1(b), 2(b) and 2(c).
[20] Arts 1(d) and 2(a).
[21] Art 1(e).

Whilst both the Geneva instruments introduced significant changes in the laws of arbitration of the countries that adopted them, in particular, reducing the extent to which courts can intervene in the arbitral process, and giving parties more freedom to decide how to organize the process, they were principally concerned with the powers of foreign, and not domestic, courts. Except for the provisions of the Geneva Protocol making arbitral clauses enforceable, neither instrument attempted to regulate the powers courts had over arbitral proceedings taking place within their territorial jurisdiction. The result was that courts retained a significantly broader range of powers in relation to domestic arbitral proceedings. National laws, particularly in countries with a civil law tradition, frequently restricted the type of arbitral procedure on which parties could agree, or stipulated mandatory, non-derogable procedural requirements. For example, in the middle of the 20th century, many civil law jurisdictions distinguished sharply between arbitration according to the rules of law and amiable composition, and required the former to follow a procedure similar to those followed by national courts.[22] Other jurisdictions imposed arbitrary limits on what could and could not be the subject of an arbitral proceeding. For example, in Norway, any contract which provided for payment by instalments could not be the subject of arbitration.[23] Many jurisdictions also allowed domestic awards to be set aside on grounds that gave the courts wide-ranging discretion to review awards. The most common of these was the power to review awards on a point of law, which was most common in common law countries but was also found in some civil law countries, such as Spain.[24]

In the years following the ratification of the Geneva Convention, commercial organizations such as the ICC worked to further restrict the powers of domestic courts over arbitration through harmonization.[25] In the 1950s, UNCITRAL began work on a new international convention relating to the enforcement of arbitral awards, ultimately producing the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, popularly called the New York Convention, adopted in 1958. The ICC's initial proposal for this Convention called—in essence—for extending the Geneva Convention to *all* courts dealing with an arbitral award covering an international commercial dispute, including the court of the territory where the award was made (the Geneva Convention itself only restricted the powers of *foreign* courts to refuse to recognize or enforce awards).[26] In the end, a less

[22] P Sanders (ed), *Arbitrage international commercial: International commercial arbitration* (Vol 1, Dalloz et Sirey, Paris 1956) 19–21. [23] ibid. 13. [24] ibid. 19–21.

[25] For an overview of the most important of these—UNIDROIT's draft Uniform Arbitration Law—see VV Veeder, 'Two arbitral butterflies: Bramwell and David' in Martin Hunter, Arthur Marriot, and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff, Dordrech 1995) 16.

[26] International Chamber of Commerce, *Enforcement of international arbitral awards* (ICC Publication No. 174, ICC, Paris 1953) 8–9.

ambitious vision prevailed. The final text was principally a merger of the Geneva Protocol and the Geneva Convention, with one change—to reduce the number of court proceedings that were necessary in order to enforce an arbitral award—as a result of which the number of grounds on which enforcement of a foreign award could be refused went down from eight to seven.[27]

The ICC's proposal did not, however, disappear. The New York Convention proved extremely successful in terms of the number of countries which became a party to it,[28] and arbitration itself grew significantly in popularity during the following decades, driven in no small part by decolonization.[29] The liberal approach to arbitration advocated by the ICC, too, had been increasing in popularity, particularly in Europe, during the 1960s and 1970s. This, eventually, led to a third round of harmonization, which this time was expressly intended to cover all aspects of the law of arbitration. The result was the UNCITRAL Model Law on International Commercial Arbitration (the 'Model Law'), which was formally adopted by the General Assembly in 1985. The Model Law's express purpose was to spread around the world the deregulated approach to arbitration that had by then gained general acceptance in major European arbitral centres.[30]

The Model Law, like previous harmonized instruments, aims principally at restricting and limiting the legal regulation of arbitration and increasing the freedom of parties to order the arbitral process as they choose, but extends this to the entire body of the law of arbitration. Its principal concern is the extent of control over, and freedom granted to, domestic arbitral proceedings.[31] Thus it expressly confers on arbitral tribunals a broad range of powers and jurisdiction, which they can exercise without much judicial interference.[32] The jurisdiction of domestic courts is for the most part severely restricted. Most notably, the Model Law restricts the powers of courts to set aside domestic arbitral awards to the same seven narrow grounds set out in the New York Convention.[33] Foreign courts have virtually no powers, except to enforce arbitral agreements and awards and provide interim measures of support.[34]

III. THE RECEPTION OF THE HARMONIZED DOCUMENTS

As should be evident from the foregoing account, the fundamental ideas that lay behind harmonization were a radical disavowal of judicial involvement

[27] Art 5.
[28] As of December 2009, it had 144 parties.
[29] Yves Dezalay and Bryan Garth, *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order* (University of Chicago Press, Chicago 1996) 75, 311.
[30] Gerold Herrmann, 'The UNCITRAL Model Law—its background, salient features and purposes' (1985) 1 Arbitration International 6, 6–8. M Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint' (1989) 6 Journal of International Arbitration 7, takes a more negative view of the intent behind spreading western jurisprudence to the third world.
[31] Hermann ibid. 8–12.
[32] Arts 16–33.
[33] Art 36.
[34] Art 1(2).

and legal regulation of arbitration, and an affirmation of the autonomy of parties to arbitration. Successive rounds of harmonization have significantly expanded the circumstances to which these ideas are applied. The Geneva Protocol and Convention applied these ideas almost exclusively to the role of *foreign* courts. For the most part, they did not seek to apply them to the courts of the arbitral forum itself. In the UNCITRAL Model Law, however, these ideas had come to be applied to all courts, and the Model Law builds upon them to restrict the power and jurisdiction of the courts of the arbitral forum. However, as I will show in this section, not all States that adopted these instruments actually accepted the ideas on which they were based, and many interpret and apply them in a manner that is not easy to reconcile with these principles or, in some cases, the texts of the laws themselves. The main example I use is India, but as I point out towards the end of this section, the case of India is far from unique, and many other jurisdictions display similar trends.

In the early 20th century, Indian arbitration law still closely resembled 18th century English law. By the time India ratified the Geneva Protocol and Convention, Indian arbitration law had been partially updated on the model of the English Arbitration Act 1889, and in 1940 a new Arbitration Act was passed on the model of the English Arbitration Act 1923. India was an enthusiastic adopter of the harmonized instruments discussed above, rapidly ratifying the Geneva Protocol and Convention and the New York Convention, and passing a new arbitration law in 1996 substantially based on the UNCITRAL Model Law. Comments in legal journals suggest a clear desire to liberalize India's arbitration law,[35] which like the English statutes upon which it was based contemplated the exercise of strict powers of supervision and control by the courts. Despite this, however, the manner in which the new laws were actually interpreted and applied by the Indian courts deviated significantly from both the letter and spirit of the documents in question, and instead, showed a pronounced trend towards asserting the very type of judicial power that the harmonized laws were intended to abolish.[36]

An early example, which is fairly typical of the way the Indian judiciary approached harmonized laws, was the decision of the Supreme Court of India in *Shiva Jute v Hindley*,[37] a case involving the Geneva Protocol and Convention. The case involved an arbitral award made by the London Jute Association, whose enforcement was sought in India under the Geneva Convention. The Indian company, Shiva Jute, resisted enforcement in India, but did so under the Arbitration Act 1940, rather than under the Geneva Convention. The suit was obviously bad, as the Indian legislation implementing

[35] See, eg V Raghavan, 'New Horizons for Alternative Dispute Resolution in India—The New Arbitration Law of 1996' (1996) 13 Journal of International Arbitration 5.

[36] F Nariman, 'Finality in India: the Impossible Dream' (1994) 10 Arbitration International 373.

[37] AIR 1959 SC 1357.

the Geneva Convention expressly provided that the Arbitration Act 1940, which principally applied to domestic proceedings, would not apply to agreements and awards covered by the two Geneva instruments.[38] The grounds for challenging an award under the Arbitration Act were significantly wider than those available under the Convention, however, and Shiva Jute wanted to rely on a ground which the Convention did not allow. The Supreme Court, surprisingly enough, heard arguments on the assumption that it did indeed have the same powers over Convention awards as it did over other awards, and dismissed the challenge on its merits.

Even though the case ended happily for the party which won the arbitration, the Supreme Court's assertion of jurisdiction over foreign arbitration proceedings more or less rendered the Geneva Protocol and Convention useless as far as enforcement in India was concerned. One of the key ideas behind both the Geneva Protocol and the Geneva Convention was to limit the role of national courts and legal systems in relation to arbitral proceedings and awards that had their seat in a foreign jurisdiction—and, as a result, both documents expressly limited the powers courts had over foreign arbitral proceedings, and the grounds on which they could set aside foreign awards. Yet, notwithstanding these express provisions, the Supreme Court in *Shiva Jute* appears to have taken the view that it was entitled to apply the Arbitration Act 1940, with the entire range of supervisory powers it provided, to that arbitral proceeding—precisely as it would have done if the statute implementing the Geneva Convention did not exist.

The adoption of the New York Convention did not improve matters. In *Tractor Export v Tarapore and Co*,[39] the Supreme Court was asked to consider the question of when court proceedings brought in breach of an agreement to arbitrate should be stayed. The New York Convention required courts to stay all such proceedings, unless the arbitration agreement was null and void, inoperative or incapable of being performed. The statute which enacted the Convention into Indian law more or less replicated this wording, but used the word 'submission' in place of 'agreement to arbitrate'. The court held that a 'submission' only arose after the matter had actually been submitted to a specific arbitral tribunal and that, as a result, an Indian court had no obligation to stay a suit brought in breach of an agreement to arbitrate until the tribunal had actually been set up and received the terms of reference. A few years later, in *Ramji Dayawala v Invest Import*,[40] the Supreme Court applied the same reasoning to the statute enacting the Geneva Protocol, and held that that statute, too, did not require an Indian court to stay a suit brought in breach of an arbitral agreement, unless an actual reference had been made to a tribunal and was pending before the suit was brought.

[38] Arbitration (Protocol and Convention) Act 1937, s 3.
[39] AIR 1971 SC 1.
[40] AIR 1981 SC 2085.

As interpretations go, this was rather peculiar. The word 'submission' used in both statutes came from the Geneva Protocol, where it quite obviously meant any agreement to submit present or future disputes to arbitration, and the phrase had had that meaning in common law for several centuries before the Protocol. The Supreme Court's decision had the perverse effect of making arbitral clauses *less* easily enforceable under the harmonized instruments than under domestic law, when the intent of harmonization was exactly the opposite. The Supreme Court in *Tractor Export* expressly states that it was aware that its decision did not reflect what the drafters of the Convention had indicated. Why, then, did it decide the way it did? A clue is provided by the decision of the High Court of Kerala in *Food Corporation of India v Mardestine Compania Naviera*,[41] which came a few years after the decision in *Tractor Export*. Statutes relating to arbitration should be construed narrowly, the High Court argued, because arbitration was an interference with the right of an individual 'to institute a suit and to proceed with the same in the ordinary civil courts of the land' which was 'a very valuable right'. This point of view, which implicitly views litigation as being by far the better form of dispute resolution, presents a sharp contrast with the belief in the superiority of arbitration which is inherent in the liberal approach to arbitration propagated by the harmonization initiatives. Its consequence, as seen in the above cases, is the perceived need to assert a significantly higher level of discretionary power over the arbitral process than the various harmonization initiatives contemplated.

The desire to assert judicial control is also seen in decisions that uphold the validity of arbitration agreements and arbitral awards. An example is the decision of the Supreme Court in *Renusagar v General Electric*.[42] The question in this case was the scope of 'public policy' as a ground of challenge. The court held that the term must be given a narrow meaning and must:

> . . . necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

The first two grounds which the court set forth are reasonable enough, but the third confers a very wide discretion upon the courts, giving as it does the power to refuse to enforce any award that they believe produces an 'unjust' result. The extent to which the Supreme Court's definition of public policy departs from the intent of the New York Convention becomes even clearer when one considers the fact that many jurisdictions did—and, in relation to domestic awards, still do—reserve to their courts the right to set aside awards

[41] AIR 1977 Ker 108.

[42] AIR 1994 SC 860.

which were 'unjust' or 'contrary to justice'. Neither the Geneva Convention nor the New York Convention recognized this as a ground for refusing to recognize a foreign award; yet the Indian court claimed precisely this power by giving the term 'public policy' a very broad meaning, which contrasts sharply with the narrow meaning that the convention had intended to convey.

Equally incongruous is the express linkage which the court set up between the ground of public policy in private international law and under the New York Convention. The New York Convention, like the Geneva Protocol and Convention, expressly aimed to make the cross-border enforcement of arbitral awards easier by giving them a higher status than judgments. Under these circumstances, it is hard to see why the concept of public policy should be defined with the breadth that it is in relation to contracts and judgments in private international law, when other concepts are not. Against this background, the fact that the award was, in point of fact, enforced did little to alter the fact that the court had reserved to itself a significant amount of power. As I will show in this section, this attempt of courts to preserve or reintroduce powers that harmonized laws were attempting to take away is a constant theme, and characteristic feature, of the failure of harmonization efforts to change the law as they were intended to, not only in India but also in other jurisdictions. This phenomenon has deeply rooted structural causes, as I describe in parts IV and V.

The fate of the UNCITRAL Model Law, which entered Indian law in the form of Part 1 of the Arbitration and Conciliation Act 1996 (ACA), was similar to that of the New York Convention and the Geneva Protocol and Convention. In theory, the Indian judiciary agreed that the ACA marked a break with the old jurisprudence. The High Court of Bombay, for example, held that the relationship between the courts and the arbitral tribunal had been fundamentally altered by the ACA, and courts must be much more cautious in exercising supervisory powers over arbitration.[43] The Supreme Court of India went even further, holding that it would be misleading to refer to cases decided under the old law in construing the meaning of provisions of the 1996 act. Courts must, it said, free themselves from the influences of the principles that they previously applied when dealing with questions arising under the ACA.[44]

In practice, however, things proved to be quite different.[45] The courts not only continued to assert a broad jurisdiction to supervise arbitration, but in the process also read into the statute powers that had deliberately been left out. The decision of the Supreme Court in *Bhatia International v Bulk*

[43] *The Bombay Gas Company v Mark Victor Mascarenhas* [1998] 1 LJ 977. The present author advised the (ultimately successful) respondent in that case.

[44] *Sundaram Finance v NEPC India*, AIR 1999 SC 565.

[45] A more complete survey of judicial decisions under the 1996 Act can be found in Promod Nair, 'Surveying a Decade of the 'New' Law of Arbitration In India' (2007) 23 Arbitration Intl 699.

Trading[46] serves as a good example. This case involved arbitral proceedings in Paris, during which Bulk Trading applied to the Indian courts for an interlocutory injunction against Bhatia International. The application was granted. Bhatia International appealed to the High Court and, on the appeal being rejected, to the Supreme Court.

The ACA did not provide for the grant by Indian courts of interim relief in relation to foreign arbitral proceedings (although, in the UNCITRAL Model Law, interim relief was one of three powers which foreign courts could exercise). Bhatia International argued, rightly, that this meant that Indian courts could not award interim relief in respect of foreign arbitral proceedings. The Supreme Court disagreed. Fundamentally, it said, the ACA should not be interpreted to exclude the courts' jurisdiction unless that was 'the only conclusion' that could be drawn. The ACA provided that the powers contained in Part 1 applied 'where the place of arbitration is in India'. This, the court said, did not mean that it *only* applied if the place of arbitration was in India. A proper reading of the ACA, they said, made it evident that 'the Legislature did not intend to exclude the applicability of Part I to arbitrations which take place outside India.' It applied when the place of arbitration was in India, and it also applied when the place of arbitration was outside India. As a result, the court could exercise the same powers over foreign arbitral proceedings as it could over domestic proceedings, unless the parties by express or implied agreement excluded the applicability of Part 1 of the ACA.[47] Since the parties had not done so here, the court concluded that it had the power to grant interim relief.

The court's reasoning is convoluted, and quite clearly artificial. Whilst the judges appear to have been influenced by a desire to fix what they saw as a gap in the statute, they chose to do so in a way that gave them a far broader range of powers than the simple power to grant interim relief. The decision meant that an Indian court could, for instance, entertain challenges to arbitrators or hear an application to set aside the award even if the seat of the arbitration was outside India, in a Convention country. Giving the courts of a country power of this type over foreign arbitral proceedings ran counter not just to the UNCITRAL Model Law, but also to the Geneva instruments and the New York Convention. It also amounted to a major expansion of the powers of the Indian courts, which had not had any equivalent power under the statutes which preceded the ACA. Thus, paradoxically, the result of *Bhatia International* was that the ACA, rather than narrowing the powers of the judiciary as the UNCITRAL Model Law was intended to do, very significantly broadened them.

This trend continued in *ONGC v Saw Pipes*.[48] This case concerned the enforcement of an arbitral award, in which the tribunal had awarded the

[46] (2002) 4 SCC 105.
[47] ibid [32].
[48] 2003 (5) SCC 705.

payment of liquidated damages as provided for in the contract. The distinction between a liquidated damages clause and a penalty clause, and the question of whether liquidated damages clauses are enforceable at all, are much less settled in Indian law than in English law. The decision of the tribunal was therefore challenged in the Indian courts. The ACA, however, like the UNCITRAL Model Law, does not allow an award to be challenged or set aside simply because it contains an error of law as a ground for setting aside an arbitral award. The appellants, therefore, challenged the award on the basis that it violated Indian public policy because it misapplied the law on liquidated damages.

As seen above, one of the purposes of the Model Law was to streamline the grounds on which awards could be challenged by confining them to principally procedural grounds, and eliminating substantive grounds such as errors of law. Nonetheless, the Supreme Court agreed with the claimants, and held that to the three grounds of public policy described in *Renusagar*, a fourth must be added: any award which was 'patently illegal' must be held to be against Indian public policy, and set aside on that basis. Since, on the facts, the arbitrator did not appear to have taken the provisions of the Indian Contract Act against penalties into account, the award was patently illegal, and therefore in violation of public policy and liable to be set aside.

Saw Pipes related to domestic arbitral proceedings, and hence to a situation where only the Model Law, and not the New York or Geneva Conventions, applied. In 2008, however, the Supreme Court in *Venture Global v Satyam*[49] extended the power to all arbitral awards, whether domestic or foreign. The case involved a joint venture agreement between Venture and Satyam. Satyam claimed that an event of default had arisen, which gave it a right under the agreement to force Venture to sell its shares in the joint venture to it. Venture disputed this, and the dispute went to arbitration in London under the rules of the London Court of International Arbitration. The award favoured Satyam, who sought its enforcement. Venture responded by challenging the award on the basis that it violated Indian law. The Supreme Court rejected Satyam's argument that it did not have the power to set aside Convention awards. It put *Bhatia International* and *Saw Pipes* together, and held that even a foreign award—including one to which the New York Convention applies—could be challenged in India on the basis that it contained an error of law, and hence violated public policy. As in previous cases, the court was not persuaded by the argument that the Convention expressly prohibits foreign courts from exercising such powers.

The interventionist approach to arbitration displayed in these cases contrasts sharply with the liberal enthusiasm for arbitration that underlay harmonization which, as discussed above, sought to limit rather than extend judicial intervention—and in particular intervention by foreign courts—in

[49] AIR 2008 SC 1061; (2008) 4 SCC 190.

arbitration. Given the readiness with which harmonization initiatives were adopted, one would expect the approach they reflected to filter into Indian law. Yet, at each and every stage, this failed to happen. The law, as applied, continued to reflect precisely the sort of suspicion of arbitration and the belief that the courts must retain their position as the ultimate guarantors of people's rights that the harmonized documents were designed to reverse.

Nor is India the only country where this has happened. The Philippine Court of Appeal, too, took a very similar position in *Luzon Hydro v Transfield Philippines*,[50] finding that any 'manifest disregard' of the law by the arbitrators was a violation of public policy, entitling it to refuse enforcement under the New York Convention. In that case, the arbitrators—following international practice—had awarded costs to the winning party. This, the court held, contravened the Philippine Civil Code, and meant that the award was in violation of public policy.[51]

The Supreme Court of Nigeria has also long had similar difficulties with the fact that the UNCITRAL Model Law—which is in force in Nigeria—does not permit awards to be set aside for reason of error of law. Unlike the Indian and Philippine courts, however, its chosen way of addressing the issue—established by its decision in *Kano State Urban Development Board v FANZ Limited*[52]—is to treat any error of law apparent on the face of the award as being an instance of 'misconduct' by the arbitrator under the UNCITRAL Model Law, thus justifying the refusal to enforce, or the setting aside of, the award.[53] In *Baker Marina v Danos & Curole*,[54] for example, the Supreme Court of Nigeria set aside an arbitral award for misconduct by the arbitrator, where the arbitrator had awarded damages that, although characterized as substantial, were in the opinion of the court really punitive damages the award of which the parties had contractually excluded. The Court of Appeal, when it heard the first of these cases, spoke scathingly of how judicial intervention was necessitated by 'foolhardy references to arbitration and rough and ready decisions by arbitrators',[55] which strongly suggests that the Nigerian courts, too, were motivated by the same attitude of suspicion as the Indian courts.

The Egyptian Constitutional Court went a step further, holding that an important provision of the UNCITRAL Model Law, which Egypt adopted in 1994, contravened the Egyptian constitution.[56] Under article 13(2) of the UNCITRAL Model Law, where a party challenges the impartiality or independence of individual arbitrators, the challenge is first heard by the

[50] CA-GR Special Proceedings No 94318 filed on April 28, 2006.

[51] P Chow, '"Manifest Disregard of Law" as a Ground for Refusing Enforcement of Award in Asia?' [2007] Intl Arb L Rev 46.

[52] (1990) 4 NWLR (Part 142) 1.

[53] A Akinbote, 'The State of Arbitration in Nigeria', 2008 APAA Colloquium, 14–15 January 2008.

[54] (2001) 7 NWLR 337.

[55] *Kano State Urban Development Board v FANZ Limited* (1986) 5 NWLR (Part 39) 74.

[56] Decision in Constitutional Case No 84 for the judicial year 19, rendered by the Egyptian Constitutional Court on 6 November 1999.

arbitral tribunal. If it rejects the challenge, an appeal lies to the court. This, the Egyptian Constitutional Court held, was a violation of the guarantee of a fair trial under the Egyptian Constitution and—more significantly—the provisions of article 68 of the Constitution guaranteeing to all citizens the right to litigate their disputes. The court was unmoved by the argument that a large number of jurisdictions—including ones which take due process very seriously—saw no issue of constitutional due process in this provision.[57] Entrusting arbitrators with a question of this type, it held, violated the basic rights of individuals. Whilst this case deals with procedural issues, and not substantive law, it nonetheless points to the difficulties which jurisdictions that had ostensibly adopted the UNCITRAL Model Law had in accepting the principles on which it was based.

IV. ANALYSIS: THE ROOT OF THE TRANSPLANT EFFECT

None of the cases discussed in the previous section are compatible with the harmonized instruments under which they were ostensibly made. And, in each case, the incompatibility runs so deep that it amounts to a rejection of the key principles around which the harmonized instruments were built, and which they were intended to propagate. What we see in these cases are instances of harmonized laws being interpreted in a manner that is so different from what they were intended to achieve that they in effect preserve the old law. This is precisely what is experienced in extreme cases of the transplant effect.

The root of the transplant effect lies in the relationship between the formal, written sources of the law, and unwritten conventions, norms and practices inherent in the legal system. It is now generally recognized that the law found in the law books does not capture the entirety of the legal system. As important is what is frequently called 'legal doctrine', or occasionally the 'legal culture' of a jurisdiction, or 'the law in lawyers' heads'. Legal doctrine, or more broadly, the law 'not in books' enjoyed greater prominence and express recognition in mediaeval times than they do today. In mediaeval English law, for example, under the name of 'comen erudition' (common learning), it was recognized as an important source of law, and was in many ways of far greater importance than the law found in case reports.[58] Whilst its modern day descendants do not enjoy the same degree of recognition, they still quite clearly exist, and empirical work, such as Lopucki's study of bankruptcy practice in the United States,[59] or Jost's study of commonly accepted legal doctrines in German law 'which cannot be found in the law books, however

[57] MS Abdel Wahab, 'International Commercial Arbitration and Constitutional Court Review: Contemporary Trends and National Policies' [2008] Intl Arb L Rev 118, 120.

[58] JH Baker, 'Why the History of English Law Has Not Been Finished' (2000) 59 CLJ 62.

[59] LM Lopucki, 'Legal Culture, Legal Strategy, and the Law in Lawyers' Heads' (1996) 90 Northwestern Univ L R 1498.

much you try to find them there'[60] demonstrates the extent to which they continue to pervade legal systems. In institutional terms, these would be referred to as the 'informal' institutions of the law including norms, morals, notions of 'right conduct', as well as shared or embedded ideas of what outcomes are 'just', 'fair' or desirable as distinguished from its 'formal' institutions—principally, statutes, precedents, interpretation and commentaries.

Formal and informal institutions within the legal system frequently complement and reinforce each other. Formal institutions may frequently depend, either explicitly or implicitly, upon informal institutions, especially if both have evolved together in a jurisdiction. For example, the progressive deregulation of arbitration in the West, discussed in Part II of this article, owed much to the fact that informal institutions—notably, arbitrators' sense of ethics and professional responsibility—do the job of policing the arbitral process more than adequately.

This is not always true, however. Where the objectives which the informal and formal institutions promote clash—if, for example, legal rules produce results which do not fit with ideas of justice or fairness in a particular society—informal institutions may actively compete with formal institutions, and seek to produce results contrary to those the formal institution was designed to create. If the formal rule is strong, the result may be an adaptive system which without technically violating the letter of the formal rule, mitigates or alters the effects it was intended to have. If it is weaker, the result may be a competing system which challenges the legitimacy of the formal rule and the outcomes it seeks to promote.[61]

Harmonization projects, like legal transplants, tend to focus principally on the 'formal' institutions of the law. They are, therefore, vulnerable to situations where informal institutions on which the formal institutions rely are missing in the receiving jurisdiction, and even more so to situations where the transplanted rule conflicts with informal institutions in the receiving jurisdiction. Against this background, the experience of arbitration in India becomes more understandable. The harmonized instruments in India suffered from two problems. In the first instance, the rules were transposed into a jurisdiction where, for over a century, the predominant belief had been that the interests of justice were best served by close control and supervision of the arbitral process,[62] an attitude that was quite obviously incompatible with the approach which harmonization sought to promote. This was worsened by the second

[60] F Jost, 'The Adjudication of Law and the Doctrine of Private Law' in M van Hoecke and F Ost (eds), *The Harmonisation of European Private Law* (Hart Publishing, Oxford, 2000) 168–72.

[61] This analysis is based in large part on the typology of institutional interaction set out in G Helmke and S Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda' (2004) 2 Perspectives on Politics, 735.

[62] I discuss the origin of this particular point of view in some detail in TT Arvind, 'Can Harmonisation Improve National Law? The Case of Arbitration in India' NLSWP 07/01, <http://lawwp.webapp1.uea.ac.uk/wp/index.php/workingpapers/article/view/4/5> accessed 28 July 2008.

problem, namely, that they were transposed into a situation where the general perception was that the rules relied on supporting informal institutions which were absent in India. Thus, for example, shortly after the decision in *Saw Pipes*, the then Solicitor General, writing in his personal capacity, echoing the words of the Nigerian Court of Appeal in *Kano State Urban Development Board v FANZ Limited*,[63] argued that the judgment was a justified response to a genuine circumstance, namely, the lack of professionalism of Indian arbitrators. Until arbitration in India came up to the standards of arbitration internationally, he said, it was inappropriate to free it from judicial control.[64]

The result was that the formal institutions that had been transposed into Indian law did not fit with the pre-existing informal institutions. Initially, the response was adaptive. The legitimacy of the approach underlying the New York Convention and the Model Law was conceded, but the courts nonetheless tried to tinker with the actual results that the laws produced. Once informal institutions start competing with the formal rules, however, it is easy to descend into a vicious cycle, where decisions progressively reduce the legitimacy of the transplanted law. And this is what appears to have happened in India, Nigeria and Egypt. The approach taken by the early cases in India, for example, suggests that at that stage, the UNCITRAL Model Law still had a significant amount of legitimacy. Yet, within five years, this legitimacy was fast being eroded. In 2001, the Law Commission of India proposed changes to the Act that, if enacted, would in effect have amounted to a repudiation of the Model Law. Courts, the Law Commission said, should be given the power to closely regulate procedural aspects of arbitration, including the procedure for hearings and adducing evidence, thus effectively putting an end to the principle of party autonomy in arbitration. The Law Commission also recommended that the power of courts to review awards on questions of law be expressly reinstated.[65] These proposals were not enacted, but the Model Law's legitimacy continued to rapidly decrease to the extent that by 2008, the Supreme Court had even begun to criticize UNCITRAL's drafting, saying in *Venture v Satyam* that it 'does not appear to be a well-drafted legislation'.[66]

And, as might be predicted, in addition to growing bolder in terms of the principles they have been willing to challenge, the decisions of the Supreme Court have also shown a clear tendency to interpret harmonized instruments in a manner that gives the courts the same powers that they had before harmonization, such as the power to set aside awards for errors of law and the ability to exercise supervisory jurisdiction over foreign awards, even though the express purpose of harmonization was the abolition of precisely these powers, as

[63] (1986) 5 NWLR (Part 39) 74, discussed in part II.

[64] G Vahanvati, 'Sore Pipes' *Deccan Chronicle* (Hyderabad 26 July 2003).

[65] Law Commission of India, *One hundred and seventy-sixth report on the Arbitration and Conciliation (Amendment) Bill, 2001* (Government of India, New Delhi: 2001) 83–4, 102–12, 137–8.

[66] Civil Appeal No 309 of 2008 (Supreme Court of India, 10 January 2008) [35].

discussed in Part I. The latest decision has in effect rolled back parts of Indian law to how they stood before the first rounds of harmonization in the 1920s. The Philippine and Nigerian examples discussed in Part II have had a similar effect.

V. WHAT STOPS CHANGE?

It is tempting to attribute the difficulties in implementing and interpreting harmonized instruments to the legal system's inability to cope with a sudden leap from an arbitral law based on old rules of common law to a law that builds upon principles drawn from French law. Yet no legal system is entirely a prisoner of its own past traditions. Informal institutions can be changed, or new ones developed, to conform to those traditions that exist in the country of origin of the transplanted law, or the countries on whose jurisprudence a harmonized law was based. The paradigmatic example of such a change is Turkey. As Esin Örücü describes, the transplant of a large number of rules from different jurisdictions was backed by the education of judges and academics. Turkish academics were trained in universities in countries from which laws were transplanted. Extensive thought and effort was put into issues of language and translation. Foreign professors at Turkish universities, many from the countries whose systems were the source for the transplants in question, contributed to the resulting legal system, and helped the transplant take root. The result was that, whilst there was some deliberate adjusting of the transplanted laws to meet local conditions, there were few of the unintended, but profound, movements associated with the transplant effect.[67]

This can easily be replicated in relation to harmonization, and it has happened. Several common law countries, such as New Zealand and Canada, have adopted the UNCITRAL Model Law, and have had no difficulty with giving up the power to review awards on questions of law. In *Downer-Hill Joint Venture v Government of Fiji*,[68] the High Court of New Zealand considered the question of whether the ground of public policy should be given a broad meaning as the Indian courts had done. The High Court of New Zealand cited the Indian Supreme Court's decision in *ONGC v Saw Pipes*, but then went on to say that, in its opinion, a failure by an arbitrator to apply a binding provision could not be regarded as 'even approaching the level required to establish a conflict with the public policy of New Zealand as that phrase is used in article 34(2)(b)(ii).'[69] The courts of Singapore, another common law country which has adopted the UNCITRAL Model Law, also had little difficulty in rejecting the suggestion that the ground of public policy should be

[67] E Örücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4 Electronic J of Comp L 1, <http://www.ejcl.org/41/art41-1.html> accessed 30 July 2008.

[68] [2005] 1 NZLR 554.

[69] ibid [80], quoting the decision of the lower court with approval.

interpreted broadly. In *PT, Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*,[70] the Singapore Court of Appeal, again after considering the decision in *ONGC v Saw Pipes*, held that the Model law:

> . . . gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the Act and Art 34 of the Model Law. While we accept that an arbitral award is final and binding on the parties under s 19B of the Act, we are of the view that the Act will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact.[71]

Why, then, does this not happen more frequently? Why did a similar shift not take place in the countries studied in this paper? There have been too few instances of successful harmonization to answer the question solely with reference to it, but useful lessons can be drawn by looking at the experience of legal transplants.

The history of legal transplants points to three factors which cause transplanted laws to diverge significantly from the original. First, and at the most basic level, informal institutions may fail to be transposed along with formal institutions because of ignorance. A commonly cited example of this is the transplant of the French civil codes to French colonial possessions.[72] The text of the French codes implements a very strict version of the doctrine of separation of powers. As Merryman points out, if one were to interpret it literally, it would severely restrict the scope of what judges can do, to the extent of crippling the judiciary. French courts developed ways of dealing with this, which enabled the French judicial system to function quite effectively. Thus, for example, in theory, French courts lack the ability to make law and precedents are not a formally recognized as a source of law, yet, in practice, large areas of French law are judge-made (such as the law of tort) and the manner in which cases are cited in argument do not differ significantly from the way precedents are used in common-law jurisdictions. Yet because the manner in which the system worked was not well documented at the time the French codes were transposed to other jurisdictions, no similar institutions evolved there, despite the problems caused by the absence of the informal institutions that assisted French practice.[73]

A second factor is that transplants and harmonized laws are sometimes adopted principally as legitimating tools, to endow the laws of the adopting

[70] [2007] 1 SLR 597.
[71] [2007] 1 SLR 597 [57].
[72] See, eg R La Porta, F Lopez-De-Silanes and A Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 Journal of Economic Literature 285, 304.
[73] JH Merryman, 'The French Deviation' (1996) 44 Am J Comp L 109, 116.

jurisdiction with the prestige that attaches to the rule's original source.[74] In such cases, there may be little interest in transposing informal institutions, or even in preserving the original meaning of the rule, because this is not a major motivating factor. Instead, rules are cited as authority for a principle that they, in origin, do not support or contemplate and, as a result, end up having a significance they lack in their original homes. The persons effecting the transplant will often be aware that what they're doing is, in effect, creating a new rule which bears little resemblance to the original rule that they purport to be transplanting. Yet this is not of concern to them. What matters is their ability to clothe the new law they are creating with the authority and prestige of the rule which they claim to be transplanting. Watson cites the example of the manner in which Roman law rules on riparian rights were used to decide cases under the laws of Scotland and South Africa in the 20th century, even though a strict application of the rules as understood by Roman jurists would have meant that hardly any of the rivers in either of those countries would have been private. Their key concern was authority, not fidelity.[75] Miller points to how US constitutional principles were adopted by Argentinian elites in the 19th century despite their unsuitability to Argentine conditions, because they had a legitimacy so strong that they almost became a talisman.[76]

A third factor which can cause divergences can arise if the initial transplant, or adoption of the harmonized rule in question, was principally the work of a small section of the legal community, which shares many of the objectives of the law, but whose views do not reflect those of the majority or of a powerful minority. Such dissenting groups may, rather than adjusting the existing informal institutions to accord with the approach taken by the new law, ignore the new law entirely or, if this is not possible, seek instead to adjust the way in which the new law is interpreted or applied so as to suit the existing informal institutions—including, if necessary, through strengthening or reinforcing existing competing informal institutions, or creating new ones. The group in question may act either in good faith with the broader interests of the legal system in mind or purely to serve their own, more narrowly defined, interests. In such cases, the transplanted rule may, as Günther Teubner suggested, become an 'irritant' that eventually ends up being rejected by the receiving legal system, producing new divergences instead of unifying the law.[77]

Early 20th century China serves as a good example of the first type of action, where the new rule is simply ignored. China adopted a number of laws related

[74] JM Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 Am J Comp L 839, 845–858.

[75] See, eg A Watson, 'Aspects of Reception of Law' (1996) 44 Am J Comp L 345–50.

[76] JM Miller, 'The Authority of a Foreign Talisman: A Study of US Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith' (1997) 46 Am U L Rev 1483.

[77] G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 12.

to companies and corporate organization in the early decades of the 20th century, based closely on Western models, which were intended to catalyse the introduction of 'modern' forms of commercial organization into China. For the most part, however, these new forms of organization were ignored by the Chinese business community, which preferred to stick to traditional clan and family based models for organising commercial activity. And, despite repeated government attempts, the courts did not uniformly give effect to policies intended to make the new forms of organization mandatory, or to outlaw the traditional forms.[78]

Conversely, Russia provides a good sample of the second type of situation, where a powerful minority actively seeks to prevent the creation of supporting institutions. Post-privatization in the 1990s, the Russian Government made a number of attempts to create a strong culture of good corporate governance and accountability to rein in the culture of law avoidance and evasion that had crept in, by enacting a number of laws that were based, amongst others, on US models. Yet all attempts to create strong, independent regulators and an infrastructure for effective law enforcement failed, principally as a result of the determined opposition of powerful sections of the business community, allied with bureaucrats, all of whom were able to profit enormously from the absence of such an infrastructure. The result was that, despite having laws that were good on paper, and had the potential to achieve fairly desirable results, Russia was for much of the 1990s unable to create effective institutions that could foster a culture of compliance.[79]

All three of these factors are likely to have been in play in relation to arbitration. Consider, for example, the points raised by Vahanvati in his critique of arbitration in India, discussed above. His comments boil down to a concern that arbitrators in India are not restrained by professional ethics in the same way that arbitrators in the West are. Uncodified ethics are a classic example of the informal institution. Whilst there have been some attempts at drafting codes of ethics for arbitrators, these have not really spread in the same way that procedural rules and the principle of arbitral autonomy have. Outside the US it is not uncommon for arbitral institutions not to have framed formal ethical rules.[80] For example, the ICC does not have rules of ethics for its arbitrators. The reason behind this is that for most of the 20th century, arbitrators in the European jurisdictions that were the cradle of modern arbitral law tended to be 'distinguished gentleman lawyers', or 'grand old men' in the words of Dezalay and Garth—who were imbued with traditional values and

[78] T Ruskola, 'Conceptualising Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective' (2000) 52 Stanford L Rev 1599, 1677–86.

[79] B Black, R Kraakman, and A Tarassova, 'Russian Privatisation and Corporate Governance: What Went' (2000) 52 Stanford L Rev 1731, 1752–57.

[80] For a discussion of the (exceptional) circumstances that led to the adoption of ethics rules in the US, see OK Byrne, 'New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel, A Note' (2003) 30 Fordham Urb L J 1815.

saw arbitration as a 'duty, not a career.'[81] As a result, arbitration functions well enough in Europe without express codes of ethics.

Yet it is difficult for jurisdictions that do not have a history of arbitration, but which seek to adopt the deregulated approach taken by the harmonized laws on arbitration, to figure out precisely what needs to be done in order to create similar conditions in their jurisdiction. This is a general issue in relation to arbitration where there is very little documentation as to why, precisely, arbitration in western countries functions as well as it does. The relative lack of information also extends to questions of legal doctrine, despite the existence of a few comparative commentaries and the compilation of abstracts of case law from around the world by UNCITRAL and private arbitral organizations. The result is, as seen in relation to India, Nigeria and the Philippines, a creeping reintroduction of strict judicial supervision of the arbitral process.

Vahanvati's views also indicate that not all in the Indian legal and commercial communities appear to have shared the belief that the liberalization of arbitral law was a good thing. The decision in *Bhatia International*, bitterly criticized by specialists in arbitration,[82] was warmly welcomed by figures in the wider legal community. An opinion piece (written by lawyers) in the country's leading financial newspaper praised the judgment,[83] and case notes argued that it was fundamentally sound.[84] The same was true of *Saw Pipes* which, once again, was criticized by arbitration specialists, but defended by senior legal figures, such as Vahanvati. And, in sharp contrast to Europe, where the business community was at the forefront of the movement to liberalize arbitration, the Indian business community received the decision very favourably. Trade journals praised the decision,[85] and the Bombay Chambers of Commerce even filed a submission with the Law Commission of India in support of the Supreme Court's view that awards could be set aside for errors of law.[86] The reason for the reluctance of Indian businessmen to embrace arbitration in the same way as their Western counterparts is not difficult to find. As Sornarajah points out, the history of the use of arbitration in disputes between developed and developing countries has created a suspicion that the arbitral process, and in particular the manner in which arbitrators formulate and apply the law, is inherently biased against parties from the developing

[81] Y Dezalay and BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, Chicago, 1996) 22, 34.

[82] SK Dholakia, 'Bhatia International v. Bulk Trading, S.A.', [2003] 5 SCC (Jour) 22.

[83] Y Bhattarai and S Farais, 'Not in tandem?' *The Economic Times*, 17 August 2002.

[84] R Singhania, 'Case comment', [2002] Intl Company and Commercial L Rev N 93.

[85] See, eg G Thoopal, 'A few issues relating to Arbitration Act, 1996', Indian Railway Accounts Service Association Times, October 2004.

[86] Bombay Chambers of Commerce and Industry, *Response to the Arbitration and Conciliation (Amendment) Bill, 2003*. Document of September 23, 2004 (available on file with the author).

world, and does not take into account circumstances that are of importance to them.[87] Thus whilst developed common law countries such as New Zealand or Singapore have little difficulty accepting a reduction in the powers of the courts, both users of arbitration and the courts in developing common law countries are less likely to believe that the loosening of judicial control over arbitration is a good thing.[88]

This was exacerbated by the fact that an important concern of the Indian proponents of harmonization in the area of arbitration was legitimation, in the sense of increasing the attractiveness of India as an arbitral venue. The adoption of the UNCITRAL Model Law by itself achieves this objective to a fairly significant extent. Adopting the UNCITRAL Model Law places India's name on lists of 'Model Law jurisdictions', where it remains even if the actual interpretation of the law deviates materially from what its drafters intended. And information about these deviations is not easy to find. UNCITRAL collects abstracts of decisions applying the Model Law in a database called CLOUT which it makes available on its website, but these only provide very brief information, and the database is incomplete: none of the Indian decisions discussed in this article feature in it. Authors writing in international arbitration journals tend to play down the negative aspects of their jurisdiction's laws,[89] or to make out that the enhanced level of judicial supervision is, actually, a good thing which makes arbitration more efficient.[90] England, after all, took an express decision to retain the power to review awards on questions of law in certain cases,[91] and London is a respected centre of arbitration, so retaining a similar power in India, or Nigeria or the Philippines cannot be a bad thing. As a result, despite the very significant number of publications on

[87] M Sornarajah, 'The Climate of International Arbitration' (1991) 8 Journal of International Arbitration 47.

[88] Resistence to the adoption of the UNCITRAL Model Law in jurisdictions such as England has been based on a somewhat different ground—that doing so would disrupt established patterns of cooperation that have developed over centuries in a manner that would be detrimental to arbitration in England. It was also pointed out that no major centre of arbitration had adopted the Model Law—the implication being that the Model Law was suited for countries that did *not* have a tradition of arbitration, rather than for those who did. Departmental Advisory Committee, *A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law* (HMSO, London, 1989), reprinted in (1990) 6 Arbitration International 1 [89]. And, notwithstanding England's rejection of the Model Law, the Arbitration Act 1996 has been influenced by the principles on which the Model Law is based. VV Veeder, 'La Nouvelle Loi Anglaise Sur l'Arbitrage de 1996: la Naissance d'un Magnifique Eléphant' (1997) Revue de l'Arbitrage 3.

[89] AI Okekeifere, 'The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria' (1997) 14 Journ Intl Arbitration 242, for example, glosses over the *Kano* decision discussed in part II.

[90] R Singhania, 'Case comment' [2002] Intl Company and Commercial L Rev N 93, for example, concludes by saying the decision 'removes the various ambiguity/lacunas' in the law, and praises it for 'making the Act a comprehensive law on international commercial arbitrations', which 'offers a remedy to all parties'.

[91] Departmental Advisory Committee (1989) (n 88) [80–1]. The power is contained in the Arbitration Act 1996, s 69.

arbitration produced by arbitral institutions and jurists, it can be very difficult to form an accurate picture of what the law of a country is actually like in practice. The debate in the past decade about whether Chinese courts were friendly or unfriendly to arbitration provides ample evidence of this.[92] And, to make matters worse, empirical research demonstrates that in any event, lawyers drafting commercial contracts rarely research the arbitral law of the chosen forum in any detail.[93]

One would therefore expect lawyers to put somewhat less effort into attempting to secure amendments to the law or to overturn case law—or to the transplant of informal institutions—than they put into ensuring the adoption of the law in the first place, particularly where they have the option of emphasising a few token judgments that take a liberalized attitude to arbitration, albeit on issues that are of less importance—such as the *Sundaram* decision.

To some extent, the harmonization process is inherently vulnerable to this. The lawyers who engage in harmonization tend to be westernized, often with a background of either education or practice in western countries, and are therefore more receptive to the changes which harmonization seeks to make. Yet, as this article has demonstrated, the experience of successful transplants strongly suggests that for harmonization to be successful, it is not with them, but with the equivalents of the merchants of the Bombay Chambers of Commerce and the judges of the Indian and Philippine Supreme Court that the drafters of harmonized documents must engage.

Perhaps the most important lesson to be learned from this analysis is therefore the relative irrelevance of formal statutes and texts. What is striking about the history of arbitration is that the bulk of the very significant harmonization of arbitration law that took place in Europe and the US during the mid-to-late 20th century happened outside the main harmonization projects of the time, in areas which those projects did not yet cover. The principle of arbitral independence, for example, which originated in France and stood in sharp contrast to the traditional approach of English law, had spread and taken root in England well before the UNCITRAL Model Law was drafted, and other principles such as the severability of the arbitral clause and the principle that arbitrators may decide on questions of their own jurisdiction as an inherent power similarly spread outwards from France to European jurisdictions and the US, well before they were embodied in any harmonized law.[94] Nor is this unique to arbitration. As recent work has demonstrated, a similar convergence seems to currently be underway in the area of conflicts of laws on both sides of the Atlantic, even though there has been no express document that harmonizes them and, indeed, the few attempts at harmonization that have

[92] R Peerenboom, 'Seek Truth from Facts: An Empirical Study of the Enforcement of Arbitral Awards in the People's Republic of China' (2001) 49 Am J Comp L 249.

[93] L Mistelis, 'International Arbitration—Corporate Attitudes and Practices, 12 Perceptions Tested: Myths, Data and Analysis; Research Report' 15 Am Rev of Intl Arb 525.

[94] von Mehren (n 13) 1051–6.

been tried have been rejected.[95] This might also explain why the transplant effect shows up most strongly in harmonized laws which have a dual purpose as instruments of 'modernization', but is less visible in, for example, the reception of harmonized instruments in European jurisdictions. It is, in the ultimate analysis, this mix of converging, complementary institutions and parallel motivation that is dispositive in determining the 'success' of harmonization and transplants, rather than the simple act of adopting the harmonized document or foreign legal rule in question.

This foregoing analysis suggests that the manner in which harmonization is carried out should be radically rethought if harmonization is to stand any chance of achieving the many ambitions that its modern proponents have for it. The drafting and adoption of harmonized instruments should be seen as the start of the harmonization process, not its end. More attention should be paid in the process to documenting how, precisely, the rules that are the subject of harmonization function in the jurisdictions from which they are principally drawn. And, perhaps most importantly, the process should involve a wider range of representatives from jurisdictions that may adopt the law in question.

None of this should be taken as a criticism of the goals of current harmonization projects or those involved in them. It is simply that, if harmonization is taken to embody goals that are desirable, the obstacles to their achievement must be recognized, and provided for.

[95] M Reimann, 'Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century' (1998) 39 Virginia J Intl L 571.