CHAPTER- 5

ALTERNATIVE DISPUTE RESOLUTION

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A. INTRODUCTION

"Ancient Wisdom notes 'a season for all things'. ADR's time has come- even overdue some would argue. Litigation in courts, whether in India, the United States or most any other country, has become so time consuming, so expensive and so stressful that some other way to resolve disputes among people had to be found. Arbitration, conciliation and other ADR forms offer an alternative to the traditional court system."

-P.C. Rao and William Sheffiled

1. ADR-Global Necessity

The necessity and utility of ADR is unquestionable. The emergence of alternative dispute resolution has been one of the most significant movements as a part of conflict management and judicial reform, and it has become a global necessity. Lawyers, law students, law-makers and law interpreters have started viewing disputes resolution in a different and divergent environmental light and with many more alternatives to the litigation. While ADR is, now, envisioned and ingrained in the conscience of the Bench and the Bar and is an integral segment of modern practice. The Harvard Business School also a few years before added dispute resolution as a new course as a part of its curriculum. The American Bar Association created a section of dispute resolution. In justice delivery system, ADR, is employed since the litigative journey in the court of law has become exorbitantly expensive, long time consuming, cumbersome, dilatory, complex and also stressful, on account of variety of reasons which may not be deeply probed in this subject at this stage. Since the enactment in 1990 of the Civil Justice Reform Act (CJRA) in US, there has been tremendous growth in the creation of ADR programmes and their implementations. In all the countries where most people opt for litigation to resolve disputes, there is excessive over-burdening of courts and a large number of pending cases, which has ultimately lead to dissatisfaction among people regarding the judicial system and its ability to dispense justice. However, the blame for the large number of pending cases in these developing countries or docket explosion, as it
is called, cannot be attributed to the Courts alone. The reason for it being the non-implementation of negotiation processes before litigation. It is against this backdrop that the mechanisms of Alternative Dispute Resolution are being introduced in all the countries. These mechanisms, which have been working effectively in providing an amicable and speedy solution for conflicts in developed economies, are being suitably amended and incorporated in the developing countries in order to strengthen the judicial system.

2. **Mushrooming of ADR in Developing & Developed Countries**

India is not the only Country which is buffeted by arrears of court cases. Even the developed countries such as the United States of America and the United Kingdom suffer from this problem, albeit on a lesser scale. The USA and, following its inspiration, several countries, including Australia, Canada, Germany, Holland, Hong Kong, New Zealand, South Africa, Switzerland and the United Kingdom have been using over the last 20 years or so what is popularly known as Alternative Dispute Resolution (ADR) that encouraged the disputants to arrive at a negotiated understanding with a minimum of outside help.1 ADR is now a growing and accepted tool of reform in dispute management in American and European commercial communities. Now ADR has become popular and desirable in USA, UK, Canada, Hong Kong and Australia as it is effective, cost-wise efficient and speedy form of dispute resolution. 2 In the last two decades, ADR initiatives have mushroomed in developing and developed countries alike.

**B. ALTERNATIVE DISPUTE RESOLUTION AT INTERNATIONAL LEVEL**

ADR originated in the USA in 1970s in a drive to find alternatives to the traditional legal system, felt to be adversarial, costly, unpredictable, rigid, over-professionalised, damaging to relationships, and limited to narrow rights-based remedies as opposed to creative problem solving. Actually informal dispute resolution has a long tradition in many of the world societies dating back to 12th century in China, England and America. The business world has rightly recognised the advantages that the ADR in one form or other is a right solution.

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It is felt that it is less costly, less adversarial and thus more conducive to the preservation of business relationships which is of vital importance in the business world. The use of ADR has grown tremendously in the international business field in recent years. The growth has been permitted by several factors including tremendous expansion of international commerce and the recognition of global economy. Many governments around the world have supported the demand for ADR as an efficacious way of handling international commercial disputes. We find that ADR has also become a common provision in United States trade treaties and the United States has been the strongest supporter of international commercial ADR. Many experts in this field are of the strong opinion that the impact of ADR on international commerce is great and will continue to expand. Many countries have adopted the Alternative Dispute Resolution Mechanism. However, it is for time to see how effective the implementation of these mechanisms would be in these countries. Internationally, the ADR movement has also taken off in both developed and developing countries.

(I) ADR in United States of America

The ADR landscape in the United States is multifaceted and diverse. The growth in both the use and the development of ADR mechanisms has resulted from initiatives at all levels and from all branches of government-executive, legislative, and judiciary - and from many corners of the private sector- community organizations, corporations and the bar. With the increased inclusion of ADR clauses in domestic and international commercial agreements and more widespread publication of ADR successes, it is expected that ADR use in the United States will continue to expand.

1. Historical Perspectives

Although the development and use of alternative dispute resolution (ADR) mechanisms have proliferated in recent years, arbitration, a well-established alternative to litigation, is not a new procedure. Use of arbitration in the United States pre-dates both the Declaration of Independence and the Constitution. For example, arbitral tribunals were established as early as 1768 in New York and shortly thereafter in other cities primarily to settle disputes in the clothing, printing and merchant seaman industries.

Arbitration first received the endorsement of the Supreme Court in 1854 when the Court upheld the right of an arbitrator to issue binding judgments.

Writing for the Court, Justice Grier stated that "Arbitrators are judges chosen by the parties to decide the matter submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from the courts of equity." 6

In 1920 New York passed the first state law in the United States that recognized voluntary agreements to arbitrate. Two years later, business leaders created a new educational organization - The Arbitration Society of America - which significantly influenced the enactment of the Federal Arbitration Act (FAA) in 1925. The FAA provided the statutory framework to enforce arbitration clauses in interstate contracts and created the foundation upon which modern arbitration agreements are built today. In 1926, the Arbitration Society merged with another foundation to form the American Arbitration Association (AAA) which is now one of the largest private ADR service providers in the United States.

Despite these early initiatives, arbitration was not readily accepted everywhere in the United States. As late as the 1960s, a contractual arbitration clause was revocable in half of the states at the will of either party. Moreover, the United States did not ratify the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) until 1970-twelve years after it was promulgated.

In the 1970's, broad-based advocacy for increased use of ADR techniques emerged. This trend, often described in the United States as the "alternative dispute resolution movement", was officially recognized by the American Bar Association in 1976 when it established a Special Committee on Minor Disputes (now called the Dispute Resolution Section).

With the ADR movement came not only an increased use of arbitration but also the development and application of other ADR techniques such as mediation, conciliation, facilitation, mini-trials, summary jury trials, expert fact-finding, early neutral evaluation and variations thereof. Over the last two decades, ADR mechanisms have proliferated and their use has expanded. Modern laws providing for binding and non-binding ADR mechanisms reflect the needs of communities and businesses as well as the growing support for ADR among lawyers and judges.

2. Community Based Dispute Resolution

The community dispute resolution movement spawned from the social activism of the 1960s and helped to propel the ADR movement generally. With the promulgation of the Civil Rights Act in 1964 came the creation of the Community Relations Services (CRS) which

6. Id. at 349.
utilized mediation and negotiation to assist in preventing violence and resolving community-wide racial and ethnic disputes. The CRS helped to resolve numerous disputes involving schools, police, prisons and other government entities throughout the 1960s.

In the late 1960s and early 1970s, the federal Law Enforcement Assistance Administration (LEAA) funded both an arbitration program and a mediation program, each in an urban United States city, designed to help resolve disputes within these communities. These programs helped to settle thousands of cases. Utilizing these programs as models, more than six other urban communities, established 'pilot' neighborhood justice centers. By 1980, more than eighty communities based alternative dispute resolution centers were in operation.

Increased support from the private sector, together with successful alignments with certain federal and state agencies and non-profit organizations, helped a number of such programs grow to more than 400 local community justice centers presently operating throughout the United States. Recent estimates indicate that more than several hundred thousand cases per year are being handled by such community-based dispute resolution programs. This community-based ADR trend has been further expanded to reach public and private school systems. Presently, more than 4,000 schools throughout the United States have developed successful peer mediation programs whereby children learn to peaceably resolve disputes occurring among the students.

Underscoring these successful school programs, the American Bar Association Section on Dispute Resolution declared its theme for 1995-96 to be "Children, Courts and Dispute Resolution." The goal of this program is to expand the use of ADR both in the schools and in the courts for the benefit of children.

3. Dispute Resolution in Judicial System

Since the enactment in 1990 of the Civil Justice Reform Act (CJRA), which calls for every federal district court to implement a civil justice expense and delay reduction plan, there has been tremendous growth in the creation of ADR program and the use of ADR by federal and state courts.

(a) Federal Courts

A growing number of courts have promulgated rules that mandate or authorize judges to recommend, or require litigants to participate in, ADR procedures such as summary jury trials, early neutral evaluation, mini trials, mediation and arbitration. As of September 30,
1995, 80 of the 94 federal district courts had authorized established some form of ADR program. For example, the United States District Court for the District of Columbia introduced a voluntary mediation program in 1989. Since the program’s inception more than 1,000 cases have completed mediations (approximately 10% of the civil case load) and the program boasts a 50% settlement rate. The Court of Appeals for the District Court of Columbia also has implemented a mediation program in an effort to supplement the Court’s 1986 Case Management Plan (which was undertaken to accommodate a 60% increase in filings and pending cases over the prior two-year period). The key difference between these two programs is that cases in the Appeals Court program are selected for mediation by the Court’s Chief Staff Counsel, whereas the District Court program is strictly voluntary.

Although the Appellate mediation program handles fewer than 100 cases per year, it has significantly reduced the court’s workload. Judges have reported that even if settlement is not achieved, the issues and positions are clarified in the mediation process and the courts benefits from more efficient briefing. This program reports a settlement rate of 31%. In 1988, Congress formally authorized ten pilot courts to conduct mandatory court-annexed arbitration programs, according to the rules spelled out in the legislation, and authorized the Judicial Conference to designate ten additional districts to conduct voluntary non-binding, court-annexed arbitration programs. The mandatory court-annexed arbitration programs require that certain categories of civil cases -typically those cases below at threshold amount ranging from $50,000 to $150,000 - be automatically referred to arbitration. However, these programs provide that one or more of the litigants, after an arbitration decision is rendered, may demand, and in a majority of the cases have demanded, a trial de novo. Despite these findings, most of the parties reported that arbitration was worthwhile and was a good starting point for settlement negotiations.

7. See Proposed Final Report of the Chief Judge’s New York State Court Alternative Dispute Resolution Project, p. 12 (September 1, 1995). A survey of current ADR and settlement practices in each of the 94 federal district courts can be found in a new publication entitled ADR and settlement in the Federal District Courts: A Sourcebook for Judges and Lawyer written by Elizabeth Plapinger, director of the CPR Judicial Center ("ADR Federal Distt. Court Sourcebook").
8. The ten districts authorized to adopt mandatory arbitration programs are: Arizona. Middle Georgia, Western Kentucky, Northern New York, Western New York. Northern Ohio, Western Pennsylvania, Western Virginia, Utah and Western Washington.
Moreover, most of the cases in which a demand for trial de novo was made, settled after the hearing and before going to trial. In addition, 97% of the judges surveyed agreed that the Court's caseload burden was reduced as a result of the arbitration program.

As of 1994, eight of the ten districts authorized to adopt voluntary arbitration programs had implemented such programs. These eight programs use one of two systems for referring cases to arbitration - the "opt-in system" in which the courts imply notify litigants that the arbitration program is available if they wish to participate, and the 'opt-out' system, in which the court automatically places all eligible cases in the arbitration program, from which litigants can opt-out. The Federal Judicial Center found that those districts with voluntary arbitration programs that rely on the opt-in referral system have had only a small number of cases participate in arbitration. In contrast, districts that use the opt-out referral system generally have rates of participation similar to those in mandatory programs.

Less formal ADR programs abound in the federal court system, as do example of ad hoc resort to ADR by judges in courts throughout the country. For example, judges in the United States District Court in the District of Massachusetts utilized an "array of Alternative Dispute Resolution choices [such as] summary jury trial, trial before a magistrate, trial before a retired Massachusetts Superior Court Justice and the court mediation project,"¹⁰ prior to the enactment of formal court rules for these procedures. With mounting frequency, even without a court rule, judges are ordering or suggesting to parties that they participate in, or consider utilizing ADR.¹¹

(b) State Courts

The use of various forms of ADR in state courts also has increased 28 state courts now have mandatory, non-binding arbitration program. More than half the states have formally incorporated ADR methods other than arbitration into their systems through statewide legislation, court rules or policies. Most states offer mediation for custody, visitation or other family issue on a voluntary or mandatory basis. Virtually every state has experimented with ADR in one or more of its courts.


11. See, e.g. Local 715 v. Michelin Amerlea Small Tire, 840 F.Supp.595 (N.D.Ind.1993) (court can order vote of union to determine participation in pretrial settlement conference); G.HeilemanBreivingCo.v.JosephOatCorp.,871F.2d648(7thCir.1989)(court can order client's attendance at non-binding ADR process); In re Air Crash Disaster at Stapleton Inter Airport, Denver, Colorado, 720 F. Supp. 1433 (D. Colo. 1988) (no abuse of discretion where court ordered parties to participate in settlement conference).
In addition, many state and federal local court rules encourage ADR use by requiring attorneys to discuss ADR with clients and opponents, to address the appropriateness of ADR in case management plans, and to be prepared to discuss ADR with judges at pretrial conferences. It also was recently reported that at least 50 state appeals courts use mediation with considerable success. Some examples of state court ADR programs are:

(i) **California**

Recent legislation, which became effective August 1, 1995, requires Los Angeles County judges to order non-binding mediation of all cases in which the amount in controversy is $50,000 or less. Judges in other California courtrooms have the same option and thereby encourage parties to consider using mediation in most civil cases.

(ii) **Connecticut**

Connecticut's state courts have been among the most active ADR advocates. Their initiatives include use of private lawyers as fact finders and arbitrators; summary jury trials; voluntary settlement conferences in the state high court; and a case-management 'tracking' system that speeds case disposition by tailoring maximum allowed discovery to the complexity of the dispute.

In 1995, ADR received broader and deeper support from the Connecticut bench and bar than ever before. In May of 1995, the Connecticut Bar Association elevated the Committee on Alternative Methods of Dispute Resolution to section status-reaffirming the bar's commitment to ADR and enabling this section to better fulfill its role in increasing the awareness of ADR. Moreover, during 1995, judges of the Superior Court increasingly encouraged litigants to use both public and private ADR to resolve their disputes.

(iii) **Minnesota**

The Minnesota Supreme Court also has adopted rules that encourage the use of ADR mechanisms. Under these rules, parties to specific types of civil suits and their attorneys must be advised of ADR options when they file a law suit. At that time, parties will be told about court-annexed procedures and given a list of outside ADR providers so they may voluntarily select the procedure and the provider. If the parties have not voluntarily chosen to use ADR, the judge, after consultation with the parties, has the authority to select a non-binding ADR procedure. Parties that fail to resolve their dispute through mediation or reject an arbitrator's decision may proceed to trial.

(iv) **New Jersey**

In 1991, a New Jersey Supreme Court task force mapped out a comprehensive plan for
the implementation and use of a full range of ADR processes in most courts throughout the state. Central to the task force's recommendations and subsequently approved by the New Jersey Supreme Court was the development of Complementary Dispute Resolution (CDR). The goal of CDR is to assure the regular and routine use of the alternative process. CDR programs are now an integral part of New Jersey's Superior and Municipal Courts and have proven successful. Among other things, CDR programs require the screening of all custody and visitation matters for referral to mediation, allow for mediation of small claims and, in the discretion of the court, landlord-tenant disputes and call for mandatory mediation of certain municipal court matters.

(v) North Carolina

In response to a successful pilot program began in 1987, North Carolina authorized and has implemented a statewide, court-ordered, non-binding arbitration program. The procedure may be employed for civil cases where claims do not exceed $15,000. The arbitrator is either court appointed or party-selected. If any party refuses to participate, that part may be subject to sanctions, and the arbitrators have authority to proceed ex parte. The state court system also encourages judges to identify cases for ad hoc summary jury trial. A report issued in May 1991 by the Private Adjudication Centre in Durham, reviewed seventeen such trials conducted in North Carolina in recent years. The authors concluded that the pilot project saved substantial discovery costs and supported the availability and flexible use of the summary jury trial in the future. Also in 1991 North Carolina established a pilot program for court-ordered, mediated settlement conferences in Supreme Court civil actions.

A four-year Rand Corporation study in the federal court for the Middy District of North Carolina found that a court-annexed arbitration program designed specifically to deal with complex, high stakes litigation sharply reduced private costs while increasing litigant satisfaction with the justice system. The amounts at issue ranged from $1000 to $7.5 million and many litigants were corporations. They reacted favourably to the program in large part because the hearings conducted were relatively formal and allowed for witnesses, cross-examination and oral argument. The data also revealed that those who benefited most from the cost reduction were the defendants, although plaintiffs' costs were lowered as well.

(vi) Texas

The Texas Alternative Disputes Act provides a comprehensive framework for voluntary, non-binding ADR processes. A judge may, upon his or her own motion or the motion of a
party, refer a case for resolution by mediation, mini-trial, moderated settlement conference, summary jury trial and arbitration. Texas also mandates two Settlement Weeks each year in which courts in the larger counties close and local lawyers, judges and parties try to mediate settlements of long-pending cases.

In addition to the state programs discussed above, special business courts, offering relatively expeditious processing of commercial disputes, have been set up in three major cities - New York (NY), Chicago (Illinois) and Wilmington (Delaware). The Commercial Division of the New York State Supreme Court is exclusively devoted to commercial disputes, committed to expedited processes and encouragement of settlement. Four judges hear cases in this Court from start to finish. This offers several advantages, the most obvious of which is speed. Specialization also allows these judges to develop subject-matter expertise. The program, while still in its infancy, has produced impressive results. Prior to its implementation, each judge was assigned approximately 1,000 pending cases. Because of the court's commitment to expediting the proceedings and encouraging settlement at every opportunity, within one year, the average caseload was reduced 400 cases per judge. The Court is proving to provide high quality dispute resolution service and fair and expeditious proceedings. In 1993, Chicago set up a program that is nearly identical to that of New York and there are preliminary indications that users are pleased with the program.

Shortly thereafter, in April 1994, Delaware introduced a summary proceedings program which was designed so that resolution of a dispute (from filing to judgment) would take no longer than twelve months. Parties to commercial disputes who agree (either before or after a dispute arises) to participate in the summary proceedings program must waive their right to a jury trial, forgo punitive damages awards and pay a filing fee of up to $5,000. The procedures also severely limit exchange of information between the parties and trials may last no longer than five days. In complex cases, however, the court may waive or modify these limitations. Other states (including Pennsylvania, California, Minnesota, Ohio, Texas and Wisconsin) are considering the creation of courts or judicial divisions devoted exclusively to commercial cases.

At least one-third of the states have established high-level commissions to structure and plan for ADR use and to address related confidentiality, ethics and other issues on a statewide basis. There is every indication that court-annexed ADR programs are likely to increase as a result of current legislative trends and the widespread interest in ADR within the judiciary, government, industry and the private bar.
4. **Federal Agencies and ADR**

Government agencies have increasingly been making ADR options available to parties with which they have disputes. This is based, in part, on legislation such as the Alternative Dispute Resolution Act of 1990 (ADRA) and the Negotiated Rulemaking Act of 1990. The ADRA authorized federal agency use of ADR, including binding arbitration and required every agency to adopt an ADR policy for all types of actions, including formal and informal adjudications, rulemaking, enforcement actions, license or permit issuance and revocation, contract administration and litigation. Each agency was required to

(i) designate a dispute resolution officer;
(ii) provide ADR training for agency employees; and
(iii) review all standard agency agreements and grants to determine whether or not an amendment to include ADR would be appropriate. In response, almost every agency appointed a dispute resolution officer and developed pilot programs and policies to make ADR a compatible any: desirable option for resolving controversies.

An example of a program spurred by the ADRA is the mediation program introduced by the United States Equal Employment Opportunity Commission (EEOC) (the government agency responsible for enforcing federal laws prohibiting discrimination in employment) in 1995 in an effort to encourage the use of ADR. This program is based on a classic mediation model in which a charging party and the respondent meet with a neutral third party to resolve the dispute. Both parties must agree to mediation which is available after a charge is filed but before the EEOC commences any investigation. The goal is to resolve 10% of the cases through ADR. As of October 1, 1995, the ADRA expired. As a result, federal agencies officially lost their authority to pursue ADR in most cases. Until October 1995, however, U.S. Government contractors may still request, and be requested by their contracting agency, to use ADRA. The ADRA's lapse resulted in the demise last October of the Administrative Conference of the United States (ACUS). ACUS had been a vocal and effective proponent of federal agency use of ADR. Thus, opportunities for ADR use on the federal agency front may not be as widespread as they had been, absent repeal of ADRA's termination and renewed authorization for ACUS, which does not appear likely.

Despite the ADRA's lapse, a recent Executive Order reaffirms the Government's intent to expand the use of ADR. The Order, which was signed by President Clinton on February 5, 1996,
requires federal agencies and litigation counsel to attempt to settle disputes before commencing litigation and to suggest ADR procedures in appropriate civil cases involving the United States Government. It also requires litigation counsel to be trained in ADR techniques.

Since the early 1980's, a growing number of government agencies have been using negotiated rulemaking procedures (reg-neg) in an effort to improve the quality of the regulations drafted and to reduce costly litigation challenging resolutions. Reg-neg is a procedure whereby mediation is utilized among the different interests that will be affected by a proposed regulation. The objective is to reach consensus on regulatory issues via a cooperative (rather than adversarial) approach. For example, a government agency may assemble a committee of persons representing various private and public interests and that of the agency. With the assistance of a mediator, the committee members negotiate the text of the proposed legislation. Agencies that have utilized these negotiated rulemaking proceedings include the Department of Health and Human Services, the Federal Communication Commission, the Environmental Protection Agency, the Department of Housing and Urban Development, the Department of the Interior, and the Department of Education.

In addition to reducing the number of lawsuits filed challenging regulation, there appears to be a widely held view by agencies and other participants that the reg-neg process has resulted in “better rules” that is, agencies are making decision based on more complete and accurate information that take into consideration real world consequences.

5. ADR in Corporate Sector

Many United States companies have developed and implemented ADR programs to handle complaints and disputes involving customers, franchisees, employees and others. Such programs include multi-level review by peers of the employees, confidential employee advisers, ombudspersons, voluntary arbitration an, third party mediation programs. These procedures, in certain circumstances, have proven to be a relatively inexpensive and expeditious alternative to litigation, particularly if they include mechanisms that are perceived as fair, impartial an, procedurally adequate.

Eight major banks, for example, have subscribed to the CPR Institute for Dispute Resolution Banking Industry Dispute Resolution Commitment (the CPF Commitment), an agreement between participating banks to negotiate and mediate inter-institutional disputes. CPR notes that the agreement can be helpful in resolving a number of
common transactional disputes between banks, including: sale and purchase of participations; assignments of loans and related indemnity and reimbursement matters; interbank trading; credit inquiries; derivative transaction relations between agent banks and syndicate members; letters of credit; mono transfers; and forged/ altered check cases.

It should be noted, however, that specific clauses in contracts or in the by-laws of a clearinghouse or similar organization that is a party to the dispute will override the provisions of the Commitment. In addition, signatories are not required to use the process in multi-party disputes where one of the parties is not bound by the CPR Commitment and will not cooperate. Although banking industry use of ADR is varied, several banks include mandatory arbitration clauses in all agreements governing certain types of transactions, including, for example, commercial loan agreements, loan agreements secured by real estate, construction loan agreements and related guaranties, consumer loan agreements, depositor agreements, credit card accounts, safe deposit box, renter agreements, letters of credit, equipment leases, and asset-based loans. Two relatively recent initiatives by a number of leading food and pharmaceutical companies have followed the example set by the banking industry.

Sixteen major food companies have subscribed to the CPR Institute “Food Industry Dispute Resolution Commitment” which provides that parties to it will use ADR for 90 days before initiating litigation for the first 30 days after a dispute has arisen, senior officials will attempt to resolve it through negotiation. Should this fail, both sides will participate in mediation for 60 days. The agreement allows participants to seek court protection of proprietary interests or a preliminary injunction to maintain the status quo while ADR is being pursued.

The agreement covers false advertising, patent and/or trade secrets, trademarks, trade names and service marks, product marketing (including unfair trade practices), product packaging or “trade dress” hiring competitor's employees, contractual disputes. In addition, under the agreement, advertising claims can be submitted to mediation or to the National Advertising Division of the Council of Better Business Bureaus.

Although industry-wide structures for implementing ADR in the food industry are still in their developing stages, a number of major food companies have longstanding dispute resolution provisions. General Mills, for example, requires ADR provisions in its service, research, and licensing contracts; acquisition and divestiture agreements; and
distributor agreements. The only circumstances under which ADR clauses are not mandatory are routine contracts involving standardized forms from other enterprises. During 1995, ten leading manufacturers of non-prescription drugs entered into an ADR Commitment, again under the auspices of the CPR Institute. The procedures are similar to those followed in the banking and food industries, but contain no initial prohibition on litigation. The Drug industry agreement is also limited to a rather specific type of dispute: product packaging. Again under the auspices of the CPR Institute, a number of franchisors launched the National Franchise Mediation Program in February, 1993. The program involves negotiations among senior executives of the parties followed, if necessary by mediation. Franchisors participating in the voluntary program commit for two years to follow its procedures. The agreement covers a number of areas of potential dispute, such as development rights of the franchisee; customer service; termination; rescission or non-renewal of the franchise; under reporting of sales or other financial violations; lease-related claims; and other violations of franchise agreements. Prior to resorting to program procedures, franchisors or franchisees are encouraged to use any existing internal dispute resolution procedures. Despite some skepticism at the outset, the program has been remarkably successful. A typical mediation takes from ten to fifteen hours, spread over two or three sessions. As of the end of September 1994, 57 cases involving 14 franchisors had been filed under the program. Of these, 38 had been closed, with the following results: 29 successes, 3 non-successes, 5 instances where the franchisee refused to participate, and 1 unknown. U.S. companies generally are increasingly including dispute resolution clauses in contracts with employees, customers, suppliers, and joint ventures, that require a 'cooling-off period,' good-faith negotiation, and/or procedures for some form of non-binding dispute resolution procedure such as mediation before the parties litigate or arbitrate. Another approach to the resolution of inter-corporate disputes has been a pledge by corporations to explore alternative means of settling disputes with other pledge signatories before initiating litigation. More than 850 corporations, on behalf of 3,000 subsidiaries, have signed one such pledge which was drafted, and is circulated by the CPR Institute for Dispute Resolution. The pledge is a corporate polio statement, not an enforceable contract, which means that a signatory could, if it wanted, go directly to court to resolve the dispute. However, the pledge has served as a helpful tool for initiating settlement negotiations with another signatory. At the state level, a similar pledge initiated by the Ohio State
Bar Association' and Ohio Chamber of Commerce reportedly has in excess of 175 signatories.

6. Law Firms Response

As of January 1996, more than 1560 United States law firms had responded to heightened client expectations regarding ADR use by, among other things, subscribing to the CPR Institute for Dispute Resolution's Law Firm Policy Statement on Alternatives to Litigation. Subscribing firms pledged to train firm attorneys about ADR and to counsel clients about the availability of ADR procedures in appropriate matters.

In 1994, the CPR Institute for Dispute Resolution conducted a survey of 244 of the largest law firms in the United States (all of which had demonstrated interest in ADR through membership in the CPR Institute) and found that 65% of the 124 responding firms had formalized their delivery of ADR services, with 68% having adopted two or more of the following organizational strategies: (i) designation of an ADR specialist or partner (58%); (ii) organization of an ADR committee or department (47%); (iii) strategic profiling of one or more prominent partners as neutrals (27%); and (iv) creation of a distinct provider group within the firm, or affiliated with but distinct from the firm (14%).

The CPR Survey also revealed significant differences in perceived gains from ADR between firms that had formalized their ADR organization and those that had not done so. Fifty-nine percent of the organized firms (versus 35% of the unorganized firms) reported positive client comments from their ADR initiatives and 49% of the organized firms (versus 21% of the unorganized firms) reported that ADR has had "an appreciable, positive impact" on the firm's lawyers, clients, and/or practice. New business or new clients resulting from the firm's ADR expertise were reported by 37% of the organized firms and only 2% of the unorganized firms.

Freyer's firm, which has more than 1,100 attorneys in 21 offices worldwide, has an Alternative Dispute Resolution and Corporate Compliance Practice group, staffed with a full-time partner, associate and paralegal. Although his ADR Practice Group provides a full range of ADR-related services, such services are also provided by attorneys in other practice areas whom the ADR group support through training, education and advice and with whom we work closely on specific matters. Attorneys in a number of our practice groups also serve as neutrals, including as arbitrators, mediators and expert fact-finders.

Although the CPR survey indicates that many law firms have effectively incorporated ADR into their practice, a 1994 Survey of 34 Massachusetts law firms' use of ADR yielded a different conclusion. Namely, it found that although individual attorneys in
increasing numbers are both using and providing ADR services, law firms are unclear about whether, or how, to reflect these changes in the organization of their firms. The differences in the CPR and Massachusetts Surveys' findings in this regard are probably due, in part, to the fact that the CPR Survey, unlike the Massachusetts Survey, involved firms that were members of CPR and had thereby already demonstrated an interest in ADR. The differences also may be attributed to differences in perception about the benefits to be derived from a formalized ADR practice and the factors contributing to realization of those benefits between firm that have been educated about ADR, through membership in ADR organizations any: their internal ADR practice organizations, and firms lacking such education any organization.

In addition to being responsive to client demands and court-imposed rules, U.S. lawyers' development of ADR expertise has been promoted in a number of jurisdictions (e.g., Arkansas, Colorado, Kansas, Hawaii, and Georgia) by the recent issuance of ethics rules or opinions that require or encourage attorneys to advise clients about the availability of ADR under certain circumstances. Law firms it these jurisdictions can be expected to take the organizational steps needed to satisfy, the professional responsibilities articulated by these authorities. Moreover, a strong argument can be made that even in jurisdictions without such ADR rules, both the American Bar Association Model Rules of Professional Conduct and the Mode Code of Professional Responsibility, as enacted in most jurisdictions, make desirable, if not essential, that counsel be positioned to advise clients of ADR options in appropriate matters.

(II) ADR in United Kingdom

It is a sign of Mediation or (as it is called) Alternative Dispute Resolution (ADR) taking off that one thinks twice now about explaining what ADR actually is. In 1996 most lawyers, other professionals and commercial people in General know, at any rate in overall terms, what ADR is about. ADR in the UK is perhaps in advance of other countries. ADR has developed relatively quickly in the UK partly because of the problems presented in the recent past by the unwieldy and expensive process of UK litigation and lawyer dominated arbitration.
The UK's close relationship to the US legal system has also helped, the common Anglo-Saxon legal base.\(^\text{12}\)

1. **Historical Background**

Back in the 60's litigation in the UK was not the fashionable thing to do in a city professional practice. Top lawyers wanted to be seen to be doing public issues, take overs and heavy commercial front end work, not tidying up the mess at the back end. Big companies tended not to litigate if they could avoid it and so there was less money in it for the professionals. All this changed from about the late 70's on. The climate and culture of commercial life became more clinical, less personal. The CV's of upwardly mobile youngish businessmen on five year change career patterns, in particular those of financial directors, had to look impressive. The UK judiciary itself has taken note in particular through a spate of recent Practice Directions to use ADR. ‘Access to Justice’ carries a hollow ring if you can't get to court for a rapid decision because others, perhaps more financially padded, are holding you up. The result is the procedures of civil litigation in UK are currently undergoing a major overhaul. An ill wind blows somebody some good. The crisis in civil litigation in the UK (and the US) has greatly advanced the cause of fast track arbitration and mediation.

2. **ADR in United Kingdom**

Mediation is now established in many parts of the world, in particular the US, UK, Australia, and the Pacific Rim. However, except in the UK and Hong Kong, the main emphasis has been towards settling domestic disputes. Of course CEDR’s bread and butter are also centred on domestic mediations but from its inception it has as a main strand of policy promoted ADR to settle international disputes.

It has been helped in this in that London has a long and impressive 'flagship' pedigree of providing financial and legal services to the international business world. Legally the UK has a reputation for intellectual rigour, probity and fairness both in the courts and in arbitration services. Professionals now have opportunity to offer the full range of dispute resolution options to disputants namely, ascending the staircase, negotiation, mediation, adjudication, arbitration and finally the courts.

\(^{12}\) Karl Mackie and Edward Lightburn—“International Mediation-The UK Experience” Supra n.1 at 137-142. Professor Karl Mackie, Chief Executive CEDR, gave ADR papers in 1994 at the Indo-British Partnership Conference in Bombay and at the World Economic forum in New Delhi. See also The British Columbia Arbitration & Mediation Institute, “ADR Rules & Procedures” Source: http://www.ambic.org/adr_rules_and_procedures.html
To date mediation has been the missing tread in the staircase but over the last five years ADR in the UK has come of age. In this the UK is ahead of the game. CEDR as the leading provider of mediation services to business in the UK can speak to this. Let the facts speak for themselves.

ADR is now a growing and accepted tool of reform in dispute management in the UK commercial community. Most leading lawyers and many other professionals are already members of ADR bodies have taken ADR training or have otherwise acquainted themselves with the ADR process. A variety of public bodies, institutes and charities have started ADR schemes for their own sectors. The Confederation of British Industry, the Institute of Directors, the Department of Trade and Industry, and the City of London, all actively support CEDR and ADR together with many leading companies including conglomerates with overseas arms. Over 600 mediators have been trained by CEDR alone from a wide range of professions. Over 5000 participants have attended CEDR seminars and training on a world-wide basis.

CEDR has handled over £1.5 billion in case value since its incorporation in November 1990. In 1995 claims totalling over £300m were successfully mediated sometimes involving disputants from several countries at once. Most cases settle in under a week's negotiation having previously been in deadlock. Savings in costs are estimated to range from £50,000 to over £250,000 per party. ADR bodies have established networks in Europe the Middle and Far East. CEDR, besides recently completing a Report on ADR for the European Commission, has trained and accredited mainland European mediators at courses in the UK and Holland. At our 1996 Summer School in Edinburgh CEDR trained further potential mediators world-wide capitalising on its National London Training Award 1995 presented by the Lord Mayor of London in December. CEDR is a founder member of Europe metropoles and the European Network for Dispute Resolution sponsored by local chambers of commerce across Europe and has wide contacts with other ADR bodies, e.g., in the US, the Pacific rim, mainland Europe, India, Malaysia, Burma, Hong Kong, Singapore, South Africa, China and the West Indies to mention a few.

With Endispute (form the US) CEDR trained over 30 mediators for the Hong Kong Airport Project, one of the largest construction projects in the world. CEDR successfully settled international disputes from Africa, the US, Sweden, France, Sri Lanka, Russia, Egypt, Hong Kong, and elsewhere. Besides London other active international mediation centres are now established or are in the process of being
established in the US, Australia, Hong Kong, Singapore, India, Malaysia and London.

(III) ADR in Australia

1. Australian Centre for Peace and Conflict Studies (ACPACS)

There are various ADR Training Programs and Mediation Courses run by ACPACS like

(a) 5-8 October 2006, Brisbane: Mediation Course

The ADR Program Mediation Course is aimed at professionals who either want to start a mediation practice or who need mediation skills as part of their professional duties. The mediation model presented in the course can be adapted to suit the needs of lawyers, human resource managers, government and policy sector professionals, social workers and health care professionals. No previous qualifications or experience are required. A certificate of attendance will be issued at the completion of the course. For more information and to register, please visit website. 13

(b) 20-21 October 2006, UQ St Lucia Campus: Advanced Mediation Course

Expand your toolkit and improve your practice through expert advice from our expert trainers. This two-day course is aimed at professionals who have undergone basic mediation training and have some mediation experience. Discuss and practice strategies to break deadlock, build better relationships and better utilise the unique role of the mediator. Refresh your skills through real life case studies and role plays. The course is presented by international mediation trainer Miryana Nesic and Ian Hanger QC. For more information and to register, please visit website. 14.

(c) 23-26 November 2006, Brisbane: Mediation Course

The second ADR Program Mediation Course was held at the end of November 2006. The mediation model presented in the course can be adapted to suit the needs of lawyers, human resource managers, government and policy sector professionals, social workers and health care professionals. No previous qualifications or experience are required. A certificate of attendance will be issued at the completion of the course. The course is presented by Prof Tania Sourdin from LaTrobe University, one of the most highly regarded ADR trainers and academics in Australia. For more information and to register, please visit website. 15

2. **Bond Dispute Resolution News**

21 August 2006: A new edition (volume 23) of this newsletter has been released. It includes (1) an abacus chart of the cycle of mythology and reality attached to warfare, as depicted by Chris Hedges and (2) an article by John Wade on “Arbitral Decision Making in Family Property Disputes”. This research sets out the startling discrepancies when 240 experienced legal practitioners wrote arbitral awards in the same family property dispute. The newsletter can be read online.16

3. **Asia Pacific Mediation Forum Peace Prize**

The APMF Peace Prize was awarded at the Third APMF Conference in Fiji in June 2006. The winner was Joan Metge, a widely respected social anthropologist from New Zealand.

(a) **Asia-Pacific Mediation Forum Conference, Fiji, 26-30 June 2006**

The 3rd Asia Pacific Mediation Forum took place in the Fiji Islands from 26-30 June 2006. The conference theme “Mediating Cultures in the Pacific and Asia” expressed the idea that mediation takes place in diverse ways throughout the different social and legal systems in the Asia Pacific region. The Forum included two days of pre-conference workshops, with basic and advanced mediation training, followed by a two day conference with presentations covering theory and practice issues. A new committee, for 2006-2008, was elected at the Fiji conference. Conference details and program are online.17 Papers from this conference will be placed online shortly.

(b) **UNESCO Prize for Peace Education 2006**

The UNESCO Prize for Peace Education will be awarded for the 24th time in 2006. The aim of the Prize, awarded every two years, is to promote all forms of action designed to “construct the defences of peace in the minds of men” by rewarding a particularly outstanding example of activity designed to alert public opinion and mobilize the conscience of humanity in the cause of peace. Any persons and civil society organizations working in the perspective of the thinking and culture of peace may nominate an individual, a group of individuals or an organization.

4. **Mediator Accreditation**

With the support of the Commonwealth Attorney-General's Department, the National Mediation Conference appointed a committee to investigate development of a proposal for a national system of Mediator Accreditation in Australia. A proposal was put forward for approval at the conference in Hobart in May 2006.\(^{18}\)

5. **Australian National Mediation Conference, Hobart, May 2006**

The National Mediation Conference for 2006 was held in Hobart from 3 to 5 May, with a conference theme of “No mediator is an island: celebrating differences learning from each other.” Held every 2 years in Australia, Next Conference 2008. Between 3 and 5 May 2006 the National Mediation Conference was conducted in beautiful Hobart. This Conference was the highlight of the Australasian mediation calendar and attracted in the region of 300 dispute resolution professionals from Australia and overseas. The Selection process for the 2008 Conference is progressing with bids received from Western Australia and Sydney.

6. **The Alternative Dispute Resolution Association of Queensland (‘ADRAQ’)**

(a) **General**

The Alternative Dispute Resolution Association of Queensland (ADRAQ) was incorporated in February 1997. The Association grew from practising mediators in the Department of Justice who saw a need to meet with other practitioners and people interested and enthusiastic about the growing field of dispute resolution and mediation in Queensland.

(b) **Mission**

The association is committed to the practice of dispute resolution which encourages people to reach their own solutions in a non-adversarial manner. ADRAQ membership reflects its commitment to the practice of dispute resolution which encourages people to reach their own solutions in a non-adversarial manner. Members include practitioners from the Dispute Resolution Centre, Queensland Building Tribunal, Law Society, Retail Shop Leases Tribunal, Relationships Australia, Lifeline Family Mediation, Residential Tenancies Authority, the Bar, Health Rights Commission, Anti-Discrimination Commission, and Conflict Resolution Network. Membership also includes private practitioners, trainers and others with an interest in dispute resolution practice.

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18. See further details of the proposal on www.mediationconference.com.au
(c) **Objectives**
1. To promote and advocate mediation and forms of conflict resolution consistent with the association’s mission.
2. To encourage and facilitate the sharing of information, ideas and experience in conflict resolution.
3. To develop and promote standards for mediation and conflict resolution.
4. To encourage the provision of high quality conflict resolution services to the community.
5. To promote and provide education, training and professional development in conflict resolution.
6. To provide and encourage the provision of information about conflict resolution services to the public.
7. To work with other organisations in order to achieve the association’s objectives.

(d) **Benefits of Membership**
ADRAQ 19 gives Members the opportunity to meet with other people who have similar interests in alternative dispute resolution and to share their ideas, information and experiences. Membership is open to anyone who accepts the aims of the Association, is proposed and seconded by a member (see membership form) and pays the subscription fee. (If you do not know a member then contacts a committee member to assist in nomination.) Annual fees are $20 for individuals and $50 for organisations for the year commencing 1 May each year. If payment is made after 31 October, the fee is 50% of the annual rate.

(e) **Activities**
The Association’s aims focus on information sharing, promotion of ADR and professional development. There is potential for a wide range of activities to be organised in response to members’ interests. ADRAQ’s role complements the roles of other ADR organisations in Queensland.

(i) **General Meetings**
The Association conducts general meetings of members at least every three months. Meetings will include diverse guest speakers, training, panel discussions and other activities based on members’ preferences.

19. Membership applications, along with fees, should be posted to: ADRAQ Inc, PO Box 596, Brisbane Roma Street. Q 4003.
Future meetings will cover discussion of native title negotiations, family law, conciliation and other models of dispute resolution practice, and other topics to cater for the broad interests of members.

(ii) Annual General Meetings
The Annual General Meeting is held in September every year in accordance with the Rules. Members of the Management Committee are elected at this meeting.

(iii) Interests for Year 2000
(a) Web Site to be set up
(b) Encouraging Regional Members to join
(c) 5th National Mediation Conference to be held at Brisbane Sheraton between 17 – 19 May 2000.

7. The Victorian Association for Dispute Resolution (VADR)
The Victorian Association for Dispute Resolution (VADR) is a not-for-profit organisation which was established in 1986.

(a) Objectives
VADR's aims include:
1. Promoting mediation and other forms of Alternative Dispute Resolution (ADR)
2. Encouraging and providing for the exchange of ideas and experience in mediation and other forms of ADR
3. Co-operating with other ADR organisations and teaching institutions
4. Providing a range of related member services, activities and benefits.

(b) Wide Range of Methods
VADR embraces a range of dispute resolution methods such as Negotiation, Facilitation, Mediation, Conciliation and Arbitration.

These approaches are:
1. Alternatives to taking matters to court
2. Conducted by a person trained in the method they are using
3. Conducive to the participants contributing to the resolutions VADR provides an accessible, equal meeting point for Members with all levels of training and involvement in ADR. VADR actively encourages debate, education, training, research and professional best practice in ADR at all levels.

8. The South Australian Dispute Resolution Association (SADRA)
SADRA works to assist ADR professionals to network, meet other practitioners, and improve practice through educational forums. They are an inclusive organisation that
welcomes members with all levels of experience from students to experienced professionals from a variety of disciplines. Members include those from community ADR organisations, non government agencies, public service ADR providers and those interested in ADR research. SADRA maintains links with other South Australian dispute resolution associations such as Leading Edge in Alternative Dispute Resolution (LEADR) and the Institute of Arbitration & Mediation Australia (IAMA) through a collaborative approach to education forums and joint events.

(a) **General**
The South Australian Dispute Resolution Association (SADRA) was incorporated in 1988. The aim of the association is to promote social justice and the use of Alternative Dispute Resolution (ADR) in resolving disputes. The University of South Australia, through the Conflict Management Research Group, provided the infrastructure support for SADRA. SADRA maintains strong links with the University. SADRA committee meetings are held approximately monthly to which all members are welcome. Education Forums are held at least four times a year.

(b) **Objectives of SADRA**
The objectives of SADRA are:

(i) to promote cooperative and fair dispute resolution systems throughout South Australia;

(ii) to enhance education, training and research in dispute resolution;

(iii) to share information, skills, resources and experience in dispute resolution;

(iv) to increase awareness of cultural diversity and issues of power imbalance in dispute resolution; and

(v) to foster cooperation between organisations and disciplines at a State and Federal level to promote these objectives.

(IV) **ADR in Sri Lanka**
The system provided by our courts has been criticised as not being a totally effective mechanism for many reasons. That there has been a certain erosion of confidence therein is a fact which is widely accepted in Sri Lanka. Uncertainty as to the outcome, inordinate delay which produces a defeatist attitude even in the successful party, as well as the expense involved, are all factors which contribute towards the creation of a deep-seated desire to keep out of courts. The adversarial system then is viewed by critics as one which produces a high degree of user dissatisfaction. The litigation upsurge continues to mount causing policy makers to look towards more effective methods of
dispute resolution adequately relevant to the type of matter and with greater potential to be meaningful.

1. **Introduction**

Being acutely aware of the disadvantages it offers, Sri Lanka chose to look towards alternative methods on the basis that policy makers and those entrusted with the responsibility of improving the system, have a duty to respond to this situation not to just maintain the system. The challenge to find new and enlightened methods is a realistic one and today, the challenge still stands. We will discuss the manner in which Sri Lanka has attempted to institutionalise methods of dispute resolution alternative to the adversarial system. We will discuss the two methods of dispute resolution which have statutory recognition in Sri Lanka, i.e., Mediation and Arbitration.20

2. **Mediation**

Amicable settlement of disputes was the accepted concept in Ceylon (as Sri Lanka was then known) even as far back as during the reign of the Kings. There existed then a hierarchy of institutions at the base of which was the Gamsabhawa mandated to settle disputes amicably and thereby maintain peace and harmony at village level. Successive foreign rulers sought to introduce more formalised mechanisms and the concept of amicable settlement gave way to more formal adversarial procedures. Although, after Independence, settlement of certain specified disputes such as those relating to small debts, industrial disputes, family matters were provided for.

(a) **Conciliation Boards Act 1958**

Sri Lanka's experience in institutionalizing alternative dispute resolution in respect of minor disputes with any degree of seriousness in later years was via the Conciliation Boards Act, in 1958 which provided for community level resolution of minor disputes at the pre-trial stage. Due to various deficiencies in the implementation of the provisions thereof, this Act was repealed in 1977 not because of any reasonable belief that the concept of alternative dispute resolution was unacceptable but, unfortunately, due to implementation defects. That the Act was sought to be repealed in its totality without an attempt to rectify the objectionable practices alone, was unfortunate.

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20. Dhara Wijayatilake-"Mediation And Arbitration as Alternative Methods of Dispute Resolution in Sri Lanka" Supra n.1 at 182-190. He is LL.B. (Sri Lanka); Attorney at Law; Secretary, Ministry of Justice and Constitutional Affairs; Sri Lanka: Secretary-General, SAARCLAW.
(b) **Mediation Boards Act 1988**

Wiser counsel prevailed in later years, and in 1988, a new Act - the Mediation Boards Act, No. 72 of 1988 - was introduced reiterating a belief in the concept of alternative dispute resolution in respect of minor disputes. The Act also sought to introduce a mechanism which was free of the defects identified as having existed under the Conciliation Boards Act. The principal features of the Mediation Boards Act are as follows:

1. **The Act provides for the legal framework necessary for institutionalising Mediation Boards, which boards are empowered to resolve, by the process of mediation, all disputes referred to it by disputing parties as well as in certain instances, by courts.** Mediation boards are appointed at community level, its members are persons of the community and it enjoys territorial jurisdiction which extends to a defined administrative area.

2. **In order to ensure the independence of members of mediation boards, and ensure freedom from any possible political taints, mediators are appointed by an independent commission consisting of five members appointed by the President, three of whom are required to be retired judges of the Supreme Court or Court of Appeal.** In addition, the Act specifies that only organisations of a non-political character can nominate persons to be appointed by the commission, to mediation boards, an important aspect of the appointment procedure is that nominated persons are required to undergo a training course in mediation skills and techniques at which the aptitude of the nominees will be assessed and the commission will appoint as mediators only such persons as are reported to possess the required aptitude, skills, and techniques. The training course is conducted by mediator trainers.

3. **In implementing the Mediation Boards Act, much emphasis is being placed on the training of mediators and of mediator trainers.** There is a permanent cadre of mediator trainers. These officers are given periodical refresher courses and are required to conduct training courses for mediators throughout the island on a regular basis. It is firmly believed that training in the skills and techniques of mediation is of the essence if mediation efforts are to achieve results.

4. **As regards matters which can be referred to these boards, the Act provides to distinguish between disputes which must mandatorily be referred mediation (prior to the filing of any action in respect of such dispute court) and other disputes which may voluntarily be referred to mediation boards by the choice**
of the parties. The mandatory category is limited to minor offences below a specified monetary limit. The intention is to divert such matters away from courts, for settlement if possible in an atmosphere which is both free of the fetters and rigours of a court procedure and is also conducive to the amicable settlement of a dispute the nature of which does not justify the applicability of technical legal concepts.

5. One of the major problems that has emerged in the process of implementing the Mediation Boards Act is the reluctance and refusal at times of the second party to come before the board for discussions. Where an application is made by one party, the board is required to request attendance of both so as to attempt mediation. However, due to the lack of provision to compel such attendance, a party is quite free to reject attempts at mediation thus leaving no alternative but to determine that matter cannot be resolved. Considering that the spirit of mediation is very necessarily dependent totally on the will and commitment of parties to settle an issue, it would be against the concept of mediation to introduce provision to compel attendance. How then do we solve or at least minimise this problem? It is firmly believed that an increased confidence in the system will result in more ready acceptance of concept and that this alone can be the most effective method of resolving this issue. A good example of a regime where mediation has received recognition as an acceptable alternative is the U.S.A. where disputants are very readily accessing the mediation and conciliation processes which are offered. There has developed in that country a very high degree of specialisation in this field making it a highly popular mode of alternative dispute resolution free of legal and technical fetters.

6. The mediation boards function in an atmosphere which is entirely informal. There are no regulated procedures or technical requirements to be complied with at any dispute hearing.

7. Statistics maintained in respect of the functioning of the boards record a high settlement rate - 61 per cent. It is not possible to state with degree of certainty that all of these are matters which would have otherwise been referred to courts. It is, however, a fact that the non-settlement of these disputes would have very definitely detracted from an atmosphere of peace within the community.

8. One of the principal features of the Mediation Boards Act is submission to
settlement is totally voluntary. The legislative provision respects and facilitates the voluntary choice of the parties institutionalises the procedure to be adopted.

9. The settlement arrived at by the parties is not one which is enforceable in a court of law. A breach of the settlement entitles the aggrieved party to seek recourse from the mediation board once again or to obtain a certificate of non-settlement which would enable him to file action in court.

(c) Mediation at Appellate Court Level

A novel experiment in institutionalizing mediation at appellate stage is sought to be attempted by the Supreme Court of Sri Lanka by means of Rules of Court. The rules provide for the reference to mediation of such categories of appeals as may be determined by the Chief Justice or the President of the Court of Appeal (the Supreme Court and the Court of Appeal have all island appellate jurisdictions and are Superior most courts in the country). Appeals preferred against a conviction or sentence made by a court of criminal jurisdiction cannot be so referred for mediation. Mediation is required to be attempted by a judge of the Court of Appeal appointed by the President of the Court of Appeal to be the mediator in respect of these appeals. An important factor of the mediation in appeals rules is that it provides that settlements so arrived at shall be binding on the parties who have agreed to the terms and the Court of Appeal is required to give effect to the terms as respects the parties to the agreement but without prejudice to the parties who have agreed thereto.

The Rules, although made and published in the Gazette in 1991 have not been brought into operation so far and it is, therefore, not possible to make any assessment to the degree to which this concept will receive acceptance at appellate stage. It is expected that the severe backlog of cases in Sri Lanka's appeal court which results the inordinate delay in their disposal, will sufficiently inspire even successful litigants to resort to mediation even at appellate level with a view to giving its decree some value at an earlier rather than later stage. Less serious attempts at infusing the spirit of settlement by non-technical methods have found place in various statutes, but these have not proved to have had an effective impact on the expeditious disposal of cases.

3. Arbitration

There is much enthusiasm with regard to the adoption of arbitration as alternative to court resolution of disputes. A new Arbitration Act, No.11 of 1995 has been enacted by Parliament and came into operation with effect from August 1st, 1995.
(a) **Arbitration Act 1995**

This Act replaced the Arbitration Ordinance which was in force up to that time. The provisions of the new Act apply to all arbitrations commenced after August 1st, 1995 unless the arbitration is conducted in terms of and under any other law making special provision for arbitration, other than arbitrations under the Board of Investment of Sri Lanka Law No. 4 of 1978 which, although containing special provision with regard to arbitrations will now be governed by the provisions of the new Act.

(b) **The Salient Features of the Act**

The main features of this Act seek to provide for party autonomy; the supporting role of court to arbitration proceedings as opposed to a coercive role which had, hitherto been adopted thereby impeding the speedy resolution of disputes, and an effective procedure for the recognition and enforcement of Sri Lankan and foreign awards. It incorporates adequate provision to give effect to the principles of the International Convention on the Recognition and Enforcement of Arbitral Award adopted by the United Nations in New York on June 10th, 1958 to which Sri Lanka acceded on April 9th, 1962. In fact the Act recites the necessity to so give effect to the said principles. It is expected that, an exhaustive and efficient arbitrative mechanism will be a considered attraction even to foreign investors.

The provisions of the Sri Lankan Arbitration Act contains in most respect provisions which are based principally on the UNCITRAL Model Law with suitably modifications considered necessary to suit domestic requirement. Some of the principal areas of importance as contained in the Sri Lankan Act are discussed below.

(c) **Sri Lankan Arbitration Act and Indian Arbitration and Conciliation Act: A Comparison**

We will refer to certain comparable provisions of the Indian Arbitration and Conciliation Act which is based on the UNCITRAL model with certain modifications. It must be pointed out at the outset that the Sri Lankan Act recognises one regime for both international and domestic arbitrations and does not seek to draw a distinction between the two in respect of the conduct of an arbitration or the enforcement of an award. Yet another important aspect is that enforcement (foreign awards is not dependent on any concept of reciprocity. Thus, any party is free to seek recognition and enforcement of a foreign arbitration award irrespective of whether the award has been made in a territory which has made reciprocal provision for enforcement of Sri Lankan awards. It is also noteworthy that the Sri Lankan Act does not limit the
application of the provisions thereof to commercial arbitrations but rather in the interpretation of the term 'arbitration agreement', refer to disputes arising 'in respect of a defined legal relationship whether contractual or not'. This is identical to the language used in the UNCITRAL Model Law with the difference that the Model is specifically in respect of international commercial arbitration.

The Act recognises the supremacy of the arbitration agreement and provides for an ouster of jurisdiction of the court if a party to the agreement objects to the assumption of jurisdiction by court. The position then is that as is in the Indian Act, a court can assume jurisdiction with regard to a dispute which the parties have agreed should be resolved by arbitration only if both parties so desire. This also means that despite an agreement to arbitrate recourse can be had to a court of law if that is the choice of the parties. It is observed that both the Sri Lankan Act and the Indian Act do not incorporate the UNCITRAL Model Law provision which provides that where a party requests the court to refer a matter to arbitration, it shall do so unless it finds that the agreement is null and void, inoperative or incapable of being performed. With the exclusion of such a discretion in court, opportunities to parties to frustrate the arbitration agreement by raising objections on such grounds and thus delaying arbitration proceedings is eliminated.

The arbitrability of the dispute is referred to by stating that any dispute which parties have agreed to submit to arbitration may be determined by arbitration. The matter in respect of which the arbitration agreement is entered into is contrary to public policy or is not capable of determination by arbitration. These two concepts play an important role in arbitration being two grounds on which an award can be set aside or a foreign award can be refused recognition or enforcement.

The procedure for appointment of arbitrators and the grounds for challenge, incorporate basically the same principles as in the UNCITRAL Model Law and the Indian Act with the difference that the latter two have specified shorter time limits for the taking of compulsory steps.

The Act recognises the concept of competence-competence by stating that the Arbitral Tribunal may rule on its jurisdiction including any question with respect to the existence or validity of the arbitration agreement or as to whether such agreement is contrary to public policy or is incapable of being performed. However, the Act preserves the right of a party to apply to court for a determination of any such question although an arbitral tribunal may continue with its proceedings pending the determination
of the question. No limitation is imposed regarding the time within which objections to the jurisdiction of the arbitral tribunal must be made nor is there a time limit for applying to the high court for a determination on the matter. The Indian Act differs in this respect in that judicial intervention as regards these matters is not specifically provided for in the Act.

The severability doctrine which treats the arbitration clause as being independent of substantive contract is enshrined in the Sri Lankan Act by providing that such a clause shall, for the purpose of determining the jurisdiction of the tribunal constitute a separate agreement when ruling upon the validity of the arbitration agreement. A contract which incorporates an arbitration clause, therefore constitutes for purposes of determining jurisdiction, two separate contracts, one which sets out the substantive obligations agreed upon and the other, is the agreement the parties to submit to arbitration disputes which have arisen or may arise in course of the performance of the substantive obligations. The Act requires only that the dispute should be one which arises in respect of a defined legal relations "whether contractual or not" but the agreement to arbitrate, is required to be writing.

As regards interim measures, the Sri Lankan Act provides for the arbitral tribunal to order, at the request of a party, any other party to take such inter measures considered necessary to protect or secure the claim which forms subject matter of the dispute after hearing the other parties. No such order permitted to be made, other than in exceptional cases without hearing the other parties. An important feature here is that a party is entitled to have such an order enforced by court.

Court assistance in taking evidence is assured by the inclusion of provision which authorises court to compel attendance before an arbitral tribunal or production of any document to a tribunal by a party, on obtaining summons to issue from court on application made therefore, after obtaining the prior consent of the tribunal for the making of the application. It is observed that the Indian Act provides for tribunal as well to apply to court for summons to issue for these purposes. Where any person who is not a party to the arbitration agreement fails to attend before tribunal, to produce any document or to do any other thing which the tribunal may require, the Sri Lankan Act provides for the court, on application made by a par with the prior approval of the tribunal, to order the defaulter to appear before court for examination or to produce the document to court or to do any relevant thing. The information so obtained is then transmitted to the tribunal by court. In the making of such an order, the court is
required to notice the other parties and to hear the defaulter. There is no provision in the Sri Lankan Act for the appointment of experts. This however, could be done by agreement of parties.

The choice of law concept is recognised in the Sri Lankan Act in respect of all arbitrations, and any designation of the law or legal system is to be construed, unless otherwise specified as a reference to the substantive law of that state and not to conflict of laws rules. In the absence of a designation of the law by parties the tribunal is required to apply the law determined by the conflict of laws rules which it considers applicable. The arbitral tribunal is permitted to decide according considerations of general justice and fairness or trade usages only if the parties have expressly authorised accordingly. It is observed that the Indian Act provides specifically for the Indian substantive law to be applied in the case of domestic arbitrations and the principles found in the Sri Lankan Act recognising the choice of law concept are applicable in respect of international arbitrations.

As regards payment of costs of arbitration, the Sri Lankan Act makes provision only for the payment of 'compensation' to the arbitrators in such amount as may be determined and incorporated as part of the award. Provision has also been included to order payment of deposit of security for payment of compensation to arbitrators, the non-payment of which entitles the tribunal to terminate the proceedings. However specific provision has been included to bar a tribunal from withholding the delivery of the award for non-payment of compensation. The practical ground situation envisaged here is a little difficult to understand because, if compensation savable to arbitrators is to be part of the award, the question of withholding the award for non-payment will not arise since the award would have to be delivered to make known the compensation. It is observed that the Indian Act provides for court intervention to enforce payment to arbitrators and provides also for the tribunal to have a lien on the award for any unpaid costs of the arbitration. In Sri Lanka it is envisaged that an arbitrator would have to sue the parties to recover compensation as in a normal money action since only 'parties' are entitled to seek enforcement of award.

In terms of the Sri Lankan Act, the only grounds on which an arbitration may be terminated by the tribunal are for non-payment of the deposit for security for compensation of arbitrators and where there has been intentional or inordinate delay in the prosecution of a claim and the tribunal is satisfied that the delay will give rise to a substantial risk of it not being possible to have a fair determination of the issues in the
arbitration proceedings or is such as is likely to cause or to have caused serious prejudice
to the other parties to the arbitration proceedings either as between themselves and
the claimant or between each other or between them and a third party. An appeal lies
from such an order to the high court. The grounds for termination are thus limited. In
the UNCITRAL Model Law and the Indian Act, more grounds for termination are
recognised.

Finality of the award is secured by the Act. However, an appeal to court is permitted
from an order made by the tribunal terminating the proceedings for non prosecution.
Enforcement of the award, whether domestic or foreign, may be sought by a party on
application made to court, within one year after the expiry of fourteen days the making of
the award. An important feature of the Indian Act is that finality of the arbitration
award is assured by providing that the award shall be final and binding on the parties
and persons claiming under them respectively and no application for enforcement is
required to be made. If there has been no application to set aside the award or if such an
application has been made and has been refused, it is recognised in the Indian Act that the
award shall be enforced as if it were a decree of court. Under the Sri Lankan law, the
award is filed, judgment is given according to the award and decree entered, only after
an application is made for the enforcement of the award and if there is no application for
the setting aside of the award (or where such an application has been refused).

Applications for enforcement of an award and for setting aside of an award are
required to be consolidated.

The grounds for setting aside a domestic award and the grounds on which a foreign
award may be refused recognition and enforcement are the same as those in the
UNCITRAL Model Law and the Indian Act. Where there is no application for setting
aside or where such an application has been refused and where the court its own
decision sees no cause to refuse recognition or enforcement of the award the basis that
there do not exist any of the grounds on which an award can be set aside or refused
recognition and enforcement, the court shall proceed to file the award and give judgment
accordingly. Upon the judgment so given, a decree shall be entered. Standardisation of
these grounds in the region in this manner is a notable and very acceptable feature.

The court jurisdiction referred to in the provisions of this Act is vested in High Court
of Colombo or such high court as may be determined by the Minister. Appeals
from orders of the high court are limited and are permitted only in respect of orders
made by high court regarding the recognition and enforcement awards and setting
aside orders. An appeal from the high court may be made to Supreme Court with leave first had and obtained only on a question of law. The parties are free, however, to exclude a right of appeal in respect of an award, by agreement and such an exclusion agreement will act as a bar to the grant of leave to appeal by the Supreme Court. This is a novel concept not found in the UNCITRAL Model Law.

It must be pointed out that the freedom of the parties to determine many of matters relating to the arbitration such as, the number of arbitrators, the procedure for appointing arbitrators, the place of arbitration, the procedure for the conduct the arbitration by the tribunal, the substantive law according to which the dispute should be decided, the manner of taking evidence, the applicability of the Evidence Ordinance, the period within which correction or modification of the award should be sought, and whether a right of appeal from a decision of the High Court to Supreme Court should be excluded, has been recognised.

In keeping with the spirit of the concept of arbitration and as found in UNCITRAL Model Law, court intervention has been kept to a bare minimum thus setting the stage for arbitrations to be conducted in an atmosphere free of the rigours and techniques of court procedures.

However noble the intentions with which the new Act has been enacted, whether the confidence reposed in this method of dispute resolution can be truly justified will be evidenced only after an assessment of its actual working. Alternative method of dispute resolution are being resorted to only because of its perceived potential improve upon some of the inequities of our traditional court system, of which delay and expense are the two major issues. Let us hope that the confidence reposed in these systems can be justified and that institutionalising these methods will not result in creating yet another system which will be riddled with the same weaknesses which have urged us all to look for alternatives.

(V) ADR in Hong Kong
The market economy and privatization of state enterprise is ever gaining pace in almost every part of the world. Pacific Asia is no exception.

1. General
In the last few years Hong Kong has emerged as one of major international dispute resolution centre in Pacific Asia. Arbitration has been described as the private sector equivalent of the commercial courts. It is thus not surprising that an increasing use is being made of arbitration as a means of resolving commercial disputes in Asia as
elsewhere. In Hong Kong this growth in the use of arbitration is particularly evident as a means of resolving international disputes. For local disputes arbitration is also frequently used but in recent years much effort has been given to the development of alternative forms of dispute resolution and mediation is now proving very effective particularly in the construction industry. This is not however a chance development. Hong Kong has built on its inherent strengths to foster the use of Hong Kong as a dispute resolution venue.21

2. **ADR in Hong Kong**

(a) **Hong Kong- A Good Arbitration Venue**

There are six major requirements for a satisfactory arbitration venue. These are:

(i) Good communications with the rest of the world by air and by telecommunications.

(ii) Good basic infrastructure including hotels, restaurants, etc.

(iii) Laws and courts which are supportive of arbitration but which do not interfere in the process.

(iv) Locally available expertise to support arbitration with experienced and competent arbitrators, expert opinion, translation services, etc.

(v) An experienced and competent arbitration centre to provide support services including the appointment of arbitrators.

(vi) Enforceability of awards in other jurisdictions.

Hong Kong has long enjoyed an excellent reputation in the first two categories. Communications are excellent and the hotels and restaurants are among the finest in the world.

(b) **Hong Kong Legal System**

The Hong Kong legal system is based on English law and the courts have a high reputation for their integrity, competence and speed. This combination is matched by few other jurisdictions in the world. English arbitration law, however, is largely based on case law and is difficult for an outsider to comprehend. To improve international understanding of Hong Kong Arbitration law the Hong Kong legislature enacted new legislation adopting the UNCITRAL Model Law for international arbitration. This came into effect on 6 April, 1990. The legislation is easy to understand and embodies

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21. Peter S. Caldwell- “Dispute Resolution in Hong Kong” Supra n.1 pp. 191-199. He has been Secretary-General of the Hong Kong International Arbitration Centre.
a high degree of party autonomy allowing the parties the dispute to select the form of arbitration which best suits their needs. Being a United Nations document it is also available in a range of languages which also a international understanding and acceptance. The courts in Hong Kong have a very clear understanding of the arbitration process and have consistently supported the process. In addition the Chief Justice has assigned a particular high court judge to be allocated all cases relating to arbitration.

Hong Kong is a unique regional centre in many areas of specialist expertise. This uniqueness stems from the very international nature of Hong Kong. In most countries expertise is confined mainly to nationals of that country. Hong Kong by contrast has a resident international community which augments the local expertise and provides a truly global perspective in such areas as international trade, financial services, construction, shipping and legal services. This unique blend of expertise provides a cultural bridge between East and West and between the traditional market driven economies and those which have had or continue to have central planned economies.

(c) **Chartered Institute of Arbitrators**

On this sound footing of commercial and international expertise Hong Kong has been active in developing a resident corps of arbitration specialists. In particular the Chartered Institute of Arbitrators (Hong Kong Branch) is very active in the education of arbitrators. The Institute has almost 1000 members in Hong Kong which over 140 have achieved the grade of Fellow. The Institute's fellowship examinations require candidates to demonstrate a detailed knowledge of law of contract, the law of tort and the law of evidence as well as a sound understanding the law and practice of arbitration. The examinations include a practical test of candidates ability to write an arbitration award. In addition to the examinations candidates are required to take part in an assessment of their ability to handle an arbitration hearing. There is thus in Hong Kong a well trained group of people free the legal profession and from other disciplines who are competent to handle arbitrations. Many of them have also obtained very extensive experience as practising arbitrators and enjoy an international reputation for their ability and fairness.

(d) **Mediation- A Traditional Concept**

Many people are aware of the East Asian tradition of conciliation or mediation. This has been used in China and Hong Kong for many generations. This fact prompts people to ask
whether the introduction of mediation from the USA, Australia and elsewhere is nothing more than reinventing the wheel. In some senses this is absolutely true. For example, in the timber trade in Hong Kong there is a long established mediation procedure where if buyer and seller disagree, they refer the dispute to a retired member of the trade whom they meet in a teahouse. Each has the opportunity to tell the retired member of the trade about the dispute and with his assistance the parties normally reach an amicable settlement. It would, however, be a mistake to assume that this ideal situation has applied to all conciliations or mediations in East Asia. Some mediations have met all of the high standards which modern mediation supporters would expect. Mediations have, however, ranged from this exemplary practice through corrupt practices to systems which were nothing more than forcing people to comply with establishment requirements often to the detriment of an outsider. Current thinking in Hong Kong is thus geared towards creating procedures which ensure fairness while encouraging amicable settlement of disputes.

Since 1990 the pace of development of mediation in Hong Kong has been very encouraging. Consultation between the Hong Kong Government and the Hong Kong Construction Association (A body representing building and civil engineering contractors in Hong Kong) has resulted in adoption of a flexible set of mediation rules. These rules allow the mediation to act simply as a facilitator or to proceed to giving his own views of the matters if required. Whether or not a mediator should ever assume an adjudicatory role is a topic of debate. The results have, however been satisfactory in reducing the cost of resolving disputes.

(e) **Hong Kong International Arbitration Centre (HKIAC)**

Hong Kong International Arbitration Centre (HKIAC) was established in 1985 to assist parties to resolve their dispute not only by arbitration but by other means of dispute resolution. It was established by a group of the leading business and professional people in Hong Kong to be a focus for Asia of dispute resolution. It has been generously funded by the business community and also by the Hong Kong Government. It is, however, totally independent of both. HKIAC is a non-profit making company limited by guarantee. It operates under a council composed of business and professional people of many different nationalities and with a wide diversity of skills and experience. The administration of HKIAC is conducted by management committee of the council through the Secretary-General.
The Centre provides a free information service on dispute resolution. Through its council and its international network of contacts, the Centre is able to provide a very wide range of literature and data relating to arbitration and other means of dispute resolution. HKIAC also operates panels of international and local arbitrators of experience and distinction and is happy to make their names available to potential arbitrants. HKIAC also holds lists of adjudicators and of mediators and can assist the parties with recommendation for suitable persons. HKIAC's facilities include ten customs built comfortable hearing and conference rooms and all necessary support services. These facilities are located in the very heart of central business district in the prestigious Exchange Square complex which also houses the Hong Kong Stock Exchange.

Since its inception HKIAC has been involved in more than 1000 cases most which have been international. Most of these cases have been referred to arbitration but a growing number are being resolved by mediation without the need to resort arbitration. Almost all of these mediations have come from the construction industry and arise under the mediation scheme agreed between the Hong Kong Government and the contractors. The mediation scheme is administered by HKIAC. There have now been much mediation of construction disputes in Hong Kong and the success rate has been extremely high. As a result of the growing interest in dispute resolution in Hong Kong, many training courses have been run in both mediation and Arbitration. There is thus a growing pool of specialist expertise. Hong Kong International Arbitration Centre is playing a pivotal role in the introduction of new dispute resolution mechanisms.

(f) ADR in Shipping Industry

Arbitration has been a means of resolving disputes for generations in the shipping industry. In particular, London has been pre-eminent as the venue for maritime arbitrations. Even today London remains the major maritime arbitration centre with the members of the London Maritime Arbitrators Association handling many hundreds of cases each year. New York is also a major maritime arbitration centre and the Society of Maritime Arbitrators also enjoys an international reputation. Interestingly nearly all of these maritime arbitrations are ad hoc arbitrations. Until very recently there were no important maritime arbitration centers outside of the traditional commercial centers in Europe and North America.

Commercial activity is, however, moving its focus eastwards. The burgeoning economies of Asia are now major players in the maritime world. In addition the
growing trade within this region is generating an important regional shipping business. Up until about a decade ago, maritime arbitrations only occurred in Hong Kong occasionally and undoubtedly similar numbers of arbitrations were taking place in many other centers around Asia. In recent years, however, there has been a remarkable growth in maritime arbitration in Hong Kong. This is primarily due to Hong Kong having emerged as the leading maritime centre in East Asia especially as the centre of chartering activities which are particularly important to maritime arbitration. It is the chartering side of the industry which yields most of the maritime arbitrations.

This growth of Hong Kong as a maritime centre has of course nurtured a corresponding growth in expertise available in all aspects of the shipping industry. Chas concentration of talented people have felt it unnecessary to take arbitration to London or New York but have thought it more desirable to make use of local expertise among the lawyers, shipbrokers, charterers, claims managers and in the chipping companies. Today there are many thousands of maritime contracts which include Hong Kong arbitration clauses and over a hundred maritime arbitrations are conducted in Hong Kong each year. All the indications are that this trend for Hong Kong to become the paramount centre in the region will continue to prosper.

(g) ADR in Construction Industry

(i) Hong Kong- A Vibrant and Exciting City

Hong Kong is well known internationally as one of the most vibrant and exciting cities in the world. Its bustling harbour and the mountain of light which is Hong Kong glimmering at night are symbols of Hong Kong's success. That success has nourished a construction bonanza over the last 20 years which has had few rivals anywhere in the world. Today the Hong Kong Government has embarked on what the press describes as the world's largest construction project. This includes the new Hong Kong international airport and a very substantial infrastructural development to connect that airport by both road and rail to the main urban areas.

In addition to this massive project Hong Kong also has an enormous building programme, a substantial environmental programme, and a huge port development programme in hand. In Hong Kong most construction projects are completed within time scales which are seldom equalled elsewhere.

(ii) Dispute Resolution

The pace of development in Hong Kong inevitably does lead to some problems. Most of these
problems are resolved by friendly negotiation which is in keeping with the philosophy of peace, harmony and conciliation engendered by traditional Confucian thinking. Hong Kong is an international city but it should be remembered that it is, and always has been, a Chinese city. The number of disputes which require assistance of a third party whether as a conciliator, mediator, arbitrator or judge is thus admirably small relative to the size of the construction industry.

Over the last 20 years or so most construction disputes in Hong Kong which have not been resolved by negotiation, have been resolved by arbitration. It must be said that many of these arbitrations have been conducted in much the same way as a high court action and with little, if any, saving in costs over court proceedings. The parties, however, have enjoyed a high degree of confidentiality and also have had the benefit of being able to choose the arbitrator. In almost all cases there has been a sole arbitrator and most of these arbitrators have been chosen by agreement between the parties.

(1) **Two Sets of Arbitration Rules**

Two sets of arbitration rules have been in common use for construction arbitration. These are very similar to each other; one was promulgated by the Hong Kong Government and the other by Hong Kong International Arbitration Centre. These rules were introduced in 1985. They have now been replaced by a more dynamic family of rules all based on a draft produced by Hong Kong International Arbitration Centre. The new concept has been adopted by the Hong Kong Government, the Hong Kong Construction Association (the contractors' representative body), the Mass Transit Railway Corporation which operates Hong Kong's underground railway system, and by the Provisional Airport Authority to resolve disputes arising from the construction of the new Hong Kong airport. These rules all give a very high degree of authority to the arbitrator to expedite proceedings and give to arbitration the same fast track reputation that has been enjoyed by the construction industry.

(2) **Government Contracts-Three Stage Program**

For the Government contracts associated with the new airport development there is a three stage dispute resolution procedure. Administration of all three of these services is also entrusted to HKIAC.

(a) The first step is mediation. This is conducted under a specially drafted set of mediation rules. These rules are similar to the standard Government mediation rules but in addition require both parties to take part in a mediation process before the other forms of dispute resolution may be initiated.
(b) As a second stage the Government have introduced an interim adjudication procedure where, if mediation fails, an independent third party may be appointed to give a binding decision. The objective of this procedure is to give a speedy and effective decision on any dispute. The adjudicator's decision may be reviewed in arbitration on completion of the works.

(c) The third stage, arbitration will not be permitted under this form of contract until completion of the works.

3) **Standing Dispute Review Board**

The Airport Authority have formed a standing dispute review board to monitor and adjudicate on any disputes which may occur during the construction of the new Hong Kong Airport at Chep Lap Kok. This board is administered by Hong Kong International Arbitration Centre.

4) **Dispute Resolution Adviser**

Another innovation in the use of ADR in Hong Kong has been introduces some major building contracts where a dispute resolution adviser has been pointed by agreement between the parties just prior to signing of the contract. The dispute resolution adviser's function is to visit the site regularly, to attend meetings and be available to nip any potential disputes in the bud. The dispute resolution adviser is akin to a mediator rather than an adjudicator and is intended to facilitate settlement rather than impose a settlement. Experience with this form of dispute avoidance has been very promising and is now being adopted by the Hong Kong Government for all of their major building works.

Significant improvement have been achieved by using these ADR mechanisms and they have done much to ensure that the large projects which are now in hand will propel Hong Kong into the 21st century with a minimum of disputes and that the disputes which do occur will be dealt with effectively.

(h) **ADR in Securities and Stocks**

It was not until 1984 that the first Chinese equity securities came into existence as a result of initial official acceptance of the idea of corporatization. By the end of 1991, there were, according to Chinese statistics, 3220 enterprises which had become joint stock companies. With the opening of the Shanghai Stock Exchange in December, 1990 and the Shenzhen Stock Exchange in July, 1991, thirst for shares in China became unquenchable. Early 1992 saw the first issue of Chinese “B” shares. Many Chinese funds listed on the Hong Kong Stock Exchange and a remarkable over
subscription of China controlled issues such as China Travel and Denway meant that Chinese stocks commanded a premium in the local market.

After much deliberation, the Hong Kong Stock Exchange decided to allow full sing of all the securities of a PRC issuer which may be bought by non-PRC nationals. These are ordinary shares of the issuer nominated in RMB but for which issuer may remit dividends in foreign currencies. This posed an enormous challenge to the Hong Kong Stock Exchange to put in place a regime of regulation and shareholder protection of a level similar to that enjoyed by investors in companies previously listed on the Exchange. To achieve this, it was necessary to include in the Articles of Association of the PRC issuers various provisions which are equivalent to those provided under Hong Kong company law.

After careful consideration it was decided to incorporate into the various documentation relating to the company and to the sale and purchase of its shares an arbitration agreement. The terms of this arbitration agreement are as follows:

(1) Whenever any differences or claims arise from these Articles or any right or obligations conferred or imposed by the Standard Opinion and any subsequently promulgated laws or regulations in place of the Standard Opinion concerning the affairs of the company between the parties set forth in sub-paragraph (2) below, such differences or claims shall, unless otherwise provided in these articles, be referred to arbitration at either the Chinese International Economic and Trade Arbitration Commission in accordance with its Rules or the Hong Kong International Arbitration Centre in accordance with its Securities Arbitration Rules, at the election of the claimant. Once a claimant refers a dispute or claim to arbitration; the other party must submit to the arbitral body elected by the claimant. Such arbitration shall be final and conclusive.

(2) This Article applies to differences or claims between the following parties:

(a) A holder of H Shares and the company,
(b) A holder of H Shares and a director, supervisor or officer of the company, and
(c) A holder of H Shares and a holder of RMB Shares.

Where a dispute or claim within the scope of [article corresponding to (1)] involves parties set forth in any of the above paragraphs, the entire claim or dispute must be referred to arbitration and all persons (being shareholders, supervisors, directors or officers of the company or the company) who have a cause of actions based on the same facts giving rise to the dispute or claim or whose participation is necessary
for the resolution of such dispute or claim, shall submit to arbitration in accordance with this Article.

(3) Unless otherwise provided in these articles, any differences or claims arising out of these Articles shall be resolved in accordance with the laws of the PRC.

(4) For the purposes of this Article, the Standard Opinion shall refer to Standard Opinion promulgated by the State Commission for Economic Restructuring on 15 May, 1992 and any addendum or explanatory notes, subsequently issued. The articles make provision for the rectification of the share register to be adjudicated by the courts of the place in which the relevant part of the register is kept. The share register will be kept in part in the “PRC” in relation to 'RMB Shares and in part in Hong Kong in relation to 'H Shares'.

In order to deal with disputes arising from the listing of Chinese company shares in Hong Kong, HKIAC has produced a set of securities arbitration rules. These rules closely follow the format of the UNCITRAL Arbitration Rules. The UNCITRAL Arbitration Rules were developed by UNCITRAL and adopted in 1976. The Gen Assembly of the United Nations by its Resolution 31/98 recommended the use of UNCITRAL Arbitration Rules in the settlement of disputes in international commercial contracts. The UNCITRAL Rules are intended for use in adhoc arbitration. That is to say there is no administrative body.

The major problem with totally ad hoc procedures is that if a respondent refuses to arbitrate a claimant must go to court. This is what the parties are usually seeking to avoid by selecting arbitration. It has, therefore, been decided to make modification to the UNCITRAL Rules to allow administration of the arbitrations by HKIAC.

Thus arbitration under the HIKIAC Securities Arbitration Rules is commenced by submission of the notice of arbitration to HKIAC for onward transmission to other party and all subsequent correspondence is channelled through HKIAC. Arbitration is conducted by a tribunal of three arbitrators. Normally one arbitrator will be appointed by each party. The parties are free to choose any arbitrator they consider appropriate providing he or she is independent of the parties. The third arbitrator, who will act as the presiding arbitrator of the tribunal, is to be appointed by HKIAC from a special panel of securities arbitrators formed by HKIAC. One exception to the general rule that the parties each choose one arbitrator is in situations where a claim is made against a number of different respondents. It would clearly be impractical to have a very large tribunal with each respondent appointing its own arbitrator. On the other hand the
respondents may not be able to agree on selection of one arbitrator as their joint appointee. In those circumstances the entire tribunal shall be appointed by HKIAC.

The new Hong Kong International Arbitration Centre Securities Arbitration Rules are intended primarily for use in disputes arising from the many thousands of transactions involved in securities which take place every year and more particularly for disputes arising out of the listing of Chinese equity securities on the Hong Kong stock market. They may, however, be suitable for other forms of dispute where the parties seek an administered form of arbitration.

(i) **Hong Kong- Emerging Dispute Resolution Centre**

On 1 July Hong Kong ceases to be a British colony and becomes a special administrative region of China enjoying a high degree of autonomy. As with all changes there are people who predict over optimistic benefits and people who warn of disaster. All of the economic indicators suggest that China in general and South China in particular is likely to enjoy a long period of sustained growth. To support this growth China is actively seeking foreign investment. To encourage and control this investments body of commercial law is in preparation. These new laws will not, however, apply to Hong Kong which already has the benefit of one of the most advanced commercial legal systems in the world. One of the benefits of the one country two systems philosophy is that this ready made system of laws can be used by China for its economic benefit. This has been clearly demonstrated by the agreement with the Hong Kong Stock Exchange to list mainland companies which, as noted above, recognised that overseas investors may prefer to have disputes arbitrated in Hong Kong rather than in China. This acceptance is despite the fact that China has a well developed arbitration system of its own and is a strong supporter of arbitration as a means of resolving international disputes. There is thus every reason to expect that Hong Kong will continue to be a major dispute resolution centre well beyond 1997.

(VI) **ADR in New Zealand**

In this part, the present researcher proposes to review the history, first, of arbitration and, secondly, of other forms of ADR in New Zealand and then to describe the work of the Arbitrators' and Mediators' institute of New Zealand Inc and, finally, the dispute resolution course provided by Massey University on behalf of the Institute. 

22. T.W.H. Kennedy Grant-“Alternative Dispute Resolution in New Zealand” He is M.A. (Oxon): Gray's Inn; F.C.I.Arb; F.I.Arb.A; F.A.M.I.N.Z(Arb); Past President of the Arbitrators' and Mediators' Institute of New Zealand Inc and, finally, the dispute resolution course provided by Massey University on behalf of the Institute.
1. **Historical Background**

Alternative Dispute Resolution (ADR) is well established in New Zealand. There has been an Indigenous Arbitration Act since 1890 (prior to that date, the English legislation current from time to time applied)\(^{23}\). There has, in addition, been a history of statutory provision for the arbitration of particular types of dispute. Although there has never been a Mediation Act, there has been statutory provision from an early date for the mediation or conciliation of particular kinds of dispute.

2. **Arbitration**

(a) **General legislation**

Arbitration is undoubtedly the longest-standing formal method of dispute resolution in New Zealand outside the court system. The New Zealand system has been based throughout on the Common Law and on English legislation up to and including the Arbitration Act, 1950. Current legislation comprises the Arbitration Act, 1908 and the Arbitration Amendment Act, 1938 (both as amended by subsequent Acts) in relation to domestic arbitrations and the Arbitration (International Investment Disputes) Act, 1979 and the Arbitration (Foreign Agreements and Awards) Act, 1982, giving effect to the Washington Convention of 1965 and the New York Convention of 1958 respectively, in relation to international arbitrations. It is unnecessary in the context of this work to comment on the legislation governing domestic arbitration. Effect has been given to both the Washington and New York conventions by the New Zealand Courts. There have been a number of cases in which proceedings have been stayed because of the existence of an arbitration agreement to which the New York Convention, as incorporated into New Zealand law, applied.\(^{24}\) The ICSID arbitration between Mobil Oil Corporation and others and the New Zealand Government was the subject of a successful application by the claimants for a stay under the Arbitration(International Investment Disputes) Act, when the New Zealand Government sought to inject the arbitration proceedings before the International Centre.\(^{25}\) In 1988 the New Zealand Law Commission published a preliminary paper\(^ {26}\) on reform of the arbitration process.

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In that paper the Law Commission reviewed law relating to the different stages of an arbitration, comparing the present New Zealand, English and Australian Acts and the UNCITRAL Model Law on International Commercial Arbitration, and expressed a preference for the adoption in New Zealand of the UNCITRAL Model Law for international arbitrations and, with modifications, for domestic arbitrations.

There followed an extensive process of consultation, both public (in the form of a joint seminar with the Legal Research Foundation on “Arbitration Law-Perimeters and Parameters”) and private; and then, in 1991, the Law Commission reported to the Minister of Justice. It recommended:

(a) That the UNCITRAL Model Law (with some minor amendments) should apply to all arbitration (whether international or domestic);
(b) That additional provisions should apply to domestic arbitration; and
(c) That
   (i) the parties to an international arbitration should be able to “opt in” to the additional provisions applied to domestic arbitrations;
   (ii) the parties to a domestic arbitration should be able to “opt out” of those additional provisions.

The Government accepted the recommendation of the Law Commission within a short time of its publication; but it took over four years for the resulting Bill to be reduced into the House. The Bill is now before the Justice and Law Reform Select Committee but has no report date.

The Act, if the Bill is passed unchanged, will have the following purposes:

(a) to encourage the use of arbitration as an agreed method of resolving commercial and other disputes;
(b) to promote international consistency of arbitral regimes based on Model Law on International Commercial Arbitration adopted by United Nations Commission on International Trade Law on 21 June 1985;
(c) to promote consistency between the international and domestic arbitral regions in New Zealand;
(d) to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards;

28. NZLC R 20.
(e) to facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and

(f) by so doing, to give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English texts of which are set out in Schedule 3). 29

The Bill seeks to achieve these purposes by providing that the Model Law, with certain modifications, shall apply to all arbitrations conducted in New Zealand, whether international in their character or domestic, and that certain supplementary provisions shall apply to domestic arbitrations, unless the parties otherwise agree and to international arbitrations, if the parties so agree. 30 The test of whether an arbitration is international is that set out in Article 1(3) of the First Schedule to the Act, which is the schedule incorporating the Model Law in its modified form.

The definition is as follows: An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places if situated outside the State in which parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, arbitration agreement;

(ii) any place where a substantial part of the obligations of air commercial or other relationship is to be performed or the play, with which the subject-matter of the dispute is most closely connected:

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The Bill also deals with other matters, such as the arbitrability of disputes, 31 protection of consumers 32 and the liability of arbitrators. 33 The Bill provides for the functions identified in Article 6 of the Model Law to be performed either by the District Court or by the High Court, except in the case of tile essentially supervisory functions under Articles 16(3) (preliminary question of jurisdiction), 34(2) (setting aside an award), and 35(1) (enforcement of an award by entry as a judgment or by action). 34

29. Clause I. 
33. Clause 11. 
34. Article 6 of Schedule 1.
In addition, the Bill provides that there shall be no right of appeal from certain applications to the court and in those cases provides for the High Court to be the relevant Court. It also, significantly, provides for the Act to apply to oral arbitration agreement. The Bill provides that, in the absence of agreement between the parties as to the number of arbitrators, there shall be three arbitrators in the case of an international arbitration and one arbitrator in the case of a domestic arbitration. On the question of the setting aside of an award the Bill provides that the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending determination of the application and also provides that, for the avoidance of doubt and without limiting the generality of the public policy ground for setting aside, an award is in conflict with the public policy of New Zealand if, (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice incurred in connection with the making of the award.

The same provision regarding the meaning of public policy is, naturally, made in respect of the recognition and enforcement of awards. The Second Schedule articles, which apply to domestic arbitrations unless the parties opt out of them and to International arbitrations if the parties opt into them, include articles dealing with default appointment of arbitrators, consolidation of arbitral proceedings, the powers which the tribunal shall be taken to have unless the parties have excluded them (including the power to adopt inquisitorial processes and to draw on its own knowledge and expertise), determination of a preliminary point of law by the High Court, appeals on questions of law, and costs and expenses of an arbitration.

**(b) Specific legislation**

There are over 50 statutes which provide for particular types of dispute to be determined by arbitration. Examples are:

35. Articles 1(3), 1(4), 13(3), 14 and the new article 11(6) of Schedule 1
36. Article 7 of Schedule 1.
37. Article 10 of Schedule 1
38. Article 34, in particular paragraphs (5) and (6) of Schedule 1.
39. Article 36(3) of Schedule
40. Article 1.
41. Article 2
42. Article 3
43. Article 4
44. Article 5
45. Article 6
the Public Bodies Lease Act, which has, since 1908, provided for the determination by arbitration of the rental payable on the renewal certain types of leases entered into between public bodies and third parties.

(b) the Share milking Agreements Act, 1937, which provides for the arbitration of disputes between share milkers and employers. 46 The Employment Contracts Act, 1991, which provides for every employment contract to contain a procedure "for settling any dispute about interpretation, application, or operation of the employment contract" and permits parties to the contract to agree upon arbitration as the dispute resolution procedure. 47

(c) the Resource Management Act, 1991, which provides that, where parties are unable to agree about any matter in respect of which any of them has a right of appeal under the Act and everyone who has such a right of appeal agrees, the Planning Tribunal may, on the application of one of those persons: "authorise the matter to be determined by arbitration, under the Arbitration Act, 1908, on such terms and conditions as the Tribunal considers appropriate". 48

3. Other ADR Procedures

(a) Statutory systems

Mediation has had an important role in the resolution of industrial disputes since the passing of the Industrial Conciliation and Arbitration Act, 1894. For almost a century after the passing of that Act (until 1991), New Zealand had a highly regulated industrial relations system based on a series of annually negotiated collective agreements or awards. An integral part of the system was the provision of a conciliation or mediation service by the State. Up until 1987 the service was provided by Conciliation Commissioners who, together with the assessors appointed by the disputing parties, constituted a Council of Conciliation whose duty it was to endeavour to bring about a settlement of the dispute,

46. Sharemilkers Agreement Act 1937, sec. 3 and Schedule. The Act applies to agreement between a sharemilker and a person by agreement with whom the share milker is entitled, otherwise than as a servant under a contract of service, to receive a share of the returns or profits derived from the dairy farming operations which are the subject matter of the agreement and are derived from the management by the sharemilker of a herd provided by the employer: ibid. s. 2. (There are other types of Sharemilking agreement to which these provisions do not apply.)

47. Sec. 44.

48. Sec. 356(1).
expeditiously and carefully enquire into the dispute and all matters affecting the merits and the right settlement thereof. 49

From 1987 to 1991 the service was provided by the Mediation Service established under the Labour Relations Act, 1987. 50 The service consisted of mediators appointed by the Governor-General on the recommendation of the Minister of Labour. The general function of a mediator was to assist employers and their representatives and workers and their representatives to achieve and maintain effective labour relations. 51

In addition to this general function, a mediator had a number of specific functions among which was to offer his or her services to the Parties to a dispute to assist them to resolve the dispute. 52

Under the Employment Contracts Act, 1991 the former system of national collective agreements or awards was replaced by a system under which it is open employers and employees to elect to enter into either individual employment contracts or collective employment contracts. The Mediation Service has been abolished. In its place there has been established an Employment Tribunal. Although this Tribunal's functions are, broadly speaking, the same as those of the former Mediation Service, the parties to employment contracts are not restricted to using the members of the Tribunal as they were previously restricted to using the members of the Mediation Service. The Act provides for the parties to agree on an alternative dispute resolution procedure not involving the use of the Tribunals. 53

Outside the industrial relations area, mediation was not incorporated in any statutory scheme until the 1980's. In 1981 a Family Court was established and provision was made in the accompanying Family Proceedings Act 1980 for mediation conferences, chaired by a Family Court Judge. This has continued to be the practice until the present, although the Boshier Committee recommended in 1993 that this practice be discontinued in favour of:

(a) The creation of a Family Conciliation Service which would provide an independent mediation service; and

(b) Concentration on the exercise of their judicial functions by the Family Court Judges.

51. Ibid. sec. 23(1).
52. Ibid. sec. 253(2)(c).
53. Employment Contracts Act 1991 sec. 44. This provision opens the way to the use of private individuals as mediators.
In 1986 the Residential Tenancies Act provided for the appointment of Tenancy Mediators, whose functions include Where an application has been made for the exercise of the Tenancy Tribunal's jurisdiction in respect of any dispute... offering their services to the parties to the dispute and (assisting) the parties in bringing about u settlement with a view to avoiding the need for the dispute to go to the Tenancy Tribunal.

In 1988 the Treaty of Waitangi Act, 1975, which was passed to enable the investigation of claims by Maori of breach by the Crown or by Parliament since 1840 of the obligations undertaken on behalf of the Crown in the Treaty of Waitangi signed between the Crowns representative and certain Maori Chiefs in 1840, was amended to empower the Waitangi Tribunal, which is the body set up to inquire into and make recommendations regarding claims, to refer Maoris to mediation. Provision for conciliation or mediation has been included in a number of other statutes since then, including the Resource Management Act, 1991.

(b) Private use

In addition to the statutory systems described last section of this in the last five years, as a result of an increasing awareness of suitability and availability of alternative dispute resolution procedures other than arbitration (all which are essentially forms of assisted negotiation), increasing use has been mad; of mediation and other forms of procedure on an ad hoc basis. This has been the result of a number of factors- the existence of the statutory schemes, the promotional work of the Arbitrator's Institute of New Zealand 54 and of LEADR (Lawyers Engaged in Alternative Dispute Resolution), 55 and the impetus to the use of ADR provided by High Court Case Management Pilot Scheme. 56 Mediation is undoubtedly the most widely used method of ADR apart from arbitration. It is being used regularly in relation to a wide range of disputes. Mr. Warren Sowerby, a highly experienced New Zealand mediator, has advised that he has mediated disputes in the commercial, company, construction, contract, employment,

54. Now known as the Arbitrator's and Mediator's Institute of New Zealand.
55. LEADR is a training organisation for lawyers and has played an important part in promoting mediation to that profession.
56. Since 1 May 1994 there has been a High Court Case Management Pilot Scheme in the Auckland and Napier Registries of that Court, one of the purposes of which has been the encouragement of the use of ADR. The existence of this scheme and the encouragement given to the use of ADR by the judges and Masters of the High Court is an undoubted factor in the increasing use of mediation.
family protection, finance, intellectual property, lease, licence/franchise, partnership, and probate fields. Provision for optional mediation or conciliation is now common place in the standard conditions of contract for construction professional services and for construction itself.  

The mini-trial has been used in at least one major construction dispute, arising out of the failure of a sub-division; but it has not gained widespread acceptance, the present researcher thinks because of the success of mediation. New Zealand is making increasing use of techniques which may be described as dispute prevention rather than dispute resolution techniques, such as partnering. The concept has been used very successfully on the National Museum of New Zealand project in Wellington. T.W.H. Kennedy-Grant chaired the first conference on the subject in New Zealand in 1994.

4. **The Arbitrators' And Mediators' Institute of New Zealand Inc.**

There has been a professional institute in New Zealand since 1982, when the Zealand Branch of the Chartered Institute of Arbitrators was established. In 1988 that branch evolved into the independent Arbitrators' Institute of New Zealand. Initially, the focus of the Institute was entirely on arbitration. However importance of mediation and other ADR techniques was quickly recognised by Council of Institute. The educational programme of the Institute was broadend to include seminars on those procedures. At its 1991 Annual General Meeting Institute adopted new rules, under which it committed itself to the promotion of use of, and the education of members in, arbitration, mediation, conciliation and other forms of ADR. In the same year the Institute brought to New Zealand one of the leading exponents of mediation in the United States, Dr. Christopher Moor of CDR Associates, Boulder, Colorado, to hold a four-day mediation training course open to interested persons generally, one-day seminars in the use of mediation in industrial relations and the environmental and planning areas and on the development of dispute management systems in business and a three-day advanced tenancy mediation training course for members of the Tenancy


Mediation Service. This initiative not only attracted considerable support but generated a large amount of publicity for the Institute and ADR procedures.

One of the results of the Moore visit was the establishment of a separate Mediator's Institute. This occurred because the Arbitrators' Institute had only recently formally recognised the importance of other forms of ADR and was not seen by those with a developing interest in mediation as being likely to serve the interest of that branch of the profession adequately. The specialist Institute of Employment Arbitrators and Mediators, set up after the introduction of the Employment Contracts Act in 1991, has also merged with Arbitrators' and Mediators' Institute.

The combined Institute has a membership of over 550 and is drawn from a wide range of professional and occupational groups: lawyers, engineers, architects, quantity surveyors, property managers, valuers, accountants, business people, agricultural consultants, psychologists and counsellors, human resources industrial relations managers, trade unionists, scientists. It has three grade membership- Affiliates, Associates and Fellows and provides training forth, directly and also through the Massey University course. It also promotes the use of ADR to the public and maintains panels of arbitrators and mediators for use by the public. The Institute has a close working relationship with the Chartered Institute of arbitrators and the two institutes recognise each other's qualification.

5. The Massey University- Dispute Resolution Course

The Arbitrators' and Mediators' Institute has been instrumental in establishing a two-year extramural course at Massey University in Palmerston North. The Institute's view is that professionals in the dispute resolution field should have a knowledge of the entire range of techniques and it require that as part of its qualification for Associateship. It then allow members to specialise in one or other area, or if they choose in both, at Fellowship level and beyond. The first year of the Massey University course is designed to meet the Institute's requirements for Associateship and the second year to meet the Institute's requirements for Fellowship in the chosen discipline. The course is overseen by a Joint Advisory Committee of the Institute and the University.

C. STUDY OF ADR INSTITUTIONS ACROSS THE WORLD

For the purpose of constituting an arbitral panel, one can pursue one of the two paths available. One can go for ad hoc arbitration whereby the parties themselves constitute an
arbitral panel and make their own rules for arbitration. On the other hand, there is the option of institutional arbitration. Opting for institutional arbitration gives the benefit of not only making use of the well-tested arbitration rules and procedures of the institution but also being assured of the presence of well-experienced and qualified arbitrators from the panel maintained by the institution. Further, in an institution, the professional staff is available to guide disputants through the arbitration process.

Among the prominent foreign arbitral institutions, mention can be made of American Arbitration Association (AAA) in USA, London Court of International Arbitration (LCIA) in United Kingdom, Stockholm Chamber of Commerce (SCC) in Sweden and Arbitral Center of the Federal Economic Chamber in Vienna. In India, we find institutions like the Indian Council of Arbitration, International Centre for ADR, which are offering similar arbitration and mediation facilities. However all but few remained off-line arbitration and conciliation centers. The various institutions\textsuperscript{59} promoting the ADR mechanisms all over the world are listed below:

1. **Permanent Court of Arbitration (PCA)**

   The Permanent Court of Arbitration (PCA), also known as the Hague Tribunal is an international organization based in The Hague in the Netherlands. It was established in 1899 as one of the acts of the first Hague Peace Conference, which makes it the oldest institution for international dispute resolution. In 2002, 96 countries were party to the treaty. The court deals in cases submitted to it by the consent of the parties involved and handle cases between countries and between countries and private parties. The PCA is housed in the Peace Palace in The Hague, which was built specially for the Court in 1913 with an endowment from the Carnegie Foundation. The same building also houses the International Court of Justice, though the two institutions operate separately.

2. **World Trade Organization (WTO)**

   The World Trade Organisation is an international organisation which oversees a large number of agreements defining the “rules of trade” between its member states. The WTO is the successor to the General Agreement on Tariffs and Trade, and operates with the broad goal of reducing or abolishing international trade barriers. The WTO has two basic functions: as a negotiating forum for discussions of new and existing trade rules, and as a trade dispute settlement body. The function of WTO as a trade dispute settlement body is important in this context. The WTO has significant power to enforce its decisions,

\textsuperscript{59} http://www.spea.indiana.edu/icri/terms.htm#ENE. See also APPENDIX-B.
through the Dispute Settlement Body, an international trade court with the power to authorize sanctions against states which do not comply with its rulings. The WTO mainly resolves disputes through the process of "consensus" and "arbitration" which are essentially mechanisms of ADR.

3. **International Chamber of Commerce (ICC)**
The International Chamber of Commerce is an international organization that works to promote and support global trade and globalisation. It serves as an advocate of world business in the global economy, in the interests of economic growth, job creation, and prosperity. As a global business organization, made up of member states, it helps the development of global outlooks on business matters. ICC has direct access to national governments worldwide through its national committees. ICC activities include Arbitration and Dispute resolution which is one of the most prominent activities that it performs.

4. **Court of Arbitration for Sport (CAS)**
The Court of Arbitration for Sport (CAS; Tribunal Arbitral du Sport or TAS in French) is an arbitration body set up to settle disputes related to sports. Its headquarters are in Lausanne; there are additional courts located in New York City and Sydney, with ad-hoc courts created in Olympics host cities as required. The CAS underwent reforms to make itself more independent of the International Olympic Committee (IOC), organizationally and financially. The biggest change resulting from this reform was the creation of an "International Council of Arbitration for Sport" (ICAS) to look after the running and financing of the CAS, thereby taking the place of the IOC. Generally speaking, a dispute may be submitted to the CAS only if there is an arbitration agreement between the parties which specifies recourse to the CAS. Currently, all Olympic International Federations but one, and many National Olympic Committees have recognized the jurisdiction of the CAS and included in their statutes an arbitration clause referring disputes to it. Its arbitrators are all high level jurists and it is generally held in high regard in the international sports community.

The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body within the United Nations system in the field of international trade law. UNCITRAL was tasked by the General Assembly to further the progressive harmonization and unification of the law of international trade. The UNCITRAL is a body of member and observer states under the auspices of the United Nations. It drafted
the UNCITRAL Model law on International Commercial Arbitration in 1985. Agreements, which cite the UNCITRAL Arbitration Rules, may be bound to this form of dispute resolution. Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Australia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bermuda, Bulgaria, Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Paraguay, Peru, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Oregon and Texas; Zambia, and Zimbabwe.

6. Institute for the Study and Development of Legal Systems

ISDLS is a nonprofit, nongovernmental organization based in San Francisco California U.S.A. The Institute conducts international legal reform and exchange projects in collaboration with foreign governments and legal professionals and is comprised of approximately eighty leading legal professionals in the state of California, including federal and state judges, prosecutors and public defenders; private civil and criminal attorneys; city attorneys; court administrators; private and court-appointed mediators and arbitrators; law professors; directors of judicial education and performance centers and committees; directors of law enforcement oversight bodies; law enforcement officers and trainers; journalists and others. For more information please visit the website. 60

7. Other Treaties

The other treaties governing ADR in various states would include the United States Code Title 9, The Agreement relating to the Application of the European Convention on International Arbitration (Paris, 1962), The European Convention providing a Uniform Law on Arbitration (Council of Europe, 1964). The various other treaties enacted by the rest of the countries in the world are not included in this list. The following organizational rules are the most common rules which serve as model clauses for the parties-

(i) ICC Rules of Arbitration and ICC Rules of Optional conciliation
(ii) International Center for settlement of Investment Disputes model clauses

D. ONLINE ADR SYSTEM

Alternative Dispute Resolution (ADR) has now been propagated and successfully implemented in the offline non-virtual world. It refers to the use of methods like arbitration, mediation, negotiation, med-arb, etc. to solve disputes rather than the traditional litigation way. Arbitration has been especially popular in international commercial transactions where the parties are able to decide on their choice of law by which they want to be governed and jurisdiction in which they want to take up the dispute. Since the jurisdiction has been a critical issue in resolution of online disputes, many online ADR agencies have sprung up in recent times providing such facilities to parties for quick and efficient dispute resolution. The general pattern is that of the grieving party to approach the ADR agency, which in turn will contact the defendant. Then, under the aegis of the agency, both the parties solve their disputes online through emails and video conferencing without the necessity of being physically present as in litigation or off-line ADR. Further, being able to decide online, they are not confronted with jurisdictional issues at all. Such a method is being characterized as both cost efficient and time-efficient and of course, the process being very much within the control of the parties.

With the advent of the Internet as a globally recognized vehicle for information travel and exchange, the ADR was re-born both in terms of cost-efficiency and speed. We witnessed the birth of various online ADR websites. These websites function the same way as the arbitral institutions and provide similar services. The only difference being is that they do not have any restrictions as to physical space and are available at any moment of time at any given place where one might have Internet facilities available.  

1. Functioning of the Online ADR System

An Online ADR service center functions somewhat like an offline arbitral institution. One can approach these institutions either ad hoc or on an agreement basis.

61. Devashish Bharuka - "On line Dispute Resolution"
See also Kamika Sawhney - "ADR to ODR"
Companies generally have a pre-arrangement for settlement of disputes, be it business to business (B2B) or business to consumer (B2C), under the aegis of such online arbitral institutions. Agreements are made out between the institution and the company as regards the method of initiating the process into action, kind of settlement to be pursued, the fee structure, goodwill and good faith of the parties, rights and responsibilities of the parties and the arbitral institution, the procedures to be followed, law applicable, confidentiality, security, etc.

2. **Assessment of Online Institutions**

When a dispute arises, either the company or the consumer (who is preinformed as to the existence of such an arbitral institution to which the company is associated) approaches the institution. The other party is then contacted and depending upon the service provided or agreed for, negotiation, mediation, arbitration, conciliation, evaluation or any other service is pursued. This is an eagle's eye view of the whole arrangement. Let us take a few examples to make the scenario clearer. The researcher is picking up a few online ADR institutions presently providing services.

(a) **Better Business Bureau Online: www.bbsonline.com**

The BBB Online is supported by 86 years of experience of the Better Business Bureau's involvement in self-regulation and alternative dispute resolution. It provides for online conciliation, mediation and arbitration. In conciliation, the BBB collects information from both parties to a dispute and works to encourage open communication between them. BBB staff presents the customer's views to the business and offer the business' viewpoint to the customer in a neutral way. Many disputes can be ended simply and quickly this way.

In mediation, a professionally trained mediator helps the parties to work out their own mutually agreeable solution to the dispute. Mediation is confidential, elective, and is claimed to offer win/win solutions to difficult problems.

In arbitration, parties state their views, offer evidence at an arbitration hearing, and agree to let an impartial, professionally-trained arbitrator make a decision that will end the dispute. The website further offers facility for a company to either commit itself in advance to settle all its disputes through BBB or to approach BBB on a case-by-case basis. The website further offers facility for a company to either commit itself in advance to settle all its disputes through BBB or to approach BBB on a case-by-case basis.
(b) **Clicknsettle.com**

Providing online negotiation service, this website is a wholly owned subsidiary of NAM (National Arbitration and Mediation), a national provider of arbitration and mediation services and electronic case management software.

The website's negotiation service is particularly lucrative for monetary disputes. For initiating an online negotiation process, one has to fill in the online form describing the dispute and pay $15. Then, you provide an initial demand or offer to settle the dispute. The other party is then contacted and its demand/offer requested. Thereafter, parties keep proposing new demands/offers with certain procedural restrictions. The case is settled for the midpoint of the offer and the demand the point both are within 30% of each other.

In case the dispute is not settled by negotiation, one can go for arbitration. There is no fee for initial submission for arbitration. A form has to be filled with dispute details. Next, the party has to give in its three preferred Hearing Officers with the details of availability, etc. A dispute resolution professional will contact all parties involved to secure agreements for an arbitration or mediation proceeding. Upon consent, clicknsettle.com will arrange for a mutually-agreed upon Hearing Officer to hear the dispute at a date, time and location that is convenient for all parties. Both parties are given opportunity to present evidence and arguments. The Hearing Officer renders a binding decision within two to four weeks.

As we see, the emphasis is a lot on negotiation. A Proprietary software has been developed to make the process simpler. In case negotiations fall, arbitration is opted for if the parties agree to it.

(c) **Squaretrade.com**

SquareTrade Online Dispute (ODR) Resolution Services: SquareTrade, a San Francisco-based firm, provides the following services:

(i) **Direct Negotiation:** Direct Negotiation allows you and the other party to address each other directly, using SquareTrade's system and process. If a resolution cannot be reached during this phase, the assistance of a SquareTrade mediator or arbitrator (collectively ‘SquareTrade Neutrals’) can be requested.

(ii) **Mediation:** Either party to a dispute has access to SquareTrade's pool of neutral mediators using the Process to assist in reaching a mutually acceptable solution. Mediators do not make judgements or issue decisions. All communication that occurs between you and the mediator will be confidential.
(iii) Arbitration: Either party to a dispute has access to a pool of neutral arbitrators using the Process to assist in obtaining a decision. Arbitrators will make a decision about the dispute. The parties agree in advance if this decision will be binding.

(d) Settleonline.com
Created by Resolute Systems Inc. for providing its services online, it is an innovative, internet based settlement tool that provides efficient, confidential dispute resolution online. With settle Online, disputing parties make offers and demands that are not revealed to the other side. Settle Online's programmed calculations match offers and demands to determine if a settlement is reached, removing personality conflicts and posturing between disputing parties. If the case does not settle, neither side is aware of the other party's numbers and either side can easily select other ADR procedures.

(e) Eresolution.ca
Canada based online ADR institution, it offers four services. Primary function is to offer the Domain Name Dispute Platform. Eresolution.ca is an ICANN authorized platform for solving of domain name disputes. The parties present their respective views of a conflict to a neutral and impartial third party, the panel. The panel will hear the parties' claims in conformity with ICANN's Policy, ICANN's Rules, and e-Resolution's Supplemental Rules. After both parties have had a fair chance to make their case, the panel, after deliberation, will issue a decision that is binding on the parties. Other services include online mediation and arbitration.

(f) Wecansettle.com
This is UK's online settlement service with its office in Liverpool. The system enables two negotiating parties to make offers, which are called 'bids' being the amount at which they are prepared to settle a legal dispute or agree a figure in any other matter. One person enters the case on the system and makes a bid to settle. The other person is notified by email and invited to enter his own bid. Neither party ever sees what the other side has bid. Every time a bid is made, the system compares the figure with the last bid from the other side. If the two bids are less than a predetermined percentage apart, which is set by default at 20%, the system splits the difference and declares a settlement at the mid point. The party starting the case has the choice of using the default percentage of 20% or using 10% or 30%.

(g) www.onlinerolution.com
Online Resolution (OR) provides for online mediation, arbitration, negotiation and expert evaluation. Working of these services are similar to those provided by other online
institutions mentioned above. There is three-tier fee structure which increases proportionately with the value of the dispute. Once you have selected an OR dispute resolution method, register your dispute by completing the confidential information form. This form is seen only by you and the professional assigned to your dispute. Online instructions will guide you in completing the form, and tell you just what to expect from OR.

OR will contact the other participant(s) and seek their commitment to the online dispute resolution method you have selected. If the responding parties are willing to participate, they will also complete a confidential information form. Once all participants agree to an online process, an OR professional is assigned, and the process begins. If the responding parties do not want to participate, or if there is no response within 7 days, OR will contact you with this information.

Numerous more online ADR services are available. A discussion on all of them is beyond the scope of this paper. However, more or less, as is evident from the above analysis, they provide similar services coupled with idiosyncratic variations of procedural aspects. What is clear is not only the emergence but also the wide-spread acceptance of such institutions which has encouraged many more to come up.

3. **Recent Developments in Online ADR**

Recent developments are quite important to understand better the impact of online ADR and realization of its importance in the commercial world.

In a survey organized in May 2001 by the American Arbitration Association involving Fortune 1000 companies on how disputes were being solved though the new medium, it was found that, even though the initial hype about e-commerce ventures may have fallen short, the reality is catching up with companies racing to preparing with their supply chains. Further, most of the companies are of the opinion that additional guidelines are necessary for handling B2B disputes.

A group of major multinational companies with significant Internet presence, recently unveiled its own proposed consumer protection guidelines that include the adoption of an international system of Online ADR. The guidelines were presented at a recent FTC workshop, and were proposed by industry leaders such as America Online, AT&T, Dell, IBM, Microsoft, Network Solutions and Time Warner ("the E-Commerce Group"). Merchant are encouraged to provide Consumers with internal mechanisms to resolve complaints and are encouraged to participant in third-party dispute resolution programs including online dispute resolution processes.
International Chamber of Commerce (ICC) is developing an Internet-based system that will guide parties in e-commerce disputes toward an appropriate online dispute resolution provider. It has decided against having its own online ADR services because it “supports the idea of competition in the marketplace” and believes that “enough [online ADR] services exist already” to provide parties with the necessary redress mechanism for B2C disputes in e-commerce. In fact, ICC has plans to explore potential partnerships with international consumer groups and academic institutions to put together “a global facilitation system for online ADR”. The proposed ICC system is “part of the ongoing building of a global infrastructure for widely available online ADR for consumers and others”.

American Arbitration Association, on the basis of the survey conducted in May 2001, finally decided to provide its own online ADR facilities to the world. It launched its new online dispute resolution Internet portal on July 12, 2001. It is designed to handle business-to-business disputes using newly developed online procedures and a specialized panel of neutrals. The Dispute Risk Management Portal will allow the general public to file online for resolution of B2B e-commerce disputes, use tools to manage the case online, and resolve disputes through “on-call mediation” and online document-only arbitration. It is definite that this journey from ADR to ODR has been extremely fascinating. While it invokes an ever challenging thought process in each one of us, it stimulates us to ponder over certain issues that are currently emerging and will very soon aid in improvisation and extension of ODR system application to new areas worldwide.

Law which exists as of today in its binding force can be categorized in three layers. The basic layer which can be said to constitute the first layer is the domain of National/domestic law which is bound by territorial/physical boundaries. The third layer can be said to comprise of International legislative texts which serve as model laws and help nations modernize adapt or adopt or amend or make more uniform their domestic laws e.g. UNCITRAL has framed laws on procurement of goods, construction and services, law on International credit transfers and laws that are more procedural laws by nature as that of International commercial arbitration. The second layer is a new and emerging layer that has helped bring about uniformity of laws worldwide and has a binding force and is enforceable everywhere such as the Uniform dispute resolution Policy adopted by ICANN for resolution of domain name disputes.
Above developments go a long way in pinpointing the increase in the recognition and importance of online ADR. Not only the present well-established arbitral institutions but also the major companies like the E-Commerce Group are taking deep interest in promoting and making use of the Internet as an effective and fast medium for solving of disputes.

E. REVIEW

ADR originated in the USA in 1970s in a drive to find alternatives to the traditional legal system. Actually informal dispute resolution has a long tradition in many of the world societies dating back to 12th century in China, England and America. We find that ADR has also become a common provision in United States trade treaties and the United States has been the strongest supporter of international commercial ADR.

Arbitration use in the United States pre-dates both the Declaration of Independence and the Constitution. For example, arbitral tribunals were established as early as 1768 in New York and shortly thereafter in other cities primarily to settle disputes in the clothing, printing and merchant seaman industries. Arbitration first received the endorsement of the Supreme Court in 1854 when the Court upheld the right of an arbitrator to issue binding judgments. In 1920, New York passed the first state law in the United States that recognized voluntary agreements to arbitrate. Two years later, business leaders created a new educational organization - The Arbitration Society of America - which significantly influenced the enactment of the Federal Arbitration Act (FAA) in 1925. The FAA provided the statutory framework to enforce arbitration clauses in interstate contracts and created the foundation upon which modern arbitration agreements are built today. In 1926, the Arbitration Society merged with another foundation to form the American Arbitration Association (AAA) which is now one of the largest private ADR service providers in the United States. In the 1970's, broad-based advocacy for increased use of ADR techniques emerged. This trend, often described in the United States as the “alternative dispute resolution movement”, was officially recognized by the American Bar Association in 1976 when it established a Special Committee on Minor Disputes (now called the Dispute Resolution Section).

With the promulgation of the Civil Rights Act in 1964 came the creation of the Community Relations Services (CRS) which utilized mediation and negotiation to assist in preventing violence and resolving community-wide racial and ethnic disputes. The CRS helped to resolve numerous disputes involving schools, police, prisons and other government entities throughout the 1960s. By 1980, more than eighty communities based alternative
dispute resolution centers were in operation. This community-based ADR trend has been further expanded to reach public and private school systems. Presently, more than 4,000 schools throughout the United States have developed successful peer mediation programs whereby children learn to peaceably resolve disputes occurring among the students. Underscoring these successful school programs, the American Bar Association Section on Dispute Resolution declared its theme for 1995-96 to be “Children, Courts and Dispute Resolution.” The goal of this program is to expand the use of ADR both in the schools and in the courts for the benefit of children.

Since the enactment in 1990 of the Civil Justice Reform Act (CJRA), which calls for every federal district court to implement a civil justice expense and delay reduction plan, there has been tremendous growth in the creation of ADR program and the use of ADR by federal and state courts. A growing number of courts have promulgated rules that mandate or authorize judges to recommend, or require litigants to participate in, ADR procedures such as summary jury trials, early neutral evaluation, mini trials, mediation and arbitration. As of September 30, 1995, 80 of the 94 federal district courts had authorized or established some form of ADR program. The use of various forms of ADR in state courts also has increased. 28 state courts now have mandatory, non-binding arbitration program. More than half the states have formally incorporated ADR methods other than arbitration into their systems through statewide legislation, court rules or policies. Government agencies have increasingly been making ADR options available to parties with which they have disputes. This is based, in part, on legislation such as the Alternative Dispute Resolution Act of 1990 (ADRA) and the Negotiated Rulemaking Act of 1990. Many United States companies have developed and implemented ADR programs to handle complaints and disputes involving customers, franchisees, employees and others. In 1994, the CPR Institute for Dispute Resolution conducted a survey of 244 of the largest law firms.

ADR in the UK is perhaps in advance of other countries. ADR has developed relatively quickly in the UK partly because of the problems presented in the recent past by the unwieldy and expensive process of UK litigation and lawyer dominated arbitration. The UK's close relationship to the US legal system has also helped, the common Anglo-Saxon legal base. To date mediation has been the missing tread in the staircase but over the last five years. ADR in the UK has come of age. In this the UK is ahead of the game. CEDR as the leading provider of mediation services to business in the UK can speak to this.
ADR in Australia is grooming, Australian Centre for Peace and Conflict Studies (ACPACS) provides various ADR Training Programs and Mediation Courses. The National Mediation Conference for 2006 was held in Hobart from 3 to 5 May, with a conference theme of "No mediator is an island: celebrating differences - learning from each other. There are may other organizations working for promotion of ADR like Alternative Dispute Resolution Association of Queensland, Victorian Association for Dispute Resolution, South Australian Dispute Resolution Association etc.

Amicable settlement of disputes was the accepted concept in Ceylon (as Sri Lanka was then known) even as far back as during the reign of the Kings. There existed then a hierarchy of institutions at the base of which was the Gamsabhawa mandated to settle disputes amicably and thereby maintain peace and harmony at village level. Sri Lanka's experience in institutionalising alternative dispute resolution in respect of minor disputes with any degree of seriousness in later years was via the Conciliation Boards Act, in 1958 which provided for community level resolution of minor disputes at the pre-trial stage. Due to various deficiencies in the implementation of the provisions thereof, this Act was repealed in 1977 not because of any reasonable belief that the concept of alternative dispute resolution was unacceptable but, unfortunately, due to implementation defects. That the Act was sought to be repealed in its totality without an attempt to rectify the objectionable practices alone, was unfortunate.

In 1988, a new Act - the Mediation Boards Act, No.72 of 1988 - was introduced reiterating a belief in the concept of alternative dispute resolution in respect of minor disputes, The Act also sought to introduce a mechanism which was free of the defects identified as having existed under the Conciliation Boards Act. A novel experiment in institutionalizing mediation at appellate stage is sought to be attempted by the Supreme Court of Sri Lanka by means of Rules of Court. A new Arbitration Act, No.11 of 1995 has been enacted by Parliament and came into operation with effect from August 1st, 1995. The main features of this Act seek to provide for party autonomy; the supporting role of court to arbitration proceedings as opposed to a coercive role which had, hitherto been adopted thereby impeding the speedy resolution of disputes, and an effective procedure for the recognition and enforcement of Sri Lankan and foreign awards.

It is observed that both the Sri Lankan Act and the Indian Act do not incorporate the UNCITRAL Model Law provision which provides that where a party requests the court to refer a matter to arbitration, it shall do so unless it finds that the agreement is null and void, inoperative or incapable of being performed. With the exclusion of such a
discretion in court, opportunities to parties to frustrate the arbitration agreement by raising objections on such grounds and thus delaying arbitration proceedings is eliminated.

In the last few years Hong Kong has emerged as one of major international dispute resolution centre in Pacific Asia. The courts in Hong Kong have a very clear understanding of the arbitration process and have consistently supported the process. In addition the Chief Justice has assigned a particular high court judge to be allocated all cases relating to arbitration. Hong Kong is a unique regional centre in many areas of specialist expertise. Chartered Institute of Arbitrators (Hong Kong Branch) is very active in the education of arbitrators. The Institute has almost 1000 members in Hong Kong which over 140 have achieved the grade of Fellow. Since 1990 the pace of development of mediation in Hong Kong has been very encouraging. Consultation between the Hong Kong Government and the Hong Kong Construction Association (A body representing building and civil engineering contractors in Hong Kong) has resulted in adoption of a flexible set of mediation rules. Hong Kong International Arbitration Centre (HKIAC) was established in 1985 to assist parties to resolve their disputes not only by arbitration but by other means of dispute resolution. Arbitration has been a means of resolving disputes for generations in the shipping industry. Over the last 20 years or so most construction disputes in Hong Kong which have not been resolved by negotiation, have been resolved by arbitration. On 1 July Hong Kong ceases to be a British colony and becomes a special administrative region of China enjoying a high degree of autonomy. There is thus every reason to expect that Hong Kong will continue to be a major dispute resolution centre well beyond 1997.

Alternative Dispute Resolution (ADR) is well established in New Zealand. There has been an Indigenous Arbitration Act since 1890 (prior to that date, the English legislation current from time to time applied). Current legislation comprises the Arbitration Act, 1908 and the Arbitration Amendment Act, 1938 (both as amended by subsequent Acts) in relation to domestic arbitrations and the Arbitration (International Investment Disputes) Act, 1979 and the Arbitration (Foreign Agreements and Awards) Act, 1982, giving effect to the Washington Convention of 1965 and the New York Convention of 1958 respectively, in relation to international arbitrations. In 1988 the New Zealand Law Commission published a preliminary paper on reform of the arbitration process. In that paper the Law Commission review Civil Justice Reform Act (CJRA), law relating to the different stages of arbitration, comparing the present New
Zealand. The Government accepted the recommendation of the Law Commission within a short time of its publication; but it took over four years for the resulting Bill to be reduced into the House.

The Bill seeks to achieve these purposes by providing that the Model Law, with certain modifications, shall apply to all arbitrations conducted in New Zealand, whether international in their character or domestic, and that certain supplementary provisions shall apply to domestic arbitrations, unless the parties otherwise agree and to international arbitrations, if the parties so agree. The Bill also deals with other matters, such as the arbitrability of disputes, protection of consumers and the liability of arbitrators.

In addition, the Bill provides that there shall be no right of appeal from certain applications to the court and in those cases provides for the High Court to be the relevant Court. It also, significantly, provides for the Act to apply to oral arbitration agreement. The Bill provides that, in the absence of agreement between the parties as to the number of arbitrators, there shall be three arbitrators in the case of an international arbitration and one arbitrator in the case of a domestic arbitration. There are over 50 statutes which provide for particular types of dispute to be determined by arbitration.

Mediation, or its close relative conciliation, has had an important role in the resolution of industrial disputes since the passing of the Industrial Conciliation and Arbitration Act, 1894. From 1987 to 1991 the service was provided by the Mediation Service established under the Labour Relations Act, 1987. Under the Employment Contracts Act, 1991 the former system of national collective agreements or awards was replaced by a system under which it is open to employers and employees to elect to enter into either individual employment contracts or collective employment contracts. The Mediation Service has been abolished. In its place there has been established an Employment Tribunal. Although this Tribunal's functions are, broadly speaking, the same as those of the former Mediation Service, the parties to employment contracts are not restricted to using the members of the Tribunal as they were previously restricted to using the members of the Mediation Service. The Act provides for the parties to agree on alternative dispute resolution procedure not involving the use of the Tribunals. There has been a professional institute in New Zealand since 1982, when the Zealand Branch of the Chartered Institute of Arbitrators was established. In 1988 that branch evolved into the independent Arbitrators' Institute of New Zealand. Initially, the focus of the Institute was entirely on arbitration. However importance of mediation and other ADR techniques was quickly recognised by Council of Institute. The Arbitrators' and
Mediators' Institute has been instrumental in establishing a two-year extramural course at Massey University in Palmerston North.

Among the prominent foreign arbitral institutions which have helped a lot in promotion of ADR at international level mention can be made of Permanent Court of Arbitration (PCA), World Trade Organisation, International Chamber of Commerce, Court of Arbitration for Sport, United Nations Commission on International Trade Law (UNCITRAL), Institute for the Study and Development of Legal Systems, American Arbitration Association (AAA) in USA, London Court of International Arbitration (LCIA) in United Kingdom, Stockholm Chamber of Commerce (SCC) in Sweden and Arbitral Center of the Federal Economic Chamber in Vienna.

With the advent of the Internet as a globally recognized vehicle for information travel and exchange, the ADR was re-born both in terms of cost-efficiency and speed. We witnessed the birth of various online ADR websites. An Online ADR service center functions somewhat like an offline arbitral institution. One can approach these institutions either ad hoc or on an agreement basis. American Arbitration Association launched its new online dispute resolution Internet portal on July 12, 2001. E-mediation has been quite successful (Jeffrey K Adjunct professor at Pepperdine University Law School and a Private Mediator recounts a case he handled a few years ago, CPR news monthly alternatives, Vol. 4, No 10 Nov 96). The online ombudsman office in Massachusetts also reports experience of online mediation since it was set up in 1996. Several other online mediation services have also been established recently in U.S and Canada including the Cyber Tribunal in Montreal whose services are offered free of charge. At present, there are already a number of ODR service providers conducting ODR successfully in a wide range of E-disputes. In the U.S the first website to offer online settlement of financial claims was cybersettle, followed by clicknsettle, cybersettle deals with insurance claims, clicknsettle with any type of monetary claims. BBB Online is developing the online handling of consumer complaints in the U.S. Gimmeabid dealer auction site, www.gimmeabid.com provide services to facilitate dispute resolution between buyers and sellers.

From the above study of ADR at international level one can conclude that ADR has become popular and desirable in USA, UK, Canada, Hong Kong, Sri Lanka, New Zealand and Australia as it is effective, cost wise efficient and speedy form of dispute resolution. In the last two decades, ADR initiatives have mushroomed in developing and developed countries alike. Many countries have adopted the Alternative Dispute Resolution Mechanism. Internationally, the ADR movement has also taken off in both developed and developing countries.