CHAPTER-TWO

Historical background of International Commercial Arbitration

2.1. International development of International Commercial Arbitration

2.1.1. General background

According to biblical theory, King Solomon was the first arbitrator when he settled the issue of who was the true mother of a baby boy. In the story, two mothers were making claims to one baby. Two of them had delivered baby boys. One of the babies died in the night and the mother whose baby had died was now claiming the surviving child as hers. King Solomon proposed that since neither was willing to relinquish their claim, it would be best to cut the baby into two and hand one-half to each of them. The true mother immediately protested, and said that she would rather give up her baby to the other woman rather than to see her baby killed. Solomon declared that the woman who had shown the compassion was the true mother and returned her baby to her. Thus he managed to find out the truth. Philip the Second, the father of Alexander the Great, used arbitration as a means to settle territorial disputes arriving from a peace treaty he had negotiated with the southern states of Greece as far back as 337 B.C. Later times, arbitration owed its beginnings to commercial disputes as it started with trade disputes being resolved by peers as early as the Babylonian days.

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1 The king james Bible 1 3:p. 16-28
2 “Judgment of Soloman” Biblical story
3 [2008] 7 M.L.J. {Putrajaya Holdings”}
The Sumerian Code of Hammurabi\(^5\)(c. 2100 BC) was promulgated in Babylon, and under the Code it was the duty of the sovereign to administer justice through arbitration.\(^6\) The Greeks were subsequently influenced by their Egyptian ancestry and continued the use of arbitration. This then moved along with the times into the Roman civilization and was slowly influenced by Roman laws. Such was the move not just within the Roman Empire but also over the countries with which Rome traded.\(^7\) In England, arbitration began even before the King’s courts were established. According to Massey,\(^8\) England used arbitration as a common means of commercial dispute resolution as far back as 1224. It developed as a means for merchants and traders to avoid the courts.\(^9\) The earliest recorded evidence relating to a written law of arbitration in England dates back to 1698. Eastwards, in India, arbitration was conceived in the system called the Panchayat. Usually the tribunals were constituted of wise men in the community. Arbitration in India then continued its development with the first Bengal Regulations, enacted in 1772 during the British rule, followed by more specific legislation, the *Indian Arbitration Act 1940*, which was later modernized by the *Arbitration and Conciliation Act 1996*.\(^10\) And in Bangladesh, a traditional dispute resolution mechanism known as the *shalish* is common. Disputes that are

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\(^5\) The Code of Hammurabi is the longest surviving text from the Old Babylonian period. It is far more significant in legal history than any of its forerunners, such as Ur-Nammu. Made up of 282 laws, carved in forty-nine columns on a basalt stele, the Code addresses a variety of issues arising out of civil, criminal and commercial matters. Hammurabi describes the code as “laws of Justice” intended to clarify the rights of any “oppressed man”: Steven Kriss, “The Code of Hammurabi” (3 August 2009), online: The History Guide available at<http://www.historyguide.org/ancient/hammurabi.html>.(last visited on 22.03.2014)


\(^7\) Ibid.


normally resolved by *shalish* are those involving marital disputes, desertion, divorce, child custody, maintenance and land issues.\textsuperscript{11}

\textbf{2.1.2. Origin & Development of International commercial arbitration at international level}

International arbitration has its roots in history. This picture was graphically captured by Serge Lazareff thus: International arbitration, it is said, has its roots in history. Modern commercial arbitration is a true product of the city, even though there were precedents in the late XVIIIth century. It is well known that the first contracts to be submitted to arbitration dealt with commodities. As the disputes involved in most cases perishable goods, they had to be settled rapidly and confidentially. London became, in the sixteenth century, the centre for maritime and financial matters, insurance, commodities and then metals. This is still the case today\textsuperscript{12} Despite this development, the common law courts were slow to show interest in dealing with commercial matters. This was understandable because their jurisdiction had a geographical limitation. The courts were restricted to matters which had arisen in England and between English citizens. According to Smith & Keenan: Foreign matters and many of these commercial disputes did involve either a foreign merchant or a contract made to be performed abroad, were left to some other body, especially if it could raise questions about the relations between the King and Foreign Sovereign\textsuperscript{13}

Furthermore the Royal Courts did not have a monopoly of the administration of justice and certain local courts continued to hear cases. Mercantile law (*or lex mercatoria*) is based upon


mercantile customs and usages. The law developed separately from common law. Disputes between merchants, local and foreign, were resolved at the fair or borough. As succinctly put by Smith & Keenan: Disputes between merchants, local and foreign which arose at the fairs where most important commercial business was transacted in the fourteenth century were tried in the courts of the fair or borough and were known as courts of pie powder’ (pieds poudres) after the dusty feet of the traders who used them. The courts of the fair or borough were presided over by the Mayor or his deputy or, if the fair were held as part of a private franchise, the steward appointed by the franchise holder. These courts applied mercantile law and the jury was made up of merchants. As an institution, arbitration originated from the practices of merchants and traders of referring for settlement, disputes which arose among them upon matters of account and other trading differences to persons specially selected for that purpose. With the development of the courts of the fair and borough, maritime disputes were heard by maritime courts sitting in major ports such as Bristol. Subsequently, the Court of Admiralty developed and took over the work of the mercantile courts. From the seventeenth century, the common law courts began to acquire the commercial work and many rules of the law merchant were incorporated into the common law. In doing this, the problem of jurisdiction over foreign nationals still arose. This was achieved partly by fiction. Smith and Keenan accurately captured the situation when they wrote thus:

“to get over the fact that technically it still lacked jurisdiction over matters arising abroad, the court accepted allegations that something that had occurred abroad had in fact occurred in England within its jurisdiction e.g. by using the fiction that Bordeaux (in France) was in Cheapside (in England).”

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14 Ezejiofor. G Op. Cit. at 20
15 Smith & Keenan, Op. Cit. at 11
Historically, therefore arbitration had an attraction for merchants and traders especially those of them dealing in perishable commodities and the need to dispose of the disputes expeditiously and in accordance with mercantile law and custom. However, with time it became obvious that the common law courts had their own inhibitions. According to Ezejiofor:

“As the value of this mode of dispute settlement became more pronounced it was discovered that the practice under the common law was not entirely satisfactory and needed amplification. Consequently provisions were made in successive statutes, to improve upon the common law practice”.16

Apart from the issue of technicality, at common law, arbitral agreement could be oral or in writing. For such agreements to be valid there must be an actual dispute and a submission to a particular arbitrator.17 An arbitrator appointed by parol agreement can be removed by either of the parties.18 Because of these deficiencies, it became clear that statutory intervention was imperative.

The object of these enactments were to reinforce the binding effect on the parties of submission to arbitration to make awards more easily enforceable and to remedy other defects which the common law practice had highlighted.

In 1889, the UK Parliament passed the Arbitration Act. This Act was itself, in large part, declaratory: either of previous statutes (that of 1854, the Civil Procedure Act, 1833 and the Arbitration Act of 1698) or of commercial and convincing practice19. were other Acts of 1924, 1930 and 1934 that led to a Consolidation Act of 1950, known as the Arbitration Act 1950. Others were those of 1975 and 1979. On the sources of Arbitration Laws in England Sutton, et.

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16 Ezejiofor, Loc. Cit.
17 Doleman & Sons v Ossett Corpn. (1912) 3 K.B 257
state thus: “There is no single source of English Arbitration Law. Prior to the Arbitration Act 1996, there was not even a partial statutory code, for the conduct of arbitrations. The Arbitration Acts 1950-1979 were more concerned with filling the gaps in an incomplete arbitration agreement and specifying the powers of the High Court.”

Thus, the 1996 Arbitration Act restated the former arbitration legislation with some changes. It has codified principles established by previous case law and also adopted part of the Model law. Be that as it may, the Arbitration Act, 1996 is the principal UK arbitration statute. This Act was also influenced by the model law which is popularly known as United Nations Commission on International Trade Law.

This analysis is not to suggest that arbitration was conducted in England only. However, we are reminded by Lazareff that arbitration does not only have its root in history but a true product of the City of London. He went further to assert thus: International commercial arbitration as we know it, started between the two World wars. Eisemann, Secretary General of the ICC Court of Arbitration, used to say that the first ICC arbitration he conducted, was spontaneous, without rules and horrendously, without a fee. International Commercial arbitration was then a procedure whereby gentlemen would settle in a gentlemanly way disputes between gentlemen. The penalty for non-compliance was blackballing nothing more. How far away that seems today.

It is far away indeed because there are various Arbitration Rules now. Similarly arbitration proceedings are almost as costly and prolonged as litigation, the fees paid arbitrators are high and the consequence for non-compliance is recourse to the courts for enforcement.

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21 United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966
22 Id
There are two other reasons why the evolution centered around England. **Firstly**, London was the centre of trade worldwide. Indeed the London Court of International Arbitration was founded in 1892, it is located in London and is probably the oldest arbitration institution in the world. **Secondly** our legal history is intertwined with the English legal system. *A fortiori* our laws on arbitration leaned heavily on the English laws until 1988. Arbitration can be seen therefore as one of the invisible exports of England. Today, there are arbitral centres and institutions worldwide. Wherever they are located, the point has to be made that arbitration evolved essentially as a private sector judicial proceedings. The law came in to merely reinforce its importance and relevance.

2.1.3. United Nations Commission on International Trade Law (UNCITRAL)

In an increasingly economically interdependent world, the importance of an improved legal framework for the facilitation of international trade and investment is widely acknowledged. The United Nations Commission on International Trade Law (UNCITRAL), established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966, plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law. Those areas include dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions,
procurement and sale of goods. These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, nonmember States, and invited intergovernmental and non-governmental organizations. As a result of this inclusive process, these texts are widely accepted as offering solutions appropriate to different legal traditions and to countries at different stages of economic development. In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law.

2.1.4. Some major International Arbitration Institutes

A summary description of some major arbitration institutions which are administering international Arbitration cases:

➢ **International Court of Arbitration of the International Chamber of Commercial (ICC)**

The world’s foremost organisation in international arbitration, the ICC International Court of Arbitration, was established in 1923.

Its seat is in Paris. ICC arbitrations take place each year in some 35 different countries. The ICC Court is not really a court. Arbitrators appointed for each particular case decide on the matters submitted to ICC arbitration. The role of the Court’s 80 or more members from 70 different countries is to monitor the arbitral process. One important and unique feature of the Court is that it scrutinizes and approves arbitral awards submitted in draft form by arbitrators. This quality-control mechanism is a key element of the ICC arbitration system. The Court’s secretariat consists of a permanent staff of over 40, including 25 lawyers divided into teams that monitor
cases. During the year 2000 alone, the ICC Court administered some 550 new cases involving parties from over 100 countries.

➢ **International Centre For Settlement Of Investment Disputes (ICSID)**

The International Centre for Settlement of Investment Disputes (ICSID) was established by the World Bank under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States. The Convention has been ratified by some 135 States. The centre’s main purpose is to facilitate the settlement of investment disputes between governments and foreign investors. Since 1978, the Centre has had a set of additional facility rules, authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals, which fall outside the Convention. (The cases may be where a party is not from a member State or where the dispute is not an investment dispute). Proceedings need not be held at the Centre’s headquarters in Washington. Advance consent by governments to submit investment contracts between governments and investors, as well as in over 900 bilateral investment treaties. By January 2001, the Centre had concluded over 51 cases, and an additional 30 cases were pending.

➢ **China International Economic And Trade Arbitration Commission (CIETAC)**

The China International Economic and Trade Arbitration Commission (CIETAC), one of the world’s busiest international arbitration centres, was established in 1954 to settle disputes between foreign companies and Chinese firms. CIETAC has set up sub-commissions, including the active Shanghai Commission. In 1998, CIETAC revised its arbitration rules to enable it to hear domestic disputes involving joint ventures with foreign investors and wholly-owned foreign
companies established in China. The total number of new arbitration filing at CIETAC during 19999, including those at its branch offices, amounted to some 700 cases.

➢ **International Centre For Dispute Resolution Of The American Arbitration Association (AAA).**

Founded in 1926, the American Arbitration association (AAA) offers a wide range of services, including education and training. In the United States in 1999, it administration over 140,000 disputes through its specialized rules for disputes in the areas of labour, insurance, construction, commerce, securities, etc. In 1996, AAA established the International Centre for Dispute Resolution in New York City, which now administers all AAA international Arbitration Rules, as revised in 2000, govern arbitrations of international disputes referred to AAA. In 1999, its international caseload amounted to over 450 disputes.

➢ **Arbitration Institute Of The Stockholm Chamber Of Commerce (SCC Institute)**

The American Institute of the Stockholm Chamber of Commerce (SCC Institute) was established in 1917 and is a separate entity within the Stockholm Chamber of Commerce. Now a days it is become most preferred place of International Commercial Arbitration. In the 1970s, it became recognised by the United States and the Soviet Union as a neutral centre for the resolution of East-West trade disputes. Since then, the SCC Institute has expanded its services and has administered cases involving parties from different countries.

**London Court Of International Arbitration (LCIA)**

“The London Court of International Arbitration (LCIA)”, based in London, is perhaps the longest established commercial arbitration institution. It took a major step towards
internationalization in 1985, through the formation of the London Court of International Arbitration. Its principle functions are the appointment of arbitral tribunals, the determination of challenges to arbitrators, and the control of costs. It does not scrutinize arbitral awards. It had an annual caseload of approximately 70 by the end of 1999.

➢ Kuala Lumpur Regional Centre For Arbitration

Established in 1978 under the auspices of the Asian-African Legal Consultative Committee with the assistance of the Government Consultative Committee with the assistance of the Government of Malaysia, the kuala Lumpur Regional Centre for Arbitration of business disputes within the region. The Centre applies the 1976 UNCITRAL Arbitration Rules with certain modifications. An amendment to the Malaysian Arbitration Act excludes international arbitrations conducted under the centre’s rules from the supervision of Malaysian courts. The Centre offers facilities such as hearing rooms, arbitrators retiring room, library, and secretarial assistance and catering.

➢ Permanent Court of Arbitration (PCA)

PCA Established by treaty at the First Hague Peace Conference in 1899, the Permanent Court of Arbitration is the oldest global institution for the settlement of international disputes. The Court offers a wide range of services for the resolution of international disputes which the parties concerned have expressly agreed to submit for resolution under its auspices. Unlike the International Court of Justice, the Permanent Court of Arbitration has no sitting judges: the parties themselves select the arbitrators. Another difference is that sessions of the Permanent Court of Arbitration are held in private and are confidential. The Court also provides arbitration in disputes between international organisations and between states and international

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23 Heauge/justice portel/index
organisations. Working in close co-operation with the Permanent Court of Arbitration, the Hague Justice Portal has digitalised a number of the Court’s historic international arbitration.

➢ **Cairo Regional Centre For International Commercial Arbitration (CRCICA)**

The Cairo Regional Centre for International Commercial Arbitration (CRCICA), like the Kaula Lumpur Centre, was established in 1978 under the auspices of the Asian-African Legal Consultative Committee, with the assistance of the Egyptian Government. The Centre’s main activity is the administration of arbitration cases, both national and international. It’s reported caseload for the year 2000 was about 38 cases. These concerned construction, export/import and supply contracts, as well as management and operation contracts and insurance disputes; in 1992 the Centre opened a maritime arbitration branch in Alexandria.

➢ **International Commercial Arbitration Court At The Russian Federation Chamber Of Commerce And Industry (ICAC)**

Based in Moscow, ICAC (formerly the arbitration Court at the USSR Chamber of Commerce and Industry) has several decades of experience as a prominent arbitration institution.

➢ **Arbitration And Mediation Centre Of The World Intellectual Property Organization**

➢ **The OHADA Permanent Court Of Justice And Arbitration**

The 1993 OHADA Treaty ratified by 16 (mainly) West and Central African States provides a single unified legal framework for business law in the region. Among its institutions is the Permanent Court of Justice and Arbitration whose seat is in Abidjan, Cote d’Ivoire. In 1998, the
OHADA Arbitration Act came into force, together with the Rules of Arbitration of the Permanent Court. In its administrative capacities, the Court manages arbitrations referred to it by the parties. It also scrutinizes draft arbitration awards. Although its arbitration activities have been in place only from 200, it is expected to play a leading regional role in the administration of arbitration disputes in West and Central Africa.

➢ **The Indian Council of Arbitration (ICA)**

In India, the Indian Council of Arbitration was established in 1965 as the apex arbitral organisation at the national level. In the recent years there has been an increasing trend in the membership of the council. At present the ICA has about 4200 members. Recently there has been increase in the number of cases with the Council. It is expected that the cases involving foreign parties will increase considerably as international contracts actually contain an arbitral clause referring to the arbitration rules of the Council. The Council provides facilities for settlement of International commercial disputes by arbitration. Its rules of arbitration have been framed on international standards and they provide a guarantee wished for the trade for quick and just settlement of the dispute. Disputes between the public sector trading organisations or parties or undertakings of foreign Government with Indian Government, can also be referred to arbitration under the Council’s rule.

**2.1.5. International conventions on International Commercial Arbitrations**

**CONTEMPORARY INTERNATIONAL ARBITRATION CONVENTION**
With this historical background, the foundations for the contemporary legal regime for international arbitration were laid at the nineteenth and beginning of the twentieth centuries. As discussed below, the basic legal framework for international commercial arbitration was established in the first decades of the twentieth century with the 1923 Geneva Protocol and 1927 Geneva Convention, with the enactment of national arbitration legislation that paralleled these instruments, and with the development of effective institutional arbitration rules. Building on these foundations, the current legal regime for international commercial arbitration was developed in significant part during the second half of the twentieth century, with countries from all parts of the globe entering into international arbitration conventions (particularly the New York Convention) and enacting national arbitration statutes designed specifically to facilitate the arbitral process; at the same time, national courts in most states gave robust effect to these legislative instruments, often extending or elaborating on their terms. As discussed below, this avowedly “pro-arbitration” regime ensures the enforceability of both international arbitration agreements and arbitral awards, gives effect to the parties procedural autonomy and the arbitral tribunal’s procedural discretion, and seeks to insulate the arbitral process from interference by national courts or other governmental authorities.

At the same time, during the past several decades, the current legal regime for international investment arbitration was developed, including particularly through the adoption of the ICSID Convention\(^ {24} \) and an extensive network of “bilateral investment treaties” (“BITs”). Similarly, if less extensively and comprehensively, followed by the 1929 General Act on the Pacific Settlement of International Disputes.\(^ {25} \) These instruments reflected a generally, “pro-arbitration”

\(^{24}\) Convention on the Settlement of Investment Disputes Between States and Nationals of Others States,2009
approach to the use of international arbitration to resolve interstate disputes peacefully, while setting forth a basic legal framework in which international arbitrations could be conducted.

1. 1899 and 1907 Conventions for the Pacific Settlement of International Disputes

By the beginning of the twentieth century, proposals for more universal state-to-state arbitration mechanism became credible. Although seldom discussed in today’s literature, an 1875 project of the Institut de Droit International produced a draft procedural code, based on existing interstate arbitral practice and designed to provide basic procedural guidelines and mechanism for future ad hoc arbitrations.26 The project provides impressive testimony to both the frequency of interstate arbitrations and the perceived desirability of more consistent, transparent, and internationally neutral procedures for such arbitrations.

In 1899, the Hague Peace Conference produced the Hague Convention of 1899 on the pacific Settlement of Disputes, which include chapters on international arbitration and established a “Permanent Court of Arbitration”, to administer state-to-state arbitration under the Convention.27 These provided the foundation for more formal interstate adjudication, in the Permanent Court of International Justice and International Court of Justice,28 as well as the founding of the Permanent Court of Arbitration.29 At the same time, arbitration remained a preferred method of

resolving interstate disputes, often selected by states during the twentieth century in preference to standing international judicial bodies.\textsuperscript{30}

The 1899 Convention was revised in 1907, with the new Convention for the Pacific Settlement of International Disputes including the addition or amendment of a number of provisions regarding international arbitral proceedings.\textsuperscript{31} In 1929, a “General Act on Pacific Settlement of International Disputes” was negotiated (with a number of States, principally Western European, ultimately ratifying the Act).\textsuperscript{32} As with the 1899 and 1907 Conventions, the Act sets forth a basic legal framework (subject to contrary agreement by the parties) for international arbitrations between state parties.

2. Geneva Protocol and Geneva Convention

During the first decades of the twentieth century, businesses and lawyers in development states called for legislation to facilitate the use of arbitration in resolving domestic and, particularly, international commercial disputes.\textsuperscript{33} These appeals emphasized the importance of reliable, effective, and fair mechanisms for resolving international disputes to the expansion of international trade and investment. In 1923, initially under the auspices of the newly found International Chamber of Commerce, major trading nations negotiated the Geneva Protocol on

\textsuperscript{30}Charney, Third Party Dispute Settlement and International Law. 36 Colum. J. Int’l 65, 68 (1997) (“While the establishment of the World Court was particularly significant, ad hoc arbitrations….continue to be important” in the twentieth century.); A. Stuyt, Survey of International Arbitrations 1794-1989(3d ed. 1990); Merrills, The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory, 54 Neth. Int’l L. Rev. 361 (2007).


\textsuperscript{32}General Act on pacific Settlement of International Disputes, done at Geneva on September 26, 1928, 93 L.N.T.S. 345, entered into force on August 16, 1929.

Arbitration Clauses in Commercial Matters.\textsuperscript{34} The Protocol was ultimately ratified by the United Kingdom, Germany, France, Japan, India, Brazil and about two other nations. Although the United States did not ratify the Protocol, the nations that did so represented a very significant portion of the international trading community at the time.

3. New York Convention

The Geneva Protocol and Geneva Convention was the result of United Nations Convention on the Recognition and Enforcement of foreign arbitral awards. Generally referred to as the “New York Convention,” the treaty is by far the most significant contemporary legislative instrument relating to international commercial arbitration. It provides what amounts to a universal constitutional charter for the international arbitral process, whose sweeping terms have enabled both national courts arbitral tribunals to develop durable, effective means for enforcing international arbitration agreements and arbitral awards.

The first draft of what became the Convention was prepared by the International Chamber of Commerce in 1953. The ICC introduced the draft with the observation that “the 1927 Geneva Convention was a considerable step forward, but it no longer entirely meets modern economic requirements,” and with the fairly radical objective of “obtaining the adoption of a new international system of enforcement of arbitral awards.”\textsuperscript{35}

Preliminary drafts of a revised convention were prepared by the ICC and the United Nation’s Economic and Social Council (“ECOSOC”), which then provided the basis for a three-week


conference in New York the United Nations Conference on Commercial Arbitration attended by 45 states in the spring of 1958. The New York Conference resulted in a document the New York Convention that was in many respects a radically innovative instrument, which created for the first time a comprehensive legal regime for the international arbitral process. The original drafts of the New York Convention were listening carefully wholly on the acknowledgment and enforcement of arbitral awards, with no stern thought to the effectiveness of international arbitration agreements. The text of the Convention was accepted on June 10, 1958, by a unanimous vote of the Conference (with only the United States and three other countries abstaining).

4. Inter-American Convention

In the early years of the twentieth century, much of South America effectively turned its back on international commercial arbitration. Only Brazil ratified the Geneva Protocol, and even it did not adopt the Geneva Convention. South American states were very reluctant to ratify the New York Convention, for the most part beginning to do so in the 1980s.

The Inter-American Convention is similar to the New York Convention in many respects; Indeed, the Convention’s drafting history makes clear that it was intended to provide the same results as the New York Convention. Among other things, the Inter-American Convention

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provides for the presumptive validity and enforceability of arbitration agreements\textsuperscript{40} and arbitral awards\textsuperscript{41} subject to specified expectations similar to those in the New York Convention.

5. European Convention

The European Convention entered into force in 1964, and 31 states are currently party to it. Most European states (but not the United Kingdom, the Netherlands, or Finland) are party to the Convention, while some ten non-EU states are parties, including Russia, Cuba and Burkina Faso.\textsuperscript{42} The Convention consists of 19 articles and a detailed annex (dealing with certain procedural matters).

6. ICSID Convention

The International Centre for the Settlement of Investment Disputes (“ICSID”) is a specialized arbitration institution, established pursuant to the so-called “ICSID Convention” or “Washington Convention” of 1965.\textsuperscript{43} ICSID was established at the initiative of the International Bank for Reconstruction and Development (“IBRD” or “World Bank”) and is based at the World Bank’s Washington headquarters.

The ICSID Convention is designed to facilitate the settlement of “investment disputes” (i.e., “legal dispute arising directly out of … investment”) that the parties have agreed to submit to ICSID.\textsuperscript{44} Investment disputes are defined as controversies that arise out of an “investment” and

\begin{footnotesize}
\begin{enumerate}
\item Inter-America Convention, Art. 1.
\item Inter-America Convention, Art. 4, 5.
\item G. Born, \textit{International Commercial Arbitration} 102 (2009)
\item Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, product at Washington, D.C., 18 March 1965.
\item ICSID Convention, Art.25(1).
\end{enumerate}
\end{footnotesize}
are between a Contracting State or designated state entity (but not merely a private entity headquartered or based in a Contracting State) and a national of another signatory state. As to such disputes, the Convention provides both conciliation and arbitration procedures. ICSID arbitrations are governed by the ICSID Convention and the ICSID Arbitration Rules.

7. Bilateral Investment Treaties or Investment Protection Agreements

Bilateral investment treaties (“BITs”) or investment agreements (“IPAs”) became common during the 1980s and 1990s as a means of encouraging capital investment in developing markets. Capital-exporting states (including the United States, most Western European states, and Japan) were the earliest and most vigorous proponents of the negotiation of BITs, principally with countries in developing regions. More recently, states from all regions of the world and in all stages of development have entered into BITs. A recent tally indicated that more than 2,500 BITs are presently operative.

2.1.6. Theories/Principles of International Commercial Arbitrations

When the parties have chosen to have their contractual relationship, and hence any ensuing disputes, governed by general principles of international law by referring, in the applicable law provision of their agreement, to general principles of international law, principles common to certain legal systems, lex mercatoria, etc, the arbitrators are bound to give effect to that choice, whether or not they consider the choice appropriate.

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46 ICSID Convention, Arts. 25(1).
48 There are also multilateral conventions, in addition to the ICSID Convention, in particular regions or economic sectors. These include the Energy Charter, the North American Trade Agreement, and the ASEAN Investment Agreement.
Indeed, most of the recent legislation on international arbitration recognises the parties’ right to choose general principles of law to govern their contractual relations, by providing that arbitrators are required to apply ‘the rules of law’ rather than ‘the law’ chosen by the parties.”

Certain legal systems discourage this solution, as does the UNCITRAL Model Law, known for its relative conservatism; Article 28 (2) of the Model Law provides that, absent a choice by the parties, ‘the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable’. Despite the fact that it is generally based on the UNCITRAL Model Law, the German statute of 22 December 1998 has departed from the formula with respect to the choice of law rule. It followed in this respect the Swiss model and holds that the award of arbitration proceeding shall be based and or framed according to pre determined rules of law, which has been primarily chosen by the parties as well appropriate to the amicable solution of the disputes. Nonetheless, it follows the UNCITRAL Model Law in restrictive the selection of the arbitrators to ‘the law’ as contrary to the ‘rules of law’ most intimately associated with the dispute missing a choice of the parties.

In contrast, other recent laws permit arbitrators to apply transnational rules if they deem it appropriate and absent agreement by the parties. In any case, most national laws, in following Article 36 of the Model Law, do not permit the arbitrator’s decision on applicable law to be subject to review of state courts during exequatur proceedings or an action to set aside the award, thus providing arbitrators with a large degree of latitude. The notion that arbitrators may apply general principles of law in the absence of any agreement of the parties as to applicable law was embodied in a resolution adopted by the *International Law Association in Cairo on 28 April 1992*, which stated that:
the fact that an international arbitrator has based an award on transnational rules (general principles of law, principles common to several jurisdictions, international law, usages of trade, etc.) rather than on one law of a particular State should A more controversial question is whether the not in itself affect the validity or enforceability of the award; (1) where the parties have agreed that the arbitrator may apply transnational rules or; (2) where the parties have remained silent concerning the applicable law”

2.2. National development of International Commercial Arbitration

2.2.1 Introduction:

Conventional perception of access to justice as understood by a lay man is to approach the courts of law. For a common man a court is where justice is meted out to him. But the courts have become unreachable due to different complexities such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities etc. To get justice through courts one has to go face this harsh reality and complexities as well expensive procedures involved in litigation.

Therefore a movement started for outside court settlements to provide speedy justice. Amongst the various ADR mechanisms Arbitration is one of the popular method of dispute resolution specially for commercial in nature, because with Economic Liberalization and the opening up of the market, there is a phenomenal growth of international trade, commerce, investment, transfer of technology, developmental and construction works, banking activities and the like are increasing day by day. To handle with the fast changing situation, India has updated
its arbitration legislation in order to provide a level playing field for both domestic and foreign entrepreneurs. Indian arbitration law ensures fairness and justice to all the concerned parties.

Over the most recent couple of decades, the business exercises got reached out outside India which was before limited inside the nation. Alongside this the necessity for setting up of a framework which would be receptive to the speedy determination of any question that may emerge throughout business exchanges between various nationalities wound up noticeably required.

Because of the development in the global exchange and business and furthermore by virtue of long postponements happening in the transfer of suits and bids in courts. There has been magnificent development towards the determination of question through option discussion of arbitration. Assertion is a question determination technique, which is an other option to attempt a debate in the court framework with a jury and judge. The option strategy for settlement of question through arbitration is a rapid and helpful process, which is being taken after all through the all over the world.

2.2.2. Concept of Arbitration:

No doubt arbitration is a legal mechanisms to provide amicable solution for a certain problems, which generally is an outside court mechanisms but legally obligatory judgment analogous to the decree of the lover courts. Arbitration is overwhelmingly a methods for settlement of disputes in the business field. It is a versatile technique for solution of legal disputes involving in commercial issues, which can give an convenient, cautious, confidential, sensible and ultimate solution for a disputes. It gives answer for the question through at least one independent third party, who are known as an arbitrator, they selected by or for the benefit of
the parties themselves. Arbitration is semi-legal technique formal strategy for the settlement of question.

The utilization of Arbitration is proper to civil matters just and in vast part to the proficient transfer of debate in the field of business, all the more so in the range of International Trade and Commerce, since with the steadily developing measure of worldwide exchange and speculation, organizations are more mindful than any other time in recent memory on the need to locate a reasonable means for settling universal business and venture disputes. It is not another arrangement of settlement of question in India. It has an exceptionally old recorded foundation and custom for common settlement of question. By and by, discretion law is administered by the 'Arbitration and Conciliation (Amendment) Act, 2015.

2.2.3. Arbitration in Pre British regime

The law identifying with mediation was not new to India lawful framework, even before the presentation of the British govern, while it might not have been fitting in the sorted out for like today’s. It was in presence as "Panchayat" to which individuals were chosen by their status and exist in the general public. Boss Justice Marten has given a comment on this framework as a noticeable element of the common Indian Life and recommended an exceptionally viable comment in the case of Chanbasappa Gurushantappa v. Balingaya Gakurnaya, in taking after sense that arbitration resembles a way of determination of question by alluding the matter to the outsider, is one of the regular technique and proposing an agreeable arrangement in view of the recommended conclusions by the gatherings. In this period there was no a particular law for arbitration procedures.

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2.2.4. Regulations relating Arbitration
Amid the British time frame in India, there was no a particular enactment or instruments for arbitration procedures. Indeed, even than under the Panchayats framework it was reflected as settlement of disputes through the middle man. In like manner The Bengal Regulations of 1772, 1780, 1781, 1793 were likewise intended to empower arbitration in these periods in India. Lord Cornwallis has likewise tried to present the outside court settlement framework through the Regulation of 1787, under which town panchayats were mindful to guarantee the settlements of question through the mediation procedure. Similarly there were an arrangement for a unique hardware under town panchayats under the Regulation of Madras of 1816 which gives obligatory support of the villagers by town Munsif too by District Munsif. Under the introduction of Bombay Regulation of 1827, it were explicitly given that there might be an outside court question settlement through assertion.

2.2.5. Indian Arbitration Act, 1899:

This Act was based upon English Arbitration Act, 1899, it was enforceable in the cases where, if the subject matter of arbitration were the subject of a suit, as well the suit could, whether with leave or otherwise, be instituted in a jurisdiction of Presidency Town. The most special feature of this Act, that the provision for reference of disputes, present as well as future, to arbitration by agreement, exclusive of the involvement of the judicial machinery. The application of the Act, was restricted to the Presidency Towns only. The Local Government was also given the power under section 2 to extend jurisdiction of the Act, but was not practically found in practice.

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51 Section 2, The Indian Arbitration Act, 1899
52 Supra Note 7, para 1.18
2.2.6. Code of Civil Procedure, 1908:

The Act of 1899 did focuses the outside court settlement under the organized dispute settlement mechanisms but it was contained with the provisions under which parties to a dispute may present their arbitration agreement before the court, then it would refer for arbitration and as well as the provisions without the intervention of court. With the amendment of 1999 an effort has been made to ensure the dispute settlement through arbitration under the provisions of section 89 of the said code.

2.2.8. The Arbitration Act, 1940

The Mackinnon Committee has made a recommendation in 1927 followed by the English Act of 1934. After that in 1938, the Government of India appointed Shri Ratan Mohan Chatterjee, Attorney-at-Law, as a special officer for revising of legislation of Arbitration and the revised Act which was came into force in 1940. This Act received the assent of the Governor General on 11th March, 1940 and came into force on 1st July, 1940. It was an Act to merge and amend the legislation associated with the arbitration. It was therefore, can be a complete Code of legislation for states. This Act extended to whole of India other than J&K. This Act managed broadly three sorts of Arbitration viz., (1) arbitration without intervention of Court, (2) Arbitration with involvement of Court where there is not a suit is pending and (3) Settlement in suits. The Arbitration Act, 1940, was dealt with only domestic arbitration.

2.2.9. Scope of Arbitration proceedings in India

Arbitration is mainly consider as a dispute resolution mechanisms in the commercial field reason being that in international trade it is often easier to enforce a foreign arbitral award than to enforce a judgment of the Court. The last decades of 20th century experienced worldwide
acceptance as the arbitration as popular mode for the resolving commercial disputes.\textsuperscript{53} The arbitration is conducted in harmony with the terms of the parties’ arbitration agreement, which is generally accommodated in the terms and conditions of the commercial contract entered into by the parties. The disputing parties agree to take their dispute to arbitration. Now a days it is becoming more popular dispute settlement mechanisms, particularly in construction, industrial and labor disputes. It has been considered the most appropriate mechanism for resolving disputes between parties to domestic or international contracts.

There are some significant institutions making significant contribution in success of ADR services in India. These institutions are Indian Council for Arbitration (ICA) and International Centre for Alternative Disputes Resolution (ICADR), the Federation of Indian Chambers of Commerce and Industry (FICCI), Indian Chamber of Commerce (ICC), the Bengal Chambers of Commerce and Industry (BCCI). An international institution means the International Court of Arbitration (ICA), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA). All these institutions have rules expressly invented for conducting arbitration proceedings in structured form. These rules are originated on the basis of experiences and that sway, they address all probable situations that may takes place in the process of arbitration.

The Indian Council for Arbitration came into existence on April 15, 1965 with the objectives to facilities both types of domestic and international commercial disputes and conciliation of international trade complaints received from Indian and foreign parties.

\textsuperscript{53} Kumar Sumit, Indian Setup and Online ADR, www.legalserviceindia.com