CHAPTER – II

HISTORICAL BACKGROUND AND EVOLUTION OF ALTERNATIVE DISPUTE RESOLUTION SYSTEM
Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees and waster of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough”- Abraham Lincoln

In the present chapter, the researcher has traced the historical background together with the evolution of alternative disputes resolution system. In this chapter, the researcher has briefly traced out the alternative disputes resolution system obtaining in various industrialized countries throughout the world and with special emphasis on the Indian historical background on the alternative disputes resolution system. Further, the object of this chapter is also to inquire into the historical roots of the arbitral system in various countries and trace the formation of arbitral institutions and how they are becoming an instrument in settling international trade dispute by offering professional support and services. The Scholar, therefore, restricted his research into the areas and placed his emphasis on USA, UK, China, Germany, France, Singapore, Sweden and Switzerland and of course India. The arbitral institutions are ICC, LCIA, LMAA, AAA, and the UNCITRAL Model Law are also discussed wherever necessary.
In any society, dispute resolution outside of courts is not a new concept and such Judicial, indigenous methods to resolve conflicts outside the formalized judicial system ever existed since organised socialized societies. However, what is new is the extensive promotion and proliferation of alternative disputes resolution models, its extensive use of court-connected alternative disputes resolution and the increasing use of such alternative disputes resolution as a tool to realize goals broader than the settlement of specific disputes in the modern times.

It has been observed that whenever two people get together for the purpose of transaction or business, misunderstanding and conflict is very common between them. Such conflict needs resolution, especially the kind that is quick and effective. Besides litigation, there is another way through which the disputes get resolved that is the way of Arbitration which is quick and effective in nature\(^1\). In addition to the normal judicial system, in most legal systems these days, most disputes and conflicts are settled or resolved in some way short of a formal trial such as through an embeds or Ombudsman who is a person who works for the government or for private industry by sector, e.g. banking, energy, financial services, aviation to resolve disputes with providers or arbitration i.e., a private hearing with a third party who is not necessarily a state appointed judge. Many special kinds of disputes also go to special tribunals which are more administrative and not courts, e.g., resolution of labour disputes, administrative tribunals, land revenue, accidents tribunals and many more. Arbitration has developed over a period as a method for settling disputes privately, but its decisions are enforceable by law. An arbitrator is a private extraordinary judge between the parties, who chosen by themselves on mutual consent to sort out controversies between them. Arbitrators are so called due to they have an arbitrary power; for if they observe submissions and keep within proper bounds their sentences are definite from which there is no appeal. Arbitration provides greater flexibility, prompt settlement of national and international private disputes and restricted procedure of appeal than litigation. Therefore, on the comparison, arbitration is a simplified version of a trial involving no discovery and simplified rules of evidence. Either both parties concurs single arbitrator, or each party choose one arbitrator or the two arbitrators elect the third arbitrator act as a president of

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tribunal and to comprise a panel. It is a fact that the litigation is expensive, time-consuming and full of complexities. Alternative disputes resolution is a system whereby disputants resolve their disputes with minimum outside help and the procedure consists of generally four basic methods of dealing with disputes which are: (1) Negotiation, (2) Mediation, (3) Conciliation and (4) Arbitration.

A look into the history of arbitration, it contains growth, evolution, and development of the Law of Arbitration. Therefore, arbitration is not the creation of one man in one day but requires experiences, proper planning according to the needs of a public through generations. However, in recent times, the number and complexity of civil disputes are increasing inexorably. In the private sector, the process of arbitration has supplemented the courts in their work of dispensing justice. Thus, more and more people are likely to become involved in the arbitral process either as disputants or as legal counsels or as arbitrators. It is clear that arbitration has become an important alternative to litigation in the resolution of commercial disputes. Sir Michael Kerr perceived that “the growth of arbitration, as an alternative to litigation, reflects its ability to escape from the limitations of the courts”.

2.1 United Kingdom

In British law, there is no statutory definition of arbitration. The common law requirements are formulated disputes or differences between the parties, the submission of that dispute or difference by agreement to a third party for resolution in a judicial manner and an opportunity for the parties to present evidence or submissions in support of their claims in a dispute.

Arbitration in London has a high reputation throughout the commercial world. The arbitration in the UK is closely monitored by the industries. For a number of reasons, London remains an attractive venue for parties to choose as a seat for arbitration. A leading hub for international commercial arbitration is in London due to its pre-eminence as the center for shipping, insurance, commodity, and financing businesses. Arbitration became ubiquitous in London, not least because of the

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capacity of commercial transactions and, inevitably, disputes which occurred there. Typically, it was more convenient for the arbitrator to use according to the law of the country of which he was a national when required in arbitral proceedings. England is the home of common law, offered a familiar legal regime and a host of specialists suitable to act as arbitrators. These factors placed London firmly on the map as an arbitration center of choice for businesses of the world over.

The exact date as to when the first formal non-judicial Arbitration of disputes took place cannot be ascertained. In England, the system of alternative disputes resolution system in the form of arbitration has roots since ancient times. Such a system has been adopted and long practiced by the merchants and traders for dispute resolution in matters connected to accounts and trading differences and persons were specially selected for this purpose. The arbitration initially applied for dispute resolution in the cases of personal chattels or personal wrongs, but however, gradually its horizon extended to the disputes relating to real estate and other matters also. Arbitration is recognized in the Bible of Old and the New Testaments and thus at first in the history of Bible started with the arbitration in non-judicial. Jesus Christ said in New Testament about the Arbitration as a Judiciary and it resolve the disputes as of the courts. As per English law, the Arbitration Act 1697 is the first law on arbitration but when the Act was passed it was at that point common. The first and principal judicial decision was recorded in 1610 at England; the acclaimed Elizabeth an English lawful researcher and the Sir Edward Coke noticed to a prior decision was decided from the Edward IV rule. Thus, the practice was governed by the Common law till the passing of the Arbitration Act, 1697. In England in 1698, Parliament enacted a law of arbitration. The foundation upon which this statute stood was the well-understood practice of consensual referrals of litigated cases to arbitration. References as they were called had an important advantage that private arbitration is required. When a reference was accepted to the agreement was made a rule i.e. an order of court. This made the arbitration agreement, and the awards are enforceable through the contempt power. The Jay Treaty of 1794 between United States and the Britain sent undecided issues of debts and boundaries of arbitration, where on November 19, 1794 Jay’s Treaty was signed by representatives of the United States and Great Britain, which try

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5 John Jay’s Treaty, (1794–95)
to settle outstanding issues between the two countries but left unresolved since American independence. The treaty proved ignored by the American public but achieve the goal of maintaining peace between the two nations and maintain U.S. neutrality.

The Common law applicable to arbitration was not satisfactory and the deficiency in the law necessitated amplification leading to enactment of the Arbitration Act, 1697. The main object behind this enactment was to render a submission to arbitration as binding upon the parties and make award easily enforceable. The advantage of arbitration, as a means for dispute resolution, was recognized by providing for Statutory Arbitration in the different Acts of Parliament. It was governed by the Special Act. There developed two classes of arbitration, parallel to each other viz. (i) Statutory Arbitration and (ii) Common law Arbitration. The Statutory Arbitration was concerned and applied to the subject matter under the Special Act. Whereas the Common law arbitration applied to the subject matter covered under general laws. During 1889, it was considered advisable to codify the general law as it had been scattered in several statutes and decided cases. In this backdrop, the Arbitration Act of 1889 was enacted in England. The Arbitration Act of 1889 repealed all the existing statutes and re-enacted most of their provisions with some amendments. It regulated all arbitration in England except arbitration arising out of oral submission. In the case of statutory arbitration, the Act applied except to where it found to be inconsistent with the provision of that statute. The Arbitration Act, 1934 introduced some important amendments to the law of arbitration. The amendment is based on the recommendations made by the Committee during 1927 constituted for the purpose. After the gap of 16 years with the changed business scenario, the arbitration rules again felt amplification to be modified accordingly. The Arbitration Act of 1950 was enacted and this Act of 1950 repealed all the existing Acts and re-enactment was in a consolidated form. The Arbitration Act, 1950 applies to arbitration under other statutes, unless excluded by the other statute concerned. Today, although the Act has now largely been superseded by the Arbitration Act 1996, Part II of the
Act which deals with the enforcement of non-New York Convention awards, remains in force\(^6\).

The very close partnerships of the commercial bar in England the arbitration process and the commercial court has remained crucial to the development of arbitration law in 1950. The 1996 Act was introduced by the Arbitration Act 1950. The latter came under increasingly acute criticism in a number of respects in the 1980s and early 1990s, prompting calls for a total overhaul of arbitration law in the United Kingdom. From a structural point of view, the approach of the Model Law brought the inadequacy of the 1950 Act. In fact, “its logic was indefensibly illogical and caused confusion and difficulty to those trying to comprehend it\(^7\)”. Furthermore, there existed no rules for the arbitral procedure and it lacked any reference to party autonomy. Rutherford and Sims rightly note that “it was largely preoccupied with the relationship between arbitration and the courts\(^8\)”. In addition, the technique which had been utilized in its drafting was often that of ‘deeming provisions’, whereby, unless a contrary intention was expressed to a particular provision, some condition would be deemed by that provision.

As Arbitration became unattractive for dispute resolution and London lost out to other jurisdictions as a venue for international commercial arbitration\(^9\). In the 1980’s mindful of this and especially the momentum the UNCITRAL Model Law was gaining, the British government initiated the Departmental Advisory Committee to consider whether the United Kingdom should adopt the UNCITRAL Model Law and the Departmental Advisory Committee concluded that the UNCITRAL Model Law should not be adopted in England under the chairmanship of Lord Justice Mustill. In June 1989, Lord Justice Mustill, the chairman of the Committee, published a report which, although rejecting the Model Law, approved of its presentation and logic\(^10\).

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\(^6\) Section 99 - Continuation of Part II of the Arbitration Act 1950, Part II of the Arbitration Act 1950 (enforcement of certain foreign awards) continues to apply in relation to foreign awards within the meaning of that Part which are not also New York Convention awards.


\(^8\) Ibid.

\(^9\) Guy Pendell and David Bridge, CMS, *Arbitration in England and Wales*.

While the Departmental Advisory Committee decided to adopt the Model law (1985), it recommends new Arbitration Act and to adopt the structure and language of the model law to be clear and accessible. Under the chairmanship of Lord Justice Saville, the Departmental Advisory Committee produced an entirely new draft bill by 1955 and after making certain changes, it becomes the English Arbitration Act.

The Departmental Advisory Committee’s terms of reference in initiating the reform of arbitration law in England was to safeguard London as a leading arbitration center. Many other jurisdictions were meeting the needs of parties to arbitral agreements by developing their arbitration law in such a way as to make it both accessible and intelligible to the layman are an advantage that the UNCITRAL Model Law had over the Arbitration Acts existing in England. Thus, this influenced the decision to ensure the Arbitration Act 1996 was drafted in a straightforward, yet comprehensive manner keeping the Model Law in view and achieved its object. Richard Lord and Salzedo comment that “there is no doubt that replacing four Acts with one will make the statutory law easier to find. It is also accurate that the Act is written in plainer English than was the previous legislation. The provision which had made criticism under the 1950 Act was the case stated mechanism. This allowed the arbitrator to make any question of law which had rise during the hearing or the award, in the form of a special case to the High Court. Although the merit of such a procedure was evident given that it ensured arbitrator’s decisions were in accordance with law and, then, it permit the law to develop in a meaningful way, its end provision was by recourse to this procedure as a delaying tactic. Such an abuse excluded the advantages which arbitration offered as an efficient dispute resolution procedure.

Therefore, as the reform process, England enacted 1979 Arbitration Act which was an attempt to redress the disincentives which were turning parties away from London. Crucially, it withdraws the case stated procedure and restored it with an alternative appeal process. Under the Act, appeals were to be ascertained exclusively on points of law with leave for appeal having to be sought beforehand.

12 Section 21 of Arbitration Act, 1950.
13 The Act was given the Royal Assent on 4 April 1979 and commenced working from 1 August 1979.
2.2 United States of America

The origins of arbitration in the United States can be found in English common law since colonial times as the United States was one of its colonies i.e. when the Europeans entered to America’s Atlantic shores, Native Americans used arbitration as resolving disputes within and between tribes. Nevertheless, arbitration in the United States was an established form of dispute resolution before the American Revolution.

Commercial arbitration in the United States existed in the early Dutch and British colonial periods in New York City. “Pilgrim colonists, convinced that lawyers threatened Christian harmony, scrupulously avoided lawyers and courts, preferring to use their own mediation process to deal with community conflicts.” When disagreements occurred, a framework of male members of the community would hear claims, determine fault, assess damages, and protect that the parties reconciled with one another. For most of the colonial period, these informal arbitrations were the norm.

Although arbitration had found a foothold in chambers of commerce as early as 1768 in New York, 1794 in New Haven and 1801 in Philadelphia, the examples thus set had not resulted in its general acceptance by other chambers of commerce; and even when established it was not generally used because little efforts were made to educate the public in its use. Of the thousands of trade associations in operation in 1927, only a comparatively small number of them knew about arbitration. Financial and commodity exchanges that had found arbitration practical in New York achieved only a limited application in similar exchanges throughout the country. Collective bargaining agreements had not come into general use, although a few pioneer organizations, such as the building trades, printing, and clothing industries had quite generally used arbitration and had thereby blazed a new trail.

14 The Dutch colonization of the Americas began with the establishment of Dutch trading posts and plantations in the Americas, which preceded the much wider known colonisation/activities of the Dutch in Asia.
15 British America comprised the British Empire's colonial territories on the continent of North America and Bermuda, Central America, the Caribbean, and Guyana from 1607 to 1783.
In 1705, the Pennsylvania colony adopted laws in support of arbitration. By the widespread use of arbitration is created by the enactment of legislation supporting arbitration by two colonies commonly remained in maritime and trade dispute.\(^\text{18}\) In 1768, the New York Chamber of Commerce created the first permanent board of arbitration in the colonies\(^\text{19}\). Initially, the New York Chamber of Commerce Arbitration Committee deal only with claims between merchants, but in 1817 the securities industry adopted a constitution that provided the nation's first comprehensive arbitration clause.

In 1874 the New York state legislature has created in the New York city the office of Arbitrator of the Chamber of Commerce of the State of New York\(^\text{20}\). The voluntary, binding arbitration of labor disputes was enacted in 1878 by Maryland. In the following years, similar laws were passed in other states too. In 1886 New York and Massachusetts discovered permanent arbitration boards with arbitration and mediation authority. The Erdman Act was enacted in 1898\(^\text{21}\) by Congress to strengthen the Arbitration Act 1888, which is the statute of the United States federal government passed the Arbitration Act, 1888. On 1 October 1888 to enact laws the government's role in railroad labor disputes, thus setting a precedent for federal arbitration between unions and railroad carriers. The act made provisions for two possibilities to settle problems: voluntary arbitration and a temporary investigative commission.

After the American Revolution, many states passed statutes permitting the enforcement of arbitral awards, but pre-dispute agreements were not recognized in the guise of a manifestation of anti-arbitration hostility exemplified by the rule in *Vynoir's case*\(^\text{22}\). In an effort to overcome centuries of this hostility and the effect of *Vynoir’s case* a pro-arbitration reform movement formed in New York. The New York Chamber of Commerce and the New York Bar Association joined forces and forced

\(^{18}\) Steven A. Certilman, *This Is a Brief History of Arbitration in the United States*.
\(^{19}\) Supra note 17.
\(^{21}\) The Erdman Act of 1898 was a United States federal law pertaining to railroad labor disputes. The law provided for arbitration for disputes between the interstate railroads and their workers organized into unions.
\(^{22}\) Vynoir’s Case, 77 Eng. Rep. 595 (K.B. 1609); In this case, Court set forth doctrine of revocability treating the contracts for arbitration as non-binding and as such it became known as the “doctrine of revocability”.
the state legislature to pass a law that would make arbitration a viable form of dispute resolution both before and after a dispute occur. The 1920 New York Arbitration Act, resulted as validated pre-dispute arbitration agreements, stayed court proceedings pending arbitration, and prohibited revocation of agreements to arbitrate. Five years later, Congress followed New York's lead and passed the United States Arbitration Act, and later codified in 1947, as the Federal Arbitration Act (FAA) with the purpose of making arbitration agreements valid, irrevocable, and enforceable.

The Federal Arbitration Act (FAA) was enacted in 1925. Its enactment is for recognition of the benefits of arbitration and the statute established a national policy favoring arbitration. The Federal Arbitration Act (FAA) was attempted to put an agreements of arbitration "upon the same balance of other contracts." It furthers this goal by allowing a party to petition a federal district court to force arbitration, to appoint an arbitrator if one has not been designated, and to enforce an award.

The Federal Arbitration Act (FAA) was designed to overcome existing judicial hostility towards arbitration which appears to have evolved from the English courts. The Federal Arbitration Act limits the grounds for non-enforcement of an arbitral award to those that "exist at the law or as in the equity for revocation of a contract." The arbitration in international agreement involved businesses of the United States which was achieved in 1970 when the Uniform Convention on the Recognition and Enforcement of Foreign Arbitral Awards i.e. The New York Convention became law to the Federal Arbitration Act in the United States. In 1982, the Supreme Court upheld the constitutionality of the Federal Arbitration Act (FAA). Almost every state has since adopted an arbitration statute patterned after either the Federal Arbitration Act (FAA) or the Uniform Arbitration Act. Thereafter, utilization of binding arbitration in the United States has increased at a rapid pace during the past quarter century involving the Federal Arbitration Act (FAA). The popularity of arbitration in the United States of America is greater than any other countries but it is now approaching the stage that of litigation.

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25 The United States Arbitration Act is an act of Congress that provides for judicial facilitation of private dispute resolution through arbitration. It applies in both state courts and federal courts Constitution.
26 Section 9 U.S.C. subsections 4-5, 9.
It can be summed up on the United States arbitration that while ADR as a system has gone through a number of iterations in the United States, the ultimate purpose of the many forms of ADR remains similar to that of the early common law equivalents—to provide parties with a satisfactory resolution of a conflict short of formal court proceedings. It is for this purpose that ADR continues to be an important and popular choice for individuals and businesses in the United States. The types of ADR available in the United States can be divided into three general categories: (i) adjudicative, (ii) evaluative, and (iii) facilitative. Adjudicative ADR consists of (a) arbitration, (b) neutral findings. In case of evaluative ADR, the mechanism consists of (a) peer evaluation, (b) Lay Evaluation or Summary Jury Trial, (c) judicial evaluation and (d) special or expert evolution. The facilitative ADR consists of (a) mediation, (b) cancelation and (c) coconscious building.

The conceptual foundation on which the United States ADR is founded is identical with that of any country experience. Traditional government methods of dispute resolution, including adversarial processes such as trials, have inherent limitations. They are expensive, sapping resources from both citizens and their government. These methods are time-consuming, demanding participants’ attention and energy for months and even years. Alternative dispute resolution (ADR) often is a better way to solve problems in a wide variety of disputed matters. In ADR, the parties meet with a neutral professional who is trained and experienced in handling disputes. With the guidance of the neutral party, they talk directly with each other about the problems that caused the dispute and ideas for resolving their differences. The neutral party assists them in identifying their underlying interests, developing creative options for meeting their needs, and crafting a resolution that will work for the future. Experience has shown that this approach is frequently quicker, cheaper, and more satisfying for everyone involved than adjudication.

2.3 Germany

In Germany, while judicially hosted settlement conferences and arbitration have been traditionally common and till recent past, mediation and other forms of ADR have now gained popularity and much known in the German business world and for a long time, the German court system was considered quite acceptable by the business community. Therefore, most German business people were only familiar
with non-binding third-party assistance in the context of political bargaining or collective bargaining negotiations. Over the last few years, the landscape of dispute resolution has significantly changed and mediation has now become part of the dispute resolution process in business life. However, the lawmakers considered introducing a limited mandatory mediation program as an opportunity to reduce the volume of small cases and subsequently, the legal community became the driving force in favor of ADR. The German arbitration regime is specified in the tenth (10th) book of the German Code of Civil Procedure, which is similar to the UNCITRAL Model Law. It seeks to the scope that the international treaties do not have pre-eminence. The arbitration regime is supported by the principles as follows: (1) an environment that is conducive to arbitration, (2) freedom of contract within the area of arbitration, and (3) a three-arbitrator tribunal where the parties have not agreed otherwise.

In Germany, arbitration was practiced and recognized as an effective means of alternative dispute resolution and has a long-standing tradition. The German Code of Civil Procedure27 (Zivilprozessordnung) ZPO forms the legal foundation for arbitration in Germany due to its function as federal law28.

**Arbitration agreement Section 1029:**

Definition (1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2) An arbitration agreement may be in the form of a separate agreement (“separate arbitration agreement”) or in the form of a clause in a contract (“arbitration clause”).29

Prior to the enactment of the German Arbitration Act 1998, the law was considered anachronistic. Kuhn explains about arbitration in Germany, that “arbitration did not have an intensive tradition in Germany because it has a minor impact due to the old provisions of the German Code of Civil Procedure (Zivilprozessordnung)30.”

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27 Section 1029 ZPO.
30 ibid.
The Zivilprozessordnung (ZPO) dates back to the year 1877 and was basically not changed until the year 1998. The publication of the UNICITRAL Model Law had had an influence on German legal regulations. In January 1998 a completely new arbitration law, which was in line with UNCITRAL Model Law was published in the book of the German Code of Civil Procedure 10th version Zivilprozessordnung (ZPO). Moreover, the rules for arbitration have not been codified separately, but they have been integrated into the code of civil procedure.

In past years there are a number of high profile cases, decision of German Higher Regional Courts and the German Federal Court of Justice (FCJ) on German Arbitration Law is growingly reported in the Digest of Case Law on the Model law31, frequently reviewed outside Germany by scholars, and more recently even referred to by foreign courts.

The implementation of the UNCITRAL Model Law was not a product of a new legal design, but merely translations of the original rules of the UNCITRAL Model Law. These new provisions are not only for international arbitrations but also for domestic arbitrations as well. The rationale behind this legislation was to create an arbitration-friendly jurisdiction and to favor the creation of a legal structure that would be familiar to the arbitration community as an already accepted international standard.

2.4 China

In China, traditionally, it is agreed on a system that there are four ways of resolving commercial disputes of international character in China, i.e. (1) negotiation, (2) conciliation (mediation), (3) arbitration and (4) litigation. However, among the above, conciliation is the most widely used alternative way of dispute settlement to litigation arbitration. In China, there established a historical preference for informal and non-adversarial means of dispute resolution which has evolved on the basis of cultural tradition which extends from ancient times to that of the modern industrial world. In China, many forms of ADR are combined with litigation and arbitration, hybrid processes, which ultimately lead to a legally binding outcome under proper

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circumstances and the Chinese legal practice, the definition of ADR is slightly different and the outcome of ADR can lead to a legally binding outcome, in the hybrid processes, if agreed by both parties in dispute. Therefore, in China, it is widely accepted that a third party intervention to a dispute, whatever the degree, is an indispensable factor to ADR. Negotiation without a third party’s intervention is not considered as a form of ADR. Alternative Dispute Resolution has been regarded, as the name itself suggests, as a dispute resolution process which is used as an alternative to litigation and arbitration.

In China, the resolution of disputes through arbitration is a non-adversarial measure and used for solving international commercial and investment disputes. In China, although the process of asking a third party to decide a dispute has a long history, arbitration in proper sense has not existed until recently. Arbitration legislation first appeared early in 1990's, the first legislative version concerning arbitration, the Civil Procedure Law of the People’s Republic of China being produced in 1991 (PRC Civil Procedure Law 1991), and the Arbitration Law of the People’s Republic of China (PRC Arbitration Law 1994) implemented on 31 August 1994 and came into force on 1 September 1995. The China Arbitration Act 1994 deals with both domestic and international arbitration in China.

The ancient Chinese people believed that referring disputes to litigation would disturb the harmony of both society and the universe. This view is grounded in Confucian ethics and Chinese cosmology. To protect popular harmony within the people and avoid hurting each other's feelings, people preferred to resolve problems by conciliation, rather than referring disputes to litigation. Moreover, in Chinese traditional legal culture, there was no concept that rational and just procedure is necessary for resolution of disputes.

Civil and commercial law, dealing with production and exchange between equals, could not come into being where there was no equality. Thus, no civil or commercial law existed in China before the end of the feudal period. This is why Chinese civil and commercial law (including arbitration law) is under-developed even though Chinese cultural history is very long.

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The real development of a modern arbitration system in China commenced at the beginning of the 20\textsuperscript{th} century. The Western concept of arbitration was introduced in China just before the fall of the Qing dynasty when the first chamber of commerce had been established in the country. In 1912, the newly established government promulgated the constitution for commercial arbitration offices and the following year the working rules for commercial arbitration offices to regulate the scope and authority of commercial arbitration offices established under the chamber of commerce.\textsuperscript{33}

Although from the 1980s, foreign arbitration in China followed the principle that arbitration is a non-governmental activity which should be chosen by the parties, and that an arbitration award is final\textsuperscript{34}, but until the promulgation of the Arbitration Law, domestic arbitration in China was controlled by administrative bodies.

Supervision of arbitration involving Chinese and Foreign parties was inaugurated in the 1950s. In 1954\textsuperscript{35} the Government Administration Council passed a “Decision” which established China International Economic and Trade Arbitration Commission (CIETAC) for external trade within the international trade promotion commission, formulating temporary Regulations to govern its operation. In December 1958 the State Council passed another `Decision\textsuperscript{36}` establishing the maritime arbitration commission within the international trade promotion commission, along with corresponding arbitration rules. From the beginning, foreign arbitration in China followed the principle that arbitration is a non-governmental activity which should be chosen by the parties, and that an arbitration award is final\textsuperscript{37}. However, the historical development of domestic arbitration is more complex. Between 1955 and 1966, the parties to economic contracts could only apply to the economic arbitration commission to resolve disputes by arbitration. The court was not allowed to deal with such disputes. A party who disagreed with the arbitral award could only appeal to the

\textsuperscript{33} Alicia Ehn, \textit{Arbitration in China}.
\textsuperscript{37} Ibid.
higher administrative department. The practice of resolving contractual disputes by administrative measures is typical of a highly planned economy.

From 1978 to 1982 i.e., till the promulgation of Economic Contract Law\textsuperscript{38}, although China followed arbitration but with no uniform procedures was existing. According to the Combined Notice as to Several Problems of Managing Economic Contracts and the Trial Regulation of Contract Arbitral Procedure of Industrial and Commercial Administrative Management Departments which were issued by the Industrial and Commercial Administrative General Department on 8 September 1979 and 2 May 1980 clarifies that it would arbitrate on any dispute. Thus, it can be seen that state agencies were playing a role as arbitrators at this stage. Interestingly, it would hold two (2) sets of proceedings, and a party might only appeal to the Court if he disagreed with the second arbitral award which was the final award. However, after passing of Economic Contract Law, a dispute could no longer be arbitrated twice. There was only one arbitral award, which was final, subject to an appeal to the Court. Indeed after the amendment to Economic Contract Law\textsuperscript{39}, an appeal to the court was no longer open.

Before the promulgation of the Arbitration Law in 1994, arbitration could only be conducted through arbitration agencies, which in turn were attached to administrative organs. Thus, arbitration agencies dealing with economic contracts were attached to industrial and commercial administrative management departments; those dealing with real estate were attached to real estate management departments; those dealing with technology contracts were attached to technology commissions, and those dealing with a dispute arising from labour relations were attached to labour administration departments. In fact, the parties were not entitled to appoint arbitrators. The arbitrators were the officers of those departments. Thus, essentially, the government exercised significant control over arbitration. Moreover, before passing the Arbitration Law, there were statutes, administrative regulations, and local regulations dealing with arbitration, although most of the regulations dealt with administrative rather than economic arbitration. Additionally, an arbitration

\textsuperscript{38} Adopted at the 4th Session of the Fifth National People's Congress on December 13, 1981 and Implemented from 07/01/1982.

\textsuperscript{39} Under the Economic Contract Law of 1981, there was an appeal provision to the Courts. This power was abolished by the 1993 amendment.
agreement was not a necessary pre-condition for commencing a commercial arbitration. Where there was no arbitration agreement before or even after a dispute arose, a party was still allowed to refer the dispute to arbitration. The fact that arbitration was an administratively directed activity was a conflict with the principle of party autonomy, removing a key advantage of arbitration, as seen from the common international standpoint\(^{40}\). It is only after the promulgation of the Arbitration Law 1994\(^{41}\), state agencies stopped appointing arbitrators and playing a role in the arbitration process. Article 8 of the Arbitration Law assigned that arbitration shall be conducted independently accord to law, free from interference of administrative organs, social groups or individuals. Article 14 provides that an arbitration commission shall be independent of and not be subordinate to any administrative organ\(^{42}\). Furthermore, the parties are entitled to appoint arbitrators and party autonomy has been protected in this regard.

However, as a result of the historical development of arbitration law in China, even nowadays, some of the legislators still retain the idea that arbitration is an administrative activity. As a result, some provisions of arbitration law do not protect party autonomy sufficiently as the arbitration agencies continue to exercise too much power and control.

2.5 Singapore

In Singapore, the history of arbitration dates back to its early days as a colony of the British Empire and the alternative dispute resolution (ADR) began in the 1980s when happened when the government envisioned the nation as a major dispute resolution center due to the strategical location. Since the 1990s, Singapore has improved to approach various ADR options to resolve disputes. With relative ease, parties may deploy alternatives to traditional court litigation or arbitration and are actively encouraged to do so. Legislative and judicial records indicate that since the nineteenth century, arbitration has been practiced and regulated within the Straits

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\(^{42}\) Article 14 of Arbitration Law of the Peoples Republic of China (1994).
Settlements, of which Singapore was then a part. Both arbitration and mediation involve a neutral third-party. In mediation, the neutral third party is known as the “mediator” who facilitates the parties’ negotiations. The aim of such negotiations is for the parties to come to a mutual agreement. This means that the agreements are reached voluntarily. In arbitration, it is the neutral third party (the “arbitrator”) who will make the final decision.

The effectiveness of any alternative dispute resolution (ADR) method depends on the national legal system to which it is subjected. In Singapore, the growth in the use of ADR methods may be represented to developments in the Singapore legal environment. Singapore feels the benefits of arbitration and mediation over civil litigation involves lower costs. Arbitration and mediation are usually less costly than litigation. As less formality are involved, this usually results in a speedier process and will be especially beneficial for business owners as long and costly disputes will result in reduced productivity and profits. Further such proceedings are less confrontational and will help to avoid the souring of relationships over a dispute. As businesses are often engaged in long-term relationships with various stakeholders, arbitration and mediation will be helpful in maintaining good relationships. Another benefit of arbitration and mediation is the confidentiality of the process. However, both arbitration and mediation have significant differences. Knowing these differences will allow you, as a business owner, to decide which method is more suitable to resolve a business dispute.

Arbitration is a fairly new concept in the Singapore context it takes root in the 1990s with the passing of the Arbitration Act and the International Arbitration Act. In 1965, gaining independence, Singapore has continued to embrace the practice of arbitration. Singapore accepted to the 1958 New York Convention on 21 August 1986, with the reservation that the New York Convention will apply in the other contracting state regarding to arbitral awards. It sanctioned the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States i.e. the Washington Convention on 24 October 1968.

The impetus to promote arbitration in Singapore really took off in the 1990s when the Singapore government undertook a concerted effort to promote Singapore as a center for international arbitration. It established the Singapore International Arbitration Centre (the “SIAC”) in 1991 as Singapore’s principal arbitral institution. At present the SIAC is a company limited by guarantee, whose sole member is the Singapore Business Federation.

In 1993, the Law Reforms Committee published its report on the review of arbitration laws in Singapore. While making certain recommendations, the Committee also recommended adopting the UNCITRAL Model Law in relation to International Arbitrations. The Committee in its report proposed draft Arbitration Bill basing on the 1985 UNCITRAL Model Law, which by and large adopted. On 31 October 1994, International Commercial Arbitration (the “Model Law”) came into being when it enacted the International Arbitration Act., which was again amended in 2009. For the past 20 years, arbitration has ensured as the most popular method of resolving disputes. So, in 2015 Singapore was named one of the five most preferred and widely used seats of arbitration by the International Arbitration Survey.

2.6 France

In France, arbitration always played an important role. In the sixteenth century, the Decree of the Moulins of 1566 made arbitration the sole and obligatory means of dispute resolution for commercial disputes. In 1560, the first law was made on arbitration mandatory for merchants in France. In 1806, the French Code of Civil Procedure took a step back and “turned arbitration into the first stage of a procedure which would lead to the judgment of a court”.

In the 1790s a notable mistrust developed on the capacity of the state’s courts in resolving commercial disputes with the same effect as that of arbitration. This trend is reflected in article 1 of the Decree of 16–24 August 1790 which stated that arbitration was to be considered the most reasonable means of dispute resolution between citizens. In the nineteenth century arbitration in France declined and revived in the 1960s. In 1920 France hosted the International Chamber of Commerce

45 Bruner and O’Connor Jr 2002, Chap. 20.
in Paris which is a favorable venue for arbitration and provided International Arbitration to become a trusted dispute resolution mechanism and established itself as an independent legal order. The establishment of institutions such as the *Chambre de Commerce International*\(^{46}\) was important in this development.

In France, there exist several ways of resolving business disputes including principally judicial proceedings, arbitration proceedings, and mediation. In the case of judicial proceedings, most business disputes are dealt with by the competent commercial courts. The commercial judicial institution in France is mainly composed of judges working in various courts spread over the country. The commercial courts are the first level of the association. Above this level are fourteen regional Courts of Appeal, which also handle civil and penal cases. Above that level is the “*Cour de Cassation*” has the power of invalidating the judgments pronounced by the Courts of Appeal and send the cases back to another Court of Appeal. While the two superior jurisdictions are run only by professional magistrates, the commercial courts are run only by businessmen and businesswomen coming from all sectors of the economy. These Commercial courts handle business litigations, summary proceedings, and of course insolvencies. Representatives of the Public Prosecutor attend the hearings of insolvency. Further, a new law on insolvency was passed in 2005, taking effect as of 1\(^{st}\) January 2006. Certain special matters which do not come within the jurisdiction of the commercial courts are trademarks, commercial leases or competition. Instead, they are dealt with by civil or specialized jurisdictions. Arbitration, whether domestic or international, is a dispute resolution method that French law and French courts have systematically favored and supported. Over the last few decades, other ADRs have been developed in France, such as the judges often invite parties to carry out conciliation with the assistance of a court-appointed conciliator. If an agreement is reached, it assigns in writing and remains confidential. The judge simply issues a judgment stating that the dispute was resolved. If agreement is not reached, then the judicial proceedings are resumed. Litigants may also have recourse to mediation. This method of dispute resolution is flexible and no specific legal rule is applicable. There are, however, institutions which have been created to organize and facilitate mediation proceedings, such as the Centre de Mediation et d’Arbitrage de Paris (CMAP), or the specialized Centre de Mediation de la Filière Automobile, dedicated

\(^{46}\) International Chamber of Commerce (ICC)
to disputes involving the automobile industry – car manufacturers, equipment suppliers, and so on. Settlement agreements are frequently concluded to resolve disputes. Such agreements may take place at any time before or during or after a court action. A settlement agreement has result as a court decision. When a settlement is authorized by a court decision, it is automatically enforceable under French law. Arbitration is a judicial method of conflict resolution, regulated by the Code of Civil Procedure (CPC) from articles 1442 to article 1527. Disputants who turn to arbitration submit contractually their dispute to an arbitral tribunal composed of one or three arbitrators. The arbitral tribunal announces an award in order to settle the conflict. The French arbitration, as administered by CMAP has many advantages such as Speed, Confidentiality, Freedom to choose arbitrator (s), Freedom to choose the place of the arbitration, Freedom to choose the applicable law, Freedom to choose the language of the arbitration. Finally, the Mandatory and enforceable judicial decision: at the end of his mission, the arbitrator gives out a decision called arbitral award, which has the same force as a court ruling when exequatur has been granted.

France has adopted a very favorable law on arbitration in 1981 and UNCITRAL Model Law in 1985. French courts had in turn shown an extreme pro-arbitration bias as regards all aspects of arbitration. In the modern era, the French law of arbitration is characterized by the existence of both a domestic and an international procedural system, with domestic arbitrations being regulated by titles I–IV of Part IV (articles 1442–1491) of the Civil Code and international arbitrations regulated by titles V–VI of Part IV of the Civil Code.

On January 13, 2011, France adopted a new law on arbitration reforming the law governing the arbitration. The new law, which was embodied in Articles 1442 through 1527 of the French Code of Civil Procedure (CCP), governs both domestic and international arbitration. French law has maintained the dualist approach which differentiates between domestic and international arbitration, continuing to allow a more flexible regime for international arbitration. This new law codifies the principles

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50 Articles 1492–1507.
to develop in case laws and aims to preserve the trust of International arbitration users in the French legal system. The 2011 new law on arbitration\(^{51}\) reformed the law governing the arbitration. The reasons for such reform in France was that she one of the first states to have adopted a very favorable law on arbitration in 1981, soon followed in 1986 by the Netherlands, in 1987 Switzerland in 1987, and in 1996 England. The acknowledged more conservative UNCITRAL Model Law was adopted in 1985. French courts had in turn shown an extreme pro-arbitration bias as regards all aspects of arbitration\(^{52}\).

2.7 Sweden

Arbitration in Sweden is a commercial party guaranteed the fundamental arbitral principle of party autonomy and protecting the arbitral process by independent and arbitration friendly courts. Arbitration as a method of settling disputes is not a new phenomenon in Sweden\(^{53}\). The Swedish court system consists of general courts, specialist courts, and administrative courts. The general courts have jurisdiction to try matters not expressly excluded from their jurisdiction and have jurisdiction over all civil and criminal matters. The general courts are the district courts, the courts of appeal and the Supreme Court. The jurisdiction of the specialist courts is confined to certain types of disputes. Examples of such courts include the Labour Court; the Market Court, which has jurisdiction over market-related disputes, such as competition matters, marketing of commercial products and certain consumer issues; and the land and environmental courts, which have jurisdiction over environmental and real estate-related issues, such as environmental damages, land parceling, expropriation and site-leasehold rights. The commercial disputes are either brought before the general courts or referred to arbitration. Swedish arbitration is governed by the Arbitration Act of 1999, which conforms closely to the UNCITRAL Model Law. The leading Swedish arbitration body is the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute), which is widely used for both domestic and international disputes.

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\(^{51}\) Ministry of Justice and Civil Liberties, Decree No. 2011-48 of 13 January 2011,


Sweden has a long history of recognized arbitration as a process of solving disputes. Alternative form of dispute resolution has been supported by Swedish law since the middle age. For the first time provisions regarding arbitration appeared in Swedish legislation in provincial codes in 1359. The code of Sweden, a collection of recent legislation, has been established as the source of law in 1734. The first statute of arbitration was enacted in Sweden in 1887. By the creation of Arbitration Institute of the Stockholm Chamber of Commerce (SCC) in 1917 is the foundation for Sweden to become the preferred place for the resolution of International Disputes.

At the beginning of the 20th century in 1929 the Swedish Arbitration Act and the Act on Foreign Arbitration Agreements ("LUSK") were established in Sweden. The LUSK was enacted by reason of the Geneva Convention on Enforcement of Foreign Arbitration Awards from 1927. The Sweden Arbitration Act follows the UNCITRAL Model Law and seen as a very modern and effective legislation. The New York Convention 1958 has been applied in Sweden as well.

The Swedish Arbitration Act of 1929 and the Swedish Arbitration Act on Foreign Arbitration Agreements have been adjusted to modern requirements by a new Arbitration Act in 1999 (Lag om skiljeförfarande 1999:116) The Swedish Arbitration Act of 1999 (SAA). The Swedish Arbitration Act of 1999 provides the primary legislative framework relevant to arbitration. The Arbitration Act is applicable to both international and domestic arbitration but deals only with arbitral proceedings in Sweden. The Arbitration Act implements the New York Convention in respect of awards rendered outside of Sweden. Swedish arbitral awards are enforced according to the Swedish Enforcement Code. The Arbitration Act contains a few mandatory provisions. The most important ones are Section 21, 24(1); section 25(3) and sections 33 and 34 concerning invalid awards and the setting-aside of awards.

Convention on the Execution of Foreign Arbitral Award, and 1923 Protocol on Arbitration Clauses.

During the last decades, the importance of arbitration as a method for dispute resolution has been steadily increasing in Sweden. Because of the high extent of its usage, nowadays there are complaints and discussions about the influence of “private” arbitration as a private remedy for the resolution of disputes, in comparison with the authority of State Courts. In contrast Bagner state that “the long history of arbitrations in Sweden has lead to the development of a positive arbitration culture both in the legal and in the business communities”. Furthermore, it is said that “it is common for commercial standard-form contracts in Sweden to provide for the resolution of disputes through arbitration”.

In Swedish arbitration system, a foreign arbitral award can be enforced in Sweden by submitting an application to the Svea Court of Appeal. The Supreme Court has examined the issue whether the court, ex officio, shall establish whether a foreign arbitral award is, in fact, an arbitral award and not a court ruling. This is an issue that is not regulated in the Arbitration Act of Swedish or the New York Convention.

2.8 Switzerland

Switzerland’s arbitration history is old. In 1911, the Zurich Chamber of Commerce (ZCC) was established as a first commercial arbitration court which was designed to resolve disputes between Chamber members in a private and business. Over a year, the Zurich Chamber of Commerce Arbitration Court gained recognized beyond the Chamber’s consistency and non-members from all over the world were allowed to use the Zurich Chamber’s arbitration services. In Switzerland, large commercial disputes are usually brought before the ordinary courts or settled through arbitration; mediation is sought, however still to a lesser extent. Enormous

58 The Svea Court courts of appeals are the second instance courts in Sweden. There are six courts of appeal, which are divided by geographic regions. In some cases involving arbitration issues, the court of appeal is the first instance court. Challenges to an arbitral award and applications for recognition and enforcement of a foreign arbitral award are made directly to the court of appeal.
commercial disputes are usually settled through litigation or arbitration. Other ADR methods play a limited role, although mediation appears to have become more popular recently by the adoption of the Swiss Rules on Commercial Mediation by the Swiss Chambers of Commerce and Industry in 2007. Arbitration but however, not necessarily other forms of ADR, is more common in international commercial disputes than in domestic disputes in Switzerland. In contentious court proceedings, the court can recommend mediation to the parties at any time and on the joint application of the parties, the court may confirm a settlement reached through mediation during proceedings (Code of Civil Procedure). Such testimony makes the mediation settlement equal to a court judgment. Settlements reached through mediation outside of court proceedings cannot be endorsed by the court. Apart from cases where conciliation proceedings are mandatory, ADR is not part of court procedures. Swiss courts cannot compel the use of ADR. However, courts are free to provide a settlement during court proceedings or to encourage parties to resort to mediation. Where a conciliation hearing is mandatory under statutory provisions, the parties can jointly choose to use mediation instead. If a settlement cannot be reached, the conciliation authority will issue a writ authorizing the claimant to proceed to the competent district court. And further, at all times during the court proceedings, parties can jointly elect to resort to mediation, thereby staying court proceedings. To be enforceable in court, a multi-tier dispute resolution clause providing for pre-trial arbitration or conciliation/mediation should clearly set out the conditions which include time limits, for the arbitration or mediation proceedings. Non-compliance with pre-arbitral mediation under a multi-tier dispute resolution clause may result in an annulment of the arbitral award.

In Switzerland, the substantive private law is a federal whereas procedural law was traditionally a cantonal (state) matter\(^59\). Therefore, in Switzerland arbitration was and is still considered a procedural matter\(^60\). This led to the situation that until 1969 arbitration (domestic and international) was governed by different rules in 26 cantonal Codes of Civil Procedures. In 1969 various cantons entered in an international arbitration convention, the so-called 'Arbitration Concordat', in order to achieve

\(^{59}\) Article 121 of the Swiss Federal Constitution now states that the procedural law is a federal matter, but so far the federal state has not yet made use of this competence. However, there are endeavors for a uniform civil procedure law in Switzerland, to substitute 26 differing cantonal codes.

\(^{60}\) Blessing, Introduction to Arbitration – Swiss and International Perspectives.
unification of the arbitration law. As of today, all cantons have joined the Arbitration Concordat. At first, the Arbitration Concordat governed both, domestic and International Arbitration. However, in the 1970s and 1980s, the Arbitration Concordat encountered criticism because it no longer appeared to satisfy the requirements of a modern arbitration law, especially with regard to international arbitration.

As a result, in 1989 when the Swiss Private International Law Act (‘SPILA’) came into force a separate chapter (the 'Chapter Twelve') was included within the act which governs the international arbitration. Thus, since 1989 in Switzerland one can distinguish between domestic and international arbitration in order to determine the applicable arbitration law. In terms of article 176 (1) Swiss Private International Law Act (SPILA), an arbitration with seat in Switzerland qualifies as international if at the time of the end of agreement of arbitration at least no one of the party had either in dwelling nor in dwelling of Switzerland. This purely objective test based on domicile, giving no regard to the (international) nature of the transaction\(^1\), bears the advantage of legal predictability whether an arbitration proceeding will be considered domestic or international.

As of today, the Arbitration Concordat remains in force for purely domestic arbitration but has practically no further significance in international arbitration. However, art 176 (2) of SPILA contains an option-clause which allows parties to a per se international arbitration to exclude Chapter Twelve of the SPILA by an express opting-out agreement and to choose the Arbitration Concordat instead of governing potential arbitration proceedings.

Another recent, Swiss “arbitration friendly” reform is the promulgation of the “Swiss Rules of International Arbitration,” commonly known as the “Swiss Rules.” The Rules have been adopted by all the major Swiss Chambers of Commerce such as Basel, Geneva, and Zurich, and came into force on January 1, 2004. Thus, international contracts with clauses providing for arbitration under the Rules of any of the Chambers of Commerce will now automatically be arbitrated under the Swiss Rules. Parties desiring Swiss Chamber Arbitration can now know that the same rules will apply whatever Swiss city they choose to arbitrate in. The Swiss Rules have

received extensive commentary including some book-length treatises. They are largely based on the UNCITRAL Model Rules by far the best-known “off the shelf rules.” They have, however, been modified to reflect the institutional supervision of the various Chambers, which is relatively modest compared to the highly supervised ICC arbitration procedure.

Today, the following organizations, among others, offer ADR services in Switzerland:

1. Swiss Chambers’ Arbitration Institution, which adopted the Swiss Rules on Commercial Mediation in 2007 and
2. The Swiss Rules on International Arbitration in 2004 (as revised in 2012), the latter of which can also be chosen for domestic arbitration.
3. WIPO Arbitration and Mediation Center, a branch of the World Intellectual Property Organization established in 1994. This center offers institutional mediation services for private parties.

2.9 ADR system in Israel

Israel ranks within the top 20 nations in the world on the latest report of the United Nations Human Development Index, which places it in the category of “Very Highly Developed”, permitting the country to possess a higher standard of living than many other Western countries. The economy of Israel is approached by global standards. The prosperity of Israel's advanced economy allows the country to have a sophisticated welfare state, a modern infrastructure, and a high-technology sector competitively on par with any other advanced countries.

Israel is relatively poor in natural resources and depends on imports of petroleum, raw materials, wheat, motor vehicles, uncut diamonds, and production inputs. The country’s major economic sectors include high-technology and industrial manufacturing; the diamond industry is one of the world's centers for diamond cutting and polishing and exports. Israel, with such an impressive track record for creating profit driven technologies, Israel has become the first choice for many of world’s

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leading entrepreneurs, investors, and industry giants. The economic dynamism of Israel has excited attention from international business leaders.

In Israel, Alternative Dispute Resolution comprises various approaches for resolving disputes in a non-confrontational way, ranging from negotiation between the two parties, a multiparty negotiation, through mediation, consensus building, to arbitration and adjudication. This system covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually acceptable resolution, to arbitration and adjudication at the other end, where an external party gives a solution. Along the axis of ADR approaches between these two extremes lies “mediation,” a process by which a third party supports the disputants to reach a mutually agreed solution.

Arbitration agreements in Israel are primarily governed by the Israel Arbitration Law, 5728-1968. The domestic arbitration process in Israel is primarily regulated by the Arbitration Law, which provides parties with a simple alternative method for resolving disputes efficiently and conclusively. Under the Arbitration Law, the arbitration process is valid when the parties enter into a written agreement. As provided in Article 2, the First Addendum to the Arbitration Law will apply to the parties' arbitration agreement by default, unless agreed otherwise. This First Addition consists of important terms that have been implemented and used for decades in almost every arbitration process in Israel. Under the First Addition of the Arbitration Law, an arbitrator is not required to apply substantive law, Court procedures, or rules of evidence, unless the arbitration agreement explicitly states otherwise. Thus, the arbitrator is free to settle the dispute by reaching a just and efficient result without legal restrictions. Almost every dispute can be resolved by arbitration in Israel, by a number of exceptions. The main exception is an arbitration agreement about a matter which cannot be subject to agreement between disputed parties and it is invalid. This largely includes all criminal matters, mandatory labour rights which cannot be subject to agreement as well as illegal agreements. Although arbitration has many well-known advantages, such as swiftness and efficiency, but it is not reached its full potential in Israel. The reason for this might have been due to the absence of an option to appeal the outcome of arbitration in the past. The conclusiveness of the arbitration process, while usually constituting an advantage, caused Israeli litigants to lose belief
in the entire process. As a result, in the Second Amendment the Knesset attached two consensual appeal options to the traditional method of arbitration:

1. An appeal before an arbitrator.
2. An appeal by leave of the Court.

The above two options allow parties to control their main concern of a substantive mistake being made in the arbitral award, which in the past could not be amended by the Court. However, once the parties have agreed on an appeal process must include this in writing in their arbitration agreement in advance. If the parties did not clear among one of the two appeal options in their agreement, then the traditional process with “no appeal option” will be applied. Thus, these appeal procedures won't be applied in international arbitration taking place in Israel as default, unless parties included them specifically and professionally.

The Israel Arbitration Law requires an arbitral award to be in writing, signed and dated by the arbitrator. The arbitral award can be accepted as a judicial award according to Article 23 of the Arbitration Law through a simple procedure, which results in the award being recognized as a judgment of a Court. However, a course for setting aside the award may be filed within 45 days of receiving the award. The Israeli Courts’ proceed towards arbitral awards is generally favourable and they are usually accepted as judicial awards, enabling their enforcement. The Arbitration Procedure Regulations (“Regulations”) 1969 govern Court procedure implementing the Arbitration Law and provide its enforcement.

On the international arbitration, Israel ratified in full and unconditionally the New York Convention on June 10th, 1958, which came into force in Israel on 7th June 1959. The Regulations for Execution of the New York Convention (The New York Regulations) were published on 6th August 1978 and came into force on 5th September. 1978. The Israeli Courts have been robustly enforcing the New York Convention ever since its adoption. While the Israeli Arbitration Law does not contain

63 Section 23. (a) The Court may, on the application of a party, confirm an arbitration award. When the award has been confirmed, it will, in all regards except as regards appeal, be treated as a judgment of the Court. (b) The Court will not entertain opposition to the confirmation of an arbitration award, save by way of an application to set it aside or as part of an appeal to the arbitration award as stated in section 29b.
a definition of “International Arbitration”, it refers to it implicitly in Articles 6 and 29 (a). Article 6 governs the issue of a stay of proceedings ordered by the court when an International Convention governs the dispute, and Article 29a governs the recognition and enforcement of Foreign Arbitration Awards. In practice, both of these matters are also managed by the New York Convention.

2.10 Genesis and growth of Arbitration in India

In the present day world, Arbitration is considered to be the most important and effective alternative dispute redressal method functioning and progressing. In the Indian scenario, where we find a rapid progress being made in respect of not only industrial, agricultural and other commercial activities but also international commerce and trade. Arbitration was practiced by the Greek city-states and in the middle Ages high ecclesiastical authorities who were called upon to settle controversies. Historians and anthropologists have provided arbitral customs and institutions in many cultures. Arbitration in India is an old concept, originating in ancient India. The same is a grass root system called Panchayats. It is still prevalent today in villages where the seniors of the village or community sit and resolve disputes between villagers and/ or community. It is cannot be said that Arbitration as a concept or Alternate Dispute Resolution is a foreign import on the Indian legal system. Arbitration is a part of Alternate Dispute Resolution or Alternative Dispute Resolution (ADR) with other popular Alternative Dispute Resolution (ADR) processes like Conciliation and Mediation. In India, Arbitration is regulated by the Arbitration and Conciliation Act 1996 according to the Model Law of the UNCITRAL (United Nations Commission on International Trade Law). The recognition of choosing arbitration over mediation and/ or conciliation has created the term Arbitration Dispute Resolution.

64 Article 6, Stay of Proceedings under an International Convention; If a claim has been filed before a court in a dispute agreed to be referred to arbitration and an international convention to which Israel is party applies to the arbitration and the convention states directions regarding stay of proceedings, the court shall act in accordance with its authority under Section 5 and in accordance with such directions and subject to them.

65 Section 29 (a) Attachment Order etc.; Where an application was filed for the approval or setting aside of an arbitral award, the court may order the attachment of the assets of the party against whom the award was rendered, order a stay of exit or order the provision of a guarantee for the fulfilment of the arbitral award; the application may be oral and the court may exempt the applicant from providing a guarantee.

66 The UNCITRAL is core legal body of the United Nations system in the field of international trade law, with universal membership specializing in commercial law reform worldwide. UNCITRAL’s business is the modernization and harmonization of rules on international business.
Alternative Dispute Resolution has been, a vital and vibrant part of our historical past. The system has received laurels from the parties involved in particular, the public and the legal functionaries in general. It also helps in the emergence of the jurisprudence of peace in the larger interest and wider sections of society. When a party goes to any method of Alternative Dispute Resolution or for informal settlement with different expectations, they know that they may not get all that they want, but they certainly not lose everything.

The Indian epics and folklore ample with examples of consensual procedures for the settlement of disputes at the grassroots level. The third party settlement morality cannot be imposed from above and they can thrive only in soils and climes that are conducive to that culture. In ancient India, Hindus recognized decisions of the Panchayats and assigned them with the ability of management of their religion and social functions. However, when the power came to be vested in the East India Company regulations touching arbitration were framed by the Company. Disputes are settle by the third party as a branch of the Indian volksgeist at immemorial time.

2.10.1 Practice of Arbitration in Ancient India

Alternative Dispute Resolution system is not a new concept it has been prevalent in India since time immemorial. The settlement of disputes the parties themselves choose tribunals, whose decision is to be accepted as final and conclusive between themselves, which is the basic idea of alternative dispute resolution was well known in ancient India by Hindus. Arbitration or mediation is alternative to dispute resolution by the municipal courts has been widespread in India since the Vedic times.

Arbitration is taken from ancient literary works of India such as Vedas, Sutras, Epics, and Dharmashastras without the court intervention but referring to the village panchayath. Village panchayath is one of the ways to resolve the dispute between ancient India and it resembles as a court. In village panchayath, villagers mediate between contending parties in their own village. Apart from the courts are established by the king, there were other tribunals recognized in the ancient Smrities and texts. There were in fact, different grades of arbitrators with provisions for appeals in

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67 Volksgeist (folk or national spirit) is the best known of a family of terms referring to sets of mental, intellectual, moral, and cultural traits that define particular human groups represented as being "nations" or "peoples."
certain cases from the award of a lower grade of arbitrators to arbitrators of the higher grade.

The practice seems to have been in vogue immediately before the advent of the British rule in India. Apart from the courts, statutorily established by the king, where the king or the chief justice appointed by him presided, other tribunals were recognized in the ancient smritis (legal texts) and digests. The sage Yajnavalkya discussed arbitration by famous treaty named “Brhadaranyaka Upanishad” refers to three types of popular courts (Puga, Sreni, Kula), and Narada states that law-suits may be decided by village councils (Kulani), corporations (sreni), assemblies (puga).

The political system of Aryans in their initial days was complex though quite indigenous. They suspend around together in small village settlements (which later grew to kingdoms) and the basis of their political and social organization was, not surprisingly, the clan or kula. As of militant nature, this was very much a patriarchal society, with the man in the house expected to keep his flock in control. Group of kulas jointly established a Grama or village, which was headed by a Gramina. Many villages established another political unit called a Visya, headed by a Visyapati. The Visyas together formed under a Jana, which was ruled by a Rajana or king. However, the specific connection between the grama, the visya, and the Jana has not been clearly defined anywhere. It is remarkable that having recognised the relevance and validity of arbitration proceedings before judges not statutorily appointed who were almost in the position of arbitrators, appeals were provided against the decisions of these arbitration courts to the courts of judges appointed by the King and ultimately to the King himself.

As Dr. Kane observes the three courts mentioned by Yajnavalkya and Narada were practically arbitration tribunals like the modern panchayats. Thus, it is clear that ancient Hindu Jurisprudence recognized two methods by which disputes between citizens could be decided; one was by judicial process in the courts

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68 The name of Yajnavalkya of Mithila stands distinguished both in the Srutis and in the Smritis. Yajnavalkya is especially known for his unsurpassed spiritual wisdom and power.
69 Anuj Kumar, Learn Law: The Concept of Alternative Dispute Resolution, (February 8, 2017).
70 Kane, History of Dharmasastra (1946), Vol. 3, page 280, cited by Dr. P.B. Ganjendragadkar in his address to the Fifth International Arbitration Congress, Proceedings of the Fifth International Arbitration Congress (7-10 January, 1975).
established by the King, and the other by the different categories of arbitration institutions.

The Puga courts were comprised of persons dwelling in the same place, irrespective of their caste or employment, and were competent to decide cases in which the local public was interested. It acts as a Supreme Court. The Srenis (guilds) were associations of persons engaged in similar pursuits, of which the merchant’s guilds were the most important. It acts as a High Court. They were competent to decide matters relating to their special calling for traders social matters concerning the members of a particular community could be investigated and decided at the level of the Kulas, the Kula were a group of persons bound by family ties acts like a Subordinate Court. The three arbitration courts (Kula, Sreni, and Puga or Gana), were private tribunals, in the sense that they were not constituted by a royal authority and they resembled arbitrators to that extent.

According to Sir V Henry Maine71, in those parts of India, in which village community was most perfect, the authority, exercised elsewhere by the headman, was lodged with what was called the village council or the panchayat. It was always considered a representative body and whatever was its real number, it always bore the name which recalled its constitution of five persons or Panchayat. Traces of this method of settling disputes can still be found in certain communities in the country.

The great Hindu jurist Priyanath Sen72 thinks that the three arbitration courts could only decide disputes which came within their special province, being disputes relating to matters which, from their very nature, fell within their special knowledge, for instance, disputes regarding trade and other local concerns. These local courts had a sort of delegated authority within their limited spheres, but their decisions were subject to appeal in the following order; a case having been decided by a family, an appeal lay to the corporation, by a corporation to the community, and by a community to the officers appointed by the King, or in other words, to the court properly

71 British jurist and legal historian who pioneered the study of comparative law, notably primitive law and anthropological jurisprudence; Village Communities in the East and West; 1876 (1981) Arden Library.
72 Dr. Priyanath Sens Tagore Law Lectures, 1909 on The General Principles of Hindu Jurisprudence, page 363, cited by Dr. P.B. Gajendragadkar in his address to the Fifth International Arbitration Congress, Proceedings of the Fifth International Arbitration Congress (7-10 January, 1975).
constituted to try all disputes; According to Narada\textsuperscript{73}, a decision arrived at by the kings court from which the king is absent is appealable to the king himself.

The Law Commission of India in its 114\textsuperscript{th} Report has suggested, Gram Nyayalayas as an alternative forum for resolution of disputes at the grassroots level. It recommended that the conciliation and consensus should be the method of the “Gram Nyayalayas” with a power to enforce the attendance of any person and examine him on oath, compel the production of documents and material objects, issue commissions for examinations of witness and any other work assigned to them. Court fee was to be levied in the proceedings before Nyayalaya. The commission also recommended that all authorities of the Revenue Department operating at village and “tehsil” level and all police authorities and forces should be put under obligation to assist the Gram Nyayalaya in discharging its functions.

The 73\textsuperscript{rd} constitutional amendment has given an enabling legal framework for promoting self-governance at district and sub-district levels. However, the amendment is silent on the important issue of dispute resolution for delivering speedy and inexpensive justice to the villagers. Though Nyaya panchayats were not a part of the 73\textsuperscript{rd} Constitutional Amendment Act, some states have included provisions regarding dispensing justice in their panchayat legislation.

**A. Panchayat**

In ancient India, the law of arbitration was very popular and highly accessible. There were systemized hierarchical boards to decide the disputes. The panchayath can tackle village problems at the grass root level and mobilize local manpower resources for a solution. There were also Panchayat’s which functioned as subordinate authorities to the regular courts and their decisions were binding as a decision of a Court of Law. The members of panchayats were known as Panchas. Proceedings before these bodies were of informal nature, free from the cumbersome technicalities of the municipal courts. Moreover, as the members of these bodies were drawn from the same locality and often from the same walk of life as the parties to the dispute, the facts and events could not be concealed from them. The head of a family, the chief of

\textsuperscript{73} Narada is a divine sage from the Vaisnava tradition, who plays a prominent role in a number of the Puranic texts, especially in the Bhagavata Purana, and in the Ramayana.
a community or selected inhabitants of a village or town act as a Panchayat. The decisions of these bodies were final and binding nature in law in force in those times. According to Colebrooke\textsuperscript{74}, Panchayath was different systems of arbitration subordinate to the regular courts of law. The Panchayat was the lowest tribunal and as such its award subject to appeal. An aggrieved party could, however, go in appeal against the decision of the \textit{Kula} to the \textit{Sreni} and from the \textit{Sreni} decision to the \textit{Puga} and finally from the \textit{Puga} decision to the Pradvivaca. Though these bodies were non-governmental and the proceedings before them were of informal nature, their decisions were reviewable by the municipal courts.

In the absence of some serious flaws of bias or misconduct, by and large, the courts have given recognition and credence to the awards of the Panchayats. For instance, in the case of \textit{Sitanna v. Viranna},\textsuperscript{75} the Privy Council affirmed an award of the Panchayat in a family dispute, challenged after about 42 years. These arbitral bodies dealt with a variation of disputes that are disputes of contractual, matrimonial, and even criminal nature. In ancient times, the Raja was the ultimate arbiter of all disputes between the subjects. However, with a change in social and economic conditions with changing times, the functioning of such arbitral bodies became inadequate and outmoded, \textit{albeit} in some form or other, even today, some variants of such arbitral bodies are prevalent in some rural and tribal areas in the country.

\textit{Marten CJ}\textsuperscript{76}, commenting on the Ancient system of Arbitration in India states-

\begin{quote}
“\textit{It (Arbitration) is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer matters to a “panch” is one of the natural ways of deciding many a dispute in India”}.
\end{quote}

\textsuperscript{74} Henry Thomas Colebrooke was an English orientalist and mathematician. He has been described as “the first great Sanskrit scholar in Europe”\textsuperscript{75} AIR 1934 PC 105.

\textsuperscript{76} Sir Amberson Barrington Marten Eminent British Judge, Chief justice of Bombay High Court; 1926-1930.
B. Ratcha Banda

In the traditional olden days, the systems of the settlement of disputes in an informal way i.e. solving controversies especially in rural communities were to be conducted at a fixed place settled by the village level committee or by the elder at a place called Ratcha Banda. In this place, the parties to the controversy i.e. the complainant, the presumed culprit and anybody else involved is gathered and explain their version of the issue and their interests. This place is considered to be the right place where the people of the village including of the elders, pranukh’s and Sarpanch will assemble and try the disputes and settle the same based on the evidence adduced before them. The place will be considered to be the place where the disputes will be settled and run equivalent to the court place. Further, there is a notion that whoever presides the Ratcha Banda proceedings, shall be vested with divine powers in order to decide the disputes as an impartial third person. Therefore, his words and decisions will be considered that of the god and will be accepted by the public at large of the village.

2.10.2 The Practice of Arbitration during the Muslim Rule

During the ancient Muslim rule in India, Imam Abu Hanifa and his disciples Abu Yusuf and Imam Mohammad in the commentary, which came to be known as the Hedaya, systematically compiled the Muslim law. A hybrid system of arbitration laws was developed for the transactions between the Muslims. During the Muslim rule, all the Muslims in India were governed by the Islamic laws; the Shari’a, as contained in the Hedaya. The non-Muslims were continued to be governed by their own personal laws. The Hedaya contains provisions for arbitration between the parties. Tahkeem is the Arabic word for arbitration and Hakam is the term for an arbitrator and he must hold the vital qualities of a Kazee i.e., a solemn judge presiding over a court of law. Certain types of persons were prohibited from acting as arbitrators. In cases, where the parties to a contract dispute are Muslims, Shari’a law governs the entire arbitral process, both procedurally and substantively. The seat of arbitration has no relevance to the procedure to be followed, though to ensure the

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77 The Hedaya id Commentary on the Islamic Laws.
78 Shari’a, also spelled Sharia, the fundamental religious concept of Islam, namely its law, systematized during the 2nd and 3rd centuries of the Muslim era (8th–9th centuries AD).
validity of the award at the seat of arbitration, any mandatory rules of the seat should be observed. If one party is a Muslim, the non-Muslim party has the option to decide whether or not to settle the dispute according to Shari’a rules. If the non-Muslim party does not agree to be governed by Shari’a rules, the law applicable will be either as agreed between the parties or by application of choice of law rules. If two parties to a dispute appointed an arbitrator and expressed their decision in the form of award, he would proceed with the arbitration. Before making award objections can be raised by the parties but in the absence of such objections the arbitrator would proceed to hear the arbitration and make the award. The award made by the arbitrators is binding on the parties except in cases where the award was invalid on account of any legal infirmity. When once the parties acknowledge or accept an arbitral award afterward they could not raise objections from such award. If an award is passed in favor of a parent, child or wife was void ab initio. Though the Arabic language had the sanctity of a religious language of Muslims, the court language throughout the Muslim era was Persian. The Persian word for the arbitrator is Salis and a party to the arbitration is a Salisee. An arbitration agreement is Salisnama while the word for the award is Faisla.

According to Shari’a, any award made under any other law is a foreign award. Even if a single condition required by Shari’a is not fulfilled, the award will be deemed to be a foreign award. To enforce such awards the jurisdiction court is not examining the disputes on merit basis or the arbitrators opinion. Nevertheless, the court can examine the formal conditions such as the existence or the validity of the agreement to arbitrate, whether the award has been made by all the arbitrators and whether it deals with the merit in dispute. However, in the area of international commercial arbitration, strict application of Shari’ah has diminished with the emergence of arbitration rules. Therefore the first law of Arbitration comes into force in India in 1697.

2.10.3 Practice of Arbitration during the British Rule

The system of Alternate dispute redressal was found not only as a appropriate method but was also seen as a politically safe and significant in the days of British/ Company Raj. However, with the advent of the British Raj, these traditional
institutions of dispute resolution started withering and the formal legal system introduced by the British began to rule.

The law of Arbitration which was existed in the country was not a changer by the East India Company. In the subsequent years of the charter 1726 has passed special powers to the company. The company’s financial breakdown was the immediate cause for the enforcement of Regulating Acts. For the first time, parliament ordered the form of government which was centralized the administrative machinery in India. The Bengal Regulations of 1772, 1780 and 1781 were orginated to encourage arbitration. The East India Company did not abrogate the law relating to arbitration as prevalent in the country at the time it came into power. But between the years 1772 and 1827, the legislative form of arbitration was granted by the government to implementing procedures in the three presidency town’ viz. Calcutta, Bombay, and Madras, in the exercise of the powers conferred upon it by the British Parliament. The Act of 1773 acknowledged the political functions of the company. This law was introduced to prevent the Governor-General from autocratic. By the Bengal regulation Act, 1772 the parties must submit their dispute to the arbitrator who was appointed after the mutual agreement between the parties in the disputes and the resolution of the arbitrator is final and binding. These regulations lacked uniformity of detail and clarity. However, they introduced substantial changes in the Panchayat system in the Presidency towns. For instance, the Bengal Regulations LVIII of 1781 provided that ‘the judge do recommend, and so far as he can without compulsion, prevail upon the parties to submit to arbitration of one person to be mutually agreed upon by the parties.’ It further provided that ‘no award of any arbitrator or arbitrators, can be set aside, except upon full proof made by oath of the credible witnesses that arbitrators have been guilty of gross corruption or partiality to the cause in which they had made their awards’.

The Regulation made by Lord Cornwallis in 1787 included a provision for arbitration with the consent of parties, but there were no provisions for the consequences of the award not being made in time, or for the situation when

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80 The East India Company was an early English joint-stock company that was formed initially for pursuing trade with the East Indies, but that ended up trading mainly with the Indian subcontinent and China.

81 David G. Sutherland, The regulations of the Bengal code in force in September 1862, Geo.Wyman And Co. Calcutta, 1862.
arbitrators differed in their opinions\textsuperscript{82}. The Bengal Regulations of 1787, 1793, and 1795 introduced certain procedural changes by empowering the court to refer suit to arbitration with the consent of the parties and further authorising the court to promote references of cases not exceeding Rs 200 in value to arbitration and disputes relating to partnership account, debts, disputed bargains and breach of contract. They also laid down the procedure for conducting arbitration proceedings before the arbitration. The Bengal Regulations of 1793 was extended to the city of Benaras in the year 1795. The limits of the jurisdiction of arbitration were extended by the Bengal Regulation of 1802, 1814 and 1883 by making diverse procedural changes. Likewise, in the Presidency town of Madras, the Regulation of 1816 empowered the district Munsifs to convene district Panchayats for settling disputes of a civil nature in connection with real estate and personal property. In the Presidency town of Bombay, the Regulation VII of 1827 provided for settlement of civil disputes and also laid down that arbitration shall be in writing, a named arbitrator and the time for making the award.\textsuperscript{83}

After several regulations, the Arbitration Act VIII of 1857 has certain provisions which codified the procedure of Civil Courts established by the Royal Charter contains sections 312 to 325 deals with arbitration in suits and section 326 and 327 deals with the arbitration without the intervention of the court. These remained in force till the enactment of Civil Procedure Code 1859\textsuperscript{84} (Act No 7 of 1859) which was extended to the Presidency towns in 1862. The Act was repealed by the Civil Procedure Code 1877 and 1882 but provisions relating to arbitration were \textit{Mutatis Muntandis}.

From time to time after some provisions Indian Arbitration Act, 1899 was passed based on the English Arbitration Act, 1899. It was a first substantive law of arbitration but limited to the presidency towns of Calcutta, Bombay, and Madras but subjected to many defects and severe judicial criticisms. Thus, the Arbitration Act 1940 was enacted replacing the Indian Arbitration Act of 1899. It amended and consolidated the law relating to arbitration in British India and remained a comprehensive law on Arbitration even in Republican India until 1996.


\textsuperscript{83} Nuseerwanji v Moynoodeen 1855, 6 MIA 134.

\textsuperscript{84} The Act was enacted basing on the recommendations of the second Law Commission in Pre-independent India as Code of Civil Procedure and Law of Limitation 1859.
2.10.4 Practice of Arbitration in Independent India.

After the end of the Second World War, particularly after the Independence in 1947, the trade and industry have fallen down their commercial community became the need of arbitration for the settlement of their disputes, as against court-litigation, which involved long delays and heavy expenses. Bodies such as panchayat, rachabanda, a group of elders in a village deciding the dispute between villagers are not common today. By the phenomenal growth of commerce and Industry, the effect of globalization requires substantial changes in the Arbitration Act, 1940. subsequently, the 1940 Act was enacted by the Arbitration and Conciliation Act, 1996.

The Civil Procedure Code Amendment Acts 1999 and 2002 inserted Section 89 with a view to giving statutory backing to the conciliation process with a view to clear backlog cases. Section 89 now made it obligatory to the court to identify and refer the disputes for the settlement through conciliation, mediation or settlement including the settlement by the Lok Adalat. The newly added section 89 extended the scope of Arbitration and Conciliation Act, 1996 and the Legal Services Authorities Act, 1987. This is only when the settlement is proved to be futile before the Alternative Disputes Resolution systems, then the civil courts have to try the cases. The courts have to exercise judicial discretion and identify the cases having the elements of settlement and then only to refer the same under Section 89 of Civil Procedure Code, 1908.

As a consequence of the introduction of Section 89 in the principal Act i.e. Code of Civil Procedure, 1908, the amending Acts also laid provisions in order X Rule 1A, 1B, and 1C etc., prescribing procedures to be adopted for reference. The tenors of these rules now are obligatory to the courts to direct the parties to opt for settlement by way of remedies as laid down under Section 89 of Civil Procedure Code, 1908.

2.11 Arbitration in International Scenario

Arbitration is not a recent phenomenon. As courts endeavored to initiate their jurisdiction at a rate consistent with the number and complexity of trade disputes in the rapidly growing sphere of international commerce, arbitration quickly became the
dispute resolution mechanism of choice. Merchants demanded that it was far more effective if they themselves dealt with mercantile problems and they implemented their own rules and procedures for resolving disputes.

The International Arbitration represents a private corporation, states and state-owned enterprises in major international disputes all over the world. States treat International Commercial Arbitration and international adjudication differently because they are categorically different enterprises. As a private contractual arrangement, International Commercial Arbitration does not raise serious legitimacy concerns. International Commercial Arbitration involves commercial disputes between sophisticated international traders. States have little interest in policing such disputes, and the commercial law does not differ much from place to place anyway.

The expansion and globalization of cross-border investment and trade have led to increased and ever more complex relations between business, investors, and states. As, inevitably, some of those relationships break down, parties need to consider the perfect means of resolving any disputes which may arise.\(^\text{85}\)

It is important to note at this stage that arbitration is consensual, parties to an arbitration agreement aimed for their disputes to be resolved in this approach rather than litigation. This independent statement of intention is referred to as ‘party autonomy’. Usually, arbitration law attempts to accord immense significance to party autonomy. As *Ercus Stewart* points out “arbitration is a method of dispute resolution. It is not ‘litigation without wigs’, nor is it supposed to be litigation by another name\(^\text{86}\)”. Party autonomy is the defining attribute of arbitration, especially when one considers that its origins lay in the concept of resolving disputes by and between merchants.

In the International arena, in the late 19th century, International Commercial Arbitration began to gather significant momentum but its governance remained the preserve of national law. With no international regulation of arbitration, the enforcement of awards was held differently in different countries. This added yet a further complexity to the international arbitral procedure, especially when


compounded with the multifarious legal regimes with which parties to an international arbitration had to grapple.

India is a party to the conventions prescribed under is:

1. The Geneva Protocol on Arbitration Clauses, 1923
2. The Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; and

Early efforts to administer international arbitration are evident in the Hague Conventions of 1899 and 1907\(^{87}\) encourage the “Pacific Settlement of Disputes” which established the Permanent Court of Arbitration. Over the decades that followed, the business community set up the International Chamber of Commerce (ICC) and the Court of Arbitration, with the inception of the former occurring in 1919 and the latter in 1923\(^{88}\). These institutions helped to drive the adoption of the Geneva Conventions 1923\(^{89}\) and 1927\(^{90}\) respectively, which was superseded by the New York Convention, 1958.\(^{91}\) These all represent early attempts at harmonizing arbitration law on an international scale.

In an attempt to break down the remaining barriers to international trade as a result of the inconsistency in national trade laws, the United Nations General Assembly formed the United Nations Commission on International Trade Law

\(^{87}\) The Hague Peace Conferences of 1899 and 1907 marked the first significant attempts to codify the international law of war and the opening of the modern era of efforts toward international disarmament.

\(^{88}\) The ICC is the world’s largest business organization working to promote international trade, responsible business conduct and a global approach to regulation to accelerate inclusive and sustainable growth to the benefit of all.


\(^{90}\) Geneva Convention on the Execution of Foreign arbitral awards, Geneva, 26 September 1927.

\(^{91}\) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). This Convention was the result of unsatisfactory results of the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. In this framework, the International Chamber of Commerce (ICC) played a very key role in that it took the initiative to replace the Geneva treaties and issued a preliminary draft convention in 1953. Working on the ICC’s initiative, in 1955, the United Nations Economic and Social Council drafted an amended version of the convention which was discussed in May-June 1958 which led to the establishment of the New York Convention.
(“UNCITRAL”) in 1966. The Commission is now the principal legal body of the United Nations system as regards to international trade law and is composed of sixty member States elected by the General Assembly. Its primary offers to international arbitration law include the UNCITRAL Rules of Arbitration and Model Law. The precedent set of rules was adopted by the General Assembly in 1976 and according to Jan Paulsson “were prepared with the input of lawyers from around the world, and therefore thought to be more acceptable to parties from developing countries than the rules of institutions perceived as inspired by the Western capitalist ethos92”. However, the UNCITRAL Arbitration rules have used in both general commercial transactions and arbitrations between states and individuals. Ultimately, in 1985, the UNCITRAL adopted a Model Law on International Commercial Arbitration.

The UNCITRAL Model Law quickly attained popularity on the international plane is given that, like Lew, Mistelis and Kroll describe, they “…are autonomous and suitable for use in almost every kind of arbitration in every part of the world…[and they]…deal with every aspect of arbitration from the formation of the tribunal to rendering an award93”. At present, more than 68 countries have adopted the 1985 Model Law in the last twenty years.

Today, the Model Law provides a vital legal framework for arbitration procedure in many jurisdictions around the world. It sets out the fundamentals of a national arbitration law incorporate, the arbitration agreement form, the composition of arbitral tribunal, the jurisdiction of the tribunal, elementary procedural rules, the award, and recognition and enforcement. Robert Merkin notes that “the Model Law in most respects follows the terms of the UNCITRAL Arbitration Rules so far as those rules deal with these matters94”. Its worldwide adoption by States, institutions and ad hoc tribunals such as the Iran-US Claims Tribunal highlights its utility in solving a variety of disputes, as well as its inherent flexibility to adapt to various forms of application.

93 Lew, Mistelis and Kröll, Comparative International Commercial Arbitration, note 5.
2.12 International Commercial Arbitration Institutions

Notwithstanding the now general preference in the international arena for arbitration in lieu of litigation, there are still new developments to take into account in planning and providing for dispute resolution. The process continues to evolve. One aspect of that evolution is the emerging convergence of principles and techniques that apply to international or, to adopt the term, "transnational" commercial arbitration. Where as one arbitrates, and who administers it, matters less than it once did. The convergence is far from complete, but that is the direction in which world practice is heading. Responsible for much of this convergence is the major international commercial arbitration institutions.\(^95\)

There are rigorously hundreds of institutions in the world wide whose services are available to appoint arbitrators and to administer arbitral proceedings. Most of these institutions are affiliated with local chambers of commerce.\(^96\) In the International Arena several important arbitral institutions, provides as the London Court of International Arbitration (LCIA) in 1892, the Arbitration Court of ICC Court i.e., International chamber of commerce in Paris in 1923 or the American Arbitration Association ("AAA") in 1926, were established.\(^97\)

The main purpose of these chambers is in the words of Manson “to have all virtues which the law lacks” and “to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer-up of strife.”\(^98\).

2.12.1 London Court of International Arbitration (LCIA)

The LCIA is one of the world’s foremost international institutions for commercial dispute resolution. In 1892 the London Court of International Arbitration was established as an institution for commercial dispute resolution. The foundation of LCIA Arbitration Court in 1985 represented a major step towards the

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96 Ibid.
97 Ibid.
99 The word “International” was added in 1981.
internationalization of LCIA. The LCIA provides an efficient, flexible and impartial administration of arbitration and other ADR proceedings, regardless of location, and under any system of law. The international nature of the LCIA’s services is in the fact that, typically, over 80% of parties in pending LCIA cases are not of English nationality. While London, is an international institution and a large proportion of the members of the LCIA Court are not from the United Kingdom. The LCIA has a general membership of over 2000 members (from over 80 countries), for which it organizes a worldwide programme of conferences, seminars and other events of interest to the arbitration and ADR community. This general membership is organized into Users’ Councils, which have been established to provide and maintain its worldwide services and to meet the developing needs of the business community.

In 2011, the LCIA and Mauritius government jointly established a new arbitration center in Mauritius, LCIAMIAC, with its own set of rules. The LCIA extend international arbitration anywhere in the world. However, if the parties have not mentioned a place in their arbitration agreement (and unless the LCIA determines there is some reason why another venue should be chosen), London will be the seat of the arbitration. The LCIA deals with a different of commercial disputes, including those relating to energy, foreign trade, transport, distribution, technology, construction, and engineering. To provide and to maintain its services and to meet the needs of the international business community, the LCIA has established Users’ Councils which cover the major trading areas of the world. Each Users’ Council has its own officers and formulate its own programme of activities suitable to the needs of the region. The latest rules of LCIA’s came into effect in October 2014. Noteworthy changes include provisions on the conduct of parties and legal representatives, also greater scope for emergency relief (including the appointment of emergency arbitrators).

2.12.2 London Maritime Arbitral Association (LMAA)

The London Maritime Arbitrators Association ("LMAA") is an association of maritime arbitrators practicing in London. It exists to promote and support London
maritime arbitration in different process. It does not administer or supervise the conduct of arbitrators.

On 12th February 1960 London Maritime Arbitrators Association (LMAA) was founded at a "meeting of the Arbitrators on the Baltic Exchange Approved List" but its source and traditions extend back more than 300 years over the history of The Baltic Exchange Arbitrations were then (and indeed still are) conducted, often informally, before members of the shipbroking fraternity to settling their clients’ disputes without any choice to the courts. Over the years, however, full membership of the association has been expanded so that the list of practicing arbitrators now embraces a variety of disciplines and a corresponding breadth of expertise.

The main object of LMAA is "to advance and encourage the professional knowledge of London maritime arbitrators and, by recommendation and advice, to assist the expeditious procedure and disposal of disputes.”

Occasionally, however, the LMAA (or, more usually, the President for the time being) will appoint arbitrators, when an arbitration agreement provides for it to do so or when parties especially agree that it should. Apart from appointing an arbitrator in circumstances in which the parties cannot agree upon the appointment of an arbitrator, LMAA does not administer arbitrations conducted by its members or under its rules. In those arbitrations in which LMAA appoints an arbitrator, then its role will be concluded with the appointment. The association does not involve at all in other arbitrations. This contrasts with the approach of other arbitral institutions which administer arbitrations and charge for their service.

The administration of LMAA arbitrations is managed by the arbitrators themselves. LMAA terms make comprehensive provision for the procedures to be followed by the parties. By and large, the tribunal only needs to get involved in one or other party fails to follow the prescribed procedure, or where a decision is required because the parties fail to agree on the relevant procedural way to be followed. More maritime disputes are raised to arbitration in London than to any other place where

103 A Talk by Simon Gault, the Honorary Secretary of the Association, 4th Annual International Conference Practice of maritime business: sharing experience, (29th and 30th May 2008).
104 London Maritime Arbitrators Association was introduced in 2006.
arbitration services are offered. In 2014 LMAA about 3,582 Full Members received new arbitration appointments and more than 584 awards were published by them.

LMAA has also started its Small Claims Procedure (SCP), Fast and Low-Cost Arbitration (FALCA) and Mediation Terms which together offer those involved in maritime matters a vast scope of choice for the resolution of disputes. One of the main attractiveness of LMAA arbitration is the absence of a secretariat and any administrative involvement in the running of the arbitrations. As a result, LMAA remains very important to the Shipping Industry and Commodity trades on a worldwide basis.

2.12.3 International Chamber of Commerce (ICC)

The ICC and its International Court of Arbitration is one of the most well-known institutions for international arbitration. Since its establishment in 1923, the ICC has administered over 10,000 arbitrations involving parties and arbitrators from over 170 countries and territories. The Court of Arbitration does not determine disputes.

The main role of the ICC was to develop trade and investment and assists the business to reach the globalization opportunities. ICC has three (3) principal activities they are setting rules, arbitration, and policy and provides services of ICC Arbitration, training, commercial crime fighting, and customs facilitation.

However, it plays a prominent role in administering arbitrations under the ICC rules. Two procedural aspects of ICC arbitrations are noteworthy. Firstly, within two months (or such additional time as the tribunal may allow) after the tribunal receives the file, the tribunal formulate ‘terms of reference’ and submits them to the Court of Arbitration for approval. The terms of reference are intended to define the claims and defenses of the parties at an early stage, to crystallize the issues for determination by the tribunal and to address procedural issues. Once the terms of reference have been accepted by the Court of Arbitration, new claims can only be made with the permission of the tribunal.

106 www.uscib.org/international-chamber-of-commerce-icc-ud-754/
Secondly, before an award is published by the tribunal, the Court of Arbitration reviews the draft award for its form. The Court of Arbitration may also make suggestions regarding the substance of the draft award. This review process is calculated to encourage the publication of consistently high-quality awards by ICC tribunals.\textsuperscript{107}

2.12.4 American Arbitration Association (AAA)

The American Arbitration Association is not for a profit public service organization with a long history of working with all level of government. The foundation and keystone of the association's mission are independence, neutrality, and integrity. American Arbitration Association was created in 1926 with its headquarters in New York, United States of America. The state of New York is associated with the beginning of commercial arbitration in the USA.

The AAA role in the dispute resolution procedure is to administer cases, from opening (filing) to closing. The AAA provides managerial services in the U.S., as well as abroad by its International Centre for Dispute Resolution (ICDR). The AAA's and ICDR's managerial services contain assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation. Ultimately, the AAA aims to progress cases through arbitration or mediation in a just, equitable and impartial manner until completion. An additional AAA service provides the design and development of alternative dispute resolution (ADR) systems for corporations, unions, government agencies, law firms, and the courts.

It is important to understand that the main goal of AAA/ICDR is not to realize the arbitration procedure but to supervise its cases. The parties that have a dispute and decide to submit it to an arbitration agreement in order to settle their issues decide which arbitration rules they will follow. If AAA is chosen, it will not perform the arbitration, but will merely supervise it. An arbitration court is chosen for each case and the arbitrator (or arbitrators) will be the ones conducting the case. The arbitrators may be chosen by the parties or by AAA.

\textsuperscript{107} Stephenson Harwood, \textit{An introduction to international arbitration}
This New York-based institution uses ADR methods, especially arbitration, to settle disputes. The mission statement of American Arbitration Association states that

“The American Arbitration Association is dedicated to the development and widespread use of prompt, effective and economical methods of dispute resolution. As a not-for-profit organization, our mission is one of service and education. We are committed to providing exceptional neutrals, proficient case management, dedicated personnel, advanced education and training, and innovative process knowledge to meet the conflict management and dispute resolution needs of the public now and in the future.”

Thus, AAA attempts to avoid disputes through education but when disputes occur, AAA provides the necessary structure in order to solve them the best way possible. American Arbitration Association is the global leader in conflict management built on integrity, committed to innovation and embracing the highest standards of client services in every undertaking. Most international arbitration cases today follow AAA rules or ICC ones, according to Offenkrantz,\textsuperscript{108} for agreements that are international in scope or are between citizens of different countries, administration of arbitration will often be had under AAA's Commercial or International Rules or those of International Chamber of Commerce ("ICC").

AAA commercial arbitration is considered relatively economical and speedy, with a minimum of institutional involvement during and after the proceedings. After surveying the available institutions and rules, two authorities concluded that "international commercial arbitrations administered by AAA, conducted under either AAA or UNCITRAL rules and subject to U.S. arbitration laws, are the best. . . to provide the parties with the most efficient and effective system of alternative dispute resolution that will achieve the essentials of business transactions internationally"\textsuperscript{109}.

\textsuperscript{109} Richard J. Graving, *The International Commercial Arbitration Institutions: How good a job they doing*, AM.UJ. International Law & Policy Vol.1
2.13 UNCITRAL Model Law

United Nations Commission on International Trade Law (UNCITRAL) is a specialized commission of the United Nations, established in 1966 to enable the United Nations to play a more active role in reducing or removing legal obstacles to the flow of international trade. U.N. recognized that various economic and legal differences existed between States. These differences were the source of many of the problems that hindered the advancement of an integrated international trade system. The General Assembly considered it desirable that the process of harmonization and unification of the law of international trade be substantially coordinated, systemized, accelerated, and that a broader participation by States, be secured. As a result, the UN General Assembly adopted the resolution establishing the Commission.

UNCITRAL is composed of sixty member states elected by the General Assembly of the United Nations. Membership in UNCITRAL is limited to a small number of states, so as to facilitate the deliberations. UNCITRAL was originally composed of 29 nations and now it includes 60 nations includes 14 African nations, 14 Asian nations, 8 Eastern European states, 10 Latin American/Caribbean nations, and 14 Western European or other nations.

Of all the texts prepared under the auspices of UNCITRAL and then launched into the world of international commerce by the UN General Assembly, dispute resolution particularly arbitration, distinguish themselves as obvious success stories. These are the Arbitration Rules of 1976, the Model Law on International Arbitration of 1985, and the Conciliation Rules of 1980. The Model Law on Arbitration was according to Holtzmann, worthy of standing alongside the New York Convention and the UNCITRAL Arbitration Rules as a crucial pillar in the worldwide system of arbitral justice.

The UNICITRAL model law on International commercial arbitration was adopted by the UNICITRAL on 21 June 1985 in the 18th annual session. The General assembly by its resolution 40/72 of 11th December 1985, recommended that “ that all

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the states give due analysis to the model law on International Commercial Arbitration, in view of the uniformity in the arbitral procedures and the requires an practice in International commercial arbitration”.  

This model law has a desired to harmonization and improvement of national laws and it covers all the steps in arbitral process. This form of model law has chosen for harmonization and improvement in preparing new arbitration laws in states.

The Model Law sets out the basic requirements of a domestic arbitration law, the arbitration agreement form, the arbitration tribunal composition, the tribunal jurisdiction, elementary procedural rules, the award and recognition, and enforcement. The Model law follows the terms of UNCITRAL Arbitration Rules and characterized by a number of notable aspects. The first is the importance of party autonomy accorded to all phases of arbitration. This is, however, issue to default procedures where no agreement has been reached by the parties. The second noteworthy feature is the right of parties and the arbitrators, in contrast to the position in most domestic arbitral frameworks, not to apply the domestic law of the gathering to the procedural aspects of the arbitration. Third, the role of the courts in the arbitral process is critically restricted. Their involvement is restricted to the appointment of arbitrators where no agreement exists, the hearing of challenges to arbitrators, the replacement of arbitrators unwilling to act, the resolution of preliminary matters as to the jurisdiction of the arbitrators on appeal from their decision on the point, providing assistance with obtaining evidence and the setting aside of awards on certain grounds. A final and highly significant principle of the Model Law is that it does not provide for a right to appeal against an error of law.

On 10th July 2017, the UNCITRAL Commission has agreed to work on multilateral reform of investment dispute settlement. UNCITRAL members have decided to work on investor-state dispute settlement (ISDS). The UNCITRAL is a subsidiary body of the General assembly of the United Nations tasked with a mandate of furthering the progressive harmonization and unification of international trade and investment law. The commission is made up of 60 states.

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112 International Commercial Arbitration, UNCITRAL Secretariat Explanation of Model Law.
113 Article 19.
114 Article 6, 27 and 34.
In summary, the UNCITRAL Model Law on Arbitration was said to be, according to H. Holtzmann is worthy of standing alongside the New York Convention and the UNCITRAL Arbitration Rules as a crucial pillar in the worldwide system of arbitral justice\textsuperscript{115}. Improvement and harmonization of national laws remain key factors in the facilitation of international arbitration because of the need for increasing uniformity and predictability of effective arbitral procedures to lower the risks of international commerce and to contribute to overall global economic relations. It assists in curing the adverse effects of the disparity between national laws in international cases, avoiding territorial constraints and local peculiarities, and it provides for functioning and fairness of the arbitral process by a universal standard. The objectives of the Model Law are to devise a fairly complete and generally acceptable set of non-mandatory provisions, closely modeled on, but sometimes distinguished from, UNCITRAL Rules, and to clarify a number of issues in the interpretation and application of the New York Convention.

**Summing Up**

To sum up this chapter, arbitration is one of the oldest forms of dispute resolution in the history of the world. India has a long history in settlement of disputes outside the court. The parties settle their disputes by an arbitrator chosen by the parties and the award or decision made by the arbitrators is final and binding on the parties from the Vedic period of times. During the British rule, several provisions on arbitration are enacted. After the Independence separate Arbitration Act was enacted in India and placed in Civil Procedure Code under Section 89 which deals with settlement of disputes outside the Court. Emphasis placed in this chapter finds out the historical perspective of ADR especially on Arbitration as it has its seeds in the ancient period and brings several aspects such as the growth of Arbitration in different systems and emergence of International Commercial Arbitration. The development of Arbitration in several countries of European Union such as France, Germany, Sweden, Switzerland and United Kingdom and also of Asian Countries like China, Singapore and off course United States of America and organized bodies like the International Chamber of Commerce, London Court of International Arbitration and

the American Arbitration Association showed the factors that lead to development in different countries and its present status. In addition historical information relating to the development of the UNICITRAL Model Law and the UNICITRAL Arbitration Rules, thus, it is evident that several historical aspects herein above brought out the insight of the present status of the developed systems of ADR.

In the next chapter, the researcher has thoroughly discussed Alternative Dispute Resolution Systems and the International Regime. In this subsequent chapter, the researcher has extensively discussed the existing international legal regime on Alternative Dispute Resolution. The discussion also provides sufficient space on several Conventions and Treaties of both International and Regional Arbitration Instruments today as an effective mechanism in resolving international commercial disputes through alternative dispute resolution.