CHAPTER – III

ALTERNATIVE DISPUTE RESOLUTION SYSTEM – INTERNATIONAL LEGAL REGIME
In the present chapter, the researcher has extensively discussed the international legal regime on Alternative Dispute Resolution. There are several Conventions and Treaties of both International and Regional Arbitration Instruments today. In the present chapter, the researcher has discussed certain important International and regional instruments relating to alternative disputes resolution. In the present Chapter, the Scholar has discussed the basis of International Legal Regime that applies to International Commercial Arbitration, wherein the scholar has made an attempt to explain the concept of lex mercatoria and its application together with UNIDROIT principles\(^1\) as International Legal Regime including Geneva\(^2\) and New York Convention\(^3\). Special emphasis has been made to explain the role of the World Trade Organization (W.T.O.) and the commerciality in commercial arbitration and other related important international instruments relating to alternative disputes resolution.

Parallel to the development of international arbitration, during the past several decades, the present legal regime for international investment arbitration was developed, including particularly through the adoption of the ICSID Convention\(^4\) and extension of bilateral investment treaties (BITs). Similarly, if less extensively and comprehensively the 1899 Hague Peace Conference adopted the Convention for the

\(^1\) UNIDROIT (Institute International pour l'Unification du Droit Privé) is an international organization that aims to harmonize of private international law
\(^2\) Geneva Convention 1927 is on the execution of foreign arbitral awards signed at Geneva on 2609-1927.
\(^3\) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959.
\(^4\) Convention on the Settlement of Investment disputes Between States and Nationals of Other States, which was produced at Washington, D.C., 18 Marc 1965.
Pacific Settlement of International Disputes (which was subsequently amended in 1907 followed by the 1929 General Act on the Pacific Settlement of International Disputes\(^5\). These international conventions are meant to resolve interstate disputes peacefully while setting forth a basic legal framework in which international arbitrations could be conducted.

It is in common practice that whenever two or more parties have a dispute, the same would be preferable if they were able to discuss it between themselves and to arrive at a peaceful solution. Only the parties themselves can achieve a solution that will not only resolve the dispute but also will facilitate a useful future relationship. However, sometimes the parties are not interested in any future relationship and only want the dispute to be settled, preferably on their own terms which may at times lead to war or its private equivalents. Even when the disputant parties are interested in a peaceful settlement of the dispute, it is not infrequent that the parties are not able to discuss or negotiate a mutually agreeable solution. In such a situation the aid of a third party must be sought for amicable settlement of the dispute. In such a situation, by the enactment of a statute, the State offers one form of third party settlement of private disputes by maintaining a court system in which they can be litigated. Most private disputes that need the services of a third party are resolved by litigation. However, it is also possible for the parties to involve third persons in a private capacity to solve, or to help them solve, the dispute. Arbitration is the more prominent of the private dispute settlement mechanisms, both domestically and for international commercial relations, though it is not the only one. In arbitration, the principal characteristics that present are it is used for the settlement of disputes, consensual in nature, private procedure and finally determination of the parties rights and obligations is final. In commercial arbitration, it must be founded on the agreement of the parties. Not only does this mean that they must have consented to arbitrate the dispute that has arisen between them, but it also means the arbitral tribunal authority is restricted to the parties has accepted. Consequently, the award provided by the tribunal must resolve the dispute that was submitted to it and must not pronounce on any matters or other disputes that may have arisen between the parties.

\(^5\) The General Act for the Pacific Settlement of International Disputes is a multilateral convention concluded in Geneva on September 26, 1928. It went into effect on August 16, 1929 and was registered in League of Nations Treaty Series.
International arbitration is a complex and important international legal framework. The national laws, international conventions, national arbitration legislation, and institutional arbitration rule have provided a specialized and supportive enforcement regime for most contemporary international commercial arbitrations and international investment arbitrations. The international legal regimes for international commercial and investment arbitrations was established and progressively refined with the express goal of facilitating international trade and investment by providing stable, predictable and effective legal framework in the commercial activities.

The transnational treaties, international commercial arbitration is governed by several sources of law, including: (1) the national law administrating the capacity of parties in entering the arbitration agreement; (2) the law administrating the arbitration agreement; and (3) the law calculating arbitral proceedings, such as the rules of a permanent arbitral institution like the International Arbitration Forum or an *ad hoc* arbitral body established by the parties. The well-known fact is that the international economy, over the last three decades, has undergone dramatic transformations, which have been more rapid and far-reaching than at any time during the last more than half century, that is since history saw the appearance of the science of economics.

In the present industrial world, a unique feature about the International commercial contracts is such that these commercial contracts are generally subjected to an arbitration clause in the very contract. This accords greater flexibility and freedom to the parties not only to choose the law governing the contract, the arbitration agreement, the seat of arbitration but also allows them to follow a set of procedure of their own choice which is most suited to the dispute at hand. Since the Arbitration Tribunal can exercise jurisdiction only upon the parties who have consented to resolve their dispute by way of arbitration, the Tribunal cannot such issue interim orders which will have a binding effect on the third parties\(^6\).

In the present globalization era, it has various challenges and opportunities. Globalization, Liberalization, and Privatization have not only has competition in various sectors of the economy but also in various aspects of human life. The

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\(^6\) Nirma Ltd v LentjesEngergy (India) Pvt Ltd decided on 26 July, 2002, Gujarat High Court, FIRST APPEAL No 5252 of 2001
processes of globalization affect all spheres of human activity. The law, being a reflection of the objective phenomena occurring in society, cannot remain away from this universal tendency. Globalization of law often requires a reassessment of many components of the national legal heritage for the purpose of making the legal regulation of certain issues more urgent and do not create obstacles to the integration within the regional and universal international organizations. Globalization has rendered international transactions more frequent and has also shown the inadequacy of national laws as a regulatory instrument thereof. The new facility of communication and transportation has encouraged the formation of world markets for many kinds of goods and services. These commercial changes have fostered the convergence of legal practice in trade transactions.

In the process of arbitration, the first principle is consensual, namely, that the parties choose arbitration. A common conclusion is that international commercial arbitration, along with the lawyer-arbitrators and counsel who serve it, emanates primarily from an amalgam of Civil and Common Law traditions that are unified by international organizations like the ICC. At a formal level, international arbitration codes, laws and practices have evolved in some measure out of Civil and Common Law traditions that are unified in part by international organizations like the ICC. Their pervasive impact upon modern arbitration is reinforced by the realization that traditional business interests served by arbitration have converged at the leading trading cities of Europe and North America where the Civil and Common Law systems prevail. Consistent with this observation, premier centers of international arbitration are mentioned as the International Chamber of Commerce, the American Arbitration Association and the London Court of International Arbitration are located in Paris, New York, and London respectively. Further embedding Civil and Common Law influences are the fact that international commercial arbitrators and counsel alike are drawn significantly from Common and Civil Law ranks. In addition, arbitrators from Latin America to Japan and China share codes of obligations of one form or

9 This is a point of emphasis among leading international arbitration centers. For example, using the banner statement “The choice is yours”, the ICC states: “The International Chamber of Commerce offers a full spread of dispute resolution services so that you and your business partner can make the best choice.”
another that trace back to Civil Law roots and which form a primary source of their legal systems.

A second principle is that these systems may allow the parties to make a choice that accommodates the preferred legal system, while still not choosing domestic courts. For example, they may adopt a European-centric model of arbitration, such as that of the ICC, because it more closely resembles Civil Law traditions, even though it is international and does not replicate the proceedings followed by the courts in any Civil Law jurisdiction. Alternatively, parties may choose the English model of the London Court of International Arbitration, or the American model of the American Arbitration Association for much the same reasons, along with local options, such as state arbitration before the Swiss Arbitration Association, the Australian Centre for International Commercial Arbitration, or China’s CEITAC. Parties may also choose to “domesticate” arbitration, such as by appealing to local customary laws and procedures.

A third principle is that the manner in which arbitration is conducted may reflect in varying degrees a particular legal tradition and more broadly, a preferred cultural orientation. For example, the influence of the ICC Court in determining the form, content, and authority of each ICC award reflects a tradition in which uniformity, consistency, and authoritativeness in decision-making are prized.

A fourth principle is that the particular procedures associated with international commercial arbitration stand out more starkly when they are modeled on a particular legal system/tradition. For example, all other factors being constant, one may well expect to encounter less reliance on oral testimony before arbitration tribunals like the ICC that before an Association like the American Arbitration Association is not for an profit organization with offices all over the U.S. the AAA has a long history and experience in the area of alternative dispute resolution, providing services to individuals and organizations who desire to settle conflicts out of court. The AAA in which the examination and cross-examination of witnesses, including experts, is often extensive.\(^\text{10}\)

\(^{10}\) The American Arbitration Association (AAA) role in the dispute resolution process is to administer cases, from filing to closing. The AAA provides administrative services in the U.S., as well as abroad through its International Centre for Dispute Resolution (ICDR)
A fifth principle is that variations in the services provided by international commercial arbitration inevitably are impacted by the customer. The London Court of International Arbitration crisply states: “Changes in commercial dispute resolution procedures are, quite properly, driven by the end-user\textsuperscript{11}.

3.1 Legal Systems

Here, it is pertinent to provide some discussion on the common law system, wherefrom the existing legal system to a larger extent in the world has emerged. This discussion is essential in order to understand the conceptual framework and subsequent contemporary developments on alternative disputes resolution system both globally and legally and also within the domestic states as well.

Introduction to the law, there are various different types of legal systems managing in countries all over the world. The content of a legal regime may find formal expression in a legal tradition, such as in codes, statutes and judicial decisions which are set out in the principles, standards, and rules of law governing the arbitration. It may also be convey in the opinions of jurists between which that law is extolled, interpreted and applied. Among the Legal Systems, the one used by most Commonwealth countries and the United States is based on Common Law and the others in Civil Law. Legal Systems of the World\textsuperscript{12} below:

1. Civil Law
2. Common Law
3. Muslim Law
4. Customary Law
5. Mixed System

\textsuperscript{11} Trakman, Leon, \textit{Legal Traditions and International Commercial Arbitration}. Available at SSRN: https://ssrn.com/abstract=986507

3.1.1 Common Law System

Common law system exist a legalized system which has a preceding authority on the basis of it is unjust in treating the related facts unusually on distinct instances. Common Law is uncodified law i.e. there is no comprehensive compilation of legal rules and statutes and it largely depends upon precedent. The body of precedent is known as a "common law" and it depends on subsequent decision or by the precedents passed by parliament without consult of legislation. The first common law system is the English Legal System. The Common law system prevails in England and in countries colonized by England. The name is derived from the medieval theory that the law controlled by the king’s courts represented the common custom of the realm, as opposed to the custom of local jurisdiction that was bid in local or manorial courts. The common law of England is almost hundreds years of growth starting with the customs of Anglo - Saxon.13

In its early development, common law was largely a product of English courts. The term “common law” is also used to express as the traditional, precedent-based element in the law of any common-law jurisdiction, as against to its statutory law or

legislation and also to indicate that part of the legal system that did not succeed out of equity, maritime law, or other special branches of practice. The legal systems used by the Commonwealth countries are on the basis of English common law they may mix all in local customary law or any other and each and every country has their own uniqueness. In the English legal system the common law system has an advantage is in determine the legal disputes priority was established in keeping with their individual circumstances and therefore the judge-made case law related rather than to apply judicial principle in general\textsuperscript{14}.

The distinctive feature of the common law is that it represents the law of the courts as expressed in judicial decisions. The grounds for deciding cases are initiated in precedents\textsuperscript{15} provided by past decisions, as contrasted to the civil law system, which is based on statutes and prescribed texts. Besides the system of judicial precedents, other characteristics of common law are trial by jury\textsuperscript{16} and the doctrine of the supremacy of the law. Gradually, the supremacy of the law meant that not even the king was above the law; today it means that acts of governmental agencies are subject to scrutiny in ordinary legal proceedings.

3.1.2 Civil Law System

The Civil law system has derived their origin in the Roman legal tradition and it is used in most countries around the world today. This system is mostly differentiating in procedure law and the substantive law. On analyzing the individual nation's civil law system, the nations have their own law system with certain trademark aspects but sometimes it has updated legal codes. In these jurisdiction a secondary source is case law. France and Germany countries are two instances with a civil law system\textsuperscript{17}. The main feature of which is that laws are written into a collection, codified, and not as in common law, interpreted by judges. Conceptually, it is the group of legal purpose and systems ultimately derived from the Code of Justinian but heavily cover by Germanic, ecclesiastical, feudal, and local practices, furthermore doctrinal strains like natural law, codification, and legislative positivism. The main

\textsuperscript{14} Ibid

\textsuperscript{15} Judicial precedents derive their force from the doctrine of stare decisis i.e., that the previous decisions of the highest court in the jurisdiction are binding on all other courts in the jurisdiction.


\textsuperscript{17} Supra note 11.
source of law is the legal code, which is a collection of statutes, arranged by subject matter in some pre-specified order. A code may also be expressed as "a systematic collection of interrelated articles written in a terse, staccato style." Law codes are usually made by a legislature's enactment of a new statute that incorporate all the old statutes relating to the subject and including changes necessitated by court decisions. In some instances, the change results in a new statutory concept.

The civil law proceeds from abstractions formulate general principles and distinguish substantive rules from procedural rules. It holds legislation as the main source of law, and the court system is usually inquisitorial, unbound by precedent, and composed of specially trained judicial officers with a limited authority to interpret the law. A legal tradition ordinarily is narrower than a legal culture. A formal legal tradition reflects the genesis and development of a legal system, its norms, doctrines, principles, standards, and rules of law. An example of a comprehensive legal tradition is the Western Legal Tradition that encompasses all the legal systems identified with the so-called “West”. A narrower but still wide legal tradition is associated with two embodiments of that Western Legal Tradition, the traditions of the Civil and Common Law. Then there are subsets of each tradition, such as the Common Law of England and the United States, and the Civil Law of France and Germany.

The Civil and Common Law traditions are even more global in their reach. Legal traditions in Africa, Asia, and the Americas were determined by centuries of colonialism. For example, the Common Law was incorporated into legal systems in Australia, Canada, South Africa, New Zealand, India, Zimbabwe, Ghana, Sierra Leone, Gambia, Nigeria, Somalia, Tanzania, Uganda, Kenya, Zambia, Botswana, Malawi, and many Caribbean islands. Civil Law was implemented by colonial France, Germany, Belgium, Italy, Spain, and Portugal. South America, in turn, reflected predominantly Spanish and Portuguese legal traditions, while the United States and Canada acquired an English Common Law heritage. A Common Law legal tradition was also initiated in India and Pakistan. French and Dutch legal traditions have permeated through other parts of Asia; while a German legal tradition was incorporated into Japanese and to some degree Chinese private law. Then, there are states that occupy the hybrid gap between Common and Civil Law traditions, Scotland, Quebec, Louisiana, Sri Lanka, and South Africa, along with Israel’s
combination of Common, Civil and Talmudic law. Completing the circle are a host of countries whose Customary Law traditions were abrogated in whole or part following colonial incursions, and sublimated and replaced by Common and Civil Law traditions.\(^\text{18}\)

Relying on Common and Civil Law traditions is also insufficient to serve as the basis for the legal traditions governing international commercial arbitration in the Twenty-First Century. Firstly, even if Civil and Common Law traditions were dominant globally historically, that dominance has become both “nationalized” and “regionalized” as a consequence of the advent of the modern state, the influence of local custom on the evolution of law and the development of regional free trade zones respectively. So too, local legal traditions have evolved that are significantly impacted by domestic political, economic and social forces beyond their early roots in Civil or Common Law Systems. The Civil Law-Common Law dichotomy also has failed to reckon with the influence of alternative political systems, notably socialist law, in which basic principles like freedom of contact are conceived and applied differently. Added to this, the transformation of societies along ethnic, religious and social lines has caused radical changes in local legal traditions, placing new demands on the old economic order. Incorporated within this change is the transformation of arbitration itself to accommodate a changing political-economic landscape, such as the significant role now played by China’s International Economic and Trade Arbitration Commission (CEITAC)\(^\text{19}\) in international commercial arbitration.

Considering the dominance of these systems in the International Legal Regime it is necessary to examine to what extent are the rules and practice of international commercial arbitration influenced by these legal traditions of Civil and Common Law, or by other traditions. There are different principles of legal tradition of International Commercial Arbitration. Common and Civil Law systems, in fact, insufficient to serve as the basis for the legal regime governing international commercial arbitration in the Twenty-First Century. Firstly, even if Civil and


\(^{19}\) China International Economic and Trade Arbitration Commission (CIETAC) Established in April of 1956, originally named Foreign Economic and Trade Arbitration Commission of China Council for the Promotion of International Trade (CCPIT) is well known in the world and it is also the earliest and the biggest arbitration institution in China. This is an organisation which independently and impartially resolves commercial and trade disputes by means of arbitration.
Common Law traditions were dominant globally historically, that dominance has become both “nationalized” and “regionalized” as a consequence of the advent of the modern state, the influence of local custom on the evolution of law and the development of regional free trade zones respectively. The Civil Law-Common Law dichotomy also has failed to reckon with the influence of alternative political systems, notably socialist law, in which basic principles like freedom of contact are conceived and applied differently. Added to this, the transformation of societies along ethnic, religious and social lines has caused radical changes in local legal traditions, placing new demands on the old economic order. Incorporated within this change is the transformation of arbitration itself to accommodate a changing political-economic landscape such as the significant role now being played by China’s International Economic and Trade Arbitration Commission (CEITAC) in international commercial arbitration\(^{20}\).

According to William K. Slate II\(^{21}\) that international commercial arbitration cannot afford to be perceived as being wholly rooted in either a Common or Civil Law tradition any more than it can afford to be seen as dominated by an elite cadre of lawyers who embed a fixed American or Eurocentric conception into the law of arbitration. As subtle as these perceptions of the culture and tradition of international commercial arbitration may be in our modern era of legalism, they can influence the attitudes of prospective users of alternative modes of dispute resolution not limited to arbitration, and therefore should be carefully considered. Nevertheless, the international commercial arbitration regime does enjoy remarkable stability, despite its diffuse nature, form, and expression. It has benefited from the authority of arbitration awards accorded to the Recognition and Enforcement of Foreign Arbitration Awards i.e., New York Convention. International Commercial Arbitration regime has also been adapted to changing market forces, most notably by crafting modified arbitration services to end users.

Despite these developments, international commercial arbitration is unlikely to be a panacea for all the dispute resolution needs of the global community. The most formidable threat to arbitration remains that it is sometimes perceived as being

\(^{20}\) Supra Note 18.

insensitive to the interests of important prospective users. It is this threat that needs to be creatively and decisively addressed if international commercial arbitration is to thrive. In the words of William K. Slade II, President of the AAA: We need to recognize cultural prejudices and be sensitive to cultural traditions lest we unintentionally offend our real and would-be friends. At the same time, we need to pay attention to culturally induced personal behaviors of our own that could be perceived in an unflattering light.\(^\text{22}\)

The following are instruments of both international and regional in nature which treaties are operating in the contemporary commercial world.

1. Agreement relating to the application of the European Convention on International Commercial Arbitration (December 1962)
3. Convention for the Pacific Settlement of International Disputes (October 1907)
4. Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation (Moscow Convention which is done at Moscow, 26 May 1972 and entered into force, 13 August 1973)
7. European Convention Providing a Uniform Law on Arbitration (Council of Europe, ETS No. 56: Opened for signature on 1st January 1966)
8. Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards (Montevideo Convention by May 1979)
10. UNCITRAL Model Law on International Commercial Arbitration
12. Claims Settlement Declaration (Iran-United States Claims Tribunal)

13. Convention Establishing the Multilateral Investment Guarantee Agency
   October 11, 1985
14. Inter American Convention on International Commercial Arbitration (Panama
   Convention)
15. Convention on Execution of Foreign Arbitral Awards
17. Organisation pour l’Harmonisation du Droit des Affaires en Afrique (OHADA)

Generally, International arbitration is described as the area of globalization “par excellence”. Indeed, it is the favored means of dispute resolution for multinational companies. It brings together parties, counsel, and arbitrators from diverse and varied legal backgrounds and these various legal influences make international arbitration a “live” example of the globalization of law\textsuperscript{23}. The growing interconnectedness among world markets, by reducing obstacles to the exchange of goods, capital, and services across national boundaries has fostered the emergence of an increasing range of international and transnational transactions covering a great part of the world. Despite the unprecedented development of integrated markets at the global level, international transactions continue to a large extent to be regulated by domestic laws, which are often ill-suited for the special needs of international trade\textsuperscript{24}.

Various national legal systems were conceived to be applied to domestic relationships only and national codes were modeled on internal relations and were not enacted for the purpose of governing international relations, as the state legislator is the defender par excellence of national interest and therefore, cannot be expected of drafting a legal system taking into account the particular features of international trade\textsuperscript{25}.

3.2 Lex Mercatoria – The Concept

The Latin expression of Lex mercatoria is “a body of trading principles used by merchants.” Generally, Lex mercatoria described as “the Law Merchant” in English, is the body of commercial law during the medieval period used by merchants

\textsuperscript{23} Maxi Scherer, \textit{The Globalization of International Commercial Arbitration.}
throughout Europe. Similarly, it was developed as a best practice in a English common law and executed along with the key trade routes by a merchant courts system. It strengthen the contractual freedom, alienability of property while avoiding the legal technicalities and cases was deciding related to the *ex aequo et Bono*\(^{26}\). The lex mercatoria\(^{27}\) is not a new one some members believes that it is from Roman i.e., *ius Gentium* as the law body which regulated the relations of economic between the foreigners and Roman citizens and others find the lex mercatoria origin in Ancient Egypt or Greek and Phoenician.\(^{28}\)

The concept of lex mercatoria has been molded on the idea of the old lex mercatoria. It was this body of law applied to a special class of people i.e. merchants in special places such as fairs, markets, seaports and was neatly separated from other systems of law in Medieval Europe such as local, feudal royal and ecclesiastical law\(^{29}\). It was endowed with special characteristics transnational in character, based on a faithful reflection of mercantile customs, developed and applied directly by mercantile corporations and courts, involving speedy and informal procedures, which made it perfectly apt to reflect the commercial need to promote free trade and recognize the capacity of merchants to regulate their own affairs through their customs, usages and practices\(^{30}\), on the assumption that national laws did not reflect the realities of international business life and therefore a new system of rules were to emerge in business practice which, like the medieval lex mercatoria, founds its origins outside domestic legal systems and was essentially composed of international sources of law, customs, and self-regulatory rules\(^{31}\).

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26 Ex aequo et bono is a Latin phrase that is used as a legal term of art. In the context of arbitration, it refers to the power of arbitrators to dispense with consideration of the law but consider solely what they consider to be fair and equitable in the case at hand.

27 Lex mercatoria refers to a body of oral, customary mercantile law which developed in medieval Europe and was administered quite uniformly across Europe by merchant judges, adjudicating disputes between merchants.


31 F. de Ly, Uniform Commercial Law and International Self-Regulation, Diritto del Commercio Internazionale- Italy.
The principle of Lex Mercatoria has two approaches are usually examined. One is having an autonomous character and on the other the positivists believe that it is not comprehensive but it is still transnational.

In the international legal regime, there are three main views could be identified on *lex mercatoria*. According to the first, lex mercatoria was an autonomous body of law, created by the international business community, and disembodied from the legal system of any given country. As per this, lex mercatoria constituted a neutral, third legal system alongside domestic and public international law, applicable to international transactions. Such a transnational legal order had its own sources and rules and found in international arbitration the preferred means of solving disputes. Secondly, lex mercatoria was not an autonomous legal order, but a special process followed by the judge or the arbitrator when he is called upon to judge international trade disputes. When parties to an international transaction have not made, neither explicitly nor implicitly, any choice about the applicable national law, or have subjected it to the international customs and usages of international trade, the interpreter considers all the legal systems connected to the matter of the dispute and selects those rules which appear to him the most appropriate and equitable to solve the controversy. This judicial process, which is partly an application of rules and partly a selective and creative process, is called the application of the lex mercatoria.

Thirdly, lex mercatoria neither as an autonomous legal order, nor as a judicial process, but as a body of principles founded on common sense, equity and reasonableness that the judge or the arbitrator may use as a source of interpretation of obscure provisions or contractual clauses. A similar view considered lex mercatoria as the part of transnational commercial law consisting of the unwritten customs and practice of merchants. On this premise, lex mercatoria should be kept separated from written codifications of customs and practice; when previously unwritten rules are incorporated into, say, a contract or a convention, they change their nature, since they

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derive their force from the contractor the convention and cease to be the product of the spontaneous activity of merchants\textsuperscript{37}. Thus, the concept of the Lex Mercatoria has a long history. The ancient Lex Mercatoria was the Merchant Law at the middle Ages. The Law Merchant appeared from the customary practices of the traders and merchants at those times. The medieval law merchant was admiralty, which provides the most prominent and oldest example of this phenomenon. Long-distance sea transport, by its very nature, has always needed its own “super-territorial” rule-making based on the special routines, traditions, and needs of mariners, freighters, charterers, ship-owners, and merchants involved in overseas trade\textsuperscript{38}. This body of maritime law has the force of law, neither from the extraterritorial reach of national laws, nor from the abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules developed to foster amicable and workable commercial relations\textsuperscript{39}. The general concept of the medieval Law Merchant as a uniform law for mercantile transactions was first expressed by an anonymous author in the late thirteenth century as part of “Colford's Collection” in the “Little Red Book of Bristol”\textsuperscript{40}. The last publication of the pre-nation-state age material was bearing the name "Lex Mercatoria" in its title was Wyndham Beawes' “Lex Mercatoria" or A Complete Code of Commercial Law of 1813\textsuperscript{41}. The main features of the medieval Lex Mercatoria as an independent body of legal rules (a) that it did not originate from any particular legislator or rule-maker, and (b) that it is consisted of a more or less coherent system of principles and rules of procedural and substantive law.

\subsection*{3.2.1 International Commercial Arbitration – Lex Mercatoria}

While looking at the international legal regime, a question may arise as to why do parties often opt for lex mercatoria international commercial arbitration. Lex mercatoria must thus be considered as a body of rules capable of governing international business transactions. In an attempt to define this concept of

\textsuperscript{37} Ibid.
\textsuperscript{40} These two books were compilations of rights, rules and customs dating from the 12th century which record Bristol’s royal charters and guild ordinances, as well as details of all its land and buildings.
transnational law further, a number of authors have emphasized the private, as opposed to public, “source” of transnational law\textsuperscript{42}.

The most common explanation is that they want to avoid the inadequacy of national legal systems or rules which are unfit for their international transaction. Furthermore, they want to plead and argue on an equal footing, so that nobody has the advantage of having a case pleaded and decided by his own law and nobody has the handicap of seeing it governed by foreign law\textsuperscript{43}. In order to overcome the uncertainties and inadequacies caused by the application of domestic laws to international transactions, a large number of scholars and business practitioners have called for the elaboration of a system of neutral rules, not directly derived from any national body of substantive law, and specifically tailored to the needs of international trade. The concept of lex mercatoria represents an answer to these claims. Despite the remarkable differences in terms of definition, sources and contents, all the theories on lex mercatoria stem from a common desire; the desire to elaborate a uniform body of rules applicable to international transactions and able to overcome the uncertainties and unpredictable effects caused by the application of domestic rules, which are frequently inadequate to solve the manifold legal problems of international commercial law\textsuperscript{44}.

In commercial transactions, in the surrounding of the application of national laws there has always been a variation which is primarily administered at domestic transactions to transnational contracts. To govern the international trade it is preferable to apply international commercial laws. On application for an international transaction a proper body of law is not only executed but the sophisticated method of laws like by conflict of laws would disappear. Though, the legislature not orders for an international commercial laws but not an international commercial court but for evolving a precedent for international commercial transactions.\textsuperscript{45}

In the International Legal Regime, especially in International Commercial Arbitration is providing lex mercatoria with an auto-poetical structure through the

\begin{footnotesize}
\begin{itemize}
\item Michael Frischkorn, \textit{Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria’s Flexibility}, 7 EUR. J.L. REFORM 331 (2005)
\item Supra note 32
\end{itemize}
\end{footnotesize}
introduction of the practice of precedents. In solving commercial disputes, arbitrators are claiming that old previous cases constitute precedents for them and begin to distinguish and to overrule. Accordingly, *lex mercatoria* is given its recursive structure characterizing the legal realm as a system. Further, quasi-legislative institutions such as UNCITRAL, the ICC, the International Law Association are emerging which produce *ad hoc* rules for transnational commercial transactions. In conclusion, exploiting the vacuum of authority at the global level, private autonomy is creating an “institutional triangle”, a set of private institutions which reflect the traditional forms of regulation in the national context: “adjudication”, “legislation” and “contracting” i.e. private autonomy\(^{46}\).

However, whatever may be against the concept of *lex mercatoria*, the argument in favour of *lex mercatoria* in International Commercial Arbitration regime is that the binding force of it did not depend on the fact that it was made and promulgated by state authorities, and as such it has a *de facto* recognition as an autonomous legal system by the business community and state authorities\(^{47}\). Moreover, the national legal systems were incomplete and required gap-filling. Every decision based on law bears a certain degree of openness and unpredictability. As such, *lex mercatoria* was much in line with the national legal systems\(^{48}\). Further, with time and application, these principles could become more refined, complete and better defined\(^{49}\). Hence, the temporary incompleteness of *lex mercatoria* could not be taken as an argument against its status as law and its applicability in international trade. There is no need to localize the applicable law in International Commercial Arbitration. The restriction on the use of applicable law to national law is inconsistent with the nature of international commercial arbitration. Therefore the *Lex mercatoria* must encourage the use of national law in appropriate cases.

Despite all the uncertainties surrounding this concept, in recent years there has been an ever-increasing application of *lex mercatoria* in international arbitration. Moreover, it nowadays enjoys increasing recognition in the international arena while


acknowledging the question about the conditions and circumstances under which it should be applied\textsuperscript{50}.

3.3 The Principles of UNIDROIT

The UNIDROIT Principles of International Commercial Contracts i.e., PICC have been drafted by UNIDROIT (\textit{Institut International pour l’Unification du Droit}), International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organization in the Villa Aldobrandini in Rome. Its main purpose was to study “the needs and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between states and group of states and to prepare uniform law instruments, principles and rules to reach those objectives”.

Since the early 90s, an innovative instrument is assuming growing importance in the context of international trade law, which may provide a general framework of reference for a more coherent harmonization, the UNIDROIT Principles. The UNIDROIT principles are a set of principles concerning international commercial contracts, drawn up by UNIDROIT. UNIDROIT is a French international institution for the unification of private law, seated in Rome. It was set up in 1926 as an auxiliary organ to the League of Nations. In 1940 it was re-established on the basis of a multilateral agreement\textsuperscript{51}.

The UNIDROIT Principles are a collection of non-national principles which are common to the existing legal systems and/or best adapted to the special requirements of international commercial contracts. Published for the first time in 1994, revised edition has been published in 2004; their scope is limited to international commercial contracts i.e. international contracts between entrepreneurs and thus is not applicable to transactions between consumers and between entrepreneurs and consumers. The third edition i.e. again revised was commenced in 2010; the provisions included are restitution, illegality, a plurality of obliges conditions and termination of long-term contracts for just cause.


\textsuperscript{51} Unidroit principles VS. Principles of European contract law.
On May 9th, International Institute for the Unification of Private Law (UNIDROIT) revised i.e. fourth edition is in 2016 of UNIDROIT Principles of International Commercial Contracts. Subsequently, the 2016 edition of the UNIDROIT principles, as the 2010 edition, consists of 211 Articles (as opposed to the 120 Articles of the 1994 edition and the 185 Articles of the 2004 edition). As of 2018, UNIDROIT has 63 member states.

UNIDROIT maintains the close relation of co-operation with other international organizations, both intergovernmental and non-governmental, which in many cases taken the form of co-operation agreements concluded at the inter-secretariat level. The Hague Conference on Private International Law, UNIDROIT and United Nations Commission on International Trade Law (UNCITRAL), these three private law formulating agencies are quite appropriately referred to as “the three sisters”.

The UNIDROIT Principles is not the traditional categories of legal instruments at the international level. They are not simple standard contract terms, nor are they drafted in the form of an international treaty; they do not have any binding force and will be applied in practice by reason of their persuasive value only52.

UNIDROIT Principles have been drafted on the model of the American Restatements, so that they may be considered a Restatement of Contracts at the global level. It consists of a collection of rules coming from the various state systems represented in a systematic fashion; however, its purpose is not only that of re-stating in a more coherent manner the existing law, but also that of promoting those changes in the various state systems, which may produce further simplification and adaptation to the needs of society.

There are two most important features which make the UNIDROIT Principles a very innovative instrument in the context of international trade law. Firstly, it's a soft law character. Although phrased as abstract rules of law, the Principles have not been drafted as a convention or model law to be transformed into national law. They constitute a source of soft law, that is to say, contract principles without a direct

binding force, the acceptance and application of which is exclusively dependent on its persuasive power and the authority of UNIDROIT. Secondly, it's neutrality. The Principles are detached from any national legal context and do not reflect the rules and principles of any single national legal order. This implies a more balanced content, in applying them into international disputes, judges and arbitrators will find it easier to avoid resorting to rules belonging to this or that domestic law and to adopt an independent and internationally uniform solution. Moreover, parties, when deciding which law should govern the contract, will no longer be faced with the necessity of either choosing a particular national law, which inevitably will be unknown or less familiar to at least one of them, or referring to not better defined international trade usages and customs.

The UNIDROIT Principles’ greatest advantage with respect to international conventions is their flexibility, that is to say, their ability to serve different purposes. This renders them particularly suited to overcome the difficulties currently encountered in international commercial arbitration. As stated in the Preamble, the UNIDROIT Principles may be used in five different contexts:

1) as rules applicable to the contract, when the parties have agreed expressively then they govern contract;

2) as rules applicable to the contract, when the parties have indirectly referred to them by stating that the contract shall be governed by the general principles of law, the lex mercatoria, the principles of natural justice, and other similar expressions. The main reason why the parties may choose the UNIDROIT Principles as the lex contractus is the frequent difficulty to agree on a national law governing the contract. During negotiations, each party often tends to impose his or her national law to the contract and is reluctant to accept the other’s party law. Accordingly, when no one has sufficient bargaining power, the parties may sometimes end up referring to a neutral system of rules such as lex mercatoria or general principles of law;

3) as rules applicable to the contract when the parties, neither directly or indirectly, have made reference to them in the contract, but it proves impossible to establish the applicable national law; as means of interpretation or integration of existing international instruments, in order to overcome the
major weakness connected to international conventions, the risk that, once incorporated into the various domestic legal systems, they end up being interpreted according to national criteria with the result that different national judges will interpret identical rules differently. In this context, the UNIDROIT Principles provide a collection of common guidelines for an autonomous and internationally accepted method of interpretation and integration of uniform law instruments;

4) as a model for national and international legislators; both national and international laws are often inadequate to meet the needs of international trade and therefore the UNIDROIT Principles, in so far as they represent generally accepted standards at the international level, may constitute a useful tool to interpret and amend national and international laws in accordance with the requirements of international trade.

In the context of international arbitration, the UNIDROIT Principles are expected to have more practical applications. Unlike state courts, who are generally bound by their national legal systems to apply exclusively national laws to international disputes, international arbitrators enjoy a wider discretion in the choice of the applicable system of rules, in the absence of a specific choice made by the parties, they are generally enabled to decide the dispute according to the rules of law they deem appropriate\(^\text{53}\); and the term rules of law is commonly interpreted as allowing the arbitrator to adopt rules which do not belong to a national legal system, but are transnational in character.

### 3.4 The Hague Peace Conference (1907)

The Hague Conventions of 1899 and 1907 are sequence of international treaties and declarations arranged at two international peace conferences at The Hague in the Netherlands. Along with the Geneva Conventions\(^\text{54}\), the Hague Conventions are the first formal statements of the laws of war and war crimes in the body of secular international law. Second Hague Peace Conference came from the

\(^{53}\) Article 1496 of the French Code of Civil Procedure; Article 1054(2) of the Dutch Code of Civil Procedure; Article 182 of the Swiss Law on Private International Law; art 17 (1) International Chamber of Commerce Regulations, Article 22.3 London Court of International Arbitration Rules.

\(^{54}\) The Geneva Conventions comprise four treaties, and three additional protocols, that establish the standards of international law for humanitarian treatment in war.
civil society in the United States, promoted by a petition in 1903 from the American Peace Society in Boston, the Massachusetts legislature passed a resolution seek Congress to authorize the President of the United States to invite the governments of the world to join in establishing a regular international congress to meet at stated periods to intended upon the various questions of common interest. The idea was taken up in St. Louis in 1904 by the Interparliamentary Union that recommended a conference to deal with the subjects postponed at The Hague in 1899. It led to the negotiation of a series of arbitration treaties among the various nations and the consideration of plans for a series of the congresses—\textsuperscript{55} the kind recommended by the Massachusetts legislature.\textsuperscript{55}

The Second Hague Peace Conference was convened in 1907 at the initiative of President Theodore Roosevelt of United States of America officially convened by Nicholas II. This conference was started from June 15 to Oct. 18, 1907, and was visited by the representatives of 44 states. The Second Hague Peace Conference of 1907 produced thirteen separate conventions. In this Conference State of Central and South America were also invited and rules governing the arbitral proceedings were prepared and the earlier Convention was revised. The Second Hague Peace Conference dealt with the subjects of the exemption of unoffending private property of the enemy upon the high seas, the limitation of force in the collection of contract debts, arbitration, an international peace court, and the project for the establishment of a permanent court of arbitral justice. The United States delegation worked towards the creation of Permanent Tribunal composed of Judges, who were Judicial Officers and who had no other occupation and who would afford their total time to the trial and decision of international cases by judicial methods.

The U.S., the U.K., and Germany submitted a joint proposal for a Permanent Court but the Conference was unable to reach an agreement upon it. Thus, the conference confined itself to recommending that States should adopt a draft convention for the creation of a court of arbitral justice as soon as an agreement was reached “respecting the selection of the Judges and the Constitution of the Court”. Although this court was never established, yet, it has given birth to the inspiration

\textsuperscript{55} Yusufali N. Asgerally, \textit{Hague Appeal for Peace}. 
which after some years culminated into the drafting of the statute of the Permanent
Court of International Justice.

3.5 The Geneva Protocol on Arbitration Clauses of 1923

Geneva Protocol 1923 is a Protocol on arbitration clauses signed at a meeting of
the Assembly of the League of Nations held on 24-9-1923. In the International
Arena during the 1920s an agreement to arbitrate could be validly entered into only in
regard to an existing dispute by a so-called compromise. In some of the countries, an
agreement to arbitrate all disputes that might arise in the future in connection with a
contract was not valid. It was also ordinary that, even in countries in which the
agreement to arbitrate was valid, it usually did not effectively prohibit a court from
taking jurisdiction over the dispute. If one of the parties started an action in court in
spite of the agreement to arbitrate, there might later take an action for damages for
breach of the agreement to submit the dispute to arbitration, but that be liable for an
empty remedy.

Therefore, with a view to eliminating the difficulties effectively, in respect of
agreements to arbitrate, the League of Nations in 1923 adopted the Geneva Protocol
on Arbitration Clauses for nondomestic agreements. In 1923, initially founded
International Chamber of Commerce, negotiated the Geneva Protocol on Arbitration
Clauses in Commercial Matters. The Protocol was an outstanding success both in
terms of the number of States that became a party to it and in regard to its contents.
The Protocol also provided that the procedure, including the constitution of the
arbitral tribunal, by whose territory the arbitration was made according to the parties
will and by country. The United States did not ratify the protocol and the nations
represented a very significant portion of the international trading community at the
time. The content of the Protocol is today incorporated into Articles II and V (d) of
the 1958 New York Convention with minor changes.

57 Article II provides that each Contracting State shall recognize an agreement in writing under which
the parties undertake to submit to arbitration all or any differences which have arisen or which may
arise between them in respect of a defined legal relationship, whether contractual or not, concerning
a subject matter capable of settlement by arbitration.
58 Article V deals with procedure relating to recognition and enforcement of the award may be refused,
at the request of the party against whom it is invoked, only if that party furnishes to the competent
authority where the recognition and enforcement is sought, proof that ………
The Geneva Protocol played an important role in the development of the legal framework for international commercial arbitration.

The following are the salient features of the Geneva Protocol on Arbitration Clauses of 1923\(^{59}\) adopted by the League of Nations held on 24\(^{th}\) September 1923.

1. Each and every Contracting States recognizes or endorse the validity of an agreement whether connecting to the existing or future differences between the parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

2. Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

3. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place. The Contracting States agree to facilitate all steps in the procedure which require being taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

4. The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators. Such reference shall not prejudice the

competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory States.

6. The present Protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date of which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.60

The Geneva Protocol had two objectives, first, it sought to make arbitration agreements and arbitration clauses in particular, enforceable internationally; and secondly, it sought to ensure that awards made pursuant to such arbitration agreements would be enforced in the territory of the State in which they were made61.

The Geneva Protocol requires each Contracting State to undertake to make certain by the authorities execution and with the own territory provisions of arbitral award of its national laws. Two conditions were required to be fulfilled before the

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Contracting State could be saddled with the responsibility to ensure the execution of the award:

(a) The arbitral award should have been rendered in accordance with the provisions of the national laws of the executing State; and
(b) The arbitral award should have been rendered in the territory of the executing State.
(c) Thus under the Geneva Protocol, only domestic awards could be enforced by the Courts of the Member States. This was one of the glaring shortcomings of the Protocol Geneva\(^62\).

### 3.6 The Geneva Convention on Execution of Foreign Arbitral Awards, 1927

As in order to overcome the deficiencies exhibited by the Geneva Protocol, Sep 24, 1923, the League of Nations was instrumental in the conclusion of another treaty for securing the recognition and enforcement of the international arbitral awards arising out of the arbitration agreements falling under the Geneva Protocol. This treaty called the International Convention on the Execution of Foreign Arbitral Awards has concluded on 26\(^{th}\) September 1927 at Geneva set the framework for the enforcement of international arbitral awards. This was ratified by 24 States. Undoubtedly Geneva Convention supplemented the Geneva Protocol by making it possible to enforce an award in a Contracting State other than where the award was rendered. As per the Geneva Convention, each Contracting State was required to recognize arbitration award made in another Contracting State pursuant to an agreement covered by the Geneva Protocol\(^63\) as binding and enforce, in following the rules of procedure of its territory. The main disadvantage of the convention was the need for *double exequatur*, whereby an arbitral award had to be confirmed in the country in which it was offered in the courts of other country could enforce the award.

### 3.7 The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

It is to be considerable that the UNCITRAL is a subsidiary body of the General Assembly. It plays a prominent role in developing the legal framework for

\(^{62}\) Gas Authority of India v. SPIE CAPAG, S.A., AIR 1994 Del 75.
\(^{63}\) Ibid.
international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative works for use by commercial parties in negotiating transactions. Further, UNCITRAL legislative texts address the international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency, international transport of goods, procurement and infrastructure development, international payments, and security interests. The background for the Recognizing the main increasing importance of international arbitration is settling international commercial disputes, the Convention of New York to provide frequent legislative levels for the recognition of arbitration agreements and the court recognition and enforcement of foreign and nondomestic arbitral awards.

The term “non-domestic” appears to embrace awards which, although made in the state of enforcement, are treated as “foreign” under its law because of some proceedings are in foreign element e.g. another State’s procedural laws are applied. Further, the principal aim of this Convention is that it will not be discriminated against the foreign and non-domestic arbitral awards and it requires Parties to protect certain such awards are recognized and usually have the ability of enforcement within their jurisdiction in the similar means as domestic awards. An additional intend of the Convention is to involve courts of Parties to present full result to arbitration agreements by essential courts to deny the parties access to court in breach of their agreement to raise the matter to an arbitral tribunal. The Convention is taking over by any state member of the U.N or any other state member of any specialized agency, or a Party to the ICJ.

The New York Convention is one among the main important tools in international arbitration. The New York Convention was established in June 1958 as a result of dissatisfaction with the Geneva Protocol and Convention. The proposal to restore the Geneva treaties came from the International Chamber of Commerce (ICC), which issued a preliminary draft convention in 1953. The ICC’s proposal was taken over by the United Nations Economic and Social Council (ECOSOC), which

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65 ICC is the world business organization, helping businesses of all sizes and in all countries to operate both internationally and responsibly.
66 The United Nations Economic and Social Council (ECOSOC; French: Conseil économique et social des Nations unies, CESNU) is one of the six principal organs of the United Nations, responsible for
produced an amended draft convention in 1955. That draft was discussed during a conference at the United Nations in May-June 1958, which led to the establishment of the New York Convention.

The New York Convention 1958\(^6\) was described as the most successful treaty in private international law. The Convention entered into force on 7 June 1959, and it is adhered to by more than 158 nations as of 2018. More than 1,750 court decisions from more than 65 countries reported in the Yearbook\(^6\): Commercial Arbitration shows that enforcement of an arbitral award is granted in almost 90 percent of the cases.

### 3.7.1 New York Convention – Basic Actions

The New York Convention applies to awards made in any State other than the State in which recognition and enforcement are sought. It also relates to awards “not considered as domestic awards”. When allowing to be bound by the Convention, a State may proclaim that the Convention will apply regards (a) in respect to awards made only in the territory of another Party and (b) only to legal relationships that are compared “commercial” under its domestic law. The New York Convention contemplated two basic actions; the first action is the foreign arbitral awards recognition and enforcement, i.e., arbitral awards executed in territory of another (contracting) State. This field of application is defined in Article I\(^6\). The general responsibility for the Contracting States to accept such awards as binding and to enforce them in accordance with their rules of procedure is laid down in Article III\(^7\).

Article IV of the convention provides that to acquire the party applying for its recognition and enforcement at the time of application shall give (a) the arbitral

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6. Article I of the Convention deals with the provisions relating to recognition and application and enforcement of arbitral awards etc.
7. Article III of the Convention provide that each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards
award; and (b) the arbitration agreement. The party against whom enforcement is required can object to the enforcement by submitting evidence of one of the grounds for refusal of enforcement which is limitatively listed in Article V (1)\textsuperscript{71}. The court may on its own refuse enforcement for reasons of public policy as provided in article V (2)\textsuperscript{72}. If the award is subject to an action for setting aside in the country in which or under the law is made, the foreign court before which enforcement of the award is required may adjourn its decision on enforcement (Article VI)\textsuperscript{73}. Finally, if a party seeking enforcement prefers to base its request for enforcement of the court’s domestic law on enforcement of foreign awards or bilateral or other multilateral treaties in force in the country where it seeks enforcement, it is allowed to do so by virtue of the so-called more favourable provision of Article VII(1)\textsuperscript{74}.

The second action studied by the New York Convention is the recommendation by a court to arbitration. Article II, paragraph 3, provides that a Contracting State court, when carry a matter on request of either of party made an agreement of arbitration and submit them to arbitration\textsuperscript{75}. In both of the actions arbitration agreement must satisfy the requirements of Article II, paragraphs 1 and 2, which include, in particular, that the agreement is in writing.

### 3.7.2 Objectives, Scope, and application of the New York Convention

Acknowledging the developing of international arbitration means of settling commercial disputes at international level, this convention pursues to give same

\textsuperscript{71} Article V (1) deals with recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, with certain proof contained therein.

\textsuperscript{72} Article V (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

\textsuperscript{73} Article VI provides with matters relating to matters that if an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e) and other conditions contained in the said Article.

\textsuperscript{74} Article VII (1). The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

\textsuperscript{75} Article II (3) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
legislative principles for the recognition of arbitration agreements and the court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are used as a "foreign" under its law because of some proceedings are in foreign element e.g. another State's procedural laws are applied.

The principal aim of the Convention's is that it will not be differentiated against foreign and non-domestic arbitral awards and it requires the parties to make certain such awards are recognized and usually able of enforcement in their jurisdiction in the same manner as a domestic awards. An additional aim of the convention is the parties give complete effect to arbitration agreements by requiring courts to refuse the parties access to court in breach of their agreement but refer their matter to an arbitral tribunal.

The scope of the application of the New York Convention depends neither on the nationality nor on the residence of the parties to the arbitration and this improvement over the Geneva Convention of 1927. It applies to all foreign awards, that is to say, all awards made in a country other than that where enforcement is sought. The term “foreign” is also generally interpreted as covering awards which are not considered “national” because of certain foreign aspects which characterize the dispute, even if such awards have been made in the country where the benefit of the convention is sought. The concept of an award is not defined by the convention, which leaves the courts of each contracting state to define it according to their own law.

Further, Article I (3) of the New York Convention authorizes the Contracting States to make two reservations prior to ratifying or adhering to the treaty which restricts its substantive and territorial scope. The first authorizes them to limit the applicability of the Convention to awards can be made only in the territory of other Contracting State, the second one is to limit the scope of Convention to variation is arising of legal relationships, whether contractual or not which is regarded as a commercial under the national law of the state is to make such reservation of
commerciality. However, very few countries actually restrict the ambit of the Convention to commercial disputes\textsuperscript{76}.

The convention defines its scope of application for the recognition and enforcement of arbitral awards it does not do so for the question of declining jurisdiction due to the existence of an arbitration agreement. The New York Convention governs neither the procedure to be followed before the arbitrator nor the challenge of the award. The provisions of the arbitration law at the seat determine the conditions for the formal validity of the arbitration agreement in these two cases.

The Convention does not permit to review any merits of an award to which it applies and in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted.

The New York Convention is one of the important legal texts in international commercial arbitration, as it defines the international currency of international arbitration agreements and arbitral awards.

Arbitration vary fundamentally from litigation as to the basis of the arbitrator's role; that arbitration falls to be considered solely as a contractual creation \textit{sui generis} rather than as a branch of any known legal system; and that the New York Convention can be construed as a practical device which recognizes that view of arbitration while providing a link to the legal systems of the subscribing nations. One might go advance and maybe open a debate by suggesting that the provisions of the Convention itself are all that is required of legislation, whether for international or, \textit{mutatis mutandis}, for domestic arbitration\textsuperscript{77}.

Apart from the founding treaties of the United Nations, the New York Convention is the most successful modern treaty considered as the lubricating super-oil for the complex machinery which has made the discharge of global trade possible over the last fifty years. It has been described in extravagant but accurate language by

\textsuperscript{76} Enforcing Arbitration Awards under the New York Convention, Experience and Prospects, UN Headquarters, United Nations Publication, (10 June 1998)

\textsuperscript{77} Hartwell. G., \textit{The New York Convention of 1958, A Basis for a Supra-National Code.}
many distinguished commentators all over the world from very different legal cultures and disparate civilizations.

The impact of the New York Convention on the development of international commercial arbitration has been exceptional. The New York Convention made two important pillars of the legal framework by providing for the obligatory referral by a national court to arbitration in the event of a proper arbitration agreement and for the enforcement of the arbitral award. In order to worldwide increase of these possibilities the UNCITRAL is developing the modern, just, fair, and harmonized rules and regulations on commercial transactions. These are:

1. The Conventions and model laws and rules which are acceptable worldwide
2. The Legal and legislative guides and recommendations having of great practical value
3. The Updated information on case laws and enactments of the uniform commercial law
4. The Technical assistance in reform law projects
5. The Regional and national seminars on the uniform commercial law.

The Convention provided strength to the hugely successful UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended in 2006). It can be inferred that the New York Convention is the main reason why arbitration is the preferred method for the resolution of international business disputes.

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78 The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

79 The UNCITRAL Model Law on International Commercial Arbitration was prepared by UNCITRAL, and adopted by the United Nations Commission on International Trade Law on 21-6-1985. In 2006 the model law was amended, it now includes more detailed provisions on interim measures. The model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law (as, for example, Australia did, in the International Arbitration Act 1974, as amended).
3.7.3 The principal purpose of the New York Convention

The New York Convention is one among the most important and successful instruments of the UN treaties in the international trade law area and the cornerstone of the international arbitration system. The Convention’s principal aim is (1) to oblige State Parties to ensure non-discrimination of foreign, (2) non-domestic arbitral awards, such that these recognized awards and (3) ability of enforcement in their jurisdiction in the same and similar way as domestic awards which can best be achieved through the uniform and effective application and interpretation of the convention. The aim of this Convention is “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are noticed and arbitral awards are enforced in signatory countries”\(^80\). However, it is also argued that the international legal regime for the enforcement of arbitral awards does not give adequate protection to the interests of losing parties. This leads one to question as to what extent does the New York Convention, as the main international legal instrument for the enforcement of arbitral awards, protect the losing party in the arbitral process. UNCITRAL aimed to improve on the success of the New York Convention by encouraging such uniform and effective application of the Convention.

The Convention was calculated and designed to subserve the cause of enabling the international trade and promotion by providing for the resolution of disputes in speed which are arising in such trade arbitration. The New York Convention provides a common yardstick on the touchstone of which these agreements and awards are recognized and enforced in the countries which have acceded to the same, thus, generating confidence in the parties, who may be unfamiliar with the diverse laws prevailing in different countries with which they are trading, that the arbitral agreements and awards flowing therefrom will be respected and enforced by the courts of the States where the enforcement is sought, provided the conditions laid down in Article I and II are satisfied with such enforcement.

3.7.4 Summary of Provisions

Under the New York Convention, usually an arbitration award issued in any other state can be enforced in any other contracting state freely only by certain limited defenses. These defenses are:

1. a party to the arbitration agreement under the law applicable to him, under some incapacity;
2. the arbitration agreement was not valid under its governing law;
3. a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
4. The improper composition of the arbitration panel or the use of the improper procedure
5. Non-binding awards
6. the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration (according to the proviso that an award which contains settlement on such matters may be enforced to the extent that it contains resolution on matters submitted to arbitration which can be separated from those matters not so submitted);
7. the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place (the "lex loci arbitri");
8. the award has not yet become binding upon the parties or has been set aside or suspended by a competent authority, either in the country where the arbitration took place to the law of the arbitration agreement;
9. The subject matter of the award was not capable of resolution by arbitration; or
10. The recognition and enforcement of the award would be contrary to "public policy".  

3.8 Conventions adopted by International Organizations

The following are various International Documents and Organs Regulating alternative dispute resolution. (ADR) Since ADR is being recognized as the most effective means of settling international disputes of any type. The diplomatic and commercial relations are being enhanced by the employment of amicable dispute resolution mechanisms. To help this disposition to ADR than to other courts, a number of treaties have been signed so far either under the supervision of the UN or under the initiation of other public and domestic institutions and states. Tribunals have been established as a result of these treaties to serve as the best forum in settling disputes of international and domestic nature. The Conventions, which was adopted by international organizations, are discussed below:

2. On 1976 - UNCITRAL Arbitration Rules
3. On 1980 - UNCITRAL Conciliation Rules
4. On 1982 - Recommendations to help institutions and the other interested bodies of arbitration under the UNCITRAL Rules which are intended to provide information and assistance to arbitral institutions and another related body, such as chambers of commerce.
5. On 1985 - UNCITRAL Model Law on International Commercial Arbitration (amended in 2006) - Amendments was made regards to certain articles are 1 (2), 7, and 35 (2), a new chapter IV A to restore article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The article 7 revised version is intended to modernize an arbitration agreement to practices of international contract. The newly introduced chapter IV A creates a more legal rule abundantly deals with the interim measures in support of the arbitration. Accord to 2006, the amended version is the standard kind of the Model Law.
6. On 1996 - UNCITRAL Notes on Organizing Arbitral Proceedings - the Notes are designed to assist arbitration practitioners by giving a list of elucidated matters on which an arbitral tribunal may make desire conclusion by decisions during the course of arbitral proceedings, including deciding on a set of arbitration rules, the language and place of an arbitration and questions relating to confidentiality, additionally other matters such as conduct of
hearings and the taking of evidence and possible requirements for the filing or delivering of an award. The work may be used in both ad hoc and institutional arbitrations.

7. On 2002 - UNCITRAL Model Law on International Commercial Conciliation uniform rules in respect to the process of conciliation is to encourage the conciliation work and provide to use greater predictability and certainty. To avoid the uncertainty from an lack of statutory provisions the Model Law gives procedural aspects of conciliation that are including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, conveyance between the conciliator and the other parties, the confidentiality and the admissibility of evidence in another proceedings as well as the post-conciliation issues such as the conciliator acting as a arbitrator and enforceability in settlement of agreements.

8. On 2006 - the recommendations regarding the explanation of article II (2), and the Article VII (1), of the New York Convention by UNCITRAL on 7 July 2006, the Recommendations was drafted in the form of recognition the widening use of electronic commerce and enactments of domestic legislation as well as case laws which are advantageous than the New York Convention in respect of the requirements governing arbitration agreements, proceedings and enforcement of awards. To apply the Recommendations promotes States in article II (2) of the New York Convention "recognizing that the circumstances described herein are not exhaustive". In addition, to the recommendations encourage States to believe the revised 7th article of the UNCITRAL. Both options of the review article 7 establish a more beneficial rule for the New York Convention. By virtue of the "more favourable law provision" contained in Article VII (1) of the New York Convention, the recommendations resolves that an "any interested party" should be allowed "to gain rights it may under the law of the country where agreement is sought upon, to get recognition of the validity of an arbitration agreement".

9. On 2010 - UNCITRAL Arbitration Rules (as revised in 2010) have been effective since 15 August 2010. They contains provisions relating with, amongst others, multiple parties’ arbitration and joiners, liability, and a procedure to object to experts appointed by the arbitral tribunal. A number of advanced features contained in the Rules aim to increase procedural
efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs, and a study mechanism regarding the costs of arbitration. They also include further detailed provisions on interim measures. It is expected that the Rules, as revised, will pursue to contribute to the development of harmonious international economic relations.

10. On 2015 - United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York 2014, the “Mauritius Convention on Transparency” – the purpose of the Convention is an instrument by which parties to investment treaties ended before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency. The Transparency Rules, effective as of 1 April 2014, are a set of procedural rules for making publicly available information on investor-state arbitrations arising under investment treaties. In relation to investment treaties concluded prior to 1st April 2014, the rules apply, inter alia, when parties to the relevant investment treaty agree to their publication. The Convention is an efficient and flexible mechanism for recording such an agreement.

3.9 The World Trade Organization (WTO)

The World Trade Organization (WTO) came into being in 1995 which is one of the international organizations, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT) established in the arise of the Second World War. The WTO provides a forum for negotiating agreements pointed at reducing obstacles to international trade and to secure a level playing field for all, thus contributing to economic growth and development. The WTO also renders a legal and institutional framework for the implementation and monitoring of these agreements, as well as for settling disputes arising from their interpretation and application. The present body of trade agreements including the WTO consists of 16 different multilateral agreements (to which all WTO members are parties), and two different plurilateral agreements (to which only some WTO members are parties). It is to be noted here that over years in the history, the WTO, which was established in 1995, and its predecessor organization the GATT have helped to create a strong international trading system, thereby contributing to unprecedented global economic growth.
The WTO’s method for resolving trade disagreements under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly. Countries bring disputes to the WTO if they think that their rights under the Agreements are being violated. Judgments by specially appointed independent experts are based on interpretations of the agreements and individual countries’ commitments. The system motivates countries to settle their differences through consultation. Failing that, they can follow a carefully surveyed, stage-by-stage way that includes the possibility of a ruling by a panel of experts, and the chance to appeal the ruling on legal grounds.

Over the ancient 60 years, the WTO, which was established in 1995, and its antecedent organization the GATT have helped to create a strong and prosperous international trading system, thereby contributing to unprecedented global economic growth. The World Trade Organisation is presently the host to new negotiations, under the ‘Doha Development Agenda’ launched in 2001. The WTO allotted with the global rules of trade between nations. Its main important function is to secure that trade flows smoothly, predictably and freely as possible. The World Trade Organization (WTO) is the sole global international organization dealing with the rules of trade between nations. The WTO agreements are negotiated and signed by the majority of the world’s trading nations and ratified in their parliaments. The aim is to assist producers of goods and services, exporters, and importers conduct their business. Presently, the WTO has 164 members, of which 117 are developing countries or separate customs territories. WTO activities are encouraged by a Secretariat of some 700 staff, led by the WTO Director-General.

Decisions in the WTO are generally taken by unity of the entire membership. Ministerial Conference is the highest institutional body, which meets roughly every two years. A General Council manages the organization's business in the intervals between Ministerial Conferences, these bodies comprise all members. Specialised subsidiary bodies i.e., Councils, Committees, Sub-committees also comprising all members, administer and monitor the implementation by members of the various WTO agreements.

The objectives of the dispute settlement system at World Trade Organisation are described in abstract terms in Article 3(2) of the Dispute Settlement
Understanding (DSU)\textsuperscript{82} as, to “provide security and predictability to the multilateral trading system.” The dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements\textsuperscript{83}.” In paragraph 3, rapidness in resolving disputes is identified as a further objective of the dispute settlement system. The rest of the DSU deals essentially with the process—how the dispute settlement system is to go about doing what it is supposed to do.

The WTO’s main activities are:

1. Negotiating the moderation or elimination of obstacles to trade (import tariffs, other barriers to trade) and agreeing on rules governing the conduct of international trade (e.g. antidumping, subsidies, product standards, etc.)
2. The administering and monitoring the application of the WTO’s agreed rules for trade in goods, trade in services, and trade-related intellectual property rights
3. The monitoring and reviewing the trade policies of our members, as well as ensuring transparency of regional and bilateral trade agreements
4. The settling disputes among our members regarding the interpretation and application of the agreements
5. The building capacity of developing country government officials in international trade matters
6. The assisting process of accession of some 30 countries who are not yet members of the organization
7. The conducting economic research and collecting and disseminating trade data in support of the WTO’s other main activities
8. To explain and educating the public about the WTO, its mission and its activities.

The WTO’s guiding principles remain the trade of open borders, the guarantee of most-favored-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities. The


\textsuperscript{83} Ibid.
beginning of national markets to international trade, with justifiable exceptions or with adequate flexibilities, will encourage and contribute to sustainable development, raise people's welfare, reduce poverty, and foster peace and stability. At the same time, such market opening must be accompanied by sound domestic and international policies that contribute to economic growth and development according to each member's needs and aspirations.

The dispute settlement activities in General Agreement on Tariffs and Trade (GATT) and now under the WTO Agreement, including dispute settlement under General Agreement on Trade in Services (GATS), Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the side agreements to the General Agreement, is based on the principles of GATT under Article XXIII. Article XXIII is the General Agreement's basic dispute settlement mechanism. Article XXIII:1 provides that the dispute settlement process may be invoked when one party claims that a benefit accruing to it under the General Agreement has been nullified or impaired by another party or that the attainment of any objective of the General Agreement is being impeded as a result of-

(a) The failure of another contracting party to carry out its obligations under the General Agreement, or

(b) The application by another contracting party of any measure, whether or not it conflicts with the provisions of [the General] Agreement, or

(c) The existence of any other situation.

So far, the vast majority of complaints brought under Article XXIII have alleged a violation of the General Agreement (paragraph (a)) by the Member

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84 GATS, TRIPS and the side agreements all refer to GATT Article XXIII (as interpreted by the Uruguay Round Dispute Settlement Understanding) as the basis for dispute settlement, although some of them contain provisions that modify or limit the understanding's general dispute settlement rules.

85 The General Agreement contains many provisions designed to resolve trade disputes between its contracting parties. Most of them provide initially, and sometimes exclusively, for consultations between the contending parties. If the parties are unable to settle their differences through negotiations, however, they may resort to Article XXIII.

86 Article XXII – Consultation (1) 1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
Countries, but there have been a few cases based on paragraph (b), which are known as non-violation cases. No successful cases have been based on paragraph (c). It should be mentioned that GATT Article XXII is a general consultation provision and practice consultations under Article XXII are for the most part considered equivalent to consultations under Article XXIII, i.e., if the consultations fail to settle a dispute, the next phases of dispute settlement may be invoked.

### 3.9.1 Dispute Settlement under the World Trade Organization

The World Trade Organization’s procedure for resolving trade disputes or differences under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly. The objectives of the dispute settlement system at World Trade Organisation are described in abstract terms in Article 3(2) of the Dispute Settlement Understanding (DSU)\(^\text{87}\) as, to “provide security and predictability to the multilateral trading system.” The dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements”.\(^\text{88}\) In paragraph 3, promptness in settling disputes is recognized as a further objective of the dispute settlement system. The rest of the DSU deals essentially with the process – how the dispute settlement system is to go about doing what it is supposed to do. Settling trade disputes is one of the key activities of the WTO. A dispute occurs when a member government believes another member government is breach of an agreement or a commitment that it has made in the WTO. The World Trade Organization’s (WTO) procedure for resolving trade quarrels under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly. Dispute settlement operates as a confidence builder. This system encourages countries to settle their differences through consultation. Failing that, they can follow a carefully survey out at stage-by-stage procedure that includes the chance of a ruling by a panel of experts, and the chance to appeal the ruling on legal grounds. Confidence in the system is borne out by the number of cases brought to the WTO —

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2. The contracting parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.


88 Ibid.
around 300 cases in eight years compared to the 500 disputes dealt with during the entire life of GATT (1947–2017).

The General Council orders as the Dispute Settlement Body (DSB) to deal with disputes between WTO members. Such disputes may begin with respect to any agreement contained in the Final Act of the Uruguay Round that is subject to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSB has power to establish dispute settlement panels, raise matters to arbitration, adopt panel, Appellate Body, and arbitration reports, maintain surveillance over the implementation of recommendations and rulings contained in such reports, and allow suspension of concessions in the event of non-compliance with those recommendations and rulings.

Dispute settlement can be categorized on the following heading in WTO:

1. Disputes by country/territory
2. Disputes by agreement
3. Disputes over Dispute Settlement Body
4. Disputes by Subject
5. Appellate Body

A dispute arises when a member government trusts another member government is violating an agreement or a commitment that it has made in the WTO. The makers of these agreements are the member governments themselves and the agreements are the outcome of negotiations among members. Ultimate responsibility for settling disputes also lies with member governments, through the Dispute Settlement Body of World Trade Organisation. From 1995 to still now over 542 disputes have been brought to the WTO and over 350 rulings have been issued.

3.9.2 World Trade Organization – A Unique Contribution

Dispute settlement is the intermediate pillar of the multilateral trading system, and the WTO’s unique contribution to the strength of the worldwide economy. Without resolving the disputes, the rules-based system would be little effect because the rules could not be enforced. The WTO’s procedure brings out the rule of law, and it makes the trading system more stable and predictable. The system is depending on clearly-defined rules, with timetables for finishing a case. First rulings are created by
a panel and rejected by the WTO’s full membership. Appeals found on points of law are possible. However, the point is not able to pass judgment. The preference is to settle disputes, through consultations if possible.

3.9.3 Principles of WTO

WTO disputes are essentially about broken promises. WTO members have admitted that if they believe fellow-members are breaching trade rules, they will use the multilateral system of resolving disputes instead of taking action unilaterally. That means abiding by the admitted procedures, and respecting judgments. The WTO dispute settlement procedure follows the principle of quick and equitable principle. Here the mechanism would be dealt with on the basis of appeal and non-appeal.

A dispute arises when one country acquires a trade policy measure or takes some action that one or more fellow-WTO members consider to be dividing the WTO agreements or to be a failure to live up to obligations. The third group of countries can declare that they have an interest in the case and enjoy some rights. The Uruguay Round agreement introduced a more structured procedure with more clearly defined stages in the process. It introduced extensive discipline for the length of time a case should take to be settled, with flexible deadlines lay in various stages of the procedure. The agreement gives essential prompt settlement to function WTO effectively. It sets out in considerable detail the procedures and the schedule to be followed in settling disputes. If a case passes its full way to a first ruling, normally it should not take more than about one year 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent such as if perishable goods are involved, it is accelerated as much as possible.

The Uruguay Round agreement also made it irrational for the country drop a case to block the adoption of the ruling. Previously GATT rulings are adopted by consensus but now, rulings are automatically adopted unless there is a consensus to reject a ruling any country wanting to block a ruling has to persuade all other WTO members including its opponent in the case to share its view. Although much of the procedure does duplicate a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is, therefore, negotiations between the governments concerned, and even when
the case has proceeded to other stages, consultation and mediation are still always possible.

The Dispute Settlement Body (DSB) of the World Trade Organization (WTO) makes decisions on trade disputes between governments that are settled by the Organization. Its decisions generally match those of the dispute body.

3.9.4 Method of the Settlement of Disputes at WTO

Disputes settlement is the duty of the Dispute Settlement Body which consists of all WTO members. The Dispute Settlement Body has the single authority to establish “panels” of experts to examine the case and to accept or reject the panels’ findings or the results of an appeal. It observes the implementation of the rulings and recommendations and has the power to allow retaliation when a country does not comply with a ruling.

- At first stage the consultation is up to 60 days before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also question the WTO director-general to mediate or try to help in any other way.
- At second stage the panel up to 45 days for a panel to be appointed, plus 6 months for the panel to conclude. If consultations fail, the opposing country can request for a panel to be appointed. The country “in the dock” can develop the creation of a panel once, but when the Dispute Settlement Body meets for the second time, the appointment can no longer be developed (unless there is a consensus against appointing the panel).

Officially, the panel is serving the Dispute Settlement Body to make rulings or recommendations. But because the panel’s report can only be rejected by agreement in the Dispute Settlement Body, its conclusions are difficult to revoke. The panel’s findings have to be depending on the agreements mentioned.

The panel’s final report should usually be given to the parties to the dispute within six months. In cases of urgency, including those regarding perishable goods, the deadline is decreased to three months.
The agreement gives in respect of how the panels are to work. The main stages are:

1. **Before the first hearing**: both sides in the dispute present its case in writing to the panel.

2. **First hearing**: the case for the opposing country and defense: the opposing country (or countries), the responding country, and those that have announced they have an interest in the dispute, build their case at the panel’s first hearing.

3. **Rebuttals**: the countries involved submit written counter statement and present oral arguments at the panel’s second meeting.

4. **Experts**: if one side augments scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.

5. **First draft**: the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to object. This report does not include findings and conclusions.

6. **Interim report**: The panel then submits an interim report, contains its findings and conclusions, to the two sides, giving them one week to ask for a review.

7. **Review**: The period of review must not exceed two weeks. During that time, the panel may arrange additional meetings with the two sides.

8. **Final report**: A final report is submitted to the two sides and three weeks later, it is spread to all WTO members. If the panel decides that the disputed trade measure does interrupt a WTO agreement or an obligation, it recommends that the measure is made to conform to WTO rules. The panel may advice how this could be done.

9. **The report becomes a ruling**: The report becomes the Dispute Settlement Body’s ruling or recommendation within 60 days unless an agreement rejects it. Each side can appeal the report (and in some cases both sides do).

### 3.9.5 Appeals

Appeal a panel’s ruling can be made either side. Sometimes both sides can do so. Appeals have to be establishing on points of law such as legal interpretation they cannot reconsider existing evidence or examine new issues.
Each appeal is heard by three members of a permanent seven-member Appellate Body made by the Dispute Settlement Body and broadly representing the scope of WTO membership. Appellate Body Members have four-year terms. They have to be individuals with familiar position in the field of law and international trade, not affiliated with any government. The appeal can ratify, modify or reverse the panel’s legal findings and conclusions. Normally appeals should not final more than 60 days, with an absolute maximum of 90 days. The Dispute Settlement Body has to accept or reject the appeals report within 30 days and rejection is only possible by agreements.

3.9.6 The Dispute Settlement Body (DSB)

The WTO Dispute Settlement Body (DSB), created in Article 2 of the Dispute Settlement Understanding (DSU) administers the World Trade Organization (WTO) dispute settlement proceedings. The DSB includes of all WTO members, generally represented by Ambassadors or equivalent. It makes settlement on trade disputes between governments that are adjudicated by the Organization. The DSB has the single authority to establish “Panels” of experts to examine the case and to accept or reject the Panels’ findings or the results of an appeal.\(^{89}\)

The DSB uses a special decision process known as 'reverse consensus' or 'consensus against' that makes it almost fixed that the Panel recommendations in a dispute will be accepted. The process needs that the recommendations of the Panel should be adopted "unless" there is a agreement of the members against adoption. This has never happened, and because the nation 'winning' under the Panel's ruling would have to join this reverse agreement, it is difficult to formulate of how it ever could.

3.9.7 Institutional structure

On admission and decision by the Disputes Settlement Body as to whether the case is capable of settlement on merits, and once it has decided on the case, i.e., whether the complaint had been shown to be right or wrong, the DSB may direct the 'losing' member state to take action to bring its laws, regulations or policies into conformity with the WTO Agreements. This is the only direction that appears from a

\(^{89}\) Giovanni Aversa, *WTO Dispute Settlement Body (DSB).*
WTO dispute. There is no idea of "punishment" or even restitution. The DSB will give the failed party a "reasonable period of time" in which to replace the conformity of its laws etc. Almost all WTO members "voluntarily" enforce DSB decisions in time. Of course, when a failed country brings its laws etc. into conformity it may choose how to do so, indeed, it may not necessarily make the changes that the winning party would select.

The DSU objectivity is effectively providing an interpretation and elaboration of GATT Articles XXII and XXIII, which were not modified in the Uruguay Round. Article XXII provides that one WTO Member may request another Member to consult with respect to any matter affecting the operation of the agreement. Generally speaking, Article XXIII provides for consultations and dispute settlement procedures where one Member considers that another Member is failing to carry out its obligations under the agreement.

As noted above, these articles were the basis for dispute settlement in the GATT system, and since all of the agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization rely on GATT Articles XXII and XXIII or very similar provisions as a basis for dispute settlement, they are the basis for dispute in the WTO system as well.

90 Article 3.1 of the DSU provides: "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

91 This is an oversimplification of the provisions of Article XXIII. More precisely, it covers either of two situations, where benefits accruing to a Member under the agreement have been nullified or impaired or where attainment of the objectives of the agreement has been impeded – that arise as a result of one of three reasons – the failure of a Member to carry out its obligations; the application by a Member of any measure (whether or not it conflicts with the agreement) or the existence of any other situation. Of the six possible combinations, the vast majority of cases involve allegations of nullification or impairment arising from a failure of a Member to carry out its obligations. A few cases referred to as non-violation cases, involve allegations of nullification or impairment by a measure not in conflict with the agreement. No panel reports have been based on an impedance of the objectives of the agreement or on the existence of any other situation, although allegations thereof have occasionally been made. The automatic adoption rules of the DSU do not apply to so-called “situation” complaints.

92 General Agreement on Trade in Services, arts. XXII, XXIII; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 64; Agreement on Agriculture, art. 19; Agreement on the Application of Sanitary and Phytosanitary Measures, art. 11; Agreement on Technical Barriers to Trade, art. 14; Agreement on Trade-Related Investment Measures, art. 8; Agreement on Implementation of Article VI of the GATT 1994 (Antidumping Agreement), art. 17; Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation Agreement), art. 19; Agreement on Preshipment Inspection, art. 8; Agreement on Rules of Origin, arts. 7-8; Agreement on Import Licensing Procedures, art. 6; Agreement on Subsidies and Countervailing Measures, art. 30. Agreement on Safeguards, art. 14. The DSU may also be applied by plurilateral agreements.
However, understanding the role of WTO dispute settlement as providing an avenue for Members who feel that their rights have been infringed is only one way of viewing the system. A different way of viewing the WTO system is to see it as one that focuses on the behavior of Members who have allegedly acted inconsistently with their obligations under the covered agreement. Obviously, this is a matter of emphasis. Any system that gives rights to complainants automatically has an effect on those against whom they complain. But a regime that is concerned with redress for those who claim that their rights have been infringed is different in focus from a system whose main concern is to provide consequences for those who do not comply with its rules.

Nevertheless, for many scholars who look at WTO dispute settlement terms particularly in the words of economists who call it as sanctioning system one that encourages punishment on the international trading system. Further, Steve Charnovitz has pointed out that while under the GATT one spoke of “rebalancing concessions,” under the WTO, the language has changed to “trade sanctions.”

One of the great achievements of WTO dispute settlement is that it depoliticizes disputes between countries. It downplays the diplomatic importance of the dispute and provides a practical means of resolving it. This is assisted by the informal nature of the WTO process. The use of email for the exchange of pleadings, the use of conference rooms as courtrooms and the relative informality of panel and even Appellate Body hearings, all contribute to making the dispute settlement process a standard or routine way of conducting relations between states. One can contrast this with the process of the International Court of Justice, which is a much more formalized process, with the appointment of Agents with ambassadorial status to

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Agreement on Government Procurement, art. XXII. It is not applicable, however, to the Agreement on Trade in Civil Aircraft. Appendix 2 of the DSU contains a list of special or additional dispute settlement rules in WTO agreements that prevail over DSU rules. DSU, art. 1.2. for an interpretation of the relationship of these special and additional rules to the DSU rules, Appellate Body Report on Guatemala – Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico adopted on 25 November 1998.

93 John H. Barton et al., the evolution of the trade regime: politics, law and economics of the GATT and the WTO 208-09 (2006).

represent states before the court. This pragmatic element is an important aspect of the effectiveness of the WTO dispute settlement.95

From the perspective of international commercial arbitration, legal traditions can also be broken down into local, regional and international traditions. Local legal traditions encompass the rules and practice of a state or local legal system, such as are embodied in a state’s commercial code. Regional legal traditions include the laws and practices of regional organizations like the European Union (EU) and the North American Free Trade Agreement (NAFTA). International legal traditions include the various institutions adopted by a multitude of states, such as is embodied in the World Trade Organization (WTO).96

Though there is clear evidence of the acceptance of arbitration or tahkim in the Islamic legal tradition, albeit not as we know it today in the West, arbitration has a checked track record in the last century in the Islamic world. Indeed, there is no disagreement about tahkim being an acceptable form of dispute resolution, but there are significant historical and conceptual differences with the western concept of arbitration. The differences can be discussed under five broad headings: 1) Nature of Arbitration; 2) Scope of Arbitration; 3) Uncertainty in the Rules and Regulations Regarding Arbitration under the Shari’a and in the Various Middle Eastern Jurisdictions; 4) Choice of Law; and 5) Scope of Judicial Review and Enforcement.97

Summing Up

To sum up the present chapter, in evaluating the international legal regime regarding international commercial arbitration, scholar considered custom and trade practices, usages as represented by lex moratoria, conventions, the Model Law on ICA, and Rules of Arbitration. The Geneva Convention and the New York Convention plays a prominent role in international commercial arbitration more than the other Conventions/Protocol. The UNCITRAL Model Law on International Commercial Arbitration, UNIDROIT principles, the World Trade Organization (WTO) has globalized and internationalized commercial arbitration. Prior to the

95 Donald McRae, Measuring the Effectiveness of the WTO Dispute Settlement System, AJWH Vol.3:1, (2008)
97 Supra note 22.
adoption of the Model Law, the existing national laws were not only inadequate or inappropriate for international commercial arbitration but there were disparities in them.

These guidelines represent what popularly also called “soft law,” in distinction to the harder norms imposed by arbitration statutes and treaties, as well as the procedural framework adopted by the parties through the choice of pre-established arbitration rules and these guidelines will have far-reaching effects, notwithstanding that they are non-binding on their face. The potential benefit of the soft law is that it can enhance arbitration’s fairness and integrity helping to strike the right equilibrium between fairness and efficiency. Modern arbitration is depending on perspective, with a lack of fixed standards related to how arbitrators conduct proceedings. Little “hard law” is with respect to how the specific of how an arbitral tribunal should gather evidence and hear argument in its effort to determine the facts, interpret the contract, and try the law governing the parties’ dispute. Thus, the procedural soft law gives its potential to promote a sense of equal treatment, by developing the perception that procedure is “regular” and according to a “rule of law” principles in International Commercial Arbitration Legal Regime.

In the next chapter, the researcher has discussed the Arbitration and Conciliation Act, 1996. In this chapter, the researcher has extensively discussed the Act as a provider for quick redressal to commercial dispute by private Arbitration.