Chapter – I

Introduction
INTRODUCTION

“More over if your brother sins against you, go and tell him his fault between you and him alone. If he hears you, you have gained your brother.”

Matthew – 18:15 (KJV)

When law runs with laity and levity, justice will be a freely purchased product on the streets. Law and Justice are not two distinct facets of fact but a unified amalgamation of truth and service. Their emergence is concomitant and coterminous and their existence is interdependent. Law is meant to yield justice and justice is to exemplify the nobility of law. This minimum and legitimate expectation of the ultimate consumer of justice system is universally applauded and acknowledged. The modes and means of justice delivery process may be different and varies depending upon the nature, need and content of the issue or problem i.e. conventional, progressive or inventive. Law is dynamic and its evolution is perpetual, so also justice is eternally illustrious and empirically glorious.

“The law was given that grace might be sought; grace was given that the law might be fulfilled.” 1 At the same time, we must be cautious of the fact that justice is not evolved only out of law, but derived out of multiple sources – individual, institutional, legislative, executive and society.

Every duty-oriented action tends to serve the cause of justice. Law may be administered only by defined and designated authorities, but Justice may be served not only by the Courts, but all – courts by expedient and effective orders in time, legislators by their true allegiance to the spirit of their constitutional oath, executive through their dispassionate and diligent implementation of rule of law, service organisations by supporting the efforts of the legislators and executive, and Alternative Dispute Resolution by supplementing the cause of judicial disposition. Here is a wise caution – if the legal

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mechanism and operators of law are drafted from ‘specially trained species’ with legal acumen, the quality of justice might be impaired and ineffective, and if the expertise operators of legal system happened to be ‘light hearted’, the justice may be exposed to mockery. A system that is supposed to take care of these two extreme situations, in modern times, is known as Alternative Dispute Resolution “A.D.R”. i.e. a system placed in between extreme ‘rigidity’ and extreme ‘flexibility’

According to most contemporary theories of justice, justice is overwhelmingly important: John Rawls claims that "Justice is the first virtue of social institutions, as truth is of systems of thought." Justice can be thought of as distinct from and more fundamental than benevolence, charity, mercy, generosity or compassion. Justice has traditionally been associated with concepts of fate, reincarnation or Divine Providence, i.e. with a life in accordance with the cosmic plan. The association of justice with fairness has thus been historically and culturally rare and is perhaps chiefly a modern innovation in western societies.2

‘Justice is a matter of the correct allocation of benefits and burdens among people’.3 It is readily conceded that ‘formal justice’ is not enough in law, that we also need ‘substantive justice’. There is a weak connection between law and justice. Every legal system has courts whose job it is to aim at justice: they must decide not only whether plaintiff deserves a remedy, or whether the prosecution is entitled to a conviction, but also whether these should be ordered in the face of a claim to the contrary, courts have an allocative job to do. This does not show that they must achieve justice, or even a minimum of justice. Nor does it show that justice is the first virtue of legal institutions. The connection between law and justice is real, but modest. Justice is a necessary aim of a necessary legal institution. The proposition of delivering justice through Alternative Dispute Resolution finds favour in the sanity of the concept of ‘justice as harmony’ advocated by Socrates. This is further buttressed by the Rawl’s theory of justice. Thus from Socrates to Rawls, Alternative Dispute Resolution has got approval. Rawls' approach to justice as a theory proposes that principles of justice can be

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2 http://en.wikipedia.org/wiki/Justice (visited on 12-3-2009)
determined through the rational thinking of individuals shrouded by a veil of ignorance. In a purely hypothetical situation, the veil of ignorance creates an original position of equality in which persons under the veil have no knowledge of status, position in society, personal wealth or natural abilities. From behind the veil of ignorance, a rational, objective and disinterested group of people would choose a system of justice that ensures an equal distribution of rights and duties.

The veil of ignorance involves a presumption of equality and equal liberty of those behind it, supportive of the egalitarian rights of individuals. Thus individuals will choose to support the lowest members of society because, one might end up in the lowest position after the veil is lifted and would want to be equally protected. From the perspective of original position, the social contract would be formed to "guarantee a just society without sacrificing the happiness or liberty of any one individual" per Rawls.4

1.1. LEX MERCATORIA – FROM STONES TO CHANDELIERS:

To say that “the gradual development of human race through generations has been through the business activities and through contacts and contracts; human and business relations thrived on the mutual confidence and reciprocal integrity” is not an exaggeration. The entrepreneurial engagements have been witnessed on the bedrock of values and principles, which in course of time, has come to be known as ‘Lex Mercatoria’ i.e. Law Merchant, the logistics of merchandise. Sir Henry Maine’s famous inference that “the movement of progressive societies has hitherto been a movement from Status to Contract”.5

Further fortifies the aforesaid view by Maine’s general thesis was that the individual’s power of self-determination increased even while the central political authority increased in power……Maine observed that much of legislative activity of its powerful sovereign was directed to increasing this self-determination still further by removing surviving incapacities (such as those of married women and religious dissenters), and abolishing restrictions on freedom of contract (such as the usury laws,

and laws fixing prices and wages). In order to appreciate the true significance and importance of parallel justice delivery system, particularly in the field of trade and commerce, we must know the historical evolution of Lex Mercatoria.

Lex Mercatoria i.e. Law Merchant which flourished during the medieval period throughout Europe was similar to that of English common Law which enforced trade customs and practice through a system of merchant courts. Lex Mercatoria is a body of rules and principles laid down by merchants to regulate their dealings, for quick and expeditious disposal of disputes, responsive to the needs of the merchants and be comprehensible and acceptable to the merchants. It grew out of the insufficient response of the Civil Law to the growing demands of the commerce, which was mostly in the hands of rich cosmopolitan merchants.

It was administered for the most part in special courts, such as those of the guilds in Italy, or the fair courts of Germany and France, or as in England, in courts of the Staple or Pie powder. Lex Mercatoria was also a means for local communities to protect their own markets, and local kings and lords extracted taxes and set trade restrictions. It functioned as the international law of commerce, and the International Commercial Law of today owes some of its fundamental principles to the Lex Mercatoria.

Further, Lex Mercatoria is sometimes used in international disputes between commercial entities. Most often those disputes are decided by arbitrators which sometimes are allowed (explicitly of implied) to apply Lex Mercatoria principles. Therefore, some legal practitioners assume that there is a whole set of legal principles named "Lex Mercatoria" in international or transnational commercial law. The most recent and constantly updated set of rules are the ‘TransLex Principles’ collected and formulated by Prof. Klaus Peter Berger (University of Cologne) and his Centre for Transnational Law. What remains of Lex Mercatoria precepts today is a qualified faith in self-regulation by merchants, and a reluctance to surrender the efficiencies of merchant practice to state confinement.

It emphasised contractual freedom, alienability of property, while shunning legal technicalities and deciding cases ‘ex aequo et bono’. A distinct feature was the reliance

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by merchants on a legal system developed and administered by them. States or local authorities seldom interfered, and did not interfere a lot in internal domestic trade. Under Lex Mercatoria, trade flourished and states took in large amounts of taxation.\(^7\)

The medieval Law Merchant did not die in the post-medieval times. Rather, it was transformed in character during the sixteenth and seventeenth centuries to blend in with local influences, to reflect the policies and interests, and the procedural rules of the forum. The merchant system still maintained its influence upon the development of domestic law. In Europe, the British Isles, and later the United States, the form of merchant law which arose reflected the needs of trade in each local community of merchants and in the international community at large. Mercantile Law in England evolved differently than did commercial law in Continental Europe. Yet the Law Merchant itself remained the source in both legal systems. What happened in each case was the embodiment of Law Merchant values within domestic legal systems that were in line with State policy, national interests and domestic mores. Only certain attributes of the medieval Law Merchant changed. For instance, domestic laws, by definition, were not universal in their application. Such laws varied from jurisdiction to jurisdiction. They altered in accordance with forum concerns, especially indigenous business demands. Yet the foundations of the Law Merchant – flexibility of approach and commercial orientation – remained intact in both civil land common law systems.\(^8\)

Such a law merchant has been undergoing metamorphosis but without sacrificing its core content and philosophy. Today’s Arbitrational audacity is nothing but the reminiscences of yesterday’s Lex mercatoria. Lex mercatoria precepts have been reaffirmed in new international mercantile law. National trade barriers are torn down in order to induce commerce. The new commercial law is grounded on commercial practice directed at market efficiency and privacy. Dispute resolution has also evolved and functional methods like international commercial arbitration is now available. The principles of the medieval Lex mercatoria - efficiency, party autonomy, and choice of arbitrator—are applied, and arbitrators often render judgements based on customs. The new Merchant Law encompasses a huge body of international commercial law.

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\(^8\) [www.heinonline.org/HOL/Landingpage/collection](http://www.heinonline.org/HOL/Landingpage/collection) (visited on 4/3/12)
A modern variant of the Lex mercatoria is the evolving law and dispute resolution in cyberspace. Internet traders are the fastest growing body of merchants in history. Parties can solve domain-name disputes online expeditiously and quickly. In a virtual court documents are filed and examined online, arguments are made Online and decisions are published online – seldom challenged before traditional courts of law. The medieval, the modern and cyberspace merchant laws face comparable issues of enforceability. They solve the problems somewhat differently, but the reaction of the market is the main incentive to comply with a ruling.⁹

**ENGLISH COMMON LAW:**

English courts applied merchant customs only if they were “certain” in nature, “consistent with law” and “in existence since time immemorial.” English judges also required that merchant customs were proven before the court. But even as early as 1608, Chief Justice Edward Coke said: “the Lex Mercatoria is part of this realm.” The tradition continued especially under Lord Mansfield, who is said to be the father of English commercial law. Precepts of the Lex Mercatoria were also kept alive through equity and the admiralty courts in maritime affairs. In the US, traditions of the Lex Mercatoria prevailed in the general principles and doctrines of commercial jurisprudence.

The history of the Lex Mercatoria in England is divided into three stages: the first prior to the time of Coke, when it was a special kind of law – as distinct from the common law – administered in special courts for a special class of the community (i.e. the mercantile); the second stage was one of transition, the Lex Mercatoria being administered in the common law courts, but as a body of customs, to be proved as a fact in each individual case of doubt; the third stage, which has continued to the present day, dates from the presidency over the king’s bench of Lord Mansfield, under whom it was moulded into the mercantile law of to-day. To the Lex Mercatoria modern English law owes the fundamental principles in the law of partnership, negotiable instruments and trademarks.

Sir John Holt (Chief Justice 1689 to 1710) and Lord Mansfield (Chief Justice, 1756 to 1788) were the leading proponents of incorporating the *Lex Mercatoria* into the

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common law. Speaking about Lord Mansfield, C.M. Schmitthoff said - Whilst sitting in Guildhall, Lord Mansfield created, "a body of substantive commercial law, logical, just, and modern in character and at the same time in harmony with the principles of the common law. It was due to Lord Mansfield's genius that the harmonisation of commercial custom and the common law was carried out with an almost complete understanding of the requirements of the commercial community, and the fundamental principles of the old law and that that marriage of idea proved acceptable to both merchants and lawyers."  

Further, the dominating feature of Laissez Faire is one of the reasons for the hegemony of Lex Mercatoria. Laissez Faire and Lex Mercatoria may be construed as the chums in trading world. Laissez Faire principle is fortified by the spirit of law of contracts. The Social function of contract in the formative era of modern industrial and capitalist society may be summed up in four elements, which are considered to be the corner-stones of contract in the classical era: -

- Freedom of movement,
- Insurance against calculated economic risks,
- Freedom of will;
- Equality between parties.

The first two are essentially formal in character and the latter two also express political and sovereign ideologies. The difficulty of bridging the gap between the formal and substantial aspects of both freedom And equality is evident in the pathetic contrast between the law of contract as it is taught in most textbooks, and modern contract as it functions in society. At this juncture, an earnest assessment of the functional role of contract by W. Friedmann referred to above enlightens us as to how the modern understanding for resolution of disputes by alternative methods is proved to be not merely desirable, but empirically imperative to perpetuate camaraderie in the trading world and general

10 Ibid.
12 W. Friedmann, Law and Social Change, Universal Law Publishing Co. New Delhi, First Indian Reprint-2010. (pp.34-72)
society. With regard to freedom of movement, he observes that for a developing industrial society contract supplied the legal instrument which enabled men and goods to move freely, which might have inspired Maine to theorize that progressive societies have developed from status to contract. The evolution from status to contract, from immobility to mobility, gradually pervaded all spheres of life, beyond the fields of commercial and labour contracts. It invaded family relations and the law of succession too. Surprisingly, in the increasing scientific and technological intercourse of international commercial transactions, particularly after the onslaught of internet, the concept of mobility is also overshadowed, and commerce is conceded even without movement of goods.

Regarding the second aspect - insurance against calculated economic risks, though courts are technically concerned with problems of possession, remoteness of damage and of positive and negative interests, occasionally, social and economic problems too intrude. The Liesbosch case\(^\text{13}\) arose in tort, but might equally have arisen in contract. The owners of a dredger, under contract to a third party to complete special work in a given time, were put too much greater expense in fulfilling this contract because they were too poor to buy a substitute for the dredger sunk by the negligence of the defendants. Was this poverty too remote a consequence to be taken into consideration? The House of Lords held that it was, and assumed that, for the purposes of the law of damages, poverty is a misfortune for which the law cannot take responsibility.

A similar philosophy was adopted by the English courts during the few years when “expectation of happiness” played an exciting though slightly fantastic role in English law.\(^\text{14}\)

As Lord Simon put it, in Benham’s case, “Lawyers and judges may … Join hands with moralists land philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status”…. But on the whole, the problem of sanctions for breach of contract, while vital to its function in modern industrial society,

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\(^{13}\) Liesbosch Dredger vs. Edison S.S. (1933) A.C. 449.

\(^{14}\) House of Lords in Rose vs. Ford (1937) A.C. 157. In the latter case, the House reduced the amount of damages to be awarded for loss of expectation of happiness in respect of a child two and half years old, from 1200 pounds to 200 pounds.
has remained relatively technical. Coming to the third aspect i.e. Freedom of Will, which is nothing but another way of expressing the essential mobility of contractual obligation, Friedmann says that freedom to make or unmake a contract also implies that a person cannot tie himself indefinitely to another. In other words, contract must not become a disguised form of status. This issue has not come before the courts, but in *Hormood vs. Millar's Timber and Trading co.* the Court of Appeal held a contract illegal by which a Man had, without any limitation of time, assigned his salary to a moneylender, contracted with him never to terminate his employment without moneylender’s consent, never to obtain credit, move from his house, and in several other respects, to restrict his personal movements. Fourthly, the concept of EQUALITY. To some extent, the concepts of freedom and equality in contract are interchangeable. Lack of freedom to make or unmake a contract, or to bargain on its terms, also implies lack of equality. As long as we restrict both concepts to the limited meaning which the orthodox theory of contract gives them, one usually implies the other.

The increasing gap between this theory and the reality of developing capitalist society, which lead to the gradual reversal of the earlier Benthamite theory, had its particular effect on the law of contract, the legal symbol par excellence of English society.

1.2. MOUNTING ARREARS AND COUNTING COURTS:

Litigation itself is annoyance and pendency in litigation is irritating and exasperating. There are many jokes or anecdotes, ranging from crude to classy, on the tardy disposal of cases by the judiciary, leading to horrendous consequences in so far as the individual rights are concerned.” Sow litigation, your grandchildren will reap the benefits.” and a party in litigation before a court is described or equated to a ‘rider on the donkey’. Such remarks are born out of frustration caused by the heap of pending cases in various courts.

Prof. N.R.Madhava Menon, a renowned jurist, observes that - ‘Judicial delays and mounting arrears are the result of many causes, some of which are inherent in the system

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16 (1917) 1 K.B. 305.
of justice (adversarial; procedure-centred; adjudication-dominated; multi-level appeals provided) and have been institutionalised as essential components of “fairness” and “justice”. Alternative procedures, summary trials, out-of-court settlements, denial of too many adjournments, curtailment of number of appeals and interim orders are all looked down upon by the main actors of the system-lawyers and judges—even if the litigants are inclined to accept them as fair and just!.

A second cause often cited for delay is the inadequacy of the number of courts and infrastructural facilities in them. The report of the Arrears Committee (1989-90) constituted by the Government of India on the recommendations of the Chief Justices Conference attributed part of the blame for mounting arrears on the executive organ of the State and said that the inadequacy of judge strength, delay in filling up vacancies and unsatisfactory appointment of judges are contributory factors. The Law Commission of India and the Satish Chandra Committee had also emphasised these factors. Adequacy of judge strength, competence of judges (selection, training, and supervision and promotion avenues) and promptness in filling up vacancies are structural issues which did not receive the attention they deserved either from the judiciary or from the executive. It will serve no purpose in apportioning the blame in each and every case while the data are hard to get. The fact remains that judiciary does not get competent persons in adequate numbers and in reasonable time.\textsuperscript{18} As reported in Legally India, 71\% of cases are delayed because of reasons such as unpaid fees, unserved notice or unfiled documents, rather than judges taking too long, as revealed by new data compiled by the apex court.\textsuperscript{19}

On 6\textsuperscript{th} March, 2010, Hon’ble Justice V.V. Rao of A.P. High Court, while delivering a keynote address on E-Governance in Judiciary, stated that - “Indian judiciary would take 320 years to clear the backlog of 31.28 million cases pending in various courts including High courts in the country, and further added that "If one considers the total pendency of cases in the Indian judicial system, every judge in the country will have an average load of about 2,147 cases."\textsuperscript{20}

\textsuperscript{18}http://www.cscsarchive.org:8081/MediaArchive/audience.nsf/(docid)/77825E595AD0EEC1E5256BB1001DA116 visited on 12-9-2010
\textsuperscript{19}http://www.legallyindia.com/201111302426/Bar-Bench-Litigation/academics-comment-on-case-pendency-kapadias-cure-worse-than-disease visited on 11-6-2009
\textsuperscript{20}http://articles.timesofindia.indiatimes.com/2010-03-06/india/28143242_1_high-court-judges-literacy-rate-backlog visited on 12-5-2009
Hon’ble Justice B.N.Agrawal observed that the questions on the credibility of judiciary to deal with the mounting arrears of cases, delay in disposal and high cost of obtaining justice are still being raised, but to blame the judiciary alone for is wrong as other limbs of the State need also play their role in solving this problem. Delay in disposal of cases, not only creates disillusionment amongst the litigants, but also undermines the capability of the system to impart justice in an efficient and effective manner. Giving the statistics of disposal of cases by the High Courts in 1999 and 2006, he stated that the total institution has gone up from 1122,430 to 15, 89,979 and disposal from 9, 80,474 to 14,50,602. Similarly, in the subordinate courts also the institution has gone up from 1,27,31,275 to 1,56,42,129 and disposal from 1,23,94,760 to 1,58,42,438.

These of institution and disposal go to show that while the disposal has increased to a considerable extent, the overall institution continues to exceed disposal and that the pendency has been increasing not due to the decline in the rate of disposal but because of rapid increase in the institution. He pointed out the executive lethargy and suggested that all Government instrumentalities should ensure that genuine cases are resolved at pre-litigation stage itself at their level so that poor and helpless citizens may not be compelled to unnecessarily knock the door of justice. Another factor for the pendency, he said non filling up of the vacancies of judges in the High Courts and subordinate courts. Whatever may be the reasons, the pendency of litigating is quite alarming and so alternate methods of disposal of cases have become imminent.

The Union Law Minister recently launched the ‘Mission Mode Programme for Reduction of Pendency of Arrears in Courts’, and the said programme aims to dispose of 40% of cases pending in subordinate courts across the country in the next six months. (The Hindu-July 2, 2010) It is reported that as on 30th September 2010, 55,000 cases are pending with the Supreme Court, 42 Lakh with High Courts and 2.9 crore with subordinate courts.

Pendency has increased by 148% in the Supreme Court, 53% in High Courts and 36% in subordinate courts in the last 10 years. Over the past few years, some measures have been taken by the government to facilitate expeditious disposal or cases. These

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21 Presidential address on 1-8-2007 at the Lecture series organised by the Supreme Court Bar Association, New Delhi-(2007) 6 SCC (J) pp.1-10)
include schemes for computerisation, infrastructural augmentation, promotion of Alternative Dispute Resolution mechanism, Lok Adalat Etc. Despite these initiatives, the rate of case disposal has not kept pace with the rate of case institution. As a result, the total number of pending cases has increased. Between October 2009 and October 2010, subordinate courts settled 1.73 Crore cases as compared to 1.24 crores in 1999, an increase of 49 Lakh. During the same period, the fresh cases filed increased by 52 lakhs. The Union Law Minister in a reply to a question in Lok Sabha mentioned the following reasons for increase in pendency:

1. Increase in institution of fresh cases’
2. Inadequate number of judges and vacancies unfilled;
3. Inadequate physical infrastructure and staff and
4. Frequent adjournments.

It is a pathetic situation in our country that the criminal justice administration did not wake up to the realities of human suffering for the number of under-trials in jails is doubles that of convicts. According to NHRC Prison population statistics June 2009, as on June 2009, there were 3.8 Lakh prisoners in Indian Jails and of these 2.6 lakhs were under-trials. Thus the trauma and travails of the present conventional justice system needs a stand-by and supplementary system of dispute resolution to bear with the yoke of indissoluble pendency of cases. It is worth remembering some of the immortal expressions of the historically renowned judges with regard to the conservative conception of justice.

“There is no longer any independent concept and practice of equity within the English Legal System. Sir George Jessel, M.R., were he alive today could say again, as he said in the late nineteenth century, "This Court is not, as I have often said, a Court of Conscience, but a Court of Law." Interestingly, and half way around the World, Oliver Wendell Holmes said much the same. Perhaps it may have been to silence a "bleeding

22 www.prsindia.org/administrator/uploads/general visited on 5/5/10
23 (Re National Funds Assurance Co. (1878), 10 Ch.D. 118, at p.128).
heart” advocate, I do not know, but Holmes said “This is a Court of Law, young man, not a Court of Justice.”

1.3. ALTERNATIVE DISPUTE RESOLUTION - ALTERNATE ANGEL – FROM NOTIONAL TO NATIONAL AND INTERNATIONAL:

Additional institutional arrangements easily evolve in such a cooperative social order. When charge is disputed, nonviolent means of resolving conflicts and clarifying property rights emerge. For example, the dispute resolution process could be handled through the appointment of a mutually acceptable arbitrator or mediator. If the loser pays restitution, he may be permitted to rejoin the group. The coercive power of a central authority is not required in such a voluntary social arrangement except as a final coercive court of appeal to enforce judgments and protect rights.

Bruce L Benson\(^{25}\) has concluded that customary legal systems tend to share the following basic characteristics:

1. A strong concern for individual rights;
2. Laws enforced by victims backed by reciprocal arguments;
3. Standard adjudication procedures established to avoid violence;
4. Offences treated as torts punishable through economic restitution;
5. Strong incentives for the guilty to submit to the prescribed punishments due to the threat of social ostracism; and
6. Legal change by means of an evolutionary process of developing customs and norms.

States amassed enough power to claim monopoly in law relatively recently and only after a long battle with competing legal systems. State law gained dominance in the competition among medieval European legal systems such Canon Law, the Law Merchant, feudal (manorial) law etc. State law wielded greater coercive power than competing legal systems which depended on reciprocity and trust. Citizens then began

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\(^{25}\) Bruce L Benson, The Enterprise of Law. San /Francisco, Pacific Research Institute, 1990- www.quebecoislibre.org/has. visited on 2-7-2009
to view the sovereign as the sole legitimate source of law. By 1200, royal law dominated the legal order of England and other countries in Europe.

In retrospect, most modern nation-states evolved from non-statist extortionist institutions. There was a natural progression as tribal war chiefs became kings and kingdoms developed into nations. The coercive state is thus seen as the source of all law. The existence coercive institutions and rules stifle the growth of voluntary trust relationships. In addition, the maturation of honouring commitments shifts to the avoidance of punishment from the sovereign state. Amidst all such turbulent changes of time, culture and attitudes of the people all over the globe, the need to establish universal brotherhood through trade and commerce has gained importance and momentum and the need of international trade is acknowledged world-wide. International law brought with it not only the prosperity but also problems and disputes.

The nation states played an active and marked role in establishing their own commercial regulations in order to maintain a good balance in this area and to boost an incipient domestic industry. Nonetheless, all of these national laws proved that there was no adequate regulation for commercial transactions at a world-wide level. The lack of such international regulations was a reflection of the commercial policies in use by the nation states which, far from boosting commercial activities, restricted global commercial turnover and prevented foreign economies from profiting from comparative costs. In other words, they denied the possibility to acquire imported goods in areas where such goods were produced at lower costs.26

The hard experiences in business world, particularly during the world-war I and 1930s, made the people to think of a viable trade regulation and they became aware of the impending need to prevent commercial restrictions. In 1941, the U.S.A. and U.K. attempted to establish a series of basic principles to regulate world trade exchange after the war, but to no avail. The establishment of U.N.O. and Britton Woods Conference of 1944, I.T.O. and World Bank and I.M.F. brought sweeping and revolutionary changes in the global scenario. The proliferation of global trade and commerce resulted in the deluge of disputes between individuals and institutions of one country with another country and their citizenry. No state could give an acceptable method of solving the trade

26 www.springerlink.com/content visited on 6/3/12
disputes and sort out the jurisdictional conflicts. Then under such irresistible pressure of necessity, the concept of Alternative Dispute Resolution has emerged as succour though not as a saviour. The concept of Alternative Dispute Resolution which was once thought of to be notional has come to be seen as a reality both in national and international dealings of business. About the need of Arbitration in International trade and commerce

1.4. SIGNIFICANCE OF THE STUDY:

The study is significant and assuming importance today because the traditional adjudicatory system was unable to deliver goods in time which is one of the most important factors for settlement of commercial disputes. Added to this is the problem of mounting arrears in the courts perforce compelling one and all to look for alternative systems for dispute resolution.

More over most of the commercial disputes are connected with contracts which are highly technical and complex calling for adjudication by persons who are specially talented and equipped with such technical aspects. It must be emphasised that the traditional judge is properly equipped with such technical matters resulting in the feeling that justice is not done. The national as well as international community of commercial entrepreneur have opted and are opting and will be opting for commercial arbitration in the place of adjudication.

With the increase of business crossing the traditional physical boundaries of the nation in view of globalization, commercial arbitration is the resort by the businessmen. The importance of ADR by way of arbitration for resolution of commercial disputes cannot be over sighted.

1.5. OBJECTIVES OF THE STUDY:

Lex Mercatoria laid the foundations for the well entrenched commercial law. The nature, scope and purpose of the commercial, be it national or international, have been to advance the uninhibited intercourse of trade and commerce comporting with the regional interests and norms. Trade and commerce amongst the nations went metamorphosis from ‘sea adventures’ to seeming essentiality and inevitability. To-day, neither individual nor state can claim to sustain without the co-operation of other country since the globe has become a village. The progress of the present day modern world
could not have been imagined without international commerce and trade. The philosophy of international commercial law and commercial arbitration is in continual development.

International arbitration captures the intellectual fascination of dispute resolution practitioners worldwide. It has spawned a vast body of scholarly and practical commentary, and an annual array of conferences and seminars so extensive that the publication of pocket calendars of arbitration community events has become a common marketing tool for law firms seeking to expand their participation in this field.27 In view of the bleeding discontent among the aggrieved clientele, suffering parties in general, and the merchant community whose economic fortunes frown upon their fate at every wink of eye and second particularly have been desperately in search of efficacious and expeditious of dispute settlement process and finally adopted ‘a system designed by the business men, for the business men and of the businessmen’, of course, within the bounds of the legality and justifiability, and prompted and prodded by the necessity of timely settlement of disputes in respect of large chunks of monetary transactions during the course of business. As such, the following objectives are set for the research:

1. To ascertain the circumstances which contributed to the evolution of Alternative Dispute Resolution
2. To study the role of international bodies like U.N.O. and W.T.O. in promoting, protecting and developing of International Trade and Commerce.
3. To acquaint with the principles and philosophy envisaged in International covenants like UNCITRAL, UNCTAD, New York Convention, etc.
4. To take stock of the settlement of disputes arising in International Trade and Commerce Through non-conventional and non-legal modes like Alternative Dispute Resolution particularly International Commercial Arbitration.
5. To take pragmatic view of the Indian scenario with regard to the implementation of Arbitration process in the settlement International Commercial Disputes.
6. To raise awareness and to assist legal practitioners, professional association and the public that arbitration is effective mechanism for solving International commercial disputes.

1.6. RESEARCH METHODOLOGY:

During the course of research, the scholar adopted Doctrinal Method relying chiefly upon the legal literature pertaining to the concept and evolution of arbitration, international commercial law and the international covenants on the subject.

1.7 SOURCE OF THE STUDY: Researcher has adopted consulted both primary and secondary sources of data to get the full information relating to the issue. Primary sources consist of conventions, texts, declarations, resolutions and reports. Secondary sources based on journals, magazines, articles, news papers, commentaries, and text books etc. Data is extensively taken from the ICADR, UNCITRAL, ADR websites and other materials published by them. The major source of data has been the internet and this is precisely because of the nature of the study.

1.8. HYPOTHESIS:

A hypothesis is a tentative expression of an expected relationship between two variables. Though research does not require inevitably the use of a hypothesis, yet a hypothesis gives a clear, steady and specific focus on the problem sought to be investigated. Hypotheses are generally derived from the theoretical framework, but they may also be derived from empirical relationships among variables. When a hypothesis is used, the purpose of the study is to find out whether or not the hypothesis is supported by the data. Generally, three steps are involved in stating a hypothesis –

- Deriving the hypothesis from a theoretical frame work-
- Designating the independent and dependent variables in the hypothesis; and
- Stating the hypothesis.

This research is based on the hypothesis that arbitration is the most effective mechanism of solving disputes, in particular commercial disputes and thus there is a need of making special initiatives to ensure that the system is effectively utilized for the purposes of increasing economic activities also. Thus, the hypothesis is formulated as under:
“International Commercial Arbitration is a dependable legal tool to regulate global trade and commerce for the economic welfare of all.”

1.9. SCHEME OF THE STUDY:

It is proved beyond doubt that Technology and Trade are twins of the parent ‘Science’. Science cannot be popular or universal without the camaraderie of the money-spinning source i.e. business. Willy-Nilly, international commerce is an accomplished fact of 21st century. The Scientific new millennium has its lustre with global grandeur of international business regime. The Law of Business of modern world is transnational, ubiquitous, and perception oriented. In view of the ramifications of international trade and commerce, there is a need to regulate this oceanic activity through authoritative normative base and ensuring the concept of sustainable development and equitable distribution. There is no dearth of literature – economics and legal – on the contemporary topic of international commercial law and the new progeny. Keeping in the view of confines of the subject, the following chapterisation is adopted:

CHAPTER-I : “Introduction” deals with the introductory supplication of the root concept of business and its inter-relation with the society, the advent of Lex Mercatoria which has sown the seeds of commercial law, and its evolution and its extra-territorial expansion to convert the globe into a small village commercially, the interaction and counter-action of law with trade and commerce etc.

CHAPTER –II: “Dispute vis-à-vis Arbitration” deals with the concept of Arbitration, definition, nature and scope and its historical development, manoeuvring with the subtleties and complexities of dispute settlement, and the emergence of new wave of UNCITRAL.

CHAPTER- III: Justice through Arbitration refers to the justice through arbitration, out-break of arbitration jurisprudence, system of Alternative Dispute Resolution as a complementary justice forum, neo-zones of international commercial arbitration, and the appraisal of the qualitative recipe of ‘arbitration justice’ with particular reference to India.
CHAPTER IV: “International Commercial Arbitration” dwells upon the significance and connotation of International Commercial Arbitration, dealing with the structural and functional aspects of arbitration system under the aegis of UNCITRAL, its impact on the national and international trade.

CHAPTER-V: “Applicable Laws in International Commercial Arbitration” comprehends on the application of law in international commercial transactions, and the principles of settlement of disputes through arbitration, jurisdiction and choice of law, and principles of private international law applicable and interplay of respective legal systems.


CHAPTER – VII: “Judicial Expediency in International Commercial Arbitration” comprehends the judicial expediency in international commercial arbitration, and harks upon the judicial contribution towards the Alternative Dispute Resolution regime, the exemplary service contribution and creation of principles by legal institutions like Permanent Court of Arbitration, Indian Council of Arbitration and Supreme Court of India, and the pleasures and pitfalls of I.C.A. etc.

CHAPTER -VIII: “Conclusion” is concluding chapter recapitulating legal nexus of Alternative Dispute Resolution with the formal judicial system and the overlapping relation between regular court system and commercial arbitration, a combination of two bodies co-ordinated by a single soul of justice. This chapter contains some suggestions also with regard to commercial arbitration.

Person ,artificial and natural, who agree to arbitration demonstrate a willingness to have their differences determined by a commonsense method, using experts or others who understand their problems and will find a just and fair solution. The presence of an arbitration provision in a contract affirms the parties’ intentions to deal ethically and fairly with one another. In international commerce, that is tantamount to an assurance that, should matters go wrong, a party can look forward to a satisfactory and predictable means of recourse. If justice is truth in action, then arbitration is the route to that truth.