

Arbitration is not to be held as a part or province of conventional law, nor should it be considered as an esoteric province of law. Law must be accessible to all and open to analysis by all. If law is a private fief, a mystery known only to a privileged few adepts, then all pretence to justice is lost. If arbitration has become a new tool of peace in commercial world, international commercial arbitration has become the fulcrum of global peace.

## *Chapter - II*

# *Dispute vis-à-vis Arbitration*

## **DISPUTE VIS-À-VIS ARBITRATION**

*“There is but one law for all, namely the law which governs all law, the law of our Creator, the law of humanity, justice, equity - the law of nature and the law of nations”*

-Edmund Burke (1729 - 1797)

### **INTRODUCTION:**

In the beginning God created the Heavens and the Earth and said that “Let there be light” and there was light. But the man created by God created dispute which is an ‘apple of discord’ since then. Dispute has become ubiquitous not only on Earth but also in Heavens. The business community too is an iota of the receptacle of this element. With the evolution of civilization there is multidimensional growth of dispute and dispute can be handled either by Mediation or Prevention.

### **2.1. DISPUTE SETTLEMENT FORMAL AND INFORMAL:**

We have witnessed in the history of mankind, the dispute settlement as a skilful and fruitful public process, by resorting to the interaction and intercession techniques. Our ancestors have shown their dexterity in bringing the disputants together and proved

the utility of parties' participatory process in successful resolving of the feuds. Thus process produced products.

### **2.1.1. MEANING OF DISPUTE:**

We have seen that sloppy or misleading use of ordinary language can seriously limit our ability to create and communicate correct reasoning. As philosopher *John Locke* pointed out three centuries ago, the achievement of human knowledge is often hampered by the use of words without fixed signification. Needless controversy is sometimes produced and perpetuated by an unacknowledged ambiguity in the application of key terms. 'Where there is no dispute there cannot be any adjudication or Arbitration or Reference'. Hence it is expedient to know "What is Dispute?" In common parlance dispute is understood as 'an argument' or 'a disagreement between the parties'. An imputation by one person of certain acts purported to have been done by an opposite party, and which assertion by the former is stoutly denied or defied by the latter, the impasse stiffening the relations between the said parties is understood by the common man as 'Dispute'. A mere disagreement on an issue need not necessarily be construed as 'dispute' and only when such gap of understanding between the parties assumes a proposition of intervention by a legal authority or lawful authority for providing an acceptable solution, then the disagreement between the parties culminates into a 'Dispute.' Dispute is inherent in every process of development, prosperity and production. In every dynamic society, interaction amongst the members of the society becomes essential though not inevitable, and there is a probability of dispute during the frequent interactions amongst the members of the society. Disputes may arise on a variety of matters like money, fundamental rights, social or professional status, reputation, health and so on involving many different issues.

As commonly understood, the word 'dispute' refers to disagreement or argument between two individuals or two groups or two countries. Dispute emanates from unresolved issues. Issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Dispute may also be considered as a conflict of interests or conflict of claims or rights and this may be analogous to a cause of action before a court of law. Further the term 'dispute' has to be distinguished from other cognate expressions like 'conflict', 'claim' or 'difference' etc. John W. Burton in his

book 'Conflict-Dispute Distinction' states that the distinction between the two terms is based on time and issues in contention. Disputes are short-term disagreements that are relatively easy to resolve, whereas Conflicts are long-term, deep-rooted problems that involve seemingly non-negotiable issues and are resistant to resolution. It may also be true that short-term disputes may exist even within larger and longer conflicts. 'Customers complain, Co-workers bicker. Defendants dig in. Counsels advocate. Union officials demand. Organizations are rife with conflict that takes many forms and wears many faces. They can hide it, quash it, control it, fight it, deny it, or avoid it, but whatever they do, they cannot make it disappear: **'Conflict is an organizational fact of Life.'**'- say Costantino and Merchant.<sup>28</sup> The authors define 'Conflict' as "the fundamental disagreement between two parties, of which a dispute is one possible outcome." Similarly Douglas H. Yarn<sup>29</sup> observes that 'conflict is a state, rather than process. People who have opposing interests, values, or needs are in a state of conflict, which may be latent (meaning not acted upon) or manifest, in which case it is brought in the form of a dispute or disputing process.' In this sense, a conflict can exist without a dispute, but a dispute cannot exist without a conflict.

Though these definitions have merit, most scholars agree that intractable conflicts are deep-rooted, protracted and resistant to resolution. However there are ups and downs in the life of such conflicts. Episodes occur in which the fighting (physical or psychological) is intense; at other Times it subsides. The View that each intense period is a dispute which ends when the dispute (though not the conflict) is settled or resolved is a useful way to distinguish the normal ebb and flow of intractable conflicts.<sup>30</sup>

Thus, it should be noted that –

1. The word 'dispute' should not be confused with the words like contention, Disputation, combat and default.
2. The word 'controversy' is sometimes used in lieu of the word dispute.
3. When difference assumes a more definite and concrete form, it may become a

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<sup>28</sup> Cathy A Costantino and Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations*, Jossey-Bass, A Wiley Co. San Francisco, CA, P.1-5.

<sup>29</sup> Douglas H. Yarn, *Dictionary of Conflict Resolution*, Jossey-Bass-1999.

<sup>30</sup> R.D.Rajan, *Alternative Dispute Resolution*, Bharathi Law Publications, Tirunelveli (2005) P.15.

Dispute.

4. The term 'claim', 'difference' and 'dispute' have to be understood as interchangeable.
5. Any dispute if it becomes bitter, more controversial and more differing may lead to a conflict. 'Conflict' refers to disagreement as a result of sharp differences in point of view. Conflicts last longer and are more deeply rooted than disputes.

### 2.1.2. CLASSIFICATION OF DISPUTES:

In fact, there is no hard and fast rule as to the classification of disputes. The term 'dispute' may be classified on different counts like magnitude, time, nature and structure etc. People in their ordinary course of life get involved in numerous but different types of disputes such as disputes relating to the contract, property, ownership, tenancy, claims for damages and disputes between institutions etc. Disputes can be classified as –

1. **Major Disputes** – are those that involve a huge stake or require considerable efforts and expense for their resolution or if the strained relationships between the parties go further irretrievable if the dispute is not amicably resolved well in time.
2. **Minor Disputes** – are those negligible disputes which occur frequently inter-parties requiring only modest effort and expense for their resolution and which will not render the relationship between the parties unnecessarily irreconcilable even in the event of their non-resolution or delayed resolution.

Disputes can also be classified into –

- (i) **Present Disputes** – are those which have arisen between the parties actually and now existing. They are also called 'Existing Disputes'.
- (ii) **Future Disputes** – are those disputes which are likely to arise in future, and they are also known as 'anticipated disputes'. They are also known as 'Potential Disputes'.

Another classification of disputes is –

- (a) **Simple or Traditional Disputes** – Those disputes emanate from the traditional fields like contract disputes, family disputes, interpersonal and money recovery disputes etc.
- (b) **New or Complex Disputes** – are the disputes relating to Intellectual Property Rights, Anti-Trust disputes, Cyber disputes and Healthcare disputes.

There is another three-fold classification of disputes: -

**I. GENERAL DISPUTES** – are again divided into international disputes, commercial disputes, consumer disputes, corporate disputes, employment and labour disputes, organizational disputes, and intra-personal disputes.

**II. TECHNICAL DISPUTES** – may be classified into genuine, verbal, apparently verbal and genuine disputes depending upon the respective positions the parties take.

Genuine dispute involves disagreement about whether or not some specific proposition is true. Since the people engaged in a genuine dispute agree on the meaning of the words by means of which they convey their respective positions, each of them can propose and assess logical arguments that might eventually lead to a resolution of their differences.

Verbal disputes arise from the misused words, or chosen words, with impregnated ambiguities used to express the positions, of the disputants. A verbal dispute can be resolved completely when people involved arrive at an agreement on the meaning of their terms and, while arriving at such agreements their intention to communicate will have to be explained and all the misunderstandings and clouds of doubts have to be cleared. In cases of apparently verbal and genuine disputes, the resolution of every ambiguous word in such verbal and genuine disputes only reveals an underlying genuine dispute. Sometimes the dispute goes beyond the verbal dispute. In such cases, clarifying the ambiguity of the terms does not settle the dispute because there may remain some genuine disagreement – in briefs or in attitudes – between the disputing parties.

Modern disputes can be classified into construction business disputes, labour disputes at Space Centres (e.g. disputes at NASA), territorial disputes, inter-state water disputes and disputes relating to food land health hazard disputes.

Another classification of disputes is –

- (a) **ON-LINE DISPUTES** are disputes that arise through or because of on-line communication methods. For ex; A dispute between a consumer and a website that sells products online, or between a buyer and a seller over an internet auction.
- (b) **OFF-LINE DISPUTES** - are those that arise in the 'real world' outside cyber space. These include family disputes, neighbourhood disputes, employment disputes etc.<sup>31</sup>

Brown and Marriot<sup>32</sup> classified the disputes as follows:

1. **INTERNATIONAL DISPUTES** – are those disputes that transcend the borders of countries. Such disputes include matters of public law – the body of law dealing with the relation between private individuals and the government, and with the structure and operation of the government itself. Public law also denotes constitutional law, criminal law and administrative law taken together.
2. **CONSUMER DISPUTES** – arise out of sale of goods between the supplier (manufacturer or trader) and consumer (buyer or hirer). Consumer dispute means a dispute where the supplier against whom a complaint has been made, denies or disputes the allegations contained in the complaint.
3. **CORPORATE DISPUTES** – cover disputes between shareholders or between the company and the shareholder or arising on liquidation or winding up and receivership.
4. **ORGANIZATIONAL DISPUTES** – include issues arising within the organization relating to administration, structural organization, and land intra-organization disputes.
5. **TRUST DISPUTES** – include disputes between trustees and beneficiaries

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<sup>31</sup> R.D.Rajan, Alternative Dispute Resolution, Bharathi Law Publications, (2005) , pp.7-8.

<sup>32</sup> Brown and Marriot, Alternative Disputes Resolution – Principles and Practice – 3<sup>rd</sup>. Edition (2011) Sweet & Maxwell, U.K.

6. **NEIGHBORHOOD DISPUTES** – include social, religious, race and ethnic disputes, gender and tortious disputes.
7. **INTER-PERSONAL DISPUTES** – arise out of personal relations between individuals.
8. **INTERNATIONAL COMMERCIAL DISPUTES** – include both national and international. These disputes span over a wide spectrum including contractual disputes which may relate to commercial relationships such as partnerships, sale of goods, engineering contracts, banking, intellectual property, building and construction work and so on.
9. **INDUSTRIAL DISPUTES**-(Employment and Labour Disputes) – relate to employment or non-employment, terms of employment and conditions of labour of any person, particularly job security, wages, unlawful termination of employment including retrenchment.
10. **FAMILY DISPUTES** – arising out of family relationships such as post divorce or separation claims including children, property and financial matters. In some situations, disputes relating to inheritance, family business and the personal disputes between the family members are also included in this group.

It is very heartening to note that the method of Alternative Dispute Resolution really evinces judicious care and inquisitiveness in analyzing the conceptual significance of the term ‘dispute’ which is no less in quality than what is obtained in judicial disposition. The term ‘dispute’ attracts even greater attention in the process and techniques of A.D.R. to secure the quintessence of justice for the parties. This vindicates that the Alternative Dispute Resolution system is a virtual compatriot of conventional justice system.

## **2.2. DEFINITION, NATURE AND SCOPE OF ALTERNATIVE DISPUTE RESOLUTION:**

“Competition begets disputes and collaboration begets resolutions.” Of all mankind’s adventures in search of peace and justice, arbitration is among the earliest. Precisely speaking, long before law was established or courts were organized, or judges had formulated principles of law, man had resorted to arbitration for resolving disputes. With the evolution of modern State and sophisticated legal system, Courts run on very formal



lines and presided over by trained judges, came to be almost exclusively entrusted with the responsibility of resolution of disputes. At the same time all other adjudicatory for a including traditional arbitration fell into disuse and declined.

But our experience has been that the court system is so time-consuming, so expensive and so vexatious, that some other way to resolve disputes among people has to be found. (Fast-Track or Expedited) Arbitration, Conciliation and Other alternative dispute resolution systems, collectively known as 'Alternative Dispute Resolution' (ADR) systems, offer themselves as alter-natives to the ordinary court litigation. Litigation is a formalized adversarial process resulting in a decision by a judicial officer in the State-funded court system.

A.D.R. encompasses processes for dispute resolution that are truly alternative to the existing judicial system as well as processes that modify or improve upon practices and procedures currently in use within the existing court system. The most commonly known methods of A.D.R. world over are negotiation, mediation, conciliation and arbitration. A.D.R. is characterized by flexibility, informality, and control by the parties to a dispute. A.D.R. alleviates huge load of courts cases and acts as only additional to the court system not supplanting courts but as supplementary to them.

### **2.2.1. DEFINITION OF ALTERNATIVE DISPUTE RESOLUTION:**

Alternative Dispute Resolution means different things to different people. The term 'A.D.R' is defined in different ways as follows: -

According to **BROWN and MARRIOT**,<sup>33</sup> Alternative Dispute Resolution is “a range of procedures that serve as alternatives to litigation through courts for resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party.

**JULIE HORNE**<sup>34</sup> says that “A.D.R” refers to dispute resolution other than litigation in the courts, including other adjudicative techniques such as arbitration.

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<sup>33</sup> *ADR Principles and Practice*, By H. Brown and A. Marriott. [London: Sweet & Maxwell. 1993, Vol.II, p.457.

<sup>34</sup> Julia Horne - Cross border Internet Dispute Resolution - Book Review, WJCLI - 2009

**KARL MACHIE and EDWARD LIGHTBURN**<sup>35</sup> of Centre for Effective Dispute Resolution.(CEDR) say that “A.D.R. is neither litigation nor arbitration, both of which are processes where the judge or arbitrator alone decides the issue in dispute. ADR is a structured dispute resolution process whereby the parties to a dispute themselves negotiate their own settlement with the help of an independent intermediary (a go-between) called a mediator or neutral specially trained in mediation techniques. Under ADR the parties themselves control the outcome of the dispute in that any settlement represents their own solution and not somebody else’s. The ‘alternative’ in ADR is more properly called ‘complimentary’ because mediation effectively may be used either as complimentary to and in conjunction with arbitration/court proceedings or on its own.”

**O.P.MALHOTRA**<sup>36</sup> in his masterly treatise on ‘The Law and Practice of Arbitration and Conciliation’ says: “The term Alternative Dispute Resolution” normally would comprehend any method of dispute resolution other than Court-litigation as part of justice established and administered by the State... The word ‘alternative’ used in ‘Alternative Dispute Resolution’ itself indicates resolution of a dispute by a system alternative to court litigation. From this point of view, even arbitration will fall within the scope of ADR since it is the major alternative to Court litigation. However, ADR is generally not used in such a wide sense.”

**Dr. AVTAR SINGH,**<sup>37</sup> a renowned jurist says that “Alternative Dispute Resolution” is an attempt to develop a device which should be capable of providing an alternative to conventional methods of resolving disputes. A.D.R. is supposed to provide an alternative not only to civil litigation by adjudicatory procedures but includes also arbitration itself.

Thus, A.D.R. is a generic term referring to all methods of dispute resolution other than the court based resolution. It refers to wide spectrum of legal avenues that use means other than trial to settle disputes. Trial means a formal examination of evidence and determination of legal claims in adversary proceedings. A.D.R. is a means to manage and resolve disputes by parties without time, expense and disruption that attends a public trial. Despite the tardy locomotion of conventional court systems, human ingenuity is not

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<sup>35</sup> Karl Mackie and Edward Lightburn in International Mediation, The UK Experience, Amity Law Review, Vol I, Part I, Jan - Jun 2000.

<sup>36</sup> *OP Malhotra & Indu Malhotra* The Law And Practice Of Arbitration And Conciliation 2006, 2nd Edition

<sup>37</sup> Avatar Singh: Arbitration and Conciliation, Eastern Law Book House, Lucknow, 1998

known to throwing up its hands in despair when any challenge arises. The U.S.A. took the lead in refining and accelerating arbitral procedures and evolving new procedures for settlement of disputes. Other western countries followed suit. Their efforts at refining and accelerating arbitral procedures yielded fast-track arbitration (a new form of arbitration) and their efforts at evolving new procedures resulted in negotiation, mediation, conciliation, mini-trial, summary jury trial, early neutral evaluation etc.

These procedures evolved in the U.S.A. and several other countries such as the Australia, Canada, Germany, Hong Kong, Netherlands, New Zealand, South Africa, Switzerland, and United Kingdom, as distinct 'alternatives to court system' have come to be known by a compendium expression namely "Alternative Dispute Resolution". The word 'alternative' means 'available as another possibility' of 'one of many'. Some writers on Arbitration use the word 'alternate' instead of 'alternative'. In American English 'alternate' means 'alternative'. According to some writers, "ALTERNATIVE METHODS OF DISPUTE RESOLUTION" (AMDR) is the correct acronym instead of A.D.R. For some people, the acronym A.D.R. is not Alternative Dispute Resolution but 'Appropriate Dispute Resolution' or 'Additional Dispute Resolution' or 'Amicable Dispute Resolution'.

In the late 1980s and early 1990s, many people became increasingly concerned that the traditional method of resolving legal disputes in the United States, through conventional litigation, had become too expensive, too slow, and too cumbersome for many civil lawsuits (cases between private parties). This concern led to the growing use of ways other than litigation to resolve disputes. These other methods are commonly known collectively as alternative dispute resolution (ADR). As of the early 2000s, ADR techniques were being used more and more, as parties and lawyers and courts realized that these techniques could often help them resolve legal disputes quickly and cheaply and more privately than could conventional litigation. Moreover, many people preferred ADR approaches because they saw these methods as being more creative and more focused on problem solving than litigation, which has always been based on an adversarial model.

The term alternative dispute resolution is to some degree a misnomer. In reality, fewer than 5 percent of all lawsuits filed go to trial; the other 95 percent are settled or

otherwise concluded before trial. Thus, it is more accurate to think of litigation as the alternative and ADR as the norm. Despite this fact, the term alternative dispute resolution has become such well-accepted shorthand for the vast array of non-litigation processes that its continued use seems assured.

Although certain ADR techniques are well established and frequently used—for example, mediation and arbitration—alternative dispute resolution has no fixed definition. The term alternative dispute resolution includes a wide range of processes, many with little in common except that each is an alternative to full-blown litigation. Litigants, lawyers, and judges are constantly adapting existing ADR processes or devising new ones to meet the unique needs of their legal disputes. The definition of alternative dispute resolution is constantly expanding to include new techniques.

### **2.2.2. ADR TECHNIQUES OR METHODS:**

ADR techniques have not been created to undercut the traditional court system. Certainly, ADR options can be used in cases where litigation is not the most appropriate route. However, they can also be used in conjunction with litigation when the parties want to explore other options but also want to remain free to return to the traditional court process at any point. Of the many ways to resolve a legal dispute other than formal litigation, mediation, arbitration, mediation-arbitration, Minitrial, early neutral evaluation, and summary jury trial are the most common.

#### **ARBITRATION:**

As arbitration is a dynamic dispute resolution mechanism varying according to law and international practice, national laws do not attempt a final definition. Although it does not provide a definition, the English Arbitration Act 1996 did set out clear statements of principle of what was expected from arbitration. Sec-1 provides –

- a) The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.
- b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

The various attempts to define arbitration have sought to reflect the evolving general understanding and essential legal forms of arbitration. For example –

“Uncontrolled decision”; “The settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision.”<sup>38</sup> “Arbitration is a device whereby the settlement of a question, which of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.”<sup>39</sup> “The reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.”<sup>40</sup>

“The process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.”

#### **DOMKE ‘COMMERCIAL ARBITRATION’:**

“A process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal. The parties agree in advance that the arbitrator’s determination, the award, will be accepted as final and binding upon them.”

#### **FOUR FUNDAMENTAL FEATURES OF ARBITRATION:**

1. An alternative to national court.
2. A private mechanism for dispute resolution.
3. Selected and controlled by the parties.
4. Final and binding determination of parties’ rights and obligations.

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<sup>38</sup> Shorter oxford English dictionary: (3<sup>rd</sup>. edition – 1969)

<sup>39</sup> Words and phrases judicially defined: edited .by Saunders (3<sup>rd</sup>. ed. butterworths. 1988), 105.

<sup>40</sup> Halsbury’s laws of England: (4<sup>th</sup>. edn. butterworths 1991) para 601, 332.

## **BINDING ARBITRATION:**

Involves the presentation of a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of a binding decision. Unless arranged otherwise, the parties usually have the ability to decide who the individuals are that serve as arbitrators. In some cases, the parties may retain a particular arbitrator (often from a list of arbitrators) to decide a number of cases or to serve the parties for a specified length of time (this is common when a panel is involved). Parties often select a different arbitrator for each new dispute. A common understanding by the parties in all cases, however, is that they will be bound by the opinion of the decision maker rather than simply be obligated to "consider" an opinion or recommendation. Under this method, the third party's decision generally has the force of law but does not set a legal precedent. It is usually not reviewable by the courts.

Binding arbitration is a statutorily-mandated feature of Federal labour management agreements. Consistent with statute, the parties to such agreements are free to negotiate the terms and conditions under which arbitrators are used to resolve disputes, including the procedures for their selection. Some agreements may provide for "permanent" arbitrators and some may provide for arbitration panels.

Arbitration more closely resembles traditional litigation in that a neutral third party hears the disputants' arguments and imposes a final and binding decision that is enforceable by the courts. The difference is that in arbitration, the disputants generally agree to the procedure before the dispute arises; the disputants mutually decide who will hear their case; and the proceedings are typically less formal than in a court of law. One extremely important difference is that, unlike court decisions, arbitration offers almost no effective appeal process. Thus, when an arbitration decision is issued, the case is ended.

Final and binding arbitration has long been used in labour-management disputes. For decades, unions and employers have found it mutually advantageous to have a knowledgeable arbitrator—whom they have chosen—resolve their disputes in this cheaper and faster fashion. One primary advantage for both sides has been that taking disputes to arbitration has kept everyone working by providing an alternative to strikes and lockouts and has kept everyone out of the courts. Given this very successful track

record, the commercial world has become enthusiastic about arbitration for other types of disputes as well.

Now a new form of arbitration, known as court-annexed arbitration, has emerged. Many variations of court-annexed arbitration have developed throughout the United States. One can be found in Minnesota, where, in the mid-1990s, the Hennepin County District Court adopted a program making civil cases involving less than \$50,000 subject to mandatory nonbinding arbitration. The results of that experimental program were so encouraging that legislation was later enacted expanding the arbitration program state-wide. As of 2003, most cases were channelled through an ADR process before they could be heard in the courts. A growing number of other federal and state courts were adopting this or similar approaches.

The term arbitration has been defined by various authors in different era to reflect the purpose of arbitration. According to Martin Donke, arbitration is a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal.<sup>41</sup> Mark Huleatt James and Nicholas Gould define arbitration as a private of solving disputes which commences with the agreement of the parties to an existing or potential, dispute to submit that dispute for decision by a tribunal of one or more arbitrators.<sup>42</sup> Avtar Singh defines arbitration as the submission by two or more parties of their dispute to the judgment of the third person called arbitrator and who is to decide the controversy in a judicial manner.

In other words arbitration can be said to be amicable way of solving dispute between the parties whereby they parties agree in advance that the decision will be final and legally binding. Arbitration as opposed to court litigation is characterized by neutrality and confidentiality that is to say is a non state involvement process of solving dispute Since, the arbitration is related to commercial activities, The Supreme Court of India (All India Reporter, 1961) observed those activities such as exchange of

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<sup>41</sup> Grand Hanessian & Lawrence W.Newman (eds), International Arbitration Checklists, 2nd Edition, United States of America, 2004)

<sup>42</sup> Huleatt Mark & Gould Nicholas, International Commercial Arbitration Handbook: (London, LLP Limited & Business Legal Publishing Division, 1996).

commodities for money or other commodities, carriage of persons and goods by road, rail, air or waterways, contracts, banking, insurance, transactions in stock exchange, supply of energy, postal and telegraphic services etc. may be called as commercial intercourse within the meaning of Article 301 of the Constitution which relates to freedom of trade, commerce and intercourse.

### **COMMERCIAL ARBITRATION –A GLOBAL EMERGING DISCIPLINE:**

Bernstein (1998) defines arbitration as a “mechanism for the resolution of disputes which take place usually pursuant to an agreement between two or more parties, under which parties agree to be bound by the decision to be given by the Arbitrator according to law or, if so agreed, other considerations, after a fair hearing such decision being enforceable by law.” Arbitration is, therefore, a process of dispute resolution between the parties through Arbitral Tribunal appointed by the parties to the dispute or by the court at the request of concerned party. Precisely, it is an alternative to litigation as a method of dispute resolution. Russell (2001) describes arbitrator as a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). Arbitration is recognized through arbitration clause incorporated in contracts. Christopher and Naimark (2005) say that 90% of international contracts include an arbitration clause. A&CA, 1996 provides that the arbitration clause can be specifically enforced by the machinery of the Act. Saville (1993) state that arbitration clause is different from other clauses of the contract and an arbitration remedy clause in a commercial contract is an agreement inside an agreement. The parties make their commercial bargain but in addition thereto agreed on private tribunal to resolve any issue that may arise between them. Conventionally, legal departments in large business organizations handle disputes compared to smaller firms, where the matters are tacked in proprietary manner. The manner the disputes are handled has undergone a substantial paradigm shift from prestige type to strategic type. The dispute handling from a strategic perspective reflects a tactical move to derive benefits or generate opportunities in complex business environment. The burgeoning cost of litigation in terms of time, money and efforts has resulted into recognition of arbitration as an alternative mechanism and top management of companies have now started paying attention to this managerial activity. Companies have started applying arbitration as a tool and have now started reaping its benefits in dispute resolution. The



emergence of number of institutions both national and international, in field of arbitration has resulted into various structural measures to align dispute management, strategic planning and development of appropriate teams to handle arbitrational issues in different business environments and industries.

In India, Arbitration and Conciliation Act, 1996 (hereinafter referred as “Act”) vest powers to judicial authority to refer parties to arbitration where there is an arbitration agreement. Section 8 (1) of the Act provides that a judicial authority before which an action is brought in a matter, which is subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. The existence of a statutory mechanism thus, puts Pressure on commercial arbitration mechanism leading to a situation of dilemma for business enterprises to undertake commercial arbitration in a serious and effective manner for business disputes resolution. Globalization of economy in general and maturity in legal system in particular are also facilitating an integrated view of the dispute management through arbitral process. As a result, many professionally managed enterprises are using arbitration as a proactive tool to add value, rather than a defensive measure to minimize the negative impact of disputes in the court of law. This in turn helps the top management to exercise greater control over the business operations, enhances organizational capabilities and business decision making in an effective manner. As a measure of corporate governance, boards of companies are ensuring that there should be well-defined arbitration policy in place while undertaking high value contracts. This is particularly of paramount significance in infrastructure projects involving huge capital investments. Stakeholders are concerned about the growth of business performance in a hassle free and dispute free manner.

Despite of this realization only few companies in its real intent have fully realized the importance of the concept of commercial arbitration. There are large number of companies especially government owned enterprises who have adopted arbitration as an effective tool for their disputes resolution. Dispute Management is responsibility of every key person in the organization irrespective of nomenclatures. The integrated view in dispute management over conventional routine litigation enables firm to reap benefits by opting for offensive legal strategy instead of defensive and time gaining move. We

hypothesize that dispute management in contractual matters through arbitration is not yet fully developed as far as India is concerned as well as many other developing countries are concerned, which may adversely affect integrated approach towards dispute resolution. Research studies that have been conducted on Indian companies on this issue are rare to find. Rogers (2003) show that various international treaties, conventions, national legislations, and even institutions have been formed to provide the framework for international arbitration.

UNCITRAL has also designed a model law is designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through the recognition and enforcement of the arbitral award.<sup>43</sup> Companies and persons 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. Arbitration is not to be held as a part or province of conventional law, nor should it be considered as an esoteric province of law. Law must be accessible to all and open to analysis by all. If law is a private fief, a mystery known only to a privileged few adepts, then all pretence to justice is lost<sup>44</sup>

**CONCILIATION** - involves building a positive relationship between the parties to a dispute. A third party or conciliator (who may or may not be totally neutral to the interests of the parties) may be used by the parties to help build such relationships. A conciliator may assist parties by helping to establish communication, clarifying misperceptions, dealing with strong emotions, and building the trust necessary for cooperative problem-solving. Some of the techniques used by conciliators include

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<sup>43</sup> [www.uncitral.org](http://www.uncitral.org), 2010. and <http://www.ipedr.com/vol2/40-P20019.pdf> Visited on 11-3-2011

<sup>44</sup> Geoffrey M. Beresford Hartwell, [http://www.beresfordhartwell.com/nyc\\_text.htm](http://www.beresfordhartwell.com/nyc_text.htm) (Visited on 12-4-2011)

providing for a neutral meeting place, carrying initial messages between/among the parties, reality testing regarding perceptions or misperceptions, and affirming the parties' abilities to work together. Since a general objective of conciliation is often to promote openness by the parties (to take the risk to begin negotiations), this method allows parties to begin dialogues, get to know each other better, build positive perceptions, and enhance trust. The conciliation method is often used in conjunction with other methods such as facilitation or mediation.

**COOPERATIVE PROBLEM-SOLVING** - is one of the most basic methods of dispute resolution. This informal process usually does not use the services of a third party and typically takes place when the concerned parties agree to resolve a question or issue of mutual concern. It is a positive effort by the parties to collaborate rather than compete to resolve a dispute. Cooperative problem-solving may be the procedure of first resort when the parties recognize that a problem or dispute exists and that they may be affected negatively if the matter is not resolved. It is most commonly used when a conflict is not highly polarized and prior to the parties forming "hard line" positions. This method is a key element of labour-management cooperation programs.

**DISPUTE PANELS** - use one or more neutral or impartial individuals who are available to the parties as a means to clarify misperceptions, fill in information gaps, or resolve differences over data or facts. The panel reviews conflicting data or facts and suggests ways for the parties to reconcile their differences. These recommendations may be procedural in nature or they may involve specific substantive recommendations, depending on the authority of the panel and the needs or desires of the parties. Information analyses and suggestions made by the panel may be used by the parties in other processes such as negotiations. This method is generally an informal process and the parties have considerable latitude about how the panel is used. It is particularly useful in those organizations where the panel is non-threatening and has established a reputation for helping parties work through and resolve their own disputes short of using some formal dispute resolution process.

**EARLY NEUTRAL EVALUATION** - uses a neutral or impartial third party to provide a non-binding evaluation, sometimes in writing, which gives the parties to a dispute an

objective perspective on the strengths and weaknesses of their cases. Under this method, the parties will usually make informal presentations to the neutral to highlight the parties' cases or positions. The process is used in a number of courts across the country, including U.S. District Courts.

Early neutral evaluation is appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases and when the top decision makers of one or more of the parties could be better informed about the real strengths and weaknesses of their cases. Finally, it is used when the parties are seeking an alternative to the expensive and time-consuming process of following discovery procedures.

**FACILITATION** - involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute). The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter.

The facilitator generally works with all of the meeting's participants at once and provides procedural directions as to how the group can move efficiently through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. The facilitator may be a member of one of the parties to the dispute or may be an external consultant. Facilitators focus on procedural assistance and remain impartial to the topics or issues under discussion.

The method of facilitating is most appropriate when:

- (1) The intensity of the parties' emotions about the issues in dispute is low to moderate;
- (2) The parties or issues are not extremely polarized;
- (3) The parties have enough trust in each other that they can work together to develop a mutually acceptable solution; or
- (4) The parties are in a common predicament and they need or will benefit from a jointly-acceptable outcome.

**FACT-FINDING** - is the use of an impartial expert (or group) selected by the parties, an agency, or by an individual with the authority to appoint a fact-finder in order to determine what the "facts" are in a dispute. The rationale behind the efficacy of fact-finding is the expectation that the opinion of a trusted and impartial neutral will carry weight with the parties. Fact-finding was originally used in the attempt to resolve labour disputes, but variations of the procedure have been applied to a wide variety of problems in other areas as well.

Fact-finders generally are not permitted to resolve or decide policy issues. The fact-finder may be authorized only to investigate or evaluate the matter presented and file a report establishing the facts in the matter. In some cases, he or she may be authorized to issue either a situation assessment or a specific non-binding procedural or substantive recommendation as to how a dispute might be resolved. In cases where such recommendations are not accepted, the data (or facts) will have been collected and organized in a fashion that will facilitate further negotiations or be available for use in later adversarial procedures.

**INTEREST-BASED PROBLEM-SOLVING** - The technique that creates effective solutions while improving the relationship between the parties. The process separates the person from the problem, explores all interests to define issues clearly, brainstorms possibilities and opportunities, and uses some mutually agreed upon standard to reach a solution. Trust in the process is a common theme in successful interest-based problem-solving.

Interest-based problem-solving is often used in collective bargaining between labour and management in place of traditional, position-based bargaining. However, as a technique, it can be effectively applied in many contexts where two or more parties are seeking to reach agreement.

**MEDIATED ARBITRATION** - commonly known as "med-arb," is a variation of the arbitration procedure in which an impartial or neutral third party is authorized by the disputing parties to mediate their dispute until such time as they reach an impasse. As part of the process, when impasse is reached, the third party is authorized by the parties to issue a binding opinion on the cause of the impasse or the remaining issue(s) in dispute.

In some cases, med-arb utilizes two outside parties--one to mediate the dispute and another to arbitrate any remaining issues after the mediation process is completed. This is done to address some parties' concerns that the process, if handled by one third party, mixes and confuses procedural assistance (a characteristic of mediation) with binding decision making (a characteristic of arbitration). The concern is that parties might be less likely to disclose necessary information for a settlement or are more likely to present extreme arguments during the mediation stage if they know that the same third party will ultimately make a decision on the dispute.

Mediated arbitration is useful in narrowing issues more quickly than under arbitration alone and helps parties focus their resources on the truly difficult issues involved in a dispute in a more efficient and effective manner.

**MEDIATION** - is the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party who has no decision-making authority? The objective of this intervention is to assist the parties in voluntarily reaching an acceptable resolution of issues in dispute. Mediation is useful in highly-polarized disputes where the parties have either been unable to initiate a productive dialogue, or where the parties have been talking and have reached a seemingly insurmountable impasse.

A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution. Mediators differ in their degree of directiveness or control while assisting disputing parties. Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution. Regardless of how directive the mediator is, the mediator performs the role of catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute.

Mediation-also known as conciliation-is the fastest growing ADR method. Unlike litigation, mediation provides a forum in which parties can resolve their own disputes, with the help of a neutral third party. Mediation depends upon the commitment of the disputants to solve their own problems. The mediator, also known as a facilitator, never imposes a decision upon the parties. Rather, the mediator's job is to keep the parties talking and to help move them through the more difficult points of contention. To do this, the mediator typically takes the parties through five stages.

First, the mediator gets the parties to agree on procedural matters, such as by stating that they are participating in the mediation voluntarily, setting the time and place for future sessions, and executing a formal confidentiality agreement. One valuable aspect of this stage is that the parties, who often have been unable to agree on anything, begin a pattern of saying yes.

Second, the parties exchange initial positions, not by way of lecturing the mediator but in a face-to-face exchange with each other. Often, this is the first time each party hears the other's complete and uninterrupted version. The parties may begin to see that the story has two sides and that it may not be so unreasonable to compromise their initial positions.

Third, if the parties have agreed to what is called a caucusing procedure, the mediator meets with each side separately in a series of confidential, private meetings and begins exploring settlement alternatives, perhaps by engaging the parties in some "reality testing" of their initial proposals. This process, sometimes called shuttle diplomacy, often uncovers areas of flexibility that the parties could not see or would have been uncomfortable putting forward officially.

Fourth, when the gap between the parties begins to close, the mediator may carry offers and counteroffers back and forth between them, or the parties may elect to return to a joint session to exchange their offers.

Finally, when the parties agree upon the broad terms of a settlement, they formally reaffirm their understanding of that settlement, complete the final details, and sign a settlement agreement.

Mediation permits the parties to design and retain control of the process at all times and, ideally, eventually strike their own bargain. Evidence suggests that parties are more willing to comply with their own agreements, achieved through mediation, than with adjudicated decisions, imposed upon them by an outside party such as a judge. An additional advantage is that when the parties reach agreement in mediation, the dispute is over—they face no appeals, delays, continuing expenses, or unknown risks. The parties can begin to move forward again. Unlike litigation, which focuses on the past, mediation looks to the future. Thus, a mediated agreement is particularly valuable to parties who have an ongoing relationship, such as a commercial or employment relationship.

**MINI-TRIALS** - involve a structured settlement process in which each side to a dispute presents abbreviated summaries of its cases before the major decision makers for the parties who have authority to settle the dispute. The summaries contain explicit data about the legal basis and the merits of a case. The rationale behind a minitrial is that if the decision makers are fully informed as to the merits of their cases and that of the opposing parties, they will be better prepared to successfully engage in settlement discussions. The process generally follows more relaxed rules for discovery and case presentation than might be found in the court or other proceeding and usually the parties agree on specific limited periods of time for presentations and arguments.

A third party who is often a former judge or individual versed in the relevant law is the individual who oversees a mini-trial. That individual is responsible for explaining and maintaining an orderly process of case presentation and usually makes an advisory ruling regarding a settlement range, rather than offering a specific solution for the parties to consider. The parties can use such an advisory opinion to narrow the range of their discussions and to focus in on acceptable settlement options--settlement being the ultimate objective of a mini-trial. The mini-trial method is a particularly efficient and cost effective means for settling contract disputes and can be used in other cases where some or all of the following characteristics are present:

- (1) It is important to get facts and positions before high-level decision makers;
- (2) The parties are looking for a substantial level of control over the resolution of the dispute;



- (3) Some or all of the issues are of a technical nature; and (4) a trial on the merits of the case would be very long and/or complex.

**NEGOTIATED RULEMAKING** - commonly known as "reg-neg," brings together representatives of various interest groups and a Federal agency to negotiate the text of a proposed rule. The method is used before a proposed rule is published in the *Federal Register* under the *Administrative Procedures Act (APA)*. The first step is to set up a well-balanced group representing the regulated public, public interest groups, and state and local governments, and join them with a representative of the Federal agency in a federally chartered advisory committee to negotiate the text of the rule. If the committee reaches consensus on the rule, then the Federal agency can use this consensus as a basis for its proposed rule.

While reg-neg may result in agreement on composition of a particular rule an agency may wish to propose, when the rule is proposed it is still subject to public review under the APA. This is the last step in the process. Federal agency experience is that the process shortens considerably the amount of time and reduces the resources needed to promulgate sensitive, complex, and far-reaching regulations--often regulations mandated by statute.

**SETTLEMENT CONFERENCES** - involve a pre-trial conference conducted by a settlement judge or referee and attended by representatives for the opposing parties (and sometimes attended by the parties themselves) in order to reach a mutually acceptable settlement of the matter in dispute. The method is used in the judicial system and is a common practice in some jurisdictions. Courts that use this method may mandate settlement conferences in certain circumstances.

The role of a settlement judge is similar to that of a mediator in that he or she assists the parties procedurally in negotiating an agreement. Such judges play much stronger authoritative roles than mediators, since they also provide the parties with specific substantive and legal information about what the disposition of the case might be if it were to go to court. They also provide the parties with possible settlement ranges that could be considered.

**NON-BINDING ARBITRATION** - involves presenting a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of an advisory or non-binding decision. This method is generally one of the most common quasi-judicial means for resolving disputes and has been used for a long period of time to resolve labour/management and commercial disputes. Under the process, the parties have input into the selection process, giving them the ability to select an individual or panel with some expertise and knowledge of the disputed issues, although this is not a prerequisite for an individual to function as an arbitrator. Generally, the individuals chosen are those known to be impartial, objective, fair, and to have the ability to evaluate and make judgments about data or facts. The opinions issued by the third party in such cases are non-binding; however, parties do have the flexibility to determine, by mutual agreement that an opinion will be binding in a particular case.

Non-binding arbitration is appropriate for use when some or all of the following characteristics are present in a dispute:

- (1) The parties are looking for a quick resolution to the dispute;
- (2) The parties prefer a third party decision maker, but want to ensure they have a role in selecting the decision maker; and
- (3) The parties would like more control over the decision making process than might be possible under more formal adjudication of the dispute.

**OMBUDSMEN** - are individuals who rely on a number of techniques to resolve disputes. These techniques include counselling, mediating, conciliating, and fact finding. Usually, when an ombudsman receives a complaint, he or she interviews parties, reviews files, and makes recommendations to the disputants. Typically, ombudsmen do not impose solutions. The power of the ombudsman lies in his or her ability to persuade the parties involved to accept his or her recommendations. Generally, an individual not accepting the proposed solution of the ombudsman is free to pursue a remedy in other forums for dispute resolution.

Ombudsmen may be used to handle employee workplace complaints and disputes or complaints and disputes from outside of the place of employment, such as those from

customers or clients. Ombudsmen are often able to identify and track systemic problems and suggest ways of dealing with those problems.

**PARTNERING** - is used to improve a variety of working relationships, primarily between the Federal Government and contractors, by seeking to prevent disputes before they occur. The method relies on an agreement in principle to share the risks involved in completing a project and to establish and promote a nurturing environment. This is done through the use of team-building activities to help define common goals, improve communication, and foster a problem-solving attitude among the group of individuals who must work together throughout a contract's term. Partnering in the contract setting typically involves an initial partnering workshop after the contract award and before the work begins. This is a facilitated workshop involving the key stakeholders in the project. The purpose of the workshop is to develop a team approach to the project. This generally results in a partnership agreement that includes dispute prevention and resolution procedures.-

**PEER REVIEW** - is a problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. The decision may or may not be binding on the employee and/or the employer, depending on the conditions of the particular process. If it is not binding on the employee, he or she would be able to seek relief in traditional forums for dispute resolution if dissatisfied with the decision under peer review. The principle objective of the method is to resolve disputes early before they become formal complaints or grievances.

Typically, the panel is made up of employees and managers who volunteer for this duty and who are trained in listening, questioning, and problem-solving skills as well as the specific policies and guidelines of the panel. Peer review panels may be standing groups of individuals who are available to address whatever disputes employees might bring to the panel at any given time. Other panels may be formed on an ad hoc basis through some selection process initiated by the employee, e.g., blind selection of a certain number of names from a pool of qualified employees and managers.

*ADR by Statute and Regulation:*

In United States of America since the late 1980s, Congress has recognized that Alternative Dispute Resolution provides a cost-efficient alternative to traditional methods for dispute resolution. In 1988, Congress enacted the “Judicial Improvements and Access to Justice Act”,<sup>45</sup> which permitted U.S. district courts to submit disputes to arbitration. Congress amended this statute with the enactment of the Alternative Dispute Resolution Act of 1998,<sup>46</sup> which requires each district court to require, by local rule, that litigants in all civil cases consider using an ADR process at the appropriate state of litigation.

Local rules of U.S. district courts typically provide a wide array of ADR methods. For example, the U.S. District Court for the Western District of Texas recognizes early neutral evaluation, mediation, mini-trial, moderated settlement conference, summary jury trial, and arbitration as acceptable forms of ADR.<sup>47</sup> According to these rules, the court may order ADR on the motion of a party, on agreement of both parties, or on its own motion. Most other district courts have adopted similar rules. Congress has also included ADR provisions in a number of statutes to resolve a variety of disputes. For instance, the Board of Directors of the Office of Compliance, which reviews complaints brought by employees of Congress, may order counselling or mediation, in addition to holding a board hearing or initiating a civil action in federal court.<sup>48</sup> Similar statutes apply to such conflicts as labour disputes and claims by individuals with disabilities.

State legislatures have similarly provided for ADR in many of their statutes. Judges in Florida, for example, possess authority to submit most types of cases to mediation or arbitration in lieu of litigation. Fla.Stat.§ 44.1011(1997). The Commissioners on Uniform Laws have approved several uniform laws, which may be adopted by the various states, related to ADR proceedings. Versions of the Uniform Arbitration Act, first approved in 1956, have been adopted by 49 states. Likewise, the Uniform Mediation Act, drafted in conjunction with the American Bar Association's Section on Dispute Resolution in 2001, provides rules on the issues of confidentiality and privileges in mediation.

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<sup>45</sup> 28 U.S.C.A. § 652 (1993 & Supp. 2003)

<sup>46</sup> Pub. L. No. 105-315, 112 Stat. 2994 (28 U.S.C.A. § 652),

<sup>47</sup> W.D.Tex.Loc.R.CV-88.

<sup>48</sup> 2 U.S.C.A. § 140 (1997).

ADR has had an impact on administrative agencies as well. Congress amended the Administrative Procedure Act in 1990 to authorize and encourage administrative agencies to submit administrative disputes to ADR.<sup>49</sup> ADR often takes the form of mediation in disputes involving labour and employment relations and equal employment opportunity. Several federal agencies provide guides about ADR proceedings to prospective complainants and other constituents.

Courts frequently uphold decisions made during ADR proceedings. In **Major League Baseball Players Ass'n v. Garvey**,<sup>50</sup> the U.S. Supreme Court reviewed a decision in which the Ninth Circuit Court of Appeals had reversed a decision of an arbitration panel regarding a complaint by former Baseball player Steve Garvey about a contract dispute. The Ninth Circuit then remanded the case to the arbitration panel with instructions to enter an award in favour of the player for the amount he claimed. Noting that Judicial Review of labour arbitration decisions is limited, the Supreme Court reversed the Ninth Circuit's decision, holding that it was not the place of a court of appeals to resolve the dispute on its merits.<sup>51</sup>

### **2.3. DISPUTE RESOLUTION – KINDS OF DISPUTE SETTLEMENT:**

It has been the experience of the people that procedures for settling disputes by means other than litigation; e.g., by Arbitration, Mediation, or Mini-Trials are usually less costly and more expeditious than litigation, are increasingly being used in commercial and labour disputes, divorce actions, in resolving motor vehicle and Medical Malpractice tort claims, and in other disputes that would likely otherwise involve court litigation.

#### **2.3.1. DISPUTE RESOLUTION PROCESSES:**

Dispute resolution processes fall into two major type –

1. **Adjudicative processes**, such as litigation or arbitration, in which a judge, jury or arbitrator determines the outcome.

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<sup>49</sup> 5U.S.C.A. § 572 (1996)

<sup>50</sup> 532 U.S. 504, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001),

<sup>51</sup> <http://www.opm.gov/er/adrguide/section1-a.asp> and <http://legal.dictionaty.thefreedictionary.com/alternative+dispute+resolution> visited on 11-10-11.

**2. Consensual processes**, such as collaborative law, mediation, conciliation, or negotiation, in which the parties attempt to reach agreement. Not all disputes, even those in which skilled intervention occurs, end in resolution. Such intractable disputes form a special area in dispute resolution studies. Dispute Resolution is an important requirement in International Trade, Negotiation, Mediation, Arbitration and Legal Action.

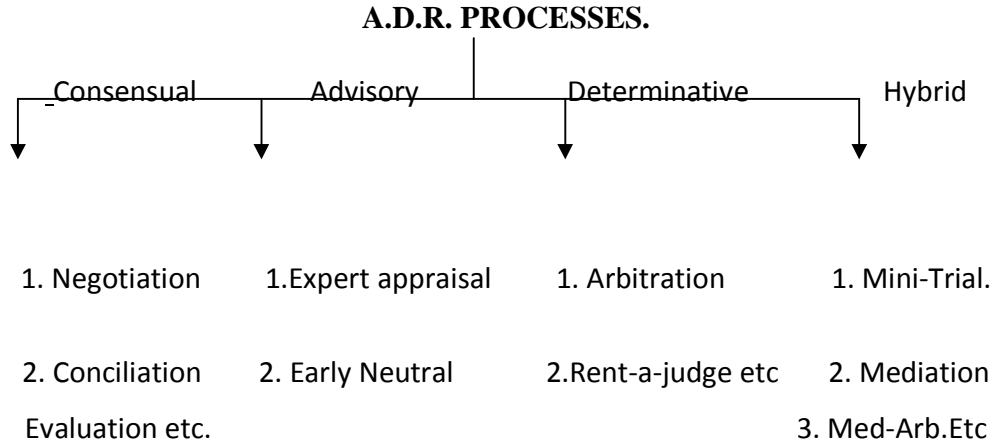
### **Judicial dispute resolution**

The legal system provides a necessary structure for the resolution of many disputes. However, some disputants will not reach agreement through collaborative processes. Some disputes need the coercive power of the state to enforce a resolution. Perhaps more importantly, many people want a professional advocate when they become involved in a dispute, particularly if the dispute involves perceived legal rights, legal wrongdoing, or threat of legal action against them. The most common form of judicial dispute resolution is litigation. Litigation is initiated when one party files suit against another. In the United States, litigation is facilitated by the government within federal, state, and municipal courts. The proceedings are very formal and are governed by rules, such as rules of evidence and procedure, which are established by the legislature. Outcomes are decided by an impartial judge and/or jury, based on the factual questions of the case and the application law. The verdict of the court is binding, not advisory; however, both parties have the right to appeal the judgment to a higher court. Judicial dispute resolution is typically adversarial in nature, for example, involving antagonistic parties or opposing interests seeking an outcome most favourable to their position. Retired judges or private lawyers often become arbitrators or mediators; however, trained and qualified non-legal dispute resolution specialists form a growing body within the field of ADR. In the United States of America, many states now have mediation or other ADR programs annexed to the courts, to facilitate settlement of lawsuits. Extrajudicial dispute resolution Some use the term dispute resolution to refer only to alternative dispute resolution (ADR), that is, extrajudicial processes such as arbitration, collaborative law, and mediation used to resolve conflict and potential conflict between and among individuals, business entities, governmental agencies, and (in the public international law context) states. ADR generally depends on agreement by the parties to use ADR processes, either before or after a dispute has arisen. ADR has experienced steadily

increasing acceptance and utilization because of a perception of greater flexibility, costs below those of traditional litigation, and speedy resolution of disputes, among other perceived advantages. However, some have criticized these methods as taking away the right to seek redress of grievances in the courts, suggesting that extrajudicial dispute resolution may not offer the fairest way for parties not in an equal bargaining relationship, for example in a dispute between a consumer and a large corporation. In addition, in some circumstances, arbitration and other ADR processes may become as expensive as litigation or more so.

**Online dispute resolution:**

Dispute resolution can also take place on-line or by using technology in certain cases. Online dispute resolution, a growing field of dispute resolution, uses new technologies to solve disputes. Online Dispute Resolution is also called "ODR". Online Dispute Resolution or ODR also involves the application of traditional dispute resolution methods to disputes which arise online.



## **2.4. HISTORY OF ARBITRATION – ADAM TO MODERN ERA:**

Once men begin to live and trade together, inevitably various forms of adjudication emerge. It follows from the above that the submission of disputes to independent adjudication is a form of ordering human society as old as society itself. Why did arbitration develop as a means of alternative dispute resolution? In order to answer this question, one needs look at the history of arbitration.

### **2.4.1. ARBITRATION IN DIFFERENT COUNTRIES:**

**England:** In England merchants have resorted to adjudication outside the Royal Courts from the first development of national and international trade. Already in the later middle ages, a solid connection between finance and commerce existed. Commercial transactions were commonly done on credit terms, such as bills of exchange, widely accepted at the seasonal fairs which brought together the trading community and provided the basis of this credit system.

The character of the Royal Courts was not adapted initially to serve the needs of this trade and traders, firstly because the early courts were primarily interested in disputes over land and conduct detrimental to the King's peace, secondly because contracts, commercial credits and debts incurred abroad and owed by and to foreigners were almost wholly unenforceable, thirdly because the traditional court procedure lacked the much needed expedition that merchants, passing from fair to fair and so often changing jurisdiction, needed and fourthly because jurisdiction was ousted by the necessity of proving venue in England. Thus, the trading communities relied on special tribunals, i.e. the Courts of the Boroughs, of the Fair and of the Staple, in order to solve the controversies arising in the world of local and international trade. These courts were the predecessors of today's modern arbitral tribunals in that a predominant feature of their character was that law should be speedily administered in commercial causes<sup>52</sup> which in effect led also to a relaxation of the strict procedure in these Courts, and in that, according also to the nature of the dispute, commercial men were also elected to form part of the tribunal.

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<sup>52</sup> K. Noussia, Confidentiality in International Commercial Arbitration, DOI 10.1007/978-3-642-10224-0\_2, # Springer-Verlag Berlin Heidelberg 2010-11.



Thus, the middle Ages saw a diverse system of tribunals dealing with commercial disputes, where it was already acknowledged that people with special knowledge to the related trade would be on some disputes better assessors to arbitrate on it and that the settlement of the commercial cases should be speedy. Following the discovery of the New World, the international society of the Middle Ages dissolved into nation states and, in this new age, men of commerce begun to look for new institutions to refer their disputes. However, although the habit for arbitration and the desire for its use continued to exist, nevertheless the adjudication of commercial disputes were not anymore exclusively reserved to it for reasons such as the fact that the common law courts developed by the mid-sixteenth century a general remedy in contract and thus gave themselves also jurisdiction over causes involving foreign elements by recognizing a notional venue in England, and Because at the same time the Admiralty court expanded a jurisdiction over cases in which a foreign merchant was a party.

However, the assertion by the traditional courts of a role in the settlement of business disputes was not entirely to the liking of the commercial community, who liked the idea of tribunals in which they also had some share, not least because the predominant notion was that lawyers did not understand commercial problems as well as the notion that the technical and time-consuming character of litigation did not accord with their desire for speed in the resolution of their disputes. In effect, a solution was found in that charters were drafted which tended to incorporate the privilege for company merchants to settle potential disputes between themselves.<sup>53</sup>

By the eighteenth century arbitration was solidly entrenched as a means of alternative dispute resolution within which judicial intervention now extensively occurs because of the natural desire of the courts to keep all adjudications within their sphere, or the fear of the growth of a new system of law, but most importantly due to the fact that litigants in arbitrations needed the assistance of the courts who in turn exacted a price for the assistance offered.<sup>54</sup>

In the nineteenth century comes the final fruition in the growth of satisfactory judicial and arbitral modes of resolving commercial disputes. The zenith of the work of absorption and growth which transmuted the practice of commerce into an effective part of the ordinary law and brought the commercial arbitral tribunal under the control of the

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<sup>53</sup> Lord Parker of Waddington (1959, pp. 5–12).

<sup>54</sup> Lord Parker of Waddington (1959, pp. 12–14).

ordinary courts, is the Common Law Procedure Act 1854 via which, for the first time, the courts were given the power to stay proceedings whenever a person, having agreed that a person's dispute should be referred to arbitration, nevertheless commenced an action in respect of the matters referred. Secondly, statutory provisions as to the appointment of arbitrators and umpires were formulated to solve difficulties arising on default and, thirdly, the courts were given power to remit an award back to the arbitrator, who was able to state a question of law for the determination of the court. Commercial arbitrations were made subject to a systematic code of law by the Arbitration Act 1889 which amended and consolidated all previous practices.

Since 1900, the general position has been that a commercial dispute can be speedily and efficiently determined in the courts as well as by arbitration, depending on its nature and what common practice in the particular sector requires, and that the two systems ought indeed to be properly regarded as coordinate rather than rival.<sup>55</sup>

The Arbitration Acts 1950, 1975, 1979 and 1996 all encapsulate the need for party autonomy as opposed to the previous tradition of judicial intervention. More specifically, the Arbitration Act 1979 was the first legislative instrument to abolish the long-established case stated procedure, whereby the courts were free to review an award if an error of law or fact appeared on the face of the award, and in its place established a structure under which errors of fact could not be the subject of an appeal and errors of law could be appealed only under stringent conditions.

The Arbitration Act 1996 is a combination of consolidation and reform of the legal principles enshrined in the previous Arbitration Acts and the common law. It is the closest thing to a definitive code of arbitration law which has ever been enacted in England, although both the common law and decisions on earlier legislation still remain significant, not least as a guide to the interpretation of its Provisions. It has managed to move English law far closer to the UNCITRAL Model Law than it was originally anticipated to do.<sup>56</sup>

**United States of America:** In the USA, already from the time of the American colonies, arbitration among merchants was common, since it proved more efficient and effective than the courts during that period. The first US president George Washington

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<sup>55</sup> *ibid*, pp. 18–24).

<sup>56</sup> Merkin (2000, pp. 1–10).

himself also served as an arbiter of private disputes before the Revolution.<sup>57</sup> However, in the late nineteenth and early twentieth century's, arbitration enjoyed a not particularly favourable position, as there was some mistrust by the legal establishment on arbitration's capacity to produce fair results. Moreover it was feared that arbitration, if it proved too successful, could jeopardize the livelihood of all those who relied on the court system. Nowadays the scenery is totally different and arbitration is embraced as a viable alternative to litigating disputes.

The tide of hostility towards arbitration began to turn in America with the enactment of modern state and federal arbitration acts and the creation of the American Arbitration Association. In 1920, New York reformed its arbitration law so as to enforce agreements to arbitrate future disputes. The American Bar Association in 1921 developed a draft of a Federal Arbitration Act patterned on the then-existing New York law. The American Bar Association draft was introduced in Congress the following year and, with minor revisions, became law in 1925.

During the same decade the American Arbitration Association was also instrumental in advancing arbitration, as it sought to promote the arbitral process – via the development of uniform rules – and it also secured qualified individuals to act as arbitrators. However, there was still some negativity towards state level arbitration which was eradicated by the late twentieth century via the adoption of arbitration statutes in all 50 states, as well as by broad federal court jurisdictional interpretations of “interstate commerce” under the Federal Arbitration Act.<sup>58</sup>

**France:** In France, arbitration always played an important role. Already from the sixteenth century, the Decree of the Moulin of 1566 made arbitration the sole and obligatory means of dispute resolution for commercial disputes. Not least, there was in France a notable mistrust of the capacity of the state's courts to resolve such disputes with the same effectiveness as arbitration. This trend is reflected in article 1 of the Decree of 16–24 August 1790 which stated that arbitration was to be considered the most reasonable means of dispute resolution between citizens.<sup>59</sup>

In the nineteenth century arbitration in France declined and only really revived in the 1960s. The establishment of institutions such as the *Chambre de Commerce*

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<sup>57</sup> Folberg et al. (2005, p. 454).

<sup>58</sup> Bruner and O'Connor Jr (2002, Chap. 20, } 20:2).

<sup>59</sup> Guyon (1995, pp. 7–8).

Internationale (CCI) was important in this development. In the modern era, the French law of arbitration is characterized by the existence of both a domestic and an international procedural system, with domestic arbitrations being regulated by Titles I–IV of Part IV (articles 1442–1491) of the Civil Code and with international arbitrations being regulated by Titles V–VI of Part IV (articles 1492–1507) of the Civil Code.<sup>60</sup>

**Germany** In Germany arbitration was from early on practiced and recognized as an effective means of alternative dispute resolution. Prior to the enactment of the German Arbitration Act 1998, the law was considered anachronistic. The German Arbitration Act 1998, which came into force on 1 January 1998, was therefore adopted to better facilitate domestic and international arbitration proceedings in Germany.

It is codified in the German Code of Civil Procedure (Zivilprozessordnung or ZPO) 1025–1066 and applies on all agreements to Arbitrate concluded on or after 1<sup>st</sup> January 1998. The German Arbitration Act 1998 was modelled after the UNCITRAL Model Law on International Commercial Arbitration in order to create an arbitration-friendly jurisdiction that would be also attractive to foreign practitioners. The rationale of the German legislation was to favour the creation of a legal structure that would be familiar to the arbitration community as an already accepted international standard.<sup>61</sup> In explaining the growth and modern use of arbitration, one need take into account factors such as the desire for secrecy, the attraction of moving to a custom of using industry experts as arbitrators rather than traditional state court judges and therefore also more flexible procedures, the option of selecting trade norms as the rules of decision<sup>62</sup> and the economy, speed, secrecy and certainty of the process, as well as The ability given to parties to settle a dispute whilst maintaining business relations.<sup>63</sup> In General, given the increasing importance of arbitration as an alternative to costly litigation, it is critical to understand the role that arbitration plays in Encouraging self-negotiated settlements in different settings<sup>64</sup> and the reasons why it is more effective, especially in an international commercial context as opposed to other widely used means of alternative dispute resolution, such as mediation and Med-Arb.

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<sup>60</sup> Devolve´ (1982).

<sup>61</sup> Ru´tzzel et al. (2005, p. 110).

<sup>62</sup> Brunet et al. (2006, p. 25).

<sup>63</sup> Bonn 1972, p. 257.

<sup>64</sup> Deck and Farmer 2007, p. 549

Mediation constitutes a process of assisted negotiation in which a neutral person helps the parties to reach agreement. It differs from arbitration in that it is rather more consensual and does not always lead to a final settlement of the dispute. It is cheaper than arbitration and assists the parties to find their own solution to the dispute. Even if no final solution is found it may help them to decide the best further steps for the resolution of the dispute. Although litigants may in some circumstances be compelled to enter mediation – or at least be put under heavy pressure to do so – it is only effective and successful to the extent that disputants find it effective. All the above and other factors such as the fact that this means of alternative dispute resolution does not fit cases where a disputant is not capable of negotiating, or feels the need to establish a legal precedent, or requires a court order to control the conduct of an adversary,<sup>65</sup> have resulted in arbitration being more popular and more often chosen and used as a means of alternative dispute resolution.

In the case of Med-Arb, which is an interim form of alternative dispute resolution in that it entails features from both arbitration and mediation, parties may choose, and arbitral institutions may offer, it in order to resolve contractual disputes. In some cases having a single neutral person serving in both the role of arbitrator and mediator saves time and money and may encourage parties to resolve their dispute at the mediation stage, because they know that their mediator will finally render a final and binding decision if disputes are not settled at the mediation stage. Nevertheless, this form of alternative dispute resolution has not evolved and is not used as much as arbitration. There is hostility towards the mixing of the roles of arbitrator and mediator for many reasons. Firstly, the roles are considered distinct and incompatible. Secondly and in contrast with what is used as an argument in favour of Med-Arb, parties may be less candid in communicating with the mediator and, thus, undermine a vivid feature of mediation, if they know that their mediator will in any case decide the dispute should mediation fail. Thirdly, the possibility that the mediator-turned-arbitrator's view of the issues concerned may have been affected by information imparted confidentially in *ex parte* discussions is also a Negative factor that may deter the use of this form of alternative dispute resolution.

Fourthly, a negative factor that may deter the use of this form of alternative dispute resolution is the fact that many mediators have little or no experience conducting

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<sup>65</sup> Folberg et al. (2005, pp. 223–231).

an arbitration hearing and may not be competent to take on the other role. Lastly, there is also the chance, unless there is an express waiver of such a right, for the arbitral award to be challenged on grounds of ex parte communication at the mediation stage.<sup>66</sup>

### **In relation to Confidentiality**

Confidentiality is vital to mediation because effective mediation requires a certain level of candour,

-secondly because fairness to the disputants requires its preservation,

-thirdly because it constitutes one of the incentives for choosing to Mediate,

-fourthly because it helps preserve the process and character of Mediation as a means of alternative dispute resolution and finally, because it helps the preservation of neutrality of the mediator, especially if the latter is involved in a subsequent legal proceeding.

However, the preservation of confidentiality in mediation has, for many reasons, proved problematic.

Firstly, because the most usual means of protecting it where the arbitral award rendered was struck down by the Court on the basis that the arbitrator had improperly relied on information gained during the course of mediation and not presented during the arbitration process is via a rule of evidence which nonetheless does not always extend this level of protection to all aspects and facets of mediation but is only a valid means of mandatory protection of confidentiality mostly in relation to state courts proceedings.

Secondly, because confidentiality is often only impliedly protected or, even where it is protected via a confidentiality provision, still the extent of this protection remains vague and even where confidentiality rules are contained in statutes in the form of legal privileges, the form of such privileges and the subsequent protection of confidentiality under them may differ.

Thirdly, even if there is mediation agreements covering confidentiality these bind only the parties entering those agreements and not third-parties that may enter the process of mediation.

Fourthly, public policy issues may detect the lifting of the veil of confidentiality.<sup>67</sup>

Likewise, the protection of confidentiality may also prove problematic in the case of Med-Arb, for all the above stated reasons, as well as because of the possibility of having

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<sup>66</sup>Ibid

<sup>67</sup> Zamboni (2003, pp. 178–179. [www.springer.com/cda/content/.../9783642102233-c1.pdf?0-0](http://www.springer.com/cda/content/.../9783642102233-c1.pdf?0-0) visited on 11-3-1010

ex parte communication at the mediation stage which, as stated above, may put the whole Med-Arb process at stake as the arbitral award can be challenged on such a ground.

It is generally thought that an expectation of confidentiality on the part of participants is critical to the successful conduct of a mediation or Med-Arb process and, as already stated above, candour by the parties can be crucial to a successful mediation or Med-Arb process. Despite its important role, the issue of confidentiality in mediation, which continues to be a hotly debated topic in the courts and among academia, remains still wide open, considering the difficulties of precisely defining such a rule together with all the possible legitimate exceptions and the fact that its protection may depend on several and variable parameters such as the terms of the mediation agreement, the applicable institutional rules, the law governing the mediation agreement, the nature of the information to be disclosed, the extent of allowance of such disclosure and the factors determining the extent of protection of confidentiality even in cases where the latter exists. However, in contrast to the above, and irrespective of the fact that no final formulation of the confidentiality obligation can be found in case law, it is generally recognized that there is, at least in common law, an enforceable and implied duty of confidentiality arising out of the nature of arbitration whereby the arbitral proceeding must be privately conducted and subject to the duty of confidentiality.<sup>68</sup> For all the above reasons, we support the argument that arbitration is a much more preferred and widely used means of alternative dispute resolution.

## **2.5. UNCITRAL – NEW WAVE:**

Freedom is neither a sedative nor a simpleton. The concept of Freedom is more perspicuous for profession than for person. Trade and profession strike common features and objects in the functional arena, collectively or competitively, which impact not only the interests of individuals involved in the trade or profession but also the society at large. Freedom has no meaning or need to exist if the same is not accessible to entrepreneurial efflorescence. Freedom sans trade is fragile and equals fallacy. Constructive and meaningful ‘freedom of trade’ is the sine qua non of a State’s economic sovereignty. Today, man is universal in all spheres of human activities, personal or impersonal.

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<sup>68</sup> See *Township of Aberdeen v Patrolmen’s Benevolent Association*, 669 A.2d 291 (N.J.S. Ct., App. Div. 1996)

Economics being the chief armour of individual existence and prosperity, there comes into existence an automatic and uncalled relationship between State, Society and Individual as the financial strength of the individual or group is the fiscal power of the society and finally the economic strength of State sovereignty. Hence there is a need to reconcile rival claims of the individual and the society by the State and State's intervention is imminent in building up a rational relationship between the Individual, Society and State. The same principle is applicable in building the net work of Individual, natural or artificial, State and the International community. This basic proposition itself justifies the promotion and perpetuation of an international body to organize, oversee and regulate the conduct of trade and business amongst the nation states for the common benefit of the global citizens or people. Resultantly, W.T.O. and UNCITRAL have to emerge to rationalize the flow of international trade and commerce – a new wave to improve the economic standards of the people across the globe.

But the **Harris Tweed Case**<sup>69</sup> not only demonstrates more clearly the elusiveness of the ideal of freedom of trade, but also shows the evolution which economic individualism has undergone in the last fifty years – the development from an almost pure Benthamism to a position where well organized economic groups struggle with each other, with authority looking on as an umpire who attempts to interfere little and to be impartial. In so far as the freedom of business competition is concerned, the Mogul Case<sup>70</sup> provides not only a striking illustration of unfettered and ruthless competition between business rivals: a classical embodiment of Benthamite economic liberalism in the law. This case reflects the outlook of a judiciary brought up in conceptions and under conditions which had already largely lost their validity at the time of judgment. \

The defendants, a group of shipping companies, had ousted the plaintiff, a rival trader, by threatening his agents with boycott if they continued to act for him, and by deliberately undercutting the plaintiff, at a temporary loss to themselves. The House found that there was no malice as required for conspiracy action, but it is the economic creed of the law lords, which gives the clue to the decision. Lord Watson said –“I cannot for a moment suppose that it is the proper function of English Courts of law to fix the

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<sup>69</sup> Crofter Hand Woven Harris Tweed Co. Ltd. vs. Veitch and another (1942) A.C.435.

<sup>70</sup> Mogul Steamship Co. vs. McGregor Gow & Co. (1892) A.C.25.



lowest price at which traders can sell or hire, for the purpose of protecting or extending their business without committing a legal wrong which will subject them to damages.”<sup>71</sup>

If this statement rather avoids the question whether the means employed did not overstep the limits of law, it certainly reflects the emphatic distrust of any controlling function of public authority which interferes with the free play of economic forces. Even more sweeping are Lord Halsbury’s categorical words – “All are free to trade upon what terms they like.”<sup>72</sup>

### **2.5.1. HISTORICAL BACKGROUND:**

The New York Convention, 1958: -The major catalyst for the development of an international arbitration regime was the adoption of the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards, 1958 which continues to set the standard requirements for a successful international arbitration process. Its success could be assessed by the fact that over 130 countries became parties to the Convention.

The UNECE and UNECAFE Arbitration Rules: -A major influence in the 1960s, following its success with the New York Convention, was the United Nations. Through its Economic Commissions for Europe and for Asia and the Far East, it developed special arbitration rules and procedures for arbitrations involving parties from and taking place in eastern and Western Europe (UNECE) and in the large and emerging economies of Asia and the Far East (ECAFE). These Rules were almost identical in content which was due in large part to the common attitudes of specialists of the day as to how international arbitration practice should be conducted. These Rules were use in many cases but never achieved international recognition in circumstances where institutional arbitration was inappropriate. They have been superseded by the UNCITRAL Arbitration Rules.

The UNCITRAL Arbitration Rules: -In the early 1970s there was an increasing need for a neutral set of arbitration rules suitable for use in ad hoc arbitrations. Once again it was under the auspices of the United Nations that special arbitration rules were prepared this time by the Commission on International Trade Law (UNCITRAL). The

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<sup>71</sup> Ibid. p.40

<sup>72</sup> Ibid, p.38. Cited by W.Friedmann, Law and Social Change, Universal Law Publishing Co. First Indian Reprint-2010, p.109-112

UNCITRAL Rules for ad hoc arbitration were “intended to be acceptable in both capitalist and socialist, in developed and developing countries and in common law as well as civil law jurisdictions.”<sup>73</sup>

This is because the Rules have a “truly universal origin, in particular their parallel creation in six languages (Arabic, Chinese, English, French, Russian and Spanish) by experts representing all regions of the world as well as the various legal and economic systems.”<sup>74</sup> The UNCITRAL Rules have achieved international recognition and are widely used. They are autonomous and suitable for use in almost every kind of arbitration and in every part of the world. Although originally developed for ad hoc arbitration they have now been adopted by many arbitration institutions either for their general rules or for optional use.

For Ex: Kuala Lumpur Regional Centre for Arbitration,

The Cairo Regional Centre for International Commercial Arbitration,

The Hong Kong International Arbitration Centre, and

The Spanish Court of Arbitration,

The American Arbitration Association,

The London Court of International Arbitration, and

The Inter-American Commercial Arbitration Commission.

The UNCITRAL Rules deal with every aspect of arbitration from the formation of the tribunal to rendering an award. They were intended to provide the guidelines and flexibility for the smooth operation of arbitration proceedings. When approved, these Rules reflected what the drafters believed were the accepted and desired independent standards for use in international arbitration. Today, these Rules are in fact reflective of what actually transpires in international arbitration practice and provide a milestone for review in much arbitration under other systems. Apart from the very wide acceptance and use of the UNCITRAL Rules generally, perhaps the most significant use has been their adoption, in slightly modified form, by the Iran-US Claims Tribunal. The publication of

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<sup>73</sup> Sanders, “Commentary on UNCITRAL Arbitration Rules, II YBCA 172 (1977) 173.

<sup>74</sup> Hermann, “UNCITRAL’s Basic Contribution to the International Arbitration Culture”, in van den Berg (Ed) ICCA’s Congress Series No. 8. (1996) 49, 50

over 800 awards and decisions of the Iran-US Claims Tribunal has provided a jurisprudence on which parties in international arbitrations, either under the UNCITRAL Rules or international arbitrations generally, can rely. This has contributed to the development of a common standard for the conduct and procedure of international commercial arbitrations.<sup>75</sup>

### **2.5.2. THE UNCITRAL MODEL LAW AND ITS DEVELOPMENT:**

As a result of the successful operation of the New York Convention and the development of established arbitration practice, the differences between national arbitration laws became only too apparent. There were essentially three different situations. In some countries the courts still sought to control and supervise arbitrations taking place in their jurisdictions. Other countries sought rather to provide support for the arbitration process whilst refusing to intervene or interfere in the process itself, as opposed to strict supervision of the arbitration process.<sup>76</sup>

This can be called minimalist approach to international commercial arbitration. This last development recognized the fundamental influence of party autonomy in international arbitration, which effectively required very limited interference with a party's will. The third group of countries had either old and out of date arbitration laws or no arbitration laws at all.

It became increasingly clear that some uniformity was needed to reflect the commonly accepted standards for international arbitration. The benchmark event in this respect was the introduction of the UNCITRAL Model Law of 1985. The concepts of party autonomy and the supportive role of courts to the arbitration process are the basis of the Model Law. The Model Law harmonized and modernized the issues it touches upon and represents a step forward along with the New York Convention and UNCITRAL Rules.<sup>77</sup> What are equally important are the jurisdictions where new legislation has been influenced by the Model Law.

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<sup>75</sup> Julian D M Lew, Loukas A Mistelis, Stefan M Kroll, *Comparative International Commercial Arbitration*, Wolters Kluwer Law (India) Pvt. Ltd. New Delhi (2007) (P-25-27)

<sup>76</sup> Goldman, "The Complementary Role of Judges and Arbitrators in ensuring that International Commercial Arbitration is Effective" in *60 years of ICC Arbitration*, 257

<sup>77</sup> Julian D M Lew, Loukas A Mistelis Stefan M Kroll, *Comparative International Commercial Arbitration*, Wolters Kluwer (India) Pvt. Ltd. New Delhi (First Indian reprint-2007) (pp.27-30)

The minimalist approach and the primacy of the principle of party autonomy, as embodied in the Model Law, have now been recognized in all modern arbitration laws. They reshape the scope of courts' powers in respect of assistance and supervision. The scope of court assistance is generally confined to the appointment and removal of arbitrators, the grant of provisional relief and the collection of evidence. The supervisory powers of a court are limited generally to the challenge to jurisdiction, removal of arbitrators, and appeal from, setting aside and enforcement of arbitration awards. In addition, no derogation is allowed from the due process requirements and there is a limit in each jurisdiction to matters which are arbitral.

Further, the regulatory web for international arbitration is hierarchical involving elements of party autonomy, the chosen arbitration rules, international arbitration practice, the applicable arbitration laws as well as the relevant international arbitration conventions. Where there are complications and uncertainties, these should be resolved by national courts and arbitrators in accordance with international arbitration practice, as illustrated and Although the 1989 Report of the Departmental Advisory Committee on Arbitration Law recommended against the adoption of the UNCITRAL Model Law, when preparing the Arbitration Act, 1996 the DAC paid "at every stage ....very close regard" to the Model Law and the content and structure of the Act owe a great deal to the Model Law recorded in the international arbitration instruments, including the New York Convention.

The UNCITRAL Rules and the Model Law. The overriding factors must be the importance of the will of the parties and the absolute essential to achieve an effective and enforceable arbitration award. Hence the importance of the criteria set out as fundamental to the validity of an award in Article-V of the New York Convention.<sup>78</sup>

**Difference between an UNCITRAL legislative text and an UNCITRAL Non-Legislative text:**

UNCITRAL legislative texts, such as conventions, model laws, and legislative guides, may be adopted by States through the enactment of domestic legislation. UNCITRAL

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<sup>78</sup> Ibid

non-legislative texts, such as the UNCITRAL Arbitration Rules, can be used by parties to international trade contracts.

Legislative texts include the following:

United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods;

UNCITRAL Model Law on International Commercial Arbitration; UNCITRAL Model Law on Procurement of Goods, Construction and Services;

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit; UNCITRAL Model Law on International Credit Transfers;

United Nations Convention on International Bills of Exchange and International Promissory Notes;

United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg);

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade;

UNCITRAL Model Law on Electronic Commerce;

UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects;

UNCITRAL Model Law on Electronic Signatures;

UNCITRAL Model Law on International Commercial Conciliation;

United Nations Convention on the Assignment of Receivables in International Trade;

UNCITRAL Legislative Guide on Insolvency Law and the United Nations Convention on the Use of Electronic Communications in International Contracts.

**Non-legislative texts include the following:**

UNCITRAL Arbitration Rules; UNCITRAL Conciliation Rules;

UNCITRAL Notes on Organizing Arbitral Proceedings; UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works; and