

English Arbitration and Mediation in the Long Eighteenth Century

By Derek Roebuck, Francis Boorman and Rhiannon Markless
(HOLO Books, The Arbitration Press, 2019)
Reviewed by Karyl Nairn

English Arbitration and Mediation in the Long Eighteenth Century is the latest instalment in an important series of books by Professor Derek Roebuck charting the development of arbitration in England. Readers will already be familiar with *Early English Arbitration*,¹ *Mediation and Arbitration in the Middle Ages*,² *The Golden Age of Arbitration*³ (addressing dispute resolution in the reign of Queen Elizabeth I) and *Arbitration and Mediation in Seventeenth Century England*.⁴ This latest work is co-written by two colleagues who were researchers for Professor Roebuck on earlier books: Dr Francis Calvert Boorman and Dr Rhiannon Markless. The collaboration has clearly been a happy and fruitful one. This latest volume is rich with detail about the role played by arbitrators and mediators during this most fascinating and tumultuous period in English history.

The authors introduce their book by reference to two arbitrations which framed the century: In 1701, a committee of arbitrators was established to resolve by merger the bitter rivalry between the London Company and the New India Company over their competing trade interests in India. The outcome of the seven-year arbitral process (which included the appointment of two leading politicians of the time⁵ as arbitrators) consolidated the power and influence of the East India Company (and indeed Britain itself) in India. The arbitral remit encompassed not only matters of empire but “*national debt, party politics, the role of Parliament, trade and monopoly*.”⁶

The close of the century witnessed what some consider to be the “beginning of the modern era of international arbitration.”⁷ The Treaty of Amity, Commerce and Navigation made between Britain and the United States in 1794 established commissions of arbitrators to resolve various conflicts arising from the American War of Independence Revolution including compensation claims brought by British merchants.

Although the details of these two famous arbitrations are not addressed in this book,⁸ they set its tone: arbitration *mattered* in the 18th century. The authors draw on a wealth of source materials, including reported cases, judges’ manuscripts and notebooks, personal letters and diaries and newspaper articles, to show that arbitrations and mediations were taking place across the entire breadth of English society in the 18th century over matters as diverse as family inheritance, labour, rights to new inventions, slights to reputation, building and engineering works, sport, gambling, entertainment, religion and

even criminal matters. The book also reveals the extent to which judges and officers across the legal system actively promoted arbitration and saw it as an integral part of the usual business of their Courts.

Such material thoroughly debunks the popular misconception of the 19th and 20th century that the English Courts were traditionally hostile to arbitration. The case against Lord Campbell as the main culprit peddling that myth is compellingly laid out.⁹ Indeed, it never made sense to accept Lord Campbell’s mischaracterisations nor Viscount Hailsham LC’s later assertion that arbitration was once regarded in England with “jealousy and aversion.”¹⁰ The 18th century was, after all, a perfect environment for arbitration to flourish. While King and State were dealing with civil unrest, the battle of Culloden, the revolution of 13 American colonies, the fallout from the French revolution, and conflicts with Spain and the Netherlands (to name but a few dramatic events of the time), ordinary citizens were coping with the upheavals of the Industrial Revolution. The cumbersome court system struggled to keep pace with the rapid urbanisation and changing times. For many there was simply no court within physical or economic access.

The research and scholarship underpinning this book is admirable but the real contribution is the way that the authors draw on existing specialised research on 18th-century subjects and weld them with perspectives gleaned from additional materials to shed new light on how arbitration formed part of daily commercial and domestic life at this time.

Keepers of the Peace

One area in which existing research is given a fresh perspective is the fascinating role of the Justices of the Peace. As well as discharging their official duties addressing criminal and other formal complaints, these officers of the state regularly assisted parties across the country to resolve their disputes informally. A few surviving diaries and notebooks, such as those of the clergyman Edmund

KARYL NAIRN, QC (knairn@skadden.com) is partner and global co-head of international arbitration at Skadden Arps Slate Meagher & Flom (UK) LLP.

Tew of County Durham and Thomas Horner, the squire of Mells in Somerset, reveal skilled dispute resolvers, moving seamlessly from a role of judge to mediator to settle private grievances. Tew's notebooks from 1750 to 1764 show him patiently considering all manner of disputes, including reputational skirmishes, unpaid wages claims and marital differences. A particular favourite is his entry from 23 April 1751: "Refused a warrant against widow Raby, publican, for opprobrious words etc against Alexander Knox's wife, 2 very touchy people."¹¹

Horner's meticulous entries from 1770-1777 include a noteworthy reference to Rev. John Wesley. The Methodist preacher brought a claim of forcible entry against certain individuals who had paid him an unwelcome "visit" at his lodgings (they objected to his preaching to the mining communities of Somerset). After proposing that the defendants make restitution, Horner recused himself from further consideration of the matter. He happened to own the freehold of the premises and was afraid of "incurring the censure of partiality."¹²

Arbitration-Friendly Courts

It was not just at the informal level of the Justices of the Peace and at the assizes, however, that arbitrations and mediations were prevalent. The authors present substantial evidence that matters were referred to arbitration by judges across the rest of the legal system of the time. Judges sitting in the four High Courts—Chancery, King's (or Queen's) Bench, Common Pleas and Exchequer as well as the High Court of Admiralty—actively encouraged arbitration. Drawing on unpublished reports and previous research undertaken by others such as Henry Horwitz and James Oldham,¹³ the book places rightful emphasis on Lord Mansfield's role as the great friend to commerce during his 32-year reign as Chief Justice of the King's Bench. That famous fashioner of the common law supported the developing capitalist economy and the growing arbitration community by dispatching hundreds of business disputes to expert arbitrators—artisans, engineers, surveyors, sea captains, builders—as well as to lawyers and jurymen. His successors, Lord Kenyon and Lord Ellenborough were similarly supportive. In the case of *Wilkinson v. Wilkinson*, brothers John and William fell out with each other after having invested nearly half a million pounds in ironworks around the country. When the matter came before Lord Kenyon in 1795, he advised placing all the disputes before an arbitrator, "the most unfettered Judge in the world."¹⁴

The authors provide ample evidence that many arbitrators appointed through court referrals were nominated by the parties themselves, especially in shipping disputes.¹⁵ Lawyers too were appointed by the Courts and some were much admired. Lawyers of today looking for 18th-century arbitrator role models need go no further than the polymath property lawyer, Charles Fearn, (1742-1794) of Bream's Buildings, Chancery Lane, whom

Lord Campbell later extravagantly praised as "a man of as acute understanding as Pascal or Sir Isaac Newton."¹⁶

Private Arbitrations in Every Sphere of Life

Perhaps the most revelatory part of the book lies in the many and varied accounts of the ad hoc arbitrations taking place in all walks of life through the initiative of the parties directly, often with the encouragement of their religious, family or trade community. Almost anything could be the subject of an arbitration at that time, including activities which were illegal such as gambling. Members of the working classes and the aristocracy were keen gamblers, betting on cards, dice and even matters such as which members of a gentlemen's club would die first and whether "...Buonaparte succeeds in his views upon Spain within 2 years."¹⁷ Bets typically included an arbitration clause. Although not legally binding, awards rendered were generally honoured for reputational reasons.

The sport arbitrations entertainingly described in the book readily demonstrate why this was not a field particularly suited to the courts. Disputes typically concerned the outcome of matches on which substantial wagers were made. The cover of the book is a scene of bare-knuckle fighters in an amphitheatre owned by boxing impresario Jack Broughton. In 1743, he promulgated a code for fighting contests which was used for the following 100 years. It included an arbitration process of two umpires chosen by the principals with a third to be selected by the first two, in the event there was no agreement as to the result. Cricket was another sport attracting the gambling public, with matches leading sometimes to riots and calls to make the sport illegal. An arbitration held to determine the outcome of a cricket match between Hadleigh and Ipswich in 1788 was a big news story of the day.¹⁸

At the other extreme, arbitration was strongly encouraged within many religious communities. The authors proclaim the Quakers as "the greatest advocates of arbitration in eighteenth century English society."¹⁹ A rich selection of material supports this thesis, including extracts and advices of the Yearly Meetings of Friends and the diary of one Isaac Fletcher of Underwood in Cumberland who sat regularly as an arbitrator within the Quaker community and even referred his own disputes to arbitration (although apparently not with much success).²⁰ Also of particular interest is the establishment by a group of Quakers of the Newcastle Upon Tyne Association for general arbitration in 1793 (initially opposed by local lawyers), which must be one of the earliest examples of a general arbitral institution. Referrals of disputes to arbitration by Quakers were often justified by reference to quotes from the scripture. Arbitration, it seems, is divinely endorsed.²¹ (Some modern arbitrators assume they are "God's gift"—this material suggests that they might be right after all.)

A chapter is devoted to showing the prevalence of ad hoc references to arbitration in many areas of business and commerce. Disputes between business partners were well suited to rapid resolution by industry peers, with many including arbitration clauses in their agreements.²² The financial stakes were often high. This century marked the birth of mass consumerism. Disputes over scientific inventions and new industrial techniques required specialist knowledge to resolve effectively. Patent disputes were frequent but were complex, slow and costly to resolve through the courts or Parliamentary system.

The book provides a fresh perspective on well-known 18th-century figures of the Industrial Revolution such as James Watt, Thomas Telford, Matthew Boulton, Samuel Crompton and Richard Arkwright. Private letters show Watt and Telford lending their technical expertise to help others resolve disputes while others appear in records as regular users of arbitration. One of Watt's arbitral awards, which was unearthed in the City of Birmingham archives, is enthusiastically reproduced and speaks across the centuries of his practical and fair-minded approach.²³

Private Arbitration: Fashionable and “Manly”

Reassuring for arbitration practitioners today who feel undervalued is the evidence presented of the high regard for the arbitral process and those taking part in it. According to the British *Evening Post* in 1792, arbitration represented “common sense and common honesty.”²⁴

Submitting to arbitration in the 18th century was seen as a way to end a quarrel while preserving the honour and reputation of the parties. Arbitration was a more fashionable and civilised way to show manliness than resorting to a duel.²⁵ A letter written to a newspaper by “Arcadius” in 1773 called duelling a “Gothic custom” and proposed arbitration as one means of addressing “many affronts and other intricate matters not cognizable by law.”²⁶ The owner of the daily newspaper *The World* challenged in the press his fellow disputant to accept his “just and manly offer of ARBITRATION—If he is not just and manly, I cannot help it. He must take the consequences.”²⁷

The status of lawyers in the 18th century was not particularly high, but the lawyers who arbitrated disputes enjoyed a welcome boost to their reputations. Particularly in the first part of the century, arbitrators did not traditionally charge for their services, so arbitration was community service rather than a remunerative activity.²⁸ Bishop Gilbert Burnet's posthumously published history of his lifetime, cited several times in the book, includes advice on the importance of being competent in the law in order that one could aspire to become an arbitrator: It “makes a Man very useful in his Country, both in conducting his own Affairs, and in giving good Advice to

those about him: It will enable him to be a good Justice of Peace, and to settle Matters by Arbitration.”²⁹

The accounts of the many arbitrations across daily life bring to mind the memorable observation of the art historian Kenneth Clark that “eighteenth century amateurism ran through everything: chemistry, philosophy, botany and natural history.” He noted “a freshness and freedom of mind in these men that is sometimes lost in the rigidly controlled classification of the professional.”³⁰ These words appear equally apposite to 18th century arbitration³¹ as revealed in this book. There are other occasional echoes of Clark in the bold conclusions of those confident in their command of the subject: in the chapter on theatre, for instance, the authors proclaim “there can hardly ever have been at any time or place a more disputatious lot than those involved in the English theatre in the 18th and early 19th century.”

The authors do not claim to have written the definitive work on arbitration in this period; they suggest that even their wide-ranging research has only just begun to reveal the importance of arbitration in daily 18th century life. They describe their book as a “call to action” for other researchers to follow them.³² But they are too modest about their achievements. Like the earlier works in the series, this is a book to which readers will happily return for inspiration.

Endnotes

1. Derek Roebuck, *Early English Arbitration*, HOLO Books, The Arbitration Press, Oxford 2008.
2. Derek Roebuck, *Mediation and Arbitration in the Middle Ages*, HOLO Books, the Arbitration Press, Oxford 2013.
3. Derek Roebuck, *The Golden Age of Arbitration*, HOLO Books, the Arbitration Press, Oxford 2015.
4. Derek Roebuck, *Arbitration and Mediation in Seventeenth Century England*, HOLO Books, the Arbitration Press, Oxford 2017.
5. Robert Harley, the Speaker of the House of Commons, and Sidney, the First Earl of Godolphin.
6. Roebuck, Boorman and Markless, *English Arbitration and Mediation in the Long 18th Century*, HOLO Books, the Arbitration Press, Oxford 2019 at page 4.
7. *Id.* citing Roger P Alford, The American Influence on International Arbitration (2002) 19:1 *Ohio State Journal on Dispute Resolution* 69-88.
8. For an account of the East India arbitration see, for example, William Foster, *The East India House, Its History and Associations*, London 1924, pp 104-105 and Roy A Sandstrom, “Godolphin, Sidney, first Earl of Godolphin,” *ODNB* 2011.
9. Roebuck et al, *supra* note 6 at pp 261-262, and *see also* Chapters 7-10.
10. *Id.* at page 47. See also Stavros Brekoulakis, “The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration” (Spring 2019) 39:1 *Oxford Journal of Legal Studies* pp 124-50.
11. Roebuck et al, *supra* note 6, at page 74.
12. *Id.* at page 82.
13. Henry Horwitz and James Oldham, “John Locke, Lord Mansfield and Arbitration During the Eighteenth Century” (1993) 36:1 *Historical Journal* 137 and other publications cited at Roebuck et

- al, *supra* note 6 at pp 30-38. The authors also acknowledge the generous assistance of Sir John Baker regarding legal manuscripts.
14. *Telegraph*, 22 June 1795.
 15. Sea captains or salvage experts appointed by the Courts were typically nominated by the parties in shipping disputes. See Roebuck et al, *supra* note 6, Chapter 10, especially page 139.
 16. *Id.* at page 114 footnote 54.
 17. *Id.* at page 235 citing *The Betting Book of White's from 1743 to 1878*, London 1892 page 38.
 18. *Id.* at page 237.
 19. *Id.* at page 247.
 20. *Id.* at pp 250-252.
 21. *Id.* at page 248.
 22. James Watt and his factory-owner business partner Matthew Boulton included an arbitration clause in their partnership agreement. See *id.* at page 209
 23. *Id.* at page 210.
 24. *Id.* at page 42, footnote 36.
 25. Robert Shoemaker, "Male Honour and the Decline of Public Violence in Eighteenth-Century London," *Social History* (2001) and "The Taming of the Duel: Masculinity, Honour and Ritual Violence in London, 1660-1800," *Historical Journal* (2002).
 26. *London Chronicle or Universal Evening Post*, 14-16 September 1773.
 27. *Gazeteer and New Daily Advertiser*, 30 September 179.0
 28. The authors cite the observations of the Radical tailor and diarist, Francis Place: "I gained much knowledge in many ways and on many subjects by these interferences, for which I never made any charge, unless, the matter related to an association or large body of men, in some such cases I have accepted a sum of money equal to that which the other arbitrators were paid, in three or four instances where the parties were found to be rogues, or where the trouble was occasi[on]ed by bad feelings on both sides I have made charges, as I did not think that rogues and evil disposed persons had any claim on my time because they had misbehaved themselves." See page 285.
 29. Gilbert Burnet, *Bishop Burnet's History of his Own Time. From the Revolution to the Conclusion of the Treaty of Peace at Utrecht, in the Reign of Queen Anne* (Dublin, 1734) at page 390.
 30. Kenneth Clark, *Civilisation*, British Broadcasting Corporation and John Murray, 1969 at page 249.
 31. Chapter 21 is devoted to the move towards greater professionalisation of arbitration, largely due to the rise of the lawyer arbitrator. For merchants, at least, there remained a reluctance to charge fees.
 32. The publication of this book was made possible by the Access to Justice research project on the Development of Arbitration in England and Wales. Contributors to the project included the author of this review.

This article first appeared in *Dispute Resolution Lawyer*, a publication of the Dispute Resolution Section of the New York State Bar Association, www.nysba.org.

NEW YORK STATE BAR ASSOCIATION DISPUTE RESOLUTION SECTION

VISIT US ONLINE AT
www.nysba.org/dispute

