

RESOLVING DISPUTES IN 18TH-CENTURY ENGLAND

FRANCIS C. BOORMAN

Institute of Advanced Legal Studies, School of Advanced
Study, University of London

*English Arbitration and Mediation in the Long Eighteenth Century*¹ will be published in November this year (see launch details in 'News and Events' section). Here, co-author Dr Francis Calvert Boorman gives a brief preview of the book.

Standard histories of the 18th century give little or no attention to mediation and arbitration. These processes of dispute resolution have, perhaps, been hiding in plain sight; activities that were so routine, contemporaries rarely felt the need to explain or justify them at length. Our book (co-written with Derek Roebuck and Rhiannon Markless) uncovers the practices of mediation and arbitration going on at every level in 18th-century life. It is the latest volume in Derek's monumental history of arbitration, covering England from Roman times onward, all published by HOLO Books. This latest volume sets out to show how arbitration and mediation changed across the long 18th century—taking in arbitration legislation a little beyond the boundaries of 1700 and 1800—yet continued to be essential to the functioning of economy and society.

Today, arbitration is usually understood as a quasi-legal process and is most often deployed in international commercial disputes. Mediation is perhaps most associated with family court and disputes between unions and employers. In the 18th century, arbitration and mediation were much more flexible and were called for wherever disputes were found. Eighteenth-century England was a society experiencing demographic expansion and rapid urbanisation, with political unrest at home and frequent conflicts with European neighbours and in a widening sphere of imperial influence. The sources of contention were many. The courts were

¹ By Derek Roebuck, Francis Boorman and Rhiannon Markless, published by HOLO Books. The book is now available for pre-order. See [website](#) for details.

accused of being slow, expensive and often unjust. As a character in a play of 1795 proclaimed: 'Never, never go to law; leave the whole business to arbitration, for if you don't at first, the lawyers, after emptying your pockets, will only do it at last' (Reynolds 1795: 25; act 2). The areas in which dispute resolution were deployed certainly included the merchant community and families, but also sectors as diverse as local government, sport and religious groups.

The structure of an arbitration was well established by the 18th century, which at its most basic required the two parties who were in dispute to agree to a reference. Each chose one or more arbitrators, who might be friends, colleagues or respected members of the community, and an umpire was usually selected, in case a decision could not be reached. The parties generally signed arbitration bonds, which obliged them to forfeit a sum of money if they did not comply with the decision of the arbitrators. The arbitrators then attempted to come to an agreement over all matters in dispute. They would hear any relevant evidence from witnesses and examine accounts, at hearings that were often held in taverns. With many arbitrators offering their time for free, the bar tab could sometimes be the major cost for the parties. The arbitrators made their award or, if they still couldn't agree, the umpire was called upon and his decision was final.

However, the variations on this theme were numerous. Many disputes were referred from the courts, where arbitration agreements could also be registered and enforced, as set out in the Arbitration Act of 1698, designed by the philosopher John Locke. All courts, including the assizes, Chancery and King's Bench made these referrals. Judges made many positive statements; Lord Chancellor Eldon called arbitration 'that more wholesome mode' of settling disputes (*Waters v Taylor* 1807); Lord Chief Justice Ellenborough found it 'desirable to lean in favour of arbitrators' (1802); Lord Chief Justice Kenyon could be found 'earnestly' recommending arbitration (1799). Lord Chief Justice Mansfield did the most to encourage court-approved arbitration and cases registered at the King's Bench increased markedly under his stewardship (Oldham 1992).

Land and shipping were particularly important subjects for arbitration. Although the textbooks of the time insisted that land was not a fit subject for arbitration, practice shows otherwise. Arbitrators were frequently asked to make fair divisions of land, determining balancing cash payments, often in cases of disputed inheritance. As a maritime power, British ships traversed the globe. Arbitrators were called upon to

determine the value of stock seized at sea in times of war, or salvaged by local sailors off the coast.

Justices of the Peace (JPs) were the frontline of both the criminal justice system and state-sanctioned mediation and arbitration, spending the greater part of their time negotiating peace in their community rather than prosecuting offenders. They kept no official records, but some ‘justicing’ notebooks have survived, which supply ample evidence of their activities. Like magistrates today, JPs volunteered their time and were often local landowners or clergymen, like the Reverend Edmund Tew, of Boldon in County Durham (Morgan and Rushton 2000). Tew negotiated the settlements to so many disputes that he often just noted down ‘Agreed’, or even ‘A’, but in those cases where he went into more detail, the most frequent reason for his intercession was assault. The modern reader may be surprised to find that assaults were often settled with an apology or a payment to the victim. Money also changed hands to bring peace following other incidents that should really have been criminal matters, including theft and in one case rape. JPs were called upon to arbitrate or mediate in finding settlements in wage disputes, and between masters and apprentices.

A particular source of strife amongst the middle classes (or middling sorts) was the provision of public services, paid for by a tax on property and organised by parish. Arbitrators were called in to decide if properties were fairly rated and what outstanding sums were owed. They might also decide questions of responsibility for maintaining roads and flood defences, or for supporting poor people and bastard children, even setting parish boundaries where these were in question. Disputes about the payment of tithes to maintain the clergy were also referred, perhaps unsurprisingly when arguments could be as arcane as whether a share of a swarm of bees had to be paid in kind (they did, but generally in wax and honey, rather than a tenth of the bees).

Many arbitrations were privately arranged between individuals, and other forums existed that routinely arranged arbitrations, with no involvement of courts or state officials. Of religious communities, the Quakers showed the most profound commitment to mediation and arbitration. Quaker meetings would mediate in commercial disputes between members, while Friends who repeatedly refused to submit disputes to arbitration, or declined to act as an arbitrator, could be disowned. The Sephardic Jewish community in London held its own arbitration tribunal, chiefly to settle small debts between poorer members. A similar institution was set up in the very different context of the Crowley

Ironworks at Winlaton Mill, established to settle differences between employees. Wagers made at gentlemen's clubs were decided by the arbitration of members. So too were the outcomes of sporting events, with an arbitration panel to adjudicate on horse races set up by the recently formed Jockey Club in 1771.

There are many examples where arbitration was used to resolve disputes in newly emerging economic activities in the 18th century, from insurance to engineering. Arbitration continued to respond to the needs of parties, not least because it was ideally suited to cases of great complexity. It was essential to unpicking financial entanglements, and partnership agreements contained a standard clause stating that all future disputes between the partners would be referred to arbitrators. When brothers John and William Wilkinson, co-owners of several steelworks around the country, fell out over the sale of their works at Bersham, one brother brought a suit in Chancery. However, the judge warned the case might take 150 years to conclude and suggested reference to an arbitrator, 'the most unfettered Judge in the world' (*Telegraph* 1795).

Experts were often called upon as arbitrators, for instance, architects or carpenters in disputes surrounding the fractious building industry. A diverse range of professions offered their services, where the arbitrator needed the practitioner's eye for quality of work, from leather breeches makers to veterinarians. Expertise became essential when disputes involved new inventions, such as the steam engine. Famed barrister William Garrow was counsel in a trial concerning the output of a steam engine, but he freely admitted he was not qualified to estimate the horsepower and that the damages owed should be referred to an arbitrator. Engineers and inventors like Richard Arkwright, James Watt and Thomas Telford all referred disputes to arbitration or acted as arbitrators themselves.

Disputes reflected wider trends in the 18th century. In an era when politeness was an aspiration and interpersonal violence was increasingly frowned upon, arbitration was seen as a solution to quarrels that still preserved the honour of the parties. This trend is best exemplified by the case of two officers of the Derbyshire militia who began squabbling over payments for breakfast and, when one threw a handful of nuts at the other, a duel was proposed. Thankfully, the situation was defused by the arbitration of a third officer, before any weapons were drawn.

Of course, not everyone complied with these emerging norms. Laurence, Earl Ferrers, agreed to an arbitration to decide terms of

separation from his wife Mary, after even excommunication failed to persuade the violent Earl to comply. He and Mary entered into bonds for the huge sum of £20,000, but the Earl gave a false account of his estates and then used force to disrupt the arbitrators. The separation was eventually confirmed by Act of Parliament, but when a trusted servant went to collect rents due to Mary under the terms, the Earl shot him dead. For this crime, Ferrers was the last peer in Britain to be hanged.

Although we don't pretend to offer any advice to the arbitrator today, there are many differences in the way that mediation and arbitration worked in the 18th century that might provide pause for reflection, particularly as we have also observed the emergence of some modern practices during the era under study. Perhaps the most profound difference was the procedural flexibility found in 18th-century dispute resolution. There was a fluidity between negotiation, mediation and arbitration that in some ways belied our distinct modern understanding of the terms. This should not be interpreted as a lack of sophistication, but simply a different emphasis, on outcome over procedure.

This was also a time when the legalisation of arbitration was taking root, but was by no means ubiquitous. An arbitration might be recognisable to current practitioners. Commercial arbitrations were sometimes quite formal and legalistic, both parties with legal representation. Or an arbitration could be a highly informal and very personal affair, like the wedding party called upon to decide which of two brothers should marry a woman when the ceremony was just about to begin. Either way, parties generally treated the decision as binding; the brothers were switched at the altar and the newspaper report of the incident describes no dissent. Enforcement was still social in many situations, not exclusively contractual.

A section of the book examines the sources we used and part of our purpose is to encourage further research. We hope that our multidisciplinary approach will challenge legal historians to broaden their outlook and look beyond the law reports. Our diverse range of sources show that the modern observer will miss perhaps the majority of mediation and arbitration in the 18th century if we look for evidence solely in the records of courts or even of lawyers.

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