
DEVELOPMENTS IN THE HISTORY OF ARBITRATION: A PAST FOR THE PRESENT?

FRANCIS CALVERT BOORMAN

Institute of Advanced Legal Studies, University of London

Abstract

It is not always easy to see the relevance of history to current practice, a complaint that might be levelled at the history of arbitration. Yet the uses made of history in work about the present state of arbitration show that some fascinating interventions have been made by both eminent academics and practitioners, with some important differences emerging in their interpretations. This article gives a brief overview of the history of legislation relating to arbitration, which predominantly relates to the relationship of arbitration with commerce and the courts. It also suggests that recent developments in studies of the history of arbitration challenge some of the assumptions made by those using it to illuminate the present. One particular difficulty with the way history has been used is the tendency to focus exclusively on commercial arbitration. Two detailed examples are given of areas that have received less attention; arbitration in the early railway industry and its use settling disputes for working-class friendly societies. These point the way to exploring a more diverse history, that looks beyond London, lawyers and commerce.

Keywords: arbitration; dispute resolution; history; Georgian; Victorian; railways; friendly societies; legislation.

[A] INTRODUCTION

What is the place of history in a discussion about current developments in arbitration? Don't ask a historian. The leap of faith needed to turn historical understanding into pithy advice will have to be taken by those with the necessary expertise; by practitioners, arbitrators and lawyers, if at all. But what the historian can (I hope) do is to show how some lawyers and arbitrators have indeed introduced history into their debates.

I will then chart how our understanding of the history of arbitration is developing, at a very exciting time for the field, which might necessitate some rethinking of how the history of arbitration is deployed. We can also point to some areas of the history of arbitration that have thus far been neglected, which could provide new perspectives on the present. The outcome will hopefully encourage use of the latest research and interest in the broadest perspectives.

Most scholarship concerning the history of arbitration focuses on its relationship with two communities: lawyers and merchants. Past legislators also appeared to share that approach, speaking largely of the effect new arbitration laws would have on commerce and the courts. I will describe the major legislation that was specifically targeted at the practice of arbitration during the two centuries following the Arbitration Act of 1698 and the ways that modern commentators have come to understand that legislation and its legacy. I will then go on to discuss a wider ecosystem of legislation that utilized arbitration, as clauses buried within laws pertaining to areas like the railway industry. This profusion of administrative law, which burgeoned in the 19th century, was not much commented on at the time by politicians and journalists who were convinced of the supremacy of *laissez-faire* government. Lawyers were not much involved in its administration, which fell to a new army of bureaucrats (Atiyah 2012: 233-236). This perhaps goes some way to explaining why much of the legal community has only shown a passing interest. I will go on to suggest that a working-class culture of using arbitration to resolve disputes also existed that had a rather uneasy relationship with state control and the legal system.

One way to illustrate how arbitration changed over the course of 200 years is via a five-minute walk down Fleet Street and the Strand on the edge of the City of London. We're going to start in the pub, specifically Ye Olde Cheshire Cheese, rebuilt shortly after the Great Fire of London and still serving today. In the latter part of the 17th century an arbitration might take place in just such a pub or tavern. The basic structure was for parties in dispute to agree to arbitration, instead of the costly and slow process of litigation. The parties might well be two merchants. One had sent the other a shipment of wine on credit, but they disagreed about the quality and therefore the price. They would begin by drawing up an indenture that set out the terms and remit of the arbitration. Each merchant chose an arbitrator, who might be a friend or colleague. In our case, they would naturally appoint other merchants with experience in the wine trade. The parties then generally signed arbitration bonds, which obliged them to forfeit a sum of money if they did not comply

with the award of the arbitrators, typically double the amount in dispute (a 'penal' sum), so that refusing to perform the award was not a viable option. The two arbitrators then attempted to come to an agreement over all matters in dispute. They would hear any relevant evidence from witnesses, examine accounts, and would no doubt have the arduous task of tasting the wine. They then made their award or, if they still couldn't agree, they would have nominated another merchant as umpire and his decision was final. For our merchants, he ordered a price for the wine and said when the money should be paid, perhaps in instalments.

Five minutes' walk to the west lets us simultaneously leap forward 200 years, to the building of the Royal Courts of Justice, that Victorian Gothic edifice still overlooking the Strand. As part of the design for the building, the architect George Edmund Street included detailed features for an arbitration room, where, when it opened in 1882, two parties might have their reference heard by an official referee, a barrister appointed by the Lord Chancellor. The symbolism is significant, the arbitration process finding a space in the very heart of the legal system.

[B] LEGISLATION

Returning to the mid-17th century, the court of King's Bench provided another method for enforcing agreements to arbitrate. They could be entered as a rule of court, which made the failure to perform an award a contempt of court, resulting in attachment, or imprisonment. The procedure to register could either begin with the submission to the court of an existing agreement to arbitrate, or as a reference to arbitration from the court, where an action had already been initiated. The first legislation relating to arbitration was the Arbitration Act of 1698, which was set in motion by the newly established Board of Trade and drawn up by the philosopher John Locke to legislate for the existing rule of court procedure (Arbitration Act 1698). Locke explicitly stated that the Arbitration Act was intended to aid the smooth functioning of trade, although it was not much called upon for over half a century. Court-backed arbitrations became more popular from the 1750s. It is worth noting that significant legalization of the arbitration process took place via its increasing interaction with the courts, without further intervention from Parliament (Horwitz & Oldham 1993).

The next general Act pertaining to arbitration was not passed until William IV was on the throne, in 1833. Much of the impetus for reforming arbitration law during the mid-19th century came from Henry Brougham, Baron Brougham from 1830 and Lord Chancellor between 1830 and 1834

(Lobban 2021). However, his vision of a comprehensive system of public arbitration, including a court of arbitration as some other European countries had, was never realized. An Arbitration Bill introduced by Lord Chief Justice Tenterden in 1832 also promised several changes that were not enacted until much later, but he died soon afterwards and the bill was lost with him (A bill, intituled, an act for settling controversies by arbitration, 1831-1832).

Instead, limited new provisions for arbitration were rolled into Brougham's single Civil Procedure Act 1833, notably losing a clause compelling reference to arbitration in matters of account.¹ Submissions to arbitration registered as a rule of court were made irrevocable unless by consent of the court, and arbitrators appointed by rule or order of court could compel the attendance of witnesses and administer oaths, meaning false testimony before an arbitrator would be perjury (Civil Procedure Act 1833, sections 39-41). The application of these provisions was slightly uncertain and seemed limited to references from the common law courts. When a reference was made from Chancery, the arbitrator could not, in the eyes of some at least, compel witnesses to attend (Russell 1853: 8). Further reform would take another two decades.

Lord Brougham introduced another bill to overhaul the law relating to arbitration in 1852, but it was overtaken by wider legal reforms and again more limited provisions were passed. The arbitration clauses in the Common Law Procedure Act 1854 allowed the court or judge to refer cases relating wholly or partly to matters of account to arbitration before they came to trial, with the option to appoint a County Court judge, at that time only recently created, as arbitrator. If the parties to an arbitration required it, a question of law or fact from an arbitration could be decided in court. Arbitrators could issue an award in whole or part as a special case to be decided by the court. An arbitration agreement was made sufficient cause to stay proceedings. If the parties failed to appoint arbitrators or an umpire then a judge could do so on their behalf and if one party failed to appoint an arbitrator then the arbitrator appointed by the other party could act alone. All awards could be made a rule of court unless explicit provision was made to the contrary. Finally, the ambiguity surrounding awards which ordered the transfer of land was removed. Henceforth, a rule of court registering an award ordering the transfer of land would have the effect of a judgment in ejectment (Common Law Procedure Act 1854, sections 3 to 17).

¹ *Hansard House of Lords Debates* 3rd ser, vol 16 (1833) col 336.

The Judicature Commission acknowledged the ongoing popularity of arbitration in the 1860s, but also identified ongoing problems. It found that arbitrations were generally referred to a barrister or an expert. Barristers were likely to have other commitments and might repeatedly adjourn hearings causing long delays. Experts lacked enough knowledge of legal proceedings and rules of evidence. The arbitrator set his own charges making arbitration expensive. Finally, there was no appeal or remedy unless the arbitrator acted particularly egregiously (Judicature Commission 1868-1869: 12-13).

The Judicature Act 1873 set up government officers called official referees, who were appointed by the Lord Chancellor, a system of patronage which the barrister and Member of Parliament Henry Matthews 'looked upon with the greatest dread and dislike'.² The newly established High Court, Court of Appeal or any Divisional Court could refer causes to them for inquiry and report, then accept this in part or whole and enforce it as a judgment. Matters requiring 'prolonged examination of documents or accounts, or any scientific or local investigation' could be referred to an official referee, or a special referee chosen by the parties (Judicature Act 1873: sections 56-59). The set cost of official referees was £5 for a reference, with further charges for every hour above two days' work and for every night spent away from London (Judicature Act 1873: section 83; Foulks Lynch 1902: 73-74). Several minor adjustments were also made to arbitration in the Judicature Act 1884 (sections 8-11).

The complete codification of law relating to arbitration was then attempted in the 1880s; Lord Bramwell introduced a bill with the backing of the Council of the London Chamber of Commerce in 1884, who saw it as a precondition to establishing the London Court of International Arbitration, which was eventually founded in 1892. Like Brougham's earlier efforts, Bramwell's bill was overtaken by an alternative, drafted by Parliamentary Counsel, and with the more modest aim of consolidating existing legislation, despite opposition amongst the business community (Veeder & Dye 1992: 330, 341, 343-347). The Arbitration Act 1889 repealed the relevant clauses from the five previous Acts that made general amendments to the law relating to arbitration, passed in 1698, 1833, 1854, 1873 and 1884. Rather than providing much that was innovative, the 1889 Act is perhaps more notable for offering consistency, certainty and even decisiveness that the judiciary had not quite managed to provide previously. The jurisdiction of courts to review awards, either on the merits or on a point of law, was ambiguous at best for much of

² *Hansard House of Commons Debates* 3rd ser vol 216 (1873) cols 679-680.

the 19th century, but there was an increasing use of judicial review and confidence in setting aside awards on procedural grounds, particularly after 1854 (Arthurs 1985: 73-74). Following the 1889 Act, judicial review of awards was entrenched, registration with the courts presumed and even a complete process provided, unless it was explicitly rejected in the arbitration agreement. The standard was for a single arbitrator to make an award within three months. The ability to compel arbitrators to state a case swept aside the persistent confusion about whether an award could be reviewed at all, but especially on a point of law (Arthurs 1985: 73-75).

[C] INTERPRETATIONS

Stavros Brekoulakis has fairly recently summarized this legislation and usefully relates the overturning of a myth that the judiciary were hostile to arbitration, which has been an important development in the historiography. Brekoulakis sees each stage of legislation as an improvement, although this is not his main focus, his ultimate aim being to argue against a view of arbitration as a relatively recent neoliberal project. He states that:

Despite the remarkable success of the Locke Act, a large number of arbitration agreements, namely agreements under the common law, were not protected against revocation. This was corrected later in the 19th century, when the Common Law Procedure Act 1854 was enacted (Brekoulakis 2019: 134).

In Brekoulakis' telling, legislation had finally given proper protection to arbitration agreements and each stage of legislation improved the overall process.

The Chief Justice of New South Wales, Hon T F Bathurst, has also used the history of commercial arbitration to reframe current debates, similarly keen to dispel its reputation as a novel threat to the rule of law. However, he sees a more problematic relationship with court oversight, stating that the usual question asked is: 'How far ought we to permit private parties to exclude determination of their dispute by a court?' However, in his opinion, a reading of the history of the law relating to arbitration suggests that the question should really be: 'How far ought courts be willing to intervene in arbitrations between private parties?' (Bathurst 2018: 3-4). His approach produces a particular difference with Brekoulakis on their attitudes to *Scott v Avery*, a case decided by the House of Lords in 1856, in which Lord Campbell denied the hostility of the courts to arbitration, but in doing so reaffirmed the doctrine that the courts could not have their jurisdiction ousted by an agreement to arbitrate, which had the

consequence that agreements to arbitrate were revocable. Brekoulakis describes *Scott v Avery* as a 'distinct advance', Bathurst as 'a dead end' (Brekoulakis 2019: 138; Bathurst 2018: 27).³

One new study challenges the assumptions of both Brekoulakis and Bathurst with regard to the Arbitration Act 1698 and demonstrates our need for a dynamic relationship with the past. In a reassessment of the 1698 Act, questioning its necessity and legacy, Julia Kelsoe has shown in her recent dissertation that that legislation was not introduced to solve a problem relating to enforcement of awards using penal bonds as previous legal historians had presumed. It was not in fact a response that had been sought by merchants and did not really answer any legal need. Instead it was most likely considered a simpler alternative to creating a merchant court and an attempt by members of the Board of Trade, including John Locke, to secure the very existence of the newly created board. This helps to explain why merchants were continuing to call for such a court nearly a century later and also why the enforcement procedure of the Arbitration Act 1698 was not much used, only becoming widespread in the King's Bench in the 1770s under Lord Mansfield (Kelsoe 2021: 144-154). Kelsoe's work strengthens the view that the legalization of arbitration was not a teleological process, but often somewhat incidental.

The motivations of later legislators were also complex and tactical, involving party politics and personal animosity. Procedural considerations in Parliament were sometimes vital and, above all, legislators were generally trying to catch up with trends that were already underway. We have already seen that attempts to codify arbitration law by Lords Brougham and Bramwell were rejected in favour of introducing changes that were mostly grouped with other legal reforms. So not only had legal professionals become the prime movers in reforming arbitration, that reform became entangled with changes to the courts and legal system. Johnny Veeder and Brian Dye have written about how both courts and Parliament took a 'piecemeal pragmatic approach' to arbitration, resulting in statutes that 'were mainly concerned with the relationship between the English courts and the arbitral process' (Veeder & Dye 1992: 333).

Douglas Yarn suggests a more forceful critique of the narrative of improvement arguing that strengthening the enforcement of arbitrations by the courts came at the cost of any independence from the legal system and much of the flexibility that had been a dwindling advantage of arbitration for centuries. Yarn describes this process of 'isomorphism through institutionalization' as the death of alternative dispute resolution.

³ Developments in the common law really warrant an article of their own.

His concern is for the loss of the conciliatory elements of arbitration, replacing it with an adversarial process in the image of the legal system. The aspects of arbitration identified by lawyers at the time and some legal historians as problems of enforcement, Yarn instead describes as the very basis of a consensual process, with a conciliatory approach. These three aspects were voluntary submission to arbitration, the ability of parties to revoke an agreement to arbitrate, and the control of parties over the proceedings. Revocation in particular came to be seen as a problem that needed to be fixed, rather than the right of a consenting party and was incrementally eliminated in the 19th century. Yarn also identifies the move from having to opt in to registering an arbitration with the courts to having to opt out as another erosion of consent. The Arbitration Act 1889 made the rule of court procedure universal, completing the transformation of arbitration into an adjudicative and coercive process. The institutionalization of arbitration by commercial organizations compounded these legal reforms, adding further inflexibility through the control they had over their members and their use of form contracts (Yarn 2004: 990-1011).

Although private commercial tribunals became increasingly popular, they never received legislative backing, a point of contention that had long been tangled with political issues (Burset 2016). In contrast to Yarn, Harry Arthurs has identified a separate worldview in the commercial community to the legal profession, which they used as the basis for arbitration tribunals, maintaining *de facto* independence from the law. He identifies this as both an economic and ideological threat to the legal profession. He contrasts the settled and universal justice of lawyers with the discretionary and particular justice favoured by commerce, which valued results over process (Arthurs 1985: 71).

The range of interpretations of arbitration legislation, from strengthening and improving arbitration, to its destruction as a true alternative to the courts, gives a flavour of the vitality of historical argument. Yet this focus on general Arbitration Acts and commercial arbitration is also reductive and I think encourages an excessive focus on London, on activities and institutions within an area not much greater than that covered by our five-minute walk. Arthurs identifies provisions for arbitration in regulatory legislation as increasing rapidly during the 19th century and Chantal Stebbings has noted the influence of arbitration on the proliferation of statutory tribunals in the 19th century (Arthurs 1985: 100-103; Stebbings 2006: 280-281). What then were these other areas in which arbitration was sanctioned by legislation which did not necessarily

concern the courts or merchants, but were vitally important to structural changes in the economy?

There were many, but space confines us to two examples. First is the transfer of land. It was a legal commonplace that it was not possible to make an award transferring title to land, but this was not observed in practice; arbitrators often made awards deciding ownership of land without difficulty in enforcement, but the land still had to be conveyed between parties. Private arbitrations involving land, including questions regarding boundaries, title, value and proper use were routine (Roebuck & Ors 2019: chapter 13). Arbitration became a matter of public policy from the 17th century, as arbitration clauses were inserted in private Acts of Parliament sanctioning the enclosure of common land. This practice became systematic in the 18th century and reached its apogee in the late 18th and early 19th centuries, continuing to the end of the 19th century (Roebuck & Ors 2019: 171-176).⁴

Enclosure was a legislative precedent, though not acknowledged at the time, of other major transfers of land that relied on arbitration as a mechanism for solving disputes, including construction of the canal network from the late 18th century. Construction of a canal required a private Act of Parliament and these often included arbitration clauses, relating to compensation for compulsory land purchases, or damages done to land by works surrounding the canal such as drainage, and disputes over water usage with other businesses that relied on local waterways (Roebuck & Ors 2019: 177-178). Arbitration clauses inserted in private Acts continued to represent a method by which the competing interests affected by canal construction could be kept at arm's length from the state if disputes arose. For instance, an Act of 1825 which sanctioned construction of a canal in Cornwall allowed for the appointment of arbitrators by the canal company and the Mayor and Corporation of Lostwithiel in case of injury to the navigation or other use of the river Fowey. If the company failed to appoint an arbitrator or umpire within 20 days, then the Sherriff of Cornwall could do so on their behalf (An Act for making and maintaining a navigable Canal from Tarras Pill in the Parish of Duloe in the County of Cornwall, to or near Moors Water in the Parish of Liskeard in the said County 1825: section 8).

⁴ For late 19th-century arbitrations, see, for instance, Kresen Kernow (Cornwall Archives), TF/2642/1-3.

Railways

The area of land needed by the railways was of another order. A railway historian, Mark Casson, is perhaps ideally situated to see the importance of land in the Victorian economy, but also the role that government played in deciding its distribution:

many of the major industrial projects in Victorian Britain involved the compulsory acquisition of land. Far from defending individual property rights unequivocally, government presided over a system in which large amounts of private land were acquired, subject to arbitration, by the authority of the state (Casson 2009: 37) .

As with canals, from the very early years of steam railway construction in England, arbitration clauses were included in parliamentary Acts to settle disputes related to purchases of land, construction and operation of the railways, particularly relating to their status as a public utility, including their role carrying the mail and in maintaining telegraph lines. Land acquisition was the most aggravated aspect of the growth of railway companies, as it placed railway capitalists in conflict with the wealth and political influence of the landed aristocracy and gentry. The passage of several pieces of consolidating legislation in 1845 saw representatives of the railway interest and the landed classes clash in Parliament over the legal form their future relationship would take (Sharman 1986: 18). This is a key date in the history of arbitration legislation often ignored. The Land Clauses Consolidation Act was passed in 1845 and presented by Peel's Government as a compromise between the needs of the landowners and the railway companies (Kostal 2012: 162-164).

The Act did allow railway companies to expropriate land, but, in cases where the offer or claim of compensation exceeded £50, the landowner could choose to settle their claim by jury, special jury or arbitration. The arbitration could not be avoided by inaction; if either party failed to appoint an arbitrator within 14 days, the single arbitrator could proceed *ex parte*, and if an umpire was not appointed then the Board of Trade could make the selection. Awards could not be set aside 'for irregularity or error in matter of form'. Costs would be paid entirely by the railway company unless the price decided was the same or less than the initial offer (Land Clauses Consolidation Act 1845: sections 22-37). While the Land Clauses Consolidation Act related to land taken for any undertaking of a public nature, the arbitration provisions were extended further in the special case of railway companies. The Railways Clauses Consolidation Act 1845 also stipulated the process to be followed if any disputes were determined by arbitration, either under its own provisions or any special Act pertaining to the railways (Railways Clauses Consolidation Act

1845: sections 126-137). One eventuality specifically provided for was arbitration to settle compensation for injury done to mining operations on land needed for the railways (Railways Clauses Consolidation Act 1845: section 81). The Companies Clauses Consolidation Act 1845 also contained very similar provisions for a full arbitration process (Companies Clauses Consolidation Act 1845: sections 128-134).

Following the Land Clauses Consolidation Act 1845, the *Law Review* lauded what it thought to be the first provision for ‘compulsory arbitration’ (*Law Review* 1845: 366). The railway press, previously favourable towards arbitration, was complaining of widespread extortion, supported by the confidential reports of the London and North Western Railway’s purchases, which expose a litany of overpayment for land (Kostal 2012: 170-171). Statutory arbitration of land prices may have proved expensive for railway companies, but private arbitration of other disputes still had strong advocates over turning to the courts. At the end of 1845 *The Times* saw railway legislation as ‘a mass of confusion and trash’ and to avoid ‘unascertained and conflicting law’ parties were advised to

resort to arbitration instead. If their agents cannot bring the matter to a satisfactory termination, two mutual friends and an umpire is a cheaper, and we feel disposed to believe, a more competent tribunal, than the law courts administering most expensively a confussed [sic] mass of stuff called railway laws. By all means avoid, by arbitration, the glorious uncertainty and the inglorious ruin of law proceedings (*The Times*, 2 December 1845).

Railway companies did indeed seek out privately arranged arbitration in other disputes. Another point of contention between the landed interest and the railway companies was the payment of rates. Local taxes, rates were collected by parishes on the rental value of properties. Upkeep of the local poor was by far the largest burden upon the rates. Railways passed through many rural parishes each of which levied taxes upon the entire railway company, shifting the burden of taxation from landowners. The companies challenged this practice in the courts with little effect, and Parliament had little appetite for wholesale reform. The intransigence of courts and Parliament led railway companies to seek long-term negotiated settlements with parishes from around 1855, bolstered by teams of local valuers and solicitors. If agreement could not be reached, arbitration was preferred to litigation by both sides (Kostal 2012: chapter 6).

Arbitration of disputes between railway companies was increasingly included in legislation, strengthening the role of the Board of Trade as regulator, which in 1842 was authorized to arbitrate disputes between connecting railways regarding their joint traffic, upon the application of

either party, but only to decide the apportionment of expenses (An Act for the Better Regulation of Railways and for the Conveyance of Troops 1842: section 11; Cleveland-Stevens 1915: 78-79). In 1859 the Railway Companies Arbitration Act was passed, with the major innovation that if any company failed to appoint an arbitrator within 14 days of a written request, the Board of Trade would appoint one for them (An Act to enable Railway Companies to settle their Differences with other Companies by Arbitration 1859). The Regulation of Railways Act 1868 allowed the Board of Trade to call upon an arbitrator in any dispute involving a railway company that it was required to decide and could also appoint an arbitrator to decide compensation if someone was injured or killed in an accident on the railway (Regulation of Railways Act 1868: section 25; Daunton 2001: 267).

The Regulation of Railways Act 1873 set up the new positions of up to three Railway Commissioners, one a legal professional and the other two lay members, and two Assistant Commissioners. Henceforth any difference involving a railway company that might have been referred to arbitration could be referred to the commissioners as arbitrator or umpire and they could rescind, vary or add to the award of a previous arbitrator (An Act to amend the powers of the Board of Trade with respect to inquiries, arbitrations, appointments, and other matters under special Acts, and to amend the Regulation of Railways Act, 1873, so far as regards the reference of differences to the Railway Commissioners in lieu of Arbitrators 1874). The Commissioners formed a ‘court’, which attracted unfavourable commentary in an anonymous pamphlet when they were due for reappointment. The pamphlet claimed that from their appointment in 1873 until the end of 1877 the Commissioners had settled an average of only 18 disputes annually, while costing nearly £10,000 in salaries. The Commissioners had also sat as arbitrators in 29 cases in that time (Anon 1878).

The sheer size, complexity, widespread ownership and public utility of railway companies continued to pose a problem to legislators and the courts that warranted one-off interventions, and a particularly powerful example was the insolvency of the London, Chatham and Dover Railway in 1866 (Lobban 2013). It resulted in a high-profile arbitration, which was a quintessential example of legislators’ need for out-of-court dispute resolution in cases of such novelty and complexity as there was no legal provision for winding up railway companies and separating competing claims on their assets until after the case of the London, Chatham and Dover Railway. Instead, the London Chatham and Dover Railway (Arbitration) Act 1869 was passed, appointing the Marquis of Salisbury

and Lord Cairns as arbitrators for their respective knowledge of the railway business and the law. The arbitrators were enabled to determine the rights of the various creditors and restructure the company as they thought fit (London Chatham and Dover Railway (Arbitration) Act 1869: sections 16-17, 21-22). Their awards of 1870 and 1871 were successful at reconstituting the insolvent company as a going concern, receiving widespread plaudits for their approach, but without forming any particular precedent for future practice.

[D] FRIENDLY SOCIETIES

That kind of interventionism was welcomed in some aspects of railway regulation, but suffered a negative response when turned on working-class organizations such as the friendly society. Friendly societies were possibly first established as early as the 16th century, spreading widely during the 18th century, and were recognized as national organizations by law in 1793 (Cordery 2003: 20-24, 45-46). They offered members a financial safety net in case of infirmity or ill health, as well as opportunities for sociability. Their importance in working-class life is undeniable, as by the middle of the 19th century their membership outstripped those of the trade unions, cooperatives and Methodist societies combined (Ismay 2018: 3). The societies defended 'the philosophy of voluntarism, the principle that people's needs are best met by self-help without state intervention' (Cordery 2003: 5). The avoidance of conflict within societies was a vital aspiration, to the extent that name-calling and controversial topics of discussion were banned by some societies (Cordery 2003: 27-28).

The 1793 Act recognized friendly societies as corporate bodies and required them to verify their rules with justices of the peace, although this stipulation was not enforced (Cordery 2003: 46, 85). The Act approved the resolution of disputes between members and a society by arbitration, and the inclusion of this mechanism in societies' rules (Friendly Societies Act 1793: section 16). In accordance with the Act, some societies included an arbitration clause in their rules that allowed members to refer to arbitration any dispute over fines, expulsion or any other matter (Scarth 1798: 35-36). Although their legal status changed little following the 1793 Act, rules for the societies became increasingly standardized in the 19th century (Friendly Societies Act 1809: section 3).

Many cases came before magistrates, often because an agreement to arbitrate had not been honoured. In a cause at the Guildhall in 1826, Jane Roberts challenged her removal from the membership of the Sisters

of Friendship, a benefit society for women. She had been ‘scratched’ from the membership for being ‘most shameful intoxicated’ and talking over other members. However, the magistrate found that a stewardess of the society had taken the decision, with no recourse to arbitration despite a clause in the society’s rules. The magistrate thus ordered that Roberts be reinstated (*The Times*, 30 August 1826).

The Friendly Societies Act 1829 appointed a barrister as registrar to certify the rules of societies, although registration was also made entirely voluntary. Societies that registered had to have rules in place to decide disputes, whether by reference to a magistrate or arbitrators. If arbitration was chosen then a panel of arbitrators with no personal interest in the institution had to be elected, with no fewer than three chosen by ballot to dispose of a dispute. If any party did not conform with the arbitrators’ award, complaint could be made to a magistrate and if the amount owed went unpaid and was less than 10 shillings, the magistrate could levy the sum and costs by distress (Friendly Societies Act 1829: section 27).

Another Friendly Societies Act of 1846 created the new national position of Registrar of Friendly Societies and abolished local oversight. Disputes between society trustees and managers or members could henceforth be referred to the Registrar, with disputes over sums below £20 automatically referred (Friendly Societies Act 1846: sections 15-16). From 1855 if disputes were supposed to be heard by an arbitrator, but none was appointed or no decision was made within 40 days of an appointment, the dispute would be taken to the County Court, which would also enforce the decisions of arbitrators (Friendly Societies Act 1855: section 40-41).

The Odd Fellows provide a case study of dispute resolution in friendly societies; they were ‘the quintessential convivial society’ in their early iteration, and they developed to become one of the largest friendly societies (Ismay 2018:123-125). A lodge of Odd Fellows was started in Manchester in 1810 and by 1814 there were six, which met together that year to form a Grand Lodge Committee and eventually became the Independent Order of Oddfellows, Manchester Unity. This became the blueprint for a network of lodges that provided travel relief to members (Ismay 2018: 128-139). The Odd Fellows tried to prevent disputes between members through rules that set out proper forms of address, also banning behaviour ranging from swearing or fighting to talking about religion or politics. Lectures were given at regular meetings that outlined how members ought to behave, illustrated with relevant stories from the Bible. When these measures failed to prevent dispute, a group of Odd Fellows would try to settle their

differences with a drinking session, a practice known as ‘proceeding to harmony’ (Ismay 2018: 144-148). From around the 1820s, more formal dispute resolution mechanisms also became necessary, particularly as the organization grew in size and drinking culture fell out of favour. One of these mechanisms was to give members the right to present their case to the Grand Master of the Order as the final stage of their dispute settlement process (Ismay 2018: 153-157).

The Odd Fellows had developed a complete formal dispute resolution process by the late 1840s. If a dispute arose it was initially referred to a ‘jury’ elected by the lodge where the dispute originated. If their award was disputed, the case could be taken to a Committee, formed of deputies elected by each lodge in that district. A final right of appeal was to the Board of Directors, made up of 12 directors elected at the annual moveable committee, together with the Grand Master, Deputy Grand Master and ex-Grand Master. This system actually precluded them from registering under the Friendly Societies Act 1846, as it did not conform with the Act’s regulations, a fact testified to by the Registrar (Select Committee of House of Lords 1847-1848: 542).

A Royal Commission that investigated friendly societies in 1871-1874 heard evidence that arbitration was supported by the vast majority of members and managers of the societies, though objected to by a few members of affiliated societies. It was in the burial societies that major objections emerged as the sums in dispute tended to be small, the managers of one society tended to arbitrate the disputes of another and there were difficulties related to the actual member being, by the nature of claims made on this type of society, deceased (Commissioners Appointed to Inquire into Friendly and Benefit Building Societies 1874: 23). Ensuing legislation in 1875 allowed consensual references to the Registrar to arbitrate (Friendly Societies Act 1875: section 22).

It is not difficult to see why arbitration with strong elements of mediation and negotiation remained widely accepted as the form of dispute resolution for members of friendly societies. Their belief in the principles of brotherhood and mutual aid did not encourage strict observance of a rigid set of rules to the detriment of the society’s wider aims of assisting and improving its members, making the equitable outcomes of an arbitration well suited to their purpose. The spirit of self-help and independence made recourse to external interference of any kind unpalatable. Politicians had to balance their desire to oversee the workings of friendly societies with the strong possibility of regulating them out of existence and prompting a turn to more overtly political organizations.

[E] CONCLUSION

I hope this discussion has given some insight into the way that the history of arbitration has been used to inform current debates and how new developments in the history of arbitration are important to consider. While its relationship with law and commerce was the focus of the major legislation relating to the arbitration process, it was much more widely applied by legislators to administrative functions. A more developed understanding of that wider application of arbitration amongst legal historians and perhaps even policymakers is made more important by the fact that it was not much remarked upon as it happened.

The examples I have taken here—of arbitration facilitating large transfers of land, arbitration being used to navigate novel and complex disputes concerning railway companies, and arbitration deciding disputes in working-class organizations—give just a taste of the wide range of historical applications in which legislators intervened, although often after the fact. One common thread is the creation of officials and commissioners who could act as arbitrators, some developing directly from the role of arbitrator. From official referees to the registrar of friendly societies, their arbitration services were generally offered and rarely imposed.

I hope that the wider ecosystem I have described is proof enough that the form and practice of arbitration has not just been a matter of contention between London lawyers and commercial men. It was certainly a concern for the barrister presiding over arbitration proceedings in the Royal Courts of Justice, but also the group of Odd Fellows, proceeding to harmony in a Manchester tavern.

About the Author

Dr Francis Boorman's profile is available on the website of the [Institute of Advanced Legal Studies](#).

Email: francis.boorman@sas.ac.uk.

References

- Anon (1878) *Observations upon the Working of 'The Regulation of Railways Act, 1873,' and of the Court of the Railway Commissioners* Manchester.
- Arthurs, H W (1985) *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* Toronto & Buffalo: University of Toronto Press.

- Atiyah, P S (2012) *The Rise and Fall of Freedom of Contract* Oxford: Oxford University Press (online edn first published 1985).
- Bathurst, Hon T F (2018) '[The History of the Law of Commercial Arbitration](#)' Francis Forbes Society Australian Legal History Tutorial, delivered 18 October 2018.
- Brekoulakis, Stavros (2019) 'The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration' 39(1) *Oxford Journal of Legal Studies* 124-150.
- Burset, Christian R (2016) 'Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire' 34(3) *Law and History Review* 615-647.
- Casson, Mark (2009) *The World's First Railway System: Enterprise, Competition, and Regulation on the Railway Network in Victorian Britain* Oxford: Oxford University Press.
- Cleveland-Stevens, Edward (1915) *English Railways: Their Development and their Relation to the State* London: Routledge & Sons.
- Commissioners Appointed to Inquire into Friendly and Benefit Building Societies (1874) *Fourth Report*, Parliamentary Papers vol XLVII, paper C 961.
- Cordery, Simon (2003) *British Friendly Societies, 1750-1914* New York: Palgrave.
- Daunton, Martin (2001) *Trusting Leviathan: The Politics of Taxation in Britain, 1799-1914* Cambridge: Cambridge University Press.
- Foulks Lynch, H, 4th edn rev D F de l'Hoste Ranking (1902) *Redress by Arbitration; A Digest of the Law Relating to Arbitrations and Awards* London.
- Horwitz, Henry & James Oldham (1993) 'John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century' 36(1) *The Historical Journal* 137-159.
- Ismay, Penelope (2018) *Trust among Strangers: Friendly Societies in Modern Britain* Cambridge: Cambridge University Press.
- Judicature Commission (1868-1869) *First Report*, Parliamentary Papers vol XXV, paper 4130.
- Kelsoe, Julia (2021) 'Arbitration in English Law and Society before the Act of 1698' unpublished DPhil dissertation, Clare College, Cambridge.

Kostal, R W (1997, online edn 2012) *Law and English Railway Capitalism, 1825-1875* Oxford: Oxford University Press.

Law Review (1845) 2.

Lobban, Michael (2013) “Cutting the Gordian Knot?” Arbitration and Company Insolvency in the 1870s’ in Matthew Dyson & David Ibbetson (eds) *Law and Legal Process: Substantive Law and Procedure in English Legal History* Cambridge: Cambridge University Press, chapter 14.

Lobban, Michael (2021) ‘Brougham, Henry Peter, first Baron Brougham and Vaux’ *Oxford Dictionary of National Biography* online edn Oxford: Oxford University Press.

Roebuck, Derek & Ors (2019) *English Arbitration and Mediation in the Long Eighteenth Century* Oxford: HOLO Books, The Arbitration Press.

Russell, Francis (1853) *A Letter to the Right Hon Lord Brougham & Vaux, on the Improvement and Consolidation of the Law of Arbitration* London.

Sharman, Frank A (1986) ‘The History of The Lands Clauses Consolidation Act 1845 – I’ 7(1) *Statute Law Review* 13-22.

Scarth, Michael (1798) *The Rules and Regulations of the Castle Eden Friendly Society* London: W Clarke.

Select Committee of House of Lords (1847-1848) *Provident Associations Fraud Prevention Bill* Parliamentary Papers vol XVI, paper 648.

Stebbins, Chantal (2006) *Legal Foundations of Tribunals in Nineteenth Century England* Cambridge: Cambridge University Press.

The Times, 30 August 1826.

The Times, 2 December 1845.

Veeder, V V & Brian Dye (1992) ‘Lord Bramwell’s Arbitration Code 1884-1889’ 8(4) *Arbitration International* 329-386.

Yarn, Douglas (2004) ‘The Death of ADR: A Cautionary Tale of Isomorphism through Institutionalization’ 108(4) *Penn State Law Review* 929-1015.

Cases

Scott v Avery 22 10 ER 1121 (1856)

Legislation, Regulations and Rules

A bill, intituled, an act for settling controversies by arbitration 1831-1832, Parliamentary Papers, vol I, paper 129

An Act for making and maintaining a navigable Canal from Tarras Pill in the Parish of Duloe in the County of Cornwall, to or near Moors Water in the Parish of Liskeard in the said County, and for making several Roads to communicate therewith 1825, 6 Geo IV, c163

An Act for the Better Regulation of Railways and for the Conveyance of Troops 1842, 5 & 6 Vict c55

An Act to amend the powers of the Board of Trade with respect to inquiries, arbitrations, appointments, and other matters under special Acts, and to amend the Regulation of Railways Act, 1873, so far as regards the reference of differences to the Railway Commissioners in lieu of Arbitrators 1874, 37 & 38 Vict c40

An Act to enable Railway Companies to settle their Differences with other Companies by Arbitration 1859, 22 & 23 Vict c59

Arbitration Act 1698, 9 & 10 Will III c15

Arbitration Act 1889, 52 & 53 Vict c49

Civil Procedure Act 1833, 3 & 4 Will IV c42

Common Law Procedure Act 1854, 17 & 18 Vict c125

Companies Clauses Consolidation Act 1845, 8 & 9 Vict c16

Friendly Societies Act 1793, 33 Geo III c54

Friendly Societies Act 1809, 49 Geo III c125

Friendly Societies Act 1829, 10 Geo IV c56

Friendly Societies Act 1846, 9 & 10 Vict c27

Friendly Societies Act 1855, 18 & 19 Vict c63

Friendly Societies Act 1875, 38 & 39 Vict c60

Judicature Act 1873, 36 & 37 Vict c66

Judicature Act 1884, 47 & 48 Vict c61

Land Clauses Consolidation Act 1845, 8 & 9 Vict c18

London Chatham and Dover Railway (Arbitration) Act 1869, 32 & 33 Vict
c116

Railways Clauses Consolidation Act 1845, 8 & 9 Vict c20

Regulation of Railways Act 1868, 31 & 32 Vict c119