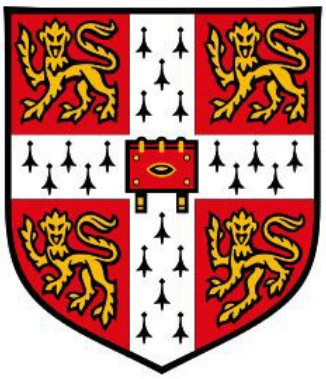
Arbitration in English law and society before the Act of 1698



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Declaration

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

Abstract

Title: ‘Arbitration in English law and society before the Act of 1698’
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The practice of arbitration in seventeenth-century England has not been the subject of close study. Whilst it is recognised that arbitration was a frequent and favoured means to resolve disputes during this period, previous historians of law and social relations have focused their interests elsewhere. For this reason, little has been done to account for the passing of the Arbitration Act of 1698, the first statute on arbitration to be enacted in England. The statute authorised the common law courts to imprison individuals for contempt of court if they did not comply with an arbitration, thereby instituting a procedure that is dissonant with the conciliatory or ‘neighbourly’ view of arbitration espoused by historians. The aim, then, of this dissertation is two-fold. First, it seeks to examine the structure and practice of arbitration in seventeenth-century England to provide an introduction to the topic that is long overdue. This will offer the opportunity to question some of the prevailing assumptions about the process, and it will be argued that arbitration was often far more coercive and law-related than previous scholars have indicated. Second, the dissertation seeks to explain why the Arbitration Act of 1698 was made. By analysing the development of the enforcement procedure on which the statute was based and the circumstances surrounding its drafting and enactment, it will be argued that the making of the Arbitration Act was in fact a two-stage process, the stages of which were largely unconnected to one another. Whereas the enforcement procedure the statute authorised first arose to ensure the specific performance of an award, the decision made as a result of an arbitration, the statute itself was passed to address political and commercial exigencies of the 1690s.

To my father, from here to the stars and back again.

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Conventions and abbreviations

Unless otherwise stated, the place of publication of all printed works is London. Dates have not been modernised, but 1 January is taken as the beginning of each new year. Where quotations are in English, their original spelling and punctuation have been retained. Where quotations are instead in Law French or Latin, an English translation is provided in the body of the text with the original wording included either in brackets or in the footnotes.

Case law is cited using the standard legal abbreviations that refer to the name of the law reporter in whose reports a case was recorded. For more information on legal citations, see Donald Raistrick, *Index to Legal Citations and Abbreviations* (2nd edn, 1993).

AJLH	*American Journal of Legal History*
Arbitrium redivivum	*Arbitrium Redivivum: or the Law of Arbitration* (1694)
ASSI	Assize files, TNA
Baker, *ELH*	J.H. Baker, *An Introduction to English Legal History* (5th edn, Oxford, 2019)
BL	British Library, London
Blackstone, *Commentaries*	W. Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765-1770)
Bodl.	Bodleian Library, Oxford
Brooke	R. Brooke, *La Graunde Abridgement* (1573)
C	Chancery files, TNA
CJ	*Journal of the House of Commons*, 12 vols. (1802-1803)
CO	Colonial Office files, TNA
Cockburn, *Assizes*	J.S. Cockburn, *A History of English Assizes 1558-1714* (Cambridge, 1972)
CUL	Cambridge University Library, Cambridge
EHR	*English Historical Review*

Fitzherbert	A. Fitzherbert, *La Graunde Abridgement* (1565, orig. 1514-1516)
HJ	*Historical Journal*
HLRO	House of Lords Record Office
HMC	Historical Manuscripts Commission
Horwitz and Oldham, 'Arbitration'	H. Horwitz and J. Oldham, 'John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century', *HJ*, 36 (1993): 137-59
HR	*Historical Research*
Ibbetson, *HILO*	D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999)
JDR	*Journal of Dispute Resolution*
JLH	*Journal of Legal History*
LHR	*Law and History Review*
LJ	*Journal of the House of Lords*, 64 vols. (1767-1830)
LQR	*Law Quarterly Review*
March, *Actions for Slander* I	J. March, *Actions for Slaunder…to which is added, Awards or Arbitrements* (1647)
March, *Actions for Slander* II	J. March, *Actions for Slaunder…to which is added, Awards or Arbitrements* (1648)
ODNB	H.C.G. Matthew and B. Harrison, eds., *Oxford Dictionary of National Biography* (Oxford, 2004)
PC	Privy Council files, TNA
PH	*Parliamentary History*
P&P	*Past & Present*
SH	*Social History*
Simpson, *CLC*	A.W.B. Simpson, *A History of the Common Law of Contract* (Oxford, 1975)

Statham	M.C. Klingelsmith, trans., *Statham's Abridgment of the Law* (Boston, M.A., 1915)
TNA	The National Archives, Kew, London
West, *Symboleography*	W. West, *Three Treatises, Of the second part of Symbolæographie* (1594)
WMQ	*William and Mary Quarterly*
YB	The Year Books (c. 1268-1535)

Introduction

This dissertation examines the practice of arbitration in seventeenth-century England. It was conceived to address the incongruity that whilst historians have recognised the importance of arbitration to early modern individuals, little has been written about the process itself. Arbitration was (and is) a method of dispute resolution whereby individuals authorised one or more third parties known as 'arbitrators' to decide their differences. As many scholars have noted, it was also a principal way to resolve disputes in the seventeenth century, one that was employed far more frequently than litigation.[1] Yet what the process entailed, how it was perceived by contemporaries, and whether it changed over the period in question are matters which have remained predominantly unexplored and unanswered. This lack of scrutiny can be largely attributed to the fact that the interests of scholars have lain elsewhere. For legal historians, scholars whom one might expect to have examined arbitration given its modern, legalised form, these interests have centred on the law and its doctrinal development.[2] For social historians who have investigated the ways in which early modern individuals resolved disputes and maintained social order, these interests have instead revolved around the use of litigation[3] and the incidence of crime.[4] Put simply, the study of arbitration has fallen outside the confines of preceding historiographical trends.

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[1] Most notable is legal historian John Baker's comment that '[t]he courts of law never, at any period in history, displaced arbitration as a normal method of dispute resolution in England'. J.H. Baker, 'From lovedays to commercial arbitration' in his *Collected papers on English legal history* (3 vols., Cambridge, 2013), vol. I, p. 432.

[2] For examples that will be used in this dissertation, see Simpson, *CLC*; Ibbetson, *HILO*; Baker, *ELH;* J.S. Rogers, *The early history of the law of bills and notes* (Cambridge, 1995); J. Swain, *The law of contract, 1670-1870* (Cambridge, 2015).

[3] For example, C.W. Brooks, *Pettyfoggers and vipers of the commonwealth: the 'lower branch' of the legal profession in early modern England* (Cambridge, 1986); *Lawyers, litigation and English society since 1450* (1998); C. Muldrew, 'Credit and the courts: debt litigation in a seventeenth-century urban community', *EHR* 46:1 (1993), pp. 23-38; W.A. Champion, 'Recourse to law and the meaning of the great litigation decline, 1650-1750' in *Communities and courts in Britain 1150-1900* (1977), pp. 179-98.

[4] For example, J.S. Cockburn, ed., *Crime in England 1550-1800* (1977); J.A. Sharpe, *Crime in seventeenth-century England. A county study* (Cambridge, 1983); *Crime in early modern England 1550-1750* (1984); J.M. Beattie, *Crime and the courts, 1660-1800* (Oxford, 1986); C. Herrup, *The common peace: participation and the criminal law in seventeenth-century England* (Cambridge, 1987).

This is not to say that arbitration has been entirely overlooked in previous studies. Indeed, it is widely held amongst social historians that arbitration was a conciliatory and 'neighbourly' way to resolve disputes in seventeenth-century England. They have maintained that because its procedure was informal and was often carried out by friends, neighbours, or kin, arbitration was more likely than litigation to bring a peaceful and lasting settlement to a dispute.[5] This view of arbitration has been applied in turn to argue that early modern England was a consensual society: the preference shown by contemporaries for the process has been used to contend that English society encouraged a 'culture of reconciliation';[6] and the fact that lawsuits were often concluded by arbitration has been emphasised to claim that the wide scale litigiousness of the period did not have a corrosive effect on social relations.[7] Yet by stressing its conciliatory nature, scholars have repeatedly construed arbitration as an endpoint in the disputing process. Less attention has been given to the instances in which arbitration failed to resolve a dispute and to the mechanisms that were in place to enforce compliance with it.[8]

Admittedly, instances of 'failed' arbitration likely composed only a small portion of the total number of arbitrations conducted in the seventeenth century, but to disregard them entirely makes it difficult to explain the enactment of the Arbitration Act of 1698, the first statute on arbitration to be passed in England.[9] The Act was fundamentally concerned with enforcement: it authorised the courts to imprison parties for contempt if they did not comply with an arbitration. Interestingly, this was done by means of a legal fiction.[10] Parties who drew up a written contract known as a 'submission' to arbitrate their dispute were permitted to enter the document into a court's rule book so that the terms of the submission could be

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[5] M. Ingram, 'Communities and courts: law and disorder in early-seventeenth-century Wiltshire' in *Crime in England 1550-1800*, ed. J.S. Cockburn (1977), pp. 110, 125-26; K. Wrightson, *English society 1580-1680*, 61-62.

[6] C. Muldrew, 'The culture of reconciliation: community and the settlement of economic disputes in early modern England', *HJ* 39:4 (1996), pp. 915-42.

[7] J.A. Sharpe, '"Such disagreement betwyx neighbours": litigation and human relations in early modern England' in *Disputes and settlements: law and human relations in the west*, ed. J. Bossy (Cambridge, 1983), pp. 167-87; 'The people and the law' in *Popular culture in seventeenth-century England*, ed. B. Reay (1985), pp. 244-70.

[8] This is in contrast to work conducted on 'failed' arbitrations from the medieval period. For example, see J. Biancalana, 'The legal framework of arbitration in fifteenth-century England', *AJLH* 47:4 (2005), pp. 347-82, at pp. 363-75; M. Stevens, 'Failed arbitrations before the court of Common Pleas: cases relating to London and Londoners, 1400-68', *JLH* 31:1 (2010), pp. 21-44.

[9] 'An act for determining differences by arbitration', 9 & 10 Wm. III, c. 15.

[10] L. Harmon, 'Falling off the vine: legal fictions and the doctrine of substantive judgment', *Yale Law Journal* 100 (1990), pp. 1-71; E. Moglen, 'Legal fictions and common law legal theory: some historical reflections', *Tel Aviv University Studies in Law* 10 (1990), pp. 33-62; J.H. Baker, *The law's two bodies: some evidential problems in English legal history* (Oxford, 2001), pp. 33-57.

taken as having been ordered by the court itself. If these terms were later breached, most notably by having one of the parties not perform the arbitrator's decision or 'award', the party would be held in contempt of the fictional rule and be subjected to the court's penalising process. Whilst legal historians and scholars have shown that the Act's enforcement procedure built on existing judicial practice[11] and have offered legal explanations for its enactment,[12] save for a few exceptions they have ignored the historical context in which the Act was made.[13] Consequently, little has been done to consolidate the Act with the conciliatory view of arbitration put forward by social historians so that the question of why the Act was needed remains unresolved.

The aim, then, of this dissertation is two-fold. First, it seeks to provide what can be seen as a historical introduction to seventeenth-century arbitration by investigating what the process entailed and how it was practised. Second, it seeks to examine more fully the reasons for the enactment of the Arbitration Act in order to clarify why the enforcement procedure it authorised was needed. Chapters 1 and 2 will address the first of these aims albeit in different ways. Chapter 1 will consider the principal elements of arbitration—namely, the people it involved, the submission used to contract it, and the award which resulted from it—and will specify the legal rules that applied to each of them. As these rules prescribed how an arbitration should be composed and conducted, they provide a useful framework on which to base the rest of this study. With this framework in place, Chapter 2 will proceed to examine how arbitration was actually practised by individuals in the seventeenth century and the reasons they might have had for choosing it. Relying on contemporary accounts of arbitration found in diaries and letters, the chapter will retrace the steps disputing parties would have taken to set up and carry out an arbitration, from their initial agreement to arbitrate the dispute to their later performance of the arbitrator's award. Chapters 3 and 4 will then shift the focus to the second aim of the dissertation, to consider why the Arbitration Act was made,

[11] Horwitz and Oldham, 'Arbitration', pp. 141-43.
[12] For example, P. Sayre, 'Development of commercial arbitration law', *Yale Law Journal* 37:5 (1928), pp. 595-617, at p. 604; S. Simpson, 'Specific enforcement of arbitration contracts', *University of Pennsylvania Law Review* 83:2 (1934), pp. 160-76, at pp. 160-61; E. Wolaver, 'The historical background of commercial arbitration', *University of Pennsylvania Law Review* 83:2 (1934), pp. 132-46, at p. 139; E. Moglen, 'Commercial arbitration in the eighteenth century: searching for the transformation of American law', *Yale Law Journal* 93:1 (1983), pp. 135-52, at p. 137; D. Yarn, 'The death of ADR: a cautionary tale of isomorphism through institutionalization', *Pennsylvania State Law Review* 108:4 (2004), pp. 929-1015, at pp. 985-86.
[13] Notable exceptions include Horwitz and Oldham, 'Arbitration', 138-44; C. Burset, 'Merchant courts, arbitration, and the politics of commercial litigation in the eighteenth-century British Empire', *LHR* 34:3 (2016), pp. 615-47, at pp. 615-17.

with each chapter examining a different aspect of the Act's making. Chapter 3 will explore how the enforcement procedure authorised by the Act first developed and will lend support to the scholarly claim that the statute built on existing judicial practice. But the chapter will go beyond mere confirmation: it will investigate how arbitration was enforced by the courts before the Act's passing to contextualise the change it later implemented, and it will bring into question explanations raised in previous scholarship for this change. Finally, Chapter 4 will centre on the making of the Arbitration Act itself, examining the circumstances surrounding its drafting and approval. It will reveal the ostensibly surprising finding that the Act had been composed by the philosopher John Locke in his role as a member of William III's Board of Trade and will argue that the statute had been advanced more to address commercial and political exigencies of the 1690s than to alter or improve how arbitration was enforced at the time. Together Chapters 3 and 4 will show that the question of why the Arbitration Act was needed is in fact more complex than previously recognised, and it is hoped that by taking the time to investigate the matter at length, this dissertation will be better positioned to comment on what the Act's passing says about the conciliatory view of arbitration espoused by scholars.

1. Sources

As it is the intention of the dissertation to approach the subject of seventeenth-century arbitration from multiple angles, taking into consideration factors that are legal, social, political and even commercial in nature, it is worth examining the principal categories of primary source material on which this study will rely. These categories are: treatises on arbitration; legal reports and records; diaries and letters; and sources relating to the Arbitration Act. The following discussion will briefly introduce each category of sources, explaining how they will be used in this study and, where applicable, addressing some of the issues encountered in analysing them.

1.1 Treatises on arbitration

The first category of primary source material that will be used in this dissertation are treatises on arbitration that were published during the period. Admittedly, stating that these works were 'on' arbitration is somewhat misleading as only one of the treatises was devoted entirely to the subject; the rest considered the process alongside other matters. It is also worth noting

that these works were essentially legal in character: they were written by lawyers and, despite some claims otherwise, they were intended primarily for a legal audience. As such, their use in this study will be largely confined to examining the 'law' side of this dissertation, in particular the legal rules that prescribed the practice of arbitration at the time.

Of the treatises on arbitration from the period, there are three which merit particular attention as they examine the process in a far greater level of detail. The first is the legal writer William West's *Symboleography*, a work that was first published in 1590 and then amended and reprinted in two parts, the first in 1592 and the second in 1594.[14] It was in this second part that West first included an entire chapter on arbitration, entitled 'Of Compromises and Arbitrements' and composed of fifty sections,[15] in which he examined issues pertaining to the people involved in arbitration, the submission ('compromise'), and the award ('arbitrement'), and provided examples of the legal instruments employed in the process.[16] Whilst West's work predates the seventeenth century and cites legal cases and other authorities that are even older, there are nevertheless two specific reasons for including the work in this study. First, as the treatise represented the earliest, systematic analysis of arbitration, it would become by the seventeenth century an authority in its own right, cited by legal writers and practitioners alike.[17] It was therefore historically significant to the period, if less useful for commenting on the practice of arbitration as it existed at the time. Second, *Symboleography* also served, both in form and substance, as inspiration for later treatises on the process, in some instances writers even copying West's text verbatim into their own writings. It seems sensible, then, to examine the text 'at source' rather than having to rely on second-hand versions of its analysis.

The second treatise to consider arbitration in more detail is one that was actually from the seventeenth century, although initially its treatment of the subject was spread over two publications. In 1647, John March, the Commonwealth legal writer, reporter, and reformer, published a work with its full title being *Actions for Slaunder, or, a Methodicall Collection*

[14] For information on the publication of West's works, see E. Poole, 'West's *Symboleography*: an Elizabethan formulary' in *Law and social change in British history*, eds. J.A. Guy and H.G. Beale (1984), pp. 96-106.
[15] The chapter is actually composed of forty-nine sections, the forty-sixth having been omitted from the text. This appears to have been rectified by the third edition of the treatise published in 1601.
[16] West, *Symboleography*, fols. 3-16v. Keeping with the convention used by other scholars, my citations regarding this text will use the section numbers provided by West rather than the folio number.
[17] *Arbitrium redivivum*, pp. 6-9, 15, 18; W. Sheppard, *A grand abridgment of the common and statute law of England* (1675), p. 175.

under certain Grounds and Heads…To which is added, Awards or Arbitrements.[18] Whilst one may rightly question what the offence of slander and the practice of arbitration had to do with one another, as March himself explained, both issues tended to result in unnecessary litigation, much of which he claimed could be avoided if there were simply a better recognition of the legal grounds and rules relating to them.[19] March's endeavours were apparently well-received, for only a year later he published a second work on these issues that served to supplement, rather than revise, his original treatise.[20] For this reason, March's analysis of arbitration can be found in both parts of what collectively became known as *Actions for Slander*: in the first, consideration is given to what March identifies as the five parts of arbitration, a classification that was itself derived from an earlier decision of Sir James Dyer, the chief justice of the Common Pleas for the period of 1559-1582;[21] in the second, whilst some additional reflection is given to the subject, particularly in relation to awards, most of the text is used to provide examples of written submissions and awards, some of which are taken directly from West's earlier work.

The third treatise to note is one that may properly be called a treatise 'on' arbitration as it was the first work to consider arbitration as a subject matter in its own right. Published anonymously in 1694 as *Arbitrium Redivivum, or the Law of Arbitration*, it is also notable for the fact that it was printed only four years before the passing of the Arbitration Act.[22] In terms of composition, much of the work compiles together earlier treatments of the subject, including the treatises of West and March but also Sir John Dodderidge's *The English Lawyer* (1631),[23] discussed below, and the legal reporter William Style's *The Practical Register* (1657), which had abridged several legal cases concerning awards from the 1640s.[24] Usefully, the author tends to be more reflective in his analysis of the various components of arbitration, noting not just the legal rules and principles relating to a particular topic but also what the 'usual course' was at the time.[25] The treatise therefore provides a window into the legal practice of arbitration at the end of the seventeenth century, and by comparing the work

[18] March, *Actions for slander* I, with pp. 149-241 concerning arbitration.
[19] Ibid., title page.
[20] March, *Actions for slander* II, with pp. 32-97 concerning arbitration.
[21] Dyer's judgement, in which he set out the five things 'incident' to an award, was reported in *Browne v Meverell* (1561/2), Benl. 107. March also appears to have copied the pleadings of the case into the second part of his work. March, *Actions for slander* II, pp. 39-52.
[22] *Arbitrium redivivum*. The title page notes that the author had also written *Regula placitandi* (1691), a pleading manual.
[23] Refer to n. 26 below.
[24] W. Style, *Regestrum practicale: or, the practical register* (1657).
[25] For example, see *Arbitrium Redivivum*, pp. 39, 68, 77.

to earlier treatises on the process, it is possible to get a sense of how arbitration might have changed over the period.

Whilst *Symboleography*, *Actions for Slander*, and *Arbitrium Redivivum* were the most detailed works on arbitration to be published during or immediately before the seventeenth century, they were not the only works to examine the process. Other treatises which discussed its practice and which will be used in this study include the judge Sir John Dodderidge's *The English Lawyer* (1631), which uses the subject of arbitration as an example of how the type of legal logic Dodderidge proposed in his treatise could be applied;[26] the lawyer William Noy's *Principal Grounds and Maxims* (1641), which includes a brief overview of the practice in recognition that parties involved in the other issues discussed in the work might seek for them to be 'quietly ended by friends';[27] and the legal reformer William Sheppard's two legal encyclopaedias, *The Faithful Councellor* (1651) and *The Epitome of Laws* (1656), both of which consider aspects of arbitration, such as the common 'faults' of awards, in the context of a wider analysis of the legal system at the time.[28] Consideration will also be given to legal dictionaries from the period, such as John Cowell's *The Interpreter* (1607) or Thomas Blount's *Nomo-Lexicon* (1670), as almost invariably they contained definitions and etymologies of words relating to arbitration, suggesting that, at least in a legal context, there was a clear idea of what constituted the process.[29]

1.2 Legal reports and records

The second category of source material to be used in this dissertation, classified here as legal reports and records, can essentially be subdivided into two groups. The first group are the nominate reports, a series of printed reports of legal arguments and discussions had principally before the justices of the common law courts which took on the name of the

[26] J. Dodderidge, *The English lawyer. Describing a method for the managing of the lawes of this land* (1631), 166-90. As noted in the preface to the treatise, an earlier work attributed to Dodderidge, *The lawyers light* (1629), was printed from an imperfect copy of the manuscript used for the treatise. For more information on these works, see R. Terrill, 'Humanism and rhetoric in legal education: the contribution of Sir John Dodderidge (1555-1628), *JLH* 2:1 (1981), pp. 30-44.
[27] W. Noy, *A treatise of the principall grounds and maximes of the lawes of this kingdome* (1641), pp. 125-130.
[28] W. Sheppard, *The faithful councellor: or the marrow of the law* (1651), pp. 259-64, 649-50; *An epitome of all the common and statute lawes of this nation* (1656), pp. 105-15.
[29] J. Cowell, *The interpreter: or booke containing the signification of words* (Cambridge, 1607); T. Blount, *Nomo-lexicon: a law-dictionary* (1670).

reporter who was attributed, however disingenuously, with having recorded them.[30] For doctrinal legal historians of the seventeenth century, the nominate reports are their bread and butter; a reliance on their use is taken as so self-evident that, on the whole, little reflection is given to their nature as a primary source. As this dissertation is not about the law but rather considers the law's impact on the contemporary practice of arbitration, the intended audience of this study is more wide-ranging than just legal historians, so it is worth taking some time to consider both the reports and the general practice of law reporting in more detail.

As John Baker and others have shown, the tradition of law reporting has a long and varied history in England, but its purpose has largely remained the same.[31] Given that the official record of a court tended to document only the formulaic pleadings of the parties to a lawsuit and the end-result of their case, for the sake of legal learning and to ground legal practitioners' arguments, the practice developed of recording in manuscript form what was discussed by the lawyers and judges *in banc*. With the advent of printing, many of these manuscript reports were put into print, and by the seventeenth century both the manuscript versions and their printed copies had become an important resource for substantive and procedural law. The nominate reports are, therefore, an invaluable tool for learning about the legal treatment of arbitration at the time, and by undertaking an exhaustive and, admittedly, exhausting search of the reports connected to the period, more than 500 distinct cases have been uncovered that involve arbitration in some way.[32] These reported cases will be used primarily in two ways. First, they will serve as an additional source for learning about the legal rules prescribing the practice of arbitration. Indeed, as the treatises on arbitration discussed above were often based on these cases, in analysing a given rule on arbitration, priority will be given to the reported case or cases to which the rule related, they being the more direct or 'root' source. Second, the reports will be used to examine how the courts enforced arbitration, a particular area of interest given that the Arbitration Act was concerned with enforcement. As, broadly speaking, the format of a case recorded in the nominate reports begins by identifying the legal action on which the case was brought, it is possible to determine what actions were used to enforce arbitration and to get a sense for which of these

[30] Baker, *ELH*, pp. 192-95.
[31] Ibid., pp. 188-97; C. Stebbings, ed., *Law Reporting in Britain* (1995).
[32] The principal categories of cases involving arbitration are as follows: those where a suit was stated to have been resolved by arbitration; where an award was pleaded to bar further proceedings in a suit; where an aggrieved party sued an opponent for not performing the award; where a legal matter relating to the validity of an award was heard on appeal; where an aggrieved party motioned for a writ of attachment to be issued against his opponent for not performing the award. This final category will be examined in more detail in Chapter 3.

actions were preferred at the time. Moreover, as the reports document *in banc* discussions, they can be used to gauge the receptiveness of the judges to particular arguments or practices. This will prove crucial to the dissertation's analysis of references, a specific type of arbitration whereby a pending lawsuit was referred by order of a court to an arbitrator or 'referee' to decide, as it would appear that during the 1650s and 1660s the court of King's Bench departed from the courts of Common Pleas and Exchequer, the other two common law courts, by refusing to enforce references in a new way.

Yet as even legal historians would admit, using the nominate reports as a source material is not without issue. For one thing, most of the reporters had never intended for their reports to be distributed amongst a wider audience, so they made no attempt at comprehensive coverage: they included only those cases that they believed were of interest, and they focused on the courts that were deemed to be most important to the development of the law.[33] One consequence of this practice was that, at least for the seventeenth century, there are few nominate reports of cases heard before the courts of Common Pleas and Exchequer, the court of King's Bench having been considered to be the more innovative at the time.[34] The fact, then, that the court of King's Bench diverged from the other courts in its enforcement of references in the 1650s and 1660s is only known because it was explicitly stated in discussions before its justices;[35] unfortunately, no reported cases exist for the courts of Common Pleas and Exchequer to confirm this position. Another issue with the reports is that some are of objectively poor quality or, due to problems with printing, are factually incorrect.[36] Legal historians are accordingly urged to consult the manuscript versions of the reports where available, advice which this dissertation has not followed.[37] The only excuse that can be given for this lapse is timing: as the law and its effects on arbitration represent only one component of this study, priority had to be given to analysing other areas instead. Whilst this decision may be regretted at certain points in the following analysis, particularly in relation to the reluctance shown by the court of King's Bench noted above, these misgivings are to an extent eased in knowing that this dissertation is and only claims to be an introduction to the subject—further research can always been undertaken.

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[33] Baker, *ELH*, p. 194.
[34] Ibid.
[35] *Kene v Fleming* (1666), 2 Keb. 22; *Derbishire v Canon* (1669), 2 Keb. 579; *Tremenhere v Tresilim* (1670), 2 Keb. 664.
[36] Baker, *ELH*, pp. 192, 194.
[37] Ibid.; J. Oldham, 'Detecting non-fiction: sleuthing among manuscript case reports for what was *really* said' in *Law reporting in Britain*, ed. C. Stebbings (1995), pp. 133-68.

The second sub-group of legal source material that will be used in this study are the order books for the Western Circuit of the assizes, covering the period 1629-1688.[38] The Western Circuit was one of the six circuits of counties through which the common law justices and some serjeants-at-law would travel twice a year to administer the trials of suits initiated in their own courts, an event that was collectively known as the assizes.[39] By convention, when the justices, who travelled in pairs, would visit a particular county, they would divide between themselves the business to be attended, one administering criminal trials (the 'crown side') and the other civil trials (the '*nisi prius* side').[40] Whilst the crown side of the assizes has received disproportionately more attention in previous studies, particularly those by historians of crime,[41] this dissertation will focus instead on the *nisi prius* side of business to which the order books relate. Essentially, the order books recorded the directions or commands made by the administering assize judge during the course of a trial. These directions dealt with a wide range of issues, many of which were procedural, but the ones that are of interest to this study are those concerning references, the type of arbitration initiated when a pending lawsuit was referred to arbitration on the order of a court. In the common law courts, this order was typically made at trial, when the parties or their legal counsel were present to agree to the reference, so for this reason the order books provide an unparalleled view into how this form of arbitration began. But not only do the order books record how a reference was initiated; they also reveal what occurred when the assize judge's order was not followed. They are, therefore, a useful source for examining methods of enforcement and, as we shall see, for contextualising the enforcement procedure that would be implemented by the Arbitration Act.

As a final point to note, it must be mentioned that parts of the Western Circuit's order books have been printed in previous works. On behalf of the Somerset record society, T.G. Barnes transcribed the assize orders that were made in Somerset, one of the six counties on the Western Circuit, for the period 1629-1640,[42] an undertaking that J.S. Cockburn continued

[38] TNA, ASSI 24/20-23. These order books are the only surviving records of their kind from the assize circuits, the others having apparently been lost or destroyed. For more information on the surviving records of the assizes, see J.S. Cockburn, 'Introduction' in *Western circuit assize orders 1629-1648* (1976).
[39] For a historical overview of the assizes and the six assize circuits, see Cockburn, *Assizes*, pp. 23-48.
[40] For the crown side of business, see Cockburn, *Assizes,* pp. 86-133. For the *nisi prius* side, see Cockburn, *Assizes*, pp. 134-50; Baker, *ELH*, pp. 23-25.
[41] For example, Herrup, *The common peace*; L. Knafla, '"John at love killed her": the assizes and the criminal law in early modern England', *University of Toronto Law Journal* 35:3 (1985), pp. 305-20.
[42] T.G. Barnes, ed., *Somerset assize orders 1629-1640* (Frome, 1959).

for 1640-1659.[43] Then, separately, Cockburn also compiled a calendar of the assize orders from the entire circuit for the period 1629-1648, which, whilst not presenting the exact text as written in the order books, does get across the principal issues, actors, and directions specified in each order.[44] Whilst these are useful resources, particularly to get a sense of the types of matters dealt with on the *nisi prius* side of the assizes in addition to administering trials, this dissertation will instead rely on the original manuscript sources for its analysis. Partly this is to ensure that the original form and language of the orders are preserved, but, more importantly, it is because the orders made in the second half of the seventeenth century, a period which, on the whole, has not been covered by Barnes and Cockburn, will be crucial to this study. It is in these later assize orders that a change in how the orders made to refer a suit to arbitration was first implemented, a change that will prove significant to explaining in turn how the enforcement procedure of the Arbitration Act developed.

1.3 Diaries and letters

The third category of source material that will be examined in the dissertation are contemporary diaries and letters, two related types of sources that will be used to investigate what the practice of arbitration was like beyond the legal rules that prescribed it. The decision to analyse these sources has been heavily influenced by the works of Craig Muldrew and Christine Churches, both of whom recognised that legal records and reports can only tell us so much about disputes and the efforts taken to resolve them.[45] Their own analyses of these types of sources have also revealed how contemporary diaries and letters can be used to explore not just the events that occurred outside the courtroom but also the motivations and responses contemporaries had in relation to them, a finding that has served to inspire this dissertation's study of why contemporaries chose to arbitrate their disputes. However, in selecting which diaries and letters to include in this analysis, it must be noted that only those that have since been put into print have been examined. Whilst this decision was again made to prioritise research into other areas, it was also taken in recognition that a given diary or letter-book from the period is not guaranteed to include accounts of arbitration. Indeed, of the

[43] J.S. Cockburn, ed., *Somerset assize orders 1640-1659* (Frome, 1971).
[44] J.S. Cockburn, ed., *Western Circuit assize orders 1629-1648* (1976).
[45] Muldrew, 'Culture of reconciliation'; C. Churches, 'False friends, spiteful enemies: a community at law in early modern England', *HJ* 71:174 (1998), pp. 52-74. For a similar perspective, see S. Roberts, 'The study of dispute: anthropological perspectives' in *Dispute and settlements: law and human relations in the West*, ed. J. Bossy (Cambridge, 1983), pp. 19-23.

more than forty printed diaries and letter-books that were consulted for this study, far fewer, only about twenty, recounted occasions in which the writers participated in arbitration in some way. Rather than take the time to seek out manuscript sources that are in no way certain to touch on the topic of arbitration, it was thought best to focus attention and efforts on more productive outcomes.

Yet even restricting the analysis to printed diaries and letters has not been without challenge. For one thing, despite every intention to consider as diverse an array of sources as possible, the extent to which this study can be seen as 'typical' of the practice of arbitration at the time is limited to those works that contain accounts of arbitration. And far from representing a wide cross-section of seventeenth-century society, the writers who described arbitration in their diaries and letters were a more homogenous bunch: whilst geographically diverse, they were entirely men; they were of the 'middling sort' or higher;[46] and their professions were largely, though not entirely, limited to matters concerning trade, law and policy, and religion. Nor were their accounts of arbitration set out in the same level of detail. Whereas some accounts of the process consisted of several paragraphs or even pages of discussion, others were nothing more than the comment that the writer had 'made an end' of a dispute.[47] Whilst both types of description will find use in this study, the more detailed accounts tend to have greater analytical value as more can be drawn from them, so they will be relied on more frequently as a result. By favouring these accounts, however, the analysis will at times become skewed toward these writer's remarks, bringing into doubt whether it can depict a representative view of what arbitration was like at the time.

A second challenge presented in analysing these sources is language. Whilst there may have been a more fixed vocabulary for arbitration in legal publications, the writers of the diaries and letters consulted for this study often employed a far looser terminology to refer to the process, such as to bring an 'end' to a dispute or to make 'peace' or 'friends' of the disputing parties. The problem with such language is that it was not used exclusively for arbitration: writers also employed the same terms and phrases in relation to other out-of-court methods of dispute resolution. How, then, is it possible to know when the writers were referring to arbitration and when they were not? Unfortunately, there is no fool-proof way to get around this issue. Indeed, there are many contemporary accounts where it may never be possible to say with complete certainty that the process described was arbitration. The best,

[46] J. Barry and C.W. Brooks, eds., *The middling sort of people. Culture, society and politics in England, 1500-1800* (Basingstoke, 1994).
[47] A. Macfarlane, ed., *The diary of Ralph Josselin, 1616-1683* (1976), p. 116.

then, that this dissertation can do is to set out the approach it has taken to identify and classify accounts as arbitration, recognising that there might be other ways to address this issue as well.[48]

Essentially, the approach of this dissertation is composed of two limbs. The first limb is the more straightforward and relies on the fact that whilst the writers of diaries and letters might have used a looser language in referring to arbitration, they did still employ words like 'arbitrator' and 'award'. As these words were specific to arbitration—they were not used in relation to other dispute resolution methods—it is presumed that when an account contains these keywords, the process it described was arbitration. The second limb of the dissertation's approach concerns instead instances in which these keywords were not used. In such cases, an account is only taken to describe arbitration if the following three conditions are evident: (i) that a third party be involved in the dispute resolution process; (ii) that the third party be responsible for deciding the matters in dispute; and (iii) that the disputing parties retain control over how the process be conducted. None of these conditions should come as much of a surprise. They take what are the hallmarks of arbitration even today—that people empower an arbitrator to resolve their differences but decide between themselves how and when the arbitration should take place—and put them into a workable form.[49] It should be noted, however, that this dissertation has been strict in applying this limb. If it is not entirely clear from an account that all three conditions have been or would be met at a later date, the process described in the account is not identified as arbitration. Whilst the effect of this approach might be to exclude from study some actual accounts of arbitration for lack of clarity, it has been felt nonetheless that the benefits of sticking to a defined approach outweigh this possibility.

1.4 Sources relating to the Arbitration Act

The fourth and final category of source material that will be used in this dissertation are sources that relate to the drafting of the Arbitration Act. As this category is less cohesive in

[48] For example, both James Sharpe and Craig Muldrew have distinguished between 'informal' and 'formal' arbitration as a way of characterisation. Sharpe, 'Such disagreement betwyx neighbours', pp. 182-87; Muldrew, 'Culture of reconciliation', pp. 931-32, 935-36.

[49] Although the questions of how and when an arbitration should take place have been largely replaced in modern practice by a choice between institutional arbitration bodies and rules. A. Tweeddale and K. Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (Oxford, 2010), pp. 61-96.

nature than the others, the only real link between the sources being the Act itself, each source or type of source will be considered in turn. First amongst them is the Board of Trade's earliest minute book or 'journal', covering the period from the Board's first meeting on 25 June 1696 until 20 February 1696/7.[50] The Board of Trade was the committee established by William III on 15 May 1696 to administer the trade-related and colonial affairs of the kingdom.[51] Accordingly, its journal begins by reproducing the royal commission that empowered its members for this purpose,[52] and then proceeds to record the official business that was dealt with at every meeting, a heading for each topic discussed written in the journal's margins. It is in this journal, then, that the directions given to John Locke, one of the Board's members, on 19 August to draw up a proposal relating to arbitration are recorded,[53] as well as Locke's later announcement on 9 November that he had drafted a bill.[54] The journal is, therefore, pivotal to learning about the origins of the Arbitration Act, and for this reason the entries pertaining to its drafting have been transcribed in Appendix II. These entries and others will be used not only to trace the Act's substantive development, but also to contextualise these efforts amidst certain issues the Board was facing in the early months of its inception, something that this dissertation will argue is key to understanding why the Act was made.

The second type of source or, in this case, sources that will be used in the following analysis are John Locke's personal papers and correspondence, Locke, as we have seen, having been responsible for the original draft of the bill, henceforth called the 'arbitration bill'. Locke's papers relating to his work for the Board of Trade are found in the manuscript collection of his writings and other texts at the Bodleian Library, and those that will be examined for this dissertation include two drafts of the arbitration bill, discussed below, as well as a report on the Board's progress that was sent to the House of Commons in 1699/1700 which Locke appears to have edited by hand.[55] The letters Locke received from the merchants Benjamin Furly and Paul D'Aranda, presumably in response to queries he had made regarding the drafting of the arbitration bill, will also be considered, the former

[50] TNA, CO 391/9.
[51] For information on the establishment of the Board of Trade, see R. Lees, 'Parliament and the proposal for a council of trade, 1695-6', *EHR* 54:213 (1939), pp. 38-66; I.K. Steele, *Politics of colonial policy: the Board of Trade in colonial administration 1696-1720* (Oxford, 1968), pp. 3-18.
[52] TNA, CO 391/9, pp. 1-6.
[53] TNA, CO 391/9, p. 62.
[54] Ibid., p. 222.
[55] Bodl., Locke MS c. 30, fols. 119-24.

included in the fifth volume of E.S. de Beer's *The Correspondence of John Locke*,[56] and the latter found in the above manuscript collection, a transcription of which will appear in Mark Goldie's forthcoming publication on Locke's later correspondence.[57] All of these sources will be used to understand how John Locke came to draft the arbitration bill and to support the argument this dissertation will make that the proposal Locke had been directed by the Board to formulate had not concerned arbitration *per se*, but rather references.

The third and final type of source that will be considered for this analysis are the actual drafts of the Arbitration Act. Excluding its final form, there are four known drafts of this statute: two are found in Locke's personal papers;[58] another is recorded in a supplementary book or 'journal' of the Board of Trade;[59] and the final is included in the manuscripts of the House of Lords.[60] As each of these drafts will be examined in this study, they have been transcribed in Appendices III-V, respectively, with a copy of the Arbitration Act set out in Appendix VI for comparison. There are two points of note regarding these drafts. First, whilst the making of each draft can be largely attributed to the arbitration bill's time before a particular institution, such as the Board of Trade or, as we shall see, the Privy Council, the identity of their actual drafters, the individuals who either wrote the drafts or were responsible for their drafting, is in most cases unclear. This is even true for Locke's original draft of the bill: whilst the two drafts found in Locke's papers are set out under the heading 'Trade: Arbitration Bill 96', suggesting that they were composed at the time when Locke was reported to have drafted his bill, no indication is given as to which of the drafts was the original. Consequently, this dissertation will take time to analyse the two texts and to arrive at a conclusion on the matter, as only one of the drafts actually proposed the enforcement procedure which the Act would later implement. Second, whilst there may have been four drafts of the Act, the bill itself was revised on at least five separate occasions after the initial draft was made. Accordingly, consideration will also be given to the revisions that did not result in the full re-drafting of the arbitration bill, the revisions being, in certain cases, even more important to understanding why the Act was made than the drafts themselves.

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[56] E.S. de Beer, ed., *The correspondence of John Locke*, (8 vols., Oxford, 1976-1989), vol. V, pp. 689-92.
[57] Bodl., Locke MS c. 30, fols. 45-46. Professor Goldie has been very kind to include my transcription of this letter in his forthcoming work.
[58] Ibid., fol. 105.
[59] TNA, CO 389/14, pp. 90-92.
[60] HLRO, HL/PO/JO/10/1/498/1219.

2. Approaches of study

As a final topic by way of conclusion, there are two issues regarding this dissertation's approach that merit particular attention. First, as the above discussion on sources suggests, the scope of the 'law' side of this study will be limited to analysing the common law courts and the assizes. Obviously this will serve to qualify what the dissertation can say about the law and its effects on seventeenth-century arbitration. For one thing, the dissertation will overlook what occurred at the local level, a particular concern for social historians, the assizes having been seen as the imposition of royal, central justice on the provinces and not necessarily representative of local practices.[61] For another, the dissertation will largely ignore how other types of courts, such as the ecclesiastical courts or the courts of equity, dealt with arbitration, areas of research which have in the past produced some interesting findings.[62] Yet in light of the stated aims of this study, to examine the practice of arbitration during the period and to explain why the Arbitration Act was made, focusing on the common law courts and their associated institutions makes sense: not only did these courts formulate the legal rules prescribing how arbitration was formed and conducted, but, as we shall see, it was also in these courts that the enforcement procedure of the Act first developed. The courts are, therefore, most relevant to what this dissertation seeks to achieve, so it has been thought best to concentrate on them alone, particularly as there are other components to this study.

The second issue relating to the approach of this dissertation is that since the research conducted for its study began, the late Derek Roebuck published a book entitled *Arbitration and Mediation in Seventeenth-Century England*.[63] This work is part of a larger anthology that had been undertaken by Roebuck, then a retired academic and chartered arbitrator, to account for the practice of arbitration in English history, from Anglo-Saxon times until, most recently, the 'long' eighteenth century.[64] Whilst this has meant that certain matters specific to the seventeenth century, most notably the Arbitration Act, were of only secondary concern to

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[61] Cockburn, *Assizes*, pp. 65-69; Herrup, *The common peace*, p. 51.
[62] For ecclesiastical courts, see Sharpe, 'Such disagreement betwyx neighbours'; for courts of equity, see W.J. Jones, *The Elizabethan court of Chancery* (Oxford, 1967), pp. 266-80.
[63] D. Roebuck, *Arbitration and mediation in seventeenth-century England* (Oxford, 2017).
[64] These works have all been published by the publishing house Roebuck set up in Oxford for this purpose, known as HOLO Books: The Arbitration Press. The works are: *Early English arbitration* (2008); *Mediation and arbitration in the Middle Ages* (2013); *The golden age of arbitration* (2015); *Arbitration and mediation in seventeenth-century England* (2017); *English arbitration and mediation in the long eighteenth century* (2019).

Roebuck in writing his book,[65] there remains nonetheless a fair amount of overlap between Roebuck's work and this dissertation, both in subject matter and in the printed sources used for analysis. Unfortunately, much of this overlap is unavoidable, particularly in relation to the legal rules on arbitration as set out in the treatises published during the period. Where it has been possible to diverge, however, this dissertation has taken deliberate steps to do so, acknowledging in its text where further information can be gleaned from Roebuck's own analysis. What ultimately sets this dissertation apart, however, is its attempt to engage with previous scholarship: it seeks to examine the practice of arbitration to confirm whether it was the conciliatory process scholars have depicted it to be, and it seeks to account for the making of the Arbitration Act to consider what its passing says about this scholarly view. Without such engagement and, indeed, lacking any substantive argument, Roebuck's work can at most be seen to provide an additional window into what it must have been like to practice arbitration at the time.

[65] With their permission, Roebuck has substantially copied Horwitz and Oldham's analysis of the Arbitration Act in his work. Roebuck, *Arbitration in seventeenth-century England*, pp. 432-37.

1. Elements of Arbitration

To embark on this study of arbitration in seventeenth-century England, it is necessary to know what the process entailed. At most, previous historians have sketched out its basic functions and have recognised the relative flexibility of its procedure. In explaining the out-of-court methods of dispute resolution that were available at the time, Craig Muldrew noted that arbitration 'involved having the disputants agree to give the arbitrator power to umpire the matter in question'.[1] Comparing the effects of arbitration to those of litigation, Martin Ingram claimed that 'the relative informality of the procedure made it possible to be flexible, to take all relevant factors into consideration and to persuade the parties at issue to compromise their rights in the interests of harmony'.[2] Presumably because the interests of these scholars and others did not concern arbitration alone, it has not been thought needed to investigate the process in a more penetrative manner. Given the types of sources historians have used to examine the disputes of contemporaries and the methods employed to resolve them, it may also be that the practice of arbitration appeared nebulous: contemporaries clearly knew that they were taking part in this process, but they did not provide the clues to reveal arbitration in any comprehensive form.

Whilst the traditional divide between the fields of social history and legal history, one that Christopher Brooks was amongst the few exceptions to have bridged,[3] has largely prevented historians of the former from using the sources and tools of those of the latter, in order to examine what arbitration entailed in the seventeenth century, such a crossing is in fact necessary. For although the sources used by social historians might not be suited to identify what arbitration was at the time, legal sources from the period assuredly are. Not only is it in the nature of the law to prescribe the accepted boundaries of practices and, indeed, behaviours, but more specifically to arbitration, the seventeenth century marked the period in which legal treatises 'on' arbitration first began to be written and published. At least from a legal standpoint, then, there was a clear understanding of how arbitration was

[1] C. Muldrew, 'The culture of reconciliation: community and the settlement of economic disputes in early modern England', *HJ* 39:4 (1996), pp. 915-42, at p. 931.
[2] M.J. Ingram, 'Communities and courts: law and disorder in early-seventeenth century Wiltshire' in *Crime in England 1550-1800*, ed. J.S. Cockburn (1977), pp. 110-34, at p. 125.
[3] Most notably, C.W. Brooks, *Law, politics and society in early modern England* (Cambridge, 2008).

composed and conducted. Whilst it may be questioned how applicable or representative this legal view was of the practice of arbitration at the time, in the absence of any other way to explain the process, detailing what arbitration was according to the law can at least provide a useful framework on which to base the rest of this study.[4] Accordingly, the purpose of this chapter is to examine the key elements of arbitration as prescribed by the law: the people who were involved in the process; the submission that was used to contract it;[5] and the award which resulted from it.

1. People

The first element of arbitration were the people involved in the process: the parties who agreed to arbitrate their dispute; the arbitrators they chose to resolve the matter; and the umpire who would essentially take over for the arbitrators in the event that they could not make an award. This section will be used to examine these categories of people in turn, focusing not just on who could take on the roles but also on the legal rules and principles that prescribed their duties and powers. As we shall see, there were not many rules in relation to these roles, the courts taking a largely hands-off approach, but the rules that did apply were crucial to the practice of arbitration as a whole. Their coverage in this section will therefore help inform the rest of this chapter's discussion, providing an important foundation for understanding some of the more technical issues that will later be examined.

1.1. Parties

The first category of people involved in arbitration were the parties, individuals who, for whatever reason, found themselves in a dispute and agreed to resolve the matter by arbitration. Unlike the words 'arbitrator' or 'umpire', the term 'party' was in no way specific to the contemporary practice of arbitration; it is instead a convenient label that will be used

[4] A similar effort has been undertaken by Joseph Biancalana for arbitration in the fifteenth century. J. Biancalana, 'The legal framework of arbitration in fifteenth-century England', *AJLH* 47:4 (2005), pp. 347-82.

[5] The following study will use the word 'contract' according to its modern meaning, that of a legally binding agreement, despite the fact that the term 'contract' had a different and more specific legal definition during the medieval and early modern periods. Baker, *ELH*, pp. 338-39. The word 'contract' does appear, however, to have assumed its modern definition by the mid-seventeenth century. For example, see W. Sheppard, *The faithful councellor: or the marrow of the law in England* (1651), pp. 93-106.

by this dissertation in light of the fact that no consistent word or phrase was employed at the time. In *Symboleography* (1594), William West would refer to the parties as 'persons striving', to emphasise that they were in strife or disagreement, or as 'compromittors', to underscore the link between the parties and their submission, the word 'compromise' being an earlier name for the contract.[6] Neither of these designations appear, however, to have survived into the seventeenth century, as later treatises on arbitration would employ more generic terms, including 'party', or use the actual names of the individuals concerned.[7] This lack of specificity might itself be indicative of the fact that there were few qualifications for being a party during the period. Even in the eyes of the law, there were no extra requirements that the parties would have to meet to make use of arbitration, something that might have been suggested had there been instead a fixed term for these individuals.

Indeed, there was only one caveat to this inclusive view. Should the parties wish to enforce their arbitration—that is, should they wish to sue their opponent at some later date for failing or refusing to comply with the process—they and their opponent would have to be capable of entering into a contract. This is because it was the submission that made an arbitration legally enforceable: the courts were willing to provide enforcement on the basis that the parties had agreed between themselves to comply with the process, it having long been an established rule that the courts would hold individuals to their promises and obligations.[8] Yet the courts were also measured in applying this rule. It was recognised that certain individuals were not able to comprehend the potential effects of entering into a contract, either for themselves or for others, and so should not be authorised to do so. Moreover, there were certain types of people whom the courts, for various reasons, did not acknowledge as existing, and so any contract made by these people would be held void and unenforceable. Accordingly, the discussions on parties found in the treatises on arbitration would almost invariably consist of specifying the different classes of individuals who were incapable of entering into a contract, presumably as a sort of guide or check-list to help their readers assess whether the arbitrations they agreed to could be enforced by the courts.[9] In a

[6] West, *Symboleography*, secs. 6-8, 41. See below at p. 20 for more information on the term 'compromise'.
[7] John March does use the term 'compromittor' once in the first part of *Actions for Slander*, but this should be seen as an exceptional. March, *Actions for slander* I, p. 200.
[8] Simpson estimates that the common law courts' jurisdiction over private contracts began sometime in the twelfth century. Simpson, *CLC*, pp. 9-10, 53-56.
[9] West, *Symboleography*, secs. 9-17. See also March, *Actions for slander* I, pp. 152-53; *Arbitrium redivivum*, pp. 13-17. Dodderidge also discusses the types of people who could enter into a

format first adopted by *Symboleography*, the treatises would distinguish between individuals who were prohibited by 'nature' and by 'law' from entering into a contract. Those who were prohibited by nature included 'infants', 'lunatics', and 'idiots', individuals who had some mental 'defect' preventing them from properly understanding the consequences arising from a contract. Those who were prohibited by law were instead a more diverse group, and included (i) individuals holding some form of joint power who had not received the authority to act from the rest of their group; (ii) married women or 'feme coverts' whose legal personality was subsumed by their husbands' upon marriage; (iii) individuals who had been deprived of their legal rights by outlawry or attainder; and (iv) members of the clergy who were not formally recognised by the common law, being instead subjected to the civil law jurisdiction of the ecclesiastical courts. Outside these classes, all other individuals, both male and female, would be capable of entering into a contract and could therefore seek enforcement from the courts.

Despite these clear classifications, it does not appear that the advice of the treatises was always heeded in practice. In *Rudston and Yate's case* (1641), the court of King's Bench refused to enforce an arbitration because the plaintiff to the suit had been an 'infant' or minor at the time when he had entered into the submission.[10] Moreover, in *Saccum v Norton* (1671/2), the same court ruled that it could not enforce an arbitration on the grounds that, whilst one of the parties, a woman, had been unmarried at the time when she had entered into the submission, she was married before her arbitrator made an award and could no longer be held to her agreement.[11] Whilst the existence of such cases might bring into question how frequently the treatises on arbitration were actually consulted at the time, it might equally reflect the noted litigiousness of the period where contemporaries initiated lawsuits often with a view to other ends, in these cases, perhaps, to use the threat of commencing legal proceedings as a way to get an opponent to meet his or her commitments out of court.[12]

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submission, but not following the same set-up as *Symboleography*. Dodderidge, *The English lawyer* (1631), pp. 177-78.

[10] *Rudston and Yate's case* (1641), March, N.R. 111, 114. For other cases concerning an 'infant' or minor, see *Holford v Platt* (1617/8), Cro. Jac. 464; *Bowyer v Blorksidge* (1681), 3 Lev. 17.

[11] *Saccum v Norton* (1671/2), 2 Keb. 865, 877.

[12] J.A. Sharpe, '"Such disagreement betwyx neighbours:" litigation and human relations in early modern England' in *Disputes and settlements: law and human relations in the West*, ed. J. Bossy (Cambridge, 1983), pp. 167-87, at pp. 173-78; C. Muldrew, 'Credit and the courts: debt litigation in a seventeenth-century urban community', *EHR* 46:1 (1993), pp. 23-38, at p. 27.

1.2 Arbitrators

The second category of people to examine were the arbitrators, individuals chosen by the parties to decide the matters in dispute between them. Arbitrators were chosen or 'elected' by being named in the parties' submission, and it was also from this contract that their authority derived. As the parties would agree in their submission to perform the award of their arbitrators, they would be legally bound to adhere to this decision: any party who did not could be sued by his opponent for enforcement. For this reason, arbitrators were accepted by legal writers and practitioners alike as judges, the principal difference between arbitrators and, say, the justices of the common law courts being that the justices were empowered by virtue of their office whereas arbitrators 'are made judges by the assent and election of the parties'.[13] As was recognised at the time, in many ways this made the power of an arbitrator to decide the parties' dispute far greater than that of an ordinary judge. As John March explained in the first part of *Actions for Slander* (1647), provided that 'theire judgment be according to the submission', arbitrators 'may judge according to there [*sic*] will and pleasure' and not be 'tied to any formalities, or punctuallities in Law…as other Judges established by publike authority are'.[14] What is more, an arbitrator's decision could not be overturned, even when it was patently unjust. In the case of *Morris v Reynolds* (1703), the arbitrators made an award in favour of the plaintiff without hearing the testimony of either the defendant or any of his witnesses, and for this 'mismanagement' the defendant refused to perform it. When the plaintiff sued the defendant in the court of King's Bench for enforcement and these issues were raised, the court refused to side with the defendant, Sir John Holt, the chief justice, stating that 'the arbitrators being judges of the party's own chusing, he shall not come and say, they have not done him justice, and put the court to examine it'.[15]

In light of the extent and effect of an arbitrator's power, it was advised in the treatises on arbitration that the parties choose arbitrators who were both 'skilfull' and 'indifferent'. By 'skilfull' it was meant that the arbitrators have the knowledge and expertise to decide the dispute between the parties so that 'their ignorance may not make them erre, and the parties

[13] *Sallows v Girling* (1611), 1 Brownl. 112. For other cases in which arbitrators were referred to as judges, see *Sir George Moor v Foster* (1605) Cro. Jac. 65; *Anonymous* (1641), March, N.R. 102; *Hanson v Liversedge* (1689), 2 Vent. 242.
[14] March, *Actions for slander* I, p. 162.
[15] *Morris v Reynolds* (1703), Holt K.B. 81, 1 Salk. 73, 2 Raym. Ld. 857.

suffer as much by their folly'.[16] By 'indifferent' it was instead intended that the arbitrators be detached and impartial in making their decision so that the award would be 'sincere and incorrupt, according to right and equity, without malice, flattery, and every other vicious affectation or perturbation, which may in any sort lead [them] awry from the right Path of Justice and Equity'.[17] Yet it must be stressed that these qualities were merely recommended; the parties were under no legal obligation to seek out these qualities in choosing their arbitrators. As John Dodderidge explained in *The English Lawyer* (1631), the law was more concerned with the award that the arbitrators would then proceed to make, a point which will be examined in more detail later in this chapter, and for this reason 'there hath not beene made many nor scarce any question, who may be an Arbitrator, and who not: Neither…should it be greatly necessary'.[18]

Essentially, there was only one legal requirement concerning the arbitrators and their power: they had to comply with what the parties had agreed to in their submission. As the courts were only prepared to provide enforcement to hold the parties to what they had agreed between themselves, if the arbitrators strayed from the contents of that agreement, any award that they would then make would be unenforceable. The reports of cases reveal that there were four ways in which arbitrators could contravene the submission. First, they could delegate either all or part of the decision-making in the dispute to someone else, which would be in defiance of the submission because the parties had only named the arbitrators as the persons whose award they would perform.[19] In *Emery v Emery* (1600), it was revealed that the arbitrators had ordered the defendant to release his pending actions against the plaintiff in a manner as to be advised by a third party, which the court of Common Pleas disallowed on the grounds that the award could not 'refer [the release] to the act of another' and so the defendant was 'not bound to perform it'.[20] Second, if, as was conventional, the parties had specified a date by which the arbitrators should make their award, the arbitrators would contravene the submission by reserving in themselves the power to decide some aspect of the dispute after that date had passed.[21] In *Winch and Grave v Sanders* (1620), the parties had sought for their arbitrator to resolve a disputed debt between them by 8 March, and whilst the arbitrator devised by that date a schedule for repaying the debt over the subsequent months,

[16] March, *Actions for slander* II, pp. 88-89.
[17] *Arbitrium redivivum*, p. 19.
[18] J. Dodderidge, *The English lawyer* (1631), p. 176.
[19] For example, *The King v Humphryes* (1648), Sty. 155; *Cater v Startute* (1650), Sty. 217.
[20] *Emery v Emery* (1600), Cro. Eliz. 726.
[21] For example, *Thinne v Rigby* (1612), Cro. Jac. 314; *Selsby v Russel* (1697), Comb. 456.

he included a provision that would have allowed him to set the value of the final payment when it became due.[22] The court of King's Bench held this provision sufficient to overturn the award entirely, stating that 'the arbitrator cannot reserve such power in himself' to decide the matter given that 'the judicial power of arbitrators is determined within the time limited to them' by the parties.[23] Third, along similar lines, if the parties set out a certain number of issues for their arbitrators to decide, the arbitrators would disobey the submission by including in their award matters other than those specified, effectively exceeding their power.[24] In *Bedell and Moor's Case* (1588), heard before all the common law justices in the Exchequer Chamber on writ of error from the court of King's Bench, the facts presented were that the parties had specified that their arbitrators resolve every quarrel existing between them up until 24 November, but in their award the arbitrators ordered that the defendant in the original King's Bench case make a release of all actions against the plaintiff arising in the year and a half following that date. As this exceeded what the parties had included in their submission, the justices ruled that the defendant was not obliged to perform the award as the arbitrators 'have no authority to arbitrate that which is not submitted unto them'.[25] Fourth, if the arbitrators required some thing or act of a third party as part of their award, this would violate the submission for concerning a 'stranger', a person who, unlike the parties, had not agreed to perform the award. Or to put it another way, the arbitrators' power was restricted to the parties who formed the submission alone.[26] In the King's Bench case of *Ecclestade v Maliard* (1582), the plaintiff sued the defendant for failing to pay the plaintiff's son five pounds as was required by their arbitrator in his award. Yet the court ruled that the 'action did not lie' and the defendant 'was not bound to pay or tender the money' on the grounds that 'the arbitrator had no authority to award any thing concerning a stranger'.[27] To summarise

[22] *Winch and Grave v Sanders* (1620), Cro. Jac. 584, 2 Rolle, 189, 214, Palmer 146.
[23] *Grace Winch and Saunder's case*, 2 Rolle 214: 'le arbitrator ne poet reserve tiel liberty a luy mesme'; 'le judicial power del'arbitrators determin deins le temps limited al eux'.
[24] For example, *Wrenche's Case* (1582/3), Cro. Eliz. 13; *Vanlore v Tribb* (1616), 1 Rolle 437; *May and Samuel's Case* (1617), Pop. 134; *Terry v Baxter* (1647), Sty. 40.
[25] *Bedell and Moor's Case* (1588), Gould. 91. The Exchequer Chamber, distinct from the court of Exchequer, was a sort of tribunal in which the justices of all three common law courts came together to decide points of law arising from a particular case, the name deriving from the fact that they would meet in the chamber where the court of Exchequer typically sat, which was a separate and more enclosed space than Westminster Hall. Baker, *ELH*, pp. 44, 149-51.
[26] For example, *Anonymous* (1582), Godb. 13; *Bretton v Pratt* (1600), Cro. Eliz. 758; *Bean v Newbury* (1664/5), 1 Keb. 857; *Alsop v Senior* (1670), 2 Keb. 707, 718; *Coke v Whorwood* (1671), 2 Lev. 6, 2 Keb. 767; *Burdet v Harris* (1674), 3 Keb. 387. But note that arbitrators could require something of a third party if he were an agent of one of the parties, such as an attorney serving as counsel: *Rous v Lun* (1663), 1 Keb. 569.
[27] *Ecclestade v Maliard* (1582), Cro. Eliz. 4.

then, arbitrators could not delegate, reserve, or exceed the authority granted to them by means of the parties' submission or require anything of a person who was a 'stranger' to the contract. Other than these four restrictions, however, the arbitrators could largely do as they pleased.[28]

1.3 Umpires

The third and final category to consider was the umpire, the person chosen to resolve the parties' dispute in the event that the arbitrators could not do so. As this description suggests, an umpire was not always involved in an arbitration; indeed, the parties would only arrange for the appointment of an umpire where there was a real possibility that the arbitrators would be unable to make an award. This might have been because the parties' dispute was especially complex, the parties recognising that someone with even more expertise than the arbitrators might be needed to settle it.[29] Alternatively, in cases where there was an even number of arbitrators elected and it was likely that they would be split in making a decision, the parties might appoint an umpire to have the final say on the matter.[30] Yet the general impression given by the sources consulted for this chapter is that the use of an umpire was not an overly common occurrence in the seventeenth century. The treatises on arbitration tend to say very little about the umpire other than the fact that in making his decision, what was known as an 'umpirage' to distinguish it from the award, the umpire had the same authority as the arbitrators and was equally bound by the terms of the parties' submission.[31] As the law reformer William Sheppard concisely put it in his *Epitome of the Laws* (1656), the umpire was 'the same in effect with an arbitrator'.[32]

Yet if the use of an umpire was not particularly widespread in the practice of arbitration at the time, the role received an inordinate amount of attention in the reports of cases, particularly those reports concerning the second half of the seventeenth century, because an umpire and the making of his umpirage presented a sort of legal quandary that the

[28] For the potentially harmful effects of this extensive power, see West, *Symboleography*, secs. 24-25.
[29] This is reflected in the fact that umpires were often persons with more experience or authority than the arbitrators. For example, see R. Hutton, *The young clerks guide* (3 vols., 1649-1659), vol. I, p. 289.
[30] This appears to have been conventional amongst merchants. For example, see J Vernon, *The compleat comptinghouse* (1678), p. 241.
[31] For example, the author of *Arbitrium Redivivum* includes his consideration of umpires within his larger discussion on arbitrators. *Arbitrium redivivum*, pp. 17-21.
[32] W. Sheppard, *An epitome of all the common and statute lawes of this nation* (1656), p. 106.

courts were ultimately forced to resolve, one that took them several decades to sort out. This issue was typically referred to as one involving 'concurrent authority', and it is best explained by means of a hypothetical scenario. Let us assume that on 1 January, two parties agree to resolve their dispute by arbitration, arranging for the appointment of an umpire in the event that their chosen arbitrators fail to make their award by the end of the month. The arbitrators set out to resolve the dispute, but because the matters involved are complex or because the arbitrators cannot agree between themselves on how to address them, they inform the parties on 15 January that they will not likely succeed in making an award within the allotted time. The parties, who desire above all else a quick end to their dispute, consequently turn to their umpire for resolution, and five days later, on 20 January, the umpire makes his umpirage on the matters. Unbeknownst to the parties, however, the arbitrators realise in the meantime that they can resolve the dispute and so proceed to make their award on 25 January which they then present to the parties. Having received two separate decisions, what are the parties to do? Do they perform the umpirage as it was the earlier decision, or do they instead perform the award given that it had been made within the time period that the parties had specified? Or to put it another way, who of the arbitrators and the umpire do the parties obey given that their authority overlaps or 'concurs'?

To prevent this very situation from arising, the initial position of the courts, one that was set out by the court of King's Bench in *Barnard v King* (1651), was to hold that an umpire would only be able to make an umpirage on the parties' dispute once the time period specified for the arbitrators to make their award had elapsed.[33] To apply this position to the scenario above, this would mean that the umpire would have only been able to make his umpirage from 1 February onwards. But what if the arbitrators decided unequivocally, rather than provisionally as above, that they could not make an award, perhaps weeks or even months before the time period specified by the parties had ended? Would the parties be forced to wait all this time for their umpire to be authorised to resolve the dispute? And, as was sometimes the case in practice, what if the parties had left it to the arbitrators to appoint an umpire when they realised that they would not be able to resolve the dispute? Even though the appointment of an umpire would provide clear evidence that the arbitrators could not

[33] *Barnard v King* (1651), Sty. 306. This case was the leading authority on the courts' initial position, but it did not establish the rule. For an earlier example, see *Abraham Jennings v Vandeputt et al* (1632), Cro. Car. 263. For an example of this position being upheld, see *Lush v Crabb* (1667-68), 2 Keb. 263, 332.

make an award, would the umpire still be prevented from making an umpirage until the time period initially specified by the parties had elapsed?

In light of the potential issues that could arise in applying the rule set out in *Barnard v King*, the courts ultimately reversed their initial position, adopting in its place a two-pronged approach. In cases where the parties were the ones to appoint the umpire, it was held by the court of King's Bench in *Case v Dare* (1681) that the 'confusion on concurrence of authority as to time' need not be an issue if priority was always given to the arbitrators' award, it having been the decision that the parties had initially agreed to perform.[34] If the arbitrators did not make an award, or if for some reason the award was invalidated by the courts, then the parties would be expected to perform the umpirage when it was made. In cases where the parties allowed instead for their arbitrators to appoint an umpire, the same court held in *Travers v Twistleton* (1665-66) that there would be no concurrence of authority as 'by chusing an umpire [the arbitrators] have renounced their power'.[35] This stance was further elaborated in *Denovan v Mascall* (1670) to require that the arbitrators expressly state that they were 'deserting' their authority by appointing an umpire so as to avoid later claims that the appointment had only been provisional.[36] Moreover, in *Trippet v Eyre* (1684), the court of Common Pleas ruled that it was not enough for the arbitrators to appoint an umpire; the umpire had to accept the appointment as well.[37] Only then would the authority to resolve the parties' dispute shift from the arbitrators to the umpire. As this overview makes clear, the law as it related to seventeenth-century arbitration was in no way fixed, the courts at least appearing to change their position in response to real problems and issues arising from practice, a theme, as we shall see, which will reappear a later points in this chapter.

2. Submission

The second element of arbitration was the submission, the contract in which the parties agreed to perform their arbitrator's award, the word 'submission' referring to the fact that the parties had submitted themselves to this decision.[38] An earlier name for this contract was the 'compromise', a term which derived from *compromissio*, the civil law designation for this

[34] *Case v Dare* (1681), Jones, T. 167.
[35] *Travers v Twisleton* (1665-66), 1 Keb. 848, 935; 2 Keb. 6, 15.
[36] *Denovan v Mascal* (1670), Raym. Sir T. 205. See also *Copping v Hernault* (1669/70), 2 Keb. 619; 1 Lev. 285; 1 Sid. 455.
[37] *Trippet v Eyre* (1684), 3 Lev. 263; 2 Vent. 110, 113.
[38] For example, March, *Actions for slander* I, p. 152.

type of agreement, one that stressed the mutual promise between the parties to perform.[39] Whilst the term 'compromise' continued to be used in the treatises on arbitration and in certain legal dictionaries that were published during the period,[40] its use in practice appears to have fallen out of favour by the mid-seventeenth century, perhaps because of its association with the civil law, a politically-fraught issue at the time,[41] or, more likely, because the word 'submission' better encapsulated the obligation it put on the parties to perform the award. For once the parties entered into the submission, they became legally bound to adhere to its terms. If one of the parties later failed or refused to perform, the other would be entitled to sue him for enforcement, although, as we shall see, this did not guarantee that he would be successful in his claim. In light, then, of the significance of this contract both to the practice and enforcement of arbitration, this section will be used to examine the submission in more detail, focusing in particular on its form, its substance, and the ability of the parties to withdraw from or 'revoke' it.

2.1 Form

The first issue to consider are the forms that a submission could take, a topic that is not only useful for envisaging what this contract looked like at the time, but also for understanding what an aggrieved party could hope to achieve should his opponent not perform the award, the form of a submission largely dictating the possible options for enforcement. Essentially, there were two ways to form a submission in the seventeenth century: either the parties could enter into an oral contract called a 'parol' submission, the word 'parol' meaning by word,[42] or they could instead write down the terms of their agreement in a deed. To form a parol submission required nothing more than the parties promising to each other to perform the award, it having been established in the mid-sixteenth century that the mutual exchange of

[39] E. Powell, 'Arbitration and the law in England in the late Middle Ages', *Transactions of the Royal Historical Society* 33:5 (1983), pp. 53-54; D.J. Ibbetson and J. Kelsoe, 'Arbitration and the courts before 1996' in *Butterworths challenges in arbitration*, ed. H. Puschmann (2019), pp. 365-74, at p. 365. For a contemporary etymology of the term, see W. Fulbecke, *A direction or preparatiue to the study of the lawe* (1600), fol. 74v.
[40] For treatises, see: West, *Symboleography*, secs. 1-4; *Arbitrium redivivum*, p. 8. For legal dictionaries, see: 'Compromis' in J. Cowell, *The interpreter* (1607); 'Compromise' in T. Blount, *Nomo-lexikon* (1670); 'Compromise' in T. Manley, *Nomothetes, the interpreter* (1672).
[41] B.P. Levack, 'The civil law, theories of absolutism, and political conflict in late sixteenth- and early seventeenth-century England' in *Law, literature and the settlement of regimes*, eds. G. Schochet, J. Gordon, P.E. Tatspaugh, C. Brobeck (Washington, D.C., 1990), pp. 29-48.
[42] 'Parol' in T. Blount, *Nomo-lexicon* (1670).

promises was sufficient to create a binding contract.[43] Yet not even the words 'I promise to perform the award' or something similar were necessary to create this form of submission. As the court of King's Bench held in *Neve v Lyne* (1596), it was enough that the parties expressed to one another a clear intention to comply with the process.[44] This lack of formality was undoubtedly useful as it meant that a submission could be formed even over the course of a conversation, with little effort or fanfare. But in the event that one of the parties did not perform the award, this same informality could also be disadvantageous as it would then be difficult to prove that a contract had been made. Not only would there be no written evidence to show that the submission existed, but if the non-performing party denied that he had agreed to it, the matter could quickly devolve into a case of 'he said, she said'. As with all oral contracts, these issues could be mitigated by having witnesses, perhaps even the arbitrators themselves, attest to the fact that a submission had been made, but depending on the circumstances, even their testimony might not have been enough to convince the courts that a submission existed. For this reason, most of the treatises on arbitration either counselled against the use of parol submissions or did not include this form of submission as an option. In *Arbitrium Redivivum* (1694), whilst the author explained that 'submissions are in two manners, either by writing or by word', he then insisted that 'every compromise or submission be made by writing'.[45] By contrast, the lawyer William Noy denied even the possibility that a submission could be made orally in his *Principal Grounds and Maxims* (1641) by stating that it was the first of 'three things [that] are to be regarded' in a submission that it be made in writing.[46] Such advice appears to have been persuasive, for by the time that the eighteenth-century treatise writer Matthew Bacon wrote his work on arbitration, *The Compleat Arbitrator* (1731), he could remark that 'submissions by parol are almost out of use, and never practised but when the controversy is of some small or insignificant matter'.[47]

It was far more common, then, for a submission to be formed by deed, the technical term for a written document that was affixed in wax with the parties' seals and then delivered into their possession, this final condition reflecting the fact that deeds were typically written by professional draftsmen, such as clerks or scriveners, and not by the parties themselves.[48]

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[43] Simpson, *CLC*, pp. 271-75; Baker, *ELH*, pp. 361-63.
[44] *Neve v Lyne* (1596), Cro. Eliz. 460. The words in the case were 'I submit to arbitration'.
[45] *Arbitrium redivivum*, pp. 8-9.
[46] W. Noy, *A treatise on the principall grounds and maximes of the lawes of this kingdom* (1641), pp. 125-26.
[47] M. Bacon, *The compleat arbitrator* (1731), pp. 6-7.
[48] Simpson, *CLC*, 15-17. For a contemporary discussion of the formalities of deed, see Dodderidge, *English lawyer*, p. 137.

Unlike the modern day, the signature of a party was not a requirement for a deed,[49] a distinction perhaps reflecting the level of literacy during the period,[50] although if the parties were capable of signing their names, they would invariably do so in addition to sealing the document. The purpose of these formalities was one of evidence: if a document satisfied all three conditions of writing, sealing, and delivery, the courts would then take it to be conclusive evidence that the terms contained within it were true.[51] This would mean that, once the parties entered into a submission by deed, they could not deny that they had agreed to perform their arbitrator's award, a clear advantage over parol submissions. If one of the parties failed or refused to perform, the aggrieved party would have a far greater chance of success in suing his opponent for enforcement, the opponent, as we shall see later, having to come up with other ways to prevent the courts from holding him to his agreement. Yet a deed was not itself a specific type of contractual instrument; it merely denoted that the formalities needed for a document to be granted greater evidential weight at law had been met. What is left to be discussed, then, are the two types of instruments that were used in the seventeenth century to form submissions by deed, focusing not just on how these instruments were made, but also on what their legal effect would be in the event that a party did not perform the award.

The first type of instrument used to form a submission by deed was known as the 'indenture', its name deriving from the fact that the written document itself was cut in half along a jagged or 'toothed' (*in modum dentium*) line.[52] On both halves of the indenture would be written the terms of the parties' submission and, to ensure that the formality of sealing was satisfied, the parties would then affix their seals to both halves, signing them if possible, thereby creating two copies of the agreement, as can be seen in the diagram below:

[49] For the current formalities for a deed, see Law of Property (Miscellaneous Provisions) Act 1989, ss. 1(2) and 1(3).
[50] For scholarly works on literacy, see D. Cressy, 'Levels of illiteracy in England, 1530-1730', *HJ* 20:1 (1977), pp. 1-23; *Literacy and the social order: reading and writing in Tudor and Stuart England* (Cambridge, 1980).
[51] Ibbetson, *HILO*, pp. 20-21.
[52] Simpson, *CLC*, p. 35.

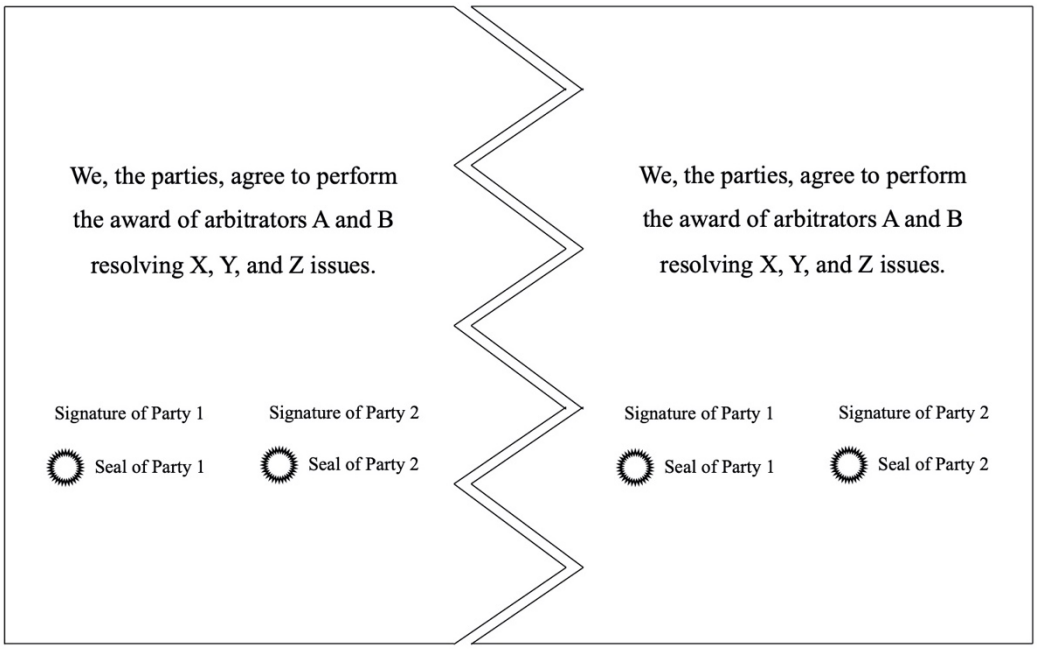

Figure 1: Diagram of a submission by indenture

Once the indenture was finalised, the parties would each retain one of the halves, satisfying the formality of delivery as well as arming each party with what he would need to bring a lawsuit against his opponent in the event that the opponent did not perform the award. In such a case, the aggrieved party would tender his half of the indenture to the court, thereby preventing his opponent from asserting that he had not agreed to perform. What is more, the physical shape of the indenture could equally be used to thwart any potential claims by the opponent that the document had been forged, for the 'teeth' of both halves of the indenture could be realigned to confirm authenticity.[53] Whilst the indenture was therefore a useful means to form a submission, one that appears to have been employed throughout the seventeenth century,[54] it must be noted that it was far less popular than the second instrument used to form submissions at the time, the conditional bond. This was not, however, caused by any fault or defect with the indenture itself; rather, as we shall see, it was a consequence of the specific advantages of the conditional bond, in particular its incentivising nature.

The conditional bond, the second instrument used to form submissions, has been a notoriously difficult subject for contemporaries and modern scholars alike to explain in any straightforward way, belying the reality that the conditional bond was the principal

[53] This was noted in Sir Henry Rolle's *Abridgment* (1668) and cited in Simpson, *CLC*, p. 35. For the use of indentures as means to prove authenticity in a commercial context, see Vernon, *Compleat comptinghouse*, pp. 235-36.
[54] *Doctor Samways v Eldsly* (1676), 2 Mod. 73. The treatise *Arbitrium Redivivum* also includes an example of a submission by indenture dating to 1692. *Arbitrium redivivum*, pp. 21-25.

instrument used to contract agreements for more than 400 years, from the fourteenth century until the mid-eighteenth century.[55] Part of this issue stems from the fact that a conditional bond, as its name suggests, was not a contract in the typical sense; instead, it was a debt obligation—an 'I owe you'—that would be waived if the terms of an agreement were satisfied or performed. This sort of dual structure, whereby a debt obligation overlay a separate, contractual agreement, was linked to the way in which this type of instrument was constructed. Essentially, when two parties wished to enter into an agreement by conditional bond, they would each draft a written document composed of two sides. On the front side would be the bond or 'obligation', specifying that one party owed to the other a specific sum of money, what was known as the 'penalty'. The bond would invariably be written in Latin and set out in the present tense so that the debt would be construed as outstanding.[56] It would also be sealed and, where possible, signed by the indebted party to prevent him from later denying that the debt was owed.[57] On the reverse side of the document would instead be the 'condition', and it would be here that the indebted party would set out what he had agreed with the other party, ending with the provision that if he satisfied the terms of the agreement, the bond would be void and of no effect. Typically the condition would be written in English, presumably to make it easier to know what exactly would discharge the debt from being owed, but unlike the front side of the document, the reverse would not be sealed.[58] Once both sides of the document were drafted, the parties would exchange their conditional bonds so that each would have in their possession a deed specifying that they were owed the penalty, the sum of money set out in the bond. If one of the parties then failed to adhere to the agreement, such as, in the case of submissions, by not performing the award, the other party would be entitled to bring a debt action to recover the penalty, the non-performing party having forfeited the one scenario that would have excused him from having to pay. A simple diagram of the two sides of a conditional bond can be found below for illustration, with the condition reflecting what would be included if the instrument were used to form a

[55] Modern scholars tend to explain how the conditional bond worked by using examples or by explaining its physical construction, as is done here. Simpson, *CLC*, pp. 90-92; Ibbetson, *HILO*, pp. 28-29. For a particularly obscure explanation of the conditional bond in a contemporary account, see Dodderidge, *English lawyer*, p. 137.
[56] For a contemporary example of the bond, see *Arbitrium redivivum*, pp. 26-27.
[57] Simpson, *CLC*, p. 91.
[58] Ibid., pp. 91-92.

submission. Note that a separate, near identical document would be prepared by Party 2, with only the roles of the two parties being reversed.[59]

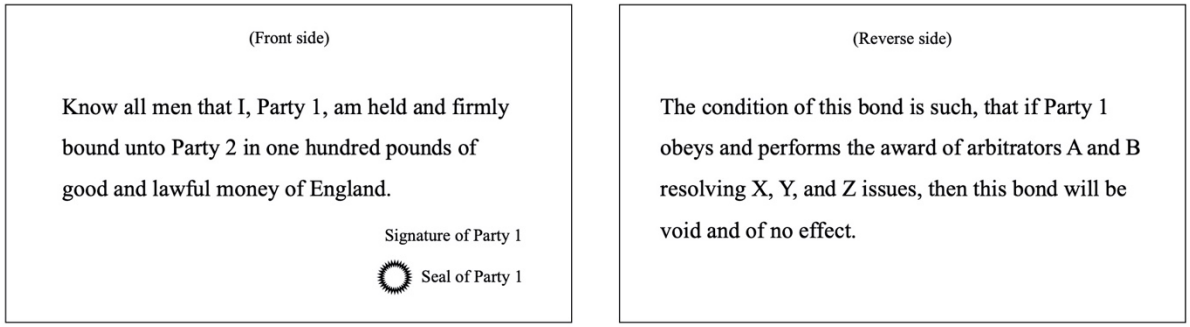

Figure 2: Diagram of a submission by conditional bond

There are two points to emphasise from the above description that help explain why the conditional bond had been the most common instrument used to contract agreements, submissions or otherwise. The first concerns the penalty, the sum of money stated as being owed in the bond. When parties entered into an agreement using conditional bonds, they would set the penalty at an exorbitant amount of money, which, by convention, was typically twice the value of the agreement itself.[60] This meant that if one of the parties did not adhere to the terms of the agreement as set out in the condition of his bond, he would become liable to pay this large sum, his actions having forfeited the one situation that would have discharged him from paying the penalty. The second point to note is the fact that, once the conditional bonds were drafted, the parties would exchange them with one another so that each had in their possession a written document sealed by their opponent stating that he owed them the penalty. Both parties were therefore equipped with the evidence needed to show a court that they were entitled to this large sum of money. Indeed, given that only the front side of the conditional bond was sealed, each party could in theory bring a debt action at any point to recover the penalty, it falling on the opponent to have to prove, first, that there was a condition to the bond and, second, that he had fulfilled it, this being the only way to avoid being compelled by the courts to pay the sum. Thus, the penalty of a conditional bond served to add 'teeth' to the parties' agreement: even if the parties were dissatisfied with what they

[59] As the author of *Arbitrium Redivivum* explained in his discussion of forming a submission by conditional bond, 'each party must give a bond unto the other, word for word only changing their names as occasion requires'. *Arbitrium redivivum*, p. 29. For an example of three conditional bonds being used to form a submission, see *Richard Hayes v Robert Hayes* (1635/6) Cro. Car. 433.
[60] The convention was acknowledged by the court of King's Bench in *Anonymous* (1662), 1 Lev. 87.

had agreed to do, they would think twice before breaking it as to do so would mean that they would almost certainly be forced to pay the penalty.

It is not difficult to see, then, why parties favoured the use of conditional bonds to form their submissions. With the penalty set at twice the value of the matters in dispute, the parties would be incentivised to perform their arbitrators' award, if not to resolve the dispute, then at least to avoid paying the penalty. John March was perhaps the most clear of the treatise writers at getting this point across. As he explained in the second part of *Actions for Slander* (1648), whilst the use of conditional bonds to form submissions 'seemeth dangerous' as the parties could by their own actions 'hazard the whole penalty of the bond', this very threat 'will the rather ingage the performance of the award, and thereby determine controversies' which was the 'sole aime, scope, and end of arbitrements'. For this reason, he concluded, the use of conditional bonds 'certainly is the best and most approved meanes' to enter into a submission, one that 'is most likely and probable to effect its end'.[61]

2.2 Substance

Having examined the various forms that the submission could take, what needs to be considered next is its substance—that is, what provisions the contract would typically contain. Some of these provisions have already been considered earlier in this chapter. For example, from the discussion of the people involved in arbitration, we know that the submission would name the arbitrators chosen by the parties and, where needed, either nominate an umpire or provide for the umpire's appointment. Moreover, as the previous sub-section has made clear, the submission would also include the agreement of the parties to perform the award, this being the constitutive element of the contract. Yet as it appears from the many examples and precedents of submissions that were printed during the period, most of the contract tended to be used to set out stipulations regarding the award. To a large extent, the parties would specify in their submission how exactly the award should be made. These stipulations generally concerned four issues: (i) content, the matters in dispute which the award should be made to address; (ii) form, whether the award should be made orally or in writing; (iii) timing, the date by which the award should be made; and (iv) notice, how the arbitrators should inform the parties that the award had been made. All four of these issues can be seen in the following precedent, which was included in the first volume of the drafting

[61] March, *Actions for slander* II, p. 63.

manual *The Young Clerks Guide* (1649) attributed, almost certainly speciously, to Sir Richard Hutton.[62] The first issue takes up most of the text, whereas the other three issues can be found in the final lines of the contract, with the abbreviation '&c' used to indicate where the reader, presumably a clerk or scrivener, would add in information specific to the arbitration at hand. Note also that this particular precedent takes the form of the condition of a bond, so its phrasing differs slightly from what one would instead find in a submission formed by means of an indenture:

> The Condition [*of this obligation is such*] That if the within bounden R.C. […] [*does*] […] well and truly stand to, abide, obey, observe, performe, fulfill and keep the award, arbytrament, order, rule, determination and judgement of &c. Arbytrators indifferently chosen, elected and named, as well on the part and behalf of the said R.C […] as on the behalfe of the within named R.S. […] to arbytrate, award, rule, decree and Judge of, for, upon, touching or concerning all actions, suits, doubts, and variances concerning &c. out of the manner of L. in the Parish of W. in the County of &c. now in question and controversie, between the said parties; And also, for touching, and concerning all and all manner of other suits, quarrels, debts, debates, duties, bonds, specialties, controversies, transgressions, offences, strifes, contentions, reckonings, accompts, and demands whatsoever, which between the said R.C. […] on the one part, and the said [*R.S.*…] on the other part, at any time from the beginning of the world, untill the day of the date of these presents, have been had, moved, stirred, or are in any wise depending, so always as the same award, arbitrament, or determination and judgement of the parties, in and upon the same premisses, be made and given up in writing indented, under their hands and Seals, ready to be delivered to the said parties, at or in &c. on or before &c. That then this [*obligation to be void and of none effect, or else to stand and remain in full force and virtue*].[63]

Whilst it was not a requirement for the parties to include these stipulations in their submission, for several reasons the practice appears to have been nonetheless conventional. The first was undoubtedly one of practicality: by addressing these issues in the submission, it

[62] The manual was composed of three volumes printed between 1649-1659 whereas Sir Richard Hutton, who served as the chief justice of the court of Common Pleas, died in 1639. The attribution may be linked to the pro-Commonwealth sentiment of the period, Hutton having been the sole judge to defy Charles I in the *cause célèbre* case concerning Ship Money. W. Prest, 'Hutton, Sir Richard', *ODNB*.

[63] R. Hutton, *The young clerks guide*, vol. I, pp. 241-42. The words in italics at the beginning and end of the precedent have been added from an earlier condition of a bond included in the work, the editor using '&c' in the text to avoid unnecessary repetition. The precedent also included multiple parties, so for ease of reference I have reduced the parties mentioned to only two. For a precedent of a submission including a provision for an umpire, see pp. 289-90.

would have been clear both to the parties and to the arbitrators what exactly the parties had agreed to perform. Presumably this would have helped structure how the arbitration would then proceed and, in cases where the terms of the submission were written in a deed, the inclusion of these stipulations would have served as a useful point of reference should any disagreement or uncertainty later arise. Indeed, this was often framed as another advantage of forming a submission by deed. As the author of *Arbitrium Redivivum* explained, writing out these stipulations enabled 'the arbitrators [to] know their power, and the parties how far they are subject to their sentence'.[64]

A second reason why the parties appear to have set stipulations about the award was in response to the position of the courts should they not. As the courts consistently held throughout the period, if the parties failed to specify how they expected the award to be made in their submission, it would be left to the discretion of the arbitrators to decide.[65] It bears emphasising that in terms of enforcement, this stance marked a clear departure from the courts merely holding the parties to what they had agreed, foreshadowing the sort of judicial law-making that we shall see in relation to the rules on the validity of awards.[66] Yet it is possible to guess at the logic behind this particular position. If the courts sought instead to verify that the award made by the arbitrators accorded with what the parties would have agreed to had they included the stipulation in their submission, not only might the parties disagree as to what they would have stipulated, but it is conceivable that any party who disliked the decision would claim that the award had not been made in accordance with what he had expected so as to avoid having to perform it. Relying on the arbitrators appears, therefore, to have been the more straightforward and impartial option. Whilst it makes sense why the courts would have taken this stance, it is equally understandable that this position could prove problematic in practice. For example, in *Newgate v Degelder* (1666) where this issue was addressed, the parties had stated in their submission that the arbitrators were to make the award 'when their occasions will permit', a provision over which the justices of the court of King's Bench were in disagreement as to whether it should mean at a time convenient for the arbitrators after one or both of the parties had requested the award to be made, or whether it should instead be construed as empowering the arbitrators to make the

[64] *Arbitrium redivivum*, p. 9. See also March, *Actions for slander* II, p. 56.
[65] *Hall v Hemminge* (1615), 3 Bulst. 85; *Anonymous* (1624), Latch 14; *Newgate v Degelder* (1666), 2 Keb. 10, 20; 1 Sid. 281; *Oates v Bromwell* (1704), Holt, KB 82.
[66] See below at pp. 47-51.

award at any point in the duration of their lives.[67] Whilst the case was ultimately ruled in favour of the plaintiff by default, the defendant having failed to observe the correct pleading formalities in making his defence,[68] it is clear that neither of the proposed interpretations would have been especially expedient, particularly if the parties had desired a quick end to their dispute. Indeed, from what the defendant did claim, when he requested for the arbitrators to make their award, two years had already passed since the parties had first entered into their submission, and yet the arbitrators had still not undertaken the task.[69] Whilst it cannot be ruled out that the arbitrators needed more than two years to come to a decision, the facts of the case being unclear, it seems more likely that this was an excessive delay, something that the parties could have avoided altogether had they simply stipulated in their submission a date by which the award should be made.

The third and final reason why the parties might have sought to stipulate how the award should be made relates to the issue of liability. By setting clear parameters for the award, the parties were effectively limiting what they could then be legally obliged to perform. Given that most submissions appear to have been formed using conditional bonds, this would also have had the added effect of narrowing the circumstances in which the parties might forfeit the penalty, something which they would have undoubtedly been eager to avoid. That this was a motive behind what the parties chose to include in their submission can be seen from the frequent appearance, typically near the end of a submission as in the precedent set out above, of the phrase 'so that the award be made of and upon the premises' or something to that effect.[70] Whilst this phrase might appear to be a mere formality, one easily missed alongside the more long-winded provisions of the contract, its inclusion in the submission served a specific legal purpose. When coupled with the stipulations the parties set concerning the award, it signalled that the parties were agreeing to perform their arbitrators' award only if it complied exactly with what they specified.[71] This would have been relatively simple for the arbitrators to achieve in terms of the form, timing, and notice of the award,[72]

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[67] *Newgate v Degelder* (1666), 2 Keb. 10.
[68] Ibid.
[69] Ibid.; *Nugate v Degelder* (1666), 1 Sid. 281. Note that in the report of the case at 2 Keb. 20, it is stated that three years had passed since the parties entered into the submission.
[70] In the above precedent, the provision is 'so always as the same award…in and upon the same premisses, be made and given up…'
[71] *Risden v Inglet* (1600), Cro. Eliz. 838; *Hamond v Hatch* (1600/1), Gould. 125; *Baspole's Case* (1609), 8 Co. Rep. 97b; *Lindsey v Astey or Aston* (1612, 1614), 2 Bulst. 38.
[72] For an example of the arbitrators nonetheless erring, see *Mawe v Samuel* (1617/8), 2 Rolle 1; Pop. 134.

but as the above precedent attests, the difficulty often concerned the award's content, as the arbitrators would in theory have to address every matter listed in their award, although the courts did qualify this rule to apply only to the matters of which the arbitrators had received express notice.[73] Nonetheless, the phrase was a useful tool for the parties to attempt to limit what they would be liable to perform, and it should therefore cause no surprise that one of the most common defences that a non-performing party would raise when sued by his opponent for enforcement was that the award did not comply with the terms of his submission.[74]

2.3 Revocation

The final issue to consider regarding the submission is revocation, the ability of the parties to withdraw from or 'revoke' this contract. Could the parties revoke their submission without facing any legal consequences for their actions? More importantly, could a single party do so, thereby terminating an attempt at arbitration unilaterally? The short answer was yes: since at least the late fourteenth century, the legal position on revocation had been that it was possible to revoke the submission and, to use an earlier phrase, 'discharge the arbitrators' at any point before the award was made.[75] Only when the arbitrators had pronounced their decision could the parties face potential legal repercussions, for any attempt to withdraw from the contract would amount to non-performance and so would be in breach of the parties' mutual agreement to perform the award. The fact that the submission was revocable was most famously stated by Sir Edward Coke, then the chief justice of the Common Pleas, in his report of *Vynior's Case* (1609), although, as noted here, he was not responsible for establishing the position; he merely confirmed it.[76] Note that the word 'countermand' was (and is) synonymous with 'revoke':

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[73] *Middleton v Weeks* (1607), Cro. Jac. 200; *Ormelade v Coke* (1614), Cro. Jac. 354.
[74] For examples of this defence being raised, see *Goodman v Fountain* (1600/1), Cro. Eliz. 861; *Barnes v Greenwel* (1601), Cro. Eliz. 858; *Bussfield v Bussfield* (1620), Cro. Jac. 577, 2 Rolle 193; *Ward v Uncorn* (1631), Cro. Car. 216. For examples of the defendant being successful in raising this defence, see *Scott v Scott* (1611), 1 Bulst. 110; *Wilson v Constable* (1698), 1 Lut. 536.
[75] The earliest reported case I have been able to find is YB Hil. 49 Ed. III, fol. 8, pl. 14, which is included in *Statham*. There is nothing in the report to suggest that the practice of 'discharging arbitrators' was new; instead, the discussion concerns what would be deemed a valid revocation.
[76] Coke's dictum has long been considered by legal scholars and practitioners, particularly in the United States, as the foundation of what is known as the 'doctrine of revocability', that any agreement to arbitrate a dispute is revocable and, therefore, unenforceable until the arbitrators make an award. Due to the supposed longevity of this rule, invariably traced back to Coke and *Vynior's Case*, the position was only overturned with much difficulty by the passing of the Federal Arbitration Act in 1925 (Pub. L. No. 401, 43 Stat. 883). For more information on the modern significance of *Vynior's Case*, see J.H. Cohen, *Commercial arbitration and the law* (New York, 1918); P. Sayre,

> Although…the defendant was bound…to stand to, abide, observe, &c. the rule, &c. arbitrament, &c. yet he may countermand it; for a man cannot by his act make such authority, power, or warrant not countermandable, which is by the law and of its own nature countermandable.[77]

What Coke went on to explain in the report and, indeed, what appears to have been the more significant part of his decision for practitioners at the time, was that for a revocation to be valid, it had to be communicated to the arbitrators in the same form as the submission.[78] Thus, if the parties had entered into a parol submission, they could express their intention to revoke it orally; but if the parties had instead formed their submission by deed, they could only withdraw from it by drafting another deed. Or as Coke put it, 'if the submission be by writing, the countermand must be writing, if by word I may countermand by word'.[79] Failing to provide the proper form of notice would result in the arbitrators retaining their power to make an award, and if they proceeded to formulate a decision, the parties would still be obliged to perform it, their intentions to the contrary notwithstanding.[80]

Whilst this was the 'official' position on revocation, the straightforward nature of this stance was complicated when the parties formed their submission using conditional bonds. This was not because this particular form of submission was fundamentally different from the others; rather, it was tied to how a conditional bond functioned. Because the bond side of the instrument, in which one party was stated to owe the other party the penalty, could only be discharged by fulfilling the instrument's condition, which was for the party to perform the award, by withdrawing from the submission the party made it impossible for this to occur, the arbitrators no longer having the power to make an award, and so the party would be liable to pay the penalty. This is what happened in *Vynior's Case*: although, as we have seen, it was recognised that the defendant in the case could revoke his submission and did on the facts do so validly, because the parties had formed their submission using conditional bonds, the defendant was held to have forfeited the penalty. As Coke explained, given that the defendant 'has by his own act made the condition of the bond…impossible to be performed…by

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'Development of commercial arbitration law', *Yale Law Journal* 37:5 (1928), pp. 595-617; P. Carrington and P. Castle, 'The revocability of contract provisions controlling resolution of future disputes between the parties', *Law and contemporary problems* 67 (2004), pp. 207-20.

[77] *Vynior's Case* (1609), 8 Co. Rep. 80a, 81b, at 81b.

[78] As evidenced by what other contemporary law reporters included in their reports of the case: *Wilde v Vinior* (1609), 1 Brownl. 62; *Vivion v Wilde* (1608/9), 2 Brownl. 290.

[79] *Vivion v Wilde* (1609), 2 Brownl. 290.

[80] For an exception to this rule, see *Saccum v Norton* (1671/2), 2 Keb. 865, 877.

consequence his bond is become single' and so he was obliged to pay.[81] The court of King's Bench explained in *Noble v Harris* (1677) that the only way for a party could avoid this unfortunate result was if his opponent consented to the revocation, presumably as the parties could then take steps to cancel the bonds that had formed their submission, each party, as explained earlier in this section, having in his possession the other party's bond to attest that he was owed the penalty.[82] Yet even this was not entirely fail-safe, as the facts of the King's Bench case of *Westlie v King* (1624) show: whilst the parties had together consented to revoke their submission, the plaintiff appears, quite deviously, to have retained the defendant's bond and, once revocation had occurred, to have used it to sue the defendant in a debt action to recover the penalty. Unfortunately for the defendant, because he failed to adhere to the correct pleading procedure in revealing what the plaintiff had done, the case was ruled in the plaintiff's favour by default and the defendant was obliged to pay him.[83] The case clearly illustrates why John March cautioned in *Actions for Slander* that forming a submission using conditional bonds 'seemeth dangerous', but, as we shall see, this was not the only occasion in which conditional bonds were used to give effect to a different result than the stated legal rule.

3. Award

The final element of arbitration was the award, the decision made by the arbitrators to resolve the parties' dispute. Or as William West put it in *Symboleography*, it was 'nothing else but the verie dome, order, and decree pronounced by arbitrators vpon the controuersie, for the ending whereof they were chosen by the striuing parties'.[84] Similarly to the submission, the award was also identified by another name, that of 'arbitrement', one that was used far more interchangeably in practice. Indeed, it could even be said that the word 'arbitrement' was considered to be the more precise, technical term for the arbitrators' decision, perhaps because it better encapsulated the dispute resolution process as a whole. As John Dodderidge explained in *The English Lawyer*, whereas the term 'award' derived from the French verb 'agarder' meaning to decide or judge, there was more than one way to account for the etymology of 'arbitrement': either it was 'because the Iudges elected therein, may determine

[81] *Vynior's Case* (1609), 8 Co. Rep. 82a.
[82] *Noble v Harris* (1677), 3 Keb. 745.
[83] *Westlie v King* (1624), Winch 75.
[84] West, *Symboleography*, sec. 42.

the controversie, not according to the Law, but *ex boni viri Arbitrio*', or else 'because the parties to the controversie have submitted themselves to the Iudgement of the Arbitrators, not by compulsory meanes, and the coertion of the Law, but *ex libero Arbitrio suo*, of his own accord'.[85]

The emphasis placed on the award as a form of judgment was not a figure of speech, however. As perhaps the most important point regarding the award, one that has been overlooked by previous scholars,[86] it must be stressed that the courts recognised the award as tantamount to a judgment. For example, in the King's Bench case of *Martham v Jemx* (1604), it was held *per curiam* that 'an award is in the nature of a judgment and sentence',[87] and in *Holford v Platt* (1617), John Dodderidge, here in his capacity as one of the justices of the same court, explained that an award was one of the four types of judgment accepted at the time, the others being by confession, default, or trial.[88] The legal view that an award was a form of judgment in turn affected how the courts dealt with this decision, leading in particular to the elaboration of an entire 'law' on awards, one that defined whether an award would be valid or void. The following discussion will be used to examine this 'law' in more detail as well as, and more immediately, the formalities an award had to satisfy to be valid.

3.1 Formalities

Rather than examine the form and substance of an award similarly to the above discussion of the submission, it is more worthwhile to focus on the formalities of this decision. This is because, as we have seen, the content, form, timing, and notice of an award were largely dictated by what the parties had specified in their submission. If the arbitrators failed to adhere to these stipulations in making their award, the courts would hold that the decision was void and that the parties were not obliged to perform it, the reasoning being that a void award was treated as if no award had been made, as attested by the established legal maxim that a 'void arbitrement est nul arbitrement'.[89] Conceivably, the requirement that the

[85] Dodderidge, *English lawyer*, p. 167.
[86] For example, Derek Roebucks makes no mention of this legal principle in his examination of awards. D. Roebuck, *Arbitration and mediation in seventeenth-century England* (Oxford, 2017), pp. 81-173.
[87] *Martham v Jemx* (1604), Yelv. 97. Also reported as *Markham v Jurex* (1604), 1 Brownl. 92.
[88] *Holford v Platt* (1617), Cro. Jac. 464.
[89] *Anonymous* (1562) Ben. & D. 43; *Tomkins v Webb* (1618), 2 Rolle 46; *Stone v Knight* (1626/7), Latch 207, Jones, W. 165. This maxim was used since at least the early fifteenth century, as evidenced by YB Trin. 2 Hen. V, fol. 10, pl. 10.

arbitrators had to adhere to the parties' specifications in making their award could have proven burdensome in practice. For example, as the facts of the King's Bench case of *Bussfield v Bussfield* (1620) reveal, the arbitrators had resided in York and had made their award there, yet because the parties had specified in their submission that they should receive notice of the decision in London, the court ruled that the parties would have to be so informed or else the award would be void.[90]

There were, however, two sorts of caveat to the principle that an award had to comply with the parties' stipulations: the first involved the question of whether an award could be a deed if the parties had specified that it be made to satisfy the conditions of this construction; and the second concerned the effect of the arbitrators complying with the parties' stipulations when the matters to decide were not themselves 'arbitrable', or capable of being determined by arbitration. As these caveats had no bearing on one another, the rest of this subsection will therefore be used to examine each of them in turn.

(i) *Could an award be a deed?*

The first caveat to the principle that an award had to comply with what had been specified in the parties' submission concerned whether an award could be a deed. It must be remembered that a deed was not itself a particular instrument but rather the technical term for a document which satisfied the formalities necessary for it to bear greater evidential weight at law.[91] But because it was ultimately for the courts to decide whether a given document would be construed as a deed or not, there was the possibility that even if the parties had stipulated that the award meet the requirements for a deed, the courts might not accept it as one. As presented, this issue might seem to be of largely theoretical concern, but there was a clear, practical reason why parties would have wanted their awards to be deeds. Since the fourteenth century, the courts had been prepared to enforce debts arising not just from contracts but from judgments,[92] and given that an award was considered to be a form of judgment, if the arbitrators chosen by the parties ordered for one party to pay the other a sum of money as part of their decision, the party who was supposed to receive the sum could bring

[90] *Bussfield v Bussfield* (1620), Cro. Jac. 577, 2 Rolle 193.
[91] Refer above at pp. 29-30.
[92] Robert Palmer has claimed that this type of debt action first arose in the 1360s. R.C. Palmer, *English law in the age of the Black Death, 1348-1381: a transformation of governance and law* (Chapel Hill, N.C., 1993), pp. 89-90. See also Baker, *ELH*, p. 393, no. 43; Blackstone, *Commentaries*, vol. III, pp. 158-59.

a debt action to recover it should his opponent fail or refuse to pay.[93] Yet for any debt action, the likelihood that a party would be successful in enforcing the debt depended on whether the obligation giving rise to it was enshrined in a deed.[94] If it were, it would have been relatively straightforward for the party to recover the sum, the deed providing conclusive evidence that the debt was owed. However, if the debt obligation were not so enshrined, the party bringing the action, the plaintiff, would almost certainly fail in his attempt, for his opponent, the defendant, could deny the debt by waging his law. This involved the defendant swearing that he was not obliged to pay the plaintiff, a claim that would then be corroborated by eleven witnesses or 'compurgators' under oath, and, if accomplished, it would amount to a complete defence against the plaintiff's action, causing the case to be dismissed.[95] Yet as John Baker has explained, given that there were no legal requirements as to who could be a compurgator, by the seventeenth century wager of law had essentially become a 'charade', it having been customary for the defendant to pay a fixed fee to the court's door-keeper to hire off the streets individuals who were willing to swear on the defendant's behalf.[96] The net effect of this practice was that it was rarely possible for a plaintiff to enforce a debt not arising from a deed, which would help explain why, in the context of awards, the parties would have wanted their arbitrators' decision to be accepted as a deed.

For the first half of the seventeenth century, however, the courts refused to construe awards as deeds. In *Markham v Jurex* (1604), the court of King's Bench expressly distinguished awards from deeds by stating that 'there was much difference between wills and deeds, and between arbitrements',[97] and in *Dodd v Herbert* (1655), John Glynne, the chief justice of the Upper Bench, asserted that 'an arbitrement under seal is no deed' but merely 'a writing under hand and seal'.[98] It should be noted that this was not a new position

[93] This debt action was referred to at the time as the action of debt on award ('sur arbitrement'). See below at pp. 98-100 for more information on this type of action. For an earlier discussion of this action, see J. Biancalana, 'The legal framework of arbitration in fifteenth-century England', *AJLH* 47:4 (2005), pp. 347-82, at pp. 370-72.
[94] Simpson, *CLC*, pp. 88-196; Ibbetson, *HILO*, pp. 24-38; Baker, *ELH*, pp. 342-46.
[95] For more information on wager of law, see Simpson, *CLC*, pp. 137-40; Baker, *ELH*, p. 81. For cases in which the possibility of wager of law was discussed in relation to actions of debt on award, see *Castle and Oldmans Case* (1589), 1 Leo. 204; *Hampton v Boyer* (1597) Cro. Eliz. 557; *Boyer v Garland* (1597/8), Cro Eliz. 600; *Peto v Checy and Sherman* (1611), 1 Brownl. 128; *Wood v Brooke* (1626), Noy 96; *Hodsden v Harris* (1669), 2 Keb. 537. For an example of a defendant actually waging his law, see *Anderson v Symonds* (1626), Latch 213.
[96] Baker, *ELH*, p. 81.
[97] *Markham v Jurex* (1604), 1 Brownl. 92, Yelv. 97. This was the same case noted in the introduction to this section, but I have retained the spelling associated with the report from which the quotation cited was recorded.
[98] *Dodd v Herbert* (1655), Sty. 459.

for the courts to take; instead, they were simply confirming what had been the 'official' stance for centuries, a theme, as we shall see, that will re-emerge elsewhere in this discussion on awards.[99] But what was a seventeenth-century development was the complete reversal of this position, a change that appears to have been implemented in the King's Bench case of *Hosdell v Harris,* heard over several terms in 1668-1669.[100] Interestingly, the case was not at all concerned with the possibility that a defendant might wage his law if his opponent, the plaintiff, sought to sue him for a debt arising from an award. Instead, the issue of the case centred, if somewhat belatedly, on the application of the Limitation Act of 1623, the first statute of limitations to be passed in England.[101] As with all succeeding statutes of limitations, the purpose of the Limitation Act was to restrict when a party could bring an action to only a fixed period after the cause of his action had occurred. One of the limitation periods specified in the Act was that a party would be prohibited or 'barred' from bringing an action to enforce a debt *not* arising from a deed more than six years after the debt became due, and it was this provision that was relevant to the facts of *Hosdell v Harris*.[102] From what can be determined from the reports of the case, more than six years previously Hosdell and Harris had decided to arbitrate their dispute, specifying in their submission that their arbitrator make an award in writing, under seal, and, presumably as it is not explicitly stated in the reports, to be delivered to the parties—ostensibly satisfying the formalities for a deed. The arbitrator proceeded to make his award in accordance with these stipulations and ordered that Harris pay Hosdell a sum of money, something which Harris refused to do. For reasons that are unclear, Hosdell then delayed suing Harris to recover this sum for more than six years, so what the court of King's Bench had to decide was whether Hosdell was barred from bringing his debt action under the Limitation Act. It was, then, crucial to the court's decision whether the award made by the arbitrator could be construed as a deed: if the court maintained its previous position by holding that an award could not be a deed, the Act would have applied to the case and Hosdell would have been barred from his action; if the court altered its stance and allowed for an award to be a deed, the Act would not have applied and Hosdell could have proceeded to recover the sum owed to him by Harris. After much

[99] The fact that an award was not a deed appears to have been the reasoning behind the courts not allowing for the making of an award to be plead to bar actions grounded on deeds, such as the action of debt on an obligation. 'Arbitrement' in *Statham*, no. 3; 'Arbitrement' in *Brooke*, no. 11. The judges' reasoning in which this view is espoused is not included in the Year Book reports of the cases.
[100] *Hosdell v Harris* (1668-1669), 2 Keb. 462, 497, 533, 536, 2 Wms. Saund. 61, 64.
[101] 'An act for the limitation of actions', 21 Jac. I, c. 16.
[102] Ibid., sec. 3.

deliberation, the court adopted the latter option, its reasoning being that the Act had not been intended to apply to cases involving debts from awards, so in this roundabout way it came to be that an award was capable of being a deed.[103] As the court ruled, 'the award being by deed is a specialty…and so out of the statute'.[104] From then on, if parties specified in their submission that their arbitrators' award be made as a deed, it was possible for the arbitrators to comply with this stipulation.

(ii) *Arbitrability*

The second caveat to the principle that an award had to be made in accordance with the parties' submission concerned the issue of 'arbitrability', whether a matter could be the subject of arbitration or not. If the parties specified that their arbitrators were to make a decision on a matter that was not 'arbitrable', should the arbitrators comply and address this matter in their award, the decision would be held void by the courts. Unlike the previous issue, then, it was not that the arbitrators were unable to satisfy the intentions of the parties as stipulated in their submission; the problem was that if the arbitrators did so, their resulting award would be legally invalid. Admittedly, this was not especially burdensome in practice as there were only two matters which the courts deemed not to be arbitrable: the first was real property, meaning land and any structure affixed to it;[105] and the second was any matter that was 'certain', which, from the examples that were typically given to illustrate this restriction, appears to have meant a matter that was already determined or settled, such as a bond attesting that a party owed a sum of money, it being 'certain' that the obligation to pay the sum existed.[106] As with the courts' initial position in refusing to accept awards as deeds, these restrictions on arbitrability pre-dated the seventeenth century and so were often expressed in both the reports of cases and the treatises on arbitration as established rules, with little or no explanation for why they existed.[107] But from a brief study of two older categories of legal

[103] *Hosden v Harris* (1669), 2 Keb. 536.
[104] *Hodson v Harwich* (1669), 2 Keb. 533.
[105] *Blagrave and Wood's case* (1591), 1 Leo. 227, at 228. But note that any inferior interest over the land, such as a leasehold interest, was arbitrable: *Trusto v Ewer's case* (1589), 2 Leo. 104; Cro. Eliz. 223.
[106] This rule appears to have been most relevant to 'certain' debts: *Sower v Bradfield* (1595) Cro. Eliz. 422; *Farrer v Bates* (1646), Al. 4; *Johnson v Rawle* (1648), Al. 90; *Morris v Creech* (1670), 1 Lev. 292.
[107] All of the above cases provide little explanation for what they express as rules. For examples in the treatises, see West, *Symboleography*, sec. 32; *Arbitrium redivivum*, pp. 3-7. John March is the one

literature, the Year Books[108] and the law abridgments commonly referred to as *Statham*, *Fitzherbert*, and *Brooke*,[109] it would appear that both restrictions were tied to the principle that an award was a form of judgment and should, therefore, bring an end to a dispute. For the restriction on real property, the reasoning would seem to be that arbitrators could not by their award alone effect the transfer of real property from one party to another, this being possible only by operation of the law, so any award claiming to do so would not actually bring an end to the parties' dispute.[110] For the restriction on 'certain' matters, the reasoning appears to be based largely on common sense: as the matter was already determined or settled, there would be nothing for the arbitrators to bring an end to or resolve.[111] To continue with the example of a debt arising from a bond, which, as we have seen, was a type of deed, at least from a legal standpoint it would have been indisputable that the debt was owed, so all that the arbitrators would have been able to do was confirm this position, they themselves lacking the power to compel the indebted party to pay. Accordingly, there would be no judgment for the arbitrators to make. This line of reasoning also helps explain the exception to this restriction: if the parties specified that their arbitrators should make an award on several matters, some of which were 'certain' whilst others were 'uncertain', any award made in accordance with this stipulation would be valid as there would then be matters for the arbitrators to determine.[112]

Probably part of the reason why legal writers in the seventeenth century did not take the time to examine these restrictions on arbitrability in much detail was that they could be circumvented by the parties forming their submission using conditional bonds. As the conditional bond was structured so that a party would be liable to pay its penalty if he did not fulfil the bond's condition, which was to perform the award, even if the award was void for concerning a matter that was not arbitrable, the party would have to perform it or else risk

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exception, adding his own commentary in presenting these restrictions. March, *Actions for slander* I, pp. 154-58.

[108] The Year Books were the law reports chronologically preceding the nominate reports (c. 1268-1535), being so called because their only headings were the regnal years (and law terms) reported. Baker, *ELH*, pp. 189-91.

[109] These were the three printed abridgements of the Year Books, all being named after their compilers or, in the case of *Statham*, the person believed to have compiled it. *Statham* was first published c. 1490; *Fitzherbert* in 1514-16 (and later entitled *The Graunde Abridgement*); *Brooke* in 1573 (also as *The Graunde Abridgement*). Baker, *ELH*, pp. 195-97.

[110] YB 31 Ed. III, fol. 26; 14 Hen. IV, fols. 18-19; 'Arbitrement' in *Statham*, nos. 8-9; 'Arbitrement' in *Brooke*, nos. 20-21.

[111] YB Pasc. 4 Hen. VI, fol. 6, pl. 17; 'Arbitrement' in *Statham*, no. 6; 'Arbitrement' in *Fitzherbert*, nos. 1, 23.

[112] Ibid. For a seventeenth-century example of this exception in use, see *Rose v Spark* (1648), Al. 51.

paying the penalty. This effective reversal of the courts' established position was recognised by the author of *Arbitrium Redivivum*: after listing what matters were and were not arbitrable in his treatise, he qualified the discussion by saying 'yet in such cases though themselves be not arbitrable, yet if a man will bind himself to stand to an award, such bond is good: and for the non-performance of the award the bond will be forfeited'.[113] Given the frequency with which contemporary writers claimed conditional bonds were used to form submissions, it would appear that the problem posed by the restrictions on arbitrability, whilst worth mentioning in a study of arbitration in the seventeenth century, was not actually all that taxing, a useful reminder that rules and doctrine were not the be-all and end-all of legal practice.

3.2 The law of awards

The final issue to examine, both in this section and the chapter as a whole, is what contemporaries referred to as the 'law' or 'doctrine' of awards, the legal rules prescribing whether an award was valid or void. From the standpoint of enforcement, this was unquestionably the most important issue concerning arbitration as it determined whether the courts would hold the parties to their agreement to perform the award or not. If the award were valid, the parties would be legally obliged to perform it; but if the award were instead void, the parties would not be so obliged, the courts, as we have seen, treating a void award as if no award had been made. Technically, the parties' legal position would revert back to how it had been in the intermediate stage between the parties forming their submission and the arbitrators making their award,[114] but usually by the point when a party sought enforcement from the courts, the time period specified for the arbitrators to make an award would have expired, discharging the parties' obligation to perform as a result. In practice, then, the effect of a court ruling that an award was void would be to terminate the parties' attempt at arbitration, with neither party suffering any legal repercussions for it.

Given this outcome, it should not be surprising that when a party was sued for not performing an award, the most common defence put forward was to claim that the award was void. Indeed, in cases where the parties had formed their submission by deed, this was

[113] *Arbitrium redivivum*, p. 7.
[114] This is evident from the fact that in the pleadings of a suit where the defendant had been sued for not performing the award, he would plead that no award had been made but that he stood 'ready' to perform. R. Brownlow, *Declarations, counts and pleadings*, 2 vols. (1652-1654), vol. II, pp. 143-45, at p. 144. For an earlier precedent of this manner of pleading, see 'Arbitrement' in *Statham*, no. 9.

essentially the only defence that could be made. If the submission had been formed using an indenture, the parties' agreement to perform would have been enshrined in a deed, so the non-performing party could not deny that he had agreed to perform the award. One of the only ways to avoid being held to this agreement, then, was for the party to argue that the award was void, in the hopes that the court would accept this defence and dismiss the case for the reasons above.[115] If the submission had been instead formed using conditional bonds, by not performing the award the party would have contravened the condition of his bond and would therefore be liable to pay the penalty. He could only hope to escape payment by contending that the award was void, for given that a void award was equated to there being no award made, the effect of this position on the bond's construction would be that the party had not breached its condition, there being no award for him to perform, and so he was not yet liable to pay. Thus, when a party, the plaintiff, brought a claim to sue his opponent for not performing the award, it was conventional for the opponent, the defendant, to plead that their arbitrators did not make an award (*nullum fecerunt arbitrium*), a plea he would maintain until joinder of issue so that the question for the court to decide was whether there was an award or not—the plaintiff claiming that there was one, and the defendant claiming there was not.[116] As this was a legal issue rather than a factual one, the defendant's plea standing only if the court ruled that the award was void, the matter would be brought before the justices *in banc* either by special verdict[117] or on demurrer[118] so that the defendant could argue that the award was void. It was from these arguments, then, that the law of awards was both expressed and

[115] The defendant could also argue that he had revoked the submission (*revocavit*): *Nugate v Degelder* (1666), 1 Sid. 281.

[116] There are many cases in which the 'correct' form of pleading was discussed, it being relatively common at the time for counsel to depart from it, particularly by the defendant not maintaining his plea until joinder of issue. For examples of cases stipulating the 'correct' pleading structure, see *Farrer v Gate* (1627/8), Palmer 511; *Skinner v Andrews* (1668), 1 Lev. 245, 1 Sid. 370. For examples in which the defendant was held to have ill-pleaded by departing from his plea, see *Westlie v King* (1624), Winch 75; *House v Launder* (1662), 1 Keb. 414; *Morgan v Man* (1663/4), 1 Sid. 180, Raym., Sir T. 94, 1 Lev. 27; *Roberts v Marriot* (1670), 2 Keb. 702, 2 Wms. Saund. 188; *Rodham v Stroher* (1677), 3 Keb. 830. For a written example of the pleadings of both the plaintiff and the defendant, see Brownlow, *Declarations*, vol. II, pp. 143-45.

[117] By special verdict, the facts of the case would be found by a jury at trial, but a verdict would be withheld so that the disputed matter of law could be decided by the judges *in banc*. For further discussion of the special verdict, see R. Sutton, *Personal actions at common law* (1929), pp. 127-28. For examples of the validity of an award being raised by special verdict, see: *Anonymous* (1582), Godb. 13; *Withers v Drew* (1599), Cro. Eliz. 676; *Keniston v Jones* (1648), Sty. 97; *Rudston and Yates Case* (1639/40), March, N.R. 141; *Barker v Lees* (1666), 2 Keb. 64.

[118] By demurrer, the disputed matter of law would instead be heard *in banc* before trial: Sutton, *Personal actions*, pp. 107-21. For examples of the validity of an award being raised by demurrer, see: *Berry v Penring* (1616), Cro. Jac. 399; *Vanlore v Tribb* (1616), 1 Rolle 437; *Travers v Twisteton* (1665), 1 Lev. 174; *Case v Dare* (1681), Jones, T. 167.

reinforced, and given that it was the *in banc* discussions that were reported in the nominate reports, it is possible to know what these rules were and, importantly, how they were justified.

Turning now to the rules themselves, it must be stressed that they were in no way haphazard; rather, they derived from the two general principles on awards that have been discussed in this section: first, that the award must comply with what was specified in the submission; and second, that the award was tantamount to a judgment. The rules proceeding from the first principle, the reader will be thankful to know, have all been examined elsewhere in the chapter and so only need to be synthesised here. In terms of formalities, the award had to satisfy the stipulations of the parties regarding content, form, timing, and notice or else it would be void. In terms of the arbitrators exercising their powers, they could not delegate, reserve, or exceed their authority or make a decision involving a third party or 'stranger' as to do so would exceed what the parties had specified in their submission and would, therefore, be void. The rules deriving from this first principle were, then, merely expressions of the fact that the courts would only hold the parties to what they had agreed between themselves. If an award contravened any of these rules, it would be void for the simple reason that it was not what the parties had agreed to perform.

The rules ensuing from the second principle, by contrast, can more properly be seen as 'judge-made' rules as they were not tied to what the parties had agreed to in their submission but instead to what the courts expected of a judgment. As a form of judgment, an award was supposed to end or 'finally determine' the dispute between the parties,[119] a result which could be achieved by adhering to three specific rules. First, the award had to be 'reciprocal', meaning that it had to provide some sort of redress or satisfaction to both parties, the implication being that if only one party received satisfaction, the dispute would not be ended vis-à-vis the other party.[120] Sir Henry Hobart, the chief justice of the Common Pleas, made this position clear in his own report of *Nichols v Grunnion* (1614), a case in which the

[119] *Jones v* ____ (1616), 1 Rolle 380; *Watson v Watson* (1647), Sty. 56; *Bens v King* (1661), 1 Keb. 166; *Anonymous* (1662), 1 Lev. 87; *Selsby v Russel* (1697), Comb. 465. The view appears to derive from the long-held practice of the courts allowing a defendant to plead the making of an award to bar proceedings in other matters. YB 11 Hen. IV, fol. 12: 'per Thirne le mitter en arbitrement est bon barre, pur ceo q[ue] ils ont eux pris auter iug[ement]'.

[120] *Colston v Harris* (1602), Cro. Eliz. 904; *Stains v Wild* (1614), Cro. Jac. 352; *May v Samuel* (1617), Popham 134; *Capell v Allen* (1647), Sty. 44, Al. 10; *Morden v Hart* (1655), Sty. 471; *Bacon v Dubarry* (1697), Skin. 679, Carth. 412, Holt, K.B. 78. But note that if there was more than one party on each side of a dispute, an award would be reciprocal if only one of the parties to a side had received satisfaction: *Libtrat v Field* (1664), 1 Keb. 885.

court of Common Pleas had been prepared to judge the award void for lack of reciprocity, it requiring the defendant to vacate her home and pay the plaintiff a sum of money whilst providing her nothing in return.[121] As Hobart explained, 'because every controversie is between two parties at the least…the controversie cannot be ended, except it be ended in respect of them both'.[122] Second, the award had to be certain, meaning that the parties had to know what exactly was required of them to bring effect to the decision, any contingency or uncertainty causing the dispute to remain unresolved.[123] This rule was distinctly expressed in *Thinne v Rigby* (1612), a case heard in the Exchequer Chamber on writ of error from the court of King's Bench.[124] As the arbitrators had not specified in their award what type of security the defendant was to give the plaintiff for payment of a sum of money at a later date, it was agreed 'by all the judges and barons' that the award was void for being uncertain, for 'every arbitrament ought to be certain, that the party may know what he is to perform'.[125] Third, the award had to be both possible and lawful to carry out, for if the parties were either physically or legally incapable of performing what their arbitrators had stipulated, they could not bring effect to the decision and end the dispute as a result.[126] Disappointingly, no reported cases have been found of an award concerning an impossible or unlawful act, perhaps because it would have been obvious even to the arbitrators not to make a decision involving these issues, but due to a pleading error in the King's Bench case of *Gennings v Markham* (1606/7), the effect was nonetheless the same. In recounting the contents of the arbitrators' award in his declaration to the court, the plaintiff stated that it was a provision for the defendant to pay the plaintiff a sum of money on 21 May and, on receiving the sum, for the plaintiff to release his claim to a disputed copyhold on 1 May. This was clearly a mistake in the writing of the plaintiff's declaration, the word 'twenty' (*vicesimum*) being omitted from 'twenty-first day of May' (*vicesimum primum diem Maii*), it having been stated that the plaintiff was to make his release on the 'aforesaid' (*predictum*) day.[127] Yet as this was how the award was presented to the court, the justices held that the decision was 'insensible' as it was not possible for the defendant's payment and the plaintiff's release to occur on the same

[121] *Nichols v Grunnion* (1614), Hob. 49; 1 Brownl. 58. Hobart notes in his report of the case that no judgment was made because the parties compounded the suit.
[122] *Nichols v Grunnion* (1614), Hob. 49.
[123] *Samon v Pitt* (1596), Cro. Eliz. 432; *Winch and Grave v Sanders* (1620) Cro. Jac. 584; *Copping v Hernault* (1670), 2 Keb. 619; *Pope v Brett* (1670/1), 2 Wms. Saund. 292, 2 Keb. 736.
[124] *Thinne v Rigby* (1612), Cro. Jac. 314.
[125] Ibid.
[126] *Lindsey v Astey or Aston* (1612), 2 Bulstr. 38; *Forster v Brunett* (1689), Holt, K.B. 78.
[127] *Gennings v Markham* (1606/7), Cro. Jac. 149.

day, 1 May and 21 May being distinct dates, and so were prepared to judge the award void. The case was, however, adjourned, and no report was made of the court's judgment.[128]

Following from the two principles concerning awards, then, there were several rules prescribing whether an award was valid or void.[129] Whilst the rules have been presented here separately, in practice they could operate in tandem, a court judging that an award was void for contravening several of the rules examined above.[130] Perhaps because of this, it was common for a defendant to raise as many rules as were relevant to the facts of his case in arguing that the award was void, in the hopes that at least one of them would be held by the court to have been breached. For example, in the Common Pleas case of *Freeman v Baspoule* (1609/10), the defendant argued that the award was void because it was not reciprocal; it did not comply with the submission; and it was uncertain. None of these points appear to have convinced the court, for it gave judgment in favour of the plaintiff.[131] Even more drastically, in the King's Bench case of *Peeling v Ken* (1648), the defendant raised no less than six separate arguments to contest that the award was void, including that the decision was not reciprocal; that it involved a stranger; that some of its provisions were impossible; and that it did not comply with the parties' submission. Presented with this veritable deluge, the court stated that it would take time to advise.[132] In light of such practices, it is not difficult to see why the law reformer William Sheppard lamented that 'the Law is so at this Day, that the wisest Man in the Country cannot make an Award that a hole cannot be pick'd in it to make it void'.[133] Yet it is worth remembering that these rules had not developed to hinder or delay arbitration; indeed, as is clear from the principles from which they derived, they were meant to support the process and what the parties had agreed to between themselves. Like so many other issues, even the most well-intentioned of rules were capable of having a different result when put in practice.

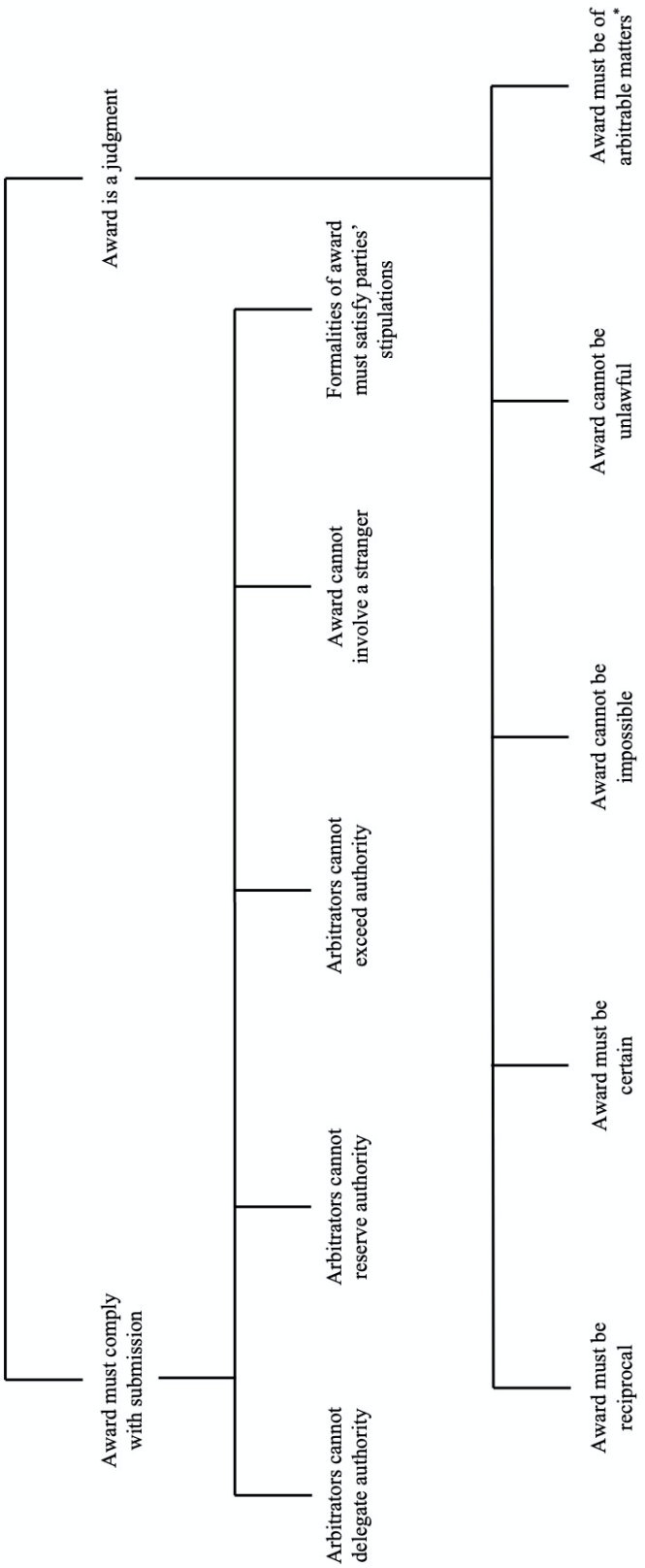
[128] *Gennings v Markham* (1606/7), Cro. Jac. 149.
[129] For an overview of these rules, see the diagram at the end of this chapter, p. 53.
[130] For example, *Samon v Pitt* (1596), Cro. Eliz. 432; *Thinne v Rigby* (1612), Cro. Jac. 314; *May v Samuel's case* (1617), Pop. 134.
[131] *Freeman v Baspoule* (1609/10), 2 Browl. 309. The case was also reported by Sir Edward Coke as *Baspole's Case* (1609), 8 Co. Rep. 97b.
[132] *Peeling v Ken* (1648), Sty. 111. The other arguments raised by the defendant concerned pleading errors.
[133] W. Sheppard, *Englands Balme* (1656), p. 59.

4. Conclusion

By examining the elements of arbitration, this chapter has shown that there was clearly a legal practice to arbitration in the seventeenth century, one that was guided by established legal rules and principles. Whilst arbitration has traditionally been linked in scholarship to the community and informal means of conciliation, it would appear that the process had greater ties to the law than previously recognised. Of course, it can and should be questioned just how widespread this legal practice had been at the time. The sources used for this analysis were legal in nature and intended, though perhaps not exclusively, for a legal audience. Yet given the noted litigiousness of the period, where the levels of litigation brought before the courts throughout the legal system appear to have represented some of the highest in English history, it would be mistaken to assume that the rules and practices examined in this discussion were entirely detached from what occurred in practice.[134] At the very least, if parties wanted to be able to seek enforcement from the courts, they would have to ensure that the way in which they conducted their arbitration complied with what the law prescribed. But neither was the law a static or immovable force to be applied against arbitration. This discussion has also revealed, through its coverage of issues such as the concurrent authority of umpires or the question of whether an award could be a deed, that the law as it related to arbitration was reactive and capable of change. As we shall see, such a recognition will be important to understanding the enforcement procedure of the Arbitration Act, but on a more general scale, it serves to illustrate that there was in fact interaction between the law and arbitration. The relationship was not just one of the law prescribing arbitration; the law and arbitration influenced one another.

[134] C.W. Brooks, *Pettyfoggers and vipers of the commonwealth: the 'lower branch' of the legal profession in early modern England* (Cambridge, 1986), pp. 49-51, 56-57; C. Muldrew, 'Credit and the courts', pp. 23-28; 'Culture of reconciliation', pp. 915-16.

Figure 3: Diagram of the 'law' of awards



*This rule could be avoided by the parties forming their submission using conditional bonds.

2. Arbitration in Practice

Having examined the elements of arbitration in the previous chapter, this discussion will move on to explore its practice in the seventeenth century. By analysing accounts of arbitration found in contemporary diaries and letters, this chapter will attempt to re-create what it was like to arbitrate a dispute at the time. This objective has been largely inspired by the works of previous historians who have undertaken similar efforts with regard to litigation.[1] To make sense of the high levels of lawsuits brought during the period and to assess whether the resulting litigiousness had an impact on social relations, these historians have sought to relate the 'experience' of litigation for early modern individuals and the reasons contemporaries had for pursuing it.[2] One of the consistent findings of these historians was that litigation was rarely initiated with the intention to reach a judgment; rather, it was commenced with the objective of securing an out-of-court settlement, most notably by arbitration. As James Sharpe claimed, 'the initiation of a lawsuit with the aim of achieving an extra-legal settlement, and the frequent recourse to arbitration as a means of reaching this end, were two of the distinctive characteristics of litigation in Elizabethan and Stuart England'.[3] But whilst these historians have been prepared to explore the purpose and practice of litigation in a critical way, they have proven less willing to apply their same methods to arbitration. As a result, the term 'arbitration' as used in scholarship has evolved into a sort of by-word for conciliation, with little consideration given to the complexities and motivating

[1] In particular, M.J. Ingram, 'Communities and courts: law and disorder in early-seventeenth-century Wiltshire' in *Crime in England 1550-1800*, ed. J.S. Cockburn (1977), pp. 110-34; J.A. Sharpe, '"Such disagreement betwyx neighbours": litigation and human relations in early modern England' in *Disputes and settlements: law and human relations in the west*, ed. J. Bossy (Cambridge, 1983), pp. 167-87; 'The people and the law' in *Popular culture in seventeenth-century England*, ed. B. Reay (1985), pp. 244-70.

[2] The term 'experience' has traditionally been used by historians in reference to authority and to embodiments of the state, see S. Hindle, A. Fox, P. Griffiths, eds., *The experience of authority in early modern England* (Basingstoke, 1996). However, Steve Hindle has more recently applied the term to litigation, expressly re-opening the debate 'about the social meaning of litigation'. S. Hindle, 'The micro-spatial dynamics of litigation: the Chilvers Coton Tithe Dispute, *Barrows* vs. *Archer* (1657)' in *Law, lawyers and litigants in early modern England*, eds. M. Lobban, J. Begiato, A. Green (Cambridge, 2019), pp. 140-163, at p. 142. For the term used in this way for the eighteenth century, see W. Prest, 'The experience of litigation in eighteenth-century England' in *The British and their laws in the eighteenth century*, ed. D. Lemmings (Woodbridge, 2005), pp. 133-54.

[3] Sharpe, 'Such disagreement betwyx neighbours', p. 185.

factors of the process. The aim of conducting this study, then, is to begin the effort to offset this imbalance, focusing on two issues in particular. First, why did contemporaries choose to arbitrate their disputes? Second, what was the practice or 'experience' of arbitration at the time? The purpose in addressing these issues will not be to refute that arbitration was a means to resolve disputes and to reconcile parties, but rather to provide a more complete picture of the process in its entirety.

1. Choosing arbitration

Before we can examine the practice or 'experience' of arbitration in the seventeenth century, it is necessary to consider why contemporaries decided to arbitrate their disputes. Arbitration was, of course, only one of several methods of dispute resolution employed at the time, so what led contemporaries to choose it? By posing this particular question, one might be inclined to think that contemporaries actively chose arbitration over other dispute resolution methods. The reality is, however, that contemporaries rarely sought to arbitrate their disputes at the first instance; instead, they resorted to the process only after more informal and consensual methods had failed to bring about a settlement. This later resort to arbitration, rather than an initial preference for it, can be clearly observed in the dispute between the Yorkshire yeoman Adam Eyre and his tenant Edward Mitchell which broke out in 1647. Eyre and Mitchell had both previously served under the command of Sir Thomas Fairfax in some of the early skirmishes of the First English Civil War, and it was presumably through this connection that Eyre had come to lease the ground floor of his farmhouse to Mitchell the preceding year.[4] After implementing this arrangement, however, Eyre and Mitchell soon fell into disagreement about the terms of the lease. Whilst they initially tried to sort out the matters themselves and, when that failed, through the mediation of their mutual friend William Rich, the dispute had so escalated by the winter of 1647 that the two were no longer on speaking terms.[5] Recognising that a more drastic approach would be needed to settle the matter, Eyre wrote to Mitchell on 16 December stating that he was 'willing to referr [himself] to [his] neighbours', and a few days later he and Mitchell met at another friend's home 'where we referred ourselves for all controversyes between us to the arbitrement of Ralph

[4] For more information on the relationship between Eyre and Mitchell, see A. Hopper, 'Social mobility during the English Revolution: the case of Adam Eyre', *SH* 38:1 (2013), pp. 26-45.
[5] H.J. Morehouse, ed., 'A dyurnall or catalogue of all my accions and expences from the 1st January 1646-7, by Adam Eyre' in *Yorkshire diaries and autobiographies in the seventeenth and eighteenth centuries*, ed. C. Jackson (1875), pp. 79-80 [henceforth cited as 'Adam Eyre'].

Wordsworth and W[illiam] Rich, and became bound in either of us 100*l*. to the other to abyde their end'.[6] As this account illustrates, the use of arbitration was a later step in the dispute resolution process which saw contemporaries turn to increasingly formal and authoritative practices should their disagreement persist.[7] By choosing to arbitrate their dispute, contemporaries acknowledged that the matter was contentious or complex enough that resolution could not be reached on their own.

Yet if contemporaries resorted to arbitration when their dispute could not be resolved by less formal methods, the same could be said for litigation. And whereas both procedures resulted in a more authoritative decision, one that was imposed on the disputing parties rather than being reached between them, the judgment of a court was the more coercive option, it being possible to sue out execution to implement the decision. Accordingly, it seems that the more critical question to ask is not why contemporaries chose arbitration, but why they might have chosen it over litigation. The rest of this section will be used to explore this question in more detail, particularly as it has been an area of concern for previous scholarship, arbitration having been widely depicted as an out-of-court alternative to litigation.

Perhaps the most significant reason that contemporaries might have chosen arbitration over litigation was that the process was more likely to reconcile the disputing parties. As Martin Ingram and James Sharpe have noted, this was largely a result of the procedural differences between the two processes, both in terms of the matters that could be addressed and the types of decision that could then be made.[8] With litigation, for example, there could only be one cause of action for initiating proceedings before a court, something which might not have reflected or encompassed the full extent of a dispute between parties. Moreover, in deciding the matter, not only would the court assign fault wholly to one party or the other, precluding the very real possibility that both parties were to blame, but the remedy it would then provide might not have been deemed satisfactory to the party entitled to it, potentially exacerbating the dispute rather than ending it. With arbitration, by contrast, the parties could specify that any number of issues between them be addressed by their arbitrators, and in making their award, the arbitrators could devise a solution that worked for all the parties involved—provided, of course, that it complied with the legal rules discussed in the previous

[6] 'Adam Eyre', p. 80.
[7] Craig Muldrew has similarly envisaged the various methods available to resolve a dispute. C. Muldrew, 'The culture of reconciliation: community and the settlement of economic disputes in early modern England', *HJ* 39:4 (1996), pp. 915-42, at p. 931.
[8] Ingram, 'Communities and courts', p. 125; Sharpe, 'Such disagreement betwyx neighbours', pp. 185-86.

chapter. Due to this greater procedural flexibility, then, arbitration was typically better suited than litigation to bring an end to a dispute, something that was reflected in the ways in which contemporaries often described the process in their writing: arbitrators were supposed to 'settle', 'compose', or 'end' a dispute and to 'make friends' of the disputing parties; and their award was equated to 'peace', 'unity', and 'love'.

Given that arbitration was more likely than litigation to resolve a dispute, there were also strong social pressures placed on contemporaries to make use of the process. As many social historians have shown, it was a prescriptive, although perhaps not descriptive, norm of the period that contemporaries were to maintain peaceful and 'neighbourly' relations within their communities, so it should not cause much surprise that when disagreements did occur, contemporaries were encouraged to settle their issues by arbitration and not by litigation.[9] The Cheshire magistrate Sir Richard Grosvenor acknowledged this preference for arbitration in a letter of advice to his son in 1636, stating that whilst 'differences and suits may commence betwixt deare freinds and loveing neighbours', the proper course would be to find 'a faire & frendly way of composure' which was 'by reference to some able & judicious freinds whose endeavours may putt an end to the controversy'.[10] When Grosvenor learned two years later that his son had ignored his advice and had sued a neighbour without first attempting to arbitrate the dispute, he was infuriated. Not only did he rebuke his son, chiding him to 'let reason and not will rule you in all matters', but he arranged for an arbitration to take place with the neighbour, ordering his son to attend.[11] Grosvenor's quick actions to rectify his son's mistake suggest that the use of arbitration could also have an effect on reputation. Indeed, as scholars have demonstrated that contemporaries regarded litigiousness as antithetical to the 'proper' conduct of social relations and characteristic of a 'bad' neighbour, it is probable that any refusal to arbitrate a dispute would have relayed a similar message to the community at large.[12] At least this appears to have been the view taken by the Quaker merchant-factor James Claypoole in his dealings with another trader in the early 1680s. Having fallen into disagreement over the balance of their commercial account, Claypoole suggested that they put the matter to arbitration. When he sensed that the trader

[9] For example, Sharpe, 'Such disagreement betwyx neighbours'; Muldrew, 'Culture of reconciliation'; S. Hindle, *The state and social change in early modern England, 1550-1640* (2002, orig. 2000), pp. 94-115.
[10] R. Cust, ed., *The papers of Sir Richard Grosvenor, 1st Bart. (1585-1645)* (Chester, 1996), p. 36 [henceforth cited as 'Richard Grosvenor'].
[11] Ibid., p. 41.
[12] For example, K. Wrightson, *English society 1580-1680* (2003, orig.1982), pp. 61-62.

was unwilling to submit to arbitration, Claypoole warned him that his refusal would be taken as 'a sign that you do not intend honestly' and that 'it will neither be for your reputation nor peace of conscience' if they did not at least try to arbitrate the dispute.[13] Presumably this was enough of an admonition, for Claypoole was not required to write anything further to the trader to convince him of this course of action.

Whilst social norms and expectations clearly played a significant role in choosing arbitration over litigation, they were not the only factors to influence this decision. The diaries and letters consulted for this study reveal that there were other, more practical reasons why contemporaries might have preferred to arbitrate their dispute. Amongst the most obvious of reasons was that arbitration was less expensive than litigation. Whilst Christopher Brooks and others have shown that the cost of bringing a lawsuit even in the central courts at Westminster was not prohibitively expensive at the time, a point which has helped explain the high levels of litigation during the period, litigants were nonetheless expected to pay significant sums of money in legal fees.[14] By contrast, if the disputing parties instead chose to arbitrate the matter, they would at most remunerate their arbitrators for making an award and pay the clerk or scrivener who drafted their submission for the service. For example, in the dispute between Adam Eyre and Edward Mitchell that was discussed above, they both paid one shilling to each of their arbitrators and six pence to the scrivener who drew up the conditional bonds used to form their submission.[15] Yet even these payments were not always necessary, especially when it came to remunerating the arbitrators. At least in the seventeenth century, it was not in fact typical for parties to pay their arbitrators for making an award; in most cases, arbitrators appear to have assumed the role without any expectation of payment. The Essex vicar Ralph Josselin's many accounts of serving as an arbitrator in the disputes of his parishioners are illustrative of this norm. Despite assuming this position on numerous occasions in the 1650s-1660s, Josselin never once recorded being paid for his efforts and, in

[13] M. Balderston, ed., *James Claypoole's letter book, London and Philadelphia 1681-1684* (San Marino, CA, 1967), p. 171 [henceforth cited as 'James Claypoole']. For further consideration of the importance of honesty to commercial transactions, see R. Grassby, *The business community of seventeenth-century England* (Cambridge, 1995), pp. 293-97; C. Muldrew, 'Hard food for Midas: cash and its social value', *P&P* 170 (200), pp. 78-120, at pp. 83-84.
[14] C.W. Brooks, *Pettyfoggers and vipers of the commonwealth: the 'lower branch' of the legal profession in early modern England* (Cambridge, 1986), pp. 101-7.
[15] 'Adam Eyre', p. 80.

one instance, he actually lent money to one of the disputing parties so that the party could perform his award.[16]

Another reason why contemporaries might have favoured arbitration over litigation was its lack of formality: its proceeding did not have to comply with a strict set of rules and could instead be conducted at the discretion of the people involved. This had two important consequences. First and more pragmatically, arbitration could be conducted more quickly than litigation. A dispute which might at law take several months or even years to reach judgment could be resolved by arbitrators in a single sitting and at a time and place convenient for the parties. For example, the diarist Samuel Pepys had been engaged in litigation over a disputed debt with Thomas Trice, the son of Pepys' aunt from a former marriage, for almost two years when the two met in London in October 1663 to discuss 'why we could not think, being friends, of referring it or stating it first ourselfs, and then put it to some good lawyer to judge in it'.[17] They agreed to meet again that evening with their clerks and lawyers at the Pope's Head tavern near Lombard Street where, after some deliberation, their counsels made an award on the matter, requiring Pepys to pay Trice one hundred pounds in satisfaction of the debt and Trice to spend forty shillings on the night's entertainment.[18] The second consequence of the relative informality of arbitration was that its proceeding could not be dismissed for failing to adhere to the 'niceties' of the law. This was a recurring point of criticism for litigation: that a lawsuit could be overturned not just on the merits of the case but because the parties had not followed the correct rules and procedures. Such an issue can even be seen in the suits brought to enforce arbitration. In the Common Pleas case of *Bretton v Prat* (1600), the plaintiff sued the defendant for not performing an award that had required the defendant to assign him a life interest over an estate. Whilst the justices ruled that this provision was valid, because the plaintiff had not averred in his pleadings that the award had been made at the place specified in the parties' submission, the justices also held that he had ill-pleaded and so gave judgment against him by default.[19] Not only, then, was the plaintiff denied his life interest by the defendant not performing his part of the award, but the plaintiff was also denied his right to a legal remedy due to a mere technicality.

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[16] A. Macfarlane, ed., *The diary of Ralph Josselin, 1616-1683* (1976), p. 278 [henceforth cited as 'Ralph Josselin'].
[17] R. Latham and W. Matthews, eds., *The diary of Samuel Pepys* (11 vols., 1971-1983), vol. IV, p. 351 [henceforth cited as 'Samuel Pepys'].
[18] Ibid.
[19] *Bretton v Pratt* (1600), Cro. Eliz. 758. The submission had been made using conditional bonds which is presumably why no issue was raised regarding the arbitrability of the life interest.

Arbitration could also be conducted privately so that the matters raised by the disputing parties would remain confidential. This was in stark contrast to litigation where most stages of a lawsuit were carried out in public, often before an eager and attentive audience.[20] There were several reasons why contemporaries might have wanted to avoid their dispute being aired before others. Merchants, for example, might have sought to keep their account disputes private so that news of their commercial transactions and debts could not impact on their credit.[21] More broadly, contemporaries might also have wanted to employ arbitration strategically to 'silence' issues before they became public knowledge. This was what led Samuel Pepys to suggest to Mrs Goldsborough, a tenant on his late uncle's estate, to arbitrate an outstanding debt she owed to him as his uncle's administrator and heir. He recounted in his diary that he had met the woman one afternoon in October 1661 to discuss the payment of the debt and, having seen 'how she talks and how she rails against my uncle', he offered to put the matter to arbitration.[22] Pepys clearly feared what she might reveal about his uncle, especially as it could in turn harm his own reputation, so when they later reconvened with their arbitrators to resolve the issue, Pepys was more lenient in his demands 'for I would not by any means go to law with a woman of so devilish a tongue as she is'.[23] Yet this strategic use of arbitration might also have signalled that a party who sought to arbitrate a dispute had something to hide. The Lancashire Nonconformist minister Adam Martindale opposed efforts to submit to arbitration a lawsuit that had been brought against him in the early 1660s for this very reason. Martindale had been indicted at the Cheshire assizes for refusing to read the Book of Common Prayer to his congregation, an accusation which he believed had been orchestrated by his enemies to have him removed from his post as the vicar of Rotherston. As the accusation was false, Martindale having not yet received the prayer book that he would then be required to read during religious services, Martindale

[20] For studies examining the public nature of litigation, see A. Gregory, 'Witchcraft, politics and "good neighbourhood" in early seventeenth-century Rye', *P&P* 133 (1991), pp. 31-66; B. Capp, 'Life, love and litigation: Sileby in the 1630s', *P&P* 182 (2004), pp. 55-83.
[21] As one contemporary put it: 'for secrecy is a vertue almost as necessary to a merchant as to a statesman'. Anonymous, *The character and qualification of an honest loyal merchant* (1686), p.6. For more information on the importance of credit to mercantile transactions, see R. Grassby, *The business community of seventeenth-century England* (Cambridge, 1995), pp. 298-300; N. Zahedieh, 'Credit, risk and reputation in late seventeenth-century colonial trade', *Research in Maritime History* 15 (1998), pp. 53-74; N. Glaisyer, *The culture of commerce in England, 1660-1720* (2006), pp. 21, 38-42. For a more general discussion of the importance of credit to contemporary transactions, see C. Muldrew, *The economy of obligation: the culture of credit and social relations in early modern England* (Basingstoke, 1998).
[22] 'Samuel Pepys', vol. II, p. 195.
[23] Ibid., p. 198.

sought to defend his innocence by denying or 'traversing' the allegation made against him. When it was suggested by an officer of the court 'pretending great pittie to me for the vastnesse of my charges' that Martindale should choose 'not to traverse, but to submit', Martindale maintained that he could not pursue such a course 'in point of conscience' as that would be 'a tacit acknowledgment of a fault; and I had neither done as the bill accused me, nor thought it any fault if I had'.[24]

A final reason why contemporaries might have chosen arbitration over litigation was that the process would have enabled them to hold greater sway over its outcome. Whereas with litigation the decision-making was taken entirely out of the hands of the disputing parties, a court's judgment deriving from established and impersonal rules, with arbitration the parties retained some ability to influence what they would then be ordered to do, having picked the arbitrators who would make the award and having specified what issues they would be required to address. Accordingly, contemporaries might have chosen to arbitrate their dispute if they believed that they could secure a more favourable result through the process. After the ship which the merchant John Paige had chartered to acquire contraband slaves from Guinea was wrecked in 1651, killing most of the crew and cargo, he found himself facing demands from both the shipowners and the wives of the lost mariners for compensation.[25] Following a decision by the court of Admiralty ordering payment of the mariners' wages, Paige recognised that he would almost certainly be forced to pay the shipowners as well should the matter go to litigation, so he resolved that 'if possible, I shall get the difference arbitrated rather than stand to a trial'.[26] There is even reason to believe that contemporaries did not simply choose arbitration in the hopes of obtaining a more favourable decision; they might also have employed the process to exploit the control they wielded for less scrupulous ends. In a more Machiavellian example of fatherly advice, the Yorkshire landowner Sir William Wentworth counselled his son in 1604 that if 'anie great man be to make an arbitrament betwixt yow and your adversarie wherin yow mean to have favour', the best course to ensure this result was to 'deal with some favorite of that great mans and enstruct him secrettlie and promise him a certaine reward, if your desire be effected'.[27] Such

[24] R. Parkinson, ed., *The life of Adam Martindale, written by himself* (Manchester, 1845), p. 161.
[25] Sadly, no one seemed particularly concerned about the loss of the slaves' lives.
[26] G.F. Steckley, ed., *The letters of John Paige, London merchant, 1648-58* (1984), no. 78b. British History Online, http://www.british-history.ac.uk/london-record-soc/vol21 (accessed 5 January 2021). To be henceforth cited as 'John Paige'. For further discussion of the court of Admiralty's jurisdiction over mariners' wages, see G.F. Steckley, 'Litigious mariners: wage cases in the seventeenth-century Admiralty court', *HJ* 42:2 (1999), pp. 315-45.
[27] J.P. Cooper, ed., *Wentworth papers 1597-1628* (1973), p. 11 [henceforth cited as 'Wentworth'].

a suggestion was clearly a long way from the prevailing view that arbitration was employed for peaceful and neighbourly ends, and it thus serves to highlight the fact that contemporaries decided to arbitrate their disputes for more reasons than prescription alone might lead us to believe. Why contemporaries chose arbitration was in fact a far more complex issue than has previously been acknowledged.

2. Initial steps

Having considered the reasons why contemporaries decided to arbitrate their disputes, the rest of the chapter will be used to re-create, so far as is possible with the sources consulted, the practice or 'experience' of arbitration, from the initial steps needed for an arbitration to take place to the parties' performance of the resulting award. This section will consider the steps the parties to a dispute would have taken so that an arbitration could occur, of which there were three: first, the parties would agree to arbitrate their dispute; second, they would nominate the arbitrators responsible for resolving the dispute; and third, they would enter into a submission. Whilst ostensibly straightforward, there was in fact much variation within each of these steps, so the aim of this section will be not only to account for how each step was implemented, but also to examine the various reasons and motivations contemporaries might have had for implementing the step in a particular way.

2.1 Agreeing to arbitrate

The first step in any arbitration was for the disputing parties to agree to arbitrate their differences. At first glance, this might appear to have been a relatively straightforward matter to address, but in practice it was often far more difficult to carry out. If, for example, the parties were no longer speaking with one another, how could they reach this agreement? Or if one or more of the parties denied that they were to blame for the matters in dispute, how could they be convinced to engage in the process? There were, then, various ways in which an agreement to arbitrate a dispute could be made, with each reflecting to some extent the level of contention in existence between the parties. The most obvious way for this agreement to be reached was for the parties to consent to it between themselves. The Chester alderman and later mayor Roger Whitley recounted such an occasion in his diary when, in 1687, he was accused by one of his neighbours, a Mr Davyes, of trespassing on his fields. Whitley denied the claim, arguing that he had a right of way over the land in question, but in concession he

offered that if a path were designated through the fields, he would not stray from it. To decide where the path would be located, Whitley suggested that they submit the matter to Davyes' lawyer to decide, a proposal which Davyes was 'well satisfyed' to accept. As a further sign of goodwill, Whitley recorded that at the conclusion of their discussions he gave Davvyes a bottle of ale.[28] To avoid the possibility that they might not be so accommodating when a dispute broke out between them, contemporaries could also come to an understanding at an earlier date that they would turn to arbitration should any difference arise that they could not resolve on their own. Such an understanding might have been set out in a contract like the one the merchant and Cumberland landowner Sir Christopher Lowther made with his business partner Rowland Jackson in 1632. In it they agreed to refer any future disagreement between them to two arbitrators, one a London merchant and the other a Cumberland gentleman, although Lowther admitted in a letter to his uncle that 'I hope we shall never neede [them]'.[29] But the understanding that contemporaries would employ arbitration should any dispute later arise could also be more general. For example, it was conventional for merchants to resolve their disagreements by arbitration, and so ingrained was this practice that they sometimes went to great lengths to ensure that such an arrangement would occur.[30] The London merchant-factor James Claypoole attempted for more than a year to convince Sir Thomas Clutterbuck, a distinguished merchant and landowner, to agree to arbitrate a disagreement over a commercial account, travelling to Clutterbuck's estate in Hertfordshire on multiple occasions, both 'in the dead of winter, [and] other times in the wind and rain', to speak with him.[31] Whilst Claypoole was ultimately successful in his endeavours, Clutterbuck sadly died before their arbitration could be completed.[32]

Yet it was often the case that the parties to a dispute were so at odds with one another that they would not have been able to agree to arbitration on their own. Instead, they would have to be persuaded or directed by others to reach this agreement. Family members often bore this burden, particularly when the parties were themselves related. After Samuel Pepys

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[28] '14 March 1687', M. Stevens and H. Lewington, eds., *Roger Whitley's diary 1684-1687 Bodleian Library, MS Eng Hist C 711*. British History Online, http://www.british-history.ac.uk/no-series/roger-whitley-diary/1684-97 (accessed on 5 January 2021). To be henceforth cited as 'Roger Whitley'.
[29] D.R. Hainsworth, ed., *Commercial papers of Sir Christopher Lowther, 1611-1644* (1977), p. 1 [henceforth cited as 'Christopher Lowther'].
[30] The merchant and economic writer Gerard Malynes maintained that arbitration was the 'ordinarie course to end the questions and controuersies arising between merchants'. G. Malynes, *Consuetudo, vel, lex mercatoria, or, the ancient law merchant* (1622), p. 447.
[31] 'James Claypoole', p. 29.
[32] Ibid., p. 200.

and his uncle Thomas had been engaged in litigation for some time over the inheritance of another uncle's estate, it was Pepys' cousin Roger, an attorney, who was able to get the two sides to arbitrate the matter in 1662.[33] The disputing parties might also have been convinced to reach this agreement by friends or neighbours. The vicar Ralph Josselin recorded in his diary that in 1647 he was able to persuade his friend and patron, the gentleman Thomas Harlakenden, to arbitrate his disagreement with a neighbouring landowner after the two had been at law for several months.[34] That Josselin felt the need to document this event suggests that getting disputing parties to agree to arbitration could be a feat in itself. This was certainly the case in the lease dispute between Adam Eyre and Edward Mitchell that was discussed earlier in the chapter. Whilst it was noted that Eyre and Mitchell had agreed to arbitrate their dispute in December 1647, when it became clear that the arbitrators they had chosen were unlikely to make an award, the two quickly reverted to their previous state of hostility. Whilst at first they restricted themselves to minor acts of provocation, Mitchell distressing Eyre's horse by repeatedly unbolting the doors to the stable, and Eyre, in retaliation, leaving open the front door to the farmhouse 'as often as I went in or out' so that the wind could upend Mitchell's belongings, matters soon escalated to litigation.[35] In early January, Eyre sued out process to initiate proceedings against Mitchell in the court of King's Bench, and a few days later Mitchell had Eyre indicted for slander at the local quarter sessions.[36] With their relations so impaired, it was only at the intervention of their friends and neighbours that Eyre and Mitchell were able to reconsider arbitrating their dispute. Once Eyre had received word from numerous acquaintances that Mitchell was again willing to 'have an end of the buisinesse', he contacted his friend William Rich to arrange for another arbitration. This time the process appears to have been successful, for Eyre recorded in his diary that on 1 February 1647/8 William Rich and a Mr Ramsden had been able to resolve the matter.[37]

Contemporaries were also prepared to take a more unilateral approach to ensure that their opponents in a dispute would agree to arbitration. As James Sharpe has shown in his study of defamation suits brought before the consistory courts of York, contemporaries often began legal proceedings against opponents to convince them to arbitrate the disagreement.[38]

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[33] 'Samuel Pepys', vol. III, p. 265.
[34] 'Ralph Josselin', p. 85.
[35] 'Adam Eyre', pp. 89-90.
[36] Ibid., pp. 87, 90-91.
[37] Ibid., p. 94.
[38] Sharpe, 'Such disagreement betwyx neighbours', pp. 173-78. Craig Muldrew has also come to a similar conclusion in relation to the Guildhall Court of King's Lynn. C. Muldrew, 'Credit and the

Not only were the costs and delays of litigation a burden that few contemporaries were willing to bear, but as Sir George Croke, a puisne justice of the court of King's Bench, explained in 1614, to bring a lawsuit against another had even wider repercussions on the party's livelihood: it 'impeaches [the party's] credit, and hinders his liberty…for by reason of this, he dares not go about his business'.[39] Sometimes merely invoking the law could be enough to persuade an opponent to agree to arbitration. At least this was the view of the Cumberland landowner Sir Christopher Lowther when, in 1635, he wrote to two individuals who had been withholding payments he believed to be owed. After specifying the amount of money he sought to recover, Lowther admitted that he would prefer to resolve the disagreement 'in love' but stated that if they refused his offer, he would 'proceed against yow which will be to your great cost and charges'. To add to his threat, Lowther recounted how another person had once tried to avoid repaying 'but as I have made him satisfye me for all his boasts, soe will I yow if you doe not satisfye'.[40] Whilst going to law or threatening to do so appears to have been a useful way to convince others to arbitrate a dispute, there was the danger that such an approach could instead exacerbate matters. In a property dispute with Sir Gilbert Talbot, the earl of Shrewsbury, which spanned the first decade of the seventeenth century, the Yorkshire landowner Sir William Wentworth sued the earl with the explicit aim 'for composycion'. Yet despite Wentworth's entreaties to Talbot, reminding the earl that he 'should haue yt very cheape' if a 'lawyer and gentleman of eyther syde might compound' the issue, Talbot refused to settle out of court, stating that he would 'haue a new tryall' against Wentworth in retaliation.[41]

A less contentious but equally one-sided tactic to convince an opponent to agree to arbitration was by petition. A party to a dispute might have solicited the help of someone else to persuade his opponent to consent to the process. Typically this third party appears to have been in a position of authority so that he had the power or influence to ensure that the parties would reach this agreement. Roger Whitley, who was serving his fourth term as mayor of Chester in 1695, was in such a position, which might explain why he was asked by several linen drapers in the city to convince the aldermen of their company to arbitrate a disagreement. Whitley was initially hesitant, stating that he should not interfere with the

courts: debt litigation in a seventeenth-century urban community', *EHR* 46:1 (1993), pp. 23-38, at p. 27.

[39] *Freeman v Sheen* (1614), 2 Bulst. 93, 2 Cro. Jac. 229, 1 Rolle 7.

[40] 'Christopher Lowther', pp. 164-65.

[41] 'Wentworth', p. 38.

company's affairs; nonetheless, he recorded in his diary that he was able to arrange a meeting between the two sides some days later to 'endeavor to compose the businesse' between them.[42] Petitions could also take on a more formal character: as both John Dawson and Derek Roebuck have shown, dealing with petitions for arbitration constituted a significant portion of the work undertaken by the Privy Council in the Elizabethan and Stuart periods.[43] Examples of these petitions are found in abundance amongst the papers of the Norfolk gentleman Sir Nathaniel Bacon, son of the lord keeper Nicholas Bacon and half-brother to Sir Francis Bacon, as he was frequently called on by the Privy Council to serve as an arbitrator in the disputes which it had been petitioned to provide redress. One such example was the petition of Adam Robinson, a glazier from Norwich, from 1589. Robinson explained that he had fallen into disagreement with a gentleman named William Warner and so had suggested that Warner 'shold make choise of fower men…and [Robinson] would choise twoo of them, and what ende soever they did sett downe [Robinson] would perfourme it'. Robinson's overture to arbitrate was, however, rejected, with Warner instead pursuing Robinson 'withall vigour of law', so Robinson requested that the Privy Council 'graunt your honours letters unto some worshipfull of the same shire for the hearing and determyninge' of the dispute.[44] That Nathaniel Bacon was able to make an award resolving the matter some months later[45] would appear to lend support to the claim of the historian Steve Hindle that contemporary efforts at conciliation often depended not just on 'ideals of neighbourliness' but on 'the injection of some measure of public authority into the "disputing process"'.[46]

Petitions were not the only occasion in which some form of 'public authority' could be wielded to make contemporaries agree to arbitration. As Hindle himself has noted, it was possible for justices of the peace (JPs) to compel disputing parties to arbitrate their disagreements by issuing a recognizance, a legal instrument similar to a conditional bond whereby a party would be forced to pay a sum of money if he did not perform a specified

[42] '17 October 1695' for 'Roger Whitley'.
[43] J.P. Dawson, 'The Privy Council and private law in the Tudor and Stuart periods: I', *Michigan Law Review* 48:4 (1950), pp. 393-428, at pp. 423-25; D. Roebuck, *Arbitration and mediation in seventeenth-century England* (Oxford, 2017), pp. 48-58.
[44] A. Hassell Smith and G.M. Baker, eds., *The papers of Nathaniel Bacon of Stiffkey*, vol. III (Norwich, 1990), pp. 76-77. [As there are different editors for each volume of Bacon's papers, in the following citations, notice will also be given to the volume number. For example, future citations of this volume will be cited as 'Nathaniel Bacon, III'.]
[45] Ibid., pp. 95-96.
[46] Hindle, *State and social change*, pp. 94-95.

task.[47] A JP might, for example, make the recognizance conditional on a party agreeing to arbitrate his dispute, even going further to require the party to comply with the process in full. In essence, the recognizance would therefore have served the same function as a conditional bond used to form a submission, the principal difference being that if the party failed to comply, he would not be liable to his opponent but rather to the crown.[48] But JPs most frequently employed recognizances to compel parties to 'keep the peace' or to 'be of good behaviour', a practice Hindle has shown contemporaries to have used strategically as a means to obstruct or constrain their opponents in the midst of a dispute.[49] Accordingly, a JP might only grant a party's request to issue a recognizance in these circumstances if the party first agreed to arbitrate the dispute. This appears to have been the approach of the Surrey JP Bostock Fuller when in 1612 four individuals came to him seeking recognizances to keep the peace against each other. Fuller recorded in his justicing notebook that whilst he granted their request, he also 'comytted the matter to arbitryament', a tactic which appears to have been successful, for some months later he was able to document that he had discharged the parties of their recognizances, presumably as they were no longer needed.[50]

A final way in which the parties might agree to arbitrate their dispute was if they were directed to do so by the order of a court. This occurred when a court ordered that the matters in a pending lawsuit be referred to one or more arbitrators to decide, and for this reason the process was often called a 'reference' and the arbitrators 'referees'.[51] References appear to have been a pervasive feature of court practice across jurisdictions[52] and at all levels of the legal system,[53] lending support to the findings of previous historians that not all litigation had been intended to reach a judgment.[54] Whilst there were many reasons why a court might have ordered a reference to occur, at least one of them was in recognition that the interests of the

[47] Hindle, *State and social change*, pp. 94-115. See also Simpson, *CLC*, pp. 126-28; J. Samaha, 'The recognizance in Elizabethan law enforcement', *AJLH* 25:3 (1981), pp. 189-204.
[48] *Arbitrium redivium*, p. 9. But see *Tresham and Robin's case* (1575), 3 Leo. 58, where the plaintiff's action to enforce an arbitration was grounded on a recognizance.
[49] Hindle, *State and social change*, pp. 94-113.
[50] G. Leveson-Gower, ed., *Note book of a Surrey justice* (1885), p. 193.
[51] For more information on references, see below at pp. 103-115.
[52] For Chancery: W.J. Jones, *The Elizabethan court of Chancery* (Oxford, 1967), pp. 266-80; for Star Chamber: Hindle, *State and social change*, pp. 66-93, at pp. 88-89; for Requests: T. Stretton, *Women waging law in Elizabethan England* (Cambridge, 1998), pp. 82-83.
[53] For example, it is possible to find many examples of references being ordered in the mayor's court of Norwich and in the Norfolk and Sussex quarter sessions. W.L. Sachse, ed., *Minutes of the Norwich court of mayoralty 1630-31* (Norwich, 1942); *Minutes of the Norwich court of mayoralty 1632-1635* (Norwich, 1967); J. Howell, ed., *Norfolk quarter sessions order book 1650-1657* (Norwich, 1955); B.C. Redwood, ed., *Sussex quarter sessions order book, 1642-1649* (Lewes, 1954).
[54] Most notably, Sharpe, 'Such disagreement betwyx neighbours', pp. 185-87.

litigating parties would be better served if their suit were resolved by arbitration. The barrister John Manningham recounted such an occasion when, in February 1602/3, the suit of two 'poore men' was argued before the justices of the court of King's Bench. Having taken into consideration the parties' limited circumstances and the fact that the issue was 'verry doubtfull', the justices 'moved that they would referr the matter to some indifferent men that might determine soe chargeable and difficult a controversy'.[55] Particularly in the court of Chancery, the principal court of equity in the realm, a reference could also develop out of the implementation of the court's own proceedings, the commissioners appointed by the court to examine the parties to a suit in the counties often being authorised to 'hear and determine' the suit as well.[56] As these commissioners would be empowered to summon the parties and to administer oaths to help facilitate the undertaking of their examination on behalf of the court, they therefore had additional powers than those of a 'normal' arbitrator.[57] Accordingly, the parties to a dispute might sometimes have initiated proceedings in the court of Chancery so that their referees would have these powers. In 1607, the Norfolk magistrate Sir Nathaniel Bacon in fact encouraged the parties whose dispute he had been attempting to resolve by arbitration to exhibit a bill into the court for this purpose, having realised that he would be unable to make an award unless he could examine their witnesses under oath, writing to Thomas Egerton, the Lord Chancellor, to forewarn him of this development.[58]

2.2 Nominating arbitrators

Once the parties to a dispute had agreed to arbitrate their differences, the next step would be to nominate their arbitrators. From the viewpoint of the parties, this would undoubtedly have been the most important step to take, for the arbitrators they nominated would then be responsible for resolving the dispute, ordering the parties, for better or for worse, to carry out certain tasks so as to bring effect to their decision. For this reason, contemporaries appear to have been on the whole prudent in selecting their arbitrators, a cautiousness which Sir Richard Grosvenor noted when, as the sheriff of Cheshire, he made an address to voters in the

[55] J. Bruce, ed., *The diary of John Manningham, of the Middle Temple, and of Bradbourne, Kent, barrister-at-law, 1602-1603* (1868), pp. 129-30.
[56] Jones, *Elizabethan Chancery*, pp. 237-48.
[57] The fact that arbitrators did not usually have the power to take oaths was noted in *Knight v Rushworth* (1595/6), it being said that arbitrators who had tried to do so were punished by the court of Star Chamber. *Knight v Rushworth* (1595/6), Cro. Eliz. 469.
[58] V. Morgan, E. Rutledge, B. Taylor, eds., *The papers of Nathaniel Bacon*, vol. V (Norwich, 2010), p. 306 [henceforth cited as 'Nathaniel Bacon, V'].

1624 parliamentary election, likening the nomination of arbitrators to the election of Members of Parliament (MPs):

> If Anie of us hath a controversie with another and bee contented to refer the difference to frends, how warie will wee bee in nominatinge our arbitrators. And if our judgment blind us not wee will choose such to deale for us as wee suppose are for their wisdom able to discerne of our right and title, and in regard of their affection and professed love are soe fast knit and tyed unto us that we dare trust them. And shall wee bee thus carefull in our own particulers for trifles and toyes, which deserve not to bee spoken of in comparison to those more greate and publique affaires? And ought wee not to bee much more care[ful] whom wee elect in this greate arbitrement (as I may call it) of our owne and our posterities future happines?[59]

Whilst it is evident that nominating arbitrators to resolve a dispute was an important decision, what is less clear are the 'mechanics' that went into the making of this decision. The following discussion will therefore be used to examine this nomination process in more detail, focusing on three separate issues: the qualities contemporaries sought in their arbitrators; the types of arbitrators that were typically chosen; and the reasons why a person might have agreed to be an arbitrator.

The first issue to consider are the qualities which contemporaries tended to seek in selecting their arbitrators. As the previous chapter has shown, there were no legal requirements prescribing who could be an arbitrator, but the treatises on arbitration nonetheless advised that disputing parties nominate arbitrators who were both 'skillful' and 'indifferent'.[60] Whilst the matter of skill and expertise will be discussed in examining the types of arbitrators on which contemporaries relied, it is worth scrutinising the matter of impartiality more closely here. An impartial or 'indifferent' arbitrator would have been expected to decide the parties' dispute without showing favour to either side and to make his award based on the merits of the issues presented to him.[61] Was this a quality that contemporaries would have wanted in their arbitrators? In some cases, it certainly appears so. During the winter of 1681-1682, the merchant James Claypoole wrote several letters to William Chare, an English merchant residing in Hamburg, in an attempt to persuade him to nominate arbitrators from London to decide their dispute over a commercial account. Chare

[59] 'Richard Grosvenor', p. 3.
[60] Refer to pp. 22-23 above.
[61] *Arbitrium redivivum*, p. 19.

had intended for the arbitrators chosen to be from Hamburg, the disagreement having arisen from transactions conducted there, but Claypoole insisted that it would be 'very unequal for me to refer a difference to those that are your friends and intimates, which are strangers to me and I to them'.[62] Whilst Claypoole's appeals failed to convince Chare to change his mind, Claypoole did not give up hope that the arbitrators might still decide the disagreement in an impartial manner. In prefacing his letter to the two arbitrators whom Chare nominated later that year, Claypoole explained that although 'he never had the opportunity to converse with you either by word or writing', he was confident that they would nonetheless be able to resolve the issue on 'equal terms'.[63] Claypoole's evident concern for impartiality appears to have been shared amongst merchants on a more general scale. As the merchant Gerard Malynes explained in his commercial treatise and manual *Consuetudo, vel Lex Mercatoria*, when arbitrators were nominated to make an award in a commercial dispute, they were expected not only to observe the 'custome of merchants' but to 'be void of all partialitie or affection more nor less to the one, than to the other'.[64] To ensure that such a result could be achieved, Malynes listed several nomination practices that were then in use by merchants and that could be employed to a similar end by his readers. The disputing parties could each name four or six potential candidates and then 'referre the naming or electing of foure out of them by reciprocall proceeding, when one named the first person, another the second, and then againe the third, and the other the fourth person'. They could equally involve a 'meere stranger' who would then be tasked with selecting the arbitrators by pricking their names from the back of a piece of paper with a pin, by drawing their names by lot, or by rolling dice. As Malynes concluded, essentially any method of 'pointing, numbring, or describing' would suffice so long as it tended 'to one end, to have indifferencie, and that partialitie may be avoided by all meanes'.[65]

The sources consulted for this chapter reveal, however, that contemporaries did not always want their arbitrators to be impartial. Perhaps as frequently, they sought instead to nominate arbitrators who could be trusted to represent or advocate for their interests in making an award. In such cases, the arbitrators nominated might be seen as taking on more of an agent-based role, where they would be expected to broker a deal on the parties' behalf. In the present day, this sort of advocacy would more properly be associated with negotiation

[62] 'James Claypoole', p. 44.
[63] Ibid., p. 191.
[64] Malynes, *Consuetudo, vel, lex mercatoria* (1622), p. 447.
[65] Ibid., pp. 447-48.

than with arbitration, the impartiality of arbitrators having become a defining characteristic of the modern practice of the process.[66] Yet it is clear that contemporaries of the seventeenth century had no issue with conceptualising the role of arbitrators in this way. As the London merchant John Paige explained in a letter to his business partner in 1653, after a lawsuit had been initiated in an account dispute between Paige and the owners of a frigate he had chartered, both sides resolved to refer the matter 'unto two arbitrators, Mr Stephen Slaney being for me'.[67] For their part, arbitrators do not appear to have been especially concerned with assuming an advocate-like role and seeking to favour one party over another. When Samuel Pepys was nominated by the merchant John Bland in November 1663 to decide a dispute that had concerned the victualling of the newly-acquired garrison at Tangier, Pepys actively tried to ensure that the award would be made to Bland's advantage.[68] Pepys and Bland had become acquainted in the preceding months due to their interactions through the Tangier Committee, the council charged with overseeing the foreign garrison and its surrounding territory, Pepys serving as one of its commissioners and Bland as one of its principal suppliers, so Pepys resolved to 'endeavour to do Mr Bland all the just service I can therein'.[69] Although Pepys was ultimately unable to convince the other arbitrator to take his side and to absolve Bland entirely of fault in the dispute, Pepys made sure to note in his diary that he had succeeded in reducing the amount of money Bland would be required to pay, something which he reckoned was 'well enough ended for Mr Bland for all that'.[70]

The second issue to consider regarding the nomination of arbitrators are the types of arbitrators typically chosen to resolve disputes. The focus on *types* of arbitrators rather than who specifically could be an arbitrator is intentional, for the sources consulted for this study reveal that a wide cross-section of the population took on the role; serving as an arbitrator was not limited to a single group, class, or profession. In the broadest sense, then, it is possible to discern three types of arbitrators on whom contemporaries would rely: the 'specialist' arbitrator, the 'horizontal' arbitrator, and the 'vertical' arbitrator. The 'specialist' arbitrator, as its name suggests, was a person nominated for the skill or expertise he could

[66] For example, see A. Tweeddale and K. Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (Oxford, 2010), p. 11.
[67] 'John Paige', no. 67b.
[68] The English had acquired the colony of Tangier from the Portuguese as part of Catherine of Braganza's dowry in 1661. For more information on Pepys' role in the administration of the garrison, see M. Lincoln, 'Samuel Pepys and Tangier, 1662-1684', *Huntington Library Quarterly* 77:4 (2014), pp. 417-34.
[69] 'Samuel Pepys', vol. IV, p. 404.
[70] Ibid., vol. V, p. 36.

bring to resolving a dispute. In previous scholarship, 'specialist' arbitrators have most commonly been associated with merchants given that commercial knowledge and expertise were often promoted by merchants themselves as a prerequisite for deciding their differences.[71] Not surprisingly, when selecting their arbitrators, it was conventional for merchants to justify their choice of candidate by referring to his practice or experience in trade. When the London merchant William Freeman attempted to fix the freightage cost for hiring a ship with another merchant in 1679, he suggested that if the merchant did not agree with his valuation, they should 'referr itt to an indifferent p[e]rson heer to decyde'. Rather than wait for his response, Freeman proceeded to propose that John Fleet, another London merchant, serve as their arbitrator for the reason that he was 'the most competent judge we know…he being the only great buyer in London'.[72] Yet 'specialist' arbitrators were not limited to merchants; the skill or expertise that an arbitrator could bring to the resolution of a dispute could take other forms. It might have been based on a familiarity with particular customs or practices, such as when Thomas Rokeby and Giles Eyre, two of the assize judges who administered common law trials in the counties, nominated their colleagues in 1689 to make a decision in their disagreement over the payment of shared travel costs whilst on circuit, the other judges being the only ones who knew how costs were typically apportioned.[73] Rokeby was, however, frustrated with their decision, being forced to pay more than he had thought was reasonable, so the next time in which he and Eyre were assigned to the same assize circuit, in 1696, he made sure to keep his travel arrangements entirely separate from Eyre's.[74] A 'specialist' arbitrator's expertise might also have been connected to the particular skills that he could offer to settle a dispute. This might explain why Roger Lowe, an apprentice shop-keeper in a village in Lancashire, was nominated on multiple occasions in the 1660s-1670s to serve as an arbitrator despite being inferior to the disputing parties in both age and social standing. Lowe seems to have 'moonlighted' as a scrivener, perhaps the only one in his village, so his neighbours would look to him for help when their

[71] G. Ellebogen, 'English arbitration practice', *Law and Contemporary Problems* 17:4 (1952), pp. 656-78, at pp. 656-58; Dawson, 'Privy Council and private law', pp. 408-10; Roebuck, *Arbitration and mediation*, pp. 114-50.
[72] D. Hancock, ed., *The letters of William Freeman, London Merchant, 1678-1685* (2002), p. 128 [henceforth cited as 'William Freeman'].
[73] *The diary of Mr. Justice Rokeby: printed from a MS. in the possession of Sir Henry Peek, bart.* (1888), p. 11.
[74] Ibid., p. 44.

dispute would have involved the drafting of legal documents.[75] Lowe recounted one such instance from 1663 when he was chosen as the sole arbitrator in a dispute between father and son which had previously been the subject of litigation. The dispute appears to have concerned some sort of debt or other payment, for once Lowe made an award, bringing 'peace' to the two relations, he accompanied them to an alehouse where he 'made bond for to pay such a sum of moneys att such a time'.[76]

Whilst the characterisation of a 'specialist' arbitrator related to what the arbitrator could bring to the resolution of a dispute, that of a 'horizontal' arbitrator instead concerned the arbitrator's position relative to the disputing parties. Essentially, a 'horizontal' arbitrator was someone who came from the same social class as the parties and so included friends, neighbours, and kin. Craig Muldrew, who also characterised arbitrators in terms of their horizontal and vertical relations, posited that nominating 'horizontal' arbitrators was of more importance to contemporaries than choosing 'vertical' arbitrators, persons who were in positions of authority relative to the parties.[77] The sources consulted for this study do not overwhelmingly support this view; instead, the impression given is that contemporaries just as often relied on their social betters to resolve their disputes. Yet there were certain groups that appear to have turned to 'horizontal' arbitrators with greater frequency. The country gentry, for example, preferred to resolve their disagreements within their own social milieu perhaps because, as Anthony Fletcher has shown, their reputation was largely based on being seen as upholding peace and social order, a view that could have been undermined if they instead appealed to more authoritative powers.[78] This might help explain the differences in the types of nomination requests Sir Nathaniel Bacon received from the Privy Council and from petitioners themselves. Whereas Bacon was directed by the Privy Council to serve as an arbitrator in disputes involving a wider range of the social spectrum, the requests he received directly came almost exclusively from other gentlemen. One such request was made in 1604 when Sir Edward Coke, who, in addition to being Attorney-General at the time, was also a member of the Norfolk gentry, wrote to Bacon and Sir Miles Corbet entreating them to resolve a land dispute between him and Sir Edward Paston, another Norfolk gentleman. Coke

[75] I. Winstanley, ed., *The diary of Roger Lowe of Ashton-in-Makerfield, Lancashire, 1663-1678* (Wigan, 1994), pp. ii-iii [henceforth cited as 'Roger Lowe'].
[76] Ibid., p. 2.
[77] Muldrew, 'Reconciliation', pp. 931-32.
[78] A. Fletcher, 'Honour, reputation and local officeholding in Elizabethan and Stuart England' in *Order and disorder in modern England*, eds. A. Fletcher and J. Stevenson (Cambridge, 1985), pp. 92-115.

explained that whilst he and Paston had previously litigated the matter, he hoped to resolve the dispute out of court because lawsuits 'are mothers of unkindnes'.[79] In a separate letter to Bacon alone, Coke further expressed the 'desire I have of quietnes' as his reason for seeking Bacon's help in the matter.[80]

Yet one drawback of 'horizontal' arbitrators was that, relative to the disputing parties, they would not have been imbued with a sense of authority which would have made it more likely that the parties would comply with their requests and demands. Depending on how contentious the dispute was between the parties, a 'horizontal' arbitrator might have lacked the ability to make the parties see the process through to its conclusion. The Leeds antiquary and wool-merchant Ralph Thoresby attempted in 1691 to act as an arbitrator in a dispute between two of his relatives who had for some time been engaged in litigation before the court of Chancery. Despite meeting with the parties on several occasions, however, Thoresby was prevented from making an award by the 'obstinacy' of one of the parties and so reported in his diary that 'they must now to Chancery again'.[81] Examples such as this might help explain why contemporaries did also nominate 'vertical' arbitrators to resolve their disputes. The fact that a 'vertical' arbitrator would have been in a position of authority relative to the disputing parties might have placed additional constraints on the parties to comply. When James Claypoole, in his dispute with Sir Thomas Clutterbuck, realised that Clutterbuck was not receptive to their original arbitrator, Claypoole nominated William Penn to serve in the role instead, someone who, by virtue of being a leading figure in the Quaker community, would have been in a far more authoritative position, both Claypoole and Clutterbuck having been Quakers. Claypoole was in fact explicit in stating that he had nominated Penn for the greater weight he wielded: Claypoole noted that Clutterbuck 'pretends to have great esteem for' Penn and for that reason the arbitration was more likely to succeed.[82] Selecting arbitrators for the authority they could provide to an arbitration was probably also why JPs were often nominated for the role. The justicing notebooks of the JPs Walter Powell (1603-1654),[83] Bostock Fuller (1608-1622),[84] and Robert Doughty (1662-1665)[85] all provide numerous examples of them serving as arbitrators and, as James Rosenheim has

[79] 'Nathaniel Bacon, V', pp. 128-29.
[80] Ibid., p. 129.
[81] J. Hunter, ed., *The diary of Ralph Thoresby (1677-1724)* (1830), pp. 202-205 [henceforth cited as 'Ralph Thoresby'].
[82] 'James Claypoole', p. 75.
[83] J.A. Bradney, ed., *The diary of Walter Powell 1603-1654* (Bristol, 1907).
[84] Leveson-Gower, ed., *Note book of a Surrey justice*.
[85] J. Rosenheim, ed., *The notebook of Robert Doughty, 1662-1665* (Norwich, 1989).

acknowledged, the examples recorded likely represented only a small portion of the actual number of arbitrations they conducted.[86] Not only were JPs typically chosen from the highest ranks of the country elite, but they were also empowered to coerce compliance through the issuing of recognizances and other warrants, so it is plausible that they would have been perceived as the ultimate 'vertical' arbitrator within a local community.[87] This, at least, was the view taken by Adam Eyre in 1647 when he advised his neighbours to refer their dispute first to the churchwardens or overseers of their parish but 'if they could not agree, then to goe before some justice of peace'.[88]

The third and final issue to consider regarding nominating arbitrators was why a person would have agreed to take on the role. As noted earlier, arbitrators were rarely paid for their efforts, so there would have been little financial incentive for assuming the position. Nor was the role particularly easy: the sources consulted give the impression that more often than not, attempting to make an award in a dispute was tedious and time-consuming. For example, the vicar Ralph Josselin once recorded in his diary that he was only able to come to a decision in a dispute after 'many journeyes and much trouble', and Roger Lowe, the apprentice shop-keeper, recounted one instance in which he spent an entire day attempting to resolve a dispute between two villagers, leaving his shop unattended to do so.[89] Yet in spite of the burdens of serving as an arbitrator, few contemporaries appear to have turned down requests to assume the role. In fact, of all the accounts of arbitration that have been examined for the purposes of this study, only one instance has been uncovered where the person nominated expressed real reluctance to take on the role, but even then he ultimately agreed to it. In the Chancery case of *Norton v Mascall* (1687), it would appear from the entry recorded in the court's files, which are far more detailed in their descriptions than their common law equivalents, that the plaintiff Norton, who had been 'young [and] vnacquainted with the Affaires of the world', had become associated with the defendant Mascall, a goldsmith and 'Cunning man', and had over a series of transactions assigned most of his estate to Mascall to satisfy various debts and obligations Mascall had pretended to be due. After much resistance and denial from Mascall, the matter was put to arbitration in 1683, with the parties selecting two gentlemen to serve as their arbitrators and, in the event that they could not make an award, to have Thomas Rokeby,

[86] Rosenheim, 'Introduction' in *Notebook of Robert Doughty*, p. 9.
[87] For previous scholarship on the role of JPs in the resolution of local disputes, see N. Landau, *The justices of the peace 1679-1760* (Berkeley, C.A., 1984), pp. 73-204; S. Hindle, *State and social change*, pp. 94-115.
[88] 'Adam Eyre', p. 58.
[89] 'Ralph Josselin', p. 107; 'Roger Lowe', p. 2.

then a leading lawyer in York, serve as their umpire. When the arbitrators proved incapable of making an award, the parties approached Rokeby to make an umpirage, something which he was initially 'vnwilling to Doe', but, as the entry states, 'at the last through Importunity of all the said [par]tyes he was p[re]vailed with' to make a decision, one whose performance would later be contested before the court of Chancery.[90]

Although the sources consulted do not provide any explicit explanation for why contemporaries agreed to serve as arbitrators, it is possible to discern several reasons for this apparent norm, some of which were specific to the circumstances of the arbitration in question, whilst others were instead more widely applicable. In terms of specific reasons, contemporaries might have felt obliged to take on the role given their relationships with the disputing parties or other persons involved. The nominated arbitrators might have been related to the parties, as evidenced in several of the accounts of arbitration discussed earlier in this chapter,[91] but they might equally have been enjoined to assume the position by a patron or another influential figure. Ralph Thoresby, the Leeds antiquary, once worked uninterrupted for nearly fourteen hours to make an award in a dispute at the behest of the wife of Samuel Sykes, the ex-mayor and leading alderman of the city,[92] and the Essex vicar Ralph Josselin agreed to serve as an arbitrator in several disputes involving, either directly or indirectly, his patron Thomas Harlakenden.[93] It would also appear that contemporaries accepted nomination requests to reinforce what the historian Bernard Capp has called an 'economy of mutual favours': they assumed the role to compensate for some previous favour done to them or to ensure that they would be owed a favour in the future.[94] The Yorkshire yeoman Adam Eyre who, as we have seen, had served in the parliamentarian New Model Army, might have agreed to his friend Nicholas Greaves' request that he act as an arbitrator in an ongoing dispute because Greaves had recently helped him put to rest a rumour circulating that Eyre had spoken ill of Sir Thomas Fairfax, who had been his commanding general.[95] Moreover, in many of the letters in which Sir Nathaniel Bacon was petitioned to

[90] TNA, C 33/268, fols. 527r-529v. The case was also reported, but without such colourful details, as *Norton v Mascall* (1687), 2 Chan. Rep. 304, 2 Vern. 24.
[91] For example, see above at pp. 59, 63.
[92] 'Ralph Thoresby', p. 115. For further information on the Sykes family, see J. Kirby, 'A man of property, Richard Sykes, merchant and alderman of Leeds', *Northern History* 37:1 (2000), pp. 71-81.
[93] 'Ralph Josselin', pp. 44, 69, 107, 356-57.
[94] B. Capp, *When gossips meet: women, family, and neighbourhood in early modern England* (Oxford, 2010), p. 57.
[95] 'Adam Eyre', pp. 4-5, 9. That Greaves helped Eyre put the rumour to rest is putting it kindly. With the help of Greaves and others, Eyre had seized the supposed initiator of the rumour and then proceeded to beat him up, with his friends standing on watching. Ibid., p. 9.

serve as an arbitrator, the writers would often frame their appeals in terms of their indebtedness to Bacon should he accept the role. When Bacon was asked by Sir Edward Coke to resolve his land dispute with Sir Edward Paston, Coke assured Bacon that both he and Paston would be 'much beholding to you for your paynes and indifferency' if Bacon made an award on the matter.[96]

On a more general scale, contemporaries might have agreed to serve as arbitrators to bolster or legitimise their own position within a group or community. This concern would have been especially relevant for 'specialist' arbitrators, for taking on the role would have signalled to others that they had the skill or expertise to resolve the matters in dispute between the parties. Such a concern for legitimacy appears to have been one of Samuel Pepys' motives for agreeing to the merchant John Bland's request that he serve as an arbitrator in Bland's dispute concerning the victualling of Tangier. As his diary reveals, Pepys had perceived his appointment to the Tangier Committee in 1662 as evidence of his growing importance as a naval administrator, so when Bland made his nomination request, Pepys was eager to have another opportunity to show his worth. As he soon discovered, however, the dispute was far from straightforward, and, after his first meeting with the parties, Pepys recorded that 'their minds are both so high, their demands so distant, and their words so many and hot against one another, that I fear we shall bring it to nothing.'[97] Yet Pepys also observed that he was 'glad to see myself so capable of understanding the business as I find I do', and he took time to remark on his own competence in handling the matter on other occasions as well.[98] In one telling example, Pepys recorded that he had grasped the issues raised by the parties better than the other appointed arbitrator, one Mr Clerke, a merchant whom Pepys made sure to note, adding in brackets to his own account, was very 'able as to his trade'.[99] Thus, whilst Pepys might not have found the experience of serving as an arbitrator particularly enjoyable, he might well have persisted in the effort given that his involvement in the matter would have served to enhanced his image as someone fit to understand and decide commercial issues.[100]

[96] 'Nathaniel Bacon, V', p. 128-29.
[97] 'Samuel Pepys', vol. IV, p. 204.
[98] Ibid.
[99] Ibid., p. 242.
[100] It probably did not hurt that Pepys was also well-compensated for his efforts. Three months after the award was made, John Bland paid Pepys twenty pieces of new gold, an amount which Pepys recorded as 'a pleasant sight' that 'cheered my heart'. Ibid., vol. 5, p. 139.

A concern for legitimacy might also have been a factor in a JP's decision to serve as an arbitrator. JPs provide an interesting case study given that their involvement in an arbitration would have been in addition to and, perhaps, an added burden on the undertaking of their official magisterial tasks. Yet given that acting as an arbitrator would have complied with what the late sixteenth-century legal writer William Lambarde called the magistrate's 'common duetie in charitie' that he should 'occupie himselfe…in pacifying the suites and c[o]ntroversies, that do arise amongst his neighbours', it may well be that JPs had perceived the act of serving as an arbitrator as a means to legitimise their more official functions.[101] By agreeing to be an arbitrator, a JP could therefore realise the 'broad social roles rather than specialised administrative functions' that Michael Braddick has claimed were critical to legitimising or 'legitmating' an office-holder in the eyes of his community.[102] This might in turn clarify why it seems to have been conventional for JPs to include in their justicing notebooks precedents of the documents and instruments used in arbitration, despite the fact that their making and implementation would not have been an official part of a JP's duties. For example, in the notebook of William Holcroft, who served as a JP for Essex in the second half of the seventeenth century, the preamble to an award was set out as one of only eight precedents Holcroft had included under the heading of 'Justice's Business'.[103] Moreover, in the memorandum book of John Locke senior, the father of the famous philosopher who, as we shall see, would play an important role in the drafting of the Arbitration Act, a precedent of the condition of a bond used to form a submission was recorded as one of the legal instruments used in proceedings of the Somerset quarter sessions for the period of 1629-1631.[104] It would appear, then, that serving as an arbitrator, whilst not an official part of a JP's duties, would have nonetheless been key to the execution of this office.

Finally, agreeing to serve as an arbitrator might simply have been indicative of the widespread participation in local government that historians claim to have characterised the

[101] W. Lambarde, *Eirenarcha, or, of the office of justices of peace* (1581), p. 11. Cynthia Herrup came to a similar conclusion in her study of the local administration of criminal law in the seventeenth century. C. Herrup, *The common peace: participation and the criminal law in seventeenth-century England* (Cambridge, 1987), pp. 53-55.
[102] M. Braddick, *State formation in early modern England, c. 1550-1700* (Cambridge, 2000), pp. 68-85, quoted at p. 91.
[103] J.A. Sharpe, ed., *William Holcroft, his booke: local office-holding in late Stuart Essex* (Chelmsford, 1986), pp. 53-54. The other precedents included were for a recognizance; a charge to constables; a certificate for commissioners of subsidies; and warrants for mustering, for distress for not appearing at a muster, for levying taxes, and for appearance to give sureties.
[104] BL, Add MS 28273, fols. 8v-9r. The precedent was entitled 'a bande of Awarde'.

period.[105] Although previous scholarship has tended to focus on the contemporary participation in office-holding, if we accept, as Steve Hindle has argued, that one of the basic functions of government had been to resolve disputes, thereby preventing social conflict, it is possible that the role of an arbitrator could have been as critical to achieving this end as any official position.[106] Contemporaries might therefore have viewed their acceptance of nomination requests as a sort of public duty, perhaps even more so when the dispute they were nominated to resolve could have had an adverse effect on the community at large. The Yorkshire yeoman Adam Eyre encountered no difficulty in securing the help of Daniel Clark, the vicar of a neighbouring parish, to act as the sole arbitrator in an ongoing dispute between Eyre and the other parishioners of Penistone, on the one hand, and their vicar Christopher Dickinson, on the other. The parishioners had sought to replace Dickinson with a more 'godly' minister, but the vicar had refused to surrender his post, getting 'very hott' with Eyre when the possibility of his replacement was first raised.[107] In spite of the doubtful precedent it would have set for one vicar to decide the fate of another, Clark ultimately made an award on the matter in May 1647, ordering Dickinson only to 'tary til Midsomer, but to preach no more' and for the parishioners to pay him forty pounds as a final allowance.[108] Perhaps the need to avoid further conflict in Penistone outweighed any reservations Clark might otherwise have had in agreeing to be the arbitrator charged with resolving this dispute.

2.3 Entering into the submission

Once the parties had nominated their arbitrators and the arbitrators had in turn accepted the role, the final step needed for an arbitration to take place was for the parties to enter into the submission, the contract in which they agreed to perform the award that their arbitrators would then make. Whilst the previous chapter's discussion of the submission would suggest that this was an important step to take, one that often involved the drafting of deeds to enshrine the terms of the parties' agreement, the diaries and letters examined for this chapter depict a markedly different view. Not only does it appear that submissions by deed were

[105] For works on participatory nature of local government, see Herrup, *The common peace*, pp. 193-206; M. Goldie, 'The unacknowledged republic: officeholding in early modern England' in *The politics of the excluded, c. 1500-1800*, ed. T. Harris (2001), pp. 153-94; S. Hindle, *The state and social change in early modern England, 1550-1640* (2000), pp. 23-28, 121-122.
[106] Hindle, *State and social change*, pp. 34, 94-115.
[107] 'Adam Eyre', pp. 31-32.
[108] Ibid., pp. 37-38.

employed less frequently, but the act of entering into the submission was not often a point worth mentioning in the writers' accounts. Whilst this difference in depiction is noteworthy, for two reasons it should not be found especially surprising. First, given the legal nature of the treatises consulted for the previous chapter, the works were bound to emphasise the submission, it being what made arbitration legally enforceable, and to the take time to discuss the forms of submission that would have provided the best options for enforcement, the works having been intended principally as practice manuals. To a large extent, the noted difference in views can therefore be attributed to the 'spin' of the sources examined, a useful reminder to the historian that no single type of source should be used at the expense of others. Second, it must be recognised that a sort of universal truth about contracts, one that applies even today, is that a contract will only really become important when it is needed—that is, when one of the parties to the agreement breaches its terms. As the writers of the sources consulted for this study tended to record events either as they occurred or very soon thereafter, they might not have felt it necessary to make note of their submission as, in most cases, they would have entered into the agreement in good faith and would not have expected to encounter any problems with enforcement. This would have been especially true for oral or 'parol' submissions, for contemporaries were unlikely to recount the exact words spoken between them and the other parties, particularly if the agreement constituted only part of a larger discussion in which the previous two steps scrutinised in this section were also deliberated. Presumably agreeing to arbitrate the dispute and nominating the arbitrators responsible for resolving it would have been of greater concern to the writers at the time.

Yet it is important to stress that entering into the submission would always have been an initial step in arbitration to avoid the assumption made by previous historians that contemporaries only engaged in a type of arbitration that had the 'force of law' when a 'legally binding bond was written up'.[109] Not only does this inaccurately reflect the law at the time, which clearly held that an oral agreement was equally binding provided that the parties had mutually promised to adhere to its terms,[110] but it leads to an oversimplification of the reasons contemporaries might have had for choosing one form of submission over another. Take, for example, a parol submission. Whilst this form was undoubtedly used when the

[109] Muldrew, 'Culture of reconciliation, p. 931. For a similar distinction suggested between types of arbitration, see Sharpe, 'Such disagreement betwyx neighbours', p. 184.
[110] Interestingly, Muldrew does acknowledge elsewhere in his article that it was possible to sue an opponent for the breach of an oral agreement, but he limits the discussion to informal credit transactions. Muldrew, 'Culture of reconciliation', p. 925.

'informal neighbourly pressures' which the historian James Sharpe has claimed to be in operation 'at a more popular level' were considered enough of a constraint to ensure that parties would comply with their arbitration, there were other reasons why this form of submission might have been adopted.[111] For example, whilst merchants customarily formed their submissions using conditional bonds, they were nonetheless advised in commercial treatises and practice manuals to rely instead on oral agreements when their dispute was relatively straightforward and 'the question be upon only one point to be determined', presumably to avoid the costs and delays associated with drafting legal documents.[112] Yet contemporaries might also have chosen to enter into a parol submissions specifically to make it harder to be sued for enforcement. For although this form of submission was legally binding, it would have been more difficult for an aggrieved party to succeed in his action without written evidence to attest that he and his opponent had agreed to perform the award. Accordingly, contemporaries might have insisted on using this form of submission when they were unsure of whether they would comply with an arbitration or not. This appears to have been the 'strategy' of Samuel Pepys when in 1662 he refused to enter into a submission by conditional bond in an inheritance dispute with his uncle Thomas. At an earlier date, Pepys and his uncle had made an oral agreement to perform the award of the four arbitrators they had nominated to resolve the dispute, two of which had been appointed by Pepys, but when the relatives met with the arbitrators with a view to making the award, Pepys soon became troubled that his arbitrators would not be able to convince the others to formulate a decision in his favour. Consequently, when it was later suggested that Pepys and his uncle enter into conditional bonds of £2,000 to perform the award, Pepys made the excuse that he had to consult with his father, who would have also been affected by the outcome, to avoid giving his uncle the occasion to sue him for such a great amount if he decided not to perform.[113]

There were also several reasons why contemporaries might have chosen to enter into a written submission enshrined in a deed. Unfortunately, it has not been possible to find accounts of parties using an indenture to form this contract, which might itself speak to the frequency with which the instrument was used, but there are enough examples of parties drawing up conditional bonds to suggest that the reasons for entering to a submission by deed

[111] Sharpe, 'Such disagreement betwyx neighbours', p. 184.
[112] Malynes, *Consuetudo, vel, lex mercatoria* (1622), p. 448. For another example of merchants being advised to enter into parol submissions for minor disputes, see J. Vernon, *The compleat comptinghouse* (1678), p. 238.
[113] 'Samuel Pepys', vol. III, p. 265.

went beyond the fact that the contract would have been easier to enforce. Of course, enforceability was still an important reason for forming a submission by deed, particularly if the parties were not willing to reach some sort of settlement. For example, when lawsuits were referred to arbitration on the order of a court, it was common for the court to require the parties to enter into conditional bonds to perform the ensuing award, thereby providing the means for an aggrieved party to seek enforcement should his opponent refuse to comply with the process.[114] Yet the very fact that a submission by deed helped to facilitate enforcement might also have signalled that a person could not be trusted to see an arbitration through, so to avoid being characterised in this way, contemporaries sometimes actively refused to enter into this form of submission. This was especially true for members of the gentry, perhaps because, as both Anthony Fletcher and Linda Pollock have shown, they would have considered it an affront to their honour if they could not be trusted to keep their promises and agreements.[115] When, in 1593, Sir Nathaniel Bacon's negotiations with his future son-in-law over the dowry he would provide for his daughter's marriage became so contentious as to require external intervention, Bacon sought the help of Sir Edward Coke to make an award on the matter. Yet Bacon flatly refused to enter into a submission by conditional bond, telling Coke that such a measure would be unnecessary as 'what you judge herin shalbe by me performed'.[116] Some years later, the Norfolk gentleman William Cobbe similarly rejected the possibility of entering into this form of submission in a property dispute for which Bacon had been nominated as an arbitrator, asserting that he would only agree to be bound 'in bandes of perpetual frendshipp'.[117]

Whilst entering into a submission by deed might have implied that the parties could not be trusted to comply with an arbitration, it might equally have been used to impart the opposite. Particularly with conditional bonds where the parties risked paying the bond's penalty if they did not perform the award, an insistence on this form of submission could communicate just how committed a party was to the process. In his correspondence with Sir William Stapleton, the governor of the Leeward Islands, over a disputed commercial account, the merchant William Freeman conveyed his willingness to arbitrate the matter by employing this very tactic. After raising objections with the estimates Stapleton had made regarding the

[114] Refer to pp. 110-111 below.
[115] Fletcher, 'Honour, reputation and local officeholding', pp. 92-115; L. Pollock, 'Honor, gender, and reconciliation in elite culture, 1570-1700', *Journal of British Studies* 46:1 (2007), pp. 3-29.
[116] 'Nathaniel Bacon, III', p. 255.
[117] V. Morgan, J. Key, B. Taylor, eds., *The papers of Nathaniel Bacon of Stiffkey*, vol. IV (Norwich, 2000), pp. 284-85 [henceforth cited as 'Nathaniel Bacon, IV'].

account, Freeman sought to assure Stapleton that he was nonetheless committed to resolving the issue by arbitration, declaring that he 'will be bound to make good the same' even if it meant jeopardising 'all I am worth' to do so.[118] As Freeman's comment suggests, the value of a conditional bond's penalty could also be an important gauge of a party's commitment to an arbitration. Whilst it was the convention at the time to fix the penalty at twice the value of the matters in dispute, a party might suggest an even higher sum to show just how willing he was to comply with the process.[119] In the Yorkshire yeoman Adam Eyre's lease dispute with Edward Mitchell, after the initial attempt at arbitration, which saw both parties enter into conditional bonds of £100 to perform the award, was unsuccessful, Eyre was convinced that the only way for the matter to be decided was through litigation. Yet he soon learned from his neighbours that Mitchell hoped to try again to arbitrate the dispute, being so committed to the effort that he was willing to enter into a conditional bond of £1,000.[120] This appears to have persuaded Eyre to agree to the attempt, for as we have previously seen, he was able to record that the two chosen arbitrators made an award on the matter.[121] Whilst the effect of the submission, to oblige the parties to perform their arbitrators' award, was always the same, how this contract was made and what form it took could be revealing about the parties' intentions and the nature of their dispute.

3. Proceeding

To this point, the chapter's discussion on the 'experience' of arbitration has concerned what occurred before an arbitration could take place. What has yet to be examined is the arbitration proceeding itself—that is, what happened between the disputing parties entering into their submission and the arbitrators later making their award. This might be seen as the public 'face' of arbitration, for it would have been during an arbitration proceeding that the parties would relate the matters of their dispute to the arbitrators, and the arbitrators would in turn take any necessary steps to come to a decision. It would have been abundantly clear to all that attempts were being made to resolve the dispute. One might therefore expect that the sources consulted for this study would be useful for describing how an arbitration proceeding took place, particularly as contemporaries were more likely to record in their diaries and letters

[118] 'William Freeman', p. 219.
[119] Refer to pp. 33-34 above.
[120] 'Adam Eyre', p. 92.
[121] Ibid., p. 94.

what they thought about a specific event and any issues they might have encountered. Yet one of the more surprising findings of the research conducted for this analysis is that contemporary writers rarely commented on how an arbitration actually proceeded. Even in cases where the writers served as arbitrators and were consequently well-positioned to relate the particular steps they had taken to make an award, they tended to focus their descriptions instead on more straightforward matters such as how long the process took or, even more commonly, whether or not they were able to come to a decision. Typical of this trend were the Essex vicar Ralph Josselin's many accounts of acting as an arbitrator in the disputes of his neighbours in the village of Earls Colne. To take one example, in his diary entry for 30 April 1655, Josselin recorded that 'this morning I ended a great difference between landlord and tenant, which could not in any ways agree formerly'.[122] No further detail on the dispute or on how Josselin was able to resolve it was provided. Of course, the apparent lack of commentary on arbitration proceedings might simply be a result of the particular sources that have been consulted. Perhaps if a wider range of contemporary accounts were considered, it would be possible to uncover more detailed descriptions of this process. But the very fact that so many of the accounts found resembled that of Josselin's might itself be revealing. It could be that contemporaries did not consider it all that important to record what an arbitration proceeding entailed. Perhaps what really mattered, both for the purposes of documentation and, indeed, for practice, was instead its outcome.

This is not to say that there were no accounts of what occurred during an arbitration proceeding in the sources consulted for this study. When the writers were themselves the parties to a dispute rather than the arbitrators nominated to resolve it, they did tend to provide more detail about the process, presumably because they would have been more invested in the proceeding and its outcome. From these accounts as well as the few occasions in which the writers were more expounding in relating what they did as arbitrators, it is possible to sketch out what appear to have been the basic features of an arbitration proceeding. Generally speaking, there were three stages to the process. First, the parties would inform their arbitrators of the dispute, presenting their version of events and any claims they wished to put forward. Whilst this was often communicated in person, at a convenient meeting place such as a tavern, a neighbour's home, or even a parish church, it could also be done by written correspondence, particularly when the parties did not reside nearby. This was frequently the case in arbitration proceedings involving merchants, the nature of their business being such

[122] 'Ralph Josselin', p. 345.

that they could fall into a disagreement with someone located a far distance away. For example, when in 1682 the London merchant William Freeman sought to terminate his commercial partnership with Captain John Bramley, a plantation owner on the Caribbean island of Montserrat, he demanded that any outstanding matters between them be decided by arbitration, with Bramley to 'make choyce of any planter in England' to serve as their arbitrator. As Bramley remained in the West Indies for the course of the proceeding, it necessarily took place by correspondence.[123] There is some doubt as to whether the disputing parties would have invariably been expected to present their side of a dispute before the arbitrators could make their award. Probably in most cases contemporaries would have wanted the opportunity to persuade the arbitrators to take their point of view, but from one peculiar account, it would appear that this was not always the case. The episode in question concerned the dispute between James Claypoole and Sir Thomas Clutterbuck that has been discussed at earlier points in the chapter.[124] Once Claypoole succeeded in convincing Clutterbuck to agree to nominate the Quaker William Penn to resolve their dispute, Clutterbuck suggested that Claypoole explain the matters to Penn on behalf of them both.[125] Admittedly, this might have been a delaying tactic: Clutterbuck had previously found excuses to avoid progressing in the arbitration, and even Penn expressed some concern as to 'whether it may be proper to end [the dispute] without hearing both parties'.[126] Yet the episode is nonetheless worth noting as it might suggest just how different an arbitration proceeding could be from what in a legal context would have been deemed patently unjust.[127]

Once the parties had informed their arbitrators of the dispute, the second stage in an arbitration proceeding would be for the arbitrators to gather any additional evidence they would need to make their award. This fact-finding effort could take many forms: it could involve the further examination of parties or the hearing of witnesses; alternatively, the arbitrators could adopt a more hands-on approach by physically inspecting the subject matter of the dispute. When the Leeds antiquary Ralph Thoresby was nominated along with one of the aldermen from the city to resolve a dispute concerning a nearby estate, Thoresby and the alderman travelled to the estate in January 1694 to survey the land before making their

[123] 'William Freeman', p. 320.
[124] Refer to pp. 63, 74 above.
[125] 'James Claypoole', pp. 90-91.
[126] Ibid. For examples of Clutterbuck's delaying tactics, see pp. 74, 80-81, 84-85, 90-91, and most directly 146.
[127] For example, this was the defendant's argument in *Morris v Reynolds* (1703) for claiming that the award he had refused to perform was void. Refer to p. 22 above.

decision. Their efforts appear to have been worth the journey, for Thoresby recorded in his diary that only days later he and the alderman 'happily put an end to' the dispute.[128] Yet one disadvantage of this particular stage was that the type or extent of information that the arbitrators could glean about a dispute was often dependant on the cooperation they received from the parties or any other persons involved. Unless separately empowered by some form of commission, arbitrators lacked the means to coerce others to assist them in their endeavours, so if a party or witness proved unwilling to participate in the process, this could adversely affect their ability to make an award. In one colourful example, Sir Nathaniel Bacon recounted how in a dispute referred to him by Sir Christopher Wray, then the Lord Chief Justice, one of the parties, a man named Gillet, by his own behaviour prevented Bacon from making an award. Not only did Gillet spit in the face of his opponent when the party informed him that he was to be examined by Bacon, but when Gillet eventually appeared, supposedly to present his evidence, Bacon explained that he 'hath not brought his bookes nor any matter in wrighting for our direction'.[129] For this reason, Bacon was forced to write to the Lord Chief Justice to say that he could not resolve the dispute.

The final stage in an arbitration proceeding occurred when the arbitrators would deliberate the making of their award. Due to the nature of the sources consulted, there is disappointingly little insight into what this stage entailed. It cannot be said, for example, what factors the arbitrators typically took into account in formulating their decision or whether they would have considered certain types of evidence to be more persuasive than others. Yet it is probable that their deliberations would have been shaped by the role they were expected to take in deciding the dispute—that is, whether they were nominated by the parties to serve as an 'indifferent' judge of the matters in dispute between them, or whether they were instead chosen with the expectation that they would advocate for one party over another. Presumably with the former, the arbitrators' deliberations would have involved careful consideration of all the evidence presented so that they could reach a balanced decision. The merchant John Paige, who had been nominated by his business partner William Clerke in 1657 to resolve an account dispute between him and his cousin, was forced to write to Clerke after hearing the cousin's demands to say that he feared 'there may be more than you were pleased [for me] to discover' about the account and so he would be unable to make an award that would be

[128] 'Ralph Thoresby', pp. 251-52. Thoresby also noted that the dispute had previously been the subject of three years of litigation.
[129] 'Nathaniel Bacon, III', p. 34.

entirely favourable to his partner.[130] Where arbitrators were instead nominated to assume a more agent-based role, their deliberations might have instead resembled a negotiation, with each arbitrator trying to convince the other to take their side. At least this appears to have been the case in the Tangier freightage dispute for which Samuel Pepys had been nominated by John Bland to resolve, for as Pepys noted, he was able to persuade the other arbitrator to lower the amount of money Bland would be required to pay from an initial sum of £1,300 to just £202.[131] As to when or where these deliberations would take place, there seems to have been a considerable about of variation. Arbitrators did not always meet privately to discuss the making of their decision; their deliberations could also occur with the parties physically in attendance.[132] There is even indication that the arbitrators did not have to meet with one another to make their award. Despite the fact that a dispute between two Norwich residents had been referred to both Sir Nathaniel Bacon and Sir William Paston in 1598, Paston wrote to Bacon to suggest that he alone could try to resolve the dispute on behalf of them both and, if he were unsuccessful, that Bacon could then do the same. Only if they were both unable to reach at a decision, he explained, 'will [I] then meete with you to that ende to doe what good we maye betwene them'.[133] Whilst an arbitration proceeding might have been the public 'face' of arbitration, there was clearly much variation within each of its stages, reflecting the discretion of both the parties to the dispute and the nominated arbitrators over the process.

4. Performance

The final issue that this chapter will consider regarding the practice of arbitration in the seventeenth century is performance. Once the arbitrators had made their award, would the parties actually perform the tasks which had been ordered to do? One might reasonably question why the focus here is on performance rather than the award itself. Indeed, as the previous section examined the proceeding of an arbitration, it would seem to follow that the next logical step would be to consider the contents of the arbitrators' decision, it being the result of that examination and fact-finding process. Yet there are essentially three reasons for framing this analysis as stated. First, whilst the award would have been the most important part of an arbitration from the viewpoint of the parties as it would have stipulated how their

[130] 'John Paige', no. 119.
[131] 'Samuel Pepys', vol. V, p. 36.
[132] Ibid., vol. IV, p. 34.
[133] 'Nathaniel Bacon, IV', p. 69.

dispute should be resolved, the contents of an award tell us relatively little about the overall practice of arbitration at the time. Award were necessarily specific to the matters in dispute between the parties, so whilst they might provide insight into the types of dispute that were put to arbitration, they are less illustrative of how the process was conducted. Second, on a more pragmatic note, Derek Roebuck has devoted an entire chapter of his book on seventeenth-century arbitration and mediation to the study of awards, investigating in particular what sorts of issues were often the subject matter of these decisions and whether awards actually complied with the many legal rules that dictated their form and substance. To conduct a similar analysis would therefore be redundant; it is far more preferable to direct readers interested in these areas to Roebuck's work instead.[134] But the third and most compelling reason for focusing on the performance of awards is that the issue has often been overlooked in previous studies. Works which have pointed to the contemporary recourse to arbitration as evidence that the high levels of litigation during the period did not undermine social order and relations have largely assumed that arbitration would reconcile the disputing parties with one another. But was this always the case in practice? Did contemporaries invariably perform awards, thereby putting into effect the settlement that their arbitrators had envisaged?

It is probable that in many, if not most, cases, there would not have been an issue with performance. The parties would have performed the award for the simple reason that it was a decision worth implementing. Not only did the parties have a significant amount of control over what an award would entail, having nominated the arbitrators and having specified the matters they were to address, but in making their award, the arbitrators had considerable scope to formulate a decision that could resolve the dispute in a definitive manner. It seems likely, then, that contemporaries would have often been satisfied with what their arbitrators decided and would have proceeded to perform their part of the award soon after it was pronounced. This might explain why it was common for contemporary writers to equate the making of an award with the ending of a dispute; the fact that the parties would abide by the decision was largely taken for granted. To illustrate this presumption, consider the antiquarian Ralph Thoresby's account of making an award in a dispute between two relatives in April 1692. Thoresby recorded in his diary that he had met one evening with the other arbitrators nominated to resolve the dispute and together they had 'now determined the controversies betwixt mother and son', yet neither in that diary entry nor at some later date

[134] Roebuck, *Arbitration and mediation*, pp. 81-173.

did Thoresby document whether the relatives had in fact performed the award.[135] Of course, it is possible that the mother and son had been present at the meeting and had carried out what Thoresby and the other arbitrators had directed them to do, but given that Thoresby only made note of the other arbitrators in the entry, this reading appears unlikely. What seems more plausible is that Thoresby and the other arbitrators had simply finalised their decision and Thoresby, in recording the event, assumed that the parties would adhere to it. He felt certain enough about the award and its subsequent performance to claim that the controversies between the parties were determined.

Yet there were undoubtedly instances in which the parties would not have been satisfied with the award. For example, they might have felt that the arbitrators failed to address the matters in dispute in an adequate manner, or the nature of the dispute might have been such that the blame or onus would have fallen disproportionately on one party over another. The impression given by the accounts consulted for this study, however, is that even in these circumstances contemporaries would still perform their awards. When the merchant William Freeman and his then business partner Captain John Bramley fell into disagreement with the master of a ship they had hired in 1682, the matter was put to arbitration and the arbitrators made an award that would have resulted in considerable financial loss for both Freeman and Bramley. Yet when Freeman wrote to Bramley to inform him of the decision, he insisted that it was immaterial whether they were content to bear the loss or not, for 'wee must doe soe, the arbitrators haveinge soe accorded it'.[136] Such firm adherence suggests that there were factors other than the parties' approval of an award that affected their willingness to perform. One of these factors was certainly the reputational damage a party would have faced if he refused to carry out what his arbitrators had decided. Just as contemporaries were likely to be viewed unfavourably by their peers and others if they refused to arbitrate their dispute, the sources reveal that a party who did not perform an award might similarly be branded as 'contentious' or a 'froward [and] obstinate sort'.[137] Indeed, it is possible that such labels would have applied more readily to a non-performing party, for by his intransigence he would have effectively wasted the time and effort given by the arbitrators and anyone else involved to carry out the process. When Nathaniel Bacon asked Richard Spratt, the steward of his estates, to serve as an arbitrator in a dispute between two labourers in 1602, Spratt took time to meet with the parties and their witnesses on multiple occasions and to formulate a

[135] 'Ralph Thoresby', p. 221.
[136] 'William Freeman', p. 312.
[137] 'Wentworth', p. 18; 'Nathaniel Bacon, V', p. 300.

decision that would 'quiet' the matters in dispute. Once Spratt pronounced his award, however, one of the parties refused to perform it, causing Spratt to complain to Bacon that he had 'never mette with a more untoward and perverse fellow'.[138]

But probably the most important factor affecting a party's willingness to perform were the legal repercussions he would face if he did not comply with his arbitrators' decision. If a party failed or refused to perform the award, he would have breached the terms of his submission and could therefore be sued by his opponent for enforcement. As noted earlier in the chapter, this could occur even if the party and his opponent had only entered into a parol submission, for oral agreements were as legally binding as those enshrined in a deed. Of course, the opponent might have more difficulty in proving to a court that a submission had been made, but this would not necessarily have precluded him from initiating proceedings, James Sharpe and others having shown that contemporaries often began litigation with no intention of continuing a suit to the 'bitter end'.[139] In as litigious and 'law-minded' a society as seventeenth-century England, it would be misguided to think that contemporaries would not have pursued this course of action.[140] Indeed, the hundreds of reported cases brought before the common law courts during the period are a clear testament to the contemporary willingness for it. Simply because contemporaries had initially sought to resolve their disputes out of court did not mean that they were averse to turning to the courts at later point for enforcement, a fact that would have undoubtedly weighed heavily in the minds of parties when they considered whether to perform or not. To re-fashion Michael Clanchy's resonant idiom, 'love' might have easily led to 'law'.[141]

5. Conclusion

Through its analysis of contemporary diaries and letters, this chapter has made the first attempt to re-create the practice or 'experience' of arbitration in the seventeenth century. It has shown that there were various reasons and motivations underpinning not just the decision to arbitrate a dispute but also the way in which the process was conducted. Whilst the

[138] 'Nathaniel Bacon, IV', p. 293.
[139] Sharpe, 'Such disagreement betwyx neighbours', p. 175.
[140] C.W. Brooks, *Pettyfoggers and vipers of the commonwealth* (Cambridge, 1986); 'A law-abiding and litigious society' in *The Oxford illustrated history of Tudor and Stuart Britain*, ed. J. Morrill (Oxford, 1996), pp. 139-55, at pp. 143-46; *Law, politics and society in early modern England* (Cambridge, 2008).
[141] M. Clanchy, 'Law and love in the Middle Ages' in *Disputes and settlements: law and human relations in the West* (Cambridge, 1983), pp. 47-68.

examination provides evidence to support the views of previous scholars that arbitration was a desired alternative to litigation and that the process could be employed for conciliatory and 'neighbourly' ends, it has also revealed that the contemporary practice of arbitration was not confined to these views. Arbitration could equally be employed for more practical or even dubious reasons, and there could be factors other than social norms and expectations affecting a disputing party's decision to agree and comply with the process. The study has also explored the role that arbitrators played in the arbitration, a topic which has only received passing comment in previous scholarship. As James Sharpe once theorised but never explored, a consideration of who the parties nominated to resolve their dispute could be telling of the nature of their disagreement and the level of contention between the parties.[142] Moreover, the investigation of why an arbitrator would agree to take on the role shows that whilst there was clearly a contemporary norm to accept nomination requests, the reasons for doing so were more varied than simply out of a desire to promote harmonious relations.[143] The practice of arbitration would appear to be more complex than previously recognised.

[142] Sharpe, 'Such disagreement betwyx neighbours', pp. 184-85.
[143] Wrightson, *English society*, p. 62.

3. Making the Arbitration Act – Enforcement

With this chapter, there marks a shift in focus to the second aim of the dissertation: to explain why the Arbitration Act of 1698, the first statute on arbitration to be passed in England, was made. Whilst the previous two chapters have considered the elements and practice of arbitration over the course of the seventeenth century, this chapter and the next will each concern one facet of the Arbitration Act's making: this chapter will focus on the enforcement procedure of the Act; and the next will examine the historical context of the Act's drafting and enactment. To begin this study of the Act's enforcement procedure, however, it is important to note that the use of this phrase 'enforcement procedure' is something of a misnomer. The Act did not in fact implement its own method of enforcement; rather, it allowed for an existing enforcement procedure, the process used by the courts to penalise contempt, to be applied in a novel way: to enforce arbitration. This was done by means of a legal fiction, the practice by which a court accepted some factual or procedural fallacy to bring about an outcome that would be otherwise unattainable.[1] In the case of the Arbitration Act, the fiction was for a court to recognise a submission, the contract between parties to perform their arbitrator's award, as one of its own rules, the effect being that if a party did not perform the award, the court could penalise his inaction as contempt. The provisions of the Act, which are transcribed in Appendix VI, therefore established a procedure to enable this fiction to occur, one that can be summarised as follows. When parties formed their submission, they would insert an additional provision in which they agreed that the contract be made a rule of a court of their choosing (lines 13-17). They would then present the submission to the court along with an affidavit, or sworn statement, made by a witness to attest that the parties had agreed to this procedure (lines 17-19). Once the affidavit was read and filed, the court would enter the contents of the submission into its rule book, thereby producing a rule directing the parties to perform their arbitrator's award (lines 20-23). If a

[1] J.H. Baker, *The law's two bodies: some evidential problems in English legal history* (Oxford, 2001), pp. 33-57; L. Harmon, 'Falling off the vine: legal fictions and the doctrine of substantive judgment', *Yale Law Journal* 100 (1990), pp. 1-71; E. Moglen, 'Legal fictions and common law theory: some historical reflections', *Tel Aviv University Studies in Law* 10 (1990), pp. 33-62.

party subsequently failed or refused to do so, he would therefore disobey the rule and could be 'subject to all the penalties of contemning a rule of court' (lines 23-25).[2]

Stepping away from the mechanics of the Arbitration Act's procedure, it is worth taking a moment to appreciate just how peculiar the Act was. For whilst it is now clear how the Act 'enforced' arbitration, for several reasons this method was objectively strange. Take, for example, its use of a legal fiction. Although legal fictions were by no means uncommon at the time, they were typically created by the courts, having been a useful way to bend or circumvent existing legal rules without the need for reform.[3] Yet the fiction of the Act was instituted by Parliament, unusual not just for having been created by this other body, but also because it marked a reversal of the traditional role that Parliament played in legal fictions. Generally speaking, Parliament was expected to 'perfect' fictions: to legislate reform so that the courts would no longer need to rely on a fiction to achieve their desired ends.[4] Why, then, did it depart from its traditional position by perpetuating a fiction with the Arbitration Act? Another peculiarity of the Act was the effect of the fiction it created. As noted in the preamble of the Act itself, the sanction for 'contemning' the rule of a court was imprisonment (lines 3-4), so if a party did not perform his arbitrator's award, he could therefore be imprisoned. This was quite an astonishing result: legal fiction aside, it meant that an Act of Parliament authorised the imprisonment of parties for breaching what was fundamentally a private contract.[5] What is more, as a non-performing party would be imprisoned for contempt, he would not be afforded the normal protections under the law in cases where a person's liberty was at stake. The process employed to imprison a party for contempt was summary in nature, designed, as William Blackstone explained, so that the contempt committed against the court could be immediately redressed.[6] Yet as breaching the terms of a submission was only fictionally in disobedience of a court, the fact that a non-performing party could nonetheless be subjected to this process would appear out of proportion with his fault. Why, then, did the Act allow this to occur?

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[2] The rest of the Act's provisions, concerning the grounds on which an award could be objected against and set aside by a court, will be considered in the following chapter. Refer to pp. 139-42.
[3] As Baker explained, 'the object of fictions is that they allow the operation of the law to change while avoiding any outward alteration in the rules'. Baker, *Law's two bodies*, p. 35.
[4] Ibid., pp. 39-40.
[5] This became a point of criticism in the 1760s-1770s, with at least some critics claiming that it violated the Magna Carta. Horwitz and Oldham, 'Arbitration', pp. 137-38.
[6] Blackstone, *Commentaries*, vol. IV, pp. 280-84. For more information on the courts' power to imprison parties for contempt, see J.C. Fox, *The history of contempt of court: the form of trial and the mode of punishment* (Oxford, 1927); R. Goldfarb, 'The history of the contempt power', *Washington University Law Quarterly* 1 (1961), pp. 1-29.

But perhaps the most peculiar feature of the Arbitration Act, particularly in light of what has been discussed, was that its enforcement procedure was not entirely new. As Henry Horwitz and James Oldham have shown, the Act instead 'built upon current judicial practice', so any investigation of its procedure must be able to account for this earlier practice as well.[7] Accordingly, this is the aim of the chapter, and to seek to explain this development, its analysis will be structured by three questions to be examined in turn: (i) why was the Act's enforcement procedure needed (or was it)?; (ii) how did its enforcement procedure develop?; and (iii) why was its procedure implemented in 1698? As we shall see, answering these questions will not only help explain or contextualise what was peculiar about the Act, but it will ultimately show that an examination of the Act's enforcement procedure cannot on its own account for why the Arbitration Act was made.

1. Legal context

To begin to understand why an enforcement procedure as peculiar as that of the Arbitration Act was made, it is necessary to consider why it might have been needed. It seems safe to say that Parliament would not have passed the Act without good reason, particularly in light of the fact that it could result in the imprisonment of a party for contempt, so there must have been a purpose for this particular procedure. The aim, then, of this section is to contextualise the Act's enforcement procedure within the enforcement practices of the time, an objective which requires examining two specific issues. First, why imprison a non-performing party for contempt? Second, what were the existing methods of enforcement and, in particular, what where their legal remedies? Each of these issues will be considered in turn to reveal that the Act's enforcement procedure did fill a 'gap' in the existing methods of enforcement. The real question, however, was whether contemporaries would have considered the procedure to be necessary.

Whilst legal scholarship has largely restricted its discussion of contempt to the court of Chancery, the principal court of equity in the kingdom, the threat of imprisonment for contempt having been how the court compelled compliance with its procedure, all courts of record—that is, every court that kept a lawful record of its proceedings—had the power to imprison individuals who had disobeyed their orders or process.[8] As Sir Thomas Malet, a

[7] Horwitz and Oldham, 'Arbitration', p. 143.
[8] For works on the proceedings of the court of Chancery, see D.E.C. Yale, 'Introduction' in *Lord Nottinghams's manual of Chancery practice; and, prolegomena of Chancery and equity*, ed. D.E.C.

justice of the court of King's Bench, maintained in *Langham's Case* (1641/2), 'it is incident to every Court of Record, to imprison for a contempt done to the Court…if a Court of Record should not have such a coercive power, they should be in effect no Court'.[9] The principle which appears to have grounded this power was that the authority of the courts and, by extension, the administration of the law should not be obstructed or delayed.[10] In his *Commentaries on the Laws of England*, written in the mid-eighteenth century, William Blackstone justified the courts' ability to imprison disobedient parties in a similar way. He noted that the laws would be 'vain and nugatory' if there were not 'a competent authority to secure their administration from disobedience and contempt', which explained why it was 'an inseparable attendant upon every superior tribunal' that the courts should be able to 'suppress such contempts, by an immediate attachment of the offender'.[11] Presumably because imprisonment for contempt was aimed at upholding the laws as administered by the courts, the sanction differed from other, more 'conventional' forms of imprisonment in two important ways. First, as Blackstone's comments suggest, imprisonment for contempt was *immediate*: a party accused of disobeying the order or process of a court would be arrested on the issuing of particular writ known as a 'writ of attachment' and would then be examined and sentenced by means of a summary procedure, without trial or jury.[12] Second, as Justice Malet's statement indicates, imprisonment for contempt was *coercive*: a disobedient party would only be imprisoned for as long as he remained in contempt of the court. Once the party complied with the order or process or signalled his willingness to do so, he would be released from gaol, having 'purged' himself of the offence.[13] Accordingly, the sanction was not punitive; instead, it was intended to compel the party to carry out what the court had required.

The purpose and nature of imprisonment for contempt help shed light on why the Arbitration Act's enforcement procedure made use of this sanction. It was not that

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Yale (Cambridge, 1965), pp. 48-65; W.J. Jones, *The Elizabethan court of Chancery* (Oxford, 1967), pp. 177-304, especially pp. 225-35. The issue of whether a court was a 'court of record' was contentious in the seventeenth century, one that the common law courts employed in their jurisdictional battles against Chancery and the prerogative courts. For the purposes of this study, the only courts of record that will be considered are the common law courts and their associated institutions.

[9] *Langham's Case* (1641/2), March N.R. 179, at 186. See also *Dr Bonham's Case* (1609/10), 8 Co. Rep. 113b, at 119b; *The Company of Vintners v Clerke* (1695/6), 5 Mod. 156, at 158-159.

[10] For example, see *Beecher's Case* (1608), 8 Co. Rep. 58a, at 60b.

[11] Blackstone, *Commentaries*, vol. IV, pp. 282-83.

[12] W. Sheppard, *The faithful councellor: or the marrow of the law* (1653), pp. 178-79; W. Style, *Regestum practicale, or, the practical register* (1657), p. 72; Fox, *The history of contempt of court*, pp. 44-69.

[13] Fox, *The history of contempt of court*, pp. 44-69; R. Goldfarb, 'History of contempt power', pp. 7-8.

imprisonment for contempt was merely the most convenient form of imprisonment that could be applied to the scenario of a party not performing his arbitrator's award; rather, it concerned what the sanction could in turn bring about. Given that imprisonment for contempt was immediate, it would have represented a strong deterrent against non-performance, there being few individuals who would have wanted to find themselves in gaol for failing to comply with their arbitrator's decision. But perhaps more importantly, given that imprisonment for contempt was coercive, its effect would have been to compel a non-performing party to perform the award. As the rule which the court would find the party to have disobeyed was the fictionalised rule of his submission, the only two ways in which the party could purge himself of his contempt and be released from gaol was either to perform his arbitrator's award outright or, if he could not carry out the required tasks from gaol, to give security that he would perform the decision once released. Accordingly, through the use of the sanction of imprisonment for contempt, the Act's enforcement procedure provided a summary way to enforce the performance of awards. Viewed in this light, the fact that a party could be imprisoned for contempt for not complying with his submission would therefore appear less peculiar.

Whilst the Act's enforcement procedure might seem less peculiar when the effects of imprisoning a non-performing party for contempt are considered, what still needs to be answered was whether the result or 'remedy' of the Act's procedure, to enforce in a summary manner the performance of an award, would have been innovative for the period. The short answer was yes: prior to the Arbitration Act, the only way that an aggrieved party could seek enforcement from the courts was to sue his opponent by way of legal action, a process which was not only far from summary, but one that could only result in the aggrieved party receiving a sum of money as a remedy. The aggrieved party would not have been able to convince the courts into forcing his opponent to perform the award. Contrary to the views of nineteenth- and twentieth-century legal scholars who were wont to depict the courts as covetous of the business handled by arbitration, the existing methods of enforcement and the remedies they provided were not intended to discourage the use of arbitration.[14] Rather, they were a by-product of how the common law system was structured at the time. In the seventeenth century, to sue an opponent in the common law courts, it was necessary for an

[14] For a discussion of this earlier view, see E. Wolaver, 'The historical background of commercial arbitration', *University of Pennsylvania Law Review* 83:2 (1934), pp. 132-146, at pp. 138-43.

aggrieved party to purchase what was known as an 'original writ'.[15] This writ was more than a 'pass' to admit potential suitors into a court; it also dictated the form of legal action that could then take place, both in terms of its procedure and the remedy it provided. There was, however, limited variation to the types of original writ that could be purchased, so if the aggrieved party could not find a writ suited to the circumstances of his case, he would be unable to sue his opponent, giving rise to the rule of 'no writ, no remedy'.[16] As one might expect, there was no original writ to enforce arbitration, so to sue an opponent for not performing the award, an aggrieved party would have had to shape his claim to fit one of the existing writs. Whilst this was possible to do with several types of writ, the legal actions ensuing from them had as their legal remedy some form of monetary payment. This was the real reason why the courts would not force a party to perform his arbitrator's award: it was not within the remit of the legal actions available to provide such a remedy.

Although each of the legal actions an aggrieved party could use to sue his opponent would result in him receiving a sum of money, the actions varied as to the amount of money the party could receive and as to when the actions would be available to him. Accordingly, it is worth briefly summarising how these actions worked in the context of enforcing arbitration, if simply to provide a more complete picture of the methods of enforcement available before the Arbitration Act was made.[17] The first legal action that an aggrieved party could use was the action of *assumpsit*, the action used in cases where there had been a breach of a promise.[18] To bring a claim under this action, the aggrieved party would plead that his opponent had undertaken and faithfully promised (*assumpsit et fideliter promisit*) to perform the award, so by breaking his promise the opponent had caused the aggrieved party to suffer a loss and should therefore be made to pay compensation.[19] The type of compensation to which the aggrieved party would be entitled was damages, a sum of money that would be assessed

[15] This was required until the nineteenth century. For an overview of the writs system, see Baker, *ELH*, pp. 60-77; F.W. Maitland, *The forms of action at common law* (Cambridge, 1968, orig. 1909).
[16] J.H. Baker, *The Oxford history of the laws of England. Volume VI: 1483-1558* (Oxford, 2003), pp. 323-25.
[17] In addition to the legal actions discussed, it would also have been possible for the aggrieved party to sue his opponent using the older action of covenant, but this option appears to have been largely out of use by the period, as evidenced by the fact that only one reported example has been found of the action being used to enforce arbitration: *Doctor Samways v Eldsly* (1676), 2 Mod. 73. For more information on this action, see Baker, *ELH*, pp. 339-42.
[18] For an overview of the use of the action of *assumpsit* to enforce a breach of a promise, see Ibbetson, *HILO*, pp. 130-47.
[19] Baker, *ELH*, p. 360; Simpson, *CLC*, pp. 574-79.

by an inquest jury only after the proceedings of the case had concluded,[20] so given the inherent uncertainty of this sum and the possibility that the aggrieved party might be dissatisfied with the amount assessed, it appears that this action was not often used in practice. Yet the advantage of the action of *assumpsit* was that it could be employed regardless of the form of the parties' submission, the action being grounded on their promise to perform the award rather than the physical document (if any) enshrining it, so it might have been viewed by an aggrieved party as a sort of action of 'last resort', when the other legal actions discussed below were unavailable to him.[21]

The second action that an aggrieved party could use to sue his opponent was the action of debt on award ('sur arbitrement'), the type of debt action discussed in Chapter 1 in relation to the issue of whether an award could be a deed.[22] As an award was taken by the courts to be a form of judgment, and since the courts had been prepared for centuries to enforce debts arising from judgments, if an arbitrator ordered one party to pay the other a sum of money, on the party's refusal to pay the sum, the aggrieved party would be entitled to bring a claim under this action to recover it. The implementation of this action came, therefore, the closest to the courts enforcing performance, for by allowing the aggrieved party to recover the sum, they were in effect compelling the non-performing party to do what his arbitrator had ordered. Yet it must be emphasised that the courts saw themselves as merely enforcing a debt that had become due, a point borne out by the fact that they would not compel the non-performing party to perform any other stipulation that the arbitrator might have required, nor would the action have been available to the aggrieved party had the arbitrator not ordered the non-performing party to pay. The action can therefore be seen as covering a singular event, albeit one that seems to have occurred relatively frequently in practice.[23]

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[20] D.J. Ibbetson, 'The assessment of contractual damages at common law in the late sixteenth century' in *Law and legal process*, eds. M. Dyson and D.J. Ibbetson (Cambridge, 2013), pp. 126-47, at pp. 137-46; G. Washington, 'Damages in contract at common law', *LQR* 47:3 (1931), pp. 345-79, at pp. 371-75.

[21] For examples of cases brought using this action, see *Holcroft v French* (1611), 2 Brownl. 137; *Tomkins v Webb* (1618), 2 Rolle 46; *Brande v Coxe* (1619), 2 Rolle 103; *Read v Palmer* (1648), Al. 69; *Newgate v Degelder* (1666), 2 Keb. 10, 20, 1 Sid. 281; *Coke v Whorwood* (1671), 2 Lev. 6, 2 Keb. 767.

[22] Refer to pp. 42-45 above.

[23] For examples of cases brought using this action, see *Hungate v Mease and Smith* (1602), Cro. Eliz. 886; *Ormelade v Coke* (1614), Cro. Jac. 354; *Waters v Bridge* (1622), Cro. Jac. 639; *Anderson v Symonds* (1626), Latch 213; *Leake v Butler* (1629), Lit. 312; *Jennings v Vandeputt* (1632), Cro. Car. 263; *Rose v Spark* (1648), Al. 51; *Hosdell v Harris* (1668-1669), 2 Keb. 462, 497, 533, 536, 2 Wms. Saund. 61, 64.

The third and final action that an aggrieved party could use for enforcement was the action of debt on an obligation ('sur obligation'), the action used to recover the penalty of a conditional bond, the word 'obligation' being the Law French term for a bond.[24] Accordingly, the action was only available to an aggrieved party if he and his opponent had formed their submission using conditional bonds, but given that approximately 75 per cent of the reported cases in which a party sued his opponent for not performing their arbitrator's award were brought before the courts using this form of action, it would appear that this was not much of a restriction in practice.[25] As a sum of money, the penalty differed from the previous types of payment considered above in two notable ways. First, it was set by the parties when they formed their submission, so an aggrieved party would know what exactly he could recover when he brought a claim against his opponent, unlike the action of *assumpsit*. Second, the penalty was typically for an exorbitant sum, intended, as Chapter 1 has explained, to disincentivise the parties from not performing their arbitrator's award, so the amount would likely exceed even what an arbitrator might order in the award. This might help explain why parties appear to have preferred the action of debt on an obligation over the action of debt on award in cases where an arbitrator had ordered the non-performing party to pay, for in the calculus of choosing which action to employ, the fact that the aggrieved party could recover a larger sum would undoubtedly have been an important factor.[26] For clarification purposes, an outline of the three legal actions discussed can be found in the following table:

Type of action	When available?	Remedy
Assumpsit	All forms of submission	Damages
Debt on award	All forms of submission + award orders payment of sum	Recovery of unpaid sum
Debt on an obligation	Submission by conditional bonds	Recovery of penalty

Figure 4: Types of common law actions available for enforcement

[24] 'Obligation' in J. Cowell, *The interpreter* (1607); T. Blount, *Nomo-lexicon* (1670).
[25] This figure has been calculated by taking the total number of reported cases I have found involving arbitration and reducing the number to reflect only those cases in which a plaintiff sued his opponent for non-performance.. This reduced number was then used as the denominator to calculate the above percentage, the numerator being the number of reported cases explicitly brought using the action of debt on an obligation.
[26] For explicit notice that both actions would have been available to the aggrieved party, see *Gage v Gilbert* (1593/4), 1 Brownl. 56. For examples of the action of debt on an obligation being used in instances where debt on award would have been available, see *Duport v Wildgoose* (1613), 2 Bulstr. 260; *Winch and Grave and Sanders* (1620), Cro. Jac. 584; *Fitzherbert v Hind* (1664), 1 Keb. 753.

When compared to these legal actions, then, it is evident that the Arbitration Act would have provided a form of enforcement not previously available to an aggrieved party. By devising a way for the courts to compel a non-performing party to perform the award, the Act's enforcement procedure would have filled a 'gap' in the existing methods of enforcement. We should hesitate to assume, however, that simply because the Act filled this gap, it was intended to 'fix' the existing system. For one thing, there appears to have been little—if any—criticism of the existing methods of enforcement and the remedies they provided. Of course, this does not mean that contemporaries were therefore uncritical of these methods, but in a period known for its proposals on law reform, one would expect there to have been greater outcry had these enforcement methods truly been considered a grievance.[27] Indeed, only a single contemporary source has been found that discusses the possibility of enforcing the performance of awards in the context of legal reform, but even there the object in raising the issue was not intended to 'fix' how arbitration was then enforced but to address another issue entirely. In the lawyer and legal writer William Sheppard's *Englands Balme* (1657), a work which set out his comprehensive plan for law reform as legal adviser to Lord Protector Cromwell, one of the proposals Sheppard advanced was 'to let arbitrators have the power to give an oath to witnesses; and when they have made an award, to let it be performed'.[28] Whilst his proposal recognised that it was not at the time possible to enforce the performance of an award, Sheppard did not, however, advance the proposal because he found the existing methods of enforcement to be lacking. As Sheppard structured his work so that each of his proposals were categorised as a 'remedy' to some stated 'grievance', it is clear that he had recommended the proposal not as a means to provide an aggrieved party with a 'better' method of enforcement, but rather to help address the problem that 'the courts at Westminster are overburthened with business'.[29] Although Sheppard did not make his reasoning explicit for proposing the possibility of enforcing the performance of awards to remedy the high levels of litigation before the central courts, it is possible to speculate on his logic.

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[27] For scholarship on law reform, see G.B. Nourse, 'Law reform under the Commonwealth and Protectorate', *LQR* 75 (1959), pp. 512-29; S. Prall, *The agitation for law reform in the Puritan Revolution, 1640-1660* (The Hague, 1966); M. Cotterell, 'Interregnum law reform: the Hale Commission of 1652', *EHR* 83:329 (1968), pp. 689-704; D. Veall, *The popular movement for law reform, 1640-1660* (1970); B. Shapiro, *Law Reform in early modern England 1500-1740* (Oxford, 2019).

[28] W. Sheppard, *Englands balme: or, proposals by way of grievance & remedy* (1657), pp. 58-59. Matthews has claimed that Sheppard's work was 'the most comprehensive design for the reform of English law and society published in the seventeenth century'. N.L. Matthews, *William Sheppard, Cromwell's law reformer* (Cambridge, 1985), pp. 144.

[29] Sheppard, *Englands balme*, p. 58.

Presumably the reasoning was that by establishing such an enforcement method, fewer parties would have been inclined to break their agreements to perform an award, thereby reducing the number of lawsuits brought before the courts. Whilst it is likely that enforcing the performance of awards would have had this desired effect, it is also evident that this 'grievance' had little bearing on the merits of the enforcement methods then available to an aggrieved party, a point made all the more clear by the fact that the intended beneficiaries of Sheppard's proposal were the courts, not the parties. At least regarding Sheppard's work, then, it would appear that enforcing the performance of awards was not seen to be needed to 'fix' how arbitration was enforced at the time.

But perhaps the more important reason why we should hesitate to view the Arbitration Act as implementing an enforcement procedure to 'fix' the existing system hinges on a consideration of how contemporaries typically sought enforcement from the common law courts. As noted above, approximately 75 per cent of the reported cases in which an aggrieved party sued his opponent for not performing the award were brought using the action of debt on an obligation, so it seems relatively safe to say that when contemporaries turned to the courts for enforcement, the remedy they most frequently sought was to recover the penalty of the conditional bond forming their submission. As Chapter 1 has explained, when parties entered into a submission using conditional bonds, they would deliberately set the penalty of the bonds at an exorbitant amount of money, typically twice the value of the matters in dispute, to disincentivise non-performance.[30] A party would think twice about not performing the award as to do so would mean that he would become liable to pay the penalty to his opponent. Yet an additional reason for setting the penalty at such an exorbitant sum can be seen in the context of enforcement: if the party did in fact fail to perform the award, his opponent, the aggrieved party, would then be entitled to receive this large amount of money. Whilst recovery of the penalty would not have equated to performance, it is worth taking a moment to consider whether the aggrieved party would have been all that dissatisfied with this form of remedy.

Let us assume that parties A and B, who are neighbours, fall into disagreement over who is responsible for repairing a pathway abutting both of their properties, a task which is projected to cost £100. The parties agree to arbitrate the dispute and enter into conditional bonds to perform their arbitrator's award, the penalty of the bonds being set at £200 or twice the value of the matter in dispute as was the convention. The arbitrator then makes an award

[30] Refer to pp. 33-34 above.

requiring party B to pay for the repairs, something that party B refuses to do, so party A sues party B in an action of debt on an obligation. If party A is successful in his claim, he will not be able to compel party B to pay for the repairs of the pathway; instead, he will only be entitled to recover from party B the £200 penalty. But given the facts as presented, would this be a particularly discouraging result? As the repairs to the pathway had been projected to cost £100, party A would receive from party B more than enough to pay for the repairs himself, effectively counteracting party B's earlier refusal to perform the award. What is more, even when the costs of bringing his legal action are factored in, it is probable that party A would still 'profit' from suing party B for the simple reason that the penalty was worth so much more than the price of the repairs.[31] It seems likely, then, that recovering the penalty would not have been perceived as an unsuitable remedy, both for party A and for aggrieved parties more generally.

Of course, there were certainly instances in which an aggrieved party would have preferred for his opponent to perform the award than to receive the penalty, particularly in cases where it would have been difficult to value the matters in dispute between the parties in monetary terms, but it is doubtful that this position would have been characteristic of all or even most of the parties seeking enforcement from the common law courts at the time.[32] Instead, it is probable that the scenario depicted above was often closer to the aggrieved party's actual position, which might in turn help explain the lack of contemporary criticism for this enforcement method. Thus, whilst the Arbitration Act might have implemented a procedure that could enforce the performance of awards, in light of the existing methods of enforcement available to contemporaries, it might not have been especially needed.

2. References

Whilst the previous section examined the 'why' of the Arbitration Act's enforcement procedure, explaining the effect of it enabling the courts to imprison a non-performing party for contempt and questioning whether this form of enforcement would have been needed, this section will instead concern the 'how': how did the Act's enforcement procedure develop?

[31] For a scholarly work considering how contemporaries might have sought to benefit or profit from the penalty of conditional bonds, see T. Stretton, 'Written obligations, litigation and neighbourliness, 1580-1680' in *Remaking English society: social relations and social change in early modern England*, eds. S. Hindle, A. Shepard, J. Walter (Woodbridge, 2013), pp. 189-210.
[32] For a fuller discussion on these two remedies and their situations of use, see Simpson, *CLC*, pp. 595-98.

As Henry Horwitz and James Oldham have shown, the Act had 'built on current judicial practice', but given the discussion of the existing methods of enforcement available to an aggrieved party, the judicial practice in question was clearly not related to the type of enforcement the courts provided when a party sued his opponent by way of legal action.[33] Rather, the practice from which the Act's enforcement procedure developed concerned references, the type of arbitration whereby a court ordered that the matters in a lawsuit be referred to an arbitrator or 'referee' to decide. This section will therefore be used to examine how references were both ordered and enforced in the common law courts, an investigation that will both explain and contextualise the two features that made the enforcement procedure of the Arbitration Act possible: first, the legal fiction on which it relied so that a submission could be made a rule of a court; second, the approbation of the courts to enforce disobedience against this fictionalised rule by means of their contempt procedure.

2.1 The assizes

In the common law courts, a reference was most typically ordered when a lawsuit was being tried at the assizes, the circuit courts headed by the common law justices to administer trials in the counties.[34] This might have been because the trial stage of a suit, unlike the pleadings stage before it, was conducted with the parties physically in attendance, so in most cases it would have represented the first opportunity for the parties to consent to a reference.[35] But as J.S. Cockburn has shown, referring a suit to arbitration was also a convenient way for the common law justices to reduce the number of cases they would have to hear whilst on circuit.[36] As the assizes only took place twice a year, the number of cases awaiting trial for any given county was understandably high, with figures peaking in the 1650s-1660s.[37] For example, in the Western Circuit, the only assize circuit for which most of its records from the period remain,[38] there were 711 cases awaiting trial for the winter assizes of 1656, which

[33] Horwitz and Oldham, 'Arbitration', p. 143.
[34] For an overview of the assize circuits during this period, see Cockburn, *Assizes*, pp. 23-48.
[35] A reference could also be ordered when legal arguments were raised *in banc*, presumably as it would have represented another instance in which the parties, or their legal counsel, could have consented to it. For a contemporary description, see J. Bruce, ed., *The diary of John Manningham,1602-1603* (1868), pp. 129-30.
[36] Cockburn, *Assizes*, pp. 136-37.
[37] Ibid., pp. 137-38. The assizes normally took place during the Lent term vacation (February-March) and the Trinity term vacation (July-August).
[38] For a discussion of the surviving records of the assizes, see J.S. Cockburn, 'Introduction' in *Western circuit assize orders 1629-1648* (1976).

would have averaged to approximately 118 cases per county.[39] Given that the justices remained in a particular county for no more than three or four days,[40] to administer this many trials would have been a monumental undertaking, so it follows that the justices would have been eager to lessen the burden by referring suits to local arbitrators. By Cockburn's estimates, it is likely that at least half of all cases awaiting trial were consequently dealt with in this way.[41]

Thanks to the survival of the Western Circuit's order books,[42] the records which documented the orders made by the justices as they administered trials, it is possible to know what an order referring a suit to arbitration, what will henceforth be called an 'order of reference', entailed. Whilst there was no standardised form for an order of reference, almost invariably it would contain three things: first, it would name the parties to the suit; second, it would appoint one or more arbitrators or 'referees' to resolve the matter; and third, it would direct the parties to perform the arbitrators' award once it was made. This three-part structure can be seen clearly in the following order made at the Exeter assize in March 1648/9:

> It is ordered by this Court by consent of parties that all matters in difference betwene John Barnes George Foster and Henry Veale shalbe referred to the examinacion hearinge [and] endinge of Mr Christofer Savery and Mr Fowell two of the Justices of the peace of this County who are desired by this Court to call the parties before them and end the differences before them and all the said parties are to stand to and performe such order [and] award as shalbe made therein.[43]

As one might expect, it was the third part of the order of reference, directing the parties to 'stand to and perform' the award, that is most relevant to this discussion on the development of the Arbitration Act's enforcement procedure. For by including this provision in the order, it meant that if a party did not perform the award, he would thereby disobey the order and could be held in contempt of court. This was even stated expressly in some orders of reference: for example, in an order made at the Launceston assize of July 1639 which referred a suit awaiting trial to two local JPs, it included the provision that 'yf any of the said parties shall refuse to abyde by the award by the referrees made', the JPs should 'bynde over all

[39] Cockburn, *Assizes*, p. 137.
[40] Ibid., pp. 25-27, 136-38.
[41] Ibid., p. 137. For a contemporary account of a reference being made for this purpose, see *The diary of Mr. Justice Rokeby: printed from a MS. in the possession of Sir Henry Peek, bart.* (1888), p. 29.
[42] The circuit's order books are the only ones of their kind to have survived from the period. Refer to n. 38 above.
[43] TNA, ASSI 24/21, fol. 133v.

parties refractory to the next assizes there to answere their contempt therein'.[44] Equally evident from the orders was that if a party did not perform the award, he could be imprisoned for contempt. Although the party would be given the chance to defend his actions at an interim hearing held at the assizes,[45] if his reasons were found inadequate, the justice administering the hearing would order for his imprisonment in one of two ways: if the party had been present at the hearing, the justice would direct the sheriff of the county or some other local official to commit the party to gaol;[46] if the party had not been present, having instead been represented at the hearing by legal counsel, the justice would order for a writ of attachment to be granted against the party so that he could be arrested.[47] The party would then remain in gaol until he performed the award[48] or provided sufficient security that he would perform it once released.[49]

Whilst this overview makes clear that a party could be imprisoned for contempt if he did not perform the award resulting from a reference, it also reveals that this sanction and the procedure employed to implement it took place entirely at the assizes. From the viewpoint of the aggrieved party, it is plausible that this assize-specific process would have been less than ideal. For as the assizes were only held twice a year, there was a real possibility that the aggrieved party would have to wait for months for the next assize session to occur in order to commence enforcement proceedings against his opponent. Even then, multiple sessions of the assizes would have to pass before the non-performing party could be imprisoned for contempt. The Western Circuit's order books suggest that the entire process normally took place over two sessions: in the first, the administering justice would be notified that the party had not performed the award, prompting him to order that the party attend the next assizes to 'answere his contempt therein'; in the second, the interim hearing noted above would be held, and, if the non-performing party did not put forward an adequate defence, he would be imprisoned. This process could be further extended if, for example, the aggrieved party was required to provide evidence that the award had not been performed,[50] or if the matter was

[44] TNA, ASSI 24/20, fol. 202r. For similar examples, see TNA, ASSI 24/20, fols. 3v, 13r, 57v, 111r, 114r, 116v-117r, 119v-120r; 20/21, fol. 77r; 20/22, fol. 36r.
[45] TNA, ASSI 24/21, fols. 10v, 22v.
[46] TNA, ASSI 24/20, fols. 48v, 109v; 24/21, fols. 174r-174v.
[47] TNA, ASSI 24/20, fols. 13r, 124r-124v, 167v-168r; 24/21, fols. 10v, 11r.
[48] TNA, ASSI 24/20, fols. 48v, 50r, 68r, 203v, 204v, 214v; 24/21, fols. 174r-174v.
[49] TNA, ASSI 24/20, fols. 110r, 124r-124v, 181r-181v; 24/21, fol. 91r.
[50] TNA, ASSI 24/20, fols. 181r, 186r.

referred back to the referees who had conducted the reference for additional consideration.[51] Thus, whilst it was possible for a party to be imprisoned for contempt, due to the infrequency of assize sessions, it could have taken years for this sanction to be imposed, a situation that would have likely served to exacerbate the aggrieved party's position.

For a time, this situation could not be remedied by the aggrieved party turning to the common law courts, which were in session far more regularly than the assizes, for enforcement. This was noted in the legal writer and reporter William Style's *Practical Register* (1657), an alphabetised compilation of rules made principally by the court of King's Bench during the period in which Sir Henry Rolle served as its chief justice.[52] Under the heading of 'attachment', referring to the writ issued by the common law courts to commence enforcement proceedings for contempt, can be found the rule that the courts 'will *not* grant an attachment against one for disobeying an order made by justices of assize'.[53] Whilst Style's editorial comments, included in italics following the rule, indicate that this prohibition had been ordered by the court in Michaelmas term of 1647, attempts to learn more about the particular circumstances prompting the rule to be made have unfortunately proven unsuccessful.[54] But rather than think of this rule as signalling a change to what had been the practice beforehand, it is possible that the court had merely been acknowledging the institutional divide that existed between the assizes and the common law courts. For although the purpose of the assizes was to administer common law trials in the counties, a purpose for which the justices of the common law courts would ride in circuit twice yearly to undertake, each assize circuit was technically a distinct court with its own clerical staff and records.[55] A common law justice who made an order at the assizes would therefore do so in his capacity as a judge of that particular circuit and, as the Western Circuit's order books attest, the order would be entered into that circuit's own records. Accordingly, if a party disobeyed the order, he would only be acting in contempt of that assize circuit and could only be sanctioned

[51] TNA, ASSI 24/20, fols. 42v, 99v, 119v-120r, 128v, 139v, 141v, 164v, 204r; 24/21, fols. 77r, 91r, 96r; 24/22, fol. 26r.
[52] W. Style, *Regestrum practicale: or, the practical register* (1657). Henry Rolle was appointed Chief Justice in 1648 and then reappointed in 1649 following the execution of Charles I, holding the position until his resignation in 1655. S. Handley, 'Rolle, Henry', *ODNB*.
[53] Style, *Practical register*, p. 15 (my emphasis).
[54] No account of any case in which this rule might have been pronounced has been found in the reports covering this period. More information may be found in the rule books of the court (TNA, KB 125), which have not been examined.
[55] Cockburn, *Assizes*, pp. 59-61. See also J.S. Cockburn, 'Seventeenth-century clerks of assize: some anonymous members of the legal profession', *AJLH* 13:4 (1969), pp. 315-32.

there.[56] The common law courts would not imprison the party for contempt because they were unwilling; instead, it was simply not in their power to do so.

That this was likely the reason for the prohibition set out by the court of King's Bench finds support in the appearance, beginning in 1662,[57] of an additional provision included in some orders of reference that the order be entered into the rule book of the common law court from which the parties' suit originated:

> It is ordered with the consent of the parties that the last juror be withdrawn and that the matters in controversy between the parties now at this assizes tried be put to the arbitrement of Edward Baynton knight to hear and determine the matters therein before the first day of November next. And with like consent the parties are obliged to perform the arbitrement of Edward Baynton. *And that this rule be entered in the court of King's Bench at Westminster next term*.[58]

Whilst this change appears to have occurred in the Western assize circuit in the 1660s, research conducted by Horwitz and Oldham, who have examined this development from the viewpoint of the common law courts, has shown that orders of reference were being entered into the rule books of the courts at Westminster as early as 1656.[59] Such a difference in timing suggests that the implementation of this change had not been a coordinated effort across the assize circuits; rather, the impression given is that one or more of the justices, perhaps with the help of an especially imaginative clerk, came up with the practice and, over time, it spread and gained in popularity. For it is not difficult to see why the change would have been popular: by entering an order of reference into the rule book of a common law court, the order would have been fictionalised as having been made by the common law court. Consequently, if a party did not perform his referee's award, not only would he disobey the assize order of reference, but he would also contravene the rule of the common

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[56] Later editions of Style's work (1670, 1694) would appear to support this view, as evidenced by the editorial comments included alongside the printed order. For the 1670 edn, see p. 25, and for the 1694 edn, see p. 33.

[57] TNA, ASSI 24/22, fol. 94r. The assize judges administering the session during which this change first took place were Robert Foster, the chief justice of the court of Common Pleas, and John Archer, serjeant-at-law.

[58] TNA, ASSI 24/22, fol. 102 (translated from abbreviated Latin, with my emphasis added). The statement that 'the last juror be withdrawn' was another formulaic statement which began to appear in orders by the early 1650s. Its purpose appears to have been to divest the jury of its authority to make a verdict so that trial would be suspended as the parties attempted to resolve their dispute by arbitration. J.H. Baker, 'From lovedays to commercial arbitration' in *Collected papers in English legal history* (3 vols., Cambridge, 2013), vol. I, p. 440.

[59] Horwitz and Oldham, 'Arbitration', pp. 141-42.

law court, the effect being that he could be penalised for contempt by either judicial body. This fiction was, therefore, the precedent for the Arbitration Act: it established the practice whereby a direction concerning a party's obligation to perform an award could be made a rule of a court. Yet this examination does not just reveal how the legal fiction that would be applied by the Act developed; it also serves to put the development into context. The fiction appears to have been implemented to bridge the institutional divide between the assizes and the common law courts, allowing an aggrieved party to seek enforcement even when the assizes were not in session. In all likelihood, the fiction of the Act, which had seemed so peculiar when considered in isolation, had been based on a clear, practical concern.

2.2 The court of King's Bench

The practice of entering orders of reference into the rule books of the common law courts was not the end of this development story, however. Despite the fact that the common law courts were now capable of enforcing a reference initiated at the assizes by means of their own contempt procedure, for a time the court of King's Bench refused to do so, putting it at odds with the practice of the other two courts. This appears to have been a source of some consternation for the court, its justices noting in several cases that its practice differed from what the other courts were doing,[60] but it stood firm in its refusal for a specific legal reason: the way in which the court examined whether a party was in contempt of one of its rules, if applied to references, could result in the party being unlawfully imprisoned. Obviously, this requires some explaining, and it is best to begin with the court's examination process, which can largely be pieced together from a various assortment of contemporary sources.[61] When a party was accused of acting in contempt of one of the court's rules, the matter would be directed to the Crown Office of the court, the clerical staff in charge of its criminal

[60] *Kene v Fleming* (1666), 2 Keb. 22; *Derbishire v Canon* (1669), 2 Keb. 579; *Tremenhere v Tresilim* (1670), 2 Keb. 664.

[61] Both printed works and reported cases have been used to piece together this process. For printed works, John Trye's treatise on the filacers, a type of clerk, of the court of King's Bench reprints an earlier schedule of fees taken by the Crown Office, confirming that the examinations were conducted there: J. Trye, *Jus filizarii: or, the filacer's office in the court of King's Bench*, pp. 207-27, at p. 221. In the introduction to Andrew Vidian's pleading manual, a brief overview the process can be found under the heading 'Of proceedings in the Pleas of the Crown': A. Vidian, *The exact pleader: a book of entries of choice, select and special pleadings in the court of Kings-Bench* (1684), no pagination. For reports of cases that include comments as to the examination being conducted by clerks and by means of interrogatories, see *Derbishire v Canon* (1669), 2 Keb. 579; *Tremenhere v Tresilim* (1670), 2 Keb. 664.

proceedings, which would then issue a writ of attachment so that the party could be arrested and brought in for questioning. With the party present, he would be sworn to answer a series of written questions or 'interrogatories' to establish whether he had violated the rule as accused, and, on the basis of this examination, the party would either be imprisoned for contempt, if found to have contravened the rule, or else discharged, if found to have not. Yet because of the nature of this process, administered as it was by the clerks of the court and by means of interrogatories, the scope of the examination was limited to matters of fact. Presumably in most cases this would not have posed any issue, for it would have been apparent from the facts alone whether the party had violated the rule or not.[62] But when it came to applying this process to references, such a limitation would have been problematic, for the question of whether a party had not performed his referee's award and was, consequently, in contempt of court was as much a matter of law as it was a matter of fact, an issue we must consider next.

As Chapter 1 has shown, in the seventeenth century there was a veritable 'law' of awards, a set of legal rules that dictated not only whether an award was valid or void, but also whether a party would be obliged to perform it.[63] If an award complied with these legal rules, the decision would be valid or 'good' and the party would be obliged to perform it; but if the award went against these rules, the decision would instead be void and the party would be under no such obligation. In both scenarios, an award would have factually been made, but only in the first scenario would there legally have been an award, for the courts treated a void award as if no award had been made ('void arbitrement est nul arbitrement'). This distinction was therefore crucial to the question of performance, but it was also one that the court of King's Bench could not address using its existing contempt procedure. A party accused of violating one of the court's rules by not performing his referee's award would only be examined to determine whether in fact he had failed to perform, but in turn the party would not be able to raise any legal objections against the award to justify his inaction. As the court acknowledged in *Kene v Fleming* (1666), the result would have been that 'all awards would be affirm'd as good how void soever', for a party could have been imprisoned for contempt even when his referee's award was void.[64] Not only would this have been unlawful, but as John Kelyng, then the chief justice of the court, explained in *Tremenhere v Tresilim* (1670), it

[62] For example, see *Anonymous* (1583), Sav. 31; *The Case of the City of London and Coates* (1671), 1 Vent. 115; *Long's Case* (1677), 2 Mod. 182.
[63] Refer to pp. 47-51.
[64] *Kene v Fleming* (1666), 2 Keb. 22.

would have established a 'new practice' whereby the court could 'imprison the body of men without having heard them'.[65] To prevent such a possibility from occurring, the court appears to have made the decision not to enforce references in this way.

Yet it must be noted the decision taken by the court would not have been the only option available for dealing with this issue. As the court was in charge of its own procedure, it could have instead changed the way it examined accusations of contempt in situations involving references so that a non-performing party would have the opportunity to object to his referee's award before the justices *in banc*, the only venue in which matters of law could be decided. As we shall see, this is what the court ultimately did, but for a period of about fifteen years, from the mid-1650s, when orders of reference first began to be fictionalised as rules of the common law courts, until the early 1670s, the court was unwilling to implement this change. The court's reluctance is not easily explained, not least because contemporary sources only rarely made note of issues pertaining to procedure,[66] but one factor that appears to have contributed to this evident inertia was the fact that there was another way to enforce references at the time.

Whilst this 'other' way of enforcing references has not been discussed so far in this analysis, neither is the enforcement method unfamiliar. As a reference was simply a type of arbitration, when the parties to a lawsuit consented to have the matter be determined by a referee, they would enter into a submission, binding them to perform their referee's award. The submission could be by deed, in some cases the parties even being directed by the assize judge to choose this particular form;[67] but equally it could be made orally or by 'parol', presumably a safer option than when an agreement to arbitrate was formed privately, for the parties' consent to the reference would have been communicated in an open session of the assizes, with plenty of witnesses to attest that the agreement had been made. Whatever the form, the fact that the parties would have entered into a contract to perform their referee's award meant that if one of the parties subsequently failed or refused to do so, the aggrieved party could sue him using one of the legal actions discussed in the previous section. It was, then, still possible for an aggrieved party to seek enforcement from the court of King's Bench. By refusing to enforce references by means of its contempt procedure, the court did

[65] *Tremenhere v Tresilim* (1670), 1 Sid. 452: 'fuit un novel practice issint pur imprison les corps des homs sans lour eeant oye'.
[66] The first comprehensive work on the court's procedure would only be published in the 1790s. W. Tidd, *The practice of the court of King's Bench in personal actions* (2 vols., 1790-1794).
[67] TNA, ASSI 24/20, fols. 7v, 40r, 48v, 60v, 61v-62r, 62v, 88r, 192r, 193v; 24/22, fols. 45r, 54v, 62r, 131v.

not preclude enforcement; rather, it merely restricted the type of enforcement that would have been available.

It is worth noting that the court would not likely have viewed this restriction as especially constraining or callous, for the benefit of the legal actions used to sue an opponent for non-performance was that the court would have been able to assess the validity of awards. As Chapter 1 has explained, the pleading structure for these actions was such that if the non-performing party, the defendant, maintained the plea that his referees did not make an award (*nullum fecerunt arbitrium*), either by special verdict or on demurrer the defendant would be able to argue *in banc* that the award was void, a void award, as we have seen, being treated as if no award had been made.[68] This is what occurred in *Copping v Hernault* (1669-70).[69] As reports of the case reveal, the plaintiff sued the defendant 'in debt on obligation conditional to stand to [an] award by rule at assize', and after the defendant pleaded that the referees had not made an award, the matter came before the justices on demurrer so that the defendant could argue that the award was void, the referees having made it only after they had appointed an umpire to decide the dispute. Confirming their position in *Travers v Twistleton* (1665-66), the justices sided with the defendant, holding that the referees had 'deserted' their authority on appointing the umpire, and so ruled that the award was void.[70] The plaintiff's case was consequently dismissed. Given the existence of this enforcement method, one that allowed the court to decide whether an award was valid or void, it is at least plausible that one reason why the court had refused to change its contempt procedure to accommodate the enforcement of references was that it deemed the change to be unnecessary.

Whilst the court might have taken this view, it is unlikely that an aggrieved party would have been so sanguine, for if his opponent had refused to perform their referee's award, there would have been two clear advantages to penalising the disobedience as contempt. First, as we have seen, this form of enforcement could have resulted in the opponent's imprisonment, a sanction which was not only more severe than the payment of money, but one which would have also compelled the opponent to perform the award, his release from gaol being conditional on 'purging' his contempt. Second and, arguably, just as important, penalising the opponent's non-performance as contempt would have spared the aggrieved party from having to bring a separate lawsuit for enforcement. As the parties' original suit, the one that had been referred to arbitration by order of an assize judge, was still

[68] Refer to pp. 47-49 for information on this pleading structure.
[69] *Copping v Hernault* (1669-70), 2 Keb. 619, 1 Sid. 428.
[70] Ibid., 2 Keb. 619. Refer to pp. 25-27 for information on the legal rules involving umpires.

technically pending, no judgment having been entered on the record to conclude it, to commence enforcement proceedings, the aggrieved party would have only had to submit a motion to the court requesting that it issue a writ of attachment against the opponent to answer for his contempt, a step that would have likely saved the party both time and money. In light of these advantages, it is perhaps unsurprising that in spite of the avowed refusal of the court to enforce references using its contempt procedure, this did not prevent parties from attempting to obtain this type of enforcement. For example, in the case of *Kene v Fleming* noted above, the aggrieved party 'prayed for an attachment' to be granted against his opponent for the 'non-performance of an award submitted by rule of the Court', but his motion was nonetheless denied.[71]

What appears to have been a turning point in this impasse was the case of *Darbyshire v Canon* (1669).[72] Similarly to *Kene v Fleming*, the aggrieved party motioned the court to issue a writ of attachment against his opponent for not performing their referee's award, but unlike the earlier case, it was also claimed that the aggrieved party was unable to sue his opponent for enforcement, the reason given being that 'debt on award being too remote'.[73] What was meant by this reason is not entirely clear, although it can at least be ruled out that the aggrieved party had been barred from bringing an action of debt on award for exceeding the limitation period set by the Limitation Act of 1623,[74] a report of the case noting that the reference had only been ordered at the previous session of the assizes and by no less a figure than John Kelyng, the chief justice of the court.[75] The meaning of this reason aside, it is evident that the aggrieved party's claim of being unable to sue his opponent convinced the court to approach the case differently. The logic behind this shift is not difficult to surmise: if the party could not sue his opponent and, additionally, if the court maintained its stance of refusing to enforce references by means of its existing contempt procedure, the party would have been without an option for enforcement, a result made all the more worrying given that the reference had been initiated by Kelyng himself. To prevent this from occurring, the court therefore changed its contempt procedure. The justices held that before they would grant a writ of attachment as the party requested, they would allow the non-performing party the opportunity to 'shew cause why an attachment should not go' by raising legal objections

[71] *Kene v Fleming* (1666), 2 Keb. 22.
[72] *Darbyshire v Canon* (1669), 2 Keb. 575, 579.
[73] *Darbyshire v Canon* (1669), 2 Keb. 575.
[74] Refer to pp. 43-45 above for a discussion of the impact of the Limitation Act of 1623 on actions of debt on award.
[75] *Darbyshire v Canon* (1669), 2 Keb. 575.

against the referee's award *in banc*.[76] When counsel for the non-performing party then appeared and made his legal arguments, however, the justices found the objections insufficient and so ordered for a writ of attachment to be issued, commencing the court's contempt procedure against the non-performing party as a result.[77]

It is tempting to think that with the procedural change implemented in *Darbyshire v Canon*, the court of King's Bench was from then on prepared to enforce references using its contempt procedure. Yet as the case of *Tremenhere v Tresilim* (1670) reveals, the willingness shown by the court to alter its procedure had been the exception rather than the rule.[78] Reports of this later case indicate that the initial suit between the parties had concerned a commercial dispute over the payment of mariners' wages and of a ship's repairs, and when the matter was referred to arbitration, it was agreed that Matthew Hale, then the chief baron of the Exchequer, should serve as the referee.[79] Whilst Hale succeeded in making an award, one party refused to perform it, so the other motioned the court to issue a writ of attachment against him, citing *Darbyshire v Canon* as precedent.[80] Yet John Kelyng, the chief justice, 'denied that any such rule was made' in the case,[81] and opposed granting the writ on the grounds that 'the Court cannot without record take notice of whether the award be good or bad', the same argument employed in preceding years to justify the court's refusal to enforce references in this way.[82] Whilst Kelyng was evidently against making the procedural change of *Darbyshire v Canon* absolute, it is worth noting the position of the other justices on this issue. As several reports of the case show, all three of the puisne justices disagreed with Kelyng (*sed Curiam contra*), so the court was adjourned to take the matter under further advisement.[83] Despite their numerical advantage, however, the puisne justices appear to have been convinced to adopt Kelyng's view, for it was later reported that the motion of the aggrieved party was denied.[84]

What appears, then, to have caused the court to change its contempt procedure for good was neither additional legal discussion nor further procedural elaboration; rather, it was the death of the 'peppery' John Kelyng in May 1671 and the accession of the more liberal-

[76] *Darbyshire v Canon* (1669), 2 Keb. 575.
[77] Ibid., 2 Keb. 579.
[78] *Tremenhere v Tresilim* (1670), 2 Keb. 645, 664, 1 Sid. 452.
[79] Ibid., 1 Sid. 452
[80] Ibid., 2 Keb. 664.
[81] Ibid., 2 Keb. 645.
[82] Ibid., 2 Keb. 664.
[83] Ibid.
[84] Ibid., 2 Keb. 645.

minded Matthew Hale in his place.[85] Admittedly, it is rare for such historical events to have an impact on legal practice or doctrine, and for this reason legal historians are wont to ignore them entirely, but consider the following three issues. First, as the reports of *Tremenhere v Tresilim* reveal, Kelyng appears to have been the only real remaining opposition to the court enforcing references using its contempt procedure, so with his death the court was ripe for change. Second, it is worth noting that Matthew Hale assumed his new position after having headed the court of Exchequer for several years,[86] a court which had been prepared to penalise the non-performance of a referee's award as contempt since the 1650s-1660s, so it is possible that he would have been more amenable to this enforcement procedure. Third, it must be remembered that it was Hale who had served as the referee in *Tremenhere v Tresilim*, his award seeming to have been an important commercial decision given that its contents were summarised in reports of the case, so the fact that the court of King's Bench had been unwilling to enforce the performance of his award would have made him particularly well-placed to disagree with its existing procedure. In light of these issues, it should not cause much surprise that with the first case following Hale's accession in which an aggrieved party sought to enforce a reference using the court's contempt procedure, the court changed its position. The case was *Miller v Clapshaw* (1671), and when the aggrieved party motioned the court to issue a writ of attachment against his opponent for not performing their referee's award, a motion that Thomas Twisden, a puisne justice of the court, opposed, Hale responded with what might have been thinly veiled frustration: 'this attachment is for the delusion put on the Court on undertaking the award, therefore it's fit either to allow no award or else to compel the performance thereof'.[87] His ultimatum so delivered, Hale appears to have convinced his fellow judges, for at the next sitting in which the case was heard, the court ordered the non-performing party to 'shew cause why an attachment should not be awarded', thereby confirming the procedure that had been implemented in *Darbyshire v Canon*.[88] The exception had become the rule.

By the 1670s, nearly two decades after orders of reference were first entered into the rule books of the common law courts, there was finally agreement across the courts on the enforcement of references, a point that was made abundantly clear in the case of *Holt v Berry*

[85] Kelyng died on 10 May 1671. S. Handley, 'Kelyng, Sir John', *ODNB.* The differences between Kelyng and Hale has been noted by Alan Cromartie. A. Cromartie, *Sir Matthew Hale, 1609-1676: law, religion and natural philosophy* (Cambridge, 1995), pp. 120-22.
[86] Hale served as Chief Baron for the period 1660-1671. A. Cromartie, 'Hale, Sir Mathew', *ODNB.*
[87] *Miller v Clapshaw* (1671), 2 Keb. 764.
[88] Ibid., 2 Keb. 812.

(1677/8). When the non-performing party attempted to argue before the justices that 'remedy ought to be taken on the award [and] not for the contempt of the breach of the rule', the justices responded *per curiam* that the issuing of a writ of attachment had become 'a setled course now' and one that 'ought not to be receded from'.[89] With consensus reached between the common law courts in approving the enforcement of a fictionalised rule to perform an award by means of their contempt procedure, the stage was therefore set for this method of enforcement to be adopted and extended in the Arbitration Act.

3. Explanation for enactment?

The final question to consider in this discussion is why the Arbitration Act was enacted in 1698. As the previous section revealed, the enforcement procedure on which the Act would rely had been fully developed in the context of references by the 1670s. All three common law courts were by then prepared to employ their contempt procedure against a non-performing party for disobeying what was only a fictionalised rule. Had the Act been needed to 'fix' the existing methods of enforcement, a view that was questioned in the first section, one might expect the Act to have been enacted soon after the common law courts reached this consensus. Yet almost thirty years would pass before the Act was made, so what can account for the Act instead being enacted when it was? In legal scholarship, only one explanation has been put forward to explain why the Act was passed in 1698, so the purpose of this section is to consider the merits of this argument, particularly in light of what has been discussed in this chapter. However, as the argument relies heavily on the well-known theory of legal historian A.W.B. Simpson concerning the penalty of conditional bonds, it is necessary first to consider Simpson's theory in more detail.[90]

Perhaps one of the most important doctrinal issues in twentieth-century legal history had been to explain the 'rise' of the action of *assumpsit*: how a legal action which had only reached maturity in the sixteenth century became the principal action for contractual disputes, underpinning the modern foundations of contract law.[91] Part of the reason why this issue

[89] *Holt v Berry* (1677/8), 3 Keb. 844.
[90] Simpson's theory was first articulated in an article, one that was later incorporated into his work on the history of contract law: Simpson, 'The penal bond with conditional defeasance', *LQR* 82 (1966), pp. 392-422; Simpson, *CLC*, pp. 118-22. For a similar, later treatment of the topic, see H. Horwitz and P. Polden, 'Continuity or change in the court of Chancery in the seventeenth and eighteenth centuries?', *Journal of British Studies* 35:1 (1996), pp. 24-57.
[91] Which in turn led to the publication of various works on contracts and obligations, including Simpson, *CLC*; S.J. Stoljar, *A history of contract at common law* (Canberra, 1975); D.J. Ibbetson,

caught the attention of so many scholars was that to explain the 'rise' of this particular action required accounting for the 'decline' of the action it supplanted—the action of debt on an obligation. Since the fourteenth century, the action of debt on an obligation had been the preeminent contractual action at common law, thanks in large part to the widespread use of conditional bonds to form agreements.[92] The advantage of conditional bonds had always been their penalty, the fixed sum of money that a party would be liable to pay if he did not adhere to the terms of his agreement. By convention, the penalty was normally set at twice the value of the matter underlying the agreement, a manifestly large sum but one which served, as we have seen, two purposes: first, it disincentivised parties from breaking their agreements as to do so would result in them having to pay the penalty; second, in instances where a party did break his agreement, it provided a suitable remedy to the aggrieved party as he would then be entitled to recover the penalty.

What was arguably A.W.B. Simpson's most significant contribution to this doctrinal issue was not, then, on the rise of the action of *assumpsit*; rather, it was on the decline of the action of debt on an obligation, a development which he attributed to a change in how the common law courts perceived the penalty of a conditional bond. To summarise Simpson's theory, he claimed that in the second half of the seventeenth century, the common law courts grew wary of the fact that because the penalty of a conditional bond was set at a sum far exceeding the value of the matter underlying an agreement, a party would be able recover from his opponent far more than the agreement was worth by suing him in an action of debt on an obligation for even the smallest of infractions.[93] Consequently, the courts began to institute a new procedure, one that built on practices developed by the court of Chancery, that would prevent parties from recovering more than the actual value of the matter at issue if their suit were successful.[94] This procedure was then put on statutory footing with the passing of two pieces of legislation, one in 1696/7[95] and the other in 1705,[96] so that by the dawn of

'Assumpsit and debt in the early sixteenth century: the origins of the indebitatus count', *CLJ* 41:1 (1982), pp. 141-61; 'Sixteenth-century contract law: Slade's Case in context', *Oxford Journal of Legal Studies* 4:3 (1984), pp. 295-317; *HILO.*

[92] Ibbetson, *HILO*, pp. 28-30.

[93] Stretton, 'Written obligations, litigation and neighbourliness'.

[94] For works on Chancery's earlier practices, see D.E.C. Yale, 'Introduction' in *Lord Nottingham's Chancery Cases* (2 vols., 1957-1961), vol. II, pp. 7-30; E. Henderson, 'Relief from bonds in the English Chancery: mid-sixteenth century', *AJLH* 18:4 (1974), pp. 298-306; C. Harpum, 'Equitable relief: penalties and forfeitures', *Cambridge Law Journal* 48:3 (1989), pp. 370-73; Horwitz and Polden, 'Continuity or change'.

[95] 8 & 9 Wm III, c 11.

[96] 4 & 5 Anne, c 16.

the eighteenth century, penalties 'were no longer penal in effect'.[97] With the penalty incapable of disincentivising parties from breaking their agreements and of providing a suitable remedy in cases where an agreement was broken, the use of conditional bonds to form agreements became less frequent and, as a result, fewer suits were brought before the courts using the action of debt on an obligation.[98]

It is not difficult to see why Simpson's theory has appealed to legal scholars attempting to explain the enactment of the Arbitration Act. As discussed earlier in this chapter, most of the cases brought before the common law courts to sue a party for not performing the award were done so using the action of debt on an obligation, presumably because recovering the penalty would have been a suitable alternative to performance. With the penalty set at twice the value of the matters in dispute, in many, if not most, cases, its recovery would have allowed the aggrieved party to counteract the effects of his opponent's non-performance and still retain a sizeable amount of money to help alleviate any hardships he might have experienced between the making of the award and the successful conclusion of his action. If, however, the aggrieved party were only able to recover the actual value of the matters in dispute, it is conceivable that this legal remedy would have appeared less agreeable. For one thing, it would have meant that the amount the aggrieved party could receive would not likely cover both the cost to counteract his opponent's non-performance and to compensate the party for any additional loss or hardship he might have suffered. But perhaps more worryingly from the aggrieved party's perspective would have been the fact that in limiting the amount of money he could recover, the courts would have effectively decided how much the matters in dispute between the aggrieved party and his opponent were worth. In cases where the dispute could not be so easily reduced to a specific amount, the possibility could arise that the courts would undervalue the matter to the aggrieved party's detriment. It is plausible, then, that in light of the effects penalty relief would have had on enforcement, parties would have desired an enforcement procedure like that of the Arbitration Act to provide a more reliable remedy.

But of course the most compelling feature of Simpson's theory was timing. Whilst he claimed that the common law courts began to relieve against the penalties of conditional bonds in the second half of the seventeenth century, the practice was supposedly codified with the enactment of two statutes in 1696/7 and 1705. Of the two statutes, it was the one

[97] Simpson, *CLC*, 122.
[98] Although Simpson notes that the effect on practice would not have occurred straightaway. Ibid.

passed in 1696/7, known as the Statute against Fines and Penalties, that was in fact the more relevant to situations like arbitration where conditional bonds were being used to form agreements involving the performance of some act—for arbitration, the performance of an arbitrator's award—as opposed to agreements for the payment of money.[99] As the statute was enacted only a year before the Arbitration Act, legal scholars have understandably been quick to posit a causal link between the two statutes. In providing a background for his work on eighteenth-century commercial arbitration, Eben Moglen explained that 'the English procedure through the end of the seventeenth century was to enforce penal bonds requiring obedience to arbitration awards; when the use of penalties was statutorily forbidden after 1697, Parliament speedily provided an act to permit the direct judicial enforcement of arbitration results'.[100] In Douglas Yarn's work on the 'institutionalisation' of out-of-court methods of dispute resolution, he stated the following: '[The Statute against Fines and Penalties] emasculated the penalty bond on which pseudo-adjudicative arbitration relied for coercion and enforcement. The following year, Parliament passed "An Act for determining differences by arbitration"…[to establish] a more effective adjudicative use of arbitration'.[101] With the undoing of one enforcement method, the tantalising conclusion was that the Arbitration Act was passed to provide parties with a needed alternative.

Yet there are problems with this explanation. For one thing, had the Arbitration Act been passed in response to the 'emasculation' of conditional bonds, one might expect this to be mentioned in the Act itself. But the Act does not do so. Indeed, the only comment it makes regarding earlier legal practice concerns references: to justify implementing its enforcement procedure, the Act begins by stating that 'whereas it hath been found by experience that references made by rule of court have contributed much to the ease of the subject in the determining of controversies…' (lines 1-2). More damaging to the explanation put forward by legal scholars is that Simpson's entire theory on penalty relief and the decline of the action of debt on an obligation has recently been put into doubt. In his article '*Lex sequitur equitatem:* fusion and the penalty doctrine', the legal scholar Peter Turner dismissed Simpson's claim that the common law courts began to relieve against penalties by the second half of the seventeenth century as a 'scholarly invention', arguing that the procedure Simpson

[99] The distinction in the uses of conditional bonds has led to their characterisations as either 'performance' or 'money' bonds.
[100] E. Moglen, 'Commercial arbitration in the eighteenth century: searching for the transformation of American law', *Yale Law Journal* 93:1 (1983), p. 137.
[101] D. Yarn, 'The death of ADR: a cautionary tale of isomorphism through institutionalization', *Pennsylvania State Law Review* 108:4 (2008), pp. 985-86.

identified as implementing this relief was in fact geared towards another practice entirely.[102] Regarding the Statute against Fines and Penalties, the legislation which has been crucial to legal scholars' claim that the Arbitration Act was passed in response to penalty relief, Turner was equally critical. Whilst he granted that the statute did sanction a form of penalty relief, he argued that the procedure was neither compulsory nor routinely applied.[103] So whereas Simpson saw penalties as losing their penal effect by the start of the eighteenth century, Turner instead maintained that they preserved their disincentivising and remedial functions for at least another seventy years thereafter.[104]

However convincing Turner's arguments may be, it is understandable that one might hesitate to dispense with as long-held a view as Simpson's theory on penalty relief simply on the merits of a single work refuting it. But it is worth taking a moment to consider whether the effects of penalty relief as theorised by Simpson had in fact been felt in the context of arbitration. If penalty relief had been applied and then codified into legal practice by the end of the seventeenth century, one would expect to see both a drop in the use of conditional bonds to form submissions and in the reliance on the action of debt on an obligation for enforcement when the terms of a submission were breached. Yet in neither case does this appear to have occurred. There is no impression from the reported cases on arbitration that the action of debt on an obligation became anything less than the most common legal action for the enforcement of arbitration. Nor do legal treatises on arbitration suggest that the use of conditional bonds to form submissions had fallen out of favour. The treatise *Arbitrium Redivivum* (1694), published only years before the enactment of the Statute against Fines and Penalties, reaffirmed that the use of conditional bonds was still the normal practice at the time, stating that 'now all submissions are usually by bond, conditionally [to perform the award]'.[105] Even in eighteenth-century treatises on arbitration, where one might expect to find evidence of a change in practice given the amount of time that had passed following the claimed codification of penalty relief, there is no indication that conditional bonds stopped being used. Indeed, both of the principal works on arbitration from the period even make note of the penal effect of conditional bonds. In Matthew Bacon's *The Compleat Arbitrator* (1731), he introduced the contemporary use of conditional bonds to form a submission as

[102] P. Turner, '*Lex sequitur equitatem*: fusion and the penalty doctrine' in *Equity and law: fusion and fission*, eds. J. Goldberg, H. Smith, P. Turner (Cambridge, 2019), pp. 254-79, at p. 264.
[103] Ibid., 264-65. John Baker has supported this view: *ELH*, pp. 346-47.
[104] Turner claims that the change in the penal effect of bonds occurred in the court of Common Pleas in 1768 and in the court of King's Bench in 1794. Ibid., p. 270.
[105] *Arbitrium redivivum*, p. 39.

follows: 'a submission by bond, as it is the most frequent, so it is by far the best; the penalty of the bond should be more the value of the thing submitted, so that the party may rather abide by the award, than forfeit his obligation'.[106] In referring to the fact that written submissions were most often formed using conditional bonds, Stewart Kyd stated in *A Treatise on the Law of Awards* (1791) that 'when the submission is in writing, it is most commonly by mutual bonds, given by the parties each to the other, in certain sum penal, on condition to be void on performance of the award'.[107] At least in the context of arbitration, penalty relief does not therefore appear to have had any discernible effect on contemporary practice. It seems unlikely, then, that Simpson's theory can provide the answer to why the Arbitration Act was passed in 1698.

Yet if penalty relief cannot explain the enactment of the Arbitration Act, what does? As noted in the introduction to this section, the application of Simpson's theory to the enforcement of arbitration has been the only explanation that legal scholars have offered for the making of the Act. If another small criticism may be laid against legal scholars, it is that they tend to seek out legal explanations for legal change. Yet the law did not occur in a vacuum: sometimes legal change can be better explained with reference to non-legal factors. As will be argued in the next chapter, the Arbitration Act was likely one such example.

4. Conclusion

As this chapter has covered a diverse array of issues relating to the enforcement procedure of the Arbitration Act, it is best to conclude this study by reviewing what it has revealed and what it has not. By detailing the mechanics of the Act's provisions and by explaining the nature of imprisonment for contempt, the chapter has shown that the effect of the Act's enforcement procedure was to make it possible for the courts to enforce the performance of awards in a summary manner. By investigating the development of the Act's enforcement procedure in the context of references, the chapter has also revealed that the two features of this procedure, first, the legal fiction on which the Act would rely to allow a submission to be made a rule of a court and, second, the approbation of the courts to enforce this fictionalised rule by means of their contempt procedure, were both in place by the second half of the seventeenth century. Equally important, however, is what this chapter has not been able to reveal. It has not shown why the Act's enforcement procedure was needed, for not only

[106] M. Bacon, *The compleat arbitrator: or, the law of awards and arbitraments* (1731), p. 6.
[107] S. Kyd, *A Treatise on the Law of Awards* (1791), p. 8.

would it appear that there was little—if any—criticism of the existing methods of enforcement, but there is reason to believe that contemporaries would have been satisfied with the methods then available to them. Nor has it accounted for why the Act was enacted in 1698, for it refuted the explanation that has been put forward by legal scholars, relying on more recent scholarship to contend that the legal theory on which their explanation was based did not have the effect which it had advanced. Thus, whilst this examination has made the Act's enforcement procedure appear less peculiar than when it was first introduced at the beginning of the chapter, it cannot alone explain the making of the Arbitration Act. Clearly, we must look elsewhere to account for this development, and it will be the purpose of the next chapter to undertake this task.

4. Making the Arbitration Act – Drafting and Enactment

As the second of two chapters used to investigate the making of the Arbitration Act, this discussion will move away from the wider view taken in the previous chapter to examine instead the more immediate issues of the Act's drafting and enactment. Proposed by the Board of Trade and Foreign Plantations, the committee established by William III in May 1696 to administer the kingdom's trade and colonial affairs, the Arbitration Act was developed with the explicit purpose of promoting trade.[1] The trade-specific intention of the Act is clear from its provisions, set out in Appendix VI: the enforcement procedure of the Act was to be applied to make arbitration 'more effectual' in resolving disputes between 'merchants and traders or others' that concerned 'matters of account or trade or other matters' (lines 5-7). In light of what has been discussed so far in this examination, the intended purpose of the Act might appear disjointed. Yet it must be noted that the Act was addressing a real concern for merchants at the time. As evidenced by the numerous commercial treatises printed in the second half of the seventeenth century, merchants found the existing legal system, and in particular the superior courts of common law and equity, incapable of resolving their commercial disputes in an effective manner.[2] Their arguments can be boiled down to two essential points. First, litigation before the courts was 'tedious and chargeable' and the requirement of having to attend to a lawsuit had the undesired effect of 'taking men off from their trade and business'.[3] Second, the courts often lacked the capability to determine a commercial dispute, either because the matter concerned issues which the courts could not legally address or because the lawyers and judges handling the dispute were not sufficiently versed in affairs of trade to understand the disagreement, being no better in their

[1] The Board of Trade was commissioned by William III on 15 May 1696 and was composed of sixteen members, eight of whom were *ex officio* and not in regular attendance whilst the other eight were working members with a yearly salary of £1000. The *ex officio* members were the Lord Keeper or Chancellor, the Lord President of the Privy Council, the Lord Privy Seal, the First Lord of the Treasury, the First Lord of the Admiralty, the Chancellor of the Exchequer, and the two secretaries of state. The working members were John Egerton, earl of Bridgewater, who served as the president of the Board, Ford Grey, earl of Tankerville, Sir Philip Meadows, William Blathwayt, John Pollexfen, John Locke, Abraham Hill, and John Methuen. A copy of the Board's commission, stipulating its powers and membership, can be found in TNA, CO 391/9, pp. 1-6.
[2] Refer to pp. 182-85 of the Bibliography for a fuller list of works expressing this argument.
[3] S. Bethel, *An account of the French usurpation upon the trade of England* (1679), p. 22.

attempts than 'a blind man to shoot a hare'.[4] As one writer put it, 'a greater hell to merchants upon Earth cannot be undergone' than to be forced to initiate proceedings before a court.[5]

Having examined the effect of the Arbitration Act's enforcement procedure in the previous chapter, it is possible to see how the Act could have addressed these grievances. As it provided a way for the courts to enforce the performance of awards in a summary manner, merchants could avoid the law, opting instead to resolve their commercial differences by arbitration, but with the assurance that performance of the resulting award could be enforced summarily. Disputes which had been handled so poorly by the courts could essentially be 'outsourced' to arbitration, a cheaper, quicker, and, if 'specialist' arbitrators were nominated to decide the matter, more effective option.[6] Ostensibly, the Act gave redress to the issues merchants faced at law. The purpose of this chapter, then, is to explain how and why the Arbitration Act developed as a proposal for remedying these commercial issues. Regarding the 'how', it will examine the process by which the Act was proposed and drafted, taking time to investigate who was responsible for drafting its provisions. Concerning the 'why', it will look more broadly at the motives of the Board of Trade for advancing the Act, taking into consideration whether it was the proposal merchants had wanted. By exploring these particular issues, the chapter will ultimately be able to come to the surprising conclusion that the making of the Arbitration Act had neither been intended nor particularly desired.

1. Substantive development

As a proposal of the Board of Trade, the Arbitration Act followed a predictable path to enactment, the details of which are set out in the timeline of Appendix I. A bill was drafted under the supervision of one of the Board's working members, John Locke, in the autumn of 1696, a few months after the Board had been commissioned by William III.[7] As the Board was answerable to the king, the bill was then submitted to the Privy Council on 21 January 1696/7 by means of a 'representation', an official report that detailed the proposal and

[4] W. Cole, *A rod for the lawyers: who are hereby declared to be the grand robbers & deceivers of the nation* (1659), pp. 8-9.
[5] T. Bland, *Trade revived, or a way proposed to restore, increase, inrich, strengthen and preserve the decayed and even dying trade of this our English nation* (1659), p. 24.
[6] The notion of 'outsourcing' was first raised by Christian Burset. C. Burset, 'Merchant courts, arbitration, and the politics of commercial litigation in the eighteenth-century British Empire', *LHR* 34:3 (2016), pp. 615-47, at pp. 616, 643.
[7] For more information on the establishment of the Board of Trade, see R. Lees, 'Parliament and the proposal for a council of trade, 1695-6', *EHR* 54:213 (1939), pp. 38-66; I.K. Steele, *Politics of colonial policy: the Board of Trade in colonial administration 1696-1720* (Oxford, 1968), pp. 3-18.

provided reasons for its advancement. There the bill remained for about a year, during which time it was amended, its revision having perhaps been delayed as the privy councillors finalised the peace arrangements concluding England's war with France.[8] After this revision, the bill was introduced to the House of Lords on 25 February 1697/8 and then to the House of Commons on 31 March 1698, with both houses making minor amendments to it. Finally, the bill received royal assent on 16 May 1698, its official title being 'An Act for determining Differences by Arbitration'.[9]

Whilst this overview provides a useful framework for following the progression of the proposal that later became the Arbitration Act, it tells us very little about the Act's substantive development. The purpose of this section is, therefore, to examine how the Act as we now know it was conceived, a process which was not as straightforward as its path to enactment might suggest. As it will be argued, not only was the Arbitration Act *not* the proposal which the Board of Trade had initially envisaged, but its substantive development occurred principally in two stages, the first during the time when the bill was being drafted by the Board and the second during its revision before the Privy Council. The Act in its final form had not been intended from the outset; rather, it came into being in a far more piecemeal fashion.

What is known about the Board's original proposal can be found in a single entry written in the Board's journal, the official record of its proceedings, a transcription of which is included in Appendix II. The entry from 19 August 1696 states that 'Mr Locke was desired to draw up a scheme of some method for determining differences between merchants by referees, that might be decisive without appeal'.[10] With the benefit of hindsight, knowing that these instructions would ultimately give rise to the Arbitration Act, scholars who have examined this entry have not done so critically, presuming that the word 'referee' was synonymous with 'arbitrator'.[11] As Chapter 3 has shown, however, contemporaries typically used the word 'referee' in the context of a reference, a specific type of arbitration which arose when a court ordered that the matters at issue in a lawsuit be referred to an arbitrator or

[8] The Peace of Ryswick, which ended the War of the Grand Alliance, was finalised in September-October 1697. *An account of the signing of the general peace, &c. in a postscript to the Flying Post* (1697). For an account of the war focusing on its effects on trade, see G.N. Clark, *The Dutch alliance and the war against French trade, 1688-1697* (New York, 1971).
[9] 'An Act for determining differences by arbitration', 9 & 10 Wm. III, c. 15.
[10] TNA, CO 391/9, p. 62.
[11] For example, Henry Horwitz and James Oldham make no mention of the specific meaning of the word 'referee' when discussing the instructions which Locke received. Horwitz and Oldham, 'Arbitration', p. 138.

'referee' to decide.[12] It is possible, then, that whereas the enforcement procedure of the Arbitration Act would concern arbitration in the more 'conventional' sense, where parties agreed to arbitrate their dispute privately, without the involvement of a court, the proposal which the Board had first suggested was instead geared towards references.

Admittedly, the word choice of the 19 August entry is not on its own sufficient to claim that the Board had directed Locke to develop a scheme for references. Nevertheless, this view finds support in what Locke did after he received the Board's instructions. As Locke's correspondence reveals, he wrote to Benjamin Furly and Paul D'Aranda, merchants with close ties to the Dutch Republic, to enquire into how references were conducted in the Hoge Raad, the high court of Holland.[13] This is evident not from Locke's letters to these men, which, unfortunately, have not been uncovered, but rather from their responses to him. Both detailed how Dutch litigants could obtain and enforce a reference before the high court and included copies of the legal instruments that were used in the process—in Furly's case, instruments that he himself had employed in a recent suit.[14] The process which Furly and D'Aranda described can be summarised as follows. Parties to a lawsuit who wished to resolve the matter by arbitration would request that their lawyers seek a rule or 'condemnation' from the Hoge Raad to that end.[15] Upon motion, the court would order that the parties' suit be referred to arbitration and require the parties not to abandon the process before their referees made an award. Once the award was made, the referees would send a sealed copy of the decision to the Hoge Raad, which would then issue a second condemnation confirming the award without the parties knowing of its contents beforehand. As both Furly and D'Aranda explained, this prevented the parties from having the time to formulate objections against the award should they dislike its outcome, for once the second condemnation was made, 'there remayns no remedy, be the sentence what it will, [and] there is no appeal, being confirmed by the highest court in the nation'.[16]

The emphasis Furly and D'Aranda placed on this 'double condemnation' process and its ability to prevent objections from being raised by the parties suggests what aspect of the

[12] Refer above to pp. 102-115.
[13] Furly's letter to Locke was printed in E.S. de Beer, ed., *The correspondence of John Locke*, (8 vols., Oxford, 1976-1989), vol. V, pp. 689-92. D'Aranda's response can be found in Bodl., Locke MS c. 30, fols. 45-46, and my transcription of it will appear in Mark Goldie's forthcoming edition of Locke's correspondence.
[14] These papers have since been lost. De Beer, ed., *Correspondence*, vol. V, p. 690, n. 2.
[15] For more information on the civil law condemnation, see R.W. Lee, *Introduction to Roman-Dutch law* (Oxford, 1953 edn).
[16] De Beer, ed., *Correspondence*, vol. V, p. 690.

Hoge Raad's reference procedure Locke had sought to understand.[17] For whilst it was possible to enforce a reference in the English common law courts, either by suing an opponent for not performing the award or by accusing the opponent of acting in contempt of an order of reference, in both scenarios the opponent would have been able to raise objections against the referee's award. In a commercial context, this would surely have been viewed as a disadvantage, merchants having lamented the delays caused by legal proceedings, so it is plausible that the Board of Trade's initial proposal had concerned developing a procedure so that when a dispute between merchants was referred to arbitration, objections could not be raised against the resulting award. At the very least, this interpretation provides a more comprehensible account for what the Board had instructed Locke to do on 19 August: to develop a proposal for resolving merchants' disputes 'by referees' that could be 'decisive without appeal'.

Yet whilst this might have been the Board of Trade's original intention, it was not the proposal which the Board submitted to the Privy Council on 21 January 1696/7.[18] A copy of the representation prepared by the Board was included in one of its supplementary journals, a transcription of which can be found in Appendix IV.[19] Examining its provisions reveals that by the time that the proposal had left the Board, it contained most of the substance of the later Arbitration Act. Drafted in the form of a bill, the proposal would have enabled an award resulting from a private contract between parties to arbitrate their dispute to be enforced by means of a court's contempt procedure. 'Merchants, traders and others' seeking this form of enforcement would insert into their submission a provision indicating their resolution to do so (lines 23-30). Upon presenting an affidavit to a court attesting to this resolution, the contents of the parties' submission would be entered into the court's rule book, thereby making it a rule of the court (lines 30-37). If a party later refused to perform the award, he would be held in contempt of court and process would be issued against him (lines 45-50). Notably, this enforcement procedure could not be stopped or delayed by 'any order, rule, command or process of any other court, either in law or equity' (lines 52-53). By early 1696/7, then, the scope of the proposal had evidently shifted away from applying to references, but the Board's aim of creating a method that could be 'decisive without appeal' remained intact.

[17] The phrase 'double condemnation' had been used by Furly. De Beer, ed., *Correspondence*, vol. V, p. 689.
[18] TNA, CO 391/9, p. 358.
[19] TNA, CO 389/14, pp. 90-92.

It can only be speculated why the Board's proposal might have changed from one concerning the enforcement of references to one involving the enforcement of arbitration more generally. The only evidence of any sort of shift in thinking is found in the entry from the Board's journal for 9 November 1696 recording that Locke had informed the Board that whilst he had 'enquired into the methods practised in Holland', he had found them 'too intricate, and too different' to be applied in England, so he had instead sought the help of men 'experienced in our laws' to draft a bill.[20] It is plausible, then, that having considered how useful a reference procedure would have been to address what the Board later called in its representation the 'tedious determination of controversies between merchants…in our ordinary methods', it might have been apparent to Locke that such a procedure would have fallen short of this mark. For a reference still required parties to initiate legal proceedings before a court. Indeed, as Chapter 3 has shown, a reference ordered by the common law courts typically took place at trial, only after the parties had completed the pleadings stage of their suit.[21] Accordingly, much of the delay and expense of going to law would not have been avoided, so it is questionable how advantageous merchants would have considered a proposal involving references to be. By contrast, when merchants agreed privately to arbitrate their disputes, they eschewed the need for legal proceedings entirely, so by developing a procedure to enforce the performance of awards resulting from these agreements, it would have been possible for merchants to by-pass the tedium of the law and yet still secure an enforceable decision.

It is unclear whether Locke actually came to this conclusion, however. As the following section will discuss in more detail, for several reasons the contents of the bill which he submitted to the Board on 9 November cannot be verified. Nonetheless, Locke was aware of the issues which merchants faced at law, having expressed in his notes several years earlier that 'the intricacy of law' was one of the principal hindrances to trade.[22] Moreover, given that Locke reported to the Board that he had consulted with lawyers to draft his bill, it is not too far of a leap to surmise that it was with their help that Locke developed a way to enforce the performance of awards resulting from the private submission of parties, something which the courts had not previously been capable of doing.[23] The Board's journal might even provide

[20] TNA, CO 391/9, p. 222.
[21] Refer above to pp. 103-4.
[22] Bodl., Locke MS c. 30, fol. 18.
[23] The records do not identify the lawyers whom Locke consulted, but some possible candidates can be suggested. Thomas Trevor and John Hawles, respectively the attorney- and solicitor-general, had been instructed to provide the Board of Trade with legal advice, so it is possible that Locke sought

evidence to support the claim that the proposal's shift in scope had occurred at the time when Locke was drafting his bill. Each entry recorded in the Board's journal was given a corresponding heading, the one for the 19 August, when the Board instructed Locke to develop a proposal, being entitled 'Trade Domestick. Referees'.[24] The entry from the 9 November, which recorded that Locke had reported on his progress and had delivered his bill to the Board, was similarly headed 'Referees'. That said, the entry does not state that the Board had read the contents of Locke's bill; it only indicates that Locke had delivered the bill to the committee and that the Board had in turn ordered that 'a representation be drawn up, to lay before his majesty the usefulness of this designe of determining controversies between merchants'.[25] By contrast, the entry from the 16 November, recording that the Board had made a representation on the bill and so had presumably read its contents, was given the heading of 'Arbitration. Representation', and all later entries on the proposal in the Board's journal were similarly entitled using the word 'arbitration'.[26] The headings would seem to suggest, then, that not only had the Board's original proposal concerned references but that the shift to arbitration more generally had occurred with Locke's bill.

The shift in the proposal's scope was not, however, the only change to have affected the Arbitration Act's substantive development. After the bill was sent to the Privy Council in early 1696/7, additional provisions were added to the bill that checked its ability to implement an enforcement procedure which could be 'decisive without appeal'. These amendments are apparent when comparing the version of the bill that the Board presented to the Privy Council in 1696/7 to the version that was then submitted to the House of Lords in 1697/8, a transcription of which is found in Appendix V.[27] Following the final lines of text in the Board's representation version, which had specified that the use of a court's contempt procedure against a party who had not performed an award would not be stopped or delayed in its execution, a proviso was added in the draft of the bill submitted to the House of Lords stating 'unless it shall be made appeare on oath, to such court, that the arbitrators or umpire

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their help. TNA, CO 391/91, p. 6. Locke would make use of this official channel of enquiry for other Board matters, seeking their advice on the legal status of English mariners employed in ships belonging to the Scottish East India Company. Bodl., Locke MS c. 30, fol. 53. John Somers, the Lord Keeper, would be another candidate by virtue of his close friendship with Locke. Horwitz and Oldham, 'Arbitration', p. 139.

[24] TNA, CO 391/9, p. 62.

[25] Ibid., p. 222.

[26] Ibid., pp. 233, 288, 354, 358.

[27] The manuscript of the bill can be found in HLRO, HL/PO/JO/10/1/498/1219. A printed version of the bill is also included in *The manuscripts of the House of Lords* (new series, 12 vols., 1887-1900), vol. III, pp. 113-14.

misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption or other undue means' (lines 42-45). This proviso was then further developed in a supplementary paragraph added to the text in which it was explained that if one of these grounds for exception were proven, the award 'shall be judged and esteemed void, and of none effect, and accordingly be set aside by any court of law or equity' (lines 48-50). Taken together, the effect of these amendments was to make it possible for a non-performing party to raise objections against an award. If the party could show that some irregularity had been present in the making of the decision, not only could he prevent its enforcement, but he could ensure that it would be set aside by a court.

Like the previous substantive change, with the evidence available it is unclear why these amendments were made to the proposal. The records of the Privy Council's meetings do not even mention the bill being received or considered by its members,[28] and the minutes of William III's cabinet, a smaller group of privy councillors who had, on other occasions, supervised the Board's work, are equally silent.[29] That said, it seems unlikely that the provisions were included for any commercial reason, for as it has been noted, the ability to raise objections against an award would have been viewed by merchants as a cause for delay. Instead, it is possible that the amendments were made to address a legal concern, one that was similar to what had prevented the court of King's Bench from using its contempt procedure to enforce references in the 1650s-1660s. As Chapter 3 has shown, the principal reason why the court had refused to employ this enforcement method was that, in light of the way its contempt procedure stood at the time, a non-performing party would not have been capable of objecting against his referee's award on legal grounds, giving rise to the possibility that he could have been imprisoned for not performing an award he was under no legal obligation to perform. It was only when this procedure was changed so that the party could raise legal objections against the award that the court began to use this method of enforcement on a regular basis.[30] In the same vein, by introducing provisions to the bill to allow objections on the grounds that the award had been made by corruption or other 'undue means', the amendments precluded the possibility that a party could be imprisoned for not performing a

[28] TNA, PC 2/76-77.
[29] Cabinet meetings were recorded informally by the two secretaries of state, Sir Charles Talbot, duke of Shrewsbury, and James Vernon. Shrewsbury's minutes are printed in Historical Manuscripts Commission, 45, *Buccleugh, Montague House* (3 vols., 1899-1928), vol. II, pp. 61-328, 455-579, and Vernon's minutes are found in BL, Add MS 40780 (May-Nov. 1697) and BL, Add MS 40781 (Dec. 1697-June 1700). For more information on the records of William III's cabinet, see J. Carter, 'Cabinet records for the reign of William III', *EHR* 78:306 (1963), pp. 95-114.
[30] Refer above to pp. 108-15.

decision that was unlawful. The revisions might have been intended, then, as a sort of legal safeguard against the potential adverse effects of the bill's enforcement procedure. Yet it is worth noting that by allowing parties to raise these objections against an award, the provisions diluted one of the original aims of the Board of Trade in developing its proposal. The bill's enforcement procedure could no longer be 'decisive without appeal', for not only did the provisions allow for objections to be made to prevent enforcement, but a party could appeal the award in a separate lawsuit so that the decision could be 'set aside by any court of law or equity'. By the time that the bill was introduced to Parliament, then, its substance had changed considerably from what had first been proposed.

Yet the substantive changes implemented by the Board and the Privy Council largely marked the extent to which the bill was amended. Although intended as an Act of Parliament, the bill underwent surprisingly little revision when introduced to both houses of Parliament. This is best illustrated by the bill's review in the House of Commons, where it was submitted only after having been passed by the House of Lords. Whilst the committee in charge of reviewing the bill was enlarged on two separate occasions, the only revision which it recommended, as evidenced from the report of Edward Clarke, the committee's chair, on 2 May 1698, was that the word 'unto' be omitted from the first paragraph of the bill.[31] The revisions made by the House of Lords were, by contrast, more substantial, but it is questionable how much these revisions can actually be attributed to the peers' own scrutiny of the bill.[32] Although the House of Lords' journal records that the Earl of Bridgewater, the chair of the bill's review committee, had reported on 11 March 1697/8 that it was fit to pass with 'some amendments',[33] examining the draft of the bill which had been submitted to the Lords on 25 February 1697/8 and to which the peers had subsequently added their amendments reveals what exactly these revisions were.[34] The first was to state from which date the provisions of the bill were to become lawful: the 'eleaventh day of May which shalbe

[31] *CJ*, vol. XII, p. 250. The significance of Commons' review of the bill is discussed below at pp. 149-50.
[32] The bill had been committed for review on 28 February 1697/8 to at least five of forty-three named peers. In order of bench, the named peers were as follows. Bishops' bench: Durham, Rochester, Exeter, St David's, Peterborough, Lincoln, Chichester; Earls' bench: Bolton, Newcastle, Halifax, Normanby, Bridgewater, Peterborough, Stamford, Thanet, Sandwich, Bath, Burlington, Macclesfield, Nottingham, Rochester, Abingdon, Marlborough, Tankerville, Jersey, Townshend, Lonsdale; Barons' bench: Abergavenny, De la Warr, Ferrers, Willoughby de Broke, Willoughby of Parham, Hunsdon, Howard of Escrick, Byron, Colepepper, Granville, Craven, Dartmouth, Guilford, Jeffreys, Herbert of Chirbury, Haversham. *LJ*, vol. XVI, p. 221.
[33] Ibid., p. 231.
[34] HLRO, HL/PO/JO/10/1/498/1219. See Appendix V for a transcription of the draft bill.

in the yeare of our Lord 1698' (line 14).[35] The second amendment was more significant: in the second paragraph of the bill, which explained that an award could be set aside by a court if misconduct, corruption, or other undue means were proven, the peers reviewing the bill added that the time period for bringing a complaint on these grounds would be limited to 'before the last day of the next [law] terme' (lines 52-53) after the award was made. Presumably these words were included to prevent objections from being brought against an award long after the parties were supposed to have performed it, and so the amendment can be seen as limiting the potentially delaying effect of the Privy Council's own revisions. Whilst this might lead one to conclude that the amendment was therefore made in opposition to what the Privy Council had included, the draft of the bill to which the peers made their amendments, having been the one submitted to the House of Lords from the Privy Council, shows that this was not the case. Instead, it appears that the Privy Council had intended for the House of Lords to make the amendments that it did, for at both points in the draft where the peers made their revisions, a blank space had been left in the original text of the bill so that words could be inserted at a later date. This would suggest that far from being innovative in the substance of its revisions, the House of Lords had in fact been following some sort of pre-arranged programme for amending the bill, a view which might find support in the fact that the Earl of Bridgewater, who had chaired the review committee, was also a privy councillor and the president of the Board of Trade.[36] Perhaps he had played a guiding role to ensure that the bill would be finalised in this way.[37] At least in terms of its substance, then, the Arbitration Act appears to have been more of a policy created outside of Parliament than within it.

Whilst much of this analysis has been speculative, being formed from the interpretation of sources which provide little direct evidence of the intentions behind the formulation of the Arbitration Act, this section has nonetheless provided a detailed study of how the substance of the Act developed. Far from being a proposal intended from the outset, the Act as we now know it instead arose gradually, as successive changes were made to what

[35] As the Arbitration Act only received royal assent on 16 May 1698, it is interesting to note that its provisions were retroactive by five days. In practice, however, this is unlikely to have made much of a difference.
[36] John Egerton, earl of Bridgewater, had been a privy councillor since 7 May 1689 and would serve as president of the Board of Trade until 9 June 1699. L. Knafla, 'Egerton, John, third earl of Bridgewater (1646-1701)', *ODNB*.
[37] Unfortunately, it has not been possible to examine Egerton's papers and correspondence, the bulk of which are found in the Huntington Library of San Marino, California. Knafla, 'Egerton, John', *ODNB.*

the Board of Trade had first envisaged. The result was something bearing little resemblance to the 'scheme' the Board had instructed John Locke to create that would have allowed commercial disputes to be decided 'by referees' in a way that was 'decisive without appeal'. This might in turn explain the finding of Henry Horwitz and James Oldham, the only scholars to have examined the making of this legislation in any detail, that the Act had not been 'a project widely canvassed either in business or legal circles'.[38] As a form of proposal, the Arbitration Act had not existed before it was drafted; rather, its substance was the result of this drafting process.

2. Drafts and drafters

As the previous section has argued, from the time when it was first proposed on 19 August 1696 until reaching its final form, the substance of the Arbitration Act underwent two important changes: first, its scope shifted from the enforcement of references to that of arbitration more generally; second, amendments were made to allow objections to be raised against awards so that its enforcement procedure could no longer be 'decisive without appeal'. Whilst it has been possible to pinpoint the making of these changes to two separate stages in the Act's development, the first to when the bill was initially drafted by the Board of Trade and the second to when it was revised by the Privy Council, it is less clear who exactly had been responsible for the changes. Accordingly, the aim of this section is to examine the known drafts of the bill in an attempt to identify the 'drafters' of these changes. As we shall see, such an investigation will not only help clarify who we should see as responsible for 'making' the Arbitration Act, but it will also reveal additional explanations for why these changes had been made.

2.1 John Locke and William Blathwayt

As the Board of Trade's journal reveals, there were three drafts of the bill made during the time when the proposal was before the Board. The first was John Locke's original version, which he composed with the help of men 'experienced in our laws' and delivered to the Board on 9 November 1696. However, as the entry from 18 December shows, 'some doubt about the forme' of the bill was then raised, so it was amended by William Blathwayt,

[38] Horwitz and Oldham, 'Arbitration', p. 138.

another working member of the Board. A copy of this second, amended version was subsequently sent to Locke, who had left London to spend the winter in the country,[39] and on 18 January 1696/7 the Board received Locke's comments and ordered that the bill 'be corrected according to these remarks'. This third version became the draft that was then used in the Board's representation: as the entry from 21 January reveals, the Board signed and transmitted to the Privy Council a draft of the bill 'according to the last corrections ordered to be made'. For the purposes of this subsection, the three drafts of the bill were therefore (i) Locke's original bill, (ii) Blathwayt's amended version, and (iii) a hybrid version comprising Locke's revisions of Blathwayt's draft which the Board presented to the Privy Council, hereinafter called the 'representation draft'.

As the previous section noted, a copy of the representation draft was recorded in one of the Board's supplementary journals, but included in Locke's own manuscripts are two additional drafts of the bill, the texts of which are set out side-by-side on a single folio and written in the same hand.[40] The verso of the folio bears the endorsement 'Trade: Arbitration Bill 96' in Locke's hand, so it is possible, even likely, that the texts are the two earlier drafts made by Locke and Blathwayt.[41] As explained above, Locke would have had in his possession a copy of Blathwayt's amended version, for the Board had ordered that one be sent to him to revise in December 1696. In all likelihood, the document found in Locke's manuscripts was prepared as it was so that Locke could more easily compare his original version of the bill to Blathwayt's and consequently make the corrections which he then sent to the Board the following month. Yet the document does not specify which of the texts was Locke's and which was Blathwayt's. This is not all that surprising given that Locke would undoubtedly have been able to distinguish between the texts at glance. But for those of us examining the document centuries later, the absence of any straightforward means to identify who composed which text is problematic. Admittedly, it does not affect how we view the Arbitration Act in its final form, for no matter the provenance of the two texts it was still the representation draft that was sent to the Privy Council on 21 January 1696/7. It does, however, have an impact on whom we should see as responsible for what was 'innovative'

[39] H.R. Fox Bourne, *The life of John Locke*, 2 vols. (1879), vol. II., pp. 357-58. By accounting for the members in attendance at each meeting, the Board's journal reveals that the last meeting Locke attended was on 13 November.
[40] Bodl., Locke MS c. 30, fol. 105. Refer to Appendix III for a transcription of the two texts.
[41] The identification of Locke's hand has been made by comparing the writing to the newly discovered manuscript written by Locke concerning religious toleration for Catholics. J.C. Walmsley and F. Waldmann, 'John Locke and the toleration of Catholics: a new manuscript', *HJ* 62:4 (2019), pp. 1093-1115.

about the Act: the fact that it extended the way in which the common law courts had enforced references by means of their contempt procedure to apply to arbitration more generally.

A closer look at the two texts reveals that whilst they both authorised the use of the courts' contempt procedure to enforce the performance of awards, they differed as to the type of arbitration to which this enforcement method could be applied. The left-hand text, like the later representation draft, applied the method to arbitration, but the right-hand text instead limited it to references. This is evident at several points in the two texts, the transcriptions of which can be found in Appendix III. For example, where the left-hand text stated that it would be lawful for an arbitration of 'any controversie suit or quarrell controversies suites or quarrells' (L, lines 15-16) to be enforced as a rule of a court, the right-hand text qualified this statement by including that only an arbitration of controversies, suits, or quarrels 'for which any action personal hath been brought' (R, lines 16-17) could be enforced in this way. And whereas the left-hand text explained that parties could specify in their submission that it be made a rule in 'any of his majesty's courts of record which the parties shall chuse' (L, lines 18-19), the right-hand text held that the parties should make their submission a rule in the court 'in which such suit or action at the time of such submission was or is depending' (R, lines 20-21). Only the left-hand text, then, reflected what the Arbitration Act would later authorise. The right-hand text, in limiting its scope to references, merely codified what all three common law courts had been doing since the 1670s. It is therefore important to determine who composed the left-hand text as it would reveal whether the Arbitration Act was substantively Locke's doing. Should we attribute, as the previous section has, the innovation of allowing the courts' contempt procedure to be used to enforce arbitration to Locke and the lawyers whom he consulted? Or should this development be instead credited to Blathwayt?

Based simply on the texts themselves, it is difficult to say either way which text should be attributed to whom. There is in fact plenty of logic for saying that the left-hand text was *not* Locke's original bill. For if it were, it would have meant that when Locke was sent Blathwayt's version in December 1696, he ignored almost all the amendments Blathwayt had made and instead recommended to the Board that it form its representation draft from essentially his original bill, the left-hand text being the more similar version of the two texts to what the Board then presented to the Privy Council. Ostensibly this would appear to be a peculiar reading of the bill's revision process, which might explain why Horwitz and Oldham came to the conclusion that 'the righthand text was the earlier of the two and that the lefthand text was probably the version sent by the board to Locke in the country after undergoing

revision chiefly at William Blathwayt's initiative'.[42] Yet if this conclusion were true, it would mean that Locke had not been responsible for introducing what was 'innovative' about the Arbitration Act. As the composer of the right-hand text, his original proposal would have applied only to references, so at most it could be claimed that Locke had been prescient enough to recognise the significance of Blathwayt's amendments to have recommended the changes to the Board. But it would be misleading to say, as many scholars have done, that the Arbitration Act was fundamentally Locke's statute.[43]

It is fortunate, then, that there is sufficient evidence to support the view that Locke was in fact the composer of the left-hand text. Consider, first, the argument that it would have been strange for Locke to have ignored most of the amendments Blathwayt had proposed, the strongest grounds for saying that Locke drafted the right-hand text. If the relationship between Locke and Blathwayt, the 'most important untitled members of the Board', is taken into account, it becomes much less surprising that Locke might have acted in this way.[44] For as several scholars have noted, the relationship between these two men was far from collegial.[45] Indeed, the historian Peter Laslett has claimed that Blathwayt hated Locke, a feeling which appears to have been mutual.[46] This enmity was in part political, Blathwayt having been a long-standing Tory and Locke an avowed Whig,[47] but it was also tied to their views on how the Board should be run and, importantly, who should be in charge of running it. For Blathwayt was, amongst other roles, the de-facto head of England's colonial administration, having served as the auditor-general of royal revenues in the colonies since 1680 and as the secretary to the Lords of Trade, the predecessor council to the Board of Trade, since 1679.[48] He therefore epitomised what Locke and the other Whig members of the

[42] Horwitz and Oldham, 'Arbitration', p. 135, n. 9.
[43] American legal scholars in particular tend to refer to the Arbitration Act by mentioning John Locke. For example, see J. Oldham, 'The historically shifting sands of reasons to arbitrate', *JDR* 1 (2016), pp. 41-54; C. Conklin, 'A variety of state-level procedures, practices, and policies: arbitration in early America', *JDR* 1 (2016), pp. 55-79; J. Oldham and S. Kim, 'Arbitration in America: the early history', *LHR* 31:1 (2013), pp. 241-66; Horwitz and Oldham, 'Arbitration'.
[44] Steele, *Politics of colonial policy*, p. 22.
[45] P. Laslett, 'John Locke, the Great Recoinage, and the origins of the Board of Trade: 1695-1698', *WMQ* 14:3 (1957), pp. 370-402, at p. 391; 'William Blathwayt, imperial fixer: muddling through to empire, 1689-1717', *WMQ* 26:3 (1969), pp. 373-417, at p. 398.
[46] Laslett, 'Locke, recoinage, Board of Trade', p. 391.
[47] L. Leder, *Robert Livingston 1654-1728 and the politics of colonial New York* (Chapel Hill, N.C., 1961), pp. 101-2.
[48] For further information on William Blathwayt, see G.A. Jacobsen, *William Blathwayt, a late seventeenth century English administrator* (New Haven, C.T., 1932); L. Cappon, 'The Blathwayt papers of Colonial Williamsburg, Inc.', *WMQ* 4:3 (1947), pp. 317-31; S. Webb, 'William Blathwayt, imperial fixer: from Popish Plot to Glorious Revolution', *WMQ* 25:1 (1968), pp. 3-21; 'Blathwayt, imperial fixer: muddling through to empire'.

Board sought to change, the previous administrators of England's commercial and colonial endeavours being largely held responsible for the economic issues which the kingdom was facing at the time.[49] The early months of the Board, the very period in which the bill was drafted, are thus replete with examples of these men and their factions working against one another to assert control over the Board's affairs. To recount just one episode, Locke, with the help of Baron John Somers, the Lord Chancellor, was able to secure the appointment of William Popple, the English translator of his *Letter Concerning Toleration*, as the Board's secretary in place of Thomas Povey, Blathwayt's kinsman and deputy at the Lords of Trade.[50] Upon learning of this development, Blathwayt retaliated against what he perceived as an attack on his patronage by having Povey remove the Lords of Trade's records to his estate at Dyrham Park and instructing his contacts in the colonies to address their letters directly to him—effectively hamstringing the Board's ability to deal with ongoing colonial matters.[51] If such blatant antagonism was typical of the interactions between these two men, it is perhaps less peculiar that Locke would not have accepted Blathwayt's amendments of his bill. Indeed, one might even say that it would have been more out of character had Locke been amenable to Blathwayt's suggestions.

There is even reason to believe that Blathwayt had not intended for his amendments to be particularly useful. For if Blathwayt had composed the right-hand text, what did his revisions do to further the Board's objective? As noted above, the changes made in the right-hand text would limit the application of the bill's enforcement procedure to references; essentially, the text codified existing court practice. How, then, would this have benefitted the resolution of merchants' disputes? The apparent futility of these changes might be more comprehensible if we consider whether Blathwayt had another reason for introducing them: to obstruct the finalisation of Locke's proposal. As the Board's journal makes clear, Blathwayt had only sought to amend the bill at the proverbial eleventh hour. The entry from 18 December 1696 reveals that the Board had been prepared to send a representation of the bill to the Privy Council, but it was only then that 'some doubt about the forme' of the bill was expressed and Blathwayt was permitted to revise it.[52] Equally notable is that Blathwayt

[49] W. Root, 'The lords of trade and plantations, 1675-1696', *American Historical Review* 23:1 (1917), pp. 20-41, at pp. 38-40.
[50] Laslett, 'Locke, recoinage, Board of Trade', pp. 390-91. Leder, *Robert Livingston*, p. 123.
[51] Webb, 'Blathwayt: muddling through to empire', pp. 398-40. The Privy Council ultimately had to order Povey to hand over the records. For coverage of this issue in the Board's journals, see TNA, CO 391/9, pp. 9-10, 11-13, 28, 33.
[52] It is not too far-reaching to presume that it had been Blathwayt who had raised these doubts, but the Board's journal does not state this expressly.

expressed his reservations only after Locke had left London, presumably under the assumption that his work on the proposal was complete. Locke departed for the country before 16 November, the date on which a representation of his bill had been agreed upon by the Board, but Blathwayt only voiced his concerns sometime after this date.[53] Could Blathwayt have waited for so long to introduce his amendments deliberately to derail Locke's efforts? He certainly could have put forward his reservations at an earlier date, having been present at the meetings of 9 November, when Locke first delivered his bill to the Board, and 16 November, when the Board approved the bill's representation. It would also have been clear to Blathwayt that the bill was Locke's personal enterprise. It was in fact the first proposal that Locke introduced to the Board following Blathwayt's return to England in mid-October, Blathwayt having spent the summer in the Netherlands serving as William III's personal secretary.[54] It is at least plausible, then, that Blathwayt's revision of Locke's bill might have represented another instance of antagonism between these two men—in this case, of Blathwayt showing that he could obstruct Locke's efforts even on an issue in which Locke had played a leading role. This might in turn explain why the Board had been so careful to solicit Locke's views of Blathwayt's amendments, despite the fact that Locke was no longer in London. On 18 December the Board directed William Popple to send a copy of Blathwayt's version of the bill to Locke, and on 18 January, after receiving Locke's comments, the Board ordered that the 'draft be corrected according to these remarks' so that a representation could be made 'in that manner' to the Privy Council.

Beyond the question of whether Locke would have accepted Blathwayt's amendments of his bill, there is additional evidence to support the view that Locke had drafted the left-hand text and was therefore responsible for what was 'innovative' about the Arbitration Act. On at least two separate occasions, Locke appears to have signalled his 'ownership' of the matter. The first occasion has been touched on briefly in the previous section: when the bill was committed for review in the House of Commons in April 1698, it was Edward Clarke, Locke's close friend and 'mouth-piece' in Parliament, who chaired the committee.[55] Had Blathwayt been the one to decide that the bill's enforcement procedure should be applied to arbitration rather than to references, it would seem likely that he would have been the one to

[53] Refer to n. 39 above.
[54] M. Lane, 'The diplomatic service under William III', *Transactions of the Royal Historical Society* 10 (1927), pp. 87-109, at pp. 89-90. The Board's journal reveals that the first meeting Blathwayt attended was on 15 October 1696, see n. 39 above for explanation of attendance.
[55] M. Knights, 'John Locke and post-revolutionary politics: electoral reform and the franchise', *P&P* 213 (2011), pp. 41-86, at pp. 52-53; *CJ*, vol. XII, p. 250.

sponsor the bill, having been only MP on the Board and therefore its de-facto representative in the House of Commons.[56] Yet despite the fact that more than fifty MPs were ultimately appointed to the parliamentary committee, Blathwayt was not amongst those who were named.[57] The second occasion in which Locke appears to have signalled his ownership of the proposal is of a more intimate nature. Also found in Locke's manuscripts is a copy of a report that had been sent to the House of Commons detailing the Board's achievements up until March 1699/1700, only months before Locke's retirement from the Board.[58] Included in the report was the notice that 'to prevent delays in determining differences about matters of trade we prepared a bill for determining such differences by arbitration which has since past into law'.[59] The name of the bill has been underlined in the text as have other sections in the report which refer to the Board's efforts in fixing the rate of guineas and amending the Poor Laws.[60] As these other issues have been identified by scholars to be attributable to Locke, it is possible that Locke had therefore read through the report and marked out the matters which he claimed as his own.[61]

For the reasons detailed above, it seems probable that the provenance of the drafts found in Locke's manuscripts is as follows: the left-hand text was Locke's original draft and the right-hand text was Blathwayt's amended version. This would mean that Locke *was* responsible for extending the way in which the common law courts had enforced references to apply to arbitration generally; he can retain his position to us in the modern day as the 'maker' of the Arbitration Act. But as a final point by way of conclusion, it is worth noting that there was one important amendment introduced in the right-hand text that was preserved in the representation draft: who could employ the bill's provisions. Whereas the left-hand text limited its use to 'merchants and traders' for their disputes concerning 'account or trade' (L, lines 8-9), the right-hand text permitted a more general application of the provisions by stating that it could be employed by 'merchants traders *and others* concerning matters of accompt, trade *or other matters*' (R, lines 9-10, my emphasis). These words, which were

[56] For example, Blathwayt would be the one who presented the Board's report on its progress to the House of Commons. Refer to n. 95 below
[57] Refer to nn. 103, 104 for MPs named to the committee.
[58] Bodl., Locke MS c. 30, fols. 119-24.
[59] Ibid., fol. 121v.
[60] Ibid.
[61] Poor laws: A. Dang, 'Fondements des politiques de la pauvreté: notes sur "The Report on the Poor" de John Locke', *Revue économique* 45:6 (1994), pp. 1423-41; S. Macfarlane, 'Social policy and the poor in the later seventeenth century' in *London 1500-1700: the making of the metropolis*, eds. A.L. Beier and R. Finlay (1986), pp. 252-77. Guineas: L. Davidson and T. Keirn, 'John Locke, Edward Clarke and the 1696 guineas legislation', *PH* 7:2 (1988), pp. 228-40.

retained in the Arbitration Act, have been singled out by scholars as a key feature in allowing the Act to exceed beyond its original commercial scope to apply to any arbitration, regardless of the identity of the parties or the subject matter of their dispute.[62] If we are to accept, then, that the right-hand text had been composed by Blathwayt, it would mean that the wider application of the Arbitration Act was Blathwayt's doing. However unintentionally, Blathwayt might have played a far greater role in the long-term significance of the Act than scholars have previously acknowledged.

2.2 Sir John Holt

As the discussion of the Act's substantive development has shown, the Arbitration Act in its final form was not entirely drafted by members of the Board of Trade. Its concluding provisions, allowing parties to raise objections against awards on grounds of corruption or other 'undue means' and authorising the courts to set aside awards for these reasons, appear to have been made when the bill was before the Privy Council. The draft of the bill which lends support to this view is the one found in the manuscripts of the House of Lords, a transcription of which is included in Appendix V.[63] The body of the text, including the additional provisions, was written in one scribal hand, whereas the amendments made by the Lords' committee charged with reviewing the bill were instead written in another hand, the same which endorsed on the verso of the bill the dates of its first and second readings before the upper house. This would suggest that the provisions in question had already been added to the bill when it was submitted to the House of Lords in February 1697/8, and given that they were not included in the representation draft which the Board had presented to the Privy Council the year earlier, by process of elimination it would follow that the provisions were made at the direction of the Privy Council.

Turing to the provisions themselves, they are notable in that they appear to have been introduced for a legal, rather than commercial, reason. The provisions prevented a party from being imprisoned for contempt of court for not performing an award which had been made unlawfully, a possibility that could have otherwise arisen had the Board's original intention of creating a proposal that would be 'decisive without appeal' been maintained. Yet by allowing parties to raise objections on the grounds of corruption or 'undue means' and by

[62] J.H. Baker, 'From lovedays to commercial arbitration' in *Collected papers on English legal history*, 3 vols. (Cambridge, 2013), vol. I, pp. 432-41, at p. 440; Horwitz and Oldham, 'Arbitration', p. 139.
[63] HLRO, HL/PO/JO/10/1/498/1219.

authorising the courts to set aside an award if such grounds were proven, the provisions effectively gave the courts oversight to review awards and to look into how they were made. If parties sought to rely on the Act's enforcement procedure, they would have to ensure that the way in which their arbitration was conducted complied with what the courts deemed to be lawful. The provisions were therefore crucial to what legal scholars have called the 'legalisation' of arbitration, for as awards came increasingly under the courts' scrutiny, the entire process of arbitration became more law-related in terms of its procedure and in the parties' choice of arbitrator.[64] It is for this reason that the Arbitration Act has often been credited with giving rise to the legalised practice that arbitration is today. In its effect, the Act laid 'the foundation stones of the modern law and practice of arbitration in England'.[65]

In light of the long-term significance of these provisions, it is therefore worth knowing who drafted them. Yet it must be noted that identifying the drafter of the provisions is a more difficult task than that of the previous subsection given that there are not just two candidates to consider. Indeed, as there is no surviving account of the Privy Council revising the bill, it is hard to say which of the privy councillors might have made the amendments. It cannot even be said for certain that the provisions were at all drafted by the councillors, for it is possible that the Privy Council had instead delegated the task to someone else. But if we make the admittedly large assumption that the amendments were drafted by a member of the Privy Council, for several reasons the most probable candidate would be Sir John Holt, the Lord Chief Justice.[66] Holt had been present at the Privy Council on 21 January 1696/7, the date when the Board of Trade recorded in its own journal to have transmitted its representation of the bill to the council.[67] Moreover, as chief justice of the court of King's Bench, Holt would have had the legal knowledge to recognise the necessity of allowing parties to object against awards which had been made unlawfully. Holt had even expressed familiarity with the process by which the court of King's Bench had come to enforce references by means of its contempt procedure, remarking in the case of *Forster v Brunetti* (1696) that the court had first granted a writ of attachment against a party for not performing

[64] C. Burset, 'Merchant courts, arbitration, and the politics of commercial litigation in the eighteenth-century British empire', *LHR* 34:3 (2016), pp. 615-47, at pp. 616-17; Horwitz and Oldham, 'Arbitration', pp. 137, 154-55. For a more general treatment of legalisation, see B. Mann, 'The formalization of informal law: arbitration before the American Revolution', *New York University Law Review* 59:3 (1984), pp. 443-81.
[65] D. Roebuck, *Arbitration and mediation in seventeenth-century England* (Oxford, 2017), p. 428.
[66] Holt served in this position for the period of 1689-1710. P.D. Halliday, 'Holt, Sir John', *ODNB.*
[67] TNA, PC 2/76, p. 571.

his referee's award when John Kelyng had been chief justice.[68] Yet attendance and legal expertise are not enough to single out Holt as the drafter of the Arbitration Act's final provisions. For one thing, these criteria could have equally applied to Baron John Somers, the Lord Chancellor, who had also been present at the council on 21 January.[69] Nor should too much reliance be placed on the attendance of this one meeting. The councillors might not have dealt with the revision of the bill when it was first presented to them, or they might have assigned the matter to a councillor who had not been present at the time. Under these circumstances, Sir John Trevor, Master of the Rolls, would also emerge as a possible candidate.[70]

Instead, what makes John Holt the most likely of the privy councillors to have drafted the amendments to the bill relates to the substance of the provisions, and particularly to the specific grounds for which the courts would be able to set aside an award. For by limiting these grounds to issues concerning corruption or other 'undue means', the provisions were consistent with Holt's decisions on the court of King's Bench in relation to the enforcement of references. This requires some explaining. When the court of King's Bench first began to enforce references using its contempt procedure by allowing the non-performing party to 'shew cause' why a writ of attachment should not be granted against him, the legal arguments that the party would then raise concerned the 'law' of awards, the legal rules prescribing whether an award was valid or void.[71] During his tenure as the court's chief justice, however, Holt sought to exclude these legal arguments from being made, as is evident from several of his decisions in the late 1690s, the very period in which the bill under consideration was being drafted. In the case of *Forster v Brunetti* mentioned above, Holt ruled that the court was prepared to grant a writ of attachment against parties for not performing their referees' awards 'though they be not legally good', and in the case of — *v Palmer* (1698), he made this exclusion even more explicit by pronouncing that '[t]he common exceptions against an award will not hold here'.[72] The grounds for which Holt would allow a party to object against his referee's award were equally clear. As he explained in an anonymous case from 1698, 'where

[68] *Forster v Brunetti* (1696), 1 Salk. 83, Holt KB 78. Presumably Holt was referring to the case of *Darbyshire v Canon* (1669).
[69] Somers became Lord Keeper in March 1693 and Lord Chancellor in April 1697. He had previously served as Solicitor-General (1689-1692) and Attorney-General (1692-1693). S. Handley, 'Somers, John, Baron Somers', *ODNB*.
[70] Trevor served in this position for the period of 1685-89 and again for 1693-1717. K. Ellis, 'Trevor, Sir John', *ODNB*.
[71] Refer above to pp. 47-51.
[72] *Forster v Brunetti* (1696), 1 Salk. 83, Holt KB 78; — *v Palmer* (1698), 12 Mod. 234.

an award is made by rule of court, it shall not be set aside; unless there was practice with the arbitrators, or some irregularity as want of notice of the meeting'.[73] By the 1690s, then, the 'law' of awards was no longer sufficient to prevent the enforcement of a reference; instead, a non-performing party would have needed to show that there had been some apparent injustice in carrying out the process.

The provisions added to the bill therefore aligned with the more limited grounds for objection which Holt had imposed on the enforcement of references. This not only lends support for claiming that Holt had made the amendments to the bill when it was brought before the Privy Council, but it also offers an additional explanation for why these specific provisions were included. By allowing the same grounds for objection whether parties sought to enforce an award made by a reference or in accordance with the Act, the provisions ensured that the courts would apply their contempt procedure consistently across both scenarios. It is possible, then, that the amendments were made with the intention of standardising the courts' method of enforcement in cases where the non-performance of an award was penalised as contempt, something that Holt, as the Lord Chief Justice and, therefore, head of the common law system, would undoubtedly have wanted to ensure. At the very least, this was the view that Lord Mansfield, chief justice of the court of King's Bench for the period of 1756-1788, took of the provisions some sixty years later. In a case concerning the grounds on which a party could raise objections against an award, Mansfield explained that the Act 'put submissions to arbitration in cases where there was no cause depending, upon the same foot as those where there was a cause depending'.[74]

3. Reception

Whilst this chapter has so far centred on the Arbitration Act's development, this section marks a shift in focus to consider how the Act was instead received. This particular issue merits consideration as there does not appear to have been much immediate commentary on the Act's passing, an altogether surprising fact given how well-known and well publicised were the commercial grievances which the Act was supposed to address. In the absence of such commentary, the views of eighteenth-century legal writers like Matthew Bacon and

[73] *Anonymous* (1698), Holt, K.B. 80; 1 Salk. 71. It is interesting to note that this position would have differed from Holt's views when an aggrieved party had instead sued his opponent for not performing an award, as expressed in *Morris v Reynolds* (1703) noted above on p. 22.
[74] *Lucas ex. Dem. Markham v Wilson* (1758), 2 Burr. 701.

William Blackstone who claimed that 'submissions by rule of court are now very frequent' and that matters relating to the Arbitration Act have 'now become a considerable part of the business of the superior courts' have been taken to represent the Act's overall reception.[75] It has been largely presumed that the Act was adopted and applied without issue. More recently, however, the findings of Henry Horwitz and James Oldham have brought this assumption into question. By examining the rule books of the courts of King's Bench and Common Pleas in the decades following the passing of the Arbitration Act, they discovered that well into the eighteenth century there was no significant increase in the number of rules entered pursuant to the Act's provisions.[76] The enforcement procedure implemented by the Act had not in fact been regularly employed.

Horwitz and Oldham admitted that the infrequent use of the Act's procedure is not easy to explain. They dismissed the idea that the courts might have actively discouraged its use out of a fear of losing business to arbitration, a view popular amongst nineteenth- and early-twentieth-century legal scholars and practitioners to describe more generally the courts' opinion of arbitration, finding sufficient evidence to the contrary.[77] They also doubted whether the very existence of the Act's more coercive form of enforcement might have deterred contemporaries from not performing awards so that the actual recourse to its enforcement procedure was rarely necessary, for whilst this view could provide an explanation for why the Act was not often employed in the first half of the eighteenth century, it does not account for the sudden rise in the number of rules entered pursuant to the Act in the 1770s-1780s.[78] The aim, then, of this section is to offer a possible explanation for Horwitz and Oldham's findings, one that can account for both the initial, infrequent recourse to the Act and the later increase in its use. It will suggest that the Arbitration Act was not at first employed because it was not the solution that merchants themselves had wanted. Instead, merchants had sought to establish a merchant court to decide their differences, but the Board of Trade chose to advance the Arbitration Act for policy considerations tied to concerns about its own survival. Only later, once the likelihood of erecting a merchant court diminished as many of the substantive issues that merchants had complained about were incorporated into the existing legal system was the Act more regularly applied, for it addressed one lingering issue that such substantive change could not fix: procedural delay. The following discussion

[75] M. Bacon, *The compleat arbitrator* (1731), p. 47; Blackstone, *Commentaries*, vol. III, p. 17.
[76] Horwitz and Oldham, 'Arbitration', pp. 144-45.
[77] Ibid., p. 146.
[78] Ibid., pp. 146-47.

will expand on this explanation in two parts, the first addressing the reasons why the Board advanced the Arbitration Act in spite of the support for a merchant court, and the second covering the changes to the existing legal system which would have made the Act a more attractive option.

3.1 Merchant courts

Whilst the Arbitration Act had been advanced to address the issues which merchants faced at law, this does not mean that it was the solution that merchants themselves had wanted. As is evident from numerous commercial treatises that were published in the seventeenth century, merchants had instead called for the establishment of a court manned by merchants and equipped with a summary procedure to determine their disputes.[79] Proposals for a merchant court, or a 'court merchant' as it was more commonly known, were often couched in terms of the benefits it could provide to commerce. Such a court would allow merchants to 'see short ends to their differences, and not to be detained at home to attend long issues', which would mean that merchants could devote more time and resources to trade.[80] Set against the backdrop of England's commercial rivalry with the Dutch Republic and France, both of which had merchant courts, the proposals also took on a geopolitical slant. The prominent merchant Sir Josiah Child lamented that the lack of a merchant court in England, so unlike the 'great cities and towns in France [and] Holland', was a 'great bar to the progress and grandure of the trade of this kingdom'.[81] The economic writer Roger Coke pointed to the ease with which commercial disputes were resolved in the Dutch Republic as a reason why 'Dutch merchants may and do improve their trades better than the English'.[82] Depicted in these ways, proposals for a merchant court appear to have been compelling. When, in December 1695,

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[79] S. Lambe, *Seasonable observations humbly offered to his highness the Lord Protector* (1657); J. Bland, *Trade revived, or a way proposed to restore, increase, inrich, strengthen and preserve the decayed and even dying trade of this our English nation* (1659); W. Cole, *A rod for the lawyers: who are hereby declared to be the grand robbers & deceivers of the nation* (1659); C. Reynell, *The true English interest: or an account of the chief national improvements* (1674), S. Bethel, *An account of the French usurpation upon the trade of England and what great damage the English do yearly sustain by their commerce, and how the same may be retrenched, and England improved in riches and interest* (1679); J. Child, *A discourse about trade* (1690); J. Cary, *An essay on the state of England in relation to its trade, its poor, its taxes, for carrying on the present war against France* (Bristol, 1695); *An essay, on the coyn and credit of England* (Bristol, 1696); J. Praed, *An essay on the coin and commerce of the kingdom* (1695); D. Defoe, *An essay upon projects* (1697).
[80] Cary, *Essay on the state of England*, p. 27.
[81] Child, *Discourse about trade*, pp. 112-13.
[82] R. Coke, *A discourse of trade* (1670), p. 68.

the House of Commons sought to appoint a council of trade to address the beleaguered state of the kingdom's commerce, it included amongst its resolutions that the proposed council would be 'empowered to consider the best methods for settling a court merchant'.[83]

Yet as is well known, the parliamentary council never came to fruition. In what was viewed at the time as a constitutional issue between the king and Parliament, William III instead commissioned the Board of Trade in May 1696 and the council proposed by the House of Commons was apparently abandoned.[84] What is less well known, however, is why the Board developed the Arbitration Act in light of the support shown for a merchant court amongst merchants and in Parliament. It is unlikely that the Board would have been ignorant of the proposal, something that was demonstrably true for John Locke. Not only had he recorded in his notes the resolutions of the House of Commons regarding its proposed council of trade[85] but he also retained in his library many of the commercial treatises advocating for a merchant court and was in correspondence with some of their authors.[86] Why, then, did Locke and the Board decide to advance the Arbitration Act in place of a merchant court? Whilst the surviving records do not provide a clear answer, it will be argued in this subsection that their decision was made for policy considerations linked to the Board's own survival. The choice to advance the Arbitration Act was less of a value judgment between the two options as it was a promotion of the scheme that was the most feasible to adopt.

To understand why the Board would have been concerned about its survival, we must consider the Board's position in the early months of its existence, the very period in which Locke had been tasked with developing his proposal. As noted above, the Board had been commissioned by the king despite attempts by the House of Commons to establish a council of trade only months previously. For several reasons, contemporaries viewed this development unfavourably. Merchants worried that the Crown-appointed Board was too similar to its predecessor council, the Lords of Trade, which they held responsible for many of the trade-related issues the kingdom currently faced. As one merchant put it, 'the council of trade was excellently propos'd at first by the Parliament; but the interest of the Court

[83] *CJ*, XI, p. 324.
[84] For an overview of this issue, see R. Lees, 'Parliament and the proposal for a council of trade, 1695-6', *EHR* 54:213 (1939), pp. 38-66.
[85] Bodl., Locke MS c. 30, fol. 34v.
[86] Locke owned copies of works by Bethel, Cary, Child, and Reynell advocating for a merchant court. J. Harrison and P. Laslett, eds., *The library of John Locke* (Oxford, 1965). He was also in correspondence with Cary about his views on trade. De Beer, ed., *Correspondence*, vol. V, pp. 515-16, 602-03, 607, 625-27, 633-35, 710. 725-26, 746.

quickly beat out its brains, and from this establishment I doubt little good will arise'.[87] Tory and 'country' politicians were also disparaging of the Board given that most of its members were affiliated with the Whig party.[88] Indeed, scholars have claimed that the establishment of the Board in place of the House of Commons' proposed council was broadly perceived by contemporaries as a victory for the Whig Junto.[89] Such widespread opposition to the Board only helped fuel rumours that it was not destined to last. As the parliamentary session in which the House of Commons had proposed its council of trade was prorogued before the proposal could receive its final reading, it was not clear whether the House would resume its efforts at the next parliamentary session. John Methuen, who had been appointed as one of the Board's working members, refused to leave his ambassadorial post in Portugal until he knew 'of what duration this commission is like to be, at least whether it is like to outlive the next sessions of Parliament'.[90] As late as June 1696, Robert Henley, a colleague of William Blathwayt's on the Transport Board, reported to him that at the Royal Exchange, odds were set at forty to one that the House of Commons would again seek to establish its proposed council.[91]

In the months following its inception, then, the Board was in a precarious position. It needed to show that its commission was warranted, especially if it were to fend off potential attempts to undermine its authority. This would have become all the more pressing when Parliament returned on 20 October 1696 and soon after the House of Commons requested that the Board compile a report on the progress it had made, a potential warning sign that the House was preparing to resume its attempts to create a council of trade.[92] With this context in mind, could the Board have advanced the Arbitration Act to serve as a token achievement of its early efforts? And could its concern about demonstrating the progress it had made by the

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[87] S. Baston, *A dialogue between a modern courtier and an honest English gentleman* (1697), p. 9.
[88] Steele, *Politics of colonial policy,* pp. 16-17, 19-23; Webb, 'Blathwayt, imperial fixer: muddling through to empire,' pp. 398-401.
[89] For example, G.A. Jacobsen, *William Blathwayt, a late seventeenth century English administrator* (New Haven, CT: Yale University Press, 1932), pp. 296-99; Leder, *Robert Livingston*, p. 123; Webb, 'Blathwayt, imperial fixer: muddling through to empire', pp. 398-99; D. Rubini, 'Party and the Augustan Constitution, 1694-1716: politics and the power of the executive', *Albion: A Quarterly Journal Concerned with British Studies*, 10:3 (1978), pp. 201-2.
[90] Steele, *Politics of colonial policy*, p. 17.
[91] Jacobsen, *William Blathwayt*, pp. 302-3. The Transport Board was first established in 1690 for the victualing of English troops in Ireland. For more information on this council, see M.E. Condon, 'The establishment of the Transport Board, a subdivision of the Admiralty', *The Mariner's Mirror* 58:1 (1972), pp. 69-84.
[92] The order was made on 31 October 1696. *CJ*, XI, p. 573. The Board's journal also mentions that the Board received the order on this date. TNA, CO 391/9, p. 205.

autumn of 1696 have affected its decision to promote the Act over a merchant court? There is some indication that the Board had intended for the Act to be one of its early achievements. The Act concerned an issue which the Board had been assigned to address when it was commissioned in May 1696: to 'enquire into the several obstructions of trade and the means of removing the same'.[93] It is also worth noting just how early on in the Board's 'lifespan' Locke had been directed to develop the proposal. When Locke received his instructions on 19 August, the Board had met a mere handful of times and had only recently settled into its rooms in Whitehall.[94] But perhaps the clearest sign that the Board had considered the Act to be one of its early feats can be found in the report which the Board drafted in response to House of Commons' request.[95] Not only did the Board identify the 'difficulties which controversies between merchants meet with, in the ordinary way of decision' as a principal 'clog' to trade, but it implied that it was in the process of finalising a measure to resolve the issue.[96] That it felt the need to advertise its efforts, without having anything to show for it at the time, suggests just how important an achievement the Board believed itself to be on the cusp of attaining.

Yet for the Act to be one of the Board's early achievements, it had to be a measure that could be readily implemented. This might explain why the Board decided to advance a proposal involving arbitration rather than a merchant court: it was the more feasible option to adopt. Consider the logistics necessary to establish a merchant court. Despite repeated calls from merchants for such a court, there was no consensus on what the court would look like. How many judges would serve on the court, and for how long? Would they be current or retired merchants? Would there be only one court and, if so, where would it be located? A more difficult issue would be how to incorporate a merchant court into the existing legal system. How would its jurisdiction be specified, especially as the existing courts already heard and tried commercial disputes? And given that merchants lamented that a suit could be appealed before several courts, how would erecting an additional court address this complaint? By contrast, the Arbitration Act would have been far easier to implement given that its enforcement procedure, whereby a party could be imprisoned for contempt for not

[93] TNA, CO 391/9, p. 3.
[94] The Board first met on 25 June 1696 and its rooms in Whitehall, which were renovated for the Board's purposes by Sir Christopher Wren, were completed on 29 July. TNA, CO 391/9, pp. 7, 10, 27.
[95] William Blathwayt presented the Board's report to the lower house on 25 November 1696, a full account of which is found in its parliamentary journal. *CJ*, XI, pp. 593-95.
[96] Ibid., p. 595.

performing an award, was already in use by the common law courts in the context of references. Comparatively speaking, it would have been much less complicated to extend the application of this procedure to apply to arbitration as well than to create a merchant court *de novo*.

The Board's journal might in fact show such a comparison being made between the two measures. On 26 October 1696, the Board requested the advice of an Italian Jewish merchant named Angelo Fermi on how to implement 'some projects for the advantage of the kingdom in relation to trade'.[97] Fermi's response, which was submitted to the Board on 9 November, was to suggest the establishment of several merchant courts or tribunals, each with jurisdiction over a trade-related issue.[98] The Board evidently took Fermi's suggestions seriously, for it ordered that his proposal be recorded in full in one of its supplementary journals.[99] Yet after this was done, no further action was taken by its members and neither Fermi nor his proposal were again mentioned in the Board's records. As this entire episode occurred at the same time when Locke presented his original proposal to the Board—indeed, Fermi's had responded to the Board on the very day that Locke had delivered his arbitration bill—it is worth considering whether the existence of Locke's proposal might have played a role in why the Board appears to have abandoned Fermi's proposition to establish merchant courts. Perhaps when faced with both proposals at once, it was clear to the Board which of the two options would have been easier to adopt.

A second and more immediate issue which the Board would have had to consider was how likely the two proposals were to pass through Parliament. If a proposal encountered significant opposition from either House, it could not be readily implemented and become the token achievement which the Board so needed. Of the two proposals, a merchant court would surely have been the more contentious option. Although the merchants in Parliament, and particularly in the House of Commons, would have favoured such a proposal, the lawyers would have been extremely hostile to the notion given that a court manned by merchants would have impinged on their own business and fees.[100] Their opposition had in fact prevented an earlier attempt to establish a merchant court from proceeding. In 1659 a bill was introduced to the House of Commons for 'the establishment of a court-merchant in

[97] TNA, CO 391/9, p. 187.
[98] Ibid., pp. 220-22.
[99] TNA, CO 389/14, pp. 71-72.
[100] Burset, 'Merchant courts, arbitration, commercial litigation', pp. 632-34.

London';[101] however, as one contemporary explained, it was abandoned soon after having been 'hindred especially by the lawyers'.[102] By contrast, the Arbitration Act would not have incited such hostility from the lawyers in Parliament. They might even have supported it, for the Act's enforcement procedure provided new opportunities for court involvement. And whilst the merchants in Parliament might not have promoted the scheme, neither would they necessarily have opposed it. Merchants had long relied on arbitration to resolve their disputes, so it seems unlikely that they would have objected too strenuously to a proposal that built on a practice which they regularly employed.

Yet when the House of Commons had proposed its council of trade, it had resolved to consider 'the best methods for settling a court merchant', so we can assume that there was at least some resistance to passing the Arbitration Act. This may help explain what occurred when the bill was committed for review in the House on 2 April 1698. Although the committee reviewing the bill had initially been composed of thirty-three named MPs,[103] it was later enlarged on two occasions: on 9 April another seventeen named MPs were added to the committee;[104] and on 27 April it was ordered that 'all members that are merchants, and all that serve for the cloathing counties' be included as well.[105] In spite of these changes, when Edward Clarke, the committee's chair, reported to the House on 2 May, the only amendment which the committee put forward was that the word 'unto' be omitted from the first paragraph of the bill.[106] On its own, this would appear to be a peculiar sequence of events, but the episode becomes more comprehensible if we consider whether the committee had been 'packed' to ensure that the bill would be recommended. Whilst there might have been a number of MPs who opposed the bill on the grounds that it did not advance a merchant court, by adding enough MPs to the committee, this opposition could have effectively been

[101] *A Bill for the Establishment of a Court-Merchant in London* (1659).
[102] Verax Philadelphus, *The knavish merchant characterized* (1661), pp. 5-6.
[103] The MPs who can be identified are Richard Beke, Maurice Bocland, George Bohun, Sir John Bolles, Thomas Brotherton, Sir John Bucknall, Sir Robert Burdett, Edward Clarke, Charles Cox, Sir Thomas Day, Nicholas Hedger, Roger Hoar, Sir William Honywood, John Lowther, Sir William Lowther, Jasper Maudit, John Mounstephen, William Norris, Richard Norton, Samuel Ogle, Sir Richard Onslow, Charles Osborne, Francis Pengelly, Thomas Rowney, James Sloane, John Thornhagh, Richard Wollaston, and James Worsley. Some MPs named cannot be identified for the reason that only their surnames are listed and there were multiple MPs with the same surname in attendance at the time. These are: Foley, Henley, Newport, and White. *CJ*, vol. XII, p. 190.
[104] Identifiable MPs: John Arnold, Henry Blaake, Thomas Blofield, George England, Samuel Fuller, Sir Francis Masham, John Perry, Sir Thomas Roberts, Sir Joseph Tily, Sir Charles Wyndham, Sir Marmaduke Wyvill, Sir Walter Younge. Non-identifiable MPs: Colt, Cowper, Morgan, Philips. Ibid., p. 200.
[105] Ibid., p. 244.
[106] Ibid., p. 250.

drowned out. This might also explain why a large number of known placemen and supporters for the Whig Junto as well as most of John Locke's close friends in the House of Commons were named to the committee.[107] It could be that the Board had deployed all of its lobbying power to see that its proposal would pass.[108]

Of course, the proposal did pass, but in light of what this subsection has shown, it is worth considering whether the Arbitration Act would have been viewed favourably by contemporaries and, particularly, by merchants. John Lowther, a Cumberland industrialist and one of the MPs who had been named to the committee reviewing the bill, wrote to his steward a few days after the bill had received royal approval to say that the Act 'wil [*sic*] be of use'.[109] But the views of merchants outside Parliament might have been less supportive. The merchant and economic writer Alexander Justice was more disparaging in his assessment of the Act, which he included in his commercial manual entitled *A General Treatise of Monies and Exchanges*, first published in 1707.[110] Whilst he admitted that 'the intent of this Act be very good', he argued that it could easily be frustrated so that 'were it allowable for me to christen it instead of, *An Act for determining differences by arbitration*, as 'tis now called, I would stile it, *An Act for preventing the determination of differences by arbitration*'.[111] His argument against the Act was largely composed of two points. First, to make use of the Act, merchants were required to have the terms of their submission entered into a court's rule book, a process which involved 'the performance of several tedious punctilio's with which merchants are so little acquainted', any omission of which would have given 'occasion to the party who shall think himself a sufferer by the sentence of arbitration to depart therefrom' so that instead of the one dispute between the parties 'they'll have two or three'.[112] Second, the fact that a non-performing party could raise objections against the award had the potential to delay the resolution of a dispute, for once it was questioned 'whether the sentence of arbitration was procured by corruption or other *undue means*', it was

[107] Friends and correspondents of Locke's included Edward Clarke, Sir Thomas Day, Roger Hoar, Sir William Honywood, Sir Francis Masham, and Sir Walter Yonge. Junto placemen and supporters included John Arnold, Richard Beke, Maurice Bocland, Henry Blaake, Sir John Bucknall, Sir William Lowther, William Norris, Charles Osborne, James Sloane, John Thornhagh, Sir Joseph Tilly, and Sir Thomas Roberts.
[108] Laslet, 'Locke, Recoinage, Board of Trade', pp. 380-82; C. Jones, 'The extra-parliamentary organisation of the Whig Junto in the reign of William III', *PH* 32:3 (2013), pp. 522-530.
[109] D.R. Hainsworth, ed., *The correspondence of Sir John Lowther of Whitehaven, 1693-1698: a provincial community in wartime* (1983), p. 598.
[110] A. Justice, *A general treatise of monies and exchanges* (1707), pp. 74-80.
[111] Ibid., p. 75.
[112] Ibid., p. 76.

almost certain that 'some flaw will be found in the arbitration, or some matter of Equity will be suggested and then away to Chancery go my gentlemen, and there we may safely leave 'em and come again in time to find them perhaps till their dying day'.[113] In light of these issues, Justice concluded his assessment by proposing the establishment of a merchant court. Acknowledging that 'there is not any probability of effecting an entire removal of all the grievances attending law-suits', he hoped that at least merchants 'might be dispens'd from the necessity of neglecting their other affairs…to follow those courts', an objective which could 'very easily be done by erecting a merchant-court, for the decision of differences arising upon matters of commerce'.[114] Clearly, then, the passing of the Arbitration Act had not put an end to the contemporary desire for a merchant court.

As the only detailed assessment of the Arbitration Act to be uncovered, it is not clear how representative Justice's opinions were of merchants at the time. Nonetheless, his views suggest that the Act might not have been considered by merchants to be as advantageous as the Board of Trade had claimed. By prioritising concerns about its own survival, the Board might have fallen short of developing a proposal that could resolve the trade-related issues it had been commissioned to address. For this reason, it is conceivable that the Act would not have been used with any great frequency in the years following its enactment. Here, too, Justice's assessment of the Act might be able to provide some insight. As he explained, because the Act 'only obliges such persons as are inclinable of themselves to take that course, to end their differences by arbitration', it was far more likely that, rather than employ the Act's provisions, merchants would arbitrate their disputes privately, thereby avoiding recourse to the law.[115] Merchants were generally honest, 'becaus [*sic*] amongst them all things are or ought to be transacted *bona fide*, and without suspicion of fraud', so they could be trusted to uphold their agreements to perform an award without the need for court enforcement.[116] The Arbitration Act might therefore have been a hollow proposition: whilst ostensibly it offered a solution for resolving merchants' disputes, in practice it might not have been especially useful.

[113] Justice, *General treatise*, p. 76. Justice was not the only merchant to criticise the delay of Chancery proceedings. For example, see Bland, *Trade revived*, pp. 38-39; Child, *A discourse about trade*, pp. 113-14.
[114] Ibid., p. 77.
[115] Ibid., p. 75.
[116] Ibid., p. 76.

3.2 Incorporation

If the Arbitration Act had been largely hollow in its effect and, for this reason, had not been frequently employed in the years following its enactment, how are we to account for the upswing in its use by the 1770s-1780s that Horwitz and Oldham demonstrated to have occurred? As to answer this question it is necessary to depart from the study of arbitration in the seventeenth century, it will only be possible here to put forward a workable solution for their finding, one that draws heavily on secondary scholarship. It will be suggested that the rise in recourse to the Act coincided with changes to the contemporary legal system that made the establishment of a merchant court similar to what merchants had promoted less likely to take place. As the principal substantive issues merchants had criticised were gradually 'incorporated' into the common law, a process which began in the mid-seventeenth century but which reached its zenith under Lord Mansfield's tenure as chief justice of the court of King's Bench in the second half of the eighteenth century, the Arbitration Act became a more attractive option for merchants as it addressed one lingering issue which this process of incorporation could not fix: it provided a way to avoid much of the procedural delay of a lawsuit.

As Alexander Justice's remarks reveal, the Arbitration Act did not put an end to contemporary support for a merchant court. Indeed, as the historian Christian Burset has shown, merchants continued to promote the establishment of such a court well into the eighteenth century.[117] An examination of these proposals, be they from the seventeenth or eighteenth century, makes it clear that a merchant court was viewed as a sort of panacea for the procedural and substantive issues which merchants faced at law. Procedurally, the court would enable merchants to 'end all businesses speedily amongst themselves without charge or delay' given that its procedure would be summary and unrestricted by the rules and formalities of the law.[118] Substantively, the court would be able to decide merchants' differences in a more competent manner, for not only would its judges have professional experience in the matters in dispute, but there would also be no issue as to whether the matter was determinable by the law. Whereas the 'municipal laws of England' were not 'sufficient for the ordering and determining the affairs of traffic, and matters relating to commerce', by

[117] Burset, 'Merchant courts, arbitration, commercial litigation', pp. 628-31.
[118] Reynell, *The true English interest*, p. 16.

allowing these issues to be judged by a merchant court, basing its decision on mercantile practice or 'custom', the issues could be decided to merchants' satisfaction.[119]

Whilst the reasons merchants put forward for requiring a merchant court do not appear to have changed over the course of the seventeenth and eighteenth centuries, the legal context in which these proposals were made did. Beginning in the mid-seventeenth century, efforts were taken by both lawyers and legislators to make it easier for merchants to have their commercial disputes decided within the confines of the common law system. These efforts were not pursued out of an altruistic concern for merchants' affairs, however. For lawyers, the ability of the courts to handle the resolution of commercial issues more effectively would have resulted in more business and, consequently, fees.[120] For legislators, the more effectual determination of commercial disputes would have had the potential to increase trade and add to the wealth of the kingdom.[121] Whatever the reason, the combined efforts of these groups gave rise to what legal scholars have called the 'incorporation' of mercantile custom into the common law.[122] As the details of how this process of incorporation occurred have been covered in previous studies,[123] it is sufficient to summarise the process here. Whilst many of the instruments and practices on which merchants had relied to conduct their commercial affairs were not recognised by the common law and could not therefore be enforced by the courts, the common law position underwent three successive stages of change. First, beginning in the mid-seventeenth century, the courts allowed merchants to plead in a lawsuit that the matter should be decided according to the 'custom' of merchants so that a jury formed of merchants could make a verdict on the issue. Second, laws were passed by Parliament at the turn of the century authorising the courts to enforce two

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[119] M. Postlethwayt, *The universal dictionary of trade and commerce*, 2 vols. (1751), vol. II, p. 22.
[120] Burset, 'Merchant courts, arbitration, commercial litigation', pp. 632-34. See also L.S. Sutherland, 'The law merchant in England in the seventeenth and eighteenth centuries', *Transactions of the Royal Historical Society*, ser. 4, 17 (1934), pp. 149-76, at p. 154.
[121] For example, Bland, *Trade revived*, p. 41; Bethel, *An account of French usurpation of trade*, p. 22; Child, *Discourse about trade*, pp. 112-20; Cary, *Essay on the coyn and credit of England*, pp. 27-29.
[122] For a refinement of this theory of incorporation, see J.H. Baker, 'The law merchant and the common law before 1700', *CLJ* 38:2 (1979), pp. 295-322.
[123] For scholarly works on the process of incorporation, see L.S. Sutherland, 'The law merchant in England in the seventeenth and eighteenth centuries', *Transactions of the Royal Historical Society* 17 (1934), pp. 149-76; D. Coquillette, 'Legal ideology and incorporation IV: the nature of civilian influence on modern Anglo-American commercial law', *Boston University Law Review* 67 (1987), pp. 877-970; D. Lieberman, *The province of legislation determined: legal theory in eighteenth-century Britain* (Cambridge, 1989), pp. 99-121; J.S. Rogers, *The early history of the law of bills and notes* (Cambridge, 1995), pp. 125-50, 164-69, 194-222; M. Dylag 'The negotiability of promissory notes and bills of exchange in the time of Chief Justice Holt', *JLH* 31:2 (2010), pp. 149-75; W. Swain, *The law of contract, 1670-1870* (Cambridge, 2015), pp. 42-106.

types of commercial instruments, inland bills of exchange and promissory notes, on which merchants had relied to transfer funds and to raise capital but which the courts had not previously accepted for contractual reasons.[124] Finally, through a series of judgments made in the 1760s-1780s, Lord Mansfield, chief justice of the court of King's Bench, developed a substantive doctrine of commercial law so that the 'custom' of merchants was no longer an exception but rather a part of the existing legal system. By the second half of the eighteenth century, then, the substantive issues which merchants long criticised were largely solved—perhaps not in the way that merchants would have wanted, but well enough that calls for a merchant court based on these complaints would have been counter-productive.

Whilst this meant that merchants could now rely on the courts to decide their commercial disputes in a more effective manner, the changes resulting from this incorporation process did not address the other principal concern that had grounded merchants' proposals for erecting a merchant court: to avoid the delays of the law. In this context, the Arbitration Act might therefore have emerged as a more attractive option, for whilst it did not preclude the involvement of the courts entirely as Alexander Justice had once criticised, it would have allowed merchants to by-pass much of the tedium associated with conventional legal proceedings. By having the terms of their submission entered into a court's rule book, in the event that one merchant did not perform the award, the other would have only had to motion the court to issue a writ of attachment against him; there would have been no need for pleadings or a trial. The Act's enforcement procedure would therefore have been more expeditious than a normal lawsuit, so as merchants began to rely more heavily on the common law courts to resolve their disputes, this comparative advantage would have been increasingly obvious. Thus, whilst the Act did not change, the context surrounding it did, which might in turn explain why there was an upswing in its use by the end of the eighteenth century. Nearly one hundred years after the Arbitration Act had first been drafted, perhaps it was finally perceived as a method for avoiding the 'tedious determination of controversies between merchants…in our ordinary methods' as the Board of Trade had once claimed.[125]

[124] The Payment of Bills Act of 1698, 9 & 10 Will. III, c. 17; Promissory Notes Act of 1704, 3 & 4 Ann., c. 9.
[125] TNA, CO, 389/14, p. 90.

4. Conclusion

This chapter has provided the most complete account for the drafting and enactment of the Arbitration Act. It has followed the Act's substantive development from its initial proposal by the Board of Trade to its passing through Parliament, and it has considered in close detail the various drafts of the Act. In so doing, the chapter has argued that the Act in its final form had not been the original proposal of the Board; rather, the intention had been to formulate a way for references to be 'decisive without appeal', and that it was only at John Locke's instigation that the proposal came to involve arbitration more generally. By contextualising this development amidst the Board's position at the time, the chapter has also contended that the Board had advanced the Act out of concern for its own survival and not because it was necessarily the best or only option available. As explored in the chapter itself, taking this view has two important consequences, particularly in relation to previous scholarship. First, it supplies an additional explanation for why England did not institute merchant courts during the period, an issue which has been examined by previous scholars, most notably Christian Burset.[126] Second, this view might be able to account for the infrequent recourse to the Act's provisions in the years following enactment, an important finding of the study conducted by Henry Horwitz and James Oldham on the Act and its effects in the eighteenth century, but one which they admitted was not easily explained.[127] But the arguments and findings of this chapter are in themselves noteworthy, especially for a study such as this on the practice of arbitration in the seventeenth century. The Arbitration Act of 1698, the first statute on arbitration to be enacted in England, might not have been intended nor specifically desired.

[126] Burset, 'Merchant courts, arbitration, commercial litigation', pp. 615-47. See also Sutherland, 'The law merchant in England', p. 154; Lieberman, *Province of legislation determined*, pp. 100-1.
[127] Horwitz and Oldham, 'Arbitration', pp. 144-47.

Conclusion

1. Principal findings and conclusions

To conclude this study of seventeenth-century arbitration, it is best to begin by summarising its principal findings and conclusions. These fall under two heads, reflecting the original aims of this dissertation: first, to examine what the process of arbitration entailed and how it was practised; second, to explain why the Arbitration Act of 1698 was made. Regarding the first aim, this dissertation has revealed that there was a full and developed 'law' relating to arbitration, a body of rules that affected and prescribed each element of the process. Although the rules were varied, it has been shown that they derived from just two principles: first, that an award had to comply with the specifications of the parties' submission; second, that the award was tantamount to a judgment, as acceptable as any resulting from the courts. The dissertation has also made clear, however, that these rules were neither fixed nor intransigent. They were capable of being changed in light of external developments or even practical problems, and, in some cases, they could even be circumvented by the parties forming their submission using conditional bonds. Whilst the extent to which these rules applied in practice may of course be questioned, their existence is, nonetheless, noteworthy. They provide a different view of arbitration than that depicted in scholarship, putting arbitration within the confines of the law rather than outside it.

By examining accounts of arbitration found in diaries and letters, this dissertation has also been able to re-create the practice of arbitration during the period, examining not just how the process was conducted, but also the reasons and motivations behind it. Whilst this study has provided evidence to support the views of scholars that arbitration was often intended as an alternative to litigation and could be employed for conciliatory and 'neighbourly' ends, it has equally revealed that there was more to the practice than these views. The parties to a dispute might have decided to arbitrate the matter for practical purposes of time and expense, or they might even have sought to exploit the process to silence an opponent or to hold greater sway over its outcome. Moreover, this dissertation has shown that the way in which the steps and stages of arbitration were conducted could itself be meaningful. Who the parties nominated to resolve their dispute could be revealing of the

nature of their disagreement, and even the form of submission the parties entered into could be telling, in various ways, of how committed they were to the process. So whilst it is not wrong to conclude that arbitration did often result in the resolution of disputes, the process of getting to that resolution is nonetheless worth examining.

Regarding the second aim of this dissertation, to explain why the Arbitration Act was made, it has been shown that the making of the Act was essentially a two-stage process. Whereas the provisions of the Act itself were drafted in the months preceding its enactment, its enforcement procedure developed as a result of changes implemented in the 1650s-1670s. Whilst this dissertation is not the first to recognise the Act's longer history of development,[1] it has made clear that the two stages were not pursued for the same reasons. The Act's enforcement procedure had arisen in the context of references, the legal fiction on which it would rely having first been used so that a reference initiated at the assizes could be enforced by the common law courts. By contrast, the Act itself was drafted to address the issues merchants faced at law by providing them with a way to obtain a court-enforced decision without the need for a lawsuit. Not only, then, were the two stages of the Act's making distinct in terms of timing, but the grounds for their development were largely unrelated. Far from representing any culmination of change over time, the making of the Arbitration Act appears to have been a piecemeal and disjointed occurrence.

Investigating the two stages of the Arbitration Act has also allowed this dissertation to come to some surprising conclusions as to why the Act was made. First, it is unlikely that the Act was made to 'fix' how arbitration was then enforced by the courts, an assumption that might be reached if the Act's enforcement procedure were considered in isolation. Whilst the Act did fill a 'gap' in that it provided a way for the courts to enforce the performance of awards in a summary manner, by examining the existing methods of enforcement as well as the apparent lack of contemporary criticism for them, it has been revealed that the effect or 'remedy' of the Act was not especially needed. Second, it is probable that the Act was made to serve as an alternative to erecting merchant courts: although it addressed the principal issues facing merchants in litigating their commercial disputes, the Act was not the solution that merchants had proposed. Nonetheless, John Locke and the Board of Trade appear to have gone against these proposals to advance the Arbitration Act not because they believed it to be the better option, but because it had the better chance of becoming a token achievement of their early efforts. Combining these two conclusions, it would therefore seem that the making

[1] Horwitz and Oldham, 'Arbitration', pp. 141-43.

of the Arbitration Act had little to do with the actual practice of arbitration, a conclusion that finds support in the fact that contemporaries did not resort to the Act's provisions in the decades following its enactment. Whilst the Arbitration Act would later become important, both to contemporaries and to the modern day, its impact on seventeenth-century arbitration was, by contrast, minimal.

2. Consequences of findings

Having set out the principal findings and conclusions of the dissertation, it is worth taking some time to consider their consequences, particularly in relation to previous scholarship. Here it is best to return to the two matters that inspired this study. The first was the incongruity that whilst scholars have acknowledged the importance of arbitration to the period, little has been done to investigate the process further. In the Introduction, this lack of scrutiny was attributed to scholarly disinterest, an opinion which appears to be confirmed by this dissertation as a whole. Not only has this dissertation made clear that arbitration as a subject matter is capable of close study, but it has shown that conclusions can be reached as to the composition, practice, and enforcement of the process. Due to the largely, but not exclusively, extra-judicial nature of arbitration, it may never be possible to assess the incidence of arbitration in a similar way to what Christopher Brooks has done for litigation,[2] but this does not mean that our understanding of the process should therefore be confined to viewing it simply as an alternative to litigation or as a community-based method of dispute resolution.[3] Indeed, there are many facets of arbitration raised by this dissertation that would likely be of interest to scholars. For example, doctrinal legal historians might find it curious that the common law justices formulated a legal fiction so that a reference ordered at the assizes could be enforced at Westminster; or that the court of King's Bench altered the way in which it examined accusations of contempt to accommodate this enforcement practice. Moreover, historians of social order and relations might be surprised to learn that there was a clear and developed 'law' of arbitration, the process was not just prescribed by norms and

[2] C.W. Brooks, *Pettyfoggers and vipers of the commonwealth: the 'lower branch' of the legal profession in early modern England* (Cambridge, 1986), pp. 48-74; 'Interpersonal conflict and social tension: civil litigation in England, 1640-1830' in *The first modern society: essays in English history in honour of Lawrence Stone*, eds. A.L. Beier, D. Cannadine, J.M. Rosenheim (Cambridge, 1989).
[3] James Sharpe, for example, stated of arbitration: 'It is, perhaps, in the nature of the phenomenon that no systematic study of it will ever be possible'. J. Sharpe, '"Such disagreement betwyx neighbours: litigation and human relations in early modern England' in *Disputes and settlements: law and human relations in the west,* ed. J. Bossy (Cambridge, 1983), pp. 167-87, at p.183.

expectations; or that the decisions contemporaries made in conducting an arbitration could impart wider social meaning. Ultimately, this dissertation has only scratched the surface of what was arbitration in seventeenth-century England, so it is hoped that by revealing some of the ways in which the process might be studied, more research can be and will be undertaken.

The second matter to inspire this study was the apparent disparity between, on the one hand, the conciliatory and 'neighbourly' view of arbitration espoused by social historians and, on the other, the fact that the Arbitration Act enabled parties to be imprisoned for contempt if they did not comply with an arbitration. In the Introduction, the need to explain or reconcile this disparity was presented as a driving force of this dissertation, with two related questions being asked. First, in light of the view of arbitration put forward by scholars, why was the Act needed? Second, in light of the passing of the Act, what does it say about this established scholarly view? Albeit similar, these two questions are not one and the same, so unsurprisingly they result in different answers. Regarding the first question, this dissertation has revealed that, at least as it concerned the general practice of arbitration at the time, the Arbitration Act was not needed. The Act was not passed to address any perceived fault with the process, so it should not be seen as some sort of bellwether as to the state of arbitration at the time or of how successful the process was at resolving disputes. The 'why' of the Arbitration Act had little to do with the noted scholarly view. Regarding the second question, however, this dissertation has also shown that the substance of the Act, the enforcement procedure it enabled, was not new. It built on a practice already in use by the common law courts, and it can easily be contextualised within the methods of enforcement at the time. The 'what' of the Act does have an effect on the view put forward by scholars: it shows that legal enforcement was a more entrenched part of the process than previously recognised. Of course, this does not mean that contemporaries were unable to conduct arbitration without court involvement. But what it cautions against is the assumption, one easily made when arbitration is viewed as a conciliatory process, that once a dispute was put to arbitration, it was bound to be determined. There was more to the practice of arbitration than being an endpoint in the disputing process, and it is hoped that future studies will be more receptive to this widened view.

Beyond the matters inspiring this study, there are other ways in which the findings of the dissertation can be seen to affect previous scholarship. One way would be in relation to the 'legalisation' of arbitration that legal scholars have claimed to have occurred as a result of

the Arbitration Act.[4] To summarise the view, it has been argued that as to employ the Act's enforcement procedure required more direct judicial involvement than simply forming a submission, with the increase in the Act's use by the mid-eighteenth century, the practice of arbitration as a whole came by extension to resemble a court process: lawyers were often chosen for the role of an arbitrator, and the way in which an arbitration was conducted took on more of the procedural trappings of a lawsuit. With its focus on arbitration in the seventeenth century, this dissertation is not in a position to assess the extent to which this transformation took place, but its findings can nevertheless speak to the causality of the change. The finding that there were clear legal rules prescribing the practice of arbitration may, for example, dampen the claim that it was because of the Act that the practice became legalised. How much of this noted transformation should in fact be attributed to the effects of the Act? Moreover, even if the Act had brought about such a change, this dissertation's analysis of the Act's drafting would suggest that this outcome had been unintended. The Act was drafted with the express intention of applying to merchants' disputes, and it was only due to an amendment, perhaps made by William Blathwayt, that the scope of the Act's provisions was extended to apply to non-commercial matters. Whilst these findings do not invalidate what legal scholars claim to have later occurred, they might help ward off the taking of a more teleological view of this transformation. Simply because the Act precipitated a process of legalisation does not mean that it had been made or designed for this purpose.

Another way in which the findings of this dissertation could relate to previous scholarship is in reference to recent arguments of social historians on the 'decline' of neighbourliness. Having focused previously on the enduring features of English society in the seventeenth century,[5] recent scholarship on the subject has been more open to questioning whether the period witnessed a change in the structuring of social relations so that the premium once placed on community and neighbourly interaction mattered less by the end of the century.[6] Given that the arbitration has been widely depicted in scholarship as a

[4] H.L. Parker, *The history and development of commercial arbitration* (Jerusalem, 1959), p. 13; Horwitz and Oldham, 'Arbitration', pp. 154-55; C. Burset, 'Merchant courts, arbitration, and the politics of commercial litigation in the eighteenth-century British Empire', *LHR* 34:3 (2016), pp. 615-47, at pp. 616-17.
[5] Most famously, K. Wrightson, *English society 1580-1680* (2003, orig. 1982), pp. 59-65.
[6] For example, K. Wrightson, 'Mutualities and obligations: changing social relationships in early modern England', *Proceedings of the British Academy* 139 (2006), pp. 177-78; 'The "decline of neighbourliness" revisited' in *Local identities in late medieval and early modern England*, eds. N. Jones and D. Woolf (Basingstoke, 2007), pp. 19-49; T. Stretton, 'Written obligations, litigation and neighbourliness, 1580-1680' and M. Gaskill, 'Witchcraft and neighbourliness in early modern

neighbourly process, it is not difficult to see how the Arbitration Act and its enforcement procedure might be taken to reflect this change. As neighbourly ties that had once constrained parties to adhere to arbitration frayed, a more coercive form of enforcement was needed.[7] At least regarding the Act, however, the findings of this dissertation would caution against taking such a view. The Act was made for reasons other than addressing the state of arbitration at the time, so its passing should not be seen as emblematic of any change in social relations. Yet one criticism that could be made of this dissertation is that in its examination of the practice of arbitration, it has not sufficiently addressed the issue of change over time. Priority was instead given to examining how the practice was conducted and the reasons and motivations underlying it. Accordingly, it may well be that the practice had undergone some form of transformation over the period; simply because the Arbitration Act was not reflective of this perceived change does not mean that the more general practice of arbitration had remained constant. It would be a worthwhile objective for future study to consider whether any changes to the practice of arbitration can be discerned.

3. Areas for further research

As a final matter to discuss, it is worth considering possible areas for further research. As noted in the above discussion on the 'decline' of neighbourliness, one area for study would be to address the issue of change over time in the diaries and letters consulted to examine how arbitration was practised in the seventeenth century. It should be mentioned, however, that in undertaking research for this analysis, no general impression was given pointing to any obvious change. That said, these types of sources were not consulted with the explicit intention of looking for a change over time, so this impression might simply be attributable to differing research objectives. Equally worthwhile would be to supplement the sources used for this examination. Only printed diaries and letters were analysed for the study, and it cannot be said that the writers were well-suited to impart a representative view of the more general practice of arbitration, being exclusively men and of the 'middling' sort or higher.

England' in *Remaking English society: social relations and social change in early modern England*, eds. S. Hindle, A. Shepard, J. Walter (Woodbridge, 2013), pp. 189-209, 211-32.

[7] Such an argument has in fact been made in relation to colonial Connecticut for around the same period. B. Mann, 'The formalization of informal law: arbitration before the American Revolution', *New York University Law Review* 59:3 (1984), pp. 443-81, at p. 444. Mann's article was later incorporated into his book on the relations between the law and the community in Connecticut. B. Mann, *Neighbors and strangers: law and community in early Connecticut* (Chapel Hill, N.C., 1987), pp. 101-36.

Yet it cannot be assured that examining additional sources would reveal further accounts of arbitration, or at least accounts that can offer a markedly different view of contemporary practice. With no other way of knowing for certain whether a given source will contain descriptions of arbitration than to trawl through its contents, any further advances in this area of study will likely be slow-going.

Further research could also be undertaken to fill in some of the 'gaps' in the account of the drafting and enactment of the Arbitration Act. Due to time and financial constraints of research, most of this account has been based on the analysis of two sets of sources: the Board of Trade's journals and John Locke's personal papers and correspondence. It might be productive to look into other sources as well, such as the papers of William Blathwayt, one of the known 'drafters' of the Act,[8] or even of John Egerton, the earl of Bridgewater, who not only served as the president of the Board of Trade and as a privy councillor, but was also responsible for chairing the review committee that revised the draft of the Act submitted to the House of Lords.[9] There are also certain features of the account that beg clarification. Who were the 'men experienced in our laws' whom Locke consulted to draft his proposal? Or how did the Board of Trade come to instruct Locke to draw up a scheme involving 'referees' that could be 'decisive without appeal'? Resolving these issues would not only provide a fuller account of the drafting process, but they could put to test the conclusions which this dissertation has reached regarding why the Act was made. For example, it has been argued that the Act had not been pursued out of a concern for how arbitration was enforced at the time, but did the lawyers whom Locke consulted make any comment as to whether the Act's enforcement procedure could provide a more suitable 'remedy' in cases where a party did not perform an award? Moreover, it has been contended that the Board had advanced the Act out of concern for its own survival, but did any of its members discuss their reasons for supporting this proposal, particularly in light of the persistent call amongst merchants for a merchant court? Due to the nature of the surviving sources, there is the possibility that these issues and others like them might never by explained, but it would be comforting to know, especially given the conclusions of this dissertation concerning the impact of the Act on the

[8] The majority of Blathwayt's personal papers and correspondence are found in the Beinecke Library of Yale University. An investigation of Blathwayt's letter-books at the National Archives (TNA, T64/88-90) has revealed nothing relating to the Arbitration Act. For a full list of archived material, see B. Murison, 'Blathwayt, William', *ODNB*.

[9] The papers and correspondence of John Egerton, earl of Bridgewater, are dispersed primarily between the Huntington Library, San Marino, CA and the Hertfordshire Record Office. L. Knafla, 'Egerton, John, third earl of Bridgewater', *ODNB*.

general practice of arbitration at the time, that all practicable avenues for research have been exhausted.

The findings of this dissertation, particularly those relating to enforcing arbitration in its various forms, lend themselves to other areas of research as well. One possibility would be to examine how the court of Chancery, the principal court of equity in the realm, dealt with arbitration. A preliminary investigation into the court's enforcement practices has revealed some interesting findings. The first is that, throughout the seventeenth century, the court was prepared to enforce references using a contempt procedure similar to the one adopted by the common law courts, the chief difference being that it was the referee's award, rather than the order of reference, that became a rule or 'decree' of the court.[10] As the justices of the common law courts often attended Chancery proceedings to give advice on points of law,[11] one wonders whether their exposure to this more long-standing procedure informed or affected how they came to enforce references in their own courts. The second and more surprising finding is that the court of Chancery was prepared to use its contempt procedure not just to enforce the performance of referees' awards, but also to enforce what it called 'extrajudicial' or 'voluntary' awards—that is, awards resulting from the private submission between parties.[12] The immediate significance of this finding is that, prior to the Arbitration Act, it *was* in fact possible to enforce the performance of this type of award, just not in the common law courts: only in the court of Chancery was this remedy available. It is also clear from this preliminary investigation that the court of Chancery was willing to enforce the performance of an 'extrajudicial' award even in instances where the aggrieved party could have or had sought redress from the common law courts, usually by means of the action of debt on an obligation.[13] Accordingly, this would suggest that when a party did not perform the award, the aggrieved party would have had at his disposal more than one option for seeking enforcement, something which might in turn explain the lack of criticism of the ways in which the common law courts had enforced arbitration before the passing of the

[10] *Lovet v Chamberlen* (1582/3), Ch. Cas. 164; *Halford v Bradshaw* (1661) Nels. 83; *Squib v Bradshaw v Bolton* (1670), 1 Chan. Cas. 186; *Cavenish v* ___ (1676), 1 Chan. Cas. 279.
[11] For example, *Squib and Bradshaw v Bolton* (1670), 1 Chan. Cas. 186.
[12] This appears to have been in departure from a 1615 rule made by Lord Chancellor Bacon that 'the court should not help arbitrements made by consent of the [par]ties w[ith]out the order of the court but those only that were made by the arbitrators named by the court'. CUL, G.g.231, fol. 480v. For examples of cases where extra-judicial awards were decreed, see *Scott v Wray* (1634/5), 1 Chan. Rep. 85; *Bishop v Bishop* (1639), Tot. 17, 1 Chan. Rep. 142; *Church v Roper* (1639/40), 1 Chan. Rep. 140; *Norton v Mascall* (1697), 2 Ven. 24.
[13] This was often the argument raised by the defendant to prevent the award being decreed. For example, *Norton v Mascall* (1697), 2 Ven. 24.

Arbitration Act. Although more research would be needed, it is conceivable that on those occasions where an aggrieved party would have preferred for his opponent to perform the award than to receive a sum of money by way of legal remedy, he would have turned to the court of Chancery for enforcement.

Another possible area for research would be in relation to the contempt procedure that the common law courts came to use in the 1650s-1670s to enforce references. As John Charles Fox, writer of the only comprehensive study on the history of contempt, contended, the ability of the common law courts to penalise the offence by means of a summary procedure—that is, by granting a writ of attachment to summon and imprison the disobedient party—was itself a seventeenth-century development.[14] Fox argued that before this time, the courts had punished the offence as any other criminal matter, by indictment or by information, and that it was the 1641 abolition of the court of Star Chamber, the prerogative court which Fox claimed to have had jurisdiction to penalise a contempt committed against the common law courts using a summary procedure, that spear-headed the change to the enforcement practices of these courts.[15] Whilst Fox's arguments are ripe for review, having first been articulated in two articles from 1909, they nonetheless find some support in the research conducted for this dissertation. For one thing, only the legal works and dictionaries published *after* the abolition of the court of Star Chamber acknowledge that a writ of attachment could be used by the common law courts in the context of contempt.[16] For another, in a mid-seventeenth-century report on the fees collected by the clerks of the court of King's Bench, one that was used in Chapter 3 to re-create the court's contempt procedure for the purpose of its analysis, it was noted that 'for examination upon attachments for contempt we do not know what hath been anciently taken by reason of the fewness of them', which might suggest that the procedure was relatively new.[17] If Fox's claims were proven correct, they might in turn provide an additional explanation for the hesitancy shown by the court of King's Bench in the 1650s-1660s to enforce references by means of its contempt procedure.

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[14] J.C. Fox, 'Summary process to punish contempt. I.', *LQR* 25:3 (1909), pp. 238-54; 'Summary process to punish contempt. II', *LQR* 25:4 (1909), pp. 354-71; *The history of contempt of court: the form of trial and the mode of punishment* (Oxford, 1927).

[15] Fox, *The history of contempt of court*, pp. 71-79; 'Contempt. II', pp. 362-67.

[16] For example, pre-1641 legal dictionaries only acknowledged the use of the writ of attachment in the contexts of attachment of privilege, foreign attachment and attachment of the forest—that is, in relation to the forest courts. William Sheppard's *The faithful councellor* (1653) is the earliest source that has been found to discuss the writ of attachment in the context of contempt. W. Sheppard, *The faithful councellor: or the marrow of the law* (1653), pp. 178-79.

[17] This report was reprinted in J. Trye, *Jus filizarii: of, the filacer's office in the court of King's Bench* (1684), pp. 205-52, the above quotation being at p. 221.

It could be that the court's reluctance was reflective of a larger trend of judicial uncertainty as to what issues the court was prepared to apply this new procedure, an area which might be of interest to legal historians in particular.

Appendices

Appendix I – Timeline of events for the making of the Arbitration Act

December 1695	House of Commons introduces proposal to establish a council of trade
28 January 1695/6	House of Commons presents several resolutions for a council of trade, one of which is that 'the said commissioners be empowered to consider the best methods for setting a court merchant'
27 April 1696	Parliament is prorogued
15 May 1696	William III commissions the Board of Trade and Foreign Plantations
25 June 1696	First meeting of Board of Trade
19 August 1696	Board of Trade directs John Locke to 'draw up a scheme of some method for determining differences between merchants by referees that might be decisive without appeal'
31 October 1696	House of Commons requests a report on Board of Trade's progress
9 November 1696	Locke delivers draft of arbitration bill to Board of Trade
18 December 1696	William Blathwayt submits amended draft of arbitration bill to Board of Trade
18 January 1696/7	Locke sends Board of Trade his revisions of Blathwayt's draft. Board orders that the revisions be included in draft of arbitration bill represented to Privy Council
21 January 1696/7	A representation is drawn up of the arbitration bill and is sent to Privy Council
25 February 1697/8	A bill 'for determining differences by arbitration' is read for the first time in House of Lords
28 February 1697/8	Second reading of bill; committed to at least five of forty-three named peers
11 March 1697/8	Earl of Bridgewater reports that the bill is fit to pass with 'some amendments'
26 March 1698	Third reading of bill; passed by House of Lords
31 March 1698	First reading of bill in House of Commons
2 April 1698	Second reading of bill; committed to thirty-three named MPs
9 April 1698	Commons committee is enlarged to include another seventeen named MPs
27 April 1698	Commons committee is enlarged to include 'all the members that are merchants, and all that serve for the cloathing counties'
2 May 1698	Edward Clarke reports that the bill is fit to pass, the only amendment being that the word 'unto' be omitted from first paragraph of bill. Third reading of bill; passed by House of Commons
16 May 1698	'An Act for determining Differences by Arbitration' receives royal assent

Appendix II – Entries from the Board of Trade's journal on the Arbitration Act[1]

Date	Heading	Entry	Board members present
19 August 1696	Trade Domestick. Referees.	Mr Locke was desired to draw up a scheme of some method for determining differences between Merchants by Referees, that might be decisive without Appeal.	*Ex officio*: Earl of Bridgewater, Chancellor of Exchequer Working: John Pollexfen, John Locke, Abraham Hill
9 November 1696	Referees	Mr Lock acquainted the Board that in Order to draw up a scheme of some method for determining differences between Merchants by Referees, that might be decisive without appeale, as had been desired of him by the Board he had enquired into the methods practised in Holland for that purpose, but found them too intricate, and too different from our methods to be put in practise here; whereupon he had consulted with others experienced in our Laws, who had drawn up a draught of an Act of Parliament for that purpose, which he delivered into the Board. Ordered thereupon that a Representation be drawn up, to lay before his Majesty the usefulness of this designe of determining Controversies between Merchants, together with a Copy of this proposed Bill for that purpose.	*Ex officio*: Earl of Bridgewater, Sir Philip Meadows Working: William Blathwayt, John Pollexfen, John Locke, Abraham Hill
16 November 1696	Arbitration. Representation.	A Representation to his Majesty upon the Draught of an Act of Parliament for determining differences between Merchants by Arbitration was read and agreed upon.	*Ex officio*: Earl of Bridgewater, Sir Philip Meadows Working: William Blathwayt, John Pollexfen, Abraham Hill[2]

[1] CO 391/9, pp. 62, 222, 233, 288, 354, 358.
[2] Locke had departed for Oates sometime after 13 November where he would remain for the winter.

18 December 1696	Arbitration	The Draught of an Act of Parliament for determining of Controversies between Merchants by Arbitration. which was intended to have been presented to his Majesty the 18th of the last month, but was then upon some doubt about the forme of it put into the hands of Mr Blathwayt to be advised upon, being now returned with some amendments; Ordered that the Secretary send a Copie of this Second Draught to Mr Locke who brought in the first.	*Ex officio*: Earl of Bridgewater, Sir Philip Meadows Working: William Blathwayt, John Pollexfen, Abraham Hill
18 January 1696/7	Arbitration	Upon reading the remarks sent by Mr Locke upon the Alterations made in the Draught of a Bill presented by him to the Board for determining Controversies between Traders by Arbitration, Ordered that the said Draught be corrected according to these remarks, And a Report prepared to lay it in that manner before his Majesty.	*Ex officio*: Earl of Bridgwater, Sir Philip Meadows Working: William Blathwayt, John Pollexfen, Abraham Hill
21 January 1696/7	Arbitration Represent[ation]	A Representation upon the Draught of a Bill to be proposed in Parliament for the terminating of Controversies by Arbitration, according to the last Corrections ordered to be made of that Draught; Was now[3] signed and transmitted to the Council Board.	*Ex officio*: Earl of Bridgewater, Sir Philip Meadows Working: William Blathwayt, John Pollexfen, Abraham Hill

[3] The words ‘both of them’ have been crossed out.

Appendix III – ‘Trade: Arbitration Bill 96’: Drafts of Arbitration Act found in Locke’s papers[1]

Whereas it hath been found by Experience that references made by Rule of Court have Contributed much to the ease of the subject in the determining of Controversies because the parties become thereby obliged to submit to the Award of the Arbitrators under the penalty of Imprisonment for their Contempt in Case they refuse submission Now for promoting Trade and rendring the Awards of Arbitrators the more effectual in all Cases for the final Determination of Controversies referr’d to them by Merchants and traders concerning matters of Account or Trade Be it Enacted by the Kings most Excellent Majesty and by and with the Advise and Consent of the Lords Spiritual and Temporall and Commons in Parliament Assembled and by Authority of the same That for and after the day of it shall and may be Lawfull for all Merchants and Traders desiring to End any Controversie Suit or Quarrell Controversies Suites or Quarrells by Arbitration to Agree that their Submission of the suite to the Award or Umpirage of any Persons or person should be made a Rule of any of his Majesty’s Courts of Record which the parties shall chuse and to insert such their Agreement in their Submission or into the Condition of the Bond or promise whereby they oblige themselves respectively to submit to the Award or Umpirage of any Person or Persons which Agreement being so made and inserted in their Submission or promise or Condition of their respective Bonds shall or may upon producing an affidavit thereof made by the Witnesses thereunto or any one of them in the Court of which the same is agreed to be made a Rule and reading and filing the said Affidavit in

Whereas it has been found by Experience that Refferences made by Rule of Court have contributed much to the Ease of the subject in the determining of Controversies for which and Action hath been brought Because the Parties become thereby obliged to submit to the Award of the Arbitrators, under the penalty of Imprisonment for their Contempt in case they refuse submission. Now for promoting Trade, and rendring the Award of Arbitrators the more effectuall in all cases, for the finall determination of controversies referred to them by Merchants Traders and others concerning Matters of Accompt, Trade or other matters Bee it Enacted by the Kings most Excellent Majesty by and with the Advise and consent of the Lords Spirituall and Temporall and Commons in Parliament Assembled and by Authority of the same, That from and after the day of it shall and may be Lawfull for all Merchants, Traders, and others desiring to end any Controversy or Quarrell Controversies or Quarrells (for which any Action personal hath been brought) by Arbitration to agree that their submission of the matter in suit to the Award or Umpirage of any persons or person should be made a Rule of his Majesty’s Court of Record in which such suit or Action at the time of such submission was or is depending, so as such submission be in writing and signed by each party submitting and Witnessed by one or more credible persons, and to incert such their Agreement in their submission, or into the Condition of the Bond whereby they oblige themselves respectively to submit to the Award or Umpirage of any person or persons, which Agreement being so made and incerted in their submission or Condition of their respective Bonds shall or

[1] Bodl., Locke MS c. 30, fol. 105.

Court be Entred of Record in such Court and a Rule shall thereupon be made by the said Court that the parties shall submit to and finally be Concluded by the Arbitration or Umpirage which shall be made Concerning ~~them~~[2] by the Arbitrators or Umpire pursuant to such Submission and in Case of Disobedience to such Arbitration or Umpirage the parties neglecting or refusing to performe and Execute the same or any part thereof shall be subject to all the Penalties of Contemning a Rule of Court when he is a Suitor or Defendant in such Court and the Court on Motion shall Issue process accordingly which process shall not be stop'd or delayed in its Execution by any order Rule Command or process or any other Court either in Law or Equity.

may upon producing an Affidavit thereof made by the Witnesses thereunto or any one of them in the Court where such suit or Action was or is depending and reading and fileing the said Affidavit in Court, be entred of Record in such Court and a Rule shall thereupon be made by the said Court that the parties shall submit to, & finally be concluded by the Arbitration or Umpirage which shall be made concerning the matters submitted to Arbitration by the Arbitrators or Umpire pursuant to such submission. And in case of disobedience to such Arbitration or Umpirage, the party neglecting or refusing to performe and execute the same or any part thereof shall be subject to all the penalties of contemning a Rule of Court when he is a Suitor or defendant in such Court, and the Court on Motion shall issue processe accordingly, which Process shall not be stop'd or delayed in its Execution by any Order Rule Command or Processe of any other Court either of Law or Equity.

[2] 'the matters submitted to Arbitration' is included superscript.

Appendix IV – The Board of Trade's Representation of the Arbitration Act[1]

To the Kings Most Excell[en]t Majesty.

May it please your Majesty.

i The great obstructions in Trade arising from the Tedious Determination of Controversies between Merchants and Traders concerning Matt[er]s of Accompt or Trade in Our Ordinary Methods, have obliged us to apply Our selves to finde out some remedy for so great an evill, Whereupon Wee humbly beg leave to lay
v before your Majesty the annext Draught of a Bill, which if past in to Law, Wee humbly conceive would greatly conduce to that End, and Consequently be of very great advantage to the Trade of this Kingdome.

Signed

21th Jan[ua]ry 1696/7:

J Bridgewater	Wm Blathwayt
Tankerville	John Pollexfen
Ph: Meadows	Abr. Hill

1 Whereas it hath been found by Experience that References made by Rule of Court have contributed much to the ease of the subject in the determining of Controversies, because the Parties become thereby obliged to submit to the Award of the Arbitrators under the penalty of Imprisonm[en]t for their contempt in case
5 they refuse submission. Now for promoting Trade and rendring the Awards of Arbitrators the more effectual in all Cases for the final Determination of Controversies referr'd to them by Merchants, Traders and others concerning Matters of Account Trade or other Matters; Be it Enacted by the Kings most Excellent Majesty, by and w[i]th the advice and consent of the Lords Spiritual and
10 Temporal and Commons in Parliament assembled and by Authority of the same, That from and after the Day of it shall and may be lawfull for all Merchants, Traders and others desiring to end any controversy suite or Quarrel, Controversies, suits or Quarrels, for which there is no other legal remedy but by personal Action or suit in Equity by arbitration, to agree that their submission of
15 the same to the award or Umpirage of any Persons or Person should be made a Rule of any of his Majesty's Courts of Record, which the Party shall chuse and to insert such their agreement in their submission, or into the Condition of the Bond or promise whereby they oblige themselves respectively to submit to the award or Umpirage of any Person or Persons, which Agreem[en]t being so made and
20 inserted in their submission or promise or condition of their respective Bonds shall or may upon producing an Affidavit thereof made by the Witnesses

[1] TNA, CO 389/14, 90-92.

thereunto, or any one of them in Court of which the same is agreed to be made a Rule, and reading and filing the said Affidavit in Court, be Entred of Record in such Court and a Rule shall there[upon] be made by the said Court, that the parties shall submit to, and finally be concluded by the Arbitration or umpirage which shall be made concerning the Matters submitted to Arbitration by the Arbitrators or Umpire pursuant to such Submission, and in case of Disobedience to such arbitration or Umpirage, the parties neglecting or refusing to performe and Execute the same or any part thereof, shall be subject to All the penalties of Contemning a Rule of Court, when he is a suiter or Defendant in such Court, and the Court on such Motion shall issue Process accordingly, which Process shall not be stopt or delayed in its Execution by any Order, Rule, Command or Process by any other Court, either or Law or Equity.

Appendix V – Draft of Arbitration Act found in the manuscripts of the House of Lords[1]

Whereas it has been found by experience that References made by Rule of Court have contributed much to the case of the subject, in the Determining of Controversies, because the Parties become thereby obliged to submit to the Award of the Arbitrators, under the Penalty of imprisonment for their contempt in case they refuse submission; Now for promoting Trade, and rendring the Awards or Arbitrators the more effectual in all Cases, for the final Determination of Controversies referred to them by Merchants and Traders, or others, concerning Matters of Account or Trade, or other Matters; Be it enacted by the King's most Excellent Majesty, by and with the Advice and consent of the Lords spiritual and Temporal and Commons in Parliament Assembled, and by authority of the same; That from and after the *eleaventh* day of *May w*[*hich*] [^*shalbe in [the] yeare of our Lord 1698*] it shall and may be lawfull for all Merchants and Traders, and others, desiring to end any Controversie, Suit, or Quarrell, Controversies, Suits, or Quarrells, (for which there is no other remedy but by personal Action or suit in Equity) by Arbitration, to agree that their submission of the suit, to the Award, or Umpirage of any person or persons, should be made a Rule of any of his Majesty's Courts of Record, which the Parties shall chuse, and to insert such their Agreement in their submission, or into the condition of the Bond or Promise whereby they oblige themselves respectively to submit to the Award or Umpirage of any Person or Persons; Which Agreement being so made, and inserted in their Submission or Promise, or Condition of their respective Bonds, shall or may upon producing an Affidavit thereof made by the Witnesses thereunto, or any one of them, in the Court of which the same is agreed to be made a Rule, and reading and filing the said Affidavit in Court, be entred of Record in such Court; And a Rule shall thereupon be made by the said Court, that the Parties shall submit to, and finally be concluded by the Arbitration or Umpirage which shall be made concerning them by the Arbitrators or Umpire, pursuant to such submission; And in case of disobedience to such Arbitration or Umpirage, the Party neglecting or refusing to performe and execute the same, or any part thereof, shall be subject to all the Penalties of contemning a Rule of Court when he is a suitor or Defendant in such Court, And the Court on motion shall issue Processe accordingly; Which Processe shall not be stopt or delayed in it's Execution, by any Order,

[1] HLRO, HL/PO/JO/10/1/498/1219.

Rule, Command, or Processe of any other Court, either of Law or Equity, unlesse it shall be made appeare on oath, to such Court, that the Arbitrators or Umpire misbehaved themselves, and that such Award, Arbitration or Umpirage was procured by Corruption or other undue means.

And be it further enacted by the Authority aforesaid, that any Arbitration or Umpirage procured by Corruption, or undue means, shall be judged and esteemed void, and of non effect, and accordingly be set aside by any Court of Law or Equity; so as Complaint of such Corruption or undue Practice be made in the Court where the Rule is made for Submission to such Arbitration or Umpirage ~~within~~ *before the last day of the* [^*next terme*] after such Arbitration or Umpirage made and published to the Parties, any thing in this Act contained to the contrary notwithstanding./

Appendix VI – An Act for determining Differences by Arbitration[1]

Whereas it hath been found by Experience That References made by Rule of Court have contributed much to the Ease of the Subject in the determining of Controversies because the Parties become thereby obliged to submitt to the Award of the Arbitrators under the Penalty of Imprisonment for their Contempt in case they refuse Submission Now for promoting Trade and rendring the Awards of Arbitrators to more effectual in all Cases for the final Determination of Controversies referred to them by Merchants and Traders or others concerning Matters of Account or Trade or other Matters Be it enacted by the Kings most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal and Co[m]mons in Parliament assembled and by Authority of the same That from & after the Eleventh Day of May which shall be in the yeare of our Lord One thousand six hundred ninety eight Itt shall and may be lawfull for all Merchants and Traders & others desiring to end any Controversie Suit or Quarrel Controversies Suits or Quarrels (for which there is no other Remedy but by Personal Action or Suit in Equity) by Arbitration to agree that their Submission of their Suit to the Award or Umpirage of any person or persons should be made a Rule of any of His Majesties Courts of Record which the Parties shall choose and to insert such their Agreement in their Submission or the Condition of the Bond or Promise whereby they oblidge themselves respectively to submitt to the Award or Umpirage of any Person or Persons which Agreement being so made and inserted in their Submission or Promise or Condition of their Respective Bonds shall or may upon producing an Affidavit thereof made by the Witnesses thereunto or any one of them in the Court of which the same is agreed to be made a Rule & reading and filing the said Affidavitt in Court be entred of Record in such Court and a Rule shall thereupon be made by the said Court that the Parties shall submitt to & finally be concluded by the Arbitration or Umpirage which shall be made concerning them by the Arbitrators or Umpire pursuant to such Submission And in case of Disobedience to such Arbitration or Umpirage the Party neglecting or refusing to performe and execute the same or any part thereof shall be subject to all the Penalties of contemning a Rule of Court when hee is a Suitor or Defendant in such Court and the Court on Motion shall issue Processe accordingly which Processe shall not be stopt or delayed in its Execution by any Order Rule Co[m]mand or Porcess of any other Court either of Law or Equity unlesse it shall be made appeare on Oath to such Court that the Arbitrators or Umpire misbehaved themselves and that such Award Arbitration or Umpirage was procured by Corruption or other undue Means.

And be it further enacted by the Authority aforesaid That any Arbitration or Umpirage procured by Corruption or undue Means shall be judged and esteemed void and of none Effect and accordingly be sett aside by any Court of Law or Equity so as Complaint of such Corruption or undue Practise be made in the Court where the Rule is made for Submission to such Arbitration or Umpirage before the last Day of the next Terme after such Arbitration or Umpirage made and published to the Parties Any thing in this Act contained to the contrary notwithstanding.

[1] 9 & 10 Will. III, c. 15.

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