THREE CENTURIES OF COMMERCIAL ARBITRATION IN NEW YORK: A BRIEF SURVEY*

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Except for its use in connection with labor disputes, arbitration is generally regarded as an extraordinary substitute for the adjudication of disputes in law courts. The proponents of arbitration argue, *inter alia*, that it is cheaper, quicker, and less acrimonious than a law suit, and enables parties to have issues decided by experts in a particular industry who have knowledge of trade usages, customs, and the like of that industry.[1] In reply to this, it is asserted that arbitration is frequently a drawn-out process since many cases drag on for months or even years and sometimes end up in courts anyway.[2] Further, it is argued that arbitration is often a means whereby persons or groups in a dominant position in a trade or industry can force persons dealing with them to submit disputes to prejudiced tribunals, or at any rate, to tribunals that will not upset the prevailing power structure. All of these arguments for or against arbitration, it should be noted, are in terms of its present utility or lack of it. Indeed, arbitration is generally presented by its proponents as something new, something whose case must be advocated before the unbelievers, and the replies are in the same terms. It is rarely treated as an established institution.

Yet it is commonplace among those who write about arbitration that it has been in use for centuries.[3] No one, however, seems to have considered it worthwhile to investigate the history of this subject in a systematic way to see just how it has been used in the past. This has been true even though a complete understanding of the subject can be gained only by a study of its history as well as of its present use. Accordingly, it was decided by the University of Chicago Law School, in connection with its research on the problem of commercial arbitration as a whole, to investigate the history of arbitration. This study resulted.

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*The writer was employed as a research associate by the University of Chicago Law School to work on its research project on commercial arbitration in 1954-55. Most of the material used in this paper was gathered at that time and it is used here with the permission of Professor Soia Mentschikoff, the director of the project. The opinions expressed are, however, those of the writer and not necessarily those of the law school.

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1. See Phillips, *A General Introduction* (to a symposium on arbitration), 83 U. PA. L. REV. 119-21 (1934).

2. *Ibid.*

3. See, *e.g.*, Ellenbogen, *English Arbitration Practice*, 17 LAW & CONTEMP. PROB. 656-59 (1952); Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934).

As indicated, almost no previous work of any consequence has been done in the field. Since the resources available for this research were limited, it was necessary to concentrate the study to one area and New York was chosen as the place to be investigated because of its paramount importance in the American commercial world. Although the study, even of New York, is by no means definitive, the results obtained have been in many ways most interesting. It is frequently asserted that in order for there to be a significant quantity of arbitration there must be legal provisions for the enforcement of agreements to arbitrate future disputes.[4] There was no such provision in New York until 1920[5] and this study was thus limited to the period prior to that time. The evidence that has been uncovered shows conclusively, however, that arbitration has been an important means of deciding disputes since the earliest days of European settlement in New York in the seventeenth century. The widespread and continuous use of arbitration over such a long period without any provision for the enforcement of agreements to arbitrate is, of course, of great significance to the study of arbitration. It is also, however, of considerable significance to any consideration of our legal system as a whole. If a significant number of disputes have always been decided by arbitration, one is forced to reconsider the generally held belief that courts are practically the only important dispute-settling agency in our society.

Before describing the evidence that has been discovered, however, it is necessary to consider the question of just what is meant by the use of the term "arbitration." The term does not have anything approaching a fixed meaning, and it is not meant to fix limits to its meaning—to define it—here. It is sufficient to say that, as considered here, arbitration is a process in which a dispute between two or more parties is submitted for decision to another party or parties who are not judicial officials of the government serving in courts or administrative tribunals. The submission may be made completely voluntarily by the parties themselves after the dispute has arisen—the classical situation of the three goddesses asking Paris to award the apple to the most beautiful. Or it may be that a court will order a matter that has come before it to be submitted or, as the process is more generally described in this situation, "referred" to an arbitrator for decision. Or a group or association to which the parties belong may have a panel of "arbitrators" (who could equally well be called judges, of course, but generally are not) to which disputes of the members are submitted and by which they are decided. Again, parties to a contract may agree in advance that any disputes between them will be submitted to arbitration.

4. *Cf.* BIRDSEYE, ARBITRATION AND BUSINESS ETHICS 62-68 (1926).
5. N.Y. Sess. Laws 1920, c. 309.

Doubtless there are other types of submission, but these seem to be the principal ones. Essentially, then, arbitration, as treated here, is any system of private adjudication by persons other than judges or administrative adjudicatory officials though it may arise out of a law suit in court. So considered, arbitration has, as indicated, existed in New York from its earliest days. The evidence of this practice will be considered in chronological fashion.

I. THE DUTCH PERIOD, 1624-64

Dutch West India Company

The Dutch settlement of New York began in 1624. The colony was under the complete control of the Dutch West India Company—a chartered trading company somewhat similar to the British East India Company. The government of this settlement consisted of a company appointed director and council.[6] These acted jointly as the only court for the colony for both civil and criminal cases. The colony was very small at first, containing perhaps 200 to 300 persons, and doubtless there were few formal legal proceedings. Evidently, however, there was some dissatisfaction with this court as well as with the government in general. In any event, after considerable unrest, which resulted in the recall of one governor and the appointment of another, Peter Stuyvesant, there was provided a body of nine men elected by the people of the colony to advise the governor and council.[7]

> This body, who were known as the board of the nine men, had certain judicial powers conferred upon them. Three of their number attended in rotation upon every court day, to whom civil cases were referred as arbitrators, and their decision was binding upon the parties, though an appeal lay to the governor and council, upon the payment of one pound Flemish.[8]

This body constituted the court of the colony until 1653.

In 1653, after considerable opposition by Stuyvesant and the Company, the new court of "schout, burgomasters, and schepens," similar to the court of the city of Amsterdam, was established for the town of New Amsterdam. Although this body had other functions besides that of a court (a characteristic of most courts of the Dutch period), it was the chief court of the colony and was, in fact, the direct ancestor of the Mayor's Court of New York City and, thus, of the Court of Common

6. C. P. Daly, *History of the Court of Common Pleas*, in 1 Smith xix (N.Y.C.P. 1855) (hereinafter cited as Daly); 1 HISTORY OF THE STATE OF NEW YORK 261-62 (Flick ed. 1933); R. L. Fowler, *Introduction*, in LAWS & ACTS xviii-xxi (1894) (a facsimile of the laws and acts of the general assembly for the province of New York, prepared under supervision of R. L. Fowler for the Grolier Club of New York) (hereinafter cited as Fowler); NISSENSON, THE PATROON'S DOMAIN 11 (1937).

7. Daly xxii; Fowler xxii; LAWS AND ORDINANCES OF NEW NETHERLANDS 75 (O'Callaghan transl. 1868).

8. Daly xxii.

Pleas of the City and County of New York. This court consisted of two burgomasters and five schepens appointed by the governor. Although in Holland the burgomaster and schepen performed separate functions, it appears that in New Amsterdam they sat together as a single court presided over by the senior burgomaster.[9] Its ordinary procedure seems to have had no elements of arbitration, but Judge Daly wrote, in his history of the Court of Common Pleas:

> If it was intricate, or it was difficult to get at the truth, it was the constant practice to refer the cause to arbitrators, who were always instructed to bring about a reconciliation between the parties, if they could; and this was not confined merely to cases of disputes about accounts, or to differences growing out of contracts, but it extended to nearly every kind of case that came before the court. The arbitrators were left to the choice of the litigants, or appointed by the court, or one of the schepens was directed to take the matter in hand, and try and reconcile the contestants. If no reconciliation could be effected, or the parties would not submit to the final determination or conclusion of the arbitrators, the dissatisfied party might again bring the matter before the court, where it was finally disposed of. These references were frequent upon every court day. In fact, the chief business of this tribunal was, in acting as a court of conciliation; and it is worthy of remark, that though the amount involved was frequently considerable, or the matter in dispute highly important, that appeals to the court from the decision of the arbitrators were exceedingly rare. Indeed, the first appeal to be found upon the records was brought by a stranger.[10]

It is helpful in attempting to visualize what this meant to realize that the population of New Netherland was probably between 7,000 and 8,000 in 1664.[11]

There were courts in many of the other towns of the colony,[12] but nothing has been found to show whether or not they used arbitration. It seems probable however, in view of the size of the colony, that, at least in the towns containing primarily Dutch settlers, there would have been a similarity of practice and procedure.

The Patroonships

Apart from the area directly controlled by the colonial government, there were also in the colony certain areas under the control of the famous subgovernments called patroonships. The patroonship was a colonizing device to encourage wealthy members of the Company to

9. Daly xxiii; 1 HISTORY OF THE STATE OF NEW YORK 308 (Flick ed. 1933); R. Morris, *Introduction*, in 2 AMERICAN LEGAL RECORDS: SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 40-43 (Morris ed. 1935) (hereinafter cited as Morris).

10. Daly xxix.

11. GREENE & HARRINGTON, AMERICAN POPULATION BEFORE THE FEDERAL CENSUS OF 1790, at 88, 93 (1932).

12. Fowler xxviii.

bring, or cause to be brought, emigrants to New Netherland and to settle them there. In return for doing this, the patroon was permitted to obtain a vast quantity of land from the Indians and was given great powers over the territory thus obtained, including almost complete civil and criminal jurisdiction over those who dwelt there.[13] Several of these ventures were begun, but only one, apparently, became well established—that of the van Rensselaers called Rensselaerswyck.[14]

In Rensselaerswyck a court was established with both civil and criminal jurisdiction over those who dwelt within the domain. At the trials held by this court a jury was never used. However,

> [i]n criminal and quasi-criminal, as well as in civil, matters use was frequently made of conciliators (*goede mannen*), usually two or four in number. Sometimes this was done at the instigation of the court; more often at the request of either, or upon the agreement of both, the parties, who usually named their respective conciliators. The latter might be members of the court, or outsiders, or both. They were arbitrators in the modern sense; judgment followed their decision.[15]

Influence of the Dutch Practice

Inasmuch as both the patroon's court[16] and that of the Company's government[17] had a fairly good selection of Dutch law books to guide them and, in the case of the Company at least, a few men who had been trained as lawyers in Holland,[18] it seems probable that this use of arbitration reflected Dutch practice of the time.

In 1664 the government of the colony was transferred from Dutch to English rule.[19] It is impossible to say accurately how much of this Dutch practice remained to influence the English colony. However, it does seem clear that Dutch law and practices continued after 1664. Indeed, it would be quite surprising if they had not. The practice of arbitration has been described as one of the outstanding instances of the influence.[20] In 1665 the governor, Col. Richard Nicolls, acting under the authority of the proprietor of the colony, the Duke of York, promulgated for the government of the colony what are known as the Duke's Laws[21]—a code containing provisions on both procedural and substantive matters derived principally from the codes of the other English colonies. This code included the following provision:

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13. *Id.* at xxiii-xxiv; NISSENSON, THE PATROON'S DOMAIN 22-27 (1937).
14. NISSENSON, THE PATROON'S DOMAIN 28, 29 & n.14 (1937).
15. *Id.* at 139.
16. *Id.* at 148-49.
17. Daly xxvii; Morris 42; 7 RECORDS OF NEW AMSTERDAM 139 (Fernow ed. 1897).
18. Daly xxvii.
19. The Dutch reoccupied New York for 15 months beginning July 30, 1673.
20. 3 HISTORY OF THE STATE OF NEW YORK 5-6 (Flick ed. 1933); Morris 44.
21. 3 HISTORY OF THE STATE OF NEW YORK 11-16 (Flick ed. 1933); COLONIAL LAWS OF NEW YORK 6 (Lincoln, Johnson & Northrup eds. 1894).

> All actions of Debt or Trespasse under ye value of five pounds between Neighbors shall be put to Arbitration of two indifferent persons of the Neighborhood to be nominated by the Constable of the place; and if either or both parties shall refuse (upon any pretense) their Arbitration: Then the next Justice of the peace upon notice thereof by the Constable shall choose three other indifferent persons; who are to meet at the Dissenters charge from the first Arbitration and both plaintiffs and Defendant are to bee concluded by the award of the persons so chosen by the Justice.[22]

This has been regarded by some as evidencing a carry-over of the Dutch practice. In any event it shows that there was arbitration in the English colony from its very beginnings.

II. ENGLISH COLONY, 1664-1783

Whatever may have been the precise influence of Dutch tradition on later practice, New Yorkers would not have had to rely on Dutch precedents. There was arbitration in England at least as early as the fourteenth century[23] and in 1698 Parliament enacted the first arbitration act.[24] This act authorized courts to enter judgments on the awards of arbitrators if the parties had so agreed in the submission of their case to arbitration.

From whatever source they derived the practice, the colonists engaged in extensive arbitration throughout the period of English rule. The evidence of this fact that has been discovered is plenteous and may be divided into four main categories: (A) court and other legal records; (B) newspaper materials; (C) mercantile letters; (D) the records of the New York Chamber of Commerce. Since the material is generally unfamiliar, it is set forth primarily by means of extensive quotations.

A. Court and Legal Records

Instances of arbitration in colonial court records are relatively frequent considering the sparseness of the available records. There are not, it should be remembered, any reports of decisions of colonial judges, trial or appellate, during the pre-revolutionary period. The only materials of this type that are available—at least the only ones that the writer has been able to locate—are minute-books of courts kept by clerks. In these there appears under each entry the title of the case and frequently, though not invariably, the nature of the action or of the motion that caused the entry to be made and the dispo-

22. COLONIAL LAWS OF NEW YORK 7 (Lincoln, Johnson & Northrup eds. 1894).

23. Thus an offer to arbitrate a dispute is found in London as early as 1327. CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON 1323-1364, at 20 (A. Thomas ed. 1926). See also MALYNES, CONSUETUDO: VEL LEX MERCATORIA, OR THE ANCIENT LAW MERCHANT 311 (1656); Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597-98 (1928).

24. 9 & 10 WILL. 3, c. 15 (1698).

sition that was made of it. These records are by no means complete and are largely unedited and unpublished and hence, generally unusable.

Nonetheless, the material that is available furnishes references to arbitration in a variety of contexts. Thus, in the minute-books of the Court of Assizes held in the City of New York from 1680 to 1682[25] there are three cases involving arbitration. One was an appeal from a judgment of the Court of Sessions in which the appellants were fined £10 for not abiding by an award—apparently in connection with the boundaries of real estate.[26] The next was an action of account for £156.6.9 for goods and merchandise sold and delivered at various times between 1677 and 1681.[27] The plaintiff requested that the account be submitted to disinterested persons (presumably there would be the problem of figuring the total amount due when all orders, sales, allowances, and payments were computed). The final case was an appeal from a successful action to enforce an award by arbitrators of £310.[28]

In the next decade, 1693-1704, an additional three cases involving arbitration are to be found in the minutes of the Supreme Court of Judicature. In one, evidently an action in rem against certain iron, perhaps a customs matter, the Attorney General moved to have the iron valued by appraisers appointed for the purpose.[29] In another, an objection was made to two jurors on the ground that they had served as arbitrators in the same case.[30] In the final case, it is noted that the parties agreed to place a matter that had been brought to court to arbitration.[31] A later case in 1748 seems to be to the same effect, though the minutes are not clear.[32]

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25. *Proceedings of the General Court of Assizes Held in the City of New York, October 6, 1680 to October 6, 1682*, in COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY FOR 1912, at 3 (1913).

26. *Id.* at 6.

27. *Id.* at 29.

28. *Id.* at 31.

29. *Minutes of the Supreme Court of Judicature from April 4, 1693 to April 1, 1701*, in COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY FOR 1912, at 63 (1913).

30. *Id.* at 78.

31. *Minutes of the Supreme Court of Judicature of the Province of New York 1691-1704*, in COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY FOR 1946, at 57 (Hamlin & Baker eds. 1952). There are actually minutes only for 1691-92 and 1701-04.

32. MINUTES OF SITTINGS OF THE COURT FOR TRYALL OF CAUSES BROUGHT TO ISSUE IN THE SUPREME COURT (unpublished manuscript in the Bar Association of the City of New York Library) (apparently a copy of an original record):

> Att a court for trial of causes Brought to Issue in the Supream Court held for the Province of New York held at Jamaica for Queens County on Tuesday the 6th Day of September 1748, Present the honourable James DeLancey Esq. Chief Justice of the Province of New York. The Court opened. Ordered by consent of Partys That This cause go off and That The costs of This court attend the Event of the cause.

Perhaps the largest group of New York colonial court records available is contained in the selection of cases from the Mayor's Court of New York, edited by Professor Richard B. Morris.[33] These again are not reports in the modern sense, but frequently contain fuller statements of the facts (or alleged facts) from a summary of the pleadings than are found in other collections. This court, as indicated above, was descended from the old Dutch court of burgomasters and schepens, and was, in turn, the ancestor of the Court of Common Pleas.[34] The selection contains cases arising from 1674 to 1784, and references to arbitration occur throughout the period. Arbitration seems to have taken place largely as the result of the agreement of the parties to submit to arbitration a case that had been brought in court and to have judgment entered on the award of the arbitrators. The subject matter of the disputes so referred could not have been more various. There were cases involving assault and battery, mayhem, seamen's wages (the latter all in four connected cases showing a certain constancy in the nature of sailors through the centuries),[35] sale of a "stear," [36] trover for a cow,[37] trespass to realty,[38] medical services to a servant,[39] etc.

In addition to indications in court records, the account-book of two prominent colonial attorneys, John Jay and Robert R. Livingston, Jr., shows them to have been engaged in a long and apparently lucrative (for them) arbitration in New Jersey.[40] The dispute probably involved the ownership of a huge tract of land. The proceeding seems to have taken over two years (February 1771 to April 1773) and to have resulted in a fee of over £85, a considerable sum at the time.

Apart from these materials, there was enacted towards the close of the colonial period, in 1766, a statute concerning arbitration.[41] It provided that on the motion of either party a case that involved long accounts would be referred to arbitrators for decision. This provision,

33. 2 AMERICAN LEGAL RECORDS: SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784 (Morris ed. 1935).

34. See text supported by note 9 *supra*.

35. Richard Barrow Ver Richard Gilbert in Case, 2 AMERICAN LEGAL RECORDS, *op. cit. supra* note 33, at 552 (Mayor's Ct. N.Y. 1726); Richard Barrow Ver Richard Gilbert Trespass Assault and Maime, *ibid.* (Mayor's Ct. N.Y. 1726); Richard Gilbert Ver Richard Barrow, *ibid.* (Mayor's Ct. N.Y. 1726); Richard Barrow Ver Richard Gilbert Trespass Dam[a]ge, *ibid.* (Mayor's Ct. N.Y. 1726).

36. Stephen Hunt agt Edward Kelly, 2 *id.* at 560 (Mayor's Ct. N.Y. 1740).

37. Anthony Lespenard agt Solomon Palmer, 2 *id.* at 561 (Mayor's Ct. N.Y. 1745).

38. David Jon: Provoost et Uxor ads Bartow Miller, 2 *id.* at 563 (Mayor's Ct. N.Y. 1753).

39. John Van Solingen Ver Benjam. D'Harriette, 2 *id.* at 554 (Mayor's Ct. N.Y. 1730).

40. JAY & LIVINGSTON, REGISTER OF CASES 1771-1782 (unpublished manuscript in New York Historical Society Library).

41. 4 COLONIAL LAWS OF NEW YORK 1040 (Lincoln, Johnson & Northrup eds. 1894).

considerably amended, it may be noted, is now section 466 of the New York Civil Practice Act.

B. Newspapers

Among the most valuable sources of information about the colonial —or any other—period are, of course, newspapers. The colonial newspapers present a special problem, however, in that most, though not all, of the news in their columns is European and evidently cribbed from English papers. The advertisements are the chief source of information on the life of the colonists. In these there are a surprisingly large number of references to arbitration. These are generally, of course, somewhat tangential, but are nonetheless definite. Thus, there are many advertisements by stationers and printers of the papers offering to sell printed forms such as wills, powers of attorney, and the like. Among these are arbitration bond forms—the instruments by means of which parties submitted causes to arbitration.[42] There is an advertisement by a scrivener offering to prepare various legal papers among which are specified "accounts for arbitration."[43] There are also advertisements by a bookseller offering for sale several English legal texts just arrived, and included in the list is a text on arbitration.[44]

References of this type, being so casual, tend to indicate a general use and acceptance of arbitration even more clearly than a discussion of the subject or references to specific instances. However, the latter are not lacking. Thus, one William Channing felt impelled to pay for a notice in the columns of the New York Gazette in several issues in the spring of 1731, that contrary to the reports being spread by his adversary William Vesey that he was not willing to arbitrate his dispute, he was, on the contrary, willing "to have all Things in Dispute to the final Determination of any Merchant or Merchants in this City."[45] In a similar vein Mr. Josiah Quimby offered in an advertisement to submit a dispute with the Dutch church to "2, 3, 5, or 7 of yourselves, Members of the *Dutch Church*."[46] Another colonist advertised that certain notes which he had given to abide by the award of arbitrators had disappeared and all persons were warned that since no award had been given no money was due on the notes.[47]

There are also indications of arbitration in connection with the division of prizes—privateering being a leading branch of colonial com-

42. N.Y. Weekly Post-Boy, Oct. 31, 1743, Dec. 21, 1747, Jan. 11, 1748; N.Y. Gazette or Weekly Post-Boy, June 30, July 21, Aug. 25, Sept. 15, 1755.
43. N.Y. Weekly Post-Boy, May 6, 1745.
44. N.Y. Gazette or Weekly Post-Boy, June 23, 1755.
45. N.Y. Gazette, March 15, 22, 1731.
46. *Id.* Jan. 28, 1734.
47. *Id.* Oct. 22, 1733. Presumably the notes were negotiable. If so, this fact would explain the writer's anxiety since the concept of negotiability was well recognized in New York during the colonial period. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW 42-43 (7th ed., Beutel 1948).

mercial activity. This is not surprising since the eighteenth century was one of almost constant war between Britain and her colonial and mercantile rivals, especially France. Thus, in one newspaper there is a series of advertisements in 1745 stating that:

> The Arbitrators for Setting the Differences between the four Privateers formerly arrived here with Six *French* Prizes will meet at the House of Robert Todd every Friday Evening til the whole is settled.[48]

The arbitrations in this case were later referred to disapprovingly in an editorial in the paper as being the unnecessary result of a poor administration of the prize court which gave rise to law suits and arbitrations and "Quarrels of sundry sorts."[49]

There also appeared in the New York Gazette and Weekly Post-Boy what was, in form, a letter from one friend to another urging him not to take his case to a law suit,[50] but to submit it to arbitration because of the delays and expense of legal proceedings. It was evidently copied from an English newspaper and read, in part:

> I am sorry to hear that the Difference between you and Mr. A———is at last like to be brought to a Law-Suit. . . . The Law, my good Friend, I look upon more than any one thing as the *proper* Punishment of an overhasty & perverse Spirit, as it is a Punishment that follows of a man's own seeking and chusing. You will not consent perhaps *now* to submit the Matter in Dispute to Reference; but let me tell you that after you have expended large Sums of Money, and squander'd away a deal of Time & Attendance on your lawyers, and Preparations for Hearings one Term after another, you will probably be of another Mind, and be glad *Seven Years* hence to leave it to that Arbitration which you now refuse. . . .[51]

C. Mercantile Papers

Another group of materials to be considered consists of the letter-books of several New York merchants. These were books in which were made copies of letters sent out by the individual or firm. They are, thus, somewhat similar to the correspondence files containing carbon copies of outgoing letters which would be found in any modern business establishment. For the purposes of this study, three of these books were read. These were the letter-books of Gerard G. Beekman,[52] John Watts,[53] and of the firm of Greg and Cunningham.[54]

48. N.Y. Weekly Post-Boy, Jan. 21, 28, Feb. 11, 18, 25, March 4, 11, 18, 25, April 1, 8, 15, 29, May 6, 1745. For another reference to prize arbitrations, see the letters of a merchant cited in note 55 *infra*.

49. *Id.* Nov. 4, 1745.

50. *Id.* May 20, 1751.

51. *Ibid.*

52. *Gerard G. Beekman Letter Book*, in 1 BEEKMAN MERCANTILE PAPERS (New York Historical Society Publications 1954, White ed. 1955).

53. *Letter Book of John Watts 1762-1765*, in COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY FOR THE YEAR 1928 (Barck ed. 1928).

54. LETTER BOOK OF THE FIRM OF GREG AND CUNNINGHAM (unpublished manuscript in New York Historical Society Library).

In the letter-book of Gerard G. Beekman there are several references to arbitration that appear throughout the period covered—approximately twenty years beginning in 1746. It should perhaps be mentioned that Beekman was a fairly prosperous and quite well-connected New York merchant, who frequently acted as New York agent for Rhode Island firms. On July 18, 1746, in a letter to the Rhode Island mercantile firm of Vernon and White, Beekman, evidently acting as the firm's New York agent, wrote, in connection with the division of a prize cargo: "Shall consult them What person to Chuse of your side to (deter)mine What Poroportion (sic) your Vessell shall draw of this (Pri)ze as it will be Left to Three Indifferent men. . . ."[55] In August, in connection with the same matter and to the same addressee, Beekman wrote that he was awaiting the results of the arbitration and named the arbitrators, adding, "I think all good men and Judges in such Cases."[56]

On May 7, 1761, Beekman wrote to the Rhode Island firm of Evan and Francis Malbone regarding insurance on a damaged ship owned by them.[57] Beekman was again evidently acting as New York agent and wrote that the insurers had offered half the premium paid or to leave the matter to arbitrators.

On May 1, 1762, he wrote to Solomon Townsend in Rhode Island, evidently acting as his agent in a controversy with insurers.[58] After stating the insurers' position, he wrote, "if you think Otherwise it must be Left to a Reference." Again, on August 3, 1762, in reference to the same matter he wrote, "they are willing to Leave it to a Reference."[59]

On February 21, 1763, he wrote to the firm of Southwick and Clark in Rhode Island, again about insurance:

> [A]s to leaving it to reference the Gentlemen who are acquainted in these affairs have so often been Trouble with settling such accounts both parties not always Pleased that Scarce any One of them Chuses to do it again.[60]

In the letter-book of Thomas Greg and Waddell Cunningham, there appear considerably more references to arbitration in view of the fact that the book covers only one year—1756-57. Greg was a merchant in Belfast while Cunningham was in New York. This letter-book was kept by Cunningham, and relates to the first year of the partnership.

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55. *Gerard G. Beekman Letter Book*, in 1 BEEKMAN MERCANTILE PAPERS 3 (New York Historical Society Publications 1954, White ed. 1955).
56. *Id.* at 5.
57. *Id.* at 378-79.
58. *Id.* at 410.
59. *Id.* at 414.
60. *Id.* at 427.

It would seem probable that Cunningham was a more prosperous merchant than Beekman.[61]

The first letter relating to arbitration is written to Messrs. Hyde and Hamilton, merchants in Manchester, England, on May 10, 1756.[62] Evidently, Cunningham had been acting as agent for the addressee firm in trying to collect the amount of the draft, charges of protest, and damages for a bill which was sent by the firm of Wallace and Bryant to Hyde and Hamilton in payment of a debt and which was returned protested. Wallace and Bryant declined to pay the damages, but offered to pay the amount of the draft, interest, and the charge of protest, and to leave the matter of damages to arbitration if desired. Later, on September 13, 1756, Cunningham wrote to Hyde and Hamilton, regarding this affair:

> Annexed you have copy our last by the Packet. We refer'd your dispute with Wallace and Bryan to Mr. Redmond Cunningham, and Mr. Henry Harrison, who gives it as their Oppinion, that you have no right to Damages on the Returned bills, more than the Interest and Charges of protest, as it was remited on Acct of them Genl [Generally?] & you run no risk, we found out, that Wallace & Bryan had some Goods from you, which they disputed taking for some time, and proposed to have an Allowance of time after they were due, for the payment of them, but this they have dropt & agrees to allow you, Interest on all your Goods, from the time they are due by your act annexed. . . .[63]

Earlier, on June 3, 1756, Cunningham wrote to Messrs. Aspinwale & Doughty, "Merchants present" (*i.e.*, in New York):

> I have received from Mr. Haliday and Messrs. McQuoid & Haliday proper proof to enable me, either to leave your disputes, to a Court, or arbitrators. I am of opinion, when the expenses are made very large, matters must be left to arbitration by order of the Court, & as yet they can't be much, I am now ready to leave all matters in dispute to two men of Character & Credit, in the place, you to choose one, me another, & if they can't agree they to choose a third, & their award to be binding. I shall expect your answer to this in writing. . . .[64]

Regarding the same matter he wrote on June 28, 1756, to Messrs. William Haliday and Hugh McQuoid, "Merchants in Liverpool":

> I have the pleasure of a letter from Mr. Wm. Haliday, of the 31st March, with the sundry proofs, of your affairs in dispute with Messrs. Aspinwale & Doughty. I have had them examined on the subject, but tho I have sent for an answer, they think proper to defer it, my reason for writing them was, least they sho'd deny

61. HARRINGTON, THE NEW YORK MERCHANT ON THE EVE OF THE REVOLUTION 12, 303 (1935).

62. LETTER BOOK OF THE FIRM OF GREG AND CUNNINGHAM (unpublished manuscript in New York Historical Society Library).

63. *Id.* at 114.

64. *Id.* at 33.

in Court I offe'rd Arbitration, which I am sure will have A great weight both with the Court, & Jury, if it shou'd come to Tryal, rest assured that all in my power shall be done for your interest, & that you shall often hear from me.[65]

On October 27, 1756, to Messrs. Haliday and McQuoid:

It gives us great Concern to Inform you, that by a positive affidavit Messrs. Aspenwale & Doughty made that Philip Ambrose their Bookeeper when they had the Transactions with you, has been absent, since your Actions Commenced & is expected here before the next Court & that he is Their principal evidence the Court admitted your Tryalls should be put of on their paying the Costs of this Court, tomorrow being the last day of this Court, our Lawyer gives Them notice of Tryal at next Court in Jan'y when we Sincerely wish, we may be able to end your affairs they Take all Methods to put of the Tryalls & if they will sware hard, they may put it off, for another Court, on paying Costs you may rest assured they will E[x?]pose themselves in the End.[66]

The matter was also mentioned in a letter addressed to Mr. Samuel Knuble in New Brunswick and dated November 16, 1756:

I have been told that you said to some gentlemen here that Mr. William Haliday or Messrs. Haliday & Dunbar Merchants in Liverpool, sent you a Bale of goods, that was invoiced about 25% more than they cost, & that the way you came to find out this villainy, was, from the maker's Bill of Parcel being packed in the Bale . . . these gentlemen did business some time for Messrs. Aspinwale & Doughty of this city, but in the end a difference arose, which I am now settling for them, by Law, by order of Court, their disputes are left to arbitration & the arbitrators are Wm. Walton, Philip Livingston & John Watts Esqrs, I find what I now mention to you is dayly told, to all the arbitrators, & is made a handle of A & D. so that if I am not able to clear up the charge, I meet these Judges, under the greatest disadvantages, & must be worst consequence, to my very Worthy Friends. . . .[67]

On October 28, 1756, he wrote to Haliday and McQuoid, "This day the Court granted that both your actions should be left to arbitration the Gentlemen appointed are as good as we can wish for. . . ."[68] Again to Messrs. Haliday and Dunbar on December 17, 1756, he wrote, "inform Mr. McQuoid, that we are at Aspinwale & Co. every day, to bring on the reference, that they promise it & that we hope to end with them very soon."[69]

To Messrs. Aspinwale and Doughty on January 3, 1757:

I have repeatedly requested you to join me in geting the Arbitrators appointed by Court, to meet, to settle the affairs in dispute

65. *Id.* at 61.
66. *Id.* at 147.
67. *Id.* at 165.
68. *Id.* at 149.
69. *Id.* at 209, 211.

between you & Mr. Halyday & Mr. McQuoid, but as you have declined that, & the Court soon comes on, I have got these gentlemen to agree to meet, at the King's Arms, on tomorrow evening at six o'clock, which please to observe & to give your attendance, or I hope they will award agreeable to my accts.[70]

The final letter appearing in the book to Messrs. McQuoid and Haliday was dated January 18, 1757:

We with concern inform you that we can't now send a Settlement of your accounts with Aspenwale & Doughty, the Arbitrators has met, & has heard what we have both had to say, & nothing now hinders the award to be closed but the Sales of your goods, which they are to deliver in Ten days, we are almost convinced, that every thing will goe, as you would desire it, but the Freight of the Vessel from Liverpool, which we expect there will be an abatement. . . .[71]

The final group of correspondence which was consulted is contained in the letter-book of John Watts. In this, there are two references to arbitration. The first appears in a letter to Mr. Joseph Maynard in Barbados on December 20, 1762. In this letter there appears the following:

I have received your Papers & Albony is here, but the Insu(r)ers on Vessel refuse to pay any more than the Vessels proportion of Ransom, & offer to leave it to reference which I think to do, as the most speedy & just determination, rather than be put to the expense of two or three lingering Law Suits, that may be spun out for Years in the way the Law is here.[72]

On August 14, 1764, he wrote again to Mr. Maynard:

I apprehend you mistake the State of the Little Molly at Martinique settled by Shea Smith & Campbell the referees, they make the Owners goods valued at £36.4 the freight £300, the Vessel £230, in all £666.4, pay one Quarter of the Ranson (sic), for that Quarter you paid £126, as the Underwriters only insurd the Vessel, according to that proportion they would have to pay but a trifle more than one third part of that sum, which would be between Forty & Fifty Pounds, the Award gave us at 18 per Ct: £90 which is more than I expected on that footing What I contended for was a total loss & the Underwriters to have the Benefit of the Sale of the Vessel, but the Referees could not be brought to that as you'll see by their Award. I wrote them a long Letter, they differd with me in opinion, said the Vessel arrivd at their destind Port, deliverd her Cargo & savd her Freight, & that whatever Expence attended it, the Vessel Cargo & Freight out to bear in their respective proportions, & so they determind it, which puts it now out of my power to pursue the Matter any farther but if you still please to recollect, before I would even

70. *Id.* at 235.
71. *Id.* at 240.
72. *Letter Book of John Watts 1762-1765*, in COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY FOR THE YEAR 1928 (Barck ed. 1928).

submit to these Terms, & deliver up the Policey, I sent you a Copy of the Award to have your opinion upon it & you left it to me to settle it in the best manner I could without law which confin'd me to the determination of the referrees, for I could not in decency appeal from their judgment, as it is contrary to all Practice & besides would be endless as one Appeal eventually begets another. And had we thrown ourselves into Expensive endless Law, we should have appeared with an ill Grace having the Award of people in Commerce against us, to be offerd to a Jury of the same profession, for which reason it is invariably lookd upon as a point of Justice & propriety to submit to the referrees or why leave it to them at all, the Looser is seldom content or satisfyd.[73]

D. Records of the New York Chamber of Commerce

Probably the most important single group of materials on arbitration during the colonial period consists of the records of the New York Chamber of Commerce. The minutes of the Chamber for the first sixteen years have been examined.[74]

In the minutes of the first meeting held on April 5, 1768, the bylaws appear. The preamble to these reads, in part:

Whereas Mercantile Societies have been found very useful in Trading Cities for promoting and encouraging Commerce, Supporting industry, Adjusting disputes relative to Trade & Navigation and procuring such Laws and regulations as may be found necessary for the benefit of Trade in general. . . .[75]

One of the first acts of the Chamber was to make provision for arbitration by means of establishing arbitration committees. Although the procedure employed for arbitration is not too clear, the arbitrators consisted of members of the Chamber who were chosen as the arbitration committee which would decide all cases coming up during the succeeding month. The first arbitration committee was appointed at the meeting held June 7, 1768, "for adjusting any differences between Parties agreeing to leave such disputes to this Chamber."[76] Committees were appointed monthly thereafter.

Evidently there was considerable demand for their services because new committees were appointed regularly until the Chamber ceased holding meetings in 1775 because of the revolution. There is very little indication in the minutes of the existence of arbitration except for the appointment of the committees. There were occasional refer-

73. *Id.* at 284-85.

74. The original minutes are on file in the library of the Chamber. The Manuscript Room of the New York Public Library contains photostatic copies of the originals. In addition they were published as COLONIAL RECORDS OF THE NEW YORK CHAMBER OF COMMERCE 1768-1784 (Stevens ed. 1867).

75. *Ibid.*

76. *Ibid.*

ences to it of different types, however. Thus, at the meeting held February 7, 1769, it was recorded that,

> Mr. Hugh Wallace acquainted this Chamber that Mr. Nicholas Gouverneur, William McAdam, & himself are appointed Arbitrators to settle a long & intricate Account between Col John Schuyler & Captain Archibald Kennedy and desiring that they may be excused from serving on any committees during the time they may be so employed, which was granted.[77]

Occasionally reports of the committees were written up in the minutes.[78] An early effort to make arbitration of disputes among members compulsory failed of passage.[79]

The last meeting held by the Chamber prior to the revolution appears to have been that of May 5, 1775, at which a committee was appointed for May. The next entry in the minutes is the following:

> The State of Public affairs having been such as not to require a meeting of the Chamber of Commerce at an earlier Period—no measures were therefore taken for that Purpose untill it was conceived that the Increase of Commerce in consequence of the Latitude it derived from the Commissioners benevolent proclamation rendered a revival of so useful an Institution absolutely necessary At the request therefore of a Number of the Members, the President issued notices for convening as many of them as were now in New York and its vicinity And the following members appeared accordingly in the Upper long Room at the Coffy House.[80]

There followed a report of a special meeting held on Monday, June 21, 1779. At this time New York was occupied by the British and at the meeting a letter was drafted to be sent to the British Commandant which read, in part, that, the Chamber "solicit a Renewal of our meetings in order that the many mercantile differences which so frequently happen may be adjusted."[81] At a meeting held on the 6th of July of that year a letter from the Commandant appears acquiesc-

77. *Ibid.*

78. Thus, at the meeting held on August 1, 1769, a report was made by the June committee of its decision on a case involving a protested bill of exchange, and the July committee reported on a case involving the delivery of goods—rum, flour, etc. On November 7 the January committee reported its decision on a case involving a charter party.

79. At the meeting held on February 6, 1770, Mr. Isaac Low made a motion which read in part:

> As therefore it is absolutely necessary that the Members should set the example which they would have others to follow in order to prevent unnecessary Litigation: I propose as a Standing and invariable Rule of the Chamber for the Future, that the Members shall on their parts never refuse to submit all disputed Matters of Accounts they may be concerned in with each other or any other Persons whomsoever to the final Arbitrament & determination of the Chamber collectively or to such of the Members as may be chosen by the Parties on pain of being expelled by the Chamber, and disqualified from being ever again admitted a Member of it.

The motion was tabled at the next meeting, and evidently no action was ever taken on it.

80. See note 74 *supra.*

81. *Ibid.*

ing in the request. Meetings were held in July and August without any reported reference to arbitration, but on September 7, 1779, a committee was appointed to serve during September "to hear and determine disputes between parties who shall agree to abide their determination."[82] These arbitration meetings continued throughout the revolutionary period. Indeed, they constituted the only court for civil disputes during the British occupation and the British Commandant referred civil cases to the Chamber for decision.[83]

At the meeting held on December 7, 1779, a motion was made that the arbitration committee should keep a book in which "they shall enter every opinion given on any disputed matter referred to them by the Commandant, the Police, or mutual references of Individuals" and that the book should be brought to each meeting of the Chamber of Commerce for examination and should be delivered to the succeeding committee.[84] A book containing manuscript records of the proceedings of the arbitration committees during this period is now in the New York Public Library.[85] Presumably it is the same book referred to in these minutes.

Committees were appointed for each month through May of 1783 after which there is no record of any meeting until January 20, 1784. At that meeting there is no record of any arbitration committee having been appointed. This, of course, ends the revolutionary period.

Undoubtedly our knowledge of the colonial period will always be incomplete because of the paucity of materials available for study. Moreover, no claim can be, or is, made that all relevant materials for the colonial period in New York have been examined here. Still, enough material on arbitration has been uncovered to show fairly conclusively that arbitration was in constant and widespread use throughout the colonial period in New York. Particularly significant are: (1) the great amount of arbitration activity in the Chamber of Commerce and the continuing interest of the Chamber in the subject—it will be recalled that the members were so insistent on having arbitration that they even reinstated it during the war; and (2) the advertising of printed forms for arbitration bonds—surely such

82. *Ibid.*

83. See, *e.g.*, the minutes of the Chamber for September 3, 1782, in COLONIAL RECORDS OF THE NEW YORK CHAMBER OF COMMERCE 1768-1784 (Stevens ed. 1867), where is was reported in regard to the case of Robert Wilkins, assured, agt John Porteous & Patrick Reed, assurers, that it was "referred by the Magistrates of Police to the Monthly Committee who thought that as their decision might be brought into precedent, prayed the opinion of the Chamber at large, who having heard the Evidences, it did appear. . . ."

84. See note 74 *supra.*

85. The book is contained in the Manuscript Room of the New York Public Library. It was reprinted by the Chamber in 1913 as EARLIEST ARBITRATION RECORDS OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK. Some sample cases from this book are reprinted in an appendix to this article *infra* p. 220.

forms would not be printed in the absence of a steady demand for them.

It is interesting to notice the apparently close connection between arbitration and court proceedings. Seemingly, arbitration was used primarily in situations where the decision would not be entirely for one side or the other, but where there was, rather, considerable area for negotiation. The settlement of an account resulting from a long course of dealing between two merchants is an example. Land boundaries and the distribution of the proceeds from a privateering expedition are others. Evidently, from the way in which individuals felt it worthwhile to advertise in the newspapers their willingness to arbitrate, there was some social pressure to arbitrate a dispute before taking it to court, and even to submit it to arbitration after the suit was begun. This tends to substantiate a feeling that one function of arbitration was to supply a final stage in the negotiation process between two disputants and that a willingness to negotiate was highly esteemed in the community. Another important reason for arbitrating, doubtless, was the physical difficulty that would confront a court which tried to unravel a long account or a prize dispute—the judicial trial, especially by jury, was not (and is not, for that matter) well adapted to these tasks. Arbitration does not seem, however, to have been in fact a sharp alternative to the courts. Although there was some contemporary sentiment to the contrary,[86] the reason for this may have been that the colony of New York was small and tightly knit, especially in the upper reaches of society. Nearly all of the important landowners, businessmen, and lawyers were related by blood or marriage.[87] Consequently, merchant litigants could expect to find persons with similar interests to theirs serving as judge and jury. The litigants would probably have picked similar persons to be arbitrators if they had gone to arbitration rather than to court. The differences in the two processes would thus relate primarily to procedure and to remedies, and there would be no sharp cleavage between them.

Whether this integration of arbitration with other methods of adjudication was the result of the small size and homogeneity of the community, or of the particular social and economic conditions of eighteenth century life is not clear. Judging from certain indications in English experience, however, the former seems the more likely

86. See text supported by note 49 *supra*.

87. See HARRINGTON, THE NEW YORK MERCHANT ON THE EVE OF THE REVOLUTION (1935). This was so true that a lieutenant governor once wrote to England suggesting that a certain Justice Livingston be removed from office "as no cause of any consequence can come before him in which or in similar cases he or the Livingston family are not interested." *Letter Book of Cadwallader Colden*, in COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY FOR THE YEAR 1876, at 462 (1877).

explanation.[88] In any event, the pattern of arbitration in the succeeding century was quite different.

III. The Nineteenth Century

There was, of course, no sharp break in the nature of the New York mercantile community in the period immediately after the revolution. Life and arbitration continued much as before. The New York Chamber of Commerce, minus a few loyalist members, continued to function and to furnish arbitration for its members.[89] The Statute of 1768, mentioned above,[90] providing for the reference of disputes involving long accounts to arbitrators, was reenacted in 1781.[91] In addition, in 1791, the legislature enacted a statute almost identical to the English Arbitration Act of 1697, providing for the entry of judgment by the supreme court on arbitration awards upon the agreement of the parties to that effect.[92]

In the course of the nineteenth century, however, New York changed radically from a small, fairly homogeneous seaport in the remote North American provinces of the British empire to the gigantic metropolis and commercial capital of the United States, notoriously heterogeneous in population. Under these conditions, it would seem-

88. The failure of mercantile cases to come into the common law courts in the period between the disappearance of the medieval mercantile courts such as *pie poudre* and the assimilation of the Law Merchant into the common law is well known. See Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 7 (1909). It is generally assumed that in this intermediate period arbitration was a common method of dispute settlement among merchants. *Ibid.* See also 6 HOLDSWORTH, HISTORY OF ENGLISH LAW 635 (1924). It may be doubted that the assimilation was quite so complete as Justice Scrutton stated, particularly in the sales field. See Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 724, 740, 742 (1939). However that may be, it seems quite clear that prior to Mansfield's time, English merchants, especially those in London, had for centuries used a variety of fora for the settlement of their disputes. Thus, the Lord Mayor's Court of London was a very important commercial court in the seventeenth and eighteenth centuries. ANDERSON, NEW LIGHT ON WARRANTY OF QUALITY OF GOODS (unpublished thesis in Columbia Law School Library 1951). As to earlier use of this court by merchants, see CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON 1323-1364, at vii, 263 (Thomas ed. 1926); CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON 1354-1381, at 248, 263, 277, 283-84 (Thomas ed. 1929); CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON 1413-1437, at xvi, 10, 14-15, 69, 169, 179, 209-10 (Thomas ed. 1943). Merchants in the medieval period also used the courts of King's Bench, frequently in connection with a jury *de mediatate linguae* (a jury composed of at least half of the jurors of the same language as the party requesting it, hence foreigners, and hence merchants usually). A special jury of merchants was used most notably by Mansfield in deciding mercantile cases, but it was used earlier as well. For an instance in the reign of Charles II, see 2 LILLY, PRACTICAL REGISTER 154 (2d ed. 735). While London in 1700 was a metropolis of 674,000 persons, it was still a fairly close knit mercantile community, and of course, this was the more true the farther back one goes. 3 TREVELYAN, ILLUSTRATED ENGLISH SOCIAL HISTORY 50 (1951).

89. See BISHOP, A CHRONICLE OF ONE HUNDRED & FIFTY YEARS 122-23 (1916).

90. See note 41 *supra*.

91. N.Y. Sess. Laws 1781, c. 26.

92. N.Y. Sess. Laws 1791, c. 20.

ingly have been easy for the mercantile community, or, more accurately, the various mercantile communities, to disappear and for their members to be absorbed in the general mass of the population. This did not take place, however. Instead, businessmen tended to organize into groups designed to advance their interests. One of their primary interests, apparently, was to have their business disputes adjudicated primarily by businessmen—in other words, arbitrated. Thus, the primary function of arbitration appears to have been to aid various commercial groups, whether formally organized or not, to retain or obtain a separate identity from the community as a whole by providing them with the desired kind of dispute-settling mechanism. Further, when businessmen had disputes regarding transactions which were within the particular area of trade in which they operated but with persons who were not professionals within that field, they tended (or many of them did) to want the matter arbitrated by someone within the industry. It is impossible to say whether arbitration was much used for nonmercantile disputes.

One indication of these tendencies is found in the reports of the decisions of courts in cases involving arbitration. An effort was made to find and read all of the cases that were reported, and about 300 were uncovered in the period from 1800 to 1920.[93] These have been analyzed according to the subject matter involved in the dispute as indicated in the following chart.

Subject Matter of Cases[94]

Decade	1800-1809	1810-1819	1820-1829	1830-1839	1840-1849	1850-1859
Total	8	25	31	22	20	24
Land	2	12	9	6	4	8
Construction	1	—	2	—	4	2
Sale	—	—	2	—	1	3
Personal Contracts	1	2	3	4	2	2
Torts	2	1	1	1	—	2
Insurance	—	—	—	1	—	—
Miscellaneous	—	3	2	3	5	5
Unknown	2	7	12	7	4	2

93. An effort was made to read all of the reports of cases decided by the Supreme Court, the Court of Chancery, the Court of Appeals, and the Court of Common Pleas of the City and County of New York. No cases arising out of the Act of 1781, which provided for the reference of cases involving long accounts, are included because of the distinctive nature of this proceeding as opposed to the usual arbitration.

94. "Land" cases principally involve boundary disputes; "construction" cases are those involving contracts to build various structures; "sales" cases involve the sale of goods; "personal contracts" are chiefly partnership and agency agreements with a few employment contracts; "torts" includes everything from assault to slander; "insurance" is chiefly fire insurance; "miscellaneous" is various, including claims owing to one who performed detective work for another and bastardy claims; "unknown" refers to those cases in which it is impossible to determine from the report of the case the subject matter of the dispute.

Decade	1860-1869	1870-1879	1880-1889	1890-1899	1900-1909	1910-1919
Total	19	35	34	33	26	27
Land	9	10	10	8	5	5
Construction	2	1	9	5	7	7
Sales	2	3	1	2	3	4
Personal Contracts	1	7	1	5	3	1
Torts	1	—	1	—	1	—
Insurance	—	1	4	8	1	1
Miscellaneous	—	6	4	3	2	3
Unknown	4	7	4	2	4	6

Several factors are of interest in these figures. The first is, of course, the fact that they show that there was a significant amount of arbitration throughout the entire period from 1800 to 1920. It is, of course, impossible to determine to what extent the arbitrations considered in reported court cases reflect the kind and quantity of the total number of arbitrations that were taking place in New York. It seems safe to assume, however, that the number of cases being arbitrated was far greater than the number of arbitrations reviewed or considered in the courts. When this fact is coupled with the fact that the 1791 Arbitration Act was frequently amended throughout the century,[95] it is clear that there was no time during this period when arbitration was not known and used by a significant number of people. Another fact which is evident from the figures is that most of these cases do not involve commercial disputes among merchants. The largest group of disputes would appear to be those involving various real estate matters and construction contracts. Even the "sales" cases are not as "commercial" as one might have anticipated. Until the latter part of the nineteenth century they involved chiefly isolated sales by farmers of horses or timber or something of the sort. During the last three or four decades of the period studied, however, the cases under this category were obviously disputes between merchants, and frequently arose out of arbitration proceedings held under the auspices

95. See text supported by note 92 *supra*. The act was amended as follows: N.Y. Sess. Laws 1816, c. 210 (swearing of witnesses before arbitrators); N.Y. Sess. Laws 1828, 2d meeting, c. 21 (complete revision as part of a general revision of New York Statutory Law as the Revised Statutes: the arbitration provisions were Revised Statutes pt. III, c. viii, tit. xiv); N.Y. Sess. Laws 1843, c. 187 (oaths to witnesses before arbitrators). Writs of error were abolished by the N.Y. CODE OF CIV. PROC. c. 5, § 271 (1849), and annotators to the Revised Statutes state that presumably the provisions of the chapter of the code relating to appeals apply to arbitration. 2 N.Y. REV. STAT. 776 (Denio & Tracy ed. 1852). In 1880, the 1828 act was repealed, N.Y. Sess. Laws 1880, c. 245, and a new statute regarding arbitration (substantially the same as the old) was enacted, CODE OF CIV. PROC. tit. VIII, c. XVII §§ 2365-86 (N.Y. Sess. Laws 1880, c. XVII). This was repealed by CIV. PRAC. ACT § 1539 which was passed on May 21, 1920, to take effect April 15, 1921 (N.Y. Sess. Laws 1920, c. 925). On April 19, the New York Arbitration Act, providing primarily for the irrevocability and specific enforcement of agreements to arbitrate future and existing disputes, was enacted. N.Y. Sess. Laws 1920, c. 275. All arbitration provisions are now contained in N.Y. CIV. PRAC. ACT §§ 1448-69 (Cahill 1927).

of trade associations or mercantile exchanges or as the result of standard provisions for arbitration contained in form contracts.[96]

This use of standard clauses providing for the arbitration of disputes that might arise under the contract was frequent in the case of leases, insurance policies, and construction contracts, as well as in the case of contracts for the sale of goods. Thus, in one case involving insurance the following language appears:

> The policy contains clauses found in New York standard policies, of which the following are copies:
>
> "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire,

96. Twenty-three cases involving sales were discovered during the period studied. They were: Woodworth v. Van Buskerk, 1 Johns. Ch. R. *432 (N.Y. 1815) (sale of timber); Wheeler v. Van Houten, 10 N.Y.C.L. Rep. (12 Johns. R.) *311 (1815) (seems to have involved sale of "goods"); Harris v. Bradshaw, 13 N.Y.C.L. Rep. (18 Johns. R.) *26 (1820) (sale of logs); Ackley v. Finch, 18 N.Y. C.L. Rep. (7 Cow.) *290 (1827) (exchange of chaise, harness, and judgment bond for $120 of sorely needed cash); Ressequie v. Brownson, 4 Barb. (N.Y.) 541 (App. Div. 1848) ("goods" sold and delivered—less than $10 involved in the case); Doke v. James, 4 N.Y. 568 (1851) (construction materials); Smith v. Compton, 20 Barb. (N.Y.) 262 (App. Div. 1855) (wagon taken in exchange for services); Curtis v. Barnes & Horton, 30 Barb. (N.Y.) 225 (App. Div. 1859) (claim for price of steam engine, boiler, and other machinery, and the work and labor in installing same); Lobdell v. Stowell, 37 How. 88 (N.Y. County Ct. 1865) ("one hundred bushels of corn, and fifty bushels of oats, which he raised on the defendant's farm"); Turnbull v. Martin, 2 Daly 428 (N.Y.C.P. 1869) (sale of blouse flannel—dispute to be submitted to "two dry goods merchants," one chosen by each of the parties, and in the event of disagreement, the umpire "should also be chosen from among the dry-goods commission merchants"); Dibble v. Camp, 60 Barb. (N.Y.) 150, 10 Abb. Pr. (N.S.) 216 (App. Div. 1871) ("a quantity of cotton"); Baldwin v. Barrett, 4 Hun 119 (N.Y. Sup. Ct. 1875) ("certain horse trades and the purchase of a cow"); Moran v. Bogert, 3 Hun 603 (N.Y. Sup. Ct. 1875) (sale of livestock, counterclaim of services rendered in keeping stock); Giles Lithographic Co. v. Recamier Mfg. Co., 14 Daly 475 (N.Y.C.P. 1888) (bottle wrappers—the arbitrator was an experienced lithographer); Cobb v. Dolphin Mfg. Co., 108 N.Y. 463, 15 N.E. 438 (1888) (jute butts); Schepp v. Manley, 59 Hun 440 (N.Y. Sup. Ct. 1891) (pudding cartons and labels for same); Shrump v. Parfitt, 84 Hun 341 (N.Y. Sup. Ct. 1895) (building stones); Stinesville & Bloomington Stone Co. v. White, 32 Misc. 135, 65 N.Y. Supp. 609 (Sup. Ct. 1900) (stone); Grant v. Pratt, 110 App. Div. 867, 97 N.Y. Supp. 29 (1st Dep't 1905) (paint and varnish in large quantity); Koewing v. Thalmann, 123 App. Div. 398, 107 N.Y. Supp. 1042 (1st Dep't 1908) (sale of stock and bonds—the president of the New York Stock Exchange was arbitrator); Welch v. Probst, 151 App. Div. 147, 135 N.Y. Supp. 642 (4th Dep't 1912) (sale of a carload of chopped apples—the buyer was from New York City, the seller from upstate and "knew of the custom of the trade in New York City in regard to arbitrations . . . between buyer and seller"); Barry v. Silberstein, 164 App. Div. 220, 149 N.Y. Supp. 627 (1st Dep't 1914) (straw braid—$7500 involved); Sutro v. H. W. Balk, Inc., 151 N.Y. Supp. 764 (1st Dep't 1915) ("goods"); Wheat Export Co. v. New Century Co., 185 App. Div. 723, 173 N.Y. Supp. 679 (1st Dep't 1919) (flour—the arbitration was under the rules of the New York Produce Exchange). The progression from sales between nonmerchants, farmers for the most part, to professional dealers in the commodities concerned seems clear.

> and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser, respectively, selected by them, and shall bear equally the expenses of the appraisal and umpire * * * No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."[97]

As indicated above, similar provisions in leases[98] and construction contracts[99] were evidently common. In the case of construction contracts, it may be that the builder desired that technical disputes be decided by a technician. It is possible in all of these cases that the party furnishing the form—the insurance company, the construction company, or the lessor—felt that it would receive a more favorable result from an arbitrator than it would from a court. Or, of course, there may have been some other reason. The fact that they were used is especially interesting in view of the fact that these provisions in these contracts were not enforceable as to future disputes at the time. That is, it was not possible to go into court, once a dispute had arisen, and force the other party to submit it to arbitration. Nevertheless, there was evidently arbitration under them. Perhaps the consumer or policy holders were unaware of their rights, or perhaps they too preferred to arbitrate. In any event, there is evident here the tendency mentioned earlier to establish an enclave of private adjudication within the area nominally covered by the courts.

This tendency is much more sharply brought out by looking directly at the activities of several organized groups of businessmen. There was some indication of this trend in the cases which arose out of arbitration. It is more clearly shown in the activities of the Chamber of Commerce. This body apparently continued to provide for its members, at least in a desultory fashion, throughout the nineteenth century by means of arbitration committees.[100] In addition, around the period of the Civil War, it began to seek support from the state in its efforts to provide adjudicatory facilities for its members outside the court system. Thus, its charter was amended in 1861 to provide specifically for an arbitration committee (the act was on an amendment to the

97. Michel v. American Century Ins. Co., 17 App. Div. 87, 88-89, 44 N.Y. Supp. 832, 833 (4th Dep't 1897).

98. See, *e.g.*, Terry v. Moore, 3 Misc. 285, 22 N.Y. Supp. 785 (N.Y.C.P. 1893). The amount of rent due on a renewal of a lease was to be determined by arbitrators, the method of whose selection was set forth.

99. See, *e.g.*, Smith v. Alker, 102 N.Y. 87, 90, 5 N.E. 791 (1886):

> [A]ny dispute concerning the construction, or meaning of the plans, "shall be decided by the architects" . . . any other difference . . . shall be submitted to the arbitration of two competent and disinterested persons selected in a manner prescribed by the contract.

100. BIRDSEYE, ARBITRATION AND BUSINESS ETHICS 89-93 (1926); BISHOP, A CHRONICLE OF ONE HUNDRED & FIFTY YEARS 122-24 (1918).

act removing doubts concerning the powers of the Chamber of Commerce of the State of New York), and to provide that awards of the committee might be entered as judgments of courts of record if the parties so agreed.[101] In general its effect was to bring these proceedings under the New York arbitration statutes. In 1874 this act was amended to provide for the appointment by the governor of an "arbitrator of the chamber of commerce of the State of New York" to be paid by the Chamber.[102] Members could be summoned to arbitrate mercantile disputes arising within the port of New York, although they could escape jurisdiction of the arbitrator by filing an objection with him. Other parties might submit such cases to the arbitrator voluntarily. In 1875 the act was again amended so that the members of the Chamber could be required by "requisition" to bring their cases before this court whose judge was to be paid by the state.[103] The judge was actually appointed by the governor and appropriation made for his salary for two years. He continued to sit without pay for many years thereafter. It is not clear whether this court was actually used much. It was certainly not used after the original judge died, though a successor was appointed.

It would appear thus that the Chamber constantly tried to provide arbitration facilities for its members, but that it never devised a completely satisfactory system, as is shown by the frequent efforts to change it after the first forty years of the Chamber's existence.[104] It may be suggested that one reason for this is that the Chamber was far too broadly based a body, after its beginning years, for its members to have very much in common with each other and hence to feel they were gaining anything by having their disputes settled there rather than in the courts. When it was founded in the eighteenth century the Chamber included all of the leading merchants in a small seaport. None of these merchants were specialists. They dealt in what came to hand.[105] In the nineteenth century the Chamber continued to include, presumably, all of the leading businessmen—merchants and others—at a time when there was considerable and growing specialization in business and elsewhere. Merchants trading in cocoa, for example, had little in common with those who traded in hay. Soon there were considerable numbers of merchants engaged in each of the many specialties. And, gradually at the beginning of the century and with considerable speed at the end, merchants started to organ-

101. N.Y. Sess. Laws 1861, c. 251, § 1.
102. N.Y. Sess. Laws 1874, c. 278, § 6.
103. N.Y. Sess. Laws 1875, c. 495, § 13.
104. The Chamber was almost moribund toward the middle of the nineteenth century. See BISHOP, A CHRONICLE OF ONE HUNDRED & FIFTY YEARS 52, 57-64, 68 (1918).
105. HARRINGTON, THE NEW YORK MERCHANT ON THE EVE OF THE REVOLUTION 57-75 (1935).

ize according to the commodity in which they dealt. In each of these organizations there was provision for the arbitration of disputes among its members.

The first of these was the New York Stock Exchange. In its very earliest days (it was founded in 1792) it is not clear whether or not there was any mechanism for the settlement of disputes among its members. It was so small and its activities so few (there being so few stocks in which members could deal), that there would not, doubtless, have been much need for a formal procedure. In its first constitution in 1817, however, there was provision for arbitration of disputes among members.[106] There has continued to be arbitration up to the present day. (The arbitration proceedings are quite formal and take place in a very elaborate room in the Exchange.)

Another exchange which had arbitration from an early period was the New York Produce Exchange. Its name was originally the New York Commercial Exchange, but was changed to the present name in 1868. The immediate predecessor of the Commercial Exchange was formed in 1852 under the name of the New York Corn Exchange, and there were previous unorganized exchanges reaching back to the earliest days of the town of New Amsterdam. There has been arbitration in the Commercial Exchange and its successor, the Produce Exchange, at least since 1861.[107] It is impossible to say whether or not there were any arbitration procedures, formal or informal, in the period preceding the organization of the New York Commercial Exchange. Since their first bylaws included such a provision, however, and since there was certainly plenty of opportunity for merchants in New York to be familiar with arbitration, there is at least a strong possibility that such a practice antedated the formal establishment of the new exchange.

Other exchanges were formed as the century wore on, such as the Cotton Exchange in 1871, the Mercantile Exchange in 1882, and the New York Coffee and Sugar Exchange in 1885. All had provisions for arbitration in their charters.[108]

In addition to exchanges where merchants dealing in a particular commodity could deal with each other, merchants engaged in the same trade began, towards the end of the century, to organize into associations for the advancement of the interests of that trade. These associations made various efforts to regulate the particular trade, such as

106. STEDMAN, THE NEW YORK STOCK EXCHANGE 65 (1905).

107. MUND, OPEN MARKETS 112-13, 115-18 (1948); Carhart, *The New York Produce Exchange*, 38 ANNALS 524 (1911).

108. For the charter of the Cotton Exchange, see N.Y. Sess. Laws 1871, c. 365. For the charter of the New York Coffee Exchange, see N.Y. Sess. Laws 1885, c. 393. The charter of the Mercantile Exchange was published by the Exchange under the title, THE CHARTER AND BY-LAWS OF THE NEW YORK MERCANTILE EXCHANGE (1948).

establishing standard grades and form contracts. Many of them also provided in their bylaws for the arbitration, sometimes compulsory, of disputes among members.[109]

It is believed that this development of arbitration both within exchanges, and especially within trade associations, has continued to increase to the present day. Such, at any rate, is the conclusion towards which the research that the University of Chicago Law School is presently undertaking seems to be tending.

CONCLUSION

In summary, it is clear that arbitration has been in constant use in New York from its beginnings to 1920. It did not suddenly come into being at that time because of the passage of a statute making agreements to arbitrate future disputes enforceable. Rather, it has existed with and without the benefit of statutes, and both separate from, and in connection with, court adjudication. For the more recent period, its most important manifestation has been in connection with mercantile organizations such as exchanges and trade associations. It seems justified to believe that the New York development has not been entirely peculiar to that state. It is rare for an American state to retain important legal and economic features entirely different from those of its fellows. Further, New York has been for so long the commercial capital of the country that its example tends inevitably to be copied. There is, in any event, evidence to show that arbitration is in considerable use in other states.[110]

However that may be, it is believed that the existence of the practice of extensive arbitration over so long a period of time in the mercantile community tends to show that, as used by merchants,[111] arbitration is not really a substitute for court adjudication as something that is cheaper or faster or whatever,[112] but is rather a means of dispute settling quite as ancient—for all practical purposes anyway—as court adjudication, and that it has, traditionally, fulfilled quite a dif-

109. See BIRDSEYE, ARBITRATION AND BUSINESS ETHICS 49-52 (1926).

110. For a discussion of exchanges in cities other than New York, with an indication that arbitration is one of their important functions, see Huebner, *The Functions of Produce Exchanges*, 38 ANNALS 319, 320-21 (1911).

111. No conclusions have been drawn as to nonmercantile arbitration. However, it is obviously of long standing both in New York and elsewhere. For some early instances in England, see Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597-98 (1928). It is the type of phenomenon that is exceedingly difficult to investigate since there are no formal records and no apparent pattern of recurrence. There is, or has been at times, much discussion of the question whether arbitration was the origin of courts. See SEAGLE, THE QUEST FOR LAW 60-65 (1941). Doubtless it is this nonmercantile arbitration that is meant. Conceivably a fuller investigation of it would produce data of considerable significance to the study of society and law.

112. Though, interestingly enough, arbitration was presented as such an alternative in the eighteenth century in almost the same language as is used today. See, *e.g.*, text supported by notes 50-51 *supra*.

ferent function. The primary function of arbitration is to provide for merchants fora where mercantile disputes will be settled by merchants. This, in turn, suggests that merchants wish to form, and have for a long time succeeded in forming, a separate, and, to some extent, self-governing community, independent of the larger unit. For law, this means that courts may perform, in the commercial field at least, a different function from that which we usually assign to them. In many cases, they may not be the primary fora for adjudication. If this is true, when they are called upon to decide a commercial case in one of these areas, it will be either after another adjudicatory agency has acted or because the other system cannot, or will not, cope with the case. In some areas, courts may almost never get a case. (What the influence of their decisions is on the arbitrators is a difficult question to answer.) Insofar as this area, in which arbitration is and—most importantly—has always been the primary dispute-settling agency, is an important one (and an area which includes stockbrokers, produce brokers, coffee merchants, etc., seems to be such an area), it cannot really be said that one has studied commercial law, in the sense of the rules that actually guide the settlement of disputes involving commercial matters, if he has studied only the reports of appellate courts and legislation. We cannot even understand the significance of the "law" contained in the reports and statutes until we have studied arbitration decisions. (A task difficult of accomplishment, but presently being attempted.)

Having gone so far with hypothesis, one may be forgiven for going a little farther and suggesting that the existence of a sufficient sense of community identity or separateness on the part of merchants to cause them to have a separate adjudicatory system tends to show that there is a mercantile community which is, to a considerable degree, self-governing. This community has existed in this form for centuries. Its existence suggests that there may be others—religious and educational communities come to mind. Thus, perhaps a governmental philosophy of corporatism is simply a recognition of a present social fact, and not a projected type of state organization. Perhaps it is the peculiar function of the state to serve as a supergovernment over a host of smaller ones.

APPENDIX

As mentioned previously, there is in existence a copy of the book used by the arbitration committees of the Chamber of Commerce during the period of the revolution (1779-84) to record the cases which were referred to them.[113] There is nothing particularly to be gained by analyzing these decisions in any detail. The period itself is atypical both because there was a war going on and because the Chamber was a sort of rump body composed of those merchants who were either loyalists or at least did not feel sufficiently strongly for the republican cause to leave New York when the British occupied it. Further, as indicated, this period was one in which the British occupied New York and the city was under military rule. Still, many of the cases decided are doubtless typical of those which the committees of the Chamber decided under normal conditions.[114] Consequently, it may be of interest to quote here some sample cases decided by the Chamber. The following is a reprint of the cases for March 1780 (the month was picked at random and is believed to be fairly typical) :

George Grundy & Co. agt Booth & Cockshot

George Grundy & Co. received from Booth & Cockshot a Bill of exchange in payment on account. Advice was received from England by Grundy & Co that the Bill was noted for non acceptance upon which they made immediate application to Booth & Cockshot who gave them in lieu of the first sett, another sett of Bills, which was regularly accepted & paid. The first Sett of Bills which had been noted for non acceptance were returned under protest and received in New York about three months after the second Sett (which had been given in lieu of the first) were paid in England. Grundy & Co Demand Damages of 20 pCt of Booth & Cockshot.

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113. See note 85 *supra.*

114. The cases decided by the arbitration committee as indicated in its records are, as might be expected, strongly maritime in nature. Thus, of 196 cases decided between 1779 and 1784, 60 are clearly maritime in nature and others may well have been, and in any event mainly involved trade and commerce. The breakdown is as follows:

Subject Matter

Unknown: 40

Maritime: 60

Prize and Privateering:	27
Freight and Shipping:	9
Seamen's Wages:	5
Disputes between Shipowners and Captains:	5
Ship Outfitting:	4
Miscellaneous Maritime: (includes repair of a schooner, ownership of a vessel, etc.)	10

Other: 96

Sales:	22
Bills of Exchange:	21
Accountings:	19
Partnership and Joint Venture:	9
Vendue:	4
Notes:	4
Insurance:	3
Miscellaneous: (varies from claim for reward and wages due for detective work to hire of a mare)	14

Opinion dd the Police

That no more damages are due to Grundy & Co. than Interest of 5 pCt p Annum on 280 (the amount of the first Bill) from the time that the first Bill became due to the time that payment was made for the second Bill (which appears to be three months) with charges of protest & postage of Letters.

Alexander Leckie agt Francis Groome

Alexander Leckie received from F. Groome a Bill of Exchange drawn by Dr. Claphane & endorsed by Groome to Leckie. The bill was remitted by Leckie & returned under protest for non payment. Leckie demands payments of Dor Claphane with damages of 20 pCt—It appeared that the bill was drawn without any time of sight being mentioned, but as the protest for non payment was not dated untill, it was probable that the common time of sight would have been expired the Committee awarded that the amount of the Bill of Exchange with 20 pCt damages should be paid to Mr. Leckie by Dr. Claphane.

John McAdam & Co agt Capt Neilson

Was by the advice of the Committee settled by the contending parties.

Philip Murphy agt Packer & Wier

Was also amicably adjusted between the parties.

Willm Kendall agt George Grundy & Co.

Willm Kendall as first Lieutenant of a Privateer of Which George Grundy & Co. were owners, demands of George Grundy & Co five Shares out the Prizes which the said Privateer had taken whilst the said Kendall acted as 1st Lieutenant on board of her. Grundy & Co. alledges that they have paid to the Captain all the money which was due to the Crew & that Kendall should therefore apply to the Capt. for payment of his shares and not to them Kendall produces a certificate was countersigned "agreed to George Grundy & Co." Kendall farther asserts that he never empowered the Captain to receive his prize money, but that Grundy & Co. were the persons of whom he expected to receive.

As the Committee could not be unanimous in their Determination It was referred to the Chamber at large.

The Chamber at large unanimously agreed that Mr. Grundy pay Mr. Kendall five Shares as demanded.

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