Symposium Introduction: Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective

Carli N. Conklin
University of Missouri School of Law, conklinc@missouri.edu

Follow this and additional works at: http://scholarship.law.missouri.edu/facpubs

Part of the Legal History Commons

Recommended Citation
Introduction:
Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective

Carli N. Conklin*

The Federal Arbitration Act (FAA), enacted in 1925, provides a framework for how we think about arbitration procedure, practice, and policy in the United States today. Yet, the FAA, and the interpretive lens it provides, are relatively new on the horizon, historically speaking.

William Blackstone included a sophisticated and fairly detailed description of arbitration in his Commentaries on the Laws of England (1765-1769).¹ In so doing, Blackstone was not describing a new or alternative form of dispute resolution. Instead, Blackstone was describing a dispute resolution practice that had flourished in England for centuries.² That same practice, like Blackstone’s Commentaries,

* Dr. Carli N. Conklin is Associate Professor of Law and Senior Fellow in the Center for the Study of Dispute Resolution at the University of Missouri School of Law. I would like to thank the Journal of Dispute Resolution and the Center for the Study of Dispute Resolution at the University of Missouri School of Law for making the Fall 2015 Journal of Dispute Resolution Symposium, Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective, possible. It was a pleasure to work with my fellow symposium authors, whose warm collegiality and insightful scholarship is unmatched. A special thanks goes out to my colleagues Bob Bailey, Assistant Dean Emeritus; Rafael Gely, Director of the Center for the Study of Dispute Resolution; S.I. Strong, Manley O. Hudson Professor of Law; Journal of Dispute Resolution Editor-in-Chief, Ashley Zellmer Sundquist; Associate Editor-in-Chief Alexandra Sheppard; and Laura Coleman and Karen Neylon with the Center for the Study of Dispute Resolution, for their generous assistance in the symposium process. Finally, a warm thanks to Derek Roebuck at the Institute for Advanced Legal Studies (University of London), who is unparalleled both in the breadth and depth of his scholarship on the history of arbitration and in his enthusiasm for the work ahead.

¹. WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 16-17 (1768). Blackstone includes the definition of arbitration in Volume III (“Of Private Wrongs”), Chapter I (Of the Redress of Private Wrongs by the Mere Act of the Parties), Part II (Arbitration) of his Commentaries.

². Derek Roebuck explores this history, and its Greek and Roman predecessors, in a multi-volume history of arbitration that is both engaging and informative. See DEREK ROEBUCK, ANCIENT GREEK ARBITRATION (2001); DEREK ROEBUCK & BRUNO DE LOYNES DE FUMICHON, ROMAN ARBITRATION
enjoyed great popularity in the mainland British colonies in North America, where English Common Law was adapted to local circumstances. Following the American Revolution, new American state legislatures continued to affirm arbitration, with many states adopting statutory forms of arbitration that were, themselves, reflective of pre-existing English law. This combination of state-level common law and statutory arbitration shaped the way lawyers, scholars, policy advocates, and, most importantly, disputants thought about and utilized arbitration in the United States throughout the late-eighteenth, nineteenth, and early-twentieth centuries.

It was not until 1925 that Congress passed the Federal Arbitration Act. Yet, our recent law and policy debates about arbitration (and there are many) tend to look from the FAA forward for an interpretive lens. Viewing arbitration through that lens skews the discourse on arbitration by unnecessarily narrowing both our understanding of arbitration practice and procedure across American history and the scope of the policy arguments we ought to consider when evaluating its use. As the articles below demonstrate, such a narrow focus ultimately skews even our understanding, interpretation, and application of the FAA itself.

The purpose of this symposium edition of the Journal of Dispute Resolution is to widen the focus of our present-day discourse on arbitration by exploring the broader histories of arbitration in America, considering not only what arbitration procedure, practice, and policy looked like in early America (and in the earlier legal, cultural, or religious systems from which American arbitration was adopted), but also how those broader histories might contribute to important discussions and developments in arbitration procedure, practice, and policy today. To that end, we


4. Oldham & Kim, Arbitration in America: The Early History, supra note 3; Conklin, Lost Options, supra note 3.


brought together scholars in law and history whose combined works restore breadth and depth to our present-day understanding of and debates about arbitration.

Our exploration begins with Margo Todd’s article, “For eschewing of trouble and exorbitant expense”: Arbitration in the Early Modern British Isles.\(^7\) Dr. Todd provides valuable insights into binding arbitration in British customary law, arguing that arbitration was favored over litigation in early modern Britain for its community focus, speed, efficacy, and uniformity of procedure. In her discussion, Dr. Todd also counters prevailing histories on arbitration by providing a fresh and nuanced analysis of Chief Justice Coke’s ruling on arbitration in *Vinyor’s* case (1609).

Francis Boorman takes a close look at Queen Elizabeth I’s use of arbitration to address the disputes stemming from an elite couple’s marital breakdown in *Arbitration and Elite Honour in Elizabethan England: A Case Study of Bess of Hardwick*.\(^8\) Dr. Boorman’s essay is important for many reasons, not the least of which are his illumination of the monarch’s promotion of arbitration, and the important role that reconciliation, honor, and ideas about gender played in the resolution of disputes—and the selection of arbitration as a dispute resolution procedure—in sixteenth-century England.


James Oldham’s keynote address, *The Historically Shifting Sands of Reasons to Arbitrate*,\(^10\) draws comparisons between arbitration practice in eighteenth-century England and in America, providing a rich historical understanding of key attributes that led disputants to select arbitration over litigation as a means of resolving their disputes. As Professor Oldham demonstrates, participants selected arbitration not only for its speed, economy, informality, and finality, but also for its distinct process benefits. Those benefits included participants’ ability to take part in the selection of the arbitrator, the benefit of arbitrator expertise in the subject matter of the dispute, confidentiality of the process, the ability to conduct discovery (including the production of sworn witness testimony and relevant documentary evidence), and arbitration’s ability to effectively manage and resolve complex cases.

The arbitration practices that were prevalent in both England and the mainland British colonies in North America continued as those colonies transitioned into becoming new American states. In my article, *A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America*,\(^11\) I look to the history of


antebellum Kentucky, New Jersey, and Massachusetts to explore not only how Eng-
lish arbitration was adopted by (and adapted to) the British colonies in North Amer-
ica and the new American states, but also how that diversity of arbitration policies,
procedures, and practices continued to exist at the state level throughout the ante-
bellum period.

Early American arbitration was reflective not only of English custom and law,
but also of the policies and practices of Quakers, who had long utilized arbitration
to resolve disputes. F. Peter Phillips' article, *Ancient and Comely Order: The Use
and Disuse of Arbitration by New York Quakers* provides a terrific overview of
that history, shedding light on Quaker arbitration practice in New York from the
eighteenth century through the mid-twentieth century. Phillips identifies key attrib-
utes shared by Quaker arbitration and mercantile arbitration—such as maintaining
community, applying community-specific standards of conduct to the resolution of
disputes, and mutual accountability—arguing that these attributes are distinctive to,
and remain essential for, the efficacy of the arbitration process.

Imre Szalai takes a historical perspective on the passage of the FAA in his
Professor Szalai not only describes the historical context within which the FAA was
passed, looking at the wide variety of social, political, economic, and military
events that influenced its passage, but also explains why that history matters. Pro-
fessor Szalai demonstrates how a rich understanding of the FAA's history chal-
 lenges the Supreme Court's interpretation of the FAA, informs current debates over
arbitration, and provides a richer understanding of the role that arbitration plays in
the legal system today.

Hiro Aragaki also looks to the history of the FAA as he brings new insights
to current debates surrounding arbitration in his article, *Constructions of Arbitra-
tion's Informalism: Autonomy, Efficiency, and Justice.* Professor Aragaki explo-
 res the historical context surrounding the enactment of the FAA, revealing that
arbitration's primary advantage over litigation at the passage of the FAA was not
autonomy or efficiency, which are oft-heralded as arbitration's primary benefits to-
day. Instead, Professor Aragaki argues that arbitration's primary advantage over
litigation was then—and should still be today—arbitration's ability to achieve jus-
tice.

Jill Gross's article, *The Historical Basis of Securities Arbitration as an In-
vester Protection Mechanism,* brings a historical perspective to securities arbitra-
tion, the primary process used by the securities industry to resolve disputes. Pro-
fessor Gross challenges current investor and industry distrust of securities arbitra-
tion by revealing the reasons behind the securities industry's early designation of
arbitration for the resolution of investor disputes. As Professor Gross demonstrates,
these reasons include not only speed, efficiency, and fairness, but also, and more

Quakers*, 2016 J. Disp. Resol. 81.
Resol. 117.
2016 J. Disp. Resol. 143.
Beyond the FAA

importantly, arbitration’s unique ability to protect investors, build trust and credibility, and thereby encourage investors to use the securities exchanges exchange system.

As these articles demonstrate, the history of arbitration is both broad and deep. It includes the wide variety of reasons that led individuals to choose arbitration in seventeenth- and eighteenth-century Scotland and England, and the ways in which historic English practice was adopted by and adapted to the mainland North American colonies and the new United States. It includes the English monarch encouraging arbitration to resolve marital disputes, Quakers and merchants utilizing arbitration to resolve disputes while preserving community, and the use of arbitration to protect investors in the securities industry. It involves arbitration under the 1925 Federal Arbitration Act, state-level common law and statutory models of arbitration, and process elements that have attracted an impressive variety of private individuals, consumers, industries, and religious groups to arbitration for centuries. A broad look at the history of arbitration indicates that individuals and organizations have chosen arbitration to resolve their disputes not only out of a desire for speed, economy, and finality, but also out of a desire for community, expertise, accountability, evidence, credibility, trust, and justice.

In short, the history of arbitration is as nuanced and diverse as the reasons why people may choose arbitration to resolve their disputes. Looking beyond the FAA—to the diversity of arbitration policies, practices, and procedures that existed in the United States before the FAA and to those that have continued or developed since its enactment—provides us with an opportunity to inform our current debates with a more complete (and complex) understanding of this centuries-long legal tradition. I hope you will join us in that pursuit.