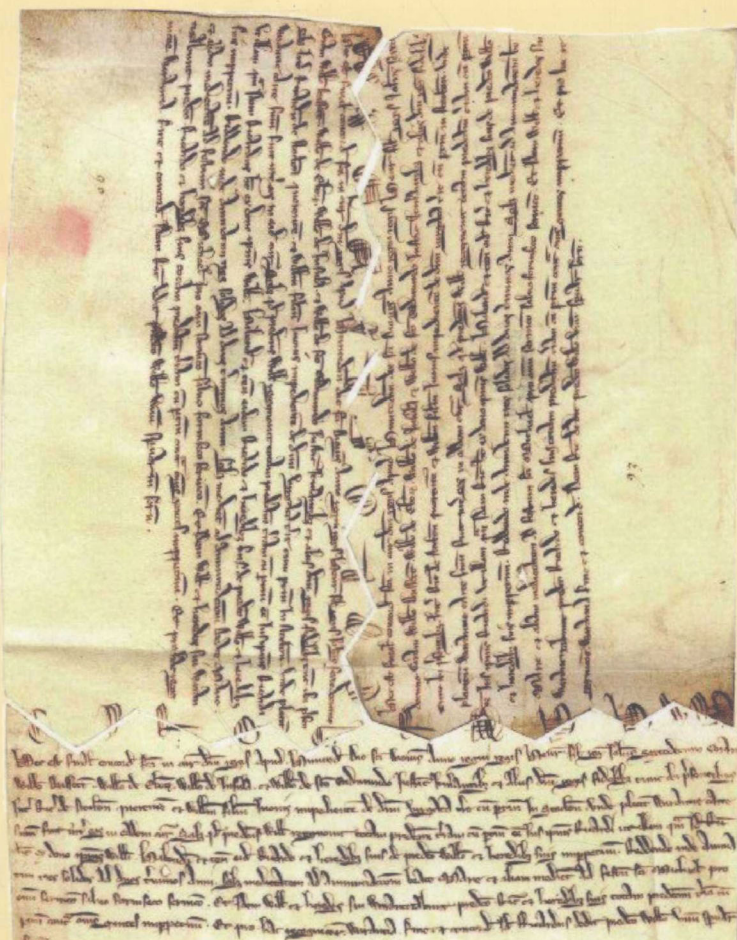


MEDIATION AND ARBITRATION IN THE MIDDLE AGES

England 1154 to 1558



Derek Roebuck

MEDIATION AND ARBITRATION IN THE MIDDLE AGES

England 1154–1558

DEREK ROEBUCK



Sponsored by Arthur Marriott QC
12 Gray's Inn Square

HOLO BOOKS
THE ARBITRATION PRESS
OXFORD
2013

First published 2013 by
HOLO Books: The Arbitration Press
Clarendon House
52 Cornmarket
Oxford OX1 3HJ

Email: holobooks@yahoo.co.uk
www.holobooks.co.uk
and www.centralbooks.com

Copyright © Derek Roebuck 2013

ISBN 978-0-9544056-3-2

The author thanks Arthur Marriott QC, 12 Gray's Inn Square,
for his generous support, not only financial, without which
this publication would not have been possible.

This book is printed on paper suitable for recycling and made from
fully managed and sustained forest sources. Logging, pulping and
manufacturing processes are expected to conform to the
environmental regulations of the country of origin.

10 9 8 7 6 5 4 3 2 1

Designed and produced for HOLO Books: The Arbitration Press by
Chase Publishing Services Ltd, Sidmouth EX10 9JB
Printed in the European Union

MEDIATION AND ARBITRATION
IN THE MIDDLE AGES

Also by Derek Roebuck
published by HOLO Books: The Arbitration Press

Disputes and Differences 2010
Early English Arbitration 2008
The Charitable Arbitrator 2002
Ancient Greek Arbitration 2001
A Miscellany of Disputes 2000

with Bruno de Loynes de Fumichon
Roman Arbitration 2004

For Lord Neuberger, President of the Supreme Court,
with respect and gratitude for his safeguarding
of all that is good in our legal system.

[illegible]

Chirograph recording the formal settlement of a dispute before the justices of the Huntingdon Eyre of 1232. Unusually, all three pieces survive together in the National Archives: CP 25(1)/92/6 nos 90, 93, 94 and are reproduced here by kind permission of the National Archives Image Library.

PREFACE

‘Tell it’; she said; ‘We give you leave. We won’t interrupt you unless you put in too many inventions.’ ‘You invite me to break the first law of story-telling, Miss Rose,’ said the doctor, lifting a finger at her. ‘Every man is bound to leave a story better than he found it’.

Mrs Humphry Ward *Robert Ellesmere* pp33–34

This book is as much about mediation as arbitration. Until recently, no one excluded mediation when they spoke of arbitration. It was an integral part of the process, though of course they knew the difference. My approach is the same. I do not feel bound by categories. For what they are worth, here are mine. They describe functions but do not determine them.

There is a distinction between a difference and a dispute. A difference exists where two or more parties have claims over the same subject matter. For example, two sons have inherited their father’s land in equal shares, as in the Jewish arbitration described in Chapter 13, **13.5**. They could have sold the land and then it would have been easy to divide the proceeds in two. But land is not so easy to divide. So they got arbitrators to work out where to draw the boundaries. If that did not quite work, they could have ordered payment of a sum of money to square it up. Only when the parties take different positions does a difference become a dispute. Then the parties may themselves agree a settlement, with or without advice. If they cannot do that, they may seek the intervention of a third party. If they retain the right to accept or reject any settlement, the process may be called mediation. I have not used the word ‘conciliation’, which is for me a synonym. No distinction has yet been achieved in general parlance. The process becomes an arbitration when the parties give a third party the power to adjudicate.

The scope is narrower than the title suggests: confined to England and to AD1154–1558, a period starting after the Middle Ages did and, some would say, ending after their end.

When I set out to write this book my aim seemed simple. It was to pick up the story of mediation and arbitration in England at the start of Henry II’s long reign in AD1154, when *Early English Arbitration* ended, and continue to the beginning of Elizabeth I’s in 1558. I expected to concentrate on the birth and youth of the Common Law. I thought that I would find in the Year Books the evidence for the creation of new rules and a new legal system and

that what was happening in the courts would dominate the narrative. The aim is still the same but the focus is different; the sources are so rich that they make it possible to reveal the more colourful tale of how dispute resolution worked in practice. It is still important to tell how the Common Law courts fashioned a body of arbitration law but that has been postponed until after its full context has been described. Therefore the structure is in five parts.

Part One has four chapters. Chapter 1 sets the scene: a sketch of the relevant bits of the history of England and the sources on which the book is based. Chapter 2 is a profile of the courts and the lawyers. Chapter 3 states the theme that will be developed and illustrated: mediation is primary in this period. Chapter 4 is a general account of the practice of arbitration.

The second part is the substance. Chapter 5 describes how mediation and arbitration were used in all kinds of commercial, trade and professional disputes. Chapter 6 concerns matters not now usually considered arbitrable: crimes and status. Chapter 7 deals with conflicts over land and inheritance, the most bitter and long-lasting.

Part Three shows how different communities managed disputes within them. Chapter 8 reveals how royal governments provided processes for the resolution of disputes, in parliament, the Privy Council, Star Chamber and Chancery. Chapter 9 describes the functions of the councils of the great lords in peacekeeping through mediation and arbitration. Chapter 10 shows that the choice of venue for dispute resolution might be determined by residence in a city or borough, which might offer regular schemes for dispute resolution. Chapter 11 uses the University of Oxford as an example of dispute resolution in a closed community governed by civil law. Chapter 12 shows how other kinds of communities worked, those of religious, craft and merchant guilds. One extraordinary community is the subject of Chapter 13, the Jews, who were established in England at the start of our period but banished in 1290. The ways in which the central government provided for disputes arising from their moneylending were specific to them. Women play a central role in all aspects of dispute resolution. The histories which leave them out are one-eyed. Chapter 14 gives them something more of the attention they deserve. The Church had its own inherited tradition of dispute resolution which Chapter 15 tries to cover within a restricted compass, though it merits a book of its own.

The unique richness of the Paston papers provide Part Four, Chapters 16 and 17, with a wealth of insights first into how a clever lawyer could manipulate the whole range of techniques to accumulate a fortune and then how his less able successors could with equal determination jeopardise it.

Though the development of the law would also justify its own book-length treatment, Part Five, Chapter 18, is offered as a temporarily sufficient if embryonic essay. My justification for abandoning my original plan to write a history of the law of arbitration is that the practice is so much more revealing.

Part Six, Chapter 19 tries to draw conclusions.

'The journey through instruction may be long but by examples it is short and efficient' is a motto many a teacher has adopted.¹ I have quoted primary sources liberally not just to support the text but to allow readers to make their own judgments without the labour of going to those sources themselves. I have made my own translations, because I want to take responsibility for them but also, I must confess, because making them has been the most enjoyable part of this work. Each of them is preceded by a bold number for ease of reference. I have tried to ensure that translations are into real English rather than the artificial monsters which are often preferred, which nobody ever spoke or wrote. Only then may the true meaning be revealed. I have often omitted 'said' and 'aforesaid' and verbiage of that kind without acknowledgment.

The bibliography is as full as I could make it. Bibliographies, like indexes, are often the most helpful parts of a book. The glossary explains difficult, technical or unusual terms, especially legal jargon; e.g. 'coparcener' or 'messuage', for which non-lawyers need an explanation which would hold up the argument of the text for many readers. There is a chronology to help readers who, like me, cannot keep dates in their head.

My citation practice is to give enough information – usually author and title – of each work the first time it is cited in each chapter, with an abbreviation for further citations.

The many references to volumes published by the Selden Society are referred to here in an abbreviated but accessible way: by year of publication, volume number and page. Full references are under the editor's name in the bibliography and they are listed there at the beginning chronologically for easy cross reference.

Standard Oxford University Press reference works are abbreviated: *OED* (*Oxford English Dictionary*), *ODNB* (*Oxford Dictionary of National Biography*) and *OHLE* (*Oxford History of the Laws of England*).

References to my earlier volumes are cited just as: *Ancient Greek Arbitration*; *Background of the Common Law*; *Charitable Arbitrator*; *Disputes and Differences*; *Early English Arbitration*; *Miscellany*; *Roman Arbitration* (with Bruno de Loynes de Fumichon).

Rather than attempt to acknowledge here the many and substantial debts I owe to others, I have done so to the best of my ability where their contributions appear in the text. But some are of a general kind: Charles Jarrosson encouraged me to produce an article for his *Revue de l'Arbitrage* and in many other ways; Neil Kaplan does his best to urge me on; Bruno de Loynes de Fumichon has undertaken a continuing obligation to ensure

1. 'Longum sit iter per precepta, breve tamen et efficax per exempla', starting with Seneca *Epistolae Morales* I and often repeated, JH Baker *Monuments of Endlesse Labours* p39 fn31.

I make no mistakes in all things French and directed me to the right place in Molière for M Josce; Victor Tunkel is patient with me when I reveal my ignorance of Jewish history; David Seipp's database of the Year Books is the greatest gift any scholar of this period has given to all others – his friendly advice is particularly appreciated.

Helen Castor has read the Paston chapters and, with grace and heartwarming generosity, corrected my errors and provided new insights.

Ray Addicott, a true master of his craft, has produced the book, with all the care and flair that I do not take for granted.

Not only has Tracey Dando's expert proofreading saved me from many slips, her suggestions have made welcome improvements.

The librarians of the Athenaeum, British Library and Bodleian Library and the staff of archives departments of Lancashire Archives, Derby Record Office, the University of Nottingham Library and Paul Johnson of the National Archives have been specially helpful. I am proud to be associated with the Institute of Advanced Legal Studies, University of London, whose Director Avrom Sherr and Librarian Jules Winterton are ever-present sources of friendly encouragement. Hesther Swift, the Foreign and International Law Librarian, has patiently and expertly helped me to access online data that were eluding me.

The President of the Supreme Court, Lord Neuberger, has been a friend for many years. This book is now in part a response to discussions with him, which have made me think afresh and more deeply. I am happy he has allowed me to dedicate it to him.

It is not easy to find the appropriate form in which to recognise Arthur Marriott's contribution to this work. His financial support took away any worries about the cost of its publication. But his patronage means much more. It is part of his continuing involvement in the intellectual study of dispute resolution, exemplified not only by his own published work but in his repeated generosity to those young men and women he has judiciously chosen to help in their early years of practice.

My greatest debt, as always for more than thirty years, is to my wife, Susanna Hoe, whose desk faces mine every working day and whose regular flow of interdisciplinary insights stimulates new thought. Her editorial skills have prevented many a blunder, and her example has taught me always to take account of what women were doing – so well that I dare claim that at last I am beginning to do so naturally.

Oxford
December 2012

CONTENTS

Preface

xvi

Part One: The Background

1. The Setting	3
Introduction	3
The Historical Setting	4
Sources	7
Primary Sources	7
Government Records	8
Law Reports	9
Abridgments	10
Treatises	10
Private Papers	11
Secondary Sources	13
Language	14
Conclusions	14
2. The Legal System	15
Introduction	15
The Legal System	16
Angevin Reforms?	16
Shire Assemblies and Royal Courts	18
The Development of the Courts	19
Common Law Courts	20
Equity	21
Ecclesiastical Courts	22
Local Courts	23
The Judges	23
The Lawyers	24
Conclusions	27
3. The Primacy of Mediation	28
Introduction	28
Love and Law and Lovedays	29
The Law	30

Literature	33
What was a Loveday?	37
The Processes of Mediation	39
Statistics	44
Policy	45
Med-Arb	47
Collusive Concords	49
Chirographs and Deeds	50
Conclusions	52
 4. Arbitration in Practice	 53
Introduction	53
Availability	55
Assessment of Damages	56
Payment by Instalments	57
Bonds	57
Umpires	61
Conclusions	62
 Part Two: The Subject Matter	
 5. All Manner of Dispute	 69
Introduction	69
Commerce	70
Mixed Tribunals	74
Honesti v Pelegrin	75
Statute Staple and Statute Merchant	76
The Wine Trade	78
Merchants in Groups	79
Advantages for Merchants	79
Maritime	80
Debt, Payment by Instalments and Liquidated Damages	84
Debts	84
Payment by Instalments	84
Liquidated Damages	86
Employment	86
Apprenticeship	87
Medical Negligence	90
Conclusions	95
 6. Crime, Status and Chivalry	 96
Introduction	96
Crime	96
Public Order	96
Murder	98

Coin-clipping	100
Assaults	100
Rape	101
Fraud	101
Conspiracy	101
Status	101
Chivalry	103
Conclusions	104
 7. Land and Inheritance	 106
Introduction	106
Sources	108
Entails	109
Arbitrability	110
Examples of Mediation and Arbitration of Title	113
The Common Recovery	119
Something for Both Sides	120
Enforcement	121
The Legal and Technical Practicalities	123
Inheritance	129
Conclusions	134

Part Three: The Communities

 8. King, Parliament and Council	 139
Introduction	139
Sources	140
Royal Disputes	141
Stephen and Henry II	141
Henry II and Thomas Becket	142
Alfonso v Sancho	142
Henry III v Simon de Montfort	143
York and Lancaster	143
Great Lords' Disputes	144
Nevilles and Percys	144
Nevilles	144
Percys	144
Gloucester and Burgundy	145
Gloucester and Beaufort	145
Norfolk and Wingfield	145
York and Somerset	146
Egremont and York	146
Bonville and Devon	146

The King's Council	147
Parliaments	148
The Council and Star Chamber	153
Chancery	159
Conclusions	159
9. Great Lords and Their Councils	162
Introduction	162
Local Justice	162
Ladbroke Manor	164
Plumpton	166
The Abbess of Syon	167
Peace	167
Royal Intervention	168
Conclusions	169
10. Cities and Boroughs	171
Introduction	171
The Staple	172
The London Mayor's Court	173
Land and Inheritance	175
Construction and Surveying	177
Foreign Trade	179
Agents	185
Experts and Auditors	186
Enforcement	187
York	188
Chester	193
Exeter	194
Bristol	196
King's Lynn	196
Norwich	197
Other Cities and Boroughs	197
Conclusions	198
11. Oxford: A Special Jurisdiction	199
Introduction	199
The City and Osney Abbey	200
St Frideswide's	200
Town and Gown	202
The University's Jurisdiction	204
Cession	206
The Judicial Authorities	207

Mediation and Arbitration	207
The Arbitration Agreement: <i>Compromissum</i>	209
Procedure	212
Conclusions	215
 12. Guilds	 217
Introduction	217
Guilds for Religious Purposes	219
Origins	219
Women Members	219
Ordinance of 1388	220
The Arbitration Provision	220
Procedure	223
Conclusions	226
Craft Guilds	226
The Arbitration Provision	228
London	228
York	230
Other Cities and Towns	232
Coventry	232
King's Lynn	232
Exeter	232
Enforcement	232
Conclusions	233
 13. Jewish Communities	 235
Introduction	235
Sources	237
Starrs and Chirographs	237
Plea Rolls	238
The Legal Position of Jews	239
Land and Inheritance	239
Women	241
Converts	241
Attitudes to Jews	241
The Expulsion of 1290	243
Dispute Resolution Within the Jewish Communities	244
The Beth Din	244
A Private Arbitration	245
Arbitration Agreements	248
The Exchequer of the Jews	248
Protection of the Jews	248
Jurisdiction	250

Mediation in the Exchequer of the Jews	250
Between Jews and Christians	252
Jew Against Jew	253
Christian Against Christian	255
Arbitration in the Exchequer of the Jews	256
Conclusions	258
 14. Women	 261
Introduction	261
Capacity: Roman Law	263
Capacity: The Church	264
Jewish Women in England	265
Women as Parties	265
Widows	267
Dower	268
Marriage	269
Apprentices	269
Rape	269
Women as Attorneys and Tithingman	271
Women as Mediators	272
Chaucer's Prudence	273
Women as Arbitrators	275
Margaret of Anjou	278
Margaret Beaufort and the Countess of Cambridge	279
French Comparisons	279
Conclusions	280
 15. The Church	 281
Introduction	281
Sources	282
Mediation	283
Arbitration	286
<i>Compromisum</i>	288
Procedure	289
Cognitio	289
<i>Litis Contestatio</i>	289
After Judgment	290
Debt and Excommunication	290
Arbitration as Bar	292
The Award	294
The Council	295
Conclusions	295