Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law

Some recent writing on the history of American law, notably that of Morton Horwitz, has observed a “transformation” in the early years of the nineteenth century as a new legal culture replaced the pre-commercial regime and altered rules of law in favor of the commercially active founders of industrial capitalism. In the course of this transformation, Horwitz argues, merchants and lawyers identified possible grounds for an “alliance,” in which the lawyers gained social status and a monopoly in adjudicative institutions, while the commercial classes gained a system of law which subsidized their interests at the expense of other classes in society. This alliance also required the dismantling of the alternative institutions by which merchants had avoided the anti-commercial characteristics of earlier law. Prominent among these alternative institutions was the system of commercial arbitration, which some evidence suggests declined in importance at the beginning of the nineteenth century. The observed decline, along with an alleged judicial assault upon the principles and practices of the institution, is thus claimed as one of the harbingers of the forthcoming transformation.

This Note explores the details of the history of commercial arbitration in colonial New York in order to examine the historical underpinnings of the Horwitz thesis. Part I presents the results of historical research into the growth and development of arbitration in eighteenth-century New York. Part II discusses the light cast by the investigation on the work of Horwitz and others, and suggests some implications for future work in American legal history.

I. COMMERCIAL ARBITRATION IN EIGHTEENTH-CENTURY NEW YORK

The tradition of arbitration among the merchants of the city of New York will be the focus of this investigation. The tradition, which developed from practices observed in England before the colonization of

2. At least one other writer has observed a discontinuity in American legal development between the eighteenth and nineteenth centuries without casting that discontinuity in precisely the same terms. See W. Nelson, Americanization of the Common Law (1975) (viewing American Revolution as source of discontinuity).
America, and from practices which formed part of the legal culture of New York before the advent of English law, provided a popular and speedy alternative to judicial dispute resolution.

A. Seventeenth-Century Background

Among the distinctive Dutch contributions to the legal environment of colonial New York was the character and frequency of extrajudicial means of dispute resolution. The reference of claims to "good men" for reconciliation or settlement was a major element in the procedure of New Amsterdam’s municipal court, and was practiced elsewhere in the colony as well. In New Amsterdam, the referees were most often appointed by the court; sometimes they were selected by the parties; and occasionally one of the members of the court was delegated to attempt a settlement. If the parties could not reach an agreement, the judgment of the referees could be appealed to the court, which would then render a final decision. This form of challenge was apparently quite rare.

During the early period of English occupation of New Amsterdam, the new government showed considerable flexibility regarding Dutch administrative and legal practice. English speech was interpreted into Dutch in the courts, and the bulk of record-keeping was carried on in Dutch. The English were procedurally as well as linguistically flexible; they incorporated the Dutch fondness for extrajudicial settlement into the new colony’s practices.

4. Throughout this discussion, "reference" and "arbitration" denote processes for the extrajudicial settlement of disputes. "Reference" is the procedure by which a court transfers adjudicative authority to a more informal tribunal after the commencement of a lawsuit. By contrast, "arbitration" refers strictly to such informal processes begun without the prior intervention of a court.

5. When New Amsterdam acquired a court in 1653, it was one whose structure was based on that of Amsterdam’s own municipal court, composed of a schout, who acted in the roles of sheriff and prosecutor; two burgomasters, who served as administrative officers; and five schepens, the equivalent of aldermen. C.P. Daly, Historical Sketch of the Judicial Tribunals of New York from 1623 to 1846, at 10-11 (1855). This court met down to the time of the English occupation and again during the Dutch reoccupation in 1673-74.

6. A similar system of reference to goede mannen, or good men, prevailed outside the jurisdiction of New Amsterdam, in the patroonship of Rensselaerswyck. See S. Nissenson, The Patroon’s Domain 139 (New York State Historical Association Series No. 5, 1937).


10. Jensen v. Spysers (New Amsterdam Mun. Ct. 1653), reprinted in 1 Records of New Amsterdam, supra note 7, at 71, is the only such case out of forty-seven references in the period 1653-54.

11. R.B. Morris, Selected Cases of the Mayor's Court of New York City 1674-1784, at 43 (American Legal Records No. 2, 1935).
Commercial Arbitration

The English tradition itself by no means lacked precedent for the use of extrajudicial dispute resolution. Arbitration played a role in the medieval common law, and the mercantile community in England had long taken advantage of its possibilities. The English procedure through the end of the seventeenth century was to enforce penal bonds requiring obedience to arbitration awards; when the use of penalties was statutorily forbidden after 1697, Parliament speedily provided an act to permit the direct judicial enforcement of arbitration results. This English tradition of arbitration helped the new authorities in New York to appreciate the Dutch predilection for reference.

From the beginning, the English colonial administration gave at least limited statutory recognition to the practice of reference. Court records from the period between the consolidation of English authority and the opening of the eighteenth century reveal the employment of reference in the resolution of commercial disputes. Two cases in the Mayor’s Court (the direct descendant of the New Amsterdam municipal court) in 1675, for example, show the court referring complex accounts.

12. “Arbitration is used for the Common Weal, that is to say to appease disputes and wronge between the people.” Y.B. Mich. 8 Edw. 4, pl. 9 (1463); see also 1 CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON 1323–1364, at 20 (A. Thomas ed. 1926) (defendant offers to arbitrate in case from 1327).


14. Id. at 598–608.


16. The so-called Duke’s Laws, promulgated in 1665 by Governor Nicolls, provided that:

All actions of Debt or Trespase 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 pretence,) their Arbitration: Then the next Justice of the peace ... shall choose three other indifferent persons; who are to meet at the Dissenters charge from the first Arbitration and both plaintifie and Defendant are to bee concluded by the award of the persons so chosen by the Justice.

The Duke of York’s Laws, 1665, reprinted in 1 COLONIAL LAWS OF NEW YORK 7 (1894). On its face, this statute provided an expedited procedure for small claims of a sort which are doubtless numerous in any community. To what extent the construction of “Neighbors” and the monetary limit kept commercial transactions outside the ambit of the statute can only be guessed. In any event, the process of appeal to a second set of referees, and the decision that appellants would bear the cost of both successful and unsuccessful appeals, indicate that the drafters anticipated that awards would be frequently appealed.

17. One case endeavored “to bring the [issues] into as briefe a method for finding out the difference, as possible they can.” Phillipps v. Cousson (New York City Mayor’s Ct. 1675), reprinted in R. B. MORRIS, supra note 11, at 257, 258. The other case sought “the stating or bringing them to a narrow Compass, for the Courts more facile understanding the merritt of the cause ...” Stevenson v. De Haer (New York City Mayor’s Ct. 1675), reprinted in id. at 268. In the former case, presumably because of the “great difficulty Therein,” Phillipps v. Cousson (New York City Mayor’s Ct. 1675), reprinted in id. at 257, the court nominated four referees, while in the latter only two were needed. In both cases, the function of the referees was to advise the court, and not to make a judgment between the parties. In a similar case in 1683, after the examiners of the accounts reported to the court, further testimony as to the facts of the disputed sales transaction was taken; the court fashioned the judgment and apportioned the costs. Wattsun v. Saunders (New York City Mayor’s Ct. 1683), reprinted in id. at 258. All three of these references are collected by Morris as examples of the old personal action of account, but the procedure followed in the cases shows that they were in fact references of actions in debt.
Nor was the use of reference in this period confined either to small claims or to the Mayor's Court. The records of the Court of Assizes in New York City exist for the terms between 1680 and 1682, and show in this brief space at least two instances of appeal from commercial arbitrations involving large transactions. The minutes of the Supreme Court of Judicature between 1691 and 1704 show a similar pattern of appeals.

The outlines of the portrait of arbitrative practice in New York at the opening of the eighteenth century can thus be discerned. It appears that both arbitration and reference, but particularly reference, had become acceptable alternatives to the more familiar procedures of judicial resolution of commercial disputes. The judiciary, however, exercised considerable control over these alternatives. Referees were occasionally used in an obviously advisory capacity, operating with severely circumscribed discretion. Although minute books are poor places in which to seek points of law, devoid as they are of both pleadings and opinions, the commentary in the minutes does not suggest that the referees in any dispute were themselves deciding points of law in addition to matters of fact. Moreover, the frequent overturning of awards suggests not only that arbitration did not overcome the dissentient proclivities of losers, but also that the courts were willing to interpose themselves in the settlement process after the conclusion of an award. Certainly, there is little sign of a common law deference to the decisions of referees.

B. Reference in the Early Eighteenth Century

The practice of reference in commercial cases expanded steadily throughout the first half of the eighteenth century, in large part because of

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Referees were not always used in a purely advisory capacity, as can be seen from the procedure followed when arbitration awards were appealed; in one such case in 1680, the defendant appealed an award "Touching accompts which have by consent of both parties bin Arbitrated . . ." The Court joined a third arbitrator to the previous two, and directed that a new report be made. Moyne v. Sharpe (New York City Mayor's Ct. 1680), reprinted in id. at 551.

18. One case appealed a result in debt on account for £156. On the motion of the original plaintiff and consent of the defendant, the court referred to four referees, who reported a judgment for £139.5s.9d. Willson v. Norman (New York Gen. Ct. Assizes 1682), reprinted in COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY, 1912, at 29 [hereinafter cited as N.Y.H.S. COLLECTIONS, 1912]. The defendant posted bond for a further appeal. The other case was an appeal from a successful action at law to enforce an award of £310. Cardwell v. Golding (New York Gen. Ct. Assizes 1682), reprinted in id. at 31. The original award was upheld. Further appeal was taken, with the result unknown.


20. See cases cited supra note 17.
the relative rapidity with which disputes could be resolved. The rule referring a case might require "the [report of the] Arbitration between the Parties on or before Tuesday Next." The reference of cases, from pleading to judgment, might require as little as ten days. By the mid-1740's, procedural changes had increased the ease with which execution could be levied after reference; it had become the practice for the defendant to confess judgment after pleading in the amount of plaintiff's claim, as security for his obedience to the referee's award. If the plaintiff was found liable, the referee's report became a debt of record, on which the defendant could readily recover.

The area of marine insurance provides further evidence of the importance of arbitration in this period. The New York practice was for merchants themselves to serve as underwriters, and arbitration clauses were a frequent feature of their policies. These clauses evidently accounted for much of the arbitration during the period.

Other evidence from outside the court records indicates that, by the 1730's at least, there was considerable social pressure among merchants to arbitrate disputes. During the 1740's and 1750's, newspaper advertisements by law stationers began to offer, along with forms for wills and

22. When a commercial account was adjusted by reference in October of 1730, the rule requested "all Convenient Speed" of the referees. The rule was entered on October 6; the report was available one week later; and the defendant was ordered to pay the judgment and costs within four days, under penalty of attachment for contempt. Connor v. Kippin (New York City Mayor's Ct. 1730), reprinted in id. at 553.
23. Waters v. Bowne (New York City Mayor's Ct. 1747), reprinted in id. at 562.
24. Duryee v. Horsfield (New York City Mayor's Ct. 1755), reprinted in id. at 563.
26. The practice of including such clauses was originally English, though one which apparently decreased in England during this period. See 2 J. Goebel, Law Practice of Alexander Hamilton 396-97 & n.24 (1969).
27. For example, of the references or arbitrations mentioned in Gerard G. Beekman's letter book for the period between 1746 and 1770, all concerned insurance matters except one prize case. See 1 Beekman Papers, supra note 25, at 34, 378-79, 410, 414, 427.
28. In March of 1731, for instance, William Channing bought advertisements in the New York Gazette denying the claim of William Vesey that he refused to submit their disagreements to arbitration. He was, the advertisement proclaimed, prepared to leave "all Things in Dispute to the final Determination of any Merchant or Merchants in this City." New York Gazette, Mar. 15, 1731, at 2; Mar. 22, 1731, at 2. In 1756, New York merchant Waddell Cunningham was engaged in a prolonged negotiation between Aspinwale & Doughty, merchants in New York, and McQuoid & Haliday, his own correspondents in Liverpool. In the midst of the preliminary maneuvering, he wrote to Liverpool:

I have the pleasure of a Letter from Mr. Wm. Haliday . . . with the sundry proofs, of your affairs in dispute, with Messrs. Aspinwale & Doughty . . . . I again proposed, An Arbitra-
powers of attorney, arbitration bonds;\textsuperscript{29} the appearance of these advertisements provides indirect confirmation of the increasing importance of arbitration and reference. The law stationers were accompanied by the scriveners, one of whom advertised, among his other works of copying, the preparation of accounts for arbitration.\textsuperscript{30}

Lawyers too played an important role in arbitration practice. Attorneys' registers show the occasional fee for drawing arbitration bonds sprinkled among the entries for more familiar instruments.\textsuperscript{31} In addition to the income from the completely extrajudicial arbitration practice, a fortunate few enjoyed the valuable reference practice in the Mayor's Court, which was, from 1731 to 1746, a monopoly by law belonging to no more than eight attorneys.\textsuperscript{32}

C. \textit{Counting-House and Courthouse: Merchant Attitudes Toward Arbitration}

The activity of the Bar in all parts of the system of arbitration adds a distinctive element to the relationship between merchants and the arbitral institutions; merchants and lawyers did not always cooperate in the public arena. Political tension between the two groups for control of governmental posts was occasionally heated, particularly during the late 1760's, when an anti-lawyer campaign became a major issue in the Assembly elections.\textsuperscript{33} Merchants' letter books reveal considerable hostility to

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\item 29. See \textit{N.Y. Weekly Post-Boy, Dec. 21, 1747, at 4; Jan. 11, 1748, at 3; N.Y. Gazette or Weekly Post-Boy, Jun. 30, 1755, at 4; July 21, 1755, at 3; Aug. 25, 1755, at 4; Sept. 15, 1755, at 4. These bonds were the instruments by which extrajudicial arbitration was commenced and regulated. Both parties executed documents under seal which stated the facts of the case and provided for the voiding of the bond obligation if the award of arbitrators was obeyed. The bonds were given to a third party, and the party getting the benefit of the award received them both.}

\item 30. \textit{N.Y. Weekly Post-Boy, May 6, 1745, at 3.}

\item 31. See the statement of costs in Fielding v. Magran (1762), Register of John McKesson's Cases, at fol. 11 (n.d.) (unpublished ms. available at the New York Historical Society).

\item 32. The Montgomerie Charter of 1731 gave to eight named lawyers the exclusive authority to practice in the Mayor's Court during good behavior. Any vacancy was to be filled by the Governor's nominee, but only when the number of members dropped below six. These restrictions proved intolerable, and in 1746 a special act of the legislature restored the right of practice in the Mayor's Court to all members of the New York bar. Act of May 3, 1746, \textit{reprinted in 3 Colonial Laws of New York 546 (1894); see R.B. Morris, supra note 11, at 53.}

\item 33. See generally D. Dillon, \textit{The New York Triumvirate 100-02} (1949) (Scott-Low controversy in the election of 1768).
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Commercial Arbitration

wards the Bar, but also convey a complex mix of attitudes about the law and its alternatives.34

One view of the counting-house, the Bar, and the value of arbitration may be found in the letter book of John Watts, which covers the period from 1762 to 1765, and reveals one merchant’s distrust of lawyers and the law.35 For Watts, arbitration was far from perfect, but it nonetheless improved upon the delay and expense of the judicial process.36 Watts was

34. Gerard G. Beekman’s letters provide an example. In 1746, awaiting the arbitration of a prize case on behalf of a Rhode Island correspondent, Beekman wrote “the gentlemen appointed are . . . I think all good men and Judges in such Cases.” Letter from Gerard Beekman to Vernon & White (Aug. 1746), reprinted in 1 BEEMAN PAPERS, supra note 25, at 5-6. The referees were Christopher Bancker, William Walton, and Abraham Lynsen—all prominent merchants and frequent arbitrators. In 1763, writing about an insurance matter to another Rhode Island correspondent, Beekman took a very different tone: “[A]s to Leaving of it to Reference the the [sic] Gentlemen who are acquainted in these affairs have so often been Trouble with settling such accounts both Parties not alway Pleased that Scares any One of them Chuses to do it again.” Letter from Gerard Beekman to Southwick & Clark (Feb. 2, 1763), reprinted in id. at 427. Beekman was not an immensely successful merchant, nor one much at home in the law (he apparently never served as a referee in any case). It seems clear that his own career, at least, did not make him more receptive to arbitrators than to lawyers, judges, and juries.

35. His portrait of the legal profession ranges from the gently sarcastic, “If you should chance to see my friend Mr. White pray ask him if he received a Letter from me lately. These lawyers won’t write unless they are paid by the Sheet,” Letter from John Watts to James Neilson (Feb. 1, 1762), reprinted in N.Y.H.S. COLLECTIONS, 1928, supra note 25, at 20, to the more furiously defamatory:

We have an odd kind of Mungrell Commerce here call’d the Mount Trade . . . the Lawyers say it is legal & contrary to no Statute, the Men of Warr say it is illegal & both take & Condemn them at their own Shops while they are acquitted at others. No two Courts pursue the same Measure . . . . [Y]et the Evil is suffer’d to go on without any determination, the Subject is tore to pieces by Robbers, Lawyers & all sorts of Vermin.

Letter from John Watts to Isaac Barre (Feb. 28, 1762), reprinted in id. at 27.

When Watts’s annoyance with lawyers descended from the epigrammatic to the pragmatic, his objections were predictable in nature—lawyers, he felt, profited by the techniques of causing delay and stirring up unnecessary litigation. In discussing a lately concluded action at law he wrote: “With regard to that Charge I can only say that I have been obligd to submit to it with great reluctance, & that your suffering is common with all others, who get under the Harrow of the Law in this part of the World.” Letter from John Watts to John Young (Apr. 18, 1764), reprinted in id. at 246. Among the kinds of litigation Watts thought the world could do without was litigation over seamen’s wages: “[S]uch a Number of Pettifoggers are allways ready to disturb the Minds of Seamen & puzzell the Laws, which are far from being explicit with respect to Commerce.” Letter from John Watts to John Erving (June 14, 1762), reprinted in id. at 62.

36. After Watts had attempted to reach an alternative settlement with the referees in an insurance matter (he “wrote them a long letter” without success) he indicated to the correspondent he was representing that:

[Y]ou left it to me to settle in the best manner I could without Law, which confin’d me to the determination of the referees, for I could not in decency appeal from their Judgment as it is contrary to all Practice . . . . And had we thrown ourselves into Expensive endless Law, we should have appeard with an ill Grace, having the Award of people in Commerce against us, to be offer’d 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 referees, or why leave it to them at all, the Looser is seldom content or satisfy’d.

Letter from John Watts to Joseph Maynard (Aug. 14, 1764), reprinted in id. at 285. Watts’s letters show once again that arbitration among merchants was prevalent enough to make the prospect of appealing to a jury from the award of referees distinctly unattractive. He naturally assumed that a trained, or special jury, composed of members “of the same profession,” would be available in any important mercantile lawsuit. The details of the procedure regarding special juries in the later eighteenth century can be found in Alexander Hamilton’s Practical Proceedings, reprinted in 1 J. Goe-
one of the most prosperous of the city's commercial elite, and his own views of extrajudicial settlement were formed from broad experience—as a party, as an attorney for his correspondents abroad, and as an active referee.\footnote{BEL, LAW PRACTICE OF ALEXANDER HAMILTON 61 (1969). For a history of the development of the special jury through the eighteenth century, see Oldham, The Origins of the Special Jury, 50 U. CHI. L. REV. 137 (1983).}

John Watts's observations about the advantages of reference may well have reflected the prevailing feeling in the Colony's government, since in December of 1768 the legislature enacted "An Act for the better Determination of personal Actions depending upon Accounts,"\footnote{37. The manuscript minutes of the Mayor's Court show more than a dozen cases between 1754 and 1765 in which Watts served as a referee. This load was particularly heavy considering the demands on his time from his business and the Governor's Council. Given his comments about seamen's wage litigation, see supra note 35, it is interesting to observe that Watts served as a referee in at least one such case, Waters v. Bowne (New York City Mayor's Ct. 1747), reprinted in R.B. MORRIS, supra note 11, at 562. The result of that reference is lost.} which permitted the Supreme Court of Judicature, on the motion of either party or \textit{sua sponte}, to send cases before it to reference.\footnote{38. An Act for the better Determination of personal Actions depending upon Accounts, 1768, reprinted in 4 COLONIAL LAWS OF NEW YORK 1040 (1894).} The statute gives us the details of reference practice as envisioned by the legislature; it most probably reflects the particulars of reference as it was then operating in the Mayor's Court in New York City.\footnote{39. The purposes of the act as set out in the preamble are puzzling: "Whereas instead of the antient Action of Account, Suits are of late, for the sake of holding to Bail, and to avoid the Wager of Law, frequently brought in Assumpsit . . ." \textit{Id.} The problem here is that account had been dormant for most of the century. In addition, wager of law was never available as an alternative to jury trial in the action of account, because there was no general denial. The wording of this statute provides an impetus to further research into the action of account in the eighteenth century.} The statute allows "to the prevailing Party a reasonable sum for such Services and Expences as may Accrue after the Reference of the Cause," thus contemplating the need for attorney's fees in preparation for reference.\footnote{40. The statute initially covered only the Colony's Supreme Court, not the New York City Mayor's Court, or any other court of inferior jurisdiction in the colony. The New York City Mayor's Court had referred cases without any statutory authority throughout the century, as we have seen, but only by consent of the parties. As the text makes clear, however, the details of the statutory procedure in other respects appear to have been consistent with the earlier Mayor's Court practice. When the statute was amended in 1772, the legislature brought the Mayor's Court and other inferior courts within its coverage. An Act to amend an Act intitled [sic] "An Act for the better determination of Personal Actions depending upon Accounts," 1772, reprinted in 5 COLONIAL LAWS OF NEW YORK 293 (1894).} Witnesses were subpoenaed and examined under oath, and a magistrate, employed at the cost of the party moving the reference, swore the referees to provide fair and impartial arbitration. Each referee was allowed eight shillings a day, plus reasonable expenses, the whole to be included in the taxed costs. Execution of the award followed the Mayor's Court pattern—if for the plaintiff, by confes-
sion; if for the defendant, judgment and costs to be recovered through \textit{scire facias}.\footnote{The writ of \textit{scire facias}, which technically required the party served to show cause why effect should not be given to a prior judgment, was the standard method for execution on judgment in eighteenth-century New York.} Decision of the referees was by majority vote, and any report had to be confirmed by the court before it became effective.

Even without the encouragement provided by the statute, reference was clearly a vigorous institution in the 1750's and 1760's, at least in the Mayor's Court. An inspection of the manuscript minutes for the years 1758 to 1762 shows that one case in forty-one was sent to referees.\footnote{There were 823 cases in the sample, of which 20 were referred. The manuscript minutes of the Mayor's Court [hereinafter cited as M.C.M.] are in bound volumes under the control of the New York County Clerk. They are currently housed in the basement of the New York Supreme Court, at Foley Square, awaiting rebinding. The records examined are in the volume covering the years from 1757 to 1765.} Because pleadings rarely appear in the minutes, it is impossible to determine directly how many of these references concerned commercial transactions. The names of the arbitrators are recorded, however, and they do provide some clue to the nature of the litigation.\footnote{This information does not, of course, provide a definitive indication of the subject matter of a referred cause. Merchants may well have served as referees in non-commercial actions, and conversely some commercial disputes may have been adjusted by referees who were, for example, lawyers rather than merchants.} Roughly half the referees chosen, either by parties or by the court, can be identified as merchants, including several who were later members of the Chamber of Commerce.\footnote{Fourteen of the thirty-one referees recorded can be so identified. One or more of them appears in thirteen of the twenty references between 1758 and 1762. Of these merchant referees, Richard Sharpe, James Beekman, Jacob Walton, John Alsop, Jr., and Gabriel Ludlow all joined the Chamber of Commerce soon after its formation in 1768. See \textit{Colonial Records of the New York Chamber of Commerce} 1768-1784, at 300-03 (J. Stevens ed. 1867) [hereinafter cited as \textit{Chamber Recs.}].} Occasionally, attorneys appeared in the guise of referees.\footnote{For example, James Duane and Benjamin Kissam both served as arbitrators and appeared on behalf of clients during the period.} Participants saw no conflict in the choice of a referee who was engaged in other litigation before the court as either a party or an attorney.\footnote{Malcolm Campbell, for example, was a referee in Craig v. McCowleigh, M.C.M., supra note 43 (New York City Mayor's Ct. Aug. 15, 1758). At the same time, Campbell was a party in two actions before the court. This pattern can be found in five other instances between 1758 and 1762.} Speed remained the most important advantage of reference. For all cases between 1758 and 1762, the average time required for a judgment through reference was slightly over four weeks\footnote{Excluded from this average is a reference in which one referee refused to participate. The rule referring the case was not set aside for twelve months, and the suit was discontinued thereafter. Davenport v. Van Zandt, M.C.M., supra note 43 (New York City Mayor's Ct. Mar. 3, 1761) (referred); Mar. 2, 1762 (rule set aside).}—less than half the time required for jury trial.\footnote{The time was measured from the initiation of action to the entry of judgment for all references and for an equal number of jury trials, selected at random from the Mayor's Court minutes for the same period. In this latter sample, the average case tried to a jury required just under ten weeks to complete.} Though it offered speed, reference did not offer
certainty. Fifteen percent of the reference awards between 1758 and 1762 were set aside, and a motion for leave to show cause why the report should be overturned might have been a standard tactical device. The value of reference to litigants apparently did not lie in the judicial inviolability of the reports of referees.

D. Merchants On Their Own: The Chamber of Commerce Arbitration Committee

In the same year that the reference statute passed the colonial legislature, the merchants of New York City formed the New York Chamber of Commerce. A month after its first meeting, the Chamber began the practice of appointing a Monthly Committee to arbitrate disputes brought to it by the parties. In three cases, members of the Chamber acted as attorneys for one of the parties—indeed, the first case recorded was won by the Chamber's first president, John Cruger. Some of the parties to these arbitrations were members of the merchant community though not Chamber members; their reason for choosing this forum over the courts is unclear.

The eve of the Revolution brought immense change to every aspect of commercial life in New York. Many merchants found themselves leaving the city to avoid Whig interference with their lives, fortunes, and sacred honors. By the winter of 1776, however, everything had changed again.


51. The minute books frequently do not record the offering of several kinds of procedural motions, including motions in arrest of judgment or for judgment n.o.v. Thus, in those references for which the minutes record no such motion, it is possible that one was offered, but was unavailing.

52. The Chamber was formed on April 5, 1768. CHAMBER REC., supra note 45, at 3. For the formation of the Monthly Committee, see id. at 8-9 (meeting of May 3, 1768). There are no independent records of these arbitrations for the first decade of the Chamber's activities, though the records of the Chamber at large do contain occasional reports of cases brought to the Monthly Committee. If these appearances in the Chamber's own records are the complete register of cases during these ten years, then the new institution was not overworked; only fourteen cases are reported. It is not possible to determine from the Chamber's records how particular cases came to the Chamber Committee.

53. Id. at 47 (meeting of June 6, 1769).

54. The apparently middling success of the Chamber's venture into arbitration was reflected in the tabling of a motion made by Isaac Low in February 1770 which provided that all disputes involving members of the Chamber be submitted to the arbitration of the Committee. Id. at 73 (moved at meeting of Feb. 6, 1770); id. at 79 (tabled at meeting of Mar. 6, 1770). Perhaps Low's proposal was too sweeping a proposition for those who sometimes found conventional lawsuits useful; at any rate, it did not succeed. Outside the Chamber's own Monthly Committee, the courts sometimes appointed Chamber members as referees (for instance, the appointment of Hugh Wallace, Nicholas Gouverneur, and William McAdam to a case in February of 1769, id. at 36), but the work of the Committee itself was only tentatively received.
Commercial Arbitration

and New York was under British military government. What little judicial business was transacted under the occupation occurred in courts martial; the structure of occupation government did not provide for civil courts. By 1779, administrative difficulties, particularly in economic management, had suggested the value of permitting the Chamber of Commerce to resume its meetings, and in June the British authorized the Chamber to do so. During the occupation, the Chamber's arbitration committee represented the best available forum for the settlement of mercantile disputes; throughout the rest of the period of British control, the Chamber's arbitrators played a major role in the adjudication of commercial claims.

The records for this period, which are extensive, thus offer a picture of arbitration as the merchants of New York thought it should be run. Although the immense difference between the conditions prevailing in New York at any other time during the century and the conditions under which the Committee worked makes any quantitative analysis of the cases unrewarding, the records nonetheless provide insight into the practices which the arbitrators preferred, and the limits—both substantive and procedural—which they imposed upon themselves.

In several substantive respects, the Committee placed considerable restrictions upon its arbitration authority. Although the courts were closed, the Committee would not hear any case pending in a court of law. If it doubted its own jurisdiction in cases raised by the parties, the Committee

55. There is no comprehensive account of British occupation government in New York City. See generally O. Barck, New York City During the War for Independence 49-73 (1931)(describing municipal administration and institutions during the occupation).

56. The municipal administration was directed by a Commandant. To him reported a city vestry, created at the end of 1777, and the Department of Police, created in early 1778. Prices were fixed by the Commandant, with the Commander-in-Chief of the occupying forces frequently setting the maximum prices for foodstuffs and fuel. The merchants of the city were, in their individual capacities, prominent participants in this wartime administration. Of the twenty-one longest-serving members of the vestry, thirteen were members of the Chamber of Commerce, and, at some point, members of the arbitration committee. Their names are given in O. Barck, supra note 55, at 55. When Peter Dubois resigned as Magistrate of Police in 1782, a former president of the Chamber, William Walton, assumed the position.

57. Chamber Recs., supra note 45, at 203.

58. The records are published in New York State Chamber of Commerce, Earliest Arbitration Records of the Chamber of Commerce of the State of New York, Committee Minutes 1779-1792 (1913) [hereinafter cited as Arbitration Recs.]. Recording of the cases began in October of 1779. The records for the period from 1779 to 1784 contain the reports of 196 cases.

59. William Catron Jones has divided these cases into classes by subject matter. Jones, Three Centuries of Commercial Arbitration in New York: A Brief Survey, 1956 Wash. U.L.Q. 193, 220 n.114. Although he sees "nothing particularly to be gained by analyzing these decisions in any detail," id. at 220, the cases do provide insight into mercantile attitudes towards arbitration.

60. See Launicefield v. Graham (New York Chamber of Commerce Arbitration Committee 1782), reprinted in Arbitration Recs., supra note 58, at 80 (jurisdiction declined on case pending at time of occupation).
would request a formal reference from the Department of Police. The Committee would not decide those elements of a case raising points of law, such as a claim for consequential damages arising from delay in settling a debt. At the same time, the Committee in several other respects construed its substantive authority quite broadly. It was guided in its deliberations by precedent in local practice, and sometimes sought specialized assistance from members of particular trades in a sort of reference within arbitration. The Committee’s rules of procedure by and large lacked the formality to be found in the courts, perhaps to discourage the use of counsel by parties to its proceedings. At any rate, in only six cases during the period do attorneys appear in the records on behalf of clients.

61. See Dale v. Rogers & Co. (New York Chamber of Commerce Arbitration Committee 1780), reprinted in id. at 33 (reference from “the Office of Police” required).
62. Van Assendelft v. Davis (New York Chamber of Commerce Arbitration Committee 1780), reprinted in id. at 34 (“The Committee consider this Matter [the claim for a further award of consequential damages] as not coming under their Cognisance.”).
63. Instead of confining itself to awarding damages, the Committee frequently made affirmative orders against parties. See Campbell v. Walker & Heath (New York Chamber of Commerce Arbitration Committee 1778), reprinted in id. at 4, 5 (defendant required to provide bond against future third-party actions against plaintiff); Ridley v. Moore (New York Chamber of Commerce Arbitration Committee 1780), reprinted in id. at 40, 41 (defendants ordered not to protest outstanding unpaid bills drawn on them by plaintiff). It was prepared to provide execution within its jurisdiction on an arbitration award from Halifax. Lyde v. Tyng (New York Chamber of Commerce Arbitration Committee 1779), reprinted in id. at 9. On at least one occasion, the Committee recommended that an unsuccessful defendant indemnify himself with a certificate from the Port Wardens and directed the Wardens to issue the certificate “gratis, as they overlooked the damage in their first examination.” Semple v. Denniston (New York Chamber of Commerce Arbitration Committee 1779), reprinted in id. at 12.
64. Donaldson & White v. White (New York Chamber of Commerce Arbitration Committee 1779), reprinted in id. at 7 (Committee rejects claim for freight charge in salvage because “no Precedent known to us” bears out plaintiff’s theory); White v. Braine (New York Chamber of Commerce Arbitration Committee 1782), reprinted in id. at 80 (rule of decision was the “usage in the Court of Vice Admiralty of New York in like Cases”).
65. The Committee used “Three Merchants (judges in Irish Butter)” in Ponsonby v. Ludlow (New York Chamber of Commerce Arbitration Committee 1779), reprinted in id. at 8.
66. The Committee frequently took jurisdiction by simple complaint, although in exceptional cases it might request that parties enter into bonds of arbitration, or even that a reluctant party secure bail. Currie v. McKis (New York Chamber of Commerce Arbitration Committee 1780), reprinted in id. at 29 (arbitration bond required); Braine v. Executors of Hylton (New York Chamber of Commerce Arbitration Committee 1782), reprinted in id. at 83 (same); Moore v. Ridley (New York Chamber of Commerce Arbitration Committee 1782), reprinted in id. at 71 (request that “the Police take such security as they think proper” until time of hearing). The Committee granted adjournments to give defendants an opportunity to secure evidence, or for reasons of personal inconvenience, and it required hearing with both parties present in order to decide a case. Campbell v. Muirson (New York Chamber of Commerce Arbitration Committee 1782), reprinted in id. at 75 (adjournment); Hall v. Trenholm (New York Chamber of Commerce Arbitration Committee 1782), reprinted in id. at 87 (continuance due to illness); Denham v. Hill (New York Chamber of Commerce Arbitration Committee 1780), reprinted in id. at 37 (requirement that both parties attend simultaneously).
67. Currie v. McKis (New York Chamber of Commerce Arbitration Committee 1780), reprinted in id. at 29; Ludlow v. Thomas Stuart & Co. (New York Chamber of Commerce Arbitration Committee 1781), reprinted in id. at 45; Johnson v. Hays (New York Chamber of Commerce Arbitration Committee 1781), reprinted in id. at 51; Kentish v. Ludlow (New York Chamber of Commerce Arbitration Committee 1781), reprinted in id. at 61; Allen & Woodcock v. Heybruck (New York Chamber of Commerce Arbitration Committee 1782), reprinted in id. at 77; Kerr v. Likly (New
When the Committee was deeply divided over the disposition of a case, it referred the case to the Chamber at large. Throughout the period, but particularly in the first year of its renewed activity, the Chamber was faced with appeals from the Committee’s decisions. The records of two of these appeals are available; in both cases the Chamber affirmed the Committee’s decision without extended discussion. For the execution of its awards the Committee could look to the police, behind whom, after all, stood the army. To flout the judgment might result in a suspension of license to do business.

The power of the Chamber Committee did not, however, survive the war years. The post-revolutionary return of the civil courts to New York City brought back the reference practice of the state courts as originally developed under the statute of 1768. In 1791, the New York state legislature took another step to make arbitration more attractive by enabling the arbitrators’ report to be entered as a rule of court without the filing and pleading of a lawsuit. The successful party could thus have direct execution through the contempt power, rather than through the intermediate mechanism of the arbitration bond.

II. THE HORWITZ THESIS AND THE EIGHTEENTH-CENTURY LAW

This review of the history of commercial arbitration in eighteenth-century New York casts considerable doubt on Horwitz’s conclusions.
about the fate of arbitration in the early national period. Horwitz misap-
prehends the nature of the later relationship between judicial and extraju-
dicial institutions because he does not adequately consider the nature of
arbitration and reference in the pre-revolutionary era.

A. Horwitz and the Evidence

Horwitz claims that in the last decade of the eighteenth century and the
first decade of the nineteenth the use of arbitration rapidly declined as the
courts began a sharp theoretical attack on the principles of extrajudicial
resolution of commercial disputes:

Despite the vastly increased opportunity for arbitration made possi-
ble by the New York statute of 1791, Julius Goebel has compiled
statistics which show that during the years 1784-1795, more than
twice as great a proportion of cases were sent to referees by action of
the New York courts than in the 1796-1807 period . . . . Though,
because of the state of judicial records we do not have . . . . statistics
concerning arbitrations for the pre-1800 period, or indeed for the
great bulk of arbitrations informally entered into, one still has the
strong sense that resort to arbitration among New York merchants
had begun to decline after 1795.74

This quantitative branch of the argument is subject to some objection.
Goebel did indeed compile statistics about reference over a twenty-year
period, but the process by which he made that compilation is of dubious
utility.75 Horwitz fails to argue that Goebel’s statistics, drawn from the
practice records of particular attorneys, are representative of practice in
the courts as a whole.76 Moreover, Horwitz makes a particular contention
about the litigation patterns among merchants despite the absence of any
indication in Goebel’s sample as to the number of commercial cases
included.

There is, however, an even more serious difficulty with Horwitz’s use
of Goebel’s statistics. After merchants became adjusted to the new proce-

74. M. Horwitz, supra note 1, at 149 (1977) (footnotes omitted).
75. Goebel reports the results of the compilation, along with a list of the manuscripts he con-
for trial courts during the years covered by his survey, Goebel went to attorneys’ registers for the
records of cases they themselves handled. He reports a rate of one reference in sixty-two cases between
1784 and 1795, and one reference for every 130 cases between 1796 and 1807. The total sample was
3,800 cases. His summary presentation of these numbers significantly decreases their probative value.
76. It is interesting to observe that, in counting references, Goebel found a rate of reference for
1784-1795 half as great as that calculated by the author from the Mayor’s Court manuscripts for the
period 1758-1762. See supra p. 143. Because of the difference in sources, no unambiguous inference
can be drawn from this change in the reference rate. The data as offered support either the contention
that the total incidence of arbitration fell off in the course of the late eighteenth century, or that the
relative rates of arbitration and reference were altered by the institutional changes of the post-
revolutionary period.
dural climate created by the statute of 1791, a fall in the number of references would not be a reliable indication of the underlying health of the institution of arbitration. The statute, like its English model, encouraged the use of extrajudicial arbitration rather than reference, and therefore would naturally result in a decrease in the number of references. Thus, Horwitz's quantitative argument for the decline of arbitration in late eighteenth-century New York measures the wrong variable in the wrong fashion and then proceeds to draw the wrong inference from the result.

The numerical contention is, however, only half the argument. The second half concerns the perceived beginnings of a judicial assault upon the institution of arbitration: "[F]rom a careful reading of New York arbitration cases beginning with the published reports in 1799, one has the strong impression of a new willingness of the judges to reverse arbitration awards for technical deficiencies." This "willingness" of the judges, according to the argument, arises first in the area of referees' competence to decide points of law. Beginning in 1801, in the case of DeHart v. Covenhaven, the New York Supreme Court denied motions to send cases to reference based upon parties' assertion that a point of law would arise. Thus, Horwitz says, "arbitrators were deprived of their prerevolutionary shares of lawmaking power." As we have seen, however, the decision of points of law was not traditionally viewed as part of the function of referees, and the Chamber of Commerce arbitrators, though activists in many other regards, believed that points of law fell outside their jurisdiction.

According to Horwitz, a second element in the "new willingness" to exert judicial control over reference cases may be found in the overturning of arbitrators' findings of fact, beginning with the 1800 case of Allard v. [77. M. Horwitz, supra note 1, at 150.]

[78. 2 Johns. Cas. 402 (New York Sup. Ct. 1801).]


[80. M. Horwitz, supra note 1, at 150.]

[81. The advisory use of arbitration reports in the New York courts at the turn of the eighteenth century is an early indication of the limited law making power accorded arbitrators. See supra note 17. Reference practice as it developed in the Mayor's Court provides another such indication, inasmuch as the procedure permitted judges to narrow the issues sharply through pleading before a decision to refer the cause was made. Cf. supra p. 139 (use of conditional confession of judgment).

[82. On only one occasion did a case raise squarely an issue of legal interpretation, and the Chamber Committee severed that issue from the award as a whole, indicating that "the Committee consider this Matter as not coming under their Cognisance," though they went on to state a judgment on the other elements of the case. Van Assendelft v. Davis (New York Chamber of Commerce Arbitration Committee 1780), reprinted in Arbitration Recs., supra note 58, at 34.
Mouchon, in which the Supreme Court granted a motion by plaintiff to set aside a reference report in the defendant's favor. The court said: "The facts in this case are intricate, and there exists so much doubt and obscurity on the subject, that there is reason to apprehend that the referees did not possess all the lights which may now be afforded them, and which may lead to a more satisfactory result." Although the order of the court is not clear, the language of the decision makes it appear that the case was being sent back to the referees. Sending a case back to reference on claims of new evidence or arbitral confusion, however, was entirely consistent with past practice—the decision would not have seemed out of place in the Mayor's Court decades earlier.

Nor can it be maintained that the fact of appealed arbitration awards represents in any sense a dissolution of the traditional process—a reversal of "the colonial pattern of merchants' deference to these awards." Contrary opinion from merchants like John Watts notwithstanding, the pattern from the beginning of the century was a pattern of appeal from arbitration.

The evidence reveals two more areas in which Horwitz has oversimplified eighteenth-century developments. First, Horwitz treats arbitration as an institution in which lawyers took no part. At least some of the evidence suggests otherwise. Second, Horwitz treats the merchant community as uniformly supportive of arbitration and uniformly hostile to the

83. 1 Johns. Cas. 280 (New York Sup. Ct. 1800). For Horwitz's discussion of this case, see M. Horwitz, supra note 1, at 150.


85. For the practice of the Mayor's Court, see Moyne v. Sharpe (New York City Mayor's Ct. 1680), reprinted in R.B. Morris, supra note 11, at 551; Ferrari v. Thompson, M.C.M., supra note 43 (New York City Mayor's Ct. Feb. 2, 1762). For the practice of the Chamber Committee, see Fanning v. Kettletas & Nicoll (New York Chamber of Commerce Arbitration Committee 1782), reprinted in Arbitration Recs., supra note 58, at 81.

86. M. Horwitz, supra note 1, at 150.

87. See supra p. 141.

88. Records from the New York City Mayor's Court, the General Court of Assizes, and the Supreme Court of Judicature all show relatively frequent appeal from arbitration awards at the turn of the eighteenth century. See cases cited supra notes 17-19. The manuscript records of the Mayor's Court at mid-century also show a significant number of appealed awards. See, e.g., cases cited supra note 50. The nature of the court records available for the period may well hide some unsuccessful attacks on arbitration awards; thus the frequency of appeal may have been higher than the records show. See supra note 51.

89. See M. Horwitz, supra note 1, at 147-49.

90. Practice records show the role played by lawyers in preparing clients for arbitration, along with the monopoly of reference practice in the New York City Mayor's Court which prevailed in the 1730's. See supra p. 140. Prominent members of the New York Bar served as arbitrators in the Mayor's Court at the same time that they represented clients before referees of that court. See supra note 46.
Commercial Arbitration

processes of law in commercial cases. Once again, there is evidence to the contrary.

B. The Search for the Transformation: Other Roads to Follow

The available evidence in colonial New York therefore casts doubt on Horwitz's suggestion that commercial arbitration fell victim at the opening of the nineteenth century to the needs of a new alliance between commercial interests and the Bar. This result cannot be taken by itself to disprove the existence of such an alliance, however, since the history of arbitration is only one of several arguments Horwitz advances in support of this concept. Any final assessment of the soundness of the Horwitz thesis must await a clearer understanding of the eighteenth-century context in which nineteenth-century legal change was rooted. The particulars of the investigation presented in this Note, however, suggest two lines of inquiry and interpretation which might assist in the development of that conception.

First, further and more detailed investigation of the relationship between the legal profession and the commercial interests of eighteenth-century America is indispensable. Close examination shows the connections between lawyers, merchants, and the arbitration system in colonial New York to have been far more complex than Horwitz has claimed. Our understanding of the role of the legal profession in colonial America has been broadened by recent scholarship, but it needs to be expanded still further.
Second, the increasing diversity in both the legal and mercantile communities in the late eighteenth century should receive greater interpretive attention. Although Horwitz has been correctly criticized for treating commercial interests as "monolithic," he occasionally analyzes with keen insight the effects of heterogeneity and specialization in the pro-commercial ranks. Applying this insight more generally might yield fruitful results. The impetus of peer opinion, as we have seen, brought many cases to arbitration. An increase in the size and diversity of the merchant community might well have lessened this particular inducement. By the same token, increasing economic specialization separated the commercial class into several smaller groups with distinct interests: insurers and insureds, bankers and merchants. The neutrality of arbitrators chosen from within the community may have become less credible, thus giving rise to a desire with the commercial class for a cadre of professional judges and advocates. Closer study of the changing composition of the commercial interest in revolutionary America might do much to increase our understanding of legal change in the early national period.

—Eben Moglen

97. Horwitz is particularly successful, in this regard, in his analysis of the law of marine insurance. Here, he points out, the formation of specialized insurance companies dismantled the structure of reciprocal cooperative underwriting common in the eighteenth century. See supra p. 139. This in turn created conflicts of interest between insurers and insureds, with consequent pressure on the courts to alter doctrine. M. Horwitz, supra note 1, at 227-28. It is worth noting that marine insurance arbitrations were one of the most common varieties in the mid-eighteenth century. See supra note 27.
98. See supra p. 139.