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Baseball Arbitration

By Theodore K. Cheng

The phrase “baseball arbitration” often generates blank stares and funny looks. It sounds as if it could be anything from a process used to resolve disputes over the ownership of baseballs to the title of an upcoming Kevin Costner movie. Admittedly, it sounds like some kind of mash-up of sports and law with no obvious connection. Baseball arbitration, however, has a well-defined and specific understanding. The term describes an alternative dispute resolution process that has further developed into a general arbitration technique. Perhaps even more surprising, it actually plays a role in mediations as well.

Arbitration is a private process for resolving disputes conducted by an impartial third-party decision maker.¹ Baseball arbitration, also known as “final offer arbitration,” is a specific type of arbitration.² In baseball arbitration, each party submits a proposed monetary award to the arbitrator, sometimes referred to as a “final offer.”³ After conducting an evidentiary hearing, the arbitrator then issues an award limited to one of the final offers previously submitted by the parties.⁴ The arbitrator lacks authority to make any modifications to those proposals.⁵ In this kind of arbitration, the arbitrator’s discretion, which ordinarily would be quite broad, is markedly circumscribed, limiting the arbitrator’s ability to arrive at a final award.⁶ In baseball arbitration, even if the evidence or the equities warrant, the arbitrator does not retain the discretion to issue an award outside of the parties’ final offers.⁷ Rather, the arbitrator’s discretion in arriving at a final award is limited to choosing between the final offers submitted by the parties.⁸

There are significant advantages to employing baseball arbitration as a dispute resolution process. First, it fosters voluntary settlements by the parties before the evidentiary hearing and generally results in greater party satisfaction with the arbitration process due to the heightened degree of control parties could exercise in terms of making their proposals.

When each party feels pressured to make a more reasonable offer, the parties are brought together toward a middle ground, which promotes settlement prior to an arbitration hearing...Although the purpose of final-offer arbitration is to avoid an arbitration hearing, it is the presence of the final-offer arbitration process that promotes good faith bargaining and drives the negotiations toward settlement, not the negotiations themselves...The parties not only save the time and expense of a hearing, but also seek a compromise in order to prevent

the arbitrator from selecting the other party’s final offer. The parties also benefit from avoiding the adversarial nature of a lengthy hearing.⁹

Because the parties know that an unreasonable offer or demand is less likely to be selected by the arbitrator as the final award, they are incentivized to make reasonable offers and demands to each other before submitting their final offers to the arbitrator.¹⁰ As parties make reasonable offers and demands to each other, they evaluate what they receive from the other party and concomitantly re-evaluate their own offer or demand in light of what they expect an arbitrator to award as the most reasonable one in the circumstances of the case.¹¹ In fact, in baseball arbitration, the arbitrator is obligated to select one of the final offers submitted by the parties irrespective of whether the arbitrator believes that one of them (or even both of them) is objectively unreasonable.¹²

For example, if a party takes the extreme approach of over-valuing its claims, rather than assessing them a reasonable value, it faces the significant risk that its final offer to the arbitrator will not be adopted, and that it will, in the end, receive nothing.¹³ Similarly, if a party takes a “no pay” approach in the face of claims that may have some merit, it risks an award in favor of the other party who puts forward a more reasonable proposal, albeit favorable to it.¹⁴ It is this final risk analysis of an “all or nothing” award that compels the parties to consider seriously the benefits of a negotiated settlement and the value submitted in their final offers to the arbitrator.¹⁵

In one variation of baseball arbitration called “night baseball arbitration,” the final offers submitted by the parties are kept confidential even from the arbitrator.¹⁶ Upon delivering the decision, the proposal that is mathematically closest to the arbitrator’s decision is delivered as the final award.¹⁷ More often than not, night baseball arbitration is chosen as a dispute resolution process only when the parties hold a strong belief about the reasonableness of their submitted proposals.¹⁸

As the name suggests, baseball arbitration is a method of dispute resolution that arose from the world of professional sports leagues and was pioneered in the context of arbitrating player-team salary disputes.¹⁹ Generally, in Major League Baseball a player and team each submit a single number representing the player’s proposed salary for the upcoming season to a panel of three arbitrators.²⁰ At the evidentiary hearing, the two sides submit a signed and executed agreement to the arbitration panel with a blank space left for the salary figure.²¹ The player and team each also have the opportunity to present their case and a rebuttal to the panel, after which the panel chooses

one of the two numbers as the player's salary.²² The National Hockey League also employs a variation of this final offer arbitration process to resolve player-team salary disputes.²³

The final offer technique established by sports leagues is now used in other contexts and works particularly well when the only real disputed issue is a subjective valuation such as pain and suffering from an injury. As a result, baseball arbitration is a useful means for resolving personal injury cases, employment and wage-and-hour disputes,²⁴ and commercial disputes or transactions where liability is not seriously contested in the context of garden variety breach of contract claims, book account cases, and collections matters.²⁵ Depending on the circumstances, baseball arbitration could also be utilized in more complex matters such as intellectual property or entertainment disputes if the real issue in dispute involves only lost sales or lost profits.

Based upon feedback from the international and domestic business community, the American Arbitration Association (AAA) and its international division, the International Centre for Dispute Resolution (ICDR), also created a specific set of supplementary rules called "Final Offer Arbitration Supplementary Rules," which took effect on January 1, 2015.²⁶ Also referred to as "Baseball Arbitration Supplementary Rules" or "Last Best Offer Arbitration Supplementary Rules," these rules embody and set forth the classic baseball arbitration dispute resolution process and can be used with the ICDR's International Arbitration Rules or other rules of the AAA.²⁷ The specific mechanics of the rules echo the advantages of baseball arbitration, noting that a

key aspect of formalizing these rules was to better define and build a more complete and predictable final offer arbitration process. Many companies could simply insert a phrase that calls for final, baseball, or last best offer arbitration, but such abbreviated language necessarily omits many important considerations that are incorporated into these procedures. For example, these rules provide detail about when and how the final offer exchanges will be made so that no party can gain an unfair negotiating advantage. These rules also describe what the final offers should and should not include and when the tribunal can open the final offers. These rules essentially establish a final offer process framework from the first preliminary offer through final award.²⁸

Although the rules do not specifically provide for variations from the classic baseball arbitration process, they permit the parties to modify the procedures by written agreement.²⁹

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Baseball arbitration can also be used in the mediation context as an impasse-breaking technique. Like arbitration, mediation is a private process for resolving disputes conducted by an impartial third-party.³⁰ But unlike an arbitrator, a mediator facilitates negotiations and communications between the parties with the goal of assisting them in arriving at a resolution of their own making and does not serve as a decision maker.³¹ In many mediations, regardless of subject matter, parties often negotiate over a monetary component to their potential resolution, transmitting offers and demands to each other, most times through the mediator.³²

Those negotiations will ostensibly bring the parties' respective proposals closer together, but there may still be a gap.³³ That gap is often small enough that a potential resolution is in sight, but also large enough that the parties reach a possible impasse in their negotiations.³⁴ As a technique for closing this gap, the mediator could propose that the parties each provide the mediator with their final (or best and last) proposal and then agree to permit the mediator, perhaps after brief presentations of any evidence or argument about the contested issues relating to the monetary component, to choose between one of the parties' proposals, thereby resolving that portion of the overall resolution.³⁵ Thus, despite its seemingly inapposite nomenclature, baseball arbitration even has a role to play in the mediation context and serves as a potentially useful component in a mediator's toolbox.

Baseball arbitration has both a long history and tradition based in the professional sports leagues as well as applicability to many other modern arbitration and mediation disputes. As a result, it is a useful tool available for dispute resolution in a variety of contexts.

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Endnotes

1. *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).
2. J. Gregory Sidak, *Mandating Final-Offer Arbitration of Frand Royalties for Standard-Essential Patents*, 18 Stan. Tech. L. Rev. 1, 3, (2014).
3. *Id.*

4. *Id.* at 4.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Benjamin A. Tulis, *Final-Offer 'Baseball' Arbitration: Contexts, Mechanics & Applications*, 20 Seton Hall J. Sports & Entmt. L. 85, 89 (2010).
10. *Id.* at 89.
11. *Id.*
12. *See id.* at 89-90.
13. *Id.* at 89.
14. *Id.*
15. *Id.*
16. "What is Baseball Arbitration?" (Jun. 9, 2011), <http://www.arbitration.com/articles/what-is-baseball-arbitration.aspx>.
17. *See id.*
18. *See id.*
19. *See* Jeff Monhait, *Baseball Arbitration: An ADR Success*, 4 HARV. J. SPORTS & ENTMT. LAW 105, 112 (2013) ("MLB salary arbitration employs a format commonly known as 'high-low arbitration' or 'final offer' arbitration. The player and team each submit a single number to the arbitrator. After a hearing during which the player and team each have the opportunity to make a presentation, the arbitrator chooses one of the two numbers as the player's salary for the upcoming season.").
20. *Id.* at 119.
21. *Id.*
22. *Id.*
23. *See* Daniel S. Greene, "National Hockey League Salary Arbitration: Hockey's Alternative Dispute Resolution," NYSBA ENTERTAINMENT, ARTS AND SPORTS LAW BLOG (July 12, 2015), http://nysbar.com/blogs/EASL/2015/07/nhl_salary_arbitration_hockeys.html.
24. Baseball arbitration is, in fact, part of the New Jersey Employer-Employee Relations Act, which governs arbitration of certain public employee salary negotiation disputes. *See* N.J. STAT. ANN. § 34:13A-16.
25. The New Jersey State court system recently considered, but ultimately rejected, a final offer arbitration pilot program that was intended to study its impact on the courts' existent mandatory non-binding arbitration procedures. Recommendation from Glenn A. Grant, Acting Administrative Director of the Courts, (Jan. 15, 2016). Only non-auto, non-Lemon Law personal injury cases were to be selected to participate in that pilot program. *Id.*
26. INT'L CTR. DISPUTE RESOLUTION, FINAL OFFER ARBITRATION SUPPLEMENTARY RULES (2015).
27. *Id.*
28. *Id.* at 4.
29. *Id.* at 8.
30. NAT'L INST. TRIAL ADVOCACY, THE ART OF MEDIATION § 1.2 (2nd ed. 2005).
31. *Id.*
32. *Id.*
33. *Id.* § 2.3.
34. *Id.*
35. This technique should not be confused with another impasse-breaking technique called a mediator's proposal, in which the mediator proposes a specific monetary amount to the parties and asks them to either accept or reject the proposal. *Id.* Only if both parties accept the proposal will the mediator announce to them that a resolution has been reached at the monetary amount in the proposal. Otherwise, an impasse is declared, at least as to that component of the resolution.

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