

Contractual Curveball: The Pros and Cons of Baseball Arbitration



By Thomas Lynch of Asmar, Schor & McKenna

By exploring innovative approaches to arbitration, construction law has begun to streamline proceedings to make them more efficient and cost effective. One such approach has been to adopt arbitration procedures used in salary negotiations between Major League Baseball (“MLB”) players and teams, which has been aptly coined “baseball arbitration.” In the MLB, this type of arbitration refers to the process of presenting two competing salary proposals to a panel of arbitrators, which picks between the two after hearing arguments and rebuttals from each party.¹ The arbitrators must pick one of the proposals; they may not **“split the baby”** or choose a different number outside of the proposals.

Baseball arbitration has become more common, and more popular, when arbitrating construction related disputes, albeit with several procedural differences.² It encourages settlement talks and results in more realistic awards. That said, the process is not a universal solution, so owners, prime contractors, and subcontractors must carefully consider how and when to utilize baseball arbitration to resolve disputes.

I. General Overview of Baseball Arbitration

Baseball arbitration is a special form of binding arbitration requiring each party to submit a final and best offer, and the neutral arbitrator must subsequently select one of the submitted offers in its entirety. Again, the arbitrator is unable to split the difference and render an award in between the amounts of the received offers

or proposing her own offer.³ The arbitrator must select one of the offer or the other without modification.

Baseball arbitration is used to efficiently award damages in various disputes.⁴ Also referred to as Final Offer Arbitration or Last Best Offer Arbitration, baseball arbitration encourages parties to realistically evaluate their positions and the merits of their arguments to determine a suitable award.⁵

Baseball arbitration is a creature of contract. If the parties choose to use baseball arbitration, they must agree to do so, and the scope of the arbitration depends on what procedure they jointly agree to follow. This is consistent with the Federal Arbitration Act, which provides that written provisions included in contracts for commercial transactions are valid and enforceable, outside of any legal or equitable grounds established to revoke a contract.⁶ Courts have upheld baseball arbitration awards when challenged to hold parties to the terms of their contracts.⁷

II. The Rules of Baseball Arbitration Under the American Arbitration Association and JAMS

Due to its increased use in modern construction dispute resolution, the most prominent arbitration organizations have developed rules to govern the process of baseball arbitration. Two notable forums under this umbrella include the American Arbitration Association (“AAA”) and JAMS. While both forums allow parties to engage in baseball arbitration, there are significant

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differences in the procedure, depending on which organization is managing the arbitration. The parties may choose to modify the procedures depending on the precise contractual language drafted.

A. American Arbitration Association

The AAA created a set of supplemental arbitration rules governing baseball arbitration procedures alongside the International Centre for Dispute Resolution (“ICDR”).⁸ In these rules, the organizations note that baseball arbitration is premised on the parties’ desire to resolve disputes prior to arbitration, which is “intended to be accomplished through a series of preliminary settlement offers intended to bring the parties closer together and less polarized in their positions.”⁹

The AAA rules require the exchange of multiple settlement offers between the parties leading up to the arbitration hearing. Specifically, at least two settlement offers must be exchanged between the parties no more than 45 days after the commencement of the arbitration and then no less than 45 days prior to the arbitration hearing.¹⁰ These offers are not shared with the arbitral tribunal. Then, at least two weeks prior to the arbitration hearing, each party must submit its final offer to the arbitral tribunal, which will distribute the offers to each party “as nearly simultaneously as practicable.”¹¹ The final offer is simply a “single monetary amount that includes all breaches, controversies and claims arising out of or relating to the contract or transaction between the parties.”¹² Following the submission of these final offers, the parties may not amend their final offers absent mutual agreement.

Similarly to the MLB’s version of arbitration, the arbitral tribunal is required to select one of the final offers and may not amend the selected offer. The tribunal is required to explain its rationale for choosing the selected offer.¹³

B. JAMS

JAMS maintains less exhaustive procedures governing the baseball arbitration process in engineering and construction disputes, which are outlined in Rule 33 of its Expedited Construction Arbitration Rules.¹⁴ Under JAMS’s rules, the parties must provide the organization with a written offer at least seven days before the arbitration hearing, which JAMS will provide to the arbitrator unless the parties have agreed not to provide the offers to the arbitrator. The parties are entitled to amend these offers at any time prior to the close of the arbitration hearing.

Where JAMS most differs from the AAA in managing baseball arbitration matters is that it provides for different procedures when: (1) the parties have determined to allow the arbitrator to be informed of the proposals; versus (2) when the parties have determined not to inform the arbitrator of the proposals.¹⁵

When the arbitrator is informed of the proposals, the arbitrator will select the proposal that the arbitrator determines to be most reasonable and appropriate, similarly to how the matter would be managed by the AAA. Distinct from AAA procedures which may require a reasoned award in making a selection, the JAMS arbitrator does not explain her decision or reasoning in making the selection.¹⁶

When the arbitrator is not informed of the proposals, then the arbitrator renders a decision pursuant to the normal arbitration operating procedures, as if the parties were not pursuing baseball arbitration. The award is subsequently corrected to conform to whichever proposal was closest to the arbitrator’s award.¹⁷ This type of baseball arbitration is also known as “night baseball” arbitration.¹⁸



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III. Pros and Cons of Baseball Arbitration

Baseball arbitration can be particularly useful in the context of construction, helping to address the heart of a dispute in an efficient and cost-effective manner. That said, the circumstances of a dispute could also render matters challenging to the procedure of baseball arbitration and may be better suited to more traditional arbitration procedures.

A. Pros

Baseball arbitration is designed to cut through to the heart of the issue and force the parties to realistically assess their case and chances of success. If a party fails to put forward a reasonable offer, then its chance of success drops in favor of a more reasonable offer from the opposition. Baseball arbitration can also have an interesting impact on damages, given that it is easier to show concrete losses through invoices and similar documentation than to quantify harm for something like delay, which requires opinion testimony by expert witnesses.

As a contractual creation, parties can impose their own restrictions or requirements on the baseball arbitration process or on the arbitrators' ability to consider certain issues independent of the presiding forum depending on the actual language of the contractual provision.¹⁹ This gives the parties the freedom to adapt the process to their specific needs and shape the arbitration in a way that is satisfactory to both sides.

Baseball arbitration also requires absolutes -- there is no middle ground. This fear can serve to encourage settlement between the parties, further reducing the time and cost required to resolve the dispute.

B. Cons

Despite the benefits that this type of dispute resolution can provide, baseball arbitration is not a one-size-fits-all solution and may be less helpful in certain construction contexts than others. For example, if the relief sought is not purely monetary—for instance, if there are requests for declaratory or equitable relief—then this form of arbitration is likely not the best fit as claims generally result in a monetary award. Additionally, baseball arbitration can get complicated when there are multiple parties involved, with each party pitching its own solution. Or, alternatively, there can be complications when a claim pertains to multiple parties but only two parties are subject to arbitration, like when a general contractor passes through claims from a subcontractor who is not party to the arbitration.²⁰

Furthermore, the process is designed to prevent parties from swinging for the fences. Ambitious offers representing what a company hopes to obtain can

become a strategic liability, which is both a pro and a con, depending on your perspective.

IV. Baseball Arbitration and Prevailing Party Clauses

Though generally more cost-efficient, baseball arbitration is still a form of alternative dispute resolution requiring fees and costs. Thus, it is important to consider when drafting the initial contract whether the parties wish to include any kind of prevailing party clause, requiring the “loser” to cover these costs. As a contractual provision, baseball arbitration can govern the resolution process but cannot override other parts of the contract (unless explicitly provided for in the contract). This means that the inclusion of a prevailing party clause in the contract can work in tandem with baseball arbitration clauses, encouraging the parties to resolve their differences via settlement or reasonable arbitration as opposed to escalating the matter further.²¹

V. Conclusion

While not perfectly suited to resolve every dispute, baseball arbitration can easily cut through the noise to reach efficient, low-cost settlements. Baseball arbitration can take different forms depending on the precise language of the contract and type of arbitration forum used but generally encompasses the same process to arrive at a single number that reasonably reflects the damages of the dispute. The process is founded in the idea that arbitration is a matter of contract, binding parties to their own agreed upon terms. So long as the contractual provisions are carefully drafted, identifying the kinds of disputes subject to arbitration, clarifying the process to be used, and addressing how prevailing party status may affect the arbitration, then a baseball arbitration provision is enforceable in a construction setting. And, more importantly, baseball arbitration may be the preferred method to play ball with the opposing party and resolve the dispute equitably.

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- ⁵ See INT'L CTR. FOR DISP. RESOL., *Final Offer Arbitration Supplementary Rules* (2015), <https://www.adr.org/media/yjcdqw0k/final-offer-supplementary-arbitration-procedures.pdf>.
- ⁶ 9 U.S.C. § 2.
- ⁷ See, e.g., *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469 (5th Cir. 2012) (determining that clerical errors resulting in a preliminary award containing aspects of both parties' offers were not enough to override the use of baseball arbitration as the contractually agreed to method of dispute resolution); *Reach Air Med. Servs. LLC v. Kaiser Found. Health Plan Inc.*, 160 F.4th 1110 (11th Cir. 2025) (upholding an arbitrator's baseball arbitration award and recognizing that arbitration awards are rarely vacated by courts due to the arbitrator's broad authority).
- ⁸ INT'L CTR. FOR DISP. RESOL., *Final Offer Arbitration Supplementary Rules 3* (2015), <https://www.adr.org/media/yjcdqw0k/final-offer-supplementary-arbitration-procedures.pdf>.
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