BASEBALL ARBITRATION – NOT SO MUCH OF AN INTERNATIONAL GAME

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About fifteen to twenty years ago, many dispute resolution professionals and business people expected that "baseball arbitration" (sometimes referred to below as "BBA") would take the world by storm. Although baseball arbitration has had at least moderate success in various domestic contexts in the United States, as a mechanism for dispute resolution in the international context, baseball arbitration has, quite simply, struck out.

Part I of this article describes various definitions of "baseball arbitration." Part II briefly describes the successes of BBA in certain domestic contexts. Part III addresses the issue of why baseball arbitration has seen only ***limited*** success in the international field.

Part I: What is Baseball Arbitration?

There is more than one working definition of the term "baseball arbitration." (Sometimes "baseball arbitration" is referred to as "final offer arbitration."[1]) As its name suggests, the procedure called "baseball arbitration" was popularized in the negotiations over salaries in major league baseball. "Baseball arbitration" is the term that has been used to describe the type of arbitration process in which an arbitrator is ***required to choose*** between two competing monetary proposals from the parties – rather than attempt to adjudicate the most precise, "right" outcome (which presumably would be a number in between those two competing offers). Put slightly differently, in BBA, the arbitrator has no authorization to render an award in an amount ***other*** than the amount set forth in one of the two proposals that were submitted by the disputants in the arbitration.

The "hands tied" aspect of BBA makes it significantly different from conventional adjudication.

Why should litigants want to tie the hands of the arbiter (arbitrator) who is adjudicating their dispute? In a Student Note in the Journal of Dispute Resolution, Sarah Jolley answered that question as follows:

"*[B]aseball arbitration purportedly … encourages parties to submit reasonable bids that tend towards the median. Unlike other forms of arbitration where arbiters can compromise by selecting a number between the parties' bids, baseball arbitration requires arbitrators to choose one of the parties' offers. As the arbitrators have instructions to select the bid closest to the player's "real market value" in this winner-takes-all system, parties have incentives to submit reasonable rather than aspirational offers for fear their bid will be rejected.*"[2]

Another way of summarizing the advantage of "tying the hands" of the arbitrator has been expressed recently on the blog of the Reed Smith firm:

"*While the thought of tying the arbitrator's hands may seem unduly risky, the risk that makes baseball-style arbitration so perilous is also its principal benefit. … [I]n a baseball-style arbitration, the parties are incentivized to take reasonable and justifiable positions or risk having their offer summarily rejected by the arbitrator. Moreover, because a [BBA] restricts the arbitrator's discretion to the parties' final positions, the parties may not rely on the prospect of the arbitrator issuing a compromise award that "splits the baby." Thus, by forcing the parties to closely examine the real merits and value of the case, and* ***by increasing the consequences of failing to reach a negotiated settlement****, baseball-style arbitration attempts to bring the parties closer to an amicable resolution.*"[3]

Both of the sources quoted above recognize that the main advantage of baseball arbitration is that it forces the two parties to ***reject taking extreme positions***. Implicit in such recognition is that BBA is a form of ***indirect*** negotiation.

Two of the largest ADR providers in the United States, the AAA[4] and JAMS[5], both have rules dedicated to BBA. The primary features of those two institutions' respective rules are summarized below.

Rule 3 of the AAA's BBA Rules provides that "[i]n rendering its award, the tribunal shall give consideration ***only*** to the ***final*** offer submitted by each party" (emphasis added). Rule 4 of these rules provides that, "[a]bsent mutual agreement of the parties, there is no right to amend final offers once submitted to the arbitral tribunal."

Rule 4 essentially sets a default rule under which each party's offer remains unchanged even after the conclusion of the evidentiary stage of the case.

Rule 6 of the AAA's BBA Rules provides that the arbitrator "shall be limited to choosing only one of the final offers submitted by the parties." The combined effect of Rules 4 and 6 is that, under the AAA BBA rules, the default is that the arbitrator is required to choose one of the two "final" offers even if one party is interested in amending its offer.

The JAMS rules regarding the baseball arbitration[6] process are somewhat different. Rule 28(a) provides:

"*[A]t least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate. . . . At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. . . . .*"

The JAMS rules also address expressly the issue of what the arbitrator is informed – and when – as to the parties' respective offers.

Thus, under JAMS Rule 28(a), there is no default rule against the amendment of offers.[7]

In addition, JAMS Rule 28 subsections (b) and (c) provide alternative procedures with respect to the level of knowledge of the arbitrator as to the competing offers:

"*(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c) [which governs the considerations that an arbitrator may take into account in rendering an award]. . . .*
(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals and the closest of the last proposals will become the Award."

Although subsections (b) and (c) provide different procedures for informing the arbitrator as to the parties' respective offers, both such procedures preclude the arbitrator from "splitting the baby."

As can be seen by comparing the JAMS rules with the AAA Rules, there is more than one way to conduct a BBA case.

Part II: Moderate Success in the Domestic Context

Baseball arbitration has had some success in industries in addition to that of professional sports. Perhaps the biggest "win" is the use of baseball arbitration in the medical services field – in particular in the federal No Surprises Act of 2020,[8] which is summarized as follows:

"*[T]he No Surprises Act protects patients from surprise bills for out-of-network medical care. Consumers are protected from surprise billing when they seek emergency care, are transported via air ambulance, and receive medical care at an in-network hospital but are unknowingly treated by an out-of-network physician. The No Surprises Act [generally] makes it illegal for healthcare and insurance providers to bill patients more than they would receive for in-network cost-sharing established by the patients' insurance . . . . Health plans must treat out-of-network medical care as if it were in-network when calculating patient costsharing. . . .*
To resolve disputes over surprise bills, the federal legislation establishes a [BBA] process to determine how much insurers must pay out-of-network physicians. It gives insurers and healthcare providers 30 days to try to negotiate payment for out-of-network bills. If a provider is dissatisfied with a health plan's payment and cannot settle an amount through negotiation, they can initiate arbitration. The Secretaries of the U.S. Departments of Health and Human Services, Labor, and Treasury are tasked with establishing a process to certify a pool of neutral arbitrators with relevant expertise and no conflicts of interest. The No Surprises Act calls for the insurer and provider to jointly agree upon an arbitrator from that pool. If the parties are unable to reach an agreement, the federal government will select an arbitrator from the pool. Both parties must pay an administrative fee for engaging an arbitrator. Additionally, the losing party must pay the arbitrator's fee. The burdens imposed by this process give parties additional incentives to negotiate a settlement within the proposed 30-day window."[9]

According to a 2022 report issued by the Departments of Health and Human Services, Labor, and Treasury, over 90,000 dispute resolution processes had been initiated in the first five and a half months of the existence of the "Independent Dispute Resolution" process pursuant to the No Surprises Act.[10]

Baseball arbitration has been used in the cable television industry to resolve licensing disputes.[11]

BBA has been used to resolve disputes between landlords and tenants as to the market rate for commercial real estate.[12]

Part III: The Lukewarm International Reception

I first heard about baseball arbitration approximately 25 years ago, from the general counsel of an American corporate client.

Since then I have devoted a great deal of attention to the advantages of baseball arbitration. I also discussed with many international business people who are not lawyers whether they could be persuaded to become advocates within their companies for the use of baseball arbitration.

In summary, my observation is that, although many international dispute resolution professionals are ***aware*** of BBA, the use of BBA in international matters is the exception. More specifically, I have been involved in international cases in court in which, ***after*** a suit was brought, the parties considered referring the dispute to arbitration.

In several such cases, one of the parties proposed that the arbitration be conducted as BBA. Yet in no case in which I was involved was the suggestion to submit an ***existing international*** dispute to BBA accepted.

It seems that the more common situation is that, once an international dispute has arisen (and regardless of whether any agreement between the disputants contains a dispute resolution mechanism), it is difficult to get all disputants to agree on BBA. Sometimes the explanation for that difficulty is that the resolution of a dispute entails resolving more than just one legal issue or one factual issue. In such a situation, each party reasons that, the more subparts there are in a dispute, the greater the risk in trying to "guess" that one side's proposal will appear to the arbitrator to be more reasonable than the proposal of the opposing side.

To illustrate the challenge, assume a dispute between a financial "finder" and a company that allegedly received two investments as a result of an introduction made by that finder. The agreement provides that the finder will be entitled to a commission from the company with respect to any investment made by an entity who was "introduced" by the finder, "directly or indirectly." The primary claim of the finder is for a commission based upon an investment made by Investor A. Although the defendant company disputes that the actions of the finder vis a vis Investor A were sufficient to constitute an "introduction," the finder and the company agree that, ***if*** the finder made an introduction within the meaning of the agreement to Investor A, then such an introduction was a "direct" one.

The above summarizes the finder's first claim. The finder's second (and closely related) claim is for an investment made by Investor B, who allegedly had been introduced to the company by Investor A – and the finder-plaintiff further contends that (a) such an introduction was one made "***indirectly***" within the meaning of the agreement, and (b) therefore, the defendant-company is required to pay a finder's fee (commission) for such an ***indirect*** introduction as well.

By all objective standards, the claim relating to Investor A is stronger than that relating to Investor B. As to the claim relating to the investment by Investor A, the primary disagreement between the disputants is the sufficiency of the plaintiff's actions so as to constitute an "introduction" that could trigger the payment of a fee; however, as to the second claim, not only are there questions as to factual matters, but there is a disagreement as to interpretation of the phrase "directly or indirectly."

From the perspective both of the plaintiff and the defendant, the risks inherent in the second claim are different from those inherent in the first claim. Both parties know that, if the finder fails to prove that he introduced Investor A and therefore fails as to his first claim, the finder will also necessarily fail as to his second claim. But both sides also know that, even if the plaintiff succeeds as to the first claim, his success does not necessarily mean that he will succeed on his second claim. In such a situation, whereas it might have been possible to get the parties to agree to use BBA to resolve the claim concerning Investor A, the addition of the claim regarding Investor B negates any such possibility.

The above example illustrates how different layers of factual and legal issues affect the decision as to whether to select BBA (as opposed to conventional arbitration or litigation in court). For ***both*** parties, the existence of multiple, contentious issues – whether legal or factual – makes it extremely difficult to arrive at a "final" offer as part of a BBA process.

It goes without saying that the finder fee dispute described above is ***far*** less complicated than many disputes that regularly end up being adjudicated before the International Chamber of Commerce, the London Court of International Arbitration, or other international arbitral institutions. If a finder's fee dispute is too complicated for baseball arbitration, then clearly a dispute arising from a multiyear joint venture relationship or a licensing agreement is likely to be too complicated as well.

Perhaps because of the difficulties posed by the typical multi-issue dispute, the Debevoise firm opines as follows in an online ADR guide:

"*A baseball arbitration clause may be desirable where the dispute between the parties involves only the amount owed and not liability itself. It may also be used for a damages phase of a bifurcated arbitration, after liability has already been determined.*"[13]

Although the above observations apply both domestically and internationally, the significance of the multiple-issue factor is more pronounced in an international case.

In my view, there are at least two more reasons why baseball arbitration has not caught on in the international commercial field:

(A) First, the greater the stakes, the greater the importance of familiarity with the process. The stakes in most international commercial disputes are usually too great for parties to want to employ a method for dispute resolution with which they are less familiar. Moreover, the major American arbitral institutions only adopted BBA within the past decade, while the ICC, the LCIA, and WIPO have yet to adopt rules specific to BBA. These facts underscore the

general lack of familiarity internationally with BBA.

(B) The second conclusion stems from the realization that BBA is, in essence, a form of ***negotiation***. The conventional wisdom – both among mediators and lawyers who represent disputants in mediation – is that a negotiated settlement is more likely to be achievable in a situation in which the disputants expect that they might "run into each other" in the business context in the future. Everything else being equal, when comparing the typical domestic commercial dispute to the typical international commercial dispute, the likelihood of "running into each other" is greater in the domestic context than in the international context.

Because disputants in domestic disputes are more likely to expect to encounter each other in the future, it is not surprising that a dispute resolution method that is, in essence, a form of negotiation is less utilized in the international context.

Endnotes:

[1] "Final offer arbitration" is the term used by the American Arbitration Association (the "AAA"). The AAA has published "Final Offer Arbitration Supplementary Rules" (the "AAA BBA Rules"), AAA, https://www.adr.org/sites/default/files/Final%20Offer%20Supplementary%20Arbitration%20Procedures. pdf (last visited Sept. 13, 2023).

[2] Sarah Jolley, Home Run or Strike Out: Can Baseball Arbitration Solve America's Medical Debt Crisis?, J. Disp. Resol. 169, 172 (2022) (footnotes omitted) (available at https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1920&context=jdr (last visited Sept. 13, 2023) (**hereinafter "BBA & Medical"**).

[3] Casey D. Laffey et al., Know the Rules Before Playing Ball: The ICDR and AAA's Supplementary Rules Governing Baseball-Style Arbitrations, https://www.reedsmith.com/en/perspectives/2017/01/know-the-rules-before-playing-ball-the-icdr-and-aa (emphasis added; last visited Sept. 13, 2023).

[4] See supra, n.1.

[5] "JAMS" was formerly called "Judicial Arbitration and Mediations Services." See The JAMS Name, JAMS, https://www.jamsadr.com/about-the-jams-name/ (last visited Oct. 26, 2023).

[6] See JAMS Streamlined Arbitration Rules & Procedures, Rule 28, JAMS, https://www.jamsadr.com/rules-streamlined-arbitration/#Rule-28 (last visited Sept. 14, 2023).

[7] In preparing this article, I spoke with a Houston-based litigator (who prefers to remain anonymous) who has conducted at least three international cases of BBA, mostly in the construction industry. That litigator told me that, in his experience, it is preferable for the parties' written offers to be submitted ***after*** the close of evidence. That view appears to be in line with the JAMS practice.

[8] 42 USC 300gg-111.

[9] BBA & Medical, supra n.2 at 179-80 (footnotes omitted).

[10] Initial Report on the Independent Dispute Resolution (IDR) Process April 15 – September 30, 2022 7, Dept. of Labor, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/q2-and-q3-partial-report-121522.pdf (last visited Oct. 26, 2023).

There has also been criticism of the Independent Dispute Resolution system. See No Surprise: The No Surprises Act Is Vague and Confusing, and Congress Must Fix It, The Heritage Foundation, https://www.heritage.org/health-care-reform/report/no-surprise-the-no-surprises-act-vague-and-confusing-and-congress-must (last visited Sept. 13, 2023); see also Baseball-style arbitration to settle medical bills?, ALM Benefits Pro, https://www.benefitspro.com/2019/02/11/baseball-style-arbitration-to-settle-medical-bills/?slreturn=20230422170454 (describing state regulation that uses BBA) (last visited Sept. 14, 2023).

[11] Baseball-Style Arbitration: Don't Strike Out, Next TV, https://www.nexttv.com/news/baseball-style-arbitration-dont-strike-out-78663 ("titans of the broadcast and cable industry are resorting to 'baseball-style' arbitrations to resolve high-stakes programming disputes between media-ownership groups on the one hand and cable and satellite video distributors on the other"); last visited Oct. 26, 2023).

[12] See A Multimillion-Dollar Trip to Saks Fifth Avenue, Valensi Rose, https://www.vrmlaw.com/blog/468-a-multimillion-dollar-trip-to-saks-fifth-avenue (last visited Oct. 26, 2023).

[13] Annotated Model Arbitration Clause for International Contracts, 51, Debevoise & Plimpton LLP, https://www.debevoise.com/~/media/files/capabilities/arbitration/annotated_model_arbitration_clause_for_international_contracts_recent.pdf (last visited Oct. 26, 2023).

The Houston-based litigator (referred to in n.7 supra) who has handled three cases of baseball arbitration in the international field shares the following observation: the more issues there are in the dispute, the less likely it is that BBA would be an effective mechanism for resolving the totality of the dispute.

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UPCOMING INTERNATIONAL LAW SECTION EVENTS

Review: 8th Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention

November 6, 2023 | 11:00 am – 12:30 pm ET

- The Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention held its eighth meeting on October 10-17 in the Hague. The Commission took stock of the implementation of both Conventions. This review will consider key issues practitioners may encounter in the implementation of those international instruments at the core of international family law practice.
- Register for the 90-minute meeting at: https://www.americanbar.org/event-registration/435089041-1/

Protection or Peril? The Rule of Law and Gender Based Violence

November 8, 2023 | 12:00 pm – 1:00 pm ET

- In July 2023, the World Health Organization alongside other partners at the United Nations, launched the RESPECT platform, an online resource to help prevent violence against women. The World Health Organization noted "preventing and responding to violence against women and girls continues to be a worldwide public health, gender equality and human rights priority." The World Bank adopted WBG Gender Strategy 2024-2030 in order to "propose innovations, financing, and collective action" to end gender-based violence. This panel session will focus on different situations where the law has been effectively (or ineffectively) utilized to address gender-based violence and identify other pathways to consider when responding to gender-based violence.
- Register for the 60-minute webinar at: https://www.americanbar.org/event-registration/435268576-1/

The "E" of ESG Climate and Nature for the Food and Agriculture Sectors

NEW DATE: November 15, 2023 | 12:00 pm – 1:30 pm ET

- This session will focus on climate risk management. Food and agriculture's intimate connection with the natural world means that there are many points of inherent intersection with environmental issues, such as climate change, biodiversity, and ecosystem integrity. As these topics continue to rise in prominence for many stakeholders, navigating the "E" of ESG is increasingly important for these sectors to manage—particularly climate change and natural capital. In this panel, we will cover the evolving regulatory and extra-regulatory pressures on companies to address these topics, key risks facing the food and agriculture sectors, as well as opportunities these sectors have to capitalize on climate and nature related trends.
- Register for the 90-minute webinar at: https://americanbar.zoom.us/webinar/register/WN_sVJTqdrLSju285-YIQkVEw#/registration