Legal Update Article

Construction Disputes and 'Baseball' Arbitration

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A form of dispute resolution called "baseball" arbitration has increased in use and popularity in the construction industry to resolve all types of disputes, including employment disputes. The procedure has unique mechanisms that may be beneficial to construction industry employers in resolving disputes.

Basics

While long-used successfully in salary negotiations in major league baseball, baseball arbitration is not limited to salary negotiations or major league sports.

In baseball arbitration, the pre-arbitration proceedings and arbitration hearing itself are not necessarily any different than any standard arbitration. However, in this type of arbitration, each party submits a proposed award — a single figure — to the arbitrator. The arbitrator *must* select one of the two numbers submitted, period. There is no middle ground. This strict requirement creates an interesting dynamic, with heightened pressure on the parties to objectively take stock of their respective positions, be as reasonable as possible, and be able to justify their proposal.

Benefits of Baseball Arbitration

A compelling reason behind the use of baseball arbitration is that, all too often, arbitrators are at least perceived to render a compromised award by "splitting the baby." This can be detrimental to parties who, in fact, are reasonable in their view of a claim's value, but far from their opponent's estimation.

Baseball arbitration forces the parties to focus on what relief they genuinely and realistically believe they are entitled to and, accordingly, can increase the efficiency of the process while creating pressure to promote a just (and, perhaps, agreed) resolution.

How to Implement Baseball Arbitration

Baseball arbitration is a creature of contract. It could be embodied in a two-party employee arbitration agreement or a collective bargaining agreement.

The American Arbitration Association, the International Centre for Dispute Resolution, and independent arbitrators have recognized and honored baseball arbitration contract provisions. *See, e.g.,* ICDR Final Offer Arbitration Supplementary Rules at icdr.org.

While arbitration awards rarely are subject to court review (absent limited circumstances of impropriety), baseball arbitration provisions have been acknowledged and enforced by various courts over the years. *See, e.g., Martin Marietta Materials, Inc. v. Bank of Okla.*, 2007 WL 3171533 (W.D. Ky. Oct. 25, 2007).

Baseball arbitration may not be well-suited to complex contractual disputes involving multiple claims between multiple parties and varied types of relief (*e.g.*, specific performance). It *may* be a best fit for employment disputes, which typically involve two parties — employer and employee — and a discrete claim for damages.

Within the framework, there are many ways to structure a baseball arbitration provision to vary the timing and disclosure of offers by the parties and the rendition of the award. For example, a variation called "night baseball arbitration" provides that the arbitrator renders the award without being informed of the written proposals. Then, the award is modified to conform to the closest of the proposals. Indeed, care should be taken to address the details of the process in such agreements. However structured, this device creates pressure that often leads to a negotiated, amicable resolution *before* the parties spend resources trying the case.

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Given significant recent developments in the use of arbitration (for instance, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021), construction industry employers should consult counsel on enforceability of such arbitration provisions.

Jackson Lewis attorneys have a wealth of experience in arbitration, including crafting and litigating baseball arbitration provisions.