

# CAN BASEBALL ARBITRATION BE A HIT?

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While the concept of baseball arbitration – more formally known as “final offer selection” – is not new, its potential has yet to be widely embraced in the field of dispute resolution. Many situations exist where it could be considered as a viable, comfortable and effective way to address conflict.

Unlike traditional arbitration, where parties to a dispute typically give the third-party arbitrator *carte blanche* to determine the outcome of their conflict, baseball arbitration limits the outcome options. The arbitrator is asked to choose from the final offers proposed by the parties to resolve the matter. This process has become known as “baseball arbitration” because it is used by Major League Baseball when a player and a team cannot agree on compensation. Each side presents what they think is a fair and reasonable outcome and the arbitrator decides which to go with. There can be several advantages to this approach, including efficiencies of time, cost and finality.

## Like Carter Did to Philly

Baseball arbitration offers closure, just like Joe Carter delivered when he hit his famous home run to end the 1993 World Series. It provides clarity around possible outcomes before a final decision is made, removing uncertainty and anxiety about which of seemingly endless possibilities could conclude a dispute. The arbitrator chooses which final offer will be the outcome. This can also limit complications that could drag the dispute into endless extra innings.

To demonstrate the draw of limiting outcome options, we venture back to Game 1 of the 1988 World Series.



In the bottom of the ninth inning, the Oakland Athletics led 4-3 with two outs. The Los Angeles Dodgers sent in Kirk Gibson to pinch hit. This was a surprise move, as Gibson was not expected to play. While he was the team’s best hitter in the regular season, he was injured – both of his legs were hurt. The injuries limited potential outcomes. As Kirk Gibson hobbled up to bat, it was clear to everyone that he was unlikely to succeed by putting the ball in play. He could not run, so was in no position to try to run out a base hit. Gibson was focused on trying to hit a home run.

Ultimately, Kirk Gibson delivered a Hollywood ending, considered to be one of baseball’s greatest moments. He hit a home run to win the game. What we draw from this is how a reduced number of outcomes can be appealing. In the context of dispute resolution, consider the thought each party must put into their final offers in a baseball arbitration. They should be less inclined to “swing for the fences,” in favour of presenting what would more likely be received by the decision maker as fair and reasonable. In truth, the narrow outcome range may also assist the arbitrator in reaching an outcome.

## Pitching a Complete Game

Bob Gibson was a legendary St. Louis Cardinals pitcher who pitched 255 complete games, predominantly in the

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1960s, in an extraordinary 17-year career (earning himself the hashtag #completegamer with contemporary audiences). The accomplishment is considered even more impressive today, as complete games in baseball are rare. Modern teams commonly use a series of pitchers in a game, from openers to middle relievers to closers. This is like the variety of different neutrals typically involved in the various stages of a dispute that does not settle – from the mediator being the starter on the journey to conflict closure, to a different practitioner playing closer, like Tom Henke called in from the bullpen as the arbitrator to “terminate” the dispute once and for all.

The throwback to a “complete game,” in baseball terms, is a way forward for today’s dispute resolution practitioners to market their services. Incorporating baseball arbitration into the med-arb process offers the chance to promote offerings as a full package – “pitching” involvement from beginning to end of addressing conflict.

In recent years, hybrid med-arb processes have garnered attention; yet, concerns emerge when the same practitioner fills both the role of mediator and arbitrator. Baseball arbitration can help address these concerns. As our colleague Bernard Morrow put it on Twitter, “[b]aseball arbitration after mediation makes sense on many levels – cost effective, efficient and no mediation chill if you go straight from mediation to decision.”

Submissions focus on persuading the arbitrator that a particular outcome is appropriate, and the arbitrator’s discretion is significantly constrained. This can help with the delicate transition of a practitioner from fulfilling the role of mediator to arbitrator – including concerns parties may have about how information shared in the mediation stage might find its way into the arbitration award. Of course, baseball arbitration creates different challenges that do not exist with traditional arbitration. For example, what is an arbitrator to do if they do not like either of the final offers presented? Even so, that possibility might still be more appealing to the parties, as one will still be able to self-determine the outcome of the dispute.

## Who’s on First?

Perhaps the most important aspect of baseball arbitration, regardless of whether it is part of med-arb or a stand-alone process, is ensuring that conflicting parties understand what they are getting themselves into. Participants must provide informed consent, which can be complicated with under-represented or self-represented parties. It is important to underscore that the arbitrator will not craft their own solution and will instead be limited to the final offers presented by each party ... like condiment options available for your hot dog at the ballpark. To that end, a “seventh inning stretch” – or even a balk – may be worthwhile for anyone considering baseball arbitration. Allow them some time to consider the pros, cons and fit for the particular conflict at hand. For example, in the days or weeks following a mediation that does not result in settlement, the mediator could follow up with the participants and pitch the idea of baseball arbitration. If they agree, they could then be signed to a new contract (an arbitration agreement) and then submit their final offers. The relatively slow pace allows the players time to avoid a wild pitch, or mistakes that can result from being under pressure – like during the ninth inning at mediation.

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***Marc Bhalla** is a Chartered Mediator and Qualified Arbitrator who offers ADR services both in-person and online. He believes that flexibility of process is a significant advantage of ADR over traditional processes.*

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