“Baseball Arbitration” in Construction Disputes

How Final-Offer Arbitration Works—and When It Makes Sense

When construction disputes boil down to how much rather than who’s right, traditional arbitration can feel like a slow, expensive rerun of litigation. That’s where “baseball arbitration” (and its cousin, “night baseball”) can make a meaningful difference—offering speed, predictability, and incentives for both sides to be reasonable. Done right, it can shorten proceedings and reduce costs. Done poorly, it can magnify risks, produce unreviewable outcomes, and leave clients dissatisfied. This article explains how baseball arbitration works, when it can be useful, and the safeguards necessary to deploy it responsibly in the construction context.

How Baseball Arbitration Works

In baseball arbitration—borrowed from Major League Baseball salary disputes—each party submits a final offer on a disputed monetary issue. The arbitrator must pick one—no compromise, no averaging. Each side presents evidence supporting its position; the arbitrator reviews both final offers and selects one in its entirety—usually the one that appears most reasonable on the record presented. Because the arbitrator can’t “split the baby,” both sides are pushed toward realistic, defensible positions.

The AAA Construction Industry Arbitration Rules do not specifically name “baseball arbitration,” but the framework fits comfortably within the rules that give the arbitrator discretion to manage proceedings as the parties agree in their contract, including procedures for presenting evidence and the form and scope of award. With careful drafting, the parties can define a final-offer process that operates within the AAA framework.

“Night Baseball”: A Blind Version

In “night baseball” arbitration, the arbitrator determines what they believe is the fair amount without knowing either side’s final offer. After the award is written, the offer closest to the arbitrator’s number automatically becomes binding. This variant can reduce anchoring and preserve the arbitrator’s independence while still motivating reasonable offers, since extreme positions risk diverging far from the arbitrator’s independent determination.

Finality, Review, and Risk

Baseball arbitration is intentionally unyielding. Awards are typically final and not subject to appeal on the merits. In practice, both the Federal Arbitration Act and common arbitral rules provide only narrow grounds for vacatur, which are ill-suited to correcting ordinary errors of fact or law. That lack of a backstop is part of what makes baseball arbitration efficient and decisive—but it also means parties must be comfortable living with an all-or-nothing result that is extraordinarily difficult to remediate if it goes wrong. This dynamic heightens the importance of arbitrator selection and procedural safeguards.

Arbitrator Qualifications and Selection

Because the decision-maker must choose one of two numbers without tailoring the outcome, arbitrator qualifications are critical. Parties should consider requiring, in their clause or submission agreement, specific experience with construction quantum, cost accounting, delay and productivity analysis, and change-order valuation. In high-stakes matters, build in vetting mechanisms such as agreed minimum years of industry-specific experience, a shortlist process, and limited strikes. To guard against idiosyncratic decision-making, some parties opt for a panel structure for baseball arbitration, but that can dilute the cost and speed advantages. At a minimum, the selection procedure should be explicit and rigorous.

Best Use Cases: “Quantum” or Price-Only Disputes

Baseball arbitration works best in true quantum disputes—cases where liability is largely settled or minor, and the remaining question is the amount of compensation.

Examples:

- Change order valuations
- Delay damages or lost productivity claims
- Termination payment disputes
- Subcontractor pass-through claims

Conversely, disputes involving contested liability, multi-party responsibility, defect causation, design professional negligence, or complex entitlement defenses are poor candidates. Where issues are mixed, consider bifurcation: resolve entitlement traditionally, and apply baseball arbitration, if at all, only to the discrete quantum phase.

Suitability for Large-Dollar Claims

The binary nature of baseball arbitration can be ill-suited to very large-dollar claims. For example, most counsel would hesitate to submit a $200 million change-order claim to a baseball arbitrator, given the all-or-nothing selection. For nine-figure disputes, the all-or-nothing nature of the process can create disproportionate risk, especially when valuation turns on complex methodologies or sharply divided expert opinions. In such matters, consider either declining baseball arbitration altogether or employing it as a non-binding mechanism within a settlement framework.

Mandatory vs. Elective Use

Making baseball arbitration mandatory across the board is risky. Tread carefully—very carefully—before making it mandatory in contract language. If imposed indiscriminately, it can force a high-variance process onto disputes that require more granular adjudication and can result in outcomes that feel arbitrary to clients. A better approach is to make baseball arbitration elective or conditional—available only if the parties agree at the time of dispute, or after the tribunal determines that the issues are truly quantum-only and suitable for final-offer adjudication. If parties nonetheless wish to include a mandate in their contract, limit it to well-defined quantum disputes and include a safety valve allowing the arbitrator to revert to conventional procedures if the framework cannot be fairly applied.

Advisory and Non-Binding Baseball as a Settlement Tool

An alternative is to use baseball mechanics in a non-binding, advisory mode as part of the settlement process. This preserves client control and reduces the odds of an adverse, irreversible outcome while still creating discipline around evidence and offers. The parties submit evidence and final offers; the baseball arbitrator issues an advisory determination or applies a night-baseball process to indicate which offer is closer to a reasoned valuation. This is not a mediator's proposal, but rather a structured, evidence-based evaluation that can facilitate resolution while preserving party autonomy. Non-binding baseball maintains the discipline and anchoring benefits of final-offer formats while avoiding the irreversibility concerns that attend a binding award.

Drafting It into Your Contract

When incorporating a baseball-arbitration clause under the AAA Construction Industry Arbitration Rules, clarity is key. Consider using language along these lines, but consult with legal counsel before including it in your contract documents:

In any arbitration conducted pursuant to these Rules, if the dispute is limited to the amount of money owed (quantum), the arbitration shall be conducted as a final-offer ("baseball") arbitration. Each party shall submit a single written final offer. The arbitrator shall select one of the two offers in its entirety as the award.

Practical Tips:

- Specify that it applies only to quantum disputes, not all issues.

- Identify AAA as the administering forum (preferred for construction disputes).
- Note whether it is daytime (disclosed offers) or night baseball (offers disclosed post-award).
- Address cost allocation—*e.g.*, whether fees shift to the party whose offer was not chosen (AAA Rule R-49).

Common Pitfalls

- Vague clause: Without defining when and how final offers apply; the process may revert to traditional arbitration.
- Mixed issues: Combining liability and damages disputes in a single baseball format risks procedural confusion.
- Multiple parties: Baseball arbitration works best in two-party disputes—joinder or consolidation under AAA Rule R-7 complicates things.
- No fallback: Include a provision allowing the arbitrator to revert to standard procedures if the agreed framework can't fairly be applied.

Conclusion

Baseball arbitration can be a powerful, efficient tool for resolving clear-cut monetary disputes, but it demands careful drafting, thoughtful arbitrator selection, and disciplined scoping. For many construction matters, the safest course is to reserve binding baseball for true quantum-only disputes of moderate size, use advisory baseball to facilitate settlement in higher-stakes cases, and avoid mandatory clauses that eliminate discretion. With those guardrails, parties can capture the benefits of speed and cost control without putting all of their eggs in one basket.

For further information on these developments, please contact Kristi Belt.