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LITIGATION

'Baseball Arbitration' and the Trial of Socrates

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Special to the Legal

Every year, during January and February, sports pages report ongoing negotiations between professional baseball teams and players. Repeatedly, the public is advised that absent a settlement, the labor agreement between the team owners and the players' union requires that salaries of certain veteran players be determined by "Baseball Arbitration."

Baseball Arbitration may take several forms. Most commonly, the arbitrator is restricted to making an award from one of the final offers presented by the two parties and may not award a different salary believed to be more appropriate. The arbitrator, in other words may not "split the baby." In a variant, commonly called "night baseball arbitration" the arbitrator is not informed of the final offers of each party; the arbitrator simply enters a decision and the undisclosed offer closer to the arbitrator's decision becomes the final award.

This procedure is often viewed as salutary as it tends to encourage parties to engage more actively and realistically in their negotiations.

In most arbitrations, the arbitrator is unrestricted and may enter a final award based solely on his or her own analysis of all of the factors in the case. In such circumstances, one or both of the parties may have little incentive to engage actively in a negotiation dance of offers and counter



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offers. Indeed, they may believe that holding fast to a more extreme position will subconsciously influence the arbitration award because the arbitrator will accept that position as the starting point in setting the appropriate parameters within which the award should be made. This strategy is known as "anchoring."

With Baseball Arbitration, however, both parties have a definite incentive to negotiate responsibly and submit a more reasonable proposal than that submitted by the other side. After all, if one party does not submit a reasonable proposal, the arbitrator will be more likely to select the "more reasonable" proposal submitted by the other. Inevitably, this moves parties to moderate extreme positions in the course of the negotiation to assure that the arbitrator will accept their proposal as the more reasonable. The hope, of course, is that such moderation will bring the parties closer together and improve the likelihood of settlement. Recent experience suggests the success of this procedure as very few of the baseball disputes potentially subject to Baseball Arbitration ever reach final adjudication. Rather, settlement is eventually achieved as a result of intensive negotiation between the parties.

Many people believe that the approach adopted by Baseball Arbitration originated with the baseball players' union and team owners. Actually this form of decision-making was employed millennia ago and appears in one of the most famous events in history — the Trial of Socrates in 399 B.C.E. as recounted by two of his disciples, Plato and Xenophon.

Historians have long debated the real reason for the prosecution of Socrates. It has been suggested that underlying the accusations was Socrates' support of anti-democratic elements during a period known as the Reign of the Thirty Tyrants. Nonetheless, Socrates was eventually charged as follows: "Socrates is guilty of refusing to recognize the gods recognized by the state; and of introducing new divinities. He is also guilty of corrupting the youth. The penalty demanded is death."

The eight-hour trial was conducted before a jury of 500 Athenians. Plato sets forth Socrates' spirited, three-hour defense in the *Apology*. Socrates is presented as both defiant and unrepentant, stating specifically that no matter what the jurors should do, he will never change his ways, even if he has to die many times. Ultimately, the jurors convicted Socrates, apparently by a vote of 280 to 220. (Socrates notes in the penalty phase of the trial that had 30 jurors changed their vote he would have been acquitted.)

It is in the penalty phase of the trial, however, that Baseball Arbitration makes its appearance. Both the prosecutors and Socrates were afforded the opportunity to propose a punishment. After listening to

the arguments the jurors, as in Baseball Arbitration, might vote for only one of the two punishments proposed.

As they had earlier, Socrates' accusers demanded the death penalty. To avoid death, therefore, Socrates had to propose a punishment that the jurors would accept as more appropriate than the death penalty. But he did not!

Socrates countered that he was, in fact, a hero and should be rewarded not punished. He proposed that the jury award him free meals in a public dining hall in the center of Athens. As I.F. Stone stated in his book *The Trial of Socrates*, "Socrates acts more like a picador trying to enrage a bull than a defendant trying to mollify a jury." In short, in this "Baseball Arbitration" Socrates initially refused to present a reasonable alternative punishment to a jury that had already found him guilty.

Finally, he relented and, somewhat facetiously, stated that as he had limited means, he would offer to pay one minae as his penalty. It was apparent, however, that such a small amount could not serve as a reasonable alternative to the death penalty. Accordingly, his disciples Plato, Crito, Critobulus and Apollodorus encouraged him to increase the amount of the penalty to 30 minae, for which they would stand surety. Apparently, they hoped that this increased offer might move 30 of the jurors who had voted Socrates guilty to vote for this lesser penalty thus sparing his life.

Nonetheless, the 30 minae offered by Socrates were deemed insufficient; the final vote reflected an even greater majority against Socrates than had voted for conviction. Selecting between the only two alternatives offered, 360 jurors voted for death while 140 voted for the payment of 30 minae.

In the *Apology*, Socrates himself notes alternative penalties. He might have suggested imprisonment or exile from Athens. Some scholars have concluded that had Socrates proposed exile, a majority of the

jurors would certainly have favored that over the death penalty. Under the rules of the penalty phase of the trial, however, the only alternatives from which the jurors might select were death or Socrates' last proposal, the payment of a small fine.

But what if Socrates' disciples, instead of offering only the 30 minae, had accumulated and offered a substantial amount of money? Would Socrates' accusers have feared that a majority of jurors might find this larger sum to be a more reasonable penalty than death; and, as a result, might they have countered by reducing their demand for the death penalty to a sentence of exile for life? Had they done so, might Socrates, who was already in his 70s, deemed it pru-

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dent to offer a counter-proposal of exile not to exceed two years? In response, might the accusers have further reduced their demand of exile for life, to six years exile in the hope that the jury might find six years more reasonable than the two years proposed by Socrates? And, finally, with both sides having so narrowed the spread in their positions with respect to the number of years of exile, might they have finally bridged the gap by agreeing on four years of exile as an appropriate penalty to be presented to the jury?

These suppositions, of course, demonstrate why parties who by agreement resort

to Baseball Arbitration often do reach settlement. They do not simply take positions and stick to them in the hope that the arbitrator will accept them as the basis upon which a compromise award may be entered. Recognition that the arbitrator is restricted to selecting the one proposal that is deemed more reasonable provides the incentive to the parties to modify their proposals and adopt reduced demands. And as the parties draw closer, they become less upset and more comfortable with positions earlier deemed totally unacceptable. Ultimately, they reach an agreement because the differences between them have been so significantly reduced that settlement is no longer viewed as capitulation; movement from these final proposals no longer requires a major concession by either side.

None of this influenced Socrates, however, because he did not necessarily view the death penalty as being worse than the alternatives presented. As he famously states to the jurors at the end of the *Apology*, "The hour of departure has arrived, and we go our ways — I to die and you to live. Which to the better fate is known only to God"

For many involved in a dispute, however, settlement is often preferred to the uncertainty of an arbitration award. Accordingly, although it is now infrequently employed, attorneys may want to consider whether, in negotiating a dispute resolution agreement, they should, for certain circumstances, suggest the incorporation of Baseball Arbitration. By adopting such a procedure, in the event of a later dispute, they may have provided the incentive to the opposing parties to negotiate in a manner that will significantly reduce the differences in their positions and, ultimately, be more likely to result in a mutually beneficial settlement. •