

**CREATIVE PROBLEM SOLVER'S HANDBOOK
FOR NEGOTIATORS AND MEDIATORS**

A PRACADEMIC APPROACH

Volume Two

A Portable Primer for Practitioners

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3.2 HAL ABRAMSON: *FINAL-OFFER ARBITRATION*

Case Information	
Nature of Case	Any dispute with money issue(s)
No. of parties	Unspecified
Representation of parties	Unspecified
Brief description of dispute	Any dispute involving money damages
Special /unusual circumstances	Parties must agree to allow arbitrator to select one party's or the other party's final offer.
Technique Information	
Primary use of technique	Breaking money-issue impasses
Other technique to use in conjunction with it	Unspecified
Any cautions with technique	It is preferable that someone other than the mediator serve as arbitrator; premature use may impair potential for mediated result.
Stage of process when most effective	When the parties believe that continued mediation will be fruitless
Other dispute/ transaction where effective	Unspecified

If you want to break money-issue impasses in mediation, you will benefit from reviewing the sections below.

3.2.1 What type of impasse can be overcome by using this technique?

Introducing final-offer arbitration can be an effective technique for overcoming an impasse due to an end-of-the day irresolvable issue over money.

3.2.2 What can a mediator do to help the parties overcome their money impasse?

After the mediator has exhausted all other initiatives during the course of the mediation, the mediator may consider breaking the impasse by proposing the use of an alternative process of dispute resolution called final-offer arbitration (FOA). This variation of arbitration, also known as baseball arbitration, can induce parties to return to negotiating a settlement.

3.2.3 Description of impasse-breaking technique

3.2.3.1 What are its essential features?

Under binding final-offer arbitration, each party agrees to submit a final offer to the arbitrator who must choose the offer of one of the parties. The arbitrator cannot split the difference or modify either offer.

Parties frequently prefer FOA over conventional arbitration because they dislike the practice of many arbitrators splitting the difference between what the parties want instead of making the hard decision on the merits.

3.2.3.2 How FOA can induce parties to return to negotiating a settlement

When parties are considering using binding final-offer arbitration, they seem to be gravitating toward an adjudicatory process but they are actually turning to a process that encourages them to take a fresh look at the possibilities of settlement. The binding feature can motivate each party to formulate a final offer that is reasonable instead of one based on a partisan legal position because the failure to be reasonable can result in the arbitrator selecting the other party's offer. As parties focus on preparing reasonable final offers, their differences can narrow to the point that they might find themselves within a settlement range that they can bridge through additional negotiations. Therefore, it is not unusual for parties to agree to use final-offer arbitration and then settle the case.

Final-offer arbitration can be an especially effective way to break an impasse when one or both parties are wedded to going to court. By agreeing to use FOA, the parties are agreeing to replace going to court with going to FOA, an adjudicatory option that is congruous with settlement efforts. Instead of participants posturing about who will win in court, participants are considering who will present the more reasonable final offer. Instead of settlement offers consisting of painful compromises of parties' positions in court, settlement offers consist of proposals that comport with the final offers they are preparing for the arbitrator. As a result, parties shift from a litigation and compromise mindset to a reasonable settlement mindset.

3.2.3.3 Structure of the FOA process

The parties need to agree on a "hearing" process that will produce a record of information that the neutral should weigh when considering which final offer to select. Parties could agree to hold a conventional arbitration hearing or to design a paper hearing in which parties submit briefs and reply briefs along with documentary evidence. They could agree to permit the arbitrator to rely on what was revealed in the mediation sessions, assuming the mediator serves as the final-offer arbitrator. Parties also could agree to adopt a hybrid of these options. (See Rule 4 in Section 3.2.6 below.)

The accompanying rules in Section 3.2.6 present a number of other structural issues that parties should resolve. Rule 1: How will the parties select the final offer-arbitrator? Rule 2: In a dispute with more than one issue still outstanding, will the parties formulate a total package offer or an offer for each issue? Rule 3: Will the final offer be absolutely final or can a party amend it before the arbitrator issues an award? Rule 5: What criteria will the arbitrator apply when selecting the final offer? Rule 6: Will the arbitrator select one of the final offers based on the criteria in Rule 5 or be required to first prepare her

own proposed award and then select the closest final offer? Rule 7: When will the "hearings" be held? When must the parties submit their final offers? Rule 9: What procedural rules will be followed in the "hearings"?

As the parties prepare their final offers, the parties might try to settle the dispute or welcome the mediator's assistance in settling the dispute.

3.2.3.4 Should the mediator serve as the final-offer arbitrator?

It is better practice to select someone other than the mediator to serve as the final-offer arbitrator. By selecting someone else, the parties can maintain the integrity of the two different processes of arbitration and mediation and ensure that the full benefits of each process will be realized. If the same neutral serves both roles, each process might be compromised.

The primary risk is that one neutral may not be able to perform effectively the two distinctively different roles of arbitrator and settler [mediator] in the same case. In order to preserve the integrity of each process, the neutral must simultaneously maintain her *impartiality* as arbitrator and her *flexibility* as settler [mediator].

The neutral must figure out how to preserve her impartiality when trying to settle a case. Settlers [mediators], for instance, may solicit confidential information for purposes of settlement, hold ex parte meetings (caucuses), engage in "reality testing," and even assess merits of claims (evaluations). These initiatives may benefit the settlement process but may expose the arbitration process to legal attack. A party may challenge the arbitrator or the award on the grounds that the arbitrator was influenced by information learned during settlement efforts. A party also may claim that the arbitrator prejudged the case during settlement efforts when she offered an evaluation of the merits of the case. A party might even complain that the arbitrator retaliated against the party in the arbitration proceeding for not heeding her advice during settlement discussions. Therefore, arbitrators face the daunting risk of engaging in settlement initiatives that may disqualify them as arbitrators. In trying to reduce this risk, arbitrators may feel compelled to limit their use of some basic techniques that can make settlement efforts effective.

Other problems arise when the same neutral serves two processes. For settlement efforts to be successful, parties must talk candidly with the neutral. Parties may be reluctant to talk candidly for strategic reasons when they realize that the neutral may later serve as the arbitrator (Abramson, 1).

Despite these risks, parties may still want the mediator to serve as the final-offer arbitrator, so long as the mediator will not mediate after the final-offer arbitration and the parties have confidence in the mediator-turned-arbitrator in spite of what she learned during the mediation.

Selecting the mediator to arbitrate has a number of advantages. Parties would save the time and money that would otherwise be expended in selecting, educating, and compensating a second neutral. Presentations and hearings would be greatly reduced because the mediator already knows much about the dispute. As the parties prepare their final offers, the mediator would be available to help the parties settle the dispute. Some parties may want the third party to have the power of the ultimate decision-maker, like in settlement conferences with judges, so that the third party would induce parties to settle by hinting what she might do as the arbitrator. Finally, knowing that the arbitrator is immediately available and ready to arbitrate, the parties would face an imminent courthouse-type deadline.

3.2.3.5 Role of the clients

Clients participate actively in preparing the final offer and any settlement efforts. In the arbitration hearing, they serve the familiar and prescribed roles of parties.

3.2.3.6 Outcome/remedies

If the final-offer arbitration process is completed, the outcome will be the one prepared by the winning party. But, because the process of FOA can encourage parties to negotiate a settlement, the parties could end up negotiating a resolution.

3.2.4 Introduction of the final-offer impasse-breaking technique

A mediator should introduce this FOA-based technique incrementally in five distinct stages. Through a gracefully orchestrated presentation of FOA, the mediator can maximize the impact of this replacement for court on the negotiating behavior of the parties. The mediator should judiciously guard against presenting FOA too early or as too attractive because it might cause parties to stop negotiating and short-circuit the mediation process.

First, the mediator should begin by introducing FOA as an impasse breaking idea for the participants to consider. The mediator might just explain the basic concept as briefly set forth above. At this early stage of discussion, the goal should be to ensure that the participants understand the basic concept and appreciate its implications, not to develop an agreement for signature. While this discussion momentarily shifts participants' attention away from settlement and back to adjudication, their view of adjudication should begin to shift from a how-to-win-in-court mindset to a how-to-formulate-an-acceptable-offer mindset.

When presenting this arbitration option in mediation, I have found attorneys to be initially reluctant due to the widespread reputation of arbitrators "splitting the difference" and the constant fear that an arbitrator may render an outlandish decision that will not be subject to any meaningful judicial review. FOA addresses directly both fears. By its very nature, a final-offer arbitrator has no authority to "split the difference"; the arbitrator must choose one or the other option. And, the risk of an extreme decision is restrained by the final offers submitted by each party. Final offer arbitration might be characterized as an implied high-low arbitration; the final offers of the parties establish the high and low limits for settlement.

Second, while the FOA idea is percolating in the minds of the participants, the mediator should return to settlement efforts in the mediation. This is a critical and delicate moment. For the first time, the possibility of this substitute for court should begin to influence the negotiating behavior of the participants. They will begin to experience negotiating in the shadow of FOA. Shifting the discussion from FOA back to settlement takes some care because if done too fast, FOA will not have its ameliorative impact on the negotiations. The opportunities to shift depend very much on what is happening in the mediation. In one case, I was able to shift back to the mediation while waiting for one of the parties to secure corporate approval for use of FOA. In another case, we had to adjourn the mediation session which gave participants time to think about a reasonable settlement offer and how to settle the dispute.

Third, if participants are still experiencing difficulty settling, then the mediator should return to finalizing an agreement to use final offer arbitration. The mediator should review with the participants the type of choices presented in the FOA rules in Section 3.2.6 below and then assist them in drafting and executing a FOA agreement. By formally and legally substituting FOA for going to court, participants should deepen their commitment to this new view of the dispute, a view that is more congruous with the goals of mediation.

Fourth, the mediator should try once again to assist the parties in resolving the dispute, now that they will be experiencing the full impact of the FOA option on their negotiating behavior.

Fifth, if the participants are still at an impasse, then the mediator should consider declaring the

mediation over and let the parties resort to final-offer arbitration. Even at this final stage with the FOA so imminent, however, it is still possible that the parties might decide to settle rather than risk an imposed decision by the final-offer arbitrator.

3.2.5 Risks of using FOA in mediations

FOA can become a crutch for mediators who might too quickly resort to it at the first sign of trouble. FOA surely can make the job of mediators much easier if mediators could simply introduce FOA whenever the parties get stuck over a money issue and then let the magic of FOA transform the parties into reasonable people who can settle their own dispute. But, the too early use of FOA can extinguish the miracle of mediation by foreclosing opportunities for broad, creative, interest-based problem-solving.

Be cautious. First, mediators should guard against parties prematurely abandoning mediation because FOA may seem relatively easy to use at less cost than going to court. And, it can be a less stressful and frustrating experience than to continue the agonizing negotiations. FOA may appear especially attractive when participants have not yet developed confidence in the mediation process. Second, mediators should guard against FOA impairing the potential of mediation by the way it requires parties to narrow their dispute to fit into the FOA mode of final offers. Instead of encouraging parties to think broadly and creatively about their interests and multiple options, FOA constricts them to framing narrow, plain final proposals. In short, if introduced too early and without care, FOA may derail the mediation.

3.2.6 Final offer arbitration rules

Directions: Check off ONE box for each Rule and fill-in the additional details.

Dispute/Case:

- 1. Selecting Arbitrator**
 - ☐ a. Procedure (specify)
 - ☐ b. Designate Particular Person
- 2. Formulating Final Offer**
 - ☐ a. Total Package
 - ☐ b. Issue-by-Issue
 - ☐ c. Other
- 3. Number of Final Offers**
 - ☐ a. One Final Offer
 - ☐ b. Option for Amendments
 - ☐ c. Other
- 4. "Hearing" for Presentation of Final Offers**
 - ☐ a. Mediation Session
 - ☐ b. Paper Hearing
 - ☐ c. Formal Hearing
- 5. Criteria for Selection of Final Offer by Arbitrator**
 - ☐ a. Most Reasonable
 - ☐ b. Applicable Law
 - ☐ c. Contract Terms or New Multiple Criteria
 - ☐ d. Other

6. Restrictions on Selection of Final Offer by Arbitrator

- ☐ a. Select One-or-the-Other Final Offer (baseball arbitration)
- ☐ b. Select Final Offer Closest to Arbitrator's Proposed Award (which is based on criteria selected in Rule 5) (night baseball FOA)
- ☐ c. Other

7. Timetable

- ☐ a. Hearing
- ☐ b. Submitting Final Offers

8. Arbitrator's Selection is Binding Upon the Parties

9. Any other procedural issues will be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator's selection is an award upon which a judgment may be entered in any court with jurisdiction.

We, the undersigned parties, agree to adopt these rules for arbitrating the above referenced dispute/case.

Signature

Signature

Plaintiff or Plaintiff's Attorney

Defendant or Defendant's Attorney

Date

Prior Publication of Technique: *Abramson, "Protocols for International Arbitrators Who Dare to Settle Cases," The Am. Rev. of Intl. Arb. 1, 3-4 (1999).*