FEATURE
ALTERNATIVE DISPUTE RESOLUTION

HOW CURT FLOOD CAN HELP YOUR ALTERNATIVE DISPUTE RESOLUTION

BY CHRISTOPHER M. ERNST

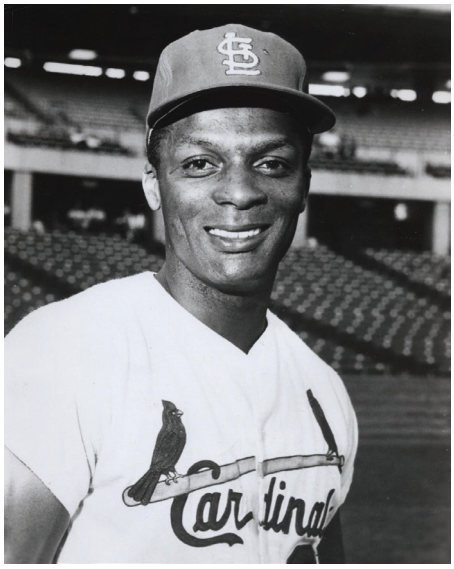
"If you get three strikes, even the best lawyer in the world can't get you off."

– Bill Veeck, the last Cleveland Indians World Series Champions team owner (1946–1949)

It's time for you to rethink your approach to ADR. It's time for you to play ball. While baseball, as an institution, is often viewed, as Terrance Mann said, as the one constant through all the years, it has sporadically changed itself to reflect current times. So, too, must you in order to represent your clients in an efficient and cost-effective manner. You need to be doing Baseball Arbitration and Baseball Mediation.

A Look Back

Using the Wayback Machine, we can transport ourselves back to October 7, 1969 when Gussie Busch, the President of the Saint Louis Cardinals (and CEO of Anheuser-Busch, the corporate owner of the team), traded centerfield Curt Flood to the Philadelphia Phillies as part of a 7-player swap. Flood, who had been with the Cardinals for 12 years, refused the trade and would not report to his new team. He wrote Commissioner Bowie Kuhn, saying "After twelve years in the major leagues, I do not feel I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several States." He asked that he be allowed to field offers from teams besides the Phillies, a request that Kuhn, a University of Virginia School of Law graduate, denied.



Flood sued Kuhn, the presidents of the two leagues and the presidents of all the Major League Baseball teams. His case made its way to the Supreme Court of the United States and, in its legendary *Flood v. Kuhn* opinion (407 U.S. 258 (1972)), the Court found against Flood and reaffirmed earlier Court opinions that validated MLB's monopoly. This decision ended up being a major underpinning to the subsequent collective bargaining agreements between MLB and the players union, and provided for Catfish Hunter to become the first, official free agent in baseball in 1974. Flood never played the game again.

A New Collective Bargaining Agreement

Prior to Hunter's free agency, on February 25, 1973, a new collective bargaining agreement was agreed and signed (ending the Lockout of 1972) and that CBA provided for Baseball Arbitration. Ostensibly, the owners agreed to the arbitration process to quell the rising popularity of free agency. But the process of arbitration in baseball differs greatly from that of traditional arbitration. Sometimes referred to as "high-low" or "final offer," Baseball Arbitration works like this:

- Each side submits to a panel of three arbitrators a proposed salary for the following season;
- Jointly, the two sides submit a signed and executed "Uniform Player's Contract" with a blank space for the salary;
- A hearing is held where each side receives one hour to argue the case and one-half hour for rebuttal/sur-rebuttal;
- Within 24 hours (usually), the arbitrators issue their decision;
- The decision is limited to awarding only one of the two figures submitted; and
- No written opinions are issued.

Essentially, this creates a process where a mid-point between the two proposals is established and the decision is made based upon how the arbitrators perceive the players worth: above or below the mid-point.

Today's ADR

So how does all this get applied to conventional arbitrations, be them business disputes, tort cases or employment issues? As follows:

- The parties agree to Baseball Arbitration, agreeing to the parameters of the process including whether it should be 1 or 3 arbitrators hearing the case;
- The parties submit their arbitration briefs to the panel, simultaneously;
- The parties also submit proposed Orders/Awards;
- A hearing is held — somewhat akin to an appellate argument — where each side is afforded a set time for arguments and rebuttals;
- Shortly thereafter, a decision is issued which is limited to granting only one of the two proposed Orders/Awards.

There are three major advantages in this process. The first is that the parties can be as creative or as routine as they want. They can set a short period of time for arguments or a long

period. They can dispose of arguments altogether. They can establish additional briefing. They could agree upon aspects of the final decision, leaving disputed aspects open for the arbitrators to decide. They could even make a provision for limited live testimony, if they wanted. They can basically do what they want within this framework.

The second advantage — one that many attorneys actually fear — is that it forces deep introspection into the case by attorneys and parties, alike. Conducting analysis into what would be a likely outcome, or an outcome designed to appeal the most to a finder of fact, requires a shift from the "I must zealously represent my client at all cost, come hell or high water, and get my client everything the client wants, no matter how unrealistic that may be" attitude to one of "Hey, how is this mostly likely to play in Peoria (i.e.: before the arbitrators)?" Attorneys need to consider what points the client is likely to win on and what points will likely be lost. Time and attention focused on discovery battles or Gotcha Moments need to shift towards what would be a good outcome — not just for "my client," but for the case as a whole. Because that requires concession on certain points, attorneys can fear that they will show weakness, be it in the case, the client or even the attorney him/herself. But when attorneys can get past that, they realize they are actually doing the best thing for their clients. They're getting the best — not necessarily the biggest or smallest, but the best — resolution for their clients, taking all factors into consideration.

The third advantage is cost. Baseball arbitration is far more streamlined than a conventional arbitration or conventional mediation. Perhaps it's a little sterile or no-frills, but with that comes less time. And less time means less money.

Baseball Mediation

The cousin to Baseball Arbitration is, of course, Baseball Mediation. Just as the former is a twist on the conventional concept, so too is the latter. It is best compared with a Mediator's Proposal, where the mediator comes up with the proposed settlement terms and it's up to the parties to accept or reject. In Baseball Mediation, the roles are functionally reversed. The parties prepare settlement proposals and the mediator chooses between them. No altering or modifying the terms.

Both techniques are usually used when the parties have reached an impasse. But it is possible to use Baseball Mediation earlier on in the process. Because mediation is a party-driven procedure, it is entirely up to the parties how they want to handle their jointly negotiated resolution. Perhaps it is a situation where some of the issues are resolved using a mediator, but a few remain to be decided in arbitration. Perhaps the parties need a threshold issue decided first before they can negotiate the rest of them. The proposals can be submitted simultaneously, or staggered, with the opportunity to rebut. The proposals can be confidential or they can be shared (after submission) with the parties. In the end, it doesn't really matter just so long as the parties (and mediator) agree. But the concept of "Here's what we got, you decide" remains constant.

Attorneys at law have a tendency to mark time, to use Mann's words, due to their constancy. There tends to be a blind adherence to the concept of sticking to what you know. Maybe it is a *stare decisis* infiltrating thought patterns, but sticking to the tried and true is the norm for attorneys. But sometimes, it is appropriate to shake up the norm because doing so can be better for your clients. Obviously, not every case is appropriate for Baseball Arbitration or Baseball Mediation, but when you think about it carefully, there are more cases that are appropriate for these methods of ADR than you are probably considering.

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