

## The Advantages of High-Low Arbitration

Every lawyer is familiar with the advantages that arbitration offers over traditional civil litigation: speed, lower cost and confidentiality.<sup>i</sup> However, there are other, less familiar forms of arbitration that are worth considering, such as high-low (or “bracketed” arbitration), “baseball” arbitration and “night baseball” arbitration.

In high-low arbitration, the parties agree in advance to a maximum and minimum award. If the arbitrator awards a figure that is higher than the agreed-to maximum, the award is automatically adjusted downward to that maximum, and if the award is lower than the agreed-to minimum, it is adjusted upward to that figure. If the arbitrator’s award falls between the high and the low, the parties are bound to accept that figure. The parties can agree either that the arbitrator *will* or *will not* be informed in advance of the high/low figures.

In baseball arbitration, each party chooses one and only one number, and the arbitrator is informed of those figures but may select only the high or the low as his award. Night baseball arbitration works the same way, except that the high and the low are *not* revealed to the arbitrator. The arbitrator will assign a value to the case and the parties agree to accept the high or low figure closest to the arbitrator's value.

A high-low arbitration works best where the parties are not *too* far apart. For example, if plaintiff is at \$1 million and defendant is at \$10K there is little incentive for either party to agree to high-low arbitration. But if, say, the parties are at \$200K and \$50K, there are certain advantages to high-low arbitration: the plaintiff knows that even if the arbitrator rules against her, she will recover something, and the defendant (and/or insurer) can limit his/its upside liability. In order to get from \$1 million/\$10K to \$200K/\$50K, the parties might engage the services of a mediator; or the parties might use a conditional offer to narrow the range.

A conditional offer is where one party extends an offer that is expressly conditioned on the other side moving its position. To use the above example, the plaintiff offers to reduce her demand from \$1 million to \$500K if the defendant will increase his offer from \$10K to \$30K. Acceptance of the conditional offer resets the outer brackets of the negotiation. Now that the range has been narrowed to between \$500K and \$30K, either party might extend another conditional offer to further narrow the range.<sup>ii</sup>

Conditional offers do not bind the party making them but do send valuable information about possible highs, lows, and midpoints. The parties may be able to use conditional offers to reach a settlement, with or without a mediator, but where their efforts fall short of settlement they may want to proceed with a high-low arbitration.

Here is an example of a high-low arbitration agreement:

