UTILIZING FINAL-OFFER ARBITRATION TO SETTLE DIVORCES: A PROPOSAL AND ANALYSIS

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I. INTRODUCTION

A divorce occurs every thirteen seconds in America.[1] That amounts to 6,646 divorces per day, 46,523 divorces per week, and 2,419,196 divorces per year.[2] Divorce settlements, like many other forms of negotiation, often begin with the parties making offers and demands at two opposite ends of the spectrum, in anticipation of being forced to compromise as the negotiation draws out. However, the more extreme the initial demands are, the longer the divorce takes. In order to avoid lengthy and expensive divorces, many couples seek alternative dispute resolution methods to settle their disputes.[3] While methods such as mediation and arbitration currently exist and are advantageous for reducing costs and time spent negotiating divorce settlements, parties still find themselves spending more time and money than they would like on settling their divorce.

An answer may be provided by binding final-offer arbitration (FOA)—also known as "last, best offer" or "baseball arbitration."[4] FOA is a dispute resolution method in which both parties submit a "final offer," and an arbitrator or panel of arbitrators chooses *one* of the offers, instead of finding a compromise between the two.[5] This method encourages parties to be reasonable from the beginning of the process, as otherwise the arbitrator will likely choose their opponent's offer instead of theirs.[6] The idea is that "since no compromise is possible, FOA should incite the disputants to stake out more reasonable bargaining positions: each party should prefer to make concessions rather than face the possibility that the arbitrator chooses the other's side proposal."[7] Another purpose of FOA is to prevent arbitrators from simply basing their decisions on a compromise that falls in the middle between the two parties' requests, in order to settle each issue.[8] The theory is that FOA will encourage good faith bargaining between parties, and that each side's fear of losing to a more reasonable offer will facilitate settlements, or at the very least, induce reasonableness.[9]

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[1] Yulia Vangorodska, *Marriage and Divorce by the Numbers*, VANGORODSKA L. FIRM (2015), https://nydivorcefirm.com/divorce-by-the-numbers/.

[2] *Divorce Statistics: Over 115 Studies, Facts and Rates for 2018*, WILKINSON & FINKBEINER FAM. L. ATTORNEYS, https://www.wf-lawyers.com/divorce-statistics-and-facts/.

[3] *Divorce and Out-of-Court Proceedings: Alternative Dispute Resolution*, FINDLAW.COM, https://family.findlaw.com/divorce/divorce-and-out-of-court-proceedings-alternative-dispute.html.

[4] Michael R. Carrell & Louis J. Manchise, *At Impasse? Consider Final Offer Arbitration*, NEGOTIATOR MAG., Dec. 2013–Jan. 2014.

[5] INT'L CTR. FOR DISP. RESOL, *Final Offer Arbitration Supplementary Rules* (2015), https://www.adr.org/sites/default/files/Final%20Offer%20Supplementary%20Arbitration%20Procedures.pdf.

[6] *Id*.

[7] Claude Fluet & Yannick Gabuthy, *Conventional versus Final-Offer Arbitration* (2010), https://www.gate.cnrs.fr/IMG/pdf/y10_m10_SER_FluetGabuthy.pdf.

[8] *Id.*

[9] Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L ARB. n.3 (1999) http://aria.law.columbia.edu/final-offer-arbitration-a-model-for-dispute-resolution-in-domestic-and-international-disputes/.

FOA is most commonly known for its use in Major League Baseball salary disputes, where notably only one issue—salary—is presented to the arbitration panel.[10] In addition, FOA is known for being used as a means to settle public sector labor disputes, especially in jurisdictions and public safety professions where strikes are not feasible for various reasons.[11] As FOA is often utilized to expedite the settlement of both labor and sports salary disputes, it seems it could be a useful method to apply to any dispute that typically takes extensive amounts of time and resources to settle.[12] The question is whether this method could be successfully applied to divorce settlements, an arena that could certainly benefit from a swifter and more practical system than those already in use.

Part I of this Note will analyze the alternative dispute resolution method of final-offer arbitration—how it operates, why it is a beneficial mechanism for settling disputes, and how and why it should be applied to the settlements of divorces. Part II will discuss the staggering divorce statistics in the United States, as well as explore the current available methods of alternative dispute resolution for settling divorces and ways in which they are lacking. Part III will examine some of FOA's history, the structure of the process, and why it is preferable to other methods that currently exist. Part IV will discuss how FOA works in Major League Baseball salary disputes and public sector labor disputes. Finally, in Section V, this Note will propose utilizing binding FOA as an effective means to settle divorces, followed by criticisms of the method.

II. BACKGROUND

A. *The Divorce Problem in the United States*

A staggering forty-one percent of first marriages end in divorce; that number increases to sixty percent for second marriages and seventy-three percent of third marriages.[13] It has also been noted that forty to fifty percent of married couples in the United States divorce, with the divorce rate climbing for those who remarry, according to the American Psychological Association.[14] Getting divorced has become so mainstream in the United States, that it comes as little surprise that actress Zsa Zsa Gabor has been married and divorced nine times.[15] The United States suffers one of the highest divorce rates among nations—there are an estimated nine divorces in the time it takes for the average couple to recite their wedding vows (two minutes), and 1,385 divorces happen during a typical wedding reception (five hours).[16] Half of all children in the United States will witness the dissolution of a parent's marriage, and of this half, nearly fifty percent will also witness a parent's second marriage end.[17] Studies done at the University of California and Brown University show that simply having a close friend or co-worker that is in the process of a divorce

[10] *Id.*

[11] *Id.*; *Nat'l Union of Hosp. Emp. v. Bd. of Regents*, 2010-NMCA-102, 149 N.M. 107, 111, 245 P.3d 51, 55.

[12] *Newark Firemen's Mut. Benevolent Ass'n, Loc. No. 4 v. City of Newark*, 90 N.J. 44, 60–61, 447 A.2d 130, 13–139 (1982).

[13] Vangorodska, *supra* note 1.

[14] John Harrington & Cheyenne Buckingham, *Broken hearts: A rundown of the divorce capital of every state*, USA TODAY (Feb. 2, 2018, 7:00 AM), https://www.usatoday.com/story/money/economy/2018/02/02/broken-hearts-rundown-divorce-capital-every-state/1078283001/.

[15] *32 Shocking Divorce Statistics*, MCKINLEYIRVIN.COM (Oct. 30, 2012, 11:06 AM, updated 2018), https://www.mckinleyirvin.com/family-law-blog/2012/october/32-shocking-divorce-statistics/.

[16] *Divorce Statistics: Over 115 Studies, Facts and Rates for 2018*, *supra* note 2.

[17] *Id.*

increases a married individual's likelihood of going through a divorce with their own spouse by 147%, and 75%, respectively.[18] Similarly, those who have siblings, parents, or other relatives that have divorced, are more likely to divorce as well.[19] After digesting these stunning divorce facts, it seems as though divorce in the United States has become "contagious," so to speak.

1. Cost of a Divorce

The average cost of a divorce can range from hundreds to thousands of dollars.[20] According to Forbes.com, the average cost of a contested divorce ranges from $15,000 to $30,000, with these numbers varying depending on multiple aspects of the divorce and how "contentious" the parties are.[21] Some have compared the costs of divorce to the costs of a wedding.[22] When determining the cost of a divorce, one must factor in attorneys' fees, court costs and fees, appraisals, experts, and when real estate is involved, refinancing and record deed fees.[23] While having a prenuptial agreement will save time and money during divorce proceedings, not every married couple has one.[24] Divorces not only cost the couple getting the divorce; one researcher found that a single divorce costs state and federal governments about $30,000, considering things such as an increase in food stamps usage, public housing, bankruptcies and the juvenile delinquency that stems from divorce.[25] In 2002, when 1.4 million divorces occurred in the United States, it is estimated to have cost the taxpayers in excess of $30 billion.[26]

B. *Why the Current Methods of Divorce Mediation and Arbitration are Deficient*

It is important to acknowledge that "somehow, the process of divorce has been passively accepted as this slightly sublimated form of ritualized violence in which the goal becomes inflicting pain on the other spouse. . . rather than obtaining what each needs for the future."[27] Parties become so obsessed with making the other party suffer, that they lose track of what is really important, which in turn ends up costing them time, money and an immeasurable amount of emotional trauma. Another problem with divorce negotiations today, is that parties tend to engage in what is known as the "chilling effect"—starting the negotiations with extreme demands in the expectation of having to ultimately compromise somewhere in the middle of the two parties' positions.[28] It is a common misconception that most divorces are settled by a trial.[29] Rather, the reality is that ninety-seven percent of cases settle.[30] Two existing forms of alternative dispute resolution methods used to settle divorces instead of litigation are divorce mediation and divorce

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[18] *Id.*
[19] *Id.*
[20] *32 Shocking Divorce Statistics*, *supra* note 15.
[21] *Id.*
[22] Laura Seldon, *How Much Does the Average Divorce Really Cost?*, HUFFINGTON POST (July 30, 2013, 03:50 PM), https://www.huffpost.com/entry/how-much-does-the-average_b_3360433.
[23] *Id.*
[24] *Id.*, (saying that, "While having a prenuptial agreement will save time and money during divorce proceedings, not every married couple has one.")
[25] *Divorce Statistics: Over 115 Studies, Facts and Rates for 2018*, *supra* note 2.
[26] *Id.*
[27] ROBERT KIRKMAN COLLINS, DIVORCE MEDIATION: COMMON SENSE AND THE CRISIS OF DIVORCE, 19 (2018).
[28] Carrell & Manchise, *supra* note 4.
[29] ROBERT KIRKMAN COLLINS, *supra* note 27, at 20.
[30] *Id.*

arbitration.[31] These methods are becoming so popular that it is even joked that "the growing movement towards Alternative Dispute Resolution has now reached the point that it's starting to be referred to instead as 'Appropriate Dispute Resolution.'"[32] However, as popular as these processes may be, both mediation and arbitration still lack efficiency in settling divorces.

1. Divorce Mediation

Mediation is a relatively inexpensive method some parties opt to utilize in order to settle their divorce in a more private, comparatively quick and less expensive manner.[33] Mediation works best for parties who feel they can amicably settle their divorce, as the parties are forced to "interact directly in order to resolve the issues."[34] For this reason, mediation will not be effective if the parties cannot engage in a constructive, open dialogue with one another.[35] Due to the animosity and emotional events surrounding a marital break-up, more often than not this is the case when parties are divorcing. Another problem with mediation is that sometimes the parties reach an impasse, and because only the parties have the authority to make the decisions, failure of both parties to compromise can result in a standstill.[36] "Because the mediator lacks the power to compel a resolution, mediation often results in simply prolonging the impasse."[37] Similarly, if one party is not assertive enough, his or her interests may get lost, leading to an unfair outcome.[38] Put simply, it is easier for submissive and non-assertive parties to get taken advantage of in mediation;[39] these "less-assertive" parties will likely not have the confidence, or even the self-awareness, to assert that mediation might not be in their best interest in the first place, and then will suffer the consequences of being soft-spoken, yet again, throughout the mediation process. For these reasons, divorce mediation is only a viable option for a limited group of couples.

2. Divorce Arbitration

Some people may choose arbitration as a method to settle their divorce in a cheaper, expedited, and more private manner.[40] However, this process has some downfalls:

> First, if the parties view negotiations as a prelude to a mini-trial in front of an interest arbitrator, the parties may be less willing to make their strongest arguments at the bargaining table, and instead may sandbag until the arbitration; this may have a "chilling effect" on negotiations and discourage the "give and take" necessary for

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[31] Anthony C. Adamopoulos, *Understanding Divorce Arbitration and Mediation*, MASS. DISP. RES. SERVS., https://www.mdrs.com/neutrals/interviews-with-the-experts/understanding-divorce-arbitration-and-mediation/ (speaking generally about divorce arbitration and mediation options).

[32] ROBERT KIRKMAN COLLINS, *supra* note 27, at 2.

[33] *Pros and Cons of Divorce Mediation over Court*, JBMARTINLAW.COM, https://jbmartinlaw.com/pros-and-cons-of-divorce-mediation-over-court/; *Mediation: The Pros and Cons*, LAUFERFAMILYLAW.COM, https://www.lauferfamilylaw.com/mediation-pros-cons/.

[34] *Pros and Cons of Divorce Mediation over Court*, *supra* note 33.

[35] *Id.*

[36] Carrell & Manchise, *supra* note 4

[37] Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, OHIO ST. J. ON DISP. RESOL. 1, 1–27 (2012).

[38] *Pros and Cons of Divorce Mediation over Court*, *supra* note 33; *Mediation: The Pros and Cons*, *supra* note 33.

[39] *The Pros and Cons*, LAUFERFAMILYLAW.COM, https://www.lauferfamilylaw.com/mediation-pros-cons/.

[40] *The Post-Divorce-Parenting Glossary*, CUSTODYZEN.COM, http://www.custodyzen.com/divorce-terms/divorce-arbitration.html#5.

> good-faith collective bargaining. Second, knowing that the arbitrators will "begin" the deliberations with where the parties "ended" their negotiations, the parties may be more likely to stake out polar positions and less likely to compromise at the bargaining table.[41]

Additionally, because arbitrators may be "tempted to 'split the difference' between the parties," the parties are also more likely to take extreme stances when beginning arbitration.[42] Because a third party (the arbitrator) makes the final decisions in arbitration, there is a chance that the arbitrator will impose a resolution that neither party is happy with, and there is virtually no appeals process.[43] Similar to how less-assertive parties suffer consequences in mediation, if one party is unable to present a "clear, solid case" to the arbitrator, the chances of them receiving a favorable outcome decreases.[44] Perhaps divorce arbitration can be viewed as even less desirable than divorce mediation, as divorce arbitration typically does "not provide the same cost and time savings [as divorce mediation], nor does it allow the disputing parties to benefit from the problem-solving, relation-building process of mediation."[45] Lastly, similar to in mediation, there is always the possibility that one or both parties will begin with outrageous positions at opposite ends of the spectrum, in in anticipation of being bargained down to somewhere in the center, elongating the dispute resolution process.

C. *Background Conclusion*

Divorce mediation and arbitration have both proven to be rather successful in achieving divorce settlements; however, each process suffers from its own shortcomings. Final-Offer Arbitration could provide advantages that are not currently offered in the alternative dispute resolution processes available for divorce today; this Note seeks to highlight those benefits, while exploring why this method of alternative dispute resolution could be favorable and effective if applied to divorce settlements.

III. DISCUSSION: AN OVERVIEW OF FINAL-OFFER ARBITRATION

A. *The Basics and Early History*

Final-Offer Arbitration (FOA) is a subcategory of interest arbitration.[46] The other type of interest arbitration is commonly referred to as "conventional arbitration."[47] FOA laws were first developed as an alternative to strikes in the public sector, because it was thought that conventional arbitration had a chilling effect on the negotiation process, because parties typically took extreme stances to avoid suffering concessions, since they knew that the arbitrator was likely to use a compromise as their determining tool.[48]

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[41] Carrell & Bales, *supra* note 37, at 11.
[42] *Id.*
[43] *Id.*
[44] *Arbitration*, LADYDIVORCE.COM, https://ladydivorce.com/arbitration/.
[45] *Family Law Arbitration*, BUCKSFAMILYLAWYERS.COM, https://www.bucksfamilylawyers.com/practiceareas/arbitration.
[46] *Nat'l Union of Hosp. Emp. v. Bd. of Regents*, 2010-NMCA-102, 149 N.M. 107, 111, 245 P.3d 51, 55.
[47] *Id.*
[48] *Id.*

B. *Structure of Final-Offer Arbitration*

Similar to other interest arbitrations, the arbitrator in FOA makes the final decision for dispute settlements, and it is binding.[49] "However, unlike interest arbitration, where the arbitrator has the authority to fashion whatever resolution s/he sees fit, in final-offer arbitration, the arbitrator is limited to choosing between the parties' last best offers . . ."[50] In FOA, each party submits a "final offer" to an arbitrator (or panel of arbitrators) who then selects either an entire "package," or chooses an offer on an "issue-by-issue" basis.[51] The idea is that in FOA, it is in the parties' "best interest to seriously and meaningfully negotiate in good faith and to narrow their differences to a point that reflects their best and final offers before the arbitrator selects one offer over the other."[52] The arbitrator chooses a party's offer based on which is the most reasonable, which is not necessarily the most compromising.[53] This process gives each party an equal opportunity to win the "award,"— what the chosen offer is referred to in FOA and other types of arbitration, as well—in addition to lessening the fear of an unwanted outcome.[54] The advantage of FOA is that the parties submit their proposed final offers and do not leave the arbitrator great discretion in the outcome.[55] Because of this, the parties have incentive to come to, or come close to, an agreement—assuming both parties are being somewhat reasonable—before the arbitrator chooses an offer, because the arbitrator has no authority to alter the final offer to add an element of compromise between the two parties; the winning offer is to be taken and binding in the exact manner it was presented, with no additional compromise to be made by the arbitrator.[56] FOA is less likely to have the same "chilling effect" as conventional arbitration, because it operates in a manner similar to how a strike would, by "posing potentially severe costs of disagreement in a manner that conventional arbitration does not."[57] Finally, if the parties have insight as to what the arbitrator will find reasonable, they will likely adjust their final offer accordingly.[58]

In some iterations, a "grace period" in FOA allows the parties to review the other's final offer before it is submitted to the arbitrator, giving the parties an opportunity to come to a settlement themselves before the FOA decision process begins.[59] This is a last-chance effort for the parties to determine the outcome of their settlement on their own, before it is placed into the hands of a third party. If they cannot come to an agreement by themselves, then the offers are given to the arbitrator to make the decision for them. The "grace period" likely occurs right before the final offers are submitted to the arbitrator; however, they could remain open up until the arbitrator renders his or her decision to the parties. Therefore, if the parties come to an agreement before the award is announced but after the final offers have been submitted, they could decide to alert the arbitrator that they have come to an agreement on their own and either: (1) no longer need the arbitrator to make a decision; or, (2) need the arbitrator to make a decision only on any remaining issues in dispute.

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[49] Carrell & Bales, *supra* note 37, at 12.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *W. Des Moines Ed. Ass'n v. Pub Emp't Relations Bd.*, 266 N.W.2d 118, 119 (Iowa 1978).
[54] *Nat'l Union of Hosp. Emp. v. Bd. of Regents*, 2010-NMCA-102, 149 N.M. 107, 111, 245 P.3d 51, 55.
[55] *W. Des Moines Ed. Ass'n v. Pub Emp't Relations Bd.*, 266 N.W.2d 118, 119 (Iowa 1978).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Carrell & Manchise, *supra* note 4.

There are two common formats of FOA, typically referred to as the "day" and "night" formats.[60] Under the "day" FOA format, each party submits their final offers and then the arbitrator chooses from one of the two offers made.[61] In the "night" format, the arbitrator makes a decision independently of the offers each party will submit, and then chooses whichever offer is most similar to his or her independent decision.[62] The "night" format is typically used when there is only one issue in dispute, and when that one issue is of quantifiable nature—such as a salary—therefore making the arbitrator's decision more objective.[63] This is often the case in civil matters, where the only settlement issue in dispute is money. The "night" version is less likely to work when there are multiple issues being negotiated, because it will be more difficult to determine which offer is closer to the arbitrator's award when there are varying components.[64]

Depending on the rules set forth before the FOA begins, an arbitrator does not necessarily have to choose one party's entire proposal when there are numerous issues in dispute.[65] While it may be most simple to just choose one party's proposal in its entirety, there are often situations in which there are multiple issues in dispute—especially non-economic ones—that may be difficult to view and decide on collectively. When more than one issue is at hand and a party's offer is selected in its entirety, it is called the "total package" approach.[66] Alternatively, for disputes on multiple issues, the parties can submit a final offer on each of the issues individually, and the arbitrator decides on an "issue-by-issue" basis.[67] Using this approach, the arbitrator can choose the most reasonable offer on each issue, giving the parties the opportunity for at least some of their offers to be chosen, if not all. It is thought that the "issue-by-issue" approach is more appropriate when non-economic issues are at hand, to avoid "combining apples (economic) and oranges (non-economic [provisions]) in the same package and making comparisons difficult."[68] The "total package" approach works better when all of the issues under dispute are of the same nature, but it is more unlikely that a package will contain reasonable positions on all of the issues if the issues are varying, making the "issue-by-issue" approach more appropriate.[69] Additionally, critics of "total-package" FOA raise concern that parties may be inclined to throw in one, or a few, outlandish provisions in a package that is otherwise reasonable, making "issue-by-issue" more preferable, because it forces parties to propose reasonable offers on all of the issues.[70] However, one criticism of the "issue-by-issue" approach is that an arbitrator might feel inclined to use a "compromise" method in awarding an equal amount of issues to each party—which is what FOA seeks to avoid.[71]

Also worth mentioning, is the timetable for when proposals should be offered, the "grace period," and the final decision. According to two of the leading scholars in this topic:

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Carrell & Bales, *supra* note 37.
[65] Carrell & Manchise, *supra* note 4.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Carrell & Bales, *supra* note 37.
[71] Carrell & Manchise, *supra* note 4.

> The exact timing of submissions of final offers is critical. Submitting final offers as early as possible before the arbitration hearing, and then allowing a "grace period" during which they may be adjusted before the hearing begins—but not right up to the start of the hearing—provides the parties incentive to achieve last minute settlement on issues.[72]

C. *Why Final-Offer Arbitration is Preferable*

While both mediation and conventional forms of interest arbitration provide quicker, less-expensive and more confidential processes for reaching settlement than do litigation and negotiations between attorneys, each method has its disadvantages. Some parties choose to pursue mediation because the process does not force them to accept anything they are uncomfortable with; however, this brings the possibility of the sometimes unavoidable lack of settlement. More simply put, mediation is not guaranteed to yield a mutually-agreed-upon settlement if either party feels the other is being unreasonable. When discussions reach a standstill in mediation, mediators often find themselves "compelled to facilitate the clients in an atmosphere primarily governed by traditional competitive distributive (zero-sum) negotiations."[73] Once the parties have established what their limits are in their minds, they may refuse to budge on certain principal issues, leaving the mediation at a standstill and the mediator unable to assist them in reaching a settlement.[74]

Where mediation can fail to achieve a resolution when the parties reach an impasse, traditional interest arbitration avoids this outcome by having the parties agree in advance to accept the decision of the arbitrator as final and binding.[75] That said, the parties in traditional interest arbitration are unable to develop the terms of the settlement themselves, as they would be in mediation.[76] The fear of being bound by an unfavorable settlement decision by an arbitrator often leads parties to seek alternative methods to settle their disputes.[77] Additionally, "conventional arbitration awards tend to be based on the compromise principle . . . Consequently, it can be argued that it will 'be to the advantage of each party to enter the arbitration proceeding without having given away too much in advance.' To the extent that this reasoning is valid, conventional arbitration has a 'chilling' effect on good-faith bargaining as each side holds back in anticipation of handing the dispute to an arbitrator."[78]

FOA offers a means of resolving an impasse with the benefits of both traditional mediation and arbitration, but with fewer drawbacks.[79] Like mediation and arbitration, FOA offers a faster, less expensive and more confidential process than litigation.[80] Binding FOA is more likely to yield a settlement than mediation (where an impasse is often reached) and gives the parties the opportunity for the award to come directly from their offers (as opposed to the arbitrator awarding what he or she thinks is right).[81] By incentivizing the parties to be reasonable from the beginning

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[72] Carrell & Bales, *supra* note 37, at 25.
[73] Carrell & Manchise, *supra* note 4.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] Gary Long & Peter Feuille, *Final-Offer Arbitration: "Sudden Death" in Eugene*, 27 ILR REV. 186, 186-203 (1974).
[79] Carrell & Manchise, *supra* note 4.
[80] *Id.*
[81] *Id.*

of the process, an enormous amount of time is saved, because the slow process of coming closer to a middle ground from opposite extremes is avoided. In addition, sometimes the final-offer arbitration award process is avoided completely if the parties are able to negotiate amongst themselves if they see that the other party's final offer is reasonable during the grace period; needless to say, this also decreases the time to settle a divorce. Lastly, FOA can minimize "the chilling effect"—when parties feel the need to begin at opposite extremes due to the anticipation that the arbitrator will compromise on each offer—that is common in other forms of dispute resolution.[82]

IV. FINAL-OFFER ARBITRATION IN MAJOR LEAGUE BASEBALL AND PUBLIC SECTOR LABOR DISPUTES

A. *Structure of Major League Baseball's Final-Offer Arbitration*

FOA is often referred to as "baseball arbitration" because of its widespread use in determining salary disputes in Major League Baseball.[83] Baseball has been recognized as a professional sport since 1871 and has been plagued by salary disputes between players and team owners ever since.[84] In the early years, a monopoly by the team owners over their players took the form of the "reserve system."[85] In this structure, players were only signed for year-long contracts, allowing players to present themselves on the open market after each season.[86] On September 30, 1879, team owners among the National League of Baseball Clubs entered into a gentleman's agreement in which the owner of every team could choose five of his players to be "reserved" for his team until they were released.[87] This system suppressed the players' salaries, increased the organization's profits, and established standards for the sport to operate under.[88] Ultimately, the reserve system was expanded to include entire teams.[89] By the 1880's, team owners put a reserve clause in the players' individual contracts, prohibiting the player from signing with any other team until he was released from the contract with the original owner.[90]

By 1973, the players union had mustered enough bargaining power to demand a salary arbitration provision from team owners.[91] On February 25th of that year, the owners and players' union signed a momentous Collective Bargaining Agreement ("CBA") that put an end to the clause that tied players to the team they first signed with, and instead gave them the opportunity to become free agents after six years.[92] FOA was used to determine the players' salaries in those first six years whenever there was a dispute between the players and the team owners.[93] The CBA provided that FOA should be utilized to determine a player's salary for the next season; however, the CBA

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[82] Carrell & Manchise, *supra* note 4.
[83] *Id.*
[84] Spencer B. Gordon, *Final Offer Arbitration in the New Era of Major League Baseball*, http://law.bepress.com/cgi/viewcontent.cgi?article=6219&context=expresso.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Gordon, *supra* note 84.
[91] *Id.*
[92] *Id.*
[93] *Id.*; Carrell & Manchise, *supra* note 4.

also held that FOA was not to be used to negotiate benefits or any other issues.[94] While the FOA process was new to baseball in 1974 and certainly criticized, "it has largely continued unchanged in the 38 years since, and has been used in hundreds of cases."[95]

Salary arbitration in Major League Baseball can be viewed as somewhat of a "hybrid" between "package" and "issue-by-issue" FOA, as salary is the only issue in dispute, yet "it entails the high degree risk commonly associated with the package system."[96] That being said, FOA in the context of Major League Baseball is typically not categorized as either "package" or "issue-by-issue" FOA.[97] Because there is only one issue at dispute—the player's salary—in Major League Baseball contract negotiations, it does not make sense to categorize this type of FOA as either the "issue-by-issue" or "package" format.

Once the player and the team have presented all of their relevant evidence, the arbitrator has a time-period of twenty-four hours to render a decision.[98] There are no explanations, opinions, findings, or reasons given regarding the decision.[99] The confidential nature of the system protects the integrity of the relationship between the players and the team owners, in addition to exponentially cutting down the duration of the process by not allowing explanations of the decisions.[100] Lastly, because the parties know that the Collective Bargaining Agreement does not allow for appeals of the decision, the process ends there.[101]

B. *Outcome of Final-Offer Arbitration in Major League Baseball*

FOA has proven to be successful in Major League Baseball salary disputes, as the process has not only been used, but has also remained virtually unaltered for nearly 40 years.[102] One reason for its success could be attributed to the findings of both Major League Baseball and non-Major League Baseball studies, which indicate that "pre-arbitration settlement is twice as likely in jurisdictions using final-offer arbitration as it is in jurisdictions using traditional arbitration."[103] FOA provides a distinctive method of dispute resolution that promotes strong relationships between players and team owners, good faith negotiations, and a well-thought-out system of upholding the baseball financial market for decades.[104] FOA offers a quick, effective means of settling baseball salary disputes at an affordable cost, while avoiding acrimony and wasting resources. Its system allows baseball to operate continuously, without the need for a lengthy process each time a team acquires a new player. Given its successes to date, FOA is likely to remain the method of dispute resolution for years to come in the context of baseball salary disputes, and has already shown itself to be a useful method in other professional sports dispute to date.

C. *Final-Offer Arbitration in Public Sector Labor Disputes*

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[94] Carrell & Manchise, *supra* note 4.
[95] *Id.*
[96] Gordon, *supra* note 84.
[97] *Id.*
[98] Carrell & Bales, *supra* note 37, at 16.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*; Carrell & Manchise, *supra* note 4.
[103] Carrell & Bales, *supra* note 37, at 15.
[104] Gordon, *supra* note 84.

Another arena in which FOA is frequently utilized in the United States is for public sector labor disputes, where the vast majority of public employees—especially safety personnel, such as police officers and firefighters—do not have the ability or legal right to withhold their services and strike.[105] FOA in public sector labor disputes seeks to resolve impasses in "a manner that allows the employees some method of meaningfully manipulating management's costs of disagreements but which protects the public's interest in continuously receiving government services.[106] In the United States:

> [T]wenty-six states provide public employees collective bargaining rights, twelve states provide some public-sector employees collective bargaining rights, and twelve states do not allow collective bargaining by any public sector employees. Of the states permitting public-sector collective bargaining, most do not allow public-sector employees the right to strike, and therefore provide some third-party process to resolve bargaining impasses.[107]

In order to help facilitate effective negotiations, about fifteen states have designated some form of FOA as the method to be used to resolve labor disputes in the public sector of the United States.[108] In 2011, for example, three states passed bills for FOA for teachers.[109] Indiana has adapted a new law applying FOA as the method for resolving an impasse between teacher unions and school districts.[110] Similar bills were passed in Pennsylvania and Rhode Island.[111] In 1987, Maine switched from non-binding arbitration of all agricultural disputes, to binding FOA, in order to "limit strikes and protect the general welfare of the state."[112] Each state's FOA statute names different types of industries it applies to, but collectively, the groups consist of: (1) State Employees; (2) Agricultural Employees and Associations; (3) Firefighters and Police Officers; (4) Public Safety, including State Patrol Troopers and State Patrol Inspectors; (5) Labor disputes; (6) Protective Services; (7) Security and Peace Officers; and, (8) Teachers for kindergarten through twelfth grade students.[113]

V. PROPOSAL

A. *Utilizing Final-Offer Arbitration for Divorce Settlements*

Early research has shown that "FOA [leads] to higher pre-arbitration settlement rates. . . because the offer of the parties converged and, ultimately, eliminated the need for a settlement imposed by the arbitrator."[114] Therefore, FOA seems to reduce, if not completely eliminate, the number of "chilled first offers" and leads to lower impasse rates.[115] However, even if the parties do not come to a negotiated agreement prior to submitting their final offers to the arbitrator, "closer

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[105] Peter Feuille & Gary Long, *The Public Administrator and Final Offer Arbitration*, 34 PUB. ADMIN. REV. 575, 575–583 (1974).
[106] *Id.* at 575.
[107] Carrell & Bales, *supra* note 37, at 17.
[108] Carrell & Manchise, *supra* note 4.
[109] Carrell & Bales, *supra* note 37, at 17.
[110] Carrell & Manchise, *supra* note 4*;* Carrell & Bales, *supra* note 40, at 17.
[111] Carrell & Bales, *supra* note 37, at 17.
[112] *Id.*
[113] *Id.* at 18, 19.
[114] Jaime Tijames, *Who Wants What? — Final Offer Arbitration in the World Trade Organization*, 26 EUR. J. INT'L L. 587 (2015).
[115] *Id.*

offers should arguably make the arbitrator's task easier, and, for instance, FOA[s] might help settle some issues during negotiations and, as a consequence, reduce the number of issues before the arbitrator."[116] Historically, studies show that FOA is typically used to settle wage disputes.[117] However, "there does not seem to be a fundamental problem with extending the main findings on this arbitration procedure to other fields. . ."[118]

If FOA is successful in settling other types of disputes, why not apply it to divorce? Evidence shows that FOA can be effective in settling disputes regarding monetary and nonmonetary issues.[119] Therefore, it could be worthwhile to utilize this dispute resolution method to settle divorces.

B. *The Structure of "Divorce Final-Offer Arbitration"*

Because of the complex nature and varying questions raised by divorce, the most appropriate form of FOA would be the "issue-by-issue" approach. Under this approach, each party would put forth their "final-offer" on issues such as parenting, assets, child support, spousal support, tax issues and other important issues. The arbitrator(s) would choose one proposal for each individual issue. For issues such as custody, the decision will be determined based on the best interests of the child or children, and the decision would be subject to review by the Court. Additionally, it is likely that the "day" format of FOA—where the arbitrator does *not* make an independent proposal and choose the party's offer which is most similar to that, rather chooses the more reasonable offer—would work best in this scenario, as it would give the parties to the divorce more autonomy when the arbitrator is choosing to whom to award a certain issue.[120]

C. *How Do We Define the "Issues"?*

Standard "issues" for the "issue-by-issue" analysis would be defined as the terms that are covered in standard judgments of divorce and separation agreements, as explained below. For any additional "issues," the parties would agree in advance of making their final offers on including such points in their offers. "Parenting Issues" will include scheduling, decision-making, sharing information, relocation, survivorship, and the introduction of significant others to the children.[121] "Scheduling" addresses the children's routine regarding school nights, weekends, school vacations, holidays, summer vacations, parents' and children's birthdays, Mothers' Day and Fathers' Day, etic.; it could also address methods of communication—telephone, email, text message, video calls, etc.—and access to the children while they are with the other parent, transportation between households, protocol for permission to travel outside the state or country with the children, etiquette surrounding visits and cancellations, and possible changes to the schedule at future times. "Decision-Making"—which can be done by method of joint agreement, consultation, or sole authority—focuses on choices regarding education, extracurricular activities, medical care, religion, etc. The issue of "Sharing Information" addresses the appropriate mechanisms for sharing important information about the children to the other parent (i.e., medical,

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[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *See* Carrell & Manchise, *supra* note 21 (explaining "day" versus "night" format of FOA).
[121] ROBERT KIRKMAN COLLINS, *supra* note 27, at, 54–55.

school, etc.). "Relocation" requires a proposal for the procedure a parent must follow when considering moving with the children if there is shared custody. "Survivorship" requests—that is, what interactions should and should not be had with the deceased parent's family members if one of them dies—will be presented by each party with respect to their own family members, and no award will be given by the arbitrator/s for this issue. Lastly, each party will submit an offer on their ideal rules regarding the introduction of a new significant other to the children by the other parent. For this issue only, the parties can decide whether they want an award to be chosen, or if they will agree to accept the other party's conditions about when and how to introduce significant others to their children.

Another subcategory under the "Parenting Issues" category is "Parenting Expenses," which constitutes contributions towards basic needs ("child support"), educational costs, un reimbursed medical expenses, child care costs, and inheritance provisions for the children.[122]

The next group of issues that will be addressed is "Property Allocation." This will include offers for asset division, the marital residence, other real property, liquid assets, retirement funds and pensions, employee benefits, business interests, pets and other property (vehicles, home furnishings, etc.); it also will address liabilities (such as credit cards, debts, etc.).[123] "Spousal Assistance," such as spousal maintenance (formerly known as "alimony") and spousal health insurance will constitute another issue category, in addition to "Tax Ramifications".[124] The tax issues will include those arising from distribution of property (capital gains), basis issues (with appreciated assets), capital gains issues (from selling the marital home or other assets), and how to file tax returns going forward.[125]

Some remaining issues might be the life insurance to underwrite future obligations, arbitration, court filing and counsel and expert fees (should the parties chose to utilize these professionals in the FOA process), future arbitration/mediation clause, and any requirements for a religious divorce.[126]

D. *How the Arbitrators are Chosen*

As in traditional forms of interest arbitration, the arbitrator in Divorce FOA should be chosen by the parties.[127] In some instances, arbitrators can be selected through an arbitration institution's process, such as the American Arbitration Association (AAA).[128] Alternatively, the parties might seek someone with traditional experience in matrimonial family matters, such as a divorce mediator. Another issue to consider when choosing an arbitrator for Divorce FOA is whether the parties would like a single, neutral arbitrator, or a panel of three arbitrators. In this situation, there could be one arbitrator appointed by each party, and one neutral arbitrator, who is often selected by the parties' arbitrators.[129] While arbitration institutions typically require the party-appointed arbitrators to be neutral, if the arbitration is not being administered by an institution, the party-appointed arbitrator can be an advocate for the party instead of simply being

[122] *Id.* at 57.
[123] *Id.* at 56.
[124] *Id.* at 58.
[125] *Id.*
[126] *Id.*
[127] Penny Reid & Tifannie Limbrick, *Selecting the Arbitrator: A Key Decision for your Next Arbitration*, SIDLEY.COM, (July 1, 2016), https://www.sidley.com/-/media/publications/texas-lawyer_selecting-the-arbitrator.pdf.
[128] *Id.*
[129] *Id.*

neutral.[130] One benefit of utilizing an arbitration institution, however, is that if the parties cannot come to an agreement on who to choose as a neutral arbitrator, the institution can appoint one.[131] Logically, it follows that parties should utilize a single arbitrator in Divorce FOA (as opposed to a panel) in order to decrease the time and costs of the process. Lastly, if the parties cannot agree on a neutral arbitrator and do not wish to use an institution to facilitate the FOA, a court can appoint a neutral arbitrator.[132]

E. *Applying Final-Offer Arbitration to Divorce Mediation-Arbitration*

Mediation-arbitration—sometimes referred to as "med-arb"—is an alternative dispute resolution method that uses both mediation and arbitration to try to reach an agreement.[133] "Thus, subject to variations, the essence of med-arb is to allow a softer mediation process to occur first thus taking every opportunity of achieving a resolution to a dispute which is not imposed . . . "[134] If an agreement cannot be reached through mediation, the parties proceed to arbitration, where an arbitrator will make the disputed decisions for them. Med-arb encourages the parties to come to an agreement in mediation, otherwise it will be submitted to an arbitrator, and the parties will lose control over the outcome.[135] "At that point, the presiding officer, now sitting as an arbitrator and no longer as a mediator, is enabled to proceed as if the hearing was one of arbitration and to impose a resolution, a final and binding award, generally relying on the information presented during the mediation hearing." This is beneficial to the parties, because they will not have to start from the beginning of the process, and they have an option to continue the process through a different method, should their first option not succeed. Additionally, the mediator can choose an arbitrator, so that the parties do not feel constrained, or the need to act differently, towards the mediator during the mediation process.

While this method is effective for achieving a resolution once an impasse is reached in mediation, it takes the autonomy away from the parties in the decision process, which is likely one of the main reasons the parties decided to utilize mediation in the first place. To solve this dilemma, parties could opt to use "Med-FOA." This method would essentially follow the traditional "med-arb" structure, however, the parties would utilize FOA instead of traditional interest arbitration after mediation reaches an impasse. This way, a resolution is guaranteed, and the parties would not lose as much autonomy in the decision process, as they might in traditional med-arb. Similar to traditional med-arb, the parties would begin their negotiations in mediation; if the parties cannot come to an agreement on some, or even all, of the issues in mediation, instead of transitioning into traditional arbitration, the parties would opt to utilize FOA. The FOA could work in two different ways: first, the parties could elect, at the beginning of their divorce mediation process, that should they come to an impasse on any individual issue, those, and only those, issues would be decided by an arbitrator—similar to the "issue-by-issue" process of FOA. Each party would submit their final offer on each disputed issue, and the neutral arbitrator—who was originally the mediator—would choose the most reasonable offer and award that issue to the

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[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *What is mediation-arbitration?*, STEPS TO JUSTICE, https://stepstojustice.ca/questions/family-law/what-mediation-arbitration

[134] *Med-Arb, Duhaime's Alternative Dispute Resolution (ADR) Law Dictionary*, http://www.duhaime.org/LegalDictionary/M/MedArb.aspx.

[135] *Id.*

respective party. Second, the parties could begin the mediation process without coming to an agreement on what would happen should they reach a stand-still on certain issues, and at the time of the impasse, the mediator can offer to transition over to FOA for the purpose of settling the remaining disputed issues. "Med-FOA" would encompass all of the benefits of mediation, traditional arbitration, and FOA, while limiting the pitfalls that currently exist when utilizing these methods individually.

F. *Criticisms*

One common criticism of FOA is that there is virtually no appeals process. One response to this criticism is that "the losing parties should be somewhat pacified by the fact that the award should not differ too greatly from that party's offer," as the offers should be similar if both are reasonable.[136]

Another criticism of FOA is that it is inherently unfair because the award consists of only one party's offer.[137] There are two answers to this: first, this fear will encourage voluntary settlements before the final award is given; and, second, the parties will find that the outcomes are "more acceptable given that the arbitrator would choose from less extreme final offers."[138]

As previously mentioned with "total-package" FOA , critics are concerned that parties may be inclined to throw in one, or a few, outlandish provisions in their package that is otherwise reasonable; this is avoided by using "issue-by-issue" FOA, because it forces parties to propose reasonable offers on all of the issues.[139] Also, the criticism of FOA that both parties can submit unreasonable packages and the arbitrator would be forced to choose between two unreasonable proposals, is also solved by using the "issue-by-issue" approach instead of the "package" format.[140] In the extraordinary scenario that the parties both choose to make unreasonable offers on the same issue, the arbitrator will be inclined to choose the more reasonable of the two offers, hence encouraging the parties to only make reasonable offers.

Another response to this critique is that research conducted on final-offer arbitration has shown that the more transparent the final-offer arbitration process is, the more reasonable the parties' offers would be, and therefore the dispute is more likely to settle.[141] "For example, in one study of final-offer arbitration scenarios structured in different ways, the study found that when the partied knew their final offers would be disclosed to the other side, their final offers were more reasonable and the parties were more likely to settle their dispute."[142]

A further critique of the "both unreasonable proposals" issue that might not be answered by utilizing the "issue-by-issue" format instead of "package" format, is that both parties could still theoretically submit utterly irrational offers on one particular issue, and then the arbitrator would still be left to decide between two unreasonable proposals. One possible response to this would be that if the arbitrator still thinks both offers are wildly unreasonable with regards to one issue,

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[136] Josh Chetwynd, *Play Ball? An Anlaysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 MARQUETTE SPORTS L. REV. 109, 115 (2009).

[137] David L. Dickinson, *The Chilling Effect of Optimism: The Case of Final-Offer Arbitration*, *in* ECON. RES. INST. STUD. PAPERS, DIGITIAL COMMONS AT UTAH ST. UNIV. (2003).

[138] *Id.*

[139] Carrell & Bales, *supra* note 37.

[140] *Id.*

[141] Carrell & Bales, *supra* note 37, at 23, 24.

[142] *Id.* at 24.

the arbitrator may, perhaps, at his own discretion, give the offers back to the parties to come back with "more reasonable" offers before he awards that specific issue. However, this would create more incentive for the parties to refrain from putting their "best" or "final" offers first, therefore undercutting the benefits of FOA. In order for the arbitrator to be able to do this in FOA, he or she could only inform the parties that this would occur after they have both submitted their final offers, and both contain an outrageously unreasonable proposal on the same issue. When returning the issue to the parties to come up with more reasonable offers (for that issue only), the arbitrator would make it clear that the parties will not have another opportunity to adjust their proposals on that issue, and therefore, the arbitrator must pick whichever offer is more reasonable of the parties' second offers. Proposing this option would be at the discretion of the arbitrator, and would likely be an uncommon occurrence in FOA.

VI. CONCLUSION

FOA has numerous benefits when compared to other alternative methods of dispute resolution, making it a useful method that could be used to settle divorces. While the currently available alternative dispute resolution methods for settling a divorce are helpful in decreasing costs and time spent during the negotiations, there are aspects of these methods that make them undesirable to some, which could be resolved by implementing FOA to the divorce negotiation process. Notably, the other methods pose obstacles around the parties' autonomy in the decision process, the ability to move forward once an impasse has been reached, the "chilling effect," which slows down the process when compromise is involved, and the notion of compromising steering the outcome of the arbitrator's decision. FOA seeks to combat these barriers in multiple ways; first and foremost, it is guaranteed to yield a settlement, and thus offers the principal advantage of traditional interest arbitration, while avoiding the primary disadvantage of mediation—the possibility of no settlement.[143]

Second, FOA encourages parties to be reasonable from the beginning, out of fear that the arbitrator will choose the other party's offer if it is more reasonable, which significantly cuts down the cost and time spent negotiating divorce settlements.[144]

Third, the arbitrator's decision provides a more reasonable settlement than that which comes out of traditional arbitration, because the decision is one proposed by one of the two parties rather than by the arbitrator alone, allowing the parties to maintain a greater level of autonomy in the decision.[145]

Fourth, the FOA process alone encourages a large percentage of the parties to settle the dispute themselves before the arbitrator renders the decision—"likely because they are given the final offer of the other side and the opportunity to then negotiate a settlement during a grace period—a critical and constructive step not typical of mediation or arbitration."[146]

Lastly, and arguably most significantly, FOA has the ability to eliminate "the chilling effect" that is common in traditional interest arbitration, where the parties do not put forth reasonable offers from the beginning under the assumption that the arbitrator will likely "split the difference."[147] By eliminating the "chilling effect," FOA reduces acrimonious and unreasonable

[143] Carrell & Manchise, *supra* note 4.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*

behavior associated with divorce settlement procedures, which in turn diminishes the length of time and amount of emotional trauma commonly associated with divorces.

By applying FOA to divorce settlement negotiations, parties would reap tremendous benefits, making the difficult process more bearable and efficient for couples going through a divorce. For these reasons, and those addressed throughout this Note, the alternative dispute resolution processes for divorce negotiation settlements would benefit tremendously from the addition of "Divorce FOA."