Final Offer Arbitration
(FOA)

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Final Offer Arbitration
(“baseball”, “last best offer”, “pendulum” arbitration)

• In Conventional Arbitration, if arbitrators are expected to “split the baby”, parties will have an incentive to make extreme offers (“chilling effect” on negotiations).
  
  o In August 1963, US Congress had ordered compulsory arbitration to terminate labor railroad disputes and avoid strikes.
  o This is why in 1966 Carl Stevens originally proposed FOA (“one-or-the-other principle”) for wage bargaining.

• In FOA, arbitrators must necessarily select one of the offers submitted by the parties.
  
  o Lack of flexibility of arbitrators will encourage parties to submit reasonable final offers, to maximize chances of success.
  o Preliminary exchange of offers may encourage parties to settle.
  o Even if an award is necessary, dispute resolution is fast and low cost.

  o While FOA typically applies to pure monetary disputes, “package-based” FOA is occasionally used (e.g. bargaining in New Zealand police).
FOA in practice

• Labor & commercial negotiations
  o “FOA challenge” (Bazerman & Kahneman, “How to make the other party play fair”, HBR, 2016)
    = Open negotiation with a reasonable offer + Propose final price to be determined under FOA
  o In 2015 ICDR approved its FOA Supplementary Rules

• Imposition by regulatory authorities, to force parties to negotiate a fair price
  o Canadian Transportation Agency, for rates disputes between carriers and shippers
  o Canadian Radio-Television and Telecommunications Commission, to decide disputes on rates for “Canadian programs”
  o Australia’s “News media and digital platforms mandatory bargaining code” (2021)
    ➢ The bill (an amendment to the Competition and Consumer Act) was designed to correct imbalance in negotiating power between digital platforms and news publishers
    ➢ As a result, News Corp reached agreements with Google (April 2020) and Facebook (February 2021).
FOA in practice (II)

• BEPS Agreement and Double Taxation Treaties
  
  o OECD recommends inclusion of FOA provision to sort out *bilateral disputes between national tax authorities* on how to avoid double taxation of taxpayers in cross-border transactions (e.g. transfer pricing)

  o FOA already foreseen in some bilateral Double Taxation Treaties (e.g. US-Spain DTT)

• FOA has also been suggested or used to determine

  o Royalties for Standards Essential *Patents* (SEP), when licensing is mandatory

  o In the US

    - Emergency care: fees charged to hospitals by out-of-network emergency doctors (e.g. New York city)
    - Drug prices charged by big pharma to health insurance companies
FOA Supplementary Rules (ICDR, 2015)

• Parties will **exchange at least 2 settlement offers** prior to the arbitration hearing
  
  o Such offers will **not** be shared with the arbitration tribunal

• At least 2 weeks before hearing, parties will simultaneously submit their **final offers** to the tribunal and their counterparties
  
  o Each offer will contain a **single monetary amount**, covering all claims, set offs or counterclaims (excluding pre- and post-award interest and arbitration costs)
  o Only the parties may see the final offers at that time
  o The tribunal shall **not open the final offers until the end of the hearing**
  o Absent agreement, offers cannot be changed once submitted to the tribunal

• After considering the evidence submitted in the hearing, the tribunal shall choose one of the final offers
  
  o The tribunal will only add any interest or arbitration costs, pursuant to the arbitration rules, applicable law or agreement
  o The award shall be **reasoned**, stating the rationale for its selection of one party’s final offer
“News media and digital platforms mandatory bargaining code” (Australia, 2021)

• Australian Communications and Media Authority (ACMA) to keep a register of “bargaining code arbitrators”

• Object: remuneration to be paid by a digital platform to a news business for making available news content

• Procedure:
  • News business may give notice to ACMA that arbitration should start if a) unsuccessful bargaining for 3 months and b) the bargaining parties have agreed to arbitration about terms for resolving the “remuneration issue”.
  • If the parties cannot agree on the panel of arbitrators, appointments to be made by ACMA from its roster
  • Expedited discovery process
  • Final offers cannot be more than 30 pages in length
    • Each party may make a 20-page submission about the other party’s final offer
    • ACMA itself may give to the panel a submission about both final offers
  
  • “The panel must accept one of the final offers unless the panel considers that each final offer is not in the public interest because it is highly likely to result in serious detriment to
    a) The provision of covered news content in Australia; or
    b) Australian consumers.

  The panel must consider the bargaining power imbalance between Australia news business and the designated digital platform corporation”.
Tentative conclusions

• If the “objective value” of the claim is ambiguous, FOA may disadvantage the party which
  o Is more risk averse (it will make offers below its subjective valuation, to ensure success)
  o Resorts to FOA less frequently (it will have fewer opportunities to make up for cases lost)

  To address those difficulties, academics have suggested a number of FOA variations (“amended FOA”, “combined FOA”...)

• FOA may be suitable for some pure quantum disputes between well-informed parties
  o In the absence of legal changes (like in Australia), this will require that both parties accept FOA and ICDR-inspired rules.