This article proposes a modified arbitration process that could be called EVALOA:¹ Evaluation followed by last-offer evaluation. When the parties agree to EVALOA:

- After opening statements, the arbitrator cautiously offers neutrally-stated initial impressions of the strengths and weaknesses of the parties' cases, while promising to keep an open mind. In this regard, EVALOA shares features with evaluative mediation, early neutral evaluation (ENE), and the mini-trial.
- Ideally, opening statements in EVALOA take place a week or two in advance of the main evidentiary hearing by conference call or Webcam video conference.
- In EVALOA, unlike in mediation, the arbitrator does not engage in private caucuses or other ex parte contact with either party; thus, she will not be influenced by a party's confidential information that was not disclosed to the other side; although she might offer suggestions to both parties jointly.
- If the parties do not settle, then at the close of evidence they proceed to last-offer arbitration, a.k.a. “baseball” arbitration, with multiple rounds of proposal, to encourage them to be reasonable in their resolution proposals; the arbitrator chooses one and only one of the parties’ final proposals.

EVALOA can thus provide an arbitration case with much of the benefit of a separate mediation,² but without the added cost of a separate mediator, and without the problems of parties’ privately disclosing confidential information to a mediator.

A real-world example

I recently served as arbitrator in a breach-of-contract case in which my comments about the strengths and weaknesses of the parties’ cases seem to have played a role in settlement. The main issues in dispute related to (1) whether the respondent could properly be bound to certain contractual commitments on an apparent-authority theory, but also (2) whether the claimant's damages demand was realistic.

At the request of a party, I convened a conference-call oral argument about a merits-related motion a few weeks before the scheduled hearing date. During the oral argument, I remarked that, in view of the parties detailed written pleadings, the respondent would likely have a hard time refuting the claimant’s case on liability; but the claimant's proffered damages evidence did not seem especially compelling. I promised that I would of course keep an open mind in both regards. The respondent subsequently reduced its damages demand by nearly two-thirds and, this time, cited specific evidence in support of its demand; shortly afterwards, the parties settled the case.

Step 1: Opening statements

As the first step in EVALOA, the arbitrator convenes an early initial session of the hearing, during which each party presents an opening statement summarizing its case.

The early initial session could take place at the start of the main evidentiary hearing — but ideally, it will take the form of a conference call or Webcam video conference shortly after the parties have exchanged exhibits and witness lists, e.g., under AAA Commercial Rule R-22 (https://perma.cc/GE4W-VB5F). It can be advantageous to conduct such an early initial session well
before the main evidentiary hearing, because if the EVALOA process does lead to settlement, then the
parties will have saved the cost of travel to and lodging at the hearing location (if applicable).

If the early initial session is done by conference call or Webcam video conference, the
proceedings can usually be recorded electronically through the built-in capabilities offered by many
providers (e.g., Zoom, GoToMeeting, Skype).

In addition, if the parties so agreed, then as part of its opening statement, each side might also put
on a “preview” or “summary” witness for a few minutes. This testimony might include one or more real
or summary exhibits; it could be offered in a “hot tub” witness-panel format; and it might include very
brief cross-examination, all without prejudice to the witnesses being recalled later for more-detailed
testimony.

If necessary, the arbitrator questions the parties about just what facts they intend to prove and
how they intend to prove those facts. Such questioning comports with the arbitrator code of ethics of the
ABA and the AAA, which contemplates that arbitrators will “engage in discourse with the parties or their
counsel, draw out arguments or contentions …. These activities are integral parts of an arbitration.”
Arbitrator questioning also follows the example of the Manual for Complex Litigation of the Federal
Judicial Center, which recommends that, at the initial pre-trial conference in complex cases, “the judge
should require the attorneys to describe the material facts they intend to prove and how they intend to
(https://perma.cc/UM4P-BVMQ), and that judges “requir[e] with respect to one or more issues, that the
parties present a detailed statement of their contentions, with supporting facts and evidence …. “ Id. at 46.

Step 2: The arbitrator's initial impressions

Next in EVALOA, the arbitrator cautiously states her preliminary, informal, tentative, non-binding
impressions of the strengths and weaknesses of each party's case:

- to both parties together in joint session, as opposed to in private caucuses;
- in carefully-phrased neutral terms, to reduce the chance of coming across as someone whose
  mind is already made up;
- with emphasis that the arbitrator is keeping an open mind and reserving judgment until all
  evidence has been presented.

Such neutral observations are routine in ENE, evaluative mediation, and mini-trials. There seems to
be no good reason not to make use of neutral observations in arbitration as well — indeed, the ABA/AAA
code of ethics for arbitration expressly contemplates that arbitrators will “comment on the law or
evidence …. These activities are integral parts of an arbitration.” Commentary, Canon I of the ABA/AAA
Code of Ethics for Arbitrators in Commercial Disputes (https://perma.cc/Y6TX-M97V). As discussed in
more detail below, an early arbitrator evaluation of this kind should provide significant benefits to the
parties and their counsel, with little or no downside risk.

The hearing is then recessed to give the parties an opportunity to talk. (At the main evidentiary
hearing, it will probably be close to lunchtime anyway.)

Importantly — and unlike in mediation — the arbitrator refrains from any ex parte contact with either
party, so as not to expose the arbitrator to either side's undisclosed confidential information. The parties
could jointly ask the arbitrator for more information about her perceptions, assuming that she was willing
to share them. This again borrows from mini-trials, ENE, and evaluative mediation.
Also unlike in mediation, the arbitrator does not attempt to broker a settlement (although she might offer suggestions). To be sure, this puts more of the burden of creative thinking onto the parties and their counsel. As discussed below, however, the experience of Major League Baseball with last-offer salary arbitration suggests that this might not be an unrealistic hope.

Such early disclosure of the arbitrator's preliminary impressions can provide the parties with significant value:

• By hearing the arbitrator’s tentative views, counsel will get a better idea of how to put on their cases as cost-effectively as possible; an arbitrator's Sphinx-like silence does not help focus proceedings or reduce costs. Of course, the parties' counsel might try to guess at the arbitrator's views based on her questions and rulings during the hearing, but such guessing games cost time and money.

(In two cases, I have informed counsel of my perceptions of the case at the close of the hearing, with counsel’s approval. Counsel seemed quite happy to gain insight into how I was perceiving the evidence, so that they could write their post-hearing briefs accordingly. In neither case did the author ever hear that the losing party tried to challenge the award.)

• The arbitrator’s cautious but frank disclosure of her impressions along the way would give counsel a valuable opportunity to correct any misimpressions the arbitrator might have formed, before those impressions hardened over time into immutability.

• A party — or its counsel — might be so convinced of its own position that it refuses to discuss settlement. If the arbitrator were to express a dissenting view, it might help to jumpstart settlement talks.

• Giving the parties early access to the arbitrator's preliminary thinking, while there's still a chance to persuade her, can help to offset one of the perceived disadvantages of arbitration, namely the losing party's very limited ability to appeal an unfavorable decision on its merits.

Step 3: After the hearing, “baseball” (last-offer) arbitration — with multiple proposals

In EVALOA, if the parties don't settle the case, then the arbitration hearing proceeds as usual. Counsel, knowing the arbitrator's initial views, might well shorten or otherwise adjust their evidentiary presentations. At the end of the hearing, the arbitrator might again summarize her then-current view of the case if the parties so agreed.

Soon after the hearing ends, the parties exchange, and submit to the arbitrator, their final proposals for an outcome, with supporting arguments, in lieu of post-hearing briefs. Importantly, each party is entitled to submit both an aggressive proposal and a conciliatory proposal. (Allowing counsel to submit an aggressive proposal would give their clients a better “customer experience,” in that each party would know that its lawyers were fighting hard, as opposed to caving in.)

The parties would also be encouraged to exchange successive proposals until some agreed time — and they might even be required to do so, as in Rule 2 of the ICDR's supplementary rules for final-offer arbitration (https://perma.cc/5TJ6-UKHH). (Hat tip: Edna Sussman.)

If the parties don't report settlement by a specified date, then the arbitrator chooses one of the final proposals and issues it, as-is, as the final award. She might or might not state her reasons, depending on her and the parties' preference. (Rule 6 of the ICDR rules requires a reasoned award.)
The requirement that the arbitrator choose one final proposal or another gives the parties an incentive to be reasonable — if a party's final proposal is too aggressive, it risks driving the arbitrator to the other, more-reasonable proposal. As one commentator put it, baseball-style arbitration of this kind “is designed to produce a settlement, not a verdict.” Thomas Gorman, *The Arbitration Process – The Basics*, Baseball Prospectus (2005) (http://perma.cc/CZR4-9XC7).


Three additional anecdotes in the same vein seem relevant:

- A tech lawyer friend in Silicon Valley once recounted how a client of hers got into a dispute concerning a contract that she had drafted for the client. She told the client’s CEO that the contract required baseball-style arbitration of the dispute and explained what that entailed. The CEO exploded: "G*dd*mn it, that means I have to be reasonable." (The parties settled the dispute.)
- Years ago, at my urging, three different litigation clients and their adversaries, in three different lawsuits, agreed to baseball-style arbitration; each case promptly settled. The author had the impression that, after agreeing to this type of arbitration, the business people on each side looked at each other and said, in effect, wait a minute — we're not that far apart; we don't need to pay the lawyers and the arbitrator for this.
- Even with baseball-style arbitration, though, the parties might need a jolt from a neutral evaluator to get them to budge from their initial positions: In an email discussion of this proposal on Paul Lurie’s mediation-and-arbitration listserv, arbitrator Edna Sussman reported that in 2016 she presided over five cases in which the parties had agreed to baseball arbitration; only one of them settled, with the other going to award; she said she “was struck by the fact that all of the parties proposed numbers that were very close to their number in the pleadings, i.e. claimant asked for almost all of the damages sought and respondent proposed a very low number compared to the damages claimed – close to zero, and in fact, in one instance zero.” In those four non-settling cases, the evaluation part of EVALOA might have provided such a jolt.

Possible concerns

**What if the arbitrator changes her mind?** Suppose that in EVALOA an arbitrator ultimately rules differently than indicated by her initial impressions. That fact should actually help to protect the award: a reviewing judge would likely be impressed that the arbitrator didn’t prejudge the case too soon, but instead was willing to change her mind when presented with additional evidence and argument—especially if the award explained the arbitrator's reasons for changing her mind.

**What about allegations of bias?** One arbitrator, reading an earlier version of this proposal, commented that: "Mixing the role of arbitrator with early neutral evaluation, a mediation technique, runs the risk of the arbitrator being perceived as biased." Certainly arbitrators must be vigilant against creating an appearance of bias — in these times especially, we must help maintain the public legitimacy of what we do as arbitrators. But neither should we arbitrators be overly fearful of being attacked for bias:

- Arbitrators and judges and jurors routinely form one or more initial impressions of the merits after the parties’ opening statements. We don't ask them not to do so; we simply ask — more precisely, we demand — that they withhold judgment until all the evidence is in. An EVALOA
arbitrator's explicit promise to keep an open mind would surely carry some weight with a reviewing court.

- An arbitrator's early disclosure of her initial impressions will help to increase the overall transparency of the arbitration proceeding, in the same vein as her disclosure of any past- or present relationships with the parties, counsel, witnesses, etc. If the arbitrator really does have a genuine bias, her early disclosure of her impressions might help counsel to identify that bias.

Granted, some unscrupulous counsel might try to delay the proceedings by claiming that the arbitrator's initial-impressions disclosure showed that she was biased. But many courts seem to be skeptical of hair-trigger accusations of arbitrator bias; see generally, e.g., Note, Arbitrator’s Evident Partiality: Current U.S. Standards and Possible Solutions Based on Comparative Reviews, 9 Arb. L. Rev. 159 (2017) (https://goo.gl/9QmdfK). In any case, being accused of bias is arguably an occupational hazard of serving as an arbitrator; it makes little sense to ditch the benefits of early impression-disclosure just because of what seems likely to be a comparatively-minor risk of delay.

**A business-project approach to arbitration:** Nowhere is it written that every arbitrator must conduct every case in accordance with a purely-adversarial- and adjudicatory model, as though the arbitrator were refereeing a karate match and awarding points to the players (i.e., counsel) for their kicks and strikes. When the parties are amenable, it makes sense to treat arbitration as a business project: The arbitrator and counsel, in search of a solution to a business dispute, work together to create deliverables, namely an award that conforms to the contract and a supporting record. Under that business-project model, it makes sense for the arbitrator to keep her colleagues (i.e., counsel, again) apprised of her thinking as they proceed through their work together.

**Conclusion**

EVALOA would likely be less costly than an unsuccessful pre-hearing mediation and then a hearing before a different arbitrator. By refraining from ex parte contacts, the arbitrator avoids the danger of inadvertently relying on a party's undisclosed confidential information. In some cases, EVALOA might even be more likely than mediation to produce a settlement, as happens so often in baseball-salary arbitration.

EVALOA could well promote not only speed and efficiency, but also the flexibility and autonomy of the parties and counsel. It would give the parties access to more information, earlier in the process, to inform their settlement discussions. And early access to the arbitrator's thinking, while there's still a chance to persuade her, would help to make up for the relative lack of a right of appeal in arbitration.

Arbitrators should add EVALOA to their toolkits and, when parties are amenable, consider using it to help the parties to resolve their dispute and get on with their business.

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Mediation as part of the arbitration process is required by the American Arbitration Association's Commercial Rule R-9 (https://perma.cc/GE4W-VB5F) and Construction Rule R-10 (https://perma.cc/PQ87-NMSD) unless either party opts out.