Conflict Resolution Techniques: The Answer to Legislative Impasses?

By Charles E. Rumbaugh

Given the greater reliance by local governments for budget support from their respective state governments, the need for prompt legislative budget action and approval is a necessity.

Can conflict resolution, or alternative dispute resolution (ADR), techniques or methods be adopted for a non-contractual situation just as effectively as with a contractual transaction? More specifically, can they assist political entities and members of their respective parties to resolve disputes through a methodology of mutual agreement, as opposed to the notion of an ideological winner and loser? This concern has been raised over state legislative actions, or (to some) "inactions," such that the debate should be aimed at a process of collaborative or cooperative solution, rather than furthering confrontational issues that separate conflicting political parties.

While the ramifications of such impasses at the state level should be readily apparent, there are other political stakeholders who experience the collateral damage that results from unresolved or delayed legislative matters. These stakeholders include special political districts, cities, and school boards, among others, and they all rely to an increasing degree upon positive state legislative action. It is these stakeholders, including the public, that are seemingly held hostage by the gridlock mindset that prevails over state legislation. And some forcibly assert that those stakeholders have had or continue to have pronounced adverse fallout thrust upon them by their elected legislators.

It has been argued that this ostensibly recent (to some) phenomenon of legislative impasse has been exacerbated due to the increased demands placed upon these lower-tiered political bodies, or state subdivisions, which is the antithesis of a process intended to resolve critical public issues in a timely, cost-effective, and democratic manner. Others have suggested that these impasses are merely part of the democratic process and that there is no guarantee of a solution under the current scheme of political structure!

In the contractual arena, disputes arise and a forward-looking, ultimate solution is arrived at through litigation (normally with finality); clearly an alternative to negotiation and in lieu of some other form of settlement or resolution. But that litigation, or adjudicatory "flavor-of-the-day" of an "unsuccessful" negotiation process, also results in impasses and deferral to the alternative of a court decision. However, a more often than not litigation approach to resolution is usually found fraught with uncertainty—both in time and money. Thus, conflict resolution or ADR techniques are increasingly being called upon.

While the ADR landscape is a dynamic process, it is normally aimed at facilitating resolution. There is one motivational ADR tool in particular that is intended to move contracting parties toward voluntary settlement; to look beyond ultimate litigation and consider another negotiation tool that incentivizes the parties to continue the negotiation dance in a proactive manner. This tool, known as "baseball arbitration,"[1] provides the process control for negotiation to develop an outcome or solution with a backstop of a real alternative. Without an alternative to metric against, the negotiating parties are usually at a loss as to the downside. When negotiations break down, baseball arbitration provides a technique that has been found to provide motivation for parties to resolve contract-related disputes.

As a conflict resolution tool, baseball arbitration, or final offer arbitration, underscores a party's need to focus on the other party's offer(s) and determine whether or not that other "final" offer could be the acceptable "best alternative to negotiated agreement" (BATNA) since, in the absence of a negotiated agreement, that alternative could result through the use of binding

arbitration (e.g., baseball arbitration) in the basis for the deal. In particular, parties know that in the absence of a negotiated resolution, an arbitrator could be called upon to select one of the two competing/final offers as binding. The motivation to move is the inherent factor in that process, since the alternative (the other party's last offer) may be unacceptable.

It is within this background that brings forth the following questions:

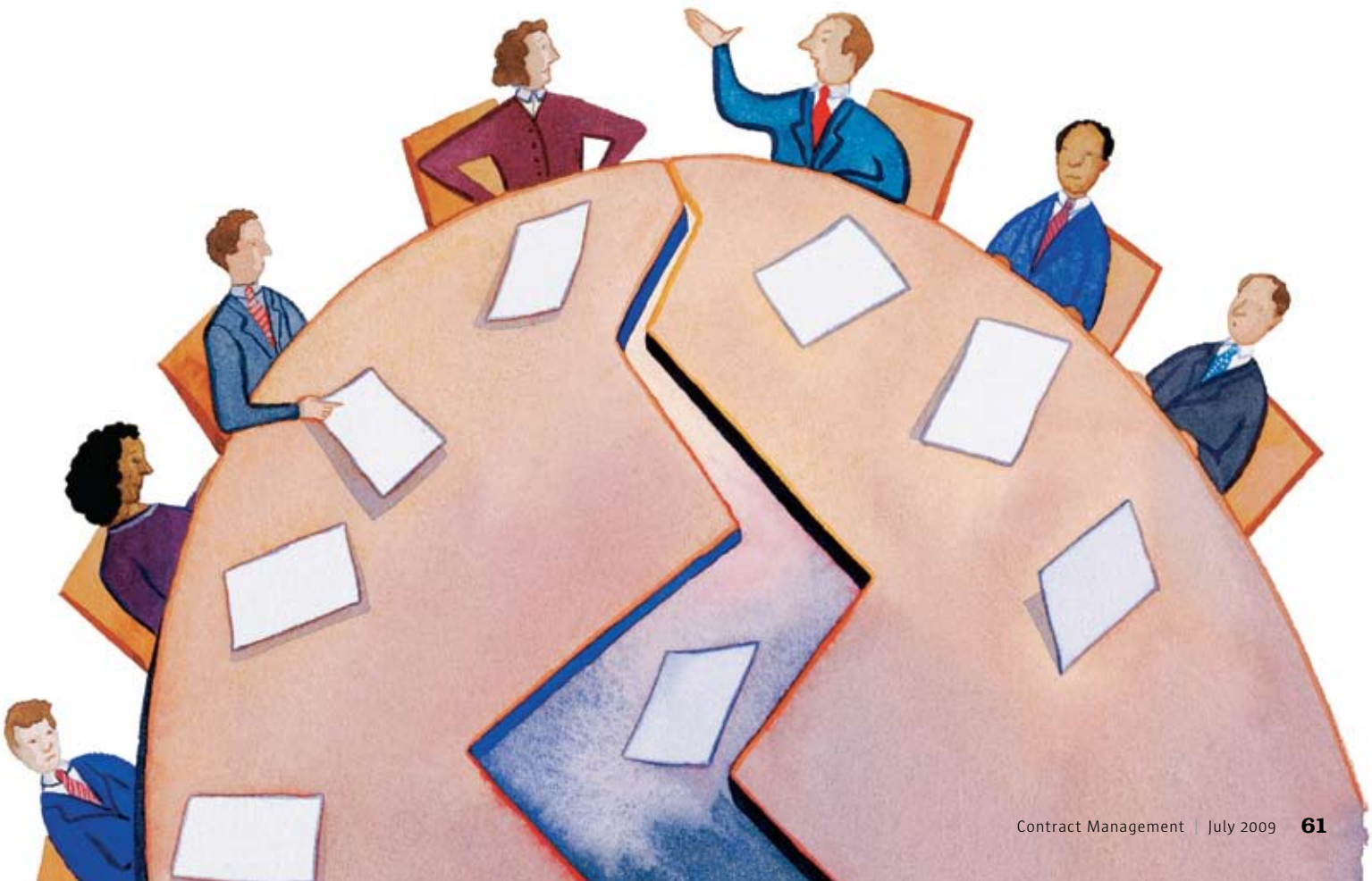
- Can conflict resolution techniques be used to resolve certain legislative impasses?
- Can the legislative process return to being a truly deliberative or cooperative process?
- Can baseball arbitration be adapted by political stakeholders, and others, for a non-contractual environment so that it could be shaped as a legislative process tool that can assist to resolve, by negotiation, the multitude of issues confronting legislatures today?

The following is a typical scenario to better illustrate the problem. Consider a state legislature being compelled by a statutory or constitutional "restraint" that requires the use of a super-majority vote for legislative approval of certain actions.[2] Specifically, this constraint is imposed most often for actions involving certain tax increases, budget approvals, or other high-level critical legislative issues. Also suppose that due in large part to the political party composition of that legislative body, the legislature is unable or unwilling to achieve that super-majority vote requirement for passage of the action on the table, which results in legislative impasse. Consequently, the stakeholders and the public are deprived of any legislative action unless that political body eventually compromises or, through the mere passage of time, escalates the situation (if not the tension)—but always in a non-timely manner.

These super-majority requirements are described in many ways, from being an "oddity" to a necessary safeguard from a purported "runaway legislature."[3] However, the fact remains that these requirements make it extremely difficult, if not impossible, to reach a consensus or an effective solution within a timely manner.[4]

Over the years, several "solutions" have been advanced in an attempt to remedy the problem, but they have generally been unsuccessful. Specifically, they have included:

- Removal from office for impasse;
- Term limits to motivate legislation/compromise/cooperation; and
- Restriction on compensation.



Having an effective methodology in place to safeguard and ensure that legislative super-majority requirements work, and, consequently, do not result in an impasse, is clearly lacking.

However, all of these "solutions" are without a focus on a process-driven solution that keeps the statutory or constitutional super-majority voting threshold coupled with an environment for negotiation and resolution. It is therefore submitted that a solution that is politically neutral can be provided by conflict resolution and ADR techniques and will usually motivate political action—whatever the political majority/minority of the day happens to be.

But, as noted above, baseball arbitration has as its core the concept that the parties have an incentive to negotiate since the otherwise binding decision of an arbitrator is unacceptable. Thus, the goal is not to go to arbitration as the default, but to negotiate a resolution. With this in mind, how can baseball arbitration be tailored for these current legislative impasses? Certain ultimate and possible alternatives need to be thoughtfully considered to provide the requisite incentive for the political process to work without resorting to an alternative, even if there is a super-majority requirement.

Using a budget impasse as an example, an alternative can be developed. Assume that a state legislature is required to have passed a fiscal budget by a certain date so that the governor and all stakeholders could then take the actions, based upon that budget, that are required of them. A date of June 15 could be selected (such that the state legislature shall have passed a budget for the forthcoming year by that date). The alternative/default could be that the citizens of that state shall have an election at another certain date (e.g., 45 days after the date that the budget was otherwise required to be adopted or some date that is appropriate and feasible given the necessary ballot preparation time). Also, that election could have various alternatives with the plurality governing the prevailing or winning budget. Under that latter scenario, those alternatives could be designed with the intent to drive the parties to negotiate. These alternatives could include the following:

- The budget as proposed by the majority party,
- The budget as proposed by the minority party,
- The previous fiscal budget of the state as increased by a certain percentage (e.g., inflation rate), and
- The previous fiscal budget of the state as decreased by a certain percentage (e.g., a similar rate as in the entry above).

Again, plurality controls the election. But, ultimately, the legislature may not, for numerous reasons, see those alternatives as its BATNA! This proposal, or perhaps an adaptation thereof, could be approved by a constitutional change and, thus, motivate the state legislature, and the governor, to have enacted a negotiated, super-majority legislated budget. The default/alternative is clear to everyone from the get-go: everyone will know that the citizens will decide the definitive budget if the legislature does not act!

However, some may see a perceived risk in the public being involved in such a defining moment, and thereby motivating the necessary legislative action in a timely manner. But at the end of the day, if the legislature does not like voter alternatives as their BATNA, then compromise is compelled. Finally, one could ask:

- Will this proposal guarantee legislative budget passage by a super-majority vote in a timely manner? *Unfortunately, no.*
- Will this proposal further facilitate the currently wanting legislative super-majority process with an atmosphere toward resolution through legislative action, but which also provides a meaningful adjudicatory or outcome-based alternative (known by everyone) that serves the interests of all stakeholders? *Yes.*

It is a step in a positive direction. Is the choice really between that of gridlock under the current regime of super-majority vote? Or is it having a mere majority vote on critical issues—especially in the case

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of one-party rule? Is that a viable choice? If not, then the current super-majority constitutional requirement (e.g., budgets), when complemented with a modern process that finds its origins in conflict resolution and ADR techniques, provides the essential mechanism for driving negotiation and compromise by elected officials.

Having an effective methodology in place to safeguard and ensure that legislative super-majority requirements work, and, consequently, do not result in an impasse, is clearly lacking. The impact on local government increases with each year of impasse. If the "peoples' business" is to be accomplished under the super-majority regime, then new tools with a conflict resolution theme should be adopted.

Baseball arbitration is one such tool that offers a proactive response to that gridlock. It improves upon a legislative process when confronted by super-majority requirements. It provides an environment that is conducive for a negotiated resolution that involves tradeoffs and compromises, while simultaneously achieving the super-majority mandate. However, if in the unlikely event there is a subsequent absence of a collaborative legislative mindset, then the outcome is a known, viable alternative decided by the people! **CM**

ABOUT THE AUTHOR

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ENDNOTES

1. Refer to Charles Rumbaugh, "Having Trouble Getting to the Negotiation Table? Try Baseball Arbitration" (parts I and II), *Contract Management* (October and November 2002, respectively). Also posted at **www.Rumbaugh.net**.
2. The State of California has such a requirement, which has been the object of much publicity lately over the delays in budget passage due to this requirement. It has been suggested that the legislature should change, having a mere majority vote instead, as most states do. However, the public and most stakeholders do not generally desire such a change.
3. Ibid.
4. A corollary of this, however, is the realization that the power of the minority party is enhanced through the status quo because of these super-majority requirements.