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Show Me the Mediation!: Introducing Mediation Prior to Salary Arbitration in Major League Baseball

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NOTE

SHOW ME THE MEDIATION!: INTRODUCING MEDIATION PRIOR TO SALARY ARBITRATION IN MAJOR LEAGUE BASEBALL

I. INTRODUCTION

It may seem contradictory in a world of winners and losers, but there is room in the professional sports industry for a win-win style of alternative dispute resolution (“ADR”).¹ This Note’s goal is to review the quantitative and qualitative data to see if adding mediation prior to arbitration could be more effective than Major League Baseball’s (“MLB” or “league”) current method of final-offer arbitration (“FOA”).² FOA is a specific type of arbitration hearing, where the arbitrator is limited to choosing only one of the offers submitted by the parties, with no other options available.³ Mediation, on the other hand, “is the submission of a dispute to an impartial facilitator who assists the parties in negotiating a voluntary, consensual settlement of their dispute.”⁴ This Note concludes that the current method of FOA used by MLB, although effective at resulting in settlements, produces several critical problems.⁵ These major problems should, and could, be fixed by introducing mandatory mediation prior to arbitration.⁶

1. See discussion *infra* Part IV.

2. See discussion *infra* Parts III–IV.

3. Benjamin A. Tulis, *Final-Offer “Baseball” Arbitration: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85, 86, 88–90 (2010) (distinguishing FOA in that it “allows an arbitrator to make an unrestricted settlement choice without the prior submission of offers by the disputants”).

4. Adam Epstein, *Alternative Dispute Resolution in Sport Management and the Sport Management Curriculum*, 12 J. LEGAL ASPECTS SPORT 153, 158 (2002) (describing the mediation process).

5. See John P. Gillard, Jr., *An Analysis of Salary Arbitration in Baseball: Could a Failure to Change the System Be Strike Three for Small-Market Franchises?*, 3 SPORTS LAW. J. 125, 131 (1996) (arguing that the current system of salary arbitration used in MLB has been successful in settling salary disputes, despite fundamental flaws); *infra* Part III.

6. See discussion *infra* Part IV.D.

Part II of this Note will discuss the history of FOA generally, as well as the history and goals of FOA in MLB specifically.⁷ It will also outline the process of salary arbitration that MLB currently uses.⁸ Lastly, it will briefly discuss the usage of ADR in the three other major professional sports in the United States.⁹

Part III will discuss the numerous consequences of FOA in general and with respect to MLB.¹⁰ These main consequences include a weakened relationship between the player and the team, the effect on small-market teams versus large-market teams, and the process being more of a win-win for players than for owners.¹¹ A few other minor effects include the uncertainty that results from a lack of written decisions from arbitrators, and the complexity of advanced metrics, or “sabermetrics,” utilized more frequently in recent cases.¹²

Next, Part IV will propose a solution that would resolve these concerns by implementing mandatory mediation prior to arbitration.¹³ This Part will also discuss how mediation has been used elsewhere in MLB.¹⁴ Part V will conclude that, even with the competitive nature of baseball, there is room for mediation prior to FOA.¹⁵ The Appendix will introduce a detailed schedule of how mandatory mediation can be implemented into the already tight schedule of the MLB offseason.¹⁶

II. HOW FINAL-OFFER ARBITRATION CAME INTO EXISTENCE IN MAJOR LEAGUE BASEBALL

The story of how FOA came to be used in MLB involves a history of labor relations in baseball spanning more than one hundred years.¹⁷

7. See discussion *infra* Part II.A–C, II.E.

8. See discussion *infra* Part II.D.

9. See discussion *infra* Part II.F.

10. See discussion *infra* Part III.

11. See Vittorio Vella, Comment, *Swing and a Foul Tip: What Major League Baseball Needs to Do to Keep Its Small Market Franchises Alive at the Arbitration Plate*, 16 SETON HALL J. SPORTS & ENT. L. 317, 326-28 (2006) (outlining the criticisms of FOA, including disproportionately favoring players, differences between the effect on large- and small-market teams, and much higher salaries); *infra* Part III.A–C.

12. See Roger I. Abrams, *Inside Baseball's Salary Arbitration Process*, 6 U. CHI. L. SCH. ROUNDTABLE 55, 66 (1999) [hereinafter Abrams, *Baseball's Arbitration Process*] (defining “sabermetrics” as “a player’s contribution to his club’s success”); Gillard, *supra* note 5, at 136 (“[A]rbitrators do not issue written decisions. Because arbitrators do not need to support their conclusions in writing, they can conceivably make their decisions based on factors not enumerated in the collective bargaining agreement.”); *infra* Part III.D.

13. See discussion *infra* Part IV.

14. See discussion *infra* Part IV.B.

15. See discussion *infra* Part V.

16. See *infra* Appendix.

17. See Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, Its Use in Major*

To fully understand how and why salary arbitration was implemented in the league, it is first necessary to generally explore the history of salary negotiations, and then look particularly at the events and issues arising in MLB before FOA was implemented via agreements between the players and the owners.¹⁸ More specifically, the hostility in the bargaining practices of the owners and the players sheds light on why MLB utilizes FOA and how such use has shaped the league today.¹⁹

A. History of Final-Offer Arbitration

The first proposed usage of FOA in the United States was for preventing labor strikes.²⁰ The first person to provide serious insight on the subject was economist Carl Stevens in 1966.²¹ He theorized that the purpose and goal of arbitration should be to “encourage negotiated settlements at a greater rate than conventional arbitration.”²² He explained that parties prefer negotiated settlements much more than decisions made by a third party, in this case an arbitrator, because the ultimate decision is left to the parties.²³ Along with that, negotiated settlements also allow the parties to avoid spending extra time and money on the arbitration hearing itself.²⁴

During the subsequent decade, several states began to implement FOA as a way of resolving labor disputes.²⁵ Since then, numerous states have used arbitrators to prevent public unions from striking.²⁶ FOA was

League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes, 20 MARQ. SPORTS L. REV. 109, 117-23 (2009) [hereinafter Chetwynd, *Play Ball?*] (outlining the long labor history of professional baseball, from 1871 and the National League to the current use of salary arbitration).

18. See discussion *infra* Part II.A–C.

19. See discussion *infra* Part II.B–C.

20. Chetwynd, *Play Ball?*, *supra* note 17, at 110. (“FOA was first proposed abstractly in the United States in the late 1940s as a tool for preventing large-scale labor strikes . . .”).

21. *Id.* at 110-11; Tulis, *supra* note 3, at 86 n.11. See generally Carl M. Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, INDUS. REL., Feb. 1996, at 38.

22. Chetwynd, *Play Ball?*, *supra* note 17, at 110-11 (discussing that proponents of FOA, namely Carl M. Stevens, asserted that this was the system of arbitration’s greatest value).

23. *Id.* at 111; see Stevens, *supra* note 21, at 46.

24. Chetwynd, *Play Ball?*, *supra* note 17, at 111.

25. *Id.* at 112 (“[B]y the early 1970s states and municipalities as well as Major League Baseball had embraced the approach.”).

26. See Vincent P. Crawford, *Arbitration and Conflict Resolution in Labor-Management Bargaining*, 71 AM. ECON. REV. (PAPERS & PROC.) 205, 205 (1981); see also Chetwynd, *Play Ball?*, *supra* note 17, at 112 (“Wisconsin and Michigan[] instituted FOA as a form of compulsory arbitration ‘to resolve labor-management bargaining disputes when the union is legally prohibited (as are, for example, many public employees’ unions) from striking.’” (internal quotation marks omitted)).

able to accomplish its goal of inducing negotiation, as best demonstrated by developments in those states in the early 1970s.²⁷

Varying forms of FOA developed at this time, including the “issue-by-issue” and “package” approaches.²⁸ These techniques are mainly used when there are numerous points of issue that are being bargained between the parties.²⁹ Issue-by-issue arbitration “allows the arbitrator more flexibility” in that the arbitrator is permitted to choose the offer of either side on each individual issue, thus allowing each side to contribute sections of the final contract or collective bargaining agreement.³⁰ On the other hand, under the rules of package arbitration, the parties “submit an offer covering every issue in dispute, and the arbitrator chooses one complete package or the other.”³¹ Issue-by-issue and package arbitration were adopted by Michigan and Wisconsin, respectively, and both states were successful in reaching settlements prior to arbitration.³² From then on, various other states began using these techniques during collective bargaining with public sector employees.³³

27. Chetwynd, *Play Ball?*, *supra* note 17, at 113. For example:

In 1972, Michigan . . . found an immediate increase in negotiated settlements. Under conventional arbitration, the parties settled thirty-nine percent of disputes after the parties requested arbitration but before the arbitrator made a determination. With FOA, that number increased to sixty-four percent. In Wisconsin, where . . . FOA was implemented the total amount of imposed arbitration awards required was almost exactly the same as those in Michigan. Despite the constraining nature of the *package* process, the reviews in Wisconsin were positive.

Id. (footnotes omitted).

28. *Id.* at 112 (emphases omitted); see also Philip E. Garber, *Compulsory Arbitration in the Public Sector: A Proposed Alternative*, 26 *ARB. J.* 226, 231-32 (1971).

29. See Chetwynd, *Play Ball?*, *supra* note 17, at 112 (defining both “issue-by-issue” and “package” arbitration and when each method is used (emphases omitted)); see also Elissa M. Meth, Note, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, *AM. REV. INT’L ARB.* 383, 394 (1999).

30. Chetwynd, *Play Ball?*, *supra* note 17, at 112; Tulis, *supra* note 3, at 94-95; see also Meth, *supra* note 29, at 394 (“[T]he arbitrator has flexibility to create a balanced award [I]f there are many issues in dispute, an arbitrator can balance the number decided in favor of each party . . .”).

31. Chetwynd, *Play Ball?*, *supra* note 17, at 112; Tulis, *supra* note 3, at 94.

32. Chetwynd, *Play Ball?*, *supra* note 17, at 113 (detailing how both Michigan and Wisconsin were able to increase negotiated settlements due to implementing, respectively, issue-by-issue and package FOA); see also Meth, *supra* note 29, at 391 n.45 (“Prior to the enactment of Michigan’s final offer statute, 40% of public sector employment cases submitted to an arbitrator settled before the arbitrator announced an award. During a comparable period after Michigan enacted FOA, 70% settled before an arbitrator announced an award.” (citations omitted)). In the first few years of Wisconsin’s FOA program, only nine out of 173 negotiations were ultimately resolved by arbitration. James L. Stern, *Final Offer Arbitration—Initial Experience in Wisconsin*, *MONTHLY LAB. REV.*, Sept. 1974, at 39, 40.

33. See Chetwynd, *Play Ball?*, *supra* note 17, at 113 (“In 2003, for example, Connecticut, Iowa and Michigan reportedly used issue-by-issue FOA, while Minnesota, Nevada, New Jersey and Wisconsin embraced package FOA”); Crawford, *supra* note 26, at 205 (listing states where compulsory arbitration systems were in use as of 1981); Timothy H. Howlett & Christina K.

Over time, other arbitration structures appeared.³⁴ These included allowing “dual final offers,” and using fact finders to evaluate each party’s offer.³⁵ Dual final offers allow each party to submit two offers into arbitration, rather than just one, as in FOA.³⁶ Several states have used independent fact finders who evaluate each side’s proposal, and may even go as far as offering their own personal opinions and suggestions to the arbitrator.³⁷ However, this technique includes drawbacks, such as the chilling effect resulting from the arbitrators’ tendencies to pick fact finders’ proposals, and the decrease in the perceived risk of arbitration, thus resulting in fewer pre-arbitration agreements.³⁸

FOA has also been combined with various other types of ADR.³⁹ An example of this can be seen in Wisconsin where a system was implemented “in which the state’s Labor and Industry Review

McDonald, *Mandatory Arbitration of Employment Claims an Update*, MICH. B.J., Sept. 2013, at 38, 40 (outlining Michigan’s Revised Uniform Arbitration Act, which was implemented to “reduce litigation over arbitration agreements,” while keeping intact the mandatory arbitration of other employment claims).

34. Chetwynd, *Play Ball?*, *supra* note 17, at 113; *see, e.g.*, Tulis, *supra* note 3, at 99 (“In New Jersey, Section 16 of the Employer-Employee Relations Act is unique in that it offers six variations of arbitration from which parties may choose.”).

35. Chetwynd, *Play Ball?*, *supra* note 17, at 113-14; Tulis, *supra* note 3, at 99 (describing Section 16 of the Employer-Employee Relations Act, which allows for fact finders to make determinations); *see* Gary Long & Peter Feuille, *Final-Offer Arbitration: “Sudden Death” in Eugene*, 27 INDUS. & LAB. REL. REV. 186, 198 (1974) (discussing the dual final offer procedure in Eugene, Oregon); Meth, *supra* note 29, at 396 (defining dual final offer arbitration, where each party submits two offers to the arbitrators); *see also* ME. REV. STAT. ANN. tit. 26, § 1285(3) (2007) (“[T]he parties . . . may agree either to call upon the Maine Labor Relations Board for fact-finding services with recommendations or to pursue some other mutually acceptable fact-finding procedure . . .”).

36. *See* Long & Feuille, *supra* note 35, at 198; Meth, *supra* note 29, at 396 (concluding that this technique has actually been shown to facilitate settlements due to the parties submitting additional information in comparison with FOA).

37. Chetwynd, *Play Ball?*, *supra* note 17, at 114 (“Independent fact finders have . . . been employed by a number of U.S. state public sectors, including Iowa, Pennsylvania and Wisconsin.”).

38. *See* Peter Feuille, *Final-Offer Arbitration and Negotiating Incentives*, 32 ARB. J. 203, 211-12 (1977) (discussing the decreased negotiation pressures under the fact finding procedure in Massachusetts); Meth, *supra* note 29, at 396-97.

39. *See, e.g.*, Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 345 (2008) (“By the same token, given that no resolution can be guaranteed in mediation, arbitration is viewed, in this context, as a backup effort to resolve disputes that parties fail to resolve in mediation. This hybrid process, which falls between mediation and arbitration, is called mediation-arbitration or ‘med-arb.’”); Martin C. Weisman, *Med-Arb: The Best of Both Worlds*, DISP. RESOL. MAG., Spring 2013, at 40, 40 (“The combination of mediation and arbitration (Med-Arb) is an often-overlooked alternative dispute resolution vehicle. Med-Arb is a hybrid mechanism in which the parties attempt to reach a voluntary agreement with a third-party neutral first through mediation, and if that is not successful, through arbitration.”); *see also* Chetwynd, *Play Ball?*, *supra* note 17, at 114 (discussing the use of a hybrid system in Wisconsin).

Commission investigated the dispute, offered mediation if there was an impasse, and then used FOA as a final option.”⁴⁰ Some states also provide an option to choose from the numerous forms of FOA listed above.⁴¹ FOA has also been suggested in non-union related disputes.⁴² As it can be seen, there have been various developments to the process of FOA since its inception in the late 1940s.⁴³

B. History of Labor Negotiation in Major League Baseball

FOA was first implemented in MLB in March 1973, after being negotiated as part of the third Basic Agreement between the MLB Player’s Association (“MLBPA”) and MLB.⁴⁴ Before the implementation of FOA, MLB experimented with numerous other methods of salary negotiations, which contributed to baseball’s long and contentious labor history.⁴⁵ This history explains why FOA is in existence today—to combat problems arising from salary disputes in the past.⁴⁶

Salary negotiations date back to 1871, when the National Association of Professional Baseball Players, the baseball league preceding MLB, began.⁴⁷ MLB was formed shortly thereafter, in 1876.⁴⁸ At that time, the maximum length of players’ contracts was only one year—ending at the conclusion of each season, at which point players were free to sign with any other team that offered them a new contract.⁴⁹ Owners grew weary of that system, arguing that the increase in salaries

40. Chetwynd, *Play Ball?*, *supra* note 17, at 114.

41. *Id.* New Jersey has a similar statute. *See id.* (“New Jersey’s Employer-Employee Relations Act gives parties a menu of six arbitration options, including five that use various forms of FOA—from *issue-by-issue* to *package* FOA to hybrid approaches that utilize both forms.”).

42. *See* Jason B. Shorter, *Final-Offer Arbitration for Health Care Billing Disputes: Analyzing One State’s Proposed Dispute Resolution Process*, 9 APPALACHIAN J.L. 191, 199 (2010) (discussing California Senate Bill No. 981, which was proposed to provide a process where FOA could be used to resolve insurance disputes that arise between insurers and physicians). California Senate Bill No. 981 was vetoed by Governor Arnold Schwarzenegger. *Id.*

43. *See supra* notes 20-42 and accompanying text.

44. Ed Edmonds, *A Most Interesting Part of Baseball’s Monetary Structure-Salary Arbitration in Its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1, 3 (2009); Adam Primm, *Salary Arbitration Induced Settlement in Major League Baseball: The New Trend*, 17 SPORTS LAW. J. 73, 80 (2010).

45. Chetwynd, *Play Ball?*, *supra* note 17, at 117-22.

46. *See id.* at 117-23.

47. *See id.* at 118 (discussing contractual arrangements in the early years of professional baseball); Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201, 210 (1993) (discussing the creation of professional baseball in 1971).

48. *Flood v. Kuhn*, 407 U.S. 258, 261 (1972) (providing an overview of the history of MLB).

49. *See* Chetwynd, *Play Ball?*, *supra* note 17, at 118.

that players were being offered on the open market led to too much player autonomy.⁵⁰ As a result, fans of each team were constantly losing their favorite players, who were being signed by other teams, and thus lost interest in attending ballgames.⁵¹

This confluence of factors caused the team owners to sign a “National Agreement” in 1879 that created “the reserve system,” which resulted in decreased salaries and less freedom to contract.⁵² Over the next eight years, owners extended their ability to safeguard players by increasing the maximum number of players that were protectable, eventually to include an entire roster through amendment of the reserve rule.⁵³ At this time, the only options available to players were to play for their current team for life, get traded, or quit baseball.⁵⁴ Owners argued that this system helped increase fan interest, while critics contended that it was an unfair restriction on players’ rights.⁵⁵

The players, for the reasons stated above, opposed that system, and thus formed the National Brotherhood of Professional Ball Players (“the Brotherhood”) in 1885.⁵⁶ This resulted in a higher minimum salary because the players at this time threatened to start a new league.⁵⁷ However, the reserve system remained in place.⁵⁸ Over the next thirty or so years the players collectively bargained to form other

50. *Id.*

51. JAMES B. DWORKIN, OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING 9 (1981).

52. Chetwynd, *Play Ball?*, *supra* note 17, at 118 (emphasis omitted); Mack & Blau, *supra* note 47, at 208.

53. DWORKIN, *supra* note 51, at 10.

54. See Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 667 (1989); Chantel D. Carmouche, Comment, *Arbitration and Major League Baseball*, 1 J. AM. ARB. 91, 93 (2001).

55. Compare William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL’Y REV. 61, 63 (2004) (“Owners believed that a bidding war between competing clubs would disrupt continuity of play, deplete club finances, confuse spectators, and distort competitive equity and balance.”), with Ross, *supra* note 54, at 667, 669-70 (arguing that player restrictions actually harm fans and noting that “[c]ritics charge that the restraints have no effect, positive or negative, on player allocation, and serve only to exploit the players”).

56. See ROBERT C. BERRY ET AL., LABOR RELATIONS IN PROFESSIONAL SPORTS 51 (1986) (noting that the formation of the Brotherhood eventually led to the players forming their own league); Chetwynd, *Play Ball?*, *supra* note 17, at 118-19.

57. Chetwynd, *Play Ball?*, *supra* note 17, at 119 (noting that the owners met the players’ demand for a higher minimum salary when the players threatened to form their own league).

58. See *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198, 203 (S.D.N.Y. 1890) (denying an injunction by holding that the reserve clause did not amount to a contract for the next season but rather an agreement to negotiate a contract); see also *Flood v. Kuhn*, 407 U.S. 258, 259 n.1 (1979) (citing *Metropolitan Exhibition Co.*, 42 F. at 202-04); Chetwynd, *Play Ball?*, *supra* note 17, at 119.

associations, but none achieved the players' original goal—to end the reserve system.⁵⁹

One of the most important events in the context of players' salaries took place in the 1922 U.S. Supreme Court decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.⁶⁰ The Court ruled that professional baseball was “purely [a] state affair[],”⁶¹ thus exempting MLB from the Sherman Anti-Trust Act.⁶² Since the Court ruled that there was no “commerce among the States,” teams were still able to use the reserve system to prevent their players from transferring teams.⁶³ The Court extended its decision in 1953, when it upheld the reserve system, and denied an attack under antitrust law in *Toolson v. N.Y. Yankees, Inc.*⁶⁴ The Court explicitly ruled that “Congress had no intention of including the business of baseball within the scope of federal antitrust laws.”⁶⁵ Most recently, in 1972, the Supreme Court upheld the reserve system in *Flood v. Kuhn*.⁶⁶

59. See DWORKIN, *supra* note 51, at 12; Chetwynd, *Play Ball?*, *supra* note 17, at 119 (discussing the League Protective Players' Association and the Baseball Players' Fraternity, both of which were unable to end the reserve system); see also ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 73 (1998) (discussing unsuccessful attempts at player unions in the thirty years following the Brotherhood); Ross E. Davies, *Along Comes the Players Association: The Roots and Rise of Organized Labor in Major League Baseball*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 325-31 (2013) (discussing the history of these organizations).

60. 259 U.S. 200 (1922); Chetwynd, *Play Ball?*, *supra* note 17, at 119 (discussing the importance of this case); Gould, *supra* note 55, at 63 (stating that this case was a landmark decision).

61. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 208. Justice Oliver Wendell Holmes stated:

The business is giving exhibitions of base ball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California*, the transport is a mere incident, not the essential thing.

Id. at 208-09 (citation omitted).

62. See *id.* at 207-09 (holding that professional baseball is outside of the scope of the antitrust law); see also *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 356-57 (1953) (per curiam) (“In [*Federal Baseball Club of Baltimore, Inc.*], this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of federal antitrust laws.”); *Piazza v. Major League Baseball*, 831 F. Supp. 420, 425 (E.D. Pa. 1993) (“[T]he unique exemption of Baseball from liability under the federal antitrust laws—an exemption [was] conferred upon Baseball by the U.S. Supreme Court in [*Federal Baseball Club of Baltimore, Inc.*] . . .”).

63. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 209; Chetwynd, *Play Ball?*, *supra* note 17, at 119 (“This decision implicitly affirmed the teams’ right to use the reserve system.”).

64. 346 U.S. 356, 357, 362-63 (1953).

65. *Id.* at 357.

66. 407 U.S. 258, 282-85 (1972).

In 1954, between the rulings of *Toolson* and *Flood*, the MLBPA was established.⁶⁷ The most important addition to the MLBPA came in 1966, when Marvin Miller, the former chief economic assistant to the United Steelworkers of America, was appointed executive director.⁶⁸ Three years later, the National Labor Relations Board approved the bargaining status of the MLBPA.⁶⁹ Then, in 1973, the owners proposed the use of arbitration to help settle any salary disputes that would arise, which was exactly what they had been rejecting for several decades.⁷⁰ Eventually, on February 25, 1973, the new collective bargaining agreement was signed, which included a provision for salary arbitration for eligible players.⁷¹

However, the reserve system still remained in place, concurrent with the salary arbitration.⁷² This changed in 1975, when one player, Los Angeles Dodgers pitcher Andy Messersmith, went against the reserve system and entered into a grievance arbitration, arguing that the right of renewal included in his contract only lasted for one year, not perpetually as his team argued.⁷³ The arbitrator sided with Messersmith; thus, every player in the league with a renewal clause in his contract became a free

67. BERRY ET AL., *supra* note 56, at 52. Some negotiation between the players and the owners took place in the following years, but nothing was done to the reserve system until years later. Chetwynd, *Play Ball?*, *supra* note 17, at 121-22.

68. Chetwynd, *Play Ball?*, *supra* note 17, at 121; Michael J. Cozzillio, *From the Land of Bondage: The Greening of Major League Baseball Players and the Major League Baseball Players Association*, 41 CATH. U. L. REV. 117, 136 (1991) (reviewing MARVIN MILLER, *A WHOLE DIFFERENT BALLGAME: THE SPORT AND BUSINESS OF BASEBALL* (1991)). Miller, as executive director of the MLBPA, was able to “trip[e] the pension fund, rais[e] the minimum salary from \$6,000 to \$16,000, and more than doubl[e] the average salary to \$40,956.” Gould, *supra* note 55, at 66. The position was first offered to Judge Robert Cannon, but he declined it. Joshua P. Jones, Note, *A Congressional Swing and Miss: The Curt Flood Act, Player Control, and the National Pastime*, 33 GA. L. REV. 639, 653 (1998). The United Steelworkers of America, the union that Miller left for MLB, was the third-largest union in the United States. Chetwynd, *Play Ball?*, *supra* note 17, at 121.

69. Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 226 (1998).

70. *Id.*; Robert A. McCormick, *Baseball’s Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1154 (1982).

71. Conti, *supra* note 69, at 226; McCormick, *supra* note 70, at 1154. In the same collective bargaining agreement, players gained even more rights, such as the “ten and five rule.” Gould, *supra* note 55, at 66-67 (“[C]ollective bargaining in 1973 produced the so-called ‘ten and five rule’ that allowed players with ten years of seniority and five years of service with one club to veto a trade with which they disapproved.”).

72. See Conti, *supra* note 69, at 227.

73. *Id.* (discussing how Messersmith challenged the reserve system by acting as a free agent after the renewal clause his contract was fulfilled); McCormick, *supra* note 70, at 1155-56 (providing an in-depth overview of the Messersmith arbitration). Messersmith played the 1975 season for the Los Angeles Dodgers, after which he believed he was a free agent. *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 532 F.2d 615, 618 (8th Cir. 1976). However, every team in the league refused to sign him, so Messersmith invoked the grievance arbitration provision. Conti, *supra* note 69, at 227.

agent once the following season was over.⁷⁴ Though the owners challenged this decision in court, the court held that the arbitrator had jurisdiction over the matter, and it would not act as “an appellate tribunal to review the merits of the arbitrator’s decision.”⁷⁵

As a result of this landmark decision, the players and owners signed the 1976 Collective Bargaining Agreement (“CBA”), which allowed players to enter into free agency after six years of MLB service.⁷⁶ Following the court’s decision, the owner of the St. Louis Cardinals, Gussie Busch, complained, “[i]f anyone does not believe [the owners] had our ass kicked in this labor matter, they are dead wrong.”⁷⁷ Thus, free agency in MLB began.⁷⁸

Although salary arbitration was signed into effect back in 1973, now, with the addition of free agency, the two processes combined would help propel salary negotiations into the forefront of MLB.⁷⁹ The owner of the Atlanta Braves, Ted Turner, went on to say to his fellow owners regarding the effect of these changes over the years, “[g]entlemen, we have the only legal monopoly in the country and we’re fucking it up.”⁸⁰ These statements by Busch and Turner show how strongly the owners felt about the direction in which MLB was headed in terms of contract negotiations.⁸¹

C. *History of Final-Offer Arbitration in Major League Baseball*

In 1974, the first salary arbitration litigation involving MLB took place between Richard “Dick” Woodson and the Minnesota Twins.⁸² That year, there were twenty-nine arbitration hearings, where players and their respective teams appeared before arbitrators and argued over

74. See Conti, *supra* note 69, at 227.

75. *Kansas City Royals Baseball Corp.*, 532 F.2d at 621. This has long been the policy for settling labor disputes. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (“The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.”).

76. MLB Basic Agreement, art. XVII(B)(2) (1976-1979), available at <http://bizofbaseball.com/docs/1976CBARotate.pdf>; see Conti, *supra* note 69, at 227-28.

77. ED GAUS, *BEERBALL: A HISTORY OF ST. LOUIS BASEBALL 175* (2001). Busch went on to say, “[w]e have lost the war and the only question is can [the owners] live with the surrender terms.” *Id.*

78. Gould, *supra* note 55, at 69.

79. Conti, *supra* note 69, at 228.

80. HOWARD BRYANT, *JUICING THE GAME: DRUGS, POWER, AND THE FIGHT FOR THE SOUL OF MAJOR LEAGUE BASEBALL 12* (2005).

81. See *supra* notes 77, 80 and accompanying text.

82. ROGER I. ABRAMS, *THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION 143* (2000) [hereinafter ABRAMS, *THE MONEY PITCH*]; Edmonds, *supra* note 44, at 1.

the players' salary for the upcoming season.⁸³ During the next two offseasons, players who went through arbitration experienced an increase in their salaries, even if they lost in the hearing.⁸⁴ In 1976, in part as a result of this phenomenon, the owners locked out the players during spring training.⁸⁵

The fourth Basic Agreement, which was signed in 1976 and ended the lockout, altered salary arbitration so that players could only be eligible for the arbitration if both the player and the team consented to arbitration.⁸⁶ Some other changes took place over the next decade, including reducing eligibility for arbitration to only two years of MLB service, which was then increased back up to three.⁸⁷ Also, an agreement to end the 1990 lockout created the "Super Twos" category for salary arbitration, discussed below.⁸⁸ The next substantial change came in 2000, when MLB began to exclusively use the three-arbitrator panels that it had gradually phased in over the previous five years.⁸⁹

Finally, since FOA was implemented in MLB, the type of arbitrator chosen to sit on cases has changed.⁹⁰ Due to the extreme advancements in statistical analysis in MLB over time, arbitrators selected to serve on panels today have far more knowledge than their predecessors in the advanced statistics often introduced in salary arbitration hearings.⁹¹

83. Edmonds, *supra* note 44, at 2 ("[O]wners edged out the players by winning sixteen and losing thirteen."); Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORT L. 301, 312 (1992).

84. Edmonds, *supra* note 44, at 4. Whether or not a player "won" his hearing, his salary was likely to be increased from the year before. See discussion *infra* Part III.C.

85. See PAUL D. STAUDOHAR, *THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING* 42 (2d ed. 1989); Edmonds, *supra* note 44, at 4 (discussing that the McNally-Messersmith arbitration decision, and the general labor relations climate in baseball, resulted in a lockout).

86. See MLB Basic Agreement, art. V(E)(3) (1976-1979), available at <http://bizofbaseball.com/docs/1976CBARotate.pdf>; see also Edmonds, *supra* note 44, at 4.

87. See Edmonds, *supra* note 44, at 5 (discussing the 1980 and 1985 agreements).

88. See ANDREW ZIMBALIST, *MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY* 85 (2003); Edmonds, *supra* note 44, at 5; *infra* note 95 and accompanying text.

89. Edmonds, *supra* note 44, at 6 (discussing that two hearings in 1995, half of the hearings in 1998, and the majority of hearings in 1999 were decided by panels, as opposed to sole arbitrators). Roger Abrams, who has served as an arbitrator for MLB, wrote: "Comparing the experience with my single arbitrator cases, I found no real difference, other than in the increased transaction costs imposed on the arbitrators to meet after the hearing and review all the evidence together." Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 65. However, despite Abrams's beliefs, clubs have favored arbitration panels, while players tend to favor a single arbitrator. Meth, *supra* note 29, at 400-01 ("[C]lubs considered a single arbitrator to be untrustworthy since he or she would be motivated to . . . foster[] job security; a three-arbitrator panel, however, . . . would ensure neutral decisions uninfluenced by employment concerns . . .").

90. See Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 66. While discussing the trend towards hiring an arbitrator based on his knowledge of MLB, Abrams noted that "[o]riginally salary arbitrators were not selected on their knowledge of [MLB]." *Id.*

91. *Id.* Abrams provides an example of an early salary arbitrator:

D. Process of Salary Arbitration in Major League Baseball

There are very specific rules that MLB follows for the salary arbitration process.⁹² Only certain players are eligible for arbitration.⁹³ Any player with between three and six years of MLB service may submit to binding salary arbitration, without the consent of the player's team.⁹⁴ "Super Two" players are also eligible for arbitration.⁹⁵

A player must provide written notice of submission to arbitration by the filing date.⁹⁶ According to the most recent CBA, less than a week after the filing date is the exchange date.⁹⁷ On the exchange date, the MLBPA and the MLB Labor Relations Department ("MLBLRD") exchange the proposed salaries for each side.⁹⁸ Players that do not apply for arbitration become free agents, which allows them to sign with any team that offers them a contract.⁹⁹ If the two sides reach an agreement any time before the arbitration panel makes a decision, the matter is withdrawn from arbitration.¹⁰⁰ Cases are heard by panels of three arbitrators, with one "panel chair" selected by the MLBPA and the MLBLRD.¹⁰¹ The player and team split all costs of the hearing evenly.¹⁰²

There is a story told about a hearing involving a relief pitcher in the 1970s, when, after hours of statistical presentation, the neutral asked: "Now what is a save?" Both sides were dismayed, but carefully explained to the befuddled neutral the nature of a save. In the process, of course, the parties realized their presentation of sophisticated statistics wasted time and energy.

Id. ("Today, virtually all salary arbitrators are veterans of the process and have been schooled in the game's parameters and statistics.").

92. MLB Collective Bargaining Agreement art. VI(E) (2012-2016) [hereinafter 2012 MLB CBA], available at http://mlb.mlb.com/pa/pdf/cba_english.pdf.

93. *Id.* art. VI(E)(1).

94. *Id.* art. VI(E)(1)(a).

95. *Id.* art. VI(E)(1)(b). The MLB Collective Bargaining Agreement, describing a "Super Two," states that:

a Player with at least two but less than three years of Major League service shall be eligible for salary arbitration if: (a) he has accumulated at least 86 days of service during the immediately preceding season; and (b) he ranks in the top 22% (rounded to the nearest whole number) in total service in the class of Players who have at least two but less than three years of Major League service, however accumulated, but with at least 86 days of service accumulated during the immediately preceding season.

Id.

96. *Id.* art. VI(E)(2).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* art. VI(E)(3).

101. *Id.* art. VI(E)(5).

102. *Id.* art. VI(E)(9).

The arbitration hearing itself is entirely confidential.¹⁰³ During the hearing, each side is allotted one hour for an initial presentation, followed by a half-hour rebuttal and summation by each side.¹⁰⁴ All written materials that each side plans to use in their case are exchanged between the parties at the beginning of the hearing.¹⁰⁵

The evidence available to be used during the hearing depends on certain criteria, which are defined as either admissible or inadmissible evidence.¹⁰⁶ Admissible criteria include:

[T]he Player's contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal), the length and consistency of his career contribution, the record of the Player's past compensation, comparative baseball salaries . . . , the existence of any physical or mental defects on the part of the Player, and the recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance (subject to the exclusion stated . . . below).¹⁰⁷

Inadmissible criteria include the financial position of the team or player, press comments about the player, previous discussions during salary negotiations, cost of representation, and salaries of persons in other occupations.¹⁰⁸ Under the CBA, "neither party shall carry the burden of proof."¹⁰⁹

Arbitration hearings are scheduled between February 1st and February 20th, and decisions are almost always made within twenty-four hours of a hearing.¹¹⁰ The salary awarded is limited to one of the figures submitted by the player or the team, no amount in between.¹¹¹ The salary

103. *Id.* art. VI(E)(7); see also John E. Sands, *Baseball Arbitration and 'Engineering' of Effective Conflict Management*, DISP. RESOL. MAG., Spring 2007, at 10, 11.

104. 2012 MLB CBA, *supra* note 92, art. VI(E)(7). These rules are not followed too strictly. See Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 66 ("The time limits for the arbitration hearing set forth in the agreement—one hour for each side followed by a half-hour rebuttal—have been stretched in practice so that each party has a greater opportunity to rebut and clarify.").

105. 2012 MLB CBA, *supra* note 92, art. VI(E)(7).

106. See *id.* art. VI(E)(10).

107. *Id.* art. VI(E)(10)(a); see also Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 58 (noting that the CBA does not provide guidance as to how the arbitrators should weigh those factors).

108. 2012 MLB CBA, *supra* note 92, art. VI(E)(10)(b); see Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 60.

109. 2012 MLB CBA, *supra* note 92, art. VI(E)(7).

110. *Id.* art. VI(E)(13).

111. *Id.*; see also Edmonds, *supra* note 44, at 33 (discussing that the midpoint between two offers will serve as a benchmark for the arbitrator). "If the panel thinks that the player is worth \$1.00 more than the midpoint, the panel chooses the player's figure. If the panel thinks the player is

chosen by the arbitration panel then becomes that player's salary for the upcoming season.¹¹² Therefore, players who enter into FOA are not capable of signing a multi-year agreement.¹¹³ Similarly, those who are awarded a salary through FOA will not be able to bargain for "such ancillary rights as a no-trade clause, bonuses based on performance, or additional tickets for family members or special travel accommodations."¹¹⁴ Lastly, there are no written opinions given by the arbitration panel at any point.¹¹⁵

E. Goals of Final-Offer Arbitration

FOA is classified as an "interest arbitration," which applies where there is an argument over what terms to include in an agreement.¹¹⁶ For example, some disputed items that could be bargained for are wages, insurance benefits, and other provisions typically found in employment contracts.¹¹⁷ While most interest arbitrations deal with collective bargaining issues, FOA in MLB only deals with an individual player's potential contract with his team, and not all of the players collectively.¹¹⁸

In baseball, the contentious term to be included in the agreement is exclusively the player's salary for the upcoming season.¹¹⁹ The

worth \$1.00 less than the midpoint, the panel chooses the team's figure." Edmonds, *supra* note 44, at 33 (footnotes omitted).

112. Chetwynd, *Play Ball?*, *supra* note 17, at 124.

113. See Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 62 (discussing the advantages of settlement, including the possibility of a creative compensation package or multi-year deal); Chetwynd, *Play Ball?*, *supra* note 17, at 124.

114. Chetwynd, *Play Ball?*, *supra* note 17, at 124 (footnote omitted).

115. 2012 MLB CBA, *supra* note 92, art. VI(E)(13); see also Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 60 (explaining that it is impossible to tell what criteria are used by the arbitrators, as no written opinions are ever issued).

116. See Tulis, *supra* note 3, at 87, 95; see also Bryan M. O'Keefe, Comment, *The Employee Free Choice Act's Interest Arbitration Provision: In Whose Best Interest?*, 115 PENN ST. L. REV. 211, 221-22 (2010) (discussing interest arbitration generally and FOA as a specific type of interest arbitration). Interest arbitration most commonly involves going through one term or condition at a time to be bargained for during the arbitration. See Tulis, *supra* note 3, at 87, 94.

117. See Tulis, *supra* note 3, at 87, 95; O'Keefe, *supra* note 116, at 222.

118. See Tulis, *supra* note 3, at 90 & n.14 ("Major League Baseball's collective bargaining agreement process utilizes final-offer arbitration for one issue only: determining a player's salary."). Interest arbitration is "rarely used in the private sector," besides in MLB. O'Keefe, *supra* note 116, at 223-24. Some have even described the process as "un-American" and "an abrogation of freedom." R.W. Fleming, *Interest Arbitration Revisited*, in *ARBITRATION OF INTEREST DISPUTES* 1, 1 (Barbara D. Dennis & Gerald G. Somers eds., 1974) (discussing the differences between "rights" arbitration and "interest" arbitration); see also Letter from R. Theodore Clark, Jr., Seyfarth Shaw LLP, to Sen. Edward M. Kennedy, Rep. George Miller & Sen. Michael B. Enzi, Rep. Howard P. McKeon (Feb. 13, 2009), available at <http://www.uschamber.com/sites/default/files/legacy/hill-letters/090213arbitration.pdf> (opposing the introduction of interest arbitration provisions of the "Employee Free Choice Act").

119. See Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 57.

overriding goal of FOA is to circumvent the chilling effect by incentivizing parties to avoid going to an arbitration hearing.¹²⁰ In the context of arbitration or other forms of ADR, the chilling effect arises when the two sides do not bargain in good faith because they have the safeguard of a third party to settle the dispute somewhere between the two proposed amounts.¹²¹ If an arbitrator can pick any salary between the two proposals, theoretically each side will be “less willing to make concessions and more likely to take extreme positions so that the arbitral ‘compromise’ will be skewed in their favor,” thus leading to more arbitration hearings.¹²²

FOA helps to diminish this chilling effect by compelling the two adversaries to give more reasonable offers to one another.¹²³ FOA only enables the arbitrator—or arbitration panel—to pick one of the provided offers, so there is no chance of a middle ground result.¹²⁴ For that reason, “each party feels pressured to make a more reasonable offer,” increasing the likelihood that the parties will bargain in good faith.¹²⁵ The mere threat of the arbitrator picking the other party’s salary proposal poses a significant risk to each side, which leads to an increased need to negotiate in order to avoid going to arbitration.¹²⁶ In this way,

120. See Tulis, *supra* note 3, at 89; Meth, *supra* note 29, at 387-88; O’Keefe, *supra* note 116, at 222.

121. Peter Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 INDUS. REL. 302, 304 (1975) [hereinafter Feuille, *Chilling Effect*]; Tulis, *supra* note 3, at 88 (“[T]he existence of a compromise can be seen as an obstacle to good-faith bargaining, based on the assumption that these compromises cause a ‘chilling’ or ‘freezing’ effect on negotiations.”).

122. See J. Joseph Loewenberg, *Interest Arbitration: Past, Present, and Future*, in LABOR ARBITRATION UNDER FIRE 111, 118 (James L. Stern & Joyce M. Najita eds., 1997); Tulis, *supra* note 3, at 88.

123. Feuille, *Chilling Effect*, *supra* note 121, at 304-05. Theoretically, if both sides know that regardless of what salary they propose, the arbitrator is not forced to pick exactly one offer or the other, but instead can pick any salary in between the two, there is less of an incentive to be reasonable while bargaining. See Meth, *supra* note 29, at 387.

124. See Jeffrey Chicoine, *A Critical Review of Collective Bargaining Dispute Resolution Under the PECBA and Alternative Models*, in OREGON PUBLIC SECTOR COLLECTIVE BARGAINING: ENTERING THE THIRD DECADE 55, 68 (Howell L. Lankford ed., 1994); Feuille, *Chilling Effect*, *supra* note 121, at 304-05 (“[FOA] attempts to increase the costs of disagreement by eliminating arbitral discretion. . . . [T]he arbitrator must select one or the other final offer . . .”).

125. Tulis, *supra* note 3, at 89; see Feuille, *Chilling Effect*, *supra* note 121, at 304-05.

126. Abrams, *Baseball’s Arbitration Process*, *supra* note 12, at 62-63 (“By comparison, in final-offer arbitration the best final position is the more reasonable one, the one closer to the real market value, wherever that is Winning means being more reasonable, the key which unlocks the door to settlement.”); Conti, *supra* note 69, at 234; Meth, *supra* note 29, at 388 (“FOA does seem to encourage reasonable offers; each side knows that the arbitrator is unable to compromise, so each side is wary of making unreasonable offers that increase the chance that its opponent will win at the hearing.”).

MLB has been very successful in preventing cases from reaching an arbitration hearing.¹²⁷

Salary arbitration in MLB also helps to avoid “holdouts.”¹²⁸ A holdout is where a player refuses to take part in any team-related activities until he receives a contract that is satisfactory to him.¹²⁹ As discussed below, holdouts occur in the National Football League (“NFL”), a major professional sports league in the United States that does not have any form of salary arbitration in its CBA.¹³⁰ Because of the implementation of FOA, holdouts are not possible in MLB.¹³¹ Finally, FOA facilitates the resolution of salary disputes in a timely manner,¹³² and decreases the cost of dispute resolution, which makes it more appealing to both players and teams.¹³³

F. Other Forms of Dispute Resolution in Professional Sports

Arbitration has been implemented and used in each of the three other major professional sports leagues in the United States: the National Hockey League (“NHL”), the NFL, and the National Basketball

127. Tulis, *supra* note 3, at 90 (“In the 2009 salary arbitration season, 111 players filed for arbitration, 46 players exchanged numbers with their respective teams, and only three of these players continued to a hearing.” (footnote omitted)). The 2013 offseason was the first time in MLB history that every possible salary arbitration hearing was settled before appearing before an arbitrator. *Arbitration Ends with No Hearings*, ESPN (Feb. 18, 2013, 2:26 PM), http://espn.go.com/mlb/spring2013/story/_id/8958928/mlb-players-pitch-first-arbitration-shutout-39-year-history. The previous low of three hearings occurred in 2005, 2009, and 2011. *Id.* Teams have begun to sign their arbitration eligible players to long-term contracts prior to hearings. *See, e.g.*, Edmonds, *supra* note 44, at 28-29 (discussing the “file-and-go” strategy in which some teams refuse to negotiate after a certain date, and, thus, encourage the player to be more reasonable earlier on during the bargaining process); *see also Arbitration Ends with No Hearings, supra*.

128. Abrams, *Baseball’s Arbitration Process*, *supra* note 12, at 72; Interview with Glenn Wong, Professor, Isenberg Sch. of Mgmt., Univ. of Mass. Amherst, in Amherst, Mass. (Apr. 5, 2011); Telephone Interview with Jim Masteralexis, Partner, DiaMMond Mgmt. Grp., LLC (Apr. 1, 2011).

129. *See* Sean M. Neary, *Mediating Professional Athlete Contracts in the Wake of Darrelle Revis*, 9 WILLAMETTE SPORTS L.J. 81, 91 (2011).

130. Mélanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 190, 211 (2003) (pointing out that while MLB has salary arbitration, the NFL instead employs a salary cap, with no option of arbitration for salary disputes); Neary, *supra* note 129, at 83-84 (detailing the holdout of NFL defensive back Darrelle Revis); *see infra* notes 146-47 and accompanying text.

131. *See* Hopkins, *supra* note 83, at 331; Tulis, *supra* note 3, at 92 (“Appeals and player holdouts are both prohibited under baseball arbitration.”). There are no holdouts because a player will either sign a new deal prior to arbitration, or his salary will be resolved by an arbitration panel prior to spring training. Abrams, *Baseball’s Arbitration Process*, *supra* note 12, at 72.

132. *See* ABRAMS, *THE MONEY PITCH*, *supra* note 82, at 146; Chetwynd, *Play Ball?*, *supra* note 17, at 126; Meth, *supra* note 29, at 412.

133. Chetwynd, *Play Ball?*, *supra* note 17, at 111; Meth, *supra* note 29, at 386; Tulis, *supra* note 3, at 111.

Association (“NBA”).¹³⁴ However, the usage of arbitration varies from league to league.¹³⁵ The NHL uses arbitration in a manner most similar to MLB, in that it provides arbitration in salary disputes between a player and a team.¹³⁶ However, there are several key differences between the styles of arbitration used by the NHL and MLB.¹³⁷ First, under the NHL’s system of arbitration, arbitrators may choose any dollar amount between the offers submitted by the parties.¹³⁸ Second, arbitrators hand down written decisions.¹³⁹ Third, unlike in MLB, where briefs are exchanged immediately prior to the arbitration, in the NHL, briefs prepared by the parties are exchanged forty-eight hours prior to the hearing.¹⁴⁰ Moreover, NHL teams have “walk-away” rights, which, although rarely used, allow a team—with some restrictions—to reject an arbitration award given to a player, resulting in the player becoming a free agent.¹⁴¹ Two other minor differences in the salary arbitration processes of the NHL and MLB are the inclusion of years of eligibility for players and which players can submit to arbitration.¹⁴²

The NBA and the NFL both use arbitration, but in ways that differ from the forms of salary arbitration in MLB.¹⁴³ The NBA uses arbitration for “general grievances over discipline, fines, etc.”¹⁴⁴ There is no process in the NBA allowing for salary arbitration for players’

134. Epstein, *supra* note 4, at 162.

135. *See id.* at 162-63.

136. *See id.*

137. *See infra* notes 138-42 and accompanying text.

138. Aubut, *supra* note 130, at 205, 211; Epstein, *supra* note 4, at 163.

139. Compare Aubut, *supra* note 130, at 211 (“NHL arbitrators must justify their decisions. Thus, the NHL provides for a system of precedents on which the parties can rely in future cases.”), with Meth, *supra* note 29, at 393 (noting that there are no written decisions by arbitrators in MLB).

140. Aubut, *supra* note 130, at 211.

141. Stephen M. Yoost, Note, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485, 517-18 (2006) (detailing the “walk-away rights” of clubs); *see also* Aubut, *supra* note 130, at 206. Mélanie Aubut asserts that:

in the event that the owner elects to reject the award, the player becomes a free agent. If the player is unable to obtain a better offer from another team, he can then return to his previous team and accept the offer that was last on the table prior to his becoming a free agent.

Aubut, *supra* note 130, at 206. Pursuant to the NHL’s CBA, teams may only exercise this right a limited number of times. *Id.* (“Each club can exercise this right up to three times in two continuous years and no more than twice in the same year.”).

142. Aubut, *supra* note 130, at 201-03 (explaining how eligibility for salary arbitration depends on the player’s age and experience); Yoost, *supra* note 141, at 521.

143. *See infra* notes 144-48 and accompanying text.

144. Epstein, *supra* note 4, at 163; *see* Jeffrey A. Mishkin, *Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator, and the Courts*, 35 VAL. U. L. REV. 449, 453 (2001) (“The arbitrator usually gets the more routine cases, for example, the cases of non-payment of obligations under player contracts, or bonuses, clauses requiring players to maintain a certain weight, *et cetera*.”).

contracts.¹⁴⁵ Likewise, the NFL only allows for arbitration for non-salary related disputes.¹⁴⁶ Instead, the NFL uses a salary cap system.¹⁴⁷ Notably, the style of arbitration used by MLB is unique among American professional sports.¹⁴⁸

III. DRAWBACKS OF FINAL-OFFER ARBITRATION IN MAJOR LEAGUE BASEBALL

Since the implementation of FOA in MLB, there have been drawbacks associated with the process.¹⁴⁹ Although many goals that MLB sets out to accomplish through FOA have been achieved, the process has serious flaws that should be addressed.¹⁵⁰ Examples of these include the potential risk of damage to the relationship between the player and his team, disadvantages to smaller-market teams versus larger-market teams, as well as a few other issues to be discussed.¹⁵¹

A. Relationship Between Player and Team

The relationship between a player and the team's management is vital in professional sports; there are countless examples of a player and management having issues, which inevitably led to more problems down the line.¹⁵² Those involved in the salary arbitration process have stated

145. Scott Bukstein, *A New Solution for Salary Disputes: Implementing Salary Arbitration in the National Basketball Association*, 22 MARQ. SPORTS L. REV. 25, 29-30 (2011).

146. Epstein, *supra* note 4, at 163; see, e.g., Jeffrey D. Meyer, Note, *The NFLPA's Arbitration Procedure: A Forum for Professional Football Players and Their Agents to Resolve Disputes*, 6 OHIO ST. J. ON DISP. RESOL. 107, 111-12 (1990) (discussing that the NFL Players' Association Regulations Governing Contract Advisors require players to resolve disputes with their agents by arbitration).

147. Aubut, *supra* note 130, at 213, 216. In the NFL, once a player's contract is completed, a player becomes either a restricted or unrestricted free agent, depending on his accrued seasons in the league. *Id.* at 213-14. Players may also be tagged as "transition" or "franchise" players, depending of certain circumstances. *Id.* at 214-15. Due to these factors, every player is either able to sign a new contract with his previous team, sign a new contract with a different team, or is stuck with his current team for another season under terms of a contract supplied by the NFL's CBA. See *id.* at 213-15.

148. See *supra* notes 134-47 and accompanying text.

149. See *infra* Part III.A-D.

150. Compare *supra* Part II.B-E (discussing the history and goals of salary arbitration in MLB), with *infra* Part III.A-D (setting out the problems with salary arbitration in MLB).

151. See *infra* Part III.A-D.

152. One recent instance was between Alex Rodriguez and the New York Yankees. Chris Greenberg, *Alex Rodriguez Tweets, Brian Cashman Reportedly Says A-Rod 'Should Just Shut the F--- Up'*, HUFFINGTON POST (June 25, 2013, 10:47 PM), http://www.huffingtonpost.com/2013/06/25/alex-rodriquez-cashman-shut-up-tweet_n_3499879.html. Over several months, Rodriguez and the New York Yankees' general manager, Brian Cashman, went back and forth over issues arising from the Rodriguez had sustained over the season. *Id.* On June 25, 2013, following a tweet by Rodriguez stating that he had been given "the green light to play games again," Brian

that this relationship could be at risk after going through the arbitration process.¹⁵³ Due to the adversarial nature of this style of arbitration, there is a large amount of negativity espoused by management regarding a player.¹⁵⁴ This has caused players to become angry with their teams,¹⁵⁵ and has resulted in players refusing to sign with their former team in the future.¹⁵⁶

In an arbitration hearing, the player's goal is to point out his strengths; meanwhile, the objective of the team's management is to highlight the player's weaknesses and inadequacies.¹⁵⁷ The player has to sit through management "questioning his value to the team," and, thus, the relationship between the two sides may become strained.¹⁵⁸ It is also

Cashman said in an interview that "Alex should just shut the f--- up." *Id.* (quoting Alex Rodriguez, TWITTER (June 25, 2013, 6:22 PM), <https://www.twitter.com/AROD/status/349668933797818368>). Another example of this relationship breakdown occurred with ex-NFL wide receiver Terrell Owens and the Philadelphia Eagles. *See Eagles Say Owens Won't Return This Season*, N.Y. TIMES (Nov. 7, 2005), <http://www.nytimes.com/2005/11/07/sports/football/07cnd-eagles.html>. Within two years of being traded to the Philadelphia Eagles, former coach Andy Reid, who at first suspended Owens for one game, decided that Owens would not return the remainder of the season. *See id.* Reid stated that the "decision [to suspend Owens] is a result of a large number of situations that accumulated over a long period of time," including repeated clashes with management, contract disputes, and physical altercations with teammates. *Id.*

153. Interview with Glenn Wong, *supra* note 128; Telephone Interview with Adam Cromie, Dir. of Baseball Operations, Washington Nationals (Apr. 8, 2011).

154. Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 55, 58-59 (2003) ("[A] team can essentially introduce evidence that may degrade a player and his accomplishments in the arbitration hearings. However, since the player will likely be returning to the same team the following year, the team may tend to hold back sensitive information which may offend the player."); Gillard, *supra* note 5, at 135.

155. Telephone Interview with Jim Masteralexis, *supra* note 128 (explaining how some players feel degraded and angered as an effect of salary arbitration).

156. Interview with Glenn Wong, *supra* note 128. There are several instances of this in the NHL, where working relationships have been "irreparably damaged." Adrian Dater, *NHL Salary Arbitration Hearings an Old Fashioned Bruisefest*, SPORTS ILLUSTRATED (July 20, 2012, 12:52 PM), http://sportsillustrated.cnn.com/2012/writers/adrian_dater/07/20/shear-weber-nhl-salary-arbitration/index.html. Some general managers have gone as far as to "get[] rid of players not long after they filed for arbitration." *Id.* One example of this involved the New York Islanders humiliating a player so much during an arbitration hearing that he refused to play the next season, resulting in the Islanders having to trade the player. *See* Das, *supra* note 154, at 58.

157. *See* B.J. Rains, *Players Reflect on Arbitration Hearings: Kyle Lohse*, MLB TRADE RUMORS (Feb. 19, 2013, 12:00 AM), <http://www.mlbtraderumors.com/2013/02/arbitration-rewind-kyle-lohse-beats-minnesota-in-2005-and-2006.html>. Pitcher Kyle Lohse, who was involved in two arbitration cases against the Minnesota Twins, described the process as follows:

They talk about how bad you are and why you deserve their number and everything that's wrong with you and then your team has equal amount of time to pump you up and say everything good about you. You're sitting there, 'Man I stink', and then, 'I'm the greatest ever.'

Id.; *see also* Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 65-66 (discussing the presentation of statistics by each side in arbitration).

158. *See* Tulis, *supra* note 3, at 92.

very common for players at arbitration hearings to “be offended by what the owner has to say, potentially leading to a decline in production and a request to be traded.”¹⁵⁹

Disputes between players and management—in both the NHL and MLB—during salary arbitration highlight this concern.¹⁶⁰ For example, in one arbitration hearing, the NHL’s management has been quoted as saying, “can we agree that the linemates are the elephant, and player X is the mouse?”¹⁶¹ Likewise, a professional hockey player wrote “I filed with Pheonix [sic] and in their brief they called me the worst forward in the NHL the previous year.”¹⁶² Among the most egregious cases occurred when, at an arbitration hearing, New York Islanders’ general manager, Mike Mulbury, “reduced Tommy Salo to tears with reasons why the goalie didn’t deserve his asking price.”¹⁶³ Likewise, the Director of Baseball Operations for a MLB club stated that a player, who was newly acquired by his team directly before going into salary arbitration, was involved in an arbitration hearing that caused tension between that player and the team.¹⁶⁴ Once the arbitrator chooses the winner after the hearing, the player remains signed to that team for the upcoming season; thus, the relationship between the two must remain intact following the arbitration process.¹⁶⁵

B. *Small-Market vs. Large-Market Teams*

Another major issue is the advantage that larger-market teams seem to have over smaller-market teams when it comes to arbitration.¹⁶⁶ An arbitrator cannot take into consideration the financial position of a team or that team’s budget when making a decision.¹⁶⁷ Therefore, a team located in a small market may not have the financial ability to keep a player that is arbitration-eligible.¹⁶⁸ If a team cannot afford a player with pending arbitration proceeding, that team may be forced to trade the

159. Gillard, *supra* note 5, at 135.

160. See *infra* notes 161-64 and accompanying text. As previously noted, the arbitration used by the NHL is similar to that used by MLB. See *supra* note 136 and accompanying text.

161. Dater, *supra* note 156.

162. Mike Johnson, TWITTER (July 10, 2012, 5:52 PM), http://twitter.com/mike_p_johnson/status/355082015579717634.

163. Dater, *supra* note 156.

164. Telephone Interview with Adam Cromie, *supra* note 153.

165. Tulis, *supra* note 3, at 92.

166. See *infra* notes 167-80 and accompanying text.

167. 2012 MLB CBA, *supra* note 92, art. VI(E)(10)(b)(i)–(v). Therefore, because an arbitrator may not consider a team’s revenue during a hearing, a player should theoretically be awarded the same salary regardless of the size of the market. See Aubut, *supra* note 130, at 236-37.

168. Aubut, *supra* note 130, at 237. Small-market teams have had to pay players more than what the player is actually worth to the team. Gillard, *supra* note 5, at 134.

player to a larger-market team with a higher payroll to maintain the player.¹⁶⁹ The result is a significant competitive advantage for teams in larger markets.¹⁷⁰

On a similar note, arbitrators are allowed to review the salaries of comparable players during an arbitration hearing.¹⁷¹ So when a player goes to arbitration against a small-market team, a player is likely to use the salaries of players who have been given contracts by larger-market teams as a comparison.¹⁷² Large-market teams are able to pay more for certain free agents “because a free agent has the ability to produce more revenue in a large-market than in a small one,” which now places a huge burden on these small-market teams to pay their arbitration eligible player a comparable salary.¹⁷³ However, this is not an accurate appraisal of that player’s value to a team in a small market.¹⁷⁴

Those involved in the management side of arbitration hearings have stated that a lack of manpower and resources available to small-market teams is a major issue.¹⁷⁵ As discussed above, salary arbitration negatively impacts the relationship between a player and a team.¹⁷⁶ To avoid this, teams may choose to settle instead, thus maintaining a positive relationship with the player even if settlement leads to a loss of \$25,000 to \$50,000.¹⁷⁷ Also, the amount of manpower required to prepare for arbitration can be significant, possibly exceeding one

169. Aubut, *supra* note 130, at 237.

170. *Id.*; Gillard, *supra* note 5, at 134.

171. Gillard, *supra* note 5, at 133-34; Vella, *supra* note 11, at 328.

172. Gillard, *supra* note 5, at 134. A manager of an MLB team stated that, “because of the arbitration process, my club is forced to pay New York and L.A. salaries, while the Club is located in a totally different market.” *Id.* at 134 n.63 (citing C. Raymond Grebey, Jr., *Another Look at Baseball’s Salary Arbitration*, ARB. J., Dec. 1983, at 24, 27).

173. Vella, *supra* note 11, at 328, 336.

174. Gillard, *supra* note 5, at 134. The best way to illustrate this effect is through this example:

[A]ssume that ten million baseball fans live in New York City, one million baseball fans live in Milwaukee, and Ken Griffey Jr. is a free agent. Also assume that the entertainment that Griffey provides would cause one percent of the fans in either city to attend ten more baseball games per year at \$10 per game. If Griffey signed with the New York Yankees, he would generate \$10 million in additional revenues for the team per year, and therefore the New York Yankees could sign Griffey for \$10 million per year without incurring a loss on the transaction. However, if Griffey signed with the Milwaukee Brewers, he would only generate \$1 million in additional revenues per year, and any salary paid in excess of \$1 million would cause the Brewers to incur a loss.

Id. at 134-35 (footnotes omitted). This is a clear, unfair advantage that larger-market teams have over smaller-market teams due to the inability to introduce market size during an arbitration hearing. *See id.*

175. *See* Interview with Glenn Wong, *supra* note 128; Telephone Interview with Adam Cromie, *supra* note 153.

176. *See supra* Part III.A.

177. Telephone Interview with Adam Cromie, *supra* note 153.

hundred hours.¹⁷⁸ Both of these concerns are more burdensome for small-market teams because they have fewer resources to spend on the case itself, and have less money to spend on finding outside counsel to assist on a case.¹⁷⁹ Furthermore, the manpower required for arbitration between February and December reduces the resources available for other key offseason activities, such as offering contracts to unsigned players, and scouting.¹⁸⁰ All of these factors demonstrate the clear advantage that larger-market teams hold when it comes to salary arbitration.¹⁸¹

C. Win-Win for Players

FOA tends to benefit players far more than teams.¹⁸² Regardless of whether a player “wins” or “loses” in an arbitration hearing, his salary is very likely to increase.¹⁸³ For example, “from 1978-1985, if every salary arbitration hearing was decided in favor of the teams, the average salary increase would still have been 58% for the players.”¹⁸⁴ Even though players only won 42.33% of arbitration hearings between 1974 and 2009, the salary of a player post-arbitration is significantly higher than pre-arbitration.¹⁸⁵ In 2009, of the 111 players who filed for arbitration, the average increase in salary was 143%.¹⁸⁶ Of approximately two

178. Interview with Glenn Wong, *supra* note 128.

179. Telephone Interview with Adam Cromie, *supra* note 153.

180. *Id.*

181. *See supra* notes 166-80 and accompanying text.

182. Vella, *supra* note 11, at 326.

183. *Id.* at 326-27 (“In 1993, players successful in [FOA] gained a 174% salary increase. That same year, players who resolved their salary disputes before going to arbitration experienced a 110% raise in pay. Players who ‘lost’ their salary arbitration hearings averaged a 54% increase in salary.” (footnotes omitted)).

184. *See* Primm, *supra* note 44, at 107-08. This fifty-eight percent figure is a little deceiving because there are other economic factors that could influence a player’s salary, such as the market forces of the league. Ethan Lock & Allan DeSerpa, *Salary Increases Under Major League Baseball’s System of Final Offer Salary Arbitration*, 2 LAB. LAW. 801, 806-07 (1986).

185. Primm, *supra* note 44, at 107-08, 112-13. For more context, between 1978 and 1985, of the 143 players who filed for arbitration, there was an average increase in their salaries of 106.2%, while all other non-arbitration eligible players had an increase in their average salaries of 22.9%. Hopkins, *supra* note 83, at 312. Even if every player who went to arbitration lost, their salaries would have increased by an average of fifty-eight percent. *Id.* at 313.

186. Chetwynd, *Play Ball?*, *supra* note 17, at 132; *see* Maury Brown, 2009 MLB Salary Arbitration Vital Stats, BIZ OF BASEBALL (Feb. 20, 2009, 1:26 PM), http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=2974:2009-mlb-salary-arbitration-vital-stats&catid=66:free-agency-and-trades&Itemid=153. During several of the seasons prior to 2009, free agents received lower salaries due to decreases in team revenues than those who went through salary arbitration. Eldon L. Ham & Jeffrey Malach, *Hardball Free Agency—The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences Crippled the Salary Arbitration Remedy—and How to Fix It*, 1 HARV. J. SPORTS & ENT. L. 63, 87

thousand players that filed for arbitration through 1994, only nine players “suffered a drop in his salary from the previous season.”¹⁸⁷ Pitcher Mike Norris, after losing at a salary arbitration, quipped, “I was either going to wake up rich or richer.”¹⁸⁸ It is evident that players are much fonder of MLB’s arbitration process than are the owners.¹⁸⁹

D. Other Problems

MLB arbitration participants also note the lack of written decisions by arbitrators as a flaw in the current system.¹⁹⁰ Written decisions would help familiarize both players and teams with the criteria that arbitrators focus on during a hearing.¹⁹¹ Decisions in writing would also establish precedents for future arbitration hearings, which would likely help accomplish the goal of avoiding an arbitration hearing.¹⁹² Since the team and player would both be privy to the reasoning behind each ruling, each party would be knowledgeable as to what arbitrators look for when making future decisions.¹⁹³ This would also help to avoid any confusion that could arise in the process, which stems from each party being unsure of what factors the arbitration panel is likely to rely on or

(2010).

187. Chetwynd, *Play Ball?*, *supra* note 17, at 132; John L. Fixel, *Play Ball: Baseball Arbitration After 20 Years*, DISP. RESOL. J., June 1994, at 42, 45.

188. DAN HETTINGER, WELCOME TO THE BIG LEAGUES: EVERY MAN’S JOURNEY TO SIGNIFICANCE: THE DARREL CHANEY STORY 104-05 (1994).

189. See *supra* notes 182-88 and accompanying text.

190. Fixel, *supra* note 187, at 43 (“[N]o explanation can be given for the salary chosen.”); Vella, *supra* note 11, at 327 (“MLB Final Offer Arbitration rulings are neither written nor explained . . .”); Telephone Interview with Adam Cromie, *supra* note 153. This is one of the biggest criticisms of baseball arbitration. See Gillard, *supra* note 5, at 136. The theory behind no written decisions is that if the teams and players do not know the reasoning behind the arbitration panel’s decision, then going to a hearing may be too risky and unpredictable, thus leading to more settlements. See Vella, *supra* note 11, at 327 (“[The] extreme difference between player and team salary proposals makes Final Offer Arbitration an extremely unpredictable risk for players and owners alike because both parties are uncertain as to which of their extreme proposals a panel will choose.”).

191. Gillard, *supra* note 5, at 136 (“A written decision would force arbitrators to make well-reasoned decisions, and the owners and players could adopt the criteria for arbitration decisions if they found that the arbitrators were placing undue emphasis on certain criteria.”). The lack of written decisions especially hurts small-market teams, because they do not have the resources to put aside in case the arbitrator awards an unpredictably high salary for a player with whom they go to arbitration. Vella, *supra* note 11, at 327.

192. Ham & Malach, *supra* note 186, at 92 (“Every victory or loss in salary arbitration has precedential value because the system focuses on comparables as the measure of a player’s value. However, in a system of law with no written opinions, parties are limited in what they can argue.” (footnote omitted)). Eldon L. Ham and Jeffrey Malach discuss three functions that written decisions could have in baseball—disciplining judges, providing precedents, and legitimizing an arbitrator’s decision as non-arbitrary. See *id.*

193. *Id.*; Hopkins, *supra* note 83, at 333.

ignore.¹⁹⁴ Most importantly, because there are no written decisions by arbitration panels, it is possible that arbitrators are using factors that are forbidden by the CBA, such as financial status of the team or statements made by analysts about the player.¹⁹⁵ This is a cause of concern because both the MLBPA and the owners collectively bargained for certain factors to be admissible or inadmissible.¹⁹⁶

A more recent issue is the increasing complexity of arbitration hearings.¹⁹⁷ Both sides involved in hearings have begun to use teams of statisticians to supplement their arguments with advanced metrics.¹⁹⁸ Arbitrators have little to no time to comprehend all of the advanced metrics being asserted by both parties because of the quick turnaround of the hearings.¹⁹⁹ This requires arbitrators to be strongly specialized—and experts—in the specific fields of math and logic that parties are including in their arguments.²⁰⁰ Each of these consequences of FOA in

194. Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW. J. 183, 193 (1994); Hopkins, *supra* note 83, at 333 (“[T]he publication of an opinion would provide a more realistic understanding of the arbitration process, and the reasoning behind a decision.”).

195. Gillard, *supra* note 5, at 136 (pointing out that it is conceivable, but not proven, that decisions in the past have been made based on not only admissible criteria, but instead incorporating factors not allowed under the CBA); see 2012 MLB CBA, *supra* note 92, art. VI(E)(10)(b)(i)–(v) (listing the five main categories of evidence that are inadmissible in a hearing).

196. Conti, *supra* note 69, at 229. As an extreme example, some have criticized that there is nothing in place right now that would stop an arbitrator from just flipping a coin to determine who should win a hearing. Ham & Malach, *supra* note 186, at 93. This also allows room for the bias of an arbitrator to go unnoticed. *Id.*

197. Donegan, *supra* note 194, at 193.

198. *Id.* This is illustrated best through the descriptions of Professor Abrams:

Today’s salary arbitration hearing room table is adorned with laptop computers capable of generating any needed comparison in an instant. Every claim is met with a counterclaim until the arbitrators are left with a huge pile of numbers. Player performance is chopped and diced, particularized and dissected. Anything not easily convertible into numerical terms, such as team leadership, hustle and courage in the face of debilitating injury, seems to play no role.

... Some salary arbitrators have been so overwhelmed by the numbers that they would prefer if the parties would supply data long before the hearing so it might be digested.

... Stats are piled upon stats in rapid fashion.

See Abrams, *Baseball’s Arbitration Process*, *supra* note 12, at 66. In the NHL, however, teams rely on specialized law firms to represent them during salary arbitration hearings, due to the fact that the statistics being introduced each year are becoming more and more complex. Aubut, *supra* note 130, at 211 (“There are currently four preferred law firms available to represent NHL teams in arbitration proceedings.”).

199. See Abrams, *Baseball’s Arbitration Process*, *supra* note 12, at 66.

200. See *id.* Some have suggested that arbitrators should “pass a 25-question examination about baseball.” JAMES T. GRAY, 1 SPORTS LAW PRACTICE, at 1-189 (3d ed. 2012). Another issue is if one of the parties provides false information, such as an incorrect statistic, there is little to no way for the arbitrator to realize this during the hearing. Abrams, *Baseball’s Arbitration Process*, *supra* note 12, at 67.

MLB has an effect on the process in its own way.²⁰¹ The key is to either minimize the influences of these factors by making adjustments to the current process, or implement solutions that can remove these negatives altogether.²⁰²

IV. IMPLEMENTATION OF MANDATORY MEDIATION IN MAJOR LEAGUE BASEBALL

There are numerous methods of dispute resolution that are used to settle differences of opinion—without requiring litigation—that could be implemented in MLB.²⁰³ These techniques are encompassed within the subset of dispute resolution called ADR.²⁰⁴ Arbitration and mediation are two of the most well-known forms of ADR.²⁰⁵ This Part will argue that introducing mandatory mediation prior to the arbitration hearing will correct many of the negative consequences of the FOA process currently used by MLB.²⁰⁶

A. Mediation

Mediation is a form of ADR that is different than arbitration in several ways.²⁰⁷ One difference is that the process of mediation “allows for mutual satisfaction in the resolution, whereas imposed decisions leave the parties at odds because there is typically a designated winner and loser.”²⁰⁸ Imposed decisions are an integral part of both arbitration hearings, as well as other forms of litigation.²⁰⁹ A second difference is that the goal of mediation is to make the solution a win-win for both

201. See *supra* notes 149-200 and accompanying text.

202. See *infra* Part IV.D.

203. Epstein, *supra* note 4, at 154-55; see, e.g., Gregory P. Mathews, Note, *Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes*, 19 OHIO ST. J. ON DISP. RESOL. 709, 723 (2004) (detailing the usage of ADR by the Internal Revenue Service).

204. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1359-60, 1362 (“Alternative Dispute Resolution (ADR) has been heralded as one of the most vital and far-reaching procedural reforms of our time. Writers have praised [these] procedures, including . . . mediation, [and] arbitration . . . as offering speedy, non-intimidating, flexible justice for the common person . . .” (footnote omitted)).

205. *Id.* at 1363; Epstein, *supra* note 4, at 155.

206. See *infra* Part IV.C.

207. Delgado, *supra* note 204, at 1363-64.

208. Kathleen C. Wallace, *A Proposal for the United States Olympic Committee to Incorporate Formal Mediation Within Its Grievance Process*, 16 MARQ. SPORTS L. REV. 59, 65 (2005); see also Delgado, *supra* note 204, at 1363-64 (“In mediation, a neutral, noncoercive, nonadversarial third party coordinates and facilitates negotiations between disputants. The mediator only encourages settlement; the parties retain ultimate decision-making authority. Mediation is widely used in resolving domestic disputes and consumer grievances.” (footnotes omitted)).

209. Wallace, *supra* note 208, at 63.

parties in the disagreement.²¹⁰ A third difference is that mediation “takes into consideration the human toll of conflict and fosters healthier communication between disputants.”²¹¹

Mediation sets out to accomplish two goals in particular: the preservation of working relationships and the quick resolution of time-sensitive matters.²¹² Preservation of a working relationship can be accomplished through the use of “private caucuses.”²¹³ A private caucus is where the mediator meets with each side privately, therefore avoiding any damage done to the relationship which could possibly result from direct, face-to-face communication between the player and management, which is essential in a workplace, like MLB, where the relationship between a player and his team is vital.²¹⁴

Time sensitivity is key to any dispute resolution that could be implemented in MLB, because there is only a finite amount of time available during the offseason when teams and players can come to an agreement on a contract.²¹⁵ Mediation allows for the parties to use “pre-selection” of a mediator in order to save time, and the timetable can be

210. See Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 244 (2002) (“Mediation purports to allow its participants the opportunity to discuss their situations, needs, and desires, and then an opportunity to reach a compromise. The ‘emphasis in mediation is placed on establishing a workable solution.’” (footnotes omitted)).

211. Wallace, *supra* note 208, at 65. That is one reason why mediation is more preferable than going to court in domestic disputes. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 33 (1982).

212. See Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 383, 391-93 (1999); see also Delgado, *supra* note 204, at 1366 (“[I]nformal dispute resolution mechanisms . . . save[] both time and money. ADR is less time-consuming than full-fledged adjudication because it eliminates many formalities of judicial proof . . . because decisionmakers often are familiar with the subject matter of the dispute” (footnote omitted)).

213. Kupelian & Salliotte, *supra* note 212, at 391; see also Epstein, *supra* note 4, at 159 (describing how caucuses work); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 27 (1996) [hereinafter Riskin, *Understanding Mediators' Orientations*] (“[M]ost mediation activities take place in private caucuses in which the mediator will gather additional information and deploy evaluative techniques . . .”).

214. Kupelian & Salliotte, *supra* note 212, at 391-92 (“For example, this would permit the mediator to soften the general manager’s tone in criticizing the player, and prevent the player [from] hearing such negative commentary directly.”). Even when there is face-to-face communication between the parties, a mediator would be able to keep the conversation civil, to avoid any broken relationships. *Id.* at 392; see also discussion *supra* Part III.A.

215. See *MLB Baseball 2011/2012 Calendar*, AZCENTRAL.COM (Dec. 6, 2012, 4:09 PM), <http://www.azcentral.com/sports/diamondbacks/articles/2011/12/06/20111206mlb-baseball-calendar.html>; see also Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270, 282 (1982) (“[M]ediation would be substantially quicker . . . than arbitration . . .”).

altered to meet the needs of the parties.²¹⁶ These mediation sessions are even allowed to take place during the workday while employees are actively working, which saves time for both the company and the employees involved in the matter.²¹⁷ Indeed, mediation is so effective, at least in comparison to arbitration, because “the emphasis is less on the lawyers and civil procedure, [and] instead it is placed on the ‘needs’ of the parties themselves.”²¹⁸

Furthermore, there is not just one form of mediation; rather, there are numerous varieties of the process.²¹⁹ Three major subsets of mediation include facilitative, evaluative, and transformative mediation.²²⁰ In facilitative mediation, the mediator is in charge of the session, but the parties are in control of the outcome.²²¹ In evaluative mediation, the mediator assesses each side’s legal rights and arguments, then directly states to the parties the likely outcome if the parties went to arbitration or judicial hearing.²²² Transformative mediation focuses on repairing a damaged relationship between the parties, which may—and hopefully will—lead to an agreement.²²³

216. Kupelian & Salliotte, *supra* note 212, at 392 (describing “pre-selection” as having a mediator hired for sessions that may come up in the future); *see also* Goldberg, *supra* note 215, at 276, 282 (noting that selecting an arbitrator could take up to forty days and that a mediator could be selected to work on multiple sessions so it would be known in advance that a mediator is available).

217. Kupelian & Salliotte, *supra* note 212, at 392 (“Many large employers in the United States have initiated similar mediation programs, and even allow the process to take place while employees are still at work and on the clock.”).

218. Epstein, *supra* note 4, at 155.

219. *See* Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 REV. LITIG. 499, 507-11 (2005); Neary, *supra* note 129, at 97-98 (describing three different forms of mediation).

220. Daiker, *supra* note 219, at 507-11; Neary, *supra* note 129 at 97-98. Another newer method is “narrative mediation,” but this technique will not be discussed further in this Note. Daiker, *supra* note 219, at 508 n.39 (“Incorporating much of the same logic as narrative therapy, a narrative mediator uses story telling to work through conflict with the goal that eventually a new story will develop where disagreement is replaced by resolution.”).

221. Daiker, *supra* note 219, at 508-09; Neary, *supra* note 129, at 97-98; Zena D. Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE.COM (Sept. 2000), <http://www.mediate.com/articles/zumeta.cfm> (stating that a facilitative mediator “is in charge of the process, while the parties are in charge of the outcome”).

222. Neary, *supra* note 129, at 98 (“The mediator here is more focused on the legal rights of the parties . . .”); Riskin, *Understanding Mediators’ Orientations*, *supra* note 213, at 27-28 (explaining that mediators “[a]ssess the strengths and weaknesses of each side’s case,” “predict outcomes of court or other processes,” “[p]ropose position-based compromise agreements,” and “[u]rge or push parties to settle or to accept a particular settlement proposal or range”); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 27-28 (2001) (listing the strategies used by mediators).

223. *See* Neary, *supra* note 129, at 98 (“The [transformative] mediation process is similar to facilitative mediation, but focuses more on mending the relationship between the parties, with an agreement as a by-product.”); *see also* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE*

Additionally, the mediator may take on different roles depending on the situation.²²⁴ This ranges from a mediator as a passive actor, to a mediator who acts as a leader.²²⁵ Once again, an important part of the mediator having different roles is that it allows for flexibility in how the mediator deals with a particular situation.²²⁶

Finally, even if the mediation session is not successful in creating an agreement between the two sides, progress will still have been made.²²⁷ First, the parties have communicated, which will likely help each side get a better handle on identifying the key issues.²²⁸ Second, even if the mediation fails, there is still the safeguard of arbitration—or some other form of dispute resolution—remaining to generate a settlement, which will be helped along by the progress made during mediation.²²⁹ This is especially advantageous because courts are extremely overcrowded and costly, and it will likely be in the best interests of both parties to bypass the formal litigation process.²³⁰

PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 3-4 (1994) (explaining that a transformative mediator uses empowerment and recognition in order to help the parties come to an agreement).

224. Josh Chetwynd, *Clubhouse Controversy: A Study of Dispute Resolution Processes Between Teammates in Major League Baseball*, 16 HARV. NEGOT. L. REV. 31, 54 (2011) [hereinafter Chetwynd, *Clubhouse Controversy*].

225. *Id.* (citing P. H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 214-17 (1979)). A passive mediator's main goal is solely to encourage the parties to talk to one another to increase the flow of communication regarding the needs and wants of everyone involved. *Id.* A mediator who acts as a leader is one who "asserts his own opinions and recommendations." *Id.* A mediator acting as a leader emerges frequently when there are arguments between players on the same team. *Id.* at 54-55. Usually for a person to act as a leading-style mediator, that person is likely to be someone who is highly regarded in the locker room by his team and commands respect from all of his teammates. *Id.* Most often, the team captain would simultaneously serve as the team mediator for these locker room issues that frequently arise. *Id.* at 55.

226. See *supra* notes 219-25 and accompanying text.

227. See *infra* notes 228-30 and accompanying text.

228. Robert A. Baruch Bush, "What Do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 36 (1996) ("In mediation with this approach, the value-added for negotiators is clear and simply stated: it enhances the quality of both party decisionmaking and interparty communication, which themselves lead to better quality outcomes—whether or not in the form of settlements."); Kupelian & Salliotte, *supra* note 212, at 396.

229. See David S. Winston, Note, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water . . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187, 190-91 (1996) ("Even when parties fail to reach a settlement, the enhanced mutual understanding resulting from the mediation process greatly improves the prospects for a later agreement.").

230. Epstein, *supra* note 4, at 155-56; Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 50; Winston, *supra* note 229, at 191-92 ("Even using the most conservative of these estimates, if two of every ten cases bound for trial settle via mandatory mediation substantial savings in time and money would accrue to the court system and the parties.").

Although there are some circumstances in which certain techniques of dispute resolution are most effective, these techniques need not be mutually exclusive.²³¹ FOA has been combined with other ADR techniques in numerous U.S. states.²³² In Wisconsin, legislation has been adopted that allows for municipal employees involved in collective bargaining to avoid strikes by submitting both to mediation and binding arbitration.²³³ In Maine, public employers during collective bargaining must “participate in good faith in mediation . . . and mediation-arbitration procedures.”²³⁴ There has even been a federal bill proposed to allow for mediation to facilitate collectively bargained agreements.²³⁵ In 2012, the *Bowers v. Raymond J. Lucia Cos.*²³⁶ court upheld the enforceability of an agreement between two parties who contracted to mediate in a mediation-arbitration, an FOA technique.²³⁷ In this process: (1) the parties would go to mediation; (2) if they could not reach an agreement, they would then submit their final offers to the mediator; and (3) the mediator would pick one of the offers.²³⁸ All of these options clearly illustrate that mediation does not need to be a stand-alone method of dispute resolution.²³⁹

B. Current Usage of Mediation in Major League Baseball

While it may not be so apparent, the process of mediation has actually been used in MLB for years, just not for salary arbitration.²⁴⁰ Many teams use mediation as a way to settle disputes between players that arise in the clubhouse.²⁴¹ These disputes have even escalated to

231. See, e.g., THE HANDBOOK OF NEGOTIATION AND CULTURE 275 (Michele Gelfand & Jeanne Brett eds., 2004) (discussing “arbitration-negotiation” and “arbitration-negotiation-mediation”); Haloush & Malkawi, *supra* note 39, at 345 (explaining the process of mediation-arbitration); Weisman, *supra* note 39, at 40 (discussing the hybrid mechanism of “Med-Arb”).

232. Chetwynd, *Play Ball?*, *supra* note 17, at 114 (“Combining FOA with other forms of alternative dispute resolution mechanisms is also a technique used by some states in the United States.”).

233. WIS. STAT. ANN. § 111.77 (West 2002 & Supp. 2013).

234. ME. REV. STAT. ANN. tit. 26, § 1285 (2007).

235. See, e.g., Employee Free Choice Act of 2009, H.R. 1409, 111th Cong., § 3 (2009). This Act was sponsored by Representative George Miller of California—with 231 cosponsors—but was never enacted. See *id.*

236. 142 Cal. Rptr. 3d 64 (Cal. Ct. App. 2012).

237. *Id.* at 67, 71. The agreement provided that, “[t]he Parties shall then proceed to a mediation/binding baseball arbitration with a mutually agreed-upon neutral within sixty days of the execution of this agreement.” *Id.* at 67.

238. Michael P. Carbone, *Binding Mediation/Baseball Arbitration*, MEDIATE.COM (July 2012), <http://www.mediate.com/articles/CarboneM10.cfm>.

239. See *supra* notes 231-38 and accompanying text.

240. See Chetwynd, *Clubhouse Controversy*, *supra* note 224, at 53-58.

241. *Id.* at 53-56. These disputes range from serious issues, such as physical altercations and

physical confrontations between players.²⁴² In order to remedy these situations, mediation has been the ADR technique most often used by players within the clubhouse.²⁴³ If something as small as taste in music can cause such angst in the locker room, which it has been known to do, then it is clear that problems spurring from contract negotiations and salary arbitration will likely also bring negativity into the clubhouse.²⁴⁴ Mediation has also been used for circumstances outside of the realm of issues between players.²⁴⁵

C. The Proposal

This Note proposes that MLB add a two-week period immediately following the date on which salary arbitration figures are exchanged, where a salary arbitration eligible player who has yet to sign a new contract with his team would attend at least one mandatory mediation session with that team.²⁴⁶ If the player and the team are not able to come to an agreement during the mediation, they would be welcome to attend another session until either a contract is agreed upon or the parties go to a salary arbitration hearing.²⁴⁷ This would keep the rest of the MLB offseason exactly the same, avoiding any potential scheduling conflicts.²⁴⁸

hazing, to somewhat minor conflicts, for example, clubhouse etiquette mainly involving music being played in the locker room. *Id.* at 37-43.

242. See *id.* at 40-42; Michael Farber, *Clubhouse Confidential: When a Bunch of Alpha Males Get Together Daily in a Confined Space, Lots of Things—Good and Bad—Can Happen*, SPORTS ILLUSTRATED, Jan. 14, 2002, at 62, 69 (explaining that the most common point of contention between MLB players in the locker room is regarding music). For example, Cleveland Indians' outfielders Chad Curtis and Kevin Mitchell once got into a physical altercation over rap music. Chetwynd, *Clubhouse Controversy*, *supra* note 224, at 41.

243. Chetwynd, *Clubhouse Controversy*, *supra* note 224, at 53.

244. See *supra* notes 242-43 and accompanying text.

245. See, e.g., Ken Gurnick, *Mediator Appointed in Dodgers-Fox Dispute*, MLB.COM (Nov. 12, 2011, 3:53 PM), http://losangeles.dodgers.mlb.com/news/article.jsp?ymd=20111121&content_id=26018756&vkey=news_mlb&c_id=mlb. In 2011, a federal mediator was used to help settle a dispute between the Los Angeles Dodgers and Fox Broadcasting Co. ("Fox") regarding broadcasting rights. *Id.* The argument between the two sides involved a bankruptcy hearing for the Dodgers, which Fox objected to, in order to force compliance by the Dodgers with the broadcasting contract that the two sides agreed upon in the past. *Id.* The two parties were able to avoid litigation, instead allowing a federal mediator to meet with officials from each side, "with authority to settle." *Id.*

246. See *infra* Appendix.

247. See *infra* notes 298-301 and accompanying text.

248. See *infra* Appendix.

D. Effects of Implementing Mandatory Mediation

Any new dispute resolution process, whether replacing, or merely supplementing, FOA in MLB, must address the problems with the current system.²⁴⁹ Mandatory mediation does just that—it helps minimize the likelihood of a strained relationship between the player and the team; eliminates the gap between large- and small-market teams in terms of the consequences of the arbitration process; and makes the process less of a win-win for the players.²⁵⁰ In addition, mandatory mediation would address other minor weaknesses of FOA, such as limiting contracts to merely one season and avoiding the rules of evidence required by the CBA.²⁵¹ Finally, by implementing mandatory mediation, MLB would still have FOA in place if the mediation sessions did not resolve the parties' disputes.²⁵²

1. Improved Relationship Between the Player and the Team

Mandatory mediation would help repair the relationship between the player and his team leading up to and following an arbitration hearing.²⁵³ The adversarial nature of FOA tends to have a negative influence on the rapport between the two sides involved.²⁵⁴ Mediation, on the other hand, uses a third party, who has limited authoritative power, to help the two sides voluntarily reach a mutually acceptable agreement.²⁵⁵ Because the settlement is not forced and is mutually agreed upon—as opposed to being decided solely by the arbitrator in FOA—the two sides are more likely to be satisfied with the result.²⁵⁶ It is vital that the parties are able to come to an agreement voluntarily, and

249. See *supra* Part III.

250. See *infra* Part IV.D.1–4.

251. See *infra* Part IV.D.4.

252. See *infra* Part IV.D.4.

253. See *supra* Part III.A.

254. Interview with Glenn Wong, *supra* note 128 (explaining how players may become upset through the arbitration process).

255. See, e.g., FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.310 (2010) (“Mediation is a process to facilitate consensual agreement between parties in conflict and to assist them in voluntarily resolving their dispute.”); see also Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida’s Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 711 (1994); Wallace, *supra* note 208, at 63 (defining mediation as “an extension . . . of the negotiation process that involves intervention of a . . . third party who has limited (or no) authoritative decision-making power”).

256. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 8 (2d ed. 1996) (“Mediation . . . involves the intervention of an acceptable third party who . . . assists the principal parties in voluntarily reaching a mutually acceptable settlement of the issues in dispute.”); Kupelian & Salliotte, *supra* note 212, at 399 (“As long as the mediator is respected by all parties involved and has a sound understanding of the necessary elements of the situation at hand, a mutually beneficial settlement can be reached.”).

although the proposed mediation sessions would be mandatory, it would not be obligatory for the sides to reach an agreement during the mediation session.²⁵⁷

Another way in which mandatory mediation could help avoid the risk of a weakened relationship is the role of the mediators themselves in the negotiations in actively fixing the relationship between the two sides.²⁵⁸ Professional mediators are “specifically trained in interpersonal skills, conflict analysis, and problem solving,” while, conversely, an arbitration panel merely listens to each side’s argument and makes a ruling based on the evidence, without adding anything else to the process.²⁵⁹ Rather than deciding who is right and who is wrong, the role of the mediator is to help to identify the issues and discover the interests of the parties, all while removing as much conflict as possible.²⁶⁰ By opening up and promoting communication between the parties in a non-adversarial environment—rather than the ownership belittling the achievements of the athlete during his time on their team—there can be respectful discussions regarding a fair and reasonable salary for next season, which could make the relationship between the two sides better than it has ever been.²⁶¹

Lastly, if mediation accomplishes the goal it sets out to achieve—namely, getting a settlement between the two sides and avoiding FOA—it will spare the player the anguish of having to hear what his team would say about him during the arbitration hearing.²⁶² As discussed

257. Kupelian & Salliotte, *supra* note 212, at 384-85 (stating that mediation promotes “voluntary agreements by the parties to [a] dispute,” otherwise known as “self-determination”). While the process may be mandatory to attend, the parties would still keep their ability to determine an outcome by themselves. See Moberly, *supra* note 255, at 711 (noting that “mediators are prohibited from coercing a settlement”).

258. MOORE, *supra* note 256, at 18-19; Kupelian & Salliotte, *supra* note 212, at 391-92; Riskin, *Understanding Mediators’ Orientations*, *supra* note 213 at 27; Wallace, *supra* note 208, at 65 (“Mediation can repair and foster critical relationships among athletes, coaches, and governing bodies.”).

259. See Wallace, *supra* note 208, at 65 (describing the dynamic that professional mediators can bring into a situation where the parties in the past have been unable to resolve an ongoing dispute); 2012 MLB CBA, *supra* note 92, art. VI(E)(5) (creating the framework of arbitrators’ obligations).

260. See Wallace, *supra* note 208, at 65 (“[Mediators] have a repertoire of tools for deescalating conflict, identifying interests and issues, mining for relevant information and feelings, creating options that meet the needs of parties, and bringing parties together in order to come to agreement.”).

261. Compare Gillard, *supra* note 5, at 135 (discussing how in arbitration hearings, teams need to point out the negatives of the player’s statistics over the course of his career), with Wallace, *supra* note 208, at 65 (highlighting how mediation encourages communication and collaboration by all of the parties involved).

262. See Gillard, *supra* note 5, at 135; Tulis, *supra* note 3, at 92 (“In an arbitration proceeding, the player would have to witness his team’s management questioning his value to the team.”).

earlier, the objective of management is to point out their own player's inadequacies,²⁶³ and the player, who is mandated to attend the hearing, might be offended by what the owner has to say.²⁶⁴ Mandatory mediation would encourage the parties to avoid arbitration altogether, and, thus, will help to circumvent any risk of damaging the relationship between the two parties.²⁶⁵

A player that goes through the entire arbitration procedure will still be under contract the next season with the same team against whom he faced in arbitration; therefore, it is of the utmost importance to make sure the player is happy with management.²⁶⁶ As a result of settling prior to arbitration, the player can avoid having to deal with the discomfort of the ownership "questioning his value to the team."²⁶⁷ It will also help maintain a possible long-term relationship between the player and the team if the two sides decide to sign a multi-year contract in the future.²⁶⁸

2. Equalizing the Consequences of FOA on Small-Market and Large-Market Teams

The next problem that mandatory mediation would fix is the discrepancy between large- and small-market teams when it comes to the consequences of FOA.²⁶⁹ Because an arbitrator cannot take into consideration the financial position of a team—or that team's budget—when making a decision,²⁷⁰ and players may use salaries of comparable players in their arguments during arbitration hearings,²⁷¹ teams in small markets are at a severe disadvantage.²⁷²

This issue could be resolved by allowing the parties to take part in a mediation session prior to going to arbitration. If submitted to mediation, there would be no rules of evidence—implemented by the CBA—forbidding and permitting only certain subject matters to be brought up

263. Gillard, *supra* note 5, at 135; see *supra* Part III.A.

264. Gillard, *supra* note 5, at 135.

265. Cf. *supra* Part III.A (describing how the relationship between a player and his team is at risk when going through arbitration).

266. Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 62; Chetwynd, *Play Ball?*, *supra* note 17, at 124; Tulis, *supra* note 3, at 92 n.21 ("A player will remain on the team unless he is traded . . .").

267. Tulis, *supra* note 3, at 92.

268. See *supra* Part III.A.

269. See *supra* Part III.B.

270. 2012 MLB CBA, *supra* note 92, art. VI(E)(10)(b)(i)–(v).

271. Vella, *supra* note 11, at 328.

272. Gillard, *supra* note 5, at 134 ("[S]mall-market teams are forced to sign players for an amount greater than their value to the team, thus forcing teams to incur a financial loss."); see *supra* Part III.B.

by either side.²⁷³ For example, if, instead of going to a FOA hearing, the two sides went to mediation, the player and the team would have more factors that they can discuss to display the player's value to the team.²⁷⁴ These discussions could include criteria that are expressly prohibited by the CBA, such as the finances of the team, stadium attendance since the player joined the team, public opinion of the player, and leadership abilities.²⁷⁵

Both sides would benefit from the ability to pick and choose which of these—normally prohibited—elements help their case.²⁷⁶ Small-market teams would be able to reasonably inform their player that—while a certain player of his caliber is receiving a higher salary in a large market—this team can only afford to pay him a smaller amount, but would be able to retain him if he enjoyed playing in that city.²⁷⁷ On that same note, a player who is a clubhouse leader and fan favorite could bring up these factors to persuade management that he deserves a higher salary than someone of his caliber who does not exude the same personality.²⁷⁸ Therefore, both the player and the team could benefit from the availability of these arguments; meanwhile, small-market teams would have a better chance of retaining a player who they would otherwise likely have to trade if given an arbitration award outside of their price range.²⁷⁹

3. Mandatory Mediation Creates a Perceived Win-Win Situation for Players and Teams

The major issue for owners is that they have seen FOA as being a win-win only for players.²⁸⁰ Owners witness the salaries of players who

273. See 2012 MLB CBA, *supra* note 92, art. VI(E)(10)(a); Tulis, *supra* note 3, at 117-20 (laying out the various admissible and inadmissible criteria in baseball arbitration); see also VALERIE F. BUTLER, *MEDIATION: ESSENTIALS AND EXPECTATION* 41 (2004) ("It's quite possible for folks to get more in mediation than they would at trial, in part because there are no rules of evidence to keep you from considering information from any reliable source."); Ronald G. Wiesenenthal, *Dick and Jane Go to Mediation: A Primer for the Less Experienced Lawyer*, 62 J. MO. B. 72, 74 (2006) ("There are no rules of evidence in a mediation . . .").

274. See BUTLER, *supra* note 273, at 41; Wiesenenthal, *supra* note 273, at 74.

275. See 2012 MLB CBA, *supra* note 92, art. VI(E)(10)(a); Tulis, *supra* note 3, at 118-20 (laying out the various inadmissible criteria in baseball arbitration).

276. See *infra* notes 277-79 and accompanying text.

277. Sands, *supra* note 103, at 11; Tulis, *supra* note 3, at 118.

278. Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 60 ("The parties also prohibit their arbitrators from considering media comments about players. If a player performed well based on his statistics, that will tell his story, not the columns of local sports writers.").

279. See Aubut, *supra* note 130, at 237 ("This forces small market teams with correspondingly small budgets to lose some of their players as they cannot afford to pay their salaries; the player is then traded to a team that can.").

280. See Fizez, *supra* note 187, at 45; Primm, *supra* note 44, at 107-08 ("Salary arbitration is a

go through arbitration increase by a large amount a majority of the time.²⁸¹ However, in reality, salary increases stemming from FOA are not outrageous; they are merely a reflection of the fair market value of a player of a certain caliber.²⁸² Because players in their first two to three years do not really have any bargaining rights against the owners, their salaries are relatively low in comparison to what they could be making on the open market.²⁸³ It only seems like a win-win for players because the systems prior to FOA in MLB history did not allow players to make their fair market value known at any point in time.²⁸⁴

Mediation could help owners utilize a process that is not solely a win-win for players. Rather, mandatory mediation creates a win-win for both sides.²⁸⁵ Teams are facilitated in avoiding the entire arbitration process altogether, through offering long-term contracts to younger players in order to bypass all of the years that the player is arbitration-eligible.²⁸⁶ Players are unable to obtain a multi-year contract through arbitration due to the rules of the CBA.²⁸⁷ However, through mediation, a team and a player may sign a multi-year contract which would allow each side to avoid the risk of having to go through arbitration at all.²⁸⁸ There has been a new trend of players signing long-term contracts to avoid arbitration altogether, which would be promoted even further by the institution of mediation, because it would help to settle more disputes

win-win for players, but this is not an unfair result for owners, because players are underpaid in their first three seasons.”); Marc Chalpin, Comment, *It Ain't Over 'Til It's Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball*, 60 ALB. L. REV. 205, 233-34 (1996).

281. See Primm, *supra* note 44, at 107-08; Jeff Passan, *Phillies Maintain Power Grip on Howard*, YAHOO! SPORTS (Nov. 25, 2008, 10:17 PM), <http://sports.yahoo.com/news/phillies-maintain-power-grip-howard-031700380--mlb.html>.

282. See Fizez, *supra* note 187, at 45; Primm, *supra* note 44, at 107 (“The logical result of any increase in bargaining power that will allow players to receive a salary closer to their fair market value is that the salary will increase whether they win or lose the arbitration.”).

283. See Primm, *supra* note 44, at 107-08 (explaining that because players are underpaid throughout their first three seasons, the increase in salary following arbitration makes owners view the system as being a win-win for the players).

284. Fizez, *supra* note 187, at 45; Primm, *supra* note 44, at 108.

285. NORA DOHERTY & MARCELAS GUYLER, *THE ESSENTIAL GUIDE TO WORKPLACE MEDIATION & CONFLICT RESOLUTION* 164 (2008); *MEDIATION IN THE CONSTRUCTION INDUSTRY: AN INTERNATIONAL REVIEW* 101 (Penny Brooker & Suzanne Wilkinson eds., 2010).

286. Abrams, *Baseball's Arbitration Process*, *supra* note 12, at 56 (“To avoid salary arbitration, some clubs have offered their junior star performers multi-year contracts at premium rates.”); Primm, *supra* note 44, at 109 (“[T]eams began to counter arbitration by signing players to contracts for multiple years . . . to avoid having to go through the negotiations and arbitration process every year.”).

287. Chetwynd, *Play Ball?*, *supra* note 17, at 124 (explaining that MLB's CBA only allows for one-year deals resulting from arbitration).

288. See Tulis, *supra* note 3, at 89-90.

prior to an arbitration hearing, thus allowing for these multi-year deals.²⁸⁹ This practice would help the player obtain the security of having a multi-year contract with his team, and the ownership would have a young, presumably high-quality, athlete “locked-up” for numerous years.²⁹⁰ Most importantly, both sides now can avoid the inherent uncertainty of FOA, resulting in benefits for each side, as discussed earlier.²⁹¹

4. FOA Remains a Fallback Option

The last major contribution that mediation could bring to baseball is that it does not alter the current format to the extent of creating any new controversies. If mandatory mediation was implemented in MLB, it could be put into action in conjunction with the current format of FOA.²⁹² As discussed earlier, there are a number of situations where states and private organizations have used a process of mediation-arbitration.²⁹³ Many states have statutes that combine mediation and arbitration by first mandating mediation sessions, and then, if there is no settlement induced by mediation, using FOA as “a final option.”²⁹⁴ This creates a “duty to bargain . . . in good faith” as stated in the statute.²⁹⁵ Currently in MLB, there is no duty to bargain in good faith, besides the risk that FOA imposes on each side to provide a reasonable offer.²⁹⁶ Mediation would help compel each side to come together and submit realistic salaries to one another, through creating this duty to bargain in good faith.²⁹⁷

Moreover, even if the two sides are not able to come together to reach an acceptable settlement during mediation, the right to go to arbitration still remains.²⁹⁸ As seen in the state statutes discussed above,

289. See, e.g., Kupelian & Salliotte, *supra* note 212, at 386 (“Mediation typically has a success rate which alone makes it a worthwhile endeavor.”).

290. See, e.g., Edmonds, *supra* note 44, at 20-21, 23-24 (explaining why the St. Louis Cardinals and the Tampa Bay Rays signed their marquee players, Albert Pujols and Evan Longoria, respectively, to long-term deals); Primm, *supra* note 44, at 104-05 (detailing how the Florida Marlins signed their young superstar Hanley Ramirez to a long-term deal).

291. See *supra* Part III.D.

292. See *supra* Part IV.A.

293. Chetwynd, *Play Ball?*, *supra* note 17, at 114 (detailing several situations where states have used multiple forms of ADR, such as mediation and arbitration); see, e.g., ME. REV. STAT. ANN. tit. 26, § 1285 (West 2007); WIS. STAT. ANN. § 111.77 (West 2012); see also *supra* Part IV.A.

294. ME. REV. STAT. ANN. tit. 26, § 1285; WIS. STAT. ANN. § 111.77; Chetwynd, *Play Ball?*, *supra* note 17, at 114.

295. WIS. STAT. ANN. § 111.77.

296. See Tulis, *supra* note 3, at 89. See generally 2012 MLB CBA *supra* note 92 (containing no mention of the parties having to bargain in good faith).

297. See *supra* notes 294-96 and accompanying text.

298. Compare *supra* Part IV.D.1 (describing the relationship between the player and team after

when implementing mandatory mediation, arbitration is still available to settle the dispute afterwards.²⁹⁹ The statute only requires that the two sides come together at some point in an effort to come to an agreement, with the safeguard of arbitration as a last resort.³⁰⁰ As a result, if mandatory mediation was placed into the offseason schedule prior to the arbitration hearings, either side would still have the right to bring the dispute to an arbitration panel following mediation.³⁰¹

V. CONCLUSION

Although there is certainly a competitive nature to baseball, there are obvious problems with FOA that could be fixed by moving to a dispute resolution method of mandatory mediation prior to arbitration.³⁰² By implementing a mediation-arbitration model into the CBA, it would require a large shift in how players and owners view their relationship as a whole.³⁰³ While FOA may accomplish the goal of compelling settlement between parties,³⁰⁴ it does so while damaging the relationship between the player and his team, impairing fairness between large- and small-market teams, making owners feel like the process is a win-win for players, and causing other aforementioned problems.³⁰⁵ All of these problems can be resolved by the introduction of mandatory mediation prior to arbitration.³⁰⁶

going through the arbitration process), *with supra* notes 294-95 and accompanying text (discussing two state statutes that deal with mediation prior to arbitration).

299. ME. REV. STAT. ANN. tit. 26, § 1285(4)(B) ("If the parties have not resolved their controversy by the end of that 45-day period, either party may petition the board to initiate compulsory final and binding arbitration of the negotiations' impasse."); WIS. STAT. ANN. § 111.77(3) ("Where the parties have no procedures for disposition of a dispute and an impasse has been reached, either party may petition the commission to initiate compulsory, final and binding arbitration of the dispute.").

300. *See* WIS. STAT. ANN. § 111.77.

301. *See supra* notes 298-300 and accompanying text.

302. *See* discussion *supra* Part IV.D.

303. *See* Epstein, *supra* note 4, at 163. It would "force these parties to agree that they are partners in a multi-billion dollar industry rather than adversaries." *Id.*

304. *See* Chetwynd, *Play Ball?*, *supra* note 17, at 110-11; Stevens, *supra* note 21, at 56; Tulis, *supra* note 3, at 89.

305. *See* discussion *supra* Part III.

306. *See* discussion *supra* Part IV.

APPENDIX – PROPOSED SCHEDULE

Nov. 1-13, 2013: General managers/owners meetings
Nov. 20: Reserve lists for all Major and Minor League levels filed
Dec. 2: Tender deadline
Dec. 9-12: Winter meetings
Jan. 14, 2014: Salary arbitration filing
Jan. 17: Salary arbitration figures exchanged
Jan. 18-31: Mandatory mediation sessions
Feb. 1-21: Salary arbitration hearings
Feb. 25: Mandatory reporting date
Mar. 2-11: Teams may renew contracts of unsigned players
Mar. 12: Last day to request unconditional release waivers (and pay
30 days termination pay)
Mar. 26: Last day to request unconditional release waivers (and pay
45 days termination pay)
Mar. 31: Opening day

*Sam B. Smith**

* J.D. candidate, 2014; Maurice A. Deane School of Law at Hofstra University; B.S., 2011, University of Massachusetts at Amherst. I would like to first thank my parents, Ronda Brooks and Alan Smith, for providing me with love and support and instilling in me a passion for sports. I would also like to thank Professors J. Herbie DiFonzo, Lisa Masteralexis, and Leah Wing for providing me with the expertise necessary to develop this Note from its infancy stage. I very much appreciate Adam Cromie, Jim Masteralexis, and Professor Glenn Wong taking time out of their busy schedules to answer any questions I had along the way. Thank you to the Managing Board, Brian Sullivan, Tyler Evans, Sarah Freeman, Aaron Zucker, Addie Katz, and Courtney Klapper, Notes and Comments Editors, Tiffani Figueroa and Erik Harmon, Research Editor, Thom Hughes, Articles Editor, Jeanne Waters, and the rest of the *Hofstra Law Review* for the dedication and hard work they put into this Note. Lastly, thank you to the rest of my family and friends who have put up with me over the last few years.

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