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# **PLAY BALL? AN ANALYSIS OF FINAL-OFFER ARBITRATION, ITS USE IN MAJOR LEAGUE BASEBALL AND ITS POTENTIAL APPLICABILITY TO EUROPEAN FOOTBALL WAGE AND TRANSFER DISPUTES**

JOSH CHETWYND\*

## **I. INTRODUCTION**

The game of baseball does not allow for draws. One team is victorious and the other loses. As a result, it should not be surprising that when it comes to wage disputes, the sport's preeminent professional league, Major League Baseball, turns to final-offer arbitration (FOA). This type of dispute resolution forces an arbitrator, or panel of arbitrators, to pick either one party's offer or the other's. In theory, like the game of baseball itself, there is one winner and one loser. But a deeper analysis of this form of arbitration suggests that, in fact, applying FOA can lead to a win-win situation as it spurs negotiated settlement at a very high rate. In its Major League Baseball milieu, FOA, which is often referred to as "baseball arbitration" because of its use in this setting, has also proved to be particularly useful in assuring that all disputes are quickly resolved, either through mutual agreement between the parties or speedy hearings. This alacrity, which appears to have been one of the main characteristics the system's architects intended, suggests that it might be useful for other sports as well. In the context of Europe, it raises the question: could a form of arbitration named after America's national pastime serve as a valuable tool for the world's game? Could European football's wage and transfer system<sup>1</sup> benefit from a speedy system that spurs settlement?

This Article examines these issues. Part I delves into the general development and mechanics of FOA. Part II considers its use in Major League Baseball and assesses whether FOA has achieved the goals it was

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1. The transfer system is the key way in which wages are determined in European football. The system is discussed in detail *infra* Part III of this Article.

intended to satisfy. Part III takes up FOA's potential applicability to European football's salary and transfer systems. Throughout, this Article also addresses criticisms raised about this style of dispute resolution.

## II. FINAL-OFFER ARBITRATION: GENERAL OVERVIEW

### *A. Early History and Basic Theoretical Framework*

FOA is a form of arbitration also known as "either-or," "last-best-offer," "one-or-the other," "flip-flop," "straight offer," or "pendulum" arbitration.<sup>2</sup> It has been described as "baseball arbitration" as well because Major League Baseball uses a version of the procedure in resolving salary disputes.<sup>3</sup> FOA's process differs fundamentally from conventional arbitration. In the conventional method, an arbitrator has the flexibility to impose any award he or she deems appropriate.<sup>4</sup> In contrast, in FOA, the arbitrator *must* choose either one party's or the other party's final offer.<sup>5</sup>

FOA was first proposed abstractly in the United States in the late 1940s as a tool for preventing large-scale labor strikes, which government officials feared could precipitate national emergencies.<sup>6</sup> There were discussions about using some type of FOA mechanism to impose settlements as an alternative to the Taft-Hartley dispute resolution procedures enacted by the U.S. Congress in 1947.<sup>7</sup> Ultimately, American politicians decided not to make this change.

The concept remained essentially dormant until 1966, when economics professor Carl Stevens provided the first theoretical analysis on the subject.<sup>8</sup> His work and those of later supporters of FOA assert that the system's greatest

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2. Gary Long & Peter Feuille, *Final-Offer Arbitration: "Sudden Death" in Eugene*, 27 INDUS. & LAB. REL. REV. 186, 187 (1974); Sid Kessler, *The Swings and Roundabouts of Pendulum Arbitration*, PERSONNEL MGMT, Dec. 1987, at 39.

3. California Dept. of Indus. Relations, *Literature Review: Final Offer Arbitration*, available at [www.dir.ca.gov/chswc/Basebal.ArbFfinal.htm](http://www.dir.ca.gov/chswc/Basebal.ArbFfinal.htm) (last visited Sept. 25, 2009).

4. *Id.*

5. Bogachan Celen, *Final Offer Arbitration with Multiple Issues* 2, 2 (Nov. 14, 2003), (unpublished manuscript), available at <http://celen.admin.fas.nyu.edu/pdfs/foa.pdf>.

6. JAMES DWORKIN, OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING 145 (1981).

7. *Id.* Taft-Hartley, formally known as the Labor-Management Relations Act, included elements aimed at preventing unions from initiating work stoppages, which government officials feared would slow the country's post-World War II industrial boom. See 29 U.S.C. § 157-58 (2009).

8. See generally Carl M. Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, 5 INDUS. REL. 38 (1966); see also Craig E. Overton & Max S. Worman, *Compulsory Arbitration: A Strike Alternative for Police?*, 29 ARB. J. 33, 34 (1974) (noting that the path to final offer arbitration (FOA) was paved by a general movement toward using binding, compulsory arbitration between states and public impasses).

value is its ability to encourage negotiated settlements at a greater rate than conventional arbitration. Negotiated settlements are preferred because they leave the final decision making in the hands of the parties rather than a third party. This avoids the cost of an arbitration hearing and presumably gives the parties a more satisfying result than an imposed decision.<sup>9</sup>

Stevens argued that FOA was superior at securing settlement compared to conventional arbitration because, in the traditional setting, arbitrators tend to “split the difference” between each side’s offer. In other words, if one party offered \$100,000 in a salary dispute and the opposing side presented a figure of \$500,000, the arbitrator would settle on an award of \$300,000.<sup>10</sup>

This creates a “chilling effect” on negotiated settlement as the two parties tend to proffer extreme offers and assume the arbitrator will ultimately come to some middle ground in his or her award—something that can not occur in the “either-or” format of FOA.<sup>11</sup> Stevens further believed that parties would opt for settlement because in the FOA setting, as a general rule, neither side is given an indication on how the arbitrator will react to their final offers. FOA, wrote Stevens, “generates just the kind of uncertainty . . . that is well calculated to . . . compel [the parties] to seek security in agreement.”<sup>12</sup>

But what about situations when parties cannot reach settlement? Proponents argue that despite the arbitrator’s lack of flexibility, the offers on the table would still lead to a fair result. FOA achieves this goal by nudging the parties toward their most reasonable offer. The reason: To do otherwise when the arbitrator can only pick one side or the other would mean a likely “loss” at the arbitrator’s table. According to FOA writer Henry Farber:

Given the FOA decision rule for selection of the award, each party faces a fundamental trade-off in setting its final offer: In submitting a more ‘reasonable’ final offer a party is gaining some probability that its offer will be selected while giving up some utility if its offers [sic] is selected.<sup>13</sup>

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9. See Stevens, *supra* note 8, at 46.

10. One early empirical study found that splitting the difference was a regular occurrence when the conventional format was used in compulsory bargaining. In research on fire fighter arbitrations across the United States, University of Wyoming academic Hoyt Wheeler found, among other results, that in 82.6% of all wage cases, the arbitrator chose a middle point in his or her award. See Hoyt N. Wheeler, *Is Compromise the Rule in Fire Fighter Arbitration?*, 29 ARB. J. 176, 179 (1974).

11. Clifford B. Donn, *Games Final-Offer Arbitrators Might Play*, 16 INDUS. REL. 306, 306-07 (1977).

12. See Stevens, *supra* note 8, at 46.

13. Henry S. Farber, *An Analysis of Final-Offer Arbitration*, 24 J. CONFLICT RESOL. 683, 685

Or, as Stevens put it: “[E]ach party may assume that the arbitrator will reject an ‘exaggerated’ position in favor of an opponent’s more moderate claim.”<sup>14</sup>

The initial reaction to FOA from negotiating professionals was not completely positive. “[T]he suggestion was not received with overwhelming enthusiasm by the labor-relations community – indeed, there was a tendency to write it off as an unworkable ‘gimmick,’” recounted Stevens a decade after his seminal paper.<sup>15</sup>

### *B. Structure and Historical Development*

Nevertheless, by the early 1970s states and municipalities as well as Major League Baseball had embraced the approach. In America’s public sector some states, such as 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.”<sup>16</sup> In these situations, the arbitrator was brought in if there was a negotiation breakdown and his or her award decision was binding.<sup>17</sup>

In instances where more than one issue was in dispute, two forms of FOA emerged during this period: *package* and *issue-by-issue* FOA.<sup>18</sup> In the *package* format, both parties submit an offer covering every issue in dispute, and the arbitrator chooses one complete package or the other.<sup>19</sup> *Issue-by-issue* allows the arbitrator more flexibility.<sup>20</sup> On each discreet issue the arbitrator must choose one side’s offer, but a compromise of awarding some issues to one side and others to the opposing side is permissible.<sup>21</sup>

The main criticism for *package* FOA is the extreme risk involved in the process.<sup>22</sup> It “prevents neutrals from imposing their view of desirable compromises upon the parties, a freedom they enjoy under issue-by-issue

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(1980).

14. See Stevens, *supra* note 8, at 46.

15. Carl Stevens, *Final Offer Arbitration*, 49 J. BUS. 574, 575 (1976) (hereinafter Stevens II).

16. Vincent P. Crawford, *Arbitration and Conflict Resolution in Labor-Management Bargaining*, 71 AM. ECON. REV. 205 (1981). Major League Baseball’s FOA history, which began in 1974, will be discussed *infra* Part II.

17. *Id.*

18. Farber, *supra* note 13, at 684.

19. Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT’L ARB. 383, 394 (1999).

20. *Id.*

21. *Id.*

22. *Id.* at 395.

FOA, conventional arbitration and litigation.”<sup>23</sup> *Issue-by-issue* suffers from the opposite effect:

[T]he arbitrator has flexibility to create a balanced award; as the number of issues in dispute increases, however, the characteristics of issue-by-issue FOA begin to mirror conventional arbitration. For example, if there are many issues in dispute, an arbitrator can balance the number decided in favor of each party; this potential dilutes the high settlement pressure FOA should impose on parties due to the neutral’s inability to compromise.<sup>24</sup>

Empirically, both formats had early success. In 1972, Michigan adopted the *issue-by-issue* approach and found an immediate increase in negotiated settlements.<sup>25</sup> 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.<sup>26</sup> In Wisconsin, where *package* FOA was implemented the total amount of imposed arbitration awards required was almost exactly the same as those in Michigan.<sup>27</sup> Despite the constraining nature of the *package* process, the reviews in Wisconsin were positive. “A widespread theoretical fear about final-offer-by-package has been that the arbitrator might be constrained to choose between two packages each of which was in some respect ‘outrageous.’ In practice in Wisconsin, the problem has not materialized,” Stevens concluded.<sup>28</sup> Since then, states have not necessarily shown a preference for one format or the other. In 2003, for example, Connecticut, Iowa and Michigan reportedly used *issue-by-issue* FOA, while Minnesota, Nevada, New Jersey and Wisconsin embraced *package* FOA in their public sector bargaining.<sup>29</sup>

Over time, a variety of FOA mechanisms and procedural elements have emerged. For example, using dual final offers is an option.<sup>30</sup> This facet is an attempt to minimize some of the risk involved in the FOA approach as each

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23. *Id.*

24. *Id.* at 394.

25. Stevens II, *supra* note 15, at 575.

26. *Id.*

27. *Id.*

28. *Id.*

29. Celen, *supra* note 5, at 3.

30. Meth, *supra* note 19, at 396.

party gives the arbitrator two options to pick from rather than one absolute, final choice.<sup>31</sup> Some studies on this strategy indicate that the additional information gleaned from two offers helps facilitate settlements.<sup>32</sup> Independent fact finders have also been employed by a number of U.S. state public sectors, including Iowa, Pennsylvania and Wisconsin.<sup>33</sup> Generally speaking, the fact-finder evaluates each party's proposals and, in some instances, offers recommendations to the arbitrator, which are considered along with the parties' final offers.<sup>34</sup> This feature can help some parties narrow their disputes and, in some cases, provide a clearer path to negotiated settlement.<sup>35</sup> On the negative side, one study found that the fact-finder tended to wield too much influence over an arbitrator's final decision, while other research suggested that the fact-finder's research led to parties amending their final offers.<sup>36</sup> This effectively moves FOA in the direction of conventional arbitration and removes a good deal of the calculated uncertainty Stevens claimed as a key reason for high incidents of negotiated settlement.<sup>37</sup>

Combining FOA with other forms of alternative dispute resolution mechanisms is also a technique used by some states in the United States. For instance, Wisconsin implemented a system in which the state's Labor and Industry Review Commission investigated the dispute, offered mediation if there was an impasse, and then used FOA as a final option.<sup>38</sup> In other states, there is the option of using various forms of FOA or conventional arbitration. 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.<sup>39</sup>

As is the case with conventional arbitration, various arbitration panel

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31. *Id.*

32. *Id.*

33. See IOWA CODE § 20.22 (2009); see PA. STAT. ANN. § 11-1123-A (2009); see also WIS. STAT. § 111.77 (2007-2008).

34. Meth, *supra* note 19, at 396.

35. *Id.*

36. *Id.* at 397.

37. *Id.* at 397.

38. WIS. STAT. § 111.77. It is worth noting that parties were permitted to use conventional arbitration as the final form of resolution, but FOA was the default.

39. See N.J. STAT. § 34:13A-16 (2008). The six options are: (1) conventional arbitration on all issues; (2) the arbitrator chooses between the single package final offer proffered by the employer and the employees' representative; (3) the arbitrator decides matters through issue-by-issue FOA; (4) the arbitrator chooses a single final package between three options: the employers' offer, the employees' offer and an independent fact-finder's offer; (5) issue-by-issue FOA is used with a choice being made for issue between offers from each party as well as a fact-finder; and (6) Package FOA is used for economic issues, while non-economic issues are decided issue-by-issue.

structures have been used in the FOA setting. Most FOA structures employ either a single arbitrator or a three-person panel.<sup>40</sup> In the single arbitrator set-up, the individual is neutral and without any relationship to either party. But three-arbitrator panels vary in their composition. For example, in Eugene, Oregon, FOA arbitration panels have been comprised of a representative for each party and a neutral chairperson.<sup>41</sup> Three-person panels have also been chosen based on expertise. In a FOA proceeding involving the United States's Internal Revenue Service and Apple Computer, each of the three arbitrators were picked because of their special knowledge of different aspects of the dispute.<sup>42</sup> Finally, three neutral arbitrators is a popular option and is, most notably, currently used in the Major League Baseball structure.<sup>43</sup>

### C. Criticisms

Despite being practically embraced throughout the United States, some theorists have expressed doubts about the value of FOA. As discussed above, supporters of this form of arbitration assert that FOA encourages a convergence of final offers between the two parties.<sup>44</sup> This should make it easier for the two sides to come to a negotiated settlement, as their offers should be closer together than in the conventional format. Also, if there is an imposed settlement, the losing parties should be somewhat pacified by the fact that the award should not differ too greatly from that party's offer. The contention that parties will make offers that tend to close the differential gap was supported by a number of theorists.<sup>45</sup> As one writer explained, the value of FOA is "[e]ach party believes that a concession increases the probability of the arbitrator choosing its offer as the award, a probability each party can know only with uncertainty. Each increment to that perceived probability increases a party's utility."<sup>46</sup>

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40. Meth, *supra* note 19, at 399.

41. Long, *supra* note 2, at 192.

42. *After Successful Use of Baseball Arbitration, Apple, IRS Both Declare Themselves Winners*, 11 ALTERNATIVES TO HIGH COST LITIG. Dec. 1993, at 163-4. The three arbitrators in the case were an economist, an industry expert, and a former federal judge. *Id.*

43. *Id.*

44. See Peter Feuille, *Final-Offer Arbitration and the Chilling Effect*, 14 INDUS. REL. 302, 305 (1975).

45. See SCOTT ROSNER & KENNETH SHROPSHIRE, *THE BUSINESS OF SPORT* 269-72, 271, 233 (2004); see generally *id.*; Craig A. Olson, *Does Final-Offer Arbitration Allow Bargaining that Conventional Arbitration Chills?*, 102 MONTHLY LAB. REV. 38 (1979); Paul D. Staudohar, *Results of Final-Offer Arbitration*, 18 CAL. MGMT. REV. 57 (1975); Henry S. Farber & Max H. Bazerman, *Divergent Expectations as a Cause of Disagreement in Bargaining: Evidence from a Comparison of Arbitration Schemes*, 104 Q. J. ECON. 99 (1989).

46. Donn, *supra* note 11, at 308.



But in what has been described as a “significant disagreement between labor relations theorists and those in the decision sciences,” decision scientists have written that FOA creates divergence in final offers.<sup>47</sup> After considering the mathematical properties of FOA, these academics found there is “little truth to this [convergence] theory: divergence, rather than convergence, of equilibrium strategies is the norm.”<sup>48</sup> Steven Brams’s and Samuel Merrill’s study of FOA concluded that the “optimal strategies [in FOA] not only preclude a median settlement but may well encourage sharply divergent bids antithetical to reconciliation.”<sup>49</sup> They argued that assuming both sides are risk-neutral in a zero-sum game, parties will try to stay within the realm of a reasonable offer, but will attempt to go to the maximum edge of that realm, leading to diverging, rather than converging, offers.

Although empirical data had indicated that convergence was often occurring, authors Jay Coleman, Kenneth Jennings and Frank McLaughlin (hereinafter “Coleman”) found little fault in the models supporting divergence. “It is difficult to make th[e] argument [of convergence] after considering the wide range of distributions investigated . . .,” wrote Coleman.<sup>50</sup> Ultimately, the explanation for the seemingly illogical movement toward convergence (despite modeling suggesting divergence should occur) had to do with the fact that parties can actually derive great value by submitting offers that do not meet their Nash equilibrium, concluded Coleman.<sup>51</sup> Usually, parties look to maximize their utility with their respective bids. In those instances, “the Nash Equilibrium set of final offers is that pair of final offers which has the property that neither party can achieve a higher expected utility by changing its final offer.”<sup>52</sup>

But Coleman contended that non-quantifiable factors beyond finding maximum utility usually play a role in a party’s offer.<sup>53</sup> In order to maximize those outside elements (such as good continuing relations with the opposing party), one side will likely alter their bid toward convergence.<sup>54</sup> This occurs, Coleman found, because the willingness to converge, even by a large amount,

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47. Jay B. Coleman et al., *Convergence or Divergence in Final-Offer Arbitration in Professional Baseball*, 32 INDUS. REL. 238, 239 (1993).

48. Steven J. Brams & Samuel Merrill III, *Equilibrium Strategies for Final-Offer Arbitration: There is No Median Convergence*, 29 MGMT. SCI. 927, 927 (1993).

49. *Id.* at 940.

50. Coleman, *supra* note 47, at 241.

51. *Id.*

52. Farber, *supra* note 13, at 690.

53. Coleman, *supra* note 47, at 240-44.

54. *Id.* at 244.

in order to maximize outside factors did very little to change ultimate costs.<sup>55</sup> “In other words, a considerable change in salary offer in the direction of the other party (i.e., convergence) has very small effects on the expected value of the ultimate award,” Coleman wrote.<sup>56</sup> “The primary implication is that this insensitivity leaves both parties the opportunity to indulge objectives other than EMV [expected monetary value] maximization.<sup>57</sup> In the presence of other sufficient objectives and motivations for the parties to settle, convergence of offers is the likely result.”<sup>58</sup>

#### *D. Summary (Part I)*

While the debate over convergence and divergence has not been definitively resolved, it has not stanchied the growth of FOA. From its roots in the United States, variations of FOA are now practiced in such countries as the United Kingdom, New Zealand and Canada.<sup>59</sup> Even with the fear of divergence, the value of high incidents of settlement trumps those concerns and has led to the growth of this form of arbitration throughout parts of the world.

### III. MAJOR LEAGUE BASEBALL AND FINAL-OFFER ARBITRATION

#### *A. Labor history*

It is unlikely that any organization or government entity draws on the FOA process more regularly than Major League Baseball.<sup>60</sup> To appreciate how

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55. *Id.*

56. *Id.* at 244.

57. *Id.*

58. *Id.* at 244-45. In Coleman’s modeling, he and his team found that offers that deviate from the optimal offer impact the expected monetary value, also known as expected cost, very little. *Id.* In one example, the authors found that for a mere 1.8% increase in expected cost, there could be a 20.6% increase in the offer. *Id.* Even a 10% increase in offer leads to a minuscule .4% increase in the cost. *Id.* “The bottom line is that each party . . . can increase or converge its offer with very little penalty by way of increased cost.” *Id.* at 244 (emphasis added).

59. See Simon Milner, *Dispute Deterrence: Evidence on Final-Offer Arbitration*, Centre for Economic Performance, London School of Economics and Political Science, 1992, available at <http://eprints.lse.ac.uk/21053/>; see generally Ian McAndrew, *Final-Offer Arbitration: New Zealand Variation*, 42 INDUS. RELATIONS 42, (2003); *Final Offer Arbitration for the Resolution of Rate and Service Disputes*, CANADIAN TRANSPORTATION AGENCY, available at <http://www.cta-otc.gc.ca/doc.php?sid=1134&lang=eng> (last visited Sept. 25, 2009) (discussing FOA in the Canada Transportation Act).

60. Major League Baseball will have more than one hundred individual filings annually for the FOA process. In contrast, the use of FOA in the municipal or state setting generally involves a single FOA proceeding for all the employees who fall under a specific collective bargaining agreement.

baseball's preeminent league came to use this process so regularly requires an understanding of the game's long and contentious labor history. Baseball's original professional circuit was the National League and it was formally founded in 1871.<sup>61</sup> During the early years, players would sign contracts with a team for a single season and then have the autonomy to switch clubs if a better deal was offered the following campaign.<sup>62</sup> But as baseball started to gain greater stature on the American sporting landscape, owners began to worry about this annual change in personnel.<sup>63</sup> They were concerned with two issues. The first was the increasing salaries players were obtaining on the open market.<sup>64</sup> The second was that team supporters, whose attendance at games represented each club's central source of income, were "becoming disenchanted with the home team because one or more favorites had been bid away by another franchise . . . ."<sup>65</sup>

To counteract this trend, team owners signed a "National Agreement" on September 30, 1879, which led to a process that became known as *the reserve system*.<sup>66</sup> This labor-controlling mechanism was first adopted in 1880 and allowed each club to prevent any opposing team from contracting with five protected players.<sup>67</sup> Owners enjoyed immediate results from this new system as "salaries decreased, profits increased, and the League operated more smoothly."<sup>68</sup> As a result, the league's potentates began extending the reserve system. In 1883, the number of players protected increased to eleven and, in 1887, that total was raised to fourteen.<sup>69</sup> Not long after, owners claimed the rights of all players on the roster, effectively meaning that every player was tied to their original team for life unless the club chose to sell or trade that individual to another team.<sup>70</sup> If a club did not want to send a player to another team, the athlete's only alternative was to quit baseball and find another job.<sup>71</sup>

In attempts to oppose the system, players formed unions as a way to collectively bargain for their rights. The first, created in 1885, was the

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Hence, the reason FOA is often referred to as *baseball arbitration*.

61. Chantel D. Carmouche, *Arbitration and Major League Baseball*, 1 J. AM. ARB. 91, 92 (2001).

62. DWORKIN, *supra* note 6, at 8-9.

63. *Id.* at 9.

64. *Id.*

65. *Id.*

66. Carmouche, *supra* note 61, at 92.

67. DWORKIN, *supra* note 6, at 10.

68. Carmouche, *supra* note 61, at 92.

69. DWORKIN, *supra* note 6, at 10.

70. Carmouche, *supra* note 61, at 93.

71. DWORKIN, *supra* note 6, at 10.

National Brotherhood of Professional Ball Players.<sup>72</sup> It aimed to address low wages and the reserve system, but did so with little success. In 1886, star player John Montgomery Ward leaked information about the group's intentions to fight the reserve system to the news media.<sup>73</sup> Owners reacted by threatening to blacklist unionized players. In response, the players attempted to form their own league, but ultimately failed as most of the athletes were unwilling to switch leagues after the owners met some player demands – such as a higher minimum salary – but retained the basic structure of the reserve system.<sup>74</sup> Similar efforts by players to organize occurred again with the League Protective Players' Association (1900-1902)<sup>75</sup> and the Baseball Players' Fraternity (1912-1918).<sup>76</sup> In both instances, the owners made some concessions to the players, but did not end the reserve system.<sup>77</sup>

Any hope that players had of convincing management to dismantle the restrictive system was seriously curtailed by the United States Supreme Court in 1922. In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, the United States's highest court held that established professional baseball was a "purely state affair[ ]," exempting the league from antitrust law, which required interstate commerce.<sup>78</sup> This decision implicitly affirmed the teams' right to use the reserve system.<sup>79</sup> Despite this ruling, a lawyer named Robert Murphy made yet another effort to overcome the reserve system when he set up a new players union, the American Baseball Guild, in 1946.<sup>80</sup> He attempted to convince players to strike rather than suffer through a system that effectively made them indentured servants. His efforts failed.<sup>81</sup> Then, less than a decade later, the

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72. *Id.* at 11.

73. *Id.*

74. DWORKIN, *supra* note 6, at 12.

75. *Id.* 12-15.

76. *Id.* 15-17.

77. *Id.* at 12-17. In both cases, rival leagues saw the player unrest as an opportunity to compete against the established National League. In the first instance, the National League combined with the opposing American League to form a two-league structure that still exists today as the Major Leagues. In the second situation, a rival Federal League failed.

78. *See Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922).

79. *See Carmouche, supra* note 61, at 95. The plaintiffs, a nascent Baltimore team from the fledgling Federal League trying to become an alternative to the Major Leagues, had argued that the reserve system was part of the Major League's violation of the Sherman Antitrust Act. The Supreme Court did not support this contention. *See Fed. Baseball Club of Baltimore*, 259 U.S. at 208.

80. DWORKIN, *supra* note 6, at 17-20.

81. *Id.* at 17-20. On June 7, 1946, Murphy demanded recognition for his union and collective bargaining rights, claiming that if the owners did not accede, the Pittsburgh Pirates team would strike.

United States Supreme Court reinforced the players' labor woes with its 1953 decision *Toolson v. New York Yankees, Inc.*, which upheld management's right to enforce a reserve system.<sup>82</sup> Finally, in 1972, the Court decided yet again not to overturn the owners' monopolistic ability to control player movements in *Flood v. Kuhn*.<sup>83</sup> According to one critique, the court upheld the system, which was artificially depressing salaries by closing off the marketplace to players, because "too many long-term commitments had been based on the assumption of baseball's exemption [from antitrust law] to overturn it."<sup>84</sup>

### *B. Introduction of Arbitration*

This brief history gives some sense of the enduring worker-management acrimony in baseball. Nevertheless, the concept of arbitration was long discussed between the two sides—albeit with labor and management having very different concepts of what that process truly entailed.

The notion of arbitration in baseball was first suggested in the nineteenth century, when a council of team owners designated to administer league policies was referred to as its "board of arbitration."<sup>85</sup> But this board was not constructed to serve as a neutral. Rather, it was merely management's representative group. In 1908, a player named Tommy Leach proposed a form of arbitration more in line with today's notion of the process.<sup>86</sup> To resolve a salary dispute with his club, the Pittsburgh Pirates, Leach suggested that three arbitrators from the local community consider the issue.<sup>87</sup> The panel would include one civic leader chosen by Leach, another picked by the team and a third selected by the other two arbitrators.<sup>88</sup> Pirates owner Barney Dreyfuss rejected the proposal and gave Leach an ultimatum: accept the club's offer or leave baseball.<sup>89</sup> Leach accepted.<sup>90</sup>

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*Id.* In the end, the players voted 20-16 to strike, but a two-thirds majority was necessary and so the strike did not commence. *Id.* This event crushed Murphy's credibility and the union quickly faded away.

82. See *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953). Player George Toolson argued that the reserve system was a restraint of trade under U.S. federal antitrust law, but the Supreme Court held that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Id.*

83. See *Flood v. Kuhn*, 407 U.S. 258, 284 (1972).

84. STEFAN SZYMANSKI & ANDREW ZIMBALIST, NATIONAL PASTIME: HOW AMERICANS PLAY BASEBALL AND THE REST OF THE WORLD PLAYS SOCCER 95 (2005).

85. ROGER I. ABRAMS, THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION 145-46 (2000).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

The concept of arbitration reemerged in 1952 when, during testimony before a United States Congressional subcommittee, baseball's commissioner A.B. "Happy" Chandler endorsed a player's right to request this type of proceeding in difficult salary disputes.<sup>91</sup> But the owners, who had much success keeping salary costs down thanks to the reserve system, remained steadfastly opposed to giving the players any sort of formalized mechanism for neutrally settling disputes. "This is a very difficult situation for any arbitrator because . . . [t]here are lots of things players do to help win games that are not reflected in averages, and to see and know what [a player] does you must be there and observe it," argued Charles Feeney, who would serve as the president of the National League from 1969 to 1986.<sup>92</sup> In other words, baseball's management was not going to engage in the arbitration process unless it had to do so.

That pressure finally came in the form of Marvin Miller.<sup>93</sup> In 1966, Miller left his position as chief economist for the United States' third-largest union, the United Steelworkers of America, to become the executive director of the Major League Players Association (MLBPA).<sup>94</sup> Although the MLBPA union was established in 1954, it was not until Miller assumed the organization's top role that true negotiations commenced between labor and management.<sup>95</sup> In 1968, he brokered baseball's first basic collective bargaining agreement.<sup>96</sup> Then, two years later, Miller was able to secure the use of an impartial arbitrator to settle numerous forms of disputes between baseball's labor and management.<sup>97</sup> After the players came out on the losing side of the *Flood v. Kuhn* decision, Miller believed arbitration would be an

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90. *Id.*

91. James B. Dworkin, *Final Offer Salary Arbitration (FOSA) - a.k.a. Franchise Owners' Self Annihilation*, in *Stee-Rike Four! What's Wrong with the Business of Baseball?* 73-74, 75 (Daniel R. Marburger ed., Praeger Publishers, 1997).

92. DWORKIN, *supra* note 6, at 142.

93. MARVIN MILLER, *A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF BASEBALL'S NEW DEAL* 239 (1991).

94. *Id.* at 19-20.

95. GEORGE J. MITCHELL, *REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES* 31 (2007), available at [http://graphics8.nytimes.com/packages/pdf/sports/mitchell\\_report\\_20071213.pdf](http://graphics8.nytimes.com/packages/pdf/sports/mitchell_report_20071213.pdf).

96. *Major League Baseball Players' Association: Frequently Asked Questions*, MLBPLAYERS.MLB.COM, <http://mlbplayers.mlb.com/pa/info/faq.jsp#cba> (last visited Sept. 23, 2009).

97. MILLER, *supra* note 93, at 239; ALBERT T. POWERS, *THE BUSINESS OF BASEBALL* 175 (2003).

indispensable tool for slowly doing away with the reserve system.<sup>98</sup> “With impartial arbitration in effect, we could argue the meaning and interpretation of a contract provision,” Miller wrote in his autobiography.<sup>99</sup> “It was only a matter of time, I felt, before we could test whether a club’s right of renewal of a contract lasted forever.”<sup>100</sup> Indeed, arbitration became a key component in settling player grievances. But tensions continued to intensify and, in 1972, Miller was able to mobilize players in a manner previous labor leaders were unable: he organized a strike.<sup>101</sup> The thirteen-day works stoppage led to a number of changes, including, most notably, the institution of FOA for salary disputes.<sup>102</sup>

### *C. Choosing Final-Offer Arbitration*

Despite the reluctance of baseball executives like Feeney to implement salary arbitration, the owners actually first proposed the use of this process in the negotiations that followed the 1972 strike.<sup>103</sup> Quite possibly, the owners sensed that in order to maintain the reserve system, some form of neutral wage determination system was necessary. Or, they wanted to engender some goodwill with labor. The comments of Bill Veeck, an owner at the time, suggest this second assertion might be accurate. Veeck said:

I think [salary arbitration] would be a splendid idea . . . I think that it would create a little better relationship. Just the right to have an arbitration, the right not to be feeling that you are singly, as an athlete, negotiating against the wealth of a ball club, I think it would improve relationships.<sup>104</sup>

From the players’ perspective, salary arbitration was essential in the quest for fair wages. “The difference between ballplayers being required to accept

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98. MILLER, *supra* note 93, at 239.

99. *Id.* at 240.

100. *Id.*

101. *Id.* at 203.

102. DWORKIN, *supra* note 6, at 33, 80. In 1975, Miller’s goal to use arbitration to cripple the reserve system was realized. MILLER, *supra* note 93, at 241. Miller’s MLBPA filed a grievance on behalf of two players named Andy Messersmith and David McNally, claiming that they should not be bound to teams in perpetuity. *Id.* at 244. On December 23, 1975, arbitrator Peter Seitz ruled in favor of the players. As a result, baseball began a new era of *free agency* – a process in which players could accept offers from any team in the marketplace once their current contract expired. *Id.* at 255. Yet, even with the advent of free agency, baseball retained the FOA system. *Id.* at 251-54.

103. Dworkin, *supra* note 91, at 75.

104. DWORKIN, *supra* note 6, at 142.

whatever a club offered him, as had been the case almost from the beginning of professional baseball, and the new system of salary arbitration was like the difference between dictatorship and democracy,” Miller wrote.<sup>105</sup> “Salary arbitration has been a major factor in eliminating gross inequities in salary structures from club to club (and sometimes on the same club) . . . .”<sup>106</sup>

But why did the two sides choose FOA rather than conventional arbitration? The literature is scant with explicit explanations.<sup>107</sup> To be sure, the decision to use FOA was not taken lightly. The owners offered salary arbitration to the union on February 8, 1973, but the parties negotiated for three weeks on the format and structure of the arbitration.<sup>108</sup> Surely, Miller, who was an expert in the arbitration process, had a strong say in the choice of FOA. In his autobiography, Miller offered some insight into why he would opt for FOA over conventional arbitration. A year before labor and management chose FOA, an arbitrator named Lew Gill came to a compromise decision in a conventional arbitration case that infuriated Miller.<sup>109</sup> “Gill, like many ‘neutral’ arbitrators, had a tendency to ‘split the baby,’ trying, if he could, to placate both sides,” Miller wrote.<sup>110</sup> “I carefully cited chapter and verse on past baby-splitting decisions of his and stated that this time he had gone too far.”<sup>111</sup> Miller’s belief in this common criticism of conventional arbitration – splitting the difference or “splitting the baby,” as Miller described it – indicates that he would have certainly been open to FOA if not an outright proponent.

#### *D. Structure of Major League Baseball’s Final-Offer Arbitration*

Beyond Miller’s distaste for midpoint awards, an investigation of the unique elements of baseball’s FOA system suggests that it was unlikely the only reason for its implementation. The mechanisms of baseball’s FOA are characterized by very narrow and explicit rules for scope, timing, and award criteria. It is a specially designed system that takes into account the uniqueness of collective negotiations with athletes and vigorously attempts to

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105. MILLER, *supra* note 93, at 109.

106. *Id.*

107. DWORKIN, *supra* note 6, at 145. James B. Dworkin, an expert on the history of Major League Baseball’s salary arbitration, was so devoid of a specific reason that he mustered this rudimentary justification, “[o]ne simple answer in the baseball arena is that [FOA] is the technique that the two parties agreed upon.” *Id.*

108. *Id.* at 143.

109. MILLER, *supra* note 93, at 139.

110. *Id.* at 139-40.

111. *Id.* at 140.



push parties toward negotiated settlement.

Baseball's form of FOA has been considered "a hybrid" between *issue* and *package* FOA.<sup>112</sup> Each arbitration considers a single issue—a player's salary amount—but "entails the high degree of risk commonly associated with the package system" as the single-issue approach prevents an arbitrator from crafting issue-by-issue compromises.<sup>113</sup> Baseball's basic agreement restricts the type of award players can seek via FOA to single-year contacts and the judgments are limited to players' wages.<sup>114</sup> If a player wants to negotiate a multi-season agreement with benefits beyond simple salary, he will be unable to do so if he opts for FOA.<sup>115</sup> Therefore, a player cannot use this process to negotiate such ancillary rights as a no-trade clause,<sup>116</sup> bonuses based on performance, or additional tickets for family members or special travel accommodations if he chooses to use this process.<sup>117</sup> As a result, settlement serves as the only "means of preserving any number of potential benefits that may be negotiated outside of arbitration."<sup>118</sup> In total, the use of a single issue allows the parties to keep the process simple and streamlined.<sup>119</sup> This keeps costs down as neither side must prepare for a wide array of issues.<sup>120</sup> At the same time, the "either-or" decision on the issue of salary maintains FOA's gambling element, which has proved to encourage settlements.<sup>121</sup>

Baseball's system also differs greatly from the other typical FOA systems in that, despite the process being set up as part of a collective bargaining agreement, each player eligible can request his own hearing. In typical FOA settings in the United States, negotiators will consider salary disputes for the whole collective bargaining unit in a single hearing. "Workers who face the same day-to-day working conditions, receive generally the same level of compensation, and bring to the workplace a similar set of skills and

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112. Spencer B. Gordon, *Final Offer Arbitration in the New Era of Major League Baseball* 13 (Bepress Legal Series, Working Paper No. 1326, 2006), available at <http://law.bepress.com/expresso/eps/1326/>.

113. *Id.*

114. *Id.* at 12.

115. *Id.*

116. In professional baseball, teams generally have the right to assign the contract of a player to another team in return for other personnel, financial compensation, or a combination of the two. This is done in the form of a "trade." Players can negotiate the right not to be sent to another club without their express agreement through a "no-trade" clause in their contracts.

117. Gordon, *supra* note 112, at 12.

118. *Id.*

119. *Id.* at 16.

120. *Id.*

121. *Id.* at 11.

experiences would be placed together in the same bargaining unit,” wrote baseball arbitrator Roger Abrams.<sup>122</sup> Abrams continued:

This is a unit a union could represent effectively in bargaining since its members have similar interests, expectations, and aspirations. In most collective bargaining settings, a union tries to maximize the interests of all its members . . . [a professional sports] bargaining unit is so diverse in terms of individual earning potential as to present an impossible challenge to any labor organization.<sup>123</sup>

Thus, despite similar working conditions and hours, each individual player is allowed to negotiate separately because “[i]n baseball, the potential market value and resulting salaries of players within the bargaining unit vary widely.”<sup>124</sup>

To counterbalance the time-consuming nature of allowing multiple hearings, baseball’s salary arbitration system is generally utilized by only a select group of young-veteran Major League Baseball players.<sup>125</sup> While a very small number of older players are offered salary arbitration each year, very few accept.<sup>126</sup> As a result, baseball’s arbitration system is mainly geared toward players with three to less than six years of Major League service time, along with a select group of players with less than three years but more than two years of experience.<sup>127</sup> From a logistical standpoint, maintaining a small

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122. ABRAMS, *supra* note 85, at 91.

123. *Id.*

124. *Id.* at 90.

125. See generally David J. Faurot & Stephen McAllister, *Salary Arbitration and Pre-Arbitration Negotiation in Major League Baseball*, 45 INDUS. & LAB. REL. REV. 697 (1992) (noting that any player’s salary may be decided by FOA if both the player and his club consent to the procedure, but the process is essentially only used by those in the select class discussed in this paragraph).

126. Mike Scarr, *24 Players Offered Salary Arbitration*, MLB.COM, Dec 12, 2008, [http://mlb.mlb.com/news/article.jsp?ymd=20081202&content\\_id=3698166&vkey=hotstove2008&fext=.jsp](http://mlb.mlb.com/news/article.jsp?ymd=20081202&content_id=3698166&vkey=hotstove2008&fext=.jsp). In 2008, for example, twenty-four older veterans were offered salary arbitration, only two accepted.

127. See generally 2007-11 MLB BASIC AGREEMENT, available at [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf). An athlete in what is called the “super two” category becomes eligible if, “(a) he has accumulated at least 86 days of service during the immediately preceding season; and (b) he ranks in the top seventeen (17%) (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.” *Id.*; *Major League Baseball Players’ Association* *supra* note 86; see generally Faurot, *supra* note 107, at 698. Throughout the history of collective bargaining in Major League Baseball, the size of the eligible FOA group has been a point of negotiation. Initially, all players with more than two seasons of experience, but less than six, were allowed to partake in baseball’s salary arbitration system. But, as

group of players that use arbitration makes it easier to complete all the individual hearings in a short period of time (see below for a discussion of FOA scheduling). From a negotiation perspective, ownership is able to retain the exclusive services of young experienced players, as athletes in this arbitration class are prohibited from negotiating with other teams without team consent, while the players have an opportunity to increase their salaries at a stage in their career when an otherwise monopolistic system would have prevented significant pay rises.

In terms of timing, the system is set up to put pressure on the parties to come to a quick settlement.<sup>128</sup> In most cases, it is the clubs' decision whether to offer arbitration or instead opt to release a player from its exclusive control, allowing him to be a *free agent* and negotiate with any team.<sup>129</sup> Clubs are required to notify players of their plans to offer arbitration between January 2 and January 15 of the year in which the player's salary is to be determined.<sup>130</sup> Within three days after a notice of submission for arbitration has been made, the parties must exchange final salary figures.<sup>131</sup> Arbitration hearings are then set for "as soon as possible after submission and, to the extent practicable . . . [between] February 1 and February 20."<sup>132</sup> The short period between the exchange of figures and potential hearing dates adds a time pressure component for the parties to settle. Also, as the baseball season runs from preseason training in late February through a postseason that ends in late October, the window to conclude all arbitrations is small, in order to assure that all cases are completed during the offseason. By doing so, it prevents any distractions in play.

When cases do go to arbitration, they are decided by an arbitration panel comprised of three neutrals.<sup>133</sup> Contractually, the players and owners are expected to jointly agree on the list of arbitrators who will be called upon to hear cases in a given year.<sup>134</sup> In years when the parties cannot agree on a roster of arbitrators, they request a list of potential candidates from the American Arbitration Association, and the two sides will alternately strike

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part of a strike settlement in 1985, the three-year minimum was established. Since then, the "super two" group has been added to the class. See generally Faurot, *supra* note 125, at 698.

128. See Meth, *supra* note 19, at 392-93.

129. 2007-11 MLB BASIC AGREEMENT, *supra* note 127, at 16.

130. *Id.* at 15.

131. *Id.*

132. *Id.* at 16-17.

133. *Id.*; see generally Meth, *supra* note 19, at 400-01. While baseball previously employed a single arbitrator to hear cases, a three-member panel system was set up in 2000. *Id.* at 400.

134. *Id.* at 401.

names until they settle on appropriate arbitrators.<sup>135</sup> A final pool of approximately fifteen arbitrators is chosen.<sup>136</sup> Nearly every arbitrator picked is a member of the National Academy of Arbitrators and most are veterans of the process.<sup>137</sup>

When a case cannot be settled and requires a hearing, the arbitrators are given a very specific set of six areas to consider when deciding the dispute. The criteria are:

- 1.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)";
- 2.the length and consistency of his career contribution";
- 3.the record of the Player's past compensation";
- 4.comparative baseball salaries";
- 5.the existence of any physical or mental defects on the part of the Player; and
- 6.the recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance.<sup>138</sup>

The parties are allowed to proffer any evidence that they deem relevant to these areas and the arbitrators are instructed when considering salary comparables to give specific attention to players who have a similar amount of service experience.<sup>139</sup>

In order to narrow further the scope of argument in the arbitration, the parties are prohibited from providing evidence in a number of additional areas. The financial position of both the player and the club cannot be considered; press comments, testimonials or other similar information about the performance of the team or player are barred; neither offers made by either party prior to arbitration nor the costs associated with the proceeding can be disclosed; and parties are not allowed to make salary comparisons between baseball players and individuals in other occupations such as wages of

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135. 2007-11 MLB BASIC AGREEMENT, *supra* note 127, at 17.

136. Farout, *supra* note 125, at 700.

137. Roger I. Abrams, *It's Time to Play the Baseball Salary Arbitration Game!*, HUFFINGTON POST, Feb. 9, 2009, available at [www.huffingtonpost.com/roger-i-abrams/its-time-to-play-the-base\\_b\\_163534.html](http://www.huffingtonpost.com/roger-i-abrams/its-time-to-play-the-base_b_163534.html).

138. 2007-11 MLB BASIC AGREEMENT, *supra* note 127, at 18-19.

139. *Id.*

competitors in other sports.<sup>140</sup> Many of these points are in place to keep the process streamlined. For example, the stipulation that neither party may introduce media accounts avoids an endless back-and-forth of opposing media clippings. As one veteran baseball salary arbitrator put it: “[O]nce the floodgates were opened to press accounts, there would be no stopping point . . . [p]ress comments tend to come in matching pairs . . . .”<sup>141</sup> As for preventing the introduction of comparable salaries outside the baseball profession, “[t]here is no way for baseball salary arbitrators to evaluate what the performances of these other entertainers contribute to their enterprises, since the arbitrators face enough of a challenge trying to measure a baseball player’s contribution, especially because the critical permissible factors tend to point in different directions.”<sup>142</sup>

With the parameters of the arbitration highly specified, the process occurs in a very short timeframe. At the hearing, each party receives one hour to offer its evidence and an additional one-half hour to rebut any opposing claims.<sup>143</sup> These proceedings are contractually private and confidential.<sup>144</sup> At the conclusion of the hearing, the arbitrators are given no more than 24 hours to pick either the player’s or the club’s offer.<sup>145</sup> The panel is prohibited from disclosing either any detailed opinion on the case or an explanation on how the panel members voted.<sup>146</sup> The arbitrators simply provide the parties with a one-year uniform player’s contract that has the winning salary figure included.<sup>147</sup>

In terms of how arbitrators make their decisions in the baseball salary environment, it has been suggested that they base their decisions on two factors: the criteria stated in the collective bargaining agreement and the potential of being removed the following year as an arbitrator if the parties are displeased with their decisions.<sup>148</sup> This second motivation means arbitrators attempt “to decide cases in the same manner as other surviving arbitrators [from previous years] . . . .”<sup>149</sup> The assumption is that beyond making adjustments for overall salary levels, arbitrators will look to choose a salary

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140. *Id.* at 19.

141. ABRAMS, *supra* note 85, at 65.

142. *Id.* at 64.

143. 2007-11 MLB BASIC AGREEMENT, *supra* note 127, at 17-18 (noting that the arbitrators can make additional time available if necessary).

144. *Id.*

145. *Id.* at 16.

146. *Id.* at 17.

147. *Id.*

148. Farout, *supra* note 125, at 700.

149. *Id.*

comparable to those picked previously by surviving arbitrators because those decisions were presumably palatable to the players and management.<sup>150</sup> Still, according to experienced arbitrator Roger Abrams, the decision-making is not calculated on self-preservation. "The arbitration panel . . . looks at the final offer and demand to find the 'break point,' the mid-point between the final positions[.]" Abrams wrote.<sup>151</sup> "If [the player] is worth more, even by one dollar, the panel should vote to give him what he demanded. If he is worth less, again even by one dollar, it should vote for the club's offer."<sup>152</sup> If, in fact, these decisions were pre-meditated, baseball arbitration panels should generally decide unanimously on the winner based on past decisions.<sup>153</sup> But Abrams said that the arbitrators "review the glossy briefs the [player's] agent and club submit [and then] argue among themselves."<sup>154</sup> All this indicates that the arbitrators are driven by the first factor: the criteria outlined in the collective bargaining agreement.

*E. Assessing Major League Baseball's Final-Offer Arbitration Structure and Results*

The architecture of baseball's FOA strongly suggests that its designers focused on negotiated settlement as their number one priority and, if that could not occur, wanted as speedy a resolution as possible through third-party determination. In an effort to force mutual agreement, the group of players, the scope of award (just salary), and the criteria for arbitrator decision-making were all very limited. As a result, the process is simplified to avoid the burdensome task of compromising on a litany of issues or contemplating a vast variety of vague criteria. For the owners, the small group that generally employs salary arbitration helps prevent management from becoming overwhelmed by juggling too many cases, again a facet that makes it easier to focus in on the task of settlement. For the players, settlement is a valuable inducement because if an eligible athlete wants anything more than a one-year basic contract, he must negotiate through settlement, as baseball's FOA only provides for nothing else. For both parties, the fact that players bargain individually provides a final reason to settle. One baseball FOA writer explained,

[T]eams prefer to avoid arbitration hearings in which they

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150. *Id.*

151. *See generally* ABRAMS, *supra* note 85.

152. *Id.*

153. *Id.*

154. *Id.*

may be forced to defend their proposals by insulting players and presenting arguments that emphasize a player's mental and physical shortcomings, limited contributions to the team in the past, club record since being a member of the team, or less than ideal public appeal . . . .<sup>155</sup>

In instances where negotiated settlement cannot be reached, the format also appears to have been set up to assure quick resolution.<sup>156</sup> The period between the exchange of offers and final determination is usually less than a month and the time period between a hearing and an award announcement is no longer than twenty-four hours.<sup>157</sup>

Why would baseball's FOA creators want to emphasize these outcomes? Clearly, more time could be spent on assuring that final awards are as accurate as possible based on a broader range of criteria. But baseball's system is constructed in a manner that identifies the uniqueness of salary negotiation in high-profile professional sports. This is evident in the decision to allow each athlete to file for arbitration individually, rather than as a group.<sup>158</sup> While no workers want to believe they are just a replaceable cog in a wheel, the individual right to bargain in baseball reflects how each player lacks a fungible quality. More than that, the pressure to settle and the speed with which arbitrations are resolved when settlement cannot be achieved, offers an inherent sports-related advantage to both labor and management.<sup>159</sup> Baseball players do not have long careers as the average Major League athlete lasts just 5.6 seasons.<sup>160</sup> In other professions careers may last decades, meaning that a long protracted negotiation might be worth the time lost plying one's trade. This generally will not be the case with players, who have a small window of fitness, youth, and heightened skill levels. As a result, the ability to resolve disputes quickly is valuable for the men on the field. For owners, shortening the process into the brief baseball offseason, between November and mid-February, protects teams from having to embark on a season without its complete roster of players.<sup>161</sup> Before salary arbitration, players would refuse to report to pre-season practice sessions in an effort to force a pay increase.

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155. Gordon, *supra* note 112, at 12.

156. *Id.* at 17.

157. *Id.* at 15.

158. *See id.* at 14.

159. *Id.* at 16.

160. *Average Major League Baseball Career 5.6 Years, Says New Study*, SCIENCEDAILY.COM, July 11, 2007, <http://www.sciencedaily.com/releases/2007/07/070709131254.htm>.

161. Gordon, *supra* note 112, at 16

This is not the case anymore. As one academic explains:

[i]n the context of its dispute resolution capacity, Final Offer Arbitration has proven to be a successful addition in Major League Baseball by establishing job-security for players, ensuring clubs are fully stocked with players under contract, providing monetary incentive for high player performance, and saving an incalculable amount of money by isolating and controlling grievances.<sup>162</sup>

If the primary unstated goal of baseball arbitration's creators has been to effectuate negotiated settlement, then they have succeeded mightily. According to one study of the first 23 years of baseball salary arbitration (1974-1996), 2,008 players filed for salary arbitration with 1,608 (80%) settling without the necessity of a hearing.<sup>163</sup> This trend appears to be increasing in recent years. For example, in 2009, 111 players filed for salary arbitration. Of that group, sixty-five settled before exchanging offers, and just three players needed an arbitration hearing to resolve their dispute.<sup>164</sup> In other words, more than ninety-seven percent of those who filed resolved their differences through negotiated settlement. "[G]ood faith negotiation does appear to occur" in baseball's arbitration process, one writer concluded, "what the figures seem to indicate is that final offer salary arbitration is encouraging parties to bargain in good faith and reach mutually acceptable settlements prior to the use of an outside arbitrator. In this regard, final offer arbitration has achieved its primary goal."<sup>165</sup>

Even if baseball arbitration achieves its intended purpose, there are still critics of the process. The strongest voice of protest comes from ownership. Between 1974 and 2009, owners have won fifty-seven percent of all cases that have gone to a hearing.<sup>166</sup> In fact, between 1997 and 2009, the players have only succeeded in more cases than the owners in a given year once.<sup>167</sup> So why does management grumble? "[T]he owners argue that the actual win-loss record of arbitration hearings is misleading because players are essentially in a

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162. *Id.* at 16-17.

163. Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 232 (1998).

164. Maury Brown, *MLB Salary Arbitration Vital Stats*, BIZOFBASEBALL.COM, Feb. 20, 2009, [http://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](http://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).

165. Conti, *supra* note 163, at 270-71.

166. Brown, *supra* note 164.

167. *Id.*



win-win situation,” according to one study.<sup>168</sup> “A vast majority of arbitration-eligible players who file, not just those who follow through with a hearing, see significant increases in their salaries.”<sup>169</sup> Indeed, the average increase in year-over-year salary for the 111 players who filed for arbitration in 2009 was 143%.<sup>170</sup> This rate of increase is not a new phenomenon. Between 1976 and 1996, the average arbitration awards skyrocketed from \$68,000 to \$2,300,000, representing a compound growth rate of twenty-three percent.<sup>171</sup> Even when a player loses his salary arbitration hearing it is incredibly rare to see a wage reduction from the previous year. Between 1974 and 1993, out of nearly 2,000 arbitration filings, there were only nine instances in which a player suffered a drop in his salary from the previous season.<sup>172</sup>

Still, this argument must be seen through the prism of baseball’s labor history and the timing in which players are generally eligible for FOA. In the period before collective bargaining and FOA, player salaries were widely described as being “artificially low” as a result of “owners having the luxury of being the only employer able to negotiate with [the] player.”<sup>173</sup> Under the FOA system, players and owners can now negotiate on equal footing, which presumably leads to wage figures that are, at the least, closer to fair market value.<sup>174</sup> In addition, players become eligible for FOA after approximately three seasons of Major League experience.<sup>175</sup> During those first three campaigns, most players start at a minimum wage and receive only small increases.<sup>176</sup> For example, pitcher Jonathan Papelbon received approximately \$1.5 million *total* in his first three seasons with the Boston Red Sox (an average of \$500,000 per year).<sup>177</sup> During each of those seasons (2006-2008), Papelbon was named an “All-Star,” which is a designation given to the sport’s very best players. Yet, during that period, Papelbon’s salary never came close to the league average, which ranged from \$2.87 million to \$3.15 million.<sup>178</sup> When the pitcher finally became eligible for FOA in 2008, his team was

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168. Conti, *supra* note 163, at 235.

169. Gordon, *supra* note 112, at 271.

170. Brown, *supra* note 164.

171. ROSNER, *supra* note 45, at 271.

172. *Id.*

173. *Id.*

174. *See id.* at 272.

175. *Id.*

176. *Id.*

177. *Jonathan Papelbon Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/p/papeljo01.shtml> (last visited Sept. 25, 2009).

178. *MLB Salaries*, CBSSPORTS.COM, <http://www.cbssports.com/mlb/salaries/avgsalaries> (last visited Sept. 25, 2009).

forced to deal on equal footing. As a result, the two sides agreed on a \$6.25 million contract for Papelbon for the 2009 season, an 806% raise over the previous year.<sup>179</sup> In other words, FOA often increases salaries to put them in line with other players who possess bargaining leverage. Also to the extent that salaries do increase through this system, it is contained to a relatively small percentage of baseball's overall playing population. Only twenty-five percent of players use the arbitration process.<sup>180</sup> Finally, there is nothing to suggest that the final-offer format (as opposed to conventional arbitration) specifically spurs higher salaries. Under conventional arbitration similar increases could be experienced, but one of the primary values of the FOA system—a speedy resolution usually through negotiated settlement—might not occur.

An extension of the burgeoning salary critique is that escalating wages place “small-market” teams at a disadvantage.<sup>181</sup> Proponents of this claim assert that “large-market” clubs spend excessively on free agent players and that arbitration salaries are “determined in part by the free agent salaries that large-market teams have paid for comparable players.”<sup>182</sup> Since arbitration criteria prevents teams from introducing evidence about their financial situation, small-market franchises cannot use explanations of limited cash flow to explain why they should not have to match the salaries large-market teams, which can over-step market value because of additional revenue. “Consequently, Final Offer Arbitration consistently imposes on poorer franchises an economic loss by forcing these small-market clubs to sign players for salaries exceeding these players’ value to the team,” the argument concluded.<sup>183</sup>

Still, this problem is mitigated to some extent by the fact that arbitrators are directed to focus on using players with similar service time as comparisons.<sup>184</sup> Players in the three- to under-six-year time frame are the

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179. Adam Kilgore, *Nothing Arbitrary About Papelbon's Deal: Reliever, Sox Settle for a Record \$6.25m*, THE BOSTON GLOBE, Jan. 21, 2009, available at, [http://www.boston.com/sports/baseball/redsox/articles/2009/01/21/nothing\\_arbitrary\\_about\\_papelbons\\_deal/](http://www.boston.com/sports/baseball/redsox/articles/2009/01/21/nothing_arbitrary_about_papelbons_deal/).

180. Gordon, *supra* note 112, at 19.

181. Vittorio Vella, *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, 318 (2006). “Small-market” teams are those in cities or regions where revenue streams from such outlets as television licensing, advertising sales and merchandising are not as readily abundant as those available in “large-market” cities such as New York and Los Angeles. *Id.*

182. *Id.* at 328.

183. *Id.*

184. 2007-11 MLB BASIC AGREEMENT, *supra* note 127, at 18. The arbitrators are directed to “give particular attention, for comparative salary purposes, to the contracts of Players with Major League service not exceeding one annual service group above the Player’s annual service group.” *Id.*

main models for comparison and athletes in that service time category would not be eligible for the big contracts offered by large-market teams through free agency. This limits the degree to which free agents should be considered as direct comparables. In addition, these small market teams are not bound to offer arbitration. A small market club fearful of a huge increase – the likes enjoyed by Jonathan Papelbon – could trade the athlete's rights to another team or the organization could simply decline to offer a contract, releasing the player from his obligation to the club. As for allowing sides to proffer evidence on the financial wherewithal of a club, it would certainly undermine the speedy nature of the arbitration process, which is a cornerstone reason for FOA. As one baseball expert put it the process of club valuation is "extremely complex and technical."<sup>185</sup> Arbitrators could weigh both sides of arguments on the financial positions of teams, but it would be a time-consuming process.

Finally, the debate over convergence and divergence that exists in FOA offers in the United States' public sector occurs in the baseball world as well.<sup>186</sup> As is the case outside of the baseball realm, academics have not come to a definitive conclusion as to whether FOA creates a convergence or divergence of offers.<sup>187</sup> Some have even argued that the process does not lead to either phenomenon occurring. "What one can surmise from the plethora [of data] . . . is that although the players' demands and the clubs' offers are not remarkably close, they are also not extremely divergent," concluded one study.<sup>188</sup> "One does not see a consistent effort on the part of the players to massively inflate their demands, nor is there a consistent level of low ball offers from the clubs."<sup>189</sup> Regardless, with baseball's very high settlement rate, the divergence or convergence of offers is usually only important as a starting point for negotiation.<sup>190</sup> Only on rare occasions—just three percent of the time in 2009—does it play a direct role in directly determining a salary

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It should be noted that some players in the arbitration pool preemptively sign long-term contracts beyond their sixth season, offering another element of comparison.

185. John Beamer, *Measuring and Managing the Value of Ballclubs (Part One)*, THE HARD BALL TIMES, Feb. 19, 2007, available at, <http://www.hardballtimes.com/main/article/measuring-managing-the-value-of-ballclubs-part-1/>.

186. Olson, *supra* note 45, at 38.

187. See generally John B. LaRocco, *Reforming Salary Arbitration*, in *Arbitration 1994, Controversy and Continuity: Proceedings of the 47th Annual Meeting, National Academy of Arbitrators* 213-14 (Gladys W. Gruenberg ed., 1994) (arguing that FOA has led to divergence); John L. Fize, *Play Ball: Baseball Arbitration After 20 Years*, 49 DISP. RESOL. J. 43 (1994) (showing that baseball's FOA has not led to divergence).

188. Conti, *supra* note 163, at 234.

189. *Id.*

190. See *id.*

through an arbitration award.<sup>191</sup>

#### *F. Summary (Part II)*

In 1974, baseball instituted FOA as a mechanism to help end years of bargaining disparity and intense acrimony between labor and management. Though no explicit explanation was given for the choice of the FOA format, an analysis of the architecture of the system indicates that the parties were searching for a structure that would strongly encourage negotiated settlement and, regardless of the form of resolution (settlement or an arbitration award), would lead to a quick conclusion of all disagreements. While there have been criticisms that the process has led to vast wage increases, FOA has successfully resulted in a high rate of settlement and has assured that all salary disputes are settled during the small window of time between the end of one season and the start of the next campaign.

### IV. EUROPEAN FOOTBALL AND ITS POTENTIAL USE OF FINAL-OFFER ARBITRATION

#### *A. Early Labor History*

Many cultures around the world can point to antiquity when discussing the roots of football, but England was the first in the modern era to organize the game as a sport. That country's Football Association (FA) was founded in 1863 and, under its code, Englishmen spread football throughout Europe.<sup>192</sup> As an early adopter of formalized play, England was also at the forefront of professionalizing the sport. In 1885, players began officially receiving wages for competition.<sup>193</sup> The salaries were meager with participants earning no more than ten schillings (approximately \$2.50) per contest, which could mean a full season's salary of \$75.<sup>194</sup>

With money at stake—clubs were also charging the public for the right to watch contests—came increasing concerns about maintaining a competitive balance. The main fear among organizers was that “[i]f the small teams simply could not match the crowds of the big ones (the clubs argued) the big teams would dominate the competition as a consequence of being able to pay the highest salaries . . . .”<sup>195</sup> Worried that a talent disparity could cause

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191. See Brown, *supra* note 164.

192. SZYMANSKI, *supra* note 84, at 50-55.

193. *Id.* at 101.

194. *Id.* at 101-02.

195. David McArdle, *One Hundred Years of Servitude: Contractual Conflict in English*

spectators to lose interest in the nascent sport, officials placed restrictions on the ability of richer clubs to lure top talent from smaller teams.<sup>196</sup> A *retain-and-transfer system* was instituted for the 1893-94 season. This system required a player “to be registered with the club he intended playing for and once he registered, he could play for no other club” unless his original team consented to the transfer of the athlete.<sup>197</sup> In 1895, the first recognized payment, known as a *transfer fee*, was paid by one club to another in order to secure the rights of a retained athlete.<sup>198</sup> Five years later, owners added to this restrictive system by applying a maximum wage for players. As one observer noted: “[the] maximum never went far above the earnings of a skilled manual laborer.”<sup>199</sup>

As other European countries began to professionalize their domestic football leagues this retain-and-transfer system was generally mirrored.<sup>200</sup> For example, when English players began going to continental Europe looking for work, England’s governing body secured an international agreement barring the transfer of athletes from one country to another without the permission of the association of the country where the departing player competed. “In practice . . . this permission was granted as long as the affected club was content with the terms of the [transfer] deal.”<sup>201</sup> In other words, retain-and-transfer became an international system. While deals could be more lucrative on the continent, this system kept salaries down throughout Europe. For instance, an Argentine player named Raimundo Orsi received a contract for approximately \$5,000 (plus a car) in 1928 to play for the Italian club Juventus.<sup>202</sup> Despite being a superstar, Orsi’s salary was very little in comparison to Major League Baseball’s most famous player of the era, George Herman (Babe) Ruth, who received \$70,000 that same year.<sup>203</sup>

Beginning in the early part of the twentieth century, players pressed the

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*Professional Football Before Bosman*, 2 WEB J. CURRENT LEGAL ISSUES, 2000, available at <http://webjcli.ncl.ac.uk/2000/issue2/mcardle2.html#Heading8>.

196. *Id.*

197. *Id.*

198. SZYMANSKI, *supra* note 84, at 102.

199. *Id.* at 101.

200. *Id.* at 105. Most of Europe’s biggest football play nations went to a professional format between 1925 and 1963. Some examples: Czechoslovakia (1925), Italy (1926), Spain (1929), France (1932), Netherlands (1954), and Germany (1963).

201. *Id.* at 106.

202. *Id.* at 105.

203. *Id.* at 99-101. Matters were even worse in England where Dixie Dean, who was one of that country’s top players, was earning just \$2000 in 1935.

courts to dismantle the retain-and-transfer process.<sup>204</sup> The first court case, involved a player named Lawrence Kingaby in 1912.<sup>205</sup> Kingaby had been sold through the transfer system from Clapton Orient to Aston Villa in England.<sup>206</sup> Kingaby did not meet Aston Villa's expectations and the team wanted to sell the player back to his original club. When Clapton refused and Villa could not find another buyer, Kingaby sought out another team. He played for a couple of clubs before signing with the Croydon Common Football Club. No transfer fee was paid by the tiny team just south of London. At this point Villa claimed that a payment was required in order for Kingaby to play. The court upheld Aston Villa's right to a transfer fee, in large part, because Kingaby's lawyers incorrectly argued the case. "Kingaby's lawyer made the mistake of attacking Aston Villa's motives rather than the inequity of the retain-and-transfer system as a whole. When the judge decided that there was no proof that Aston Villa had acted maliciously, the case was dismissed, without any consideration of the fairness of the system."<sup>207</sup>

Change to the system did not begin to take hold until a half-century after *Kingaby*. In England's 1963 high court decision *Eastham v. Newcastle United FC*, Justice Wilberforce ruled that the ability for clubs to retain the exclusive rights to a player after his contract had expired was illegal.<sup>208</sup> Wilberforce wrote in his opinion: "Any system that interfered with the player's freedom to seek other employment at a time when he was not actually being employed by another club would seem to me to operate substantially in restraint of trade."<sup>209</sup> As a result, "the club holding the player's registration had to offer a new contract at least as rewarding and of the same duration as the expired contract . . . in order to retain his registration."<sup>210</sup> But this ruling was limited in its impact as Wilberforce's decision only focused on the impropriety of the *retain* portion of the system, leaving the *transfer* elements in tact.<sup>211</sup> Players could now claim to be a free agent if a contract expired, but teams retained the right to receive a transfer fee even if an athlete was out-of-contract with a club.<sup>212</sup>

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204. *Id.* at 103.

205. *Id.* at 103-104.

206. *Id.* at 103.

207. *Id.* at 104.

208. *Id.* at 111.

209. *Eastham v. Newcastle United FC*, [1964] Ch. 139, 147.

210. STEPHEN DOBSON & JOHN GODDARD THE ECONOMICS OF FOOTBALL 92 (2001).

211. SZYMANSKI, *supra* note 84, at 112

212. *Id.*

*B. European Football's Modern Salary System*

In the years following the *Eastham* decision, the transfer system grew at an exponential rate. "By the 1960s, the amount of money a club could generate from selling a star player was substantial enough to make a difference to the financial future of a club," wrote one observer.<sup>213</sup> In 1960, the transfer fee record was \$290,000; a decade later that number was \$590,000. But under the surface, changes in the law indicated that the system could not continue unabated. The 1957 Treaty of Rome, which established the European Economic Community (EEC), enshrined into law the right to "freedom of movement" for Europeans to work throughout the European Union.<sup>214</sup> The Union of European Football Associations (UEFA), which was established in 1954 as football's governing body in Europe, initially ignored this requirement and allowed for teams to effectively veto a player's movement if the clubs were unhappy with the transfer fee.<sup>215</sup> In 1988, then-UEFA President Jacques George claimed that "[UEFA] can make up whatever rules we want as long as they are within Swiss laws, as we have nothing to do with the EEC."<sup>216</sup>

This sentiment was proved incorrect when a journeyman Belgian football player named Jean-Marc Bosman challenged the transfer system in the European court system. Bosman, whose contract with the Belgian club RFC Liege had expired, argued that his European rights allowed him to be transferred to the French team Dunkerque Liege without the new club being required to pay a transfer fee. The European Court of Justice found in favor of Bosman, ruling that transfer fees for out-of-contract players were illegal and that quota systems that limited the number of foreign European Union players in country's domestic leagues were prohibited.<sup>217</sup> Following the decision, the European Commission negotiated with UEFA and the Federation Internationale de Football Association (FIFA), which is international football's governing body, on a mutually acceptable transfer system. The 2001 pact allowed teams "to require a transfer fee for players up until the age of 23, as a reflection of any investment in a player's development."<sup>218</sup> Beyond that

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213. *Id.*

214. Originally this right was delineated in Article 48 of the Treaty, it is now Article 39 of the EU Treaty. See G. Pearson, *The Bosman Case, EU Law and The Transfer System*, FOOTBALL INDUSTRY GROUP, available at <http://www.liv.ac.uk/footballindustry/bosman.html>.

215. In addition, national football federations were allowed to limit the number of foreigners permitted to play in their league.

216. McArdle, *supra* note 195.

217. See *Belgian Football Association v. Bosman*, 1996 E.C.R. I-4921, ¶ 46; McArdle, *supra* note 195.

218. SZYMANSKI, *supra* note 84, at 114.

*protected period*, teams could only receive a transfer fee for players who were in-contract. As a result, the *Bosman* ruling gave free agent footballers unfettered movement.

The scope of *Bosman* was expanded in 2008 by the Court of Arbitration for Sport (CAS) in its decision *Heart of Midlothian v. Webster and Wigan Athletic*.<sup>219</sup> Player Andy Webster had one year remaining on his contract with the Scottish team Heart of Midlothian.<sup>220</sup> When the player and club could not come to terms on a new deal, Webster unilaterally terminated the final year of his pact. The court ruled this was permissible, but required Webster to pay damages equivalent to the amount left on the player's contract.<sup>221</sup> The upshot of this decision was football players (with the exception of 23-and-under players) could now leave a team while still in contract without transfer fees as long as they are willing to compensate their club for damages equal to the value of the time remaining on the contract.

The combination of the *Bosman* and *Webster* decisions gives players tremendous freedom in determining their future. If a football player is out-of-contract, he can change teams at only the cost of his salary. If the athlete is in-contract, he may still side-step the transfer fee and depart if he is willing to pay out what is left on his contract. Only players in the protected period (23-and-under) are limited. Despite these changes, there is no early indication that the transfer system is in peril. To date, the *Webster* decision has not become a mechanism for players looking to switch teams and players continue to work within the transfer system.

### C. European Football and Arbitration

Arbitration is not a new concept to European football. UEFA and affiliated clubs have long relied on conventional arbitration on issues ranging from deciding whether a non-independent state could be prevented membership to UEFA to tackling conflicts of interest in European club competitions when two clubs have the same ownership.<sup>222</sup> This commitment to arbitration was enshrined in a 2007 Memorandum of Understanding between UEFA and FIFPro (Division Europe), which is the representative organization for professional football players in Europe. The two parties agreed to be "supportive of the implementation of proper arbitration

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219. *Heart of Midlothian PLC v. Webster*, CAS 2007/A/1300, 10.

220. *Id.*

221. *Id.* at 151.

222. See *The Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, CAS 2002/O/410, 68; *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)*, CAS 98/200, 38.



procedures to deal with disputes in [football].”<sup>223</sup>

In terms of the transfer market and wage disputes, labor and management have expressed a similar affinity for arbitral resolution. “Subject to national legislation any dispute between the Club and the Player regarding employment contract shall be submitted to independent and impartial arbitration composed of equal representatives of each party (employer and employee) under National Association statutes, or to CAS.”<sup>224</sup> Moreover, since 2002, FIFA has used CAS as the body to decide all final appeals on the calculation of player transfer fees.<sup>225</sup>

A notable example of the domestic use of arbitration in the labor market is the Football League Appeals Committee (FLAC), which addresses transfer disputes in England under certain circumstances. At the start of the 1977-78 season, English football began allowing out-of-contract players to negotiate a switch to a new club.<sup>226</sup> This move could be done with one restrictive caveat: if the player’s former club offered the footballer a contract at a wage rate that was as good as or better than the final year of the athlete’s deal and those terms were rejected by the player then the former club was entitled to a fee.<sup>227</sup> If the two teams could not agree on a fee then the FLAC would arbitrate as an independent tribunal. Its awards focus solely on financial remuneration and can “take a variety of forms including a topping up payment triggered by a certain number of appearances with the new club, or the imposition of a share in the profits made in any subsequent transfer, as well as a straightforward fee.”<sup>228</sup> Following the *Bosman* decision, the scope of the FLAC has been narrowed. Since then, the former clubs of out-of-contract players are not eligible for compensation with one exception: those football players who remain in the protected 23-years-old-and-under category. In those situations, the FLAC serves as an arbitration panel for teams unable to agree on a compensation amount.<sup>229</sup>

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223. See Memorandum of Understanding between the Union des Associations Europeenes de Football (UEFA) and the Federation Internationale des Associations de Footballeurs Professionnels (FIFPro), 3 RIVISTA DI DIRITTO ED ECONOMIA DELLO SPORT 157, 160-166 (2007), available at [http://www.rdes.it/RDES\\_3\\_07\\_FIFA\\_FIFPRO.pdf](http://www.rdes.it/RDES_3_07_FIFA_FIFPRO.pdf).

224. *Id.* at 165.

225. Fédération Internationale de Football Association (FIFA), FIFA Statutes, art. 60, § 4 (2008), available at [http://www.fifa.com/mm/document/affederation/administration/01/09/75/14/fifa\\_statutes\\_072008\\_en.pdf](http://www.fifa.com/mm/document/affederation/administration/01/09/75/14/fifa_statutes_072008_en.pdf).

226. F. Carmichael & D. Thomas, *Bargaining in the Transfer Market: Theory and Evidence*, 25 APPLIED ECON. 1467, 1468 (1993).

227. *Id.* Although it was instituted more than a decade after the *Eastham* decision, this system appears to be put in place to adhere to that ruling.

228. *Id.*

229. See Rex Garton, *Paul Hayes Appeals Hearing Report*, SCUNTHORPE-UNITED.CO.UK,

While this decision-making process uses conventional arbitration rules, the procedural elements utilized by the FLAC board have a number of similarities to Major League Baseball's FOA system. The criteria are streamlined. Payments in these instances are not a "transfer fee" *per se*, but represent an amount of compensation for the training and development by the former team. As a result,

the decision of the Appeals Committee in cases like this is not in any way based upon the value or the amount that a club might expect to receive for a player as a 'transfer fee' and hence, the Committee makes it clear that, in arriving at its decision, it will not take into account transfer fees that have been agreed for comparable players between clubs in a free trade situation.<sup>230</sup>

What is considered is clearly delineated, including: the costs of developing the player through its academy or centre of excellence, the length of time with the former club, the performance of the player, the length of contract offered to the player by the former club and the extent of interest in the athlete by other teams.<sup>231</sup> As in baseball, hearings are very short. In the case of player Paul Hayes, whose fee for moving from Scunthorpe United to Barnsley was set by the FLAC in 2005, the proceedings and deliberations lasted just two hours combined.<sup>232</sup> The player met privately with the board first – a procedure that differs from Major League Baseball, which has the player present throughout – then each side was given a chance to present its case with the first presenter being given a brief rebuttal period.<sup>233</sup> One key difference with this process is that partisans are chosen to comprise the board. Unlike baseball's FOA where arbitrators are mutually agreed upon independents, the FLAC's four-person arbitration panels have a chairman and then nominees of the Institute of Football Management and Administration, the Professional Footballers' Association and the Football League. Regardless, the FLAC arbitration proceedings' similarities to baseball's FOA offer an instructive example of how in at least one location European football has embraced speedy and streamlining characteristics similar to baseball's process.

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<http://www.scunthorpe-united.co.uk/page/Announcements/0,,10442~709811,00.html#continue> (last visited Oct. 17, 2009).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

*D. Applying Final-Offer Arbitration to European Football Wage and Transfer Disputes*

The FLAC system is a valuable one in the context of this Article as it is one of the only – if not the only – European football arbitration system that actually contemplated the use of FOA in its proceedings. In 1987, FLAC chairman Sir John Wood instituted an experiment to see whether FOA could improve his committee's system.<sup>234</sup> He did this because, increasingly, parties were relying on arbitration rather than negotiated settlement to resolve disputes. In 1986, thirty-three of the forty-three cases of out-of-contract transfers ended up in arbitration – up from just eight of forty instances in 1978.<sup>235</sup> "The factual evidence before the FLAC showed in some cases little serious attempt at negotiation," Wood wrote.<sup>236</sup> As a result, in a "random number" of cases in 1987, the parties were asked to submit their formal offers and then submit what their offer would be under a FOA system.<sup>237</sup> The results of Wood's experiment showed that FOA "undoubtedly brings the figures much closer together."<sup>238</sup> Despite this conclusion, Wood said that gaps between offers "still remained substantial" and that differing of opinions on the players "would prevent the clubs, however reasonably they acted, [from] agreeing . . . [a] club in a lower Division with a young 'starlet' is bound to value higher than the senior club taking a player who to them must be a real risk . . . ."<sup>239</sup>

As this was just an experiment, it is impossible to know how many cases that went to an arbitration hearing would have been solved through negotiated settlement if the final offer bids were used and the potential of "either-or" was applied. Still, the results of Wood's test indicate that a FOA system could have had value. Furthermore, his concerns seem unfounded in light of what we know about the baseball system. Baseball owner and player acrimony is well-detailed, yet they have learned to bargain in good faith. To the extent that there cannot be an honest meeting of the minds, as Wood suggested, this may be a product of the criteria for arbitration. While the characteristics considered are detailed, it is possible that further fine-tuning could lead to an even greater gap closing between the two sides. One study of FLAC's awards from 1978-79 to 1990-91 found that selling teams tend to fare poorly in

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234. Sir John Wood, *Pendulum Arbitration: A Modest Experiment*, 19 INDUS REL. J. 244, 245 (1988).

235. *Id.*

236. *Id.*

237. *Id.* at. 246.

238. *Id.*

239. *Id.*

arbitrated decisions compared to buying clubs.<sup>240</sup> This could very well indicate that the panel's criteria for awards do not adequately insure bargaining on a level playing field. With some changes, FLAC might be an excellent candidate today for the use of FOA as a method for settlement. The similarities in many of its mechanisms to baseball's arbitration process suggest that FLAC could also enjoy similar results in the number of negotiated settlements with the addition of the "either-or" element to its arbitral decision-making.

Beyond the FLAC system, could FOA have broader reach in the European football system? There would certainly be hurdles to any prospective European FOA football system. The first might be cultural. FOA has not been particularly embraced in Europe's civil law nations. "[L]awyers from civil law countries tend to be more conservative when selecting their method of dispute resolution[;]" one observer wrote, "[t]he element of 'gambling' or 'betting' inherent to baseball arbitration may also have contributed to its slow reception in a more conservative legal environment."<sup>241</sup> In addition, in order to apply FOA on a pan-European basis, it would likely require a collective bargaining agreement between management and the players similar to the pact in baseball. Such an agreement is unlikely, according to academic Chuck Korr who has written on both baseball's labor issues and European football. "The legal stumbling block for applying U.S. regulations is the nature of football and its unions," Korr said in an interview.<sup>242</sup> "The sport goes across national boundaries and has the regulations of the EU to govern it. The union has a multiplicity of divisions, as well as numerous countries. Trying to craft any kind of agreement is all the more difficult." Indeed, UEFA and FIFPro claimed in their memo of understanding in 2007 that "in certain [European] countries arbitration on labour disputes is not allowed."<sup>243</sup>

Despite these limitations, FOA could still have value as an *ad hoc* tool or a domestic mechanism in the large majority of European countries that use arbitration. As the FLAC example indicated, FOA could be utilized in the transfer process. If the FLAC fine-tuned its criteria, added the FOA component and went to an independent panel of arbitrators it might serve as a model for such a system. One reason for this is that the nature of European

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240. Alan Speight & Dennis Thomas, *Football League Transfers: A Comparison of Negotiated Fees with Arbitration Settlements*, 4 APPLIED ECON. LETTERS 41, 41-44 (1997).

241. Christian Borris, *Final Offer Arbitration from a Civil Law Perspective: How to Play Baseball in Soccer Country*, 24 J. INT'L ARB. 307, 307 (2007).

242. Korr has written such books as *THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION (1960-1981)* and *WEST HAM UNITED: THE MAKING OF A FOOTBALL CLUB (1987)*. Interview with Chuck Korr, Professor Emeritus of History, University of Missouri - St. Louis (Jan. 11, 2009).

243. Memorandum of Understanding, *supra* note 223, at 165.

football transfer windows lends themselves well to the implementation of baseball's FOA. Under the current system, transfers in Europe must be completely conducted during two small windows: winter (generally January 1<sup>st</sup> through February 2<sup>nd</sup>) and off-season (July 1<sup>st</sup> through August 31<sup>st</sup>).<sup>244</sup> In order for a transfer to be successfully processed all elements of the deal – including the transfer fee and the negotiation of the player's salary with his new club – must be completed.<sup>245</sup> During every window there are stories of deals falling apart for one of three reasons: (1) although the player and team could agree on a salary, a transfer fee price could not be settled; (2) the transfer fee sum is set, but the player and new club cannot come to terms on wages; and (3) neither wages nor a transfer fee can be agreed upon. In all these situations, the short timeframe for the window puts pressure on the process.

In instances where deals are close (i.e. reasons one or two above), parties could submit to baseball's version of FOA as a method to resolve final differences. Baseball's FOA has proven successful in effectuating negotiated settlement at an extremely high rate and doing so in a very short timeframe. European football's transfer windows offer a similar timeframe for resolution. In order for such a process to work, it would require the parties to be committed to resolution. The parties would have to submit to FOA as a binding decision – hence the need for both sides to be sure that this was a transaction they wanted. For players in particular, this process may be an appealing option. For a football player who is very keen to switch clubs, he may be more willing to take the chance on his wages. Moreover, like baseball players, footballers recognize that their careers are short and may be willing to gamble financially to join a new more promising club – especially if there is ill-will with a player's previous team. Clubs may balk, but if the type of convergence illustrated in the FLAC study occurs and parties bargain in good faith, this may be a viable tool under certain circumstances.<sup>246</sup>

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244. Matt Majendie, *The Transfer Window Explained*, BBC SPORTS ONLINE, Dec. 18, 2002, <http://news.bbc.co.uk/sport1/hi/football/2563385.stm>. These dates represent the windows for the vast majority of major European football playing nations; some Nordic countries have slightly different dates.

245. *Id.* Note that the FLAC situation discussed earlier is slightly different as the fees were not considered "transfer fees" but compensation for the investment the former club put into a player. As a result, they do not have to be concluded during the tight transfer window.

246. In terms of player salaries one important element that would differ in European football from baseball FOA is that baseball players all sign one-year contracts in the FOA system. It is customary for players in the European football world to sign multiple year deals. The length of the contract would likely have to be agreed on before submitting the wage figure to arbitration. In addition, criteria would probably need to be set by UEFA and FIFPro so as to offer some sense beforehand of the elements that would be considered by an arbitration panel. Otherwise, the task of

*E. Summary (Part III)*

Like baseball, European football has its own history of owner-labor strife. In recent years, players have earned a tremendous amount of freedom of movement in the marketplace. Nevertheless, a transfer system, in which teams can sell players under contract, remains in place. While a comprehensive FOA apparatus like the one used in baseball is unlikely in European football, the use of FOA is possible. As one study of the FLAC system indicated, FOA could be used to bring negotiating terms closer together. FOA could certainly be used today by the FLAC. In the context of the transfer system, FOA could also be a valuable tool when parties have settled most financial issues but are stuck on one element – whether it is a transfer fee figure or a wage sum. As applied in baseball, its successful application under a tight deadline would prove useful during football's transfer windows.

## V. CONCLUSION

FOA is not for everybody. It requires good faith bargaining and a willingness to truly commit to negotiated settlement. In baseball, its use has had its detractors. In particular, the owners believe that arbitration inflates player salaries. Others counter that it compensates players who have been underpaid under the final vestiges of the reserve system. Whichever perspective is correct, it is clear that FOA has been a useful mechanism for getting teams and players to agree on salaries and to do so under a tight timeframe.

Could European football benefit from those advantages? The answer is probably yes. A common term used by the media during the transfer window is that a deal fell through – despite a transfer fee being agreed on – because the player “failed to agree personal terms.”<sup>247</sup> Surely, the use of FOA would prevent a good number of those instances. While the use of FOA would require a cultural shift for many, the influx of American ideas into Europe's most lucrative league, the English Premiership, in recent years may prove a harbinger that this kind of change is possible. After all, few would have thought a generation ago that Americans would serve as key owners for such

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detailing the rules for judgment would undermine the speedy nature of the process.

247. When “failed to agree personal terms” and “football” are typed in a google.com search, nearly 700 entries are returned. “*Failed to Agree to Personal Terms*”, GOOGLE.COM, <http://www.google.com/search?hl=en&client=firefox-a&rls=org.mozilla%3AenUS%3Aofficial&hs=dVw&q=failed+to+agree+to+personal+terms&aq=f&oq=&aqi=>. “*Football*”, GOOGLE.COM, <http://www.google.com/search?q=football&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a> (last visited Oct. 17, 2009);

historic clubs as Manchester United, Liverpool FC, and Arsenal.