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# **A NEW SOLUTION FOR SALARY DISPUTES: IMPLEMENTING SALARY ARBITRATION IN THE NATIONAL BASKETBALL ASSOCIATION**

SCOTT BUKSTEIN\*

This paper proposes that the National Basketball Association (NBA) adopt a salary arbitration system in specifically defined circumstances—for restricted free agents who either last played under a four-year rookie salary scale contract, or last played under a two-year or three-year contract as a second-round draft pick or undrafted free agent. Part I of this paper summarizes the use of salary arbitration in professional sport leagues. Part II of this paper provides an overview of the current arbitration procedures in the NBA. Part III of the paper outlines a proposed new NBA salary arbitration model. Part IV discusses some of the problems associated with the NBA's current restricted free agency and qualifying offer rules and explains how the proposed salary arbitration system would alleviate these problems. Part V provides a case study illustrating a potential trend in the NBA that supports the overall goals of the salary arbitration framework proposed in this paper. Part VI analyzes Major League Baseball's (MLB) salary arbitration process and how the proposed salary arbitration model for the NBA incorporates best practices from MLB. Part VII analyzes the National Hockey League's (NHL) salary arbitration process and how the proposed salary arbitration model for the NBA incorporates best practices from the National Hockey League. Part VIII details some of the potential practical drawbacks and limitations associated with the proposed NBA salary arbitration model. The paper concludes with a recap of the potential positive impact of implementing the proposed NBA salary arbitration framework.

## **I. INTRODUCTION: THE USE OF SALARY ARBITRATION IN PROFESSIONAL SPORT LEAGUES**

The NHL and MLB have utilized salary arbitration procedures to facilitate interest-based contract negotiations and a fair resolution to salary disputes.

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The NHL and MLB have implemented salary arbitration processes as a compromise between giving all players the right to free agency and keeping the option clause and reserve systems in place, which had allowed teams to unilaterally and perpetually renew a player's contract.<sup>1</sup> The MLB salary arbitration system has become a significant factor in driving player salaries upward, thus generating negative reaction amongst team owners because the system provides players with additional leverage in settling contract disputes. The MLB system has been in place since 1973, with very few changes to the basic structure and application of its final offer arbitration format, which is designed to facilitate solution-oriented negotiations and actually discourage an arbitration hearing.<sup>2</sup> The NHL salary arbitration system has been used since the 1970 season for players who meet certain criteria in order to provide players with an opportunity to settle salary disagreements with their teams by submitting cases to a third-party arbitrator.<sup>3</sup> The NBA has never used any type of salary arbitration.

All three leagues (MLB, NHL, and NBA) operate under a Collective Bargaining Agreement (CBA). All three leagues require that a player accumulate a certain amount of service before the player can become a free agent. Similar to the NHL, the NBA operates under a salary cap.<sup>4</sup> The National Football League (NFL) is the other main professional sports league that has a salary cap, and the NFL has never used salary arbitration. One line of reasoning is that there is a direct correlation between a league having a

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1. See Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 193 (2003).

2. See Ed Edmonds, *A Most Interesting Part of Baseball's Monetary Structure—Salary Arbitration in Its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1, 3 (2009); see also Aubut, *supra* note 1, at 193.

3. During the most recent collective bargaining negotiations, NHL owners unsuccessfully pushed for a final offer format to replace the current arbitration procedures because the owners felt that players and agents held too much control over the arbitration process and salaries were skyrocketing. See Stephen M. Yoost, Note, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485, 492 (2006).

4. NBA teams are allowed to exceed the salary cap, which was \$57,700,000 for the 2009–2010 season, and sign players with “exceptions to the salary cap,” outlined in Article VII, Section 6 of the league's CBA. The luxury tax threshold, which was \$69,920,000 for the 2009–2010 season, operates as the main mechanism that helps put a cap on team spending. However, teams are allowed to sign or trade for players whose salaries take the team over the luxury tax level. Teams with a payroll that exceeds the tax level must pay a one-dollar tax for each dollar that their team salary is over the luxury tax level, pursuant to the escrow and tax arrangement in Article VII, Section 12(f)(1) of the CBA, but this penalty has not deterred about twenty to thirty percent of the teams each season from having team payrolls that exceed the tax level. See Helmut Dietl, et al., *The Effect of Luxury Taxes on Competitive Balance, Club Profits, and Social Welfare in Sports Leagues*, 5 INT'L J. SPORT FIN. 41 (Aug. 2008); see also *Super Luxury Tax Breakdown*, ESPN (Oct. 21, 2008), [http://espn.go.com/blog/truehoop/post/\\_id/5498/super-luxury-tax-breakdown](http://espn.go.com/blog/truehoop/post/_id/5498/super-luxury-tax-breakdown).

salary cap and not allowing salary arbitration. Hence, if a league with a salary cap had an arbitration system, this would result in escalating salaries that greatly exceed the salary cap and substantially limit a team's ability to sign players.<sup>5</sup> While an argument can be made that the fact that both the NBA and NFL employ a salary cap and not a salary arbitration system implies that salary arbitration and the salary cap are mutually exclusive, if properly designed, both systems together can foster competitive balance and maintain economic stability for all teams.<sup>6</sup> This is particularly true given that the NHL recently implemented an "Upper Limit of the Payroll Range" provision in the league's new CBA that functions as a hard salary cap.<sup>7</sup>

The NBA is ideally suited to employ a salary arbitration mechanism in specifically defined circumstances—for restricted free agents who either last played under a four-year rookie salary scale contract, or last played under a two-year or three-year contract as a second-round pick or undrafted free agent.<sup>8</sup> Thus, players who are eligible for arbitration under the proposed NBA salary arbitration system discussed in this paper, which will be referred to as "NBA-ARB," will have played between two and four full seasons in the NBA.<sup>9</sup> The NBA would have a more limited classification of players who

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5. MLB, the professional sports league with the highest team payrolls and players' salaries, does not operate under a salary cap. However, MLB has a similar luxury tax arrangement where teams whose aggregate payroll exceeds a certain annually determined figure are taxed on the excess amount. Other arguments for why a league with a salary cap should not also have salary arbitration include the concern that teams that drafted multiple first-round picks in a season would not agree to arbitration with more than one of these marquee players because their salaries in arbitration would be too high and allowing arbitration would almost render the concept of restricted free agency meaningless.

6. See Aubut, *supra* note 1, at 193.

7. NHL teams cannot sign players above the upper limit salary cap, which was \$56,800,000 for the 2009–2010 season. See NATIONAL HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, art. 50, § 50.5 (2005) [hereinafter NHL CBA] for salary cap provisions. Prior to the resolution of the 2004–2005 lockout the NHL was the only major professional sports league that had no luxury tax, revenue sharing, salary cap, or salary floor.

8. Under Article I, Section 1(yy) of the NBA's CBA, a "[r]estricted [f]ree [a]gent" means a [v]eteran [f]ree [a]gent who is subject to a [t]eam's right of first refusal." NATIONAL BASKETBALL ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION, EFFECTIVE JULY 2005, art. I, § 1(yy) (2005) [hereinafter NBA CBA]. Under Article XI, Section 4(a)(i) and 4(b), any first-round pick who finished the fourth season of his rookie scale contract (which is for two guaranteed years and two team option years) and any veteran free agent who will have three or fewer years of service entering the off-season will be a restricted free agent if his prior team makes a qualifying offer to the player at any time from the day following the season (e.g., in mid-June after the NBA Finals) through June 30. If such a qualifying offer is made, then, on July 1, the player shall become a restricted free agent, subject to a right of first refusal in favor of the prior team. *Id.* art. XI, § 4(a)(i), (b).

9. An NBA rookie who signs two successive one-year contracts, or a one-year contract followed by a two-year contract, to start his career would also be eligible for arbitration under NBA-ARB after

could become arbitration-eligible than in MLB; a particular player could only be eligible for NBA-ARB twice compared to up to four times in baseball.<sup>10</sup>

Although the NFL does not have a salary arbitration system, the league's "Franchise Player" designations and "Transition Player" designations provide a CBA-formulated instrument that attempts to calculate a player's fair value for one season without having to appeal to a third-party neutral to determine what a player should be paid for that season. The designations mandate that teams must make a particular one-year required tender offer that is calculated based on the average of the top-five or top-ten player salaries at the designated player's relevant position.<sup>11</sup> If a player is designated a Franchise Player, he can only negotiate or sign a contract with his prior team. If a player is designated a Transition Player, he can sign a contract with a new team, but his prior team has the right of first refusal and would receive draft pick compensation in return for not matching the new team's offer.<sup>12</sup> The Franchise Player designations and Transition Player designations are the same value for every player at the relevant position. Thus, there is not an independent calculation of the fair-market value for a particular player—it is assumed to be the average of the annual salaries of the top five or ten highest paid players at the position.

The NBA does not currently have any similar procedure to calculate a player's fair-market value via a Franchise Player designation or Transition Player designation. An identical designation system to the one used in the NFL would likely not be effective in the NBA. This is because the average salary of the top-ten players at each position is extremely high, and the market value for the majority of restricted free agents would not reach this level.<sup>13</sup>

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the second or third season.

10. See MAJOR LEAGUE BASEBALL, BASIC AGREEMENT BETWEEN MAJOR LEAGUE BASEBALL AND THE MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION, EFFECTIVE DECEMBER 20, 2006, art. VI, § F(1), art. XX, § B(3) (2006) [hereinafter MLB CBA]. MLB arbitration applies to players with between three and six years of Major League service, "super twos" who rank in the top seventeen percent of the class of players with between two and three years of service and have accumulated eighty-six days of service in the immediately preceding season, and to free agents offered arbitration by the team that they played for in the prior year. MLB's arbitration system allows players who are eligible for arbitration under the above criteria to submit the issue of his salary to final and binding arbitration without the consent of the team.

11. NATIONAL FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, EFFECTIVE MARCH 8, 2006, art. XX, §§ 1-5 (2006) [hereinafter NFL CBA]. Franchise Player and Transition Player Designations allow a current team to designate a player who would otherwise be a free agent, which gives that team either sole negotiation rights or the right of first refusal on a contract that the player signs with another team.

12. *Id.*

13. By way of example, for the ten highest paid power forwards, the position in the NBA with the most money allocated to the top-ten players at a position, the average salary during the 2009-2010

Teams in the NBA do not have the option of offering any type of market value designation to keep a player's rights while locking the player into a set process for determining that one-year salary. Restricted free agents in the NBA find themselves in situations where their prior team will frequently make a low-ball offer and tell them to sign an offer sheet with a new team that the prior team will match.<sup>14</sup> Creating a formula to calculate Franchise Player or Transition Player designations for NBA players would not be as useful in encouraging negotiated settlements, which are reasonable to both the player and the team, as a comprehensive salary arbitration system. The proposed NBA-ARB system would have mechanisms to control arbitration awards so that salaries do not escalate out of control. Calculating a player's salary under NBA-ARB would be on an individualized case-by-case basis because creating a formula derived from the average or median salaries of the top-paid players at a particular position would not typically result in an NBA player being paid a fair-market value salary.<sup>15</sup>

## II. CURRENT USE OF GRIEVANCE ARBITRATION AND SYSTEM ARBITRATION IN THE NBA

The NBA has recognized the effectiveness of an arbitration process, as players in the NBA are subject to CBA rules providing for grievance arbitration. Arbitration in the NBA is not used during the actual salary negotiation process; rather, it is used after a player contract is agreed upon for disputes concerning the validity of a contract, involving the interpretation of or

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season was \$14,696,993, which would constitute 25.5% of the league's salary cap for each team (with a mandatory thirteen-man roster) and 21.0% of the league's luxury tax level for the 2009–2010 season. Additionally, the average salary for the top ten point guards was \$13,651,008, which constitutes 23.6% of the league's salary cap and 19.5% of the luxury tax. This is compared to NFL transition designations with a \$12,444,000 average salary for the top ten highest paid quarterbacks and a \$8,370,000 average salary for the top ten highest paid cornerbacks, which equates to 9.7% and 6.5%, respectively, of the league's \$128,000,000 salary cap in 2009 for each team (with twenty-two starters and a fifty-five person roster). Over the past five off-seasons, only one NBA restricted free agent, Andre Iguodala, has signed a contract with an annual average of at least \$12,000,000. *See generally Salaries*, HOOPDATA.COM, <http://hoopdata.com/salaries/index.aspx> (last visited Oct. 3, 2011); *see also Franchise and Transition Tender Amounts*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d806a24a3&template=without-video&confirm=true> (last visited Oct. 3, 2011).

14. An "offer sheet" is a contract offer signed with a new team; it must be for at least two seasons not including an option year but does not have to contain 100% salary compensation protection. *See* NBA CBA, *supra* note 8, art. XI, § 5(b).

15. For reference, the average and median annual salaries for the seventeen NBA starting shooting guards who are not under a rookie salary scale contract or a maximum salary contract are \$9,708,950 and \$9,500,000, respectively. *See NBA Player Salaries*, DRAFTEXPRESS.COM, <http://www.draftexpress.com/nba-player-salaries> (last visited Oct. 3, 2011); *see also Salaries*, *supra* note 13.

compliance with certain provisions of the CBA, and for player disciplinary actions where the issue to be resolved relates to whether there has been just cause for the penalty imposed.<sup>16</sup>

There is also system arbitration that is used primarily for league-team-union disputes, but also for disagreements about certain player-contract terms.<sup>17</sup> Player-agent arbitration cases are handled under the National Basketball Players Association's (NBPA) *Regulations Governing Player Agents*, which has its own grievance arbitration procedure. Based on the detailed, coordinated structure, accessibility, and overall success of the NBA's grievance arbitration procedures, the NBA would benefit from implementing a similar arbitration system for salary disputes—one that furthers the league's financial and parity goals, maintains competitive balance between teams, decreases negative publicity and media scrutiny about unconstructive negotiations, and provides players and team management with the tools and processes necessary to operate a winning organization.

### III. A NEW PROCESS: A KEY OPPORTUNITY TO IMPLEMENT SALARY ARBITRATION IN THE NBA

Many NBA players are significantly underpaid because of the current CBA rules for restricted free agents, and other players are overpaid because of these same inapt rules. The proposed NBA salary arbitration model, NBA-ARB, would combine elements of MLB and NHL salary arbitration (see Table 1 for the specific process and criteria for the proposed new Article XI, Section 5 of the NBA CBA). NBA-ARB would be an issue-by-issue variation of “night baseball arbitration.” The team and player would both file salary numbers and complete a one-page “one-year salary request” form to be delivered in a sealed envelope to the panel of arbitrators. The parties would not exchange these figures. The arbitrator would determine the arbitration award without the benefit or guidance of seeing the parties' proposals. By not allowing the arbitrator to see the parties' filing figures, the arbitrator's mindset

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16. See NBA CBA, *supra* note 8, art. VI, XI, and XXXI. Common disputes involve whether incentive compensation should be classified as likely to be earned for cap purposes, players under contract withholding services, transactions with retired players, and salary guarantees. Common disciplinary actions include player conduct, fines, suspensions, injuries, off the court activities, guns, actions taken by Commissioner to preserve integrity of and maintain public confidence in the game, and violations of player misconduct provisions in the League Constitution such as trade demands and statements detrimental to the NBA.

17. See *id.* art. XIII, XIV, and XXXII. Common contractual term disputes include contents of an offer sheet and which team has a binding agreement, league audit reports, collusion, expansion, circumvention, basketball-related income (BRI) revenue, escrow amounts, group licensing, and NBA memos unilaterally promulgated by the league.

will not be anchored by an extremely high or low proposal. More importantly, because the format is not final offer, high-low, the arbitrator would not have to focus on the midpoint between the two proposals, which is the typical benchmark for a salary arbitration panel in baseball.<sup>18</sup> By having the team and player conceal and not exchange figures, one party would not be able to scramble to settle on the other party's side of the midpoint before a hearing out of fear of losing the case entirely after that party submitted an extreme initial offer.<sup>19</sup>

The issue-by-issue component, which is a broader concept than having an arbitrator merely determine pure base salary compensation, allows arbitrators to have flexibility to balance the award across different issues presented by the parties and make a determination of each element independently or as a package.<sup>20</sup> Unlike the MLB system, where the arbitrator's award is limited to a player's base salary, NBA-ARB would allow the arbitrators to have discretion to include incentive compensation or a trade bonus in the award. Because the arbitrators will not have viewed the parties' actual salary filing figures, the parties at the hearing can point to comparable players who received specific types of incentive compensation or trade bonuses.<sup>21</sup>

The phases of NBA-ARB would mirror certain procedural elements of the NBA's grievance and system arbitration processes. It would also be modeled after, and track some of the language contained in, the NHL and MLB arbitration procedure provisions, including the following language: at any meeting or hearing, a player may be accompanied by a representative of the players association, and the NBA and any team involved may be accompanied by a representative; all costs of arbitration, including the fees and expenses of the arbitrator, shall be borne equally by the parties, but each party shall bear

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18. Edmonds, *supra* note 2, at 35.

19. Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 231 (1998).

20. Spencer B. Gordon, *Final Offer Arbitration in the New Era of Major League Baseball*, 6 J. AM. ARB. 153, 160 (2007).

21. One complication is that an arbitrator will be determining one prime issue (base salary) and other ancillary issues (incentives, trade bonuses), which would not allow the parties to keep the process as simple and streamlined as in the MLB arbitration context that allows arbitrators to award only single-year contracts for specified salaries. Teams would most likely argue for a lower base compensation and more incentives, discussing the player's situation broadly in terms of what other players make and what types of bonuses they are receiving (e.g., for games played, minutes played, All-Star games, shooting percentages). Under NBA-ARB, if an arbitrator's award of base salary plus incentives totals more than the player's filed request, the decision would not be adjusted downwards so long as the base salary does not exceed such request. The arbitrator would not rule on the percentage of compensation protection because, under Article II, Section 4(a), (e), and (g) of the NBA's CBA, all one-year salary awards will have 100% compensation protection for lack of skill, and non-insured injury or mental disability.

the cost of its own witnesses, counsel, and the like; and no party may initiate the arbitration process by filing or appearing at an arbitration hearing until and unless it has first discussed the matter with the other party in an attempt to settle the dispute.<sup>22</sup>

Unlike the NHL, where the league office and National Hockey League Players Association (NHLPA) provide the arbitrators with a “comparable player list exhibit” that catalogs the only players that the arbitrators can rely on for comparison purposes to the case at hand, NBA-ARB would allow each party to craft creative arguments about which particular players to compare.<sup>23</sup> Justifications for not having the NBA parties’ proposed lists of comparable players restrained via a “comparable player list exhibit” include the fact that there is already a limited sample group of players for parties to highlight.<sup>24</sup> Due to the increasing use of analytics and sabermetrics for player and team performance in basketball, there is an availability of statistics that gives teams, agents, and arbitrators the ability to pinpoint a player’s value using quantitative metrics. The NBA league office and the NBPA could develop a universal database containing all possible statistics that could be offered in arbitration.<sup>25</sup>

NBA-ARB would allow parties to present witnesses, affidavits, documents, or other evidence so long as they met the state admissibility of evidence provisions spelled out in the CBA. The arbitrators would not be bound by any evidentiary rule and would therefore have the discretion to determine the weight given to each piece of evidence. In the NHL, admissible evidence includes the player’s overall performance, number of games played,

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22. See NHL CBA, *supra* note 7, art. 12; MLB CBA, *supra* note 10, art. VI, § F; NBA CBA, *supra* note 8, art. XXXI, §§ 14(b)–(f) and art. XXXI, § 2(b).

23. NHL CBA, *supra* note 7, art. 12.9(d), art. 12.9(g)(v).

24. For reference, there are only 220 players that are currently under non-rookie salary scale contracts in the NBA who are making more than the minimum player salary for the 2009–2010 season; thus the sample group is limited to approximately 50% of all of the NBA players under contract during a given season, because parties cannot use players currently under a rookie salary scale contract as comparables. Furthermore, if the player was only worth a minimum player salary, which tops out at \$1,306,455, the team would almost certainly not waste the time and resources to engage in the arbitration process. A player’s age and experience should not outweigh other factors such as performance or role on the team. Differing from the NHL, in NBA-ARB, the parties would be allowed to make an argument that any particular player is relevant, and not just those on a list generated by the league and players association, that their client resembles for comparison purposes. Players with similar career and season games and/or minutes played in the NBA (but not necessarily years of service because players who play just one game in a season are credited with a full year of service) and similar statistical production and roles on the team would provide the best comparisons. See *Salaries*, *supra* note 13.

25. For example, the database could be similar to the statistics found at <http://www.nba.com/statistics>, with advanced metrics employed by the *NBA StatsCube* and *Synergy Sports Technology* data currently available to all NBA teams.

injuries or illnesses, length of service in the league and with the particular team, overall contribution to the team's success or failure, special leadership qualities or public appeal, and the performance and compensation of comparable players in similar situations to the player who elected arbitration.<sup>26</sup> Arbitrators in the proposed NBA-ARB system would be instructed to allocate weight based on comparable players' salaries and the particular player's years of service, position, statistical production, trends in career, platform year performance, team success, restricted free agency status, injury history, overall contribution, and role on the team.<sup>27</sup>

In NBA-ARB, once the arbitrators looked at the evidence, they would make a determination about what a fair one-year salary would be. The team and player would establish their demands, including salary and other contractual elements, but would not reveal them to the arbitrators. The parties would be allowed to identify comparable players without explicitly stating a particular salary that the player at the hearing deserves. The arbitrators would determine the award based on issues regarding salary, incentives, structure, and clauses, without the guidance of the parties' proposals. Unlike in baseball, whichever party's filing figure is closest to the arbitrators' determination will not automatically be selected because the arbitrators would be permitted to determine any compensation structure. Nonetheless, the arbitrators' award determination will likely fall somewhere within the spectrum between the classified team and player proposals.

However, there would be an "arbitrator award adjustment" exception, which would apply in two delineated circumstances: (1) if the arbitrators' award determination is within 2% or \$50,000 of the midpoint between the figures filed by the team and the player, then the arbitrators' award will automatically be adjusted to be the exact midpoint between the two filing figures; and (2) if the arbitrators' award determination is within 2% or \$50,000 of either party's filing figure, then that party's figure will be the actual award and not the arbitrators' decision.<sup>28</sup> This exception encourages negotiated settlement. If the dispute reaches a hearing, it nudges parties to have accurate

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26. NHL CBA, *supra* note 7, art. 12, § 12.9(d), (g)(i-ii); MLB CBA, *supra* note 10, art. VI, § F(12)(a).

27. As mentioned previously, the universe of comparable players in NBA-ARB would not be explicitly curtailed.

28. The midpoint is one way of making that determination in that it is a "bargained for" number, but if a player settles below the midpoint (or in the case of NBA-ARB, an arbitrator reaches a result below the midpoint), and is still compensated at a level that accurately reflects his value within the system, he has not really lost in negotiations. Jay Reisinger, *Debunking Salary Arbitration Myths – Part 2*, CONTEMP. SPORTS L. ISSUES (Feb. 9, 2010), [http://jayreisinger.blogspot.com/2010/02/debunking-salary-arbitration-myths-part\\_09.html](http://jayreisinger.blogspot.com/2010/02/debunking-salary-arbitration-myths-part_09.html).

filing numbers that are not too high or too low to get close to the arbitrators' potential decision. This would create a rational midpoint or increase the likelihood that their filing number is close to what the arbitrators would pick, so that the award would be adjusted upward or downward to the party's actual proposed figure.

For example, if a team files at \$3,000,000, the player files at \$4,000,000, and the arbitrators' monetary valuation of the player is between \$3,430,000 and \$3,570,000, the arbitrators' valuation will be adjusted pursuant to the "arbitrator award adjustment" exception and the midpoint of the filing figures (\$3,500,000) will be the player's salary because it will be less than 2% below or above the \$3,500,000 midpoint of the parties' filing figures. If under the same team and player filing figures above the arbitrators determine that the player's salary should be \$3,060,000 or slightly less, the team's \$3,000,000 would be the final result. On the other hand, if the arbitrator decides that the player's salary should be \$3,920,000 or slightly more, then the player's \$4,000,000 would be the controlling outcome.

As with MLB's salary arbitration system, one goal of NBA-ARB is to ultimately have a fair salary being paid to players, determined by objective criteria in an organized, expedited process with incentives to engage in principled negotiations. This would create a different process than the current environment, where teams give the player an ultimatum of either signing a one-year deal at a preset amount or an offer sheet with a new team that the current team could match with their right of first refusal. NBA-ARB would encourage teams to negotiate in good faith with a certain category of current players for one-year contracts, which would help avoid the possibility of flooding in the free agent market, depleting player salaries, and damaging fan identification as a result.<sup>29</sup> NBA-ARB would also provide a mechanism that would keep players in the NBA; over the past two off-seasons, three former first-round draft picks grew frustrated with the current restricted free agency and qualifying offer rules, and how their respective teams approached contract negotiations based on the leverage created by these rules, and decided to sign with teams in Europe.<sup>30</sup>

NBA teams should have a superior right to keep their free agents, but they should only be able to keep this right if they are willing to pay the player a market-rate salary. The decision to tender a player for salary arbitration would be in the teams' hands—if a team is not willing to pay a player his fair-market

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29. Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 55, 59–60 (2003).

30. The three former first-round picks who signed contracts in Europe are Josh Childress, Linaz Kleiza, and Nenad Krstic.

value for a one-year contract, the player would be an unrestricted free agent who can negotiate a long-term deal with another team.<sup>31</sup> In NBA-ARB, once the player agrees to accept the “arbitration tender” offer, his current team will gain certainty in that it will not lose the player’s services to another team; the focus will be on negotiating the provisions of a fair one-year or multi-year contract with the player.<sup>32</sup> This is because once an NBA team offers salary arbitration and the player accepts, the player would only be permitted to negotiate exclusively with that team. Whereas in the NFL, a player who is given a Transition Player designation can sign with another team, with the prior team having the right of first refusal to match the contract offer or receive draft pick compensation if the player signs with another team and the current team decides not to match the offer.

Under NBA-ARB, once the team makes an arbitration tender, the player can decide whether to accept the offer or to be bound to the arbitration process. If he accepts the tender, he would be forfeiting the opportunity to sign an offer sheet with a new team. Once the tender is accepted, the player would then either accept or reject the “initial proposed salary” in the team’s offer. The initial proposed salary would be a one-year contract with a salary of at least the minimum salary and up to the maximum salary allowed under CBA rules.<sup>33</sup> If the player agrees to accept the tender offer but rejects the initial proposed salary, the parties would continue to engage in contract discussions, for either a one-year or multi-year deal, prior to an arbitration hearing, which would be scheduled within the following month.<sup>34</sup>

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31. Note that in NBA-ARB, the current team would have an advantage in that it can negotiate a long-term contract during a one-week period prior to offering the arbitration tender and an additional three weeks to continue negotiations before a hearing takes place, while also forcing the player to decide whether or not he wants to be bound to the arbitration process.

32. Article IX, Section 1 of the NBA’s CBA allows a former first-round pick to re-sign with his current team for a term of up to six years.

33. For the 2009–2010 season, the minimum initial proposed salary offer would have been \$736,420, and the maximum initial proposed salary offer would have been \$13,520,500.

34. Currently, when a player signs a one-year qualifying offer, that player cannot be traded without his consent. Under NBA-ARB, a player who signs a one-year contract pursuant to a salary arbitration award could still not be traded (he would have a veto right, and could consent to a trade, subject to the trade rules in Article VII, Section 8(d), which state that a player who signed a contract as a free agent cannot be signed until the later of three months after the signing or the following December 15). *See* NBA CBA, *supra* note 8, art. VII, § 8(b). However, there would be an added clause: if the parties agree to a one-year contract prior to a hearing, the parties can agree to waive the consent provision as a new allowable amendment under Article II, Section 3. Thus, teams who agree to enter into the salary arbitration process and end up signing a player who accepts the arbitration tender to a one-year contract pursuant to the arbitrators’ award would now be paying the player his fair market value and could only trade the player to another team with that player’s consent. But, parties who agree to a deal before the hearing can modify the consent provision. This rule would encourage parties to negotiate a long-term deal and to only agree to a contract if both parties have

If the player rejects the tender offer, he would become a restricted free agent governed by the current CBA rules, free to sign a one-year or multi-year deal with his prior team or another team. The caveat is that his prior team would retain the right of first refusal to match any offer sheet, and the prior team would only have to offer a “minimum salary tender offer” to maintain the right of first refusal.<sup>35</sup> The player would lose his fallback option of returning to the team under any type of rookie salary scale qualifying offer.<sup>36</sup> Thus, by declining the arbitration tender offer, the player would be taking a risk of not being offered a significant deal by another team and not having a contingency alternative of what would have been a somewhat lucrative qualifying offer.

Once the request to have the player be bound by the arbitration process is made, the player either accepts or declines the request. This changes the dynamic of whether the player is going to stay with his current team. The arbitration tender cannot be withdrawn by the team once offered. Once the arbitration process begins, the player and team could agree to a multi-year deal. Both parties would now have an objective starting point for contract discussions—the player’s value for a one-year contract. The threat of going to an arbitration hearing would hopefully result in a settlement as the parties can create the contract elements without the costs, assistance, or uncertainty provided by a third-party neutral’s determination at a hearing. If the team fails to make the arbitration tender by the deadline of July 15, the player would become an unrestricted free agent, where the prior team would not have the right to match an offer sheet. The prior team would no longer have the benefit of keeping a player restricted unless the team pays fair-market value via the arbitration process.

NBA-ARB would utilize a two-member panel of arbitrators. While a two-member panel is a deviation from traditional odd-number panels, it is

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intentions of playing out the entire season with the player on that team or if the player receives a salary that justifies him giving up the right to consent to the trade. Players who consent to a trade would be considered to have changed teams by means of signing a contract with the assignee team as a free agent, and not by means of a trade, and thus would become non-qualifying veteran free agents and the new team could only sign the player with available cap room, a salary cap exception, or for 120% of the player’s prior salary. *See also id.* One concern with this new proposed provision is that changing the rules to allow parties to agree to waive the consent provision may conflict with the purpose of the rule; a team could possibly agree to re-sign its own player with the intention of the team or player to trade him later in the season to another team who would be unable to sign that player as a free agent with available cap room or an exception.

35. *See* NBA CBA, *supra* note 8, art. VII, § 4(a)(2)(ii), (d)(1)(ii). The player’s “free agent amount” (the hold that would count against the salary cap) would still be either 130%, 250%, or 300%, depending if the player is an early qualifying of qualifying veteran free agent and if his prior salary was equal to or less than the average player salary.

36. Every restricted free agent who has signed a qualifying offer during the past six seasons has waited until close to the October 1 deadline to do so.

consistent with the system first employed by the NHL for salary disputes.<sup>37</sup> The case would be submitted to two arbitrators, one nominated by the team and the other by the player, and if these nominees could not agree, the dispute would then be submitted to a third arbitrator. The third arbitrator, who would have the tie-breaking vote, would be randomly selected from the pool of available arbitrators for that off-season's hearings. The arbitrator would have access to a videotape of the hearing, and the parties' pre-hearing briefs and exhibits presented at the hearing, but would not communicate directly with the two-member panel.

A two-member panel would help create improved dialogue and an opportunity to study the market together and reach a joint consensus. The two-member panel would also help avoid the phenomena of arbitrators strategically not siding with one party too often and of "groupthink" that seems to happen occasionally in a three-person panel in baseball.<sup>38</sup> For reference, of the eight MLB salary arbitration cases that went to a hearing in 2010, three arbitrators heard three different cases, and three other arbitrators heard two different cases during this same three-week period of arbitration hearings—only one of these arbitrators voted for the same party in every case that they presided over.<sup>39</sup>

The two-member panel in the NBA-ARB would be able to craft an appropriate one-year contract, resolving any disagreements between each other without forcing the other to side with the majority. This is contrasted to a three-member panel that could allow the two-person majority to influence the third arbitrator to consent to the viewpoint of the majority. Even if the third arbitrator dissented from the majority viewpoint, her vote would be rendered meaningless to the final outcome. While a two-member panel may have reached the same conclusions, not having a third member might allow the parties to more thoroughly consider each arbitrator's viewpoint of the case without the potential of forming a majority alliance with a second arbitrator in a three-member structure. In NBA-ARB, an individual arbitrator would not be allowed to hear more than two cases in the same season, and he or she could

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37. See Aubut, *supra* note 1, at 204.

38. See Joseph M. Weiler, *Legal Analysis of the NHL Player's Contract*, 3 MARQ. SPORTS L.J. 59, 71 (1992).

39. Fredric Horowitz voted for the same party, the team, in both cases that he presided over this past season. Historically, over the past ten seasons, there have been five instances where the same arbitrator heard disputes involving the same team in a particular off-season, and only once did the arbitrator decide with the same party, in this case Steven Goldberg ruling for the Astros in 2008 twice. Maury Brown, *Arbitration Scorecard*, BIZOFBASEBALL.COM (Feb. 10, 2007), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=719&Itemid=116](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=719&Itemid=116); see also <http://sports-law.blogspot.com/search?q=arbitration>.

not hear more than one case involving a particular team or player representative in two successive seasons.<sup>40</sup>

The process timeline, evidence criteria, adjustments, and exceptions of NBA-ARB would encourage the parties to file a reasonable offer, seek security in a negotiated pre-hearing settlement, and avoid taking exaggerated positions at a hearing.<sup>41</sup> Once a team submits the matter to NBA-ARB, the player or team could not withdraw from arbitration and the parties could not terminate the arbitration for any reason. In MLB, the player may, within seven days after receiving the team's salary arbitration notification, notify the team that he does not wish to arbitrate the matter.<sup>42</sup> In MLB arbitration, a player whose hearing is scheduled later in the process may benefit from previous arbitration awards.<sup>43</sup> In NBA-ARB, to avoid any allegation of favoritism, one arbitrator would be responsible for drawing names from a box to figure out the order of hearings. In NBA-ARB, an arbitrator would not be prevented from granting a player a salary that the arbitrator deems appropriate because it would go over the team's salary cap; a newly created "salary arbitration alignment" exception would allow a team to sign up to two players each season to one-year contracts under the newly created salary arbitration alignment exception.<sup>44</sup>

#### IV. DRAWBACKS OF THE NBA'S CURRENT RESTRICTED FREE AGENCY AND QUALIFYING OFFER RULES, AND THE EFFECTIVE SOLUTION OF SALARY ARBITRATION

The NBA's current qualifying offer system lacks efficiency, effectiveness, and fairness for players and teams. Under the existing restricted free agency rules, a player who receives a qualifying offer must be given until at least October 1 to accept the offer.<sup>45</sup> The current qualifying offer rules lead to a

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40. See LAURA COOPER, ET AL., *ADR IN THE WORKPLACE* 690 (2d ed. 2004). Arbitrators can sometimes favor teams or agents who are repeat players more familiar with the pool of potential arbitrators, particularly where an arbitrator may be interested in generating future business and thus predisposed to favor one party—this is a distinguishing feature in that most employees do not have a representative who also represents other players who compete for different employers in the league.

41. Josh Chetwynd, *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*, 20 MARQ. SPORTS L. REV. 109, 112 (2009).

42. MLB CBA, *supra* note 10, art. VI, § F(4).

43. Aubut, *supra* note 1, at 237.

44. This exception would be added to the list of current exceptions available in Article VII, Section 6 of the NBA's CBA.

45. The October 1 deadline is ninety days after the date by which the qualifying offer must be made, and is just one day before the start of a team's training camp for the upcoming season. Under the existing rules, a qualifying offer may be unilaterally withdrawn by the team at any time through

drawn out process that creates too much uncertainty for players and teams and leads to unsatisfactory results. The free-agent market and player salaries in general have outpaced the current qualifying offers tendered to players because the qualifying offers are not tied in any way to market comparables.

The NBA's current qualifying offer system is flawed mainly because the number pick that a player is selected in the NBA Draft does not always indicate his value four years later.<sup>46</sup> Under NBA-ARB, there would be new rules for first-round draft picks that would replace the current required qualifying offer that has a predetermined salary increase over the player's fourth-year salary of their rookie scale contract based on where the player was selected in the NBA Draft. For first-round picks, qualifying offers range from a 30% increase from the fourth-year salary for the first overall pick to a 50% increase for the thirtieth pick.<sup>47</sup> For reference, for 2010 NBA Draft picks, the 2013–2014 qualifying offer amounts range from \$9,394,958 for the first pick to \$3,101,820 for the thirtieth pick. The NBA-ARB system would produce one-year contracts for different players with salaries within this range, but without the salaries being allocated to a player based on where he was selected in the draft. In NBA-ARB, there would be a cap placed on the maximum salary for an NBA arbitration-eligible player—no one-year salary could exceed 12.5% of the salary cap for that season. Accordingly, for the 2009–2010 season, no player would have received a salary greater than \$7,212,500 in arbitration, which is slightly below the \$8,182,598 qualifying offer that the first pick in the 2005 NBA Draft would have received under the current rules.<sup>48</sup>

Over the past six seasons, only seven former first-round NBA Draft picks

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July 23 following its issuance. If the qualifying offer is not withdrawn on or before July 23, it may be withdrawn thereafter but only if the player agrees in writing to the withdrawal. If a qualifying offer is withdrawn, the player shall immediately become an unrestricted free agent. *See* NBA CBA, *supra* note 8, art. XI, § 4(c)(i).

46. For instance, there have been eight different players selected to the All-Star Game in the past two years who were drafted outside of the top fifteen picks. *See* NBA & ABA All-Star Game History and Statistics, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/allstar> (last visited Oct. 3, 2011).

47. The NBA rookie salary scale can be found in Exhibit B of the CBA. *See also* Exhibit B-Rookie Scale, NBAP.ORG, <http://www.nbpa.org/cba/2005/exhibit-b-rookie-scale> (last visited Oct. 3, 2011).

48. The cap placed on an arbitration-eligible player's salary is similar to the NHL's rules, which state that no one player can make more than 20% of the league's salary cap (e.g., no one player could receive a salary greater than \$11.36 million for the 2009–2010 NHL season). Regulating the maximum amount that any one player can receive will curtail any drastic inflation in player salaries based on precedent set in an arbitration hearing. *See* Yoost, *supra* note 3, at 517–19; *Collective Bargaining Agreement FAQs*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=26366> (last visited Oct. 3, 2011).

who became restricted free agents following the fourth year of their rookie-scale contract signed qualifying offers with their prior team (see Table 2 for a list of restricted free agents signing qualifying offers during the past six seasons). The amount of a qualifying offer is based on where a player was drafted, predetermined by the rookie salary scale. The value of qualifying offers, which decrease in total value, but increase in the percentage, raise as a player gets drafted with a later pick, does not accurately reflect a player's value because it is based on where a player was drafted four years prior.<sup>49</sup> For example, Ben Gordon, the third overall draft pick in 2004, received a 31.2% increase over his previous year's salary by signing a qualifying offer for \$4,881,669.<sup>50</sup> Robert Swift, the twelfth overall pick in 2004, received a 37.6% increase over his previous year's salary and signed a qualifying offer for \$3,579,131.<sup>51</sup> Despite averaging 19.5 more minutes, 16.8 more points, and 0.8 more rebounds per game during the preceding season, Gordon only received \$1,302,538 more than Swift.<sup>52</sup> A sound conclusion is that Gordon was underpaid and Swift was overpaid based on the unalterable qualifying offer amounts, particularly when considering Gordon signed a \$58,000,000 contract with a new team and Swift did not make an NBA roster the following season, when the players were both unrestricted free agents.<sup>53</sup>

No player drafted after the twelfth pick in any NBA Draft since 2000 has ever signed a qualifying offer, presumably because the value of the one-year deal was too low to even contemplate being accepted. On the other hand, some players drafted later in the first round are not extended qualifying offers by their respective teams because the players did not produce at a level where their team wanted to keep them around for another season at the high qualifying offer amount. All seven of the players who accepted a qualifying offer over the past six seasons did so near the October 1 deadline.<sup>54</sup>

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49. See *Exhibit B-Rookie Scale*, *supra* note 47. Over the past six seasons, three players (Ben Gordon, Mickael Pietrus, and Vladimir Radmanovic) received one-year qualifying offers that were well below what they were subsequently paid the following season. Two players (Robert Swift and Melvin Ely) signed one-year qualifying offers that were well above what they were subsequently paid the following season. One player (Stromile Swift) signed a qualifying offer that was right around the annual average salary of his next contract. See *infra* Table 2.

50. See *id.*

51. See *id.*

52. Compare *Ben Gordon*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/players/g/gordobe01.html>, with *Robert Swift*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/players/s/swiftr01.html>.

53. See *infra* Table 2.

54. Each player signed the qualifying offer after not being able to secure a long-term deal with their prior team or a contract with a new team that would be subject to the prior team's right of first refusal. Gordon signed the qualifying offer on October 1, *Bulls Guard Gordon Skips Practice, Then*

Astoundingly, none of these players who signed a qualifying offer re-signed with that same team during the next off-season.<sup>55</sup> This is possibly because players can harbor resentment towards their prior team who failed to offer a fair contract when the player was a restricted free agent.<sup>56</sup> The players' reluctant acceptance of the qualifying offers and the teams' overall lack of initiative to sign the players to fair deals illustrates that a new process—with criteria that arbitrators would use to encourage the parties to engage in principled discussions to avoid an actual hearing—is needed so that players can receive, and teams would only be required to make, market-value offers. Also, teams should not be obliged to offer an inflated salary based on where a player was drafted. Players may be more enthusiastic about signing a one-year contract with their current team if the value of their salary was based on objective criteria.<sup>57</sup>

With the current system, NBA players might feel that a one-year deal at a

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*Signs Qualifying Offer*, ESPN (Oct. 2, 2008), <http://sports.espn.go.com/nba/news/story?id=3621188>; Ely on September 30, *Ely Signs One-year, \$3 Million Offer with Bobcats*, ESPN.COM (Oct. 2, 2006), <http://sports.espn.go.com/nba/news/story?id=2610570>; Stromile Swift on September 30, *General Managers*, HOOPSHYPE, [http://hoopshype.com/general\\_managers/jerry\\_west.htm](http://hoopshype.com/general_managers/jerry_west.htm); Felton on September 23, Chris Mannix, *Felton Signs Deal with Bobcats*, SI.COM (Sept. 23, 2009), <http://sportsillustrated.cnn.com/vault/article/web/COM1160535/index.htm>; Pietrus on September 23, Tom Ziller, *Mickael Pietrus Relents*, AOLNEWS (Oct. 2, 2007), <http://www.aolnews.com/2007/10/02/mickael-pietrus-relents/>; Radmanovic on September 21, *Sonics Re-sign Radmanovic to One-year Qualifying Offer*, ESPN.COM (Sept. 21, 2005), <http://sports.espn.go.com/nba/news/story?id=2168504>; and Robert Swift on September 13, *Thunder Re-sign C Swift*, YAHOO! SPORTS (Sept. 11, 2008), <http://sports.yahoo.com/nba/news?slug=txthunderswift>. Under Article XI, Section 4(c)(ii), “[i]f a Qualifying Offer is neither withdrawn nor accepted and the deadline for accepting it passes, the Team’s Right of First Refusal shall continue,” but the player will no longer have the option of signing the one-year qualifying offer and the current team can either offer a minimum salary contract or wait until the player signs an offer sheet with another team and determine whether to match the offer. NBA-ARB would operate under similar parameters.

55. See *infra* Table 2.

56. For example, during the 2005 off-season, the Seattle Sonics signed three different players—Vladimir Radmanovic for \$3,166,155, Reggie Evans for \$1,100,000, and Ronald Murray for \$895,248—to one-year qualifying offers. Even though all three players were seeking long-term deals with the team, all three were traded during the 2005–2006 season to three different teams, with each player ending up signing new multi-year contracts the following season with a salary that was 165–360% greater than their qualifying offers from the Sonics. One of the Sonics' motives was possibly to achieve cost savings by using the CBA rules that gave the team a right of first refusal and fixed a low salary for the player's respective qualifying offers to the team's short-term advantage. See generally *Oklahoma City Thunder*, NBA.COM, <http://www.nba.com/thunder/news/offers050630.html> (last visited Oct. 3, 2011); *NBA & ABA Player Directory*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/players> (last visited Oct. 3, 2011).

57. Other ancillary factors that would increase a player's willingness to re-sign for one season with his current team include a player's prior injury history, the team's position with respect to the luxury tax, the team's ownership situation, the team's desire to see how the player performs with a new coach, and a player's desire to test the market the following year after improved production or when the free agent class is not as strong.

low salary does not offer the security of a long-term deal because they could get injured the following season and not be able to recoup money in a new deal. Moreover, players could think that their current team is not committed to them. Conversely, the NBA's salary cap and luxury tax do constrain some teams' ability to pay players their fair-market value. Teams frequently make decisions on which player to sign and how much to pay the player based on how the team's payroll fits within the salary cap and luxury tax restrictions. Teams will sometimes use the cap and tax parameters as an excuse not to offer a player a certain contract. In particular, when a player is a restricted free agent, other teams are reluctant to sign the player to an offer sheet because the player's prior team has seven days to determine whether to match the principal terms of that offer sheet.<sup>58</sup> During the seven days, the new team's salary cap room or contract exception to the salary cap is committed to the player and they may miss out on signing another player during this time span.<sup>59</sup> To increase the likelihood that a prior team will not match an offer sheet, the new team will usually have to overpay a restricted free agent or add provisions to the contract to dissuade the prior team from matching. The most common contract provisions that a new team will include in an offer sheet are a signing bonus, trade bonus, and up-front payment schedule. The prior team will usually take an approach of telling the player to go out on the market, sign an offer sheet to prove that other teams value him so highly in terms of how much they are willing to pay, and then the prior team will either match that offer or let the player leave. Thus, prior teams frequently do not engage in principled, good faith bargaining because the CBA's restricted free agency and qualifying offer rules give the team considerable leverage. A common result is that the player ends up leaving for another team or the prior team agrees to match an offer that includes a base salary and contract provisions that are far more generous than the player was willing to accept from the prior team in the first place.

Having an arbitration process in place would increase a player's willingness to sign a one-year deal to remain with his current team and explore free agency the following year. It would encourage good-faith negotiations

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58. Pursuant to Article XI, Sections 5(d)(i)–(iv) and (e) of the NBA CBA, “principal terms” include the term of the contract, base compensation, incentive compensation, early termination options, payment schedule, and trade or signing bonuses of the new team's offer sheet; a team that has the right of first refusal can wait up to seven days to match the principal terms of the other team's offer sheet.

59. If a team is over the salary cap, the team can sign a player with either the mid-level exception or bi-annual exception. For the 2009–2010 season the mid-level exception had a first-year salary of \$5,854,000 and the bi-annual exception had a first-year salary of \$1,990,000. *See* NBA CBA, *supra* note 8, art. VII, § 4(a)(1)(iv)(3).

and create an impetus for the parties to agree to multi-year contracts. Players and teams would both have leverage in negotiations, as opposed to the team having too much power by tendering a low qualifying offer. The focus would be more on creating value in a new deal structure as opposed to losing a player because he was not offered what he, or the industry, would consider an objectively reasonable salary.

NBA-ARB would also apply to players who were not drafted in the first round. The arbitrators would be instructed that a player's past compensation, which is usually the minimum player salary for non-first round picks, should not be given any weight. In addition to the seven former first-round draft picks who have signed one-year qualifying offers, several second-round picks and undrafted players have signed qualifying offers.<sup>60</sup> The requisite qualifying offer for all restricted free agents who are not first-round picks is extremely low. The predetermined qualifying offer for a non-first-round pick is the greater of (1) the applicable minimum salary for the next season plus \$175,000, or (2) 125% of the player's previous year's salary.<sup>61</sup> Consequently, these stipulated qualifying offers undervalue a player even more than the rookie salary scale qualifying offers for first-round draft picks.

Only sixteen restricted free agents over the past six seasons signed offer sheets with a new team that the prior team, who had the right of first refusal, did not match.<sup>62</sup> Over this same period, thirteen players signed offer sheets

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60. Four former second-round picks and undrafted players signed one-year qualifying offers this past season, worth between \$1,000,497 and \$1,030,189: C.J. Watson, Aaron Gray, James Singleton, and Steve Novak. These four players all received fair market value contracts. Other former second-round picks, such as Carl Landry, encounter a situation where their current teams extend a qualifying offer for under \$1,000,000 and the player's options are limited because other teams are reluctant to offer a contract due to the prior team's right of first refusal. Second-round picks and undrafted players are not subject to the first-round rookie scale and can sign contracts at a length between one and four years as rookies. While NBA-ARB would apply to these players, on average historically, more first-round draft picks are still in the NBA after two seasons and thus the focus of NBA-ARB would be on first-round picks and the unbalanced qualifying offer system for this particular subgroup of players. For reference, only seven to nine former second-round picks out of thirty selections each year were still in the NBA after just two seasons in each of the past four years, compared to seventeen to twenty-one former first-round picks playing past their four-year rookie scale contract over the past four draft classes. See *Salaries*, DRAFTEXPRESS, <http://www.draftexpress.com/nba-player-salaries/year/2009/> (last visited Nov. 1, 2011).

61. See NBA CBA, *supra* note 8, art. I, § 1(rr). A qualifying offer for a former second-round pick or undrafted player is usually for a raise from the minimum player salary worth between \$457,588 and \$825,497. All terms and conditions in the qualifying offer must be unchanged from those that applied to the last year of the player's prior contract. Note, however, that some European players drafted in the second round, such as Manu Ginobili, Andres Nocioni, Luis Scola, David Andersen, and Marc Gasol, have received or will receive larger qualifying offers because they signed lucrative rookie deals, which the teams offered to convince the players to give up their high-paying contracts to join an NBA team.

62. See *infra* Table 3.

with a new team that their prior team matched, thus keeping the player with the prior team (see Table 3 for a list of restricted free agents signing offer sheets with a new team during the past six seasons). In comparison, ten unrestricted free agents in the 2010 off-season alone signed contracts with a starting salary of at least \$4,000,000 with a new team.<sup>63</sup> Players, teams, fans, and the league can benefit from franchises keeping their marquee, former first-round draft picks and other players who want to stay, but end up leaving because of a perceived injustice based on the current restricted free agency and qualifying offer rules. The current system, where players end up grudgingly signing preset qualifying offers, or teams reluctantly extend a qualifying offer to an underperforming player, contradicts this goal.

V. START OF A NEW TREND TOWARDS FAIR SALARIES IN ONE-YEAR CONTRACTS: THE KNICKS' RECENT SIGNINGS OF DAVID LEE AND NATE ROBINSON MIRROR OUTCOMES GENERATED BY NBA-ARB

Recently, the New York Knicks were the first team ever to re-sign a former first-round pick who became a restricted free agent to a one-year contract at a value greater than the pre-slotted qualifying offer established by the rookie salary scale. The Knicks signed David Lee to a one-year, \$7,000,000 deal, even though the team was only required to tender Lee a one-year qualifying offer worth \$2,682,050.<sup>64</sup> The Knicks also signed Nate Robinson to a one-year, \$4,000,000 deal, even though his qualifying offer was for \$2,911,078.<sup>65</sup> Both players' contracts also contained a \$1,000,000 bonus if the team were to make the playoffs.<sup>66</sup> Neither of these players had any real leverage because no other team was offering to sign them to a restricted free agent offer sheet worth what the players considered fair-market value. According to Lee's agent, Mark Bartelstein, "[t]here's never been a player who signed a deal worth more than the qualifying offer on a one-year deal. . . . [The Knicks] did something that's unprecedented [as] they could have taken a

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63. See *Salaries*, HOOPSHYPE, <http://hoopshype.com/salaries.htm> (last visited Nov. 1, 2011).

64. Howard Beck, *As Lee Soars, His Career as a Knick May Be Ending*, N. Y. TIMES, Apr. 12, 2010, at D4.

65. Robinson was the twenty-first overall pick and Lee was the thirtieth overall pick. After four years in the NBA, Lee's statistical production and role on the team outpaced that of Robinson. However, under the existing rules, the Knicks still had to extend a higher-salary qualifying offer to Robinson. See *Exhibit B-Rookie Scale*, *supra* note 47; Alan Hahn, *Knicks' Walsh Denies Trying to Low-Ball Nate, Lee*, NEWSDAY, July 14, 2009, at A49, available at <http://www.newsday.com/sports/basketball/knicks-walsh-denies-trying-to-low-ball-nate-lee-1.1307991?qr=1>. Lee and Robinson no longer play for the Knicks.

66. See *Salaries*, *supra* note 13; Marc Berman, *Not a Lotto Luck; Knicks' Misfortune Helps Jazz*, N.Y. POST, Mar. 29, 2010, at 60.

much harder stance on this.”<sup>67</sup> The Knicks’ General Manager Donnie Walsh furthered, “I hope the fact that the franchise treated [Lee] well and didn’t nail him means something.”<sup>68</sup>

The Knicks accomplished two goals by paying Lee and Robinson well above their qualifying offer amounts: (1) the team avoided the possibility of having to make a decision about matching a long-term offer sheet from a new team, which would have added significant salary to their future 2010–2011 season salary cap space; and (2) the team treated each player fairly to ensure productivity on the court and to maintain goodwill in the event that the team and either player wanted to negotiate a long-term deal the following off-season. Instead of taking an uncompromising stance, the Knicks bargained in good faith, following protocol that would now be required by all teams pursuant to the provisions of NBA-ARB. Without a comprehensive arbitration process, it is highly unlikely that other teams in the future will follow the Knicks’ lead in paying players a one-year salary above the preset qualifying offer amount.<sup>69</sup>

#### VI. BEST AND IMPERFECT PRACTICES: MLB’S SALARY ARBITRATION PROCESS

MLB has used final offer arbitration as a means of resolving salary disputes since 1973.<sup>70</sup> In final offer arbitration, an arbitrator must pick one party’s filing figure, and cannot create a compromise between the parties’ positions. The final offer format usually forces the parties to submit reasonable proposals and encourages settlement in preference to allowing a third-party neutral to favor the more defensible proposal.<sup>71</sup> The arbitration system in baseball is effective in preventing players from being bound to

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67. GM Donnie Walsh “rewarded Lee with a contract that was \$4.5 million more than the Knicks had to pay to keep him. Perhaps Walsh bought a little patience in the process.” Walsh denied that he was trying to use the dried-up market to force both Lee and Robinson into taking much cheaper qualifying offers; Walsh said, “I’m not trying to back them into something like that. There are other ways of dealing with them than that.” See Howard Beck, *As Lee Soars, His Career as a Knick May Be Ending*, N.Y. TIMES, Apr. 12, 2010, at D4; Marc Stein, *Source: Robinson Close to Deal*, ESPN.COM (Sept. 25, 2009), <http://sports.espn.go.com/nba/news/story?id=4501088>; Hahn, *supra* note 65, at A49.

68. See Beck, *supra* note 64.

69. There are several reasons why a team may only want to sign a player to a one-year contract, such as the Knicks’ desire to not sign players to contracts that extended past the 2009–2010 season in order to preserve salary cap space for the 2010–2011 season.

70. In 1995, baseball owners proposed a switch from a sole arbitrator to a panel of three, and by 2000 all hearings were conducted by a three-arbitrator panel. In 1995, two hearings were decided by panels, both victories by the team. See Edmonds, *supra* note 2, at 6.

71. *Id.* at 32.

unfair contracts and avoiding actual hearings that are costly financially and with regards to player-team relations. The system encourages good-faith negotiations and the use of specific arbitration evidence criteria by the parties before an actual hearing is conducted by an arbitrator panel.<sup>72</sup> The team executive and the player's agent will engage in contract discussions with the overriding theme of an arbitrator's likely interpretation of and weight given to relevant evidence if the case proceeds to a hearing. The representatives exchange information about comparable players and the particular player's statistical highlights, areas of improvement, and contributions to the team.

A three-arbitrator panel for baseball cases uses identifiable objective criteria to quantify the player's "value" to the team, including the quality of the player's contribution during the past season (i.e., his overall performance, special qualities of leadership, and public appeal), the length and consistency of his career contribution, the record of the player's past compensation, comparative baseball salaries, the existence of any physical or mental defects on the part of the player, and the recent performance record of the team (i.e., the team's standing in the league and attendance as an indication of public acceptance).<sup>73</sup> The panel must pick either the team's salary filing figure or the player's figure; they cannot meet in the middle, add any incentives or ancillary options to the contract terms, or allow the parties to negotiate a long-term contract. At a hearing, the parties are not allowed to introduce other criteria to generate creative options, including previous negotiation offers, press comments, the financial position of the player or club, testimonials from teammates and community members, or awards and achievement outside of baseball.<sup>74</sup>

MLB team owners are concerned that salaries are escalating too much, which is usually caused by arbitrators picking a player's figure and establishing a precedent salary for future comparable players and others in the player's service class, such as with Ryan Howard.<sup>75</sup> Yet, some players who are involved in the arbitration dispute process are not receiving salaries commensurate with their level of productivity when compared to the general free-agent market. Some team owners are blaming baseball's current economic imbalance on salary arbitration, fearing that rising player salaries are

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72. However, some team owners feel that teams will acquiesce to player salary demands to try to avoid the arbitration process at whatever cost. See Anthony Castrovince, *Arbitration Season Reopens Discussion: MLB's Increasingly Scrutinized Process Gets Under Way*, MLB.COM (Jan. 5, 2010), [http://mlb.mlb.com/news/article.jsp?c\\_id=mlb&content\\_id=7870548&fext=.jsp&vkey=news\\_mlb&y\\_md=20100104](http://mlb.mlb.com/news/article.jsp?c_id=mlb&content_id=7870548&fext=.jsp&vkey=news_mlb&y_md=20100104).

73. MLB CBA, *supra* note 10, art. VI, § F(12)(a).

74. *Id.* art. VI, § F(12)(b).

75. See Das, *supra* note 29, at 60.

in direct correlation with the process of salary arbitration, even if arbitration is not responsible for salary inflation in MLB any more than the free agency system.<sup>76</sup>

MLB could possibly establish a more customary form of arbitration where the arbitrators could decide on a compromising figure. This is similar to one component of NBA-ARB. The aim would be to potentially keep salaries more level and prevent arbitrators from having to set the market at a number that is too high or too low simply because it is more reasonable than the other party's filing figure in the final offer, high-low format. Because compromise is not allowed within a particular decision, arbitrators may be tempted to "even the score" by alternately ruling in favor of the disputing parties; for instance, if the arbitrators' decision in hindsight turns out to undervalue or overvalue a past player, an arbitrator could favor the team or player or agent who felt slighted in a future decision.<sup>77</sup> Nonetheless, the possibility of experiencing an expensive loss in final offer arbitration can create a significant incentive to settle prior to the arbitration hearing.<sup>78</sup> Because the arbitration system relies on comparable players, every decision by an arbitrator provides valuable instructive precedent for future parties to make arguments about why a player is better than, equal to, or not too much worse than a player that was previously awarded a certain arbitration salary.

When players and teams settle prior to a hearing, the result is usually a one-year contract somewhere between the parties' initial proposals, or a multi-year contract. One benefit of final binding arbitration is that teams prefer to avoid hearings in which they 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, or less than ideal public appeal.<sup>79</sup> MLB's arbitration process is designed to be used sparingly; it

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76. For example, Brian Cashman, the general manager of the Yankees, said that arbitration is "a vehicle for a guy to make more than he'd make in free agency." Castrovince, *supra* note 72; *see also* Stuart Riemer, *Albert Pujols: Major League Baseball Salary Arbitration from a Unique Perspective*, 22 CARDOZO ARTS & ENT. L.J. 219, 240 (2004); Das, *supra* note 29, at 59.

77. *See generally* Robert D. Bretz Jr. & Steven Thomas, *Perceived Equity, Motivation and Final Offer Arbitration in Major League Baseball*, 8 (Ctr. for Advanced Human Resource Studies, Working Paper No. 91-05, 1991), available at <http://digitalcommons.ilr.cornell.edu/cahrswp/337>.

78. Gordon, *supra* note 20, at 14.

79. *See* Roger Abrams, *Inside Baseball's Salary Arbitration Process*, 6 U. CHI. L. SCH. ROUNDTABLE 55, 63 (1999). Some MLB teams, including the Florida Marlins and Tampa Bay Rays, have a "file and trial" approach where if the team and player exchange salary figures without having reached an agreement prior to this exchange, the team will refuse to negotiate further and will take its chances by proceeding directly to the arbitration hearing. This tactic is used to get the player to agree to their zone of settlement and sign a contract at a figure favorable to the club or take a risk of going to arbitration and is employed partly because profit-maximizing baseball clubs must sacrifice some potential settlements to minimize their expected payments to players and some use it as a standard

can fuel animosity between the team and players, and a player may avoid playing up to his full potential the following season due to resentment toward the team that introduced degrading evidence at a hearing.<sup>80</sup>

In baseball, if a team does not want to engage in the salary arbitration process and maintain exclusive negotiating rights with the player, they must “non-tender” a player by December 12, which is the non-tender deadline.<sup>81</sup> By choosing to non-tender a player, the team does not offer the player a contract and is making a determination that the player is not worth the salary that he might command in the arbitration process.<sup>82</sup> A player who is non-tendered is released from the control of the team, becomes an unrestricted free agent, and can sign with any team, including his former team, at any price. NBA-ARB’s arbitration tender offer is modeled after MLB’s requirement for teams to make a contract tender if they want to retain exclusive negotiating rights and pay the player a market-value salary commensurate with other comparable players.<sup>83</sup>

In 2010, there were 210 MLB players eligible for salary arbitration. Eighty-two of these players either were non-tendered or agreed to contract terms with their teams prior to the January 15 deadline to file for arbitration. Of the remaining 128 players, 84 players agreed to contracts before even exchanging figures with the team (5 of these players agreed to multi-year deals), 36 players exchanged figures and agreed to contract terms to avoid

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policy in an attempt to encourage settlements. *See also* David J. Faurot, *Equilibrium Explanation of Bargaining and Arbitration in Major League Baseball*, 2 J. SPORTS ECON. 22, 30–34 (2001).

80. *See* Abrams, *supra* note 79, at 57.

81. *See* MLB CBA, *supra* note 10, art. XX, § A.

82. A tender, at a minimum, must be for eighty percent of his salary the previous season or seventy percent of his salary from two seasons prior. Note that thirty-nine players were non-tendered for the 2010 season. *See* Jeff Euston, *Tender Date/Non-tender*, BIZOFBASEBALL.COM (Jan. 30, 2007), [http://www.bizofbaseball.com/index.php?option=com\\_content&task=view&id=665&Itemid=75](http://www.bizofbaseball.com/index.php?option=com_content&task=view&id=665&Itemid=75).

83. Under Article VI, Section F (12)(a) of MLB’s CBA, “[t]he arbitration panel shall, except for a Player with five or more years of Major League service, 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. This shall not limit the ability of a Player or his representative, because of special accomplishment, to argue the equal relevance of salaries of Players without regard to service, and the arbitration panel shall give whatever weight to such argument as is deemed appropriate.” Similarly, players and their representatives in NBA-ARB would be allowed to make arguments that any restricted or unrestricted free agent is a relevant comparable. The two-member arbitration panel would give whatever weight to such argument as is deemed appropriate, with particular attention being given to restricted free agents with similar years of service. For a former first-round pick who has achieved extraordinary accomplishments and is just one service class away from being an unrestricted free agent the following season, the arbitration panel would likely allocate more weight to the contracts of past unrestricted free agents and not just other restricted free agents coming off of their rookie salary scale contracts.

going to a hearing (14 of these players agreed to multi-year deals), and 8 players actually went to an arbitration hearing.<sup>84</sup> Teams won 5 of the 8 cases at hearings in 2010, which marked the thirteenth time out of the last fourteen years that the teams have won the majority of the decisions; since the first hearings were held in 1974, teams have won 286 times and players have prevailed 212 times, and, historically, 90% of the players filing for arbitration reach an agreement before going to a hearing.<sup>85</sup>

Approximately 23% of the employees in the bargaining unit of all MLB players are covered by the salary arbitration clause—210 players were arbitration-eligible out of the approximately 900 total players on each team's 25-man roster and disabled list in 2010.<sup>86</sup> NBA-ARB would cover only approximately 7%-10% of the players.<sup>87</sup> Thus, its impact is not as far reaching and it is limited to an important subgroup of restricted free agents each off-season. NBA-ARB would not fundamentally change the dynamics of free agency or cause player salaries to skyrocket out of control.

#### VII. BEST AND IMPERFECT PRACTICES: NATIONAL HOCKEY LEAGUE'S SALARY ARBITRATION PROCESS

Similar to the NBA, the National Hockey League has predetermined values for qualifying offers. The qualifying offers in the NHL are solely based on the salary earned by the player in the previous season. The qualifying offers are not tied to a percentage of the league's average player salary like the

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84. The 128 players in the 2010 arbitration class saw a combined 107% increase over their 2009 salaries, and these players' average salary for 2010 was \$2,726,270, an increase of 2% from the average of \$2,746,582 for the 111 players in the 2009 salary arbitration class. See Edmonds, *supra* note 2, at 35; Ed Edmonds, *2009 Arbitration Season Ends with Settlement*, SPORTS L. BLOG (Feb. 20, 2009, 9:26 AM), <http://sports-law.blogspot.com/2009/02/2009-arbitration-season-ends-with.html> [hereinafter *2009 Arbitration*]; Maury Brown, *2010 MLB Salary Arbitration Players See Pay Increase of 107 Percent*, BIZOFBASEBALL.COM (Feb. 21, 2010), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=4108:2010-mlb-salary-arbitration-players-see-pay-increase-107](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=4108:2010-mlb-salary-arbitration-players-see-pay-increase-107).

85. Since 2004, there have been seventy multi-year deals keeping the player under contract with his current team for at least two seasons, which is twenty-one percent of all settlements during this seven-year span. NBA-ARB would also serve as an incentive for players and teams to agree to multi-year contracts. See *2009 Arbitration*, *supra* note 84.

86. See *Listing: 210 Potential MLB Salary Arbitration Players for 2010*, BIZOFBASEBALL (Nov. 13, 2009), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=3742:listing-210-potentially-mlb-salary-arbitration-players-for-2010&catid=66:free-agency-and-trades&Itemid=153](http://bizofbaseball.com/index.php?option=com_content&view=article&id=3742:listing-210-potentially-mlb-salary-arbitration-players-for-2010&catid=66:free-agency-and-trades&Itemid=153).

87. This estimate is based on the number of players who have received qualifying offers during the 2007, 2008, and 2009 off-seasons, plus players who might have received offers if the preset amount was not so high or low based on where they were drafted and the salary earned in the previous year, compared to the total number of players on an NBA roster.

NFL designations. If a player earned \$660,000 or less, the qualifying offer is for 110% of his prior year's salary; if a player earned between \$660,000 and \$1,000,000, the qualifying offer is for 105% of his previous year's salary; and if a player earned more than \$1,000,000, the qualifying offer is for 100% of his previous year's salary.<sup>88</sup> A similar system in the NBA would be unfair, unprincipled, and unfitting because most players will typically have earned greater than a 10% raise from their rookie salaries and other players should not automatically get a raise if they were overpaid as a rookie. The focus should be on the player's current market value and not past compensation that was not established under NBA-ARB procedures.

If an NHL player is a restricted free agent, his team must tender a qualifying offer to him before June 30 if the team wants to maintain its rights to the player.<sup>89</sup> In the NHL, a team or a player can elect arbitration, with such election being made by July 5. If the team exercises its right to take the player to salary arbitration, the player is given two weeks to accept or decline the qualifying offer or engage in the arbitration process.<sup>90</sup> If the player files for arbitration or the team elects to file for arbitration to determine the player's salary, the player cannot negotiate or sign an offer sheet with another team.<sup>91</sup> In the NHL, the arbitrator can award a salary that is for either one of the two offers made by the parties or for an amount ranging anywhere in between the two offers.

The NHL also allows teams to have "walk-away rights." An NHL team has a right to reject the arbitrator's award and refuse to bind itself to the decision, allowing the player to either become an unrestricted free agent or accept the last offer that was on the table by the team before the hearing.<sup>92</sup> Previously, the team, after the arbitration hearing concluded and the parties knew the arbitration award, has twice walked away from the arbitrator's

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88. See NHL CBA, *supra* note 7, art. 10, § 10.2(a)(ii)(D); Aubut, *supra* note 1, at 202.

89. See NHL CBA, *supra* note 7, art. 10, § 10.2(a)(ii).

90. See *id.* art. 12, § 12.9(b). Hearings, conducted by only one neutral arbitrator, are then scheduled starting two weeks after this deadline (from July 20 to August 4). Forty-eight hours prior to an NHL hearing, both sides are required to send a brief/memo (maximum of forty pages) to both the arbitrator and the opposing side. NBA-ARB would follow the lead of the NHL and allow arbitrators to be prepared heading into the hearing with knowledge of the particular player, potential comparable players, and an introduction to arguments that are likely going to be made by the parties. Also, the player should have the right to be present at the hearing, but should not be required to do so, as in baseball and hockey. See Weiler, *supra* note 38, at 70.

91. As with NBA-ARB, an NHL player shall be subject to only one club-elected salary arbitration in his career. And once the player and team are in the salary arbitration process, the player is not permitted to engage in contract discussions with another team. See NHL CBA, *supra* note 7, art. 12, § 12.3.

92. See NHL CBA, *supra* note 7, art. 12, § 12.10.

decision in the last ten years.<sup>93</sup> By way of example, in 2009, when twenty players filed for salary arbitration, the New York Rangers exercised its right to walk away from the arbitrator's award to Nikolai Zherdev, thereby allowing him to become an unrestricted free agent.<sup>94</sup> Because NBA-ARB would only allow the team to initially elect salary arbitration, with the player having the choice whether or not to accept it, NBA teams would not have walk-away rights.

In the NHL, the arbitration procedures include a compensation equalization system, which provides that when a restricted free agent is signed by a new team, the former team is compensated for its loss of the player in the form of draft picks.<sup>95</sup> As a result of the significant expenses incurred by a new team to sign a restricted free agent in the NHL, there has been little movement in the restricted free agent market.<sup>96</sup> The current NBA restricted free agency process would not be further augmented to have some type of compensation equalization system because there are only two rounds with sixty total picks in the NBA Draft, compared to seven rounds in the NHL Draft and fifty rounds in MLB Draft. Additionally, new teams already face an obstacle in structuring the player's contract to prevent a prior team from deciding to match the offer sheet.

Similar to the NHL, the NBA arbitrators' decision would include an explanation of the player's base salary and bonuses, and a five to ten page report outlining the reasons why the particular salary and contract provisions were decided upon and what evidence, comparable player salaries, and contractual elements were most relevant.<sup>97</sup> Unlike the NHL, once a player

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93. Yoost, *supra* note 3, at 491, 517–19.

94. Ray Slover, *Hudler Case Headlines 2009 Arbitration Hearings*, SPORTING NEWS (July 19, 2009), available at <http://aol.sportingnews.com/nhl/story/2009-07-19/hudler-case-headlines-2009-arbitration-hearings>.

95. See NHL CBA, *supra* note 7, art. 10, § 10.4. A team that is entitled to but does not exercise its right of first refusal is entitled to obtain draft choice compensation from the new team—for example, if the offer sheet is for between \$2 million and \$3 million, the prior team receives a first and third round draft choice.

96. See Aubut, *supra* note 1, at 195.

97. See NHL CBA, *supra* note 7, art. 12, § 12.9(n)(ii). While arbitrators in baseball write the salary award number on a dotted line and do not give any opinions, explanations, findings or statements of reasons regarding his opinion, arbitrators in hockey have forty-eight hours to write a full opinion explaining the award. In MLB, the arbitrators are precluded from revealing the grounds on which they based their selection of either the team or player proposal. While this saves time and costs, it seems to hamper future negotiations or arbitration hearings between these same parties or other players in the league because no system of precedent is set with justifications for which players were deemed to be most comparable. There are benefits of creating precedent of the comparable players and statistics and arguments from both parties that were persuasive to help prevent second-guessing and a perception of bias. See MLB CBA, *supra* note 10, art. VI, § F(5); Aubut, *supra* note

accepts the team's arbitration tender offer and the parties proceed to a hearing, the arbitrators in NBA-ARB could only award a one-year contract.<sup>98</sup> Arbitrator Carol Wittenberg said that, "[a]rbitrators obviously prefer the hockey system [over the MLB system], because we have an opportunity to make the decision as to what salary is actually fairer or more appropriate."<sup>99</sup>

#### VIII. POTENTIAL COSTS OF AND PROBLEMS WITH THE PROPOSED NBA SALARY ARBITRATION MODEL

The NBA-ARB system has some potential costs and problems. For the first class of eligible restricted free agents, there will be a lack of established precedent or pool of comparable players. Because the format is not "pure final offer," more parties might be willing to take their chances at a hearing if the arbitrators' decision would likely be close to a suitable midpoint.<sup>100</sup> The final offer format also has more of a deterring factor in encouraging settlement before a hearing. The costs of preparing for and attending a hearing and the resulting damage to player-team relations in a potentially adversarial process might outweigh the benefits. Players might become more selfish on the court if they realize that their individual statistics could help them receive more money in the salary arbitration process. This may be to the detriment of the team as basketball is a game that relies on teamwork and coordinated plays, rather than on individual performance like pitching or batting in baseball.

How might going to arbitration eliminate certain possibilities, including players committing too quickly in free agency to their current team, players not being able to sign an offer sheet with another team, or teams being reluctant to go back to offering a multi-year deal once in the process? With fewer players in the NBA than in other leagues, can accurate comparisons be drawn? Should the pool of arbitrators be required to have knowledge of basketball, such as the rules of the game, different types of plays, role of different positions, and the impact of a team's offensive pace and efficiency? Does having arbitrators who watch basketball games and understand fundamentals, such as offensive rebounding, steals, and pick and rolls, result in better decisions based on an accurate interpretation of data? Or would this

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1, at 205.

98. Whereas, in the NHL, the arbitrator can award either a one-year or two-year deal.

99. Carol Wittenberg, Panelist at The Cardozo Journal of Conflict Resolution Symposium: Sports Law and Alternative Dispute Resolution (Fall 2001), *available at* <http://www.cojcr.org/vol3no1/symposia.html>.

100. The theory is that parties will typically file at similar increments above and below what they feel is a fair salary, which is why the midpoint is a valuable number to look at when determining a player's salary. *See* Das, *supra* note 29, at 58.

have a negative impact in the arbitrators' decision-making, such as forming biases, a fandom of certain teams and players, an individual preference for certain roles on the court, or an overemphasis on esoteric statistics such as a player's on-court plus-minus?

Despite the above-analyzed attributes of NBA-ARB, there are potential risks and costs that must be addressed and monitored to ensure that the salary arbitration system achieves its objectives. For now, arbitrators might have some difficulty identifying accurate figures regarding the market value of comparable players in order to determine the market value for a one-year contract for a player who is party to a hearing. As the NBA-ARB process develops, more players would likely enter the NBA-ARB system, and future players will be able to utilize more player comparisons. Arbitrators would need to continuously develop and systematically refine their skills in analyzing the admissible evidence and rendering a multi-faceted arbitration decision.<sup>101</sup>

#### IX. CONCLUSION AND RECOMMENDATIONS

If a NBA team thinks that a player's market value, which is a fair salary based on his performance and interest from teams, does not necessarily correlate to his actual value to the team, it can decide to not offer an arbitration tender and let the player become an unrestricted free agent who is able to sign with a new team without the impediments that come with restricted free agency. If a team wants to keep a player but is only offering to sign him to a one-year deal, the team should pay the player a salary for that one season that is determined by objective criteria. An arbitration process would help set out certain measures that the parties could use together to craft an agreement, and if no agreement is reached, a two-member panel would make such a determination at a hearing.

NBA-ARB would encourage teams and players to utilize the criteria that arbitrators would use during negotiations to reach a settlement before going to an actual hearing.<sup>102</sup> NBA-ARB would also be economically feasible, allowing NBA teams to pay a player less than NFL teams currently pay players under the Franchise Player and Transition Player designations, and accomplish numerous objectives beneficial to both teams and players. An arbitration system helps provide certain gauges, thresholds, and parameters for player compensation. Requiring a ceiling on the actual salary that a player could earn, and having it tied to the league's salary cap, which fluctuates each

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101. See Yoost, *supra* note 3, at 518.

102. Note that in MLB, there has been an annual average of only six hearings per year over the past seven seasons, including three hearings in 2009 and eight hearings in 2010.

year based on the revenue that the league generates, is a needed deviation from MLB's arbitration system where there is a threshold on pay cuts but no cap on pay raises.<sup>103</sup> In NBA-ARB, there would be no maximum salary reduction rule, as a team should be allowed to pay a player his fair-market value.<sup>104</sup> What a player was paid in a previous season should not be the main barometer for what salary he should be paid in future seasons because this is not indicative of his value. When first-round picks are under a set rookie salary scale and second-round picks usually receive minimum salary contracts, a player's draft slot is not as relevant as his performance, consistent productivity, and role on the team.

The NBA has probably not considered using a salary arbitration system because it would be too complicated with high costs; the game is more team-oriented, there is no perceived benefit to teams, and the players conceded on the current restricted free agent and qualifying offer rules for other benefits that players receive in the current CBA. But, NBA-ARB would also minimize delays, minimize holdouts, and eliminate procedural rigidity, unsatisfactory results, and negative player-team relations.<sup>105</sup>

While NBA-ARB would likely be objected to by NBA teams and owners, the NBPA should propose having salary arbitration as part of negotiations for new CBA rules to counteract some of the extreme demands that NBA Commissioner David Stern has suggested. Agreeing to such a system would be a major concession for teams and owners in collective bargaining negotiations. However, now is an opportune time for the NBPA to propose using a salary arbitration process to maintain a level playing field, allow teams to lock their players into long-term deals, remain competitive, and pay restricted free agents who are in the arbitration process a fair one-year salary. The CBA expired following the 2010–2011 season. In exchange for team owners wanting a hard salary cap, lower maximum player salaries and annual increases, and a reduction in player salaries and share of basketball-related income, the players and the NBPA should ask for a change to the restricted free agency rules.<sup>106</sup> The owners would unlikely get rid of the concept of restricted free agency altogether, but modifications to the current rules could help increase or limit player salaries so that restricted free agents would be

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103. MLB's maximum salary cut reduction rules. MLB CBA, *supra* note 10, art. VI, § D.

104. This is compared to an NHL arbitrator, who may not award a player a one-year salary in arbitration that is less than 85% of the aggregate sum of his previous salary plus bonuses. See NHL CBA, *supra* note 7, art. 12, § 12.3(a)(ii).

105. See Yoost, *supra* note 3, at 491–98.

106. See Kyle Stack, *NBA Labor Negotiations Breakdown: NBA Economic Experts Analyze Talks Between the Player's Union and Owners*, SLAMONLINE.COM (Apr. 20, 2010), <http://www.slamonline.com/online/blogs/stacks-house/2010/04/nba-labor-negotiations-breakdown/>.

getting paid a fair value by their prior team or would be able sign with a new team without the prior team having the right of first refusal. NBA-ARB would allow late first-round draft picks who outperformed their rookie contracts during the first four years to have a chance to be subject to an arbitration process during their fifth year in the league, before becoming an unrestricted free agent. The change to the current rules would not require teams to make a high qualifying offer to high first-round draft picks that have underperformed during their first four years in the league. The particular rules of NBA-ARB would have a positive effect on how contract negotiations are resolved, whether by following through with arbitration or by settling to avoid an arbitration hearing.<sup>107</sup>

Dialogue between the NBPA and the league office has made little progress towards extending the current CBA or agreeing to terms that would be in a new CBA. Pioneering solutions are needed to create a CBA that is acceptable to both players and teams. Making minor modifications to the current free agency and salary rules in place will not accomplish some core objectives that a salary arbitration process could help achieve. Owners who want to reduce the length and guarantees of player contracts would benefit from having players sign short-term, one-year contracts offered by the new arbitration system. At the very least, the NBPA should counter the owners' proposal of suggested terms in the new CBA with an innovative scheme, most notably a salary arbitration system such as NBA-ARB that can help anchor future collective bargaining negotiations and establish a better alternative to current restricted free agency and qualifying offer rules.

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107. See Yoost, *supra* note 3, at 492.

TABLE 1: NBA SALARY ARBITRATION—THE PROCESS AND CRITERIA OF  
NBA-ARB (NEW ARTICLE XI, SECTION 5)

The following salary arbitration procedure will apply to restricted free agents in the NBA:

**Player Eligibility:** A player is eligible for salary arbitration if he meets the following qualifications: (a) last played under a four-year rookie salary scale contract; or (b) is otherwise classified as a restricted free agent subject to his prior team's right of first refusal pursuant to Article XI, Section 4(b).

**Initiation of Process—Election of Arbitration by Team and Notice Given to Player:** A team must exercise its right to elect salary arbitration by delivering a written request by personal delivery or pre-paid certified, registered, or overnight mail to the NBPA and the player by July 15.<sup>108</sup> The player must declare his intent to accept the team's offer for arbitration (the "arbitration tender") by July 22. If the arbitration tender is accepted, the player would no longer be able to accept any offers from another team; the player and the team cannot withdraw from the arbitration process. If the arbitration tender is not accepted, the player will remain a restricted free agent, the team can now offer the applicable minimum player salary to retain his rights, and the parties will not be eligible for salary arbitration.

**Hearing—Scheduling, Attendance, and Conduct:** If an agreement is not reached by August 7, the player and team must file written briefs (not exceeding fifty pages), including comparable player salaries and allowable evidence (as defined below) with the Arbitration Panel. In no event will any party overtly request a specific single salary figure in the brief for the player. The one-page "one-year salary request" form must be completed and delivered in a separate envelope indicating its contents to the Arbitration Panel. A hearing for each player will be scheduled for the week that begins on or includes August 14. No witnesses or testimonials will be allowed; the hearings will take place in either New York or Los Angeles and will be conducted on a private and confidential basis. A party's written brief can be updated once and re-sent to the Arbitration Panel within forty-eight hours of

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108. This date is one week after the start of the free agency signing period and two weeks after the date on which free agents are allowed to negotiate with any team. If a team fails to make an arbitration tender by July 15, the player would become an unrestricted free agent.

the scheduled hearing. The player and the team may be represented at the hearing by union executives, league executives, and counsel. Each party will have a total of ninety minutes to present its direct case and rebuttal case, with a coin flip determining which party can elect to make its affirmative case first. There will be no continuances, adjournments, or reopening of a hearing.

***Selection of Arbitrators:*** At the beginning of each regular season, the League and NBPA will jointly appoint fifteen Salary Arbitrators, all who must be a member of either the American Arbitration Association (AAA) or National Academy of Arbitrators. In the event that the parties are unable to agree by December 1 of any season, the list of fifteen arbitrators will be selected by the parties alternately striking names from a list of thirty arbitrators provided by the AAA. An individual who has served as a Grievance or System Arbitrator for the NBA cannot be selected as a Salary Arbitrator. Arbitrators will be randomly assigned to particular cases. A Salary Arbitrator may hear only two cases in a given off-season. Each case will be heard by a two-member panel of Arbitrators. The Salary Arbitrators' decision, made within seventy-two hours of the hearing and containing a brief statement as to the reasons for the decision, including the identification of which players were most comparable and what evidence was most relevant, will be final and binding on the parties. The Arbitrators' determination can be for any one-year salary plus any addition of incentives, bonuses, and clauses, subject to the "arbitrator award adjustment" exception.

***Evidence—Admissible Criteria:*** Each party may present documents and other evidence at the hearing; all statistical evidence asserted in a party's affirmative case must be included in the party's pre-hearing brief delivered to the Arbitration Panel in order to be admissible. Each party may use video and interactive computer modules for visual exhibits that help demonstrate the qualitative and quantitative data provided in the party's brief. The Arbitrators will be the judge of the relevancy and materiality of the evidence offered and the weight attached to the evidence. The Arbitrators will be provided with access to a statistical database via a secured internet link that is maintained and updated by the League and NBPA during the season. Relevant statistics may include the following: minutes, points, rebounds, assists, steals, blocks, turnovers, free throws, three-pointers, shooting percentages, plus/minus, efficiency ratings, per game/possession/rate statistics, points produced, defensive ratings, win shares, opponent-counterpart production, usage rate, and shot selection and location. Parties can introduce evidence pertaining to the following: (a) trends in a player's career and platform year performance (including totals, averages, disparities, improvement, and consistencies in

games played, production, and injuries); (b) the team's success (including the team's record, playoff appearances, and attendance); (c) the overall contribution of the player and his role on the team (including awards won such as sixth man of the year, most improved player, All-Star, All-Defense, or ranking in the top-ten in the league in a certain category, the player's leadership, and off the court community involvement); and (d) the compensation and evidence in clauses (a) to (c) of players alleged to be comparable to the player. The Arbitrators will consider the salaries of all comparable players and not merely the salary of a single player. Evidence of the following will not be admissible: the player's past compensation, what the team's qualifying offer would have been under old CBA rules, the financial condition of the team, offers made by either party prior to the hearing, or press comments.<sup>109</sup>

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109. For comparable CBA provisions, see NHL CBA, *supra* note 7, art. 12, § 12.9(g)(iii); MLB CBA, *supra* note 10, art. VI, § F(12)(b).

TABLE 2: NBA RESTRICTED FREE AGENTS SIGNING QUALIFYING OFFERS DURING PAST SIX SEASONS

Player, Prior Team	Draft Pick #	Year of Signing Qualifying Offer	One-Year Qualifying Offer – Contract Signed	Next Contract Signed in Season Following when Player Accepted Qualifying Offer
Raymond Felton, Charlotte	5th pick	2009	\$5,501,196 <sup>110</sup>	Unrestricted Free Agent in 2010
Ben Gordon, Chicago	3rd pick	2008	\$4,881,669	5 yrs, \$58,000,000, Detroit
Robert Swift, Oklahoma City	12th pick	2008	\$3,579,131	Did not play in the NBA
Mickael Pietrus, Golden State	11th pick	2007	\$3,470,770	4 yrs, \$21,200,000, Orlando
Melvin Ely, Charlotte	12th pick	2006	\$3,308,615	2 yrs, \$1,893,739, New Orleans
Vladimir Radmanovic, Seattle	12th pick	2005	\$3,166,155	5 yrs, \$30,247,000 , L.A. Lakers
Stromile Swift, Memphis	2nd pick	2004	\$5,993,105	4 yrs, \$22,400,000, Houston

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110. Salary information is from the following sources: *2005 Collective Bargaining Agreement*, NBPA.ORG (Dec. 16, 2009), <http://www.nbpa.org/cba/2005>; *Salaries*, HOOPSHYPE.COM, <http://hoopshype.com/salaries.htm>; *Salaries*, HOOPSDATA.COM, <http://hoopdata.com/salaries/index.aspx>.

TABLE 3: NBA RESTRICTED FREE AGENTS SIGNING OFFER SHEETS WITH A  
NEW TEAM DURING PAST SIX SEASONS

Free Agency Year	Offer Sheet Matched – Player Returned to Prior Team	Offer Sheet Not Matched – Player Joined New Team
2009	Paul Millsap Marcin Gortat	Jarrett Jack Jamario Moon Ryan Hollins Ramon Sessions
2008	Josh Smith C.J. Miles Carl Landry Kelenna Azubuike	Nenad Krstic Ronny Turiaf
2007	Anderson Varejao Charlie Bell	Jason Kapono Maceo Baston
2006	N/A	Jared Jeffries John Salmons Jackie Butler
2005	Damien Wilkins Chris Duhon	Zaza Pachulia
2004	Etan Thomas Trenton Hassell Morris Peterson	Carlos Boozer Mehmet Okur Hedo Turkoglu Mo Williams