

ARBITRATION ON ICE: HOW MLB CAN SOLVE THE ISSUES WITH ITS SALARY ARBITRATION PROCESS BY BORROWING PRACTICES FROM THE NHL & IMPLEMENTING PRE-ARBITRATION MEDIATION

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ABSTRACT

The 1975 McNally-Messersmith arbitration decision and the 1976 Major League Baseball (MLB) Collective Bargaining Agreement (CBA), in which players were awarded free agency after six years of service and salary arbitration after three, constituted major victories for the players in their efforts to break free of MLB's archaic reserve system. The reserve system allowed teams to reserve a number of players on their rosters and forbid those players from signing with other teams. As a result of free agency, players' salaries began to soar as teams competed for their services for the first time. Since the beginning of free agency, team owners have attempted to curb the increases in player salaries. One way they tried to do this was by campaigning for the elimination of salary arbitration.

Even though MLB's salary arbitration process has been changed incrementally in post-1976 CBAs, the current system of MLB salary arbitration is far from perfect. Most notably, the current process constrains an arbitrator to the salary offers of either the team or the player. The process also encourages players and teams to submit unreasonable salary offers, inflates player salaries, constrains salary arbitrators, deteriorates relationships between players and their teams, and perpetuates a league-wide imbalance between small and large-market franchises. Further, the lack of written decisions after arbitration hearings only adds to the uncertainty and inherent risk in submitting salary disputes to arbitration. Additionally, teams have started signing their young, star players to long-term contracts well in advance of their arbitration eligibility, resulting in contracts that restrict the players' free agency eligibility and entitle them to salaries far below their market values.

On the other hand, the National Hockey League (NHL)'s system of salary arbitration allows arbitrators to choose any salary figure between the bounds of the team and player's offers. NHL arbitrators are also mandated to issue written decisions explaining their reasoning. Further, the process of mediation is quicker and less expensive than arbitration. Mediation also expands the criteria parties may introduce to argue their positions and allows parties to share resources and opportunities, often resulting in more satisfactory outcomes for both parties.

If MLB implemented pre-arbitration mediation while also adopting certain elements of NHL salary arbitration, specifically allowing salary

arbitrators to award a salary equal to any amount between the parties' final offers and mandating that salary arbitrators issue explanatory, post-hearing written decisions, it may help to cure the imbalance between MLB's small and large-market teams. This would also improve competitive balance, allow for more accurate compensation, and improve post-arbitration relationships between teams and players. In order to address criticisms to MLB's system of salary arbitration, the League should adopt the aforementioned practices of NHL's system of salary arbitration and implement mediation as a mandatory pre-arbitration process.

INTRODUCTION

If you had just learned that a Major League Baseball (MLB) franchise had signed two All-Star position players in their early twenties to long-term contracts, keeping the players under team control until both reach the age of thirty, how much salary would you guess the two players' contracts pay them? In 2019, the Atlanta Braves signed Ronald Acuna Jr., the 2018 MLB Rookie of the Year, to an eight-year, \$100,000,000 contract.¹ That same year, the Braves locked up another 2018 All-Star by agreeing to a seven-year, \$35,000,000 contract with Ozzie Albies.² Both players signed their contracts prior to their first year of eligibility for salary arbitration, and the deals keep both under team control through the players' prime years of free agency eligibility.³

Ronald Acuna Jr. and Ozzie Albies' contracts are just two examples of an emerging trend in MLB; teams are beginning to offer long-term contracts to their young, star players ahead of their arbitration eligibility in order to avoid salary arbitration altogether and stabilize payroll by underpaying these players relative to their market values.⁴ This trend is just one notable adverse consequence of the current process of salary arbitration in MLB. The process also encourages players and teams to submit unreasonable salary offers, inflates player salaries, limits the abilities of salary arbitrators, deteriorates relationships between players and their teams, and perpetuates a league-wide imbalance between small

1. Bill Baer, *Scott Boras Calls Young Players' Contract Extensions 'Snuff Contracts'*, NBC SPORTS (Apr. 7, 2019, 7:34 PM), <https://mlb.nbcsports.com/2019/04/07/scott-boras-calls-young-players-contract-extensions-snuff-contracts/>.

2. Michael Baumann, *Ozzie Albies's New Deal Could be the Worst an MLB Player Has Ever Signed*, THE RINGER (Apr. 11, 2019, 6:19 PM), <https://www.theringer.com/mlb/2019/4/11/18306927/ozzie-albies-atlanta-braves-contract-extension>.

3. *See id.*; Baer, *supra* note 1.

4. Adam Primm, *Salary Arbitration Induced Settlement in Major League Baseball: The New Trend*, 17 SPORTS L. J. 73, 94 (2010).

and large-market franchises.⁵ This Note will explore the various criticisms of MLB's salary arbitration process and suggest ways in which the League could address them. Specifically, MLB should borrow elements from the National Hockey League (NHL)'s salary arbitration process. NHL salary arbitration allows its arbitrators the freedom to award a salary in between the bounds of the parties' final offers, which affords the arbitrators greater flexibility in rendering their decisions.⁶ NHL also mandates that arbitrators issue written decisions explaining the reasoning behind their decisions, which provides needed transparency to the process.⁷

Part I of this Note details the history of MLB salary arbitration to provide an understanding as to how its current process developed. Part II explores MLB's salary arbitration process by diving into the Collective Bargaining Agreement (CBA) that presently governs league operations and explaining the many criticisms of the process. Part III first explores how the current process of NHL salary arbitration functions by exploring NHL's governing CBA and then explains how adopting practices from NHL's system of salary arbitration could improve MLB's own process. Part III also explains the benefits of adopting mediation as a mandatory pre-arbitration process in MLB. Finally, this Note concludes by recapping the many criticisms of MLB salary arbitration and restating how both mediation and NHL salary arbitration could effectively address those criticisms.

I. HISTORY OF MLB SALARY ARBITRATION

In order to understand the deficiencies in the current process of MLB salary arbitration, one must understand the historical aspects of its development. Many of these significant historical events, including Marvin Miller's tenure as Executive Director of the Major League Baseball Players' Association (MLBPA), the McNally-Messersmith arbitration decision, and the 1976 MLB CBA, discussed below, illustrate the tension between MLB team owners and players that influenced how the League's current salary arbitration process developed.

5. See Jeff Monhait, *Baseball Arbitration: An ADR Success*, 4 HARV. J. SPORTS & ENT. L. 105, 140–41 (2013).

6. Scott Bukstein, *A New Solution for Salary Disputes: Implementing Salary Arbitration in the National Basketball Association*, 22 MARQ. SPORTS L. REV. 25, 52 (2011).

7. Matt Mullarkey, *For the Love of the Game: A Historical Analysis and Defense of Final Offer Arbitration in Major League Baseball*, 9 VA. SPORTS & ENT. L. J. 234, 235 (2010).

A. Marvin Miller's Influence

Marvin Miller was hired as the Executive Director of the MLBPA on July 1, 1966 after leaving his position as the chief economist for United Steelworkers of America, the third-largest labor union in the United States.⁸ It was not until Marvin Miller began his tenure as MLBPA Executive Director that real labor negotiations between teams and players commenced.⁹ Miller's hiring, coupled with MLB teams' pattern of contemptuous behavior toward players before the first CBA, formed a necessary bond between Miller and the players that sparked productive labor negotiations.¹⁰

In 1968, Marvin Miller helped negotiate the first CBA for MLB players.¹¹ The 1968 CBA established a league-wide minimum salary and formal grievance procedure.¹² Miller was able to secure a new arbitration procedure with an independent arbitrator in the 1970 CBA while also negotiating a \$5,000 increase in the league-wide minimum salary.¹³

Despite this initial success, Miller continued to press for further changes to the labor relationship between MLB teams and players by organizing a strike in 1972.¹⁴ As a result of this thirteen-day strike, prompted by disagreement over the players' pension fund, MLB adopted final offer arbitration ("FOA") as the League's method of resolving salary disputes.¹⁵ MLB team owners actually proposed FOA in lieu of opening up the free agent market to players.¹⁶ FOA is a type of arbitration where the arbitrator is forced to pick one party's final offer or the other party's final offer.¹⁷ Shortly thereafter, Miller was able to put FOA into practice.¹⁸ Dick Woodson, a pitcher for the Minnesota Twins, demanded a salary of \$30,000 from the Twins following the 1973 season.¹⁹ The

8. Ed Edmonds, *At the Brink of Free Agency: Creating the Foundation for the Messersmith- McNally Decision 1968-1975*, 34 S. ILL. U. L. J. 565, 572 (2010); 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, 121 (2009).

9. Chetwynd, *supra* note 8.

10. Edmonds, *supra* note 8, at 618-19.

11. Chetwynd, *supra* note 8.

12. Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 269 (2008).

13. *Id.*

14. Chetwynd, *supra* note 8, at 122.

15. *Id.*

16. *Id.* "Quite possibly, the owners sensed that in order to maintain the reserve system, some form of neutral wage determination system was necessary." *Id.*

17. *Id.* at 109.

18. See Monhait, *supra* note 5, at 113.

19. *Id.*

Twins, however, offered only \$23,000 and Woodson elected to go to arbitration.²⁰ Woodson ended up receiving his requested \$30,000 in salary, but blames the decision to arbitrate his salary for the subsequent reduction in his playing time.²¹ Thus, even though Miller was able to show the players that the changes they were fighting for were working in practice, there was much work left to do to counteract the adverse consequences of the salary arbitration process.²²

In 1974, Marvin Miller and the MLBPA filed a grievance on behalf of Jim “Catfish” Hunter.²³ After Hunter signed a two-year, \$100,000 contract with the Oakland Athletics that included an agreement where Hunter would be paid one half of his salary as a deferred annuity, the Athletics failed to make the annuity payment.²⁴ Arbitrator Seitz ruled in favor of Hunter and the MLBPA and declared Hunter the first free agent in MLB history.²⁵ The subsequent bidding war amongst teams over Hunter’s services resulted in a then-staggering five-year, \$3,750,000 contract between Hunter and the New York Yankees.²⁶ Hunter’s contract illustrated the potential consequences of free agency, which influenced team owners’ future collective bargaining strategies aimed at eliminating the link between free agency and salary arbitration.²⁷

B. The McNally-Messersmith Arbitration

Both Dave McNally and Andy Messersmith, pitchers for the Baltimore Orioles and Los Angeles Dodgers, respectively, agreed to play out the 1975 MLB season under their current contracts and use arbitration after the conclusion of the season to test the validity of Paragraph 10(a) in their contracts.²⁸ Paragraph 10(a) of the Uniform Player Contract permitted teams to renew a player’s contract “for the period of one year on the same terms” if the player failed to sign a new contract by a certain

20. *Id.*

21. See Edward Silverman, *Dick Woodson’s Revenge: The Evolution of Salary Arbitration in Major League Baseball*, 2013 PEPP. L. REV. 23, 31 (2013).

22. See *id.*

23. Edmonds, *supra* note 8, at 610.

24. Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS L. J. 21, 42 (2008).

25. Hunter’s free agent status granted him the liberty to freely negotiate and sign with any team. See Dennis P. Hughes, Jr., *Steinbrenner: The Last Lion of Baseball*, 21 MARQ. SPORTS. L. REV. 801, 807 (2011).

26. Goldberg, *supra* note 24, at 43.

27. See Hughes, *supra* note 25. Team owners thought that these events signaled doom for small-market teams as the Yankees, one of the richest MLB teams, could easily afford to sign star free agents like Catfish Hunter away from the player’s previous small-market team. *Id.* at 807–08.

28. See Edmonds, *supra* note 8, at 611.

date.²⁹ McNally and Messersmith argued that, because they did not sign a new contract for the 1975 season but instead elected to play out the season as the one-year renewal period, they should be allowed to explore free agency.³⁰

Peter Seitz, the chair of the three-arbitrator panel hearing their case, agreed that Paragraph 10(a) effectuated only a one-year renewal option of the players' contracts, not a perpetual renewal option as MLB had argued.³¹ Seitz's ruling removed McNally and Messersmith from their teams' reserve lists and allowed them to explore free agency.³² This landmark ruling constituted a major win for the players and provided the MLBPA with the necessary ammunition to gain leverage against team owners.³³ As a consequence of Seitz's ruling, salaries began to rise as players followed in the footsteps of McNally and Messersmith and explored free agency.³⁴

C. The 1976 MLB CBA

The 1976 MLB CBA marked a pivotal moment in labor negotiations between teams and players. Team owners gained back some leverage that was lost after the McNally-Messersmith arbitration by securing delayed free agency.³⁵ Even though this CBA prevented players from exploring free agency until the year following their sixth MLB season, players were given the right to submit their salary disputes to arbitration after their third season.³⁶ These balanced concessions helped tame the introduction of free agency, which quelled Marvin Miller's fear of driving player salaries down.³⁷ The 1976 CBA, however, still left problems unsolved.

29. Henry D. Fetter, *From Flood to Free Agency: The Messersmith-McNally Arbitration Reconsidered*, 5 ALB. GOV'T L. REV. 156, 157 (2012). This clause had been included in every MLB player's contract since 1947. *Id.*

30. *Id.* Counsel for the MLBPA thought of the issue as "nothing more than a simple question of contract interpretation." *Id.* at 167.

31. *Id.* at 157–58. "There is nothing in Section 10(a) which, explicitly, expresses agreement that the Player's Contract can be renewed for any period beyond the first renewal year . . . the right to additional renewals must have been an integral part of the renewed contract." Fetter, *supra* note 29, at 177.

32. Edmonds, *supra* note 8, at 565.

33. *See id.* at 567; Mullarkey, *supra* note 7, at 237. The Eighth Circuit Court of Appeals affirmed Seitz's ruling in 1976, holding that the McNally-Messersmith arbitration panel had jurisdiction to resolve the players' salary disputes as the panel's award drew its essence from the CBA. *Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615, 617 (8th Cir. 1976).

34. Mullarkey, *supra* note 7, at 247.

35. The MLBPA agreed to allow teams to retain their rights to players for the players' first six seasons. *Id.* at 237.

36. *Id.* at 237–38.

37. Primm, *supra* note 4, at 82; Monhait, *supra* note 5, at 114.

The link between free agency and salary arbitration forced low revenue teams to pay players comparably to what teams with higher revenues were offering.³⁸ If teams with low revenues failed to offer players similar salaries, they would lose out on players to the teams that could afford to offer higher salaries, thus widening the competitive gap between teams with high and low revenues.³⁹

D. Post-1976 Collective Bargaining & Power Struggle

Following the 1976 MLB CBA, the tension between team owners and players grew as both sought to shift the balance of power in the league toward their side. By 1980, owners campaigned, albeit unsuccessfully, for the elimination of salary arbitration and the institution of a fixed salary plan in order to prevent salary inflation resulting from salary arbitration.⁴⁰ Even though salary arbitration remained in place, team owners were able to restrict the players' arbitration eligibility to two years of MLB service.⁴¹

In 1985, owners agreed, behind the players' backs, to not participate in free agency.⁴² Owners were concerned about the growing problem of salary inflation related to salary arbitration's entanglement with free agency.⁴³ Since the owners had been unsuccessful in eliminating salary arbitration, they focused their efforts on suppressing free agency. As a result of their collusion, the owners agreed to pay the players treble damages of \$280,000,000.⁴⁴ Since 1986, arbitration panels have found the owners guilty of collusion at least three more times.⁴⁵

In 1994, the 1990 CBA was set to be renegotiated for the upcoming season.⁴⁶ At the forefront of the issues necessitating these negotiations was the disparity between small and large-market teams when it came to

38. Monhait, *supra* note 5, at 115.

39. *See id.*

40. *See id.*; Silverman, *supra* note 21, at 28.

41. Silverman, *supra* note 21, at 29 n.50.

42. Monhait, *supra* note 5, at 116. This collusive effort violated the 1985 MLB CBA. *Id.*

43. *See id.*

44. Daniel C. Glazer, *Can't Anybody Here Run This Game? The Past, Present and Future of Major League Baseball*, 9 SETON HALL J. SPORTS L. 339, 375 (1999).

45. *See* 1 JAMES T. GRAY, SPORTS LAW PRACTICE § 1.09(6)(b) (3d ed. 2018). The owners' actions illustrated that players will receive less money when "precluded from contracting in an open labor market, even if [as a general matter] owners have more money to [allocate to player] salaries. Glazer, *supra* note 44, at 375 (alterations in original). Also, during negotiations prior to the 1990 CBA, owners renewed their efforts to get rid of salary arbitration by demanding a salary cap and locking out the players during spring training. Monhait, *supra* note 5, at 116.

46. Dryer, *supra* note 12, at 270.

television revenue.⁴⁷ Large market teams wouldn't agree to share their television revenue unless a salary cap was implemented in the next CBA.⁴⁸ The players ultimately rejected this proposal, sparking a strike that lasted 232 days.⁴⁹ During this time, owners still pressed forward with their campaign to wipe salary arbitration from MLB.⁵⁰ The strike ultimately ended when the National Labor Relations Board (NLRB) sought a court injunction to force the owners to reinstate the previous CBA's terms for the upcoming season.⁵¹ United States District Court Judge Sotomayor granted NLRB's preliminary injunction on March 31, 1995, ending the strike.⁵² The 1994 player strike illustrated the fact that players were willing to miss games in order to protect their right to salary arbitration. In the years following the 1994 player strike, team owners, although unsuccessful at completely eliminating salary arbitration, focused their efforts on remedying problems caused by FOA.⁵³

The first CBA following the 1994 player strike, which took effect in 1997, implemented luxury tax and revenue sharing plans while salary arbitration was left "largely unchanged."⁵⁴ The following year, Congress enacted the Curt Flood Act of 1998 which narrowed the scope of baseball's antitrust exemption.⁵⁵ Notwithstanding its enactment, the Curt Flood Act only affected baseball's antitrust exemption as it pertained to labor relations while subjecting players' conduct affecting their

47. *Id.* Whether a team is considered a large-market team or a small-market team depends on the size of its media market: large-market teams have larger revenue streams which allows them to allocate more funds to their rosters than small-market teams. See Al Streit, *Baseball Markets*, BASEBALL ALMANAC, https://www.baseball-almanac.com/articles/baseball_markets.shtml (last visited Nov. 11, 2019).

48. Dryer, *supra* note 12, at 270.

49. Silverman, *supra* note 21, at 29. The strike resulted in the loss of the rest of the 1994 MLB season, including the postseason, and the first eighteen games of the 1995 season. *Id.* Notable players involved in the 1994 strike included Tony Gwynn, Jeff Bagwell, Frank Thomas, Barry Bonds, and Ken Griffey Jr. See ESPN, *MLB Batting Leaders - 1994*, http://www.espn.com/mlb/history/leaders/_/breakdown/season/year/1994 (last visited Nov. 11, 2019).

50. Silverman, *supra* note 21, at 29.

51. Paul D. Staudohar, *The Baseball Strike of 1994–95*, 120 MONTHLY LAB. REV. 21, 26 (1997).

52. Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 261 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054, 1062 (2d Cir. 1995).

53. In 1995, the Second Circuit ruled that salary arbitration was a mandatory subject of collective bargaining. Allan H. ("Bud") Selig & Matthew J. Mitten, *Baseball Jurisprudence: Its Effect on America's Pastime and Other Professional Sports Leagues*, 50 ARIZ. ST. L. J. 1171, 1197 (2018).

54. Dryer, *supra* note 12, at 271. Even though the 1997 CBA introduced the three-arbitrator panel, this change was not uniformly implemented until 2000. Monhait, *supra* note 5, at 117.

55. Selig & Mitten, *supra* note 53, at 1185. The Curt Flood Act was the product of joint lobbying by the MLB owners and MLBPA. *Id.*

professional employment to antitrust laws similar to other professional athletes.⁵⁶ In effect, the Curt Flood Act ended MLB's reserve system, which had permitted teams to prevent players from negotiating with other teams.⁵⁷ As a result, the Curt Flood Act perpetuated further the problems associated with MLB's salary arbitration system, including rising player salaries.⁵⁸

After 2000, team owners continued their efforts to stymie the perceived problems tied to salary arbitration through collective bargaining. The 2002 MLB CBA simplified the systems of revenue sharing and luxury tax, which illustrated an effort by team owners to close the disparity between small and large-market franchises.⁵⁹ The 2012–2016 MLB CBA aimed to eliminate the problematic tie between free agency and salary arbitration.⁶⁰ Players could now attain salary arbitration eligibility by either accruing three years of MLB service time or achieving a “Super Two” player designation.⁶¹ After six years of service time, players were awarded unrestricted free agency.⁶² Even though team owners originally lobbied for the elimination of salary arbitration altogether, the incremental changes achieved through each post-1976 MLB CBA have instead led to the current, widely-criticized system of MLB salary arbitration.⁶³

II. MLB SALARY ARBITRATION

Before discussing the many criticisms of MLB's current process of salary arbitration, Subsection A explores the current MLB CBA governing league operations. Subsection B then details the many flaws stemming from the salary arbitration process, including how it constrains salary arbitrators, encourages unreasonable offers, inflates player salaries, deteriorates relationships between teams and players,

56. Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. CONTEMP. PROBS. 55, 56 (2003); Selig & Mitten, *supra* note 53, at 1186.

57. *See* Das, *supra* note 56, at 56.

58. *Id.*

59. Mullarkey, *supra* note 7, at 240. The revenue sharing system taxes revenues earned by all franchises and equally redistributes the funds to all teams irrespective of market size. *Id.* at 240–41. The luxury tax system makes it disadvantageous for teams to keep high payrolls by taxing teams after combined player salaries exceed a certain threshold. *Id.* at 240–41.

60. *See* Patrick Kessock, *Out of Service: Does Service Time Manipulation Violate Major League Baseball's Collective Bargaining Agreement?* 57 B.C.L. REV. 1367, 1384 (2016).

61. *Id.* at 1379. A player's service time is equivalent to the aggregate number of days he spends on a MLB regular season roster. *Id.* at 1378. A player achieves a “Super Two” designation by being “in the top 22% [in total service time] of players with between two and three years of service time.” *Id.* at 1379 (alterations in original).

62. *Id.* at 1379–80.

63. *See* Kessock, *supra* note 60, at 1376–77.

perpetuates a league-wide imbalance between small and large-market franchises, and facilitates a growing trend in which teams sign their young players to substandard long-term contracts well in advance of their arbitration eligibility.

A. The Current Process of MLB Salary Arbitration

The current MLB CBA is effective through December 1, 2021.⁶⁴ Eligible players or their teams may elect to submit to arbitration the amount of salary the player is to be paid for the upcoming season by filing a written notice of submission to arbitration.⁶⁵ Even though the player is still under contract with his team, the salary figure within the player's contract is submitted as an arbitrable issue.⁶⁶ Because either the player or his team may elect salary arbitration, both parties do not necessarily have to agree on whether the issue of the player's salary should go to arbitration.⁶⁷ However, if both parties agree on the player's salary before the arbitration hearing, then the issue will not be arbitrated.⁶⁸

The MLBPA and MLB Labor Relations Department (LRD) select arbitrators on an annual basis.⁶⁹ If the two cannot agree on a three-arbitrator panel by January 1, then the American Arbitration Association will provide a list of qualified, professional arbitrators from which the MLBPA and MLB LRD jointly select the arbitrators.⁷⁰ Salary offers are exchanged by team and player representatives on a specific date in January set out in the CBA.⁷¹ Both parties submit their "last best offer" ahead of the arbitration hearing and when the parties appear at the hearing, they provide the arbitration panel with the player's complete

64. See generally 2017–2021 Basic Agreement between the 30 Major League Clubs and Major League Baseball Players Ass'n, <https://www.mlbplayers.com/cba> [https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf] (last visited Dec. 13, 2019) [hereinafter 2017–2021 Basic Agreement] (the document is valid from 2017–2021).

65. Players with between three and six years of service time and "Super Two" players may submit their salaries to arbitration without their teams' consent. *Id.* at art. VI, § E(1)(a)–(b); Monhait, *supra* note 5, at 118; see Melanie Aubut, *When Negotiation Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS L. J. 189, 203 (2003).

66. See Benjamin A. Tulis, *Final-Offer "Baseball" Arbitration: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85, 90–91 (2010).

67. See *id.* at 91.

68. See *id.*

69. 2017–2021 Basic Agreement, *supra* note 64, at art. VI, § E(5).

70. *Id.*

71. *Id.* at § E(2). The exchange date for 2020 is Friday, January 10. *Id.*

Uniform Player Contract absent his salary figure.⁷² The arbitrator-chosen salary is then inserted into the player's contract following the hearing.⁷³

Arbitration hearings are held between February 1 and February 20.⁷⁴ Each party is given one hour to present a case for their salary figure, and the arbitrators are limited to awarding only the player's base salary, which does not include any additional clauses or bonuses.⁷⁵ Arbitrators also do not issue any written opinions or reasoning for their awards and must choose either the player's proposal or the team's proposal within twenty-four hours after the conclusion of the hearing.⁷⁶ The criteria teams and players are permitted to use as supporting evidence at salary arbitration hearings is also governed by the CBA.⁷⁷ Admissible criteria includes evidence relevant to the player's team contribution from the previous season, the length and consistency of his playing career, the player's past salaries, comparable player salaries, the team's performance, and any of the player's potential relevant mental or physical conditions.⁷⁸ Criteria that is specifically disallowed includes the financial positions of the team and player, media comments on player or team performance, pre-arbitration offers, the cost of representation at the arbitration hearing, and any non-MLB salaries.⁷⁹

B. Criticisms of MLB Salary Arbitration

1. Encourages Pre-Arbitration-Eligible Players to Sign Bad Contracts

The goal of salary arbitration is to encourage good faith negotiations and pre-hearing settlements between the team and player.⁸⁰ Considering the fact that the average career length of a MLB player is approximately five years, a contract with a term extending beyond five years is promising to young players because they perceive a feeling of security from this long-term commitment.⁸¹ Teams have started to take advantage of this by offering their younger players below-market value contracts ahead of their arbitration eligibilities.⁸² By accepting such contracts,

72. Silverman, *supra* note 21, at 34.

73. See Tulis, *supra* note 66, at 87.

74. 2017–2021 Basic Agreement, *supra* note 64, at art. VI, § E(13).

75. Mullarkey, *supra* note 7, at 238; Bukstein, *supra* note 6, at 31.

76. 2017–2021 Basic Agreement, *supra* note 64, at art. VI, § E(13).

77. See *id.* at § E(10).

78. *Id.* at § E(10)(a).

79. *Id.* at § E(10)(b)(i)–(v).

80. Bukstein, *supra* note 6, at 46.

81. Mullarkey, *supra* note 7, at 249.

82. See Primm, *supra* note 4, at 94.

players allow teams to artificially cap their earning potential over the term of the contract.⁸³ Also, these contracts normally extend past the player's years of salary arbitration eligibility and into the player's first years of free agency eligibility.⁸⁴ This trend is very beneficial for teams because they are able to keep their young, star players under contracts below the players' market value, which works to stabilize team payroll.⁸⁵

Ronald Acuna Jr. and Ozzie Albies found themselves right in the middle of this trend at the start of the 2019 season. Ronald Acuna Jr. signed an eight-year, \$100,000,000 contract with the Atlanta Braves in 2019.⁸⁶ Acuna was eligible for salary arbitration in 2022; however, this contract extension will keep him under team control until the 2027 season.⁸⁷ Acuna won the 2018 National League Rookie of the Year Award after finishing with a .293 batting average (AVG), a .366 on base percentage (OBP), and a .552 slugging percentage (SLG) while compiling 26 homeruns (HR), 64 runs batted in (RBI), and 4.09 wins above replacement (WAR).⁸⁸ He followed up his rookie season by batting .280 AVG/.365 OBP/.518 SLG while compiling 41 HR, 101 RBI, and 5.5 WAR in 2019.⁸⁹

In light of his early statistical success, Acuna was likely headed for a much more lucrative contract if he were to hit the open market as an unrestricted free agent because teams would be allowed to freely bid against each other for Acuna's services, driving up his price.⁹⁰ However, by signing this contract in 2019, Acuna gave up his prime years of free agency eligibility.⁹¹ Scott Boras, a notable MLB player agent, opined in saying that Acuna signed his most lucrative years of earning potential away for "40 cents on the dollar."⁹² Acuna's team, the Atlanta Braves, on

83. *See id.* at 106.

84. *Id.* at 94.

85. *Id.* Even though the team is taking on risk by signing young (and oftentimes unproven) players to these longer-term contracts, players still bear the majority of the risk by signing away their most lucrative years of earning potential in salary arbitration and free agency eligibility. *See id.* at 95.

86. Baer, *supra* note 1, at 2. The maximum value of this contract is ten years and \$124,000,000 if all options are exercised. Spotrac, *Ronald Acuna*, CURRENT CONTRACT, <https://www.spotrac.com/mlb/atlanta-braves/ronald-acuna-25027/> (last visited Dec. 16, 2019).

87. Baer, *supra* note 1, at 2.

88. Baseball Reference, RONALD ACUNA JR., <https://www.baseball-reference.com/players/a/acunaro01.shtml> (last visited October 17, 2020).

89. *Id.*

90. *See* Baer, *supra* note 1, at 2.

91. *See id.*

92. *Id.*

the other hand, locked up one of their best players at a reasonable price for the next eight to ten seasons.⁹³

Ozzie Albies, also a member of the Atlanta Braves, signed a seven-year, \$35,000,000 contract in 2019.⁹⁴ Albies is a 22-year-old All-Star who batted .261 AVG/.305 OBP/.452 SLG while compiling 24 HR, 72 RBI, and 3.79 WAR in 2018, and batted .295 AVG/.352 OBP/.500 SLG while compiling 24 HR, 86 RBI, and 4.77 WAR in 2019.⁹⁵ Albies would have been eligible for salary arbitration following the 2020 season, but now will not have the chance to take advantage of free agency until he turns 31 years old.⁹⁶ In 2018, the Philadelphia Phillies signed Scott Kingery to a similar contract.⁹⁷ As of April 2019, Scott Kingery had never played in a MLB game; thus, it is reasonable to say that Ozzie Albies, a 2018 All-Star, should be worth exponentially more than a player who has yet to prove himself in the way that Albies did in his first two seasons.⁹⁸ Even though teams must take on the risk that a player does not live up to his contract, namely because of injuries or underperformance, Albies' statistical performance in his first two seasons demonstrates that if he had continued to play as projected, he would have been able to sign a better contract if he had the chance to explore salary arbitration and/or free agency.⁹⁹ Again, the Braves struck gold by successfully signing another one of their best players to a long-term contract below the player's market value.

2. Encourages Unreasonable Offers & Facilitates Unpredictability in the Process

Even though the salary arbitration process is supposed to encourage good-faith negotiations between teams and players, owners are often forced to offer high salaries during the negotiation stage because players always have the option to elect salary arbitration if they are dissatisfied

93. *See id.*

94. Baumann, *supra* note 2. The maximum value of this contract is nine years and \$45,000,000 if all options are exercised. Spotrac, *Ozzie Albies*, CURRENT CONTRACT, <https://www.spotrac.com/mlb/atlanta-braves/ozzie-albies-21317/> (last visited Dec. 16, 2019).

95. Baumann, *supra* note 2; Spotrac, *Ozzie Albies*, STATISTICS, <https://www.spotrac.com/mlb/atlanta-braves/ozzie-albies-21317/statistics/> (last visited Dec. 16, 2019).

96. Baumann, *supra* note 2. Only two MLB position players have been able to secure a \$100,000,000+ contract through free agency after turning 30 years old. *Id.*

97. *Id.* The Phillies signed Kingery to a six-year, \$24,000,000 contract with a maximum value of nine years and \$66,000,000. *Id.*

98. *Id.* at 2. ESPN Analyst Jeff Passan called Albies' contract "the worst contract ever for a [MLB] player." Baumann, *supra* note 2 (alterations in original).

99. *See id.* at 5.

with the team's proposal.¹⁰⁰ This lack of compromise in the negotiation stage then works to encourage unreasonable offers in the arbitration process given that both parties know the arbitrators must choose one of their offers.¹⁰¹ Despite that, the timeline of the arbitration process may allow teams and players the time to negotiate and reach a mutually beneficial compromise ahead of the arbitration hearing. Because final offers are exchanged approximately one month before the possible dates of the arbitration hearing, both parties are incentivized to provide more reasonable offers early in the negotiation process in order to come to an agreement before the arbitration hearing.¹⁰² Allowing parties to submit their final offers as early as possible prior to the actual arbitration hearing, while also limiting the amount of time both parties have to adjust those offers, facilitates open settlement discussions between the parties.¹⁰³

The salary arbitration process is also inherently unpredictable because neither party may rely on past arbitration decisions as precedent.¹⁰⁴ Arbitrators do not issue written decisions explaining their reasoning for the ultimate salary award and are expected to reach a decision shortly after the hearing concludes.¹⁰⁵ This lack of time in which to decide prevents a formulaic weighing of criteria presented by both parties, which may result in arbitrary outcomes—especially since the arbitrators do not have to explain how they weighed the evidence presented.¹⁰⁶ Nonetheless, it can be argued that a salary arbitration outcome is in and of itself precedent, even if it may not be as telling as

100. Mullarkey, *supra* note 7, at 239. A 2012 Baseball prospectus study concluded that “players who went through [the salary] arbitration [process] were less likely to re-sign long-term [contracts] with their teams. Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. SPORTS & ENT. L. 189, 199 (2014) (alterations in original).

101. Mullarkey, *supra* note 7, at 239.

102. Tulis, *supra* note 66, at 105; *see* 2017–2021 Basic Agreement, *supra* note 64, at art. VI, §§ E(2), E(13).

103. Tulis, *supra* note 66, at 105. Limiting the period in which parties could adjust their offers serves to incentivize both parties to submit more reasonable offers as the arbitrators are more likely to award the most reasonable salary offer presented at the hearing. *Id.*

104. Mullarkey, *supra* note 7, at 239. Also, given that arbitration proceedings are confidential, neither party may acquire feedback on how it performed at the hearing. Because of this, no one is more informed or better off the next time around. Silverman, *supra* note 21, at 34–35. The more information both parties have as to how the arbitration panel may decide only increases the probability that they will be able to reach a compromise. Tulis, *supra* note 66, at 127.

105. 2017–2021 Basic Agreement, *supra* note 64, at art. VI, § E(13).

106. *Id.* Each party to the arbitration is given one hour to offer evidence, and an additional half hour to rebut the other party's claims before the arbitrator makes their decision. Silverman, *supra* note 21, at 34–35.

written precedent in the NHL.¹⁰⁷ In any event, this type of precedent may only be used in the form of a comparable player exhibit when presenting an argument at the arbitration hearing, and not to prepare either side as to how or why arbitrators decide the actual award. Even in spite of this argument, arbitrators are forbidden from awarding a salary that is not equal to either of the two offers presented at the hearing.¹⁰⁸ This prevents the arbitrators from imposing a desirable compromise during salary arbitration, which makes the process extremely risky for both parties.¹⁰⁹

3. *Inflates Player Salaries*

The combination of salary arbitration and free agency has resulted in a win-win situation for MLB players.¹¹⁰ As a direct result of players submitting their salaries to arbitration, the number of free agency-eligible players is reduced.¹¹¹ Because of this reduction in the supply of available free agents, the increased competition among teams for free agents drives up their salaries. In turn, given that arbitration salaries are often based on comparable players' salaries earned in free agency, arbitration-eligible players also see a spike in their salary awards.¹¹² The salary arbitration process disregards the supply of talent in MLB as any outlier contract signed in free agency will have an invariable impact on subsequent salary arbitration awards.¹¹³

For the first three years of a player's MLB career, his team does not have to pay him any more than the league minimum salary.¹¹⁴ In fact, Pete Alonso, 2019 All-Star and National League Rookie of the Year, only earned \$555,000 in his record-setting rookie season with the New York

107. See Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, Sept. 16, 2012–Sept. 15, 2022, at art. XII, §12.9(n)(ii)(D), <https://www.nhlpa.com/the-pa/cba> (click on "Click Here To Download The CBA") (last visited Dec. 14, 2019) [hereinafter NHL CBA] (requiring a brief statement of the reasons for a decision in a salary arbitration decision to provide a written precedent).

108. 2017–2021 Basic Agreement, *supra* note 64, at art. VI, § E(13).

109. Chetwynd, *supra* note 8, at 112.

110. *Id.* at 131–32.

111. John P. Gillard, Jr., *An Analysis of Salary Arbitration in Baseball: Could a Failure to Change the System Be Strike Three for Small-Market Franchises?*, 3 SPORTS L. J. 125, 133 (1996).

112. *Id.* at 133. The most important factor in predicting a player's salary award through arbitration is not how well the player has performed, but instead how that player has performed relative to other comparable players. Silverman, *supra* note 21, at 34.

113. Mitchell Nathanson, *More than Just California Dreamin'?: California Labor Code § 2855 and Its Applicability to Major League Baseball*, 17 VA. SPORTS & ENT. L. J. 23, 48 (2017).

114. A player does not become eligible to submit his salary to arbitration until after his third year of MLB service. 2017–2021 Basic Agreement, *supra* note 64, at art. VI, § E(1)(a).

Mets.¹¹⁵ Therefore, the salary a player is awarded in his fourth year after finally becoming eligible for arbitration is not just compensating him for that fourth season, but often is also compensating him for the player's first three seasons in which he was underpaid relative to his performance.¹¹⁶ This 'make-up' compensation contributes to why salary arbitration works to drastically increase player salaries.

However, even though salary arbitration increases player salaries, players are still often undercompensated relative to their marginal revenue product, or true value to their team.¹¹⁷ Team attendance and widespread media coverage results in higher stadium and broadcasting revenues, which in turn help to offset the rising player salaries that flow from free agency and salary arbitration.¹¹⁸ All in all, the spikes in player salaries caused by salary arbitration may not be high enough. Team revenues are increasing with player salaries; the players are just extracting some of the extra revenue they truly helped earn for themselves instead of it all flowing back into team owners' pockets.¹¹⁹

Even though the rising player salaries may help make up for rising team revenues, the 'reasonable' market values players are offered in salary arbitration are often disproportionately high even when that player loses his arbitration hearing.¹²⁰ Given that the arbitration panel must award the player either his salary offer or the team's salary offer, the player could earn multiple times his previous salary even if he outrageously misstates his value.¹²¹

115. Spotrac, *Pete Alonso*, CURRENT CONTRACT, <https://www.spotrac.com/mlb/new-york-mets/pete-alonso-20674/> (last visited Dec. 18, 2019). Alonso also led MLB in HR his rookie season. See Spotrac, *Pete Alonso*, STATISTICS, <https://www.spotrac.com/mlb/new-york-mets/pete-alonso-20674/statistics/> (last visited Dec. 18, 2019).

116. Mullarkey, *supra* note 7, at 248.

117. Monhait, *supra* note 5, at 121. Marginal revenue product is defined as the extra revenue the player's performance generates for [his team]. *Id.* (alterations in original). In 2019, even though overall league attendance decreased, team revenues increased on average. See Ben Weinrib, *MLB Revenues Continue to Hit Record Highs as Payrolls Drop*, YAHOO! SPORTS, <https://sports.yahoo.com/mlb-revenues-continue-hit-record-highs-payrolls-drop-223057984.html> (Jan. 7, 2019).

118. Glazer, *supra* note 44, at 384.

119. Gray, *supra* note 45, at § 1.09(7)(d)(vii).

120. Stephen M. Yoost, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485, 504 (2006).

121. See *id.* If Pete Alonso, who earned \$555,000 his rookie season, demanded \$10,000,000 in arbitration while the Mets offered only \$5,550,000, the arbitrator would be allowed to award him either \$10,000,000 or \$5,550,000. See *id.* Even if Alonso 'loses' his arbitration hearing, he would still earn 1,000% of his previous salary. See *id.*

4. Arbitrators are Constrained by Admissible Criteria

Given that the MLB CBA limits the admissibility of evidence at salary arbitration hearings, arbitrators are constrained as to what they may consider in rendering their final decisions.¹²² Arbitrators are also prevented from substituting their own view and creating issue-by-issue compromises since they are restricted to awarding only the player's base salary for a single-year contract.¹²³ Further, if both offers are objectively unreasonable, one of the two parties will walk away from the hearing having derived a gain at the other party's expense.¹²⁴

Even though it may be argued that the CBA intentionally limits certain criteria's admissibility in order to decrease confusion amongst all parties to the arbitration hearing, it certainly does not do arbitrators any favors by constraining their judgment—arbitrators may potentially be removed from their positions the following year if either party happens to be displeased with the panel's decision.¹²⁵ Further, the CBA fails to inform arbitrators beforehand how they should weigh any of the criteria the CBA does allow, which impedes settlement opportunities—the supposed main advantage of salary arbitration in the first place.¹²⁶ If both parties knew ahead of the hearing how the arbitration panel would weigh certain criteria in reaching its decision, then they may choose to undergo further settlement talks in an effort to avoid the cost of an arbitration hearing.¹²⁷

Most notably, the MLB CBA excludes information about the team's financial position from criteria admissible at salary arbitration hearings.¹²⁸ Even though this exclusion may have been put in place to prevent the unintentional punishment of players who were drafted by poorer teams, it has the unintended effect of skewing the market represented at these hearings.¹²⁹ Given that small and large-market teams are objectively in different financial situations, it disadvantages the financially ill-equipped team by preventing them from introducing evidence of how much they can reasonably afford to pay a specific player.¹³⁰ For example, an arbitration award of \$5,000,000 may be an

122. 2017–2021 Basic Agreement, *supra* note 64, at art. VI, § E(10).

123. Bukstein, *supra* note 6, at 31. For example, even if the parties could reach a compromise by including a no-trade clause or conditional bonus in the player's contract, MLB salary arbitrators are limited to awarding a player only the salary amount offered by either the player or team. *See* Chetwynd, *supra* note 8, at 124.

124. Monhait, *supra* note 5, at 140.

125. Chetwynd, *supra* note 8, at 128.

126. Tulis, *supra* note 66, at 117–18; Bukstein, *supra* note 6, at 45.

127. *See* Tulis, *supra* note 66, at 118.

128. 2017–2021 Basic Agreement, *supra* note 64, at art. VI, § E(10)(b)(i).

129. Tulis, *supra* note 66, at 118–19.

130. Aubut, *supra* note 65, at 225.

entirely reasonable salary for a large-market team to pay a specific player, but a small-market team may be pushed over its tax threshold if one of its players is awarded \$5,000,000 at arbitration. It seems unfair for arbitrators to not take a team's financial position into account when deciding a player's salary as different teams may place inherently different values on the same player depending on the team's market size.¹³¹ Because the CBA leaves out this factor as arbitrators decide a player's salary, the imbalance between small and large-market teams in MLB may be perpetuated further—if MLB salary arbitration is attempting to mimic the labor market by adjusting player salaries according to comparable free agent signings, excluding market factors such as the parties' financial positions does little to help that.¹³²

5. Deteriorates Relationships Between Players & Teams

Limiting the arbitration panel to either of the two parties' salary offers doesn't just prevent them from creating creative options; it also forces the team to present evidence that tends to show the player is actually worth less to it than the player believes.¹³³ In order for the team to 'win' the arbitration hearing and avoid paying the player a higher salary than it wants to pay, the team must devalue the player in front of him to sway the panel's decision in its favor. This type of behavior has the potential to fuel animosity between the player and his team going forward.¹³⁴

It is very common for players to take offense to the team's introduction of disparaging evidence against him, which may affect the player's willingness to play for that team beyond his arbitration season.¹³⁵ The player could even see his performance decline or be motivated to demand a trade as a result of the deteriorating relationship with his team.¹³⁶ Correspondingly, the team may reduce the player's playing time or position in the lineup because it feels as though the player's arbitration award was too high.¹³⁷

131. *See id.*

132. *See* Nathanson, *supra* note 113, at 48.

133. Dillon Reid, *Major League Baseball's Major Issue*, 72 DISP. RESOL. J. 87, 90 (2017).

134. Bukstein, *supra* note 6, at 47–48.

135. Sam B. Smith, *Show Me the Mediation!: Introducing Mediation Prior to Salary Arbitration in Major League Baseball*, 42 HOFSTRA L. REV. 1007, 1026 (2014).

136. *Id.* It is also possible that the player could purposely not play up to his potential during the season following arbitration with the intention of not signing with his team long-term. Das, *supra* note 56, at 58.

137. Das, *supra* note 56, at 58. This in turn affects the player's offensive output and his chances of earning a lucrative long-term contract with his present team or with a different team. *Id.* at 58–59. Dick Woodson, the first MLB player to go through the salary arbitration

Further, the salary arbitration process induces team owners to engage in behavior in an effort to either delay or avoid the process altogether.¹³⁸ First, because the player almost always sees his salary increase following arbitration, owners may opt to release the player and hopefully re-sign him to a more reasonable contract as a free agent instead of participating in salary arbitration.¹³⁹ Second, team owners have often been accused of manipulating a player's service time in order to delay their arbitration eligibility.¹⁴⁰ Because players are eligible for salary arbitration following their third year of MLB service, owners may intentionally keep a talented player in their minor league system for the beginning of the player's rookie season and then promote him to their major league team a few months after the start of the season.¹⁴¹ This action essentially allows the team to get almost a year of labor out of the player without having the player accrue a year of service time to count toward his arbitration eligibility.¹⁴²

Kris Bryant's 2015 experience with the Chicago Cubs is particularly illustrative. Kris Bryant, arguably the best prospect in baseball going into 2015, was not called up to the Cubs' MLB roster for Opening Day and was instead optioned to their Triple-A affiliate.¹⁴³ After eight games, the Cubs called him up to their major league roster.¹⁴⁴ Had he been on the Cubs' Opening Day roster, Bryant would have qualified for free agency after the 2020 season.¹⁴⁵ Instead, Bryant was kept in the minor league system just long enough to delay his free agency another year.¹⁴⁶

6. Perpetuates the Imbalance Between Large & Small-Market Teams

Because of the effect salary arbitration has on player salaries, it also has a corresponding effect on the disparity between large and small-

process, thought that his election to go to arbitration "had an adverse effect on his playing time." Silverman, *supra* note 21, at 31.

138. Silverman, *supra* note 21, at 38.

139. *Id.* at 38–39.

140. Nathanson, *supra* note 113, at 48.

141. *Id.*; 2017–2021 Basic Agreement, *supra* note 64, at art. VI, § E(1)(a).

142. Nathanson, *supra* note 113, at 48.

143. Mike Axisa, *Cubs Win Kris Bryant Service Time Case: Bryant Will Become Free Agent After 2021, Per Report*, CBS SPORTS (Jan. 30, 2020, 12:39 PM), <https://www.cbssports.com/mlb/news/cubs-win-kris-bryant-service-time-case-bryant-will-become-free-agent-after-2021-per-report/>.

144. *Id.*

145. *Id.*

146. *Id.* "Players need six years of service time to qualify for free agency and 172 days equals a full year. Bryant was credited with 171 days in 2015, one day short of a full season." *Id.*

market franchises.¹⁴⁷ Large-market teams are able to derive greater revenue from signing star players than small-market teams because large-market teams have relatively larger fan bases and markets for selling team merchandise.¹⁴⁸ Given that large-market teams have more fans and receive greater media coverage, if both a large and small-market team were to sign a similar player, the large-market team would reap a greater financial windfall from that signing for this reason.¹⁴⁹

As a result of this additional revenue, large-market teams derive a larger pool of team funds that they can use to sign free agents.¹⁵⁰ Small-market teams are then forced to account for this lavish spending by large-market teams in arbitration since arbitration awards are often spiked by comparable players signing large contracts in free agency.¹⁵¹ Because small-market teams are often financially incapable of paying players the same amount as large-market teams, they are forced to trade away their productive, arbitration-eligible players, which then further widens the competitive gap between small and large-market teams.¹⁵² Small-market teams also have the option of signing these players to contracts worth more than the player's financial value to the team; nevertheless, this would set the team back financially as small-market teams are less able to adapt to a large free agent signing than large-market teams.¹⁵³ Either way, small-market teams lose as a result of MLB's salary arbitration process and its entanglement with free agency.

III. SUGGESTIONS

In light of these criticisms, Part III of this Note suggests ways in which the League could improve its salary arbitration process. First, MLB should adopt elements of NHL's salary arbitration process by permitting salary arbitrators to award a salary between the bounds of the parties' final offers, mandating that arbitrators issue written decisions explaining their awards, and amending the criteria admissible at hearings for both parties. Second, MLB should institute mediation as a mandatory pre-arbitration process.

147. Mullarkey, *supra* note 7, at 235.

148. *Id.* at 240.

149. *See id.*

150. Tulis, *supra* note 66, at 119.

151. *Id.* What a large-market team is able to pay a player "is not an accurate appraisal of th[e] player's value" to a small-market team. Smith, *supra* note 135, at 1027 (alteration in original).

152. Tulis, *supra* note 66, at 119; Glazer, *supra* note 44, at 398-99.

153. Gillard, *supra* note 111, at 134.

*A. Adopt Elements of NHL Salary Arbitration**1. The Current Process of NHL Salary Arbitration*

The current NHL CBA is effective through September 15, 2022.¹⁵⁴ Eligible players or their teams may elect salary arbitration.¹⁵⁵ Players or their teams may initiate the salary arbitration process by filing a written request on or before specific dates set forth in the NHL CBA.¹⁵⁶ The NHL and National Hockey League Players' Association (NHLPA) jointly select eight arbitrators to serve on the arbitration panel, create an exhibit that lists players comparable to the player who is the subject of the arbitration hearing, and then exchange these exhibits.¹⁵⁷ Both parties must submit their offers no later than forty-eight hours before the start of the arbitration hearing.¹⁵⁸

Similar to MLB salary arbitration, the evidence teams and players are allowed to offer at the hearing is governed by the NHL CBA.¹⁵⁹ Admissible evidence includes the player's previous performance (including statistics, injury history, games played, leadership qualities, etc.), the team's success, and any comparable players' previous performance and compensation.¹⁶⁰ Players and teams are prohibited from presenting—and arbitrators are forbidden from considering—evidence relating to contracts entered into by players who were not eligible for salary arbitration (including contracts signed by unrestricted free agents), contracts of non-comparable players, any qualifying offers made by the team, prior history of contract negotiations between the team and the player, media comments, any references to walk-away rights, the financial position of the team (including their salary cap figures) or NHL, any salary arbitration award issued between 2005–2006, and any

154. See generally NHL CBA, *supra* note 107, at art.3 § 3.1(a).

155. *Id.* at art. XII, § 12.1. Players must be a restricted free agent and meet certain service time requirements in order to be eligible for salary arbitration. *Id.* at § 12.1(a)–(b). Players may only be subjected to team-elected salary arbitration once throughout their careers. *Id.* at § 12.3(c).

156. *Id.* at §§ 12.2, 12.4(a)–(b). If the team elects salary arbitration for eligible players who had compensation packages greater than \$1,750,000 in the previous season, then the team must file on or before “the later of June 15 or 48 hours after the conclusion of the [previous year’s] Stanley Cup Finals . . .” NHL CBA, *supra* note 107, at §§ 12.3(a), 12.4(a) (alterations in original). If a team extends a qualifying offer to an eligible player and that player fails to accept the offer or elect salary arbitration himself, the team must file between July 5 and July 6 if the team wishes to elect salary arbitration. *Id.* at §§ 12.3(b), 12.4(b).

157. *Id.* at §§ 12.6, 12.9(g)(v). Both parties are prohibited from distributing these exhibits to the arbitrators; however, they may use excerpts from these exhibits to inform the arbitrators of potential comparable salaries. *Id.* at § 12.9(v)–(vi).

158. *Id.* at § 12.9(b).

159. NHL CBA, *supra* note 107, at art. XII, § 12.9(g)(i)–(iii).

160. *Id.* at § 12.9(g)(ii).

compensation or salary arbitration information predating July 22, 2005.¹⁶¹

The arbitration panel has forty-eight hours to issue a written decision, which includes the term of the player's contract, the salary awarded to the player, and an explanation of their decision, including any comparable players on which they relied in making their decision.¹⁶² In coming to this decision, arbitrators have complete discretion in weighing any evidence presented by either party.¹⁶³ In deciding the player's salary, the arbitrators may award a salary equal to either of the two offers made by the team and player, or any amount between the two offers.¹⁶⁴ If the team is dissatisfied with the arbitrators' award, the team may exercise its "walk-away rights" by rejecting the award, allowing the player to freely negotiate and sign with any team or accept a one-year contract with a salary equal to the arbitrator's award.¹⁶⁵

2. Adopting Elements of NHL Salary Arbitration Would Make MLB's Process More Efficient

First, MLB should adopt NHL's practice of allowing arbitrators to award a player a salary equal to any amount in between the team and player's final salary offer. If MLB adopted this practice from the NHL, it would help alleviate two criticisms of its salary arbitration system: deteriorating player-team relationships and encouraging unreasonable offers. One of the most notable benefits of NHL's system of salary arbitration is their arbitrators do not have to award either the team's final salary offer or the player's final salary offer.¹⁶⁶

This not only affords the arbitrators greater flexibility in rendering their final decision, but also results in a fairer and more appropriate salary award for the player.¹⁶⁷ Because arbitrators would not have to decide between two (potentially unreasonable) offers, a player who goes through the arbitration process would have a greater chance of receiving a salary award that matches his objective production and value to his team.¹⁶⁸ Also, this flexibility helps promote compromise between both parties,

161. *Id.* at § 12.9(g)(iii).

162. *Id.* at § 12.9(n)(i)–(ii).

163. Aubut, *supra* note 65, at 210.

164. Bukstein, *supra* note 6, at 50.

165. *Id.*; NHL CBA, *supra* note 107, at § 12.10. After the one-year contract term ends, the player is automatically an unrestricted free agent, free to negotiate and sign with any team. *Id.* at § 12.10(b). A team may not exercise its walk-away rights in connection with team-elected salary arbitration. *Id.* at § 12.10(e).

166. Bukstein, *supra* note 6, at 50.

167. *Id.* at 52.

168. *See id.*

which increases the likelihood that the player-team relationship will be preserved following the hearing.¹⁶⁹

Second, MLB should mandate that arbitrators issue written decisions explaining their reasoning behind a salary award and how they weighed any evidence presented at the arbitration hearing. The NHL CBA requires arbitrators to issue a written decision that explains the reasoning behind their salary arbitration decisions.¹⁷⁰ This would address the unpredictability inherent in MLB's system of salary arbitration. Issuing written decisions explaining how the arbitration panel reached their decision decreases the likelihood that the actual salary award is arbitrary.¹⁷¹ In doing so, players and teams will also develop the presumption that arbitrators do not decide awards arbitrarily, which would help inject confidence into the arbitration process itself.

Allowing arbitrators to issue written decisions will also save time for the parties and the arbitrators in the future. The written arbitration decisions in the NHL act as a form of precedent.¹⁷² MLB arbitrators would not have to reinvent the wheel when rendering decisions because they would have past decisions that they could reference. Players and teams would be better prepared for future arbitration hearings by having information as to how panels ruled beforehand. Information contained in the written decisions, such as how arbitrators weighed certain criteria, would increase the probability of the parties themselves reaching an informed compromise.¹⁷³

Third, MLB should amend how the CBA treats admissible criteria. This would address MLB's issue of salary inflation. By providing arbitrators with more information as to how certain criteria should be weighed, the panel is more likely to award a salary reflective of the player's performance and not one reflective of arbitrator discretion.¹⁷⁴ Even though this would diminish the panel's discretion in weighing the evidence presented, it would create a less confusing and more bright-line process for all parties involved. In doing so, this encourages both players and teams to keep their offers reasonable because they know ahead of time how arbitrators must weigh certain criteria.¹⁷⁵ Further, by eliminating the incentive to offer unreasonable salaries, salary inflation directly tied to arbitration should decrease—controlling for free agency.

169. Mullarkey, *supra* note 7, at 244.

170. NHL CBA, *supra* note 107, at art. XII, § 12.9(n)(i)–(ii).

171. Mullarkey, *supra* note 7, at 251.

172. *Id.* at 244.

173. Tulis, *supra* note 66, at 127.

174. Mullarkey, *supra* note 7, at 251.

175. *Id.* at 252.

MLB should also relax restrictions on which criteria are admissible and allow parties to present more evidence at arbitration hearings. Specifically, evidence of any prior salary offers and of both parties' financial positions should be admissible. Allowing the parties to present evidence of prior offers during negotiations would serve to keep them honest during the arbitration process.¹⁷⁶ If a player or a team knew that the other would be presenting a previous contract offer made during negotiations at an arbitration hearing, the other would be discouraged from proposing unreasonable evidence or offers with the knowledge that the arbitration panel is privy to past offers.¹⁷⁷ Permitting both parties to present evidence of their financial positions at arbitration hearings would allow the arbitration panel the opportunity to correct their awards for small-market franchises. Because different teams may have different valuations of the same player due to their market sizes, making both parties' financial positions admissible at arbitration hearings would prevent small-market teams from having to trade their financial flexibility for one player, thereby helping to cure the imbalance between large and small-market teams that the current system of MLB salary arbitration perpetuates.¹⁷⁸

B. Adopt Mediation as a Mandatory Pre-Arbitration Process

1. Process of Mediation

Mediation is defined as a voluntary and private process of dispute resolution "in which a third-party neutral invited by all parties assists . . . in identifying issues of mutual concern, developing options for resolving those issues, and finding resolutions acceptable by all parties."¹⁷⁹ The third-party neutral helps the parties throughout the entire mediation process in negotiating a mutually beneficial settlement of all amenable issues of the parties' dispute.¹⁸⁰ Mediation not only allows the parties to the process to select their mediator beforehand in order to save time and expense, but it also allows the parties to determine the timeline of mediation in order to fit the parties' needs.¹⁸¹ The parties themselves control the mediation process; the mediator is an unbiased third-party that serves to facilitate the parties' discussion.¹⁸²

176. *Id.*

177. *Id.*

178. See Aubut, *supra* note 65, at 225.

179. Taylor Brisco, *Med-Arb and Professional Sports: Could Med-Arb Work as an Effective Dispute Resolution Process in Professional Sports?*, 29 MARQ. SPORTS L. REV. 505, 507 (2019).

180. Smith, *supra* note 135, at 1007.

181. *Id.* at 1032–33.

182. Brisco, *supra* note 179, at 508.

By facilitating discussion between the parties, the mediator enables the parties to formulate creative solutions by focusing on both needs and concerns.¹⁸³ The mediator is also able to share his/her opinions about each issue of the dispute with the parties.¹⁸⁴ Overall, the process of mediation differs from the process of arbitration in that mediation places less emphasis on the actual procedure than on the specific needs of the parties involved.¹⁸⁵

2. *Benefits of Mediation*

First, the mediator is enabled to take on different roles throughout the mediation process depending on the situation.¹⁸⁶ This function not only allows for greater flexibility, but it also presents a greater opportunity for the parties to explain their issues and interests fully.¹⁸⁷ In turn, this results in a more open and honest flow of communication between the participants because their participation is completely voluntary, as opposed to arbitration where one party could elect arbitration to the objection of the other.¹⁸⁸ MLB teams and players would benefit greatly from the opportunity to explain their underlying interests to one another. As both parties explain more information to one another, the probability that they will come to a mutually agreeable salary term increases.¹⁸⁹

Second, mediation helps parties reach a resolution both faster and at a lower cost than arbitration.¹⁹⁰ Mediation is a quicker process because of the way the mediator is able to facilitate discussion between the parties.¹⁹¹ This allows the parties themselves to make a mutually beneficial agreement instead of the mediator needing to mull over all points made during the process. Because mediation helps achieve this result a lot faster than arbitration, MLB team owners and MLBPA representatives would save a lot of money on legal representation costs.¹⁹²

Third, the process of mediation is not weighed down by rules of evidence and criteria applicable to arbitration.¹⁹³ Because mediators wouldn't be constrained by the MLB CBA as to what is and is not

183. Reid, *supra* note 133, at 91.

184. *Id.* at 92.

185. Smith, *supra* note 135, at 1033.

186. *Id.* at 1034. For example, the mediator could decide to be more vocal in one instance or more of a passive participant in other instances. *See id.*

187. Reid, *supra* note 133, at 90.

188. *Id.*

189. *Id.* at 92.

190. Grabowski, *supra* note 100, at 197.

191. Brisco, *supra* note 179, at 518.

192. *Id.* at 519.

193. Smith, *supra* note 135, at 1039–40.

admissible, more factors would be available for mediators to help facilitate discussion regarding a player's objective value to his team.¹⁹⁴ Even though this informalizes the procedure and creates the potential for the process to get out of hand due to the limitless pool of admissible factors, the informality of mediation is what allows the parties to be more honest with each other knowing they aren't constrained by the CBA.¹⁹⁵ Moreover, the mediator has the ability to guide discussion toward productive topics, which deflates the concern about the process getting off track.

Fourth, mediation encourages parties to be open and honest about the interests behind their dispute.¹⁹⁶ In an arbitration hearing, the parties have a limited amount of time to present their arguments as to why the player should earn either Salary A or Salary B.¹⁹⁷ This prevents the parties from engaging in an open dialogue as to why they are proposing those salary offers in the first place. Mediation, however, encourages this open dialogue and allows the parties to discuss the emotions behind their relevant actions and desires.¹⁹⁸ Not only does this create the potential for players and teams to share and discuss objective evidence with each other, but it also increases the likelihood that their existing relationship will be preserved.¹⁹⁹

Fifth, mediation can "save face" for the party that either feels dissatisfied with the ultimate result of the process or is hesitant to cave their position and submit to a compromise.²⁰⁰ Because of the fact that mediation is more private than an arbitration hearing, mediation would allow both MLB players and teams to protect their images and reputations irrespective of the outcome of the process.²⁰¹ Disputes in professional sports are unique in that numerous external factors have the potential to affect the parties' motivations and strategies.²⁰² Because of the greater privacy offered by mediation, it can help preserve fans' confidence in both the team and the player moving forward into the season.²⁰³

194. *Id.* at 1040.

195. *See Reid, supra* note 133, at 90.

196. *Id.*

197. Mullarkey, *supra* note 7, at 238.

198. Brisco, *supra* note 179, at 508.

199. *Id.* at 508–09.

200. Grabowski, *supra* note 100, at 194.

201. *Id.* at 202.

202. *Id.* at 193. For example, sports disputes may be coupled with media coverage and opinions, extraneous legal processes, or financial concerns related to local fans or constituents. *Id.*

203. *Id.* at 194.

Finally, mediation allows the parties to craft a creative and mutually beneficial agreement as opposed to a one-issue result.²⁰⁴ Throughout the mediation process, the mediator facilitates the parties' discussion surrounding their underlying interests and desires behind the dispute at hand.²⁰⁵ This dialogue helps the mediator paint a complimentary end goal for the parties, which incentivizes them to openly discuss objective criteria and make proportionate concessions in order to reach that goal.²⁰⁶ Since this dialogue is both honest and centered around the parties' interests, as opposed to being rehearsed and focused on disparaging criteria that could demoralize the player moving forward, teams are able to develop links between their and the player's interests, which increases the likelihood that the solution to their dispute will be both conclusive and mutually beneficial.²⁰⁷

CONCLUSION

MLB salary arbitration has been widely criticized for, among other things, its unintended effect on small-market teams, its adverse effect on player-team relationships, its tendency to incentivize unreasonable offers, and its causal effect on salary inflation. Implementing pre-arbitration mediation would serve to facilitate discussion between the parties' surrounding their underlying interests relevant to their dispute. In doing so, pre-arbitration mediation would help preserve the parties' existing relationship while also promoting a mutually beneficial result. Also, by amending MLB's salary arbitration process itself, the proposed 'second option' will not be as inefficient if the parties do not settle their dispute in mediation. By amending the MLB CBA to require arbitrators to issue written decisions, allow arbitrators to choose any salary award equal to or between the parties' offers, and relax the restrictions on criteria admissible at arbitration hearings, MLB could temper many of the criticisms with its current salary arbitration process.

204. See Michael N. Widener, *The Five-Tool Mediator: Game Theory, Baseball Practices, and Southpaw Scouting*, 12 PEPP. DISP. RESOL. L. J. 97, 115 (2012).

205. Brisco, *supra* note 179, at 508.

206. Widener, *supra* note 204, at 114.

207. See *id.* at 121.